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Palliser Ltd v Fate Ltd (In Liquidation)

Introduction

In this briefing we examine the recent decision of the High Court in *Palliser Ltd v Fate Ltd (In Liquidation)*, and the implications for landlords and tenants when taking out insurance for other parties.

Background Facts

In 2010, a fire started at the ground floor restaurant owned by Fate Limited.

Fate was negligent in starting the fire, damaging the restaurant itself, but also to three upper floors of the building. Fate owned the freehold and leased the upper floors to Palliser Limited under a long lease. Fate had taken out an insurance policy with the second defendant, which was subsequently transferred to the third defendant.

It is relevant to note that Fate's insurers had paid £610,000 under the property damage section of the policy to Fate for the cost of the refurbishment that it had carried out, but this sum was less than the actual cost because Fate had underinsured the property.

Palliser commenced proceedings against Fate attempting to recover the shortfall, which were settled with judgment entered against Fate with damages to be assessed. However, Fate went into liquidation and the claim continued under the Third Parties (Rights against Insurers) Act 2010 ("TPRAIA"). Under TPRAIA (i) where an insured has a liability to a third party; and (ii) the insured is covered by insurance with an insurer against that liability; and (iii) the insured is insolvent; then (iv) the third party can claim directly against the insurer.

Under the public liability section of Fate's policy, cover was provided for accidental damage to *"property not belonging to [Fate]..".*

Palliser claimed an indemnity under TPRAIA and under the public liability section of the policy.

Did Fate's liability insurance respond?

Although there were several issues, the principal question was whether Fate's ownership of the freehold meant that the upper floors were property that did belong to Fate, which would mean that any damage to them would be excluded under the policy. Palliser argued that the upper floors did not "*belong*" to Fate since, being subject to a long lease, they were not under its possession or control. If it were wrong about this, one would expect the damage to be covered by the property damage section of the policy. But that section only covered premises "*occupied*" by Fate and so, it argued, did not cover the upper floors: thus, if insurers' argument were correct, there would be no insurance at all for fire damage to the upper floors, which cannot have been the parties' intention.

A difficulty which Palliser faced in advancing this argument was that insurers had already made a payment to Fate under the property damage section of the policy, as discussed above. Palliser had to say that whilst this may have been done for commercial reasons, it was not what the policy required.

The Court rejected Palliser's argument. He held that, as matter of ordinary language, property still "*belongs*" to a freehold owner even where it is demised to a third party under a long lease. This interpretation was supported by the fact that there was cover for Palliser under the property damage section, as evidenced by the following: (i) the amount of the sum insured under the property damage section only made sense if it was intended to include the upper floors; and (ii) the policy schedule recorded the interest of Palliser's mortgagee, HSBC, which would make no sense if the floors demised to Palliser were not covered by the property damage section.

Did the *Berni Inns* Defence apply?

A second issue was whether, under the terms of the lease between Fate and Palliser, Palliser had agreed that Fate would not be liable for damage to the building because Fate had undertaken to take out building insurance to cover damage of the type in question. Insurers advanced this argument in reliance on the decision in *Mark Rowlands Ltd v Berni Inns Ltd* [1986].

In the *Berni Inns* case, the landlord insured the building and the building was subsequently destroyed by fire due to the negligence of the tenant. The insurer indemnified the landlord and brought a subrogated claim in the name of the landlord against the tenant. Even though the tenant was not named as a co-insured, the Court of Appeal held there was no right of subrogation against the tenant as the landlord was held to have taken out the policy for the benefit of itself and the tenant.

However, the judge noted that the Berni Inns defence was distinguishable in this case in that it is usually available to tenants where a landlord is alleging negligence against the tenant, not the other way around because it is the landlord who has the obligation to obtain insurance intended to cover the landlord's losses. Nevertheless, the judge declined to decide whether the Berni Inns defence would apply because he had found for the insurers on the first issue.

Conclusion and impact on tenants and landlords

On the first issue, the Judge's essential finding was that it was the property damage rather than the third-party liability section of Fate's insurance policy that responded to the fire damage to the floors leased by Palliser. This underlines the importance for tenants of ensuring that their interests (and those of their lenders) are properly and fully protected under property sections of policies.

For landlords, when they are arranging insurance on behalf of themselves and tenants, they should ensure that they do not inadvertently exclude their insurer's rights of subrogation because, in certain circumstances, this may give an insurer a right to decline paying a claim.

If you would like more information, please contact Chris Ives or your usual Eversheds Sutherland contact.

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