

Risk Allocation in Leases:

An Update on *Deslaurier Custom Cabinets v. 1728106 Ontario Inc.**



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Introduction

The allocation of risk in a commercial lease is an issue that both landlords and tenants, and their lawyers, spend a considerable amount of time negotiating prior to the start of a lease. However, despite the time and effort spent by both sides in reaching a mutually agreeable solution, it's also an issue that continues to be litigated year after year. Case law demonstrates that our courts consistently defer to the same set of common law principles in determining whether a landlord or tenant (or, oftentimes, their insurer) is, or is not, entitled to sue the other after a commercial property has been damaged by fire. Why then, despite the relatively consistent case law and the time spent negotiating the provisions related to risk allocation in commercial leases, do we continue to see the same issues and the same factual scenarios litigated over and over again?

In drafting and negotiating commercial leases, landlords and tenants are guided by the underlying notion that a party who causes damage to an innocent party should be held responsible to the innocent party. But, without recognizing and carefully crafting the interplay between the insurance, indemnity, release, and repair provisions in a lease, parties are often left in the unfortunate position of finding that what they had intended was not accurately reflected in the terms of the lease. The 2017 Ontario Court of Appeal decision in *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*,¹ and the Supreme Court of Canada's subsequent denial of leave to appeal indicates that these

¹ 2017 ONCA 293 [*Deslaurier*], leave to appeal to SCC refused, 2017 CanLII 68350.

issues are best dealt with by proper and careful drafting in order to avoid ambiguity and the need for a court to interpret conflicting provisions in a lease.

Part I of this paper will provide an overview of the common law principle of tort immunity, which forms the basis for any court's analysis of the allocation of risk in a commercial lease. Part II will summarize the facts and history of *Deslaurier's* journey through the courts. Part III will provide an overview of relevant Canadian case law regarding the ability to rebut or escape the principle of immunity.

Part I – The Principle of Immunity

Any analysis with respect to the allocation of risk in a commercial lease will inevitably draw upon the principles set out by the Supreme Court of Canada in the “Trilogy”: *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.*,² *Cummer-Yonge Investments Ltd. v. Agnew-Surpass Shoe Stores Ltd.*,³ and *Smith v. T. Eaton Co.*⁴ Each of the three cases involved attempts by a landlord (or its insurer by way of subrogation) to recover damages from a tenant as a result of fire damage caused by each tenant's negligence. In both *Cummer-Yonge* and *T. Eaton Co.*, the leases expressly required the landlord to obtain fire insurance in respect of the premises. In *Ross*, there was no express covenant by the landlord to insure the premises, but instead there was an obligation on the tenant to pay its share of the landlord's insurance bill. In each of the three cases, the Supreme Court found in favour of the tenant and dismissed each landlord's action on the basis of the principle of immunity. The Supreme Court established that in a landlord-tenant relationship, an express obligation to obtain property insurance, and an express obligation to contribute to the costs of insurance, each operates as an assumption of risk for loss or damage caused by the other party, including for acts of negligence. In *Madison Developments Ltd. v. Plan Electric Co.*,⁵ the Ontario Court of Appeal provided a succinct explanation on the effect of the Trilogy, in what has become one of the most consistently-cited passages in similar cases:

The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course,

² (1975) [1976] 2 S.C.R. 35 [*Ross*].

³ (1975) [1976] 2 S.C.R. 221 [*Cummer-Yonge*].

⁴ (1977) [1978] 2 S.C.R. 749 [*T. Eaton Co.*].

⁵ *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 [*Madison Developments*], leave to appeal to SCC refused (1998).

the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence.⁶

Part II – The *Deslaurier* Case

Deslaurier was a fairly standard fact scenario. In November 2007, the parties entered into a lease for the rental of several units in the landlord's commercial building. On January 1, 2009, a welding contractor engaged by the landlord carried out repairs at the premises and a fire occurred, causing significant damage to the building and the premises (and the tenant's property therein); the building was a total loss and was eventually demolished. The tenant made a claim to its insurer and was paid approximately \$10.861 million, which, unfortunately for the tenant, was insufficient to cover its full losses. The tenant sought recovery of the uninsured loss (and the tenant's insurer sought recovery of the subrogated loss) from the landlord, and the landlord defended on the basis that the tenant assumed the risk of loss, and that if tenant had added the landlord as an additional insured to its property damage insurance policy as required by the lease, the tenant and its insurer would be precluded from claiming against the landlord. Both parties moved for summary judgment. The relevant provisions of the lease are significant and will assist in analyzing the Courts' disposition of this case. Accordingly, they are reproduced below.⁷

8.1.1 The Tenant must also obtain the following insurance for the Premises:

ii. insurance against all risks of loss or damage to the Tenant's property; The Tenant covenants to keep the Landlord indemnified against all claims and demands whatsoever by any person, whether in respect of damage to person or property, arising out of or occasioned by the maintenance, use or occupancy of the Premises or the sub-letting or assignment of same or any part thereof, and the Tenant further covenants to indemnify the Landlord with respect to any encumbrances on or damage to the Premises occasioned by or arising from the act, default or negligence of the Tenant, its officers, agents, employees, contractors, customers, invitees or licensees;

8.2.1 The Landlord covenants to keep the Tenant indemnified against all claims and demands whatsoever by any person, of or occasioned by the Landlord's maintenance, use or occupancy of the Premises, and the Landlord further covenants to indemnify the Tenant with respect to any encumbrances on or damage to the Premises

⁶ *Ibid* at para 9.

⁷ *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2014 ONSC 5148 at para 8.

occasioned by or arising from the act, default, negligence of the Landlord, its officers, agents, employees, contractors, customers, invitees or licensees;

8.3 The Tenant shall carry insurance in its own name to provide coverage with respect to the risk of business interruption to an extent sufficient to allow the Tenant to meet its ongoing obligations to the Landlord and to protect the Tenant against loss of revenue.

8.4 To the extent not included in the insurance required by section 8(1.1)(ii), if any, the Tenant shall carry insurance in its own name insuring against the risk of damage to the Tenant's property within the Premises caused by fire or other perils and the policy shall provide for coverage on a replacement cost basis to protect the Tenant's stock in-trade, equipment, Trade Fixtures, decorations and improvements.

8.5 The Tenant's liability and property damage insurance policies required by this Lease shall include the Landlord as an additional insured;

9.1. If the Premises or the building in which the Premises are located, are damaged or destroyed, in whole or in part, by fire or other peril, then the following provisions shall apply

9.3. Apart from the provisions of Section 9(1) and as otherwise specifically provided for in this Lease, there shall be no abatement from the reduction of the Rent payable by the Tenant, nor shall the Tenant be entitled to claim against the Landlord for any damages, general or special, caused by fire, water, sprinkler systems, partial or temporary failure or stoppage of services or utilities which the Landlord is obligated to provide according to this Lease, from any cause whatsoever.

Sections 8.1.1(ii), and 8(3) to 8(5) are referred to as the "Tenant's Insurance Covenants"; and Section 8.2.1 is referred to as the "Landlord's Indemnity Covenant".

The Lower Court Decision

Although the motions judge referred to the Trilogy, she stated that cases following the Trilogy have "consistently held that a covenant to insure is to be limited by express provisions of the lease."⁸ The motions judge focused primarily on trying to interpret what the term "Premises" meant as it was used in the various provisions of the lease (particularly in respect of the Landlord's Indemnity Covenant). She went on to state that restricting "Premises" to the rentable space would provide the tenant with "indemnification for something in which the Tenant had no interest" and would "render the second portion of s. 8.2.1 meaningless."⁹ In her opinion, such a result would be inconsistent

⁸ *Ibid* at para 32.

⁹ *Ibid* at para 28.

with the principles of contractual interpretation, and accordingly “Premises” must include the tenant’s property.

The motions judge went on to state that there was no clause in the lease waiving subrogated claims against the landlord. She then proceeded to consider other leases in the building as extrinsic evidence to guide her in interpreting the lease. She stated that the other leases only have a one-way indemnification clause, which led to a strong indication that the parties must have intended to give the tenant “some contractual right not granted to the other Tenants in the building...”¹⁰ Finally, the motions judge stated that there was “no certainty that the Landlord would be immune from liability ... even if he were an additional insured.” Accordingly, the motions judge held that the landlord was responsible for indemnifying the tenant and granted summary judgment to the tenant.

The First Court of Appeal Decision - 2016

Perhaps rather predictably, the landlord appealed the motions judge’s decision and the Court of Appeal ultimately set aside the summary judgment and held that the motions judge erred: (i) in law by failing to apply the Trilogy and by interpreting the Landlord’s Indemnity Covenant as taking priority over the Tenant’s Insurance Covenants; (ii) by admitting extrinsic evidence and relying on such evidence to interpret the lease; and (iii) by failing to hold that the tenant’s claim was barred as a result of its failure to add the landlord as an additional insured in accordance with its obligations under the lease.

The Court of Appeal began its analysis with a determination as to the applicable standard of review. The Court stated that, based on the Supreme Court of Canada’s decision in *Creston Moly Corp. v. Sattva Capital Corp.*,¹¹ the correctness standard of review may apply to contractual interpretation concerning extricable questions of law, such as the application of an incorrect principle. The Court held that the motions judge erred in law by failing to apply binding appellate authority, failing to assign meaning to the contested terms of the lease, and failing to follow the governing principles of contractual interpretation. Accordingly, the correctness standard of review applied.¹²

The Court identified the motions judge’s reference to the Trilogy in her reasons, but stated that she failed to actually apply those principles to the interpretation of the lease. Based on the Trilogy and *Madison Developments*, the Tenant’s Insurance Covenants presumptively allocated to the tenant the risk of the very losses the tenant was claiming, and by agreeing to insure, the tenant assumed the risk of liability for such losses.¹³

¹⁰ *Ibid* at para 39.

¹¹ 2014 SCC 53 [*Sattva*].

¹² *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2016 ONCA 246 at para 31.

¹³ *Ibid* at para 42-43.

The Court then went on to consider the motions judge's analysis with respect to interpreting the term "Premises". The Court stated that the motions judge's analysis discounted the fact that "Premises" was in fact a defined term in the lease with an agreed upon definition, which did not include the tenant's property.¹⁴ The Court also stated that the motions judge ignored multiple provisions in the lease that "draw a clear distinction" between the "Premises" and the tenant's property, such as Sections 8.1.1(ii), 8.2.1, and 8.4, and that the terms of the lease supported a narrow interpretation of the word "Premises".¹⁵ Finally, the Court stated that "contrary to the motions judge's implied finding that the Tenant has no interest under the Lease in the space rented to it, the Tenant has a leasehold interest in the 'Premises'..." and that the Landlord's Indemnity Covenant would still respond to a claim by the tenant for damage that is either excluded under the tenant's insurance policies or is not required to be insured against by the tenant. The Court of Appeal referenced the case of *Lincoln Canada Services LP v. First Gulf Design build Inc.*¹⁶ as being instructive in this regard:

[65] The landlord in Lincoln argued that the effect of the tenant's insurance covenant and the landlord's indemnity covenant, read together, was that the parties intended the landlord to be exempt from liability for the specific matters that were to be insured against by the tenant. The motion judge in Lincoln agreed. She concluded that the seemingly conflicting provisions of the lease could be interpreted in a manner that avoided inconsistency and reflected the intention of the parties. She explained this interpretation, at para. 44, as follows:

- i) the tenant was obliged to obtain the specific insurance required by its insurance covenant;
- ii) the tenant had to look to its own insurer for any damage that was the subject of the tenant's insurance obligation, whether or not caused by negligence, and the tenant and its insurer were restricted from claiming against the landlord for recovery for such damage;
- iii) if the landlord's negligence caused any damage that the tenant was not required to insure against, the landlord was obliged to indemnify the tenant for such damage; and

¹⁴ *Ibid* at para 42-43.

¹⁵ *Ibid* at paras 56-60.

¹⁶ 2008 ONCA 528.

iv) apart from negligence, the landlord had no liability to the tenant for any damage listed in the landlord's indemnity covenant, whether or not the tenant had to insure for such damage.¹⁷

The Court also stated that the motions judge erred in admitting and considering extrinsic evidence in interpreting the lease, as there was no need to consider anything beyond the words of the lease to properly determine the effect of the Tenant's Insurance Covenants and the Landlord's Indemnity Covenant. Finally, the Court held that motions judge erred in holding that the tenant's failure to add the landlord as an additional insured did not operate to bar the subrogated claim against the landlord.

Based on the foregoing reasons, the Court concluded that the landlord "bargained ... to be free of responsibility for the risk of loss or damage to the Tenant's property or business caused by fire."¹⁸ Accordingly, the Court allowed the appeal, set aside the summary judgment, and dismissed the action against the landlord.

The Second Court of Appeal Decision – 2017

The tenant sought leave to appeal to the Supreme Court of Canada. While the tenant's application for leave was pending, the Supreme Court released its decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,¹⁹ and instead of considering whether to grant or deny leave to appeal, the Supreme Court directed the Court of Appeal to reconsider its decision in light of the Supreme Court's ruling in *Ledcor*. The ultimate issue for the Court of Appeal was whether *Ledcor* mandated the application of a different standard of review (the palpable and overriding standard), and whether the application of that standard, if necessary, required an alteration of the Court of Appeal's decision.

Ledcor was a contractual interpretation case involving the proper interpretation of an exclusion clause in an all-risk property insurance policy, a standard form contract. In *Ledcor*, the Supreme Court elaborated on, and largely affirmed, the principles of contractual interpretation set out in *Sattva Capital Corp. v. Creston Moly Corp. (Sattva)*. The result of *Ledcor* was that the Supreme Court identified an exception to the general rule that contractual interpretation is a question of mixed fact and law, subject to deferential review on appeal: that contractual interpretation is a question of a law subject to a standard of correctness on appellate review where the appeal involves a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the parties to assist in the interpretation process.²⁰ In

¹⁷ *Deslaurier*, *supra* note 11, at para 65.

¹⁸ *Ibid* at para 89.

¹⁹ 2016 SCC 37 [*Ledcor*].

²⁰ *Deslaurier*, *supra* note 1 at para 28.

addition, *Ledcor* affirmed *Sattva*'s holding that the correctness standard applies to extricable errors of laws that arise in the interpretation process.

The Court of Appeal noted that the lease in question was a negotiated contract, and therefore the *Ledcor* exception for review on a correctness standard for standard form contracts was not applicable in this case.²¹ The Court stated that although the interpretation of a lease involves a question of mixed fact and law subject to deferential appellate review, both *Ledcor* and *Sattva* hold that where it is possible to identify an extricable question of law, the correctness standard applies.²² The Court recognized the difficulty in distinguishing between a question of law and a question of mixed fact and law. However, the Court affirmed its view that the motions judge's interpretation of the lease was "tainted" by the following legal errors: (1) the failure to apply binding appellate authority (the Trilogy and *Madison Developments*) regarding contractual allocation of risk; (2) the failure to assign meaning to all the contested terms of the lease; and (3) the adoption of a construction of the lease that fails to accord with the governing principles of contractual interpretation.²³ The Court made the following notable comment regarding the motions judge's failure to apply governing authorities and applicable principles: "The goals of certainty, clarity and consistency in the law dictate that missteps in the identification of controlling legal principles be characterized as questions of law subject to correctness review."²⁴

Based on the principles of both *Sattva* and *Ledcor*, the Court of Appeal confirmed that it applied the appropriate standard of review and affirmed its original decision.

The Supreme Court Decision – 2017

Once again, the tenant sought leave to appeal. On October 9, 2007, the Supreme Court provided finality to this case by dismissing the tenant's application for leave. By refusing leave to appeal, the Supreme Court has inferentially affirmed the precedential value of the Trilogy principles and that only in the clearest of cases will it be possible to rebut the principle of immunity.

Part III – Escaping the Principle of Immunity

The case of *Lee-Mar Developments Ltd. v. Monto Industries Ltd.*²⁵ provides one of the very rare examples in which a court has found that the parties successfully contracted out of the principle of immunity. The parties entered into a commercial lease in September 1993. Of note is the fact that the lease was for an entire building, as opposed a multi-tenanted property, which has been highlighted subsequently by the Ontario Court of Appeal as an important consideration in the

²¹ *Ibid* at paras 47-48.

²² *Ibid* at paras 49-50.

²³ *Ibid* at para 58.

²⁴ *Ibid* at para 68.

²⁵ [2000] O.T.C. 250 (Ont Sup Ct J) [*Lee-Mar*], aff'd (2001), 146 O.A.C. 360 (CA).

disposition of this case.²⁶ In February 2006, an explosion and ensuing fire occurred that caused significant damage to the building. Both parties were insured, and the landlord's insurer sought recovery from the tenant.

The lease in question did not contain an express covenant by the landlord to obtain insurance, but the tenant was responsible for contributing to the costs incurred by the landlord in insuring the property as part of the tenant's additional rent payments. The Court appeared to place considerable weight on two specific provisions of the lease, which read as follows:

Repair Where Tenant at Fault

Notwithstanding any other terms, covenants and conditions contained in this Lease including, without limitation, the Landlord's obligations under "utilities & maintenance, and Tenant's obligation in "insurance" if the Land, Building or any part thereof including, without limitation, any equipment, machinery, facilities or improvements contained therein or made thereto, or the roof or outside walls of the Building or any other structural portions thereof, require repair or become damaged or destroyed through the negligence, carelessness or misuse of the Tenant or through it in any way stopping up or damage the heating apparatus, water pipes, drainage pipes or other equipment or facilities or parts of the Building or Land, the cost of resulting repairs, replacements or alterations, shall be borne by the Tenant, who shall pay the same to the Landlord forthwith upon presentation of an account of such expenses incurred by the Landlord.²⁷ (Emphasis added)

(1) The Tenant shall, during the entire Term, at its sole costs and expense, take out and keep in full force and effect and in the name of the Tenant, the Landlord and any Mortgagee as their respective interests may appear, the following insurance:

The following types of mandatory coverages are enumerated:

- (a) insurance for the tenant's contents;
- (b) public liability and property damage insurance; and
- (c) Tenants' legal liability insurance for the full replacement costs of the Premises.²⁸ (Emphasis added)

In the Court's opinion, these two provisions were clear and unambiguous in allocating the risk of loss and clearly reflected the parties' intention that the tenant assume the risk for any

²⁶ 1044589 Ontario Inc. v. AB Autorama Ltd., 2009 ONCA 654 at para 21.

²⁷ *Ibid* at para 11.

²⁸ *Ibid* at para 12.

losses caused by the tenant's negligence.²⁹ The Court stated that the allocation of risk was reinforced by virtue of the fact that: (1) there was no express covenant by the landlord to insure the building; (2) although there was an express bar against subrogation by the tenant's insurers, there was no reciprocal provision with respect to the landlord's insurers; (3) the lease contained an 'entire agreement' clause; and (4) the lease was a 'completely carefree' net lease.³⁰ The Court's decision was subsequently upheld by the Ontario Court of Appeal.

In Manitoba, the Court of Appeal has also shown a willingness to interpret a commercial lease in such a manner as to circumvent the principle of immunity. In *Sooter Studios Ltd. v. 74963 Manitoba Ltd.*³¹, the Court referred to *Lee-Mar* in permitting a landlord's insurer to bring a subrogated claim against a negligent tenant. The Tenant had a relatively standard repair obligation under the lease as well as the obligation to take out all-risks and general liability insurance. The tenant was also obligated to pay a proportionate share of operating costs, which included the landlord's cost of maintaining insurance on the building, but there was no express provision requiring the landlord to obtain any insurance. Finally, the lease contained a typical "loss and damage" clause and an indemnification clause in favour of the landlord, which read as follows:

12.03 Indemnification of the Landlord

Except to the extent that the loss of life, personal injury or damage to property referred to in this sentence is caused by the negligence of the Landlord, or another person for whose negligence the Landlord is responsible in law, *the Tenant will indemnify the Landlord and save it harmless from and against any and all claims, actions, damages, liability and expenses in connection with loss of life, personal injury or damage to property arising from any occurrence on the premise or the occupancy or use of the Premises or occasioned wholly or in part by an act or omission of the Tenant, its officers, employees, agents, customers, contractors or other invites [sic], licensees or concessionaires [sic] or by anyone permitted by the Tenant to be on the Premises. In case the Landlord, without actual (as opposed to merely vicarious) fault in its part, is made a party to litigation begun by or against the Tenant, excepting a bona fide action by the Tenant against the Landlord, the Tenant will protect and hold the Landlord harmless and will pay all costs, expenses and reasonable legal fees*

²⁹ *Ibid* at para 13.

³⁰ *Ibid* at para 15.

³¹ 2006 MBCA 12 [*Sooter*].

incurred or paid by the Landlord in connection with the litigation.³²
(Emphasis added)

The Court held that to conclude that the subrogated claim was barred would be to ignore the express indemnification clause in the lease. However, the Court seemingly ignored the very principles of the Trilogy in stating that "...and perhaps, most importantly," to conclude otherwise would be to ignore "the absence of an express covenant of the landlord to insure."³³ Finally, the Court commented that the lease in question had "many similarities to the lease in *Lee-Mar*"³⁴, though it is worth noting that the repair clause in *Lee-Mar* contained language indicating that it applied notwithstanding any other provisions of the lease; the indemnification clause in *Sooter* did not contain any similar language.

The Saskatchewan Provincial Court has shown a reluctance to rely on decisions such as *Lee-Mar* and *Sooter*, even in the face of express provisions which appear to capture the parties' intentions with respect to the allocation of risk. In *Poole Properties Ltd. v. Stevens*,³⁵ the lease in question contained a repair clause similar to that in *Lee-Mar*:

EXPENSE OF REPAIRS

(f) If the Premises, elevators (if included), heating equipment, pipes and other apparatus (or any of them) used for the purpose of heating or air-conditioning the Building or operating the elevators, or if the water pipes, drainage pipes, electric lighting or other equipment of the Building or the roof or outside walls of the Building get out of repair or become damaged or destroyed through the negligence, carelessness or misuse of the Tenant, its servants or agents, employees or anyone permitted by it to be in the Building (or through it or them in any way stopping up or injuring the heating apparatus, elevators, water pipes, drainage pipes, or other equipment or part of the Building), the expense of any necessary repairs, replacements or alterations shall be paid by the Tenant to the Landlord forthwith on demand.³⁶ (Emphasis added)

The lease did, however, contain an express covenant on the part of the landlord to insure the building. The Court distinguished *Lee-Mar* on the basis that: (1) the landlord expressly covenanted to insure the building; and (2) the repair clause in this lease did not contain the notwithstanding

³² *Ibid* at para 26.

³³ *Ibid* at para 32.

³⁴ *Ibid* at para 34.

³⁵ 2016 SKPC 12 [*Poole Properties*].

³⁶ *Ibid* at para 9.

clause preceding the repair provision in *Lee-Mar*. Accordingly, the risk of loss by fire passed to the landlord, thereby precluding the landlord (and its insurers) to recover from the tenant.

The British Columbia Court of Appeal has taken a similar approach to that in Saskatchewan. In *North Newton Warehouses Ltd. v. Alliance Woodcraft Manufacturing Inc.*,³⁷ the lease in question contained another repair clause similar to those in *Lee-Mar* and *Poole Properties*, which read as follows:

Except as provided in subclause 10.1(c), if the Premises are damaged by fire or other casualty not caused by the negligence of the Tenant or those for whom it is responsible in law, and the damage is covered by insurance held by the Landlord under this Lease, then the damage to the Premises shall be repaired by the Landlord at its expense provided that the Tenant shall, to the limits of insurance it ought to have received under the terms of this Lease, be responsible for any costs in excess of insurance proceeds received. The Tenant shall, at its expense, repair all Leasehold Improvements and any installations, alterations, additions, partitions, improvements, and fixtures made by or on behalf of the Tenant and all damage caused by its negligence or the negligence of those for whom it is responsible in law...³⁸ (Emphasis added)

The lease also contained an express covenant by the landlord to insure the building, but also required the tenant to indemnify the landlord from damage caused by the tenant³⁹. The Court ultimately distinguished *Lee-Mar* for the same reasons outlined by the Saskatchewan Provincial Court in *Poole Properties*, and dismissed the subrogated claim by the landlord's insurer. The Court stated, "it makes little business sense for a landlord to covenant to insure and for a tenant to pay the premiums if the tenant is not to derive some benefit from the insurance. One might properly say that there is a presumption in favour of a tenant benefiting from a landlord's covenant to insure."⁴⁰

Finally, the Alberta courts have followed the courts of Saskatchewan and British Columbia. In *Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.*⁴¹, the tenant was obligated to reimburse the landlord for costs incurred in making good any damage caused as a result of any act or neglect by the tenant, and to indemnify the landlord for any wrongful act or neglect of the tenant. The lease did not contain an express covenant by the landlord to obtain insurance, but the tenant was obligated to contribute towards the landlord's insurance premiums. The Court stated that the notwithstanding provision preceding the repair covenant in the lease in *Lee-Mar* was an important consideration, and distinguished *Lee-Mar* on the basis that no such clause existed in the lease in

³⁷ 2005 BCCA 309 [*North Newton*].

³⁸ *Ibid* at para 28.

³⁹ *Ibid* at para 27.

⁴⁰ *Ibid* at para 27.

⁴¹ 2006 ABQB 854 [*Alberta Importers*].

question.⁴² Relying on *Ross* and the principles of the Trilogy, the Court dismissed the subrogated claim by the landlord's insurer.

Conclusion

Courts continue to rely on the principles of the Trilogy in dismissing actions brought by innocent parties (or their insurers) against negligent parties, often distinguishing the decisions in *Lee-Mar* and *Sooter*, suggesting that only the most clear, express and unambiguous language will provide an exception to the principle of immunity.⁴³ Landlords, tenants, and their lawyers should ensure they are 'on the same page' regarding the intended allocations of risk and then modify the insurance/indemnity/release/repair provisions of a lease accordingly.

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⁴² *Ibid* at para 41.

⁴³ See also *Royal Host v. 1842259 Ontario Ltd.*, 2017 ONSC 3982; *Imperio Banquet Hall v. Gold Line Conversions Ltd.*, 2018 ONSC 280; *Youn v. 1427062 Alberta Ltd.*, 2016 ABQB 606; *Canadian Language Leadership Centre v. 20 Eglinton*, 2017 ONSC 3542.