IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA517/2017
[2018] NZCA 149

BETWEEN	RUIREN XU AND DIAMANTINA TRUST LIMITED Appellants
AND	IAG NEW ZEALAND LIMITED Respondent

Hearing:	15 February 2018
Court:	Asher, Clifford and Gilbert JJ
Counsel:	N R Campbell QC and J Moss for Appellants M G Ring QC and C M Laband for Respondent
Judgment:	11 May 2018 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] The owners of a house in Christchurch that was damaged in the earthquakes on 4 September 2010 and 22 February 2011 held insurance against loss caused by such damage under a policy underwritten by IAG New Zealand Ltd (IAG). The policy

provides for claims to be settled on the basis of either an indemnity payment or by IAG meeting reinstatement costs in the event the insured elects to restore the home (the replacement benefit):

> **The amounts you can claim**
>
> 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 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] The owners made a claim under the policy but then sold the property before the claim was settled. They did not restore the home and will not now do so because of the sale. They assigned to the purchasers their rights in respect of their claim under the policy. There is no dispute that their right to receive an indemnity payment under the policy was an accrued right at the time of the sale and has been validly assigned to the purchasers. The question on this appeal is whether the new owners can now reinstate and claim the replacement benefit under the policy.

[3] A similar issue was considered by this Court nearly 30 years ago in *Bryant v Primary Industries Insurance Co Limited*.[1] In that case, an old house on a farm was destroyed by fire in the early hours of the morning on the day the farm went to auction. The house was insured with Primary Industries Insurance Co Ltd (Primary) for an indemnity value of $14,060 and an excess of indemnity sum of $48,101 (replacement benefit). The policy provided that if the insured was unable or unwilling to effect reinstatement or replacement of the house then Primary would be under no liability to pay the excess of indemnity. The farm sold at auction and the purchaser took an assignment of the insured's rights under the policy. This Court held that the

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

right to reinstate and claim the excess of indemnity payment was personal to the insured and could not be assigned. Cooke P, who gave the judgment of the Court, reasoned:[2]

> 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] In view of the judgment in *Bryant*, the parties to the present appeal agreed in the High Court that the following issue should be determined as a preliminary question before trial:

> In light of the judgment of the Court of Appeal in *Bryant v Primary Industries Insurance Co Limited*, does the fact that the [insured homeowners] have not and will not restore the home by itself prevent the [new owners and assignees — the appellants] from recovering from IAG the replacement benefit?

[5] The appellants sought to distinguish *Bryant*, relying on a condition in IAG's policy (condition 2) which confers a benefit directly on them as purchasers:

> **Conditions of Home Insurance**
>
> …
>
> **Insurance during sale and purchase**
>
> 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
>
>   (a) comply with all the Conditions of the Policy, and
>
>   (b) claim under any other insurance that has been arranged before claiming under this Policy.

[6] In a judgment delivered on 17 August 2017, Nation J answered the preliminary question "yes" thereby determining the issue in IAG's favour.[3] The Judge noted that he was bound by this Court's judgment in *Bryant* and the appellants could not succeed,

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[2] At 145.

[3] *Xu v IAG New Zealand Ltd* [2017] NZHC 1964, (2017) 19 ANZ Insurance Cases 62–160 [High Court judgment].

at least not in the High Court, unless *Bryant* could be distinguished on the basis of condition 2.[4] However, the Judge found that condition 2 did not assist the appellants because it only provided cover to a purchaser for insured damage occurring between the time of contract and settlement.[5] Condition 2 was therefore inapplicable in the present case because the damage occurred well before the contract was entered into.

[7] The appellants appeal. Their primary submission is that as assignees they are able to satisfy the condition for payment of the replacement benefit. They contend that *Bryant* was wrongly decided and should be overruled. Alternatively, they argue that they are entitled to recover the replacement benefit in reliance on condition 2 so long as they incur the reinstatement costs.

Agreed facts

[8] The preliminary issue was determined on agreed facts.

Natalie Hall-Barlow and Matthew Barlow (the Barlows) were the registered owners of the house at the time it was damaged in the earthquakes. The Barlows are named as the "Policy Owner" in the schedule and are the "Insured" under the policy:

> 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.

[9] The Barlows made a claim with IAG for the earthquake damage on 27 April 2011. On 16 July 2014, they transferred the property to M&N Property Ltd, of which they were (and are) the shareholders and directors. On 9 December 2014, M&N Property Ltd entered into an agreement to sell the property to Bryan Staples or nominee. Mr Staples subsequently nominated Ruiren Xu and Diamantina Trust Ltd (the appellants) as purchasers under the agreement. On 9 February 2015, M&N Property Ltd transferred legal ownership and possession of the property to the appellants. On the same day, the Barlows (as Insured), M&N Property Ltd (as vendor) and the appellants (as purchasers) entered into a deed of assignment in terms of which the Barlows assigned absolutely to the appellants all their rights and

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4 At [32].
5 At [62].

remedies in respect of any claims lodged by the Barlows with IAG under the policy in relation to the earthquake damage. On 5 May 2016, the appellants gave written notice of the assignment to IAG.[6]

[10] The following facts were also agreed. As at 9 February 2015, the date of the assignment, the Barlows had not restored and did not intend to restore the home, and had not incurred and will not incur any actual costs of restoration of the home. However, the appellants do intend to restore the home and will incur the actual costs of restoring the home.

The assignment

[11] The operative clause in the assignment reads:

> 2.1 In consideration of the settlement of the purchase of the property by the Purchaser and at the request of the Vendor, the Insured hereby assigns absolutely to the Purchaser all their rights, title and interest in the Benefits.

[12] "Benefits" are defined as follows:

> "Benefits" means all of the rights and remedies of the Insured with respect to:
>
> (a) The EQC claim and the IAG claim including without limitation:
>
> (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
>
> (b) Any other actual or potential claims against EQC and/or IAG with respect to loss or damage to the property.

6 IAG does not take any technical point arising out of the transfer by the Barlows to their company M&N Property Ltd. That feature of the transaction can be ignored for present purposes.

Should *Bryant* be overruled?

[13] Mr Campbell QC submits that the appellants are able to satisfy the condition and claim the replacement benefit under the policy. Mr Campbell's argument in summary is this. Under the general law of assignment contractual rights are assignable except where there is a prohibition on assignment (not the case here) or it is apparent from the terms of the contract that the right's correlative obligation is personal. A condition will be "personal" only where it makes a difference to the counterparty (here, IAG) whether the condition is satisfied by the original party or by an assignee. The condition for a claim for reinstatement costs is not promissory and does not involve the provision of any value to IAG. It should make no difference to IAG whether the original insured or an assignee restores the home. He says this is reflected in the language of the insurance contract.

[14] Mr Campbell relies on the long-standing statement of principle as to the assignability of the benefit of a contract set out by Collins MR in *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*:[7]

> On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice.

[15] Mr Campbell acknowledges that most insurance contracts are regarded as personal to the insured because the personal attributes and claims history of an insured will be relevant to an underwriter's decision to accept the proposed risk on the given terms.[8] However, this does not mean the right to recover under such an insurance contract in respect of a loss is not assignable without the insurer's consent.[9] Mr Campbell argues that the critical issue is whether the correlative obligation is personal. He says that the relevant condition for payment of the replacement benefit

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7. *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA) at 668. The Court of Appeal's decision was affirmed by the House of Lords in *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 (HL) and applied in *C B Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 (CA) at 583.
8. *Peters v General Accident Fire & Life Assurance Corporation Ltd* [1938] 2 All ER 267 (CA) at 269.
9. *Holmes v National Fire and Marine Insurance Co of NZ* (1887) 5 NZLR SC 360 at 366; *Schneiderman v Barnett* [1951] NZLR SC 301 at 306.

is simply a choice whether to do something the insured has no obligation to do — it is not a promissory condition. The correlative obligation is to pay money in respect of a particular loss and the insurer is indifferent as to who satisfies the condition or to whom it makes payment.

[16] In the absence of any provision in IAG's policy preventing assignment and taking into account that this was a policy sold directly to consumers, Mr Campbell submits that while "you" in the policy is defined as the Barlows, the words "[t]he amounts you can claim" should be interpreted as meaning "[t]he amounts you or your assignee can claim". There are five numbered clauses in the policy listing "the amounts you can claim". Mr Campbell points out that in three of these clauses IAG's promise is expressed as "we will pay", not "we will pay you". The other two clauses state "you can claim" but he submits that this should be read as meaning "you or your assignee can claim" because IAG is indifferent as to who it pays. Mr Campbell submits that this interpretation is supported by Note 1 to these clauses which states "[i]f your Home is totally destroyed it may be restored at another site but only if we agree" — he argues that the passive language used in this note is a further indication that it is unimportant to IAG who restores the home.

[17] Finally, Mr Campbell argues that the interpretation he urges is consistent with the purpose of the contract as a whole which is to protect insureds against losses including those caused by widespread disasters such as the Canterbury earthquakes. He contends that the interpretation adopted in the High Court would render one of the benefits of the contract precarious. This is because more than 100,000 homes were damaged by the earthquakes. As a result, the insurance claims have taken many years to assess and resolve. Indeed, many claims remain unresolved now, some seven years later. He argues that if the High Court's interpretation is right, many insureds will effectively be forced to forego the replacement benefit because they do not have the resources to reinstate their homes or the resilience to continue living in their unrepaired homes while waiting for their claims to be resolved.

[18] While we can well understand why insured vendors of unremediated properties might wish to transfer the benefit of replacement cover to purchasers, the argument

that they can do so confronts insuperable difficulties which cannot be overcome despite Mr Campbell's careful submissions to the contrary.

[19] The indemnity provided under a fire policy has always been regarded as personal to the insured. The policy insures the named insured against his or her personal financial loss, not the loss suffered by a third party such as an assignee.[10] It is well settled that the right to be indemnified under such a policy is not assignable without the insurer's consent because the moral risk associated with the party insured is of critical importance to the insurer's decision to provide cover.[11] An insurer should not be held liable to a stranger to the insurance contract whose moral character it has not been able to assess and who may seek to profit from the loss. Here, we are referring to the right of the insured to be indemnified for its loss covered by the policy rather than the insured's right to assign its entitlement to payment for that loss.

[20] There is also force in Mr Ring QC's submission for IAG that an insurer's vulnerability is increased where the particular policy allows recovery of more than the indemnity value of the damaged property. The Supreme Court accepted this proposition in *Tower Insurance Ltd v Skyward Aviation 2008 Ltd*, observing that insurance covering reinstatement costs creates a heightened moral hazard of a party seeking to profit from the loss.[12] We emphasise that this general observation is not directed at the appellants whose particular circumstances are not before us. However, it explains why we do not accept Mr Campbell's submission that the insurer is truly indifferent as to who incurs the cost of reinstating the home and whom it pays.

[21] The only permissible assignment without the insurer's consent of a policy of this type is the right to receive payment of an amount to which the insured is entitled under the policy (an accrued debt) or may become entitled on the happening of a contingency (a contingent debt). In either case, the right to receive the payment will only ever

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10 *Minucoe v The London & Liverpool & Globe Insurance Co Ltd* (1925) 36 CLR 513 (HCA) at 524 citing authority dating back to the 18th century including *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, 2 ER 292 (HL); and *Ocean Accident & Guarantee Corp v Williams* (1915) 34 NZLR 924 (SC) at 927–928.

11 *Peters v General Accident Fire & Life Assurance Corporation Ltd,* above n 8, at 269–270 affirming *Peters v General Accident Fire & Life Assurance Corporation Ltd* [1937] 4 All ER 628 (HC).

12 *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [26].

reflect the insured's loss covered by the policy. If the insured does not suffer the loss and it can be shown that it will never suffer the loss, there can be no right to payment under the policy (accrued or contingent) and accordingly no payment right to assign.

[22] The Barlows have suffered the loss covered by the indemnity payment. They suffered that loss prior to the sale and their right to receive the indemnity payment for it had accrued and was validly assigned, as IAG accepts. However, the Barlows have not reinstated and will not reinstate. It is an agreed fact that they will never incur the loss occasioned by doing so. Their contingent right to payment of reinstatement costs was extinguished by the sale. It follows that they could not assign the right to receive such a payment. It is trite that the appellants as assignees can have no greater rights than the Barlows as assignors.

[23] IAG's policy is entirely consistent with this analysis. The insured is defined as the Barlows, not the Barlows or their assignees. The replacement benefit is expressed to be payable if "you restore your Home" — in other words, it is conditional on the Barlows restoring their home and incurring the cost. It does not indemnify an assignee for the cost it may choose to incur in restoring what has become its home following purchase. The general conditions include that "you" must not incur any expenses in connection with a claim without the insurer's prior agreement. This reinforces that the benefits are personal to the insured and an assignee would not be entitled to incur reinstatement costs in connection with a claim and then seek reimbursement. IAG's policy also contains a general condition confirming that all policy conditions, where applicable, apply to "your" legal personal representative. Had there been an intention to confer benefits on an assignee, one would expect the scope of this condition to have been extended to assignees.

[24] This Court's decision in *Bryant* is directly on point. Cooke P expressed some attraction to the view that the contractual right to receive reinstatement costs ought to be able to be assigned to a purchaser who wishes to rebuild. However, the Court concluded that the non-assignability of such a right was firmly settled as a matter of law and to depart from it in New Zealand could not be justified:[13]

[13] *Bryant v Primary Industries Insurance Co Ltd*, above n 1, at 145.

> 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. …
>
> 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. …
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> …
>
> 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.

[25] We are not persuaded that this Court's analysis in *Bryant* was wrong. In any event, we do not consider it would be right to overrule it given the judgment has stood for nearly 30 years and we are not aware of any subsequent decision in which its correctness has been questioned. This is not one of those rare cases where it would be appropriate for this Court to overrule one of its earlier decisions.[14]

Is *Bryant* distinguishable?

[26] Mr Campbell argues that *Bryant* is distinguishable because of the cover provided to a purchaser under condition 2 of the IAG policy (quoted at [5] above). There was no equivalent provision in the Primary policy considered in *Bryant*.

[27] Mr Campbell submits that the effect of condition 2 is that where a contract for sale and purchase of the home has been entered into, the purchaser is entitled to the benefits provided under the policy subject to complying with all policy conditions that

14 As to the limited circumstances in which it may be appropriate for the Court to overrule one of its earlier decisions in a civil case, see *R v Chilton* [2006] 2 NZLR 341 (CA) at [83]–[90].

otherwise would fall to be performed by the insured. He says this must include the ability to restore the home and therefore satisfy the condition for recovery of the replacement benefit. These submissions are uncontroversial. The question is whether condition 2 has a temporal limit and applies only to damage occurring between contract and settlement. Nation J found that this was the correct interpretation of the clause. Mr Campbell argues to the contrary that there is no temporal limit on its operation.

[28] Mr Campbell's first submission is that the Judge was wrong to rely on the heading of condition 2 — "Insurance during sale and purchase" — as an aid to the interpretation of the provision. He says that the heading can be nothing more than a rough guide to the text. Accordingly, any temporal limitation indicated by the heading cannot be relied on by a sophisticated insurer such as IAG to imply a limitation on cover which it has not spelt out in plain language in the text.

[29] Next, Mr Campbell criticises the Judge's apparent reliance on conditions in the sale and purchase agreement which he considered were consistent with his interpretation of the policy. We agree with Mr Campbell that the agreement for sale and purchase, which was entered into well after the policy and between different parties, cannot assist with the interpretation of the policy.

[30] The Judge considered that s 13 of the Insurance Law Reform Act 1985 formed part of the relevant background when interpreting condition 2.[15] The relevant part of this section reads:

> **13 Purchaser of land entitled to benefits of insurance between dates of sale and possession**
>
> (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).
>
> (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

[15] High Court judgment, above n 3, at [61].

> those fixtures under any other policy of insurance, for the benefit of the purchaser as well as the vendor.
>
> (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.
>
> (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.
>
> …

[31] He thought it supported IAG's submission that the purpose of the clause was to spell out the statutory consequence that insurance against damage or destruction to the land or fixtures the subject of an agreement for sale and purchase enures for the benefit of the purchaser as well as the vendor during the period beginning with the making of the contract and ending on the date of possession or settlement, whichever occurs first. Mr Campbell submits that consumers like the Barlows would be unlikely to be aware of this statutory provision and therefore it should not have been taken into account as an interpretive guide.

[32] We are satisfied that the Judge was correct to find that condition 2 provides cover to a purchaser for loss suffered after a contract for sale and purchase has been entered into and before settlement. Self-evidently, any loss caused by an insured event prior to the date of the agreement will be sustained by the vendor, not the purchaser. It is only after an agreement for sale and purchase is entered into that the purchaser acquires an insurable interest in the property and becomes vulnerable to loss caused by an insured fortuity. We consider that the purpose of condition 2 is to provide cover to a purchaser for this risk. The text of the clause makes this clear by stating that the condition applies "where a contract of sale and purchase of your home has been entered into". The contract marks the commencement of the operation of the clause. Following settlement, the property is no longer "your home" and the vendor no longer has an insurable interest in it. This marks the end of the relevant period of insurance because the insured is no longer vulnerable to the insured risk after that date.

[33] It is not necessary to rely on the heading to reach this interpretation but the heading supports it — "Insurance during sale and purchase". The headings in IAG's

policy are not merely rough guides to interpretation and in many instances they form part of the text — for example, "You are insured for", "You are not insured for" and "The amount you can claim". We see no reason why the headings should be ignored when discerning the meaning of a particular clause. The headings form part of the document which should be considered as a whole when interpreting any part of it.[16]

[34] We see the existence of the statutory provision as being a more neutral factor. If both parties are to be taken as having been aware of the provision, why did they include condition 2? On the other hand, it is common for contracts to contain superfluous provisions that merely relate the law. Further, the provision in the policy does not mirror the statutory provision. For example, it does not differentiate between possession and settlement.

Conclusion

[35] For these reasons, we agree with Nation J that the answer to the preliminary question quoted at [4] above is "yes". The appellants, as strangers to the policy, are not entitled to claim the replacement benefit from IAG. The appeal must accordingly be dismissed.

Result

[36] The appeal is dismissed.

[37] The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Canterbury Legal, Christchurch for Appellants
DLA Piper, Auckland for Respondent

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16 See *Farmers Mutual Group Association Ltd v Watson* (2001) 11 ANZ Insurance Cases 61–510 (CA) at [30], [34] and [48].