IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CIV-2020-092-003988
[2021] NZDC 23513

BETWEEN	INLET STORAGE LIMITED Plaintiff
AND	UNITED MOVERS LIMITED Defendant

Hearing: 18 November 2021

Appearances: R Johnstone for the Plaintiff
C Langstone for the Defendant

Judgment: 22 December 2021

RESERVED JUDGMENT OF JUDGE D J CLARK

Introduction

[1] The defendant (United) seeks to strike out the plaintiff's (Inlet) remaining cause of action.[1] United relies on ss 268 and 269 of the Property Law Act 2007 (the Act) and says that Inlet is barred from a proceeding with this cause of action.

[2] Inlet is the registered proprietor of a property located at 23 Inlet Road, Takanini, Auckland (the property). United were the tenant of a warehouse located on the property which was destroyed by fire. Inlet seeks to recover some of the costs it has incurred as a consequence of the fire.

Background

[3] There is no dispute between the parties in terms of the background circumstances in this matter.

[4] The parties entered into an agreement to lease dated 1 May 2019. The form was the standard Agreement to Lease (ADLS 6th edition 2012) Form. Although the agreement to lease contemplated that the parties would enter into a Deed of Lease,[2] that deed was prepared but never executed.

[5] Pursuant to the agreement to lease, Inlet was to take out full replacement and reinstatement material damage insurance cover, including loss, damage or destruction of windows and other glass, plus cover for fire, flood, explosion, lightning, storm, earthquake and volcanic activity. United was to pay the annual rent and outgoings including any insurance excess in respect of a claim and insurance premium.

[6] Inlet purchased an NZI material damage insurance policy in satisfaction of the policy described in paragraph [4] above with such policy commencing on 1 November 2019.

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[1] The first cause of action has settled although the issue of costs remains open as at the date of the hearing.

[2] ADLS 6th edition 2012 (5) form.

[7] United's business operates as a freight and storage company. Items which were stored in the warehouse on behalf of United's customers included household and office contents including fridges, freezers, furniture and vehicles.

[8] On 4 December 2019 a fire broke out at the property and the warehouse was completely destroyed. Although it is denied by United, Inlet claims that the fire was caused by employees of United who were smoking, and their cigarette butts ended up amongst cardboard within the warehouse. The cigarette butts allegedly ignited the fire.

[9] Ward Demolition attended the fire and assisted the Fire and Emergency Service to access parts of the warehouse and then attended and assisted in the clean-up of the destroyed warehouse. On 5 December, WorkSafe New Zealand,[3] having been notified of possible asbestos contamination issued a prohibition notice under s 105 of the Health and Safety at Work Act 2015. Pursuant to that notice Inlet was directed to:

(a) Apply the WorkSafe recommended methodologies to address the asbestos contamination in a safe and effective manner;

(b) Identify, test and remove suspected asbestos contamination material at the property and on neighbouring properties; and

(c) Undertake the clean-up works on an urgent basis.[4]

[10] The warehouse roof contained asbestos. WorkSafe New Zealand were concerned how far the property and neighbouring areas were possibly affected. The neighbouring areas which needed to be investigated amounted to approximately 50,000 sqm of land and buildings outside of Inlet's property. The work involved identifying, testing, collecting and removing asbestos contamination, including materials from other properties, understanding the extent of and preventing any further damage of property and personal injury to people in the surrounding area.

[3] An Inspector Clark was the WorkSafe NZ representative and issued the notice and directions.
[4] Paragraph 23 Statement of Claim.

[11] Ward Demolition was instructed by WorkSafe NZ to undertake the investigation and clean up works. This was undertaken between 4 December 2019 and 20 February 2020.

[12] The timing and cost of the works can be broken down as follows:

(a) 4-5 December 2019 – demolition and partial deconstruction and access clearance at direction of Fire and Emergency Service.
Cost $13,755.15;

(b) 5-15 December 2019 – ACM clean-up and fire debris removal and disposal from neighbouring properties and roads/pavements;

12-22 December 2019 – site contamination works, foam and exterior mesh fencing.
Cost $108,768.75;

(c) 15-20 February 2020 – in conjunction with United, site clean-up of United's fitout, stored contents, vehicles and equipment; including asbestos monitoring and clearance.
Costs – Ward Demolition invoices WD10003 $20,092.80
WD10004 $123,914.80

[13] The total cost of the removal of debris and clean-up amounted to $312,059.40. Some of these costs were partially indemnified by insurance and therefore the total of the costs set out in [12] (a) to (c) above amount to $266,531.50.

[14] United paid the Ward Demolition invoice WD10003 in the amount of $20,092.80 leaving a balance of $246,438.10 remaining. It is this sum Inlet claims from United in respect of its remaining cause of action.

The Insurance Policy

[15] As noted, Inlet secured a material damage policy through NZI Insurance.

[16] The NZI policy is a combined material damage and business interruption policy and, without any objection, was exhibited in an affidavit sworn by Ms Offner, a solicitor employed by United's law firm. Both Mr Langton and Mr Johnstone referred to the policy in the course of their submissions.

[17] The policy contains general and then specific terms relating to the coverage for Inlet as provided for in Schedules A and B of the policy. Schedule A includes endorsements, one of which was an asbestos endorsement which states:[5]

> ASBESTOS ENDORSEMENT
>
> This policy does not insure asbestos except that which is physically incorporated in an insured building, and then only such asbestos, which has been physically damaged during the period of insurance due to an accidental loss.
>
> Coverage under this policy in respect of asbestos shall not include any sum relating to:
>
> 1. Faults in the asbestos or its design or workmanship:
> 2. Asbestos not physically damaged:
> 3. Actions taken to protect human health or property; or
> 4. Meeting standards or requirements set by any Government or regulatory authority.
>
> The maximum this policy will indemnify for demolition, clean up costs and disposal of asbestos after an insured **event** is $25,000 or the sum insured limit noted on the **schedule** whichever is the lesser.

[18] Schedule B provides as follows:

> **For: Inlet Storage Limited & Inlet Holdings Limited**
>
> 'Property Insured' means tangible property of every description not expressly excluded, the Insured's own or held by the Insured jointly or in trust or on commission or has management control.

ITEM NO.	DESCRIPTION	BUILDINGS $	PLANT/ CONTENT $	STOCK $	TOTAL PROPERTY INSURED $
1	23 Inlet Road, Takanini, Auckland Building 2 / Lot 3	5,000,000			5,000,000
	TOTAL	**5,000,000**	**0**	**0**	**5,000,000**

[5] Page 84 Defendants Bundle of Documents.

United's Application

[19] United says that Inlet's second cause of action does not disclose a reasonably arguable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious or, is otherwise an abuse of the process of the court.[6] In short, it argues that ss 268 and 269 of the Act preclude Inlet's claims against United on the basis that United is exonerated from any liability under s 269 of the Act. In particular:

(a) Sections 268 and 269 of the Act apply where leased premises are destroyed or damaged against the risk of which, the lessor is insured or has covenanted with the lessee to be insured (s 268(1)(a)); and

(b) The claim involves the destruction of leased premises by fire where the lease provided for Inlet to insure against the risk of fire.[7] Pursuant to s 269 of the Act where the lessor is insured a lessee is exonerated and the lessor must not require the lessee to:

(i) Meet the costs of making good the destruction or damage (s 269(1)(a));

(ii) To indemnity the lessor in respect of the destruction or damage (s 269(1)(b)); or

(iii) Pay damages in respect of the destruction or damage (s 269(1)(c)).

[20] The second cause of action by Inlet seeks to recover the costs which United says it is exonerated from as a result of s 269 of the Act.

Inlet's Response

[21] Knowing that a lessee is exonerated from liability where destruction or damage occurs in respect of leased premises, Inlet argues it has deliberately separated out the

[6] See Rule 15.1 District Court Rules.
[7] Paragraph 3.1 defendant's application to strike out.

damages which do fall within the exonerated provisions of s 269(1). It accepts that the preconditions under s 268 of the Act operate. However, the damages it is claiming under this cause of action, it contends, are "not in respect of the destruction of or damage to the leased premises."[8] To grant United's application would be an "unnatural and unnecessary extension of the statutory exoneration beyond the purpose and the scheme of the legislation".[9]

[22] Furthermore, they are not the type of damages contemplated by the parties in terms of the insurance cover that was secured and as covenanted under the agreement to lease. Inlet took out a policy which provided cover for 'full replacement and reinstatement material cover'. There was no agreement to take out any other form of insurance to cover the damages it now seeks such as injury to people or property (other than Inlet's property), or damages arising from contamination or pollution. If such a policy was contemplated it would not be a Material Damage and Business Interruption policy but rather a Public Liability or General/Broadform Liability policy.[10]

[23] Mr Johnstone further submits that given the nature of the business operated by United it can be expected that United would hold insurance to cover any risk in respect of its own property located on-site and in respect of any potential civil liability.

Strike Out Principles

[24] There is no argument as to the relevant principles. A cause of action will be struck out where a pleading does not disclose any reasonably arguable cause of action. It is noted in *Galbraith v Alderson Logistics Limited*:[11]

> The principles to apply to a strike out application advance on the basis that the pleading does not disclose any reasonably arguable cause of action was summarised by the Court of Appeal in *Attorney General v Prince* [1998] 1 NZLR 262 (CA) at 267, and were endorsed by the Supreme Court in *Couch v Attorney General* [2008] NZSC 45, 3 NZLR 725 at [33]. In this case the issue is one of statutory interpretation. The focus must be on the statutory purpose *Commerce Commission v Fonterra Cooperative Group Limited* [2007] 3 NZLR 767 (SC). The meaning of an enactment is to be ascertained from its text and in light of its purpose.

[8] Para 3 of Mr Johnstone's submissions.
[9] Ibid at para [27].
[10] Ibid at para [24].
[11] *Galbraith v Alderson Logistics Limited* [2013] NZHC 3102 at para [9].

Statutory Framework

[25] Section 268 of the Act provide application of ss 269 and 270:

> **268 Application of sections 269 and 270**
>
> (1) Sections 269 and 270 apply if, on or after 1 January 2008, leased premises, or the whole or any part of land on which the leased premises are situated, are destroyed or damaged by 1 or more of the following events:
>
> (a) fire, flood, explosion, lightening, storm, earthquake or volcanic activity:
>
> (b) the occurrence of any other peril against the risk of which the lessor is insured or has covenated with the lessee to be insured.
>
> (2) Section 269 applies even though an event that gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee's agent.
>
> (3) In this section and sections 269 and 270, **lessee's agent** means a person for whose acts or omissions the lessee is responsible.
>
> **269 Exoneration of lessee if lessor is insured**
>
> (1) If this section applies, the lessor must not require the lessee–:
>
> (a) to meet the cost of making good the destruction or damage; or
>
> (b) to indemnity the lessor against the cost of making good the destruction or damage; or
>
> (c) to pay damages in respect of the destruction or damage.
>
> (2) If this section applies, the lessor must indemnify the lessee against the cost of carrying out any works to make good the destruction or damage if the lessee is obliged by the terms of any agreement to carry out those works.[12]

[26] The primary issue in this application is one of statutory interpretation. The "meaning of an enactment must be ascertained from its text and light of purpose".[13]

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[12] Subsection (3) of section 269 refers to the situation where a lessee is not exonerated from liability if the destruction or damage was intentionally caused by the lessee or was caused as a result of an imprisonable offence. The section is not relevant to this application.

[13] *Holler v Osaki* [2016] NZCA 130 (CA) at para [18] referring to the Interpretation Act 1999 s 5(1).

[27] Mr Langstone argues the law is clear in that all damages arising from the fire irrespective if that damage occurred in or to the land surrounding the premises is covered by the exoneration provisions of the Act.

[28] Mr Johnstone says that there is a clear delineation between what damages are covered by the exoneration provisions and what is not. To grant United's application would be an unnatural extension of the law as it is currently stated and, what was not contemplated by the provisions of the Act.

Case Authorities

[29] There is no dispute between counsel that s 268 of the Act applies. Inlet's premises were destroyed by the fire, which was an event in respect of which Inlet carried a material damage and business interruption insurance policy and this policy responded to that event. The real issue is whether the damages sought by Inlet are covered by s 269(1) of the Act.

[30] Both counsel referred to the most recent authorities which have considered the exoneration provisions. The first is the Court of Appeal decision of *Sheehan and Ors Trading as Otahuhu Joint Venture Partnership v Watson and Anor*[14] and the second is the High Court case of *Galbraith v Alderson Logistics Limited.*[15] Venning J provided the reasons of the Court of Appeal in *Sheehan* and was the presiding judge in *Galbraith v Alderson.* I add to these cases the Court of Appeal's decision in *Holler v Osaki*[16]

[31] In *Sheehan v Watson* the Court of Appeal considered the issue of whether, for the purposes of s 269(2) of the Act an "agent" of a lessee included an employee. The Court of Appeal confirmed that employees were to be treated as lessee's agents,[17] but agents did not include independent contractors.[18]

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[14] *Sheehan and Ors Trading as Otahuhu Joint Venture Partnership v Watson and Anor* [2010] NZCA 454.
[15] Supra at n 5.
[16] Supra at n 13.
[17] As referred to in s 268(3) of the Act.
[18] *Sheehan* at [45].

[32] *Galbraith v Alderson* involved a claim by the landlord for loss of rental and outgoings. The landlord (Hunua) carried business interruption insurance for consequential lost rental but it was limited to 12 months. Venning J held that the lessor was unable to recover the uninsured rental and outgoings as these costs fell within the 'damages' definition of s 269(1)(c) of the Act.

[33] *Sheehan v Watson* considered in some detail the reform which predicated the enactment of ss 268 and 269 of the Act. That included consideration of the Law Commission's preliminary paper, its final report, submissions to the Law Commission, and comments in the House when the Bill was introduced and through its various Readings. The Court noted[19] the objective of the legislative change was to "address the unsatisfactory state of the case law and its economic unreality" by:

a. Imposing the risk of damage or destruction of a premises on the lessor, even in the absence of insurance; and

b. Preventing the insurer (where the lessor had insurance) from exercising by subrogation, a right to claim against the lessee.

[34] In *Galbraith v Alderson* Venning J stated:[20]

> [14] In my judgment s 269 has the following effect in this case. Section 269(1)(a) prevents Hunua from requiring Alderson to meet the costs of making good the physical damage caused by Alderson's employees. In other words it prevents Hunua from requiring Alderson to directly meet the costs of paying for the damage. Section 269(1)(b) prevents Hunua requiring Alderson to indemnify it against the costs of making good the damage. It would cover, but not necessarily be limited to, a situation where Hunua or its insurer had paid for the repairs for the damage and then sought to recover from Alderson. Section 269(2) confirms that if, by reason of any other provision of the lease Alderson was obliged to carry out the repair works, Hunua must indemnify it. The "damage" referred to in ss 269(1)(a) and (b), and s 269(2) is physical damage.
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> [15] By contrast, s 269(1)(c) encompasses two separate concepts of damage, first, damages (in the terms of losses that may be sued for at law) and physical damage. Damages in terms of losses that may be used for at law is a common and well understood concept: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1070 per Hailsham LJ.
>
> > Of all the various remedies available at common law, damages are the remedy of most general application of the present day, and they remain the prime remedy in actions for breach of contract and tort.

[19] *Sheehan* at [26].
[20] *Galbraith* supra at [14].

> They have been defined as "the pecuniary compensation obtainable by success in an action for a wrong …".

In this case such damages would include the rent and outgoings lost as a result of the physical damage provided they can properly be said to be "in respect of" such physical damage.

[35] As noted, s 269(1)(c) states:

> (1) If this section applies, the lessor must not require the lessee–:
>
> …
>
> (c) to pay damages *in respect of* the destruction or damage.

(italics mine)

[36] Venning J concluded that the phrase was to be interpreted broadly:[21]

> The words "in respect of" are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.

[37] Referring to *Body Corporate 200012 v Eden Village Ltd (in liq)*[22] Venning J agreed with Associate Judge Sargisson who cited with approval the passage from *The Law of Liability and Insurance*:

> … are the widest import, having well respected amplitude, though [the phrase] must be strictly identified with its object and is narrow than "in connection with". The nexus set is broad and imprecise, but it requires some discernible and rational link.

[38] Finally, in citing *Sheehan* Venning J summarised the position as follows:[23]

> … the common theme that emerged was that, where the lessor is insured (or has covenanted to insure), the lessee has paid for the costs of that insurance, either pursuant to its obligations under an express clause in the lease or in the level of rental charged, so that it would be unreasonable to require the lessee to have to pay again for its own insurance for the same risk (or face a claim by the lessor or its insurers arising from the occurrence of the risk). The reform was intended to confirm the lessor was to bear the risk, not the lessee.

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[21] *Galbraith* at [17] citing with approval *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111 per Mann CJ.

[22] *Body Corporate 200012 v Eden Village Limited (in liq)* HC Auckland CIV-2006-404-1931, 14 November 2011.

[23] Supra at [21].

[39] In determining that a lessor carries the risk to cover loss of rent and outgoings, and that there was a direct link between Hunua's loss of rental and outgoings and the physical damage occurred to the premises caused by Alderson's employee, Hunua's claim fell within the ambit of s 269(1)(c) and the claim was struck out.

Analysis

[40] As a result of *Sheenan v Watson* and *Galbraith v Alderson* it is clear where "leased premises, or the whole or any part of the land on which the leased premises are situated, are destroyed or damaged" by any of the events prescribed in s 268(1)(a) or (b) whether that damage is physical damage or economic damage, the lessee will be exonerated from being sued by the lessor unless the exceptions under s 269(3) apply. To date, that exoneration includes damages caused by the employees of the lessee and also includes consequential economic damages such as rental and outgoings.

[41] The issue in this proceeding, is whether s 269 of the Act captures the economic damages claimed by Inlet in respect of loss beyond its premises and land, or in respect of the clean-up within the boundary of Inlet's property but including the clean-up of United's assets. Mr Johnstone says there is a "demarcation line" between damages which may arise but are restricted to the lessors premises and the land defined within the lease and, damages arising from a site clean-up and/or costs of works beyond the perimeter of the site. Such costs were never covered by the Material Damage Policy as they were never contemplated by the parties.

[42] Mr Johnstone argues that the policy considerations of the Law Commission, only focused on physical premises which were owned by the lessor and tenanted by the lessee. All commentary, both in terms of the Law Commission's reports as well as when the Bill was introduced to Parliament by the Honourable Clayton Cosgrove, confirmed what the purposes of the legislation was, namely:

> One specific reform proposed in the Bill removes a commercial lessee's liability for unintentional damage to leased premises when the lessor is insured. The Law Commission expressed concern that lessees can be liable under a lease covenant for repairing premises damaged through their

> negligence, even though the lessor is protected by insurance that is directly or indirectly paid for by the lessee.[24]

[43] Mr Johnstone makes the point that the Court of Appeal in *Holler v Osaki*[25] observed that Minister Cosgrove when introducing the Bill did not indicate the exoneration provisions were to be narrower in scope than what was intended by the Law Commission.[26] Mr Johnstone submits the Minister also did not say the reforms should be wider in scope and go beyond the natural meaning of the words as stated. He also says Mr Langstone is unable to point to any commentary (from the Law Commission or Minister Cosgrove) which would suggest the exoneration provisions would extend to the situation in the current proceeding.

[44] Mr Langstone argues that the scope of the cost and damages anticipated by s 269 is deliberately wide. Relying on *Galbraith v Alderson* he submits all damages and/or financial compensation which arises "in respect of" destruction or damage is covered by the exoneration. All three categories which Inlet claims as its damages are all "damages in respect of the damage or destruction" caused by the fire and therefore are excluded. They are directly linked to the fire and fall within what was anticipated by Venning J in considering the words "in respect of." Accordingly, the exoneration provisions must apply.

[45] Mr Langstone also relies on the obiter comments made by Venning J in *Galbraith v Alderson*. Counsel for Hunua argued that only physical damage to the leased premises is intended to be covered by the exoneration regime relying on the commentary in the Property Law Bill 2006 and any extension could bring inconsistency and ambiguity, especially in relation to consequential losses.[27]

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[24] Associate Minister for Justice Hon Clayton Cosgrove in introducing the Bill to Parliament: Property Law Bill 2006 (89-1) explanatory note at [1], cited *Holler v Osaki* [2016] NZCA 130 (CA) at para 51.

[25] *Holler v Osaki* [2016] NZCA 130 (CA) at paras [51] and [52].

[26] In *Holler v Osaki* the Court of Appeal in dismissing an appeal confirmed the exoneration provisions applied to residential tenancies notwithstanding when the Bill was introduced the application of the exoneration provisions to residential tenancies was unclear. This position has been further clarified by the enactment of the Residential Tenancies Amendment Act 2019.

[27] (89-1) (explanatory note) at 47, *Galbraith v Alderson* supra at [27].

[46] In support of that submission counsel for Hunua then gave examples, one of them being exposure to a claim based on statutory liability:[28]

> …where the lessee operates a chemical storage facility and where a tanker is damaged and leaks chemicals into a neighbouring waterway resulting in a statutory liability for the lessor, the lessor could claim against the lessee. But if the leased premises include a large silo containing hazardous materials and the lessee negligently damaged the silo causing a discharge into the same waterway, the lessor would be prohibited from claiming against the lessee.

[47] Venning J responded to this (and the other examples given) as follows:[29]

> The answer to those examples is that the present case does not fall into those categories. The exoneration scheme only applies in respect of events or perils identified in s 268(1)(a) against the risk of which the lessor is insured or has covenanted to be insured. Hunua was insured for part of the consequential losses. It could have obtained business interruption insurance for a period longer than the 12 months if it had wished.
>
> … In relation to the third example of statutory liability I again consider there is force in Mr Bierre's argument that there is a strong argument s 269 could apply to both situations as the spill on the lessor's land would constitute damage regardless of whether the hazardous material was originally stored in a tanker or a silo.

[48] In terms of what risk was intended to be covered by insurance Mr Langstone relies on to the decision of *Linklater v Dickison*[30] as authority for the proposition that Inlet and United agreed Inlet would arrange insurance for the risks identified in the Schedule of the Agreement to Lease. Inlet proceeded to obtain a Material Damages and Business Interruption policy which included an endorsement for asbestos damage but limited it to the sum of $25,000. Mr Langstone argues that as the obligation rests with the lessor to assess the risk that it wishes to cover, in terms of the amount it wishes to cover, it carried the risk of limiting asbestos damage to $25,000. In *Linklater v Dickison*[31] Nation J stated at:

> Section 269(1) plainly means that s 269 will apply once and if it is clear the lessor is insured for the damage that occurred or has covenanted with the tenant to be insured for that damage. The protection for the tenant is not limited to the extent of the indemnity or cover which a lessor is entitled to under the insurance policy. It is the fact that there is such an insurance. The extent of it, which protects the tenant … it is inherent in ss 268 and 269 that it

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[28] *Galbraith v Alderson* supra at [28].
[29] Ibid at [29] and [30].
[30] *Linklater v Dickison* [2017] NZHC 2813.
[31] Ibid at [39].

> will be the lessor, who insures the property, is responsible ensuring the cover is adequate and carries the risk of it not being so.

Discussion

[49] How far then do the exoneration provisions extend? Are they restricted by a physical boundary and/or what is agreed by the lessor and lessee in terms of the risk to be insured? Do they include damage to items which are owned by the tenant and are not part of the premises and/or land?

[50] I start with the purpose of the reform. It is clear the Law Commission recommendations intended to clarify inconsistencies in the way courts were determining when a tenant was liable or, benefitted from insurance, where an event caused the damage or destruction to those premises. Of concern to the Law Commission were the decisions of the courts that proceeded "upon a scrutiny of individual lease contracts, arriving at conclusions which may be thought to be at odds with reality and to turn on fine, and probably unintended, nuances in the wording." Without reform [the] "courts would continue to construe lease covenants in an artificial manner."[32]

[51] The Law Commission recommended:[33]

> We tentatively propose that the new Property Law Act should contain a section providing that where leased premises are destroyed or damaged by fire, flood or any other peril against which the lessor is insured or has covenanted with the lessee to insure, the lessor shall not be entitled to require the lessee to make good the destruction or damage or to indemnify the lessor in respect of the destruction or damage or to pay damages in respect of it… It would be spelled out that the provision would apply regardless of whether the destruction or damage has been caused or contributed to by the neglect or default of the lessee. It would also be stated that the section would not excuse the lessee from liability for wilful damage. The section would not apply if the insurance moneys were rendered irrecoverable by the act or default of the lessee or the lessee's agent, contractor or invitee.

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[32] Law Commission *The Property Law Act 1952: A discussion paper* (NZLC PP16, 1991) at [460] and [483].
[33] Ibid at [482].

[52] In order to avoid artificial distinctions in interpreting clauses in leases the Law Commission recommended the new provision should be mandatory.[34] It then concluded by stating:

> We consider that the proposed rule should protect the tenant in relation to the whole of any building in which the premises are situated as well as in relation to the premises themselves. Such an extension will avoid a trap for tenants who might easily overlook the possibility of causing negligent damage to another portion of the landlord's property.

[53] I agree with Mr Johnstone that nowhere within the Law Commission's paper did it discuss whether its recommendation went beyond the premises or land owned by the landlord. The closest it got was the protection extended to another portion of the landlord's property not leased by the tenant.

[54] However, it is clear from reading the discussion paper that the Law Commission was focused on removing the inconsistencies in the decisions which were made and to protect the tenant from being sued where it thought it was benefitting from the landlords insurance. The recommendations clearly focused on the landlord accepting the risk of the insurance coverage but mitigating against that by passing on the costs of the premiums (to the extent of the coverage) for the tenant to pay. There is no better example of the focus to protect the tenant in these circumstances than the questions posed by the Law Commission as part of its conclusion:[35]

> Questions:
>
> 0112 Should an insured landlord or its insurer be able to claim against the tenant for damage to the premises caused or contributed to by the tenant's negligence?
>
> 0113 Should the risk of inadequate insurance cover (other than when vitiated by the tenant) fall on the landlord?
>
> 0114 Who should bear the risk if there is no cover?
>
> 0115 Should any new rule be mandatory?

[55] The answer from the Law Commission to these questions focus on protecting the tenant and placing the risk on the landlord.

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[34] Ibid at [484].
[35] Ibid at [484].

[56] Following its 1991 paper, the Law Commission produced a report in 1994[36] which drafted the provisions which were to become the new ss 268 and 269 of the Act. No mention of whether the exoneration provisions extended beyond the physical premises or land was made in this report.

[57] The Law Commission's recommendations were adopted in full by Parliament when the Bill was enacted. Throughout the three readings in the House no comments, from any Members[37] were made regarding whether the exoneration provisions, as drafted, were limited to just the premises and land of the landlord.

[58] There is no disagreement between the parties that the purpose of the reform was intended to remove inconsistencies between decisions and to make mandatory that a landlord carries the risk of damage or destruction to its premises unless it is a deliberate act of the tenant that causes the damage.

[59] The protection from a claim in damages is not limited to only the cost of repair to the physical damage or destruction of the premises but also against economic damage.[38] The question though is whether the 'protection' for the tenant extends beyond the physical boundary in respect of damage or destruction to something other than the landlords premises and/or land.

Decision

[60] Against the background and authorities above I now consider each of the categories of damages claimed by Inlet.

[61] The first category relates to the partial demolition and access clearing carried out at the direction of the New Zealand Fire Service while the fire was occurring. This work was carried out on-site. The costs claimed are $13,755.15.

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[36] Law Commission *A New Property Law Act* (NZLC R29, 1994).

[37] The Bill had cross-party support. Hansard records general comments about the reform and reliance on the Law Commission's recommendations but no independent comment regarding the extent of its scope. See n 48 in *Holler v Osaki* [2016] NZCA 130 (CA) as examples of Members who spoke to the Bill at various stages of its readings.

[38] *Galbraith v Alderson Logistics Limited* [2013] NZHC 3102.

[62] In my view the claim for the costs under this category should be struck out. These costs, irrespective of whether they were incurred at the direction of the Fire Service are damages "in respect" of the damages or destruction of the premises. They cannot be anything else. Although they were incurred as part of the need to suppress the fire, they relate squarely to damage or destruction within the physical boundary of Inlet's property. The claim for those damages then is struck out.

[63] The second category relates to the costs for works beyond the perimeter of Inlet's land for the clean-up and fire debris removal. The claimed costs are $108,768.75. In my view, this claim must also be struck out for the following reasons.

[64] Firstly, I consider the purpose of and the mischief being addressed by the reforms. The Law Commission was concerned to end litigation between landlords and tenants over whether insurance applied or not and the resulting inconsistent decisions. If no or insufficient insurance was obtained the risk is with the landlord. A tenant entering into a lease since the enactment now has sufficient certainty that if its acts or omissions start (as an example) a fire then it will not be sued (unless it was deliberate).

[65] Uncertainty will be created again if the exoneration provisions cease to apply if the damages claimed relate to damage outside the property boundary. It would be a most unsatisfactory position that United has no liability for the spread of the asbestos within Inlet's land but immediately is liable if the spread has drifted into neighbouring properties. The nuances and interpretation of leases which the Law Commission was attempting to avoid will arguably be at the forefront of litigation again.

[66] Secondly, I turn to who holds the insurance risk in this proceeding. Although United's employees have allegedly caused the fire, the sole basis for the costs claimed under this category is because of the spread and contamination of neighbouring properties from the asbestos which was contained in the roof of the premises.

[67] It is unrealistic for a tenant in a leasing situation to carry the risk of contamination when it would have no knowledge of and no ability to ascertain the composition of the roof. Commercial reality dictates that the due diligence of a tenant does not extend to seeking answers to such questions and nor should it. Only the

owner of the premises would have this knowledge and be in a position to insure against this peril. In the circumstances, I rely on the words of Venning J in *Galbraith v Alderson*; "The reform was intended to confirm the lessor was to bear the risk, not the lessee."[39]

[68] Thirdly, I have noted that the Material Damage and Business Interruption policy did have an asbestos endorsement, but it was insufficient to cover the damages now claimed. In this instance then it appears Inlet did turn its mind to coverage for asbestos clean-up but as in *Galbraith v Alderson,* the limitation imposed by the policy does not allow Inlet to claim the balance beyond the limit. As Venning J stated in *Galbraith v Alderson*[40] it was open for the landlord to extend its business interruption insurance beyond 12 months loss of rent and outgoings, but it chose not to. In this case Inlet had coverage for asbestos cover but limited it to $25,000. It was perhaps open to Inlet to extend its coverage beyond $25,000. I agree then with the comments of Nation J in *Linklater v Dickison;*[41] "The protection for the tenant is not limited to the extent of the indemnity or cover which a lessor is entitled to under the insurance policy".

[69] Fourthly, I turn to the decision of *Galbraith v Alderson* and the obiter comments made by Venning J in relation to the examples provided by counsel for Hunua. Venning J was of the view that the hazardous spill could still "constitute damage" and s 269 of the Act could apply.[42]

[70] There is little difference in the example given and what has occurred here. The roof, being part of the premises owned by Inlet, contains a hazardous material namely asbestos. As a result of the (alleged) negligence of United's employees, a fire has occurred, and this is an event which an agreed insurance policy will respond to.

[71] The spread of asbestos is similar to the example of the spill. I agree then with Venning J that such damage is "still damage" arising out of the events prescribed in s 268 and on that basis s 269 of the Act should apply.

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[39] *Galbraith v Alderson* supra at [21].
[40] *Supra* at [28].
[41] *Linklater v Dickison* supra at [39].
[42] *Galbraith v Alderson* supra at [30].

[72] Finally, I consider the analysis undertaken by Venning J in *Galbraith v Alderson*[43] has application to this situation. Section 269(1)(c) exonerates the lessee from damages in terms of losses that may be sued for at law. In this case damages would include the costs incurred in the clean-up outside of Inlet's property, incurred as a result of the physical damage and in respect of such physical damage.

[73] For the reasons set out above then the claim under this category should be struck out.

[74] I now consider the third category. As I understand this claim, Ward Demolition carried out site-clean-up and removal of United's fitout, stored contents, vehicles and equipment.[44] This clean-up progressed after a discussion was held with a Mr Ussher of United.

[75] The total cost of this clean-up was $144,007.60 made up of the two invoices outlined in para 12(c) above. United have paid invoice WD 1003 for $20,092.80 but have not paid WD10004 for $123,914.80. Mr Johnstone says no explanation was given as to why one was paid and not the other. Mr Langstone says the costs relating to United's motor vehicles have been paid.

[76] A strike out application will focus primarily on the pleaded facts.[45] On the face of it and given there is no apparent dispute over what work the invoice covered, it seems to me that the work was clean-up/removal work of United's assets, or United's customers' assets which were stored on the premises, all work being undertaken in consultation with United (Mr Ussher).

[77] What is not clear on the pleaded facts is whether the parties discussed or agreed that United's assets would or would not be covered by insurance taken out by Inlet.

[78] Mr Langstone submits this head of claim falls within section 269(1)(a) and/or (c) of the Act. There has been destruction of the leased premises and the cause is an insured event (fire) and the destruction or damage in respect of which the damages are

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[43] At para [34] of this judgment.
[44] Para 19 Mr Johnstone's submissions.
[45] *A-G v McVeagh* [1995] 1 NZLR 558 (CA).

sought is in respect of the physical damage. It is arguable then in terms of the definitions of damage and the obligation to insure, the exoneration provisions could apply.

[79] However, of relevance to this assessment are various factual and policy matters where it is inappropriate to determine this issue on a strike out application. While Inlet carries the burden of assessing the risk in respect of damage and destruction to its premises and the follow-on consequences, it is also arguable those consequences do not include damage to United's assets.

[80] The issue is should Inlet be burdened with the responsibility to carry the insurance risk to cover United's assets? No knowledge of what was discussed between the parties is before the court (if such a discussion was even held) and in the absence of such an agreement it is arguable Inlet has no responsibility to cover these assets. By paying one of these invoices it would appear United has also accepted it had some responsibility to pay these costs.

[81] Furthermore, I return to the purpose of the reform. The intention of the Law Commission and the enactment is to bring certainty in respect of protecting a tenant from not having to pay for the remediation of the damaged landlords premises, and, any other damages where the landlord is better positioned to assess what the other potential damages could be.

[82] Arguably, the reform was not intended to place the responsibility on the landlord to insure the tenant's assets. To do so would place an unrealistic burden on the landlord to understand what the nature of the tenant's assets will be. This burden is similar to my earlier observations regarding the tenant's ability to assess the risk of what the composition of the roof was.[46] To strike out this claim may have the consequence of tenants believing they no longer have any obligation to carry their own insurance to protect their own assets. That assumption is against the reality of what occurs in commercial leasing situations.

[83] For these reasons I am not prepared to strike out this part of Inlet's claim.

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[46] At para [45].

Result

[84] The application to strike out is granted in relation to the damages claimed under paragraph 26 (a) and (b) of Inlet's statement of claim.

[85] The application to strike out the claim under paragraph 26(c) of the statement of claim is dismissed.

[86] Both parties have had a measure of success in respect of the application. If counsel cannot agree on costs, then I ask that memoranda is filed within 14 days of the date of the receipt of this judgment with replies within 7 days thereafter. I will then deal with costs on the papers.

[87] The proceeding should also be allocated a case management conference to further progress matters in the proceeding. I direct the registry to allocate a date accordingly.

Signed at Auckland this 22nd day of December 2021 at 3.25 pm

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/12/2021