



**Supreme Court of New Zealand
Te Kōti Mana Nui**

3 JULY 2019

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**RUIREN XU AND DIAMANTINA TRUST LIMITED v IAG
NEW ZEALAND LIMITED**

(SC 47/2018) [2019] NZSC 68

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Home insurance policies often provide for the insured to recover the actual costs of repairing an insured property to its condition when new (replacement benefits). The entitlement to replacement benefits is often expressed to be conditional on the insured having already incurred the cost of reinstatement. The primary issue in this appeal is whether such a right to replacement benefits can be assigned where the insured party has not incurred the cost of reinstatement so as to entitle the assignee to reinstate and recover the costs.

The issue arises in this way. The Christchurch home of Natalie Hall-Barlow and Matthew Barlow (the Barlows) was insured under a standard replacement policy underwritten by IAG New Zealand Ltd (IAG). If the home is damaged, the policy provides the insured party with two options: first, to recover the actual costs of repairing the property to its condition when new where the insured party has reinstated the property; alternatively, if the insured does not reinstate the home, to recover the economic loss suffered (an indemnity).

The Barlows’ home was damaged in the Canterbury earthquakes on 4 September 2010 and 22 February 2011. Following the earthquakes, the Barlows made a claim with IAG for the damage. However, after three years their claim remained unresolved. At that time, the Barlows decided

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to sell the property and accordingly entered into an agreement to sell the home in its unrepaired state to Ruren Xu and Diamantina Trust Ltd (the appellants). As part of the sale and purchase agreement, the Barlows assigned to the appellants their rights in respect of their claim under the policy. At the date of assignment, the Barlows had not incurred any actual costs of repairing the property.

All parties accept that, having been assigned the rights under the IAG policy, the appellants were entitled to payment on an indemnity basis. But the appellants claim also to be entitled to replacement benefits under the policy should they reinstate the house. The appellants' claim is denied by IAG.

The appellants' claims failed in the High Court and Court of Appeal. In the High Court, the Judge was bound by *Bryant v Primary Industries Insurance Co Ltd*, which held that a right to replacement benefits conditional on the insured incurring the cost of repair cannot be assigned, where the insured party has not incurred that cost, so as to entitle the assignee to reinstate and recover the costs. For this reason, the primary focus of the argument in the High Court was on the interpretation of condition 2 of the policy. That condition is titled "Insurance during sale and purchase" and provides that, in certain circumstances, a purchaser of an insured property may claim under the policy. The appellants argued that they are within the letter of this condition and that, irrespective of *Bryant*, they are entitled under it to recover the replacement benefits. The High Court Judge rejected this argument, finding that condition 2 applied only to situations where the insured event occurred between the entering into of an unconditional contract for sale of the Barlows' home and settlement. The Court of Appeal agreed with this interpretation of condition 2 and also declined to overrule or distinguish *Bryant*.

The Supreme Court granted leave on whether the Court of Appeal was correct to dismiss the appellants' appeal against the judgment of the High Court.

A majority of the Supreme Court, comprising William Young, O'Regan and Ellen France JJ, has dismissed the appeal. The Court declined to overrule *Bryant*. It found that *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 so as to confer on an assignee the ability to reinstate the house and recover the costs. The Court held that the wording of the policy in this case made recovery of the replacement benefits subject to reinstatement by the insured. It said that references to the insured in the policy could not be interpreted as extending to assignees of the insured. Accordingly, the majority concluded that reinstatement by the assignees would not give them the right to recover the cost of reinstatement effected by them.

Glazebrook and Arnold JJ dissented. They found that from the time when the property was damaged in the 2010 and 2011 earthquakes, the Barlows had an accrued right to the replacement benefits. They said that, while the right to be paid the replacement benefits was conditional

on reinstatement, this did not prevent assignment. They held that there was nothing so obviously personal in the reinstatement condition that meant it could only be discharged by the Barlows. Finally, they found that, for a number of reasons, *Bryant* was wrongly decided and would have overruled it. They accordingly concluded that there was nothing precluding assignment of the replacement benefits so as to entitle the appellants to reinstate and recover the costs.

Finally, all members of the Court rejected the appellants' argument on the interpretation of condition 2. The Court agreed with the interpretation adopted by the Courts below – namely, that the condition applies to loss that occurs while the sale and purchase agreement is in force.

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