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Fourth Time's Not A Charm: A Case of Subrogation Despite Contrasting Trilogy of Decisions by the Supreme Court of Canada

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In *Royal Host GP Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467, the Ontario Court of Appeal recently examined whether there was a bar to subrogation in a commercial lease. The Court found that there was no bar and set out a useful summary of the law in this area.

Facts of the Case

The Plaintiff owned a multi-story commercial building in which it operates a hotel. The Defendants leased a portion of the building in which they operated a restaurant. A fire broke out in the Defendants' kitchen causing extensive damage to the building. The Plaintiff was indemnified by its insurer for its losses, and its insurer commenced a subrogated action. The action alleges that the fire was caused by the Defendants' negligence. The Defendants took the position that even if the fire was caused by their negligence, the terms of the lease prevented the Plaintiff from bringing the action. The Defendants brought a motion to have this issue decided, and the motion judge ruled in favour of the Defendants, and consequently dismissed the action.

The motion judge's decision was based on the following points:

- The lease provided that the landlord "shall take out and maintain" fire insurance on the building and added the costs of the insurance to the common expenses paid by the tenants.
- Citing a trilogy of Supreme Court of Canada decisions, the motion judge said "as a general rule, courts have limited the subrogation rights of an insurer when a landlord covenants to pay for the insurance and agrees to look to its own insurer for any loss."

Court of Appeal's Decision

The Court of Appeal disagreed with the motion judge, and held that the lease did not bar the insurer's subrogation action. The Court reversed the motion judge's decision for the following reasons:

- The motion judge had erred in stating that the trilogy represents a rule of general application. Instead, they are simply conclusions that reflect the particular lease provisions, which were in issue in those cases.
- The trilogy has not affected the fundamental tenet of contractual interpretation that it is necessary to observe the intentions of the parties in accordance with the language they have agreed to in the contract.
- The lease's insurance clause contained two "notwithstanding" provisions, as follows:

Notwithstanding the Landlord's covenant contained in this Section 7.02, and notwithstanding any contribution by the Tenant to the cost of any policies of insurance carried by the Landlord, the Tenant expressly acknowledges and agrees that

(i) the Tenant is not relieved of any liability arising from or contributed to by its acts, fault, negligence or omissions,

The Court of Appeal found that the plain meaning of s. 7.02 of the lease is that the tenant remains liable for its own negligence notwithstanding the landlord's covenant to purchase insurance and the tenant's contribution towards the cost of that insurance.

Key Insights

The presence of an agreement to insure or contribution towards the costs of insurance in a lease or contract does not necessarily bar a subrogation claim. It is critical to review the lease or contract as a whole to determine the plain meaning of the provisions in question and the intent of the parties. The Supreme Court of Canada's "trilogy" of decisions on covenants to insure do not represent a general rule of application. A lease or contract may set out insurance obligations, but not in a way that disturbs the ordinary principles of negligence law, i.e., a person is responsible for damage caused by his/her negligence.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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