A TENANT'S RIGHTS UNDER A LANDLORD'S POLICY

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Lease agreements often contain provisions dealing with insurance cover. Typically, the landlord arranges for cover over the premises let and the tenant is responsible to insure the contents. What is often not dealt with expressly is whether or not the cover purchased by one party is for the benefit of the other. This can give rise to difficulties where a loss occurs that was caused by the negligence of the party who had not purchased the cover.

This was the situation in *Fir & Ash Investments v Cronje & Others*, an as yet unreported decision in the Cape High Court. In that matter, the Court had to decide whether the insurer of a landlord, who had paid a claim after certain leased premises were damaged by fire, could institute subrogated proceedings against the tenant, whose negligence, it alleged, had caused the fire in the first place.

The tenant raised a special defence, pleading that the lease contained the following implied terms: (1) the landlord would procure fire insurance and (2) this insurance was to be to the benefit of both it and the landlord. It was accepted by the parties that if this was shown, the insurer's subrogated claim against the tenant would have to fail. This is because, had the landlord arranged the insurance for the benefit of both parties, the subrogated claim could never have been brought as the insurer would then effectively be seeking to recover from its own insured.

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After a thorough examination of the terms of the lease, the Court held that the implied terms contended for by the tenant could not be supported. It used the ordinary rules for interpreting contracts when arriving at this conclusion.

Same defence raised

This decision is of particular interest given what the Court went on to say when considering the decision in *Commercial Union Insurance Company vs Golden Era Printers and Stationers 1998* (2) SA 718 (B). That case had also involved a fire at premises insured by a landlord whose insurers had subsequently sought to recover damages from the tenant, based on their right of subrogation. The tenant raised the same special defence that was raised in *Fir & Ash*.

When interpreting the lease in *Golden Era*, the Court took guidance from decisions in foreign jurisdictions, particularly the so-called 'trilogy' of cases decided in Canada during the 1970s that dealt comprehensively with the issue. It went on to support the general proposition that:

"Where, as in this case, two contracting parties specifically agreed that the leased premises should be insured against fire and each has an insurable interest in the premises, the clear implication in my view flowing from the agreement is that, unless the contrary is clearly indicated, each intended that both would be protected against the possibility of loss." (My emphasis.)

In the Fir & Ash decision, the Court was referred to various subsequent authorities decided after the trilogy of Canadian cases, as well as decisions in other jurisdictions such as the United Kingdom and the United States. The Court held that, in its view, most subsequent decisions appeared to suggest that:

"A mere covenant on the part of a Landlord to insure premises against fire does not per se give rise to an inference that such insurance is to inure to the benefit of the Landlord and tenant." (My emphasis.)

Although removed from their context, the two quotations set out above are arguably in conflict with each other. In *Golden Era*, the existence of a covenant to insure gave rise to the inference that this would be to the benefit of both parties. In *Fir & Ash*, the Court held that no such inference would exist, *per se*.

Binding decision

Although, technically speaking, the position is still as was set out in *Golden Era* (the comments by the Court, in *Fir & Ash*, were not part of the binding decision, the Court being satisfied that the lease did not support the terms contended for by the tenant) the decision in *Fir & Ash* certainly suggests that, in the future, a Court may be inclined to follow the developments in the foreign jurisdictions that post date the *Golden Era* decision.

From a practical perspective, the *Fir & Ash* decision will typically make things easier for the insurer of a Landlord to recover from a negligent tenant. Of course, the most practical way in which insurers could deal with such a subrogated claim, would be to require their insureds to clearly specify to whom the benefits of insurance are to inure in the policy itself. The landlord would have to ensure that the policy matches the undertakings made in the lease or it could be sued for damages for failing to insure. ◆