IN THE COURT OF APPEAL OF NEW ZEALAND

CA654/2014
[2016] NZCA 130

BETWEEN	ANDREAS LUIGI HOLLER AND KATHARINE MARY ROUSE Appellants
AND	KENJI OSAKI First Respondent
	TEIKO OSAKI Second Respondent

Hearing:	5 November 2015
Court:	Cooper, Winkelmann and Kós JJ
Counsel:	B D Gray QC and E J Walton for Appellants D G Collecutt for Respondents
Judgment:	15 April 2016 at 12.30 pm

JUDGMENT OF THE COURT

A The questions are answered as follows:

Question 1

Whether residential tenants are immune from a claim by the landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant's guests?

Answer: Yes, in terms of loss or damage caused carelessly, to the extent provided in ss 268 and 269 of the Property Law Act 2007 but no, in terms of loss or damage caused intentionally.

Question 2

Whether, by enacting the Property Law Act 2007 Parliament has intentionally adopted different positions for commercial and residential tenancies and has expressed this clearly so that it is inappropriate for the Court to construe the Property Law Act 2007 and the Residential Tenancies Act 1986 in a manner which achieves a different effect?

Answer: No.

B The appeal is dismissed.

C The appellants must pay the respondents costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

Table of Contents

[1] Sections 268 and 269 of the Property Law Act 2007 (the PLA) provide as a general rule that a lessor of leased premises may not require the lessee to meet the cost of destruction or damage to the premises caused during their tenancy by fire, flood and other perils which can be insured against, other than in very limited circumstances. The issue that arises on this appeal is whether those statutory

provisions apply to residential tenancies under the Residential Tenancies Act 1986 (the RTA).

Background

Damage to the residential premises

[2] Mr Holler and Ms Rouse owned a house insured by AMI Insurance Ltd. They entered into a residential tenancy agreement with Mr Osaki pursuant to which Mr Osaki, his wife and children occupied the house. In March of 2009, Mrs Osaki left a pot of oil on high heat and unattended for five minutes. Fire broke out causing substantial damage to the house.

The lengthy background to this appeal

[3] AMI indemnified the appellants for the costs of repairs, $216,413.28, but then exercising rights of subrogation, issued summary judgment proceedings in the name of Mr Holler and Ms Rouse in the High Court, claiming the fire repair costs from Mr and Mrs Osaki. The Osakis protested that Court's jurisdiction, claiming, inter alia, that the Tenancy Tribunal had exclusive jurisdiction and that the claim made was barred by ss 268 and 269 of the PLA. Sections 268 and 269 provide:

> **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 the land on which the leased premises are situated, are destroyed or damaged by 1 or more of the following events:
>
> (a) fire, flood, explosion, lightning, storm, earthquake, or volcanic activity:
>
> (b) the occurrence of any other peril against the risk of which the lessor is insured or has covenanted 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 indemnify 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.

(3) Subsection (1) does not excuse the lessee from any liability to which the lessee would otherwise be subject, and the lessor does not have to indemnify the lessee under subsection (2), if, and to the extent that,—

(a) the destruction or damage was intentionally done or caused by the lessee or the lessee's agent; or

(b) the destruction or damage was the result of an act or omission by the lessee or the lessee's agent that—

(i) occurred on or about the leased premises or on or about the whole or any part of the land on which the premises are situated; and

(ii) constitutes an imprisonable offence; or

(c) any insurance moneys that would otherwise have been payable to the lessor for the destruction or damage are irrecoverable because of an act or omission of the lessee or the lessee's agent.

[4] Associate Judge Abbott upheld the protest to jurisdiction.[1] He said that while the claim was beyond the monetary limit of the Tribunal's jurisdiction, the Tribunal still had the ability to decide whether the claim was barred by ss 268 and 269.

[5] In October of 2012, the Tribunal held that ss 268 and 269 had no application to the claim, and the Osakis were liable for the damage under ss 40 and 41 of the RTA.[2] Those sections provide in material part:

---

1 *Holler v Osaki* [2012] NZHC 939 at [33] and [35].

2 *Osaki v Holler* NZTT Auckland 12/02284/AK, 23 October 2012 at [82].

40 Tenant's responsibilities

(1) The tenant shall—

(a) pay the rent as and when it is due and payable under the tenancy agreement; and

(b) ensure that the premises are occupied principally for residential purposes; and

(c) keep the premises reasonably clean and reasonably tidy; and

(d) notify the landlord, as soon as possible after discovery, of any damage to the premises, or of the need for any repairs; and

…

(2) The tenant shall not—

(a) intentionally or carelessly damage, or permit any other person to damage, the premises; or

…

(4) Where any damage (other than fair wear and tear) to the premises is proved to have occurred during any tenancy to which this Act applies, it shall be for the tenant to prove that the damage did not occur in circumstances constituting a breach of subsection (2)(a).

41 Tenant's responsibility for actions of others

(1) The tenant shall be responsible for anything done or omitted to be done by any person (other than the landlord or any person acting on the landlord's behalf or with the landlord's authority) who is in the premises with the tenant's permission if the act or omission would have constituted a breach of the tenancy agreement had it been the act or omission of the tenant.

(2) Where any person (other than the landlord or any person acting on the landlord's behalf or with the landlord's authority) intentionally or carelessly damages the premises while the tenant is in the premises, it shall be presumed that the tenant permitted that person to be in the premises unless the tenant proves that he or she took all reasonable steps to prevent that person from entering the premises or (as the case may require) to eject that person from the premises.

[6] The Osakis appealed that decision to the District Court. Judge Mathers upheld the Osakis' appeal, finding that ss 268 and 269 of the PLA applied to bar Mr Holler and Ms Rouse's claim.[3]

---

3 *Osaki v Holler* DC Auckland CIV-2012-004-2306, 23 September 2013 at [56].

[7] Mr Holler and Ms Rouse then appealed that judgment to the High Court.

[8] Keane J found that the exoneration provisions (we adopt his shorthand description of ss 268–270 of the PLA) did apply to residential tenancies and that the immunity thereby conferred extended to Mrs Osaki, although she was not party to the tenancy agreement.[4] His reasoning rested upon his interpretation of s 142 of the RTA which provides:

> **142 Effect of Property Law Act 2007**
>
> (1) Nothing in Part 4 of the Property Law Act 2007 applies to a tenancy to which this Act applies.
>
> (2) However, the Tribunal, in exercising its jurisdiction in accordance with section 85 of this Act, may look to Part 4 of the Property Law Act 2007 as a source of the general principles of law relating to a matter provided for in that Part (which relates to leases of land).

[9] The Judge said that although ss 268 and 269 lie within pt 4 of the PLA, s 142 assisted to define, rather than restrict, the Tribunal's jurisdiction and therefore did not operate to exclude ss 268 and 269 from conferring tenant immunity under the RTA.[5]

[10] Keane J granted the appellants leave to appeal to this Court on the following questions of law, the questions now before us:[6]

> 1. Whether residential tenants are immune from a claim by the landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant's guests?
>
> 2. Whether, by enacting the Property Law Act 2007 Parliament has intentionally adopted different positions for commercial and residential tenancies, and has expressed this clearly, so that it is inappropriate for the Courts to construe the Property Law Act 2007 and the Residential Tenancies Act 1986 in a manner which achieves a different effect?

Appeal

[11] The meaning and effect of s 142 of the RTA is central to this appeal. Mr Gray QC for Mr Holler and Ms Rouse (the appellants), argues that the reforms in

---

4 *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791 at [48] and [51].
5 At [48].
6 *Holler v Osaki* [2014] NZHC 2470 at [1] and [3].

ss 268 and 269 of the PLA apply to commercial leases only and s 142(2) of the RTA does not, contrary to Keane J's findings, bring the exoneration provisions across to the residential tenancy regime.

[12] He draws our attention to s 8(4) of the PLA, which establishes the hierarchy between these enactments. Section 8(4) provides:

> **8 Application**
>
> …
>
> (4) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.

[13] The appellants say that ss 40 and 41 of the RTA lie at the heart of the tenant's responsibilities. Because they are inconsistent with ss 268 and 269 of the PLA, ss 40 and 41 prevail. They acknowledge that the RTA provides no remedy beyond termination of lease for breach of ss 40 and 41, but say that the Tribunal does have jurisdiction to award damages for breach under s 77(2)(n) of the RTA. The appellants invoke the common law principle that where a statutory duty is placed upon one person for the benefit of a particular person or persons, there arises a relative right in those persons who may be injured by its contravention.[7]

[14] On the appellants' case, when s 8 of the PLA and ss 40, 41 and 142 of the RTA are read together, they show Parliament's clear intention that residential tenants should be liable to repair or compensate their landlord for the cost of repairing damage they or their guests cause to the premises in breach of the tenancy agreement or the RTA. The appellants say that in contrast, any path to absolving the respondents of their liability under ss 40 and 41 is tortuous and unlikely in the face of the clear policy articulated in s 8 of the PLA and s 142 of the RTA as to the hierarchy of the Acts, and is also inconsistent with the common law regarding statutory duties.

[15] The appellants acknowledge the requirement to give s 142(2) some sensible meaning, but say that the subsection only applies to allow the Tribunal to look to the

---

[7] See for example the English authorities cited in *M A Paterson Ltd v Robertson* [1960] NZLR 1160 (SC) at 1168 and 1169.

general principles of law in pt 4 of the PLA on matters where the RTA is silent. It does not permit a provision to apply that is inconsistent with the general scheme of the RTA.

[16] As to the purpose of the exoneration provisions, the appellants say they were intended to address the economically unrealistic and unsatisfactory case law in relation to commercial leases, which imposed the risk of damage or destruction of the premises on the lessee even where the lessor was insured for the loss and the lessee was levied for the cost of that insurance. They say that the economic reality in the area of residential tenancies is fundamentally different. In residential tenancies, landlords and tenants are able to choose whether to take out insurance cover for their separate interests and liabilities. If the landlord takes out cover, the landlord must pay the premiums. The landlord may not recover the cost of insurance premiums as the rent recoverable for a residential tenancy is capped by the RTA at market rent, without regard to the personal circumstances of the landlord or the tenant.[8]

[17] For the respondents, Mr Collecutt argues that s 142(2) does the work of bringing across to the RTA the provisions of pt 4 of the PLA, at least to the extent that they are relevant to and not inconsistent with the RTA. The general principles referred to in s 142(2) are the principles of law established by the provisions of pt 4 of the PLA. The Tribunal can have resort to those general principles, just as it has always had access to general principles of law when deciding issues between landlord and tenant.[9]

Analysis

The text

[18] The task for this Court is one of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose.[10] Here the critical issue is the meaning of s 142 of the RTA.

---

8 RTA, s 25(3).
9 Section 85(2).
10 Interpretation Act 1999, s 5(1).

[19] Starting with the text of s 142 of the RTA we acknowledge immediately the difficulty in ascertaining the meaning of those words. Subsection (1) provides that nothing in pt 4 of the PLA applies to residential tenancies, yet subs (2) appears to contradict that otherwise absolute statement, with the qualification that the Tribunal may look to pt 4 as "a source of the general principles of law relating to a matter provided for in that Part." We therefore turn to the statutory context to make some sense of this provision.

[20] Although in its present form s 142 is a consequential amendment introduced by the PLA, the section sits within the RTA. The RTA is consumer protection legislation. Its long title describes it as:

> An Act to reform and restate the law relating to residential tenancies, to define the rights and obligations of landlords and tenants of residential properties, to establish a tribunal to determine expeditiously disputes arising between such landlords and tenants, to establish a fund in which bonds payable by such tenants are to be held, and to repeal the Tenancy Act 1955 and the Rent Appeal Act 1973 and their amendments

[21] The RTA establishes the Tribunal as the body with exclusive jurisdiction to determine disputes within its monetary jurisdiction between landlord and tenant, or which concern a residential tenancy.[11] Notwithstanding its law reform objectives, the RTA is not a code. It does not set out all rights and obligations of landlords and tenants under residential tenancies. It anticipates that parties will enter into tenancy agreements. Although it protects tenants from attempts by landlords to contract out, modify or restrict the application of the provisions of the RTA, it leaves the parties free to reach their own bargains in other areas.[12]

[22] As noted, the RTA establishes the Tribunal as the body with exclusive jurisdiction to determine disputes within its monetary jurisdiction between landlord and tenant, or which concern a residential tenancy.[13] The reference to general principles in s 142(2) links to s 85 in the same Act. Section 85 describes how the Tribunal must exercise its jurisdiction, and in doing so, it expressly acknowledges

---

11 Sections 77(1) and 82(1).
12 Section 11(1).
13 Sections 77(1) and 82(1).

that the Tribunal may have regard to general principles of law not contained within the RTA. Section 85 provides as follows:

> **85 Manner in which jurisdiction to be exercised**
>
> (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.
>
> (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[23] Seen in this statutory context, s 142 can be read as providing that pt 4 of the PLA may also be treated by the Tribunal as a source of general principles "relating to a matter provided for in that Part". But how can that be reconciled with s 142(1) which says that nothing in pt 4 of the PLA applies to residential tenancies? And what is a "general principle of law" in pt 4?

[24] Addressing the first question, the use of the word "however" makes plain that subs (2) qualifies the general proposition contained within subs (1). Answering the second question is more difficult. Inconveniently, there is no neat subpart labelled "general principles" in pt 4, and none of the provisions in that part can easily be categorised as such. Although the appellants resist an interpretation that the exoneration provisions can be a source of general principles, Mr Gray for the appellants was unable to identify for us what other provisions in pt 4 are better qualified for the role. What can be said with confidence is that where a provision in pt 4 conflicts with existing provisions of the RTA, that provision cannot be looked to as a general principle. That is the effect of s 8(4) of the PLA.[14] There are also provisions in pt 4 which are irrelevant to the Tribunal's jurisdiction as having no

---

[14] Examples of provisions in direct conflict include PLA, s 222 (rent is payable monthly in advance unless agreed otherwise) and RTA, s 23(1)(a) (a landlord shall not require the payment of rent more than two weeks in advance); and PLA, s 245 (a lessor may only exercise the right to cancel for non-payment of rent where notice has been served on the lessee and the rent has been in arrears for at least 10 working days) and RTA, s 55(1)(a) (a landlord can apply to the Tribunal for an order terminating the tenancy if the rent has been in arrears for 21 days; there is no provision for termination on the landlord's notice).

application to residential tenancies.[15] Those too cannot be a source of general principle.

[25] If the appellants are correct and the exoneration provisions conflict with ss 40 and 41 of the RTA, then s 8(4) applies here, so that the exoneration provisions cannot be a source of general principles. However we do not consider that there is such conflict.

[26] The provisions of the RTA which bear upon the parties' obligations where a dwelling is damaged or destroyed by fire during the course of a residential tenancy are as follows:

(a) Section 39(1) provides it is the landlord's obligation to meet all outgoings which are incurred whether or not the premises are occupied. This includes the obligation to pay insurance premiums payable in respect of the premises.[16] The tenant is responsible for all outgoings exclusively attributable to the tenant's occupation of the premises or use of facilities.[17]

(b) Section 40(2)(a) provides that the tenant must not intentionally or carelessly damage, or permit any other person to damage the premises. Section 40(4) further provides that where damage other than fair wear and tear occurs, it is for the tenant to prove it did not occur in breach of s 40(2)(a).

(c) Section 41(1) provides that the tenant is responsible for anything done or omitted to be done by any person in the premises with the tenant's permission. Where any person intentionally or carelessly damages the premises while the tenant is in the premises, it is presumed, unless the

---

15 Such as provisions relating to reversions (PLA, ss 230–238) and implied covenants in unregistered, short-term leases (PLA, s 220).

16 RTA, s 39(2).

17 Section 39(3).

tenant proves to the contrary, that the tenant permitted that person to be in the premises.[18]

(d) Section 45 describes the landlord's obligations. Although s 45(1)(b) requires the landlord to provide and maintain the premises in a reasonable state of repair, s 45(4) further provides that nothing in s 45(1) imposes upon the landlord an obligation to repair any damage, or compensate the tenant for any want of repair, arising out of any breach by the tenant of any obligation imposed upon the tenant by s 40.

(e) Section 55 provides that on the landlord's application the Tribunal can make an order terminating the tenancy if the tenant has caused or threatened to cause (or has permitted any other person to cause) substantial damage to the premises. The Tribunal may refuse to make such an order if the breach has been remedied, the landlord has been compensated for any loss arising from the breach, and it is unlikely the tenant will commit further breaches.[19]

[27] In our view none of these provisions are inconsistent with the exoneration provisions so as to bring into play s 8(4) of the PLA. Their effect can be summarised as follows. It is a breach of the tenant's statutory duty to intentionally or negligently cause damage (including by fire) to the premises. The tenant is "responsible" for such damage caused by them or anyone they allow on the premises. The landlord can apply for an order terminating the lease on the basis of that breach. Although the RTA absolves the landlord of an obligation to repair damage caused by a tenant in breach of ss 40 and 41 or to compensate the tenant for that damage, notably the RTA does not impose a mirror obligation upon the tenant to make good the damage or compensate the landlord.

[28] The RTA therefore does not expressly address what liability a tenant has to make good damage caused through fire or other insurable event, by reason of the

---

[18] Section 41(2).
[19] Section 55(2).

tenant's intentional or negligent act or omission. As the appellants note, s 77(2)(n) provides that the Tribunal has jurisdiction to:

> … order the landlord or the tenant under any tenancy agreement to which this Act applies to pay to the other party such sum by way of damages or compensation as the Tribunal shall assess in respect of the breach of any express or implied provision of the tenancy agreement or any provision of this Act:

But that is a provision with general application and cannot be said to be in conflict with the exoneration provisions.

[29] As to insurance, although the RTA provides that premiums for insurance on the premises are for the landlord's account,[20] there is no provision which addresses the application of insurance proceeds where the landlord has insurance (as a landlord almost invariably will) or the availability to the insurer of subrogated rights against the tenant.

[30] Given the interaction of the various provisions we have outlined (s 8 and pt 4 of the PLA, and ss 40, 41, 85 and 142 of the RTA), the interpretation of s 142 suggested by Mr Collecutt is the most likely interpretation. On this interpretation the Tribunal is entitled to have resort to provisions in pt 4 of the PLA if they create general principles relevant to an issue before the Tribunal and are not in conflict with the provisions of the RTA. We also consider that when regard is had to the content of pt 4, the exoneration provisions are very good, if not the best candidates in pt 4 for "general principles". As noted, most of the other provisions detail terms to be implied into, or are of potential application only to, commercial leases.

[31] There are some objections to this reading. Perhaps the most powerful objection is that articulated by the appellants. Given the significance of the change which, on the respondents' case is achieved by s 142(2), it could be expected that Parliament would have spoken more directly than through the cloudy mechanism of s 142(2). But against this we bear in mind that the RTA already provides in s 85 that the Tribunal may have reference to general principles of law sitting outside the RTA's provisions. When seen in that context s 142 appears a less unlikely vehicle

---

[20] Section 39(2)(b).

for achieving this reform. Section 142(2) merely makes explicit that those general principles may include those contained within pt 4 of the PLA.

[32] We have considered whether the use of the word "may" in s 142(2) is also a contra-indication to this interpretation. The Tribunal "may" have regard to pt 4 for general principles, whereas s 85(2) provides that the Tribunal "shall" have regard to general principles of law when exercising its jurisdiction. The use of the word "may" could be interpreted as giving the Tribunal a discretion to have resort to the principles of law set out in pt 4, which in itself would be inconsistent with a parliamentary intention to effect such significant reform. However, the word "may" can also be read as requiring the Tribunal to have regard to those general principles where they are relevant and available, as some of the principles established by pt 4 are irrelevant or inconsistent with existing provisions. On this latter reading, s 142 provides a flexible interface between pt 4 and the RTA without the need for the extensive amendment otherwise necessary to make plain the relationship between the two pieces of legislation. As will emerge from the subsequent discussion, it seems this approach was just what the Law Commission intended when it drafted pt 4 of the PLA and s 142 of the RTA, and what Parliament intended when it enacted them.

[33] The appellants point to the express amendment of the Tribunal's jurisdiction, upon the PLA's enactment, expanding that jurisdiction so that it encompasses the jurisdiction conferred upon the Courts under s 264 of the PLA.[21] They say if that provision of pt 4 of the PLA was expressly incorporated, why then were the exoneration provisions not also expressly brought across? We do not however see that particular aspect of the wider statutory context as of assistance on this issue of interpretation. The reform achieved in s 264 is different in kind to the reform the respondents say was achieved in this case. If the Tribunal's powers are to be increased to encompass the power of a Court under s 264 of the PLA, that needs to be done expressly: the Tribunal is a statutory body, and only has the powers conferred upon it by statute. However, amending the nature of the general principles to which the Tribunal may have resort, which by definition sit outside the RTA, could quite logically be done by a more indirect route.

---

[21] RTA, s 77(4).

Legislative history

[34] We have considered the legislative history of s 142 as a useful cross-check on this interpretation as it can shed light upon the purpose of the legislation and the intent behind the language used. Although the best source of deducing Parliament's intent is the words of the statute itself, where those words are difficult or unclear, as here, assistance may be sought in Law Commission reports and with a little more trepidation, in the pages of Hansard. We say with a little more trepidation, as in Parliament there is often more than one voice. Those who speak do so within a political context, and not solely to elucidate the purpose of the legislation. However, in this case, as we will demonstrate, it appears that there was general agreement as to the purpose of the legislation.

(i) Law Commission reports

[35] The amendment of s 142 was consequential upon the enactment in 2007 of the PLA. That Act had a long gestation period. The Act that the PLA replaced, the Property Law Act 1952, was described in the following way by the Law Commission in 1991:[22]

> It is not a code, more a repository for legislative supplements to or corrections of judge-made law. Where it has been thought that the rules of common law or equity have fallen short of producing a sensible solution to a problem concerning the creation, disposition or control of property interests, legislative attention has been given to the problem by way of a section in the Property Law Act or one of its predecessors.

[36] The Law Commission identified the 1952 Act as in need of reform due to the ad hoc nature of numerous amendments made to it.[23] In its preliminary paper, it identified a number of areas for reform, including the lessee's liability for negligently damaging premises.[24] The Commission said consultations undertaken suggested that in the case of perils for which insurance is commonly obtained, such as fire and flood, both owners and tenants assumed that the tenants would have the benefit of landlord cover.[25] The Commission considered that this understanding was

---

22 Law Commission *The Property Law Act 1952: A discussion paper* (NZLC PP16, 1991) at [1].
23 At [14].
24 At 150.
25 At [457].

more in keeping with the economic reality that if the landlord has a property it wishes to be insured, to do so it needs to pay premiums and the source of the money it uses to pay those premiums is the rent obtained from the tenant.[26]

[37] The Commission identified the case law which had imposed the liability for loss on the tenant as problematic, often turning upon fine and probably unintended nuances of the wording of individual leases, and with strong dissenting judgments in appellate courts.[27]

[38] The Commission specifically addressed residential tenancies. It said:[28]

> The Residential Tenancies Act 1986 does not grapple with the problem. Section 40(2)(a) requires that the tenant shall not "carelessly damage, or permit any other person to [damage], the premises". Tenants are responsible for the actions of their licencees (section 41). Section 59 provides that on destruction of, or serious damage to, the premises, either party can terminate the tenancy by notice to the other. The Act is silent on the question of insurance. Any reform should therefore extend to residential tenancies.

[39] The Commission's tentative proposal was that the new PLA should contain a section providing that where leased premises were 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 should not be entitled to require the lessee to make good the destruction or damage or to indemnify or pay damages to the lessor in respect of the destruction or damage.[29] This would apply even if the damage is caused by the default of the tenant, but not in the case of wilful damage by the tenant or other conduct by the tenant which rendered insurance moneys irrecoverable.[30]

[40] That paper was followed up in June of 1994 with a Law Commission report, which recommended the inclusion of provisions that became ss 268–270 of the PLA.[31] The report attached a draft Act which in large part formed the basis for the PLA as enacted.

---

26 At [459].
27 At [460].
28 At [466].
29 At [482].
30 At [482].
31 Law Commission *A New Property Law Act* (NZLC R29, 1994) at 170.

[41] In its introduction the report addressed the relationship of the proposed new Act to other Acts.[32] The Commission said that the Act would not be the place to seek provisions of a specialist nature like those designed for the protection of tenants, but continued: "It does, however, contain some general rules relating to leases, excluding residential tenancies."[33]

[42] In the same part of the report the Commission proposed that the scope of the RTA be extended so that the provisions in the 1952 Act which dealt with service and fixed term tenancies were no longer necessary.[34] Prior to the 2007 reforms, s 142 of the RTA addressed the relationship between the RTA and the PLA in connection with service and fixed term tenancies and provided:

> **142 Effect on Property Law Act 1952**
>
> (1) Nothing in Part VIII of the Property Law Act 1952 shall apply to any tenancy to which this Act applies.
>
> (2) The provisions of Part VIII of the Property Law Act 1952, so far as they were applicable to any fixed-term tenancy or service tenancy immediately before the commencement of this Act, shall continue to apply to that tenancy, but shall be read subject to the provisions of this Act.

[43] The Law Commission proposed to amend s 142. It said:[35]

> … s 142 of the [RTA] will remain, so that, as at present, the general rules about leases in the new Property law Act will not apply to residential tenancies. As provided in the [RTA], however, reference may be made to those rules in certain circumstances.

[44] The draft s 142 the Commission proposed was as follows:[36]

> **142 Effect of Property Law Act 199–**
>
> (1) Nothing in Part 9 of the *Property Law Act 199–* applies to a tenancy to which this Act applies.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, the Tribunal, in exercising its jurisdiction in accordance with the provisions of section 85 of this Act, may look to part 9 of the

---

32 At [4].
33 At [4].
34 At [6].
35 At [6].
36 At 248.

Property Law Act 199– as a source of the general principles of law relating to any matter provided for in that part.

(3) So far as the provisions of Part VIII of the *Property Law Act 1952* were applicable to any fixed term tenancy or service tenancy immediately before this Act came into force, the corresponding provisions of Part 9 of the *Property Law Act 199*– shall, so far as applicable, apply to that tenancy, but shall be read subject to the provisions of this Act.

[45] In relation to this the Commission said:[37]

> Section 142 presently excludes the operation of Part VIII of the 1952 Act in relation to residential tenancies. Similarly, part 9 [which became part 4] of the new Act will not apply to residential tenancies, except where the [RTA] itself provides otherwise. Section 142 of that Act has been amended to permit tenancy tribunals to look to that part as a source of general principles of law when deciding disputes in accordance with the requirements of s 85. The supremacy of the RTA reflects the general policy of the new Act as stated in s 7(3) [which became s 8(4)].

[46] The appellants argue that the 1994 report evidences that the Commission had backed off its recommendation to extend the proposed exoneration provisions to residential tenancies, pointing in particular to the introductory remarks and to the absence of any express reference to residential tenancies in that part of the report dealing with exoneration provisions.[38] We see no evidence of a backing off. When discussing the exoneration provisions in the draft Act (draft s 218, which combined the provisions that later became ss 269, 270 and 271) the Commission said on more than one occasion that the reasons for the proposed reform were as set out in the earlier discussion paper.[39] Those reasons of course extended to residential tenancies. It is also significant that the only change the Commission identified in this part of the report from the reforms proposed in 1991 was its proposal to extend the application of the exoneration provisions to cases where the lessor had no insurance cover, thereby placing the burden upon the lessor to ensure the adequacy of the cover for insurable perils.[40] The Commission made no mention there, or elsewhere in the report, of an intention to exclude residential tenancies from the protection of the exoneration provisions. This is particularly notable given that one part of the report was devoted to outlining any significant departures from the 1991

---

37 At [787].
38 At [98].
39 At [98], [666] and [667].
40 At [670].

recommendations.[41] Excluding residential tenancies from the exoneration provisions would be such a significant change that the Commission can be expected not only to have highlighted that change, but also to have provided reasons for it.

[47] We observe however that the failure to expressly repeat the intention to include residential tenancies within the reforms did have the potential to create confusion. The 1994 report has to be read with care, and alongside the 1991 discussion paper as it seems the Commission thought would be the case. When that is done it is clear the Commission's proposed reforms in this area remained unchanged from the 1991 discussion paper, and encompassed both residential and commercial tenancies.

[48] To this point we consider that the legislative history of the exoneration provisions and s 142 of the RTA supports the construction we arrived at above based upon a purely textual analysis. In a similar vein we note that elsewhere in the report the Commission assumes in its commentary that provisions in pt 9 (which became pt 4) setting out implied covenants could apply to residential tenancies unless they were inconsistent with the RTA.[42] The Commission's discussion of the relationship between the part of the new PLA dealing with leases and the RTA, suggests that it did indeed envisage a flexible and complex interaction between the provisions of the RTA and pt 4 of the PLA.

(ii) The enactment of the Property Law Act 2007

[49] The proposals to reform the law lay dormant until 2006. The Property Law Bill was introduced to the House in November of that year. There were some amendments as to substance and drafting style, but the substance of the provisions with which we are concerned remained unchanged from that proposed by the Commission in 1994. The explanatory note to the Bill stated that it closely followed the text of the Bill in the Commission's report, with some changes made to accommodate refinements in policy and developments in legislation and case law

---

41 At [19].
42 At [559] and [560].

since 1994.[43] It outlined recommendations from the Commission which were not being carried forward into the Bill but makes no mention of excluding residential tenancies from the application of the exoneration provisions.[44]

[50] The accompanying notes for the exoneration provisions provide little assistance with the present interpretation issue, simply referring to them as applying to leases.[45] The regulatory impact statement part of the explanatory note addresses the issue, if only obliquely. When describing the issues the Bill sought to address, the statement records:[46]

> Another issue that has arisen concerns commercial lessees who commonly, and often wrongly, assume that they enjoy the benefit of a lessor's insurance cover in the event that premises are damaged by a lessee's negligence. Relevant lease covenants can take many forms and are often difficult for lessees to understand.

[51] The Bill was introduced to the House of Representatives by the Associate Minister for Justice, the Hon Clayton Cosgrove. He linked the reforms in the Bill to the recommendations of the Commission. Of the exoneration provisions he said:[47]

> 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.

[52] The appellants point to the Minister's statement and say that it supports the construction of s 142 they propose. We do not see that it does. The Minister's description is a very shorthand outline of what is proposed to be achieved through the reforms. To some extent it is inaccurate, referring to the reforms as applying only where the lessor is insured, when the reforms are not so limited. The Minister does not state that the reforms do not apply to residential premises. Nor is there any indication that he intended the reforms to be narrower in scope than those proposed by the Commission. In any case, and more fundamentally, what is relevant to the interpretation exercise is Parliament's intention not that of individual members of

---

43 Property Law Bill 2006 (89-1) (explanatory note) at 1.
44 At 1.
45 At 47.
46 At 79.
47 (14 November 2006) 635 NZPD 6461.

Parliament, even if they are ministers. It is apparent from Hansard that this Bill had cross-party support. In the course of debate there was repeated reference to the fact the Bill followed Commission recommendations closely and that it was intended to give effect to them.[48]

[53] The Commission articulated good policy reasons why the exoneration provisions were necessary. Mr Gray argues that there are good reasons why Parliament might later take the view that those policy reasons did not justify extending the reforms to residential tenancies. We do not agree and see no evidence of that in the parliamentary debates. It is true that in a residential tenancy the landlord is obliged to pay the premiums and cannot levy the tenant for them. But the economic reality, to use the expression the Commission favoured, is that the landlord's cost of insurance will be factored by the market into the rent for a particular set of residential premises.[49] If the premises do not attract a sufficient return, then it can be assumed that they will not be on the residential tenancy market.

[54] The Commission's point that tenants are confused as to their rights and obligations in this area applies with significantly more force in the area of residential tenancies than it does in the area of commercial leases. Tenants of residential property seldom have the assistance of lawyers when entering into a lease. Commercial tenants will often, if not usually, obtain legal advice as to their rights and obligations in respect of lease documentation and leased premises. Confusion as to rights and obligations is therefore likely to be even more pervasive in the residential market than in the commercial lease market.

(iii) Subsequent amendments

[55] Mr Gray also points to later unsuccessful attempts to limit a residential tenant's liability for damage to the premises to four weeks' rent if the Tribunal was satisfied the tenant neither caused the damage intentionally or recklessly, nor intentionally or recklessly encouraged or permitted another person to damage the

---

[48] See for example comments made by Mr Cosgrove (14 November 2006) 635 NZPD 6460; comments made by Dr Richard Worth (14 November 2006) 635 NZPD 6462; comments made by Christopher Finlayson (11 September 2007) 642 NZPD 11765; and comments made by the Hon Harry Duynhoven (20 September 2007) 642 NZPD 12115 and 12116.

[49] Law Commission *The Property Law Act 1952*, above n 22, at [459].

premises.[50] Mr Gray argues that this supports the interpretation of s 142 the appellants contend for. If Parliament was considering proposals to limit a tenant's liability for damage, then it follows, say the appellants, that tenants must have had that exposure. We do not see later attempts at amending the RTA as assisting in the interpretation of s 142. As confirmed by this Court in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc,* the general rule is that subsequent statutes are irrelevant as an interpretive aid.[51] Nothing that happens after an Act has been passed can affect the intention of the Parliament that enacted it.[52] This reasoning applies with more force here as the proposed amendments were not enacted. To conclude, our task is to interpret legislation enacted by Parliament in 2007. Amendments proposed in later years, but not enacted, do not assist with this.

[56] We were not asked to address the application of ss 270 and 271 and do not do so.

Conclusion

[57] We have therefore concluded that the text, policy and legislative history of s 142 of the RTA and the exoneration provisions in the PLA support the interpretation contended for by the respondents. The Tribunal is entitled to have resort to provisions in pt 4 of the PLA if they create general principles relevant to an issue before the Tribunal and are not in conflict with the provisions of the RTA. The general principles to which the Tribunal may have resort include the exoneration provisions contained in ss 268 and 269 of the PLA.

Result

[58] On the above basis we answer the questions stated for us as follows:

---

50 The Residential Tenancies Amendment Bill (No 2) 2008, which did not progress to first reading, would have limited liability accordingly: Residential Tenancies Amendment Bill (No 2) 2008 (217-1), cl 26. A further attempt was made during the Committee of the Whole House to amend the Residential Tenancies Amendment Bill 2009: (22 June 2010) 664 NZPD 12207.

51 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [193].

52 At [193].

1. Whether residential tenants are immune from a claim by the landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant's guests?

   Yes, in terms of loss or damage caused carelessly, to the extent provided in ss 268 and 269 of the Property Law Act 2007 but no, in terms of loss or damage caused intentionally.

2. Whether, by enacting the Property Law Act 2007 Parliament has intentionally adopted different positions for commercial and residential tenancies and has expressed this clearly so that it is inappropriate for the Court to construe the Property Law Act 2007 and the Residential Tenancies Act 1986 in a manner which achieves a different effect?

   No.

[59] The appeal is therefore dismissed.

[60] The appellants must pay the respondents costs for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
Wynn Williams, Christchurch for Appellants
Simpson Dowsett Meggitt, Auckland for Respondents