

Risk Management in Today's Leasing Market

Contractual Immunity and the Covenant to
Insure

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Deslauries Cabinets

- Lease contained covenant requiring both Landlord and Tenant to insure their own property
- Landlord's contractor caused fire that destroyed building and Tenant's property
- Tenant significantly under insured
 - \$14 million loss/\$10 million of insurance

Mutual Indemnity

- *The Landlord covenants to keep the tenant indemnified against claims and demands whatsoever by any person, whether in respect of damage to person or property, arising out of or occasioned by the Landlord's maintenance, use or occupancy of the premises...*
- Question? – Does such an indemnity override the immunity inherent in the covenant to insure?

Court Rulings

- Trial Judge – the indemnity overrides the immunity – reasons somewhat convoluted
- Ontario Court of Appeal - Trial judge was wrong in its interpretation and application of precedent law
- Supreme Court of Canada – did the OCA apply the correct standard of review?
- OCA – Yes we did
- Supreme Court of Canada – awaiting ruling

Implications

- The Covenant to Insure is given broad scope and to overcome very specific language must be used
- Recent important case:
 - Sanofi Pasteur v UPS SCS. Inc. et al 2015 ONCA 88
 - Royal Host Limited Partnership ... v 1842259 Ontario Limited [2017] O.J. No. 3493
 - Williams-Sonoma v Oxford [2013] O.J. No. 2980
 - Deslaurier Custom Cabinets v 17283106 Ontario Inc. [2016] O.J. No. 1705