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Insurance policy exclusions for ‘flood’ and the importance of the language deployed

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Introduction

An insurer bears the onus in establishing that a particular claim falls within an exclusion clause.¹

In relation to exclusions of damage caused by flood, as was observed by His Honour Jackson J in *LMT Surgical*² the scope of the cover or exclusion of damage caused by flood, depends on the specific language deployed in the particular policy on the subject matter and is not determined by cases decided upon the meaning of other clauses in policies which deploy other language or by broad statements as to purpose or object.³

Therefore a starting point is to identify with precision the wording of the particular clause in question and to consider any case authorities which have either considered that precise same wording or the precise wording considered in the context of a similar clause,

but not ‘*other policies which deploy other language*’.⁴

In the New South Wales Court of Appeal decision of *Provincial Insurance v Consolidated Wood Products*⁵, the relevant exclusion provided:

‘The Insurer(s) shall not be liable ... in respect of:

Physical loss, destruction or damage occasioned by or happening through [writer’s emphasis]

- (a) *flood, which shall mean the inundation of normally dry land [writer’s emphasis] by water escaping or released [writer’s emphasis] from the normal confines [writer’s emphasis] of any natural watercourse or lake whether or not altered or modified or of any reservoir, canal or dam;’*

Occasioned by or happening through

In *Provincial Mahoney JA* said:⁶

'... It was submitted for the insured that the loss or damage in question was not 'occasioned by' nor did it 'happen through' a flood as defined.

The argument, in effect, was that the water which entered the insured's premises and caused the loss or damage was not shown ever to have been in the relevant canal or natural watercourse and therefore it was not water 'escaping ... from the normal confines of' the watercourse or canal. Therefore the argument suggested the exclusion did not apply.

I do not think that argument should be accepted. For the exclusion to apply, it is not necessary that the precise water which escaped from the watercourse or canal be identified as having actually entering the insured's premises. The exclusion is of loss or damage 'occasioned by or happening through' the inundation of normally dry land 'by water escaping ... from ... a watercourse or canal'. If by reason of the inundation of normally dry land by water so escaping, other water was forced into the insured's premises and occasioned loss or damage that would, in my opinion, be loss or damage 'occasioned by or happening through' the escape caused by such a flood. In my opinion therefore, exclusion 3 applied.'

In the case of *Eastern Suburbs Leagues Club v Royal & Sun Alliance Insurance*⁷ Mackenzie J stated:

'Einstein J applied the passage from Mahoney JA's judgment with approval in Hams ... (2002) NSWSC 273... The concept of something being 'occasioned through'...was discussed in Mercantile Mutual Insurance (Aust) Limited v Rowprint Services (Victoria) Pty Ltd [1998] VSCA 147 especially by Callaway JA at [24]. The concept implies that there is a consequential or causal relationship not necessarily a

*direct or proximate cause.*⁸

In that later case, Callaway JA had stated:

*'Loss or damage may also 'happen through' a cause which is not the proximate cause.'*⁹

Ormiston JA, when considering the expression 'occasioned by or happening through', spoke of the circumstances of that case as a 'chain of events' which was 'unbroken, leading naturally from one event to the next'.¹⁰

Normally dry land

In *Elilade Pty Ltd v Nonpariel Pty Ltd* (2002) 124 FCR 1 [50], the definition of 'flood' in the policy included 'the inundation of normally dry land' and Mansfield J rejected the insured's contention that because the premises and surrounds were already under water, the land was not 'normally dry land', stating:

*'...The expression 'normally dry land' must be construed in its context. The context is in the definition of 'flood' for the purposes of the exemption and in the context of the policy as a whole... the character of the land inundated is intended, in my view, to have a more or less constant character. That is, indicated by the use of the word 'normally'. It suggests that the character of the land is measured not by reference to its particular (and on the evidence very occasional) character following very abnormal rainfall but by its usual or normal character.'*¹¹

Escape

In *Hams*,¹² Einstein J considered a flood exclusion which contained the words '... escape of water from the normal confines of any lake, reservoir, dam, river, creek or navigable canal...'

His Honour said:¹³

*'I reject the Plaintiff's submission that upon its true construction the word 'escape' as used in the flood exclusion, only applies where water was at one time within a lake. To my mind, the reasoning of Mahoney JA in **Provincial Insurance** is persuasive and in any event arguably binding on a first*

instance judge.

*Notwithstanding the slight differences in the wording of the provision there being construed, the same approach requires to be taken in relation to the present provision*¹⁴ [emphasis added].

It can be observed from what is set out above, that it was accepted that ‘...escape’ means both ‘leaving’ and also ‘avoiding’ in the sense of ‘failing to enter’.¹⁵

The normal confines

Einstein J also considered the expression ‘normal confines’. Einstein J concluded that the expression operated viably so as to prevent a body of water which might otherwise have fallen within one of the terminological descriptions in the clause (in that case ‘lake’) from doing so, or alternatively, preventing its categorisation as ‘an escape of water from their normal confines’ on account of there simply being no such normal confines.¹⁶

The Wayne Tank Principle¹⁷

The dicta of Mahoney J and the decision of Einstein J (again quoting the passage from Mahoney J’s judgment in its entirety) was seemingly accepted as correctly stating the applicable principles in the Queensland Supreme Court decision of *Eastern Suburbs Leagues Club v Royal & Sun Alliance Insurance*.¹⁸ His Honour ultimately determined that case on a different basis however, finding that there was no basis for concluding that there was inundation by the run off water, as a discrete body of water or ‘...looked at in a different way, there was one body of water, even though intermingling may only have been partial and perhaps quite small by the time the inundation occurred’.¹⁹

LMT Surgical – ‘water overflowing from the normal confines’

In *LMT Surgical* the flood exclusion was in the following terms:

‘Physical loss, destruction or damage occasioned by or happening through:

- (a) *Flood, which shall mean the inundation of normally dry land by water overflowing from the normal confines of any natural watercourse or lake*

(whether or not altered or modified), reservoir, canal or dam.

To understand the import of the finding in *LMT*, regard needs to be had to the wording contained within the exclusion and the questions to which his Honour, Jackson J was giving consideration.

The dispute in *LMT* effectively resolved into the following questions:²⁰

1. Were the pipes an ‘altered’ or ‘modified’ natural watercourse and, if so, was the inundation ‘by water overflowing from the normal confines’ of that natural watercourse?
2. Alternatively, were the pipes a ‘canal’ and if so, was the inundation by water overflowing from the normal confines of that canal?
3. Alternatively was the river a relevant natural watercourse and, if so, was the inundation ‘by water overflowing from the normal confines’ of that natural watercourse.

Jackson J concluded that the pipes were a functional replacement for the prior natural watercourse, but were not an altered or modified natural watercourse.²¹

His Honour further concluded that in the context of the flood exclusion ‘canal’ did not include the pipes.²²

His Honour found that the normal confines of the river did not include the pipes.²³

His Honour had earlier found that the flooding in the area of the premises did not occur because of the overtopping of the river bank resulting in overland flow.²⁴

In light of these conclusions there was no scope for operation of the flood exclusion which required there to be an *overflowing* from one of the sources identified in the clause.

Jackson J essentially adopted a ‘narrow view’, holding that the requirement that the inundation be by water overflowing from the normal confines, restricted the operation of the flood exclusion to inundation by water which has overflowed the banks, where those banks were the normal confines.²⁵

Conclusion

In *LMT Surgical* Jackson J regarded the scope of cover or exclusion of damage caused by flood to depend on the specific language deployed in the particular policy.

His Honour accordingly did not ‘essay’ the application of the cases to which reference was made at footnote 2 of paragraph 47 of his judgment,²⁶ some of which have been considered above.

It may be observed that in as much as it was determined in *LMT* that ‘*from the natural confines*’ modifies ‘*overflowing*’ and that the ordinary meaning of the words is directed to the place from where the overflowing occurred, a somewhat different approach seems to have been taken previously in both *Hams*²⁷ and *K Sika Plastics Ltd v Cornhill Insurance Co Ltd*²⁸ in which it was said by Cooke J:²⁹

*‘In ordinary and natural language, I think that a watercourse is said to overflow its normal banks when all the water that would otherwise drain or fall into it cannot be contained in it because it is full. All of the surplus water is then overflow, no matter whether or not some of it has at one time been within the banks and then forced out.’*³⁰

¹ *Pye v Metropolitan Coal Co Ltd* (1934) 50 CLR 614, 625.

² *LMT Surgical Pty Ltd* [2014] 2 Qd R 118, [20]-[21], [47].

³ It should be noted that on June 18 2012 regulations (subject to transitional arrangements) were enacted that introduced a standard definition of ‘flood’ to insurance contracts for home building and contents, small business and strata title. That definition of ‘flood’ is ‘*the covering of normally dry land by water that has escaped or been released from the normal confines of any lake, or any river, creek or other natural watercourse, whether or not altered or modified; or any reservoir, canal or dam*’ [*Insurance Contracts Amendment Regulation 2012 (No. 1)*].

⁴ As per Jackson J in *LMT Surgical* at [21].

⁵ (1991) 25 NSWLR 541.

⁶ *Ibid* 564.

⁷ (2003) QSC 413.

⁸ *Ibid* [41].

⁹ *Mercantile Mutual Insurance (Aust) Ltd v Rowprint Services (Victoria) Pty Ltd* [1998] VSCA 147, [24].

¹⁰ *Ibid* [17].

¹¹ (2002) 124 FCR 1, [50].

¹² [2002] NSWSC 273.

¹³ *Ibid* [160].

¹⁴ The passage of Mahoney JA in *Provincial* at page 564 was then cited in full.

¹⁵ *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541, 564; *K Sika Plastics Ltd v Cornhill Insurance Co Ltd* [1982] 2 NZLR 50.

¹⁶ *Hams* [2002] NSWSC 273, [158]-[159].

¹⁷ The *Wayne Tank Principle* derives from the decision in *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57, and operates such that if there are two or more proximate causes of loss, one of which is expressly excluded from cover and the other within the ambit of cover, the loss will be excluded.

¹⁸ (2003) QSC 413, [37]-[41].

¹⁹ *Ibid* [45]. The *Wayne Tank Principle*, thus applying.

²⁰ *LMT Surgical Pty Ltd* [2014] 2 Qd R 118, [8].

²¹ *Ibid* [28].

²² *Ibid* [32].

²³ *Ibid* [42].

²⁴ *Ibid* [37].

²⁵ *Ibid* [44].

²⁶ *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541; *K Sika Plastics Ltd v Cornhill Insurance Co Ltd* [1982] 2 NZLR 50; *Hams* [2002] NSWSC 273; *Peterson v Union des Assurances de Paris IARD* (1997) 9 ANZ Ins Cas 61-366; *Elilade Pty Ltd v Nonpareil Pty Ltd* (2002) 124 FCR 1.

²⁷ *Hams* [2002] NSWSC 273.

²⁸ [1982] 2 NZLR 50. This decision was approved in *Hams* at [161].

²⁹ *K Sika Plastics Ltd v Cornhill Insurance Co Ltd* [1982] 2 NZLR 50, 53.

³⁰ The writer would observe that ‘*overflow*’ might well be thought to have connotations of a ‘*flow over*’ of something. In *LMT Surgical* this something was the banks, which were found to constitute the normal confines: see *Oakleaf v Home Insurance* (1958) 14 DLR (2d) 535 per Porter C JO in which the Judge thought the expression obviously applied to water ‘*flowing over*’ the window sill.

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