SUPREME COURT OF QUEENSLAND

CITATION:	*Livesay v Hawkins & Ors* [2012] QSC 122
PARTIES:	**SHIRLEY LIVESAY** (plaintiff) **v** **GAYLENE HAWKINS** **(**first defendant) and **JEREMY HAWKINS** (second defendant) and **NEVILLE NEWMAN** (third defendant) and **AMERICAN HOME ASSURANCE COMPANY** **ABN 67 007 483 267** (third party) and **GAYLENE HAWKINS AND JEREMY HAWKINS** (second third parties) and **NEVILLE NEWMAN** (third third party)
FILE NO:	BS 5449 of 2008
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2012 - written submissions
JUDGE:	Daubney J
ORDERS:	**1. The issues for determination are answered as follows:** **(a) The plaintiff's letter to the third defendant dated 26 April 2005 is a "Claim" as defined in cl 2.2 of the Policy of Insurance No. REAP21404 dated 24 July 2004 between the third defendant as insured and the first third party as insurer ("the policy");** **(b) It is not necessary to make this determination;** **(c) The policy exclusion 3.5 Bodily Injury does apply;**

(d) The third defendant is not entitled to be indemnified, in accordance with the terms of the policy, against his liability, if any, to the plaintiff under the terms of the policy;

2. I will hear the parties as to costs.

CATCHWORDS: INSURANCE – GENERALLY – CLAIMS GENERALLY – hearing for determination of a separate question – where the third defendant held a professional indemnity policy with the first third party – where the third defendant issued a third party notice claiming that the first third party is liable to indemnify the third defendant in respect of any civil liability the third defendant might have to the plaintiff – where the first third party denied that it is liable to indemnify the third defendant – whether the plaintiff's letter to the third defendant is a "claim" as defined in the policy of insurance – whether because of the application of s 54 of the *Insurance Contracts Act 1984* (Cwth), the first third party may not refuse to pay the plaintiff's claim by reason of the third defendant's failure to give written notice of the said claim to the first third party as soon as practicable during the policy period - whether the policy exclusion of "bodily injury" does not apply – whether the third defendant is entitled to be indemnified, in accordance with the terms of the policy, against his liability, if any, to the plaintiff and/or second third parties

Personal Injuries Proceeding Act 2002 (Qld)
Insurance Contracts Act 1984 (Cwth), s 54

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1995-1996) 160 CLR 226, cited
John Connell Holdings Pty Ltd & Conasoc Pty Ltd v Mercantile Mutual Holdings Ltd, Vanguard Insurance Co & Ors [1998] QSC 116, cited
Junemill Ltd (in liq) v FAI [1999] 2 Qd R 136; [1997] QCA 261, cited
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65, applied
Pacific Couriers Ltd v BNP Paribas (2004) 218 CLR 451
Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co [1993] 1 SCR; 99 DIR (4th) 741 at 756, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, applied

COUNSEL: N E Ulrick for the third defendant
R Ashton for the first third party

SOLICITORS: Bartels Solicitors and Attorneys for the third defendant
Sparke Helmore for the first third party

[1] As at April 2005, the plaintiff and her husband were living in a house at Meadowbrook, which they rented from the first and second defendants. The third defendant operated the real estate agency which was retained by the first and second defendants to manage the rental property.

[2] The plaintiff claims that she suffered personal injuries on 25 April 2005 when a pelmet above a door in the house fell and struck her. She has sued the first, second and third defendants, claiming damages for the personal injuries she suffered. As against the third defendant, she claims that "the said accident and the plaintiff's personal injury, loss and other damage were caused as a result of the negligence of the third defendant".[1] The particulars of negligence allege, in effect, that the third defendant failed to take reasonable care to keep and maintain the property in a safe condition for tenants.

[3] The third defendant held a professional indemnity policy with the first third party. The third defendant issued a third party notice claiming, *inter alia*, that the first third party is liable to indemnify the third defendant in respect of any civil liability the third defendant might have to the plaintiff. The first third party has denied that it is liable to indemnify the third defendant.

[4] On 4 October 2011, it was ordered that there be a separate determination of the first third party's liability to the third defendant, and specific issues were enumerated for determination.

[5] Before turning to those issues, however, it is convenient to state the background in more detail. Most of the relevant factual background was not in issue for the purposes of the present hearing, and was set out in a Statement of Agreed Facts (and annexures) which was in evidence before me.

Background

[6] As at 2005, and for some time previously, the third defendant ("Newman") carried on business as a real estate agent and property manager under the name "Ray White Waterford Marsden Crestmead".

[7] In January 2003, the first and second defendants ("Hawkins") appointed Newman as their agent to manage the letting of the Meadowbrook property (including carrying out inspections, arranging repairs, entering into tenancy agreements and collecting rent) and, from that time on, Newman professionally managed the letting of the property for a fee as part of his usual business as a real estate agent.

[8] In order to obtain professional indemnity insurance, Newman dealt with an insurance broker, Eagle Insurance Brokers Pty Ltd ("Eagle"), which held a financial services licence under the *Corporations Act*. The particular broker at Eagle with whom Newman dealt was John Denehy.

---

1 Amended Statement of Claim, para 9.

[9] In July 2003, Eagle arranged a policy of professional indemnity insurance for Newman with the first third party ("AHAC") for the period 24 July 2003 to 24 July 2004.

[10] The policy schedule for the 2003-2004 policy:

(a) listed a number of specific items of "retention/excess":

> "1. $17,000 arising out of bodily injury or property damage to which this policy responds.
>
> 2. $17,000 arising out of commercial or industrial management and strata title management.
>
> 3. $17,000 other than those Claims subject to Retention 1 and 2 above.
>
> Each and every claim including defence costs."

(b) specified that the "Policy Wording" was "AIG Real Estate Agents Professional Indemnity Insurance Policy Wording (04-02)" ("Policy Wording (04-02)").

[11] On 28 June 2004, Denehy emailed Newman a document described as a proposal form, and asked Newman to complete and return it. The covering email stated:

> "Everyone has experienced the troubles of the Insurance industry over the last twelve months and it appears that the market is starting to slow down. We have been fortunate that we can provide multiple options for our clients with more than 5 reputable insurers depending on the needs of your firm.
>
> Our role as your Insurance Broker is to find the best deal, interpret the details and fine print and provide you, our client with options so that you can make an informed decision. This year we will be obtaining quotations from the following companies so that you can be ensured that you are receiving the best value for money policy available on the market:
>
> - American Home Assurance (AAA rated Standard & Poors)
> - Crown Insurance on behalf of Lloyd's of London
> - PI Direct on behalf of ACE Insurance
> - QBE Insurance (Australia) Limited
> - Dexta Underwriting on behalf of Employers Reinsurance
> - CGU Insurance
>
> As you would be aware your Professional Indemnity Insurance policy will expire on the **24th JULY 2004** and as there are no hold cover arrangements, all policy coverage will cease at 4:00pm on that date. It is vitally important that you return the attached completed proposal form prior to the **25th June 2004** to our Brisbane office by facsimile or mail as this will allow us sufficient time to obtain premium quotations on your behalf."

[12] Newman completed the required details on the proposal form and returned it to Denehy on 7 July 2004.

[13] On 7 July 2004, a number of emails passed between Denehy and a representative of AHAC, in the course of which Denehy negotiated a reduction of the excesses which would be payable by Newman under a new policy with AHAC.

[14] Later on 7 July 2004, AHAC emailed to Eagle a document described as "Quotation Details". As its name suggests, this document set out details of the AHAC quote for Newman's policy, including the applicable excesses. It also specified that the policy wording was Policy Wording (04-02).

[15] On 21 July 2004, Eagle emailed Newman a document headed "Real Estate Agents Professional Indemnity Insurance – Quotation". The document stated: "Your proposal has been accepted and the quotation details are outlined below". It then gave instructions as to various actions which could be taken, including "ACCEPT the quotation and bind cover". The document then set out the quotation details. These included:

"Policy Period:	From: 24/7/2004 at 4.00pm local time To: 24/7/2005 at 4.00pm local time
Limit of Liability:	$2,000,000 any one Claim / $2,000,000 in the aggregate for all Claims during the Policy Period including Defence Costs. Cover for loss of Documents is sub-limited to $250,000 in the aggregate.
Retention:	1. $10,000 for each and every Claim (including Defence Costs) arising out of bodily injury or property damage to which this policy responds. 2. $15,000 for each and every Claim (including Defence Costs) arising out of commercial/ industrial property management or commercial /industrial strata title management. 3. $10,000 for each and every Claim (including Defence Costs) other than those Claims subject to Retentions 1 and 2 above.
...	
Policy Wording:	AIG Real Estate Agents Professional Indemnity Insurance Policy Wording (04-02)
Endorsements:	Nil
Premium:	$12,700.00
GST:	$1,270.00
Stamp Duty:	$698.50
Total:	$14,668.50"

[16] The document then repeated details which had been contained on Newman's proposal form. Under the heading "Details of Business", the proposal form had asked for a statement of gross income earned by Newman over the previous 12 months from specified real estate agent activities. In response to "Property Management – Residential", he disclosed $300,000 income. This section concluded with a warning that the policy only provided cover for the activities which had been specified.

[17] On that same day, Newman accepted the quotation by signing and dating its last page. He then phoned Denehy to pay the premium. Denehy asked Newman for an additional $330 (inclusive of GST) for his fee as broker. Newman agreed to this and paid a total of $14,998.50 by credit card. Denehy took the details of Newman's credit card over the phone and processed the payment. Newman then faxed the signed acceptance of the quotation to Denehy under cover of a facsimile cover sheet dated 21 July 2004 with the message:

> "Please find attached my Real Estate Agent's Professional Indemnity Quotation acceptance signed, dated and paid today (ANZ card)."

[18] On 22 July 2004, Eagle raised a tax invoice for a total of $14,998.50 (including broker's fee). The tax invoice noted:

> "As per your request, we have arranged the following insurance cover effective from the 24/07/2004."

The tax invoice bears a handwritten notation that it was paid in full on 21 July 2004. The tax invoice identified the new policy as being Policy No REAP21404. Attached to the tax invoice was a schedule, which was described as forming part of Policy No REAP21404. The schedule contained details of the insured (i.e. Newman), the limit of liability under the policy, and set out:

> "Retention/Excess:
> 1. $10,000 arising out of bodily Injury or Property damage to which this policy responds.
> 2. $15,000 arising out of commercial or industrial property Management and strata title management.
> 3. $10,000 other than those Claims subject to Retention 1 and 2 above.
>
> Each and every claim including defence costs
>
> Retroactive Date: Unlimited, excl known claim & circumstances
>
> Continuity Date: 24/07/2003
>
> Policy Wording: AIG Real Estate Agents Professional Indemnity Insurance Policy Wording (04-02)"

[19] On 6 October 2004, Denehy sent a letter to Newman on Eagle letterhead. The letter stated:

> "Dear Neville,
>
> We enclose the following policy document which has been arranged on your instructions:

Policy Number	:	REAP21404
Class of Insurance	:	Professional Indemnity
Period of Insurance	:	24/07/2004-24/07/2005
Insurer	:	AIG
Transaction	:	New Business

Whilst we have checked this document for accuracy, we would ask that you read it carefully, with particular attention to the exclusions and conditions, and advise us if you need clarification on any matter.

As this is a legal document, it should be retained in a safe place.

Yours sincerely,"

[20] Enclosed with the letter were the following:

(a) A Policy Schedule. In this regard, there is a minor factual dispute between the parties as to the precise form of this schedule. There are two versions in the evidence before me. They are identical, save that one refers to version "04-02" of the Policy Wording, while the other refers to version "01-05". This discrepancy is explained in an affidavit by Mr Clarke, commercial manager of the underwriter which took over AHAC's business in 2011. He refers to the schedule which contains the reference to "04-02", and explains that the Policy Wording itself also carried that designation, meaning that the wording had not changed since April 2002. He continues:

> "17. The document which is annexure 11(b) to the Statement of Agreed Facts and page 80 of Mr Patino's affidavit was printed out, as the footer shows, on 11 July 2005. It refers to an insurance wording designated 01-05 i.e. implemented in January 2005. As explained in paragraph 11, when a new policy wording was adopted, it would be given the designation referring to the month and year of its first use and that would be programmed into the system. Although this document refers to a period of insurance which commenced on 24 July 2004, it has picked up automatically but erroneously, the designation of the new 2005 wording.
>
> 18. The 01-05 wording did not exist when the policy in question was issued. However, the system was not sophisticated enough in 2005 to print out in a particular year but refer back to an applicable wording from a different year. I do not know and have been unable to ascertain who circled the reference to 01-05 and wrote beside it "04 02" but I expect this would have been done by whoever printed the document, recognising that there was an error on the face of it.
>
> 19. The printing out of this schedule seems to have been done at the request of the claims department following receipt of an email from Eagle Insurance Brokers dated 30 June 2005. A copy of the email chain is exhibited and marked **MC4**."

Given that the form of policy wording designated "01-05" did not exist when this policy was issued to Newman, I accept that the Policy Schedule enclosed with the letter of 6 October 2004 referred to Policy Wording version "04-02".

(b) A copy of Policy Wording (04-02).

[21] On 20 April 2005, Newman's employees carried out an inspection of the premises and, on behalf of Hawkins, entered into a tenancy agreement under which the plaintiff and her husband leased the premises for a term of about six months commencing 20 April 2005 at a rental of $300 per week. The plaintiff and her husband then entered into possession of the premises.

[22] On 25 April 2005, while the plaintiff was in occupation of the premises, a pelmet above a sliding doorway fell and struck her on the head and caused her injury.

[23] On 26 April 2005, the plaintiff and her husband signed, and delivered to Newman's office, a letter complaining about the state of the property. The letter commenced:

> "Dear Property Manager,
>
> As you requested by your offices, further to our pleas for help, we are informing you in writing of the current Breaches to our lease agreement and hope for a resolve.
>
> We moved into the Premises 13 Yeates Street on 20.04.05.
>
> We were informed prior to moving in that the owners of this property were angry with the prior tenants thus the pool not being maintained until they moved out. You informed us that it was organised to be repaired and brought to proper standards in the first week on our tenancy. We were also promised that any repairs to this property would be attended to by the owner's advice in the first week of our tenancy.
>
> We have found this property to be in a very poor non-maintained state. It is an un-safe environment to live in and requires immediate attention."

The letter then referred to the fact that the plaintiff had contacted Newman's office on 22 April complaining about a problem with doors in the property, particularly the toilet door which was stuck. The letter continued:

> "On 25 April at approx 10 am Mrs Livesay attempted to enter the bathroom in this premise (most sliding doors in this house are hard to open and need attention) as she opened the door the overhead pelmet dismantled from the wall and fell on top of her. **It caused Personal Injury to her left hand and what appears to have cracked her nose. We are currently seeking medical advice and will advise you of our intentions on this matter."** (Emphasis added)

The letter then enumerated some 17 repairs which were urgently required to the property, and said:

> "As per our references, you will see that we are good tenants and have always maintained and cared for our rental properties to a high standard. We have the utmost respect for our Agents and the Owners of any property we rent. We expect the same in return. This house is not safe and we have two small children that reside here, we request that you display professionalism and immediate attention to the repair of this property treating these repairs with urgency.
>
> **As per the Tenancy Act and advice from Rental Tribunal, Ray White Real Estate and the owners of a rental property will be held liable for any personal injury claims arising from damage caused to the tenants due to poor living conditions**.
>
> We trust with the above information you will organise immediate repair to this home." (emphasis added)

The letter concluded:

> "We are very disappointed by the state of this home and wish to have the above-rectified ASAP. We are not bad people and wish to enjoy a happy time in our new home ensuring the owners that we will care for their home as if it were our own. If the owners of this property disagree to having the premises repaired and brought to a good standard for the rent they are asking, we will have to vacate the premises and will seek legal advice from the rental tribunal for compensation of any costs involved to do so, due to the breach of our lease.
> **This does not include Personal Injury Claim that we are currently entitled to due to injury caused by dangerous fixture**.
>
> We will take no legal action if this property is repaired effectively and promptly and made safe for living in. We state again, that we would be happy for the owners of this property to visit and meet us and inspect their property.
>
> Sincerely,
> Mr and Mrs Justin & Shirley Livesay" (emphasis added)

[24] In September 2005, the plaintiff served on Newman a Form 1 Notice of Claim under the *Personal Injuries Proceedings Act* 2002 ("PIPA"). This Notice of Claim was directed to "The Manager, Property Management Department, Ray White Waterford". The subject matter of the claim was an incident which occurred on 25 April 2005, described as:

> "As claimant opened the sliding door into the bathroom the pelmet came away from the wall and fell on her".

[25] Newman then provided to Denehy a copy of the letter dated 26 April 2005 and the Form 1 Notice of Claim received from the plaintiff.

[26] On 4 October 2005, Denehy prepared a one page document described as a "claim notification" and sent it to AHAC. The claim notification stated:

> "Our client has reported the following claim.
>
> Any further correspondence regarding this claim should be addressed to this office.
>
> Internal Claim number: CL2573
>
> Claim details:
>
> Pelmet fell on tennant
>
> Date of Loss: 26/04/2005
>
> Excess: $15,000.00
>
> 4/10/2005 1:19:41 PM John Denehy
> Copy of claim notification and claim file incl copy of tennancy agreement indicating notification of loss 26/4/2005."

[27] On 4 November 2005, AHAC wrote to Denehy rejecting Newman's claim. It was contended in that regard that no claim had been made against the insured during the policy period nor was the matter notified to the insurer during the policy period, and accordingly the policy did not respond.

[28] It is common ground that:

(a) AHAC has not been prevented or hindered in dealing with the claim by the plaintiff if it chose to do so; and

(b) On 11 July 2008 the plaintiff commenced this proceeding against Newman and on 10 December 2008 Newman filed a defence and commenced the third party proceeding against AHAC. Details of the claims, admissions and defences are set out in the pleadings.

The terms of the policy

[29] Clause 1.1 of Policy Wording (04-02) provided:

> "1.1 PROFESSIONAL LIABILITY
>
> The Insurer will pay on behalf of the Insured all Loss which the Insured is legally liable to pay by reason of any Claim first made against the Insured during the Policy Period and notified in writing to the Insurer during the Policy Period for a Breach of Duty committed or allegedly committed on or after the Retroactive Date."

[30] Clause 2 of the policy contained definitions of terms used in the policy. Those definitions included:

> "2.2 Claim means:
>
> (a) any written demand;
>
> (b) any civil proceeding
>
> for compensation made against the Insured but only in respect of the performance of Professional Services by the Insured."
>
> ...
>
> 2.8 Loss means:
>
> (a) damages or compensation payable by the Insured pursuant to an award or judgment entered against the Insured;
>
> (b) settlements negotiated by the Insurer and consented to by the Insured;
>
> (c) legal costs and expenses awarded against the Insured but only in connection with a covered award, judgment or settlement;
>
> (d) Defence Costs
>
> in respect of a Claim which is covered under this policy.

Loss does not include:

(i) fines or penalties (be they civil or criminal);

(ii) non-compensatory damages including punitive, aggravated or exemplary damages and orders for restitutionary relief;

(iii) costs incurred by the Insured in complying with any order for, grant of or agreement to provide injunctive or other non-monetary relief;

(iv) taxes;

(v) costs incurred by the Insured in correcting or re-performing any Professional Services;

(vi) any amount which is uninsurable pursuant to the laws of the Commonwealth of Australia and the Australian State or Australian Territory in which this policy is issued."

[31] Paragraph 3 of the policy set out exclusions from the policy. It relevantly provided:

"The **insurer** is not liable to make any payment for **Loss** in connection with any **Claim**:

...

3.5 Bodily Injury

for bodily injury or nervous shock, sickness, disease, death or mental anguish of any person. This Exclusion does not apply to damages for mental anguish in respect of a Claim for defamation which is covered under this policy.

The questions for determination

[32] On 4 October 2011, this Court made the following orders:

"2. There be a separate determination of the First Third Party's liability to the Third Defendant concerning the Plaintiff's claim;

3. The issues for separate determination are, whether, in the circumstances disclosed in the Plaintiff's statement of claim:-

a. the Plaintiff's letter to the Third Defendant dated 26 May 2005 [sic] is a "claim" as defined in clause 2.2 of the policy of insurance number REAP21404 dated 24 July 2004 between the Third Defendant as insured and the First Third Party as insurer (the policy);

b. because of the application of section 54 of the *Insurance Contracts Act 1984* (Cwth), the First Third Party may not refuse to pay the Plaintiff's claim by reason of the Third Defendant's failure to give written notice of the said claim to the First Third

> Party as soon as practicable during the policy period of 24 July 2004 to 24 July 2005;
>
> c. the policy exclusion, 3.5 Bodily Injury, does not apply.
>
> d. the Third Defendant is entitled to be indemnified, in accordance with the terms of the policy, against his liability, if any, to the Plaintiff and/or the Second Third Parties;"

[33] In argument before me, AHAC accepted that:

(a) If the plaintiff's letter of 26 April 2005 is found to be a "claim" as defined in the policy wording, then the failure to notify the insurer within the period of insurance is "saved" by s 54 of the *Insurance Contracts Act* 1984 (Cwth); and

(b) If the other three issues set out in Order 3 are found in favour of Newman, then he is entitled to be indemnified under the terms of the policy for the claim made against him by the plaintiff and the second third parties in the proceedings.

The letter of 26 April 2005

[34] By cl 1.1 of the policy, liability on the part of the insurer was relevantly triggered only if there was "any Claim first made against the Insured during the Policy Period".

[35] The policy period in this case expired on 24 July 2005, and the notice of claim under PIPA was not made until September 2005. The question, therefore, is whether the plaintiff's letter to Newman of 26 April 2005 was a "Claim", as that term was defined in the policy.

[36] The determination of this question requires close attention to the terms of the policy, and especially the particular definition of "Claim". It is clear enough in principle that a contract of insurance is to be construed objectively. The meaning of terms in the contract of insurance are to be determined by what a reasonable person would have understood them to mean, and this normally requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[2] It is also clear that the question of what amounts to a claim against an insured, within the meaning of that term in the relevant policy, is one of substance and not of form.[3]

[37] The present policy relevantly defined "Claim" to mean "**any** written demand ... for compensation made against the Insured but only in respect of Professional Services

---

2 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *Pacific Couriers Ltd v BNP Paribas* (2004) 218 CLR 451.

3 *Junemill Ltd (in liq) v FAI* [1999] 2 Qd R 136*; John Connell Holdings Pty Ltd & Conasoc Pty Ltd v Mercantile Mutual Holdings Ltd, Vanguard Insurance Co & Ors* [1998] QSC 116

by the Insured" (emphasis added). I note in passing that "Professional Services" under the policy was defined to include property management.

[38] For Newman, it was submitted that the letter of 26 April 2005 was written notification which set out the facts establishing liability, identified the injury that had been suffered, asserted that Newman was liable to the plaintiff for damages for personal injuries, and accordingly was a "Claim" under the policy.

[39] Counsel for AHAC argued that the letter of 26 April 2005:

(a) was a letter of complaint about the condition of the premises;

(b) did not demand compensation, but merely advised of an intention to seek medical advice;

(c) mentioned the prospect of liability for personal injuries claims not as the subject of a demand but as a reason why it would be prudent to carry out repairs;

(d) raised the possibility of Rental Tribunal compensation, but only in the context of a claim against the owners of the property for the costs of vacating;

(e) contained an enigmatic reference to not including "personal injury claim that we are currently entitled to due to injury caused by dangerous fixture". It was argued that, whatever this means, it was not a demand for compensation.

[40] Considerable argument was addressed to me by both counsel in respect of the judgment of the Court of Appeal in *Junemill Ltd (in liq) v FAI*.[4] It is relevant to note, however, that the definition of "Claim" in that case was quite different to that with which I am presently concerned. In that case, the definition was as follows:

> "The expression 'Claim' shall mean **the** demand for compensation made by a third party against the insured ..." (emphasis added)

This form of definition led Fryberg J to adopt an approach by which his Honour considered whether the words "the demand" referred to the act of demanding or the subject matter of the demand. His Honour identified features in that case which inclined him to the view that the word "demand" in that clause was used to refer to the subject matter rather than the act of demanding. It seems to me, however, that such a distinction does not need to be drawn in relation to the definition in the present case. What was required in this case was that there be "any written demand ... for compensation". That is quite a different definition to the one considered in *Junemill*.

[41] A further issue in *Junemill* was whether the terms of a particular letter from solicitors to the insured in that case constituted the making of a claim. The solicitor's letter said that advice had been given to their client to the effect that there existed a number of grounds for legal proceedings against the insured, and gave notice that in the event of the client sustaining a loss, the client intended to

---

4 [1999] 2 Qd R 136.

commence legal proceedings. It was argued, *inter alia*, that this letter did not demand compensation or assert a right to compensation, and was not made in respect of an existing loss. Fryberg J said:

> "It is true that the letter of 21 August did not particularise the remedy to which its writer implicitly asserted a potential entitlement. It is also true that the indemnity provided under the policy was only against claims 'for compensation'. It was, however, perfectly well known both to the sender of the letter and to the appellant that work had been done by way of valuation of properties in the IOOF mortgage portfolio. In that situation, it seems to me that the legal proceedings referred to must almost certainly have been for damages; and such a claim is quite properly described as one for 'compensation' in this context. There is no formula which must be included in a claim by a third party. 'What is required, unless the policy expressly so stipulates, if a *form* of demand or assertion of liability, not a *formal* demand or assertion of liability.'[5] It must be remembered that the wording is a matter quite beyond the control of the insured."

[42] In the present case, the letter of 26 April 2005 expressly asserted an entitlement on the part of the plaintiff to recover for her personal injury claim "due to injury caused by dangerous fixture". Contrary to the submissions on behalf of AHAC, this statement was not enigmatic. It occurred in a context in the letter in which the plaintiff and her husband were seeking resolution of the complaints they had in respect of many defects in the property, and indicated that they would refrain from action in respect of those defects if the property was repaired. They expressly excluded from that course of action the entitlement which the plaintiff claimed to recover for "injury caused by dangerous fixture". The letter further made it clear that the plaintiff appreciated, and contended, that she had such a claim against Newman – she expressly referred to Newman's business being "held liable for any personal injury claims arising from damage caused to the tenants due to poor living conditions".

[43] These elements in the letter of 26 April 2005 are sufficient, in my view, for the letter to be considered as a form of demand or assertion of liability. It is not to the point that this demand or assertion of liability was co-mingled with complaints about the condition of the property. I consider it sufficiently clear that the plaintiff was making an assertion of liability on the part of Newman, even in the context of the other matters mentioned in the letter, for it to constitute a written demand for compensation, within the definition of the term "Claim" in the policy.

The bodily injury exclusion

[44] The plaintiff's claim against Newman is one for damages for bodily injury suffered by the plaintiff. As such, cl 3.5 of the policy *prima facie* excludes that claim from the ambit of the policy.

---

5 *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co* [1993] 1 SCR at 275; 99 DIR (4th) 741 at 756.

[45] Counsel for Newman submitted, however, that on its proper construction the policy between AHAC and Newman did not contain the exclusion for bodily injury. It was submitted that the relevant contract of insurance was constituted by:

(a) the quotation dated 21 July 2004, referred to at paras [15] and [16] above;

(b) Newman's letter of acceptance – see para [17] above;

(c) Policy Wording (04-02) "to the extent that the printed terms are not inconsistent with other operative terms"; and

(d) the signed and dated proposal form - see paras [12] and [13] above. This document is incorporated in the contract of insurance because Policy Wording (04-02) commences by reciting: "[AHAC] has received a written proposal which is incorporated in and forms part of this contract".

[46] Newman pointed to the following matters of background knowledge and surrounding circumstances:

(a) He sought insurance cover for his professional activities from 24 July 2004; AHAC was willing to consider Newman's proposal, and Eagle was the broker involved;

(b) Newman's proposal form expressly disclosed a significant amount of income ($300,000) derived from "Property Management – Residential";

(c) There were negotiations between AHAC and Denehy about the quantum of the excesses (described as "retentions") which would be payable under a new policy.

[47] Counsel for Newman also pointed to:

(a) the terms of cl 1.1 of the policy, which obliged the insurer to pay "all loss which the insured is legally liable to pay ... for a breach of duty ...";

(b) the fact that AHAC's quotation:

(i) provided for a number of retentions, including:

"(i) $10,000 arising out of bodily injury ... to which this policy responds";

(ii) recited Newman's business as including earning income from "Property Management – Residential";

(iii) recited Newman's response that his business maintained a complaints/repair register to record reports it received about problems with the properties it managed.

[48] It was submitted that "the prominent language in the quotation would convey to a reasonable person that Newman, if he accepted, would be insured for loss arising

out of bodily injury and loss arising from activities relating to residential property management when the claim relates to bodily injury, and he would pay an excess".

[49] It was further submitted that a reasonable person, with knowledge of the background and surrounding circumstances, would regard the terms of cl 3.5 as not consistent with:

(a) the quoted retention of $10,000 arising out of bodily injury, and

(b) the recital of Newman's "Property Management – Residential" business, with a warning that the policy only provided cover for the specified activities.

[50] In this regard, it was submitted that the written proposal expressed the objective intentions of the parties, rather than the printed policy wording.

[51] Counsel for Newman also submitted that, to the extent there was any ambiguity with respect to the content of the policy, the *contra proferentem* principle required such ambiguity to be resolved against the insurer and in favour of Newman.

[52] The difficulty with these submissions, however, is that it was clear from the time that AHAC provided the Quotation Details to Eagle on 7 July 2004, and indeed from the Quotation provided to Newman on 21 July 2004, that the terms which would apply to this policy were those in Policy Wording (04-02). These were the same terms as the policy which Newman had previously held with AHAC.

[53] In *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Gleeson CJ said, at 589:

> "A policy of insurance, even one required by statute, is a commercial contract and should be given a business like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects it is intended to secure."

[54] On any view of it, AHAC's quotation, on which Newman placed significant reliance, expressly incorporated Policy Wording (04-02).

[55] The fact that Newman's proposal, and AHAC's quotation, referred to his disclosure of the relevant "Property Management – Residential" business, together with the warning that the policy only provided cover for that, and other specified, activities, was not, of itself, apt to displace specific exclusions contained in Policy Wording (04-02). The proposal form required Newman to state income derived from various specified business activities, one of which was "Property Management – Residential". The warning then stated:

> "Please note that this policy only provides cover for the activities referred to above. It does NOT provide cover for any other activities including but not limited to property valuation, business broking, insurance agency, mortgage or finance broking/origination."

[56] A reasonable person reading that warning would understand its meaning, namely to identify those business activities for which the policy provided cover and to make clear that other business activities were not covered. To that extent, this part of the proposal is completely consistent with the definition of "Professional Services" under the policy wording:

> "2.12 Professional Services means professional services the Insured performs for others for a fee and for which the Insured is licensed under the laws of the Commonwealth of Australia or of an Australian State or Territory to perform but only in the following capacities:
>
> - Real Estate Agents
> - Property Managers
> - Strata Title Managers
> - Residential Unit Managers
> - Strata Body Corporate Managers
> - Land and Livestock Auctioneers
> - Livestock and Station Agents
>
> Professional Services does not include business broking or business agency services or any form of valuation services even though the Insured may be licensed to perform those services."

[57] But the fact that the proposal sought this information, and provided that warning, did not mean that cover would be provided for the activity of "Property Management – Residential" regardless of what was stated in Policy Wording (04-02). One cannot simply ignore the fact that the quotation, which was accepted by Newman, expressly specified that the policy wording for the policy would be Policy Wording (04-02).

[58] Newman's submission about the retention provisions rely on a constrained interpretation. The quotation did not, as Newman would have it, provide for a retention of $10,000 simply for every claim arising out of bodily injury. In fact, what was provided for was a retention of "$10,000 for each and every Claim (including Defence Costs) arising out of bodily injury or property damage **to which this policy responds**" (emphasis added). When one has regard to cl 3.5, it is expressly stated that the bodily injury exclusion "does not apply to damages for mental anguish in respect of a Claim for defamation which is covered under this policy". In other words, the terms of Policy Wording (04-02) admit of specified circumstances when there may be a claim which falls outside the "bodily injury" exclusion, and in respect of which the specified retention would be payable. If anything, the reference in the retention to a claim for bodily injury "to which this policy responds" would draw a reasonable person's attention to enquire as to the circumstances in which the policy wording does allow for the policy to respond to such a claim.

[59] Moreover, as counsel for AHAC pointed out, acceptance of Newman's submissions on these points would mean that one derives the terms of the policy not from the policy wording but from the insured's proposal and that, because there is no reference in the proposal to exclusions, there would be no exclusions of any kind applicable to the policy. This would be an uncommercial, if not absurd, result.

[60] Attention to the language used by the parties, even in the AHAC quotation and the acceptance by Newman, indicates explicit incorporation of the terms of Policy Wording (04-02). A reasonable person, knowing of the background, would have had regard to that policy wording and understood that the exclusions contained in the policy wording apply to the contract of insurance entered into between AHAC and Newman.

[61] An alternative argument put on behalf of Newman was that "closing advice" as to the terms of the policy given by Eagle to Newman at the time it rendered its tax invoice on 22 July 2004 also constituted a contractual document between the parties, and was given by Eagle as agent of AHAC to Newman.

[62] There is nothing in the "closing advice" which is different from the quotation and acceptance documents to which I have referred above. In particular, the closing advice also specifies Policy Wording (04-02) as the relevant policy wording.

[63] It is also clear, as a matter of fact, that Eagle was not acting as AHAC's agent. The traditional position is that a broker is the agent of the assured, not the insurer.[6] The correspondence makes abundantly clear the fact that Eagle was acting as Newman's agent. It is sufficient in that regard to refer to the following:

(a) The email from Denehy to Newman, in which Denehy confirmed that Eagle's role, as Newman's insurance broker, was "to find the best deal, interpret the details and fine print and provide [Newman], our client with options so that [Newman] can make an informed decision";

(b) The terms of the tax invoice, which referred to Eagle having arranged insurance "as per your request";

(c) The undisputed fact that Denehy asked Newman for additional money for Eagle's fee as broker, and Newman paid that broker's fee.

[64] Accordingly, I would reject the argument that Eagle acted as AHAC's agent.

[65] My conclusion, therefore, is that the bodily injury exclusion contained in cl 3.5 of Policy Wording (04-02) forms part of the contract of insurance between Newman and AHAC. It follows that, as the plaintiff's claim against Newman is one for damages for bodily injury, that claim falls within the ambit of the exclusion.

[66] The form of question contained in Order 3(d) for determination also extends, on its face, to making a determination with respect to Newman's entitlement to be indemnified against any liability to the Hawkins, who have been joined as second third parties to the claim. No argument was addressed to me on that aspect, nor did I hear from the Hawkins, and it would therefore be inappropriate for me to make a determination on that point.

---

6 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1995-1996) 160 CLR 226 at 234.

Conclusion

[67] I answer the issues for separate determination as follows:

(a) The plaintiff's letter to the third defendant dated 26 April 2005 is a "Claim" as defined in cl 2.2 of the Policy of Insurance No. REAP21404 dated 24 July 2004 between the third defendant as insured and the first third party as insurer ("the policy");

(b) It is not necessary for me to make this determination;

(c) The policy exclusion 3.5 Bodily Injury does apply;

(d) The third defendant is not entitled to be indemnified, in accordance with the terms of the policy, against his liability, if any, to the plaintiff under the terms of the policy.

[68] I will hear the parties as to costs.