

May 2009 – For NZACS Members only

CHAIRMAN'S COMMENT

Hamish Wixon writes:

Members often ask us about other Professional Indemnity Insurance covers that appear on the market from time to time. And of course we are always looking at opportunities from time to time to fine tune and improve upon the policy we provide for our Members. For your interest we publish below an article by Graham Strez based on notes he made on a visit from an Insurance Broker in Auckland.

We believe we continue to provide comprehensive and effective cover to all our Members.

“COLD COMFORT”

Graham Strez writes:

Recently, I was contacted by an Insurance Broker whose firm offered a Professional Indemnity Insurance policy as an alternative to that arranged by **NZACS**. The nature of the phone call was to arrange a meeting so that the merits of the policy, which included full “*leaky building*” cover, could be explained to me. I suggested that it would be more helpful to this discussion, if I first received a copy of the policy wording for prior perusal and consideration.

The policy subsequently presented appeared to be a “*standard*” insurance policy, but with a mold (sic) exclusion write-back. What this means, is that the standard policy excluded losses arising from the effects of mould or other organisms. The write-back was a clause which negated the “mold” exclusion, thus providing up to a \$1m cover (maximum and in aggregate for all claims) in the case of any “*leaky building*” claims.

This feature was seen by the Broker, as being the perceived attraction of this policy to architects, over that provided by the **NZACS**-promoted policy.

I met with the manager of the brokerage firm in my office. I advised that I was currently insured through the **NZACS** scheme, along with some **700** other firms. I therefore wanted to understand the extent of his presented policy and the associated service intended to be provided by them.

What then, did I ascertain from the meeting?

The Insurance Brokers

I noted that the insurance broking firm was listed on the Companies register as being a limited liability company consisting of **300** shares. **299** of these were allocated to one shareholder, and the remaining one share to his wife. This was acknowledged. If these shares were valued at **\$1**, then the substance of the firm in terms of its share capital was not particularly comforting.

The firm appeared to operate by placing the business through an Underwriting Company of **1000** shares, **600** of which were owned by another Holding Company with **300** shares. Again if these shares were valued at **\$1**, then the substance of the Underwriting Company in terms of its share capital was also not particularly comforting.

My concern was that if I paid my insurance premium to the insurance broking firm, could I then be assured that the money paid would reach the ultimate Insurer and thus consummate the insurance contract? I was advised that the Broker would confirm policy acceptance by the Insurer.

I would, none the less, still demand to sight the ultimate Insurer's stamp on the policy, rather than the Broker's or Underwriting Agency's stamp on the confirmation of the placement.

The Insurer

The Insurer proposed by the brokerage firm, was stated to be a syndicate of Lloyds of London, but I had no evidence of this or of any security rating that may have applied to the syndicate. Lloyds typically provides cover for specialist insurance risk.

It may be helpful here, to briefly outline the nature of a Lloyds Syndicate, as Lloyds operates somewhat differently from a typical insurance company. A syndicate is a group of investors who have come together to accept the risk of making a profit (or loss) on insurance contracts. Lloyds of London is the group of syndicates. Apart from this, they are commercially unrelated. Simplistically, this association is not unlike that of a rugby club and its relationship with the rugby union.

I was somewhat puzzled as to why an Insurer based on the other side of the world, would wish to provide cover for "*leaky buildings*" in New Zealand, when it is well known here that "*leaky building*" losses in New Zealand are very substantial and a huge drain upon any insurance pool, and also a significant contingent liability for councils. My conclusion therefore was that the Lloyds Syndicate may not be fully aware of the risk-profile of buildings in New Zealand. I was assured by the Broker that they were, but I have no confirming evidence of this.

My next question was, that if such full "*leaky building*" cover was provided, then after the first serious claim notification involving a leaky building, the Insurer may certainly become intimately aware of its risk exposure. In such circumstances, it would appear most likely that the Insurer would re-assess its position in regard to the other Professional Indemnity policies and possibly give notice of its intention to withdraw the cover under the policy on the renewal.

Options open to an Insurer upon renewal in such circumstances, might include any or a combination of the following:

Increased premium,
Increased excess,
Reduced cover,
No cover.

I was concerned, that if an insured firm like mine was presented with any of these options and was unwilling to accept them, where might they find alternative reliable insurance cover. The response was that the Broker would find another Insurer who would become a substitute. He appeared to be confident about this while I was thinking: ***Yeah right!***



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The Broker's Experience

I was interested next in the Broker's Professional Indemnity claims-handling experience, particularly in relation to the building design and construction industry, as I did not discern any particular detailed experience, other than general experience in PI insurance matters.

I asked the broker to tell me about his understanding of NZIA AAS or SF Agreements. He said he was aware that the Architects used such documents, but was unaware of their content. He did not know of NZS3910, or what it may be concerned with.

In my view, he also appeared to have a limited understanding of the law relating to joint and several liabilities in tort. Whilst he was aware that partnerships had joint and several liabilities, he did not appear to know that it was a major aspect of Architects' Professional Indemnity Insurance claims.

In my view, he clearly believed that Architects will only be responsible to pay for their own negligence. He seemed confident in the belief that a builder would be responsible for its own construction mistakes and liability. We all know that it is the insolvency or inability of builders and other parties to pay for their share of legal liability that impinges upon the quantum of the Architects' (and Councils') financial settlement contributions.

With respect to limitation of legal liability, the Broker was unaware of the conflicting High Court decisions of *De Geest v Cromwell Plumbing*, and alternatively *Dustin* which effectively determined that the *De Geest* case was unsoundly determined. This judicial uncertainty is of concern to Architects, as it leaves the limitation period open to legal argument beyond the 10 year long stop under the Building Act.

The WHRS has its own limitation period regime.

The Insurance Advisers

I enquired as to how his firm would typically handle a claim, particularly when the Insurer's office is 12 hours behind NZ standard time. They would be asleep when we are awake, wanting attention. This was not seen as a problem for the Broker, as the Insurer would appoint a lawyer in New Zealand to advise upon the claim. I commented that lawyers give legal advice and asked who would provide the necessary architectural advice. The Broker stated that they had some Architects on their books (*and presumably would consult them for advice*).

It has been my observation, that Architects need timely, accurate and reassuring advice when they are confronted with situations outside their normal professional experience. I did not feel that this would be readily or freely available through this Broker/Insurer team.

"Leaky Building" exclusion

The impression elicited after speaking to other Architects who have similarly been approached by the Brokers with an alternative Professional Indemnity policy, is that they can provide Architects with Professional Indemnity insurance cover for "*leaky buildings*" in contrast to the *NZACS* - arranged policy. *The impression left is misleading.*



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The **NZACS**-arranged policy currently provides for full insurance cover for non-residential buildings. For stand-alone residential buildings for which the Building Consent was issued after **31 March 2005**, there is insurance cover for “leaky building” claims, but with an indemnity cap of **\$250,000**. Multi-units or apartment buildings have similar cover if the building design and documentation has been peer-reviewed by another Architect (*outside of the firm*) or similar approved reviewer.

Residential buildings designed and building consented prior to the **31 March 2005** (The commencement date of the Building Act 2004), have a “leaky building” exclusion.

It is again timely to remind Architects that buying a Professional Indemnity Insurance policy is not just about purchasing an apparently inexpensive piece of paper, but rather purchasing the policy-wording imprinted upon the paper and the Insurer’s response in the event of a claim.

NZACS has arranged Professional Indemnity and Companion Liability insurance and provided Risk-Management advice to Member firms for over **35** years. It therefore has considerable experience and expertise in its claims-handling capability: - including appropriate insurance, legal and architectural advice. This Risk-Management advice is available to Member firms. The alternative insurance providers do not, in my current understanding, appear to offer such a service.

Importantly, **NZACS** is in for the long-haul, and through its wholly owned subsidiary Acanthus Insurance Company Ltd can provide appropriate and effective policy cover.

Response

At the end of our discussion, I invited the Broker to consider and address my various queries and to come back for a further discussion when he has the answers. *I await the reply.*

Meanwhile

If architects have particular queries concerning the nature and content of their Professional Indemnity Insurance policy, or that of alternative insurers, you are encouraged to write to **NZACS** outlining these matters for address in a future issue of “*Communiqué*”

COMMUNIQUE

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*We welcome contributions from readers,
on how they manage risk.*



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