

RISK MANAGEMENT IN TODAY'S LEASING MARKET

Review of Key Risk Management Concepts




**HURRICANE
SEASON**

Key Risk Management Concepts

Supreme Court of Canada - Trilogy of Cases in the 1970s:

1. *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 222;
2. *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 23; and
3. *Eaton (T.) Co. Ltd. et al. v. Smith et al.*, [1978] 2 S.C.R. 749)

Key Risk Management Concepts

Three main ways to ALLOCATE RISK in a Lease:

1. **Insurance** (and self-insurance) provisions;
2. **Indemnity** provisions; and
3. **Release** provisions.

Key Risk Management Concepts

- What is a “Subrogated Claim”?
- What is a “Waiver of Subrogation”?

Key Risk Management Concepts

Principle of Immunity – Implied Releases

- Can we finally do away with express Releases and Waivers of Subrogation?

Key Risk Management Concepts

Myth: Insurance requirements in a Lease form must be inflexible

- Fault-based approach; or
- Territorial-based approach?

Hypothetical – Restaurant Fire due to Negligent Landlord



Hypothetical – case study

NEGLIGENT LANDLORD

Tenant operates a restaurant which is located on the ground floor of a multi-storey office tower. To draw customers to the Project, the Landlord has installed a waterfall feature in the common areas adjacent to the restaurant. The waterfall has become a major attraction, but it has not been functioning properly. There have been numerous leaks that the Landlord has repeatedly requested its contractor to repair. One evening the waterfall floods the restaurant. The flood sparks an electrical fire in the kitchen, which destroys the kitchen and results in smoke damage throughout the restaurant. Major repairs were required for the entire restaurant, including replacing the kitchen equipment, walk-in coolers, HVAC and storefront. Tenant's repairs took several months to complete.

Relevant Lease Provisions

13. INSURANCE AND INDEMNITY	20
13.1 Landlord's Insurance.....	20
13.2 Tenant's Effect On Other Insurance.....	20
13.3 Tenant's Insurance.....	21
13.4 Landlord's Right to Place Tenant's Insurance	22
13.5 Landlord's Non-Liability.....	22
13.6 Indemnity of Landlord	22
13.7 Landlord's Employees and Agents.....	23

13.3 Tenant's Insurance

- (a) Tenant shall, at its sole expense, maintain in full force and effect at all times throughout the Term and such other times, if any, as Tenant occupies the Premises or any portion thereof, such insurance as would be maintained by a prudent tenant of premises such as the Premises, which insurance shall include at least all of the following:
- (i) commercial general liability insurance on an occurrence basis with respect to any use and occupancy of or things on the Premises, and with respect to the use and occupancy of any other part of the Project by Tenant or any of its employees, servants, agents, invitees, licensees, subtenants, contractors or persons for whom Tenant is in law responsible, with coverage for any occurrence of not less than Five Million (\$5,000,000.00) Dollars or such higher amount as Landlord may reasonably require on not less than one (1) month's notice;
 - (ii) **all risks insurance covering the leasehold improvements, trade fixtures and contents on the Premises, for not less than the full replacement cost thereof and with a replacement cost endorsement;**
 - (iii) broad form comprehensive boiler and machinery insurance on all insurable objects located on or about the Premises or which are the property or responsibility of Tenant, for not less than the full replacement cost thereof and with a replacement cost endorsement;
 - (iv) **business interruption insurance in such amounts as necessary to fully compensate Tenant for direct or indirect loss of sales or earnings attributable to any of the perils required to be insured against under the policies referred to in subsections 13.3(a)(ii) and (iii) and all circumstances usually insured against by cautious tenants including losses resulting from interference with access to the Premises or the Project as a result of such perils or for any other reason;**
 - (v) tenant's legal liability insurance for the full replacement cost of the Premises, and the loss of use thereof; and
 - (vi) any other insurance against such risks and in such amounts as Landlord or any mortgagee of Landlord may from time to time reasonably require upon not less than thirty (30) days' notice to Tenant.

- (b) Each of Tenant's insurance policies shall name Landlord as an additional named insured, with Landlord as loss payee, and shall be taken out with insurers and shall be in such form and on such terms as are satisfactory to Landlord from time to time. Without limiting the generality of the foregoing, each of Tenant's insurance policies shall contain:
 - (i) the standard mortgage clause as may be required by any mortgagee of Landlord;
 - (ii) **a waiver by the insurer of any rights of subrogation to which such insurer might otherwise be entitled against Landlord or any person for whom Landlord is in law responsible;**
 - (iii) an undertaking by the insurer that no material change adverse to Tenant or Landlord or any mortgagee of Landlord will be made and the policy will not expire, lapse or be terminated, except after not less than thirty (30) days' written notice to Tenant and Landlord and to any mortgagee of Landlord;
 - (iv) a provision stating that Tenant's insurance policy shall be primary and shall not call into contribution any other insurance available to Landlord;
 - (v) a disputed loss endorsement, where applicable;
 - (vi) a severability of interests clause and a cross-liability clause; and
 - (vii) a waiver, in respect of the interests of Landlord and any mortgagee of Landlord, of any provision with respect to any breach of any warranties, representations, declarations or conditions contained in the said policy.
- (c) Tenant shall ensure that Landlord shall at all times be in possession of either certificates or certified copies of Tenant's insurance policies which are in good standing and in compliance with Tenant's obligations hereunder.
- (d) **Tenant hereby releases Landlord and its servants, agents, employees, contractors and those for whom Landlord is in law responsible from all losses, damages and claims of any kind in respect of which Tenant is required to maintain insurance hereunder or is otherwise insured.**

13.5 Landlord's Non-Liability

Tenant agrees that **Landlord shall not be liable or responsible** in any way for any injury or death to any person or for any loss or damage to any property, at any time on or about the Premises or any property owned by or being the responsibility of Tenant or any of its servants, agents, customers, contractors or persons for whom Tenant is in law responsible elsewhere on or about the project, **no matter how the same shall be caused and whether or not resulting from or contributed to by the negligence of Landlord, its servants, agents, employees, contractors or persons for whom Landlord is in law responsible.** Without limiting or affecting the generality of the foregoing, **Landlord shall not be liable or responsible** for any such injury, death, loss or damage to any persons or property caused or contributed to by any of the following: **fire, explosion, steam, water, rain, snow, dampness, leakage, electricity or gas.** Without limiting or affecting the interpretation of the foregoing, and notwithstanding the foregoing, it is agreed that Landlord shall in no event be liable for any indirect or consequential damages suffered by Tenant, or for any damages, whether direct or indirect, resulting from the performance by Landlord or any of Landlord's employees, agents or contractors of any cleaning or janitorial services in the Premises, **no matter how any of the same shall be caused and whether or not resulting from or contributed to by the negligence of Landlord, its servants, agents, employees, contractors or persons for whom Landlord is in law responsible.**

13.6 Indemnity of Landlord

Tenant shall indemnify Landlord and all of its servants, agents, employees, contractors and persons for whom Landlord is in law responsible against any and all liabilities, claims, damages, losses and expenses, including all reasonable legal fees and disbursements, arising from: (a) any breach by Tenant of any of the provisions of this Lease; (b) any act or omission of any person on the Premises or any use or occupancy of or any things in the Premises; (c) any act or omission of Tenant or any of its servants, agents, employees, invitees, licensees, sub-tenants, concessionaires, contractors or persons for whom Tenant is in law responsible on the Premises or elsewhere on or about the Project; or (d) **any injury or death of persons, or any loss or damage to property of Tenant or any of its servants, agents, employees, invitees, licensees, subtenants, contractors or persons for whom Tenant is in law responsible, on the Premises or elsewhere on or about the Project.**

13.7 Landlord's Employees and Agents

Every indemnity, exclusion or release of liability contained in this Lease for the benefit of Landlord shall extend to and benefit all of Landlord's servants, agents, employees, others for whom Landlord is in law responsible, and contractors of Landlord. Solely for such purpose, and to the extent that Landlord expressly chooses to enforce the benefits of this section for the foregoing persons, it is agreed that Landlord is the agent or trustee for such persons.

Hypothetical

1. What arguments should the Landlord's lawyer make (on behalf of the Landlord) that all responsibility and liability rests with the Tenant and the Tenant's insurer?
2. How could the provisions have been modified by the Tenant and its counsel to allocate the risk in a more equitable manner?
3. If the facts were different (such as an electrical fire was caused by a natural disaster, such as Hurricane Harvey or Irma), how would this change the result?



Thank You.



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