

Tort immunity can be far-reaching, B.C. law firm warns

RECENT decisions by appeal courts in B.C. and Alberta provide what Vancouver law firm Clark Wilson calls a "useful refresher" on covenants to insure and tort immunity arising from them.

"Immunity can lurk in almost any kind of commercial contract, not just leases between landlords and tenants," Clark Wilson's Valerie Dixon wrote in the firm's 'Insurable Interest' newsletter.

The cases show that "immunity can be far-reaching and can protect a party not only from claims by a plaintiff but also claims for contribution and indemnity by third parties."

Canadian jurisprudence in this area relies on a 'trilogy' of Supreme Court of Canada rulings from the 1970s holding that a landlord's covenant to insure relieves a tenant from liability for losses caused by the tenant's negligence.

"That principle, however, has been extended beyond tenancies to many other sorts of commercial contracts, which include covenants by one or both parties to obtain insurance," Ms. Dixon said.

In the B.C. case, cement manufacturer Lafarge Canada chartered

four barges owned by JJM Construction Ltd. A condition of the charter was that Lafarge would keep the barges in good condition and be responsible for any damage.

Lafarge was also required to obtain insurance on the barges, on which JJM was to be named an additional insured. The policy required joint instructions from Lafarge and JJM before any payment would be made for any claim.

The barges were damaged when Lafarge returned them. JJM repaired some of the damage at its own expense but couldn't afford to fix the rest so it made a claim under the policy procured by Lafarge. While the insurer agreed to pay around \$54,000 for the repair costs, Lafarge rejected the assessment.

During arbitration Lafarge moved to dismiss JJM's claim on the basis that Lafarge's covenants to insure barred the claim. The arbitrator dismissed Lafarge's application, saying the trilogy cases did not apply, and awarded JJM \$650,000 in damages.

Lafarge appealed the award to the B.C. Supreme Court and lost.

It then appealed to the B.C. Court of Appeal.

Lafarge said the trilogy cases back the principle that a party that pays for insurance is entitled to tort immunity for its own acts, regardless of which party is responsible for obtaining the insurance.

But the appellate judges dismissed the appeal, noting that the trilogy cases involved tenants contributing money towards the landlord's insurance (as opposed to the tenants purchasing their own insurance).

The court said trilogy precedents don't apply where "the very party that covenanted to insure seeks to shelter behind the existence of the insurance in denying responsibility for damage caused by its own acts."

In the Alberta case, the insurer of a building destroyed by fire sued tenant CDI Career Development Institutes and a CDI employee. There was no allegation the defendants caused the fire (it was caused by contractors), only that the employee did not alert the landlord when she smelled smoke, as the lease required.

When CDI pointed out that it had paid part of the fire insurance

premiums as required under the lease, the insurer discontinued its subrogated action against the tenant but continued the action against the contractors.

However the contractors launched their own suit against CDI seeking contribution and indemnity. CDI's application to have this action dismissed was denied by the trial court. The tenant then appealed.

Under law a party can only be liable for contribution if it is also liable to the plaintiff directly. But the contractor argued that this principle should not apply because the tenant and employee would have been liable for breach of contract if not for their insurance payment.

But the Court of Appeal said the tenant's complete immunity from liability to the landlord also ruled out the contractors' claim.

Concluded Ms. Dixon: "It is important that in property damage cases involving commercial agreements between the parties, the contracts (the insurance clauses in particular) should be carefully reviewed to determine whether any tort immunity defence may come into play."

Reach the decision makers

- ✓ Career opportunities
- ✓ Business-to-business
- ✓ Brand awareness
- ✓ Appointments / notices

Reach thousands of the Canadian p&c industry's decision makers with an ad in *Thompson's*.

Display ads for \$695* or less.

Business card-sized placements** for \$193.

Regular weekly ear ads (back page) are currently available for \$600 per month (four weeks) or less.

*— 3.75" x 5" ad before any discount for multiple placements.

**— 1.5" x 2.43" ad before discount. Prices are for black & white placements (colour available for extra charge). Taxes not included.

Email us at mpub@sympatico.ca or visit www.thompsonsnews.com for more information

Thompson's is also accepting advertising in our daily email news service. Prices start at \$375 for 130 words (before multiple-insertion discounts). Text only. Limited availability (one per day) on a first-come, first-served basis. Inquiries as above.