

DETERMINATION

REFERRAL NO: 23108

*Home Building – malicious damage – extent of cover – joint & composite policy
- mortgagee's interest – legal costs – interest – utmost good faith
– member's obligations*

SUMMARY OF FACTS

The applicant held a home building insurance policy with the member in the joint names of her and her husband for the period, 18 February 2005 to 18 February 2006. The building was insured for \$251,800 and on 22 April 2005, a contents policy was incepted at the applicant's request. The building policy was subsequently endorsed with the contents cover of \$20,000. There was a policy excess of \$100.

On 4 May 2005, the home was damaged by a fire that was deliberately lit by the applicant's husband. The damage was assessed by the member and the home was deemed to be repairable. However the contents were a total loss. The member obtained a quotation for the cost to repair the building in the sum of \$219,340.

On 10 May 2005, it issued a payment of \$2,000 to the applicant as emergency funds. Within a short time after the fire, the member arranged for the applicant and three of her children to be accommodated at a serviced apartment facility. On 1 June 2005, the applicant was advised by the member's assessor to locate a more suitable property to rent and told that it was in order for her to enter into a six-month lease. Relying on this, she entered into a lease for this period commencing 8 June 2005. However, shortly thereafter, the member withdrew from this arrangement.

The claim was initially denied on the ground the co-insured had deliberately burnt the home. The denial of the claim was confirmed on subsequent occasions. Following a review of the claim which included reference to legal advice, the member maintained its denial in respect to the building damage. However it decided to offer 50% of the contents sum insured less the policy excess in full and final settlement. The claim remained in dispute and the member subsequently referred the matter to its legal department. Following that referral, it decided the policy was in fact a composite policy. The significance of that decision was therefore, the applicant would be entitled, as a joint tenant and co-insured, to 50% of the rebuilding costs.

The member subsequently paid the balance of the contents sum insured in addition to the sum of \$2,700 for temporary accommodation costs. This figure was based on information that the insured residence could have been let at \$450 per week and it allowed 50% of this amount over a period of 12 weeks. The applicant's claim included the loss of frozen food items to the value of \$319.50, and the member decided to meet this loss in full on an *ex gratia* basis. The property was mortgaged at the time of the fire and the member has calculated its liability to the applicant, except for the claim by the mortgagee, as 50% of the estimated damage, namely \$109,670. The member advises it is prepared to pay this sum subject to the following:

- The applicant and the mortgagee both providing an agreed direction on how the sum should be apportioned between them.
- The applicant and the mortgagee advising they both accept the sum in full and final settlement of their respective claims.
- The applicant and the mortgagee both being prepared to enter into a Deed of Release with the member in terms that are acceptable to it.

The applicant submits in response to its claim, the mortgagee is entitled to be paid \$145,766.41, which is the balance outstanding at the time of the loss. As a result, the

maximum exposure to the claim by the applicant is limited to \$106,033.59 or half the cost of repairs, whichever is the greater. In addition, the remainder of the applicant's claim can be summarised as follows:

- Interest on one half of the estimated cost of repairs, the contents sum insured and the amount paid in respect to the loss of frozen foods, from 8 June 2005 until payment.
- Accommodation allowance at \$450 per week for the period from 16 August 2005 until the first anniversary of the first payment by the member for accommodation following the fire.
- Interest on the arrears of accommodation from 16 August 2005 until payment.
- Legal costs to discharge the mortgage on the insured premises. The amount of that liability to be determined when the mortgage has been discharged, or alternatively, the parties may agree on a figure.
- Legal costs and expenses incurred by the applicant in order to properly and effectively prosecute her claims.

The applicant submits the member was not acting in the utmost good faith when it originally denied the claim. She states in examining the manner in which the member dealt with the claim, it would seem to have been the member's position that, irrespective of its true obligations toward her, it would force her to seek legal advice and take proceedings for enforcement of her rights rather than responsibly and compassionately deal with her claim, and pay her the monies to which she was entitled within an equitable and responsible timeframe.

ISSUE IN DISPUTE

Whether the member has indemnified the applicant pursuant to the cover provided by the policy and at law, and particularly whether the applicant is entitled to the following payments as requested on her behalf by her solicitors.

- (a) Half the cost of repairs;
- (b) Interest pursuant to the Insurance Contracts Act on the monies paid in response to her general contents claim in the amount of \$661.08;
- (c) An accommodation benefit provided for in the policy in the amount of \$14,271.43, being \$16,971.43 less \$2,700 part payment made by the member on 4 January 2006;
- (d) The applicant's legal costs to discharge the mortgage on the insured premises;
- (e) The applicant's legal costs and expenses in relation to the prosecution of this claim;
- (f) Payment to the mortgagee of the sum outstanding on the mortgage at the relevant time, namely \$145,766.41 and interest on that amount.

RELEVANT POLICY PROVISIONS

"Who is insured under this policy

The person whose name is set out in the schedule is insured. The following people are also insured, as long as they normally live with that person named in the schedule.

❖ That person's partner.

❖ ...

In this policy all these people are called 'you' or 'your'.

...

Cover 1 – Listed Events

What is insured

Your buildings and/or your contents as set out in your schedule are insured if they are destroyed, lost or damaged. They are insured only if you own them, or are liable for them.

...

We will cover your buildings and your contents for the events listed below. There must be damage or loss from one of these events, to your buildings or your contents, for you to make a claim.

- ❖ Fire or explosion

- ❖ ...

...

Additional things we will pay for when you have insured your buildings

The following will be paid in addition to the sum insured. These will only be paid when they relate to damage or loss from a listed event.

- ❖ If you are unable to live in your buildings after damage or loss has occurred, we will pay for you to rent another property. We will pay an amount equal to the amount that your buildings could have been rented out for each week if you had not had a loss. We will also pay the costs of alternate accommodation for your pets. We will pay this for up to 12 months. The most we will pay under this section is 10 per cent of your buildings sum insured.

...

- ❖ We will pay your legal costs to discharge your mortgage if your claim is for a total loss.

...

Additional things we will pay for when you have insured your contents

The following will be paid in addition to the sum insured. These will be paid when they relate to damage or loss from a listed event.

- ❖ ...

- ❖ We will pay legal costs and expenses you are liable to pay following legal proceedings brought by you, or against you, in Australia. You must advise us of any legal proceedings brought by you, or against you. We will only pay claims notified to us during the period of insurance shown on your most recent schedule. We will only pay the legal costs and expenses incurred with our prior consent. The most we will pay during any one period of insurance is \$5,000.

...

What Section 1 and Section 2 of the policy do not cover

We will not pay claims for loss, damage or liability arising from:

- ❖ ...

- ❖ Damage, loss or injury that you or anyone acting for you deliberately caused."

OUTCOME AND REASONS

There is no dispute the defined event, "fire", resulted in serious damage to the residence and the total loss of the contents. In these circumstances, the onus rests with the member to establish, on the balance of probabilities, that the claim falls within an exclusion in the policy of insurance. The member's offer of settlement to the applicant has been made on the basis her husband, a co-insured named in the policy, deliberately set fire to the residence. On the applicant's behalf, her legal representative has advised:

- The applicant and her husband had been married for 28 years at the time of the loss.
- During the past ten years, her husband's behaviour towards her progressively degenerated and was characterised by threats to harm and kill her in addition to physical, psychological and verbal abuse and physical assault and verbal abuse toward the two eldest of their five daughters.
- By early 2005, the relationship between the applicant and her husband had reached the stage where it was intolerable to the applicant and her daughters; they had to separate. It was arranged between the parties, they would sell the residence and they would each receive a share of the sale proceeds.

- Arrangements were made for the residence to be sold. This was not initially successful; however subsequent arrangements were made for the residence to be sold at auction on 28 May 2005.
- Following a further threat to kill the applicant, the applicant's husband was removed from the residence by police on 24 March 2005. At that time, the police took from him his keys to the residence and he gathered some of his personal effects. The applicant then applied for an Apprehended Violence Order (AVO) and this was issued on 9 April 2005.
- Within a few days of her husband being removed from the residence, all his clothing and personal effects were gathered and given to him via his relatives. The only property belonging to her husband that remained at the residence was his tools of trade. The husband also made an attempt on his life. By that time, all the furnishings and furniture in the property were owned by her and her children.
- On 4 May 2005, the applicant was at her sister's house when she received a call from a neighbour telling her the residence was on fire. Later that day, as her aunt recounted, her husband had told her in a telephone conversation he wanted to kill the applicant and those around her including one or more of his children.

The applicant's legal representative states the member paid rent for the premises for which the applicant entered into a six-month lease, up until 16 August 2005. As a result, she and her children were forced to find cheaper accommodation. As a consequence, her 18-year-old daughter, who was then a student, had to leave the family to live with relatives as the accommodation the applicant could afford was not conducive to study.

It is not disputed the applicant's husband set fire to the insured residence. There is evidence he was depressed and had attempted suicide shortly prior to lighting the fire. In a record of interview with the member's investigator, he stated he was angry with his family and for this reason he wanted to burn the home down. The member submits in this case the policy was a composite policy. It states that claims involving an innocent co-insured can be complex and subject to differing opinions and outcomes. To this end, it refers to the case of *MMI v Baktoo* (2000) 11 ANZ Ins Cas 61-466. However, after obtaining legal advice, it agreed the applicant was entitled to one half the rebuilding costs.

The Panel notes the courts have held in *Holmes v GRE Insurance Ltd* (1989) 5 ANZ Ins Cas 60-894, and *Maulder v National Insurance Company of New Zealand* (1992) 7 ANZ Ins Cas 61-141, two of several cases referred to by the applicant's legal representative, that a home and contents policy taken out by husband and wife in respect of property, in which they have separate interests, should be seen as a composite rather than a joint policy in which the separate interests of the parties are insured under the one policy. It followed that while the husband's arson prevented him from claiming under the policy in respect to his interests, the wife was entitled to claim in respect of any property owned by her and half of all jointly owned property. The traditional approach, that a policy in both names was necessarily joint in nature if it covered jointly owned property, was held to be no longer good law and each case had to be taken on its own facts.

However, in *MMI v Baktoo*, the court held that where the insured property was owned by a partnership, with the husband and wife jointly owning the partnership rather than having any interest in the partnership property, then the policy should be seen as joint, as the nature of their interest in the insured property was inextricably intertwined, and to allow the (innocent) wife to successfully claim under the policy would necessarily benefit the husband (who had set fire to the insured property and

was debarred from claiming) as she had to account to the partnership for the proceeds of her claim and thus the husband would benefit from his fraudulent actions.

This is not the factual situation in this dispute and the court in *Baktoo* did not overrule the decisions in *Holmes and Maulder*. The court expressly approved the decision in *Kelly v The National Insurance Co of New Zealand Ltd* (1995) 8 ANZ Ins Cas 61-239, in which the court distinguished insurance cover taken out by a trading partnership from a domestic house and contents policy. The pattern of ownership in the current case makes it far more similar to *Holmes and Maulder* than to *Baktoo*, the critical difference being the partnership arrangement that existed between the parties in *Baktoo*, which is entirely different to the situation in this dispute where the husband had left the residence in what appears to have been acrimonious circumstances and the parties had agreed to sell the house and divide the proceeds.

The applicant has provided a letter from the mortgagee to the member dated 8 September 2005. It states relevantly:

"[Bank's] interest is recorded on the above policy issued by your company covering the above property.

On 4 May 2005 the property was destroyed by fire. As a result, the value of [bank's] security for its mortgage was reduced by at least \$150,000. At the time of the fire, the amount payable by [names] to [bank] to their mortgage obligation was \$145,766.41. ..."

The policy provides the member will pay the insured's legal costs to discharge their mortgage "if your claim is for a total loss." The member appointed a building consultant to prepare a scope of works and it obtained a repair quotation from a builder on the basis of this document. The quotation was in the sum of \$219,340, and was subject to any additional works, which would increase the amount of the quotation. According to the member, the building is not a total loss as a result of the fire. In the Panel's view, where an insurer would authorise repairs to a building, discharge of the mortgage would not occur. Conversely, in the event of a total loss, the insurer would pay out the mortgagee in the first instance and any balance to the insured, subject to the sum insured. On the material presented, the mortgage was in the joint names of the applicant and her husband.

The Panel considers the practical application of an insurance policy must recognise the considerable range of interests and arrangements that may operate between parties to an insurance contract and the possibility of change in those arrangements between policy inception and the event giving rise to a claim. The parties to this policy were not living together at the time of the fire and the applicant has provided documents to establish the residence was for sale and was to go to auction. The Panel considers it reasonable to accept the applicant had an entitlement to a share of the proceeds of the sale. Clearly, the mortgagee would have to be paid the outstanding loan amount from the sale proceeds in the first instance. The Panel also considers it reasonable to accept that both the applicant and her husband would have contributed to paying out the mortgage from their respective shares of the sale proceeds.

The member has offered to pay the applicant \$109,670, being 50% of the quoted cost of repairs. In this regard, the applicant has not provided any evidence to rebut the member's submission regarding the cost of repairing the building. The applicant is the innocent party as the evidence indicates her husband deliberately lit the fire. Accordingly, the member's liability is limited to the interests of the applicant only. While the applicant submits the mortgagee is entitled to recover from the member the monetary diminution in the value of its security caused by the fire, on the material presented, the Panel is not satisfied this entitlement has been established taking into

account the policy wording, the terms and conditions of the mortgage and the relevant case law.

In any event, the Panel does not believe it has jurisdiction to determine the member's obligations to the mortgagee notwithstanding the applicant has attempted to establish the interests of the applicant and the mortgagee are sufficiently similar for the matter to be determined herein. The Panel also notes that, if it were to award any additional sum in addition to the \$109,670 in favour of the applicant, it would be awarding her an amount of more than 50% of the rebuilding costs and/or the loss she has sustained with respect to the damage to the property and the Panel can see no legal basis for so doing.

In relation to the claim for temporary accommodation, the Panel believes it is important to ascertain the history of this matter after the initial claim was made which is set out in a series of documents which the member provided to the applicant's solicitors but not to the Service, the documents being headed "File Information Sheet". The Panel does not know why these documents were not provided by the member to the Service because they contain critical information to a number of matters and most particularly, to the issue relating to the claim for accommodation. The Panel notes the member has unilaterally deleted parts of these documents without having obtained an order for special circumstances or without having made any legal submission or explanation as to why the deletion occurred. The Panel views these matters with concern. However, the relevant extracts from the file information sheet are as follows:

- (a) There is a note dated 5 May 2005 that a member of the underwriting department of the member advised the applicant or a person on her behalf "the fact they were separated doesn't come into effect – technically no cover as [husband] has damaged his own property."

The documents indicated repeated contact from the applicant and persons ringing on her behalf advising the member of the urgent and desperate circumstances facing the family.

- (b) A further note appears on 13 July 2005, by an employee of the member which reads as follows:

"I have now rung the insured [applicant's name and telephone number], I have now explained to [applicant] that she is not covered by the policy as the fire was a deliberate act by the husband. She said she paid for everything, I said that after a thorough investigation the fire was a deliberate act caused by an insured [indecipherable]."

A further note appears on the same date, by the same employee of the member which reads as follows:

"I have now received a call from the insured [applicant] counsellor ... acting on the insured [applicant]'s behalf and needed me to run through the decision with her, again informed her that it was a deliberate act caused by an insured and is not covered".

- (c) A further note appears, an employee of the member:

"received a telephone call from the applicant's daughter to the effect that she had been advised that her mother was advised to sign (by a representative of the member's staff) the lease for accommodation for six months. She has now been advised to leave the premises by [an apparent representative of the member's name is inserted therein but part of the name has been blacked out]".

The member's representative then advised the caller the member would pay for "three more week's rent and then any other costs incurred after that will be at the expense of O/I" (presumably 'our insured')."

A further note appears

"Advised O/I of above – she advised that they were advised to sign the lease by [apparent employee or representative of the member] and they would not have done so had they known this would have happened – advised her to call [employee]".

- (d) A further file note appears on 14 July 2005 wherein it appears that one employee of the member contacted the other one named above and
"He has confirmed that even though this claim is refused we did agree to pay temp accommodation and this will now need to honour this".

At this stage, it is helpful to analyse the comprehensive, persuasive submission made by the applicant's solicitors on this issue. At page 3 of the submission he made on 30 January, the following appears:

"At the time of the initial report the insurer was also aware that [husband] had admitted lighting the fire and had been arrested by police.

The insurer was also aware that [husband] had been criminally charged as a result of the fire and had been refused bail.

By 7 July 2005 the insurer was aware that [husband] was still in gaol... and [husband] does not have any possible claim for accommodation benefits, nor any interest in that policy benefit. ...

By its Response, the insurer accepts its contractual obligation to meet the claim by [applicant] and her daughters for accommodation expenses yet refuses to deal with that claim properly or fairly.

Indeed, the insurer's treatment of [applicant] and her daughters in response to their claim for accommodation expenses is staggering in the extent of the callous indifference the company has to their circumstances. ...

On 29 July 2005 the claims person apparently spoke with [member's representative] and asked him to confirm the arrangement between the company and [applicant] regarding accommodation. The entry records that he had in fact agreed to accommodation for 6 months. ... The claims officer's recorded attitude to this claim is that irrespective of whatever the loss assessor had said to [applicant] nonetheless, [applicant] would be allowed 13 days accommodation benefit. ...

[Applicant] is entitled to the accommodation benefit for up to 12 months. The insurer has so far wasted 8 of those months. For so long as the insurer continues in breach of its contractual obligations [applicant] is in no position to make any arrangements for repair or otherwise of the insured premises and is in desperate need of the accommodation benefit provided by the policy.

[Husband] has no interest in that accommodation benefit."

The Panel believes the above analysis reveals the following:

- (a) The member showed little interest in properly investigating its legal responsibilities to the applicant in the early stages of the claim and on three separate occasions, simplistically and incorrectly asserted it had no obligation to meet the claim at all. After some months, the member obtained legal advice, a step it should have taken much earlier.
- (b) As both the member's and the applicant's solicitors would be well aware, the member has an obligation to deal with the applicant's claim with the utmost good faith (see section 13 of the Act). This term has been judicially defined as requiring the member to act with scrupulous fairness and honesty towards the applicant. The Panel wishes to emphasise the term "scrupulous fairness" in the context of this claim. The Panel believes the above analysis of the member's response to the applicant's claim for accommodation expenses reveals it has fallen well short of the standard.
- (c) The Panel notes the applicant's solicitor has stated the member's attitude was one of "callous indifference" to the circumstances of the applicant and her daughters. Whilst the Panel believes the term "callous" may be arguable, it

nevertheless is concerned about the fact, in terms of the member's obligations to the applicant, it should have been so indifferent to the concerns of the family that had seen the father/husband gaoled, the house seriously damaged, following various threats made to the applicant and members of her family.

- (d) In the Panel's opinion, leaving aside considerations of utmost good faith, an insurance company has social responsibilities to a policyholder in dealing with claims. An insurer's representative must be aware that persons in the position of the applicant and her family, assisted by concerned parties, need all the help to which they are entitled in deeply distressing times such as those encountered by the applicant. In the Panel's opinion, the member failed to properly and promptly consider the claim, to properly give consideration to the applicant's desperate circumstances, and when finally persuaded to provide some limited accommodation relief, then without any adequate warning, sought to terminate that relief in circumstances which the Panel finds as perplexing.

In any event, in the Panel's opinion, the member, by its actions, has created a circumstance where the applicant is entitled to the full benefits under the policy for accommodation for the reasons advanced by the applicant's solicitors.

The Panel also wishes to record the member was given the opportunity to respond to the detailed and persuasive submissions provided by the applicant's solicitors and the member chose not to do so. In those circumstances, the Panel believes it has no alternative than to accept the submissions made by the applicant's solicitors in support of the applicant's entitlements under the policy, subject to law and any contrary views the Panel forms.

For these reasons, the Panel determines the applicant is entitled to the claim for rental benefits set out above, formulated by her solicitors.

The applicant's solicitors have made a claim for payment of their legal costs which they have calculated in the sum of \$18,397.98. In support of that figure a detailed and itemised calculation has been provided. These details have been provided to the member. In past determinations, the Panel has acknowledged, in accordance with the provisions of clause 10.2(b)(vii) of the Terms of Reference, the power to order costs exists. However, the Panel has indicated it would only make a determination requiring payment of a policyholder's legal costs in exceptional circumstances such as for example where it would have been virtually impossible for the policyholder to adequately have presented the claim and her entitlements under a policy.

In the context of the claim for costs, the above analysis reveals the member, by firstly refusing the applicant's claim absolutely and then ultimately, by offering partial but inadequate assistance under the policy, placed the applicant in a position where considering her overall circumstances and the complexity of the issues she faced, she was forced into a position where she required legal advice. Fortunately for the applicant, she obtained advice from a solicitor who was able to comprehensively, thoroughly and effectively present her case to the member. This case is one of a small number of cases in which the applicant policyholder has established an entitlement pursuant to the Terms of Reference to have her legal costs paid.

The Panel has carefully considered the detailed bill of costs provided by the applicant's solicitors and considers for the most part, the items referred to therein are fair and reasonable, both with respect to work performed and the fee charged. However in the event the member believes the amount charged is excessive, it should have the right to have the costs independently costed by a costing consultant agreeable to both parties or failing agreement to be nominated by the Panel Chair.

The Panel is also of the opinion that, whilst the member offered to pay the sum of \$109,670 in settlement of the claim, it did not do so setting terms and conditions on that offer. Whilst it was entitled to set those terms and conditions, the fact of the matter is it has retained the benefit of money properly payable to the applicant and therefore it should pay interest on that sum or in the event the applicant can establish the rebuilding costs have increased in the meantime, any further sum which it may be obliged to meet. The Panel is also of the opinion that interest should be paid from the date of its denial letter, namely 23 August 2005 to the date of settlement of the dispute. The Panel is also of the opinion, based on the above analysis, the applicant is entitled to payment of the sum of \$661.08 interest on the contents claim, but is not entitled to payment of any legal costs associated with the discharge of the mortgage.

The Panel observes the total of the above sums cannot be readily ascertained at the present time. The sum payable may or may not exceed the limit of its primary jurisdiction, which is the sum of \$150,000. It is the intention of the Panel in issuing the above rulings that the amount payable pursuant to this determination not exceed the sum of \$150,000. If, notwithstanding the inability to precisely calculate all the amounts referred to above, the member chooses to pay the applicant the sum of \$150,000 or such lesser sum as may be agreed between the parties, this determination will bring to an end the dispute between the applicant and the member. If it does not, the applicant is of course entitled to pursue her remedies elsewhere.

The Panel therefore determines the member is to pay the following sums to the applicant:

- | | |
|--|---|
| * Interest on contents claim | \$ 661.08 |
| * One half of estimated costs of repairs | \$109,670.00 (or as revised) |
| * Rent | \$ 14,271.43 |
| * Legal costs | \$ 18,397.98 (or as independently assessed) |
| * Interest on \$109,670 (or as revised). | |

27/3/06