Joint Insurance Provisions In Leases

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1. Joint insurance obligations in leases

It is becoming more common for retail and commercial leases to include provisions requiring a tenant to take out a public liability policy "in joint names", that is, in the names of both the landlord and the tenant covering their respective liabilities.

Often the lease adds fairly specific requirements as to what the insurance is to include. An example of this is:

Each public liability insurance policy must:

(a) be taken out in the name of the Lessee, note the Lessor as an insured and insure each of their insurable interests,

(b) be effected with a reputable insurer approved by the Lessor,

*(c) cover the risks and indemnities in [**specified**] clauses*

(d) note that it shall not lapse, terminate, vary or forfeit without at least a month's prior written notice to the Manager,

(e) bear endorsement that notice of any occurrence given by one insured is deemed to be notice given by all insured parties and that breach of duty or failure by one insured to observe the conditions of the policy does not prejudice the rights of any other insured,

(f) provide that the insurer waives all claims against the Lessor, its agents, contractors, employees and officers (except to the extent that the claim being waived is caused by the negligence or wrongful act or omission of the Lessor, its agents, contractors, employees or officers), and

(g) conform with the Lessor's reasonable requirements notified in writing to the Lessee.

This provision contains a contractual obligation on the tenant to effect public liability insurance which is to include specific terms. If the tenant fails to take out the insurance, the tenant is in breach of the lease.

2. What are the consequences for the tenant if it does not take out the requisite insurance?

(a) ***Hacai Pty Ltd v Rigil Kent Pty Ltd and Others*** (1995 Supreme Court of Western Australia - unreported)

Facts:

(i) Mr Brown was a butcher employed in a shopping centre. He was injured when he slipped on some rotten fruit in a common area in the shopping centre, at the rear of the butcher shop.

(ii) Mr Brown sued his employer in respect of his injuries and obtained judgment for a substantial amount of damages.

(iii) The employer claimed from the landlord a contribution towards the damages, on the basis that the injury was caused by the landlord allowing rotten fruit to accumulate in a loading dock and therefore failing to keep the common area safe.

(iv) The employer's lease of the premises in the shopping centre contained a provision that the employer/tenant was to take out a public risk insurance policy in the joint names of it and the landlord.

(v) The employer/tenant had not taken out the required insurance.

The landlord accepted that it had a liability to contribute to the amount which the employer/tenant had to pay to Mr Brown, but argued that it had an offset claim against the employer/tenant because the employer/tenant

was in breach of the lease by not taking out the joint insurance. Had the employer/tenant taken out the insurance, said the landlord, the insurance would have covered the liability of both landlord and tenant to Mr Brown. The court accepted that argument and said that the landlord was not required to contribute to the damages paid to Mr Brown by the employer/tenant.

The landlord had its own insurance but did not claim on it. The employer/tenant said that the landlord had suffered no loss which it could offset against the employer/tenant claim for contribution, because the landlord could claim on its own policy. The court said the fact that the landlord had insurance was irrelevant.

The result in this case is succinctly summarised by Mr Justice Dawson in the High Court in rejecting the tenant's application for leave to appeal:

> "*This case is a case in which the landlord says, "Look you, the lessee, agreed by contract to take out a policy of insurance which would cover me. In breach of contract, you did not do that, and I am entitled to damages for that breach of contract". It is not a question of two sets of benefits and you ignore one; it is a question of whether he suffered damage by reason of breach of contract.*

This case illustrates the fact that if a tenant is required under a lease to take out joint insurance and does not do so, the landlord can claim from the tenant any damages which the landlord is liable to pay for the landlord's own negligence, even if the landlord has its own insurance to cover the loss.

(b) ***Theiss Contractors Pty Ltd v Norcon Pty Ltd*** (Supreme Court of Western Australia , 2001WASCA 364)

The principles in *Hacai* were applied in *Theiss.* An employee was injured at work when he tripped over a piece of uncapped reinforcing steel and injured his spine. He sued his employer. The employer in turn joined as parties the main building contractor on the site and a subcontractor. As in

the *Hacai* case, there was a contractual obligation by the subcontractor to take out insurance in the joint names of the building contractor and the subcontractor. The subcontractor did not take out insurance. The result was similar to *Hacai* in that, even though the building contractor had its own insurance, and may have claimed on it, it still had a right to recover from the subcontractor damages for breach of the contract to take out joint insurance.

The court said: "It is consequently well-established that where a plaintiff suffers loss as a result of a defendant's negligence, but is the beneficiary of an insurance policy covering that loss, the sum received by the plaintiff from the insurer is not taken into account in reduction of the damages". It quoted Sheller JA in *Western Sydney Regional Organisational Councils Group Apprentices v Statrona Pty Ltd* (NSW Supreme Court unreported 29 August 1995) "There is no difference in principle where a plaintiff is entitled to recover damages for breach of a contract to effect liability insurance for its benefit. The plaintiff's entitlement under a different contract for indemnity on the contingency of its becoming legally liable to pay compensation to the worker does not reduce the damages recoverable for breach of contract. The plaintiff is not indemnified by the second contract of insurance for breach of the first contract but because it has made a contract for a contingency upon the happening of which it became entitled to indemnity. If... (*the plaintiff*) claims against an insurer to be indemnified it must account to the insurer for any benefit which reduces the loss or liability insured against. For like reason it is immaterial that, had...(*the defendant*) obtained the cover it contracted to obtain, that insurer might have been entitled to contribution from some other of... (*the plaintiff's*) insurers."

(c) ***Burch v Shire of Yarra Ranges*** [2004 VSC 437]. The *Hacai* principles were again applied, but the court held that the terms of the joint insurance that had to be taken out were not sufficiently detailed and the contract to take out joint insurance could not be enforced.

Accordingly, if a landlord requires joint insurance, the provision in the lease should clearly set out the kind of insurance that is required. The tenant must make sure that it takes out insurance exactly in the terms required by the lease. Otherwise, it would be required to cover the loss anticipated by the clause. [Note the kinds of provisions which are set out in the first paragraph above, that would have to be included in the insurance policy.]

What is the effect of this? If the tenant is required to take out joint insurance and does not do so in the terms specified in the lease, the tenant will be liable to reimburse the landlord for the loss that the landlord suffers because of that breach. From the point of view of the tenant, it does not matter whether or not the landlord has insurance to cover the landlord's loss. If the tenant has breached the lease by not taking out the insurance, the tenant must cover the landlord's loss. This may mean that if the landlord and tenant each bear 50% of the responsibility for an accident, the tenant will be left covering 100% of the loss. How much of that can be recovered by the tenant from its own insurer would depend on the terms of the tenant's insurance contract.

3. Possible consequences/benefits for the landlord

If the tenant does not take out joint insurance as required, and the landlord is liable for any thing that would have been covered by the insurance had it been taken out, the landlord need not claim on any policy it might have but can recover the whole of the claim from the tenant.

The benefit to the landlord is that if it does not claim on its policy, it does not have to pay a deductible, and its claims history is preserved.

Under insurance law and the Insurance Contracts Act (Sec 76), if the same risk is covered by two insurers, the insurer who pays a claim can recover a share of the loss from the other insurer. Similarly, other parties have rights of contribution – see the two ***Speno*** cases below. These rights can complicate the ultimate resolution of claims, but they do not affect the liability of a tenant where it has not insured under an obligation to do so in a lease.

4. If the tenant does take out joint insurance

If the tenant takes out the required joint policy, any claim should be fairly straightforward, as the policy covers the liability of both the landlord and the tenant.

However, in almost every retail and commercial lease, the landlord requires the tenant to indemnify it against certain liabilities. That is, the landlord passes on to the tenant liability which the landlord would otherwise have to meet. Even if the tenant does insure in accordance with its obligations under the contract, it may still be at risk if it is not insured for any liability that it may incur under the indemnity.

Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd [2000] WASCA 408

Speno contracted with Hamersley to carry out rail grinding work on Hamersley's rail network. The contract provided that:

(a) Speno was to indemnify Hamersley in respect of any injury to any person in the course of the work, and

(b) Speno was to take out joint public liability insurance covering Speno & Hamersley.

Speno took out the required public liability insurance with Zurich Australian Insurance Ltd covering both itself and Hamersley. However, Speno did not have insurance covering any possible liability which it might incur under the indemnity.

An employee of Speno was injured due to Hamersley's negligence. Hamersley accepted liability for 100% of the claim and was reimbursed under the Zurich policy. Hamersley also claimed against Speno on the indemnity and obtained judgment for the amount of the damages payable to the injured worker. At this point, despite having the Hamersley judgment against it, Speno was not out of pocket as Hamersley had recovered its loss from Zurich.

Zurich then claimed against Speno on the basis of the law of contribution. The court said:

> *The principle upon which contribution was claimed was that Speno was liable to indemnify Hamersley under clause 37 of the contract. That liability was said to be a co-ordinate liability with that of Zurich, and those persons who are under co-ordinate liabilities to make good the one loss must share the burden pro rata. This is a principle which applies (inter alia) in respect of insurers where more than one insurer has insured the insured in respect of the same event. However, for a right of contribution to arise, it is essential that the parties had shared an obligation which may be described as "co-ordinate".*

Zurich's argument was that there were two claims which were co-ordinate:

(i) Hamersley had recovered from it the amount of its liability to the injured worker, and

(ii) Hamersley had a judgment against Speno under the indemnity in their contract (where Speno had agreed to indemnify Hamersley in respect of any injury to workers.)

Therefore, so Zurich argued, under the doctrine of contribution, it could effectively stand in Hamersley's shoes and recover from Speno the amount of Hamersley's judgment against Speno.

In the Western Australian Court of Appeal, the judges said that the claims were not co-ordinate. They said that Zurich's liability arose from a contract of insurance and Speno's did not, that the liabilities were intrinsically different in character. Accordingly Zurich was not able to recover from Speno on a pro-rata basis the amount which it had paid to Hamersley under the joint public liability policy covering Hamersley and Speno.

As a final twist, it turned out that Hamersley had its own insurance with Metals and Minerals Insurance Pty Ltd but had not claimed on that policy. Zurich was able to recover from MMI a proportion of the amount it had paid out, on the basis of contribution, because the two companies had both insured the same risk. ***Zurich Australian Insurance Ltd v Metals and Minerals Insurance Pty Ltd*** [2007] WASC 62.

The Hamersley and Speno saga illustrates just how complex claims can become when joint insurance is involved.

5. How easy is it for the tenant to take out the policy?

This depends on the particular insurer. Normally both the landlord and tenant will be required to fill out a proposal and provide any necessary declarations and information that the insurer requires. The tenant will have to ensure that the provisions required by the landlord are in the insurance terms and conditions.

6. Summary

Insurance involves the allocation of risk between parties. This may be appropriate where the parties are two large companies who are in a position to negotiate the allocation of risk. However, small tenants in shopping centres and other retail premises are rarely in a position to negotiate with the landlord on such matters.

Few tenants understand the intricacies of the law of insurance, and many lawyers struggle with it. Tenants would not generally be aware that if they sign a lease requiring joint insurance and they do not take out that insurance, they could be personally liable for the whole of any claim even where the landlord is partly responsible.

If a landlord of retail premises:

(a) requires a tenant to take out a joint insurance policy containing specific terms,

(b) does not itself check that the required insurance is in place,

(c) is aware that if the insurance is not effected, the landlord stands to benefit by claiming against the tenant for the whole of any damages to a third party, even if the landlord is jointly liable,

that might constitute unconscionable conduct under the NSW Retail Leases Act or the Trade Practices Act.

The most cost effective way to deal with the situation is for retail leases legislation to preclude a landlord requiring joint insurance, or indemnities, unless the tenant is, for example, a public company, or of a certain size determined by the annual rent payable. If the landlord is prevented from requiring joint insurance or certain

indemnities, the liability will rest where it falls and the tenant will not be at risk from a claim by the landlord for failing to take out joint insurance containing specific terms. A small tenant is rarely financially or practically in a position to negotiate detailed terms of an insurance policy.