

## Buyer beware: assignment of full replacement insurance claims

When selling their house, is a homeowner entitled to assign their ongoing insurance claim to the purchaser? Not for the full replacement value of their insurance policy and not without the insurer's consent, according to the recent Court of Appeal decision of *Xu & Diamantina Trust Limited v IAG New Zealand Limited* [2018] NZCA 149 (11 May 2018).

*\*Partner, Stuart Dalzell and Solicitor, Zoe Caughey discuss the decision and its implications below.*

### Replacement or "excess of indemnity" benefits

Until recently, homeowners were able to purchase 'full replacement' home insurance, which had no monetary limit and was generally based on a like-for-like replacement of the current structure using modern day methods and materials. The 'catch' usually lay in the condition for recovering this sum – the requirement that the costs of the repair/rebuild be incurred before they would be reimbursed by the insurer. Without incurring those costs, the insured's only loss (and the only recoverable sum) would be "indemnity value". This is usually calculated as the market value of the house less the value of the land, at the time of the loss (in this case, the earthquakes), and usually represents a much lesser sum than the replacement benefit.

The Court of Appeal considered the assignability of full replacement insurance in *Bryant v Primary Industries Insurance Co Ltd* [1990] 2 NZLR 142 (CA), deciding that the 'replacement' component of the insured's fire insurance policy was not assignable to the post-loss purchaser, as the purchaser had not experienced the loss. All he had suffered was the loss in market value of the (now burnt down)

building, which was covered by an indemnity value payment to the purchaser.

In *Xu*, the plaintiffs/appellants purchased a house in Christchurch after the Canterbury Earthquake Sequence (CES), and now seek to recover the full value of the vendors' full replacement policy.

### Facts

Matthew Barlow and Natalie Hall-Barlow held a full replacement policy for the house they owned in Wainoni, Christchurch. The condition on the 'actual replacement' coverage was that the costs of reinstatement had to be incurred before IAG would pay.

A brief timeline:

- April 2011: The Barlows lodged a claim in respect of earthquake damage to their house.
- February 2015: The settlement date for the purchase by Ruiren Xu and Diamantina Trust Limited (DTL) of the house in question.
- February 2015: The parties signed a deed of assignment, a document purporting to transfer the Barlows' rights and remedies in respect of the earthquake damage claim to Xu and DTL.

### Preliminary question

Both parties agreed on a preliminary question to be answered by the courts:

"In light of the judgment of the Court of Appeal in *Bryant*, does the fact that the [insured homeowners] have not and will not restore the home prevent the [new owners and assignees – the appellants in this case] from recovering from IAG the replacement benefit?"

Nation J in the High Court decision (delivered on 17 August 2017) answered that question "yes". The Judge was bound by the *Bryant* decision and was not convinced that the facts were different enough to justify a different outcome.

### This decision

On appeal, the Court of Appeal accepted IAG's argument that full replacement cover (referred to as the replacement benefit) is separate to the indemnity cover, in that the former is personal to the original insured whereas the latter is not.

The Court referred to the insurer's right to choose who it insures, and the value of that insurance. Full replacement insurance presents a heightened moral hazard of insureds seeking to profit, since it is intended to replace older materials/building elements with new.

The plaintiffs submitted that it does not, and should not, matter who incurs the cost of repairing the house, if a valid claim was made and accepted. This was not accepted by the Court. A general underlying theme of insurance law is that an insured can never recover more than their actual loss – since the Barlows have not incurred the costs of repairing and have not suffered that particular loss, then they could not assign the right to recover based on that loss. If they were to do so, it would give the assignees greater rights than the assignors.

### Comment

Over 7 years have passed since the most significant events in the CES. Many Cantabrians have sold or purchased homes since, and many have done so assuming that their house insurance, and claims for

earthquake damage, can be passed on from vendor to purchaser.

Although it is likely to be appealed, this decision has wide-reaching implications for vendors and purchasers of homes.

Purchasers should be wary of existing damage and any ongoing insurance claims or insurance disputes. It is unclear for now what effect this will have on the housing market in Christchurch. Prudent buyers should probably ensure they have the insurer's written consent to any purported assignment of rights of recovery.

*\*The foregoing has been prepared for the general information of clients and friends of the firm. It is not meant to provide legal advice with respect to any specific matter and should not be acted upon without specific legal advice.*