IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-404-001071
[2017] NZHC 1964

BETWEEN	RUIREN XU and DIAMANTINA TRUST LIMITED Plaintiffs
AND	IAG NEW ZEALAND LIMITED First Defendant
AND	THE EARTHQUAKE COMMISSION Second Defendant

Hearing: 31 July 2017

Appearances: N Campbell QC and J Moss for the Plaintiffs
M Ring QC and C Laband for the First Defendant
No appearance for the Second Defendant

Judgment: 17 August 2017

JUDGMENT OF NATION J

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[1] The Barlows owned a residential property in Wainoni, Christchurch. It suffered earthquake damage in the 2010 and 2011 Canterbury earthquakes. They had insured the home under a BNZ actual replacement policy underwritten by IAG. In April 2011, the Barlows made a claim with IAG for earthquake damage. In December 2014, their company agreed to sell the property. On 9 February 2015, pursuant to that contract, the plaintiffs acquired legal ownership of the property. The Barlows assigned to them rights and remedies in respect of the claims lodged by them with IAG. The plaintiffs have issued proceedings seeking judgment for $163,000 against EQC for natural disaster damage and against IAG for $353,888 for natural disaster damage based on alleged rebuild costs of nearly $584,000.

[2] The parties agreed the Court should determine a question before trial against an agreed statement of facts. The proposed question was:

> In light of the judgment of the Court of Appeal in *Bryant v Primary Industries Insurance Co Limited*, does the fact that the Barlows have not and will not restore the home by itself prevent the plaintiffs from recovering from IAG the replacement benefit?

[3] Counsel advised that the determination of this issue will be relevant to other earthquake proceedings currently before the Court.

Further background information

[4] The Barlows made their claim with IAG on 27 April 2011. On 16 July 2014, they transferred the property to a company of which they were and are the shareholders and directors. IAG indicated that no issue arises out of that transfer. The Court is asked to determine the proposed question on the basis the property was insured with IAG at the time it was sold to the plaintiffs.

[5] On 9 December 2014, through their company, the Barlows sold the property to Brian Staples or nominee for $217,000 plus GST. The agreement included the following conditions:

> 18. Insurance Clause 2:
> This agreement is conditional upon the purchaser obtaining full replacement insurance on the property and contents or a transfer of the vendor's existing policy or policies, such insurance to be satisfactory to the purchaser in all respects, within 10 working days of the date of this agreement, and that insurance remaining in place as at the date of settlement. This clause is inserted for the sole benefit of the purchaser.
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> 19. Insurance clause 2:
> If the vendors have made an insurance claim (not EQC) in respect of damages to the property as a result of the Christchurch earthquakes then the vendors agree to provide the purchasers with full details of any such claim(s). If any damage to the property the subject of the claim(s) has not been repaired prior to settlement then the vendors agree to assign the benefit of the insurance claim(s) to the purchasers on settlement or to reduce the purchase price by the amount of any insurance payment received by the vendor.

[6] Mr Staples nominated the plaintiffs as purchasers under the agreement. On 9 February 2015 the Barlows, through their company, transferred the legal ownership and possession of the property to the plaintiffs.

[7] On 9 February 2015, the Barlows and their company signed a deed of assignment. In that deed, the parties acknowledged the Barlows had made claims against IAG and EQC under the policy of insurance in respect of damage suffered as a result of the Canterbury earthquake sequence. The Barlows assigned absolutely to the plaintiffs:

i. the right to pursue the claims;

ii. the proceeds of the claims including repair or reinstatement of the property;

iii. the power to give a good discharge with respect to the claims and any other actual or potential claims against EQC and/or IAG with respect to loss or damage to the property.

[8] "Claims" was defined in the deed as meaning the claims lodged by the Barlows with EQC and IAG for the damage.

[9] On 5 May 2016, the plaintiffs gave written notice of the assignment to IAG.

[10] The parties agreed the preliminary question is to be determined on the basis:

As at 9 February 2015, the Barlows:

1. had not restored, and did not intend to restore, the home; and

2. had not incurred, and will not incur, any actual costs of restoration of the home.

The plaintiffs:

1. intend to restore the home;

2. will incur the actual costs of restoration of the home; and

3. allege that, pursuant to the assignment, they are or will be, entitled to the replacement benefit, notwithstanding the Barlows circumstances and intentions.

The policy

[11] The IAG policy is a "plain English" type policy. It begins:

> IAG New Zealand Limited (we/us/our) agrees to give the insured (you/your) insurance as set out in this policy during the period of insurance and any further period for which the policy may be renewed.

[12] In section 1, as to Home Insurance, the policy states:

> The insured is the person (or persons) shown in the schedule (you/your). This also includes any person you are married to or with whom you are living in the nature of a marriage.

[13] In the schedule, the policy owner was stated to be "Mrs N A Hall-Barlow and Mr M C Barlow.

[14] The cover provided by the policy included:

> **Event A – Loss or damage to your home**
> **You are insured for:**
> 1. Accidental or sudden loss of or damage to your Home.

[15] As to the indemnity provided by the policy it stated:

> **The amounts you can claim**
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> 1. If, following loss or damage you
>   (a) restore your Home, we will pay the cost of restoring it to a condition as nearly as possible equal to its condition when new using current materials and methods plus any extra costs that are necessary for the restoration to meet with the lawful requirements of Government or Local Bodies.
>   (b) do not restore your Home, we will pay the lesser of
>   (i) the amount of the loss or damage, or
>   (ii) estimated cost of restoring your Home as nearly as possible to the same condition it was in immediately before the loss or damage happened using current materials and methods.
>
> 2. This insurance will also pay architect's fees, surveyor's fees, the cost of demolition and the cost of removing debris and contents which are necessary and reasonably incurred following loss or damage to your Home.

[16] Mr Ring QC, for IAG, submitted that the policy was generally framed in terms that make it clear the contract of insurance was with the Barlows personally as the insured. Mr Campbell QC, for the plaintiffs, accepted this was so.

[17] There was also this section in the policy:

> **Conditions of Home Insurance**
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> …
>
> **Insurance during sale and purchase**
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> 2. Where a contract of sale and purchase of your Home has been entered into the purchaser shall be entitled to the benefit of this Section but to get this benefit the purchaser must
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> (a) comply with all the Conditions of the Policy, and
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> (b) claim under any other insurance that has been arranged before claiming under this Policy.

I refer to this section of the policy as condition 2.

[18] The plaintiffs argue that condition 2 entitles the purchasers to the full benefits of the policy provided they comply with the conditions of the policy in the same way as would have been required of the Barlows if they had remained owners.

Principles as to insurance contract interpretation

[19] As noted by Mr Campbell, insurance contracts are interpreted according to the ordinary principles of contractual interpretation. Those principles are summarised in the Supreme Court's decision in *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd*:[1]

> [60] It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> …
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> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.
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> (citation omitted)

[1] *Firm Pl 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

Bryant v Primary Industries Co Limited

[20] In *Bryant*, an insured farm house had been destroyed by fire on the morning of an auction of the farm.[2] The auction proceeded. The house was insured for an indemnity value of $14,060 and an excess of indemnity sum of $48,101. The "excess of indemnity cover" was for what would now be called reinstatement or replacement cover. The policy provided that, if the insured was unable or unwilling to effect reinstatement or replacement of the house, then the insurer would be under no liability in respect of excess of indemnity.

[21] After the auction, the vendors assigned the policy to the purchasers for $8,470 being an assessor's calculation of the indemnity value of the house at the time of the fire. The purchasers issued proceedings against the insurer claiming indemnity value up to $14,060 and for the excess of indemnity sum. Cooke P, for the Court of Appeal, stated:[3]

> There is some attraction in the view or interpretation that the insured should be able to assign this contractual right to a purchaser of the property who wishes to rebuild. After all the insurer has accepted premiums for replacement insurance and the risk of destruction by fire has eventuated. Why should it make any difference that instead of the insured himself rebuilding and then selling, he sells to a purchaser before a rebuilding? But in the end we are driven to the conclusion that there is a difference and that the interpretation of assignability runs counter to a principle of insurance law from which this Court would not be justified in departing.
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> This is the principle that a contract of insurance such as for fire insurance is no more than one of indemnity for the particular insured, who can accordingly never be entitled to more than his actual loss. We will refer to it as the principle of personal indemnity. It is to be observed that the clause already quoted is consistent with the principle in that the insurer thereunder will indemnify the insured for the actual incurred cost to reinstate or replace.
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> …
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> The assignment after the fire could not make the purchasers retrospectively the insured at the time of the fire. They could acquire no more than whatever assignable rights had accrued to the insured before the assignment. But the right to replace under the excess of indemnity clause was personal to the insured. As stipulated in special condition (ii), if the insured was unable or unwilling to effect reinstatement or replacement of the property, the insurer was under no liability in respect of this item of insurance.[4]

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2 *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 (CA) at 145.

3 At 145.

4 Special Condition (ii) was the clause stating the insurer would have no liability for excess of indemnity or replacement costs if the insured was unable or unwilling to effect reinstatement or

[22] The Court said the insured under that policy were those personally named as the insured in the policy. Cooke P went on:[5]

> The principle appears to be firmly settled in other jurisdictions, and we consider that to depart from it now in New Zealand would wrench the common law too far without solid justification. There is nothing in the facts of this case to persuade us that the principle works real injustice in the kind of situation with which this case is concerned. The insurer did not represent in the policy or otherwise that the right to replace at the cost of the insurer was assignable. Neither the vendors nor the purchasers appear to have been lulled into that belief. Indeed the solicitor evidently acquiesced at the conference in the assessor's advice.

Parties submissions

[23] The plaintiffs accepted that the ratio of *Bryant* is binding on this Court (while expressly reserving the right to challenge the judgment in the Court of Appeal if that is necessary).

[24] Mr Campbell submitted that the attention the Court of Appeal gave to the wording of the insurance contract shows that its decision was based on the interpretation of the particular contract before it, that interpretation taking account of the principle of personal indemnity. He said the Court of Appeal did not decide that parties could not contract out of the principle of personal indemnity or that the Court thought that the principle of personal indemnity prevented the assignment of rights that were personal to the insured. He said, if that had been the Court's view, it would not have allowed the purchasers even to recover indemnity value, as it did with their judgment. Mr Campbell submitted:

> The ratio of *Bryant* was, therefore, that on a proper interpretation of the contract (that interpretation taking account of the principle of personal indemnity) the purchasers, even if they incurred the cost of replacement, could not recover excess of indemnity.

[25] Mr Campbell said, in contrast to the policy in *Bryant*, here the policy had a provision dealing specifically with a home being purchased. He was referring to condition 2 under the heading "insurance during sale and purchase". He submitted the effect of condition 2 was that, where a contract of sale and purchase of the home had been entered into, the purchaser is entitled to the benefit of the home insurance

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replacement.

5 At 145.

in section 1, including the replacement benefit, provided the purchaser is able to perform all the conditions that otherwise would fall to be performed by the insured. He submitted this condition clearly and unambiguously entitled a purchaser to the replacement benefit. Mr Campbell submitted the IAG policy, through condition 2, expressly permitted an insured vendor to assign the benefits of a claim, including the replacement benefit, to a purchaser, as distinct from an assignment to a party who was not the purchaser. He argued that the distinction was consistent with the purpose of requiring the cost of replacement or restoration to actually be incurred before replacement value was payable. He submitted that, it appeared from IAG's drafting, IAG was indifferent as to whether the insured or a purchaser actually incurred the costs.

[26] Mr Ring submitted the reasoning of the Court of Appeal in *Bryant* means that, where the replacement benefit in the policy is personal to the insured, the parties to the insurance contract must be presumed to have intended that the replacement benefit would be personal to the insured. If the insured had not incurred the costs of restoring the home before a sale, he or she would not have suffered the loss for which the replacement benefit was payable. Once the insured sold the home and there was no possibility of their incurring the replacement costs, it would no longer be possible for the insured to suffer the loss for which indemnity was available. An assignee, by incurring the costs of restoring the home, could not recover those costs because they would not be costs or a loss suffered by the insured before the assignment.

[27] Mr Ring submitted a fire policy does not insure the insured property. Rather, it is a personal contract indemnifying the insured against his or her financial loss resulting from the destruction of or damage to the property.[6] Because of the principle of personal indemnity, the assignment is not effective to transfer the fundamental indemnity benefit to the assignee unless the insurer has consented. The insurer is entitled to the opportunity to assess whether it wishes to assume the risk of having to indemnify the particular assignee in light of the particular risks associated with a policy which potentially requires the insurer to provide the insured with a new

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6 WIB Enright and RM Merkin *Sutton on Insurance Law* (4th ed, Thomson Reuters, Australia), vol 1 at [11-780].

home of greater value than was the pre-casualty dwelling. With an assignment of rights in relation to a claim, the rights assigned remain the rights of the original insured, subject to the same qualifications, contingencies and/or conditions as the assignor's entitlement.

[28] Mr Ring submitted the rationale for the distinction between the insured's right to assign rights to recover the indemnity value of a claim against the rights to recover replacement cost is that, where proof of loss is a condition precedent to the recovery of a special benefit under the policy, there will be risks for the insurer with regard to the proof of loss and the extent of that loss because of the potential for fraud or because of the particular difficulty that an insurer might face in dealing with a particular insured. It is for that reason that an insurer would want to assess whether it wished to assume the risk of having to pay replacement costs to the particular insured. He thus submitted that the presumed common intention in an insurance contract would be that the right to recover replacement costs would be personal to the named insured and not capable of assignment without the consent of the insurer.

[29] Mr Ring submitted there was no material difference between the situation in this case and that in *Bryant*.

[30] Mr Ring thus submitted that the plaintiffs had to rely on condition 2 of the home insurance section of the policy to distinguish this case from *Bryant*. IAG submitted that, with due regard to the heading, the relevant statutory context and its content, condition 2 could only confer the home insurance cover on a purchaser in respect of accidental loss or damage to the property occurring between the dates on which the unconditional contract had been signed and settlement.

Discussion

[31] I accept that, in all material respects but for the inclusion of condition 2 in the IAG policy, the material circumstances in this case are the same as in *Bryant*. The house was insured for replacement value. In terms of the policy, the replacement benefit was payable if and when reinstatement or replacement costs had been incurred. The right to recover replacement costs was personal to the named insured. In both cases, the house was badly damaged before sale and before the right to claim

the replacement benefit was assigned to the purchaser. In both cases, the insureds had not incurred and would never now incur reinstatement costs. In both cases, the assignee was or is claiming the right to recover reinstatement costs when incurred by the assignee.

[32] The question the Court is asked to determine relates to the plaintiffs' rights to recover the replacement benefit, not the indemnity value of the Barlows home. Sitting in the High Court, I do not need to consider the rationale for a vendor to be able to assign to a purchaser the right to pursue a claim for indemnity value as against the ability to assign a right to recover the replacement benefit. The judgment of the Court of Appeal in *Bryant* is binding authority that, with a similarly worded policy, the right of an insured to obtain replacement or reinstatement value is personal to the insured. It is the insured personally who must carry out the work and sustain the loss required to obtain that replacement benefit and that right cannot be assigned to a third party without the consent of the insurer. Although counsel made submissions as to the rationale for that conclusion, it is not for me to discuss the merits of the submissions in that regard. I am bound by the Court of Appeal judgment unless there is a basis on which the facts here are materially different.

[33] Mr Campbell, for the plaintiffs, submitted that the Court of Appeal's judgment involved an interpretation of the particular contract before it. He submits this case is different from *Bryant* in that here the policy includes condition 2.

[34] In his submissions for IAG, Mr Ring said that the Barlows had purported to assign to the plaintiffs a right to claim reinstatement costs but they could not do that because the Barlows had to incur the costs of replacement personally and they had not done so. IAG submitted that whether or not such a condition precedent had to be performed by the insured personally was a matter of interpretation and thus depended on the terms of the contract, both express and implied.

[35] To the extent the IAG policy was for the benefit of the insured personally and because of the principle of personal indemnity, an assignment of the policy cannot

effectively transfer the fundamental indemnity benefit to the assignee unless the insurer has consented.[7]

[36] There can however be an assignment of the insured's right to receive the proceeds of the policy, in other words, the proceeds of a claim because that is an assignment not of the contract of insurance but of a debt arising under the policy. It is thus the assignment of an ordinary thing in action.[8]

[37] In this case, there has been an assignment of the rights to pursue the claims lodged by the Barlows with IAG under the policy in relation to the earthquake damage and to the proceeds of such claims. The point of *Bryant* however is that the right of the Barlows to recover replacement costs was personal to them and they had to incur those replacement costs to be entitled to indemnity for replacement costs. Applying *Bryant*, the Barlows could not, by assignment, transfer to the plaintiffs a right to obtain indemnity for replacement costs on the basis it would be the plaintiffs who incur those costs.

[38] These principles apply to an insurance contract which is silent about assignment or which prohibits assignment. The principles also apply to an assignment which is a purely unilateral act by the assignor. It is important however to look at the actual terms of the policy because the policy itself may permit its assignment without the insurer's consent.[9]

[39] The plaintiffs here argue that condition 2 extends the definition of "insured" to "purchasers of the home" and thus entitles them to claim under the policy.

[40] The answer to the preliminary question thus depends on how the contract of insurance between the insurer and the insured is to be interpreted and applied.

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7 *Schneideman v Barnett* [1951] NZLR 301 at 306

8 *Schneideman v Barnett*, above n 5.

9 *Sutton on Insurance Law*, above n 6, at [11.820].
In *Soole v Royal Insurance Co Ltd* [1971] 2 Lloyd's Rep 332, the insured was defined in the policy to include successors in title to the insured property and thus successors were entitled to claim under the policy.

[41] This was a consumer-type policy of a sort which would be marketed directly to homeowners and not necessarily through brokers. Both the insurer and insured would have entered into this contract on the basis the insurer had to decide, on a reasonably informed basis, whether it wished to assume the risks associated with an insurance policy with the particular people who were seeking the particular insurance cover.

[42] With the particular terms of this policy, the insured would also have known that the insurer was insuring them personally for any loss they might suffer in respect of the property which was the subject of the policy, including their home. The insurance was for them personally with the extension that was also to apply to people who they might be married to or living with in a relationship in the nature of marriage.

[43] Condition 2 has to be interpreted against that background.

[44] In that context, assessed on an objective basis, condition 2.1 has to be interpreted as an exception to the insurance contract as a whole.

[45] In *Vector Gas Limited*, Tipping J said:[10]

> As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties minds.

[46] Putting the heading to one side, through condition 2, IAG accepted that a purchaser of the home would be entitled to all the benefits as set out in section 1 of the policy. The wording also indicated that, to obtain the benefit of that section of the policy, it would be sufficient if the purchaser met the conditions for entitlement. IAG's intention to provide the full insurance benefits for the purchaser personally was also consistent with the requirement for the purchaser to first claim on any other insurance that he might have arranged before benefitting under the IAG policy.

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[10] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5 at [19].

[47] I accept that, with the particular wording of condition 2, excluding the heading, IAG did indicate that they would extend the benefit of insurance to a third party purchaser without reserving to themselves the right to obtain information about the purchaser before committing themselves to assume the insurance risk for the benefit of that purchaser. The wording of condition 2 thus extended the definition of insured under the policy to include a purchaser of the insured's home. The purchaser would thus be entitled to the same benefits of the policy as the original insured. It would be contrary to the terms of this policy for IAG to refuse to recognise an assignment of the vendor's rights or entitlements under the policy to the purchaser if, applying condition 2, the assignment was of the same rights or entitlements which the purchaser had.

[48] The extent to which IAG widened the scope of those who might benefit from the policy and the circumstances in which that benefit might be available was however limited by the heading in condition 2 "Insurance During Sale and Purchase".

[49] It is well established that headings in an insurance policy are a legitimate and useful aid to interpretation.[11]

[50] Mr Campbell, for the plaintiffs, accepted that headings are part of the context for interpretive purposes. He said "the heading itself is merely a rough approximation of the text".

[51] I consider a reasonable and properly informed third party would consider that condition 2 provided insurance cover for a purchaser of the home in respect of an event or calamity that might occur between the time a purchaser had an unconditional agreement to purchase the property and settlement of that purchase. The temporal limits on the application of condition 2 are clear from the use of the word "during" in the heading. Consistent with this limit on the application of condition 2, that condition refers to the situation "where a contract of sale and purchase of your property has been entered into". The condition also recognises in

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[11] *Farmers Mutual Group Association Limited v Watson* (2001) 11 ANZ Insurance Cases 61-510 (CA), at [30] & [34] (Gault & Anderson JJ). Although dissenting in the conclusion, William Young J agreed with the use of headings as an aid to interpreting the policy, at [48].

2(b) that the purchaser may well be arranging his own insurance on the property. It is highly unlikely that a purchaser would have arranged insurance on the property before he owned it or had agreed to buy it.

[52] With that wording in the policy, I do not consider a reasonable and properly informed third party would think that condition 2, with its heading, would permit a purchaser to take over all the vendor's rights or entitlements in relation to some event that had arisen before sale and purchase or after his purchase had been settled. To hold otherwise would be to hold that with condition 2 the insurer was agreeing that, on a sale of the home, the purchaser would be an insured under the policy without limitation. With the heading and the wording within condition 2, it is clear this is not what IAG intended and nor is it what a reasonable and properly informed third party would have understood was intended.

[53] Although it is the objective meaning of the words which is important, it is consistent with my interpretation that, with conditions 18 and 19 of the sale and purchase contract, the vendors and Mr Staples proceeded on the basis the purchaser would have to arrange new insurance for the property and it would be the vendors who would be receiving the benefit of any claim that had been made in respect of any damage caused by the Christchurch earthquakes.

[54] I accept the submission for IAG that, in ordinary language and in the context of this policy, "during" refers to a period of time in the course of which a specified event or process occurs. That is how the word would be interpreted in condition 2, consistent with the way the word was used in the first sentence of the basic insurance clause:

> IAG New Zealand Limited … agrees to give the insured … insurance as set out in this policy <u>during</u> the period of insurance and any further period for which the policy may be renewed.

[55] It might be suggested that, given the insurer was willing to extend the benefits of the policy to a purchaser during the sale and purchase, the insurer would accept an assignment of the policy and its benefits relating to an event that occurred either before that period or afterwards. That would not however be a reasonable interpretation.

[56] Part of the background which a reasonable and properly informed third party would consider is s 13 Insurance Law Reform Act 1985. As an insurer, IAG would be assumed to have known of the insurer's obligations under that section.

[57] Mr Campbell submitted that legislation should not be taken into account because it is highly unlikely a prospective insured would know of it. I reject that submission. The heading would make it immediately apparent to a prospective insured and also a prospective purchaser of the property who might seek to benefit from this condition in the vendor's policy that condition 2 applied to a particular period when the property was owned by the insured, that period described as during sale and purchase. In that situation, a reasonable and properly informed third party would contemplate that both the vendor and purchaser would be receiving, or at least have access to, legal advice. A reasonable and properly informed third party would be likely to conclude that condition 2 was intended to refer to the period corresponding with that covered by s 13.

[58] Section 13 states:

> **13 Purchaser of land entitled to benefits of insurance between dates of sale and possession**
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> (1) Subsection (1A) applies during the period beginning with the making of a contract for the sale of land and all or any fixtures on that land, and ending on the purchaser taking possession of the land and fixtures, or final settlement (whichever occurs first).
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> (1A) During the period specified in subsection (1), any policy of insurance maintained by the vendor in respect of any damage to or destruction of any part of the land or fixtures enures, in respect of the land and fixtures agreed to be sold and to the extent that the purchaser is not entitled to be indemnified or to require reinstatement of that land and those fixtures under any other policy of insurance, for the benefit of the purchaser as well as the vendor.
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> (1B) In particular, the purchaser is entitled to be indemnified by the insurer or to require the insurer to reinstate that land and those fixtures in the same manner and to the same extent as the vendor would have been so entitled under the policy if there had been no contract of sale.
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> (1C) However, nothing in subsections (1A) and (1B) obliges an insurer to pay or expend more in total under a policy of insurance than it would have had to pay or expend if there had been no contract of sale.

(2) It shall not be a defence or answer to—

(a) a claim by a purchaser against an insurer under this section, that the vendor otherwise would not be entitled to be indemnified by the insurer or to require reinstatement because the vendor has suffered no loss or has suffered diminished loss because the vendor is or was entitled to be paid all, or the balance of, the purchase price, by the purchaser; or

(b) any claim under this section by a purchaser against the vendor's insurer in relation to the land or fixtures sold, that the purchaser's entitlement under the policy to which the claim relates is affected or defeated by the existence or terms of another policy; or

(c) any claim by a purchaser against an insurer (other than the vendor's insurer) that the purchaser's entitlement under the policy to which the claim relates is affected or defeated by a claim under this section.

(3) Where, in respect of a contract for the sale of land and all or any fixtures thereon,—

(a) there is damage to or destruction of any part of the land or fixtures during the period specified in subsection (1); and

(b) the whole or part of the amount payable in respect of the damage or destruction under the policy of insurance maintained by the vendor is payable to a mortgagee of, or any person claiming through, the vendor—

the purchase price payable under the contract of sale shall be reduced by the amount so payable to the mortgagee or person claiming through the vendor.

(4) In this section, vendor includes a mortgagee of the vendor and any person claiming through the vendor.

(5) This section shall not apply to the extent that the purchaser and vendor under a contract of sale expressly agree at any time.

(6) This section—

(a) shall apply only in respect of contracts of sale made after the commencement of this Act; and

(b) subject to subsection (5), shall have effect notwithstanding any provision to the contrary in any enactment, rule of law, policy of insurance, deed, or contract; and

(c) shall apply, with all necessary modifications, in respect of a sale or exchange of land and fixtures by order of a court as if the order were a contract of sale.

[59] That section extended the benefit of indemnity to the purchaser but only for:[12]

> … damage to or destruction of any part of the land or fixtures during the period beginning with the making of the contract for sale and the purchaser taking possession or final settlement (whichever occurred first).

[60] The way in which insurers have provided indemnity for purchasers in the period between contract and settlement is now reasonably longstanding. The editors of Colinvaux described how problems could arise for both vendor and purchaser if there was significant damage to a property when it was awaiting settlement of a contract for sale and purchase. They said "the market sought to resolve the problem by means of an extension clause in the vendor's policy, which covered the purchaser unless the purchaser had secured its own policy". They said s 13 provided a statutory extension of the vendor's policy along the lines previously accepted by market practice.[13]

[61] Given the heading, I reject the submission that the words of condition 2 do not have any temporal limit and that, because of this, condition 2 has a different scope to s 13. I also reject the submission that condition 2 has to be given a meaning wider than s 13 because, if it covered the same ground as s 13, there would be no point to including it in the policy. Because this is a consumer-type policy, it is understandable IAG wanted to set out in the policy what its obligations would be in the event of a sale and purchase. In doing this, it also makes it clear that, if a purchaser had arranged his own insurance over the property, the purchaser would have to first seek indemnity for damage to the property under that policy. IAG has done all this in simple language, without the detail in ss 13(1) and 13(3)(a) but, when condition 2, including the heading, is read as a whole, its meaning is certain and there is not the ambiguity that would require the condition to be construed against the insurer in the way the plaintiffs submit is appropriate.

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12 Section 15(3)(a).

13 Robert Merkin and Chris Nicoll *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at [9.1.11]. See also Contracts and Commercial Law Reform Committee *Aspects of Insurance Law: report of the Contracts and Commercial Law Reform* (19 May 1983) at 21-37.

[62] Mr Campbell submitted that the interpretation IAG place on the heading is nonsensical in that a sale and purchase happen simultaneously. The interpretation which IAG place on the heading refers to a period, as shown through the use of the word "during". That period had to be for a time when both the insured and the purchaser had an insurable interest in the property. The only time when that was the case was the period between an unconditional contract for sale and settlement. The interpretation which IAG place on the heading and the whole of condition 2 is the interpretation that I consider a reasonable and properly informed third party would consider the parties intended. My interpretation of the policy is that the parties intended the insurer would provide indemnity for a purchaser subject to the conditions of the policy and the further conditions in 2(b) but for events or calamities that occurred in the period between contract and settlement, and not in respect of events that occurred either before or after that period. The interpretation advanced by IAG gives effect to condition 2 in a way which is not nonsensical.

Conclusion

[63] The question the Court has been asked to determine as a preliminary question is:

> In light of the judgment of the Court of Appeal in *Bryant v Primary Industries Insurance Co Limited*, does the fact that the Barlows have not and will not restore the home by itself prevent the plaintiffs from recovering from IAG the replacement benefit?

The answer is yes.

[64] IAG sought costs on a 2B basis if its submissions were accepted. They have been. If there is agreement over what those costs should be, a memorandum is to be filed accordingly within three weeks. If there is no agreement, IAG are to file their memorandum within four weeks. A memorandum for the plaintiffs is to be filed within six weeks. The memoranda should be no longer than four pages. If necessary, I will make an order as to costs on the basis of those memoranda.

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