

## The Supreme Court confirms reinstatement is not a right that can be assigned

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The Supreme Court decision of *Xu v IAG New Zealand Limited* [2019] NZSC 68 confirms reinstatement is not a right that can be assigned.

The Supreme Court has had the final say on the status of 'on sold' earthquake damaged properties insured by IAG at the time of the Canterbury earthquakes.

In a judgment released yesterday, the Supreme Court by 3:2 majority, decided that owners of on sold properties are not entitled to replacement benefits under the IAG policy. The decision is a blow to purchasers of damaged properties, particularly those with undiscovered earthquake damage at the time of sale.

### No assignment of replacement value?

The Barlows owned a house that was damaged in the earthquakes. With the insurance claim still unresolved, they sold the house to the appellants and purported to assign their rights in respect of their claim under the policy. The key issue was whether the assignment transferred the Barlows' entitlement to replacement costs under the policy. IAG claimed that the assignment only transferred an entitlement to an indemnity payment as the entitlement to replacement benefits under the policy was personal to the Barlows.

IAG had been successful in the High Court and the Court of Appeal based on an earlier decision in *Bryant v Primary Industries Insurance Co Ltd*. While the majority in the Supreme Court accepted that the reasoning in *Bryant* was 'contestable' in places, they considered the decision was largely correct and found:

- A claim under an insurance policy can be assigned, however, while this means that an assignee has an entitlement to an indemnity payment they do not have an entitlement under the IAG policy to replacement costs
- The Barlows' entitlement to replacement benefits was not an 'accrued right' capable of being assigned but rather it was conditional on them actually incurring the cost of reinstatement
- As the Barlows had not incurred any reinstatement costs they did not have any rights to reinstatement costs to assign to the purchasers.

### Minority judgment

While the minority (Glazebrook and Arnold JJ) were unable to distinguish *Bryant* they considered the case was wrongly decided and poorly reasoned. They disagreed that the policy required the Barlows to restore the house personally finding that:

- The replacement benefit had already 'accrued' at the time of the assignment; the right to payment for the loss arose at the time of the earthquakes
- There was nothing so obviously personal in the restoration condition that it could only be discharged by the Barlows. The Barlows would have a very limited role to play as the insurer would likely contract third parties to carry out the repairs.

### Is there any room left for argument by purchasers?

While the majority decision indicates that generally the right to reinstatement is not assignable, the decision is limited to the IAG policy wording that was before the court. The Supreme Court recognised that there are insurance policies in New Zealand where payment of replacement costs does not depend on reinstatement works having been carried out and this would presumably lead to a different result. There are a range of approaches that insurers have adopted to assignment of claims in Canterbury. You should check with your insurer before buying or selling a property which has suffered earthquake damage.

For specific advice on how this decision affects your situation, please contact one of the team to discuss.

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