

# Determination

**Case number:** 601649

25 June 2019

## 1 Determination overview

### 1.1 Complaint

The complainants held a home and contents policy with the financial firm (insurer) and on 17 May 2016 lodged a claim for damage to the property because of construction and excavation work conducted by a neighbour.

The complainants maintain that the damage was malicious damage as the neighbour (QQ) deliberately and with reckless disregard, built into the complainants' property causing the resultant damage.

The insurer denied the claim and says that whilst the neighbour intentionally built into the complainants' property, the resultant loss or damage was not caused by an insured event as the damage was not caused with malicious intent.

The complainants dispute the insurer's decision and seek payment for the damage together with payment of legal costs incurred being in proceedings against the neighbour.

### 1.2 Issues and key findings

#### Have the complainants established a valid claim for damage to the property under the terms of the policy?

The policy is an insured events policy that covers a number of specified events including loss or damage caused by malicious acts or vandalism. The action of the neighbour was an intentional action, being a wrongful act without lawful excuse or done with reckless indifference sufficient to constitute malice. I am satisfied the complainants have established a valid claim within the terms of the policy.

#### Are the complainants entitled to cover for legal costs?

The complainants are entitled to cover for legal costs incurred as it was necessary for the complainants to pursue legal action to prevent further property damage and recover losses QQ's acts had caused. I am satisfied that section 54(5)(a) of the Insurance Contracts Act 1984 (the Act) is enlivened and that the insurer is liable to cover the complainants outstanding legal costs.

### 1.3 Determination

This determination is in favour of the complainants.

The insurer is required to accept the complainants' claim for the building repairs as set out under section 2.1 of this determination. The insurer is further liable to meet the complainants' outstanding legal costs, as set out in section 2.2 of this determination.

## 2 Reasons for determination

There has been a full exchange of material between the parties and each party has had the opportunity to address the issues arising from the information exchanged.

This determination follows consideration of all the information exchanged and is based on what is fair in all the circumstances, having regard to the relevant legal principles, terms of the policy, good industry practice including codes of practice and prior determinations where applicable.

### 2.1 Have the complainants established a valid claim within the terms of the policy?

#### Complainants have the onus to establish a claim within the terms of the policy

The complainants' policy is a specified events policy that provides cover for loss or damage to the complainants' property arising from a number of defined events including malicious acts and vandalism. Whilst the policy includes optional cover for accidental damage, that has not been taken out by the complainants.

The expressions 'malicious act' and 'vandalism' are not defined in the policy. The parties cite *Jeffery v Associated National Insurance Co Ltd* [1984] 1 Qd R 238, in which the Supreme Court of Queensland ruled that a malicious act was 'the intentional doing of a wrongful act without just cause'. This was affirmed by the Supreme Court of Victoria in *Insurance Manufacturers of Australia Pty Ltd v Vandermeer* [2007] VSC 28, which considered, but did not determine, whether reckless indifference was sufficient to constitute malice.

The Macquarie dictionary provides the following definition:

vandalism noun 1. Wanton or malicious destruction or damage of property.

Based on this, I accept vandalism is wanton or malicious property damage and a malicious act is the intentional doing of a wrongful act without just cause. I accept that where a party recognises the risk of causing damage, but shows a reckless indifference to causing that damage, that such damage is also malicious damage for the purpose of the policy.

The onus is therefore on the complainants to show that the damage to the property was caused by an intentional act without just cause or with reckless indifference to the likely damage arising from the act.

#### Circumstances of the loss

There is no dispute as to the circumstances by which the complainants' property came to be damaged.

The complainants' neighbour, QQ, lodged a development application on 15 December 2014, to which the complainants lodged extensive objections. The council gave consent to the development on 21 July 2015, subject to a range of conditions.

During the development, the complainants say QQ deliberately breached these conditions by:

- an intentional or a negligent encroachment on his land
- inserting 11 pins into the complainants' property
- failing to heed warnings from the complainants to cease the works
- failing to undertake proper stormwater drainage works.

### **Land and Environment Court found QQ knowingly and intentionally breached planning conditions**

There is no dispute between the parties that the complainants brought proceedings before the state's Land and Environment Court. Those proceedings were subject to court judgement on 16 December 2016.

A copy of the Land and Environment Court's judgement has been exchanged and I do not propose to repeat the judgement in detail in this determination.

The court found that the complainants had interacted with QQ about the building works many times before QQ carried out the building works encroaching onto the complainants' property. The interactions were through formal and informal planning processes, email and face to face encounters with QQ.

The development consent provided by the Council in July 2015 included condition 2:

The following amendments are to be made to the approved plans: No approval is given to any works on number [the complainant's address].

The complainants told the court QQ breached development conditions by building outside of permitted hours four times in December 2015. The Land and Environment Court imposed an injunction on QQ from continuing building works in December 2015.

QQ expressed uncertainty about where the boundary between QQ's and the complainants' property was. The complainants arranged for land surveys and gave these to QQ. The court found QQ knew the complainant's survey was correct but ignored this and:

- excavated into the complainants' land
- drilled underpins in the complainants' building's wall
- constructed a shortcrete wall encroaching onto the complainants' property.

The court was also satisfied:

- QQ knew it was not his wall or rock to insert pins into before he started
- after he started, even when the complainants warned him to stop, QQ ignored this
- QQ made a conscious decision to breach development condition 2 by inserting the pins
- QQ 'clearly disregarded the possibility of where he was excavating being on [the complainants'] property despite advice from [a contractor] and particularly [the contractor] pegging out [the correct property boundary, which means that QQ was prepared to risk a breach of the condition [2], at the best for him, in an inappropriate fashion where the condition placed an express onus on him to comply
- QQ then built a shortcrete wall on the excavated land (including the complainants' land) and 'undertook the construction of the wall with indifference as to its location and taking a risk that the location was not accurate'
- QQ continued to build this wall after the complainants sought an injunction
- these were serious breaches of the conditions and QQ's conduct was reckless and deliberate.

The court also granted QQ an easement over complainants' land under the shortcrete wall. The court was satisfied the circumstances warranted QQ paying the complainants at a rate imposed where there is intentional encroachment. This is triple the rate of negligent encroachment.

The court's above findings are based on the hearing. This was subject to evidentiary and process rules. It involved evidence from the complainants and QQ (or their representatives), valuers, surveyors, engineers and QQ's excavation contractor. It is therefore appropriate I give significant weight to the court's findings.

### **Actions by QQ were malicious**

The insurer argues QQ acted deliberately but without malice, because the court says he breached the conditions since it was easier and cheaper for him.

This view ignores the protracted and involved interaction with the complainants, specifically aiming to prevent QQ from knowingly encroaching onto the complainants' land, before QQ carried out the acts damaging the complainants' property.

In my view, the conduct of QQ was malicious because:

- he deliberately and intentionally carried out the works to the complainants' property
- he deliberately and intentionally acted outside the terms of the development consent
- at all times he was aware of the possibility of damage being sustained to the property

- despite the above he deliberately and intentionally drilled underpins into the complainants' property, with resulting cracking and other damage to the complainants' stairs, garage, masonry walls.

QQ acted in a manner that is consistent with doing a wrongful act without just cause or alternatively, having recognised the risk associated with his conduct, having a reckless indifference sufficient to establish malice.

As I accept that the malicious acts were the proximate cause of damage, it is not necessary to determine other matters that were raised during this complaint relating to the possibility of storm or flood damage.

### **Insurer is to complete the building repairs**

The policy provides the insurer with a discretion whether to repair the damage to the home, rebuild the home or pay what it would cost to repair or rebuild the home. Whilst I accept the insurer has that discretion, such discretion must be exercised fairly, reasonably and consistent with the principle of utmost good faith.

In the current complaint, the complainants have provided the insurer with an estimate of the costs of repairs, however, it is acknowledged that until the repairs have commenced, the exact costs of repairs will not be known. The insurer has not provided any assessment as to the extent of damage or likely costs of repairs.

In my view, given the uncertainty as to the damage sustained, it is fair that the insurer agrees to repair the damage to the home, in accordance with the terms and conditions of the policy. The insurer should obtain a detailed scope of works and work with the complainants to settle the scope of works before commencing the repairs.

Under the terms of the policy, the insurer will have the right to seek recovery against QQ and/or QQ's insurer for the cost of the repairs.

## **2.2 Are the complainants entitled to payment of legal costs?**

### **Policy provides cover for legal costs**

The complainant has incurred considerable legal costs in acting to prevent QQ continuing with the construction works in a bid to minimise any damage. I accept these are consequential costs incurred because of the insurers decision to reject the claim. The complainant did not obtain the insurers consent to incur the costs as the claim had been rejected.

The insurer relies on the general exclusions and says the costs are not covered under the policy which excludes consequential loss for:

Professional, expert, legal consulting or valuation costs unless you obtained our prior written authority to incur these costs.

The insurer says that as the complainants have not obtained prior written authority to incur these costs, that it is not responsible for the legal costs.

I have considered these costs in light of section 54 of the Act because:

- the act of commencing legal proceedings was a post-contractual act within the purposes of section 54(1) of the Act
- the failure to obtain the insurer's prior written authority because of the insurer's initial refusal to pay the claim
- the act could not reasonably be regarded as capable of causing or contributing to the damage, namely the damage to the property.
- the available information shows that the complainants needed to pursue the matter before the court and therefore incurred legal costs to protect the property and did so to prevent or mitigate damage to the property.
- the court found the complainants needed to engage in legal proceedings because of QQ's malicious acts.

Given the above I am of the view that the insurer should pay the complainants outstanding legal costs incurred in bringing the proceedings against QQ because:

- section 54(5)(a) of the Act applies as the act was reasonably necessary to preserve the property
- section 54(5)(b) of the Act applies as it was not reasonably possible for the complainants not to do the act
- at all times, it was reasonably open for the insurer to accept the claim and exercise its right of subrogation to direct the legal actions.

The complainants have recovered some costs from QQ and the insurer is not liable for these costs. The insurer should pay the complainants' claim for any outstanding legal costs (subject to proof) incurred and may exercise its right of subrogation to recover such costs from QQ or his insurer.

## 3 Supporting information

### 3.1 Policy

#### What you are covered for – Insured events

... we cover your home ... for loss or damage at the insured address caused by an insured event during the period of insurance.

#### Malicious acts and vandalism

We cover: Loss or damage caused by malicious acts or vandalism e.g. vandals damaging your letterbox or painting graffiti on your home.

#### General exclusions

You are not covered under any section of this policy for damage, loss, cost or legal liability that is caused by, arises from or involves:

#### Consequential losses or extra costs following an incident covered by your policy

consequential loss (financial and non-financial loss) or extra costs following an incident covered by your policy, such as: ... professional, expert, legal, consulting or valuation costs unless you obtained our prior written authority to incur these costs; ... any costs not covered by your policy.

#### Words with special meanings

**Accidental loss or damage** means loss or damage that occurs without intent.

**Insured event** means:

- the insured events on pages 20 to 29; and
- if you have the Classic Extras or Platinum level of cover or the Classic level of cover with optional Accidental damage at the home, it also means accidental loss or damage to your home or contents that is not excluded by your policy.

In addition, an insured event is always a single event, accident or occurrence which you did not intend or expect to happen.

**Loss or damage** means physical loss or physical damage.