IBD DETERMINATIONS
January 2007 to December 2007

Case no 877 – Home and Contents – Claim - $50,000

Complaint lodged with IBD	*12/07/2006*
Initial response received from member	*25/07/2006*
Complaint Manager Investigating	*25/07/2006*
Finding issued	*15/12/2006*
Referral to Referee	*22/01/2007*
Determination issued	*20/03/2007*
Complaint finalised	*03/10/2007*

This is a complaint by a property owner in respect of insurance arrangements made by the broker for property being a strata title subdivision at a north Queensland beach resort.

CIRCUMSTANCES

By policy commencing 17 October 2003 the body corporate was held covered for liability and property limited to common property with sum insured of $100,000.00. This insurance was arranged by a third party who was apparently the only person, other than the Complainant, with an interest in the subdivision and body corporate.

It appears that effectively the Complainant and this third person were the only occupiers of the premises and occupied one lot each. There is some uncertainty about the nature of the improvements on the property which I note appears to be continuing and which unfortunately has given rise to the problem and complaint.

Effectively the Complainant occupied a house situated on his lot and on the second lot the third party apparently has a caravan and small workshop.

Unknown to the broker, the Complainant had already effected a Householders insurance policy in respect of the house which he occupied on his lot.

In 2005 the Complainant asked the broker for a quote for insurance over the house on his lot. The broker provided a quote under a landlord's policy as the broker believed that the Complainant was not residing in the house at the time. However, the Complainant did not proceed with that policy.

On 20 December 2005 the Complainant spoke to an employee of the broker who, according to the broker, informed the Complainant that individual lot owners' buildings were not covered by the strata title policy.

On 29 December 2005 the Complainant contacted another employee of the broker and had a discussion concerning the Householders insurance policy. There is a difference of opinion as to the nature and extent of that discussion. The broker says that the policy was described as a liability policy and that the broker was asked to cancel it because the Complainant realised that the liability section of the strata title policy covered all liabilities. The Complainant says it was a much broader discussion. I consider these matters further hereafter.

In any event, the broker cancelled the policy and the Householders insurance policy insurer then refunded to the Complainant premiums paid from 2003. It is not clear from the documentation how or why this occurred. The refund was made direct to the Complainant

although the fax letter of cancellation came from the broker. Presumably there was some additional information supplied to the Householders policy insurer to persuade it to refund more than one year's premium.

When cyclone Larry struck the area in 2006, the Complainant's house was damaged. The strata title policy did not respond because it was only issued to cover common property. The Complainant had no cover for his house.

The Complainant says that this position is the fault of the broker.

SPECIFIC COMPLAINT

The Complainant says that it was his understanding that the strata title policy covered damage to his home as well as damage to the common property. The Complainant says that when he received a renewal notice from his Householders insurer in December 2005 he thought he might be doubly insured so he telephoned the broker providing policy details and asking whether or not he was doubly insured. The Complainant says he instructed the broker to take up the matter with a person described as "Jill" at the insurer's office.

Subsequently after cancellation of the Householders insurance policy and refund of the premiums, the Complainant found himself without cover when his house was damaged by the cyclone. The Complainant says he would not have instructed the broker to cancel the Householders insurance policy if he had known that cover for that risk was not provided by the strata title policy.

The Complainant says he instructed the broker only to cancel the Householders insurance policy if the Complainant was covered for the same risk under the strata title policy.

I note that the quantum of damage to the house has not yet been ascertained but the Complainant has agreed to limit his claim to $50,000.00 which is the limit at present applying to disputes of this nature handled by IBD.

BROKER'S RESPONSE

The broker says that it was requested by the third party to arrange liability cover for the body corporate and was not asked to arrange any insurance for individually owned properties.

Subsequently when the Complainant asked the broker to quote for insurance cover for his house and the broker produced a landlord's policy quote the Complainant did not proceed with that cover.

The broker says that on 20 December 2005 and again on 29 December 2005 the Complainant telephoned the broker speaking to a different employee each time. During the telephone discussion of 20 December 2005 the Complainant was advised that his house was not covered by the strata title policy.

During the telephone discussion of 29 December 2005 there was a discussion concerning liability cover. The Complainant pointed out that there appeared to be two liability policies over the property and that as the Householders insurance policy covered the risks that were also covered by the strata title policy the broker should cancel the Householders insurance policy from date of inception.

The broker says he was not aware that the home insurance policy was a property damage policy rather than a liability policy.

Specifically the broker denies that the Complainant requested the broker to consider the cover provided under the policy by the Householders insurance underwriter.

The broker also says that it never suggested to the Complainant or the third party that it had arranged any insurance cover other than the body corporate cover. The broker also points out that the strata title insurer does not insure houses in the area and the broker would not have arranged such a policy with the strata title insurer.

FINDING BY CASE MANAGER AND OBJECTIONS BY BROKER

Subsequently the case manager wrote to each of the parties setting out what she saw as the relevant issues. Thereafter another case manager issued a Finding. I refer to that Finding because of the subsequent objections raised by the broker.

The broker has raised various issues as a result of the Finding. The broker says that the Householders insurer should be involved in the dispute because of the relevance of its underwriting policy in determining whether that insurer acted appropriately by cancelling the policy. The broker says that, because the Householders insurer could be involved in the claim, substantial issues of fact concerning the Householders insurance policy and its response to any claim are raised and without the involvement of the Householders insurance underwriter it is inappropriate for IBD to determine the complaint.

The broker also says that the Householders policy would not have responded to the claim in any event and restates factual allegations as to the Complainant's knowledge of the policy.

I deal with these objections as a preliminary.

HOUSEHOLDERS INSURANCE POLICY

The broker says that it acted in good faith in following the Complainant's instructions to cancel the Householders insurance policy and that the Complainant was fully informed as to the nature of the policies held by him and the body corporate when he made the request to cancel the Householders insurance policy.

Further the broker says that it is unlikely that the Householders insurance policy would have responded to the claim in any event because of material non disclosure by the Complainant that the premises were being used, at least in part, as commercial premises.

Unfortunately there appears to be a misapprehension about the Complainant's use of the premises. At some stage it was apparently suggested in the course of correspondence and discussions between the parties and IBD that the Complainant was using the premises as a café, restaurant or coffee shop. The Complainant says that this is incorrect and that there had merely been some consideration given to the Complainant undertaking a commercial activity of that nature at some stage in the future. The broker has been unable to provide evidence of a commercial activity except for a photograph with a sign referring to a café. In those circumstances it appears that the so called material non disclosure of that nature may not be based on the correct factual situation.

In any event whether or not a particular insurer will respond to a claim by a denial based on non disclosure is really a matter of speculation until the insurer makes a decision.

The broker further says that the Householders policy insurer should be involved in the dispute because of the relevance of its underwriting policy in determining whether that insurer acted appropriately by cancelling the policy. The broker says that pursuant to Clause 3.3(f) of the IBD Terms of Reference, IBD should not continue to consider the dispute. Clause 3.3(f) is as follows and is under the following heading:

"Discretion of GM (General Manager) to refuse to consider or continue considering a dispute

3.3 The GM has discretion to refuse to consider or to continue considering a dispute, which the GM believes in all the circumstances, is inappropriate for IBD. For example, where:

…(f) the dispute raises substantial issues of facts which would not be appropriate for the GM to determine”.

I also point out that Terms of Reference Clause 3.18(f) in regard to the discretion of the Referee is similar and reads as follows:

“Discretion of Referee to refuse to consider or continue considering a dispute

3.18 The Referee also has a discretion to refuse to consider or continue considering a dispute, which the Referee believes in all the circumstances, is inappropriate for IBD. For example where:

…(g) The dispute raises substantial issues of fact which would not be appropriate for the Referee to determine”.

I note that both these clauses give the General Manager and the Referee a discretion.

In my opinion the position with the Householders insurance policy is clear. The policy was cancelled in circumstances where I am unable to see any possibility of any argument that the insurer did not act appropriately. It was requested to cancel the policy by a broker who referred to the Complainant as “the above client”. Further, there must have been some additional discussion between the Complainant and the insurer because the broker’s fax message of cancellation does not request cancellation from inception. In all the circumstances I am unable to see how the broker could say that the underwriter did other than what was requested.

Further, I note that the Complainant did attempt to have the insurer respond to the claim but the insurer declined. It was open to the Complainant to take the matter further but the Complainant did not do so, no doubt for very good reasons known to the Complainant.

The broker also claims that the Householders insurance policy would not have responded and therefore the Complainant would not have suffered any loss and the matter should not be considered by the General Manager of the Referee pursuant to Clause 3.39(e) of the Terms of Reference.

I note that Clause 3.3(e) of the Terms of Reference is a further subclause of Clause 3 and reads as follows:

…“(e) The client has or will not suffer any economic loss as a result of a dispute”.

In the same way Clause 3.18(f) which is part of the above previously quoted clause relating to the Referee reads as follows:

“(f) The client will not suffer any economic loss as a result of the dispute”.

Once again the General Manager and the Referee each have discretion to refuse to consider or to continue considering a dispute.

However, as I have previously stated, the alleged non disclosure relating to the use of the property for commercial purposes or any specific exclusion in the Householders insurance policy in respect of losses in relation to commercial premises is not relevant because there is no compelling evidence that the property was being used for commercial purposes at the time on the information at present available to me.

I now move to a Decision on the substance of the claim.

RELEVANT LAW AND CODE

I refer to Section 4 and the various paragraphs thereunder of the General Insurance Brokers Code of Practice which relates to the responsibilities of an insurance broker acting as an agent of the insured. Specifically I refer to Clauses 4(a), (b) and (c) which are mentioned above.

I also refer to the Terms of Reference and in particular paragraphs 3.3 relating to the discretion of the GM and 3.18 relating to the discretion of the Referee.

In addition I have generally considered the provisions of the Insurance Contracts Act 1984 and particularly those sections relating to non disclosure although I have not found it necessary to rely on any of those provisions because of the factual situation as set out above.

DECISION

It is in dispute between the parties as to whether in the first telephone discussion between the broker and the Complainant on 20 December 2005 the Complainant was told that the strata title policy did not provide cover for his house.

It is also in dispute as to whether the telephone discussion of 29 December 2005 consisted or an instruction by the Complainant to the broker to cancel the Householders insurance policy or whether it was a wider discussion which included a request by the Complainant to the broker to consider the Householders insurance policy and to cancel it only if it provided the same cover as that provided by the strata title policy.

In his Finding the case manager has referred to the discussion of 29 December 2005 in some detail. I do not disagree with the comments expressed by him about that discussion and the earlier discussion of 20 December 2005.

However, in my opinion it is very clear that on 29 December 2005 and on 5 January 2006 when the broker sent the cancellation message to the Householders insurer, the broker must have been aware that the Householders insurance policy was not just limited to liability cover but also included property cover in respect of the house. Among other things the policy number provided by the Complainant to the broker was clearly in respect of a Householders insurance policy. The nature of the telephone discussion on 29 December 2005, even ignoring the discussion of 20 December 2005, was such that the broker could not have been unaware that the Householders insurance policy included cover for the building and the policy number which the broker was obliged to supply to the insurer commenced with the initials HOM which is clearly a reference to a policy including a domestic dwelling.

I do not think it is reasonable for the broker to suggest that a policy of that nature would be likely to merely provide some form of liability cover.

Brokers do not just provide a post office service to clients. Brokers provide a value added service which includes more than just acting as the middle man between the insured and the insurer and handing over policies in return for premium payment.

A broker provides input to and insured for whom he acts in respect of the insurance arrangement which is being made. Clauses 4(a) – (c) and indeed all the various subclauses set out under section 4 of the General Insurance Code of Practice set out all those matters to which a broker is expected to attend when arranging cover and, by implication, when arranging the cancellation of policies.

In my opinion it was the broker's duty, even if the only instructions given to the broker by the Complainant were to cancel the Householders insurance policy, to point out to the Complainant that this would leave him uninsured in respect of his home. I note that this was at a time when the monsoon season was almost upon far north Queensland, if it had not already commenced.

Of course, if the discussion was, as the Complainant says it was, then the broker obviously failed in respect of a request to discuss the matter and check the nature of cover but it is not necessary for me to make any finding in that regard. In my opinion once the broker knew that the Complainant had his own Householders policy it should not have been cancelled without further detailed enquiry.

I have therefore come to the conclusion that the broker was in breach of its obligations under the Code of Practice as set out in Section 4 and in particular Clauses 4(a) – (c). The result is that the broker is obliged to compensate the Complainant in respect of the Complainant's loss.

QUANTUM OF LOSS

I take the point made by the broker that quantum must be the quantum which would be payable under the Householders insurance policy had it remained current. There is an argument that perhaps the broker should have looked even more closely at the policy and if he thought the Householders insurance policy was inadequate, then the broker should have made recommendations about any another more comprehensive policy. However, I assume for all relevant purposes that the Householders insurance policy covers the loss in general terms.

Nevertheless I agree that further information is required in order to properly quantify the amount of any order.

I agree with the broker that the loss claimed must be assessed and allowance should be made for a reduction in respect of the appropriate premium which would have been payable and any excess which would have been payable under the Householders insurance policy. Further, there can be no order made in excess of $50,000.00. Also, if evidence is produced in respect of the alleged commercial use of the premises I will consider how this Decision should be varied depending on the nature and extent of the commercial use.

There must also be some allowance made for input by the Complainant in respect of assessment of the loss. Many insureds find it necessary to employ a claims consultant to negotiate with a loss adjuster and it would be unfair and unreasonable to prevent a Complainant from challenging any assessment by a loss adjuster retained by the broker.

In the circumstances I make the following orders:

1. The broker is to compensate the Complainant for the loss suffered by the Complainant as a result of the cancellation of the Householders insurance policy.

2. The Complainant is to provide a copy of the Householders insurance policy wording (and copies of all premium notices and the cancellation invoices or other documents containing details of premium payments and the refund) to IBD within 7 days of acknowledgment by the broker that it agrees that it will comply with this order. IBD will forward copies of these documents to the broker.

3. The broker is to arrange at its cost for a loss adjuster to attend the premises and provide a detailed adjustment of the loss in writing to the broker within 60 days of receipt of the policy and associated documents. Copies of the adjuster's report are to be provided to IBD which will forward a copy to the Complainant.

4. The Complainant is to provide IBD with a response to that assessment within 30 days of its receipt by the Complainant. IBD will provide a copy of the response to the broker.

5. The broker will then have a further 14 days to make any further submissions.

In due course I will then make a Supplementary Order concerning quantum.

SUPPLEMENTARY ORDER

In this matter I have previously issued a Decision which is dated 1 March 2007. In that Decision I set out details of the procedures to be carried out by the parties to confirm the quantum of the loss suffered by the Complainant as a result of the cancellation by the broker of the Householders Insurance Policy.

The Loss Adjuster whom the broker arranged to provide a report has confirmed the quantum of the Complainant's loss although the Loss Adjuster has not set out in his report a detailed adjustment of the loss nor provided any documents in addition to those submitted by the Complainant.

Pursuant to the Orders made by me on 1 March 2007 the Complainant has responded to the assessment by advising that he considers the Loss Adjuster's report to be reasonable although there is some concern that the quotes previously obtained by the Complainant may now be out of date.

If that is the case then the Complainant may be out of pocket when he attempts to have the work carried out. However, I understand that the Complainant is prepared to bear that risk.

I also note that the broker has not made any submission in respect of the excess and premium which the Complainant may have been required to pay the Householders Insurance Policy insurer. I suspect that the amounts involved are not substantial and that they may well be outweighed in any event by increases in cost which the Complainant will incur in respect of the cost of repairs given that the previous quotes were provided in February 2007 and there is no shortage of work for builders and contractors in North Queensland because of continuing repair work following the cyclone which was the cause of the loss.

I note that the broker has suggested that the Complainant should enter into some form of Settlement Release but this is not in accordance with the terms of my original Decision and Order.

In the circumstances I direct that the broker shall within 14 days pay to the Complainant the sum of $47,839.00 being the cost of repairs as agreed. IBD will forward the standard documentation to the parties to implement my Decision.

Case no 885 – Professional Indemnity – Premium Level - $5,000

Complaint lodged with IBD	*13/06/2006*
Initial response received from member	*16/06/2006*
Complaint Manager Investigating	*16/06/2006*
Finding issued	*18/10/2006*
Referral to Referee	*13/12/2006*
Determination issued	*03/07/2007*

Complaint finalised *05/07/2007*

This is a complaint by an estate agent for whom the broker arranged professional indemnity cover for 4 years from 2002. The Complainant says that the broker did not place the most cost effective insurance for the business and claims a refund of the amount which he says represents the additional premiums which the Complainant has paid which he would not have paid had the broker put the business with an underwriter who charged a lesser premium. There is also a complaint about an excess or deductible.

SPECIFIC COMPLAINTS

The Complainant says that the broker did not place the most cost effective insurance for his business and says that this is evident from the fact that another broker provided cheaper insurance cover through another underwriter in 2006/2007.

The Complainant says that the total overpayment for the 3 years from 2003 is $3,771.26.

The Complainant also says that the broker failed to inform him that in 2003 the excess payable for bodily injury had been increased from $4,000.00 to $20,000.00. This meant that when the Complainant was the subject of a claim he was obliged to pay $17,803.40 being the amount actually paid by the insurer to settle the claim including costs so that the Complainant lost a further $7,803.40 because the maximum he would have paid as the deductible under the better policy would have been $10,000.00.

I note that the Complainant says that he was not aware of an industry based professional indemnity insurance arrangement effected by his State Real Estate industry and that the broker did not advise him about possible cover through that scheme.

BROKER'S RESPONSE

The broker says that it was generally difficult to obtain professional indemnity insurance including the risk for personal injury for real estate agents and valuers during the relevant period.

The broker says he contacted various underwriters each year to obtain quotes for cover and always acted with the Complainant's best interests in mind.

The broker says that the professional indemnity market is different today to what it was during the relevant period.

The broker further says that the Complainant completed various proposal forms and placement authorities in order for the broker to obtain quotes and place cover and that these documents clearly showed the various levels of cover and relevant excesses prior to invoices or policies being issued.

In respect of the excess the broker says that the excess of $4,000.00 payable in 2002/2003 was a general excess and at that time cover was not provided for personal injury. In 2003/2004 an opportunity became available to include personal injury cover with no conditions other than a $20,000.00 excess and at that time the general excess was increased from $4,000.00 to $10,000.00 in any event. In 2005/2006 the general excess was reduced to $5,000.00 with personal injury excess being $10,000.00. The broker emphasises that all these figures were shown clearly on invoices.

FINDING BY IBD CASE MANAGER

By Finding dated 18 October 2006 the IBD Case Manager found that the broker did not breach a duty or obligation owed to the Complainant and reference was made to the broker's inability to access the policy arranged by the industry, the fact that the broker requested quotes from different insurers each year and the fact that the professional indemnity insurance market was different in 2006 to what it had been in relevant previous years.

FURTHER SUBMISSIONS

Following the Finding by the Case Manager both parties have made further submissions, although they are really elaborations on issues previously ventilated and responses to further queries by IBD I have considered those further submissions and reviewed the Finding before reaching my Decision.

RELEVANT LAW AND CODE

I have considered the general obligation of an agent at common law to act in the best interests of its principal and I have also considered the General Insurance Broker's Code of Practice and in particular Clause 4 of the Code which sets out the responsibilities of an insurance broker when acting as agent for an insured. Clause 4 in general terms requires a broker to act in its client's best interests, exercise reasonable care and skill and discharge its responsibilities and duties competently and with integrity and honesty.

The broker is also a member of the National Insurance Broker's Association which has its own Code of Conduct which sets out the responsibilities of its members in providing services to their clients. In general terms it provides that a broker shall at all time act in its client's best interests.

Both these Codes are common sense documents and the emphasis is on fairness and reasonableness in dealings by the broker with, for and on behalf of its client. There is no specific requirement in either Code that a broker must obtain the lowest possible premium for insurance. Obviously a policy is more than the premium and there are many different factors which will affect the recommendation which a broker makes to his client in respect of cover to be arranged.

GENERAL CIRCUMSTANCES AND ISSUES

The Complainant says that it left it up to the broker to decide the best possible policy for the insured in any particular year and the criticism made by the Complainant of the broker is effectively that the broker did not sufficiently investigate all aspects of the policy required by the Complainant including the amount of excess, whether or not bodily injury was included in the liability cover, the amount of cover provided specifically for bodily injury claims and the relevant excess or deductible.

It appears that over the relevant period of time the broker did obtain quotes from different insurers each year before placing the insurance. The Complainant has queried the extent of the investigation and enquiries made by the broker each year and in particular complains that the broker did not inform the Complainant about the existence of the insurance scheme arranged by his State Real Estate Agent body.

The Complainant says he expected the broker to "look at all this and get me the best deal". He has suggested that the broker did not refer the industry scheme to the Complainant because the broker would not receive a commission.

The Complainant says he was not aware of the industry scheme and in any event advertisements for the industry scheme in the Real Estate Journal did not contain details of premiums or statements that those premiums were cheaper.

It also appears that the Complainant before 2002 had been in business in another state also as a self-employed real estate/business broker for 3 – 4 years. For that purpose he had professional indemnity insurance in that other state. This was also arranged by the broker against whom this complaint is made.

I also note that the complaint appears to have been precipitated at first, not by a dispute concerning the premium cost but because of the excess payable by the insured for a bodily injury claim mentioned above. I note that it appears that at that time some professional indemnity policies did not include cover for bodily injury but of those which did, there were differences in the amount of the excess or deductible payable in the event of a claim.

In respect of the steps taken by the broker each year to obtain quotes and generally make enquiries concerning the availability of cover, I note that the Case Manager, following his enquiries, was satisfied that the broker discharged its obligations to act in the best interest of the Complainant when placing the insurance by contacting various insurers each year for quotes.

DECISION

The cost of insurance of which the premium is the main component is only one item which a broker must consider when placing cover for a client. There may be many other factors which will influence the broker. These include any particular requirements by an insured, the insured's own instructions, the nature of the insured's business and any particular specialty. The factors extend to the nature of the policy but also inclusions and exclusions in the policy wording, the broker's knowledge of the attitude of the insurer to claims and the ability of the insurer to pay.

Where a client requests a broker to provide cover when the insured is a member of an organisation which has its own industry scheme for cover, the broker may also take the view that there is some reason why the client has decided not to go with the industry scheme. In my opinion it would be a fair comment to say that a reasonable expectation might be that the industry scheme, because of the potential number of insureds, might well be expected to offer a cheaper premium although whether the terms and conditions of the policy would be similar or better than those on the open market may be unknown.

In this case the Complainant has suggested that the broker did not discuss with the Complainant the merits or otherwise of the industry scheme but I do not find that surprising. I suppose it is possible that the broker could have suggested to the Complainant that he should look at the industry scheme and that the broker might do so on his behalf if the insured were prepared to pay a fee for service rather than a commission to which the broker would not be entitled if the Complainant signed up with the industry scheme. This is because the broker who was handling the industry scheme was apparently not prepared to deal with other brokers.

However, I am able to make a decision without pursuing that line of enquiry.

It appears to me that the Complainant having been a member of the real estate industry in two states for a total period of approximately 8 years could not reasonably expect to persuade a Court that he was not aware of the industry scheme for insurance. Details of that scheme are provided to new members of the real estate industry by all relevant state industry bodies. The scheme is advertised regularly in the various state real estate journals.

In my opinion no real estate agent who was a member of the state body could fail to be aware of his ability to obtain insurance through the industry organised scheme.

I have also come to the conclusion that any reasonable businessman would assume that there must be some benefit to members of the industry in obtaining insurance through the industry scheme. In failing to consider the possibility of insurance through the industry scheme, I consider that the Complainant has acted in a way which prevents him from complaining that the broker did not also consider that scheme in any detail.

When the Complainant moved to his current state of practice in 2001 -2002, the position concerning professional indemnity insurance and many other similar liability policies was difficult. The industry was facing problems of capacity following the HIH collapse. Many brokers found it hard to place cover for clients.

Even when the market is "soft" and brokers find it easy to place cover and premiums are competitive, there can be complications and difficulties in comparing one policy with another. Benefits and exclusions and conditions in policies can vary and sometimes one policy may contain an exclusion which does not appear in another policy. Likewise benefits may vary.

A broker cannot be expected to necessarily obtain the best possible policy for the lowest possible price. There will always be considerations of different benefits, different exclusions and different premiums. The broker must strike a balance and make a recommendation. He may, of course, make several recommendations and alternatives. Many clients may, of course, be expected to say they only require one recommendation because they do not wish to be bothered with the difficulty of comparison.

Where a particular benefit, such as the introduction of cover for claims involving personal injuries in real estate agent's professional indemnity policies is being gradually introduced by the industry so that the level of cover varies from policy to policy and where also the specific and general deductible may also vary, a decision concerning which particular policy is best may be extremely difficult.

In this case I note that the broker says that in 2003/2004 an opportunity became available to include bodily injury cover with no conditions other than the $20,000.00 excess. At that time the general excess was increased from $4,000.00 to $10,000.00. These excesses remained until 2005/2006 when they were reduced. The broker has pointed out that all these excesses were shown on relevant invoices at relevant times.

I have come to the conclusion that the Complainant cannot argue that he was not aware of the relevant terms and conditions of his policy because the premium and excesses were set out on the Tax Invoices each year.

There is no evidence to suggest that the Complainant advised the broker of any special requirement for cover such as personal injury cover.

Further, the Complainant must have been aware of the industry scheme for insurance. He could have made enquiries about that scheme but chose not to do so.

There were undoubtedly other policies available on the market from time to time during the years 2002 – 2005 but they would no doubt have had different benefits and exclusions as well as premiums. In my opinion the time for the insured to have considered all those questions was when the policy was incepted, not when a claim is received.

A broker can be expected to take reasonable care that the insurer is solvent and likely to pay proper claims, that the cover is for a reasonable spread of risks in comparison with what the market offers and that the premium is also within tolerance. However, it is not reasonable to suggest that in the absence of a request by the insured for a specific cover or conditions, the broker should be able to guarantee that the policy contains more favourable terms and conditions than any other on the market. Likewise a broker cannot be expected to guarantee that a premium is the cheapest on the market.

A broker must make reasonable enquiries about all the above matters but is not a guarantor that a policy covers all claims or has the lowest deductibles or the lowest premium.

An insured can ask a broker to obtain particular terms or conditions or the insured may make his own enquiries.

It is difficult to re-create in 2007 all the factors which operated when the broker was required to make a decision concerning the policy to be recommended in 2002, 2003, 2004, and 2005. The multiplicity of factors including deductibles, excesses, benefits and premium together with market capacity make it almost impossible to say with any confidence what may have been the best choice in any of those years.

In any event it is also difficult to be certain exactly what alternative policies were available five years ago. I do not think it is reasonable to argue that in 2007 it is possible to be quite sure exactly what alternatives were open to the broker in 2002. Not only is there an evidentiary problem about the policies which would have been offered by insurers or underwriting agents in the market at that time but there will always be the additional complication of differing terms and conditions, deductibles and excesses and premiums.

It is not reasonable in 2007 to point to a specific item in a specific policy and say that because it was included in one policy it made that policy a better policy than another. The other policy may well have contained different benefits or exclusions which may subsequently have been relevant to a claim. It is easy to be wise after the event and say that because a particular claim has eventuated, the policy which responded best to that claim with maximum benefit to the insured, should have been chosen.

In the absence of evidence that the Complainant asked the broker to source a policy with a particular benefit I cannot conclude that the broker did not provide a policy which provided cover similar to other available policies. The policy did respond to a personal injury claim. Other policies might not have responded. If the claim had settled at a much higher figure the Complainant might not be objecting to the amount of the deductible or excess which he was required to pay.

All these are imponderable factors which may be clear after the event but are certainly not known when the policy is taken out.

A broker is not a prophet and he does not have a crystal ball. He can only attempt to provide a policy which responds to reasonable spread of risks. He cannot be expected to find a policy which covers all risks and all risks completely.

In assessing the suitability of a policy there may well be trade-offs. Premium and deductibles/excesses are examples. In the end a broker must make a judgment as to what he recommends but it is also up to the insured to say if he has a particular requirement or strong views about certain cover or risks.

In this case the Complainant appears to have provided no instructions to the broker about particular risks or specific covers. Instead he says he expected the broker to provide "the best possible cover" and "get me the best deal".

A Rolls Royce and a Holden Commodore provide transport from A to B in comfort but which is the "best deal" may be a matter of discussion. It is a question which can only be answered by the buyer, not the car salesman. It depends on what the buyer wants and what he is prepared to pay. There are many choices in between. A choice between options at one end of the spectrum (Holden/Ford/Toyota/ Mitsubishi) and the other (Rolls Royce/Bentleigh/Benz/BMW) may be problematic. All will be different in various ways.

A failure to more specifically communicate his desires and expectations means that a client is handing some discretion to his broker.

In this case the broker has provided a product which was undoubtedly a Professional Indemnity policy as sought. The complaint is that it did not go far enough because of the amount of a particular excess and was more expensive than others. Nevertheless it was a policy which was on the market, issued by a reputable insurer and must have had some appeal to insureds. It may not have been the cheapest and it may not have included all possible benefits but it appears to have been one of several typical policies available on the market and commercially acceptable at a time when choice was limited.

In my opinion it is no more reasonable to complain about the broker's choice some years after the event than it would be to argue about the merits of different motor vehicles five years after purchase.

I find that the broker recommended a reasonable policy to the Complainant. It is true that in the circumstances of the claim the Complainant was out of pocket but other policies might have resulted in the same or a worse result and had the claim been of a different type the result may have been quite different.

In the circumstances I find that the broker discharged his obligations pursuant to Clause 4 of the General Insurance Brokers Code of Practice and the NIBA Code of Conduct.

I am therefore unable to accept the Complaint.

Case no 890 – Life Stock – New Business issue - $5,000

Complaint lodged with IBD	*13/06/2006*
Initial response received from member	*05/07/2006*
Complaint Manager Investigating	*05/07/2006*
Finding issued	*04/10/2006*
Referral to Referee	*05/12/2006*
Determination issued	*22/06/2007*
Complaint finalised	*28/06/2006*

This is a complaint by an insured horse stud for which the underwriting agent arranged bloodstock mortality insurance in respect of an unborn foal. When the mare did not deliver, the insured made a claim but the insurer declined to accept the claim. The Complainant says that the underwriting agent was negligent in respect of the underwriting agent's arrangements with the insurer for cover or failed to arrange such cover.

CIRCUMSTANCES

By fax letter dated 15 June 2005 the Complainant requested the underwriting agent to amend his insurance schedule in respect of 9 blood stock policies and also to effect new cover for a mare which was due to foal on 28 September 2005 and requested "unborn foal insurance $20,000.00".

I note that previously the Complainant had effected blood stock cover through the underwriting agent for approximately 3 years and in particular had obtained unborn foal insurance in respect of another mare in November 2003.

The period of insurance was expressed to be from 16 June 2005 to 27 September 2005 although in other parts of the documentation the period is expressed to be 16 June 2005 to 30 days after birth. I have decided that nothing turns on this discrepancy.

Tax Invoice dated 23 June 2005

The initial tax invoice and coverage summary was issued by the underwriting agent and bears date 23 June 2005.

The tax invoice is a one page document and in the middle of that document appears the following:

"IMPORTANT NOTES

Insured: (Complainant) Pty. Ltd. & F.T.R.R.I

Prospective foal cover for "(name of mare)" through until 30 days after birth-Sum Insured $20,000.00.

Proposal form and current pregnancy certificate required".

Coverage Summary dated 23 June 2005

Attached to that document was a 3 page document headed "COVERAGE SUMMARY" which repeated the various particulars of cover noting that the last service date for the mare was 23 October 2004.

On the first page of those 3 pages appeared the following:

"VETERINARY PREGNANCY CERTIFICATE: Required

Note – Certificate must make specific reference to the general health of the mare, confirming pregnancy status and scan dates".

On the second page of the coverage summary appeared the following:

"PROSPECTIVE FOAL INSURANCE CLAUSE

Subject to all of the terms, conditions and exclusion of the Insurance to which this clause is attached, and in consideration of the additional premium paid, it is agreed that the Insurance is extended to indemnify the Insured, up to but not exceeding the Underwriters' limit of liability specified in the Schedule, in the event that:

(i) the mare named in the Schedule, who has not given birth to a live foal during the period of this Insurance, is not in foal at the expiration of the Insurance to which this extension clause is attached; or

(ii) the foal in utero names in the Schedule is not alive at the expiration of the Insurance to which this extension clause is attached.

VISUAL PROOF OF LOSS REQUIREMENT

No loss shall be payable under this extension clause unless a written VETERINARY SURGEON'S report has been received and accepting by the Underwriters certifying visual inspection by the VETERINRY SURGEON of:

a) the recently aborted fetus and evidence of the mare having recently aborted; or

b) the delivery of the dead foal by the mare; or

c) the death during the period of the Insurance to which this extension clause is attached, of the named live born foal; or

d) a Post-Mortem examination of the mare revealing the existence of an unborn foal".

Renewal Letter dated 30 June 2005

By letter bearing post office sticker BN18929296 the underwriting agent forwarded to the insured copies of all blood stock insurance renewals for 2005/2006. This was as a result of a telephone call from the insured earlier in the week. I mention the post office sticker number to avoid any dispute about whether or not that letter was received.
That letter noted that a pregnancy certificate for the mare the subject of this claim was required and also a Vet. Certificate of Health for another horse.

Alteration to Cover Tax Invoice 25 July 2005

Subsequently the insured decided to reduce the sum insured from $20,000.00 to $10,000.00 and the underwriting agent issued an Alteration to Cover tax invoice dated 25 July 2005. On the front of that tax invoice in the same position as the "**IMPORTANT NOTES**" which appeared on the original tax invoice, appeared the following:

"IMPORTANT NOTES

Insured: (name of insured)
Prospective Foal covering on "(name of mare)"
Proposal Form received 19 August 2005".

Coverage Summary 25 July 2005

Attached to that Alteration to cover tax invoice was a Coverage Summary which appears to be identical to that originally issued except for the sum insured which is shown as $10,000.00.

Of relevance is the fact that the paragraph in respect of the "VETERINARY PREGNANCY CERTIFICATE" on the first page of the original coverage summary and the paragraphs headed "PROSPECTIVE FOAL INSURANCE CLAUSE" and "VISUAL PROOF OF LOSS REQUIREMENT" which appeared on page 2 of the original coverage summary, were repeated in this document.

Original Letter 23 June 2005

With the original policy documentation dated 23 June 2005 the underwriting agent forwarded a letter to the Complainant. The salient part that letter reads as follows:

"Further to your instructions we have arranged an insurance cover for 30 days on your horse(s) as per our attached Tax Invoice. Please note that in order for us to effect cover for the period as stated on our invoice, we require all of the following documentation to be completed and returned to our office.

1. A fully completed and signed proposal form (enclosed for your completion)
2. Payment of the annual premium and charges as per our invoice.

A current veterinary certificate of health is required on your animal if:

** The sum insured exceeds $30,000.00 sum insured

** The horse is over 12 years of age or under 90 days of age (Noting IGG Results if foal)
** There has been any illness/disease in the past 12 month period

To ensure this cover continues for the period as stated on our invoice please forward all documentation together with full payment of premium which can be made by cheque credit card, BPAY or monthly instalments where the premium exceeds $1,000.00 (see below for details).

Please note that full payment of premium and all documentation requested must be received in our office within 30 days from the date of this letter, or we will have no alternative other than to cancel all cover".

The above documents are not the subject of dispute as to their existence. At times during the relevant period the underwriting agent has alleged telephone discussions occurred between the parties during which the need for a pregnancy certificate was discussed. Because there can be disputes about telephone discussions, particularly two years after the event, I prefer to consider only the documents about which there is no argument as to their existence.

When the Complainant made a claim under the policy for the loss of the foal in September 2005 the claim was declined.

By negative certificate obtained by the Complainant from a veterinary hospital and dated 9 September 2005 it is certified that when the mare was examined at a stud on that day she was found to be not pregnant. That document was subsequently presented to the underwriting agent. At some time a veterinary certificate issued by a veterinary clinic and dated 8 September 2005 was also obtained and presented to the underwriting agent which stated that the mare was 45 day pregnancy tested on 6 December 2004 and the results found the mare to be pregnant. The mare was apparently presented to the vet at the stud where she had been serviced.

In subsequent correspondence the underwriting agency which had arranged cover on the London market referred to the prospective foal insurance clause and the visual proof of loss requirement as set out above which appeared in the original coverage summary issued on 23 June 2005 and again on 25 July 2005 when the sum insured was decreased.

Subsequently, following correspondence from the Complainant to underwriters, a dispute arose as to whether or not cover had actually been affected by the underwriting agent. The underwriters formed the view that cover was effected and that the claim would have been paid if the provisions of the policy had been met. The underwriters said that the loss was unable to be proven as the visual loss proof of loss clause was not fulfilled.

However, the underwriters said they were prepared to agree to refund the premium on a without prejudice basis. This was said to be subject to confirmation that the return premium would be a full discharge of all liabilities. The Complainant then signed a form of Release agreeing that all liabilities under the above policy were discharged against the underwriting agency and the underwriting agent. He then received a cheque for the return premium of $1,722.46.

SPECIFIC COMPLAINTS

1. The Complainant says that the letter sent by the underwriting agent to the Complainant on 23 June 2005 was incorrect and caused the Complainant to suffer a loss of $10,000.00 being the sum insured. The Complainant says that the allegation of negligence is vindicated by the fact that the insurer returned the premium and admitted that it was at no time on risk.

2. More specifically the Complainant says that he insured the mare on the basis that she was in foal at the date of inception of the policy and the Complainant had a 45 day

positive test certificate. The Complainant says that to properly incept the policy the underwriting agent's duty was to advise him that a veterinary certificate dated the day prior to inception of the policy was necessary. The Complainant says that all he received from the underwriting agent was a letter dated 23 June 2005 requesting a veterinary certificate in certain circumstances, with no mention whatsoever of a positive pregnancy test certificate. The Complainant says that had the underwriting agent done its job properly and professionally he would have not have had to rely on visual proof of loss and his claim would have been paid on a veterinary certificate stating that the mare was empty on the due date of foaling.

3. The Complainant says he paid his premium and the underwriting agent's fee to have a policy properly incepted without qualifications and not dependant on visual proof of loss only. The Complainant says that the underwriting agent as agent for the underwriter incorrectly raised an invoice, accepted payment and incepted a policy without sighting and making the Complainant aware of crucial documentation required by the underwriter. The Complainant further says that his understanding of cover provided by the policy is that after inception one of the following can occur:

    a. Absorption or abortion can be undetected and a veterinarian certifies that the mare is empty.

    b. At a later stage of pregnancy visual proof supported by a veterinary certificate would have to be supplied

4. The Complainant emphasises that if the underwriting agent had advised that a current positive pregnancy test was required at inception of the policy the Complainant would not have been required to show visual proof of loss to substantiate the claim. The Complainant says that the claim would have been paid on a veterinary certificate stating that the mare was empty on the due date of foaling.

5. The Complainant further points out that he has now commenced dealing with a different underwriting agent who does not issue a tax invoice or a policy unless all the requirements of the underwriter are fully met. In this case, meaning that the policy should not have been issued until the pregnancy certificate had been produced.

UNDERWRITING AGENT'S RESPONSE

The underwriting agent says:

1. The original tax invoice dated 23 June 2005 stated that a proposal form and current pregnancy certificate were required.

2. The Coverage Summary dated 23 June 2005 provided that a veterinary pregnancy certificate was required.

3. The letter of 30 June 2005 said a pregnancy certificate was required.

4. The coverage summary dated 25 July 2005 issued when the sum insured was reduced to $10,000.00 repeated the previous requirement for a veterinary pregnancy certificate.

5. The underwriting agent also says that at various times during the period immediately before the issue of cover and afterwards, the underwriting agent advised the Complainant verbally that a current pregnancy certificate would be required. The underwriting agent has specified certain times as follow:

    a. When the underwriting agent received the initial letter of 15 June 2005 from the Complainant an employee of the underwriting agent contacted the Complainant to discuss the letter and at that time advised the Complainant that

a current pregnancy certificate would be required. The Complainant said he had a pregnancy certificate from when the mare was served and it was dated in December 2004. The Complainant was told that this certificate was too old and that a current certificate was required.

b. A further discussion with the Complainant when he decided to reduce the some insured from $20,000.00 to $10,000.00 occurred in June and the Complainant was again informed that a current pregnancy certificate was required.

c. There were a number of other discussions at various times when the Complainant was advised of the need for a current pregnancy certificate.

6. The claim was denied by the underwriter because the Complainant did not supply visual proof of loss.

7. The underwriter advised the Complainant that any loss under the policy would require visual proof of loss unless an up-to-date pregnancy certificate were to be received prior to the event.

8. The Complainant signed a form of Release in respect of refund of the premium which effectively discharged any liability on the part of the underwriting agent.

RELEVANT LAW AND CODE

As the underwriting agent was acting as agent of the insurer in this transaction, the relevant section of The General Insurance Underwriting agent's Code of Practice is Part 5 which relates to a underwriting agent acting as agent of an insurer and Part 6 which sets out the general obligations of an insurance underwriting agent.

In addition I refer to the Trade Practices Act 1974 (Commonwealth) Sections 51A – 55A relating to false representation, misleading and unconscionable conduct and Sections 41 – 50 of the Fair Trading Act 1987 (New South Wales).

DECISION

I am concerned that this matter has become extremely complicated firstly because the underwriting agent is the agent of the underwriters and secondly because the underwriters appear to have taken a view of policy interpretation with which I have some difficulty.

The Case Manager has set all this out in a lengthy and detailed finding dated 4 October 2006.

The Case Manager pointed out that the underwriters' statement to the Complainant in a letter dated 2 December 2005 that any loss under the policy would require visual proof unless an up-to-date pregnancy certificate were to be received prior to the event appeared to be based on that part of the policy which was relevant to a multiple pregnancy exclusion extension. That extension did not appear to be relevant to the cover or claim because there was no suggestion that the mare was carrying twins.

The Case Manager also pointed out that the underwriters in a further letter dated 22 December 2005 stated that coverage was in effect. On one view, there was therefore a waiver by the underwriters of the requirement that a pregnancy certificate be produced prior to inception.

Although in their letter of 22 December 2005 the underwriters say that the loss was unable to be proven as the visual proof of loss clause was not fulfilled, they had previously said in their letter of 2 December 2005 that:

"You were informed that a current pregnancy certificate was required and were also informed that any loss under the policy would require visual proof of loss unless an up to date pregnancy certificate were to be received prior to the event. The pregnancy certificate dated December 2004 is unfortunately not sufficient evidence to prove that the mare (named) was in foal at the time of inception in June 2005."

This implies quite clearly that no visual proof of loss would be required if there had been an up to date pregnancy certificate.

On my reading of the policy wording that interpretation is not correct and the visual proof of loss requirement remains unless the matter falls within the terms of the multiple pregnancy exclusion. However, the underwriters do not appear to interpret the policy as I do.

The comments by the underwriters have led the Complainant to the conclusion that had he supplied a current positive pregnancy certificate at inception, then it would have been unnecessary for him to comply with the visual proof of loss requirement under the policy. That forms the basis of the Complainant's complaint against the underwriting agent because he says the underwriting agent did not point this out to him.

In my opinion there are very real doubts about the ability of the underwriters to deny the claim for loss of the foal if a court were to find that effectively the underwriters had waived the requirement of a current pregnancy certificate by the issue of the policy as evidenced by their subsequent written statements in correspondence and their interpretation of the policy wording in respect of the requirement for visual proof of loss as also set out in the subsequent correspondence.

I note that in this regard the underwriting agent was acting as agent for the underwriters at inception but it appears to me that this is really a matter for a decision by underwriters, and if the Complainant has a Complaint in that regard then it should be made to the appropriate Tribunal which is the Insurance Ombudsman.

However, it is possible that if the underwriters were to reconsider the matter in the light of the apparent waiver and their interpretation of the policy, they may well come to a conclusion which resolves the matter.
I turn to the complaints specifically made against the underwriting agent by the Complainant concerning the underwriting agent's alleged "negligence".

Effectively the Complainant says that the underwriting agent did not draw his attention to the need to provide a current pregnancy certificate for the mare. In my opinion that complaint cannot be justified on the facts.

It was very clearly stated in the original tax invoice, the original coverage summary and the subsequent coverage summary issued when the sum insured was reduced, that a veterinary pregnancy certificate was required.

It is true that the letter from the underwriting agent to the insured dated 23 June 2005 refers to a veterinary certificate being required in certain other circumstances and does not refer to a pregnancy test certificate.

However, the matter must be taken in context. This was a proposal for a policy in respect of an unborn foal. The mind of all parties would immediately be directed to the question of the mare's pregnancy. The Complainant would have been aware of this requirement in any event following the insurance arranged in 2003 for another mare and foal but in my opinion was reasonably advised of the need for a pregnancy certificate in the four documents being the original tax invoice, the original coverage summary, the letter of 30 June 2005 and the subsequent coverage summary issued when the sum insured was reduced.

I note that the underwriting agent says that at various times the Complainant was advised verbally that the current pregnancy certificate would be required. However, in my opinion it is irrelevant whether those conversations ever occurred because it is quite clear from the other four documents mentioned above that a reasonable insured in all the circumstances would have known that a pregnancy certificate was required.

Reference has also been made to the Release executed by the Complainant to obtain a refund of the premium. On one view it might be said that the Complainant was merely attempting to minimise his loss and there is a very strong argument that he executed that Release under a misapprehension as to the interpretation of the policy as a result of the correspondence received from underwriters. In the circumstances I do not consider that the Release is a document which should be relied upon to the Complainant's detriment.

However, as to the thrust of the complaint against the underwriting agent about the alleged failure to advise the need for a pregnancy certificate at inception, I am unable to accept that suggestion.

I find that the underwriting agent was not negligent in the manner in which this policy was incepted and in particular that the Complainant was advised in writing on four occasions that a pregnancy certificate was required but did not produce such a certificate. Had the certificate being produced it is clear from the documentation provided by the underwriter and the underwriting agent that the claim would have been met.

In the circumstances I must dismiss the complaint against the underwriting agent.

Case no 950 – Business Pak (Fire & Perils) – Cover - $50,000

Complaint lodged with IBD	*15/09/2006*
Initial response received from member	*03/10/2006*
Complaint Manager Investigating	*03/10/2006*
Finding issued	*29/05/2007*
Referral to Referee	*08/11/2007*
Determination issued	*08/11/2007*
Complaint finalised	*08/11/2007*

This is a complaint by a manufacturing business against the broker who arranged business and machinery breakdown cover for the business over a period of some years. When the Complainant had occasion to have her insurance reviewed by a second broker she became concerned that the business would not have been covered in the case of a fire because of nondisclosure concerning the materials used in the building, that the sum insured for machinery breakdown was excessive and also that the premiums paid for machinery breakdown cover over a period of years were excessive.

The complaint was investigated by the IBD case manager who issued a Finding on 29 May
2007. The Finding contains various details relating to the complaint which I will not reproduce in this Decision but insofar as they are questions of fact I accept the case manager's Finding.

CIRCUMSTANCES

The broker arranged cover with two separate national insurers of repute. The first policy was a general business insurance policy and the second a machinery

breakdown policy. The policies issued were typical of their type but the Complainant became concerned about their adequacy and response to claims which might occur in the future. Nevertheless there was a lengthy claims history where the machinery breakdown insurer had paid claims over a period without problems.

COMPLAINT

1. The Complainant says that the figure for machinery breakdown was excessive and the insured did not require the amount of cover provided.

2. The Complainant says that because the building was not properly described in the documentation submitted to the insurer, any claim for loss under the property damage section of the business policy would not have been accepted.

3. The Complainant says that the machinery breakdown premium was excessive and had been excessive for the previous 5 years.

4. The Complainant says that in general terms the broker had failed to find the most appropriate insurer at renewal.

BROKER'S RESPONSE

1. The broker says that the business insurer was well aware of the construction of the property having carried out a survey.

2. The broker says that the sum insured for machinery breakdown was correct as it represented approximately the value of the machinery on the premises.

3. The broker says that the premium quoted and paid each year was a market premium and that the complaint arose only because an underwriter had provided an incorrect quote at a much discounted figure because of an error.

4. The broker says that he had arranged appropriate insurance cover for the Complainant on renewal on each occasion.

RELEVANT LAW AND CODE

The broker is required pursuant to the National Insurance Broker's Association Code of Conduct and the General Insurance Broker's Code of Practice to act in its client's best interests and discharge its duties competently and with integrity and honesty and exercise reasonable care and skill.

DECISION

1. The documentation which has been provided shows that although the proposal and policy schedule provided limited comment concerning the construction of the building, the insurer was well aware of the nature of the building, having carried out a survey. There was some confusion because the survey was not produced until a later date but I am satisfied that the insurer was aware of the building construction and that this would not have been a problem had a claim been made.

2. The documents show that the sum insured for machinery breakdown was approximately the same amount as the value of the machinery and in the circumstances it appears to me that the sum insured was appropriate.

3. The Complainant was concerned because the second broker was able to arrange machinery breakdown cover at a very much lower premium than

previously paid. However, I am satisfied from the documentation that this was an error on the part of the underwriter and that the premium which the broker had negotiated at the renewal over the previous 5 years was a market value premium and reasonable.

4. I am satisfied from the documentation that in general terms the broker acted in the best interests of the Complainant over the period of 5 years the subject of the claim and did so both in respect of the nature of the insurance arranged, the amount of such insurance and the premiums payable.

5. The Complainant obviously had reason to be concerned when she was told by the second broker that the premium for machinery breakdown which he could arrange for renewal in 2006 was approximately 25% of the premium paid the previous year. Even in a "soft" insurance market this appears a remarkable difference in premiums. However, I note that on investigation, as set out by the case manager in his Findings, it appears to be quite clear that the underwriter involved made a mistake in calculation which mistake has been confirmed by the ultimate insurer.

6. The Complainant also had reason to be concerned about the description of the property in the policy documents. It is unfortunate that communications and trust between the Complainant and the broker had broken down at that time so that the broker was unable to satisfy the Complainant's concerns. I am satisfied that the insurer had no reason to say, if a claim had been made, that it was not fully aware of the nature of the building construction.

7. In all the circumstances I am unable to accept the complaint against the broker and I endorse the Finding of the case manager.

Case no 1040 – Professional Indemnity – Cancellation/Refund Premium

Complaint lodged with IBD	*06/02/2007*
Complaint Manager Investigating	*28/02/2007*
Referral to Referee	*14/09/2007*
Determination issued	*14/09/2007*
Complaint finalised	*14/09/2007*

This is a Complaint by a mortgage broker concerning the manner in which the insurance broker dealt with the cancellation and subsequent premium refund of a professional indemnity policy which the broker had arranged for the Complainant.

CIRCUMSTANCES

The Complainant had previously entered into an agreement with a third party to set up a company to operate residential and commercial mortgage broking. The Complainant arranged for the broker to issue a policy in the name of that joint entity as well as in the name of the Complainant himself because it appeared that the Complainant would be doing most of the day to day work.

Unfortunately the arrangement with the third party never really got off the ground and the Complainant and the third party parted ways professionally about 2 months after the policy had been initiated.

A month later the Complainant requested that the policy be amended to show the Complainant and his new company as the insureds. However, at about the same time the third party with whom the Complainant had previously been in business asked the broker to cancel the policy and refund the premium.

The broker did cancel the policy and returned the premium but sent it to the company named on the policy which was then effectively controlled by the third party so the Complainant did not receive the benefit of any refund.

There is also some confusion and dispute as to what happened when the Complainant sought changes to the policy to show his new company and the Complainant as the insureds.

The circumstances surrounding all these arrangements are somewhat complex and are well set out by the case manager in his Finding. I do not propose to repeat the specific details here except insofar as they are relevant to my Decision.

Likewise the submissions made on behalf of the Complainant and the broker are well set out in the finding and I do not propose to repeat them here.

RELEVANT LAW AND CODE

Apart from general issues of law I have referred to the General Insurance Broker's Code of Practice and specifically clause 4 which sets out the responsibilities of an insurance broker acting as an agent of the insured.

DECISION

When a policy is cancelled it should be arranged and authorised by all persons who have an interest in the policy. In the same way, the refund of premium should be paid to all parties unless they direct otherwise or unless there are some obvious reasons why this is not appropriate.

In this case there appears to be some confusion about exactly how the cancellation occurred but it appears to me that both the Complainant and the third party with whom he had entered into an arrangement were agreed that the policy should be cancelled.

I note that the Complainant thought that it should be possible for him to change the name of the policy to his own company and his own name but that does not appear to have been followed through by the Complainant. Having seen email correspondence between the Complainant and the broker I am not satisfied that the broker was fully instructed in that regard by the Complainant and I am not prepared to make an adverse finding against the broker for that reason.

As to the refund of premium I note that there is even more confusion surrounding the manner in which the premium was paid and to whom. Ultimately the refund was not paid to the Complainant but to the company which was the entity formed by the Complainant and the third party albeit that it was in operation only for a very short time. However, I note that it was another company owned by the third party which effectively paid the premium although it was in a convoluted form through the company jointly owned by the Complainant and the third party.

I am concerned that the broker may have made insufficient enquiries about the correct position before he forwarded the refund of premium but on the other hand it appears to me

that there has been no miscarriage of justice because the party who paid the premium received the refund.

In all the circumstances and particularly bearing in mind the somewhat complex business arrangements entered into by the Complainant with the third party, which the broker, or anyone else, would have had great difficulty in understanding, I am not satisfied that the broker was at fault in any way in respect of the allegation that he should have changed the name of the policy holder or that he should have paid the premium refund to any person other than what was effectively the person or company who had paid the original premium.

In the circumstances I am unable to accept the Complaint.

I would point out to brokers that where cover or changes of cover are requested by an insured, a broker should make all possible attempts to clarify outstanding issues and arrange for the cover to be put in place even if the insured appears to be having difficulty in formulating the specific request. However, in this case I am not satisfied that the broker failed in respect of his obligations in that regard.

Further, brokers must be extremely careful in respect of the recipient of the refund of any premium. Brokers should make sure that all parties to the policy are in agreement with the manner in which the premium refund is disbursed. In this case that did not occur but I am not satisfied that there has been any miscarriage of justice in that regard because the party who paid the premium received the refund.

Case no 1050 – Home & Contents – Claim - $1,890

Complaint lodged with IBD	*16/02/2007*
Initial response received from member	*02/04/2007*
Complaint Manager Investigating	*19/04/2007*
Finding issued	*16/07/2007*
Referral to Referee	*20/08/2007*
Determination issued	*11/10/2007*
Complaint finalised	*20/12/2007*

This is a complaint by householders for whom the broker arranged household cover. When kitchen cupboards were damaged by water the insurer said that the policy only responded to the damaged portion of the cupboards. It was impossible to replace that damaged portion in a colour/material identical to that of the other cupboards. The Complainants were concerned by the mis-match.

The Complainants say that the broker had never told them that this would be the position and say that by implication the recommended policy was not appropriate.

CIRCUMSTANCES

The detailed circumstances are set out in the Finding by the Case Manager dated 16 July 2007. When it became clear that the new cupboards would not match the remaining cupboards,

there was correspondence and discussion between the parties being the insurer, loss adjuster, broker and the Complainants. In the end the Complainants replaced an undamaged bench top at their own expense.

The insurer paid for the cost of replacing the cupboard which was actually damaged and incidental repair costs which came to a total of $5,000.00 but the Complainants were obliged to pay an additional $1,890.00 to replace the remaining surface finishes with the same matched colour.

In reaching its decision the insurer relied on that part of the policy in which the insurer said it would try and match any material used to repair buildings with original material but if it could not it would use the nearest equivalent available to the original materials. Specifically the insurer said:

"We will not pay any costs for replacing undamaged property".

The Complainants say that at no time prior to the broker arranging the policy did the broker mention anything about the contents of the policy. The Complainants say that the broker posted them a copy of the policy wording but left it entirely up to the Complainants to read the wording and placed their own meaning on the wording and conditions.

The Complainants say that had the broker gone through the wording and conditions with the Complainants they would never have accepted the policy.

Accordingly, they look to the broker to reimburse them for the cost which they have paid out of their own pockets to match the cupboards.

I note that this is a complaint specifically made against the broker. IBD cannot concern itself with any complaint which the Complainants may have against the insurer in respect of the insurer's interpretation of the policy as it affects the claim. That is a matter which the Complainants would be obliged to take to the Insurance Ombudsmen Service.

It would appear that the broker recommended the policy after being asked by one of the Complainants which insurer the broker himself used for his domestic cover. The broker says that he recommended the best available insurance. I note that cover is placed with one of the largest national insurers with a longstanding high reputation.

I also note that most insurers have a policy clause similar to the one mentioned above in which the insurer points out that it does not indemnify for undamaged property and/or reserves the right to use materials which are the nearest available equivalent to the original materials.

I also note that the broker says that one of the Complainants, even if he had not read the policy, would have been aware of this from his own previous involvement in the insurance industry.

I note also that the Complainants say that the broker left them to battle out the claim with the insurer direct. This involved the Complainants persuading the insurer that it should pay various costs involved in the actual repair of the cupboards because of the need to remove, and in that process, damage or destroy panelling and other parts of the cupboards.

SPECIFIC COMPLAINTS

These are well set out in the Finding. The salient complaint appears to be that the Complainants consider that the broker had a duty to go through the policy with the Complainants and he did not do so. As a result various provisions were not explained and the Complainants were left to interpret the policy themselves.

Further, and in particular, it was not pointed out to the Complainants that in the event of damage the indemnity provided did not include replacement of any undamaged property so that material and colours were matching. A difference in material and/or colours could mean a reduction in value of the property.

Further, the Complainants say that the broker did not assist them adequately in negotiation with the insurer concerning the claim.

BROKER'S RESPONSE

This also is detailed in the Finding. I note the comment by the broker that one of the Complainants had been involved in the insurance industry for 20 years and would have been aware in any event that no insurer would indemnify in respect of undamaged property. The broker also notes that he provided a copy of the policy wording and that other insurers have similar provisions in their policies which would have left the Complainants in the same position regardless of choice of insurer.

RELEVANT LAW AND CODE

Apart from the general principles of contract law and the detailed provisions of the policy, I have considered the General Insurance Broker's Code of Practice and in particular Clause 4 where a broker's duties are set out in respect of assisting an insured to determine policy requirements, arranging policies and making available copies of policy wordings and assisting with a claim.

DECISION

Arguments about matching colours, finishes and materials are not unknown to brokers and insurers. The problem frequently arises where a carpet has been damaged and it requires replacement but there is no replacement available which is identical with the carpet in an adjoining room or perhaps throughout the whole house or a series of rooms in a house. Insurers protect themselves against such problems with appropriate wordings.

In this case I can understand the concern by the Complainants about the mis-match of the two kitchen benches and cupboards. Obviously in a small galley kitchen, which theirs was, the contrast would be obvious. However, although the broker arranged the policy, it does not necessarily follow that the broker is responsible for the results of a claim which is effectively governed by the policy and the response of the insurer to the request for indemnity.

The Complainants have suggested that the broker should have gone through the policy with them in detail and particularly should have pointed out to them the problem which could arise in the event of a claim when only that part of the building or contents would be replaced.

It would not have mattered whether it was kitchen cupboards. It could have been a carpet. For instance carpet flowing from a lounge room to a dining room might only be damaged in one room and might be replaced only in that one room so that there was an obvious join and difference in colour even if only caused by a difference between batch lots of otherwise identical carpet where the dyeing process may result in slightly different shades of colour even where the production of both rolls of carpet occurs within a short time frame.

In my opinion the problem which arises is no different to many other problems which can arise for insureds when a claim occurs.

It is difficult to sustain an argument that a broker should be able to advise a client about all the problems which might arise in the course of a claim and the interpretation of a policy. This is particularly so where different policies have similar terms and conditions but even then a broker may have good reason to recommend a particular underwriter or policy wording

because of the broker's experience in dealing with the underwriter or claims made under that particular policy in the past. A decision by a broker to recommend a particular underwriter or policy may be governed by many different factors of which the current problem is only one example.

I note that there is some disagreement between the parties as to the exact circumstances of the discussion between the broker and one of the Complainants when the particular policy and underwriter was recommended. However, given that the subject policy is a relatively standard product and issued by a national and highly reputable insurer, it is difficult to come to the conclusion that the broker was in some way at fault in making the recommendation which he did.

I note that the Complainants did not ask the broker to arrange a policy which specifically overcame the problems which have resulted from this claim.

In the absence of a specific request for a cover or risk that that the broker ignores, I do not consider it practicable to suggest that a broker has an obligation to sit down with a proposed insured and go through all the terms and conditions of what is a relatively standard policy. It cannot be argued that the chosen policy was inappropriate for the Complainants' purposes.

While it is unfortunate that the Complainants were presented with a problem it is not, in my opinion, a problem which the broker should have foreseen.

It would be different if the policy contained an unusual condition such as no refund of unexpired premium on interim cancellation or an unusually high excess or deductible.

I am however concerned that the broker may not have been as diligent in pressing the claim with the insurer has he might have been.

Although the policy wording is clear, there is a certain logicality in providing an indemnity against loss to an insured but effectively leaving the insured with a very practical problem at the end of the day of having a kitchen with two distinctly different finishes.

The broker obviously thought that the insurer had made the correct decision and was influenced by the fact that one of the Complainants had industry knowledge. Nevertheless, a broker must be expected to put the best possible argument for an insured to the insurer when negotiating a claim.

I am not convinced from the documentation and information supplied to IBD that the broker did put to the insurer with any real strength, the obvious argument in favour of the insured that the kitchen cupboards in there entirety represented one unit and damage to part was damage to all cupboards. This is the obvious contrary argument to the proposition that the policy does not respond to a claim in respect "undamaged" property.

In my opinion, whatever his personal views may be, a broker is obliged to put to an insurer, as part of the broker's obligation to assist an insured with claims, the best possible argument to support the claim. Even if the insurer rejects that argument and even if it appears to have some problems, it is nevertheless a broker's responsibility and duty to do the best he can for his client pursuant to Clause 4 of the General Insurance Broker's Code of Practice.

However, I am not satisfied that it was lack of diligence on the part of the broker that has resulted in the insurer making the decision which it has. Nor does it appear to me to be likely that insurer might have changed its mind but we do not know.

In fact the Complainants were able by their own efforts to negotiate a higher settlement with the insurer than that which was originally offered.

Nevertheless, I draw to the attention of all brokers the need to put their best foot forward in respect of an argument in favour of the client particularly where there is obviously a problem for the client as a result of the strict application of the policy wording.

In the circumstances I consider that the broker should undertake some further instruction in respect of claims management.

In all the circumstances I am unable to accept the complaint as resulting in any liability on the part of the broker to pay the additional cost incurred by the Complainants in carrying out the additional work on the kitchen but I direct that the broker shall undertake a further education course in respect of the handling of claims which course shall include at least 3 hours of instruction whether electronic or otherwise to be agreed and specified with the Compliance Manager of IBD.

In default of the broker reaching agreement about the course with IBD within 21 days of this date, I will make a further more specific order.

Case no 1061 – Pleasure Craft – Cover - $40,000

Complaint lodged with IBD	*13/03/2007*
Initial response received from member	*12/04/2007*
Complaint Manager Investigating	*13/04/2007*
Finding issued	*30/07/2007*
Referral to Referee	*07/09/2007*
Determination issued	*01/11/2007*
Complaint finalised	*16/11/2007*

This is a complaint by the owner of a motor powered boat for whom the broker arranged race boat insurance. When the Complainant made a claim for damage to the boat arising out of an accident while it was operating on the water, the claim was denied because the policy was limited to theft, transit and liability cover. The Complainant says that he did not request such a limited policy and says that the broker did not provide cover as requested which would have covered the circumstances of the accident.

CIRCUMSTANCES

The circumstances are well set out by the case manager in his Finding dated 30 July 2007 but it is necessary for me to restate them here because there is a difference of opinion between the parties about the circumstances under which the policy incepted.

The Complainant had previously owned another racing boat which was insured for $30,000.00 and had been covered for some time. A renewal notice sent to the Complainant for the policy year 30 June 2006 to 30 June 2007 shows the premium as $1,420.00 which with GST, stamp duty, policy administration fee and other charges came to a total of $1,833.70.

It appears that the Complainant did not pay that premium because he had at about time of renewal sold the boat and purchased another boat. The initial cost of the new boat was $48,000.00. The motor was upgraded at a cost of $26,000.00 and after a full

paint job and a new race seat was fitted the Complainant says the value of the boat was $80,000.00.

On 7 August 2006 there was a telephone conversation between the Complainant and the broker. The Complainant refers only to one telephone discussion when the Complainant says he asked the broker to arrange cover for the new boat. The broker says that there were two discussions because he telephoned the complainant back after obtaining quotes for cover from two underwriters.

The Complainant says that the broker explained that there was an option for cheaper cover which related to a lay-up period when the boat was not being used but the Complainant declined that option because he used the boat all year round.

There is a dispute between the parties as to what else was said in the telephone discussion(s).

The Complainant says that he asked the broker to organise the same cover for the new boat as the Complainant had for the old boat. I refer to the broker's version of the telephone discussion(s) hereafter.

Following the telephone discussion(s) the broker sent to the Complainant a letter with policy invoice and schedule by fax on that day. The broker also mailed to the Complainant copies of those documents and policy wording.
The problem is that the new policy was limited to theft, transit and liability cover and did not cover the operation of the boat on the water so that when the boat was severely damaged in an accident on the water the policy did not respond.

BROKER'S VIEW OF DISPUTED TELEPHONE DISCUSSION(S)

The broker says that in the second telephone conversation of 7 August the Complainant was offered 4 alternative options for racing boat cover. The broker says the Complainant was offered cover by 2 separate insurers described as "full comprehensive" or "theft, transit and liability cover only".

The broker says that at the same time there was a discussion on cover available under the "full comprehensive" option and that of the "theft, transit and liability only" cover option.

The broker says that although the Complainant had full comprehensive cover for $30,000.00 on the first boat, the Complainant said that the cost of full comprehensive cover on the new boat valued at $80,000.00 was too high and therefore the Complainant instructed the broker to place cover as from 7 August using the cheapest of the 4 options which was theft, transit and liability cover offered by one of the insurers at the lowest price. The broker says that the limitation in cover is clear on the documentation subsequently sent to the Complainant.

COMPLAINANT'S RESPONSE

The Complainant says that he would not have been able to make a proper choice instantly of 4 quotes received in a telephone discussion and that if this had been what happened he would have expected to have been sent the 4 quotes before making a decision.

The Complainant says that he needed insurance for a boat which he used for racing and that all he did was advise the broker of the details of the new boat in the

expectation that he would receive a policy similar to that which he already had for the old boat.

The Complainant also says he would have expected the broker to have confirmed that the Complainant had reduced his insurance cover from comprehensive to theft, transit and liability cover if that had occurred.

The Complainant says that the tax invoice referred to "racing boat insurance" and this lead the Complainant to believe that he had obtained cover similar to that which he had previously held for the old boat.

The Complainant also points out that a recent renewal notice received had the word "only" added to the clause referring to the cover for theft and transit.

OPPOSING POINTS OF VIEW

The difference in the descriptions by each of the parties of what was said in the telephone discussion(s) on 7 August 2006 is extreme. On the one hand the Complainant asserts that he merely sought a change of cover from one boat to another. On the other hand the broker says that there was a discussion about possible policies and premiums and that the difference between comprehensive and fire, theft and transit cover only was explained to the Complainant who made a decision based on cost.

In considering the difference in the evidence offered by the parties I have considered the documentary evidence which has been set out in detail by the case manager in the Finding.

SUPPORTING DOCUMENTATION

The Complainant does not appear to have any documentation relevant to the telephone discussion(s) but the broker has produced three documents.

The first is a note of the Complainant's original telephone enquiry about cover.

The second is a file note of a conversation between the broker and one of the insurers which sets out details of two quotes one for what is described as "full racing cover" and the other for presumably the more limited theft, transit and liability cover.
The broker has also produced what is referred to as a "Call Sheet" is a computer generated print-out of two quotes from the other insurer for comprehensive cover and third party fire, theft and transit cover.
The broker says that having obtained these quotes he telephoned back the Complainant to make the insurance arrangements.

I note that the total of the premium for the old boat would have been $1,833.70 as mentioned above but that the new premium for the cover provided for a boat with the sum insured of $80,000.00 was $1,470.75 for fire, theft and transit cover.

What is obviously striking is that if the insured thought that he was obtaining new cover on the same terms and conditions as the old cover but for a sum insured increased by $50,000.00, he must have been obtaining a bargain premium because it was $363.00 less than previously.

I would consider that any insured who receives such a quote might be expected to comment about the apparent discrepancy. In my opinion it would be a natural matter for an insured to ask whether the previous premium was excessive or whether rates had come down if he was able to insure a boat worth $80,000.00 for less than the cost of insuring a boat worth $30,000.00.

The Complainant says that if given the choice he would have sought comprehensive cover because he always insures motor vehicles on that basis and that the documentation sent to him by the broker does not clearly show the reduction in cover from comprehensive to theft, transit and liability only.

However, the Complainant is firm in his belief that he only informed the broker in one telephone discussion of the new name, details and increased value of the new boat.

The Complainant also points out that if the broker is correct in his assertion that the Complainant was provided with 4 quotes over the telephone, the Complainant was put in an unreasonable position in that he had to weigh up his options, assess the value of the insurance, compare the quotes and then make a decision on the spot over the telephone without any documentation in front of him.

I note that the Complainant says that the reduced premium did not “raise any suspicion with me”. The Complainant says he recently obtained a cover note for comprehensive insurance cover for an identical boat for $2,193.40 and as a consumer he accepts that prices go up and down all the time.

RELEVANT LAW AND CODE

In addition to the general principles of law relating to the obligations of an agent to his principals I have considered the duty owed by a broker to his client as set out in the General Insurance Broker’s Code of Practice particularly in section 4 paragraph (i) which provides that a broker acting as agent of the insured must assist the insured in determining its policy requirements and arranging policies.

I have also considered the general principle that a broker must act in the best interest of his client.

I have also considered the broker’s own Financial Services Guide.

DECISION

I am concerned by the discrepancy between the recollection of the parties of the telephone discussion or discussions on 7 August 2006.

The Complainant is very clear in saying that he merely asked for what was effectively a transfer in cover from the old boat to the new boat and instead received a policy which was extremely limited because it did not cover the racing risk which was what the boat was used for.

If the Complainant is correct the broker appears not to have complied with his obligation to assist the insured in determining policy requirements as provided by the General Insurance Broker’s Code of Practice S.4(1)(i) and as more particularly set out in the broker’s own Financial Services Guide.

Also, if the Complainant is correct then it might be said that the broker did not respond to his request for cover sufficiently or clearly to point out the limitation of cover provided by the new policy.

On the other hand the broker says that the insured was given a very clear choice and made a decision on the basis of price. The broker is able to produce three documents which support this argument. The broker has also produced copy insurance documentation which was sent to the Complainant on 7 August 2006 which the case manager has set out in detail in his Finding. If the broker is correct, then it should have been obvious to the Complainant from the documentation that he was obtaining

only limited cover. I am concerned that the very serious allegations made against the broker about the limited nature of the telephone discussion on 7 August 2006 cannot be supported by any documentation. In fact, the only documentation available supports the broker's version of the telephone discussions.

SUBSEQUENT DOCUMENTATION

It is perhaps unfortunate that the two policies which are used to provide racing boat cover are not printed in such a way as to make it obvious as to which policy is provided in the same way that motor vehicle comprehensive and third party liability only policies are printed.

However, the broker is not responsible for the printing of the policy and as the case manager set out in his Finding, the documentation sent to the Complainant by the broker on 7 August 2006 is clear. Not only did the tax invoice state that it was a new policy and refers specifically to "racing boat insurance – theft, transit and liability cover" but the Cover Summary attached shows the type of cover as "theft, land transit and liability".

Further, attached to that document was a second page headed "ADDITIONAL CONDITIONS AND ENDORSEMENTS APPLYING TO THE POLICY". There under were several conditions which included the following:

"25. Theft and Transit
Under Section 1 of the policy the insurers will pay only for any loss or accidental or malicious damage to the boat resulting from Theft and Land Transit".

CONCLUSION

In my opinion the Complainant cannot say that the broker issued misleading documentation or mislead the Complainant into the belief that he had obtained full comprehensive cover as provided by the policy which the insured had for his first boat. The evidence all points the other way.

Insofar as there is no agreement about the nature of the telephone conversation(s) on 7 August 2006 I can only find that the Complainant is unable to prove his assertion as to what was said. Unfortunately there is no evidence beyond his own memory to support the Complainant's allegations about the telephone discussion whereas the broker does have two file notes and a print out of an underwriter's quote.

The evidence therefore favours the broker's version of what was said in the telephone discussion(s).

In all the circumstances I am unable to accept the complaint.

Case no 1068 – Marine – Cover - $2,008

Complaint lodged with IBD	*03/05/2007*
Initial response received from member	*16/05/2007*

Complaint Manager Investigating	*25/05/2007*
Referral to Referee	*07/09/2007*
Determination issued	*07/09/2007*
Complaint finalised	*07/09/2007*

This is a Complaint by a boat owner to whom the underwriting agent provided a boat insurance policy. When the trailer on which the insured was towing the boat became disconnected from the vehicle and crashed into that motor vehicle, the insured made a claim for the cost of repairs to the boat trailer and the motor vehicle.

Acting on behalf of the insurer the underwriting agent has accepted the claim in respect of the boat trailer but not the claim in respect of the damage to the towing motor vehicle.

PARTICULARS OF COMPLAINT

The Complainant says that the underwriting agent initially advised that the insured was covered for both losses and asked for quotes for the cost of repairs to the car and the boat. The insured says that subsequently the claim for the car was rejected on the basis that the car was not covered because of an exemption under liability claims for property owned or in the physical or legal control of the insured.

The Complainant then pressed for acceptance of the claim pursuant to the transit damage event noting that there was no reference in that part of the policy to any exclusion for personal property such as damage to the insured's own car.

The Complainant also says that the claim is not a liability claim which would be the case if the accident has been caused by the Complainant's own negligence. The Complainant said that she was not negligent because the trailer was attached correctly before it came off the tow ball at low speed a few kilometres down the road from where the Complainant lived and that the trailer was always double checked before travelling and that the Complainant and her partner have over 20 years experience in towing jet skis, trailers and boats.

UNDERWRITING AGENT'S RESPONSE

The underwriting agent says that the policy is a comprehensive boat policy covering damage or loss sustained to the boat for various risks and the definition of boat not only includes the hull but also motors including fuel tank, mast, spars, rigging and sails, trailer, equipment and accessories and the boat tender.

The underwriting agent points out that the policy does not have any provision for the Complainant to also insure her own motor vehicle.

The agent also points out that an exclusion for liability cover provides specifically that the policy will not respond to a claim in respect of legal liability that arises from loss or damage to any property "owned by you or in your physical or legal control". However, the policy would respond to damage caused by the Complainant to a third party or property owned by a third party.

Finally the agent says that the premium was paid to protect the boat and only the boat. The damage sustained to the motor car would be covered by the Complainant's own car insurance policy which should respond to the claim.

FINDING BY CASE OFFICER

By Finding dated 16 July 2007 the IBD case officer set out the circumstances of the loss in some detail and the attitude of the parties and came to the conclusion that a proper

interpretation of the policy clearly limited the policy to covering damage to the items included in the definition of boat. This included the trailer but not the motor vehicle.

The complaints officer then considered specifically the damage to the motor car and came to the conclusion that just because the wording of the policy in respect of the reference to transit damage stated:

> "we will cover you for loss or damage sustained in an accident or which occurs while your boat is being transported on its own trailer by road, rail or ship"
>
> this did not extend to damage caused to a towing vehicle owned by the Complainant who was the insured.

I have not reproduced in its entirety the Finding of the case manager because in my opinion that is unnecessary.

RELEVANT LAW AND CODE

I have considered the complaint on the basis of a legal interpretation of the policy.

DECISION

In this case I am not satisfied that there is any ambiguity in the policy wording. The policy is in my opinion very clear.

The certificate of insurance states clearly that the insured property is the boat which has a wide definition as mentioned above. In addition there is legal liability cover, personal accident cover and personal effects cover.

While it is true that in the policy documentation there is reference to transit damage in my opinion that cover must inevitably be limited to the property insured. There is a specific section of the policy dealing with liability cover which would be relevant if the insured while in charge of the boat or trailer caused damage to property owned by other persons.

The Complainant has suggested that the liability cover section is irrelevant because the insured was not to blame for the accident. That is merely an interpretation by the Complainant of the circumstances under which the accident occurred. If a third party had been involved then the third party would undoubtedly have issued proceedings against the complainant alleging negligence in respect of the attaching of the hitch. The question would be whether the hitch had been properly attached by the Complainant and whether or not the problem with the hitch arose out of some factor for which the Complainant was not responsible such as a faulty part or faulty mechanism or an inadequate hitch. It is irrelevant that the Complainant considers that the Complainant was not negligent in respect of the circumstances of an accident where there is a claim by a third party.

Under the liability section there is a very clear exclusion in respect of property owned or in the control physical or legal of the insured.

In this respect the policy does not differ from many other policies of insurance which include similar exclusions.

I have therefore come to the conclusion that the transit section of the policy does not apply because that section must inevitably be restricted to the property the subject of the insurance. The liability section of the policy has a very specific and clear exclusion.

I note that that Complainant has pointed out that in her opinion the transit policy section is ambiguous and other policies issued by other insurers are clearer. It is my opinion that there is no ambiguity and the transit section of the policy very clearly only relates to the property

the subject of the insurance. It would be ludicrous to suggest that had the trailer or boat collided with the insured's house or any other property owned by the insured, not the subject of this policy, that somehow the damage to that other property was included in the loss for which the insured was entitled to be indemnified under the policy.

This is clearly a policy which covers damage to the boat including its extended definition and the liability of the insured for damage caused by the boat to other property not owned or in the custody or control of the Complainant.

All these matters were set out in some detail in the Finding by the case manager and also, in my opinion were correctly covered and set out by the underwriting agent in a letter of 10 April 2007 to the Complainant.

In all the circumstances I am unable to accept the Complaint.

Case no 1070 – Motor Vehicle – Extended Vehicle Warranty – Cover

Complaint lodged with IBD	*27/04/2007*
Initial response received from member	*21/05/2007*
Complaint Manager Investigating	*29/05/2007*
Finding issued	*07/09/2007*
Referral to Referee	*23/10/2007*
Determination issued	*29/11/2007*
Complaint finalised	*20/12/2007*

This is a Complaint by the owner of a motor vehicle to whom the IBD Member (called in this Decision "the Warrantor") provided a mechanical breakdown warranty. The Warrantor has not accepted the claim although it has made what it describes as an ex gratia settlement offer and the Complaint relates not only to the failure of the Warrantor to accept the claim but also to the circumstances surrounding the provision of the warranty and the attitude of the Warrantor to the claim.

CIRCUMSTANCES

On 7 May 2006 the Complainant, who is a qualified and working mechanic, purchased a 1991 Subaru Liberty station wagon with odometer reading of 109,828 kilometres for the sum of $8,000.00 from a second-hand car dealer. The Complainant says that immediately before the purchase he road tested the vehicle although he did not travel at a speed in excess of 60 kph in doing so.

The Complainant says that his wife thoroughly questioned the dealer about the reasons the vehicle had been traded in and whether there were any faults or pre-existing conditions and the Complainant's wife was informed that there were no known faults and no mechanical issues present.

As part of the purchase arrangement, the dealer provided the Complainant with the Warrantor's mechanical breakdown warranty which was for a period of 12 months and for which the Complainant did not apparently pay an additional amount although there appears to be some understanding that the cost to the dealer was in the order of $500.00 being by way of a "special promotion" offer by the dealer as an inducement to purchase the vehicle. I note that the dealer also offered an additional inducement in the form of RACV membership and roadside service.

I note that the Complainant says that at no time was a roadworthy certificate provided. I presume that the Complainant being a qualified mechanic thought that he was in as good a position as any other mechanic to judge for himself the condition of the car and that he did not require a roadworthy certificate or other independent test of the vehicle to reach a decision concerning its condition. Of course, a roadworthy certificate must be produced to the Motor Registration Authority before the ownership of the vehicle can be transferred and I assume that the dealer did produce a roadworthy certificate to the Authority in due course when the transfer registration process took place.

The Complainant says that on 18 May 2006, 11 days after he purchased the vehicle, he drove to Tullamarine Airport. To do so he would travel on a freeway where the speed limit is up to 100 kph. The Complainant says that on that trip he noticed that the transmission "flared on up shift" between 80 kph and 100 kph. This was the first time speeds above 60 kph had been attained since purchase and this is when flaring was noted. By "flaring" I assume the Complainant means that the engine was "revving" and not going into gear immediately.

The next day the Complainant's wife rang the Warrantor to discuss a claim under the breakdown warranty. According to the Complainant, his wife was told that nothing would or could be done until the vehicle broke down. The Complainant was concerned by this because he thought that the slipping in the transmission was effectively a breakdown and that this had not been present when he purchased the vehicle.

I note that there is a difference of opinion as to whether the Complainant's wife was told then or at a later date to present the vehicle to a repairer approved by the Warrantor. The Warrantor says it has transcripts of the conversation with the Complainant's wife on 19 May 2006 confirming instructions by the Warrantor to present the vehicle to an approved repairer.

The Warrantor says that there was another call on 27 October 2006 (over 5 months later) regarding the transmission and again the advice was to take the vehicle to an approved repairer.

The Complainant has other issues with the Warrantor. It appears that on 1 June 2006 there was a discussion between the parties as to whether the Complainant being a qualified mechanic could carry out servicing the vehicle which the warranty required to be done by a party authorised by the Warrantor.

I note that there was also an issue raised with the Warrantor on 19 May 2006 concerning the fact that the horn did not work at which time the Complainant was referred back to the dealer because the horn was a roadworthy item.

There appear to have been delays in respect of approaches to the dealer and Warrantor in respect of the Complaint. According to the Warrantor the Complainant telephoned on 27 October 2006 and advised that transmission was slipping and the car was revving. It appears that at that time he was told that it might be a valve problem and he was asked to take the vehicle to a mechanic and arrange for the mechanic to phone the Warrantor prior to commencing any work.

There appears to have been a further delay until 5 February 2007 when the Complainant's repairer sent to the Warrantor a quote for repairs dated 22 January 2007 and totalling $930.00 in respect of the transmission stating under the heading "Work to be Done" the following:-

"Slow into gears and slips. Note: Quoted site unseen. Vehicle only roadtested".

According to the Warrantor, at that time a note was made that the vehicle had a gear box problem since purchase so the Warrantor would not cover the claim as it was a pre-existing problem or there had been negligence because the vehicle had not been taken to a repairer.

The Warrantor also noted that the vehicle had not been serviced and the Complainant had been informed that he was not entitled to carry out his own servicing.

On 16 February 2007 the motor vehicle repairer which had provided the previously mentioned quote telephoned the Warrantor and advised that the car had a “burnt high clutch, band and reverse”.

At that time the Warrantor telephoned the motor vehicle repairer declining to pay for the costs of repairs and informing the repairer that the warranty was invalid because of failure to comply with the service conditions and also because the Warrantor took the view that the vehicle had been purchased with a gear box problem. I note that discussion concerning these matters and allegations continued for some time until the matter was referred to IBD.

I note that the Warrantor has produced various documents to IBD supporting the allegations concerning the various telephone conversations noted above and IBD has received a copy of the motor vehicle repairer quote dated 22 January 2007 showing the cost of parts and materials at $205.98 and the cost of labour at $640.00 which together with GST of $84.60 makes a total anticipated cost of repairs of $930.58. The odometer reading is shown as 120,100 approximately 10,000 km in excess of the reading when purchased.

I note that there is also a tax invoice dated 20 March 2007 showing the cost of labour at $640.00 and the cost of parts and materials at $582.31 which together with GST of $122.23 makes a total cost of repairs of $1,344.54. The odometer reading is shown as 120,973 indicating the vehicle travelled 873 km in the previous 2 months.

I note that on 6 July 2007, according to the Warrantor’s records, the Warrantor reviewed the claim status and noted that the transmission was slipping between third and fourth gear and higher speeds. The reason for that review is not stated.

I will comment hereafter concerning the relevant sections and response of the warranty agreement but I note that the Warrantor specifically declined to pay the repair costs on 19 February 2007, setting out several reasons including that burnt clutches are specifically excluded from cover under the warranty wording, that there was a pre-existing problem, that the problem was in fact normal wear and tear, that the Complainant had failed to follow instructions to take the vehicle to an approved repairer when the problem was first noticed and on a number of occasions, that the service conditions of the warranty had not been satisfied as to the regular carrying out of such service by an approved service centre and that the Complainant had been advised that he could not carry out his own servicing. The Warrantor also said it would not accept claims from natural persons whose occupation was selling or servicing vehicles.

Note that the above reasons why the Complainant’s request for indemnity under the mechanical breakdown warranty was refused in February 2007 are not necessarily the same or all the responses by the Warrantor to the Complaint when it was subsequently made to IBD by the Complainant. I set out details of the Complaints by the Complainant and the response of the Warrantor to those Complaints hereafter.

Firstly, however, I turn to the warranty document itself.

MECHANICAL BREAKDOWN WARRANTY

This document includes a Financial Services Guide and Product Disclosure Statement. Like many such warranties there are two types of warranty available. One is described as a Drive Train Warranty and the other is described as a Comprehensive Warranty. The cost of the latter is higher and I refer to the differences hereafter.

Among other matters the Financial Services Guide states that the motor dealer is an authorised representative of the Warrantor.

The Product Disclosure Statement sets out details of the warranty. The document provides among other terms the following:-

*"**The Warranty terms***
The (Warrantor's) Mechanical Breakdown Warranty is designed to provide assistance with the cost of repair or replacement of certain Components and Parts of your new or used Vehicle, due to a Mechanical Breakdown."

The document goes on to refer to the product as being a discretionary risk product and provides the following information concerning a discretionary risk product.

"The Warranty is offered as a discretionary risk product. This means that (the Warrantor) will decide whether to pay a contribution towards your claim for repair costs.

(The Warrantor) has absolute discretion as to whether it will or will not pay even if the claim comes within the Warranty terms in this booklet. Although the discretion is absolute, (the Warrantor) will not exercise that discretion in a way that is unfair or unconscionable and will always consider the merits of your claim.

The Warranty is not the same as an insurance policy because you do not have a right to be indemnified for your loss, you have a right to have your claim for discretionary assistance considered by (the Warrantor) and you are entitled to know the outcome of that decision."

The document then refers to **"Significant Risks**". The relevant section concerning Significant Risks reads as follows:-

"As the Warranty is a discretionary risk product, (the Warrantor) is not obliged to pay all claims that come within the Warranty terms. As mentioned above, you are entitled to have your claim for assistance with repair costs considered by (the Warrantor). You are also entitled to have (the Warrantor) decide whether or not to pay the entire claim or to make a contribution. When making this decision (the Warrantor) will always consider the merits of your claim and exercise their discretion in a fair or just way. If (the Warrantor) decides not to pay your claim, you will have to bear the repair costs yourself.

The Warranty does not offer the same level of protection that an insurance policy may give you. (The Warrantor) is not an insurance company and is not required to maintain the same financial resources that an insurance company does. However, (the Warrantor) does meet the Australian Securities Investment Commissions (ASIC) 'financial resource' requirements for an Australian Financial Service Licensee that transacts with customers in this way.

There is a risk when purchasing this Warranty that one or more of your claims may exceed the Warranty Claim Limit for a particular Component or Part or exceed the Total Limit. If the cost of the repairs is greater than the Warranty Claim Limit or Total Limit, (the Warrantor) may decide that you have to bear that additional cost yourself. Detailed information about the Warranty Claim Limits for each benefit under your Warranty is on page 10 for Drive Train (Option A) and page 11 for Comprehensive (Option B).

The total amount that we will pay under your Warranty is limited to the total purchase price that you paid for the car. This is called the Total Limit and is shown on your Schedule. If your total claims under the Warranty exceed the Total Limit, you will have to bear any additional costs yourself.

There is also a risk that if you fail to meet any of the conditions attached in the Warranty, (the Warrantor) will not exercise discretion in your favour. Make sure you read "What are the conditions" on page 16 and 17 for details of the servicing and other conditions that apply to this Warranty".

The document emphasises that it is up to the purchaser to choose the type of warranty that best suits his or her needs and says that the motor dealer cannot give this advice but the purchaser needs to decide it for himself.

The document then provides that to understand the Warranty Terms it is important that the purchaser read the detail setting out the terms used in the document, details of the benefits, details of what is excluded and details of conditions.

The document also explains the differences between the Drive Train and Comprehensive Options. Drive train covers "engine, gear box and differential" and Comprehensive covers engine, gear box, differential and various other parts of the vehicle engine and system.

The document also points out that the purchaser has a choice of duration of the warranty from 1 – 5 years or in the case of a new vehicles or vehicles still under manufacturer's warranty, 1 or 2 years commencing immediately after the manufacturer's warranty expires.

Details of the Drive Train and Comprehensive benefits are set out in more detail as Options A or B and provide a more specific definition, in the case of the drive train of the engine parts, gear box and differential with specific exclusions. Option B provides similarly for the comprehensive benefits.

There are also details of exclusions which include a vehicle where the purchase price is $3,000.00 or less, vehicles in bad condition, modified vehicles, vehicles not serviced according to the conditions, pre-existing faults, consequential loss and certain components and parts of the vehicle which are always excluded. The document provides specific requirements for servicing including servicing at regular intervals – at least every 6 months or 10,000 kms whichever occurs first and provides that all services and maintenance on vehicles must be carried out by the vehicle selling dealer, a franchise dealer for the make of a vehicle or a service outlet approved by the Warrantor. There is provision for a service validation coupon to be completed and mailed back to the Warrantor.

The document contains definitions of various words and phrases. Of relevance to this Complaint is the definition of mechanical breakdown as follows:

"Mechanical breakdown means a failure under normal use and service of mechanical or electrical Components and Parts or the breaking down or burning out of Components and Parts causing sudden stoppage of their function necessitating repair or replacement and arising from defects in material and/or workmanship of the Components and Parts".

There are various other terms and conditions of the policy but I set out the above for ease of reference.

DECLARATION

At the foot of the Application document is a declaration by the purchaser which includes the following:-

"I confirm that I have been given a copy of the Combined Financial Services Guide (FSG) and the Product Disclosure Statement (PDS) relating to this Warranty and confirm that I have read it, understood it, and agree to be bound by the Terms and Conditions contained therein".

SPECIFIC COMPLAINTS

The Complainant says that the warranty document should respond to the cost of repairs to the vehicle.

The Complainant also says that he was not aware that it was necessary for him to forward service coupons to the Warrantor to comply with the terms and conditions of the warranty.

The Complainant says that to his knowledge the problem did not exist at the time of purchase.

The Complainant also has a Complaint in respect of the failure of the dealer to explain or disclose that the Complainant should choose an option as to the type of warranty he required.

The Complainant says that the condition of the warranty which effectively prevents him as a qualified automotive technician from carrying out servicing of his own vehicle is restraint of trade and the Complainant has kept up to date all service requirements.

The Complainant says his vehicle did suffer a mechanical breakdown because a component burned out.

The Complainant believes that because he was not given advice that he should choose the type of warranty that best suited his needs and requirements, there was no proper disclosure to him of the terms and conditions of the contract before he entered into it and that he should be recompensed for the value of the warranty of $500.00 which I presume is a reference to the premium apparently paid by the motor car dealer.

I note that there are numerous other Complaints about the manner in which the Complainant and his wife were treated by the Warrantor but they do not appear to me to go to the liability of the Warrantor to make any payment to the Complainant pursuant to the mechanical breakdown warranty document.

Finally, following the Finding by the case manager the Complainant has pointed out the inconsistency between the exclusion shown at Option A of the drive train option in respect of burnt or worn clutches which appears to ignore the reference to "burning out of components and parts" in the mechanical breakdown definition set out above.

WARRANTOR'S RESPONSE

I have set out above, when referring to the circumstances of the claim, the reasons put forward by the Warrantor when the Warrantor declined to pay the repair costs submitted on 19 February 2007. I note that the Warrantor has an impressive record of discussions with the Complainant and his wife concerning the Complaint and also has spelled out for the benefit of the compliant on several occasions the Warrantor's attitude not only to the claim but also to the request by the Complainant that he be allowed to carry out his own servicing.

The Warrantor has pointed out the delay in the formal claim until 5 February 2007.

The Warrantor also says that it was the Complainant's responsibility to read the documentation and the Warrantor has specifically referred to the declaration of the purchaser on the mechanical breakdown warranty application form that the purchaser had been given a copy of the combined financial services guide (FSG) and Product Disclosure Statement (PDS) and confirming that the Complainant had "read it, understood it and agreed to be bound by the terms and conditions contained therein".

The Warrantor also says that it offered the Complainant an ex gratia payment of $250.00 to settle the claim.

The Warrantor emphasises that the documentation specifically excludes cover for a burnt clutch.

The Warrantor also says the defect was a pre-existing problem.

Alternatively the defect was caused by normal wear and tear.

The Warrantor also says that the Complainant failed to take the vehicle to an approved repairer when requested to do so. The Warrantor has also taken the defence that the warranty contains an exclusion in respect of:

"Claims relating to any vehicle during the period of ownership by a business or natural person whose occupation is selling or servicing vehicles".

RELEVANT LAW

I consider this Complaint from the point of view of the general law relating to contracts. There have been decisions by the courts over the years about various relevant elements of the law of contract from which we draw various principles.

Of relevance to this Complaint are cases concerning firstly the obligation on a party to comply with terms and conditions of contract where the party has not read the document. In this case the Complainant says various provisions of the warranty were not drawn to his attention before he signed the application but at the foot of the application is a declaration stating that the purchaser Complainant had been given a copy of relevant documents and had read, understood and agreed to be bound by the terms and conditions.

In a 1934 English decision of *L'Estrange v. F. Groucob Ltd.* the court set out clearly the principle that when a document containing contractual terms is signed then in the absence of fraud or misrepresentation the party signing is bound "and it is wholly immaterial whether he has read the document or not".

Secondly, the Complainant in this Complaint has argued that it is in restraint of trade for the Warrantor to refuse to accept the Complainant as a qualified automotive technician from being entitled to service his own vehicle rather than having it serviced by some person approved by the warrantor to comply with the relevant condition of the warranty.

There has been a series of cases in Australia over the past few years concerning what may be described as similar requirements in respect of the repair of motor vehicles and other circumstances. The situation is sometimes referred to by the jargon "third line forcing".

I am not satisfied that there is anything untoward with the requirement in the warranty that the vehicle should be serviced by some person approved by the Warrantor. It is a traditional requirement in manufacturer's warranties for new vehicles and in my opinion is commonsense.

The above and other decisions of the courts must be taken into account when considering the interpretation of contracts and applying the terms of a document such as a warranty to the circumstances to reach some proper understanding about the rights and obligations of the parties. However, in this case I am not persuaded that the answer to the current Complaint is provided by either of the above legal precedents.

DECISION

In this Complaint I am concerned by the provisions in the warranty which provide that the warranty is a "discretionary risk product" and that the Warrantor has absolute discretion as to whether it will or will not pay even if the claim comes within the warranty terms.

The warranty does provide that this discretion will not be exercised in a way that is "unfair or unconscionable" and the warranty says the Warrantor "will always consider the merits of your claim". It would make commercial nonsense of the warranty document if the Warrantor were not bound to meet a claim which complied with all the terms and conditions of the warranty

and it is hard to see how such a claim could ever be described as "unfair and unconscionable".

I do not intend that this decision should in any way be seen as relying on the exercise by the Warrantor of its discretion to reject the claim for any reason other than lack of compliance with the terms and conditions of the warranty. I would be concerned by any suggestion that a Warrantor was entitled to exercise any discretion to reject a claim under the warranty for some other reason but my decision does not turn on that point.

I have considered whether the warranty might be regarded as ambiguous because it provides cover pursuant to the definition of mechanical breakdown for the "burning out of components" but purports to exclude cover under the heading "Gearbox" at Option A Drive Train in respect of "burnt or worn clutches, seals, bushes and gaskets".

Traditionally courts when interpreting a document will find against the author of that document if there is an ambiguity in the document on the basis that the author had it in his hands to either properly write the document to make it clear or alternatively failed to adequately exclude a fact situation by imprecise language. With respect to insurance policies, this is known as the application of the doctrine of "contra proferentem" and can be used against insurers who produce an ambiguous policy wording when it was in their power to do otherwise.

In this case however I see no ambiguity in the Warrantor providing by a very clear exclusion that it will not provide a benefit for "burnt or worn clutches". Although the definition of mechanical breakdown refers to "burning out of components" there is no ambiguity in the Warrantor providing that this does not include clutches or other specified parts of the gear box.

It would be odd if it were otherwise because the wearing of a clutch in a motor vehicle engine is exactly what happens with use. Owners of motor vehicles who retain them for a lengthy period of time will expect to replace the clutch from time to time because it wears out because of the nature of its use in changing gears. The problem which has arisen in this case is that the clutch has worn and it has become apparent to the Complainant over a period of time from 18 May 2006 to 5 February 2007 that the clutch was wearing out. During that time the vehicle travelled nearly 11,000 km.

I am unable to see why the exclusion to the benefit does not apply to exclude the claim made by the Complainant.

Further, I note that the definition of mechanical breakdown refers to the "breaking down or burning out of components and parts **causing sudden stoppage of their function necessitating repair or replacement……**".

In this case the deterioration and/or burning out of the gear box equipment did not cause a sudden stoppage. The failure appears to have been a gradual failure and the discovery by the Complainant of the problem 12 days after purchase occurred when the Complainant noticed noises which were symptoms of the problem arising but this did not cause a sudden stoppage.

It may be argued that in the definition of mechanical breakdown the words "failure under normal use and service of mechanical or electrical components and parts" do not demand a "sudden stoppage" because the words "sudden stoppage" only refer to the words "breaking down or burning out of components and parts". Even if this argument were correct, and I do not agree that it is correct, the exclusion in respect of "transfer cases, burnt or worn clutches, seals, bushes and gaskets" effectively excludes the application of the benefits under the warranty.

Numerous other matters were raised by the parties.

Of some concern is the allegation that the dealer and/or the member did not properly disclose the provisions of the warranty to the Complainant before the Complainant entered into the warranty agreement. It is specifically said that the Complainant did not have the opportunity to choose the relevant appropriate cover. However, in my opinion, these suggestions completely ignore the position that the warranty was provided to the Complainant by the dealer as part of the motor vehicle purchase. The warranty was not provided to the Complainant as a result of some request by the Complainant for appropriate warranty cover. It came with the vehicle as part of the purchase.

I note that numerous other issues have been raised and ventilated by the parties in this matter. In my opinion many of them are irrelevant. The question of who serviced the vehicle is not one which affects the result and my decision in respect of the Complaint. However, I can understand that it is a very real issue with the Complainant. Nevertheless, it was a term of the warranty which he received with the vehicle. It may have been open to the Complainant to have sought another warranty from another party and to have negotiated with that other party supplying the warranty to allow the Complainant to carry out his own servicing.

I am of course intrigued by the fact that the Complainant did not seek to view the roadworthiness certificate for the vehicle before he agreed to purchase it, nor did he arrange to have an independent mechanical examination of the vehicle by some other person. It is therefore not perhaps surprising that a defect such as the problem with the gear box/clutch arose shortly after the purchase when there had been no known relevant road test carried out which might have disclosed such a problem prior to purchase. The suggestion that that this possibility did not arise because of assurances made by the dealer to the Complainant's wife about the state of the vehicle does not in my view accord with practical commonsense. At the time of purchase this was a 15 year old vehicle with over 100,000 kms on the odometer.

In the circumstances I am unable to see any liability under the warranty for the Warrantor to accept the claim. Nor am I able to see any breach by the Warrantor of its obligation of disclosure to the Complainant of the terms and conditions of the warranty prior to or at the time the Complainant entered into the agreement.

In all the circumstances I am surprised that the Complainant did not accept the Warrantor's settlement offer of $250.00 and, assuming that the Warrantor is still prepared to make such a payment to the Complainant then I am of the opinion that he is well out of the matter on that basis.

Case no 1075 – Motor Vehicle Extended Warranty – Claim - $1,000

Complaint lodged with IBD	*06/06/2007*
Initial response received from member	*06/06/2007*
Complaint Manager Investigating	*06/06/2007*
Finding issued	*19/09/2007*
Referral to Referee	*19/10/2007*
Determination issued	*23/11/2007*
Complaint finalised	*04/12/2007*

This is a Complaint by the owner of a motor vehicle to whom the IBD member (known in this decision as "the Warrantor") issued a Parts and Labour Warranty following the purchase by the Complainant in January 2006 of a 1995 Jaguar XJR motor vehicle. When the sealed

unit coil packs forming part of the ignition system failed and the Complainant made a claim under the warranty, the Warrantor declined to accept the claim.

CIRCUMSTANCES

On 1 May 2007 the Complainant's motor vehicle service and repair mechanic reported a problem with the vehicle engine which was apparently "missing". The problem was traced to the failure of the coil packs.

The Warrantor declined to accept the claim and produced written reports from two mechanics the first of which said that the problem was caused by "inferior design". The other mechanic said that this was a common problem. Both suggested that the coil pack could be replaced employing heat shrinking to reinforce and isolate the coil which would reduce the price of repair to $250.00 or $300.00.

The Complainant's mechanic said it was not possible to be precise as to the reason for the failure of the coil units. He thought it was not a manufacturing defect because they had lasted almost 12 years and the vehicle had travelled almost 200,000 km. The Complainant's mechanic thought that heat shrink was "at the very best a band aid solution" which would not work or if it did would only do so for a very short time.

The Warrantor suggested to the Complainant that the failure was a manufacturing fault supported by the fact that 5 out of 6 coils failed at once alternatively the vehicle was suffering from faulty high energy ignition or lean issues the cause of which was most likely worn spark plugs. Manufacturing faults and worn items are specifically excluded from the warranty as is the consequential loss arising from worn items. The Warrantor offered to settle the claim by payment of $500.00 towards the costs of repair. He advised that it was prepared to review its decision should the Complainant "be able to supply expert mechanical opinion that proves the problem has arisen in compensable circumstances".

I note that the Complainant took the straightforward view that as the warranty document provided a payment of up to $1,000.00 for electric ignition components, and as he had been obliged to spend approximately $1,400.00 to replace the components, he was entitled to payment of $1,000.00. This is the amount appropriate for Sapphire Blue which is the premium product and for which the Complainant applied. The other level of cover is described as Sapphire. I note that the Complainant paid a premium of $1,190.00 for a 5 year warranty for the Sapphire Blue level of cover.

WARRANTY DOCUMENT

The Warrantor issued a product disclosure statement booklet which is described as "Parts and Labour Warranty".

That document contains details of the various components which are covered and corresponding claimable limits. The document also contains details of exclusions, the claims procedure, definitions of various words and phrases and details of conditions including servicing requirements and similar matters.

Under the heading "coverage" the product disclosure statement contains the following:

"At our absolute discretion, we will return to good working order only those covered vehicle components listed under the particular coverage of your product. When returning a component to good working order, we have regard for the age of your vehicle and kilometres travelled by your vehicle. Returning components to good working order does not mean we will return the component to a condition as if it were brand new.

This contract only covers the breakdown of specific Covered Components listed for your product. Please refer to the Covered Components table provided in the Significant Benefits

section on page 2. The contract does not cover repairs to components of the vehicle in the event that they are faulty, worn out or damaged.

We will not be held responsible for the delay or lack of availability of any parts required for the vehicle for any repairs".

In the exclusions various events are listed including the following:-

"All manufacturing faults and recall items".

There is no suggestion that the Complainant has failed to comply with the condition of the policy relating to servicing requirements so I do not reproduce the relevant wording which relates to regular servicing and the provision of a service coupon to the Warrantor stamped by the licensed mechanic performing the service.

There is also a provision in the product disclosure statement concerning significant risks of the products as follows:-

"The products do not offer the same level of protection as an insurance policy. We are not an insurance company and the products are not insurance products. You do not have the right to be indemnified for your loss. You do however have the right to have your claim for assistance considered.

We have an absolute discretion as to whether or not we will pay a claim on your vehicle, even if that claim falls within the Covered Components of your vehicle's coverage. Although the discretion is absolute, we will, at all times consider the merits of your claim and will not act in an unfair or unconscionable way.

There is also a risk that one or more of your claims may exceed your maximum claimable limit under your particular coverage. If the cost of repairs is more than your maximum claimable limit then you will have to bear the cost of repairs over and above the maximum claimable limit. Information as to the claimable limits of the product is detailed on page 2.

If you give approval for the disassembling of a component of your vehicle in order to determine whether it is a claimable nature, and it is found not to be, then you will have to bear the costs and charges payable to either rectify the failure or reassemble such component.

Furthermore, the total monetary limit payable, for any repair(s), undertaken at any one (1) time under one (1 Claim Authorisation Number shall not exceed the highest claimable limit payable under your product for any particular covered component. All claimable limits are inclusive of GST.

If you fail to meet any of the terms and conditions of the product, then there is also a risk that we will not exercise our discretion in your favour. Ensure that you read and understand all the terms and conditions of the product including regular servicing requirements and the Claim Procedure".

Finally I note that the product disclosure statement contains a section in respect of the benefits of the product as follows:

"The products will benefit you by covering you for the cost (up to a maximum amount) of repairing or replacing a mechanical breakdown of the component(s) specifically covered by your particular warranty. The amount of the cover will depend on the claimable limits of your particular warranty. In the event of a mechanical breakdown, at our absolute discretion, we will return to good working order those component listed under your particular warranty.

You will also benefit from the network of mechanics, performing repairs at generally wholesale rates, that we have at our disposal along with our ability to source parts, generally at a lower cost".

RELEVANT LAW

The common law as it relates to contracts is obviously relevant to this Complaint. In addition the Complainant has suggested that various provisions of the Queensland Fair Trading Act and the Commonwealth Trade Practices Act are relevant. For reasons set out hereunder I do not consider it necessary to consider the applicability of those acts.

I note that the Complainant has also suggested that IBD should refer this matter to "the supervising authorities under those Acts" for appropriate action. Such a reference is not part of the obligation or practice of IBD although in very serious cases of misconduct it may be appropriate for IBD to take such action. However, if a Complainant considers that some action is required by a regulatory authority then it is of course always open to the Complainant to take the matter up with that regulator.

SPECIFIC COMPLAINTS

The Complainant says that the faulty part is part of the ignition system which pursuant to the warranty schedule should result in a payment of up to $1,000.00.

The Complainant also says that the offer by the Warrantor to settle the matter for $500.00 was not an offer made in good faith and was simply an effort to save money.

The Complainant also says that a suggestion made by the Warrantor that the Complainant had repaired the car without the Warrantor's approval is not appropriate because the Complainant was obliged to mitigate his loss and the Warrantor had wrongfully refused the claim.

The Complainant also has some strong views concerning the wording of the warranty and in particular the Warrantor's discretion in respect of acceptance of the claim. I have mentioned the relevant provisions when discussing the warranty document above.

The Complainant has referred to the contra proferentem principle in respect of any ambiguity in a document where a court will find against the author of the document on the basis that the author could have made the document unambiguous.

The Complainant has also referred to the provisions of the Queensland Fair Trading Act and the Commonwealth Trade Practices Act and I have referred to this under the previous heading "Relevant Law".

WARRANTOR'S RESPONSE

The Warrantor says that the problem with the coils was a manufacturing fault which is not covered by the warranty.

The Warrantor also says that the fault was caused by wear and tear which is an exclusion.

The Warrantor suggested that the fault could be rectified by using heat shrink at a cost of $250.00 - $300.00.

The Warrantor has suggested that the problem with the coil is caused by inferior design.

The Warrantor has suggested that the nature of the problem causing 5 out of 6 coil packs to fail is perhaps an ignition or "lean" (petrol) issue which indicates that it is a wear and tear problem.

DECISION

On the face of it the warranty covers the claim because the words "electronic ignition components" appear in the schedule of cover for which under the Sapphire Blue policy the benefit is up to $1,000.00.

The Warrantor suggests that the coil failure is a manufacturing defect. I note that the relevant exclusion refers to "manufacturing faults and recall items". There is no evidence that the ignition coils were ever the subject of a recall, nor is there any evidence that there was a manufacturing fault.

The proof of the pudding is in the eating. The problem did not arise until more than 12 years after the vehicle had come off the production line and after it had travelled almost 200,000 kms. These two facts suggest to me that it would be unreasonable to characterise the problem as a manufacturing fault occurring as it did at such a late date.

The Warrantor also says that the fault was caused by normal wear and tear. However, there is no evidence about this beyond opinions expressed by several mechanics. The coil units are sealed units and no one has opened them to ascertain the reason for the failure.

In my opinion a conclusion that a sudden failure in a component is caused by wear and tear requires some objective proof and evidence. In this case we have neither. The comments by the mechanics are speculative.

I would be impressed with an argument about wear and tear if the evidence was that the ignition coils required replacement from time to time and that this was done as a matter of course in servicing at particular service intervals. Items such as spark plugs which form part of the ignition system are routinely replaced as are other parts of an engine. However, there is no evidence before me to suggest that there would be any expectation other than that the sealed units would last indefinitely. I note that the repairs effected by the Complainant involved the installation of second hand sealed units which fact further confirms my view that there is no wear and tear problem.

References and comments such as that the ignition coils "commonly break down" or that it is a "common problem" are of the same concern. However, those comments are imprecise and at best anecdotal. After all, the mechanic will only have seen failed units when they are brought into the shop for repair and we do not know what percentage that might represent of the total number of vehicles imported into Australia.

The purpose of the warranty is to provide a purchaser with some security in respect of the cost of unexpected breakdown of certain components.

Where the component which has failed is clearly the subject of cover, then it is up to the Warrantor to show how any exclusion is relevant. The Warrantor has not provided sufficient evidence to convince me that the failure was caused by a manufacturing fault or wear and tear. The coils failed for some reason but there is no evidence as to the specific cause.

In my opinion this type of situation is exactly the type of circumstance where the purchaser of the product might reasonably expect the warranty to apply. It is an unexplained and unexpected event. It could not have been foreseen. There is no servicing relevant to the ignition coils. In all these circumstances I consider that the warranty responds to the claim. The only question might be the amount which is appropriately payable.

QUANTUM

The warranty contains statements that the Warrantor "will return to good working order" the relevant component which is listed. It is specifically provided that this does not mean that the Warrantor will return the component to a condition as if it were brand new.

The Warrantor has suggested that the problem can be resolve by "heat shrink". I am not sure exactly what this means but I note that the Complainant's mechanic says that this would be unsatisfactory and he would not regard it as being other than a "band-aid solution".

In my opinion the provisions of the warranty require the Warrantor to take some action in respect of the ignition coils rather than provide some other alternative form of equipment or system to comply with its obligations under the warranty.

The words "returning components to good working order" are clear. Obviously something must be done to the faulty part to put it in "good working order". In the case of a sealed unit it will be necessary to replace that sealed unit rather than carry out repairs by breaking the seal.

The Complainant has replaced the failed sealed units with second hand sealed units at a cost in excess of the sum of $1,000.00 allowed under the warranty. The Warrantor has provided no persuasive proof that the "heat shrink" procedure is reasonable or appropriate. The comments by two mechanics produced by the Warrantor are merely comments. They do not provide a detailed opinion or evidence as to why "heat shrink" is appropriate (apart from price) as opposed to the obvious remedy which is replacement of the part to return the components to good working order as required by the warranty wording.

In all the circumstances it appears to me that the appropriate payment to the Complainant is the sum of $1,000.00 as provided in the warranty document schedule.

In the circumstances I order that the Warrantor pay the sum of $1,000.00 to the Complainant within 14 days of this date.

Case no 1076 – Business Pak – Cover - $36,790

Complaint lodged with IBD	*09/05/2007*
Initial response received from member	*31/05/2007*
Complaint Manager Investigating	*31/05/2007*
Finding issued	*19/09/2007*
Referral to Referee	*29/10/2007*
Determination issued	*08/11/2007*
Complaint finalised	

This is a complaint by a company involved in earthmoving landscaping, paving and similar construction type activities for whom the broker arranged theft cover for an excavator. When the equipment was stolen the policy did not respond because of a restriction in cover in respect of an earthmoving or excavating machine weighing less than 5 tonnes while the machine was unattended with the proviso that the exclusion did not apply if the machine was inside a locked building or a fully enclosed worksite, depot, compound or yard "in each case guarded continuously by security personnel who are continuously on site".

CIRCUMSTANCES

The circumstance are well set out by the IBD case manager in his Finding but because I differ with the conclusion reached in that finding and for ease of reference and understanding I set out the salient points.

Inception of Policy

This was comparatively simple. On 29 January 2007 the insured sent the broker an e-mail asking the broker to include the excavator in the relevant policy as follows:-

"Can you please include the following WEF 18/01/07-

- 1 x Kobeko 2.5 t SK255R Mini Excavator with Rubber Tracks, Blade, Zero Swing, Buckets (300, 450 and 1000) Manual Tongue Hitch, Hammer Piping and 1 x New Montabert Hammer, Ripper

- SeriaL; 5012A50287

- Purchase Price: $36,790

I await your reply"

The broker responded the same day as follows:-

"The Extra Premium to include the below mentioned item WEF 29/01/2007:

- Kobelco 2.5t SK255R Mini Excavator with Rubber Tracks, Blade, Sero Swing, Buckets (300, 450 and 1000) Manual tongue hitch, hammer piping and 1 x New Montabert Hammer, Ripper, Unregistered, Serial No 5012A50287 – Sum Insured $36,790

Prem.	FSL	GST	S/D	Total
$127.00	$1.27	$12.83	$7.05	$148.15

The Attached Theft Endorsement will apply to this item.

Excess is as per policy"

The theft endorsement was as follows:

<u>"Loss by Theft – restriction of cover</u>

The following exclusion shall apply to Section 1-5:

1. The Underwriters shall not indemnify the Insured against any loss, damage or liability caused directly or indirectly by, arising from or in connection with theft or attempted theft of:

   (a) an earthmoving or excavating Machine weighing less than 5 tonnes;
   (b) any attachments to such Machine;

   while the Machine is unattended.

2. This exclusion shall not apply if the Insured proves that, at the time of the theft or attempted theft, the Machine was inside:

   (a) a Locked Building; or
   (b) a fully enclosed worksite, depot, compound or yard in each case guarded continuously by security personnel who are continuously on-site.

3. **Locked Building** means an enclosed structure at the Insured's or Machines operator's premises that is:

   (a) affixed to land; and
   (b) has all means of access and egress locked closed;

   but does not include a shipping container".

Immediately thereafter there were some further e-mail exchanges concerning the correct date of inception but in my opinion they are not of any relevance and they occurred on the same day.

Subsequently the broker forwarded a tax invoice dated 30 January 2007 in respect of the alteration to cover the second page of which referred to the machine and stated:

"The attached theft endorsement will apply to this item"

There was then a third page which set out the endorsement as referred to in the e-mail of 29 January 2007.

<u>THEFT</u>

On 28 March 2007 a theft occurred from the insured's premises. Vehicles were ransacked, various items were removed and the thieves stole sensors from a paving machine and escaped with the excavator and its attachments.

<u>POLICY RESPONSE</u>

Subsequently the underwriter advised that the policy did not respond because of the wording of the endorsement. The underwriter also said that it would not change the wording of the endorsement in any way. By this I assume the underwriter meant that had it been asked to change the wording it would not have done so.

The underwriter also said that it would not offer theft cover even if a tracking device had been attached to the machine because the underwriter considered tracking devices were not 100% accurate.

The underwriter also said that other underwriters might have taken the same view however similar terms and conditions would apply. I am unsure what this means.

The broker made other enquiries and ascertained that one other insurer at least would not have insured the excavator on a stand alone policy and if it had been part of a policy including other equipment then the minimum requirement would have been an immobiliser and/or a GPS tracking system. However, if the schedule of equipment was "all excavators they would decline to insure". A minimum theft excess of $2,500.00 would apply. Following further discussions the complainant put the broker on notice that the complainant considered the broker should have sought other insurance to cover the excavator in respect of theft in the open yard.

<u>COMPLAINT</u>

The complainant says that the broker failed to advise the complainant of the endorsement when the cover was sought.

The complainant further said that being a customer of long standing (some 20 years) the broker should have contacted the complainant to discuss the endorsement when the cover was sought and should have sought out an underwriter who would have covered the excavator for theft in the circumstances of the theft which occurred.

The complainant also says that he did not realise that the policy contained the endorsement until the policy was reviewed following the theft.

Consequently the complainant says that the broker is responsible for the loss.

Following the issue of the Finding by the case manager on 19 September 2007 both parties made further submissions.

Among other submissions, the complainant said that in previous circumstances where insurance was sought the broker had contacted the complainant to discuss options "providing choice, advice and clarity in regards to the insurance. However in this instance no consultation was provided showing a clear failure by the broker to act within our best interests".

The complainant further says that the broker knew that a machine of the nature of the excavator had not previously been insured by the complainant yet the broker still failed to contact the complainant to discuss the restriction imposed by the endorsement.

The complainant says that the restriction in cover was unusual. The broker apparently suggested at some stage that the broker had made enquiries about obtaining cover which excluded the endorsement but this was not available. The complainant says that this is not correct and that the broker did not make those enquiries at the time cover was sought but after the loss occurred and in any event cover was available though other brokers and underwriters. There were obviously conditions which would be attached to the extended cover including a higher excess and requirements for immobiliser and tracking device systems to be installed but in general terms cover could be obtained if the machine was kept in a locked compound with 24 hour back to base alarms.

The complainant says that the broker took the decision regarding insurance coverage of the excavator out of the complainant's hands. Although apparently positive on the face the broker's response was not an appropriate response.

The complainant also says that it should have been advised of the position when it made the first enquiry and should not have been forced to rely on receipt of the endorsement which took some days to arrive and even then the effect of the endorsement was not drawn to the attention of the insured.

The complainant also says that representatives of the broker had visited the premises from time to time and knew very well that it could not be claimed that the premises were "guarded continuously by security personnel who are continuously on site" within the wording of the endorsement.

The complainant also says that the endorsement was attached to a tax invoice which was a matter for the accounts department and this was insufficient and inadequate notice to the complainant of the endorsement.

Finally, the complainant points out that the services of a broker are utilised to provide advice including the suitability of coverage and clarity of conditions for which the broker receives financial benefit.

BROKER'S RESPONSE

The broker says that at the request of the complainant the policy was endorsed to include the excavator but was subject to the theft exclusion imposed by the underwriter and this was clear from the tax invoice.

The broker says it explained the effect of the exclusion to the complainant and that the underwriter would not have offered theft cover for the excavator even if the complainant had pressed the point.

Subsequently the broker has contested the suggestion that it should have made direct contact with the complainant to advise that cover was only available on the terms set out in the endorsement.

The broker further says that Section 50 of the New South Wales Division 6 of the Civil Liability Act 2002 as amended which sets out the standard of care expected by professionals provides quite clearly that a professional does not incur a liability in negligence if it is established that the professional acted in a manner that at the time the service was provided was widely accepted in Australia by a peer professional opinion as competent professional practice.

There is an exception to that provision "if the court considers that the opinion is irrational".

Further there is a provision concerning differing peer professional opinions which says that the fact that there are differing peer professional opinions does not prevent any one or more or all of those opinions being relied upon for the purposes of the legislation. Nor does the peer professional opinion have to be universally accepted to be considered widely accepted.

The broker further says that there is a substantive issue of causation. It says that the complainant has not provided any proof that it would have acted differently had it been aware of the situation or that other cover was available through other underwriters.

The broker emphasises that in any litigation it would be necessary for the complainant to produce appropriate evidence about those matters.

The broker also disputes any suggestion that it did not forward details of the endorsement to the complainant promptly or that had the complainant known about the situation it would have housed the excavator inside a building so that the equipment was covered.

RELEVANT LAW & CODE

I have considered the provisions of Section 50 of Division 6 of the New South Wales Civil Liability Act 2002 being the legislation referred to above in respect of peer professional opinion.

I have also considered the requirements of clause 7.1 of the Insurance Brokers Code of Practice which reads as follows:-

"**7. BUYING INSURANCE**

7.1 We will, in relation to your purchase of any insurance:

- (a) Act in your best interests;
- (b) Provide advice that is appropriate for your needs;
- (c) Assist you to determine your policy requirements and arrange polices for you;
- (d) Promptly provide proposal information to the insurer;
- (e) Promptly advise you if policy coverage is accepted, declined, cancelled or lapsed;
- (f) Take all reasonable steps to promptly make available to you copies of any relevant insurance documentation such as policy wordings, schedules, certificates and endorsements;
- (g) Assist with any variation, reinstatement, replacement, renewal or cancellation of your policies; and

(h) Receive all general insurance notices from the insurer on your behalf, unless we act for the insurer or tell you otherwise".

DECISION

I am concerned that when the complainant made a very clear request to the broker for cover for theft of the machinery, the broker responded in an apparently positive fashion but did not specifically draw the attention of the complainant to the fact that the cover offered was substantially limited because the machine weighed less than 5 tonnes and in those circumstances theft cover would only apply if the machine was inside a locked building or a fully enclosed worksite, depot, compound or yard in each case guarded continuously by security personnel who are continuously on site.

These restrictions on cover are substantial particularly in the case of an excavator owned by a contractor who might be expected to have a yard (in fact the broker's representatives had inspected the premises).

In my opinion a reasonable broker would have every reason to doubt that a complainant carrying on a business of the nature of the insured would lock up an excavator in a building or keep it in a yard guarded to the extent described in the exclusion.

I am concerned that in failing to draw the attention of the complainant to the fact that the theft cover was a very limited cover, depending on the circumstances of the insured's premises, the complainant was deprived of the opportunity of seeking broader cover which an average business person might consider was appropriate for an insurance policy described as a theft policy.

In my opinion the appropriate response to the broker should have been to advise the complainant that the theft cover which the broker could arrange was limited in the manner set out in the endorsement.

The broker says that it was not possible to obtain wider cover and disputes the suggestion by the complainant that wider cover is available from other underwriters.

I do not believe that the broker can say that more complete cover was not available. The broker has not provided any specific evidence in that regard. In my opinion it is irrational to say that peer opinion is with the broker on this issue.

Insurance brokers are not post offices merely providing a conduit between and insured and an insurer. Brokers provide a value added product which includes obtaining the appropriate cover for insureds with particular needs. I do not believe that the broker would not have been able to obtain more appropriate cover, even if it were subject to changes in respect of the excess, security and similar matters if the broker had made an attempt to do so. Unfortunately the broker has not provided any evidence of such an attempt. Instead, the broker has thrown the ball back to the complainant by suggesting that the complainant did not properly consider the terms and conditions when the copy endorsement was sent to the complainant by the broker.

However, this ignores the fact that the complainant was a contractor and not a broker. In my opinion it should have been obvious to the broker when cover was sought that the cover which the broker had immediately available was insufficient and inadequate for the complainant's needs.

CODE PROVISIONS IN RESPECT OF BUYING INSURANCE

Clauses 7.1 a – c provide that a broker will act in the best interests of an insured, provide advice that it is appropriate for the needs of the insured and assist the insured to determine policy requirements and arrange policies.

In my opinion the broker did not comply with the provisions of clauses 7.1 (a), (b) & (c).

ACTING IN THE BEST INTERESTS OF THE INSURED

In my opinion the broker failed to comply with clause 7.1 (a) .

In my opinion it was clearly not in the best interests of the insured that theft cover be incepted on the terms and conditions which the broker arranged. The flaws in the cover arranged by the broker were that it did not take into account either the nature of the machinery or the nature of the insured's premises or the nature of the insured's business.

The machine was described in detail by the insured when cover was sought and in particular was described as a 2.5 tonne machine. This should immediately have alerted the broker to the fact that the endorsement was extremely relevant and could substantially limit cover.

The insured was obviously engaged in business where it would be operating in the open air, on different sites and even if the machine were garaged at the insured's premises, the broker would have been aware from previous inspections, and in any event any reasonable person would be alert to the fact that those premises would probably be in the nature of a work depot or holding yard rather than a lock-up garage.

Further, 24 hour a day, 7 days a week, personal attendance of security guards at a business premises is not such a common factor, particularly in the case of what is essentially an earthmoving, landscaping paving, contracting business, as to suggest that it would be likely that the insured could comply with the conditions of the saver to the exclusion.

In my opinion it was clearly not in the best interests of the insured that the broker arranged the policy. The terms and conditions, particularly the endorsement, would probably only provide very limited cover to the insured.

ADVICE APPROPRIATE TO NEEDS

In my opinion the broker also failed to comply with clause 7.1 (b) because he provided no advice to the complainant beyond arranging the cover.

In my opinion the response of the broker should have been immediate and simple. The cover provided by the policy would be very limited because the machine weighed less than 5 tonnes unless the insured had particular garaging and/or security arrangements. The matter should have been raised and discussed on receipt of the request for cover.

The broker did not provide any advice whatsoever about these matters.

ASSISTANCE TO DETERMINE POLICY REQUIREMENTS

In my opinion the broker also failed to comply with Section 7.1 (c) because he did not assist the complainant to determine its policy requirements.

In the matter of arranging insurance the broker is the professional party. The broker is the person who can be expected to know the detail of policies and in particular the effect of endorsements.

The broker is also expected to know something about the client's business. There is no point in the broker inspecting the client's premises if he subsequently does not act in a manner consistent with knowledge of the detail of those premises.

At the very least the broker should have asked the insured whether the insured was sure that the cover was adequate and should have pointed out specifically that the machinery was less than 5 tonnes so it was relevant to consider whether it was kept in a locked building or a yard with appropriate security, noting that the demanded security was of a very high standard.

RESULT

In my opinion the broker's response to the request for cover was so inadequate that it cannot be said, taking an overall view, that the request for theft cover was complied with because the cover was so limited.

In my opinion the response by the broker was also misleading in that the e-mail of 29 January 2007 was misleading in the sense that it implied that the cover arranged was in any way commercially effective cover.

The theft endorsement made it completely inappropriate but the attention of the complainant was not drawn to that fact.

PEER PROFESSIONAL OPINION AS TO COMPETENT PROFESSIONAL PRACTICE

The broker has not provided any evidence about peer professional opinion but in my opinion the suggestion that the response by the broker to the request for cover was appropriate would be an irrational response.

There may well be some brokers who would differ. There is a maxim that "comparisons are odious". Brokers are familiar with the problem because every day they are obliged to compare different policy wordings. But brokers know that it is not only the policy wording which is important, it is the service offered by the particular underwriter, the way that underwriter interprets its policy, the manner in which the insured's business fits in with the provisions of the policy as well as numerous other factors not relevant on the face of the policy wording, which are extremely relevant to a decision concerning the appropriateness or otherwise of a particular policy.

The legislation nods to such problems with peer professional opinion in providing that a court may consider whether or not the opinion is irrational and also that there may well be differing professional opinions so that the court has a choice and further that peer professional opinion does not have to be universally accepted to be considered widely accepted.

There is no evidence before me to suggest that the broker's opinion is widely accepted by his peers and I do not believe that this could be the case because it would be irrational given the factors which I have mentioned above including the nature of the machine, the nature of the insured's business and the nature of the insured's premises.

PROMPT PROVISION OF DOCUMENTATION

Clause 7.1 (f) of the Code requires the broker to make available "promptly" all relevant insurance documentation.

There was some argument between the parties as to whether the broker had provided details of the cover including the endorsement "promptly". In my opinion that is irrelevant. The broker should never have arranged the cover on the terms and conditions which he did without discussing the matter with the insured because the product which was provided was so inadequate.

Likewise, I do not consider that the broker is entitled to handball the problem back to the insured by saying that the insured should have read the endorsement. The broker is the professional entity involved and should have realised that the endorsement made the policy completely inappropriate for this particular insured with this particular machine kept at the particular premises.

CONCLUSION

In the circumstances I have come to the conclusion that the broker is liable to indemnify the complainant in respect of its loss suffered because the underwriter was able to avoid providing indemnity under the policy.

I am conscience of the fact that an appropriate policy may well have involved a premium substantially higher than that which the complainant paid. There may also have been a substantial excess.

I direct that the parties make submissions in writing to IBD within 28 days of this date concerning quantum of the claim. Those submissions should include not only matters relating to the value of the equipment at the time of the loss but also the likely premium payment, excess and any other expenses which the complainant might have incurred in order to have obtained cover for the machinery while it was in the yard.

On receipt of those submissions I will make a further decision concerning quantum.