

DETERMINATION

REFERRAL NO: 203 10 18227

*Home Building – water damage – leaking pipe – proximate cause
- meaning of term “sudden”*

SUMMARY OF FACTS

The claimants insured their home building for \$458,541 against loss or damage caused by insured events. On 13 May 2003, the claimants suffered damage to their home when a retaining wall collapsed, which they maintain was due to water bursting from a blocked stormwater pipe. The repairs, apart from the plantings, have been completed by the claimants and have cost in the range \$95,000 to \$100,000.

The insurer denied liability for the claim on the ground the collapse of the retaining wall was not caused by a sudden bursting, leaking, discharging or overflowing water pipe and therefore did not fall within an insured event under the policy. It also relies on the general policy exclusion that excludes claims resulting from hydrostatic pressure.

ISSUES IN DISPUTE

Whether the damage to the claimants' retaining wall falls within the cover provided by the policy; and

Whether the insurer is entitled to deny liability for the claim on the basis of a policy exclusion.

RELEVANT POLICY PROVISIONS

“1.8 Bursting, Leaking, Discharging or Overflowing

- ✓ You are covered for damage or destruction caused by the sudden bursting, leaking, discharging or overflowing of a
- water main or water pipe
 - roof gutter, downpipe or road gutter
 - fixed water tank, oil tank, hot water system...
- ...
- x You are not covered for
- the cost of repairing or replacing the apparatus or pipe from which liquid escaped and caused the damage or destruction
 - exploratory or restoration costs if **we** have not accepted a claim under this **insured event**
- x Nor are you covered for destruction or damage caused by or as a result of
- ...
 - water escaping from a water bed, ...
 - ...
 - the gradual escape of liquid over a period of time
 - flood.
- ...

Section 1 – General exclusions

- x “Exclusions” are those **events** and happenings for which cover is not included in this policy. This means that you are not covered for loss, damage or legal liabilities which arise from or are as a result of
- 1.1 ...
- 1.6 Hydrostatic pressure

being damage to swimming pools, swimming pool surrounds or any other structure as a result of a change in the water table below the ground or from emptying the pool or any other cause.”

OUTCOME AND REASONS

The onus of proof is on the claimants to establish, on the balance of probabilities, that they have suffered a loss caused by a risk insured against. Once the claimants have established that the loss was *prima facie* caused by a risk insured against, the onus shifts to the insurer to show, on the balance of probabilities, that the claim falls within an exclusion in the contract of insurance.

The claimants dispute the insurer’s denial that the policy under the insured events of “Flash flooding” or “Bursting, Leaking, Discharging or Overflowing” does not respond to cover the event that occurred. The claimants state that the retaining wall had been in place since 1983 and that it collapsed on 13 May 2003, as a result of a burst/blocked stormwater pipe and not because of natural saturation of the area behind the wall. The Shire in which the claimants reside had been declared a natural disaster area due to the unnatural quantity and severity of rainfall on the morning of 13 May 2003.

The insurer initially appointed a loss adjuster to inspect the site and report on the cause of the damage. He inspected the site on 16 May 2003 and in his report dated 29 May 2003, states:

“On Sunday 11th May the insured noticed the pool & surrounding paved area were not draining properly & so arranged for a plumber to call out the following week to check the surface drains.

On Tuesday morning a severe rainstorm affected the area during which the retaining wall collapsed & the steps were displaced. The collapse & subsequent movement of the retained soil has exposed the drain-pipe which has been found to be blocked & broken, thereby allowing water to escape into the ground behind the wall.

...

There is evidence of an escape of water from a pipe which has, at the very least, contributed to occurrence (sic) of the incident. There is no evidence or reason to indicate the insured has failed to maintain the wall, or that there was any pre-existing damage of which the insured was aware.

We therefore consider policy liability will operate in respect of this incident...”

The insurer authorised the appointment of a structural engineer to conduct an inspection of the site and provide a report on the cause of the damage to the retaining wall. This engineer concluded in his report dated 28 May 2003, that “The retaining wall failed as a result of saturation of the fill behind the wall and an associated reduction in the shear strength of the soil, resulting in increased loading against the wall.” He also stated he was almost certain that there was some degree of leakage from the stormwater line behind the retaining wall, but pointed out that, to determine the extent of the leak would require further investigation.

On receipt of this report, the loss adjuster in his second report dated 31 May 2003, stated:

“In summary there is evidence of an escape of water from a pipe behind the retaining wall which at the very least, has significantly contributed to the damage. The report indicates the wall to be “grossly inadequate” in design but has nevertheless stood for over 20 years with no history of problems during the insureds ownership.

We do not therefore consider there to be sufficient evidence to support the application of a policy exclusion in this matter.”

The loss adjuster was instructed to obtain a further report from the structural engineer on the cause of the damage and the means of repair. His very lengthy and complex report dated 7 July 2003, stated the primary cause of the collapse of the main retaining wall was considered to have been due to a number of sources of excess moisture in the fill behind the wall. In addressing the issue of 'Speed and duration of failure' he states:

"In this case, the threshold value related to the resistance of the wall and the fill behind the wall to slip failure. Until such time as slip occurred, the wall was unaffected, even though it was marginal. However, the instant that slip commenced, the wall was doomed and nothing could save it. Thus, failure of the wall was not a gradual process but was one whereby a series of previous events could have occurred, as discussed below in section 12.11, without affecting the wall until one single more serious event led to its failure."

His report also addressed the seepage behind the base of the wall in the 38 days ending 10 May 2003, where he advised that it had rained during the 25 of the 38 days, with an average of 14mm per day. He stated that, under these conditions, he would have expected fairly continuous subsurface seepage during the period from about 4 April 2003 to 13 May 2003. However, his report goes on to state:

"In the absence of leakage or blockage of the stormwater line or some other major source of unexpected moisture, a rainfall intensity of at least 100 mm/hr for 2 hours or at least 50 mm/hr for 4.5 hours or at least 35 mm/hr for 8 hours would have been required for the wall to collapse, as indicated in Sketch N031234-Sk11. Such rainfall events are extremely rare and thus the wall would not be expected to have collapsed without leakage or blockage of the stormwater line or some other major source of unexpected moisture.

The leakage from the stormwater line prior to the upper blockage during the very heavy rain of 4 February 2002 is considered to have brought the main retaining wall to the brink of collapse.

The upper blockage of the stormwater line and the associated discharge of stormwater from the drains, together with a range of other factors detailed in section 12.8, have slightly exceeded the loads of February 2002 and have resulted in the collapse of the wall."

The structural engineer attributed about 57.9% of all moisture resulting in the collapse, originated directly or indirectly from the discharge from the stormwater drains due to the upper blockage at the upper fractured elbow in the stormwater line and he suggests that, without the blockage, the failure may not have occurred.

In view of these findings provided by the structural engineer, the Panel considers the proximate cause, being the major contributing factor that led to the wall collapsing, was the upper blockage in the stormwater/sub-surface drain.

Having concluded the proximate cause of the damage was due to the blockage of the stormwater/sub-surface drain, the Panel must now consider whether such a process falls within the policy term "Bursting, Leaking, discharging or Overflowing". In this respect the Panel must direct its attention to the crucial proviso "sudden" attaching to the above insured event. In other words, the discharging of the water from the surface grates must have been sudden to activate the policy cover. The word "sudden" must apply to the insured peril and not to the damage itself.

The claimants argue

"The report (i.e. the engineer's report) clearly states there was no cumulative effect and even if a blockage had occurred some time ago there was no permanent discharge of

water and was of no consequence even when it rained until a sizeable specific rainfall event occurred which had a sudden and immediate effect.”

The policy does not provide a definition of the word “sudden”. A number of legal decisions have been made by the courts over many years in order to construe the word “sudden” and relying on those cases, the Panel accepts it should be given its ordinary meaning. Further, in any attempt to define the meaning, it is appropriate to rely on the Macquarie dictionary which states as follows:

“happening, coming, made or done quietly, without warning or unexpectedly.”

The Panel has had its attention drawn to the case of *Spiker Trading Pty Ltd v Royal Assurance Australia Ltd* (1985) 3ANZ Insurance cases at 60-63. The facts relevant to the decision in that case were that, on 5 November 1984 and again on 8/9 November 1984, water entered the plaintiffs’ warehouse after heavy rain and damaged a large stock of printing paper situated therein. One of the issues raised for consideration by the court was whether the damage to the stock could be described as sudden. The insurer’s counsel submitted that, as the damage took place over a period of time, namely a matter of days, it could not be sudden. The court found that by 6 November, that is one day after the first entry of water, damage had been caused to the goods. In those circumstances Rogers J held “that in my view, is sufficiently sudden, to satisfy the call or the proviso”. His Honour therefore took the view that damage developing over a period of approximately 24 hours could be categorized as sudden.

The Panel has also had its attention drawn to a decision of *Vee H Aviation Pty Ltd v Australian Aviation Underwriting Pool Pty Ltd*, a decision of the ACT Supreme Court (Hogan, J) of 1996. The policy relevant to the judgement provided that before machinery breakdown could be the subject of cover, it had to be established “sudden and unforeseen damage resulting from [various events]” had occurred.

There was no dispute there had been a breakdown of machinery and it was unforeseen. However, in dealing with the issue as to whether it was “sudden”, His Honour said:

“But I am unable to see that in any meaningful sense of the word it could be called ‘sudden’”

He went on to say:

“In the present policy it is the damage that must be sudden. The definition clearly contemplates that the cause of the damage may be something that has been taking place over a period of time, such as the wearing out or loosening of a part, or fatigue. In those circumstances it is not necessary to construe the word “sudden” to mean merely “unforeseen and unexpected” to give commercial reality and purpose to the policy.

“Sudden” to my mind is to be contrasted with “gradual”. Synonyms are “abrupt” and “quick”. It is often a connotation of the word that the event it describes should be “unforeseen” or “unexpected” or “without warning” but those words alone or in conjunction do not express denotation.

An event may be sudden, even though it is foreseen and expected. Engineers testing materials for resistance to stress might be able to predict almost to the second when a particular sample will fail but because the material is of a particular molecular structure, when it does fail it will fail suddenly. Other materials may gradually deform and slowly fall apart, but just as predictably.

The ordinary everyday meaning of the word “sudden” is not the same as “unforeseen” and “unexpected”.”

In applying that analysis to the facts of this case, the Panel notes that in a statement to the insurer's engineer, the male claimant advised

"on the weekend before the collapse, water was noted to be discharging from the surface drains beside the pool".

He also "noticed that the pool was filling more quickly than usual over the past ten months."

The Panel further notes during the period of two weeks prior to 13 May 2003, there had been fairly constant rainfall of slight to moderate intensity. In these circumstances it would appear the process which led ultimately to the collapse of the wall, including as stated above, the proximate cause of the damage, namely the blocked drain, occurred over a period of time.

The Panel therefore concludes that the insured peril did not come about as a "sudden" event, in which case the requirement of the policy wording is not activated and the loss does not fall within the cover provided by the policy in respect of damage caused by "Bursting, Leaking, Discharging or Overflowing".

The Panel therefore concludes the policy does not provide cover in respect of the collapse of the retaining wall, and its consequences which is the subject of the claim, and therefore the insurer was entitled to deny liability in response to the claim.

5/3/2004