

Briefcase

Xu v IAG and The EQC Assignment of Insurance Claims

Insurers' obligations to purchasers of earthquake damaged homes with assigned claims.

Key Points

- Insurers are only liable to pay the indemnity value of assigned insurance claims to purchasers of earthquake damaged homes, even if the purchasers actually carry out the reinstatement works.
- The exception is if the insurer has consented to the assignment either in the policy or to the insured/purchaser.
- This case is likely to be appealed.

Background

The Barlows' home was damaged during the Canterbury Earthquake Sequence. They made claims in respect of that damage with the EQC and their private insurer, IAG. The Barlows sold their property and assigned their insurance claims to Bryan Staples or nominee in December 2014. Mr Staples then nominated the plaintiffs as purchasers and the legal title and insurance claims were transferred/assigned to them in February 2015. The plaintiffs gave written notice of the assignment to IAG in May 2016.

The parties¹ sought the Court determine the following preliminary question:

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

*Bryant v Primary Industries*²

The Court of Appeal in *Bryant*, acknowledged that there was attraction to the view or interpretation that an insured should be able to assign their insurance claim to a purchaser of a property who wishes to reinstate. Particularly, given the insurer had received premiums for the risk of the home being rebuilt, and its liability would be limited to those costs regardless of whether it was the insured or a purchaser who actually carried out the rebuild. However, it found that there was a difference between the insured rebuilding the home themselves and then selling versus selling to a purchaser before rebuilding; and that difference runs counter to a principle of insurance law (the principle of personal indemnity) from which this Court would not be justified departing from.

¹ The EQC did not appear at the hearing of this preliminary question

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

The difference was that the insurer and the insured had entered into a contract of insurance, and that contract was personal to the insured. The insured could therefore not assign the policy, but could assign a debt arising under the policy that they were entitled to at the time of the assignment, i.e. the claim proceeds. The insured was immediately entitled to indemnity value when the damage occurred, but was only entitled to reinstatement costs once they actually were incurred. Since the insured had not incurred those costs at the time of the assignment, all the insured was able to assign to the purchaser was their right to receive indemnity value. They could not assign the right to receive reinstatement costs even if the purchaser carried out the reinstatement work, unless the insurer consented to the assignment.

The parties accepted the ratio of *Bryant* was binding on the High Court, but the plaintiffs reserved their right to challenge the judgment in the Court of Appeal if necessary.

Had the insurer consented to the assignment in the policy?

IAG had not expressly consented to the assignment so, the hearing focussed on whether IAG had consented to the assignment in clause 2 of its 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.

IAG accepted that, putting the heading to one side, through condition 2 a purchaser of the home would be entitled to all the benefits as set out in section 1 of the policy. However, the heading made it clear that IAG only consented to transferring the policy benefits to the purchaser for damage occurring “during” the sale and purchase of the home, not damage that pre-dated that transaction. The Court accepted this argument. Therefore, since the Barlows had not incurred the costs of reinstating the home at the time of the sale and assignment, they were unable to assign the right to receive the reinstatement value from IAG to the purchasers.

Comment

We anticipate that this decision will be appealed because a number of purchasers will be affected by this decision. The Court may have sympathy for insured homeowners who need to sell before reinstating. However, there are instances where the assignee will be looking to profit. For example in this case the Barlows sold for \$217,000 but the plaintiffs claimed against EQC and IAG for a total of \$516,888.

Further, if the decision is not successfully overturned, conveyancing solicitors may face litigation if they did not properly advise prospective purchasers about the value of the deed of assignment.

For any further information regarding this please contact Peter Hunt or Kristal Rowe

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