# SUPREME COURT OF QUEENSLAND

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| CITATION: | John Connell Holdings P/L & Anor v Mercantile Mutual & Ors [1999] QCA 429 |
| PARTIES: | **John Connell Holdings Pty Ltd**<br>(First Plaintiff)<br>First Appellant<br><br>**Conasoc (Queensland) Pty Ltd**<br>(Second Plaintiff)<br>Second Appellant<br>v<br>**Mercantile Mutual Holdings Limited (formerly known as Mercantile Mutual Insurance Company Limited)**<br>(First Defendant)<br>First Respondent<br><br>**Vanguard Insurance Company Limited**<br>(Second Defendant)<br>Second Respondent<br><br>**Transport Industries Insurance Company Limited**<br>(Third Defendant)<br>Third Respondent<br><br>**Southern Pacific Insurance Company Limited**<br>(Fourth Defendant)<br>Fourth Respondent |
| FILE NO/S: | Appeal No 5921 0f 1998<br>Appeal No 1914 of 1991 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General civil appeal |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 15 October 1999 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 April 1999 |
| JUDGES: | de Jersey CJ, McPherson JA, Fryberg J |
| ORDER: | **Appeal dismissed with costs to be taxed.** |
| CATCHWORDS: | INSURANCE – PROFESSIONAL INDEMNITY |

INSURANCE – appellants sued for breach of contract by repudiation of obligation to indemnify – contract required notification of claim – whether claim arose out of previous occurrence notified to respondents – whether appellants effectively jointly covered by policies so that one's notice operated for the other's benefit – whether respondents waived need to comply with contract requirement – whether respondents estopped from relying on non-fulfillment of requirement – whether detriment suffered.

*Antico v CE Heath Casualty and General Insurance Ltd* (1995) 8 ANZ Insurance Cases 61-268
*The Commonwealth v Verwayen* (1990) 170 CLR 394
*Deaves v CML Fire & General Insurance Co Ltd* (1979) 143 CLR 24
*Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492
*Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* (1994) 2 Qd R 394
*General Accident Fire & Life Assurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388
*Motor & General Insurance Co Ltd v Davy* [1994] 1 Ll Rep 607
*Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VLR 198
*Hawkins v Bank of China* (1992) 26 NSWLR 562
*State Government Insurance Commission v Stevens Brothers Pty Ltd* (1984) 154 CLR 552
*Taylor v J Thomas and Son* (1983) 2 ANZ Insurance Cases 60-524

COUNSEL: Mr DR Cooper SC, with him Mr CL Francis for the appellants
Mr SW Couper SC, with him Mr LD Bowden for the respondents

SOLICITORS: McInnes Wilson for the appellants
Hunt and Hunt Solicitors for the respondents

[1] **de JERSEY CJ:** The appellants (respectively, "JCH" and "Conasoc") unsuccessfully sued the respondent insurers for damages for the respondents' breach of two insurance contracts, by repudiation of their alleged obligation to indemnify the appellants. To aid understanding of the judgment and the basis of the appeal, it will be convenient if I traverse the relevant circumstances in narrative style, drawing

attention, as I proceed, to the approach taken by the learned trial judge and to the points of challenge mounted on appeal.

[2] The appellants were (and are) related companies with common directors. Together with other companies they formed a group. Until 30 June 1979, Conasoc carried on a civil and structural engineering business. From 1 July 1979, JCH took over that business.

[3] These claims relate to a warehouse at West End. Fletcher Organisation Pty Ltd ("Fletcher") constructed it. Conasoc designed the building and acted as consulting engineer during the construction. JCH replaced Conasoc as consultant as from 1 July 1979.

[4] The warehouse was demolished in 1988 because of structural deterioration. The potential problem first became apparent in the latter part of 1979 with the movement of a pier. On 27 May 1980, Fletcher claimed its consequent loss against JCH. In support of its claim, Fletcher referred JCH to Fletcher's own solicitors' advice, to the effect that Conasoc (not, one notes, JCH) was responsible for the problem.

[5] In respect of the period 1 July 1979 to 30 June 1980, JCH and Conasoc were respectively insured under two policies of insurance issued by the respondents through their agent, GE Brown Underwriting Agencies Pty Ltd ("Brown Underwriting"). The principal of Brown Underwriting was Mr Gregory Brown. Policy 412, as it was described in the evidence, covered JCH, and policy 896 covered Conasoc.

[6] Under each policy, the respondents agreed to indemnify the respective insured in respect of breach of professional duty, in these following terms:

> "To indemnify the insured against any claim or claims which may be made against them or any of them during the period specified in the Schedule:
>
> (a) for breach of professional duty in the profession stated in the schedule by reason of any negligent act, error or omission ... on the part of the Insured or their predecessors in business or any person now or heretofore employed by the Insured or their predecessors in business or hereafter to be employed by the Insured during the subsistence of this policy in the conduct of any business conducted by or on behalf of the Insured or their predecessors in business in their professional capacity as specified in the schedule".

[7] Each policy provided in the usual way for notification of a claim as a condition precedent to the right to indemnity (clause 3):

> "The Insured shall as a condition precedent to their right to be indemnified under this Policy give to the company immediate notice in writing
>
> (a) of any claim made against them, or
>
> (b) of the receipt of notice from any person of an intention to hold the Insured responsible for the results of any breach of professional duty as specified in the Schedule
>
> and shall in either case, upon request, give to the Company such information as the Company may reasonably require. "

[8] Although, as has been seen and as the learned judge held, Fletcher made a claim against JCH in May 1980, JCH did not, as required by clause 3, notify the respondents of that claim. I note that the ameliorative provisions of the *Insurance Contracts Act 1984* (Cth) had no application to these policies.

[9] The appellants relied, however, on notice of occurrence given by JCH under clause 4 of JCH's contract - as it was argued, given both for JCH itself and for Conasoc. That clause, which appears in both policies, is in these terms:

> "If during the subsistence hereof the Insured shall become aware of any occurrence which may subsequently give rise to a claim against them for breach of professional duty as specified in the Schedule by reason of any negligent act, error or omission and shall during the subsistence hereof give written notice to the Company of such occurrence, then any such claim which may subsequently be made against the Insured arising out of that negligent act, error or omission shall for the purposes of this Policy be deemed to have been made during the subsistence hereof."

[10] JCH's notice was dated 5 June 1980, given to its broker and then passed on to the respondents' agent, Brown Underwriting. It reads:

> "Philips Warehouse - West End Brisbane
> We have been advised by our Brisbane office, that they have a potential problem because of lateral movement of a pier at one corner of this building. The movement has been continuing for some time and minor rectification (cosmetic) work has been done only to be lost as time goes on. We have formed a theory about the cause of the movement but believe that further investigation is necessary to be fully satisfied. At present there is a suggestion by the builder Fletchers that the Engineers may have been remiss in interpreting the Soils Report. This we refute and believe that until further investigation is undertaken that no one knows the cause of the problem. Overall costs involved could exceed the excess on our policy. Would you please consider this as a report pending further investigation and what ever comes from that."

[11] The learned judge regarded that as notice by JCH, under clause 4 of JCH's insurance contract (No. 412), being notice of an occurrence which might subsequently give rise to a claim against JCH. A ground of appeal is that his Honour erred in not regarding that as notice by Conasoc also.

[12] In that regard, the appellants submitted, first, that the insurance cover extended by the two policies in reality covered the entire Connell group of companies, so that notice given by one member of the group effectively operated for the benefit of all others against whom a claim might be made in the relevant circumstances; and

second, because any relevant default must in fact have been attributed to Conasoc, because it was responsible for the design, and the informed reader Mr Brown having taken that view himself, one should conclude that the notice could only reasonably have been interpreted as that company's notice.

[13] As to the first of those contentions, the learned judge accepted evidence that there were substantial commercial reasons why these companies chose to maintain separate policies. The contracts were in legal terms quite distinct, each going so far as expressly to exclude such liability as might be covered by the other. The appellants sought support from Mr Brown's evidence that he personally did not distinguish between the policies, for example regarding any notification as received on behalf of all of the group. His Honour expressed substantial reservations about the credibility of Mr Brown's evidence, but concluded that Mr Brown's personal views of that character were in any event irrelevant. As the judge put it, and with respect this is obviously correct:

> "The parties reduced their contractual arrangements to the formality of writing. Mr Brown's understanding, honestly expressed or not, of what those arrangements were will not assist the court in deciding whether the policies of insurance confer, in the circumstances, a right to indemnify for breach of which the plaintiffs may recover damages. That question is to be determined by a consideration of the written contracts the parties made."

[14] Even a brief consideration of these contracts leads inexorably to the conclusion to which his Honour came: that the contracts are legally and factually distinct, and that notice given under clause 4 by JCH on about 5 June 1980 was given under contract 412, enuring to the benefit of JCH alone.

[15] As to the second contention, we were pressed with the assertion in the fourth paragraph of the letter of 5 June 1980, of a suggestion "that the engineers may have been remiss ..." which it was said could only have been reasonably interpreted by Mr Brown as referring to neglect on the part of Conasoc. That may be, but the letter is nevertheless notice by JCH in order to preserve JCH's position under its policy in respect of any related claim which may subsequently be made against it. As the judge said, with reference to this and other correspondence:

> "There is no hint in any of those communications that a claim has been made against Conasoc or that there is an occurrence out of which there might arise a claim against Conasoc. The correspondence uniformly refers to John Connell & Associates as the subject of indemnity ... The evidence does not provide any objective basis for finding that notice was given by Conasoc pursuant to its policy. There is not even evidence that Conasoc subjectively intended to give notice pursuant to its policy."

Those findings were amply supported by the evidence.

[16] It is worth repeating here his Honour's reference to the observation of Giles CJ Comm D in *Antico v CE Heath Casualty and General Insurance Ltd* (1995) 8 ANZ Insurance Cases ¶61-268 at page 76, 003:

> "Notification is a significant contractual step not lightly to be imputed to or imposed on the parties to the contract of insurance."

[17] The appellants relied separately on that part of the insuring clause covering "the insured" in respect of breach of duty on the part of the insured "or their predecessors in business". It was suggested this gave rise to an obligation to indemnify JCH in respect of the claim against Conasoc. But as the learned judge pointed out, the claim brought by T&G against JCH was in respect of the default of JCH, not Conasoc, so that that provision within the insuring clause had no application.

[18] Mr Cooper SC, who appeared for the appellants, referring to the letter of 5 June 1980 suggested the claim then notified was of neglect by "the engineers", which must have meant Conasoc, so that it should be regarded as notification of a possible claim against Conasoc. But the point remains that the only claim litigated against JCH was in respect of its own alleged negligence, not negligence on the part of its predecessor in business, at first on an obviously misconceived basis (although that carries no presently relevant significance), and later on grounds quite specifically related to JCH's own acts or omissions.

[19] The appellants' case at trial was that the respondents had purported to avoid, and thereby repudiated, the policies in May 1989, and the appellants accepted that repudiation as wrongful and sued for damages. Accordingly, Mr Cooper submitted, the respondents could not rely, against the appellants, on non-fulfilment of notice requirements. He referred to the observation of McPherson J, as he then was, in *Taylor v J Thomas & Son* (1983) 2 ANZ Insurance Cases, ¶60-524 at pages 77, 996-7:

> "... the condition or its fulfilment was irrelevant if, as I have already concluded, the third party had repudiated the policy, and also if the defendant had unambiguously accepted that repudiation and sued for damages for breach of contract."

[20] This contention overlooks the role of clause 4 of the contracts. To be entitled to damages for breach of the contracts of insurance, the appellants must show that they were entitled to indemnity under the policies. Condition 4 (unlike condition 3) is not a condition precedent to an entitlement to indemnity in respect of a claim otherwise within the insuring clause. Clause 4 extends the scope of cover. If no notice is given under clause 4, a claim made outside the policy year - as here - is

simply not covered. Conasoc has no entitlement to indemnity because it gave no notice under clause 4 which, if given, would have extended the scope of the limited cover otherwise available. As to JCH, the claim ultimately pursued against it, as the judge found and as I agree, did not arise out of the "occurrence" notified in June 1980. In either case, therefore, the repudiation of the contracts is without present significance.

[21] I return now to the narrative. On 21 February 1983 the then current owner of the building, T & G Mutual Life Society Ltd ("T & G") commenced proceedings in this court against a number of companies including JCH. T & G's claim against JCH was misconceived: that JCH negligently designed the foundations and failed to rectify the inadequacy during construction. With presently irrelevant exceptions, the respondents did, however, indemnify JCH in respect of that claim, which the judge in my view rightly held arose out of the occurrence notified in June 1980. The claim may have been misconceived (because the relevant default was that of Conasoc), but that did not exclude the operation of clause 4 and the respondent's obligation to indemnify, which they substantially discharged - subject to exceptions presently irrelevant because their value aggregated less than the "excess" applicable to the policy.

[22] JCH's claim against the respondents which failed at trial arose from the respondents' failure to indemnify JCH following a reformulation of the claim against JCH in February 1989. The plaintiff had by then become National Mutual Association of Australasia Ltd, following a process of merger or amalgamation with T & G. National Mutual abandoned the original claim against JCH. Its then newly formulated claim was distinct: that JCH negligently advised the purchaser of

the building in May 1980 that movement in the pier was localised to that part of the building and could easily be rectified, the purchaser relying on that representation - negligently made - in determining to buy the building.

[23] The learned judge concluded that the claim pursued against JCH from February 1989 when that reformulation occurred, should not be regarded as a claim "arising out of" the occurrence made in June 1980 under clause 4. His Honour offered this analysis, which I respectfully adopt in full:

> "The claim articulated in 1989 against JCH does not, in my opinion, arise out of the occurrence notified in 1980. Designing inadequate foundations because of a negligent failure to appreciate the ground conditions is altogether different from a negligent failure to appreciate and advise that the foundations designed by someone else were inadequate. The occurrence was negligence in designing. The claim was negligence in not deducing that the design was flawed. The one does not arise out of the other. It is true that the occasion for the giving of the allegedly negligent advice would not have existed had there not been a problem with the foundations. But this is, in my view, an insufficient connection between the negligent design of the foundations and the negligent advice that the movement in the pier was not a serious problem. The policy provides cover against a claim for breach of professional duty by reason of negligence. When notification of an occurrence is given it is notification of such an occurrence that might give rise to a claim for breach of duty by reason of negligence. The duty with which the notified occurrence is concerned is quite different to the duty breach of which founded the claim. The duty to take care in designing foundations and the duty to advise whether an existing building is sound are wholly different in content, time of performance and identity of obligee. The difference in the description of the duties provides an indication that the claim did not arise out of the occurrence of which notice was given. The negligent advice does not "spring from" carelessness in reading a soils report or designing foundations. It was not "caused by" the negligent design. That alleged negligence did no more than give rise to the circumstances in which the advice was sought."

[24] Both appellants nevertheless rely on the doctrines of waiver, election and estoppel, for the contention that the learned judge erred in not holding the respondents liable in damages.

[25] To understand this part of the argument, one must go back to earlier stages of the action, to a point shortly after JCH delivered its defence to T & G's statement of claim. On one view oddly, JCH admitted in its defence that it had carried out Conasoc's design role. JCH's solicitor, Mr Squires, then apparently believed that one policy covered both JCH and Conasoc, so that to distinguish between the two bore only academic significance. He therefore wrote to Mr Brown in these terms on 29 August 1983:

> "... there is one point in respect of these pleadings which we wish to bring to your attention in that the party named as the Second Defendant is John Connell Holdings Pty Ltd, and on our instructions it would appear that this company was not incorporated until July 1979 when, in fact, the material time when the events took place concerning these proceedings was prior to that date when our mutual client was trading under the name of Conasoc (Queensland) Pty Ltd. This means that strictly speaking, Conasoc (Queensland) Pty Ltd should also be a Defendant in the action and this, of course, would be very easily done by the Plaintiff ... to join that company as a Defendant.
>
> This would achieve nothing but simply complicate the action and build further costs and hence we now seek your specific instructions as insurer for our mutual client for us to consent to the following admissions:-
>
> 1. That the Second Defendant, John Connell Holdings Pty Ltd is and was at all material times a company duly incorporated; and
>
> 2. That the Second Defendant ... was at all material times engaged in the business of consulting civil and structural engineers, consulting specialists in soil mechanics and foundations.
>
> .....
>
> We therefore now seek your specific assurance that you are agreeable to us taking this line, and further we seek the insurer's

> undertaking that they will indemnify the Second Defendant, John Connell Holdings Pty Ltd, in respect to these proceedings ... despite the fact that the party insured was (presumably) Conasoc (Queensland) Pty Ltd at the material time."

Mr Brown told Mr Squires on 14 September 1983 that he should "proceed accordingly".

[26] The appellants contended that the respondents waived the need for compliance with clause 3, requiring, as a condition precedent to the obligation to indemnify, notification of claims; or that the respondents are estopped from relying on non-fulfilment of that condition. The learned judge held that if it mattered, he would hold that the respondents did in fact waive the need for compliance with clause 3, by reason of Mr Brown's response to Mr Squires' enquiry on 29 August 1983. But no relevant point arose, for as his Honour explained, in a passage which I again respectfully adopt in full:

> "There was no claim against Conasoc which might have given rise to a claim by it to indemnity under its policy for the year in question. It had no occasion to seek indemnity and no obligation to give notice. It might have given notice of an occurrence on receipt of Fletchers' letter but its omission to do so has no consequence for condition 3. There was no "breach" to waive. The only claim was against JCH which did give notice of an occurrence. When the occurrence gave rise to a claim, condition 4 had the effect of deeming that notice to be notice of the claim to satisfy condition 3. The defendants' "acceptance" of the claim meant no more than they were accepting liability under JCH's policy in circumstances where a claim insured against had been made against that insured. Performance of an obligation in one contract does not amount to the waiver of obligations between different parties to another contract. Funding the defence of JCH to the claim against it says nothing about the contractual duties or performance of obligations by a different insured, Conasoc, under a wholly different contract. Accepting liability to indemnify JCH according to the terms of its policy did not amount to a waiver of Conasoc's obligation to give notice of a claim against it, especially when no such claim was made."

And as to the separate case on estoppel:

> "For the same reason no estoppel can arise. Performance of the obligations found in one contract does not amount to a representation that the party performing the obligation will perform other obligations which might arise under another contract with another party. Accepting liability in 1983 for the costs of defending JCH against a claim which arose from notified circumstances and which was covered by the policy was not a representation that the defendants had or would become obliged to indemnify either JCH or Conasoc against claims that were not made until 1989."

[27] In addition as to estoppel, his Honour concluded that the appellants had established no relevant detriment. The appellants relied on three particular matters: loss of use of moneys paid as premiums between October 1979 and May 1989; an alleged consenting to the joinder of Conasoc, in T & G's action; and an incurring of legal costs to bring about an eventual settlement. His Honour's reasons, which again I adopt, follow:

> "The first detriment pleaded is the loss of use of the premiums between October, 1979 and 5 May, 1989. This is not made out. The premiums were paid in consideration of the cover given by the two policies of insurance for the year 1979-1980. The defendants do not now maintain the avoidance of policy 896. In the reasons following I find them not entitled to avoid policy 412 by reason of non-disclosure. The defendants were entitled to the premiums which bought the plaintiffs (together with the other insured) the cover bargained for.
>
> The second aspect of detriment is consenting to the joinder of Conasoc in the T & G action "rather than requiring that (Conasoc) be substituted in the action for (JCH) at a time when (Conasoc) was incapable of meeting any judgment ... but (JCH) was capable of satisfying any judgment." There is no evidence that the plaintiffs consented to the joinder or that they did so in reliance on representations made by the defendants. There need have been no detriment in the joinder of Conasoc. That company could then have given notice to its insurer for that year.
>
> There is no evidence that the joinder of Conasoc by National Mutual occurred prior to the defendants' intimation contained in the correspondence from Feez Ruthning that the defendants denied liability to indemnify the plaintiffs. If the joinder occurred after the intimation it cannot have been something done in reliance upon a

> representation that the defendants were accepting liability under the policy.
>
> Further, there is no evidence that the plaintiffs could have "required" the substitution of Conasoc for JCH. The indications are to the contrary. In the July 1989 amendments National Mutual made separate allegations of negligence against both Conasoc and JCH.
>
> The third matter of detriment is that the plaintiffs were required to incur legal costs to resolve the action on the best terms available. If this were a detriment it was not occasioned by relying on the defendants' representation that they would indemnify JCH against the claim. It was occasioned by the plaintiffs being sued."

[28] I add, with respect to the third matter, a reference to what Brennan J, as he then was, said in *Commonwealth v Verwayen* (1990) 170 CLR 394, 429:

> "The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable merely to non-fulfilment of the promise."

The third matter of alleged detriment falls into the latter category to which Brennan J refers, as indeed the learned judge in effect noted at the end of that earlier extracted passage.

[29] The appellants essentially asserted that because the respondents initially accepted JCH's claim for indemnity, prior to the reformulation of the plaintiffs' claim against JCH, the respondents became bound to indemnify both appellants in respect of any claim for negligence associated with the foundations of the building. But accepting, consistently with the learned judge's findings which are not vulnerable on this appeal, that the relevant claim against JCH fell outside the scope of the policy because it did not arise out of the notified "occurrence", and that any claim by Conasoc fell outside because Conasoc gave no notification at all, any initial acceptance by the appellants of an obligation to indemnify JCH could not constitute

a binding election with the enduring consequence for which the appellants contended. See *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd* (1994) 2 QdR 394, and especially the explanation by McPherson JA at page 395 of why, in not dissimilar circumstances, no case of "election" could arise, there being no obligation to indemnify in the first place.

[30] In the course of this judgment I have quoted extensively from the reasons of the learned trial judge. This is a case where I would have been content simply to adopt those reasons as a sufficient answer to the appeal, because his Honour's analysis effectively anticipates and answers the points now raised on appeal. I have, however, provided some additional reasoning in deference to the arguments on appeal, which were in the end largely helpful, however, for their further illumination of the correctness of the judgment at trial.

[31] I would dismiss the appeal with costs to be taxed.

[32] **McPHERSON JA:** I have had the advantage of reading the reasons, with which I agree, of the Chief Justice . What follows are essentially some additional reasons of my own for concluding that this appeal should be dismissed.

[33] The two plaintiffs John Connell Holdings Pty Ltd ("JCH") and Conasoc (Qld) Pty Ltd were different entities in what was described as the John Connell Group of companies. At the root of much of the difficulty in the present case is their insistence on treating themselves as if they were insured by the defendants under a single policy of insurance. The further amended statement of claim in the action (no 1914 of 1991) does, it is true, allege that two policies, conveniently referred to by

their concluding numerals no 412 and no 896, were issued to the plaintiffs by the defendants. But in the end a claim is made to recover a single sum, as to which it is alleged in para 14 of that pleading that "the plaintiffs incurred and paid costs and expenses in the sum of $305,286.64 in their defence and settlement of the proceedings". The "proceedings" referred to there are action no 767 of 1983, in which originally only the first of the two insured plaintiffs (which is JCH) was joined as a defendant, with the second (which is Conasoc) being joined as a defendant only late in 1989.

[34] The statement of claim concludes in para 16 with the allegation that, by reason of the defendants' breach of contract, the plaintiffs have suffered damages in that amount. In the prayer for relief, the amount claimed of $305,286.64 is sought to be recovered as damages for a breach, presumably constituted by the same act of repudiation, of the defendant insurers' promise under the two policies to indemnify each of the two plaintiffs against liability for professional negligence. What seems to me to be the underlying defect in the current action no 1914 of 1991 brought by them is that a claim to recover a single indisseverable amount of damages cannot in law be sustained by two or more plaintiffs except on a single contract to which both of them are parties, and perhaps then only if they are joint parties to it. Even if they were insured under a single policy document, it would not necessarily follow that their right in or to the proceeds of the indemnity would be joint rather than several, or even joint and several: cf *General Accident Fire & Life Assurance Corporation Ltd. v Midland Bank Ltd* [1940] 2 KB 388, approved in *Deaves v. CML Fire & General Insurance Co Ltd* (1979) 143 CLR 24, 66-67, 70-71.

[35] It would therefore be surprising if the plaintiffs in the present case were jointly entitled to, or to recover, the proceeds of the insurance or damages for breach of it. The loss, if any, that each of them sustained was actually or potentially different in amount. In the present case, the plaintiff JCH was an original defendant and a party to action no 787 of 1983 for a longer period of time than was the plaintiff Conasoc. It would appear to be inevitable that the amount of costs it incurred in defending those proceedings would be greater than those incurred by Conasoc which was joined in the action only much later. In addition, it is not possible from the Deed of Settlement of that action to determine in what proportion each of the various defendants, of whom in the end there seem to have been seven, contributed to the amount of $200,000 for which that action was ultimately settled. Paragraph 1 of the Deed of Settlement dated 14 August 1991 simply records a release by the plaintiff (or its successor) in favour of all defendants (of whom JCH and Conasoc were only two) in the original action no 787 of 1982. The release was given in consideration of the receipt by the plaintiff in that action of the agreed sum, which, according to recital (n) of the deed, was paid or to be paid by all of them together. In these circumstances even if the claim for damages in the action is taken to be put forward severally, or jointly and severally, it is not possible from the Deed itself to say what loss has been suffered by each of them in defending and settling the action.

[36] The notion that there was only a single contract of insurance seems to have had its genesis in the views of Mr G Brown of Brown Underwriting, who at relevant times was the agent of the defendant insurers. What he said in evidence at the trial was that "we were insuring the entire group but the client wanted the policy split." By

the time of the trial, he had had a falling out with his principals and was not well disposed to them. The extent to which the learned trial judge rejected Mr Brown's evidence is said to be uncertain; but on this point it is clear that his evidence was not accepted. On the contrary, his Honour rejected Mr Brown's statement or conclusion that what was involved was a "group insurance" of all the companies who were members of what was called the John Connell Group.

[37] In doing so, his Honour was plainly correct. There were, as I have said, two separate policies no 412 and no 896. The policy conditions, printed or otherwise, were similar to the extent that each of them provided indemnity in respect of what may be broadly described as liability for professional negligence. But there were also important differences. Under policy no 412, which insured the first plaintiff JCH for the period 30 June 1979 to 30 June 1980, the limit of the indemnity was $1.5 million subject to an "excess" of $50,000. Policy no 896, which covered the same period, insured a number of different entities who, with the second plaintiff Conasoc, were all members of the same Group of which JCH was also a member; but, under that policy, both the total amount of the indemnity and the amount of the excess varied from one entity to another. In no case did the insured amount under policy no 896 exceed $1 million, which was the maximum for which Conasoc was covered.

[38] That being so, it seems to me to be impossible as a matter of law to treat JCH and Conasoc as in effect insured by or under a single policy. The fact that they were not so insured was, in any event, the product not of some accident but of deliberate arrangement. JCH was segregated from other members of the Group because the nature of its work as a structural and consulting engineer increased both the risk of

liability and the amount of it. The premium payable under policy no 412 was therefore proportionately higher. Conversely, for other members of the Group that were not engaged in consulting activities, as to which the risk of liability and the amount of it were likely to be less, the premium payable under policy no 896 was lower. In addition, liability under the two policies was mutually exclusive; in effect, the insurers were not bound to indemnify an insured under one policy if it was insured under the other. Each policy was specifically indorsed to exclude liability in respect of activities performed on behalf of the insured by principals or staff of named entities that were insured under the other policy.

[39] Whatever was meant by the description Group insurance used by Mr Brown, there plainly were separate policies and separate contracts of indemnity in respect of JCH and of Conasoc. As a consequence, each of them was separately bound by the terms and conditions of the particular policy issued in its favour. In each instance indemnity was provided against claims made against the insured during the period specified in the schedule from 30 June 1979 to 30 June 1980. Clause 3 of policy no 412 prescribed in standard form that, as a condition precedent to the right to be indemnified under that policy, the insured should give immediate notice in writing of any claim against it. By letter (ex 24) dated 27 May 1980, Fletcher Organisation Pty Ltd or its solicitors gave notice to JCH that it had a claim against the latter for damages, for which it proposed to hold JCH liable. However, JCH did not, as contemplated by cl 3, pass this claim on or give notice of it to the defendant insurers. Neither, in accordance with cl 3 of policy no 896, did Conasoc ever do so. The requirements of cl 3 were never satisfied by either of the two plaintiffs in this action.

[40] Reliance was, however, placed on cl 4 of each policy. Clause 4 conferred on the insured a power, in effect, to extend the duration of the cover to claims made beyond the subsistence of the policy. To do that, written notice needed to be given to the insurers "of any occurrence which may subsequently give rise to a claim against them for breach of professional duty ... by reason of any negligent act ...". If the insured gave such a notice, then any subsequent claim against it "arising out of that negligent act ..." was deemed to have been made during the subsistence of that policy. After notice of the Fletcher Organisation's claim was received in the form of the letter ex 27, the insurers or their agent were notified not in respect of the claim made in that letter but in respect of something else. That was done by letter dated 5 June 1980 (ex 15). Although the learned trial judge did not regard ex 15 as notice of a claim that satisfied the requirements of cl 3 of the policy, his Honour was prepared to treat it as a sufficient notice in terms of cl 4 of an "occurrence" from which a claim arising out of a negligent act might subsequently arise.

[41] The short point (or at least the first short point) is the identity of the person who gave that notice. The answer, as it seems to me, is that it was given by JCH. The letter of 5 June 1980 (ex 15) is typed on the printed letterhead of John Connell & Associates, of whom, it is explained at the foot of that letterhead, the "proprietor" is John Connell Holdings Pty Ltd, which is the plaintiff JCH. On the face of it, therefore, the notice was given by JCH alone. It was nevertheless submitted that ex 15 was capable of being considered as given on behalf of each of the members of the John Connell Group of companies, which included Conasoc, pursuant to cl 4 of the particular policy applicable to it.

[42] Both the learned trial judge and, on this appeal, the Chief Justice have given reasons (with which I agree) for rejecting this interpretation of ex 15. There is no evidence that Conasoc authorised that notice to be given on its behalf. The fact that it might later have wished it had in fact done so is not sufficient for that purpose. Notice under cl 4 had to be given "during the subsistence of" the insurance, which, so far as relevant, came to an end on 30 June 1980. Nor am I persuaded that notice under cl 4 may validly be given by anyone without having any authority from the insured to do so. Unlike the notice required by cl 3, giving a notice under cl 4 is, as the Chief Justice has pointed out in his reasons, not a condition precedent to the insured's right to indemnity under the policy. Its function is to confer on the insured an option to vary the contract of insurance by extending the duration of the policy in the particular way specified in that clause. Whether it is properly regarded as a conditional contract or as a standing offer capable of acceptance, an option must, to be effective, ordinarily be exercised by the person on whom it is conferred, and not by someone else not shown to have been authorised to do so.

[43] Once that is accepted, it is difficult to see how Conasoc can succeed in this action. It never gave notice under cl 3 of any claim made against it during the subsistence of policy no 896 from 30 June 1979 to 30 June 1980. The letter ex 15 dated 5 June 1980 was in my opinion not capable of being regarded as notice by Conasoc of exercise of the option conferred on it by cl 4 of policy no 896, so as to extend it to a claim made beyond the duration of that policy. It follows that the defendant insurers cannot be considered as having repudiated liability to indemnify Conasoc under policy no 896 either in its original or its potentially extendable form. Equally, JCH never gave notice under cl 3 of policy no 412 of the claim which had been

made against it. On the other hand, it did by the letter ex 15 dated 5 June 1980 give timely notice of exercise of its option to extend the duration of the insurance to cover an occurrence from which a claim might subsequently arise. There is, it must be said, a certain logical difficulty in conceiving of a right to indemnity in respect of a claim arising out of an occurrence at a time when the insured did not exist at all. The fact is that JCH was not incorporated until 26 June 1979, which was only four days before the inception of the insurance or indemnity afforded by policy no 412. In that short time it could scarcely have done the work or brought about the "occurrence" out of which the claim was said to be capable of arising. That may, as was submitted on appeal, be an argument in favour of the view urged by JCH and Conasoc that ex 15 must be taken to have referred to a claim against Conasoc rather than JCH; but, as I have already concluded, the notice given under cl 4 was not shown to have been given with the authority of Conasoc.

[44] A claim is, it may be accepted, capable of attracting the benefit of insurance cover even if it is altogether unfounded. What is provided by the policy is an indemnity against claims. It is a matter of some notoriety that costs awarded by courts even in favour of completely successful litigants in defending claims against them do not afford a complete indemnity for all costs incurred in doing so. The insuperable problem here is however that, in addition to other difficulties mentioned in the reasons both of the trial judge and of the Chief Justice on appeal, it is not possible to say what, if any, costs were in fact incurred by JCH in defending action no 767 of 1983 and are claimed by it as damages in the current proceedings action no 1914 of 1991. Despite the "excess" of $50,000 applicable under policy no 412, JCH was, as his Honour found, paid the costs it had incurred in defending that action, subject

to only two exceptions, as to which the defendant insurers were held to be under no liability to indemnify in any event. Any contribution made by JCH to the settlement sum of $200,000 could not, on any view of it, have been justified once it became apparent, as it must have been by 14 August 1991 when the deed of settlement was executed, that JCH was not incorporated at the time the negligent act was alleged to have been made or done. It follows that, as his Honour found, JCH suffered no identifiable loss at all as a result of the defendant insurers' failure or refusal to indemnify it. The loss, if any, must have been sustained by Conasoc alone.

[45] In a curious way, the conclusion that JCH suffered no loss is reflected in the particulars dated 18 August 1992 supplied by the plaintiffs in respect of para 14 of their amended statement of claim in action no 1914 of 1991. Paragraph 7 of those particulars declares that:

> "Although the proceedings commenced by writ no 767 of 1983 were commenced against [JCH], the plaintiffs in these proceedings maintain that the writ should have been issued against Conasoc ... It was only since the amendments made by the plaintiffs in those proceedings on 18 February 1991 that substantive allegations were made against [JCH]".

That is as much as to say that no claim at all was made against JCH in that action, which, as is demonstrated by para 14 of the statement of claim in action no 787 of 1983 is quite preposterous. Even more surprisingly, para 7 of those particulars adds that on 5 October 1989 Conasoc (Qld) Pty Ltd was joined as a defendant in that action, and all of the admissions made by JCH were withdrawn. The same paragraph of the particulars then proceeds to allege:

> "Accordingly, all of the costs and expenses incurred until 18 February 1991 were incurred on behalf of Conasoc (Qld) Pty Ltd. The costs and payments made after that date (including payment of the settlement sum of $75,000) was made equally on behalf of [JCH] and Conasoc ..."

with the exception of one account, which is identified.

[46] What clearly enough appears from these particulars is that, having realised the fact that JCH was not incorporated at the time the alleged "occurrence" took place and so could not have been legally responsible for the loss (if any) that flowed from it, the plaintiffs in the current proceedings set out to ascribe to Conasoc the costs and expenses in fact incurred by it, as well as its contribution to the overall settlement amount of $200,000 which was paid. That Conasoc may have paid the costs and expenses in fact incurred by JCH in action no 787 of 1983, or that JCH elected to contribute an amount of $75,000 to the sum provided to settle that action, cannot affect the defendant insurers in any way. They were and are in no way bound by internal arrangements made between those two companies, but are liable only for claims falling within the terms of the policies under which each of those parties was insured. The attempt by this means to transfer the liability for the costs incurred from one plaintiff JCH to the other Conasoc is not sustainable.

[47] What therefore remains to be considered is Conasoc's claim to be indemnified. For this purpose it is necessary to proceed on the assumption that the claim in action no 1914 of 1991 for damages for breach of the promise to indemnify is made by Conasoc in the alternative to or in substitution for JCH's claim for the same amount. To maintain its right to it, the plaintiff Conasoc relies on an estoppel said to arise out of correspondence between Steindl & Co, who at that time were the solicitors for JCH, and the agent for the insurers. Those solicitors sent that agent a letter dated 29 August 1983 (ex 44) seeking instructions to consent to two admissions being made by JCH in action 767 of 1983 against it. The two admissions were that,

at all material times, JCH was duly incorporated; and that it was engaged in the business of consulting civil and structural engineers. The instructions were sought in conjunction with the request for a further undertaking or assurance, which was given by or on behalf of the insurers, that they would "indemnify ... John Connell Holdings Pty Ltd in respect to these proceedings despite the fact that the party insured was (presumably) Conasoc (Queensland) Pty Ltd at the material time".

[48] To my mind, it is not possible to extract from this undertaking to indemnify JCH a further undertaking by the defendant insurers that they would also indemnify Conasoc; or else to derive from it any waiver on the part of those insurers of the right to insist that notice of claim be given by Conasoc in accordance with cl 3. What was sought was indemnity in favour of JCH and not Conasoc. In any event, at the time of the solicitors' letter in August 1983, there was, as the learned trial judge pointed out, no claim against Conasoc in respect of which notice under cl 3 could have been given or waived. In saying that I am conscious of the decision of Fullagar J in *Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VLR 198, 209-212, that an insurer who elects to defend in the name of the insured may be estopped from later asserting that the defendant was not insured. But at the time the particular undertaking, assurance or indemnity was sought, the insurers were not engaged in defending Conasoc (which was not a party to the action), as distinct from JCH (which was a party), in an action to enforce a claim against it. If it comes to that, it is not even clear that the defendant insurers themselves ever took over and conducted the defence of action no 767 of 1983 in the name of JCH. The true position seems rather to have been that JCH instructed Steindl & Co as its own solicitors, while at the same time taking pains to ensure that any instructions it gave

to them were confirmed by the defendant insurers. On any view of it, there is, as the trial judge and the Chief Justice have pointed out, no evidence that the defendant insurers conducted the defence of action no 767 of 1983 on behalf or in the name of the plaintiff Conasoc on or after 5 October 1989, which was the date when, according to the particulars, it was joined as a defendant to that action.

[49] In the result, I am quite unable to see any conduct on the part of the defendant insurers that estopped or precluded them from denying liability to indemnify the appellant Conasoc under policy no 896 in respect of the claim notified by the Fletcher Organisation by the letter (ex 24) dated 27 May 1980. Equally, it has not been established that the appellant JCH sustained any loss or damage in consequence of the repudiation (if any) of the liability of the insurers under policy no 412. For these reasons, as well as those given by the Chief Justice, I would dismiss the appeal with costs.

[50] **FRYBERG J:** Most of the relevant facts are set out in the judgments of the other members of the court. I shall not repeat them.

**Conasoc's claim**

[51] I agree with the Chief Justice that the claim by the second appellant ("Conasoc") must fail. Its policy provided indemnity against "any claim or claims which may be made against [it]" during the period from 30 June 1979 to 30 June 1980. No claim was made against it during that period. Condition 4 of the policy had no application because it is not possible to regard the letter of 5 June 1980 as having

been sent on its behalf. That being so, it cannot be regarded as a notice given by Conasoc. On this point, I agree generally with the learned trial judge and with the Chief Justice.

[52] The doctrines of waiver and estoppel provide no assistance to Conasoc's case. The principal (or perhaps the only) conduct relied upon in argument during the appeal as constituting waiver occurred in 1983. At that time, no claim had been made against Conasoc. It had no obligation to be waived. Nor did the events of 1983 create an estoppel. If Mr Brown had not agreed with the proposal advanced by Mr Squires, the latter would no doubt have caused the defence of the first appellant ("JCH" - a defendant in action 767 of 1983) to be amended so as to deny responsibility for events prior to its incorporation. The overwhelming probability is that had that happened, Conasoc would have been added as a defendant in that action. The claim thereby made against it would not have fallen under the policy, because it would not have been made in the policy period. I agree with the learned trial judge, for the reasons which he gave in the passage quoted by the Chief Justice, that the three particular matters alleged to constitute detriment (loss of use of moneys paid as premiums between October 1979 and May 1989, an alleged consenting to the joinder of Conasoc in the action, and an incurring of legal costs to bring about an eventual settlement) do not assist in establishing an estoppel.

**JCH's claim**

[53] The claim by JCH raises other considerations. Clause 4 of the conditions of the policy provided:

> "4. If during the subsistence hereof the Insured shall become aware of any occurrence which may subsequently give rise to a claim against them for breach of professional duty as specified in the Schedule by reason of any negligent act, error or omission and shall during the subsistence hereof give written notice to the Company of such occurrence, then any such claim which may subsequently be made against the Insured arising out of that negligent act, error or omission shall for the purposes of this Policy be deemed to have been made during the subsistence hereof."

[54] On 5 June 1980 (ie during the policy period), JCH wrote the letter which was forwarded to the respondents' agent, in these terms:

> "We have been advised by our Brisbane office that they have a potential problem because of lateral movement of a pier at one corner of this building.
>
> The movement has been continuing for some time and minor rectification (cosmetic) work has been done only to be lost as time goes on.
>
> We have formed a theory about the cause of the movement but believe that further investigation is necessary to be fully satisfied.
>
> At present there is a suggestion by the builder Fletchers that the Engineers may have been remiss in interpreting the Soils Report.
>
> This we refute and believe that until further investigation is undertaken that no one knows the cause of the problem.
>
> Overall costs involved could exceed the excess on our policy.
>
> Would you please consider this as a report pending further investigation and what ever comes from that."

Of that letter, the learned trial judge wrote:

> "It is not, I think, seriously in contest that Exhibit 15 gave notice of an occurrence of which the insured became aware during the relevant year of insurance and out of which a claim for breach of duty might arise. I regard it as such. So did Mr Brown, the defendants' agent, in 1980 and 1983. The defendants, rightly in my view, focus attention on ... whether the claim eventually made arose out of the occurrence. They argue that ... the claim which was made against JCH did not arise out of the occurrence notified by Exhibit 15."

I respectfully agree with the view taken by the learned trial judge. I did not understand the respondents to argue to the contrary on the appeal. The letter did

give notice of an occurrence. His Honour further found that the occurrence notified was movement of a pier at one corner of the warehouse.[1] Again, in my respectful opinion, his Honour was correct.

[55] After dealing with some other matters, his Honour turned to the question whether the claim made against JCH in the amended statement of claim of July 1989 arose out of that occurrence[2]. He observed that a causal relationship between the occurrence and the claim was necessary. That is correct; but it must be remembered that the expression "arising out of" has a wider meaning than "caused by" and does not require the direct or proximate relationship necessary for the latter: *State Government Insurance Commission v Stevens Brothers Pty Ltd*[3]. Bowen JA once described the relationship as referring to the one thing "originating in or springing from" the other[4]. The learned trial judge continued:

> "The occurrence notified was the possibility that an engineer had been careless when considering the nature of the ground into which the foundations would be laid. This necessarily imports the notion that the design was inappropriate or inadequate for the soil conditions encountered so that the foundations were insufficient. The claim initially made against JCH obviously arose out of that occurrence. Movement of the foundations with consequential settlement of the building manifesting itself in stressed structural members and structural failure originates in and/or was caused by the initial carelessness.
>
> The case pleaded against JCH in July, 1989 was that:-
>
> *(1)* · During the course of constructions, movement occurred in the building;

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1 Reasons for judgment, p 16.

2 Reasons for judgment, p 23.

3 (1984) 154 CLR 552 at pp 555, 559.

4 *Walton v National Employers Insurance Association Ltd* [1973] 2 NSWLR 73 at p 84.

*(2)* · JCH was aware of the movement;

*(3)* · Movement was caused by the inadequacy of the foundations;

*(4)* · JCH should have realised from the movement that the foundations were inadequate;

*(5)* · JCH negligently failed to realise that the foundations were inadequate and failed to advise that rectification should be undertaken;

*(6)* · In May, 1980 Mr Farrar advised National Mutual, by its agent, that cracking in the pier and associated beam was due to lateral movement of the pier which was localised and could be rectified simply by retaining fill which was pushing against the pier;

*(7)* · The advice was given negligently;

*(8)* · National Mutual relied upon the advice when deciding to buy the building; and

*(9)* · National Mutual suffered loss arising from purchase of the warehouse.

The claim articulated in 1989 against JCH does not, in my opinion, arise out of the occurrence notified in 1980. Designing inadequate foundations because of a negligent failure to appreciate the ground conditions is altogether different from a negligent failure to appreciate and advise that the foundations designed by someone else were inadequate. The occurrence was negligence in designing. The claim was negligence in not deducing that the design was flawed. The one does not arise out of the other. It is true that the occasion for the giving of the allegedly negligent advice would not have existed had there not been a problem with the foundations. But this is, in my view, an insufficient connection between the negligent design of the foundations and the negligent advice that the movement in the pier was not a serious problem. The policy provides cover against a claim for breach of professional duty by reason of negligence. When notification of an occurrence is given it is notification of such an occurrence that might give rise to a claim for breach of duty by reason of negligence. The duty with which the notified occurrence is concerned is quite different to the duty breach of which founded the claim. The duty to take care in designing foundations and the duty to advise whether an existing building is sound are wholly different in content, time of performance and identity of obligee. The difference in the description of the duties provides an indication that the claim did not arise out of the occurrence of which notice was given. The negligent advice does not ‘spring from’ carelessness in reading a

> soils report or designing foundations. It was not 'caused by' the negligent design. That alleged negligence did no more than give rise to the circumstances in which the advice was sought."

[56] In this passage, his Honour characterised the occurrence as "the possibility that an engineer had been careless when considering the nature of the ground into which the foundations would be laid" and "negligence in designing". In so doing, his Honour departed from his earlier finding that the occurrence was the movement of the pier. In doing so, his Honour in my opinion fell into error. That error flowed into his Honour's examination of the relationship between the occurrence and the claim.

[57] In the passage just quoted, his Honour summarised the allegations against JCH in a series of dot point paragraphs. I have numbered these for ease of reference. The claim in paragraphs *(1)* to *(5)* had first been made against JCH in 1983. His Honour held that this claim did arise out of the occurrence described in the letter of 5 June 1980. He wrote:

> "That occurrence was movement in a pier, that is, part of the foundations of the building, which was thought by Fletchers to have been the result of a misreading of the conditions of the soil into which the pier was placed. This was the essence of the case first pleaded against JCH."[5]

I respectfully agree with that finding.

[58] Before us, the respondents challenged it. They argued that no evidence had been led (in the present action) to establish any relationship between the design of the pier referred to in the letter and the design of the foundations as a whole. It was

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5 Reasons for judgment, p 16.

submitted that no evidence was led to establish that there was in fact any link between the supposed negligent design of the pier causing lateral movement of the pier and the alleged negligent design of the entire foundation system which caused substantial differential settlement of the building as a whole. In my view, that submission misconceives what it was necessary for JCH to prove. Condition 4 required it to show that the claim was one "arising out of that negligent act, error or omission". The use of the demonstrative "that" indicates a reference back to the negligent act, error or omission earlier specified in the clause. That reference in turn is not to an actual negligent act or omission but to a hypothetical act, error or omission involved in or connected with the hypothetical claim possibly arising from the occurrence. JCH was required to show the relevant connection only in the terms of the allegations in the claim. This was the approach adopted by his Honour below. In my respectful opinion, he was correct, and the respondents' submission should be rejected.

[59] Did the addition of the allegations summarised in paragraphs *(6)* to *(8)* in 1989 effect any material change to the position? Whether the claim summarised in these paragraphs was an expansion of the existing claim or a completely new claim could be debated in terms of semantics or philosophy; but there would be little benefit in that abstract debate. It can be seen from paragraph *(6)* that the allegation is made that the cracking was due to the lateral movement of the pier. The particulars of negligence (paragraph *(7)*) alleged that having regard to the circumstances set out in (*inter alia*) paragraphs *(1)* and *(5)*, no person carrying on the business of JCH could competently or reasonably have given such advice. The movement referred to in paragraph *(6)* and incorporated by reference into the

particulars to paragraph *(7)* is plainly the movement constituting the occurrence notified in June 1980. The statement of claim argued that the movement should have caused JCH to realise that the foundations were inadequate and alleged its failure to do so as negligence. It further argued that Mr Farrar's advice that cracking was due to the movement was given negligently, and by the particulars raised the movement as one of the factors to which regard ought to be had in so characterising the advice. For these reasons, it should in my judgment be found that the 1989 claim against JCH arose out of the occurrence notified to the respondents in the letter dated 5 June 1980.

[60] The consequence of this is that the 1989 claim is, under condition 4, deemed to have been made during the subsistence of the policy.

**Condition 3 - the original claim**

[61] The respondents submitted that if JCH was otherwise entitled to indemnity, it was deprived of that entitlement by non-compliance with condition 3. That condition provided:

> "The Insured shall as a condition precedent to their right to be indemnified under this Policy give to the Company immediate notice in writing
>
> (a) of any claim made against them, or
> (b) of the receipt of notice from any person of an intention to hold the insured responsible for the results of any breach of professional duty as specified in the Schedule.
>
> and shall in either case, upon request, give to the Company such information as the Company may reasonably require."

They argued that the letter of 5 June 1980 did not constitute notice of a claim and that nothing else occurred which could amount to such notice.

[62] The learned trial judge found that shortly before writing the letter of 5 June 1980, JCH received a letter from a company called Fletcher Organisation Pty Ltd ("Fletchers") and that this letter amounted to a claim by Fletchers against JCH. He held that the letter dated 5 June 1980 did not constitute notice in writing of that claim. He indicated that were it necessary for him to decide the point, he would hold that the respondents waived compliance with condition 3 by their "acceptance" of the claim in 1983 and their instructions to Steindl and Company to conduct the defence on behalf of JCH. Before us, the respondents argued that his Honour's contingent view was in error because there was no evidence that at the time in 1983 when the respondents accepted the claim and instructed the solicitors they had any knowledge of the existence of the letter from Fletchers, and therefore there could not have been any waiver by them.

[63] I respectfully agree with the learned trial judge. In my opinion, the respondents had all the information they needed to make a sufficiently informed decision. They had requested additional information from the appellants when the claim came to their notice in 1983, and had received it in May of that year, before taking the steps said to constitute the waiver. Had they wished to sight specific documents, or all relevant documents, they no doubt could have done so. The appellants specifically referred them back to "earlier advices on this problem" and they must (or should) have realised that those advices could only have sprung from a communication from Fletchers. I would hold that by accepting the claim and instructing the solicitors, the respondents waived any non-compliance with condition 3.

[64] In these circumstances, it is unnecessary for me to express an opinion on whether a failure by JCH to notify a claim by Fletchers precludes it from indemnity in respect of the later claim by T & G[6].

**Condition 3 - the 1989 claim**

[65] By 1989, National Mutual, the successor in title to T & G, had been substituted as plaintiff. The amended claim already described was made in July of that year. The respondents argued that JCH breached condition 3 by failing to give them immediate notice in writing of that amended claim. Of course, an obligation under condition 3 could only have arisen if the amended claim was or contained a substantially new claim. I am far from persuaded that it did; but to avoid the abstractions already referred to, I will assume the fact for present purposes.

[66] On this assumption, were the respondents entitled to rely on condition 3 in and after July 1989? On 8 May 1989, before National Mutual amended its claim, the respondents had purported to avoid the policy for non-disclosure. They asserted the validity of such avoidance at the trial. The learned trial judge found that there was no material non-disclosure and the respondents did not challenge that finding before us. Indeed, they conceded that in the light of this finding, their conduct amounted to repudiation of the policy. It is plain from the pleadings that JCH accepted that repudiation and determined the policy, and the respondents did not

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6 See *Motor & General Insurance Co Ltd v Pavy* [1994] 1 Ll. Rep 607 (PC).

argue otherwise. Consequently, the respondents were not entitled to rely upon non-compliance with condition 3: *Taylor v J Thomas and Son*[7].

**Damages**

[67] The deficiencies in the prayer for relief in the current action have been observed by McPherson JA, whose draft reasons for judgment I have had the benefit of reading. I respectfully agree with what his Honour has written on this point. However despite these deficiencies, I do not think it would be fair to JCH to treat its case as a joint claim to recover the amount specified in the prayer. By particulars dated 18 August 1992, JCH specified the amount of its separate claim. It claimed costs and payments made after 18 February 1991 were made equally on behalf of the plaintiffs, with one exception where the bill was specifically apportioned. It made no claim in respect of anything before that date. It provided a schedule of its alleged legal expenses in the particulars (they totalled $33,245.27). The respondents do not seem to have objected to the failure to amend the statement of claim to accord with the particulars. In this light, I think it only fair to consider the claim as particularised.

[68] The learned trial judge found that in about August 1989, the appellants retained Messrs Seymour Nulty to conduct the defence of National Mutual's action. He made no finding as to whether the retainer was joint, or joint and several; and in my view it was unnecessary for him to do so. In the absence of any evidence to the contrary, I would be prepared to infer that each of the appellants was liable to the

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7 (1983) 2 ANZ Insurance Cases ¶ 60-524 (Full Court of the Supreme Court of Queensland).

solicitors for at least half of their charges. It is unnecessary to decide if each was liable for the full amount, since JCH does not claim on such a basis.

[69] There is no doubt that such charges were covered by the policy - condition 1 makes that clear:

> "1. The liability of the Company hereunder shall not exceed in the aggregate for all claims under this Policy the sum stated in the Schedule, except that (subject to the provisions hereof) the Company will in addition pay the costs and expenses incurred in the defence or settlement of any claim."

JCH was relieved of a further requirement to obtain the written consent of the respondents to any settlement because of their repudiation of the policy.

[70] As will be seen, the respondents pleaded that Seymour Nulty's charges were excessive, and attempted to demonstrate this by cross-examination. Mr Cantwell, a partner in the firm, gave evidence identifying the memoranda of fees sent by the firm and the basis of the apportionment of those fees between the plaintiffs. His Honour made no findings on this point, but the following passage in the evidence, at the conclusion of cross-examination on behalf of the respondents, is instructive:

> "HIS HONOUR: Before you re-examine, Mr Cooper, can I ask a couple of questions? Mr Cantwell, was the National Mutual litigation complicated?-- Yes, Your Honour.
>
> I've noticed the claim was for about or just under $4 million. Did that make a substantial claim in 1989?-- Yes, Your Honour, that was one of the largest claims, certainly in our firm at the time.
> And the result, would you regard that as satisfactory from your client's point of view?-- Yes, Your Honour, yes.
>
> ...
>
> Mr Bowden has asked you about the difference that there might be between the bills that you rendered and what the bills would have been had they been taxed in the Supreme Court?-- Yes, Your Honour.

> Is it your view that the bills you rendered were reasonable -----?-- Yes, Your Honour.
>
> ----- for the work done?-- Yes,.
>
> And the complexity of the matter?-- Yes, Your Honour.
>
> Even though they might have come out at a lower figure if they had been taxed?-- That's correct, Your Honour, yes.
>
> Anything arising out of that, Mr Bowden?
>
> MR BOWDEN: No, Your Honour, thank you."

Not surprisingly, the respondents addressed no submissions during the appeal on this aspect of the case.

[71] One issue which was raised both at the trial and on the appeal related to the *payment* of the solicitors' fees. The appellants pleaded by paragraph 14 of the statement of claim that in the defence and settlement of the proceedings they incurred and paid the costs and expenses later particularised in the amount of $305,286.67. In answer, the respondents pleaded as follows:

> "(b) The defendants admit the payment by the plaintiffs of the sum of $75,000 in settlement of the claims of National Mutual;
>
> (c) As to the balance sum of $230,286.67 paid by way of legal costs, the defendants say as follows:
>
> (i) that it was an implied term of the policy of insurance that the defendants would only be obliged to indemnify the plaintiffs for reasonable legal costs assessed on a solicitor and client basis;
>
> (ii) the defendants deny that the balance sum of $230,286.67 constitutes a reasonable sum for legal costs assessed on a solicitor/client basis but the defendants are unable to further particularise this allegation.
>
> (iii) the plaintiffs failed to mitigate their loss in respect of such costs in that they failed to require that such costs be taxed."

That constitutes an express admission of payment by the appellants of their share of the settlement moneys and to my mind, it also constitutes an admission of payment by them of the solicitors' costs. At the trial, counsel for the respondents sought to cross-examine Mr Reid, a director (with executive responsibility for finance) of the plaintiffs and of other companies in the Connell group, to show that in fact, the fees had been paid by another company in the group. Counsel for the appellants objected to this course on the basis that the issue had been admitted in the pleadings. His Honour heard argument and reserved his decision on the point. He allowed the cross-examination to proceed on the basis that he would ignore the evidence if he decided the point in favour of the appellants. Ultimately, it was unnecessary for him to decide it. I would decide it in favour of the appellants.

[72] Even if this view is incorrect, the defence should still fail. Mr Reid gave evidence that when Seymour Nulty were engaged, he entered into a costs agreement with them on behalf of the appellants. Memoranda of fees were sent in accordance with that costs agreement. He said a service company in the Connell group met costs for the whole group. That company paid the fees. By the time the action came on for trial, both the appellants had ceased trading, apparently for reasons unconnected with the litigation. Their financial records did not contain any entry reflecting a debt in respect of the amounts paid on their behalf by the central company. Mr Reid explained this on the basis that, since they were not trading, there was no need to make such a record. He said there was no need for a meeting of directors to make a formal decision on this - it was just an operational issue within the group. He had authority to procure the service company to pay the debts of the appellants and if there were a recovery, to make repayments to it. In

his view there was no necessity to record these transactions in the books of the non-trading companies.

[73] Mr Reid was a certified practising accountant and a chartered company secretary. The questions relating to the nature of book entries required in respect of wholly owned subsidiaries within a corporate group were matters which plainly were within his expertise. There is no reason to doubt the accuracy of his answers. Using a subsidiary as a "banker" is not an uncommon commercial arrangement. In my view, it cannot seriously be argued that JCH did not come under any legal obligation to reimburse the service company. There were common directors and the payments were made by Mr Reid pursuant to their authority. JCH caused the payments to be made just as surely as it would have done had its bank made them in response to instructions contained in a cheque drawn by it.

[74] In any event, I doubt that it is necessary for JCH to show that the Seymour Nulty bill was actually paid. The respondents were obliged by the policy to pay costs and expenses "incurred" in the defence or settlement of the claim. The Macquarie Dictionary defines "incur":

> "**1.** to run or fall into (some consequence, usu. undesirable or injurious). **2.** to become liable or subject to through one's own action; bring upon oneself:"

The relevant meaning in the present context is "liable". The Oxford English Dictionary is to like effect:

> "To run or fall into (some consequence, usually undesirable or injurious); to become through one's own action liable or subject to; to bring upon oneself."

"Liable" is the well known meaning of "incurred" in the context of the *Income Tax Assessment Act* 1936[8]. It is the natural meaning of the term devoid of context:

> "The expression 'incurs a debt' in s 556(1) [of the Companies Code] is, in isolation, entirely apt to describe an act on the part of a corporation whereby it renders itself liable to pay a sum of money in the future as a debt. The act of 'incurring' happens when the corporation so acts as to expose itself contractually to an obligation to make a future payment of a sum of money as a debt."[9]

While the meaning must depend upon the context in which the word is found, I see nothing in the present context which would warrant a departure from this meaning. In my judgment, JCH incurred the charges within the meaning of the policy.

[75] JCH has proved that it incurred liabilities totalling $70,745.27. Its policy was subject to an excess of $50,000. Unless there are some mathematical matters which I have overlooked, it should have recovered damages in the sum of $20,745.27. Subject to argument on any such matters, I would allow the appeal by JCH, set aside the judgment against it and in lieu, order that judgment be entered for it for that sum. I would hear further argument from the parties on costs, both at trial and on appeal.

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8 *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at pp 506-7.

9 *Hawkins v Bank of China* (1992) 26 NSWLR 562 at p 576 per Kirby P; see also at p 572 per Gleeson CJ.