

## DETERMINATION

REFERRAL NO: 203 11 18342

*Home Building – malicious damage – onus of proof - policy exclusion*

### SUMMARY OF FACTS

The claimant held a home building policy providing cover against loss or damage caused by listed events.

A claim was lodged on the policy for extensive vandalism/malicious damage to the insured house. The insurer refused to accept the claim on the basis the loss was outside the scope of cover. The claimant maintained he was entitled to have his claim met by the insurer.

### ISSUES IN DISPUTE

Whether the loss is covered under the terms and conditions of the policy.

### RELEVANT POLICY PROVISIONS

#### “Section 2 – general policy conditions

...

#### 2.10 Reasonable care

At all times, and at **your** expense, **you** must

- take all reasonable precautions to maintain and protect the property insured to minimise or avoid damage, destruction or theft

▪ ...

#### Part 3: Meanings of words and phrases we use frequently

...

**You** or **Your** means

- the policyholder or policyholders named on the certificate;

▪ ...

#### Part 4: What you are insured for

...

#### 1.9 Vandalism, Malicious damage, Riots or Civil disturbances

**You** are covered for damage or destruction caused by vandalism or malicious acts, provided **you** report all such incidents to police.

...

**You** are not covered if the damage or destruction is caused by

- **you**
- tenants or boarders
- anybody who is at the **insured address** with the express or implied consent of
  - **you**
  - tenants or boarders
  - any other person who lives at the **insured address**.

**Damage caused by tenants is available as an extension to our Investment Home Insurance policy.”**

### OUTCOME AND REASONS

The legal onus is on the claimant to demonstrate a claim falls within one or more of the events covered in the policy. The claimant's policy is the insurer's standard home policy which provides cover for vandalism and malicious damage but has the added condition that cover does not apply if the damage or destruction is caused by the policyholder, a tenant/boarder, or any other person who is at the home with the express or implied consent of such persons, or any person whom lives at the insured address. It is not suggested the claimant arranged the cover on the basis it was an

investment property with the cover extended to provide cover for damage done by tenants.

The claimant's submission is summarised below:

- The claimant has some health problems that have impaired his ability to manage his affairs.
- When the occupiers were given notice to quit, the claimant had not been living at the home for about a month. Prior to this, a neighbour has confirmed hearing threats of serious violence made against the claimant. Some of the occupiers of the house were known to have a history of assault charges.
- Persons entered the property and lived with the claimant on a shared occupation basis around late 2001. This occupation continued on this basis until mid 2002 and up to that time, there was no damage to the property.
- From June 2002 other persons came into the house on the invitation of persons living there but without the claimant's permission. By June or July 2002, all occupants were aware the claimant wished them to leave and permission to be there was not granted.
- The property was unlawfully occupied by persons other than the claimant from mid 2002 and these persons left the property on 7 November 2002.
- The claimed damage to the house occurred between 5 November and 7 November 2002 and the persons who were responsible were not:
  - Tenants;
  - Boarders;
  - persons at the property with the claimant's consent; or
  - a person at the property with the consent of a tenant or border of the claimant.
- Certain persons involved in damaging the property came onto the property with the claimant's consent but in relation to this:
  - consent was withdrawn between mid 2002 and the service of a Notice to Quit document was effected on 5 November 2002. After that date these persons became trespassers;
  - their continued occupation despite the withdrawal of consent was accompanied by threats of assault and violence and was not to be assumed as acquiescence or consent of the claimant to continued occupancy.
- The claimant took action to remove the unlawful occupiers and accordingly did not fail to appropriately attempt to protect the property. This action included:
  - Informing the occupiers of the withdrawal of all consent and permission for them to be there.
  - Approaching the police for assistance to remove these persons.
  - Soliciting advice and assistance to remove the occupiers from a local real estate agent.
  - Soliciting advice from the manager of the bank that held a mortgage over the property.
  - Asking for assistance from senior members of the local community.
  - Approaching a solicitor who prepared a Notice to Quit and delivered it to the occupiers on 5 November 2002.
- These events took place in a small country town and followed serious threats made against the claimant who was also experiencing health problems. As the occupation after mid 2002 was under duress and with personal threats

including an actual assault on 7 November 2002, clearly these persons were not in the house with consent.

- The police attended the residence on 7 November and recorded the damage then present.
- The insurer has alleged the damage occurred over a six-month period based on material from the police, but this is not established and it would be possible to do all the damage in one day. The claimant's brother is an experienced builder and he inspected the property on 7 November 2002. On that date his brother considered the damage appeared to be fresh, mostly occurring in the previous two days and some of it appeared to be no more than two weeks old.
- The claimant is a person of "good heart" and having invited some people into the house, he lost control of the situation in that he was unable to remove them.
- The claim is genuine and the damage was beyond the claimant's control to stop and as such, the insurer cannot refuse to accept liability.

The insurer's response has been partially summarised as follows:

- It is agreed the policy provides cover for vandalism and malicious damage, subject to the terms and conditions of the policy.
- The claimant first contacted the insurer on 17 October 2002 advising the property had been vandalised and maliciously damaged on 8 October 2002.
- Loss adjusters were appointed on 18 October 2002 and they inspected the property on 13 November 2002, the delay resulting from unsuccessful attempts to contact the claimant. The property was extensively damaged at that time.
- The loss assessor considered the damage had occurred over a period of time dating back to April 2002.
- The police have advised when they attended at the house on 7 November 2002, Mr G and another man (Mr N) were present and left the house.
- An investigator was appointed to clarify the circumstances of the loss and the investigator was provided with conflicting information by the claimant, namely that the windows, French doors, and internal hallway walls, were smashed in June 2002.
- Local police advised the investigator the claimant was a resident at the house until about 7 November 2002, on a permanent or semi permanent basis, and the claimant was well aware of the problems at the house.
- Police also have a record of damage to the house on 29 December 2001, when there was damage due to a person throwing bottles at the house. The claimant had made numerous complaints about persons at the house but subsequently withdrew those complaints.
- Police have, over an extended period, had complaints about the behaviour of residents in the house and have visited it many times, with the claimant usually at the house at those times.
- Both the claimant and occupants in the house have agreed that tenants were there on a rent paying basis, albeit the payments might not have been made or were made irregularly.
- Neighbours have also provided information indicating the premises were subject to damage over an extended period of time and the occupants of the house were tenants of the claimant.
- The damage is outside the cover provided under the policy and the claim cannot be accepted.

The loss adjuster interviewed the claimant and the Panel has reviewed the record of interview. The Panel is concerned to note the insurer subsequently established the reason for the claimant's apparent distraction during the interview was that a person was under the house, being someone the claimant feared would hear the interview and cause him harm. The Panel has serious concerns as to whether it was appropriate to conduct the interview in these circumstances. The Panel also considers any apparent inconsistency in the claimant's account can be reasonably attributed to his preoccupation with the perceived risk and has therefore attached no weight to any alleged inconsistency arising during the interview. During the interview, the claimant advised as follows:

- He invited a person (Mr G) to share the house with him on the basis Mr. G would pay rent.
- Mr G invited others to move in and by August 2001, there were as many as six adults and two children using the house as accommodation. No rent was being paid.
- Between August 2001 and April 2002, these people were asked to leave and most did, except for Mr G and another man.
- The premises were in good condition until April 2002, with the only damage being to the glass in the rear door, the front door and some broken sheets of gyprock. The claimant did not report this damage to the insurer as he intended to repair it himself.
- By April 2002 the claimant felt threatened and between then and June 2002 attempted to evict the remaining visitors. In August 2002 he sought legal advice and gave notice of his intention to utilise police assistance if the premises were not vacated.
- Although he felt scared, the house was in adequate condition until October, with only negligible damage as stated.
- By October 2002, the claimant had moved to his friend's home.
- On 8 October 2002 the claimant visited and noticed newly broken windows and broken rear French doors,
- The majority of the damage occurred between the end of October and 7 November.
- With police assistance, the occupants were evicted on 7 November 2002 and the claimant discovered the visitors had maliciously and viciously destroyed his home.

The insurer also submitted a number of statements from police officers. In relation to the statements that were signed, the Panel noted the five police officers concerned had knowledge of the claimant, the occupants of the premises and the property. The Panel notes there appeared to be concerns over the general deterioration of the property, specifically the build-up in rubbish. However, the observations of damage to the property were limited to the demolition of a carport and fence, which does not appear to form part of the claim, and to the damage described by the claimant in his interview relating to the front door, the window panes in the rear door and two sheets of gyprock. In the Panel's opinion, the police officers' statements do not contradict the process of damage described by the claimant. However, some of the police statements confirm the claimant sought assistance to remove the occupants from his premises but subsequently withdrew his request. The police also confirm threats were made to the claimant and he was assaulted by one of the occupiers during the eviction process on 7 November 2002.

The insurer has provided copies of a large number of documents from its file in relation to this claim. These documents included images of the damaged house,

reports from the loss adjuster, and detailed reports from an investigator with records of interviews conducted by that investigator. Based on the material presented, the Panel concludes there is no specific evidence the property had been progressively damaged by the occupants over a relatively prolonged period, and finds the evidence establishes three events in which damage to the premises occurred prior to October 2002. The Panel further accepts there was substantial damage inflicted in the period immediately prior to 7 November 2002, and it is only this damage which is the subject of the claim.

The issue for the Panel to consider is whether the damage claimed is excluded under the policy by reason of its being inflicted by tenants or boarders or persons at the premises with the claimant's consent or the consent of anyone living in the premises. The Panel notes the claimant's advice he was under duress and feared harm from the occupiers, who were at the property without his consent.

After carefully reading the material provided by both parties, the Panel considered that, on the balance of probabilities, the house was damaged by persons who had either been living there on the basis they were tenants, or who had been invited into the house by persons who lived there. In the Panel's opinion, the local police officer's statements strongly indicate the claimant was present on many occasions when they were called to the house following complaints regarding noise or behaviour of occupants.

While it is undisputed the claimant was forced to take action to have the occupants of his house vacate the premises, the Panel notes a Notice to Quit was served on 5 November 2002. However, it is also noted this document did not require the occupiers of the property to vacate until 7 November 2002, which implies the occupiers were not trespassers and had some legal basis to be on the premises, notwithstanding it was against the claimant's wishes.

While the Panel accepts the property has been vandalised and maliciously damaged, the policy does not offer unqualified cover for damage of this nature in the circumstances of this loss, regardless of when the damage occurred. The cover offered under the policy is conditional on the persons causing the damage not being a tenant, a person living at the address, or a person invited to enter the property by a tenant or person living there. As the evidence suggests the damage claimed was inflicted by persons who were on the premises as either tenants or with the consent of a person living at the premises, and it is not established any damage occurred after the date of eviction, the Panel finds the loss is excluded under the terms of the policy.

Accordingly, the Panel determines the insurer is entitled to deny liability in response to the claim.

9/3/04