IN THE SUPREME COURT OF NEW ZEALAND SC 47/2018
I TE KŌTI MANA NUI [2018] NZSC Trans 14

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

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| Hearing: | 13 November 2018 |
| Coram: | William Young J<br>Glazebrook J<br>O'Regan J<br>Ellen France J<br>Arnold J |
| Appearances: | N R Campbell QC and J Moss for Appellants<br>M G Ring QC and C M Laband for Respondent |

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**CIVIL APPEAL**

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**MR CAMPBELL QC:**
May it please the Court, I appear for the appellant with my learned friend, Mr Moss.

**WILLIAM YOUNG J:**
Thank you, Mr Campbell.

**MR RING QC:**

May it please Your Honours, I appear with Ms Laband for the respondent, IAG.

**WILLIAM YOUNG J:**

Thank you, Mr Ring. Mr Campbell?

**MR CAMPBELL QC:**

Your Honour, in this case there is no real dispute that the indemnity value payment or the right to the indemnity value is assignable. There is no dispute because IAG's submissions provide some examples that the right to the replacement benefit in itself is assignable. What's in dispute is whether the right to the replacement benefit can be assigned in such a way that the assignee can satisfy the condition upon which the replacement benefit is payable, namely the restoration of the home.

**GLAZEBROOK J:**

Sorry, I didn't quite understand that it was agreed that the right to the replacement benefit was assignable.

**MR CAMPBELL QC:**

Can I just give the examples that my learned friend gives in his submissions on behalf of IAG?

**GLAZEBROOK J:**

Sure.

**MR CAMPBELL QC:**

So that would be, for instance, where the original insured restores the home and then assigns to, let's say, a financier or maybe the builder the right to receive the replacement benefit from the insurer. So that's just a simple assignment of the right to receive the proceeds but with the insured having satisfied the condition upon which the payment of the replacement benefit depends.

**GLAZEBROOK J:**

Right. Perhaps if I can bring this up right now. What about the contents insurance where you get new-for-old with no conditions at all? I mean obviously in some cases the insured, the insurer gets the choice of whether to give a replacement of the asset or a cash equivalent. In some cases you have it as of right if it's a certain type of asset if it's less than such certain time old. What's the position with those because there's no condition at all?

**MR CAMPBELL QC:**

Well, in that case it would be even clearer that the right to recover those proceeds from the insurer would be assignable because there it's simply a right to receive money which is assignable in the same way that any other right to receive money might be.

**GLAZEBROOK J:**

And this is probably more a question for Mr Ring. In that case it's the loss of the chattel itself that's the loss, not the necessity to pay out money. So the indemnity principle, because you are getting more than you've actually lost at that stage because you're getting new-for-old, doesn't seem to me to apply. Well, at least not in the traditional sense of not getting any more than you've actually paid out or lost at the particular time that the loss has happened.

**MR CAMPBELL QC:**

Yes, well, it seems, with respect, Your Honour, that your first observation there touches upon what seems to me to be probably the key point in this appeal.

**GLAZEBROOK J:**

Yes, which is why I thought I might as well raise it straight up because I just was searching on the Internet for copies of contents of policies and there's no – they do often give a cash equivalent of a replacement value new-for-old.

**MR CAMPBELL QC:**

Yes, and that tends to emphasise that what is going on is that the relevant loss occurs at the time of destruction, damage, and that's an important difference between the parties on this appeal and that really has emerged from the two sets of submissions, and I was going to say that there seemed to me to be two key issues. One is that one. Does the relevant loss, and therefore the original insured's rights, arise at the time of, in this instance, the earthquake, the damage, or does it arise, as IAG would have it, when the insured subsequently spends money on restoration, repair, replacement, and so on? So that's the first key issue, because it's acknowledged that the assignor, the insured, cannot assign any greater rights than he or she has at the time of the assignment and, of course, that is one of the key reasons that the Court of Appeal gave for dismissing the appellant's appeal below.

So that it seems to me is the first key issue and the second is whether the condition upon which the replacement benefit is payable, the restoration of the home, is, and I'll use quote marks, "personal" in the sense that it has to be performed or satisfied by the original insured and cannot be satisfied by the assignee.

I just say as an aside I will sometimes lapse into referring to this as performance of the condition and I probably have done that in our written submissions. That's a slightly inapt word because it's not a promissory condition. It's just an option and it's really a matter of satisfaction or fulfilment rather than performance. Of course, we say that's one reason why it's unimportant to IAG who fulfils or satisfies that condition because it's not conveying any value to IAG in the way that it would if there were – if we were concerned with a promissory condition.

**WILLIAM YOUNG J:**

Are there any insurance policies where the measure of loss is simply replacement value, and leaving aside chattels, or is it the universal industry practice that replacement value is provided only where there has been replacement?

**MR CAMPBELL QC:**

It's close to universal. I've seen one where it gets very close to entitling the policyholder to the new-for-old cost and it's an estimated cost without actually incurring it. I say "very close to". I can't remember the precise details of the provision but it was something to the effect that the insured would be entitled to that payment if the insurer agreed to the estimate. So an element of discretion remained with the insurer. Otherwise, it's fairly universal.

So the two key issues that I identified are foreshadowed in the written submissions at paragraphs 28 and 29. So that sets out the overview of the appellants' primary submissions. Paragraph 28 identifies what in our view is the essential question for the Court, whether the Barlows having sold their home without restoring it, the condition can still be fulfilled by the appellants as assignees restoring the home and we say that resolving that question depends on the application of the general law of assignment to this particular contract and context and we say that it can be fulfilled by the appellants as assignees restoring the home.

Subparagraphs 29.1 and 29.2 focus on what I called the second of the issues a couple of minutes ago and that is whether the assignee is able to fulfil the condition or whether it has to be fulfilled personally by the original insured.

Paragraph 29.3 addresses the principle that the assignee can have no greater rights than the assignor and in this instance, or in this case, the relevant question is, of course, what rights did the original insured as assignor have at the time of the assignment, and we say that the loss had already occurred. The insured already had two options, one to recover the indemnity value or alternatively to recover replacement benefit if the home was restored, and we say that the loss had already been incurred. The fact that the costs of replacement had yet not been incurred is not relevant to determining what rights the insured already had and it is not relevant to determining whether or not the relevant loss had already occurred. All that the incurring of the restoration costs does is quantify the loss that has already occurred.

Now our written submissions then deal step-by-step with the general law of assignment. I don't perceive there to be much if any dispute between the parties as to those general principles. So although I may return to those, I don't intend to step the Court through those this morning unless you wish me to.

The two key issues that I identified earlier are addressed in more detail from paragraphs 60 to 74 of the written synopsis.

So again paragraph 61 identifies those two issues, firstly, whether the condition can be fulfilled by the appellants as assignees and secondly whether recovery of the replacement benefit is or is not inconsistent with the principle that an assignee has no greater rights than the assignor. On reflection, I think it makes more sense to deal with those two issues in the reverse order from what appears in my submissions.

So the second of those starts at paragraph 70, and I've first outlined that the Court of Appeal below reasoned that although the Barlows, the original insureds, had suffered the loss covered by the indemnity payment, they will never incur the loss occasioned by reinstating or restoring, and the Court went on to say that therefore the Barlows' contingent right to payment of reinstatement costs was extinguished by the sale of their home so that they could not assign the right to receive such a payment and make the observation that it's trite that the appellants as assignees can have no greater rights than the Barlows as assignors. We don't disagree with that last sentence.

It's also true that the policy responds to the insured's loss, not to the assignee's loss. So, for instance, one could probably think of examples where a potential assignee had some different interest in the property, perhaps was intending to develop it, had their eye on it and therefore suffered some quite different loss from the original insured. The fact that the assignee then buys the property, takes an assignment, doesn't allow the assignee to then claim for that different loss as opposed to the loss that the insured suffered. But

we're not in that situation because the appellants aren't claiming that as a result of the assignment IAG is liable to pay them in respect of a loss that they suffered when the Barlows' home was damaged in the earthquakes. They're claiming simply and merely that IAG is liable to pay them in respect of loss that the Barlows suffered.

Maybe highlight those words "in respect of" because the loss that the Barlows suffered gave rise to rights in the Barlows to claim certain amounts from IAG and it is – so those payment rights and conversely IAG's payment obligations are in respect of a loss that the Barlows had suffered.

Now we say that the Barlows suffered that loss the moment their house was damaged by the earthquakes and from that moment the Barlows were exposed to the cost of restoring their home and became entitled to payment from IAG in respect of that loss. This, the fact of that loss or the occurrence of that loss, didn't depend upon or await the Barlows restoring their house. The only thing that was dependent upon restoration was the ascertainment or, one might say, the quantification of how much IAG had to pay the Barlows in respect of their loss.

So we say, with respect to the Court of Appeal, that they conflated two separate ideas. Firstly, the occurrence of the loss that the Barlows had suffered and, secondly, IAG's payment obligation in respect of that loss.

**O'REGAN J:**
But at the time of the assignment it wasn't ascertained yet whether the building would be repaired or restored, was it? So it wasn't known that that was going to become payable.

**MR CAMPBELL QC:**
No, and that's only going to happen and only going to be known, even on the appellants' argument, when the appellants as assignees restore the home, and IAG's never going to be exposed to liability above indemnity value unless and until that occurs.

**O'REGAN J:**

But you said at the time of assignment all that remained outstanding was to quantify the loss but, in fact, there was still also a live issue as to whether the payment above indemnity was ever going to be required, wasn't there?

**MR CAMPBELL QC:**

Yes, but that's just part of ascertaining the amount of the payment that IAG has to make to either the insured originally or the assignee, or the appellants as assignees. So the point is that that just ultimately determines what IAG's payment obligation is. The –

**O'REGAN J:**

But IAG presumably had already paid the indemnity, had it?

**MR CAMPBELL QC:**

I don't think that's correct but I suspect that they would say that they have no obligation even to pay anything above what EQC was liable for. So I suspect there's a dispute as to what indemnity might be.

**O'REGAN J:**

I see, right. Okay, yes.

**ARNOLD J:**

Well, I was going to raise a similar thing. I mean it's one thing if the arrangements between the insured and the purchaser contain an obligation or the purchaser accepts an obligation to rebuild the house within a reasonable time, but there's no such obligation here. So on your approach the purchaser could take several years before making a decision about whether to rebuild or not and yet the insurer would remain on the hook, is that right?

**MR CAMPBELL QC:**

Yes, but that's no different from the position that the insurer would find itself before the assignment because equally one could say that the original owner could take years to decide whether to rebuild. Those concerns can be

addressed in a number of ways. Very often the policy, although I don't think this one does, will contain a condition obliging, or contain another condition which says the replacement benefit is not payable unless the insured reinstates with reasonable dispatch. That's a very common condition, particularly in commercial property insurance, less so in residential.

So the issue arises whether there's an assignment or not. In the absence of a condition like that IAG might rely on some implied term, some duty of good faith. I just raise these as possibilities but the important point is that it doesn't matter whether it's never sold or whether it is sold, the same potential for delay can occur.

**O'REGAN J:**
Well, it does matter here though because the Barlows decided not to and that, as far as IAG's concerned, that's the end of the game.

**MR CAMPBELL QC:**
Yes, but they didn't simply decide not to. They decided not to and assigned their rights under the insurance policy which we say include the right to recover the replacement benefit if the condition upon which that right depended was fulfilled.

I want to expand a little bit upon what we've said at paragraphs 72 and 73, having seen my learned friend's submissions which characterise the loss as having been suffered or say that the loss will only be suffered when the restoration costs are incurred.

Firstly, the incurring of restoration or rebuilding costs in itself does not constitute a loss because typically when the insured or an assignee incurs those costs they are going to recover something or receive something in exchange. The building is going to slowly come back out of the ground. So that's one reason that it's not appropriate to think of the incurring of the restoration costs themselves as the occurrence of the loss. The occurrence of

the loss is when the damage occurs and the property owner is exposed to the need to incur those restoration costs.

It's also quite an odd way for IAG to characterise the policy. Just looking briefly at it, for instance, and this is at tab 8 of the case on appeal, so, firstly, using the numbered pages at the top right-hand corner, page 64, IAG agrees to give insurance as set out in this policy during the period of insurance. So things have to happen during the period of insurance, of course. And if we turn to the home insurance section at page 67 what is the insured insured for? Event A, you are insured for, this is the left-hand column, "accidental and sudden loss of or damage to your home". So that identifies in plain terms what the relevant loss is and that, of course, has to happen during the period of insurance, and then the amounts you can claim –

**GLAZEBROOK J:**
Sorry, I think I'm – 67, is it?

**MR CAMPBELL QC:**
Yes. So the policyholder is insured for accidental and sudden loss of or damage to your home and, of course, that has to happen during the period of insurance because of the introductory operative clause on page 64. And then at the top of the right-hand column, the policy explains what the policyholder can claim. "If, following loss or damage you", and then there are two options, "restore your home", this doesn't go on to say that the or indicate that the insured is suffering some loss from restoring the home. It simply says if you restore your home, we will pay. If you do not restore your home, we will pay. So these are just alternative ways of quantifying or ascertaining the insurer's payment obligation. They are not different ways in which the loss may be incurred.

One can think of other instances. If you've got a pure indemnity policy, no replacement benefit at all, sometimes the appropriate measure of indemnity will be loss in market value. That's measured at the date of the loss, not at some later date, let's say, a year later when the insured sells the property.

That might be evidence as to what the loss in market value was at the date of the loss but the relevant loss occurred at the date of damage. Likewise, if under an indemnity policy the appropriate measure of indemnity is the estimated costs of reinstatement less a deduction for betterment, that's going to be assessed as at the date of the loss and if the insured does go on to reinstate at some later point that will simply be evidence of what those costs were at the date of the loss.

The approach that IAG is taking, namely that the loss, the relevant loss, does not occur until the restoration costs are incurred, is also, in our submission, contrary to this Court's approach in the *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 129, [2015] 1 NZLR 40 decision. *Ridgecrest*, of course, was not concerned with assignment. It was concerned with successive losses. I'll have to hand Your Honours a copy of that case because it's not in either of the casebooks.

And if I may, I'll just take Your Honours to the various ways in which the, in the *Ridgecrest* litigation, the Courts below and this Court described the loss that had been suffered and the effect of the insured incurring restoration costs. I realise, of course, that this Court reversed the approach of both Justice Dobson and the Court of Appeal but not in respect of the descriptions that I'm about to take you to.

So at paragraph 20 this Court starts dealing with or describing how Justice Dobson approached the matter, and this Court at the end of that paragraph says that the Judge recorded that the words "you restore or replace" meant that liability, not loss, liability under clause C2, that was the reinstatement clause, was conditional on such repairs being effected. Likewise, at paragraph 23 this Court then was describing the approach of the Court of Appeal and at paragraph – in that quote, the first paragraph is paragraph 49 of the Court of Appeal's judgment, "In relation to claims relating to a damaged but repairable building, IAG is liable under clause C2," that's the reinstatement clause, "in respect of each happening for the cost of restoration of damage to the building to the same condition as when it was new. The

quantification of the liability depends on the repairs actually being made." So again, not the loss but the quantification of the liability.

**GLAZEBROOK J:**
Sorry, I just missed the paragraph number.

**MR CAMPBELL QC:**
It's paragraph 23 of the Supreme Court's judgment quoting from –

**GLAZEBROOK J:**
23, that's fine.

**MR CAMPBELL QC:**
And then paragraph 50 of the Court's judgment at subparagraph (d), I acknowledge here the Court is addressing itself to the earlier unrepaired losses but the Court says, "A cause of action in respect of the losses caused by each of the earlier earthquakes accrues immediately." That applies equally to any cause of action arising in relation to an earthquake or damage where the insured might ultimately wish to or an assignee might ultimately wish to restore the property. So again that's not consistent with the conception that IAG is putting forward that the relevant replacement benefit loss, if you like, doesn't occur until the restoration costs are incurred.

I note also that the Court of Appeal in *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 (CA) never suggested that the loss or the relevant loss awaited the incurring of the reinstatement or restoration costs in that case.

**GLAZEBROOK J:**
I thought *Bryant* was actually an indemnity policy but I'm not sure it was totally clear from what was said.

**MR CAMPBELL QC:**
In *Bryant* there were two layers, indemnity and excess of indemnity.

**GLAZEBROOK J:**

There were two layers? Maybe I'm thinking of one of the other cases because a number of the cases have related to indemnity which is why I was possibly slightly puzzled in light of some of those earlier cases why it is accepted that indemnity can be assigned in that manner.

**MR CAMPBELL QC:**

Well, some of the older cases such as *Holmes v National Fire and Marine Insurance Co of New Zealand* (1887) 5 NZLR (SC) 360 and *Schneideman v Barnett* [1951] NZLR 301 (SC), I'm pretty sure they're indemnity only and it's accepted by the Courts in those cases that the indemnity payment can be assigned. The right to be indemnified in respect of a loss that the insured is potentially going to suffer can't be assigned in the sense that assignee can then be indemnified for a loss that he or she suffers.

**GLAZEBROOK J:**

I think that's possibly the issue when a contract is unconditional although in *Bryant* it seems to be accepted that there's still an insurable interest during that period for the vendor although not in some of the earlier cases as far as I can make out. But it's probably a red herring because of the particular context those cases were decided on where there'd been damage in that period when the contract was unconditional.

**MR CAMPBELL QC:**

I think the insurable interest is probably a red herring.

**GLAZEBROOK J:**

Well, exactly, and in *Bryant* they accepted there was so – am I thinking of *Bryant* or one of the other – anyway, no, maybe *Carly v Farrelly* [1975] 1 NZLR 356 (SC) and *Simon* I'm thinking of in terms of the insurable interest issue.

**MR CAMPBELL QC:**

One of the themes of IAG's submission very closely connected to its submission that the relevant loss does not occur until the reinstatement or restoration costs are incurred is to describe this cover as somehow elective and they draw an analogy between this and liability insurance which very commonly has a defence costs add-on, almost always, and IAG suggests that the replacement benefit, like defence costs cover, is elective. In our submission that's a mischaracterisation. Insurance is against fortuities. That's a basic principle of insurance practice and insurance law and the relevant fortuity, if you think of liability insurance, is usually the making of a claim by a third party against the insured. Once that has occurred, then so long as the claim continues to be pursued the defence costs are not truly elective. They're forced upon the insured. They've become – they're not things that the insured wished to incur and, of course, to the extent that there is some control by the insured as to what steps they take in defending a claim usually the policy will closely control what the insured can do. They'll need the consent of the insurer and sometimes the insurer will be able to take over the defence of the claim.

It's the same with this insurance. The fortuity is the happening of the damage. Once that happens, the insured's exposed to the need to incur costs of reinstatement and the reality is that in almost all cases the insured is going to have to do that as a matter of practicality on a new-for-old basis. It's very seldom possible to simply reinstate or repair on an old-for-old basis.

So it's not truly an elective matter and once again we see that in any case the insurer has some control over what the insured does. Firstly, generally speaking, these policies are written on the basis that if you're going to recover on a new-for-old basis you have to reinstate on a like-for-like basis. Sometimes there's a bit of flexibility to that such as we saw in the *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 case. Secondly, the policy will, as this one does, have a claims condition giving the insurer control over what is done. So here at page 64 of the policy, general condition 5, "Unless we have agreed, you must not incur any

expenses in connection with the claim", and typically, of course, when restoration, reinstatement goes ahead the insured will reach agreement with the insurer as to the scope of that reinstatement. If they can't reach agreement they might have to go and have that dispute resolved before a Court, but it's both unwise and usually contrary to the conditions of the policy for the insured to simply march on and start rebuilding or restoring without first obtaining the agreement of the insurer.

So the submission for the appellants is that the relevant loss occurs in this case at the time of the earthquake. From that time the Barlows had a right to be paid by IAG. The ascertainment or quantification of that payment obligation depended upon whether the condition upon which the replacement benefit was payable was fulfilled. So we say that the Barlows were entitled to assign that right to payment. The remaining issue is whether the condition upon which the replacement benefit depended could be satisfied by an assignee or whether it had to be satisfied personally by the Barlows.

So that takes me back in my submissions, because I'm dealing with these two issues in the reverse order that they appear, to paragraph 62, and our submissions at this point of course build upon what we've said earlier as to the general principles relating to the law of assignment.

And the key principles from our discussion of the general principles to the law of assignment are, first, the right to receive a benefit under contract is generally assignable unless it makes a difference to the person who has to provide that benefit, whether they provide the benefit to the original party or to some new party. Now we say that can never be an obstacle to assignment in this instance because the relevant benefit is just the payment of money and it's a bit like the employment context where the right to salary or to wages, the right to be paid, is undoubtedly capable of assignment. What's not capable of assignment in the employment context and in other contexts is the right that goes the other way, the right to the service of the employee.

So that's the first principle and I don't understand that point to really be disputed and this goes back to one of the things I said at the very start that even IAG acknowledges that the right to receive that money in itself is capable of assignment. So the next point of principle is –

**ELLEN FRANCE J:**
Sorry, could I just check, in your overview, paragraph 5, you're saying the assignee is able to satisfy the condition unless the identity of the person satisfying the condition is material.

**MR CAMPBELL QC:**
Yes.

**ELLEN FRANCE J:**
So could you just explain how that works or are you saying that doesn't apply at all in this case? So are you saying there might never be any situation here for this type of policy where the identity of the person would be relevant?

**MR CAMPBELL QC:**
Let me – so under the general law of contract a contractual benefit might be assigned at a time when the benefit remains conditional on the original party continuing to perform the contract and, indeed, this is what is typically going on when people say that they are assigning the contract as a whole. What they are doing is assigning the benefit of the contract and then expecting and often arranging for the assignee to then perform the balance of the contract, and the question that arises there is whether the original party is entitled to essentially have their obligations performed vicariously by somebody else, and it's –

**WILLIAM YOUNG J:**
So that's in the wagons case, *British Waggon Co v Lea & Co* (1880) 5 QBD 149, whether the company that was leasing out the wagons could, as it were, have the requirement to maintain them vicariously performed by the assignee?

**MR CAMPBELL QC:**

Yes, yes, and if, because if you can't have it vicariously performed then all that the assignee is entitled to is the benefit but that's still going to be conditional upon performance and the performance has to be by the original party. So in that case the Court said, well, it doesn't matter to the party leasing the wagons whether they are repaired by the original party or by somebody else. They just have to be repaired in accordance with the contract.

So likewise here what is, in our submission, relevantly in issue is whether it makes any difference to IAG whether the conditions, the restoration of the home, is satisfied by an assignee as opposed to the original insured.

**ARNOLD J:**

You said earlier that the insurer had some control over the reinstatement through that general clause about not taking any steps without our agreement and so on. So there may be a situation where the person actually undertaking the rebuild, or wanting to, is in a position where he or she has to negotiate with the insurance company about the reinstatement. So the insurance company will end up negotiating with this person who has got the benefit of the assignment rather than the insured. Doesn't that make a difference to the insurance company?

**MR CAMPBELL QC:**

Well, I'd make several points in response to that, Sir. The first is that it's commonplace with any assignments that the assignee may be somebody who is more willing to stand on his or her rights than the assignor and that fact, that possibility, has never stood in the way of contractual benefits being assigned, and in our bundle of authorities there's an extract from *Chitty on Contracts* which makes that point succinctly. It's one of the first paragraphs in the extract that we've supplied. Otherwise you wouldn't be able to factor debts and do all sorts of other things that have been going on for centuries. Secondly – so that in itself is not a reason for saying that the condition can't be fulfilled by the assignee.

**GLAZEBROOK J:**

Is it worth going to look at the extract you're referring to, or is it in your submissions? I can't remember.

**MR CAMPBELL QC:**

I think it's touched upon in my submissions but I'll take you to the extract. It's at tab 19, and the relevant paragraph is [19-055]. So this, to be clear, is looking at the assignment of the benefit of a contract and the authors say, "It is only assignable in cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it", and the authors say: "It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the Court on objective grounds."

**ARNOLD J:**

But isn't – I mean to take your employee example, you assign your part of your salary or your salary, whatever it is. If there is some issue as to the quantification of salary it's nothing to do with the assignee, is it? It's for the employee and the employer to work out so – but here, if you look at it objectively, there is a requirement in the contract of insurance that the reinstatement cost be effectively agreed with the insurer. So that passage you refer to, whether an assignment makes any difference must be decided by the court on objective grounds, isn't an objective ground the existence in the insurance contract of that requirement for consent? In other words, it's not just a matter of whether the particular individual is more difficult than another individual which I can see would be utterly irrelevant, but this is, isn't it, an objective consideration?

**MR CAMPBELL QC:**

Well, in the contract the controlling provision is really on page 67 which describes what cost is going to be reimbursed if the insured, or we say assignee, restores the home. So right-hand column, subparagraph (a), "If, following loss or damage you restore your home," there's then a fairly detailed description of what cost is going to be paid by IAG, "the cost of restoring it to a

condition as nearly as possible equal to its condition when new," but then subject to the qualification, "using current materials and methods," and then an addition for any what are often called compliance costs.

So the requirement that the insured not proceed with restoration without the insurer's consent provides a mechanism to ensure that, well, even if the insured was to ignore that requirement, IAG would still be able to say, "Well, we're not" – "You've actually done something more than is provided for in this clause. We're only going to pay for the cost of restoring to a condition as nearly as possible. You've added an extra room, a deck, whatever. We're not paying for that." So, of course, there is always the potential for disagreement as to what those words are going to encompass and there have been a myriad of cases since the earthquakes before the courts on that sort of dispute.

**WILLIAM YOUNG J:**
By and large I guess in practice those disputes have to be resolved before building commences?

**MR CAMPBELL QC:**
And they are, one way or another.

**WILLIAM YOUNG J:**
If not, I suppose that the insured might, and this is an example I think you've given, assign the right to be paid to a builder by way of security for payments.

**MR CAMPBELL QC:**
Yes, although that would, that might be done if there'd never been any dispute about the scope of the reinstatement.

**WILLIAM YOUNG J:**
Yes.

**MR CAMPBELL QC:**

So it seems to me, Sir, in answer to your question that any – although as a matter of practice, yes, the parties are going to often have a discussion about whether the proposed restoration work matches that clause, that's really no different from, and the assignee might take a harder line than the original insured might have and it's true that in thousands of different disputes some insureds have been softer on this than others but in my submission that's no different from the assignee who's going to enforce that debt, not give the debtor more time which the assignor might have done. So it's not really any different in character from that.

**ARNOLD J:**

Alright, thank you.

**O'REGAN J:**

Does it make a difference that the assignee is able to do the reinstatement where the assignor wasn't? I mean obviously the Barlows have decided it wasn't, that they weren't up to it. Either they couldn't finance it or they just didn't have the stomach for it any more after such a long period. So from IAG's point of view meant their liability was limited to the indemnity amount whereas the assignee is able to do it and therefore is able to call on the additional benefit.

**MR CAMPBELL QC:**

Well, that seems to me just another variant on Justice Arnold's example, it seems to me, and so –

**O'REGAN J:**

Well, except that we know here the Barlows are not going to reinstate because they've sold the property.

**MR CAMPBELL QC:**

Yes, but there's always that potential at the time of, you know, in advance of the assignment that the assignor may be less able than some other party to

either afford to do it in the case of a dispute or have the stomach for it again in the case of a dispute, or in the case of, even if it's not so much a dispute, just the practicalities of the widespread disaster leading to delays. There was another thought that's escaped –

**O'REGAN J:**
I mean it clearly does make a big difference to IAG here because you've got – the assignor wasn't going to and the assignee is going to.

**MR CAMPBELL QC:**
Yes, though in itself that doesn't seem to be a very attractive reason for prohibiting an effective assignment of the replacement benefit so as to allow the assignee to satisfy the condition. It remains the case that IAG never has to pay more than indemnity value unless and until restoration takes place. And my learned friend in his written submissions has talked about the myth of delay and we're not relying here on any supposed myth of delay. What we're saying is, and I think this is relevant to your question, Sir, what we're saying is that it would create a perverse incentive for delay for an assignee not to be able to satisfy or fulfil this condition because that, and it may just, well, that's because the longer the delay the harder it's going to be.

**O'REGAN J:**
We're not going to say the contract means one thing but because of a perverse incentive we're going to say it means something else so I don't think that takes you very far, does it?

**WILLIAM YOUNG J:**
Well, except that in a way the insurer's saying that because it gives a perverse incentive to, as it were, to enable people to make a profit out of reinstatement claims. So I mean they're a moral hazard that, that – you're – they're relying on a moral hazard argument. In a way, you're relying on a reverse moral hazard argument.

**GLAZEBROOK J:**

Well, is the question a bit is there something particular about insurance contracts because if you have the wagon contract you could equally have disputes about what the repair obligation included, et cetera? So is it an argument specifically in terms of the moral hazard and perverse incentive argument particular to insurance contracts or is it just a general assignment argument which your argument is it's just a general assignment of proceeds in the way that you can do for any contract as long as it's not personal?

**MR CAMPBELL QC:**

Yes, and we acknowledge that those principles have to be applied to this particular contract. We also acknowledge that what you cannot assign is the ability to recover – the insured can't assign the contract in such a way that the assignee is now able to recover a loss that is only suffered by the assignee and not by the assignor and the 40-year-old driver versus the 20-year-old driver is an example of that. That's a completely different risk. The 20-year-old driver can't just buy the policy and then be covered for her driving risks. But that's not the territory that we're in because here the loss has already occurred.

**O'REGAN J:**

The fact is if people had thought about this here they could easily have entered into an arrangement that ended up with the house being rebuilt and the assignee moving into it when that had occurred, I mean, or they could have just sold the company that was when the insured, couldn't they? I mean all that's happened here is that somebody has made a snafu and not read *Bryant* before the transaction was entered into.

**MR CAMPBELL QC:**

Yes, and that tends to, in our submission, support the view that it doesn't make a difference to the insurer.

**O'REGAN J:**

Well, a well-advised insurer, if you're saying the insurer can exploit the situation, the answer is no, they can't because a well-advised insured could have got around it.

**MR CAMPBELL QC:**

But that does tend to suggest that it's not really material to the insurer whether it's the insured personally that reinstates.

**O'REGAN J:**

Well, it goes both ways. All I'm saying is your perverse incentive argument is only true if you have a badly advised insured.

**MR CAMPBELL QC:**

Yes, although I think some of the structures that Your Honour might have in mind would still be challenging in the ordinary residential conveyancing context where individuals were the insureds and the owners of the property. So I acknowledge that one could put those sorts of structures in place but they'd be challenging, expensive and perhaps create some of their own risks.

**GLAZEBROOK J:**

Actually, here wasn't it assigned to the company in any event after the earthquake?

**MR CAMPBELL QC:**

Yes, though ultimately the insurance rights were assigned directly to the appellants.

**GLAZEBROOK J:**

From the Barlows, were they?

**MR CAMPBELL QC:**

The Barlows were party to the assignment. I think the company might also have been party.

**GLAZEBROOK J:**

Yes, I just wondered.

**MR CAMPBELL QC:**

The parties haven't treated that as causing any difference at all to the question for the Court.

**GLAZEBROOK J:**

No, no one's taking that, no.

**O'REGAN J:**

I mean did they –

**GLAZEBROOK J:**

Well, it's just the idea of selling the shares in the company mightn't have worked in this case if there'd been an assignment in the middle that could be challenged.

**MR CAMPBELL QC:**

I think that's right, Your Honour.

**O'REGAN J:**

Did they ask IAG for consent?

**MR CAMPBELL QC:**

Not that is revealed by the agreed statement of facts, otherwise I don't know.

**WILLIAM YOUNG J:**

So do I take the underlying dispute is that EQC and IAG say that the damages were paid out in full, that the losses in respect of the house have been paid in full at about 60 or $70,000?

**MR CAMPBELL QC:**

That is – yes, yes. I understand that's the, roughly the position.

**O'REGAN J:**
That's a very enigmatic answer.

**WILLIAM YOUNG J:**
Whereas the plaintiffs say it's a rebuild.

**MR CAMPBELL QC:**
Yes, and I'm sorry that my answer is so enigmatic but I haven't had anything to do with the carriage of the underlying substantive proceeding. So…

**GLAZEBROOK J:**
Would your junior counsel be able to answer the question if it is one that people want the answer to? Not immediately.

**WILLIAM YOUNG J:**
Perhaps after the adjournment.

**GLAZEBROOK J:**
Sorry, that would be an awful thing to do to you.

**MR CAMPBELL QC:**
I'll address you after the adjournment on that, Your Honours.

So this second issue, whether or not the condition can be satisfied or fulfilled by the assignees, the first point is that we acknowledge that the insurance contract talks about you, which is a term defined as the Barlows, restoring your home but it's commonplace for a contract to express a condition by reference to the original party to that contract without any reference to assignees and that *British Waggon* case is an example of that. So this has never been thought to stand in the way of what's essentially vicarious performance and the *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 (HL) case, although that doesn't deal with vicarious performance or satisfaction of a condition, it's just concerned with really pure assignment of benefits, again in that case the benefit was

expressed to be payable to the or provided to the named party but neither the Court of Appeal nor the House of Lords saw that as standing in the way of the benefit being capable of being assigned and the House of Lords said that one effectively read the contract as if the references to the named party included references to assignees.

So the main point upon which IAG relies and the Court of Appeal relies we say is actually a neutral point, the fact the contract refers to "you" restoring the home. We also say, and this is at paragraph 64, that there are a number of – if you look at the insuring clause, rather the "amounts you can claim" clause as whole, there are signals in there that IAG is indifferent as to who it pays and as to who incurs the cost because those clauses don't require you, the insured, to actually incur the costs of restoration.

**WILLIAM YOUNG J:**
What page is this?

**MR CAMPBELL QC:**
Page 67 of the casebook.

So it says that "we will pay the cost of restoring". It doesn't say "we will pay the costs that you incur in restoring".

**GLAZEBROOK J:**
Well, who else would be incurring them?

**WILLIAM YOUNG J:**
Maybe the insurer.

**MR CAMPBELL QC:**
The insurer, Sir?

**WILLIAM YOUNG J:**
Yes.

**MR CAMPBELL QC:**

Possibly by –

**GLAZEBROOK J:**

Well, if the insurer takes over the rebuild, yes, but I mean in any sense you'd be incurring them if you're restoring your home whether you get it done by whether you do it yourself in which case you wouldn't be incurring labour or get someone else to do it in which case you would be incurring labour so you'd probably be a bit silly to do it yourself if you've got an insurer standing behind you.

**MR CAMPBELL QC:**

Well, you could have an assignee incur the costs or a friend or relative.

**GLAZEBROOK J:**

No, but that's the whole question here, whether you can have an assignee incur the cost. Do you mean under a long-term agreement for sale and purchase of some sort?

**MR CAMPBELL QC:**

It could be under that sort of agreement, something such as –

**WILLIAM YOUNG J:**

Or the *Brkich & Brkich Enterprises Ltd v American Home Assurance Co* (1995) 127 DLR (4th) 115 (BCCA) sort of arrangement.

**MR CAMPBELL QC:**

Sorry, Sir?

**WILLIAM YOUNG J:**

Or the *Brkich* sort of arrangement where the vendor puts in place the reinstatement costs, the reinstatement, and then in the middle of that process sells the building and assigns the policy, assigns the right to payment.

**MR CAMPBELL QC:**

Yes. You could –

**GLAZEBROOK J:**

Although presumably the same issue – you mean has actually, so has actually completed it?

**WILLIAM YOUNG J:**

Yes, well, in that case there it's only one.

**MR CAMPBELL QC:**

It was actually the original insured, Sir.

**WILLIAM YOUNG J:**

Was it?

**MR CAMPBELL QC:**

Yes, but it still – the point of that case is that the policy required the original insured to effect reinstatement just as this policy requires you to restore the home and the British Columbia Court of Appeal said that the insured had effected reinstatement by entering into those arrangements.

It's just as relevant here because what it's concerned with is identifying what rights the original insured had and, of course, that's one of the questions that this Court has to address because once we know what rights the Barlows had then we know what they can, we're able to assign to the assignees or to the appellants.

**WILLIAM YOUNG J:**

I see, sorry, sorry, yes. It hadn't been an assignment. But presumably it would've been – an assignment would have worked in *Brkich*?

**MR CAMPBELL QC:**
Well, given that the Court of Appeal concluded that the arrangements that the insured had set up were sufficient to have effected the repairs, then they could –

**WILLIAM YOUNG J:**
The repairs. The condition was satisfied.

**MR CAMPBELL QC:**
– then they could have simply, had they assigned the replacement benefit, then the assignee would have been in the same position.

So under the amounts you can claim, the clauses also go on to allow for claiming architects' fees, surveyors' fees, and again these are not expressed as things or amounts that the insured has to incur. Again, I'm – so these, if you like, are equally neutral as to whether or not the condition can be satisfied by an assignee. But if they're neutral then one should be falling back on the general position that unless it matters to the counter-party, here IAG, who actually fulfils the condition then it should be able to be satisfied or satisfied vicariously, and the idea of what I've called sometimes vicarious performance, although satisfaction is better than performance or more appropriate, is really reinforced by the fact that the policy can't mean what it literally appears to mean, that it doesn't require the insureds to restore the home. They are going to engage or arrange for somebody to do that.

So those are the key reasons that we say, firstly, that the loss had already occurred, it didn't depend upon and simply arise once restoration costs were incurred and, secondly, why we say that the condition does not have to be fulfilled by the original insureds.

Perhaps one more point to note. Reading my learned friend's submissions, if we go back to the moral hazard point that obviously IAG has relied on, if this was such a concern then it's rather surprising that the policy allows the benefit of this section to be extended to a purchaser who IAG has no control over

who that purchaser might be, and this is leaving to one side the interpretation of that particular condition which I'll come to in a moment.

**O'REGAN J:**
Sorry, are you on clause 2 now?

**MR CAMPBELL QC:**
Not yet.

**WILLIAM YOUNG J:**
Just adverting to it?

**MR CAMPBELL QC:**
Just the fact that even on IAG's interpretation of condition 2 a purchaser is going to be entitled to the benefit of the insurance they say if there's damage occurring between contract and settlement in my submission undermines IAG's claim that moral hazard is a strong concern and that they shouldn't be forced to have to deal with somebody who they haven't entered into the contract with because that purchaser, if the damage occurs between contract and settlement, that's the purchaser who IAG is ultimately going to have to deal with and determine or agree the scope of reinstatement, and they will have had no control over who that person might be. So it's –

**O'REGAN J:**
It's a reasonably limited moral hazard if, if IAG is right about the limited duration of that cover though. It's only going to be while the contract is hovering in limbo between contract signing and settlement, isn't it?

**MR CAMPBELL QC:**
That's correct, Sir, but their point as I understand it is that, well, they make a number of moral hazard points, I think, but in this context it is that they shouldn't have to deal with as part of the claims process somebody who is going to be more difficult, perhaps more litigious, than the person to whom they originally sold the insurance. I have to say that, firstly, that assumes that

they carefully choose their original insureds in the first place. That might have been true 150 years ago. This is a BNZ policy, no doubt sold through the bank, not quite over the counter. That doesn't really happen any more. But that sort of selection of the original insured, you know, is this person going to press hard for their entitlements, with respect, is never going to occur but, in any event, as I say, they seem disinterested at least in respect of the potential purchaser.

**ELLEN FRANCE J:**

But in relation to that, isn't that covered by the Insurance Law Reform Act 1985? Doesn't that limit the ability to contract out? Your point relating to clause 2.

**MR CAMPBELL QC:**

Sorry…

**ELLEN FRANCE J:**

Because the Act says that this section applies, "Subject to subsection (5), shall have effect notwithstanding any provision to the contrary in any…policy of insurance," et cetera, and subsection (5) is dealing with arrangements that the purchaser and vendor make. So unless I'm misreading that, I'm not sure if…

**MR CAMPBELL QC:**

So your point is that this is going to be foist upon or thrust upon IAG in any event?

**ELLEN FRANCE J:**

Well, that's what I understand the section says.

**MR CAMPBELL QC:**

Yes, although the – I acknowledge that's a fair point, Your Honour, but condition 2 does go beyond this section to some extent. So it's expressed a

little more broadly than the provision but I do acknowledge that to some extent it's forced upon IAG by the statute.

**GLAZEBROOK J:**
I suppose under the statute they may be able to limit replacement possibly, if in fact their argument is right that you can't. So they may actually even be able to say that in that period of…

**WILLIAM YOUNG J:**
That statute does apply to rights to reinstate. It does cover a right to reinstate.

**GLAZEBROOK J:**
Does it say you have to assign that too? Sorry, I wasn't sure about that. Maybe?

**WILLIAM YOUNG J:**
"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" –

**GLAZEBROOK J:**
Okay, so it does, yes.

**MR CAMPBELL QC:**
The other point that I'd make about moral hazard really in response to IAG's submissions on this, in relation to reinstatement insurance the relevant moral hazard that we're talking about arises from the nature of the insurance itself rather than from the particular insured, and that's been recognised in a lot of the cases, including I think in the *Skyward* judgment. So what I mean by that is that by providing new-for-old cover the insurance is providing the potential for the insured to be in a better position than they were before, in other words to profit, and again I think that's exactly how it's put in the *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352 judgment by this Court. So it's the nature of the insurance that creates that

additional moral hazard. The way in which that is controlled is by conditioning the right to that replacement benefit on the costs actually being incurred. So it's not a concern with the particular characteristics of the insured or indeed of the party who, if we're right, as assignee might reinstate or restore the home. It's simply concerned with ensuring that the payment is not made unless restoration on a new-for-old basis takes place.

Now Your Honours, unless you have further questions on that primary submission I will move to condition 2.

**O'REGAN J:**

Can I just ask, apart from the argument you've just made to us, is there anything that should lead us to a view that the *Bryant* decision shouldn't be allowed to stand? I'm sure Mr Ring is going to say "well, we wrote the policy against a legal background where we knew that's what the legal position was, and as a matter of certainty, and so on, the Court shouldn't be changing the law unless there's a good reason to do that". I mean, is there any, for example, is there commentary on *Bryant* that would indicate that it was wrong or are there overseas precedents which would indicate that New Zealand law is out of step with other countries' laws?

**MR CAMPBELL QC:**

Thank you, Sir, yes, I will address that. My learned friend hasn't yet said that they wrote the policy on the assumption that *Bryant* was correct. I'm sure he will now say that.

**O'REGAN J:**

I think he probably would've anyway.

**MR CAMPBELL QC:**

And he hasn't said that yet below either. Well, yes, I should deal with *Bryant* as we have quite extensively in our written submissions so, firstly, if I can summarise why we say *Bryant* was, with respect, wrongly decided and then I'll touch briefly upon other authorities.

So we address this from paragraph 80 onwards. So first we say the issue before the Court of Appeal in *Bryant* was really the application of the general law of assignment to the insurance context but the Court didn't refer to any of that law, including some of its own previous decisions. Particularly there I am referring to the *C B Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 (CA) case which affirmed the approach of the House of Lords in the *Tolhurst* decision.

So we say that led to a number of errors. Firstly, the Court overlooked that whether a right is assignable depends upon whether the right's correlative obligation is personal. So the employment context, for instance, the right to the service of an employee is not assignable because the employee's obligation to serve is regarded as personal. The employee can't be made to serve some new employer. But what assignability doesn't depend upon is whether the right itself can in some way be characterised as personal, and so we say that the Court erred in focusing on the personal nature of the insured's right and so that relates to the Court there emphasising the personal nature of the right of indemnity.

That leads to the second point, that the Court reasoned that the right in that case to the excess of indemnity benefit was not assignable because it was personal to the insured. But, with respect, that proved too much because if that were right then the right to an ordinary indemnity wouldn't be assignable because one can equally say that's a personal right in the sense that the right to indemnity is going to depend upon the loss that the insured personally has suffered, and all that's meant by that is that you have to look at the particular circumstances of the insured in relation to the insured property, why were they holding it, were they planning to sell it, all those sorts of things, in order to determine what loss the insured suffered. But if that were true then you couldn't assign the right to be paid indemnity value and *Bryant* itself allowed that such a right could be assigned. So were the earlier New Zealand cases, *Holmes* and *Schneideman*, which we've referred to earlier in the written submissions.

Thirdly, the Court relied on the fact that the policy certificate named the vendors as the insureds and the policy didn't widen that definition, but one comes across that, as I said earlier, in most contracts but, of course, most contracts are able to be assigned. This has never stood in the way of allowing the assignment of rights.

And next we say the particular issue for the Court was whether the purchasers as assignees could satisfy the condition upon which the excess of indemnity entitlement was payable, the same issue that we have here, and that depended, we say, on whether it made a difference to the insurer whether the condition was satisfied by the insured as opposed to an assignee, but the Court didn't address the extent to which an assignee is able to satisfy conditions. So no consideration of cases such as *British Waggon v Lea*, admittedly not an insurance case but that actually identifies what the relevant question is, which is does it make any difference to the, in this case to the insurer, whether the home is restored by the original policyholder or by an assignee?

Second error, we say, is that the Court placed much weight on *Castellain v Preston* (1883) 11 QBD 380 (CA). Now we acknowledge that is, of course, a classic insurance law decision but it's just a vivid illustration that an insured's right to payment depends upon the particular circumstances of the insured. In that particular case the insured ended up being paid effectively by the purchaser who couldn't resist settlement on the ground that the building had been destroyed by fire in the meantime. Now in that case by then the insurer had already paid indemnity to the insured and the case was about the insurer recovering or recouping that indemnity payment, but exactly the same result would have occurred if it had been a claim by the vendor against the insured for the indemnity and the insurer was resisting that payment.

So it is, as I say, a vivid illustration that you have to look into all the circumstances of the insured to determine what rights they have. But it doesn't tell us anything about whether or not those rights are assignable.

And then the Court said that assignability, and this is probably the key reason that the Court of Appeal gave, runs counter to a principle of insurance law from which this Court would not be justified in departing and the Court viewed that as involving a "wrenching" departure from that principle, and we say two things. Firstly, that assumes wrongly that there was an inconsistency between assignability and principle of personal indemnity and we say that's wrong because if there was an inconsistency then rights of indemnity, rights to an indemnity payment or an indemnity value payment, could never be assigned, and it also suggests that the principle of personal indemnity is immutable.

**GLAZEBROOK J:**

Can I just check why you say they could never be assigned? That's because, in fact, the insured would not have suffered loss, in fact? Because unlike – well, is that what the point is or was that some other point?

**MR CAMPBELL QC:**

No, I'm making a different point. What I'm saying is that if there was, as the Court thought, an inconsistency between assignability and the principle of personal indemnity then you would expect that the right to an indemnity value payment could not even be assigned because that right is equally a personal right in the sense that it depends on what loss the insured personally has suffered.

**WILLIAM YOUNG J:**

The sort of point you're making if you look at page 67 of the case is that someone can kick up almost as much a fuss about an indemnity pay-out as they can about a reinstatement pay-out.

**MR CAMPBELL QC:**

Thank you, Sir, I think I did make that point below but it seems to have fallen by the wayside and I agree and there are, I suppose, *Prattley* –

**GLAZEBROOK J:**
What page were you – page?

**WILLIAM YOUNG J:**
Page 67.

**GLAZEBROOK J:**
Of the policy? Yes, exactly.

**MR CAMPBELL QC:**
As witness *Prattley*.

**WILLIAM YOUNG J:**
Yes.

**MR CAMPBELL QC:**
It is a slightly more complicated dispute but to some extent a dispute about, given that they acknowledged they hadn't bought the reinstatement cover, it was a dispute about what the policy meant and what it therefore entitled them to.

**WILLIAM YOUNG J:**
Yes, I see it, *Prattley*, yes. Yes, but before we get to clause 2, the overseas cases, is *Brkich* the best sort of source of or summary of them?

**MR CAMPBELL QC:**
Yes. I'm not aware of any cases from Australia or England dealing with this issue. The – and you – one can see that in the texts that IAG has put before the Court, the Australian texts when they refer to the proposition that the Court of Appeal relied on in *Bryant* the only authority they give is *Bryant* and that's the same with the English texts. I'm not sure that the English ones are actually before the Court but again there's no reference to any other authority than *Bryant*, and I'll address Your Honours on the authorities referred to in the

*Brkich* case which referred to about five United States cases, some of which favour us, some of which favour IAG. I acknowledge that, of course.

**WILLIAM YOUNG J:**
The drift is perhaps slightly in favour of IAG.

**MR CAMPBELL QC:**
Not sure about that, Sir.

So the second, well, 84.2, the principle of indemnity is not immutable as this Court's recognised both in, I've cited the *Skyward* decision but it's true also, it was also recognised in the *Prattley* decision at paragraph 46 of this Court's judgment which said that reinstatement policies provide for recovery unconstrained by the indemnity principle. So *Prattley* is in IAG's bundle of authorities.

From 87 we say that even if the Court wasn't minded to say that *Bryant* was wrongly decided, this particular insurance contract is distinguishable from that that was before *Bryant*. So I've summarised at 87.1, 2, 3 and 4 the particular parts of the *Bryant* policy that the Court of Appeal relied on. It is quite clear from the Court of Appeal's judgment in *Bryant*, and I do wish to make this quite clear, that the Court ultimately made its decision based in part on the wording of the insurance policy before it.

So notwithstanding that it referred to the underlying or fundamental principle of indemnity, the Court also paid attention to the terms of the policy, and we say that the terms here are different and we've set out the differences really by comparing paragraphs 87 to 88. Clause 1(a) of this policy is different from the excess of indemnity clause. It doesn't say that IAG will "indemnify you". It doesn't even say we will pay "you". I acknowledge that ordinarily that is what is going to be contemplated. It doesn't refer to the actual incurred cost. In clauses 2 and 5 under the heading "The amounts you can claim", again it doesn't say that IAG will pay "you".

The note that appears at the bottom of the relevant paragraphs again is expressed in the passive voice which tends to indicate that it's unimportant to IAG who restores the home, and the IAG policy doesn't contain a clause quite as emphatic as special condition (ii) of the *Bryant* policy which said if the insured was unable or unwilling to effect reinstatement the insurer was under no liability in respect of this item of insurance. Now I appreciate that that's the reading that IAG wants to bring to bear on this policy but it's not as emphatic as in *Bryant*, and then there's the inclusion of condition 2 regardless of how it is interpreted.

**WILLIAM YOUNG J:**
Alright, we'll take the break now.

**MR CAMPBELL QC:**
Thank you, Sir.

**COURT ADJOURNS: 11.32 AM**

**COURT RESUMES: 11.46 AM**

**MR CAMPBELL QC:**
Your Honours, I've spoken to Mr Moss. My understanding is that both EQC and IAG in the substantive dispute take the view that the $64,000-odd that EQC has paid is sufficient to indemnify the, or was sufficient to indemnify, the Barlows for the loss that they suffered. So, as is usual, there is a dispute about what the entitlements are. In any event, this – but IAG also raised the point that the appellants were mere assignees and therefore could not recover anything or couldn't recover the replacement benefit in any event and for whatever reason this was – the parties decided that a separate question should be raised for the determination of the Court. As should be apparent from the leave submissions there are many, many other proceedings where the same issue's been raised either by IAG or sometimes by some other insurers.

Now I was going to turn to the *Brkich* case and just take you through the United States authorities that are summarised there. These are discussed from paragraph 30 onwards in the Court of Appeal's judgment. So this is at tab 3 of the appellant's bundle of authorities.

So paragraph 30 provides the full citations for the cases that are then discussed. The first one, a New Jersey case, *Ruter v Northwestern Fire & Marine Insurance Co* 72 NJ Super 467, 178 A 2d 640 (1962) discussed from paragraph 31, that was not a case of assignment, so similar to *Brkich* but the insured was nonetheless held entitled to recover when the purchaser reinstated the damaged building. As part of the sale the insured had agreed to accept a mortgage from the purchaser to allow the purchase moneys to be applied to the reconstruction but the reconstruction was carried out by the purchaser. So although that's not an assignment case, like *Brkich* it identifies what rights the original insured had and therefore what rights could have been assigned had there been an assignment.

The next case, *Machson v Wausau Underwriters Insurance Co* No 85C-FE-103 (Del, 26 July 1986), discussed from paragraph 33, a Delaware decision. Again, like *Brkich* and like *Ruter*, not an assignment case but one where the insured made arrangements for the premises, the insured premises, to be restored or reinstated in that case by an incoming tenant, and the Supreme Court of Delaware held that that amounted to – well, there the policy required, you'll see at the top of the next page, page 126 of the report, the policy said "The company shall not be liable under this endorsement for any loss unless and until the damaged or destroyed property is actually repaired or replaced by the insured with due diligence and dispatch", and the Court found that effectively the insured had replaced or repaired the property through the arrangements that were entered into with the tenant and therefore that the insured was entitled to recover the new-for-old costs and again we would say, well, that supports, even though it's not an assignment case, that identifies or clarifies that the condition can be fulfilled vicariously, in that case by a tenant, in the previous case, *Ruter*, by a purchaser.

Then contrasting cases –

**GLAZEBROOK J:**
Although still on behalf of in those cases because there wasn't an assignment the owners or the insured presumably.

**MR CAMPBELL QC:**
Not in the – it's easy to see that in the second of those cases where the tenant reinstated.

**GLAZEBROOK J:**
Yes.

**MR CAMPBELL QC:**
The tenant didn't do so as a result of, or wasn't expressed to be doing that on behalf of, but, as the Court said, had the tenant not reinstated and had the insured carried out the reinstatement itself then one would have expected the lease to have provided for a higher rent to be paid, for instance. So as a matter of economics the Court regarded it as making no difference. That's less clear from the former case, the *Ruter* case, where there's just a mortgage which makes it easier for the purchaser to effect reinstatement.

Then *Paluszek v Safeco Insurance Co of America* 517 NE 2d 565 (Ill App Ct, 1987) from paragraph 36, an Illinois decision. Again, no assignment, and in that case the insured was unable to recover the replacement benefit because the Court found that the – because the insured had not incurred the reinstatement cost themselves and they distinguished the *Ruter* case because they said that in the *Ruter* case the purchaser would apply the entire purchase price towards the erection of a building on the premises. Unlike the present case, in *Ruter* that precluded the insured from making a profit on the sale and collection of the insurance proceeds.

With respect, whether a profit is made is going to depend on the arrangements between the insured and the purchaser. So it entirely depends

upon whether or not or how much the purchaser is prepared to pay for the property and when one has an assignment case how much the purchaser is prepared to pay for the assignment, and I make that point because in such cases if there is any profit being made by anybody it's going to depend on those arrangements rather than on the profit being thrust upon, if you like, the insurer.

Then in the *Athena Restaurant Inc v Sheffield Insurance Co* 681 F Supp 561 (ND Ill, 1988) case, again an Illinois decision, unsurprisingly, it's a District Court decision and the Court followed the *Paluszek* decision which was an appellate decision and much the same situation, no assignment, insured unable to recover in respect of the replacement costs notwithstanding the purchaser incurred them.

And then finally, I think, *Tiffin Avenue Investors v Midwestern Indemnity Co* No 5-85-22 (D Ohio, 29 July 1986) from paragraph 42, this is the one case that is closest to this one and, unsurprisingly, IAG relies on it because there there was an assignment. The trial Judge rejected the assignee's claim for the replacement benefit on two bases. One was that the reinstatement wasn't in accordance with the policy and the other was that the plaintiff was merely an assignee, and you will see how the appellate court dealt with those two arguments at the top of page 129 of the report.

Firstly, they said the appellant's argument that the trial Court erred in construing paragraph 6 to require appellant to construct an identical structure is correct. So the part of the decision that relied on the reinstatement standard being exceeded was reversed, but the Court went on, "This error does not prejudice appellant since it was the insured, First Findlay, which must repair or replace the damaged property with due diligence and dispatch under paragraph three and then its assignee, Tiffin, could recover the lesser of three amounts in paragraph six."

So that's the really one-line reason why the appellate court are saying that the, analogously to the case before this Court, that the Barlows, as the original

insureds, were the ones who had to satisfy the condition. If that happened then the assignees could recover but the assignees themselves could not satisfy the condition and we say, well, that doesn't engage with the question which we say is most important or most relevant and that is whether vicarious satisfaction of the condition is available under the contract and that depends in large part on whether it makes any difference to IAG who satisfies the condition.

And then, of course, *Brkich* itself, the decision ultimately is that if you look down at paragraph 57 of the judgment, page 132, they noted that the relevant clause does not expressly require the insureds to expend replacement costs themselves. What it required was that the insured effect replacement, and the Court ultimately concluded that the insured had effected replacement and you will see from paragraph 63 through to 68 the Court also deals with the argument by the insurer in that case that allowing the plaintiff to recover would leave them with a windfall profit, and in particular paragraph 68. I signalled earlier that *Brkich* supported the view that the loss occurs at the time of damage, not later when the costs are incurred. You'll see in paragraph 68 from the third line, "They", that's the insured, "obtained, and paid for, insurance from the insurer for the amount by which the hotel building had been 'depreciated', as well as for its actual market value. The loss, including the depreciated value, crystallized when the fire occurred. The loss was to be valued", or I would say quantified or ascertained, "in accordance with the policy requirements that the insureds effect replacement, and upon expenditure of the costs of replacement."

So given the United States decisions themselves and the –

**ARNOLD J:**

Just before you leave, I'm sorry, I don't want to interrupt your flow, but one of the points that Mr Ring makes about *Brkich* is that in that case there was no indemnity clause, no cash value, and the Judge deals with that at 59 and following and does accept that that is a factor to take account of in interpreting

that contract. Now here, of course, we do have the two options, so what do you say about that?

**MR CAMPBELL QC:**

It's difficult to understand why that makes any difference because ultimately the question is whether, two questions, one, when – did the loss occur at the time of damage or is it delayed until the costs are incurred and, in my submission, that's not affected by whether or not there's also an indemnity value clause, and the other question is does it matter to the insurer whether it's the original insured or an assignee who reinstates or satisfied the condition, and again, in my submission, I don't see how that's affected by the absence or presence of an indemnity value clause because the answer to the question "Why does it matter?" depends upon examining issues about the sort of things that we were discussing earlier this morning. Does one take into account the potential for the assignee to be more difficult or to stand on their rights further? And again, the fact that there was no actual cash value or indemnity value clause in the *Brkich* policy doesn't in my view have any relevance to that. Had there been then that would have just been another instance where potentially there could have been a more difficult assignee but it's quite clear that the indemnity value or the actual cash value payment or entitlement could have been assigned.

**ARNOLD J:**

Okay, thank you.

**GLAZEBROOK J:**

Did you want to make a comment now we're here about the depreciation point that Mr Ring makes in relation to that passage?

**MR CAMPBELL QC:**

Well, I'm not sure that that has any bearing on how the Court should resolve this dispute in the following sense. It can be a helpful description of new-for-old cover to say that it covers the impact of depreciation or that it covers depreciation. But that's really just describing or explaining why the

cover has been or was developed. My learned friend's submissions say that it's quite inapt or inaccurate. I don't agree with that. The way that it's put in, I think, the *Skyward* case by this Court is that it covers the impact of depreciation and I'd emphasise the impact because the impact of depreciation when the damage occurs is that the insured inevitably is going to be having to spend – he's going to have to be reinstating or rebuilding on a new-for-old basis and therefore putting back something that was better than the depreciated state immediately before the damage, and it's not really about whether all of that depreciation occurred while the insured owned the property. It's just explaining that, as I say, the impact of the depreciation is to thrust that additional cost upon the insured and it is against that impact that new-for-old cover was essentially developed.

I also would refer to the extract from *Colinvaux* which is in IAG's bundle at tab 4 and it's at the end of that extract that the authors address the *Bryant* decision, so the last two pages, and the authors summarise what that case decides in the second paragraph beginning, "This case does not decide that the proceeds of a policy are not assignable, and indeed the fact that there was recovery under the indemnity part of the policy shows that that was not the position. The case, rather, turns on the fact that payment was conditional on rebuilding by the assured, and in the absence of rebuilding then there was no recovery." The authors then go on in that paragraph to say that there are considerations in favour of this ruling and they refer to the fact that an insurance contract is personal. They first refer to there being numerous authorities recognising that the assured's right to recover reinstatement costs can by policy wording be made conditional upon, firstly, the assured incurring liability and, secondly, upon doing so with reasonable despatch. That's just reflecting the common practice. It's not reflecting any particular decisions that would be relevant to what's before the Court today.

They then say that "an insurance contract is personal, and an important aspect of the assured's duty to the insurer is the conduct of the assured in the claims process, in particular the duty not to make fraudulent claims", and they then go on to say, "Thus it is unsurprising that an insurer may properly have

objections to dealing in the claims – most importantly, the rebuilding – process with an assignee, and particularly one who is a commercial concern whose business includes the purchase of insurance claims for profit." In my submission that proves rather too much because one can say exactly the same thing about the claims process in relation to an indemnity value payment.

The authors then go on to note other considerations and they say "it may be questioned whether the wording in the *Bryant* policy was sufficiently robust to exclude assignment of the right to rebuild". The authors don't there note but they could and they probably have in mind the general principles relating to assignability that I didn't deal with orally but are covered in my written submissions and they say it's one thing to make payment conditional on actual reinstatement but quite another to hold that reinstatement has to be by the assured rather than by an assignee. "It is at least arguable that the purpose of the special condition in *Bryant* was to prevent the insurers having to pay a cash sum if that sum was not to be used for reinstatement purposes." And so they say any objection to the outcome in *Bryant* is not of principle, but rather of the question whether the wording used was sufficient to exclude reinstatement by an assignee, and then they note that even if *Bryant* is incorrect, the assignee is nevertheless to be treated as stepping into the shoes of the assured for the purposes of the making of a claim. So the authors are rather equivocal in their support of that particular decision.

Unless Your Honours have further questions, I will move to condition 2 which is very much the alternative submission by the appellants and it involves a very narrow issue of interpretation and that is whether properly interpreted the condition applies only, as the Courts below have held, to damage that occurs between the date of the contract and the date of settlement, and I don't think we need to discuss whether the date of the contract is the date of a conditional or an unconditional contract. That's not relevant for these purposes.

We say two things. Firstly, that the text of condition 2 itself clearly and unambiguously entitles a purchaser to the replacement benefit provided the purchaser restores the home. We say that proviso because condition 2 itself says that the purchaser must comply with all the conditions of the policy, and so the issue is whether a temporal limit has to be placed or should be placed on condition 2 as the Courts below held it should. That depends firstly and primarily on the use of the word "during" in the heading. The respondent has the *Farmers Mutual Group Association Ltd v Watson* (2001) 11 ANZ Insurance Cases ¶61-510 case on their side. I would say that that is a case that depends upon the particular contract before the Court in that case. Headings by their nature can't be exhaustive as to what follows. They merely summarise, and so it's a rare case indeed that a heading can make any difference to interpretation and a Court should be very reluctant to allow a heading to control the text that follows. We then explain why *Watson* was such a rare example. It involved a contract in which there was a clear attempt to categorise different risks under different bullet points and headings. We're not in that territory here.

Now we acknowledge that condition 2 has a temporal limit in that it won't operate until there is a contract for sale and purchase but we say that the damage does not have to occur after the contract. The condition is much more broadly expressed. The purchaser shall be entitled to the benefit of this section, the section being the home insurance section.

Just to reinforce that although I refer to condition 2 in relation to the primary submission, my reference there doesn't depend upon the outcome of this alternative submission because we say even if you accept the interpretation of condition 2 that was found in the Courts below it is still a signal in relation to the primary submission that IAG is indifferent as to who satisfied the condition that the home be restored.

Your Honours, unless you have further questions I think I should hand over to my learned friend.

**WILLIAM YOUNG J:**
Thank you.

**MR RING QC:**
Your Honours, I have a synopsis of what I'm hoping to get to say. Your Honours, the first page is a summary and the next two pages deal with the assignment issue, next three pages, and then finally a page on the condition.

Page 1, just setting out in four paragraphs what the overview issues are as far as we are concerned. Of course, the assignment is essentially was *Bryant* correctly decided and does it apply, and that breaks down into what are the controlling principles of insurance law and assignment law in this case and we say essentially three things under this heading that I'll expand on as we go through. First, that the replacement benefit indemnifies the insured as defined against the cost of reinstatement which is the amount that is in excess of the indemnity. So this is against the background that insurance is covering its financial loss and the financial loss that we are talking about in this context is not the indemnity loss. It is the cost of replacement loss, the betterment to the excess of indemnity.

And I think we're now, from what my learned friend was saying, in agreement that the effect of this cover is to eliminate the accumulated depreciation loss to the property and we would say any other defects like construction defects for that matter. That will or may well include the insured's own depreciation loss but that depreciation loss by the insured might be minimal depending on how long the insured has actually owned the property. However, the purpose of the cover is to indemnify the named insured against the unforeseen and unexpected elective cost incurred in obtaining a fully reinstated home that includes new-for-old betterment. My learned friend has said in this context that that loss is inevitable. But, of course, it isn't inevitable. It depends on the insured electing to reinstate the property and then proceeding to reinstate the property and to incur the costs, and we have a ready example of the lack of inevitability about that loss in this case. The Barlows have not suffered that loss. It is not inevitable for them.

**GLAZEBROOK J:**

At some stage will you deal with the contents insurance point? Not in this policy actually but – although to a degree in this policy because nothing needs to be done.

**MR RING QC:**

Well, yes, I'm happy to but I may need some assistance from you first in understanding exactly what the comparable point is.

**GLAZEBROOK J:**

Well, you say the loss is only incurred once they incur the cost of replacing the building but in contents insurance policies, well, at least not so much in this one but in one that is readily available on the Internet it says that you at – the insurer can require you to repair if it can be repaired, otherwise they give you a replacement or its cash equivalent. So consequently you haven't incurred anything whatsoever in respect of – with the cash equivalent because it's not tied at all to the replacement of the item, so in fact if the loss doesn't occur at the time of damage when does it occur?

**MR RING QC:**

Okay, can I deal with that in –

**GLAZEBROOK J:**

Yes, I'm not suggesting that you interrupt the flow at all. It's just that I did want to give you the opportunity to reply to that at some stage.

**MR RING QC:**

Thank you, Your Honour.

So the first point is what is the replacement benefit all about? What is its purpose and what is the loss that it indemnifies the insured for? The second is that as with any right to be indemnified under a fire policy, subject to the terms of the policy the replacement benefit indemnity is personal to the insured and, third, the assignee of a replacement benefit claim proceeds is

only an assignee of the right to receive the insured's indemnity payment if any and that is whatever debt is owed by the insured to the insurer pursuant to the replacement benefit. He or she is not an assignee of the insured's right to indemnity because of the right or because of the personal or the principle of personal indemnity and because of the requirement for the insured's consent to such an assignment.

And, essentially, there are in this insurance context, and in the context of insurance policy, there are only two types of assignment, and I've got a table further on in the submissions that elaborates on this, but there are only two types of assignment. There is an assignment of the right to be indemnified, and then there's an assignment of the proceeds of that claim.

The assignment of the right to be indemnified is subject to the principle of personal indemnity. It cannot be assigned without the insurer's consent. The assignment of the debt, that is what the insurer owes the insured by way of indemnity, that doesn't require the insurer's consent and that can be assigned. We accept, as has already been indicated, that whether it is the indemnity value payment or it is the replacement benefit payment, that can be assigned without the insurer's consent. That is the insured's loss that is being assigned, the insured's loss that has been converted into a debt owed by the insurer. There is a payment that is due or will be due by the insurer to the insured. That payment can be diverted in accordance with any other type of assignment to a third party. That is quite different from saying the right to be indemnified can be assigned. So it is no longer in that situation the insured's loss that is being assessed. It is the assignee's loss that is being assessed and once it is the assignee's loss you're not assigning the proceeds of the claim any more. You're assigning the right to be indemnified and that requires the insurer's consent. There is no middle ground. There is no third type of assignment, and we say that the assignment here is an assignment of the, in terms, an assignment of the claims benefit, whatever that turns out to be. If the insured is not the lawful recipient of a debt from the insurer then the assignee cannot recover that amount.

**ARNOLD J:**

It does rather suggest though, doesn't it, that you can structure these arrangements in a way that would satisfy your requirements that you've just outlined by some of the techniques we've seen in a Canadian case and so on?

**MR RING QC:**

Yes, that is possible but in *Brkich*, for example, the person who got the benefit of the replacement benefit proceeds was the original insured.

**ARNOLD J:**

Yes.

**MR RING QC:**

So the original, in *Brkich* it was the original insured who actually recovered the replacement benefit under the policy.

**ARNOLD J:**

But that's a result of the way you organise the contractual arrangements. It could've been done that way in this case.

**MR RING QC:**

I'm sure that there are many ways in which things can be structured but – and I would prefer to reserve my position on the ingenuity of conveyancers until I'm confronted with it in another case. In this case none of that happened. In this case the Barlows did not even elect to reinstate, let alone restore their house, let alone incur any costs, and I would prefer to concentrate on that factual situation which is exactly the *Bryant* factual situation as well as a number of the USA decisions.

**ARNOLD J:**

Trouble is some of the issues that you raise, for example, moral hazard and so on, may arise in these other situations which you might accept are perfectly appropriate structures given your analysis of how things work, and so if as a

Court you're trying to test and understand the validity of the arguments raised, isn't it legitimate to have a look at this question or how else could you do it and where does that leave the moral hazard argument?

**MR RING QC:**
Well, I think it's only partly a question of the moral hazard argument.

**ARNOLD J:**
Yes, I understand that.

**MR RING QC:**
It's also a question of contract.

**ARNOLD J:**
Yes, yes, sure.

**MR RING QC:**
And the fact is when we boil it down to its absolute bare essentials what is the bargain between the Barlows and IAG? That is all we're concerned with here. What did they bargain for? And Diamantina, the appellants here, they cannot get any more than what IAG and the Barlows bargained for which is essentially – I'm not ducking the question but I just prefer to deal with this contract and these circumstances because there may well be other cases that come along. We will have to address some other things.

**O'REGAN J:**
Well, you are though relying on principles of insurance law more generally.

**MR RING QC:**
Correct.

**O'REGAN J:**
So it's not just "what do the words of the contract say?".

**MR RING QC:**

Well, no –

**O'REGAN J:**

You are saying we have to construe those against the background of those principles and –

**MR RING QC:**

Absolutely. Yes. What I'm saying is that these are the controlling principles of insurance law and assignment law. Unless they have been modified by the terms of the contract between the Barlows and IAG, they're the ones that rule the outcome, and we say they haven't and, in fact, if anything, they have been reinforced.

So hence what we say in paragraph 2. Was *Bryant* correctly decided? We say yes, because it essentially it applied those principles. Is *Bryant* distinguishable? The answer is, we say, no, not on the facts or on the policy terms. And, finally, is the replacement benefit in the IAG policy personal to the Barlows and we say yes, because the principle of personal indemnity is expressly reflected by the terms of IAG's policy. There are only two alternatives, two relevant alternatives here, both referring to a named insured and his or her home and covering the universe of possibilities. If you restore the home, IAG will pay the restoration cost and you must fulfil all the terms of this policy, and you could add in there also the requirement to obtain IAG's prior consent as well to the incurring of any costs. That's condition 5(a) at page 64 of the case on appeal.

So because of those additions, this is a stronger case, we say, than *Bryant* on the terms of the policy. So the two alternatives are if you restore the home we'll pay the cost. If you don't restore the home we will only pay you indemnity value. Those are the only two possibilities that the policy envisages. It doesn't envisage a third possibility where some third party comes along and restores the home for its own benefit. It doesn't restore your home any more. It restores its home at that point.

So dealing first on page 2 with the nature and purpose of the replacement benefit, first to note in our submission the fire policy insures the insured and not the property. It provides an indemnity against the insured's own actual financial loss suffered as a result of physical damage to the building. What that loss is depends on the insured's personal circumstances at the time of the casualty and that is the essence of the principle of personal indemnity.

The policy, as is common, provides alternative indemnities. First there is the indemnity value payment and that arises in circumstances that the physical damage to the building causes an immediate diminution in value. The purpose and effect of the indemnity value payment is to indemnify the insured against this financial loss. The payment and the residual value of a damaged property makes the insured financially whole again and that is what we describe as restoring the insured's notional balance sheet reduced by the reduction in the value of the property.

So immediately before the fire or the earthquake, the insured's notional balance sheets shows a market value for this property as an asset. Immediately after the casualty, that notional value has been reduced by the amount of the damage. It doesn't matter at this point whether the property is going to be repaired or the property is going to be sold and the insured is going to take a reduction in value or crystallise the reduction in value. The insured asset position is reduced by the amount that of the financial loss that the insured has occurred. The indemnity value aspect of the insurance policy fills that gap. So immediately before the fire, insured has an asset. Immediately after the fire, insured has an asset worth less but the insured also has a right to receive from the insurer an indemnity payment which makes up that gap. Notional balance sheet restored.

Notional balance sheet restored. No reinstatement work has been done. Full reinstatement is not even on the horizon at this stage. This is the insurer notionally turning up in the ashes of the fire with a cheque book and saying, "What's it going to cost me to make this good for you right here, right now?"

Reinstatement, that's further down the track. The reinstatement benefit only arises if the insured elects to reinstate that physical damage. At that point the insured suffers when he or she incurs that cost a new-for-old loss or a new-for-old requirement. That's the excess of indemnity element, or to put it another way, the betterment cost, that, which would not otherwise be insured in the absence of the replacement benefit policy. If there was no replacement benefit element to the policy, the insured would incur, if he or she elected to reinstate, the cost of reinstatement but the insurer would be saying, "I am only reinstating to the value or to the equivalent condition that this property was immediately before the earthquake." So if you have an old building with the paint peeling off the walls and second-hand items, second-hand weatherboards or whatever, if we could get them this is what we would give you. If we can't get them, then if we have to give you new weatherboards you are going to owe us the betterment value of those new items. So the insured would be paying part of the cost of reinstatement, that is the amount that is required to limit the indemnity the insured receives to his actual, his or her actual financial loss.

The replacement benefit removes that problem for the insured. Its purpose and effect is to indemnify the insured against that elective expense and again I emphasise it is an elective expense. The insured does not have to reinstate and, as the Barlows have shown, some insureds don't. It is a choice to reinstate, and so it is an elective expense, and what is then indemnified is that elective expense if and when it is actually incurred, and either the insurer will reimburse those costs as the insured presents the invoices to the insurer or more often than not the insured with the insurer's consent and with a co-operative arrangement with the contractor simply has the contractor sending the bills to the insurer and the insurer pays them direct. But it doesn't matter which way. Either way the insured has incurred the actual cost in being out of pocket or the liability to pay which the insurer then satisfies.

The reinstatement benefit makes the insured financially whole again in respect of that cost. There is no loss to the insured unless and until the

insured incurs that cost or incurs that liability, and again, if I go back to my notional balance sheet for a moment and we fast forward from the moment of the fire where the notional balance sheet was made even by the indemnity payment, the notional balance sheet remains even. The insured elects to reinstate. The notional balance sheet does not change. The notional balance sheet only changes when the insured either signs a building contract in which he or she incurs a liability to pay or is actually out of pocket. At that stage there is a loss, a measurable loss, the amount of that out of pocket expense or the amount of that liability, and the replacement benefit then makes that balance sheet loss, and again that would be a loss that would be recorded on the balance sheet for the insured, on the notional balance sheet, the insurer's obligation to pay makes that loss whole again.

So very much we say, and I am at number 3 on page 2, these are the elective costs of – these are elective costs, or this is an elective cost indemnity but it is a true indemnity nonetheless against the insured's financial loss actually suffered. It reimburses the insured's actual expenditure or it discharges the insured's actual liability. It's an insurance against elective costs. That is not unusual. Elective costs insurance is well known and we've referred, Your Honours, in our submissions to defence costs and in particular there's a table that I've set out at paragraph 4.10, sorry, 4.11 and on to 4.12. There is a close analysis or a close analogy here. My learned friend suggested that there was a difference because an insured had to incur the costs to defend a liability claim but that's not so. Obviously, an insured who is facing a liability claim may want to incur the cost to defend it, but an insured, for example, who has gone out of business and does not care about being made bankrupt or whatever, is out of the country or for whatever reason does not have to incur the costs of defending a claim and may choose not to, in the same way as an insured who has suffered an indemnity loss by an insured event such as a fire or an earthquake, like the Barlows, may choose not to reinstate.

So the features of the two types of insurance benefit are closely aligned and there's probably one more that could be added to that list as well and that is the insured's prior consent. In both cases there is likely to be a requirement in

the policy, almost invariably there'll be a requirement in the policy that these costs are not incurred without obtaining the insurer's prior consent.

**WILLIAM YOUNG J:**
Well, that's not true of reinstatement, is it?

**MR RING QC:**
Yes, yes, it is, Your Honour. Para – condition 5(a) on page 8.64.

**WILLIAM YOUNG J:**
Sorry, what…

**MR RING QC:**
Page 64 of the booklet, policy conditions. "Unless we have agreed, you must not incur any expenses in connection with the claim."

**WILLIAM YOUNG J:**
That'll be liability, isn't it?

**MR RING QC:**
No. That's –

**WILLIAM YOUNG J:**
But the insurers can't say, "You can't" – "We won't let you reinstate your house."

**MR RING QC:**
Well, it can't be unreasonably withheld, but it requires the insurer's prior consent.

**WILLIAM YOUNG J:**
Maybe.

**GLAZEBROOK J:**

That reduces the moral hazard then, doesn't it, rather than increases it? If you say that you can actually control what the assignee does, then where's the moral hazard at all? You just do exactly what you would have done with the previous – the actual insured. That's subject to your argument, of course, that the policy requires it be the insured but…

**MR RING QC:**

I'm not saying that the moral hazard is completely eliminated by the interpretation or the principles that we are referring to. These principles simply reduce the moral hazard risk that is inherent in any event. So I'm certainly not suggesting that it is a complete answer to everything but it is part of the background in the sense that coming back to my two fundamental categories of assignment, the assignment of the right to be indemnified and the assignment of the debt owing to the insured, if any, the assignment of the right to be indemnified is subject to the principle of personal indemnity and that's 300 years of insurance history back to at least 1729 and those cases are referred to in the Court of Appeal judgment at I think paragraph 19.

**GLAZEBROOK J:**

Well, isn't the real question whether it is an assignment of the right to indemnity which you can't do without consent or whether it's an assignment of the proceeds but conditional on reinstatement, and that relates very much to when the loss actually incurred for the Barlows because if it incurred at the time of damage then there's a much stronger argument for it being able to be assigned and being conditional and that's where the normal contents proceeds comes in effectively in terms of when damage actually does occur.

**MR RING QC:**

I accept that, Your Honour. It is very much dependent on when the loss occurs because when you know, once you know when the loss occurs you're a long way, if not already there, as to who's actually incurred it. The Barlows – if the loss took place at the time of the casualty, it can only be the Barlows' loss because obviously the appellants weren't around at that stage, but if the

loss has not occurred then but has occurred later when the costs are incurred, it can only be the appellants' loss because the Barlows aren't around any more, and hence my submissions to separate the indemnity payment –

**GLAZEBROOK J:**

Well, that can only be in relation to this policy. It can't be just generally in relation to replacement policies that are worded differently then because if you have a replacement policy that is not conditional on replacement, which was the case with at least one of these policies that I saw, in fact two of them which were just standard – I think they were AA Mutual and somebody or other else, just at State Insurance or whatever's around, but standard policies, one of them the insurer had the right to say, well, we'll either pay you replacement or something or something. The insurer could choose. But nevertheless when the insurer chose to pay them the replacement value, they didn't have to replace because they could have a cash equivalent. So there was no incurrence of any expenditure as far as I could see in those policies required.

**MR RING QC:**

Well, I would prefer not to comment on policies that I haven't actually seen.

**GLAZEBROOK J:**

No, but what I'm saying to you is – well, you can have a look at them over the luncheon adjournment. Just have a look at a number of policies on the Net, but the actual point is you seem to be suggesting that the only loss you can ever suffer at the time of damage is the indemnity loss, even if you have just a replacement policy, and you seem to be suggesting that's a general principle rather than something related to this particular contract and, in fact, you almost have to because you're relying on general insurance law rather than just ordinary assignment law.

**MR RING QC:**

Well, the way I would put it, with respect, Your Honour, is that I'm relying on the general principles which we say emerge from the authorities leading up to

and including *Bryant* but that is subject to the terms of the particular policy which *Bryant* made clear and so the question really is whether in – if you're looking at a particular policy, not this one, and not *Bryant*, whether those principles have been carried into that particular policy.

**GLAZEBROOK J:**

Well, I suppose my difficulty is that the indemnity principle doesn't really fit with replacement policies unless you're losing – I mean you can make it fit in a sort of odd sort of way because you can say, well, what you're losing is a house that's liveable in and if you can only have it back to being liveable in by using new materials then in effect you've actually lost that and not just the value. So it's not a notional balance sheet issue. It's a sort of, well, an amenity issue in terms of your being able to live in that house.

**MR RING QC:**

Well, no, again, with respect, it is a financial issue because all insurance is all about financial loss.

**GLAZEBROOK J:**

No, no, no, I understand that. I'm just saying that in any sense unless you look at the amenity value you haven't lost any more than the indemnity value, and so replacement policies don't fit within the indemnity principle. Now they're relatively new, as I understand it, in insurance and so the indemnity policy, the indemnity principle, was in fact in relation to indemnity contracts, and not these odd things that are now actually commonplace, and probably weren't very commonplace at the time of *Bryant*.

**MR RING QC:**

Well, to give you a factual context or historical context, 1940s in New York was where replacement insurance first emerged. So I would suggest that it had a fairly good foothold by –

**GLAZEBROOK J:**

But not your 300 years that you were so eloquently indicating earlier.

**MR RING QC:**

Well, my 300 years was in relation to the principle of personal indemnity and a fire policy, and what I am more so strongly submitting to Your Honours is that although there have been dicta, including by this Court, that says that the principle of personal indemnity is a bit awkward in the context of a replacement benefit, what I am suggesting to Your Honours is that it depends on how you look at it and if you look at it as an elective cost indemnity it actually is not a bit awkward; it actually makes perfect sense. It is absolutely within the concept of indemnity and so absolutely within the concept of the principle of personal indemnity.

And that does bring us I think to the next point, that I've referred in paragraph 3 to the moral risk but I think we've already covered that and I just wanted to add a note if I may there to the *Colinvaux* reference that my learned friend took you to just to remind Your Honours that *Colinvaux* recognised the moral risk issue in relation to an assignee who was purchasing the property or taking the assignment in order to make a profit and that was appellants' authorities 23 at page 836 of the *Colinvaux* text.

But the next section that we're talking about, it is really this loss issue and I absolutely agree with Your Honour, Justice Glazebrook, this is at the heart of the issues in the case. The appellants' position is that this is insurance against the insured's risk of loss and we say that just cannot be right. You can't insure against a risk of loss. What you can insure against is an actual financial loss, and the relevant loss occurs when the insured actually incurs the costs, either actual expenditure or a liability to pay, and we compare that with the indemnity value loss which is incurred immediately, albeit notionally, the very minute that the property is no longer worth what it was one minute ago because of the fire or the earthquake. If no costs are actually incurred then no loss is suffered by the insured of a kind for which the replacement benefit is payable.

And this brings us to the point that we make in 5 that this is not an insurance against a depreciation loss suffered by the insured, and we dealt with that at

paragraphs 4.18 to 4.20 of our written submissions, and the first point to note, and an important point, in my respectful submission, is we know this isn't an insurance against depreciation loss because it says so. You are not insured for depreciation. Page 67, exclusion 1. Second, it's that confusion, in my respectful submission, between effect and purpose. The insured who buys an already existing home that's been up for five, 10, 15, 20 years, does not suffer the depreciation loss that has accrued in relation to that home before he or she acquires it if it subsequently burns down or is destroyed in an earthquake. Unless the property burns down the day the insured buys it, all – well, if the property burns down the day the insured buys it in the extreme example, there is no depreciation loss whatsoever for the insured. Could never be a depreciation loss. If the home has just been completed and the insured moves in and it then burns down, there is no depreciation loss for the insured to recover. What the insured is recovering then is the increased costs created by regulatory upgrades that are required because regulations said you get away with this at the time it was consented and now you need something else. The insurance will cover that. The replacement benefit will cover that. That is not a depreciation loss. That is an increased cost of rebuilding. If the insured had formed a fixed intention to sell the property including the home or redevelop the property by selling or demolishing it at the time that the fire or the earthquake happened, the insured's already decided to crystallise any depreciation loss and to abandon its recovery.

In all of those situations the insured is getting new-for-old and what the insured is getting is not only the new-for-old for the period that the insured has acquired or has owned the property but new-for-old going right back to when the property was first new, no matter how many owners you have to go back to get there.

So, with respect, it just cannot be right to say that the purpose of this cover is to protect and insure it against the depreciation loss.

So if you then ask the next question, when the house burns down, on the day the house burns down, that the insured has – well, let's say the insured has

just purchased it that day and the day that house burns down the insured's loss is the diminution in value between what that house was worth, what the insured paid for it, if he or she paid market value, and what it's now worth. The insured's notional balance sheet is made right by the indemnity payment available under the policy. The insured has not suffered at that point any loss that could be referable to the replacement benefit and the insured will not suffer any loss referable to the replacement benefit until further down the track when the election is made, when a building contract is entered into and the insured incurs a liability or when the insured starts paying for the cost of reinstatement and is out of pocket by that amount. That must be the first point in time when the insured has suffered a loss that is referable to the replacement benefit.

So the next question would be, okay, if that's what the insured's position is in terms of suffering a loss, an immediate indemnity value loss, and not yet suffering a replacement benefit loss, what happens when the insured assigns that replacement benefit? And here again the type of assignment we are talking about is an assignment of claim proceeds. The insured can't assign the right to be indemnified because the loss has already – if the loss has already happened, the insured can't assign the right to be indemnified and the insured will not be suffering a loss that needs to be indemnified if they've sold the property and they do not intend to reinstate.

And that necessarily draws the distinction between the two types of policies that are in the chart at page 2. So what is assigned? In the right to indemnity it's the right to receive indemnity against the assignee's own loss. The assignee acquires the right in respect of what might happen to the assignee compared with the assignment of the proceeds of a claim which is the right to payment from the insurer. That is the right to receive the proceeds of the insured's claim. The assignee acquires the right in respect of what might happen or has happened to the insured. The right to be indemnified must be assigned before the loss has occurred. The right to the proceeds of a claim can be assigned before or after a loss is incurred. For example, you might assign to a mortgagee the benefit of the claims proceeds of a policy in

advance. Commonly happens. Or after the loss occurred the example we gave in the submissions assigning the right to receive the replacement benefit proceeds to the contractor who's going to be carrying out the work to assure him or her that they will be paid.

The assignment of the policy or the right to indemnity is not the assignment of an existing debt but of a future debt that may become owing by the insurer direct to the assignee if and when the assignee suffers the indemnifiable loss as compared with the assignment of the proceeds of a claim which is either the existing debt payable by the insurer to the insured now or later, that's a legal assignment, or an agreement to assign an equitable assignment as the assignment of a future debt that may or may not become payable.

Who's the counterparty to the contract of insurance at that point? The assignment of the policy, the assignee becomes for all intents and purposes the insured. It's a novation, a true novation of the original insured to the assignee and the assignee then also, of course, becomes the loss payee under the policy.

Assignment of the proceeds of a claim. The assignor remains the only insured and the assignee simply becomes the loss payee of the assignor's loss.

**WILLIAM YOUNG J:**
Alright, we might take the break now.

**COURT ADJOURNS: 1.01 PM**

**COURT RESUMES: 2.15 PM**

**MR RING QC:**
Just before we go back to that table where I'm at the top of page 3 of the hand-up, I'd like to just take you to the assignment itself for a couple of minutes. If you turn to the case on appeal at page 101, really the essential

purpose of this is just to make it very clear that this is not an assignment of the right to be indemnified. This is an assignment by the Barlows of their payment entitlement from IAG and if we look at 2.1, that is the essential assignment clause, the insured assigns absolutely to the purchaser their right, title and interest in the benefits and the benefits are defined on the previous page at the bottom in 1.1 as all the Barlows' rights and remedies with respect to, in this case, the IAG claim and the IAG claim is defined in background clause D as the claim that they have made on IAG. So that would be a claim that did not include electing to reinstate.

**WILLIAM YOUNG J:**
How do we know that?

**MR RING QC:**
Well, because they haven't. They didn't elect to reinstate.

**WILLIAM YOUNG J:**
But mightn't they be claiming, "We want to reinstate but we don't want to do it until you confirm you're going to cover us"?

**MR RING QC:**
Well, there's no evidence of that.

**ARNOLD J:**
But just on that, if they had filed a claim and said, "We're intending to reinstate," and for whatever reason nothing happened for three years and then they did this deal, on your view it wouldn't make any difference?

**MR RING QC:**
No, it wouldn't. No, it wouldn't make any difference at all.

So it's the IAG claim including without limitation, at the top of page 1, the right to pursue the claims. That is the appellants' right to pursue the Barlows' claims and the proceeds of the claims, including repair or reinstatement of the

property. So the proceeds of the reinstatement benefit. And "claims" means the claims lodged by the insured with IAG for the damage.

So this is not an assignment of a right to be indemnified. This is not an assignment to the appellants that entitles them to recover their loss, whatever it is. It's only a right to recover whatever IAG owes the Barlows.

So what is the loss? That brings us back to the fundamental question, what is the loss that the Barlows have suffered, the payment for which has been assigned to the respondents and when did they suffer it? Or to put it another way, what does or will IAG owe the Barlows? So…

**WILLIAM YOUNG J:**
Is the question being they have a conditional obligation to pay the Barlows reinstatement costs if the Barlows reinstate?

**MR RING QC:**
Yes. But that is a contingent debt. It's not a present debt –

**WILLIAM YOUNG J:**
It's a conditional debt. Sorry, it's a chose in action that they had.

**MR RING QC:**
No, it's a contingent debt. It's a contingent debt that may or may not turn into an amount that is actually payable.

**WILLIAM YOUNG J:**
But there's no law that says that assignments are compliant or really accrued debts.

**MR RING QC:**
No, but the –

**WILLIAM YOUNG J:**

So one can as a general principle assign a chose in action. The question is Barlows did have a chose in action, a right to be paid reinstatement costs if they reinstate. The issue in the case is whether that chose in action is assignable or whether it's precluded by the principles of insurance law you're relying on.

**MR RING QC:**

There is a difference between debt that is currently payable or payable at a future time and a debt which is contingent, and –

**WILLIAM YOUNG J:**

Of course there is. But all are possibly subject to assignment.

**MR RING QC:**

Yes. But what we're talking about here then is an agreement to assign because that debt is not currently in existence.

**WILLIAM YOUNG J:**

Well, are we talking about a debt or a chose in action? If you can assign a chose in action, if that's the right way of looking at it then your distinctions are meaningless. The question is is a chose in action consisting of a conditional right to be paid subject to the insured doing something capable of being assigned to a third party who will do that thing that the insured was going to do?

**MR RING QC:**

Well, that analysis, with respect, only works if you are first accepting that the Barlows are the ones that have suffered a loss.

**WILLIAM YOUNG J:**

Well, it depends, and I agree it comes back to what you see as a loss. Is a loss, the loss of value in the house which is the indemnity which you've argued for or is it simply the fact that their house has been very badly

damaged and there are two different ways that they can address that damage?

**MR RING QC:**
Well…

**WILLIAM YOUNG J:**
I understand the argument. I think you're just splitting hairs over some of the words that is I suppose arousing my hostility.

**MR RING QC:**
Maybe. I feel like I'm being taken down a slippery slope, that's all, Your Honour, and I'm not sure that I want to even embark on the first step. The important proposition from our side of things is that the insurance indemnifies against a financial loss. So if we talk about the damage to the property, we're not insuring the damage to the property. We're insuring the insured against the financial loss that is consequent on the damage to the property and the financial loss the insured suffered when the property was damaged was the immediate loss of value in that property.

**WILLIAM YOUNG J:**
Yes, I genuinely understand that argument.

**MR RING QC:**
Yes. So going back to the table, the right to be indemnified. Whose loss is recovered? Well, the assignee's loss. The assignment of the proceeds. The loss recoverable is the insured's loss, the Barlows' loss in this case. The nature of the indemnity. Personal to the insured but the assignee then is the new insured so that's where the principle of personal indemnity bites. In relation to proceeds, the indemnity is personal to the insured, so the insured is still the person or entity that the principle of personal indemnity applies to. Is the insurer's consent required? Yes, to an assignment of the right to be indemnified unless there is a contrary policy provision. Insured consent's not required to the assignment of proceeds and it's evened out for whether the

insurer can enforce a policy provision prohibiting assignment of proceeds or requiring the insurer's consent, and that's the *Schneideman* case, amongst others. The rationale for requiring the insurer's consent, the assignment of the right to be indemnified, a new moral risk presented by the assignee, the risk of a false claim and of a genuine claim made falsely such as a false proof of loss incurred by the assignee.

On the other side it's still primarily the moral risk presented by the insured and similarly the risk of a false claim and of a genuine claim made falsely by the insured. And applying that to the right to the replacement benefit indemnity and the payment for it, the assignment of the right to be indemnified indemnifies the assignee against that elective cost. It's not just a procedural condition precedent but it's a separately indemnifiable loss. The insured's indemnity promise is novated to the assignee personally as the new insured and that is again still consistent with the principle of personal indemnity.

On the other side, the indemnity is to the insured against an elective cost but it isn't just a procedural condition precedent again but separately indemnifiable loss. The insurer's indemnity promise is still only made to the insured and so still consistent with the principle of personal indemnity. The insured for an assignment of the right to be indemnified can assign the right to the replacement benefit indemnity and the assignee can then recover his or her own loss suffered. If the assignee incurs the cost of reinstatement, the assignee has personally suffered that indemnifiable loss.

On the other side, the insured can assign the right to receive the indemnity payment but the assignee can only recover the insured's loss that has been suffered. If the insured doesn't incur the cost, the insured doesn't personally suffer the indemnifiable loss, and referred there to the *Tiffin Avenue Investors* case which is referred to in our submissions at 5.28 and 5.29, and the same analysis would apply to the indemnity payment as well.

And the question of a procedural condition precedent, that requirement can be performed by the assignee in the assignment of the right to be indemnified

because the assignee is the new insured, and if this was to be treated as a procedural condition precedent, which we say it isn't, whether the requirement has to be satisfied in relation to the assignment of proceeds depends on whether the personal nature of the condition, whether the condition is of a personal nature and on a proper interpretation of the policy, and there is an inferred common intention that the procedural conditions precedent that materially affect moral risk would be performed by the insured personally such as proof of loss and that is directly analogous, we say, to the replacement benefit and so even if this is treated as a condition precedent then the result would be the same, and one of the very useful authorities in support of that proposition is the article that's in our bundle of authorities by Mr Christopher Nicoll, "Judicial Regulation of Derivative Rights under Non-Marine Insurances", which is at tab 9, and that's again referred to in the paragraphs of the submissions that are referred to on the right-hand side there.

So was *Bryant* correctly decided? We say the answer to that is yes if held that the replacement benefit is personal to the insured as the terms of *Bryant*'s – of the primary policy provided. The policy provided that the replacement benefit was first payable only to the named or described insured and payable only if that insured incurred the costs of restoring the house and not payable if the insured didn't incur the costs of restoring the house. So a post-casualty assignment by the insured assignee, assignor to the assignee of the right to receive the proceeds of the replacement benefit without the insurer's consent could not, the Court of Appeal said in *Bryant*, retrospectively make the assignee an insured under the policy.

*Bryant* has stood, we say, the test of time for 30 years. As Your Honour, Justice O'Regan, said, insurers have been entitled to refer to and rely on it. But –

**O'REGAN J:**
Your prediction came true, Mr Campbell.

**GLAZEBROOK J:**

Yes, although it's not one of those that you're going to right pull or seize in a particular way, is it? Because I can understand that argument and also it's slightly odd if it's such an amazing principle and happened so often that there haven't been other cases on it.

**MR RING QC:**

Well, surely it works the other way, Your Honour.

**GLAZEBROOK J:**

Well, not really.

**MR RING QC:**

I mean the fact is it's so clear that there haven't been any other cases on it.

**GLAZEBROOK J:**

Well, not anywhere in England or Australia or Canada that anyone's found.

**MR RING QC:**

Well, yes –

**GLAZEBROOK J:**

I mean it be because it's just so self-evident but it may be that it doesn't come up very often.

**MR RING QC:**

Well, it's hard to imagine in the jurisdictions that we mostly turn to for assistance in the common law, in civil common law, that there have been absolutely no cases on this point and that this issue has never come up in any way and, if anything –

**GLAZEBROOK J:**

Well, I think that goes rather to the fact that it's not a particularly common issue that comes up although you could say perhaps it's so self-evident that nobody else has bothered to take the point.

**MR RING QC:**

Well, yes, I do, Your Honour, that's –

**GLAZEBROOK J:**

Is that what – so is that the submission?

**MR RING QC:**

Yes, I do absolutely, Your Honour.

**WILLIAM YOUNG J:**

It's most likely to arise in cases of general catastrophe like Christchurch, isn't it, because normally someone who wants to rebuild their house can get on with it, where, I'm not sure this is the problem in this case but where simply the number of cases meant that claims are not being settled very quickly.

**MR RING QC:**

Well, again, with respect, Your Honour, *Bryant* wasn't a catastrophe case. None of the USA cases were catastrophe cases.

**WILLIAM YOUNG J:**

No, no, I agree. It just seems it's likely to be a situation that will surface where there's been a general catastrophe or, sorry, it's more likely to surface.

**MR RING QC:**

Well, I would have said it was more likely to surface if people didn't read *Bryant*. That's the likelihood, because if you read *Bryant* then why would you do it?

**WILLIAM YOUNG J:**

Why would you? Well, you might do it because you just haven't got the – the insurance company has sat you out and you've got no choice but to sell. That's why you might do it.

**MR RING QC:**

Well, again, with respect, that's…

**WILLIAM YOUNG J:**
I'm not saying that's this case.

**MR RING QC:**
Well, it's not. I would have to take issue, Your Honour, with the suggestion that the insurance companies are sitting people out generally anyway. I mean that –

**WILLIAM YOUNG J:**
Well, you drive around Christchurch you see a few signs suggesting they are, but…

**MR RING QC:**
Well…

**GLAZEBROOK J:**
There may be other reasons for that but it might be that somebody just gets to the end of their financial means to continue. It might be a perfectly legitimate dispute with the insurance company but people just get to the end of their financial or their inner fortitude means to reinstate perhaps.

**MR RING QC:**
Well, that –

**GLAZEBROOK J:**
But the fact that you can get around it so clearly means that probably nobody's been relying on it anyway because it would be very silly for insurance companies to be setting policies on the basis of the miniscule number of assignees who might reinstate rather than other people when actually you can get around it anyway.

**MR RING QC:**
Well, I've reserved my position on the get-around-it proposition at the moment, Your Honour.

**GLAZEBROOK J:**

Well, you said earlier they could get around it. You're now saying they can't.

**MR RING QC:**

Well, I'm saying I don't know. When and if a case arises in which somebody has tried to get around it then obviously somebody will have a look at it if they think that's necessary.

**GLAZEBROOK J:**

Well, it's hard to say "get around" when you say, well, you have a long-term agreement for sale and purchase of property whereby somebody else takes the responsibility for reinstating it on your behalf and then it's sold at the end as a get-around that could in any way be impugned, I would have thought. In fact, some of the cases are effectively that.

**MR RING QC:**

Well, if you're talking in terms of a get-around that the insured incurs the obligation –

**GLAZEBROOK J:**

Yes, yes, exactly.

**MR RING QC:**

Well, then the policy is doing its job. If the insured is incurring –

**GLAZEBROOK J:**

Well, but they're incurring it in the sense that as soon as it's incurred it's sold on.

**MR RING QC:**

Well, that's not this case, of course.

**GLAZEBROOK J:**

No, no, it's not.

**MR RING QC:**

No. So as far as where *Bryant* has got to and what is its place in the international jurisprudence, we've got no cases in New Zealand other than *Doig v Tower Insurance Limited* [2017] NZHC 2997, [2018] 2 NZLR 677 that has supported *Bryant* and *Doig* is, of course, a High Court decision which was bound to follow it anyway. There are the articles or the article by Mr Nicol that I referred to that obviously endorses the principles in *Bryant*. There are the texts that are referred to in the submissions. That is Sutton in *Australian and New Zealand Insurance Law*. There's Kelly & Ball, New Zealand, *Principles of New Zealand Insurance Law*. *Colinvaux's Principles of New Zealand Insurance Law*. *Colinvaux* only questioned the policy interpretation aspect of *Bryant*. It didn't question, and in fact it specifically endorsed the principles in *Bryant* as being correct.

**ARNOLD J:**

Could I just ask you about that point, the proper interpretation? Are you referring to the statement on 836? So that's under tab 4 of your bundle.

**MR RING QC:**

Yes, Sir.

**ARNOLD J:**

At 835, rather. The point about it being open to question in the middle of the paragraph there: "a claim for property damage could validly be assigned without affecting the right of the assignee to recover the full amount of the claim, so that there was no deduction for the sum paid by the assignee. It might be thought that this aspect of the *Bryant* decision is open to question." I thought that was open to question because it was contrary to the fundamental indemnity principle, not on the basis – not – it wasn't referring to the interpretation of the particular contract, but have I got that wrong?

**MR RING QC:**

Well, I think what's being said there is it might be thought that this is open to question. However, if you were thinking that you would be wrong because it's important to bear in mind the overriding consideration.

**ARNOLD J:**

Right.

**MR RING QC:**

So I didn't read that as saying in fact they were questioning it. They were saying that you might think that but you need to –

**ARNOLD J:**

Okay, okay, I must admit I misinterpreted it. I thought that's what they were saying was open to question.

**MR RING QC:**

Well, I think the more important – perhaps there were the clearer passages at 836 and 837.

**ARNOLD J:**

Yes. No, I've read that.

**MR RING QC:**

Yes. The other cases, of course, that support *Bryant* are the USA ones that are referred to in *Brkich*. If Your Honours can turn to that in the same volume tab 3. Of the cases that are referred to in *Brkich*, in relation to *Machson* which starts at paragraph 33 on page 125, the Court at *Machson* is cited on the next page at the bottom of the page at paragraph 35 as saying, "This is not a case of the owner failing to replace the building, leaving the land vacant, nor is it a case where the owner has sold the property to a third party and has divested her relationship with the property. This owner continued as the same owner." So making it clear that had that been the case the position that the third party purchaser couldn't recover would have been clear.

In *Paluszek*, which is the next case referred to, paragraph 37 on that page 127, “defendant is not obligated to reimburse plaintiff for repairs to the dwelling performed and paid for by another party”. The contract of insurance is personal to the insured. Defendant does not insure the subsequent owner and therefore cannot reimburse plaintiff here for pecuniary loss suffered by the subsequent owner.

*Athena* is the next one that’s referred to at tab 40 and at 41 on the next page at line d, “Athena could have avoided the current predicament by making the necessary repairs within a reasonable time after the fire occurred but before selling the business.”

And then there’s *Tiffin* at 42 which is a case directly on point and wholly supports the *Bryant* position and what we’re submitting are the relevant legal principles.

So I don’t think it’s a fine margin there. I think basically it’s, with one or two exceptions, it’s pretty well every one that is saying that the principles are what we are saying they are.

So turning to page 4, is this case distinguishable from *Bryant* apart from condition 2 in the policy, and on the left-hand side there set out the indistinguishable facts, and on the right-hand side the indistinguishable policy terms, and as can be seen the essential facts are indistinguishable from *Bryant* in this case and the policy terms are not just indistinguishable but, if anything, this case is a stronger case than *Bryant* because of the additional provisions such as general condition 1 that requires that the insured must fulfil all the conditions.

And the only policy provision that I would just ask you to note in this context is at page 65 of the case on appeal. The general conditions, condition 13, “Personal representation. All policy conditions as far as applicable and with any necessary modifications apply to your legal personal representative.” So

again making it clear from an objective point of view that as far as the parties to this policy were concerned the common intention was that the insured meant the insured and not some third party as well.

So for those reasons, Your Honours, we say that *Bryant* applies and is indistinguishable and this case ought to be decided in the same way.

Turning to condition 2, as my learned friend has said, and we've said at 3.1 of the hand-up this morning on page 5, this is that point that's unrelated to the assignment. Set out at 3.2, the competing conditions. The respondents say that the condition applies if the purchaser has at any time entered into a contact of sale and purchase regardless of when the casualty occurs, and so there are those three different possibilities: casualty, contract, settlement; contract, casualty, settlement; contract, settlement, casualty. And IAG says it only applies for the middle sequence where the casualty intervenes between the contract for sale and purchase and the settlement of that contract. We support the High Court's reasons, as does the Court of Appeal. The heading is available as an aid to interpretation, but also the words must bear a recognised meaning and during the sale and purchase cannot reasonably mean whenever the sale and purchase, that is in between or after the sale and purchase or before. The obvious purpose of the condition is to replicate the effect of section 13 and the language reflects that purpose.

**ARNOLD J:**

To what extent in a plain English contract is it permissible to look at a section like section 13 or take it into account? I mean the insured is going to have no idea about it. The whole point of a plain English contract is to try to convey to the insured in simple, straightforward language what the terms of the policy are.

**MR RING QC:**

Well, again, the policy is not created in a vacuum. It's created against the background of section 13.

**ARNOLD J:**

No, no, I understand that, but how does that help when you're talking about the intention of the parties, one of whom is a layperson and not familiar with insurance?

**MR RING QC:**

Well, I think what the effect, with respect, of Your Honour's submission is that lay people should not be expected to know the law and so therefore the state of the statute, of the statutory consumer protection law ought not to factor in statutory, in contractual interpretation, but I think, with respect, it's not a matter of asking the specific question. It's a matter of saying there is an assumption that everybody knows the law and that consumer protection, that applies to consumer protection or as much as any other form of law and the policy has been drafted in that context, because otherwise you end up potentially with perverse results because…

**ARNOLD J:**

Well, not really if this provision had been drafted rather better, the text of clause 2 could have followed the sort of language of the section which is quite clear.

**MR RING QC:**

Well, the section uses the word "during" as well.

**ARNOLD J:**

I know.

**MR RING QC:**

But the body of –

**ARNOLD J:**

But this, I mean you've got to rely on the heading to get that in this clause. All I'm saying is it's a very simple piece of drafting to make clause 2 crystal clear.

**MR RING QC:**

Well, Your Honour, I think we made the point in the submissions that in hindsight, once you know what the point is that's being taken against your construction or against your wording, it's very easy to see how you could have fixed it.

**ARNOLD J:**

Yes, well, there is that book, very interesting book, *Everything is Obvious Once You Know the Answer*.

**MR RING QC:**

Well, yes, well, once you know somebody's raised the question. I mean I think the point – it's not only, it's not just that we're relying on section 13 as effectively the legal position whether this clause was in there or not but it's also the points that we're making at paragraph 3 there of that page that the proviso (b), for example, relating to other insurance, objectively it wouldn't be consistent with the common intention that condition 2 applies before the sale and purchase process commenced because before the contract is entered into the parties wouldn't reasonably expect that the purchaser would have other insurance. There would be no reason for the purchaser to obtain other insurance before they had a risk or an interest in the property, a legal or beneficial interest in the property.

**ARNOLD J:**

Well, I don't know that that answers it either because the clause would apply in some situations where a purchaser might have insurance, as where it occurred during the thing, but it doesn't, during, between contract and settlement, so it could apply there, but it doesn't mean to say it couldn't apply in other situations where no issue of additional insurance would arise.

**MR RING QC:**

Well, except that clause 2(b) couldn't apply in the before or the after, logically and as a matter of common sense, couldn't apply anywhere other than in the during phase.

**ARNOLD J:**

I know, I know, but even on the broader interpretation of this clause it would apply in the during period. So that 2(b) still has meaning, still has operation in some situations falling within the clause. So the fact that it's there doesn't tell you anything, it seems to me.

**MR RING QC:**

Well, with respect, Your Honour, the issue is whether this clause applies before, during and after.

**ARNOLD J:**

Yes.

**MR RING QC:**

And we say absolutely during.

**ARNOLD J:**

Yes.

**MR RING QC:**

And anybody who looked at this clause and wondered whether it applied before and/or after would look at 2(b) and say, "Well, 2(b) wouldn't make any sense if that was the case. 2(b) can only apply to 'during'."

**ARNOLD J:**

Okay, I hear it. I just don't agree. It talks about a claim under any other insurance that's been arranged. Well, if there isn't any or whatever the explanation for that may be, it just doesn't apply.

**ELLEN FRANCE J:**

I thought the idea was that you wouldn't have another policy in that situation.

**MR RING QC:**

But that's the – I'm sorry, am I not making that clear?

**ARNOLD J:**

You are but I just don't see that that…

**MR RING QC:**

Well, if a purchaser was looking at this and saying, let me think, will this apply to me in the period before I enter into an agreement for sale and purchase for this property, the answer would be no, it wouldn't, because you would never have any other insurance and so 2(b) would be irrelevant to you, and would it apply to me after the casualty has taken place and then I got other insurance? Well, no, it couldn't possibly because I'd never get any other insurance.

**ARNOLD J:**

No, I do understand the point.

**MR RING QC:**

And after settlement the parties would reasonably expect the purchaser to obtain their own coverage or obtain an assignment of the insured's policy with IAG's consent as did the Barlows and the appellants. They actually did do that and condition 18 is the evidence of that, and the parties wouldn't reasonably expect the coverage to be provided to a substituted insured contrary to the principle of personal indemnity and they wouldn't reasonably expect there to be free coverage after settlement to an unknown purchaser who could just take the benefit of the unexpired portion of the policy.

And again the point that has already been made, section 13 applies in this context and so the clause is not indicative of an insurer attitude. It just can't be contracted out of anyway.

So unless I can help Your Honours with anything further, those are our submissions.

**WILLIAM YOUNG J:**

Thank you, Mr Ring. Mr Campbell.

**MR CAMPBELL QC:**

I can be fairly brief, Your Honours. My learned friend's submissions, with respect, draw a number of distinctions which are rather fine ones without looking at the underlying reasons for those distinctions and whether they are either reflected in the policy itself or whether, the insurance policy, or whether they justify the result that IAG seeks to achieve.

So, for instance, my learned friend said that it was an important point that the insurance is not against the physical loss or damage but is against the financial loss suffered as a result of that loss or damage. That's a distinction that, firstly, I doubt any insured, commercial or residential, would appreciate when looking at the remains of their fire-damaged building or earthquake-damaged building, nor would they appreciate that distinction when reading this insurance policy which, as I indicated in my earlier submissions, says that the insured is insured for accidental and sudden loss of or damage to the home and then goes on to explain what IAG will pay in respect of that loss or damage, and although it is a small point the payment obligations of IAG under this policy, and this is not uncommon in residential insurance, include a fairly modest stress payment in the event of a total loss, and that's just one example of the policy not simply responding to financial losses. It is primarily concerned with responding to the physical loss or damage to the property.

IAG's position comes down, it seems to me, to characterising the right to the replacement benefit under this policy even after a loss has occurred as being a right to be indemnified against a loss that is yet to occur. Hence my learned friend's emphasis on the reinstatement costs being elective, the submission that the relevant loss does not occur until those costs are incurred. But if one thinks about the reasons that a right to be indemnified can't be assigned, and we acknowledge that, to use the 40-year-old driver versus the 20-year-old driver, the right to be indemnified against a loss that is yet to occur can't be assigned so as to allow the assignee to recover for her motor vehicle accident, for instance. If we think about why that right can't be assigned, it's because the insurer takes such care over the selection of the insured.

Particularly that's obvious with motor vehicle risks, less so with insurance over a home which is where the insurer is going to be far more concerned with the characteristics and location of the property. Nonetheless, there are still the particular risks raised by the insured him or herself. But once the loss has occurred, once there's been a car accident or a fire or an earthquake, virtually all of that disappears. The only thing that remains as far as that moral risk is concerned is that the insurer then has to deal with the insured and the claims process, and what we see then is that the sorts of concerns, all of the concerns that IAG has raised, arise just as much with the claims process in relation to the indemnity value payment as they do in relation to the replacement benefit, and so if one looks at why we have this rule against the underlying or core right to indemnity not being able to be assigned, those concerns disappear just as much with the right to replacement benefit as they do to a right to the indemnity value in respect of which it has long been held the insured is able to assign.

That's all I have in reply, Sir.

**WILLIAM YOUNG J:**

Very well, thank you, Mr Campbell. Thank you, Mr Ring. We'll take time to consider our decision and deliver it in writing in due course.

**COURT ADJOURNS: 2.58 PM**