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Does your repairing covenant dovetail with your Landlord's insurance policy?

Approximately half of all GPs rent their practice premises. In the first of an occasional series on rented GP property, solicitor Daphne Robertson looks at the vexed question of the tenant's repair clause

Most commercial leases leave the obligation to insure the building to the landlord although the tenant is required to reimburse the landlord for all or a part of the premium. Any well-drafted lease will spell out the insured risks that the landlord is obliged to cover under his policy. Some lease obligations are not spelled out but are limited to "comprehensive risks". Some less desirable clauses simply say that the landlord shall insure "against such risks as the landlord in his absolute discretion shall decide".

If the building is damaged or destroyed by an event which is not covered by the landlord's insurance policy, is the rebuilding or repair of the premises the landlord's problem? The answer is that it depends, because it may be the tenant's problem. The reason is that most leases require the tenant to keep the premises:

“.. in good and substantial repair and condition (damage by any of the insured risks excepted unless vitiated by any act or default of the Tenant, his servants or agents).”

In other words, it might be the tenant who is shown to be negligent and you must guard against this.

Many years ago, the courts decided that an obligation by the tenant to "keep" in repair includes an obligation to "put" in repair so the tenant could be required to rebuild the premises if they are destroyed. The basic point is that the tenant will have a legal obligation to fill any gap between his lease repairing liability and the landlord's insurance obligations unless the landlord has been at fault in failing to insure within his lease obligations. Hence, the wording of the landlord's insurance clause assumes some importance. To exacerbate matters, the tenant may also be obliged to pay the rent whilst any repairs or rebuilding are being carried out if there is no rent abatement clause in the lease. So do watch out for this.

Insurance

In practice, most landlords will have obtained a normal commercial insurance cover including three years loss of rent, depending on the lease terms. Statute requires the insurance company to lay out the policy monies for the purpose for which the cover was taken out so any gap between the landlord's obligations and his actual insurance cover may disappear. However, the statute does not apply to loss of rent even though the tenant has paid the insurance premium.

There are 3 important exceptions where many tenants are exposed to risk. These are where the property damage or destruction is caused by an event that is outside the landlord's insurance obligation and so not covered by his policy. These events are flooding, subsidence and terrorism.

Flooding

With the weather changes ascribed to global warming, many areas are becoming more susceptible to flooding so that some insurers are refusing cover or are increasing the premiums the tenant is required to pay. Any loading of premiums would generally be borne by the tenant, so the landlord should not use the loading as an excuse not to include flooding in the cover.

Subsidence

Subsidence will depend on the soil structure beneath the property. Insurance may be refused in some circumstances, or it may mean the premium is loaded.

Terrorism

Insurance for damage caused by terrorism is becoming more difficult in inner city areas with or without premium loading.

Solutions

There are two possible solutions to the problem:

1. If you are currently negotiating a new lease try to ensure that damage caused by any insurable risk is the landlord's obligation
2. For existing leaseholders, ask for a copy of the current insurance schedule. You are entitled to see it. See if the landlord has insured with a major reputable company and then check the landlord's obligations in your lease. If the landlord has fulfilled those obligations it is unlikely that you can arrange any additional cover to fill the 'gaps' if the property is in a problem area. But it is worth making enquiries.

Key points

- Check the repairing clause in your lease to see your obligations. Is it a full repairing lease?
- Check the lease for your landlord's insurance obligations. Are the risks defined?
- Check the landlord's insurance schedule. Is the property covered for flooding, subsidence and terrorism?

Daphne Robertson leads a bespoke team of ex-City lawyers at DR Solicitors, specialising in providing medical business law advice to NHS GP Practices.

Tel: 01483 511555