IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 47/2018
[2019] NZSC 68

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

Hearing:	13 November 2018
Court:	William Young, Glazebrook, O'Regan, Ellen France and Arnold JJ
Counsel:	N R Campbell QC and J Moss for Appellants M G Ring QC and C M Laband for Respondent
Judgment:	3 July 2019

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellants are to pay costs of $25,000 and reasonable disbursements.**

REASONS

WILLIAM YOUNG, O'REGAN AND ELLEN FRANCE JJ
(Given by William Young J)

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Introduction

[1] The Christchurch home of Natalie Hall-Barlow and Matthew Barlow (the Barlows) was damaged in the Canterbury earthquakes on 4 September 2010 and 22 February 2011. The house was insured pursuant to a policy underwritten by IAG New Zealand Ltd (IAG) which provides:

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

[2] The Barlows claimed under the policy but, some three years later, with their claim still unresolved, they transferred the property to a company under their control, which then, several months later, sold the house to the appellants. As part of the latter transaction, the Barlows assigned to the appellants their rights in respect of their claim under the policy. IAG has been content for the case to be addressed on the basis that the transfer by the Barlows to their company can be ignored. It is common ground that the assignment to the appellants was effective to transfer to the appellants the Barlows' entitlement to an indemnity payment under cl 1(b), but the appellants claim also to be entitled to replacement costs under cl 1(a), should they restore the house. This claim is denied by IAG and is the subject matter of this appeal.

[3] The IAG policy is what we will refer to as a "standard replacement policy". It provides for the insured to elect between: (a) recovery of "replacement benefits", being the actual costs (on a new-for-old basis) of repair ("reinstatement") where the insured has reinstated the property; and (b) in default of reinstatement by the insured, an indemnity payment for the economic loss suffered by the insured (being the lesser of the diminution in value of the insured property and the cost of restoring it to its pre-event condition). As we understand it, replacement building insurance has usually been offered on this basis (although sometimes with the additional option of replacing the building on another site). There are, however, some North American cases involving policies which were not explicit as to reinstatement being effected by the insured – cases which we will discuss later in these reasons. As well, it appears that some insurers in New Zealand are now offering replacement policies under which recovery of replacement benefits is not dependent on reinstatement or replacement of the property.[1]

[4] The primary issue in this case is whether the right under cl 1(a) is assignable so as to entitle an assignee, in this case the appellants, to reinstate and be reimbursed. It is common ground that as of the date of assignment, the Barlows had not restored, and did not intend to restore, their home and had not incurred, and would not incur, any actual costs of reinstatement of their home.

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1 See Chris Boys "Rights and indemnity plus policies" [2019] NZLJ 99 at 102.

[5] Standing in the way of the appellants' claim is *Bryant v Primary Industries Insurance Co Ltd*, a decision of the Court of Appeal nearly 30 years ago.[2] *Bryant* provides powerful support for IAG's primary position that under a standard replacement policy, the entitlement to replacement benefits conditional on reinstatement by an insured (where such reinstatement has not occurred) cannot be assigned so as to give an assignee the right to reinstate and be reimbursed.

[6] There is a further issue whether, irrespective of *Bryant*, the appellants are entitled to reinstate and be reimbursed. This is because condition 2 of the policy provides:

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

The appellants say they are within the letter of this condition and that they are entitled under it to recover the replacement benefit provided by cl 1(a).

[7] The appellants' claims failed in the High Court and Court of Appeal. In the High Court, the primary focus of the argument was on condition 2 as the Judge considered that he was bound by *Bryant*.[3] He concluded that condition 2 applied only to situations where the insured event occurred between the entering into of an unconditional contract for sale of the insured item (with risk transferring to the purchaser) and settlement.[4] This is consistent with the legislative context provided by s 13 of the Insurance Law Reform Act 1985 which we discuss later. The Court of Appeal agreed with this interpretation of condition 2 and, as well, declined to overrule or distinguish *Bryant*.[5]

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

3 *Xu v IAG New Zealand Ltd* [2017] NZHC 1964, (2017) 19 ANZ Insurance Cases ¶62-160 (Nation J) at [32].

4 At [61]–[62].

5 *Xu v IAG New Zealand Ltd* [2018] NZCA 149, (2018) 20 ANZ Insurance Cases ¶62-177 (Asher, Clifford and Gilbert JJ) at [25] and [32].

Is the right under cl 1(a) to reinstate and be reimbursed for the cost assignable?

Bryant v Primary Industries Insurance Co Ltd

[8] *Bryant* concerned a standard replacement policy. A farm house had been insured for an indemnity value of $14,060 and an excess of indemnity sum (or replacement benefit) of $48,101. The policy provided that if the insured was unable or unwilling to effect reinstatement, the insurer would not be liable to pay the replacement benefit. The house was destroyed by fire shortly before the farm was sold at auction and the purchasers took an assignment of the insured's rights under the policy.

[9] The purchasers sued the insurer, claiming both the indemnity sum and the replacement benefit. The claim for the replacement benefit failed; this for reasons explained by Cooke P:[6]

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

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6 *Bryant*, above n 2, at 145.

> The principle of personal indemnity is illustrated by the leading case of *Castellain v Preston* (1883) 11 QBD 380. There damage by fire occurred before the completion of a contract of sale and purchase. The insurer paid out indemnity value, but when the purchaser completed (as a purchaser is bound to do in the absence of provision to the contrary in the contract of purchase) the insurer was held entitled to recover from the vendor insured the money paid out, for the vendor had suffered no loss. A simple modern illustration of the same principle is *Ziel Nominees Pty Ltd v VACC Insurance Co* (1975) 7 ALR 667, which shows that the result cannot be altered by the vendor's assigning the policy after the fire and directing the insurer to pay to the purchaser all moneys to which the vendor is entitled under the policy. The prudent purchaser avoids the result by insuring his own interest.
>
> The principle appears to be firmly settled in other jurisdictions, and we consider that to depart from it now in New Zealand would wrench the common law too far without solid justification.

[10] *Bryant* was decided on the basis that in the context of the policy wording:

(a) assignability of the right to the replacement benefit would infringe the indemnity principle, that is that insurance only covers losses suffered by the insured and thus will not cover a loss suffered by an assignee; and

(b) the entitlement to reinstate and be reimbursed for the cost was personal to the insured.

The general insurance law principles as to assignment

[11] It is trite that an entitlement to cover under an insurance policy in respect of future events is not generally assignable without the consent of the insurer.[7] We say "generally" because there are exceptions in respect of life and marine insurance.[8] There is also an exception provided for by s 13 of the already mentioned Insurance Law Reform Act for insured events which occur where risk to property has passed

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7 *Peters v General Accident Fire & Life Assurance Corp Ltd* [1938] 2 All ER 267 (CA) at 269–270; *Minucoe v The London and Liverpool and Globe Insurance Co Ltd* (1925) 36 CLR 513 at 524 per Starke J; *The Ocean Accident and Guarantee Corp v Williams* (1915) 34 NZLR 924 (SC) at 927–928; and *Schneideman v Barnett* [1951] NZLR 301 (SC) at 305–306. Because the consent of the insurer is required, this will be, strictly speaking, novation as opposed to assignment: see Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [17.1.9]; and Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [11.4.2(1)].

8 See s 51 of the Marine Insurance Act 1908; and s 43 of the Life Insurance Act 1908.

under an agreement for sale and purchase but the transaction has not been settled. We discuss s 13 later in these reasons.

[12] The reason for the general non-assignability of cover is that if the law were otherwise, insurers would be required to accept an assignee whom they might not have been prepared to insure.[9] Underpinning this notion is the ability of an insurer to evaluate the moral hazard of the particular insured when assessing the likelihood of loss at the time a contract of insurance is entered into.

[13] It is clear that, in the absence of express words to the contrary in the policy, an accrued right to payment under a policy can be assigned,[10] either at law under s 50 of the Property Law Act 2007 or in equity. In particular, it is well established that this extends to the right to payments calculated on an indemnity basis.[11] Such rights are in the nature of an existing debt. Accordingly, IAG accepts that such rights to indemnity as the Barlows had under cl 1(b) are now vested in the appellants. It is also accepted that if the Barlows had restored the house, they could have assigned what, by then, would have been their accrued right to payment under cl 1(a).

The indemnity principle

[14] Under the indemnity principle, policies are construed in such a way as to avoid insurers paying more than the insured has actually lost. In 1883, this principle was expressed in very strong terms by Brett LJ in *Castellain v Preston*:[12]

> In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the

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9 *Peters*, above n 7, at 269–270.

10 *Holmes v The National Fire and Marine Insurance Co of New Zealand* (1887) 5 NZLR SC 360 at 366; *Bank of Toronto v St Lawrence Fire Insurance Co* [1903] AC 59 (PC); *Schneideman*, above n 7, at 306; and *Delta Pty Ltd v Team Rock Anchors Pty Ltd* [2017] QSC 115, (2017) 19 ANZ Insurance Cases ¶62-144. There can be a pre-event equitable assignment, for instance where the insured asset is subject to a security which requires the insured/borrower to take out insurance. In this situation, there will be a charge on the proceeds of the policy in favour of the security holder by way of assignment: see *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 NZLR 1 (PC).

11 *Bryant*, above n 2, at 145. See also *Lloyd v Fleming* (1872) 7 LR QB 299 (QB) at 302–303.

12 *Castellain v Preston* (1883) 11 QBD 380 (CA) at 386.

> assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

[15] This principle is of continuing significance and application in the case of indemnity insurance, as is illustrated by the judgment of this Court in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*.[13] But it is not easy to apply the indemnity principle in the context of replacement insurance.[14] Replacement insurance was not available in 1883 and was thus not within the contemplation of Brett LJ in *Castellain*.[15]

Replacement insurance, the indemnity principle and moral hazard

[16] Replacement insurance first became widely available in the 1940s in the United States.[16] It addressed the problem that indemnity cover is usually insufficient to enable the owner of a damaged building to fund reinstatement to the extent necessary to produce the functional equivalent of the building as it was before the insured event. This is because it is seldom possible to reinstate a building on an old-for-old basis given the likely introduction of new building materials and techniques and possibly more stringent building standards.[17]

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13 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352 at [35]–[48].

14 See *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 129, [2015] 1 NZLR 40 at [54] where this Court noted that the indemnity principle "is a slightly awkward phrase in the context of a replacement policy".

15 There were clauses prior to 1883 which conferred upon the insurer the option of reinstating or repairing the insured item. However, those clauses only required reinstatement on an old-for-old basis, that is reinstatement to the pre-event condition of the property: see, for example, *The Times Fire Assurance Co v Hawke* (1858) 1 F & F 406, 175 ER 783 (Exch). Alternatively, the insurer would be entitled to deduct for betterment or to deduct from the assessed repair or reinstatement cost an allowance representing the depreciated condition of the insured property immediately before it was damaged: see *Prattley*, above n 13, at [41]. Those clauses are thus distinguishable from replacement benefits as defined in [3].

16 For an explanation of the history of replacement insurance: see *Higgins v Insurance Co of North America* 469 P 2d 766 (Or 1970) at 771–774; Leo John Jordan "What Price Rebuilding? A Look at Replacement Cost Policies" (1990) 19(3) Brief 17; and Jeffrey E Thomas and Brad M Wilson "The Indemnity Principle: From a Financial to a Functional Paradigm" (2005) 10 Journal of Risk Management and Insurance 30.

17 *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [24].

[17] Where reinstatement on a new-for-old basis occurs, the insured property is likely to be worth more than it was before the insured event.[18] The prospect of financial advantage resulting from an insured event disincentivises careful behaviour by an insured and, probably more importantly, may provide a motive for fraudulent behaviour. It thus creates a heightened moral hazard.[19]

[18] Replacement insurance is usually issued on the standard basis which we have outlined, that is, with the entitlement to replacement benefits expressed (with more or less particularity) to be subject to the insured reinstating the property and limited to the amount actually expended in replacing the property.[20] Two interconnected reasons have been advanced for the imposition of these conditions.

[19] The first is that the conditions enable replacement insurance to be reconciled with the indemnity principle. This was the point made by Cooke P in *Bryant* when he observed:[21]

> It is to be observed that the clause already quoted is consistent with the [indemnity] principle in that the insurer thereunder will indemnify the insured for the actual incurred cost to reinstate or replace.

[20] Although supported by other authority,[22] the conceptualisation of loss which underpins Cooke P's rationalisation of the indemnity principle and replacement insurance is contestable. The provision of indemnity makes good the extent to which the insured is worse off by reason of the insured event – that is, a loss represented by a diminution in total wealth. The loss recoverable under replacement insurance is of a different nature – that is, expenses incurred, reimbursement of which may result in

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18 For example, in *Tower Insurance Ltd*, above n 17, the house which was the subject of the claim had a pre-event value of around $500,000. The total of the payments already made and those likely to be required on the interpretation adopted by this Court was more than twice that amount.

19 See the early case of *Godin v London Assurance Co* (1758) 1 Burr 489, 97 ER 419 (KB) at 420 where Lord Mansfield stated: "Insurance was considered as an indemnity only, in case of a loss: and therefore the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses." See also Neil Campbell and Barnaby Stewart "Prevention of Performance in Replacement Cost Insurance — Preventing a Fictional Response" (2002) 10 Otago LR 229 at 231–232; and *Tower Insurance Ltd*, above n 17, at [26], n 13.

20 See *Tower Insurance Ltd*, above n 17, at [26] where it was noted that issuing replacement benefit policies on this basis is "commonplace".

21 *Bryant*, above n 2, at 145.

22 This rationalisation was adopted in *Medical Assurance Society of New Zealand Ltd v East* [2015] NZCA 250, (2015) 18 ANZ Insurance Cases ¶62-074 at [20]–[21] and [28]; and Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at [5.12].

a gain in the insured's net worth. It may thus be better to just accept that replacement insurance is an exception to the indemnity principle.[23]

[21] The second and more convincing reason – albeit interconnected because the indemnity principle addresses moral hazard – is that limiting liability to pay replacement benefits to reimburse reinstatement costs actually incurred by the insured limits (although it certainly does not eliminate) the moral hazard which replacement insurance creates.[24] This is explained by Thomas and Wilson, who, in discussing the emergence of replacement insurance, observed:[25]

> This shift means that insurers can no longer rely on the indemnity principle as a mechanism to address moral hazard. As a result, moral hazard needs to be addressed in its own right, especially as new products are [developed] that may provide even greater opportunities for insureds to benefit from their losses. Insurance providing replacement cost coverage has begun to address this concern. Most policies, for example, require that compensation be used to actually rebuild the property or be subject to a reduction for depreciation. It remains to be seen whether such measures are sufficient.

The personal nature of insurance

[22] Mr Ring QC for IAG argued that the personal nature of a contract for insurance is material to whether the cl 1(a) right to reinstate and be reimbursed is assignable.[26] He contended that, when it comes to reinstatement, an insurer will not be indifferent to the identity of the person making the election to reinstate; albeit that he necessarily accepted that the insurer is sufficiently indifferent to the identity of the person making an indemnity claim as to not preclude assignment.

[23] There may be circumstances – for instance in the case of a new building – where there may be no practical difference between indemnity and replacement cover; this because the replacement benefit would reflect the cost of

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23 See the remarks in *Prattley*, above n 13, at [46] where this Court said: "We accept that it is open to the parties to an insurance contract to provide for recovery on a basis which is not constrained by the indemnity principle. Reinstatement and agreed value policies provide examples where this happens." This is consistent with this Court's earlier statement in *Tower Insurance Ltd*, above n 17, at [25], n 12 where it said "the applicability of the indemnity principle is subject to the wording of the policy under consideration". See also the cases cited below at [24].

24 *Brkich & Brkich Enterprises Ltd v American Home Assurance Co* (1995) 8 BCLR (3d) 1 (BCCA) at [29]; and *Tower Insurance Ltd*, above n 17, at [26].

25 Thomas and Wilson, above n 16, at 42–43.

26 See *Peters*, above n 7, at 270.

reinstating the building using new materials and the indemnity payment would be calculated by reference to the cost of the building, also constructed with new materials. And arguments in respect of indemnity cover can be quite difficult (as *Prattley* shows).[27] That said, a claim to replacement benefits will generally be more complex to assess than a claim for indemnity. There will likely be more interaction between the insurer and the insured, and thus greater scope, and incentive (because the amounts are likely to be larger), for deception and fraud. In that sense, there is force in Mr Ring's argument and it finds support in *Colinvaux's Law of Insurance in New Zealand*:[28]

> … 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. … Thus it is unsurprising that an insurer may properly have objections to dealing in the claims – most importantly, the rebuilding – process with an assignee … .

Non-standard replacement insurance

[24] Pausing at this point, it may be helpful to consider how the case might be decided if cl 1 had read:

> **The amounts that can be claimed**
>
> 1. If, following loss or damage
>
> (a) Your Home is restored, we will pay the cost of restoring it to a condition as nearly as possible equal to its condition when new using current materials and methods plus any extra costs that are necessary for the restoration to meet with the lawful requirements of Government or Local Bodies.
>
> (b) Your Home is not restored, we will pay the lesser of
>
> (i) the amount of the loss or damage, or
>
> (ii) estimated cost of restoring your Home as nearly as possible to the same condition it was in immediately before the loss or damage happened using current materials and methods.

There are a number of North American decisions concerning policies expressed in broadly this way, that is with reinstatement a pre-condition to recovering replacement

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27 *Prattley*, above n 13.
28 Merkin and Nicoll, above n 7, at [11.4.3(3)].

benefits but with no explicit requirement for such reinstatement to be effected by the insured. There are three, in particular, to which we will refer. They are *Ruter v Northwestern Fire and Marine Insurance Co*,[29] *Paluszek v Safeco Insurance Co of America*[30] and *Edgewood Manor Apartment Homes LLC v RSUI Indemnity Co*.[31]

[25] In each of these cases: (a) the plaintiff was the original insured; (b) the property had been sold "as is where is"; and (c) reinstatement was effected by the purchaser. In one of the cases (*Ruter*), the sale was made expressly on the basis that the purchaser was to reinstate the property, with the insured advancing back to the purchaser the purchase price, secured against the property, to facilitate this happening.[32] In all three cases, the insurers argued that it was implicit in the policies that reinstatement was to be effected by the insured.[33] This argument was accepted in one of the cases (*Paluszek*)[34] but rejected in the other two.[35] In the second, and more recent, of those two cases (*Edgewood Manor*), the United States Court of Appeals for the Seventh Circuit observed that:[36]

> If [the insurer] wanted to impose a prerequisite that the insured repair or replace the property itself, it could have written the conditions as follows:
>
> d. We will not pay on a replacement cost basis for any loss or damage:
>
> (1) Until you actually repair or replace the lost or damaged property;
>
> …

Edgewood Manor proceeded on the basis that, on the policy wording, reinstatement by the insured was not a prerequisite to an entitlement to replacement benefits. We have no difficulty in accepting that if the policy wording in this case can be construed in the same way, the appeal should be allowed; this despite the apparent inconsistency with the indemnity principle.

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29 *Ruter v Northwestern Fire and Marine Insurance Co* 178 A 2d 640 (NJ Super Ct App 1962).
30 *Paluszek v Safeco Insurance Co of America* 517 NE 2d 565 (Ill App Ct 1987).
31 *Edgewood Manor Apartment Homes LLC v RSUI Indemnity Co* 733 F 3d 761 (7th Cir 2013).
32 *Ruter*, above n 29, at 641.
33 *Ruter*, above n 29, at 642; *Paluszek*, above n 30, at 568–569; and *Edgewood Manor*, above n 31, at 774–775.
34 *Paluszek*, above n 30, at 569.
35 *Ruter*, above n 29, at 642–643; and *Edgewood Manor*, above n 31, at 775.
36 *Edgewood Manor*, above n 31, at 773–774. This echoes an earlier comment made by Jordan, above n 16, at 41 who, in discussing the effect of *Ruter*, said: "Standard policies, however, now require repair or replacement by the insured as a requirement to receiving replacement proceeds."

The terms of the policy

[26] Under the policy:

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

The Barlows are named as the "Policy Owner" in the schedule. The definition is extended by cl 13 of the policy to encompass "your legal personal representative". Unsurprisingly, there is no express inclusion of assignees.

[27] On the argument advanced for the appellants by Mr Campbell QC, "you", when used in cl 1(a) is to be read as meaning "you or your assignee", a meaning which it plainly does not generally bear in the rest of the policy. This suggests that, on the most obvious reading of the policy, restoration of the house by the insured is a precondition of any entitlement to replacement benefits. It is not, however, in itself a decisive consideration. Clause 1 is headed "The amounts you can claim" and it is common ground that an assignee also can claim indemnity entitlements under cl 1(b). And, as Mr Campbell observed, references in a contract to named parties taking certain steps are not necessarily inconsistent with those steps being taken by an assignee.

The assignment cases relied on by Mr Campbell

[28] Mr Campbell referred to a number of decisions in respect of assignment which he said supported the view that restoration of the house by an assignee would suffice to trigger liability under cl 1(a). A brief discussion of the cases he relied on and the legal context in which they were decided is thus necessary.

[29] Although it remains the law that only the benefit, and not the burden, of a contract can be assigned,[37] it is also customary to refer to "assignment of contracts".[38]

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[37] *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [85] and [90]–[92].

[38] See the comments of Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) at 103 where he said: "Although it is true that the phrase 'assign this contract' is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned."

Sometimes this is just a misnomer for novation.[39] It otherwise usually denotes a situation in which: (a) the assignor remains a party to the contract; and (b) the assignee performs the assignor's obligations and is entitled to the benefits of the contract from the other party ("obligee"). In practical, although not strictly legal, terms this means that a contract can be assigned where the assignor's obligations can be performed by the assignee.[40] Such an arrangement may be contemplated expressly by the contract, for instance where the parties are defined as including their assignees.[41] As well, vicarious performance is possible where the obligee is (or should be) indifferent to whether the obligations are performed by the assignor or a third party such as an assignee and where performance is in accordance with the terms of the contract.[42]

[30] Building on the cases which establish the principles just outlined, Mr Campbell maintained that a similar approach should apply to the reinstatement requirement because he maintained that IAG should be indifferent to whether this is effected by the Barlows or the appellants. In support of this argument, Mr Campbell relied on a number of assignment cases, two of which warrant consideration.

[31] In *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* both parties were defined as including their assignees.[43] The contract concerned the supply of milk by a dairy farmer to Hamilton Milk Producers. The supplier sold some of the land on which the milk was produced and assigned the milk supply contract to the purchaser. Hamilton Milk Producers claimed that the assignment was ineffective in the absence of its consent and, in particular, that it was not required to accept the milk which the assignee produced in discharge of the assignor's obligations. This argument was rejected by the Court of Appeal. McCarthy J explained why:[44]

> The parties have expressly provided for assignment. The contract for the supply of milk was not one drawn between [the vendor] and the Hamilton Milk Producers Company Limited. It was one drawn between [the vendor], his executors and his assigns on the one part and [Hamilton Milk Producers], its successors and assigns, on the other; and by virtue of this interpretation clause the performance of each obligation on the part of the supplier can be

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39 Merkin and Nicoll, above n 7, at [11.4.2(1)].
40 HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 1 at [19-082].
41 *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 (CA) at 579.
42 *The British Waggon Co v Lea* (1880) 5 QBD 149 (QB) at 154.
43 *CB Peacocke*, above n 41, at 579.
44 At 582.

> satisfied not only by the [vendor] personally but also through his executors or his assigns.

[32] The same result is arrived at where the nature of the contract contemplates that the assignor might subcontract out performance of its obligations. *The British Waggon Co v Lea*,[45] on which Mr Campbell particularly relied, was a case of this character. Lea & Co had hired 100 railway wagons from the Parkgate Waggon Company for a term of seven years. Under the rental agreements, Parkgate was required to keep the wagons in good repair and was to receive a yearly rent payable quarterly. Parkgate went into voluntary liquidation but was not dissolved. It sold the wagons to the British Waggon Company and assigned to British Waggon the benefit of the rental agreements including money which would become due under them. In return, British Waggon undertook to perform the repair obligations of Parkgate under the agreements.

[33] Lea & Co wished to treat the rental agreements as at an end. Its principal argument to this end was summarised by Cockburn CJ in this way:[46]

> The main contention on the part of [Lea & Co], … was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and [Lea & Co], to substitute a third party to do the work they had engaged to perform, nor were [Lea & Co] bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

This argument was dismissed for the following reasons:[47]

> Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim Qui facit per alium facit per se applies.
>
> In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with [Lea & Co]. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, [Lea & Co] cannot, in our opinion, be heard to say that the former company is not

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45 *The British Waggon Co*, above n 42.
46 At 151–152.
47 At 153–154.

> entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved [Lea & Co] from further performance on their part.

[34] On this analysis, the contract between Parkgate and Lea & Co remained in place, with Parkgate satisfying its repair obligations by subcontracting them out to British Waggon. The Court declined to express an opinion whether the same result would have been arrived at if Parkgate had been dissolved and thus unable to perform, even vicariously, its obligations under the rental agreements.[48]

[35] Both cases are consistent with the principle that only the benefits and not the burden of a contract may be assigned. In both cases, the assignors remained liable under the contracts. In *CB Peacocke*, the inclusion of "assigns" in the definitions of the parties made it clear that the obligee was required to accept supply by an assignee in discharge of the assignor's milk supply obligations. And in *The British Waggon*, it was open to the assignor/obligor (Parkgate) to subcontract out performance of its repair obligations. The fact that the assignors/obligors remain liable to the obligees is consistent with the position at common law whereby the assignee cannot be sued by the obligee for non-performance or defective performance of the obligations.[49]

[36] Analysed in this way, neither case is of assistance to the appellants. This is because, in both instances, the assignor was still in contract with the obligee and the assignee was acting, in a sense, on behalf of the assignor in discharging its obligations. In contradistinction, in the present case it could not sensibly be said that restoration of the house by the appellants would be on behalf of the Barlows. It is no longer their property, they have no continuing insurable interest and they are indifferent to whether it is restored.

Other authorities and commentary on the assignment of replacement benefits

[37] As we have noted, there are some North American cases in which arguments bearing some similarity to the case for the appellants have succeeded. These cases

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48 At 151.

49 Finn, Todd and Barber, above n 7, at [17.2.2], citing *Schmaling v Thomlinson* (1815) 6 Taunt 147, 128 ER 989 (Comm Pleas); Beale, above n 40, at [19-082]; and *Davies v Collins* [1945] 1 All ER 247 (CA) at 249.

involved non-standard replacement policies under which replacement benefits were available following reinstatement but with no express stipulation as to such reinstatement being effected by the insured. This is discussed above at [24]–[25]. The particular arguments which succeeded in those cases would not be tenable in respect of the IAG policy in issue; this given the specificity of cl 1(a) of the policy, which is expressed in substantially similar terms to those postulated in *Edgewood Manor* as being effective to limit an insurer's liability for replacement benefits to reimbursement of reinstatement costs incurred by the insured.

[38] Mr Campbell did, however, rely to some extent on North American decisions. Some of these concerned the non-standard wording identified above and, as will be apparent, we see such cases as distinguishable. Others, where reinstatement by the insured was required by the policy wording, turned on whether the insured had taken sufficient steps to satisfy this requirement even though reinstatement was directly brought about by the actions of third parties.[50] Only one of the cases cited involved a situation comparable to the present dispute and in particular: (a) a standard replacement policy; (b) an "as-is-where-is" sale; (c) an assignment of the policy to the purchaser; (d) actual or proposed reinstatement by the assignee-purchaser; and (e) a claim by the assignee-purchaser. This was *Tiffin Avenue Investors v Midwestern Indemnity Co* where the Court held that reinstatement by the insured was a prerequisite to recovery of the replacement benefit and therefore the assignee-purchaser was not entitled to the replacement benefit.[51]

[39] For the reasons just given, we do not see the North American cases as assisting the appellants. And as far as we are aware, there are no authorities from elsewhere which bear directly on the issue we must determine. The leading case is thus undoubtedly *Bryant*.

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50 See, for example, *Brkich*, above n 24.

51 *Tiffin Avenue Investors v Midwestern Indemnity Co* (Ohio Ct App, No 5-85-22, 28 May 1986).

[40] *Bryant* has been applied in New Zealand[52] and has been cited, generally without adverse comment, in a number of textbooks.[53] The only arguably adverse comment comes from *Colinvaux's Law of Insurance in New Zealand* which, in discussing *Bryant*, and after noting the arguments in favour of the approach taken, goes on to say:[54]

> As against those considerations, it may be questioned whether the wording in the *Bryant* policy was sufficiently robust to exclude assignment of the right to rebuild. It is one thing to make payment conditional on actual reinstatement or on an expressed intention to reinstate, but it is quite another to hold that the 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. Any objection to the outcome in *Bryant* is, therefore, not of principle, but rather of the question whether the wording used was sufficient to exclude reinstatement by an assignee.

[41] In a recent article, Chris Boys criticised the reasoning in *Bryant* (and in the Court of Appeal in this case) in relation to reliance on the indemnity principle – a criticism for which we have some sympathy.[55] He also did not see reinstatement by the insured personally (as opposed to by an assignee) as a pre-condition to the recovery of replacement benefits.[56] In this respect he was influenced by the common industry practice under which the insurer assumes responsibility for reinstatement.[57]

[42] Although the wording of the policy in issue in *Bryant* differed from the IAG policy we are concerned with, the essential and relevant features of both policies are the same:

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52 *Bryant* was recently applied without criticism in *Doig v Tower Insurance Ltd* [2017] NZHC 2997, [2018] 2 NZLR 677; and *Doig v Tower Insurance Ltd* [2019] NZCA 107.

53 Merkin and Nicoll, above n 7, at [11.4.3(2)] and [11.4.3(3)]; David Kelly and Michael Ball *Kelly and Ball: Principles of Insurance Law* (looseleaf ed, LexisNexis) at [6.0080.5]; Ian Enright and Robert Merkin *Sutton on Insurance Law* (4th ed, Thomson Reuters, Sydney, 2015) vol 1 at [11.770] and [11.820]; John Birds, Ben Lynch and Simon Paul *MacGillivray on Insurance Law* (14th ed, Sweet & Maxwell, London, 2018) at [22-009], n 41 and [22-017], n 69; Michalik and Boys, above n 22, at [11.2.10], n 55; Andrew McGee *The Modern Law of Insurance* (3rd ed, LexisNexis, London, 2011) at [47.10], n 2; and John Birds *Birds' Modern Insurance Law* (10th ed, Sweet & Maxwell, London, 2016) at [11.4], n 41.

54 Merkin and Nicoll, above n 7, at [11.4.3(3)].

55 Boys, above n 1, at 100–101.

56 At 101–102. Although he did acknowledge that the policies in this case and in *Bryant* "do support an inference that require the named insured to carry out the reinstatement": at 101.

57 At 101–102.

(a) The policies provided for replacement cover but in terms which were conditional on reinstatement by the insured. The wording of the policies is expressed with far more specificity than the non-standard wording used in the North American cases referred to above.

(b) Both provided that in the event that the insured did not reinstate the house, indemnity cover was available.

Entitlement to replacement benefits conditional on reinstatement by the Barlows: a conclusion

[43] There are policy considerations which support the appellants' argument. If replacement benefits are lost on sale of the insured property (which is the result contended for by IAG) insurers may seek to sit out claimants who are time constrained and/or lack the money to reinstate first and sue later.[58] In any event, in the case of natural disasters producing hundreds of thousands of claims, as was the case with the Canterbury earthquakes, insurers may have insufficient staff and other resources to deal reasonably promptly with claimants, thus exacerbating the pressure such claimants may be under. Such claimants may have little choice but to sell on an "as-is-where-is" basis and thus be unable practically to insist on their contractual entitlements.[59] A conclusion that the entitlement to reinstate and be reimbursed is assignable would produce better results from the point of view of claimants and might also promote speedier resolutions of claims by insurers.

[44] The approach proposed by Glazebrook and Arnold JJ proceeds on the basis that from the time when the house was damaged in the 2010 and 2011 earthquakes, the Barlows had a right to replacement benefits, albeit one that was conditional on

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58 The need for the insured party to have sufficient funds to meet the cost of reinstatement in order to fulfil the conditions of a replacement policy was a consideration noted in both *Bland v South British Insurance Co Ltd* (1990) 6 ANZ Insurance Cases ¶60-998 (HC); and Campbell and Stewart, above n 19, at 232–233.

59 This is not to say that unreasonable delays on the part of insurers are not able to be dealt with by the courts: see *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291 at [163]–[164]; *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262 at [202]; and *Kilduff v Tower Insurance Limited* [2018] NZHC 704 at [108] and [123]. As well, an insured who has not reinstated may insist on payment of the indemnity value of the loss which will provide at least some funds to commit to reinstatement: see the discussion in Henry Holderness "Replacement Cost Cover in Residential Property Insurance and the Canterbury Earthquakes 2010–2011" (2017) 23 NZBLQ 3 at 13.

reinstatement. They describe this as an accrued benefit. They note that a contract for the writing of a book is personal but that royalties can be assigned.[60] And they see no reason why "the already accrued right" to replacement benefits cannot also be assigned. In reaching this conclusion they conclude that the policy does not require that reinstatement be effected by the Barlows.

[45] It is on the last point – that the policy does not require that reinstatement be effected by the Barlows – that we part company. As will be apparent, we are of the view that on the most obvious reading of the policy, the entitlement to replacement benefits is conditional on reinstatement by the insured. Given the moral hazard associated with replacement insurance, insistence by insurers on reinstatement by the insured is at least rational. In North American cases, similarly worded policies have been so construed. And, most significantly, this was the approach taken in *Bryant*. While we have adopted a doubting approach to Cooke P's rationalisation of the indemnity principle and replacement insurance, we think *Bryant* is still correct to the extent that it stands for the proposition that the entitlement to replacement benefits conditional upon reinstatement by the insured cannot be assigned where no such reinstatement has occurred. Given that *Bryant* is the leading decision on the point and must have been influential as to the terms on which insurers have offered replacement insurance in New Zealand over the last three decades, it would be very destabilising to, in effect, overrule it, a consideration which we see as being of paramount significance. And, as indicated at [3] above, some insurers are now offering policies under which recovery of replacement benefits is not legally dependent on personal reinstatement by the insured, a development which may reflect either or both of market forces and an attempt to bring the wording of policies into line with common industry practice.[61]

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60 We see this a difficult analogy. An author commissioned to write a book and entitled to royalties on sales plainly cannot assign the contract so as to entitle an assignee to write the book. So the analogy assumes that the original author will write the book. Translating this to the current situation, the analogy is awkward, as there is no obligation to reinstate; rather reinstatement is a condition which must be satisfied before replacement benefits are payable. More generally, if reinstatement of the house by the Barlows is to be treated as the equivalent of the writing of the book by the author (that is, as something which must be effected by the assignor), the analogy does not support the appellants' claim. The case thus comes back to whether, on the true interpretation of the policy, replacement benefits are payable only if the Barlows reinstate the house. If this is the case, the appellants' case must fail.

61 See [41] above.

[46] Read against the background to which we have referred, and particularly given *Bryant*, we conclude that in this case, the entitlement to replacement benefits is conditional upon reinstatement having been effected by the Barlows. In light of this conclusion, the "right" of the Barlows to replacement benefits was highly contingent (as subject to a condition which might never be satisfied). In this context, we do not see the expression "already accrued right" as apt to describe the Barlows' conditional entitlement to replacements benefits.

Condition 2

[47] Despite the repetition, it is helpful to set out again the wording of condition 2 of the policy:

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

The "benefit of this Section" encompasses the entitlements of the Barlows under cl 1(a) and (b) of the policy.

[48] Mr Campbell's position is that the appellants are within the language of condition 2. A contract for sale and purchase was entered into, the appellants were the purchaser and, accordingly, they were "entitled to the benefit of this Section".

[49] In the absence of a provision to the contrary, equitable ownership and risk pass to the purchaser once there is an unconditional agreement for sale and purchase of land.[62] The vendor retains an insurable interest; this because of retained legal ownership and the contingency that the purchaser might not settle.[63] As well, because

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62 *Poole v Adams* (1864) 10 LT 287 (Ch); *Carly v Farrelly* [1975] 1 NZLR 356 (SC) at 362; and *Budhia v Wellington City Corp* [1976] 1 NZLR 766 (SC) at 768.

63 *Collingridge v The Royal Exchange Assurance Corp* (1877) 3 QBD 173 (QB) at 177; and *Carly*, above n 62, at 361.

equitable ownership and risk has passed, the purchaser also has an insurable interest.[64] What is important for present purposes is that vendor and purchaser both have insurable interests during – but only during – the period between the agreement for sale and purchase and settlement. We will refer to this as "the period of overlapping insurable interests".

[50] Prior to 1985, the position was that, in the absence of an agreement by the vendor's insurer to extend cover to the purchaser pending settlement, the purchaser could not obtain the benefit of the vendor's policy; this despite being obliged to settle in full for the property. If, for instance, the vendor on settlement assigned to the purchaser all rights under the policy, a claim by the purchaser would be met with the answer that the result of the settlement was that the vendor/assignor had suffered no loss and therefore had nothing to assign to the purchaser/assignee.

[51] In order to protect against this risk, the purchaser would have to obtain its own insurance or take an assignment of the vendor's policy which, as noted above, required the consent of the insurer and is therefore, strictly speaking, novation.[65] To resolve this problem, a clause was often included in the vendor's policy extending its coverage to the purchaser in the interim period between contract and conveyance.[66] As will be apparent, the effect of these mechanisms was to extend cover to a purchaser for events which occurred in the period of overlapping insurable interests.

[52] All of this, and possible solutions, was addressed in the 1983 report of the Contracts and Commercial Law Reform Committee.[67]

[53] In response to that report, Parliament enacted s 13 of the Insurance Law Reform Act 1985 in the same terms as recommended by the Contracts and Commercial Law Reform Committee.[68] The provision was subsequently amended by the

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64 *Milligan v Equitable Insurance Co* (1858) 16 UCQB 314.
65 See above at n 7.
66 Merkin and Nicoll, above n 7, at [9.1.11].
67 Contracts and Commercial Law Reform Committee *Aspects of Insurance Law (2): A Report by the Contracts and Commercial Law Reform Committee* (Government Printer, 19 May 1983).
68 At 48–51.

Property Law Act 2007, however it remains substantially the same as that enacted in 1985.[69] Subsections (1), (1A), (1B), and (1C) provide:

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

As will be apparent, those subsections provide for a statutory extension of the vendor's policy in the period between contract and conveyance to protect the purchaser from damage to the property. Subsections (2)–(5) provide more detail as to the cover provided to the purchaser and for the section to be excluded by express agreement by the vendor and purchaser. Cover is thus extended to purchasers for events which occur during the period of overlapping insurable interests but with the variation that this cover terminates if the purchaser obtains possession prior to settlement.

[54] The end point for the operation of condition 2 must be settlement. Upon settlement a vendor no longer has an insurable interest and any insurance policy in respect of it necessarily lapses.[70] So although this is not spelt out in the text of condition 2, we think it clear that it extended cover only in respect of events occurring

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69 Property Law Act 2007, s 364(1) and sch 7.

70 *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 146 LT 26 (HL) at 27; *Collingridge*, above n 63, at 177; and *The Ecclesiastical Commissioners for England v The Royal Exchange Assurance Corp* (1895) 11 TLR 476 (QB) at 476.

prior to settlement. This is consistent with the heading of the condition – "insurance during sale and purchase" – which might be thought to denote an event prior to settlement.[71]

[55] The more significant issue on this aspect of the case is whether condition 2 applies to events which occur prior to the entering into of the contract for sale and purchase. At least if the heading is put to one side, it is perhaps possible to construe the words "[w]here a contract of sale and purchase of your Home has been entered into" as identifying not the commencement of cover but rather as a definition of the circumstances in which a third party to the contract (that is the purchaser) would derive rights under it. This, in essence, is the argument advanced for the appellants. That said, the text of condition 2 and particularly the heading suggest that coverage for a purchaser is confined to events which occur after the entering into of the agreement, that is events which occur during the period of overlapping insurable interests.

[56] Mr Campbell's argument on this aspect of the case was rejected by both the High Court and Court of Appeal, with the latter Court explaining why in these terms:

> [32] … Self-evidently, any loss caused by an insured event prior to the date of the agreement will be sustained by the vendor, not the purchaser. It is only after an agreement for sale and purchase is entered into that the purchaser acquires an insurable interest in the property and becomes vulnerable to loss caused by an insured fortuity. We consider that the purpose of condition 2 is to provide cover to a purchaser for this risk. The text of the clause makes this clear by stating that the condition applies "where a contract of sale and purchase of your home has been entered into". The contract marks the commencement of the operation of the clause. Following settlement, the property is no longer "your home" and the vendor no longer has an insurable interest in it. This marks the end of the relevant period of insurance because the insured is no longer vulnerable to the insured risk after that date.
>
> [33] It is not necessary to rely on the heading to reach this interpretation but the heading supports it — "Insurance during sale and purchase". The headings in IAG's policy are not merely rough guides to interpretation and in many instances they form part of the text — for example, "You are insured for", "You are not insured for" and "The amount you can claim". We see no reason why the headings should be ignored when discerning the meaning of a particular clause. The headings form part of the document which should be considered as a whole when interpreting any part of it.

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[71] Headings in insurance policies are a legitimate aid to interpretation: see *Farmers Mutual Group Assoc Ltd v Watson* (2001) 11 ANZ Insurance Cases ¶61-510 (CA) at [34] and [48].

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

Save that we see s 13 as providing support for IAG's argument (in the sense of helping to identify the problem to which condition 2 is addressed), we broadly agree with the approach of the Court of Appeal.

[57] There is another consideration not mentioned by the Court of Appeal which we see as providing further support for the conclusion that the appellants cannot rely on condition 2. The earthquake damage which is the subject of the claim occurred during the currency of a policy which covered the period 1 April 2010 to 1 April 2011 and the agreement for sale and purchase was not entered into until 9 December 2014. Cover under the IAG policy is addressed to events which occur during its currency. Given this, it would be perhaps a little odd to treat condition 2 as engaged by events which occur some years after the policy expired.

Disposition

[58] The appeal is dismissed. The appellants are to pay costs of $25,000 and reasonable disbursements.

GLAZEBROOK AND ARNOLD JJ
(Given by Glazebrook J)

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Introduction

[59] IAG New Zealand Ltd (IAG) is the insurer of a house damaged in the Christchurch earthquakes of 4 September 2010 and 22 February 2011. Mr and Mrs Barlow were the owners of the house and the insured at the time it was damaged.

[60] The IAG policy (the Policy) provides cover for loss or damage to the house.[72] If restoration takes place, then IAG agrees to pay the "cost of restoring [the house] to a condition as nearly as possible equal to its condition when new" (replacement sum). If the house is not restored, IAG agrees to pay the lesser of the amount of loss or damage, or the estimated cost of restoration to the condition the house was in immediately before the loss or damage occurred (indemnity sum).

[61] The Barlows made a claim under the Policy on 27 April 2011. Their claim was still unresolved in 2014. By the process explained by the Court of Appeal,[73] the legal

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[72] The relevant Policy provisions are set out at [79]–[82] below.

[73] *Xu v IAG New Zealand Ltd* [2018] NZCA 149, (2018) 20 ANZ Insurance Cases ¶62-177 (Asher, Clifford and Gilbert JJ) [*Xu* (CA)] at [9].

ownership and possession of the property passed to the appellants on 9 February 2015. The rights related to the insurance claim were assigned absolutely to the appellants on the same day.[74]

[62] It is common ground that the appellants, as assignees, have the right to recover the indemnity sum. It was also accepted by both parties that, as at 9 February 2015, the Barlows had not restored the house and would not incur any of the actual costs of restoring it. The issue in the appeal is whether the appellants can restore the property and claim the replacement sum. IAG says that they cannot.

[63] We were told at the hearing that the indemnity value will not exceed the amount to be paid by the Earthquake Commission (EQC). If IAG is correct in its contention that the appellants cannot claim the replacement benefit, this means that IAG will in fact pay nothing under the Policy, despite having received premiums from the Barlows based on replacement cover.[75]

The Courts below

[64] The High Court[76] and the Court of Appeal found for IAG, in part because of a decision of the Court of Appeal on a similar issue in *Bryant v Primary Industries Insurance Co Ltd*.[77] The High Court was bound by *Bryant* and did not consider it could be distinguished.[78] The Court of Appeal refused to overrule *Bryant*.[79]

[65] The Courts below also rejected an argument that condition 2 of the Policy (set out at [82] below) conferred the ability to claim the replacement benefit directly on any purchaser.[80]

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74 The assignment was in accordance with s 50 of the Property Law Act 2007.

75 The Policy in this case excepted cover for loss or damage covered by the Earthquake Commission Act 1993: see below at [80].

76 *Xu v IAG New Zealand Ltd* [2017] NZHC 1964, (2017) 19 ANZ Insurance Cases ¶62-160 (Nation J) [*Xu* (HC)].

77 *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 (CA) (Cooke P, Somers and Wylie JJ).

78 *Xu* (HC), above n 76, at [32].

79 *Xu* (CA), above n 73, at [25].

80 *Xu* (HC), above n 76, at [52]; and *Xu* (CA), above n 73, at [32].

The submissions of the parties

The appellants' submissions

[66] For the appellants, Mr Campbell QC submits that the assignment in this case is of an already accrued benefit under the Policy and that the ordinary rules relating to assignment apply. In his submission, the fact that the Barlows will not restore the house does not, by itself, prevent the appellants from recovering the replacement sum from IAG.

[67] An assignee is able to fulfil a condition upon which an assigned right depends, except where it makes a difference to the counterparty (IAG) whether the condition is fulfilled by the original party or by an assignee. In this case Mr Campbell submits that it makes no difference to IAG whether or not the original insured or an assignee restores the home. The condition is not promissory and does not involve the provision of any value to IAG.

[68] Further, the Barlows suffered the loss as soon as the damage to the house occurred and the Policy does not prohibit assignment. It is submitted that *Bryant* is either wrongly decided or distinguishable.

[69] In the alternative, it is submitted that condition 2 of the Policy allows the appellants to restore the home and receive the replacement benefit.

IAG's submissions

[70] Mr Ring QC submits that this case is governed by two fundamental principles of insurance law:

(a) subject to the terms of the policy, any indemnity provided under a contract of fire insurance is personal to the insured; and

(b) an assignee can only recover the insured's loss and not his or her own loss.

[71] In this case the contention is that the replacement sum indemnifies the insured against the cost of restoration. In Mr Ring's submission, the insured only suffers this loss once the insured elects replacement and restoration costs are incurred (rather than when the damage caused by insured event actually happens).

[72] Further, on a proper interpretation of the Policy, the replacement benefit is personal to the Barlows as, unless the original insured actually incur costs of restoration, they do not actually suffer the loss for which the replacement benefit is payable. Mr Ring submits that the Policy definition of "the insured" and the reference to "you" in the operative policy provision are properly interpreted as making the replacement benefit personal to the Barlows.

[73] Mr Ring also submits that allowing assignment of a replacement benefit would increase moral hazard as an insurer might end up dealing with a person who may have acquired the property solely for the purpose of making a quick profit or who is dishonest or who is particularly difficult or litigious.

[74] It is submitted that *Bryant* was correctly decided and is not distinguishable and that condition 2 does not assist the appellants.

Issues

[75] The main issue in this appeal is whether:

(a) as the appellants contend, the assignment is of an already accrued benefit under the Policy, albeit a conditional benefit; or

(b) as IAG contends, the Policy insures the loss incurred for the restoration costs and therefore the right to the replacement benefit has not yet accrued under the Policy.

[76] If the appellants' contention is correct, this gives rise to the following issues:

(a) whether the replacement benefit can be assigned; and

(b) whether *Bryant* can be distinguished and, if not, whether it should be overruled.

[77] The final issue is whether condition 2 allows the appellants to claim the replacement benefit, irrespective of the answer to the question set out at [75].

[78] Before discussing these issues, we first set out the terms of the Policy in more detail and provide some history on replacement insurance.

Insurance Policy

[79] The Policy provides, with regard to "Home Insurance":

> **You are insured for**
>
> 1. Accidental and sudden loss of or damage to your Home.

[80] The Policy also provides insurance for gradual damage caused through water or waste disposal pipes in certain circumstances. There are then a number of matters "you are not insured for", including wear and tear and depreciation, and loss or damage covered by the Earthquake Commission Act 1993.

[81] The Policy then sets out the amounts able to be claimed in the event of loss or damage occurring:

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

[82] Condition 2 of the Policy provides:

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

Replacement insurance

[83] Thomas and Wilson trace the history of fire insurance and the 20th century movement towards replacement cover in the United States. They note that a strict, financial approach to indemnity stemmed from three concerns:[81] whether insurance was consistent with contemporary understanding of morality,[82] whether insurance would improperly tempt insureds to become involved in immoral conduct (moral hazard) and whether insurance was distinct from gambling.[83]

[84] The "moral hazard" concerns (including that insurance could encourage carelessness) led to requirements, such as in Massachusetts, of not allowing insurance to exceed 75 per cent of the value of the property.[84] The authors note that concerns about moral hazard were heightened by the inability of nineteenth century insurers to use risk data as a basis of underwriting. This meant that nineteenth century insurers relied on the "morality and individual character" of the insured to limit risk.[85]

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81 Jeffrey E Thomas and Brad M Wilson "The Indemnity Principle: From a Financial to a Functional Paradigm" (2005) 10 Journal of Risk Management and Insurance 30 at 33.

82 Similarly in the United Kingdom, the Victorian moral code and the perils of insuring/wagering against lives led to a prohibition of insurance without interest: see, for example, the preamble to the Life Assurance Act 1774 (UK) and the discussion in John Lowry, Philip Rawlings and Robert Merkin *Insurance Law: Doctrines and Principles* (3rd ed, Hart Publishing, Oxford, 2011) at 177.

83 Insurance law developed to require an "insurable interest" to ensure gambling and insurance were distinct: see Marine Insurance Act 1906 (UK), ss 4–5; and Marine Insurance Act 1908, ss 5–6. This requirement has since been abolished in non-marine indemnity cases by s 7 of the Insurance Law Reform Act 1985 and wagering is now restricted under the Gambling Act 2003: see Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [1.6].

84 Thomas and Wilson, above n 81, at 33–34.

85 At 34. This of course has now changed and methods to detect fraud, and in particular arson, have become more sophisticated.

[85] Adding to these concerns was a perception that insurance could be seen as gambling, hence a prohibition on insuring property a person had no interest in:[86]

> By limiting the recovery to precisely what the insured had prior to the loss, insurance policies avoided the temptation to cause a loss because such a loss would not convey a benefit. Similarly, reducing the amount of recovery to what the insured had prior to the loss distinguished insurance from gambling. The insured's recovery would not convey any extra benefit, the "winnings" that would be received from gambling.

[86] By the mid-twentieth century, replacement cover had become common in the United States. In New Zealand, new-for-old reinstatement provisions are now common in insurance contracts.[87] Such policies do not fit easily within a strictly financial view of indemnity.[88] This is because replacement on a new-for-old basis may well mean that a property is worth more reinstated than in its original state. As such, an insured could be seen as receiving more than the loss actually suffered and this can be seen as increasing the moral hazard concerns.[89]

[87] Replacement insurance arose, however, because a purely financial view of indemnity frequently caused an under-insurance issue. It is often not possible to restore on an "old-for-old" basis. New materials and building techniques may well be required, either for practical or for regulatory reasons. This means that strict financial indemnity cover does not allow repair or replacement to the same functional state as before the loss or damage had occurred.[90] Thomas and Wilson suggest that, if indemnity is viewed in a functional sense, then all that is being provided by replacement cover is a property with the same functionality as before the loss or damage.[91]

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86 At 34. See also above n 83.

87 Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at [5.11].

88 As was noted in *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [24]–[26] per William Young J for the Court; and *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 129, [2015] 1 NZLR 40 at [54] per William Young J for the Court.

89 Conditions are often placed on replacement policies to reduce moral hazard: for example that an insurer has the option to provide indemnity by payment or replacement, or that reinstatement must actually occur before the replacement sum is payable, with the sum being limited to costs actually incurred. Respectively see the discussion of this Court in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352 at [38] per William Young J for the Court; and *Skyward Aviation*, above n 88, at [26].

90 *Skyward Aviation*, above n 88, at [24].

91 Thomas and Wilson, above n 81, at 36.

Has the replacement benefit accrued?

[88] IAG's submission is that the replacement benefit has not accrued as the relevant loss occurs only when restoration costs are incurred.

[89] We reject this submission as it does not accord with the wording of the Policy. The Policy covers "[a]ccidental and sudden loss or damage" to the Barlows' house. That is the insured event and what the insurance is for. The insured then has two options for payment for that loss or damage: (a) the replacement sum (conditional on actually restoring the home) or (b) the indemnity sum (if the house is not restored).

[90] We thus accept the appellants' submission that the assignment is of an already accrued benefit. The sudden loss or damage occurred at the time of the earthquakes in 2010 and 2011 when the property was owned by the Barlows and at a time when the Barlows were the insured under the Policy. The right to payment for that loss also arose at that time, even though the basis for calculation of the payment depended on whether the property was reinstated or not.

[91] We accept the appellants' submission that restoration merely quantifies IAG's payment obligation in respect of the Barlows' loss that had occurred in the earthquakes. This conclusion is further reinforced by the fact that, without the earthquakes causing loss or damage to the property, neither the replacement sum nor the indemnity sum would be payable.

[92] We also note that different insurers word policies differently. In some policies used in New Zealand, it appears that the payment of replacement benefits does not depend on restoration having taken place.[92] There would thus be no question in relation to such policies but whether the loss occurred at the time of the insured event. Making payment conditional on restoration is a means of reducing moral hazard.[93] It would be odd if the addition of a condition for this purpose could so fundamentally alter the nature and timing of the loss.

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92 For examples of policies see Chris Boys "Rights and indemnity plus policies" [2019] NZLJ 99 at 102.

93 See methods to reduce moral hazard and authorities discussed above at n 89.

Can the replacement benefit be assigned?

[93] Insurance contracts are seen as personal to an insured and not generally assignable unless the insurer consents to the assignment.[94] This is because the identity of an insured has been seen to be important to the insurer in the setting of premiums, often because of different risk profiles.[95]

[94] The Barlows in this case were not, however, purporting to assign the whole Policy. They were merely assigning the claim, including for the replacement benefit.[96] As indicated above, we consider this was an already accrued benefit under the Policy.[97] Accrued benefits can be assigned even if they arise under personal contracts. For example, as pointed out by the appellants, a contract for writing a book is undoubtedly personal but nevertheless the royalties can be and are regularly assigned.[98]

[95] In this case it is accepted by IAG that the right to be paid the already accrued indemnity sum under the Policy is assignable. This accords with the decision in *Bryant.*[99] Contrary to IAG's submission (and the decision in *Bryant*), we do not consider there to be any reason why the already accrued right to the replacement benefit should not also be assignable.

[96] IAG submits that the Policy makes it clear that the Barlows must restore the property personally. We do not accept this submission. The fact that the Policy identifies the parties and attributes responsibilities to them does not suffice to prevent assignment.[100] As the appellants submit, it is commonplace for a contract to express a condition by reference to a named party and not to include assignees. If the rights are, on a proper interpretation of the contract, assignable, the contract will be

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94 Merkin and Nicoll, above n 83, at [11.4.2(1)]–[11.4.2(2)], citing *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA).

95 Merkin and Nicoll, above n 83, at [4.4.2]. The Court was not asked to revisit whether this should be the case for all types of insurance contracts and it is not necessary to do so for the purposes of this appeal.

96 See the distinction between assigning a contract of insurance versus assigning the insured's right to receive the proceeds of the policy: *Schneideman v Barnett* [1951] NZLR 301 (SC) at 306.

97 Contrary to the view expressed in the reasons given by William Young J at [13] and [44]–[46].

98 See Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [17.1.8(b)]; and Merkin and Nicoll, above n 83, at [11.4.3].

99 *Bryant*, above n 77, at 145.

100 In agreement with the reasons given by William Young J at [27].

interpreted as if the named parties included assignees.[101] In any event, in this case, the same wording is used in respect of the indemnity sum[102] and IAG accepts this is assignable.

[97] IAG also argues that the Barlows have suffered no loss. This is on the basis of its argument we have already rejected that loss only occurs once the restoration costs are incurred. The relevant loss occurred at the time of the earthquakes. It was also presumably reflected in the sale price of the property.[103]

[98] It is true that the right to be paid the replacement benefit was conditional on restoration and the Barlows will not restore the property. The mere fact that a right is conditional does not, however, prevent it from being assigned.[104] While a burden under a contract cannot be assigned,[105] vicarious performance of a condition is possible where it does not matter to the other party who fulfils the condition.[106] The test is whether "the obligations are so obviously personal in character that it must be concluded that the common intention of the parties was that the obligations could be discharged only by the specific individuals between whom the contract was made".[107]

[99] The Policy in this case limits the costs that can be claimed to the cost of restoring the house to a condition "as nearly as possible equal to its condition when new". The insurer is not obliged to pay more than this. Further, as pointed out by the appellants, it would obviously not be the case that the Policy would require the Barlows to do the restoration work personally rather than employ contractors. Moreover, it is common industry practice for the insurer to contract third parties to carry out reinstatement and make direct payment to the contractors.[108] This means that an insured would in fact have a very limited role to play in the restoration process.

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101 *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 (CA) at 583 per McCarthy J for the Court of North, Turner and McCarthy JJ, citing *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 (HL) at 420 per Lord Macnaghten.

102 The clause provides: "If, following loss or damage you (a) restore your Home" the replacement sum is payable; and "If, following loss or damage you … (b) do not restore your Home" the indemnity sum is payable. See above at [81].

103 The property was sold for $217,000.

104 Amounts payable in the future under a right already possessed by the assignor are assignable under ss 50 and 53 of the Property Law Act 2007.

105 HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London, 2018) vol 1 at [19-079].

106 Beale, above n 105, at [19-082].

107 *CB Peacocke Land Co Ltd*, above n 101, at 582.

108 Boys, above n 92, at 99 and 102.

There is thus nothing so obviously personal in the restoration condition that it must be inferred that it could only be discharged by the Barlows.

[100] In other contexts, terms requiring quite extensive work have been held able to be performed vicariously. In *The British Waggon Co v Lea*, a covenant to repair leased railway wagons was held to be able to be performed vicariously, on the basis that "[a]ll that the hirers … cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done".[109]

[101] We accept, as William Young J notes,[110] that in *British Waggon* the assignors remained liable under the contract, while in this case the Barlows are only theoretically in the same position.[111] We do not consider this a relevant distinction. In *British Waggon*, the repair covenant mattered to the lessee and thus the continued liability of the assignor was important. In this case, whether restoration occurs is at the option of the insured. There is no contractual requirement that the house be restored. Indeed, IAG would presumably prefer the house was not restored. As noted above, if the house is not restored, IAG does not have to pay anything under the Policy, despite having received the premiums for replacement cover.[112]

[102] As to the moral hazard arguments raised by IAG,[113] these were addressed in the Policy by providing that the replacement costs are not paid until they are actually incurred and by limiting the costs to those necessary for reinstatement. The main moral hazard concern is that the insured could be more careless or more tempted to be dishonest because, with replacement insurance, the occurrence of the event insured against would leave them better off. Once the event insured against has actually occurred, however, that danger has either already been realised (because the insured has been more careless or has been dishonest) or no longer exists (because the loss or damage has already occurred).[114]

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109 *The British Waggon Co v Lea* (1880) 5 QBD 149 (QB), at 153.

110 At [32]–[35].

111 Although the Barlows as assignors remain parties to the insurance contract, it is accepted they would play no part in any restoration.

112 See above at [63].

113 See IAG's submissions summarised above at [73].

114 In the case of natural disasters such as earthquakes, the moral hazard risk of carelessness or dishonesty in bringing about the insured event does not arise.

[103] The issue that remains is that the insured may inflate replacement costs when reinstating. That danger is addressed by the Policy wording limiting what is to be paid and by the practical measures, such as paying directly to contractors, discussed above. Further, no payment will be made until reinstatement has occurred. All of these measures will continue where there is an assignment. The moral hazard protection therefore continues to apply. As to IAG's submission that it may end up dealing with a person who has acquired the property to make a quick profit[115] or who is dishonest[116] or particularly difficult or litigious,[117] substantially the same risk would also apply to the assignment of an already accrued indemnity claim. In the end, we find the moral hazard arguments unconvincing.

Applicability of *Bryant*

Reasoning in Bryant

[104] In *Bryant* the property had been destroyed by fire on the morning of an auction for the sale of the house. The vendors were told by the insurers that, if they sold the property at auction, they would forfeit the replacement sum and would only receive indemnity value.[118] The auction proceeded, despite the purchasers knowing about the fire. The vendors later assigned their rights under their insurance policy to the purchasers for $8,470, a sum equating to an assessor's calculation of the indemnity value of the house at the time of the fire. The issue was the same as in this case: whether the replacement benefit could be assigned.

[105] Cooke P, writing for the Court, recognised that the insurer had received the premiums for replacement cover and queried, "should it make any difference that instead of the insured himself rebuilding and then selling, he sells to a purchaser before a rebuilding?" However, he considered that assignment of the replacement benefit ran

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115 Such an assignee might in fact be easier for an insurer to deal with as the assignee's aim would be to complete restoration as soon as possible. By contrast an insured restoring a home would have concerns beyond expeditious reinstatement (see below n 117).

116 The measures to deal with possible dishonesty still however apply if there has been an assignment.

117 These risks would still be present if the original insured restores the property and, in some cases, might be exacerbated by the insureds' understandable emotional issues arising from restoring his or her damaged home.

118 *Bryant*, above n 77, at 144.

counter to the principle of personal indemnity, a principle of insurance law the Court would not be justified in departing from.[119]

[106] The Court said that the principle of personal indemnity means that a contract of insurance is "no more than one of indemnity for the particular insured, who can accordingly never be entitled to more than his actual loss".[120] The Court said that the assignment could not retrospectively make the purchasers the insured at the time of the fire and that they "could acquire no more than whatever assignable rights had accrued to the insured before the assignment".[121] The Court went on to say that the "right to replace under the excess of indemnity clause was personal to the insured".[122] It was noted that the insurance policy named the insured and nowhere was the definition widened. The Court also pointed to the clause providing that, if the insured was unwilling or unable to reinstate or replace, then the insurer had no liability.[123]

[107] In coming to its conclusions, the Court applied *Castellain v Preston*[124] from the Court of Appeal of England and Wales and *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd* from the High Court of Australia.[125] Cooke P considered that departing from principles that are settled in other jurisdictions would not be justified as the facts did not lead to real injustice, the insurer did not represent that the insured could assign the replacement sum and neither the vendors nor purchasers appear to have been "lulled into that belief".[126]

Our assessment of Bryant

[108] We agree that *Bryant* cannot be distinguished.[127] It will be obvious, however, from what we have said above that we consider *Bryant* to have been wrongly decided.

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119 At 145.
120 At 145.
121 At 145.
122 At 145.
123 At 144.
124 *Castellain v Preston* (1883) 11 QBD 380 (CA).
125 *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd* (1975) 180 CLR 173.
126 At 145.
127 See reasons given by William Young J at [42].

[109] The Court in *Bryant* relied on *Castellain* and *Ziel* in coming to the view that assignment of the replacement benefit was precluded by the principle of personal indemnity.[128] Neither of these cases however concerned replacement policies. Both were indemnity cases.

[110] In *Castellain,* the property was damaged by fire after the date of agreement for sale and purchase but before the purchase was completed.[129] Risk had therefore passed to the purchasers because they were legally obliged to complete the purchase. Settlement took place at the full purchase price, notwithstanding the fire damage. The vendors, still the legal owners at the time of the fire, made a claim to the insurance company in relation to the fire and received the indemnity sum.[130]

[111] The insurer sued the vendors and was held, by way of subrogation, to be entitled to recover part of the money paid to the vendors by the purchasers, to be put in "as good a position as if the damage insured against had not happened".[131] This was based on the principle that an insured cannot recover more than his or her loss.[132] Because the vendors in this case had received the full purchase price, there was no loss. In effect, neither the purchasers nor the vendors were entitled to the insurance proceeds.

[112] In *Ziel,* the timing was similar: the parties entered a contract for sale of a property before the loss (again a fire) occurred. The vendor then lodged an insurance claim and the contract of sale was settled. Assignment of the insurance claim to the purchaser was executed on the same day.[133] As in *Castellain,* the property was sold for the full purchase price, notwithstanding the damage. The insurer did not pay the claim. The purchaser sued. It was held that the vendor had not suffered a loss and therefore was not entitled to any money under the policy.[134] As the vendor had nothing

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128 The Court also referred to *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 and distinguished *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. We do not need to comment on *Kern* as there was no purported assignment in that case. Nor is there any need to comment on *Trident* which was a case of co-insurance and concerned contractual privity.

129 *Castellain,* above n 124, at 385.

130 At 385–386.

131 At 392 per Brett LJ. See also at 396–397 per Cotton LJ and at 397 and 407 per Bowen LJ.

132 At 386.

133 At 174–175.

134 At 176.

to assign,[135] neither the purchaser nor the vendor were able to claim from the insurance company.

[113] If, based on these cases, the principle of personal indemnity prevented the assignment of the replacement benefit in *Bryant*, it is not clear, as the appellants point out, why the indemnity sum could nevertheless be assigned. After all, both *Castellain* and *Ziel* were indemnity cases.

[114] The answer of course lies in the timing of the loss.[136] In *Castellain* and *Ziel*, the risk had passed to the purchasers before the insured event (the fire) had occurred. This meant that the purported assignment could only have been an attempt to assign the whole policy, which runs counter to the principle of personal indemnity.[137] No benefit under the policy had already accrued before the sale and purchase agreements had been entered. Nor was there any loss, the full purchase price having been received at settlement.

[115] By contrast, in *Bryant* the insured event had occurred before the sale and purchase agreement had been entered into and while the risk remained with the insured vendors. For the same reasons as in this case,[138] both the rights to the indemnity sum and to the replacement benefit had therefore already accrued before the assignment of the insurance claim, albeit conditional on restoration in the case of the replacement benefit. Further, while it is not clear from the case the extent to which the price received in *Bryant* was lower than it would have been had the fire not occurred, the fact that the vendors assigned their insurance policy to the purchasers for a separate consideration suggests that the sale price had been affected by the fire.[139]

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135 At 176.

136 The situation in *Castellein* and *Ziel* would now be covered by s 13 of the Insurance Law Reform Act 1985 and the vendor's insurance would cover a purchaser up until settlement. See discussion on that point in Merkin and Nicoll, above n 83, at [15.1.6(2)]. See also discussion of s 13 below from [127].

137 See also Merkin and Nicoll, above n 83, at [11.4.3(1)]. See also our earlier discussion of assigning the whole policy versus assigning the proceeds, above at [94].

138 See above at [90]–[91].

139 See above at [104]. In any event, the vendor lost the functional utility of the property before the sale and purchase agreement was entered into: on functional indemnity, see above at [87].

[116] The significance of the timing issue was not appreciated by the Court in *Bryant*. It meant that the assignment in *Bryant*, unlike in *Castellain* and *Ziel*, was not of the policy but of benefits that had already accrued under the policy. The personal indemnity principle thus had no application.

[117] The mistaken belief that the personal indemnity principle applied meant that the Court in *Bryant* did not consider the ordinary law on assignment. As in this case, the mere fact that the policy certificate named the vendors as the insured would not have prevented assignment.[140] The issue was whether the purchasers, as assignees, could satisfy the condition of reinstatement or replacement of the property, upon which the excess of indemnity was payable.[141] That depended on whether it made a difference to the insurer whether the condition was satisfied by the insured as opposed to an assignee.[142] From his rhetorical question at the beginning of his judgment, Cooke P apparently did not consider that it would.[143] This should have led to the conclusion that the replacement benefit, like the indemnity sum, was assignable.

[118] Cooke P in his reasons also said that the principle of personal indemnity means that an insured is never entitled to more than his or her actual loss.[144] It might be that this was the unarticulated reason why the Court in *Bryant* considered there was a difference between assignability of the indemnity sum and the replacement benefit. If so, it is not a valid distinction. Both benefits had accrued. Further, either replacement policies are an exception to the indemnity principle, as William Young J suggests,[145] or the issue must be looked at in terms of functional indemnity as discussed above.[146]

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140 See above at [96].
141 *Bryant*, above n 77, at 144.
142 See above at [98].
143 *Bryant*, above n 77, at 145. Cooke P said: "Why should it make any difference that instead of the insured himself rebuilding and then selling, he sells to a purchaser before a rebuilding?"
144 See above at [106].
145 At [20]. The indemnity principle, however, must apply at least to the extent of preventing double counting: see *Ridgecrest NZ Ltd*, above n 88, at [14]–[15].
146 See above at [87].

Should Bryant *be overruled?*

[119] Even though this Court is not bound by *Bryant*, it is a decision that has stood since 1990. Where commercial parties have ordered their affairs on the basis of a Court decision and particularly if that decision is longstanding, an appellate court may be reluctant to overturn it, even if it considers the decision to be wrong. The Court may well take the view that any change should be for Parliament. This does not, however, mean that decisions will never be overturned.

[120] In a case such as this where the Court of Appeal proceeded on a totally mistaken basis,[147] it could well be argued that it would be contrary to justice and the rule of law for this Court to follow *Bryant*, no matter how important the value of certainty.[148]

[121] In this case, however, we do not consider that insurance companies will in fact be disadvantaged if the decision is overruled and so the certainty principle is not engaged. Insurance companies would have been prudent to price policies on the basis that the insured will act rationally. This means that premiums should have been calculated on the basis that the replacement option will be chosen when it is rational to do so. Whether replacement will be rational will include not just financial considerations but will also take into account the personal time, labour and inconvenience involved in restoration. It would have been unwise, to say the least, for insurance companies to price policies on the basis that the insured would try and assign claims in ignorance of the *Bryant* decision.

[122] It is true that insurance companies may have explicitly provided that replacement benefits were not assignable if *Bryant* had been decided the other way but, as it should not matter to the insurer who restores the home, this does not seem to us to be a factor in favour of not overruling the decision.[149]

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147 The majority also expresses doubts about the reasoning in *Bryant* regarding reliance on the indemnity principle: see above at [41] and [45].

148 Different considerations might apply if *Bryant* had been a decision of this Court.

149 If IAG had wanted to limit the assignability of the replacement sum, it arguably should have said so explicitly, despite *Bryant*, on the principles set out at [129]–[131] below.

[123] There is also force in the appellants' submission that *Bryant* could force homeowners to accept an indemnity sum because of delays in the resolution of claims. As noted above, the Barlows' claim was made in 2011 and was still unresolved in 2014. This is not to suggest there was any improper delay on the part of IAG. In the case of widespread disasters some delay will be inevitable. But equally in such cases, the insured will not only be dealing with the trauma of damage to their house but also with the general trauma related to the disaster. This could increase the incentive to sell the unrestored home and mean that, despite having received premiums for replacement cover, the insurer would only have to pay the indemnity sum.

[124] It seems to us that *Bryant* can perhaps be explained by the history of replacement policies and the concerns discussed by Thomas and Wilson relating to gambling, fraud and morality. This led to concerns about excess of indemnity, at least on a purely financial measure. As replacement policies are now a common form of residential property insurance, this suspicion is outdated and the common law must catch up.

[125] In principle, there is no reason why, if an indemnity claim is assignable, a replacement claim should not likewise be assignable. A poorly reasoned decision of the Court of Appeal some thirty years ago should not be allowed to perpetuate what is a harsh outcome for insureds and somewhat of a windfall to insurers, given that they sold and priced replacement cover and would largely be in the same position whether or not there is an assignment of the replacement sum.[150]

[126] For all of these reasons, we would overrule *Bryant*.

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[150] This is particularly the case as there may well be techniques having the same practical effect as an assignment that could be employed to attempt to get around any prohibition on assignment: for example through a long term sale and purchase agreement, with the original insured nominally responsible for restoration. We say "may" because we are not to be taken as expressing a view on whether such techniques would be successful assuming assignment of replacement benefits was not allowed.

Condition 2

Submissions

[127] Mr Campbell submits that because condition 2 is subject to the purchaser complying with all of the conditions of the Policy, it entitles the purchaser to satisfy the condition upon which the replacement benefit is payable, that is, restoring the home. Mr Campbell submits that the heading is "nothing more than a rough guide" to the text and does not make a difference in this case to interpretation. Mr Campbell also submits that if IAG, as a sophisticated commercial party, had wished to limit the application of condition 2 to where the insured event occurred after the contract had been entered into, it could have done so explicitly, as the current policy now does.

[128] Mr Ring submits that condition 2 only applies where the insured event intervenes between the entry into an unconditional contract to purchase and settlement of that agreement. Mr Ring relies on the word "during" in the heading of condition 2 and the statutory context of s 13 of the Insurance Law Reform Act 1985. Condition 2 in his submission is "simply a contractual expression of the effect" of s 13.

Our assessment

[129] Contracts are interpreted in light of the context in which they are made. The extent of the context courts have regard to is, however, in itself contextual.[151] For example, for registered instruments the relevant context is likely to be very restricted.[152] In this case we are dealing with a consumer contract written in plain English, presumably designed to explain all the terms of the Policy in an understandable manner without the need for the insured to have legal advice.

[130] There is a strong argument that when interpreting such standard form consumer contracts (and in particular those written in plain English) context should be restricted

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151 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[62] per Arnold J writing for the majority.

152 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 at [73]–[74] per William Young and O'Regan JJ. See also at [151] per Glazebrook J, agreeing with all of William Young and O'Regan JJ's reasons apart from the actual interpretation of the covenant.

and not include matters of which the average consumer would be unaware.[153] The ordinary consumer of residential insurance would not be expected to be familiar with s 13 of the Insurance Law Reform Act and we therefore do not take it into account in interpreting condition 2.

[131] Further, in the case of consumer contracts, the courts are likely to apply the principle of contra proferentem robustly.[154] This means that, if there is an ambiguity in condition 2, it would be construed against the drafter, IAG.

[132] In this case, condition 2 could have been drafted more clearly. Certainly it is not made clear in the actual text of the condition that it is intended only to apply to loss that occurs while the sale and purchase agreement is in force. However, it is difficult to read the clause with the heading in a way that gives the purchasers the benefit of insurance for events that have occurred under the Policy before the sale and purchase agreement was entered into. We accept Mr Ring's submission that the use of the word "during" in the heading is key.

[133] We do not accept the appellants' submission that the heading should be disregarded. As William Young J points out, the headings in other clauses are clearly part of the text and there is no reason to read this clause differently.[155]

Result

[134] We would have allowed the appeal on the basis that the replacement benefit was validly assigned to the purchasers and that the purchasers could fulfil the condition of restoring the home.

Solicitors:
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DLA Piper, Auckland for Respondent

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153 See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, [2008] 3 SLR 1029 at [110]; and *Sabean v Portage La Prairie Mutual Insurance Co* 2017 SCC 7, [2017] 1 SCR 121 at [35]. See also the colourful comments of Young J in the New South Wales Supreme Court in *Ross v NRMA Life Ltd* (1993) 7 ANZ Insurance Cases ¶61-170 (NSWSC) at 77,963.

154 For more on the rule, see Finn, Todd and Barber, above n 98, at [7.3.1].

155 At [54]–[56].