

# INSIGHT



**ISSUE 010:** January 2010 **Craig Langstone**

## First Test Case on Property Law Act Insurance Provisions

**On 23 December 2009 at 2pm the first Court decision dealing with the insurance provisions of the Property Law Act 2007 ("PLA") was delivered by Justice Harrison. The decision will please liability insurers, but not property insurers.**

The case (*Sheehan & Ors v Watson & Anor*) concerned a fire in industrial premises in Otahuhu, Auckland on 14 March 2008. Sheehan owned the building in partnership with others and leased it to a company called GTR Access Equipment Limited ("GTR"). The first defendant, Watson, was employed by GTR. Sheehan alleged that the fire was caused by the negligence of Watson and a second employee, Robinson. GTR could not be sued for negligently causing the fire because of the provisions of section 269 of the PLA which prevents a landlord's insurer from recovering from a negligent tenant (a relatively well known fact now within the NZ insurance industry).

However the writer realised that the relevant sections of the PLA do not expressly prevent a claim against the negligent employees of a tenant. Accordingly Sheehan's insurer issued Court proceedings against the negligent employees (Watson and Robinson). Although the amount at issue was not that large (\$122,874), the case was run in the High Court on agreed facts so that the insurance industry would have a high level decision as to whether or not employees of a tenant can be sued.

The writer argued that because the words "lessee's agent" are not contained in section 269 of the PLA, only the lessee itself is excused from liability for a negligently caused fire. As section 269 only refers to the lessee, this only meant that GTR could not be sued. Because employees of the lessee were not referred to in section 269, the writer argued that they could be sued.

Counsel for the defendants virtually conceded that on a strict interpretation of section 269, the employees of a tenant can be sued. The defendants' counsel argued that this was a drafting oversight and that the

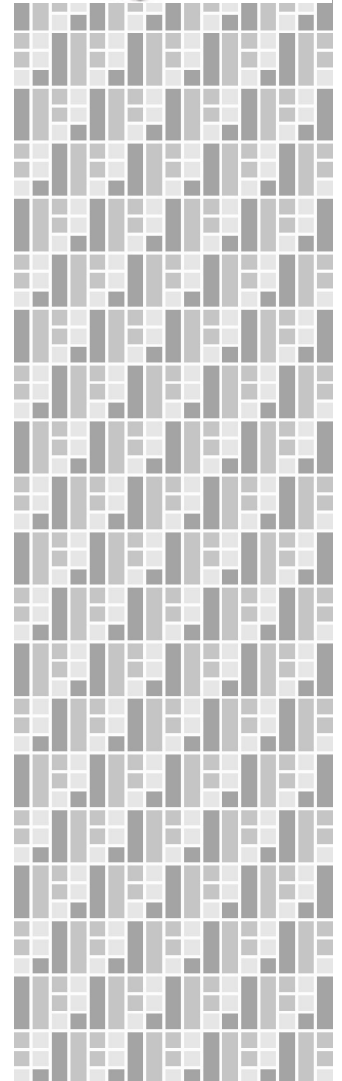
clear intention of the PLA is to stop litigation by landlords where tenants have negligently caused a fire. Thus, claims against employees of a tenant were meant to be excluded as well.

In broad terms the argument came down to whether the legislation should be interpreted strictly (Sheehan's view), or whether words should be read into section 269 so as to give effect to the apparent intention of those drafting the PLA.

Various Court decisions both in New Zealand and overseas were referred to but of course, there was no binding legal precedent in respect of the new PLA. Accordingly the decisions referred to were any of limited assistance to the Judge.

Ultimately, the Judge held that it was *"appropriate to adopt a construction which identifies the lessee's employees with the lessee for the purpose of s269"*. The Judge said - *"It is doubtful, however, that the drafters of this remedial legislation foresaw the resourcefulness of property insurers of leased premises (or more particularly their legal advisors) who would attempt to circumvent the statutory intention of eliminating unproductive litigation by suing only the lessee's employees and omitting the party of vicarious liability"*. Effectively then, the Judge was prepared to read words into the statute so as to give effect to the intention of those drafting the PLA.

The issue the writer has with that though is that whilst the Law Commission clearly wanted to stop litigation by insurers of landlords against negligent tenants, there is little, if anything, to suggest that claims against negligent employees of the tenant were meant to be caught. Justice Harrison took the view that the Law Commission wanted less litigation where a landlord has a building damaged and is insured. That is clearly correct but because the Law Commission did not actually say employees should be excused from liability, there is certainly doubt about what they were trying to achieve.



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Indeed, the whole rationale behind preventing landlords' insurers suing negligent tenants is a little difficult to understand as it does not actually bring litigation regarding fires in commercial buildings to an end. Tenants can still sue a negligent landlord, for example. And tenants of a multi-tenanted building can sue a negligent tenant if the negligent tenant causes a fire which causes loss to them. Why then should a landlord's insurer not be entitled to recover for a tenant's negligence?

Justice Harrison went on to say that if he was wrong to adopt a construction of s269 which identified the lessee's employees with a lessee, alternatively he would hold that the legislature's omission of a reference to the "lessee's employees" from statutory exoneration from liability was inadvertent. Accordingly those words should be read into the PLA because the legislature intended that they be there.

Justice Harrison also said that employees of a tenant do not owe a duty of care to the landlord in any event. The Judge said that this was because of the provisions of the PLA which negate a duty of care.

There were many technical issues and legal points raised and considered by Justice Harrison. Ultimately however, Justice Harrison preferred a liberal rather than a literal interpretation of the PLA.

The decision is obviously of importance to the insurance industry as a whole. Liability insurers will be pleased with the decision, whilst property insurers will be aghast. But at least, the industry has a decision which determines whether tenant's employees can be sued or not. Thought is however being given to an appeal. Watch this space.

Anyone wanting a full copy of the decision should contact the writer.

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