JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPAEAL NO. 137/2001

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**DYOLL INSURANCE COMPANY LTD.**	**DEFENDANT/APPELLANT**
AND:	**DAVID CARDOZA**	**PLANITIFF/RESPONDENT**

Dennis Morrison, Q.C. and Kent Gammon instructed by Dunn Cox for the appellant

Patrick Bailey instructed by Patrick Bailey & Co. for the respondent

November 5, 6, 8, 2002 and February 26, 2003

DOWNER, J.A.

Introduction

Was the appellant, Dyoll Insurance Company Ltd. (the "Insurance Company") liable, to indemnify David Cardoza for the damage done to the retaining wall on his property? The respondent Cardoza had successfully contended in the Court below that the damage was caused by flood which was one of the perils covered by the policy. The insurer, on the other hand, argued that there was no flood and that the damage was caused by a landslip which was within the exclusion clause and so was not covered by the policy.

The learned judge, Cooke J. accepted the account of the experts called on behalf of the insurer as to how the damage was done. Despite this he found in favour of Cardoza on the basis that the flood was the proximate cause of the damage and the exclusion clause was not applicable in the circumstances of this case. The issue on appeal is to ascertain if the resolution of the conflict by the learned judge was correct.

The framework of the policy

The Householders Comprehensive Policy reads as follows in so far as is material:

> "PRINCIPAL PERILS COVERED BY SECTION 1 OF THE POLICY"

Then referring to Section 1 it reads:

> "Item 1 Private Dwelling House
>
> Item 2 Swimming Pool
>
> Item 3 Walls, gutter and fences"

Then the policy continues:

> "Loss or Damage to property specified in the schedule caused by:
>
> a. Fire, Explosion, Lightning
> b. .....
> k. Flood"

Then the exclusion clause reads:

"**POLICY EXCLUSION**

We will not pay for:

1...

7. Subsidence

Loss or damage caused by subsidence or landslip"

Was there "flood" within the ambit of the policy for insurance?

Here is how the learned judge found that "flood" was within the ambit of the policy at No 2 Norbrook Mount (at page 39 of the Record):

> "But Mr. Bailey sought to use ordinary meaning for the flood in k. Mr. Bailey invited me to look at the ordinary dictionary meaning of 'Flood'. I could not read what was passed up to me so I had recourse to my own dictionary which is the Concise Oxford Dictionary 8th Edition 1990 and therein 'Flood' is defined as an 'overflow or influx of water beyond its normal boundaries: and inundation." I am persuaded by Mr. Bailey, and in my view there was flood at No. 2."

Porter C.J.O. came to the same conclusion in **Oakleaf v. Home Ins. Ltd.** 14 D.L.R. (2d) 535 at 538. He said:

> "The word "flood" as applied to quantities of water inundating cellars as in this case is in common use."

As for the evidence here are the findings of Cooke J. at page 37 of the Record:

> "The Plaintiff, Mr. David Cardoza is the owner of property at 2 Norbrook Mount in Kingston 8. On August 4, 1998, he resided at 4 Norbrook Mount across the road from No. 2 Norbrook Mount (I will hereafter refer to these premises as No. 4 and No. 2

respectively). At No. 2 according to the Plaintiff there was a house under construction - about 90% complete. There was also a swimming pool and retaining wall – 70% complete.

On the morning of August 4, 1998 the plaintiff awoke to the sound of rainfall. He considered it to be heavy rainfall which was consistent. There was no cessation throughout the day. From No. 4 he observed water accumulating at No. 2. He says it was very high. He further said that water was flowing down the hill to No. 2 Norbrook Mount. He wished to leave No. 4 to go to No. 2 but the area was flooded with water. However at about 11:00 am., he heard a cracking sound emanating from No. 2 and it piqued his curiosity and so he went over to No. 2. At No. 2 there was much water gathered and to plaintiff's dismay, a part of the pool was torn off and part of the wall too. That is the genesis of this action."

On the issue of the heavy rainfall which caused the flood the experts on both sides were of one accord. Here is the learned judge's assessment of the matter at page 44 of the Record:

"In respect of my assessment of the evidence I prefer the opinions given by the witnesses for the Defence. Their evidence was blessed with clarity and precision and I hold that there was slippage. What is constant to all experts is their recognition of heavy rainfall. Jervis spoke of heavy saturation. Betty of water in backfill. Thompson referred to the effect of water when he said "it is probable that the shear strength of the ground was reduced by the heavy rain which occurred"... Irvine said that the proximate cause was super-saturation. As I held that there was flooding I now hold there was slippage. This slippage was the last factor to damage."

The learned judge's finding on this aspect of the matter was never seriously challenged and the respondent Cardoza therefore proved this aspect of the case.

Did the exclusion clause exonerate the owner from the liability?

The ratio of the judgment in the Court below runs thus at page 48 of the Record:

> "I regard the slippage as the final step. The prior flooding in my view is the proximate cause. Without the flooding there would have been no slippage without which damage would not occur. Slippage was the direct result of flooding. I find it curious that the exclusion of landslip was not put in the context of flooding."

Before coming to the above conclusion the learned judge posed the principal issue in the case thus at page 45 of the Record:

> "The defendant placed great reliance on the exclusion clause in the policy where there is no liability on the defendant's part for payment for loss or damage caused by subsidence or landslip. So now there are two (2) operational factors – flooding and landslip. How does court resolve this issue?"

Since it was found that landslip was a contributory factor to the damage, it must be recognized that it was placed in the exclusion clause. That clause must be construed. The principle here is that the Insurance Company must bring itself within the exception with unambiguous words. What effect does the word landslip have in the context of the exception clause? There is no certainty on this issue. It could mean any landslip whatsoever is excluded, or it could mean the landslip must be the proximate cause of the damage for it to

exclude the effect of the flood or, it could mean a landslip which followed the flood, and was merely incidental to it. It is this last meaning which the judge ascribed to landslip in the passage above where he stated that he found it curious that landslip was not put in the context of flooding.

The precisely worded exclusion clause in **Oakleaf v. Home Insurance Ltd.** 14 D.L.R. (2d) 535 at 536 reads:

> "There shall in no event be any liability hereunder in respect to:-
>
> (c) loss or damage caused by cold weather, rain, sleet, snow, sand or dust, unless same shall enter the building through an aperture concurrently broken therein by a wind or hail storm.
>
> ...
>
> (e) loss or damage due to tidal wave, high water, overflow, flood, land subsidence or landslip, irrespective of the cause."

Porter C.J.O. stated the effect of the above clause thus at page 539:

> "There is no doubt that policies such as these are to be liberally interpreted in favour of the insured, and where there is ambiguity in the terms, the construction more favourable to the insured should be adopted: **Worswick v. Can. Fire & Marine Ins. Co.** (1878),3 O.A.R. 487; **Fitton v. Accidental Death Ins. Co.** (1864), 17 C.B. (N.S.) 122 at p. 135, 144 E.R. 50 Willes J.; **Re Etherington & Lancashire & Yorkshire Acc. Ins. Co.,** [1909] 1 K.B. 591 at p. 596, Vaughan Williams L.J.
>
> In this case I can find no ambiguity. I think that the meaning is plain. From the wording of this exclusion clause, it is clear that the parties contemplated the possibility of a flood or an overflow which in some way, wholly or in part, might be the result of a windstorm, and that the water from the flood or the overflow might cause damage. By this

> clause the company clearly stated in effect that it would not be liable if such occurred, irrespective of whether the flood or the overflow were caused by a windstorm, or any other event."

Mr. Patrick Bailey for Cardoza, in the Court below grasped the principle of how an exclusion clause can be made effective. Here is how the learned judge acknowledged it at page 45 of the Record:

> "Mr. Bailey referred the court to General Principles of Insurance Law by E R Hardy Ivanny (6th edition). In particular the Court was referred to page 418 to the Section with the caption **'Where peril insured against precedes an excepted Clause.'**
>
> 'Where the peril insured against precedes an excepted clause which actually produces the loss, there is a loss within the meaning of the policy if, notwithstanding the operation of the excepted cause, the peril insured against is to be regarded as the proximate cause of the loss.
>
> If there is a causal connection between the peril and the loss, the excepted cause being merely a link in the chain of causation inasmuch as it is a reasonable and probable consequence of the peril, the peril is the cause of the loss within the meaning of the policy.'
>
> In the instant case the peril insured against is flooding and the excepted cause is landslip. I accept those passages as correct statement of law."

Since Porter C.J.O., the learned author Ivanny, and Cooke J. cite **Etherington** [(1909) 1 K.B. 591] for the principle on which the respondent Cardoza relies, it is helpful to examine the ratio of the case. Vaughan Williams L.J. put it thus at page 596:

"I am of opinion, therefore, that in the case of policies of insurance the principle that the document must be construed "contra proferentes" strongly applies."

Then on pp. 598-599 the learned Lord Justice said:

"In this case the assured fell from his horse. It was a heavy fall, and, though no breakage of bones, or wound, or obvious internal injury was caused, the fall involved a great shock to the system accompanied by a wetting. The assured had to ride home without a change of clothes, and the case makes it clear that the first result of such an accident would be a lowering to a great extent of the vitality of the person exposed to such a shock and wetting. It is also clear that such a lowering of vitality is in the ordinary course of things likely to produce a great development of the pernicious activity of those germs called pneumo-cocci, which are stated to exist even in healthy persons, and that this increased activity of the germs would, unless the vitality were restored again, ultimately produce pneumonia; and it was of pneumonia so produced that the assured died. Under these circumstances, I really do not think I need trouble myself with going at length into the cases to see how the Courts have in particular cases dealt with the question whether the peril insured against, whether peril of the sea or accident or fire, or whatever it might be, was the proximate cause of the loss or injury so as to bring the case within the operation of the policy. In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results."

Be it noted that the learned Lord Justice envisaged that the principle adumbrated in the above passage applied to "peril of the sea, accident or fire,

or whatever it might be, was the proximate cause of the loss or injury so as to bring the case within the operation of the policy. Here is the contribution of Farwell LJ on the issue of the relationship of the exemption clause and the main clause:

> "I do not think that anybody, after hearing the arguments on both sides in this case, can have any doubt as to the ambiguity of this policy. I agree that the insurance company which prepares these documents is bound to make their meaning as clear as possible, and, if there is any ambiguity in the document, it does not lie in the mouth of the company, who may have been receiving premiums under it for years, to insist on that construction of an ambiguous clause which is in their favour. It is clear that, apart from the proviso, this case would come within the terms which primarily define the liability of the company under the policy. The words "within three calendar months from the occurrence of the accident" shew that the company's liability was not intended to be confined to sudden death, or death occurring immediately upon the accident."

Then after dealing with the facts, Farwell L.J. at 601 continues thus:

> "It is said that these words are qualified by the proviso, and that this case falls within it. Where there are clear words which prima facie import liability on the part of the company, and it is said that their effect is cut down by a subsequent proviso, I think we are bound to see that the terms of the proviso are clear and not repugnant: but, if the company's construction be adopted, the proviso in effect renders the three months period of none effect, and reduces the company's liability to cases of sudden death. I decline to put such a construction on an ambiguous proviso which it was the duty of the insurance company to make absolutely clear, if they intended it to have such an effect as that for which they contend."

Then there is the contribution of Kennedy L.J. which runs thus at pp 602-603:

> "But the real difficulty here seems to me to arise on a portion of clause 3, of the proviso, which qualifies the liability imported by what has gone before by saying that the policy is not to insure against death "where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." To my mind, on the whole, the view adopted by Channell J. was correct when he said that the words "intervening cause" in that clause meant some new cause independent of the accident. As has been pointed out, if the words of the document, which has been prepared by the company, may reasonably be said to be ambiguous, it ought in such a case as this to be construed most strongly against the company who are its framers. I think that in this case the words "disease or other intervening cause" may reasonably be looked on as ambiguous."

Cooke J. in relying on the above case was content in his oral judgment to rely on the headnote. He said at pages 46-48 of the Record:

> "By the terms of a policy an accident insurance company undertook, if, at any time during the continuance of the said policy, the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representative of the insured the capital sum of £1000. The policy contained the following proviso:- *Provided always and it is hereby as the essence of the contract agreed as follows: that this policy only insures against death where accident within the meaning of the policy is the direct or*

> *proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."*
>
> The assured, while hunting, had a heavy fall, and the ground being very wet, he was wetted to the skin. The effect of the shock and the wetting was to lower the vitality of his system, and being obliged to ride home afterwards, while wet, still further lowered his vitality. The effect of this lowering of his vitality was to cause the subsequent development of pneumonia in his lungs, of which he died. The pneumonia was not septic or traumatic, but arose as a direct and natural consequence from the fact that the diminution or vitality caused through the accident, as above mentioned, allowed the germs called "pneumococci," which in small numbers are generally present in the respiratory passages, to multiply greatly and attack the lungs:-
>
> *Held*, affirming the judgment of Channell J., that the death of the assured was directly caused by accident within the meaning of the policy, and that the case did not come within the proviso therein, and the company were consequently liable on the policy."

Mr. Dennis Morrison Q.C., argued with great skill that the cases on fire insurance where there is an exception clause for explosives ought to be the guiding principle in the instant case. It follows therefore that he contended that the **Etherington** case should be distinguished. It is a serious submission brilliantly expounded, so it warrants examination. He took his cue from Ivanny where at note 7 on page 418 the learned author, after referring to

Etherington and **Accident Insurance Co. of North America v Young** 20 SCR 280 wrote:

> "It is not easy to reconcile these cases with the cases dealing with exceptions in a fire policy against explosion, In **Stanley v Western Insurance Co** (1868) LR 3 ExCh 71 (fire insurance), followed in **Re Hooley Hill Rubber & Chemical Co Ltd and Royal Insurance Co Ltd** [1920] 1 KB 257 at 264, CA (fire insurance), and **Curtis and Harvey (Canada) Ltd v North British and Mercantile Insurance Co** [1921]1 AC 303, PC (fire insurance)."

As previously stated Vaughan Williams L.J. in **Etherington** recognized that there might be some consistency with the fire insurance cases. He said at p.599:

> "I have not looked at the cases to see how they deal with the question of insurance against fire; but I should be inclined to think that if there was a fire insurance, and, a fire taking place, and fire engines being used to put out the fire, the contents of the building insured were destroyed more or less by the fire and more or less by the water thrown on the fire to put it out, the whole result would be one which might be expected to arise from a fire, and the fire would be the proximate cause of the destruction of the goods, though there had been the intervening deluging of the goods by the water used to put out the fire. See per Kelly C.B. in **Stanley v. Western Insurance Co.,** (1868) L.R. 3 EX. 71, at p. 74. I only, however give that as an illustration, and do not base my judgment upon it."

When the insured peril is fire and the exception is explosives, **Curtis's and Harvey (Canada) Limited, in Liquidation v North British and Mercantile Insurance Company, Limited** [1921] A.C. 303 is the leading case on this aspect of insurance.

In stating the facts Lord Dunedin emphasizes, that the policy holder manufactured explosives and in stating the law, he explained that explosives were not an insured peril by virtue of a precisely worded exclusion clause. The first passage runs thus at page 307:

> "The appellants are manufacturers of explosives and are the owners of works in which such explosives are made, and in particular, they were engaged in the manufacture of tri-nitro-toluol (hereinafter referred to as T.N.T.). They wished to insure their works against fire, and through their brokers they sent to the respondents, the North British and Mercantile Insurance Co., a slip on which were typewritten their requirements for insurance. These consisted of a specification of the various buildings wished to be insured, with the addition of terms on which they wished the insurance to be granted. Upon this the respondents issued a policy. The policy consisted of a printed form giving the general words of insurance against fire, leaving a blank for a specification of the premium, and leaving a large blank for the specification of the subject insured. This latter blank was filled up by pasting in a slip, or, as it is locally termed, an "allonge," which was a typewritten paper exactly echoing the proposal made by the broker. On the back of the form are the printed statutory conditions which, according to the law of Quebec, must be printed on every policy, and to which fuller reference will be presently made."

Then the ratio of the case runs thus at p. 312:

> "Their Lordships think that it is the policy of the statute to make a hard-and-fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk can also receive effect in so far

> as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect. This leads, though by a different line of reasoning, to the same result as reached by the learned judges of the King's Bench on the appeal. Their Lordships need only add that they agree with the appellate Court, differing from the trial judge that the condition is not in itself unreasonable."

The other fire insurance case cited were **Hooley Hill Rubber and Chemical Company Ltd.** [1920] 1 K.B. 237. The first point to note was that Douglas Hogg K.C. as he then was, at page 265 cited **Etherington's** case with no adverse comment.

Here again the special feature of fire insurance where explosives are excepted is highlighted in the judgment of Bankes L.J. He stated his judgment thus at p. 267-268:

> "The appellants were during the war manufacturing explosives at Ryecroft, Ashton-under-Lyne. With the intention of insuring themselves against loss or damage by fire they entered into contracts with various insurance companies including the Royal Insurance Co. Each company had its own form of policy and conditions, but on the particular point before us there was no material difference in the language of these instruments. Early in the second year of the insurance the amount of the premium was altered and a memorandum was indorsed on the policies in the same terms in each case relating to the liability of the companies in case of an explosion

> occurring at the appellant's works. The memorandum was intended to be supplementary to the conditions in the policies which already dealt with the case of explosion. During that year a very disastrous fire broke out, followed by an explosion which had the effect of putting out the fire but in itself did immense damage to the assured property. The companies admit liability for the damage done by fire before the explosion, but they contend that by the terms of their policies they are exempt from liability for damage resulting from the explosion, and the question is whether the companies' contention is well founded."

Then the learned Lord Justice continued thus:

> "The argument for the appellants is that the contract between the parties is a contract of indemnity against loss by fire, and that for ascertaining whether a particular loss has been caused by a risk insured against the general rule is that the proximate, effective, or efficient cause or, as it was called in **Leyland Shipping Co. v. Norwich Union Fire Insurance Society** [1918] A.C. 350, the dominant cause, is to be sought for; and that the fire which brought about the explosion was plainly the proximate, effective or dominant cause of the loss in this case. On the other side this general rule is not disputed, but another general principle is invoked, namely, that the parties may exclude the operation of a general rule in any particular case, and that in this particular case the general rule has been excluded in express and unambiguous language. The point to be decided is whether this contention of the insurance companies is or is not correct. In considering this question it must be borne in mind that these contracts of insurance were entered into by parties contemplating damage to property by fire, and that the introduction of any reference to explosion shows that they contemplated an explosion following on or causing a fire. An explosion without any antecedent or consequent fire does not seem to have been in the contemplation of the parties at all. The policy as originally drawn excluded loss or damage from explosion in these terms: "This policy does not cover

> .... Loss or damage by explosion, except loss or damage caused by explosion of illuminating gas . . . ." The exception of one particular kind of explosion from the general exclusion of explosives shows that the parties intended to exclude from the risks covered by the policy all kinds of explosion other than the one expressly excepted. This general exclusion of explosions, although altered, is not cancelled by the memorandum indorsed on each of the policies, which provides that "this policy does not cover loss or damage by explosion nor loss or damage by fire following an explosion unless it be proved that such a fire was not caused directly or indirectly thereby..." That memorandum shows even more plainly that the parties were contemplating and intending to exclude all classes of explosion as sources of loss or damage, and even fire following an explosion, unless the fire is proved to have ~~been~~ caused directly or indirectly by an explosion."

Scrutton L.J. was of the same opinion. He said at p.271:

> "The question is whether the terms of a particular policy entitle the appellants to recover the damage done by the explosion. The policy is not in its original form. During the first year of its currency in circumstances which we are not told, but which we can easily surmise remembering the number of munition factories that sprang up during the war, a special memorandum was indorsed on the policy. The policy in its original form insured the appellants from loss or damage "if the property shall be destroyed by fire." There is no express English decision whether by force of those words damage not directly caused by fire, but necessarily consequent on the fire, is recoverable; for example, damage from an explosion caused by a fire, or damage done by roofs and heavy beams or girders which fall in consequence of the fire where damage is done by the fall and not by the fire itself, though the fall is caused by the fire or by efforts made to extinguish it."

Dealing with the exclusion clause Scrutton L.J. said at p. 272:

"To see what damage, prima facie covered by the policy is excepted from the insurance, a printed condition relating to explosions and an added memorandum have to be considered. Fifty years ago it was submitted, as a possible construction of a similar clause excepting loss or damage arising from explosion, that it only shut out explosions where there was no antecedent fire. That was Mr. Quain's argument in **Stanley v. Western Insurance Co.** L.R. 3 Ex. 71. The Court of Exchequer decided against it. The result is that for fifty years there has been authority in England for construing condition 3 of this policy as excluding loss or damage from an explosion although it is the consequence of an antecedent fire. I feel bound to read the words of the condition in the light of existing English decisions. It would take a very strong case to induce me to give to the words a meaning different from that given to them by an English decision unquestioned for fifty years. I am not impressed by the fact that a different view has been taken by American Courts on American policies. Those Courts frequently differ from ours on the construction of mercantile documents. English Courts construe documents by the light of English decisions. In my view the loss or damage in this case was excluded by the effect of condition 3."

Duke L.J. said at page 273-274:

"I agree. The immediate cause of the damage in this case was an explosion through which the premises themselves and the fire which had broken out in them ceased to exist at the same time. The assured claim to recover because, as they say, the effective cause of the damage was the fire. It is not necessary to say what the result would have been if the case had rested on the words on the face of the policy or on those words together with the condition 3. The original position of the parties was modified by a memorandum the terms of which we have to consider. The memorandum provided that the policy should not cover loss or damage by explosion, nor loss or damage by fire following an explosion unless it were proved that, to put it shortly, the fire was

> independent of the explosion. What is the effect of excluding one of several kinds of damage which insurers might otherwise be bound to make good? I take it to be elementary that an exception such as this is an exception of something which would be in the policy if it had not been excepted. The intention then is to exclude loss by explosion which but for the exclusion would or might have involved the insurers in liability."

The analysis of these two fire insurance cases show that in both instances the policyholder was aware of the explosives as they manufactured them and the insurers took care to exclude explosion as an insurance peril by apt words. In the instant case the exclusion was ambiguous and the learned judge below by accepting **Etherington** so found, and that finding ought to be affirmed.

Was the finding by Cooke J. that there was a landslip justified by the evidence?

The learned judge in the Court below accepted the appellant's evidence on the issue of the landslip. The major report on this issue was prepared by Apex Consultants who retained the services of a geotechnical engineer from Civil Engineering and Research Ltd. to examine the matter.

The report from the geotechnical engineer, Mr. Andrew Irvine, ruled out the failure of the wall thus at page 23 of the Record:

> **"Wall Failure**
>
> This would involve the failure of the wall itself to withstand the active pressure of the material behind it and would usually result in the wall topping forward. This in our view is unlikely as a portion of the wall was still standing at the time of our visit, having

> moved outwards and downwards towards the road. This is further reinforced by the fact that the other section of the wall has fallen over backwards suggesting a failure of the material beneath it."

This is how the report describes the ground failure at page 23 of the Record:

> "**Ground Failure**
>
> This involves the shear failure of the soils directly beneath the wall itself and is a result of the bearing capacity of the soils being exceeded. The result is that the wall loses its underlying support and will either subside until it reaches firmer strata, as is the case with the section remaining vertical, or will cause the wall to collapse, as is the case with the western section of the wall. In our opinion the collapse is isolated and could not be considered a classic landslide due to a lack of certain features such as a scarp or a toe.
>
> In conclusion we believe that the collapse of the retaining wall was as a result of the soil having failed because the ground was super saturated. We further believe that this ground failure was a direct result of the bearing capacity of the underlying soils being exceeded by a combination of two factors, one, the increased loads imposed and two, the reduced shear strength of the underlying soil both as a result of the super saturation that occurred. It should be noted that the construction activity above which had the dual effect of reducing the protective vegetative cover and increasing the overland flows, was in our opinion the significant factor in increasing the levels of water behind the wall and saturating the soils."

The initial report by Apex Consultant Ltd. prepared by Mr. John Thompson a structural engineer ran thus at page 24 of the Record:

> "It is believed that the failure occurred because the ground beneath the retaining wall, under the influence of the weight of backfill, the wall itself, and construction over, sheared and adopted its natural angle of repose, sliding down the slope and taking the wall with it."

Then the report continues thus at page 25 of the Record:

> "This opinion is supported by the fact that one portion of the failed wall remains standing, but has moved outwards and downwards, while the portion which has collapsed has fallen over backwards with its footing closer to the road and the upper concrete block wall closer to the swimming pool. The failure is similar to other land slippages which have occurred in the foothills of St. Andrew where structures have been built too close to escarpments.
>
> It is probable that the shear strength of the ground was reduced by the heavy rain which occurred, but in our view the configuration of ground and wall was unstable with no safety factor against the effects of soil saturation and/or vibration."

Both experts Andrew Irvine, the geotechnical engineer and John Thompson a structural engineer, in addition to their reports gave evidence in Court and were cross-examined. The following extract from the evidence of Andrew Irvine was crucial to the finding of the learned judge. It occurs at page 62 of the Record:

> "If pure increase in active pressure and foundation soils has not failed the wall pushes forward. Evidence that wall slipped indicated that soil beneath wall that failed. It is a localized slip – slippage. Slip defined as soil movement. Slippage results from rotation – localized is discrete in that narrowly defined. I say localized slip because of the evidence I saw in respect to the failure of the wall."

Then his evidence continued thus on the same page:

> "First piece slid down exposing pretty face."

The finding of the learned judge below reads thus at p. 44 of the Record:

> "In evidence Mr. Irvine said the soil bearing capacity was exceeded and the proximate cause was the rainfall making the backfill heavier. His view was that there was a localized slippage which resulted from soil rotation.
>
> In respect of my assessment of the evidence I prefer the opinions given by witnesses for the Defence. Their evidence was blessed with clarity and precision and I hold that there was slippage."

In making the above finding the learned judge rejected the opinion of Mr. Neville Betty the expert for policyholder, and preferred Mr. Andrew Irvine the expert for the insurer. Betty's conclusion at page 10 of the Record ran thus:

> **"COMMENTS:**
>
> The active pressure on a retaining wall caused by the backfill is horizontal in nature. This pressure is resisted by the weight of the retaining wall together with the passive pressure developed by the depth of its foundation. The water in the backfill brought about by the continual rain increased the active pressure on the wall by a minimum of 50- percent. In our opinion, the increase in active pressure was more than the weight of the retaining wall or any increase in the passive pressure could withstand. The excess pressure overloaded the retaining wall causing it to topple over.
>
> The failure of the retaining wall is, in our opinion, not a case of soil slippage; but rather, the increase in active pressure behind the wall, overcoming the combined resistance of the weight of the wall and the

> passive resistance supplied by the depth of the wall foundation."

The report of Mr. Peter Jervis the structural engineer and expert for the policyholder states at page 13 of the Record:

> "In summary, it is evident that almost all of the backfill had been supersaturated because the downpour came before the drainage system had been completed, leading to severe lateral loading to the wall and consequent collapse. Most of the fill material essentially 'poured' down the slope exposing the original hillside profile in the vicinity of the pool. This may be ascertained by comparison with the undeveloped lot next door. The lower part of the wall is still in the virgin ground under the fill and may be considered for reconstruction. The remaining walls standing should be inspected for rotation and damage and may be redeemable."

Cooke J. stated his reasons for rejecting the evidence of Betty and Jervis. With respect to the evidence of Jervis the learned judge said at pp. 40-41 of the Record:

> "He was shown photographs and it is important that what he saw shown is what has been called 'pretty side' of the wall. The 'pretty side' is the side that is on the exterior. One thing that the 'pretty side up' demonstrated is that wall side did not topple over. In the face of this it seems that Mr. Jervis revised his position and instead of lateral loading he said the damage was caused by shear failure of the wall at ground level by super saturation of the backfill in respect of failure 1. His view is that other two portions of wall failed because the wall was linked by a beam across the top and with the collapse of the portion behind the top of the wall the ensuing tugging caused the other portions to collapse. The expert called Mr. Morrison had a different view and I accept that the way that Mr. Jervis said those parts of the wall failed is not acceptable as he would have one

> part of the wall going in an opposite direction to the others and this does not make sense."

As for Betty the learned judge said that he was unimpressive. The reasons he gave were as follows at page 42 of the Record:

> "He virtually agreed with Morrison's stance. In fact he regarded all the conclusions of the defendant's expert witnesses as possible. Perhaps the most useful part of his evidence was when he told us what soil slippage was. He said soil slippage occurs where one soil of less density overlies a denser soil and some exterior outside action operating on the overlying soil causes it to move over the underlying soil."

In **Oddy v Phoenix Assurance Company, Ltd.**[1966] 1 Lloyd's Law Report 134 at 139 Veale J. defines landslips thus:

> "Had it been necessary to make any finding on the point I would have held that this fall was a landslip. I do not think it would be right to describe it as a subsidence. Landslip is something which I think should be approached in a broad common-sense way much as a Jury would approach it. Landslip is a small land-slide. One can perhaps define a land-slip in different ways but the accepted definition was "A rapid downward movement under the influence of gravity of a mass of rock or earth on a slope" This was put to Mr. Brew and I think he agreed that that is exactly what happened here, because the land was held temporarily in position by the retaining wall, it was stopping it from slipping: when the pressure built up it pushed over the wall and there was nothing to stop the land slipping and it slipped and it was, in my view, a landslip."

Here is a crucial aspect of Betty's evidence under cross-examination at page 57 of the Record:

> "What you see in Exhibit 1 is pretty face of wall.

> Exhibit 2 – piece broke away from wall in picture pretty face shown.
>
> If subject to rolling – if topple over would see back of photographs not support toppling over.
>
> Agree one possible cause is pressure to base causing to pull forward on its back.
>
> What photograph appears to show is consistent with suggested possible cause.
>
> Not see body of wall dropped 8 feet (Jervis) Failure 3 Mr. Jervis No. 3 consistent with slippage. If Jervis is correct in failure not necessarily consistent with slippage. It could be slippage but not necessarily so."

Mr. Patrick Bailey for the policyholder did not seek to upset the findings of the Court below on the issue of slippage or landslip. Quite apart from that, the learned judge's findings were reasonable, in the light of the evidence.

It is now appropriate to address the grounds of appeal:

The Grounds of Appeal

The grounds read as follows:

> "1. That the Learned Judge erred in finding that on the evidence before him there had been a flood within the accepted meaning of that term as used in the policy of insurance between the parties on August 4, 1998 in the vicinity of Norbrook Mount in the parish of Saint Andrew.
>
> 2. That having accepted the evidence of the Defendant's experts that the damage to the Plaintiff's property resulted from landslip, the Learned Judge erred in declining to give effect to the policy exclusion of liability for damage caused by subsidence or landslip."

The learned judge relied on the dictionary meaning of flood, but he could equally have relied on the judicial gloss of the meaning of flood in the context of a peril covered by an insurance policy. Here is how three Lord Justices approached the issue in **Young v Royal Sun Alliance** [1976] 3 All E.R. 561. The first by Shaw L.J. is at page 563 which was cited by Cooke J.at page 39 of the Record. It states:

> "It is because the word 'flood' occurs in the context it does, that I have come to the conclusion that one must go back to the first impressions, namely that it is used there in the limited rather than the wider sense; that it means something which is a natural phenomenon which has some element of violence, suddenness or largeness about it."

Lawton L.J. stated his position thus at page 564:

> "I agree with Shaw L.J. that the issue of "flood" in ordinary English is some abnormal violent situation. It may not necessarily have to be sudden, but it does in my judgment have to be violent and abnormal."

Then to complete matters, Cairns L.J. (the Lord Justice presiding) said:

> "I think it is very largely a question of degree. Counsel for the defendants made it the main part of his concise argument before us that a flood involved a large quantity of water. That seems to me to be right."

So, whether relying on the dictionary meaning of flood, or the gloss put on it by judges in the context of an insurance policy, ground 1 in the Notice and Grounds of Appeal fails.

As for Ground 2 it is true that the learned judge accepted that there was landslip as found by the experts called by the Insurance Company. However,

as a matter of law he found that the dominant cause for collapse of the wall was due to "flood" as covered by the policy. He found that the "flood" preceded the landslip and that the landslip was merely incidental to the flood as a cause of damage to the wall. The equally convincing alternative approach is to find that the landslip in the context of the policy was ambiguous and could have any of three meanings described earlier and so it must be construed against the Insurance Company. Such is the true construction of the policy, and the result is that the insurer is liable for all the damages caused by the flood. Accordingly therefore, ground 2 of the Notice and Grounds of Appeal also fails.

In the light of the foregoing, the appeal is dismissed. The order below affirmed. The taxed or agreed costs of the appeal must go to the respondent, Cardoza.

BINGHAM J.A:

I have taken the opportunity to read in draft the judgment prepared in this matter by Downer, J.A. I wish to state that I agree with his reasoning and the conclusion reached that the appeal ought to be dismissed and the judgment of Cooke, J.A. be affirmed with the consequential order as to costs.

Given the very stimulating and interesting arguments which were presented during the appeal, I would just wish to add a few words of my own.

The outcome of the case below and of this appeal turned on two main issues viz:

(1) The primary facts

(2) The expert evidence

The facts were elicited from the viva voce evidence of the plaintiff/respondent David Cardoza. His account provided the material for the views advanced by the expert witnesses who gave evidence for the parties. The accounts of the respondent before Cooke, J. and these persons are fully set out and rehearsed in the judgment of Downer, J.A. and in that respect does not require any repetition on my part. As a starting point the evidence of Mr. Cardoza provided the basis for the critical finding by the learned trial judge of a flood; defining "flood" within

the ordinary dictionary meaning of that term. That situation was one of the perils which was covered by the terms of the householder's policy taken out by the respondent with the appellant company. This finding had its genesis from the uncontroverted account given by the respondent which related the events occurring leading up to the damage to the retaining wall and the swimming pool. This unnatural and extreme rainfall, the learned trial judge in my view, rightly found to be the primary cause of the damage which followed. In short, it was this occurrence which brought on or set in motion, the super saturation of the foundation of the wall eventually undermining the structure and resulting in the landslip with its consequential damage.

The critical question for the learned trial judge to determine therefore, was what was the primary cause of the resulting damage to the respondent's property at No. 2 Norbrook Mount?

This question without the primary facts elicited from the respondent Cardoza may have posed very challenging problems for the learned trial judge, given the differing opinions canvassed in the technical and expert evidence which he had to determine. Once, however, he was able to find as he did from the respondent's account, which he accepted as a credible narrative of the events occurring at the time of the incident, he was able to ground his judgment in the finding that there was a flood, and

that, it was the proximate cause of the loss (damage). The landslip or slippage as he termed it could then be viewed as an incidence of the flood, in short, the final link in the chain of circumstances brought about initially by the flooding. A common sense approach given the nature of the evidence in the case would be to ask oneself this simple question. As a reasonable passerby looking on, and given the account related by Mr. Cardoza, what was the cause of the damage which occurred? The answer would very well be, that the extreme rainfall had inundated the area where the property in ~~question was sited~~. The extent of that rainfall was what constituted the flood and "flood" was covered by the Policy of Insurance.

The fact of the landslip was the final factor which brought about the damage: this was not the proximate cause of the damage but a mere link in the chain of causation. The landslip was set in motion by the flooding that occurred.

It was in light of the above reasons that I also agree that the appeal be dismissed in terms of the orders as set out in the judgment of Downer, J.A.

Since reading the draft of the judgment prepared by Downer, J.A., I have taken the opportunity to examine the draft prepared by Panton, J.A. I am entirely in agreement with his reasons and the conclusion which he has clearly set out therein.

PANTON, J.A.

1 On October 11, 2001, Cooke, J. delivered judgment in favour of the respondent in the sum of $4,288,240 with interest at 16% from September 7, 1998, the date on which the appellant insurance company denied liability. This was in response to a claim by the respondent for $7.5 million against the appellant arising from a contract of insurance between the parties. In this appeal, it is sought to set aside that judgment and to substitute a judgment in favour of the appellant.

2. There is no dispute that the respondent owns property at 2 Norbrook Mount, St. Andrew, and that on that property are a dwelling-house , a swimming pool and a retaining wall. The appellant, which is a company carrying on the business of insurance, entered into a contract in writing with the respondent to insure the said property and to indemnify the respondent against certain specified loss or damages, namely, damage caused by storm or tempest, gale, hail, hurricane, tornado, tidal wave, windstorm and flood caused by the said perils.

3. The maximum value of the loss which the appellant agreed to indemnify the respondent against was $19.5 million for the period June 2 to December 1, 1998. The respondent paid premium of $39,000 to secure this coverage. There was an exclusion clause in the contract in respect of subsidence or landslip. At

the time of the contract, the dwelling-house was at an advanced stage of construction.

4. It is admitted that on August 6, 1998, that is, during the contract period, there was persistent and heavy rainfall in and around the Norbrook Mount area. However, whereas the respondent claimed in his statement of claim that there was also windstorm and consequential flooding and flood waters, the appellant's response was a denial of this state of affairs. The appellant further denied that there was any recoverable loss as a result of windstorm, flood or any other peril indemnified under the insurance policy. It is admitted that the retaining wall and swimming pool were among the property insured and that those structures were insured at agreed values of $5 million and $2.5 million respectively - hence the claim for $7.5 million.

5. In his judgment, Cooke, J. said he was persuaded to the view that there was a flood as defined in the 8th edition of the Concise Oxford Dictionary. That definition is: "an overflow or influx of water beyond its normal boundaries: an inundation". He went on to say that the critical question for the determination of the Court was whether the damage had been caused by flood, so defined. After a review of the evidence of the experts called by the parties, the learned judge expressed a preference for the opinions of those called by the appellant on the basis that "their evidence was blessed with clarity and precision". He then held that there was "slippage". This is how he put it: "As I held that there was flooding I now hold there was slippage. This slippage was the last factor leading

to damage". In expanding his reasons, he said that it was beyond debate that if there was no flooding there would have been no landslip. The learned judge then concluded his reasons thus:

> "I regard the slippage as the final step. The prior flooding in my view is the proximate cause. Without the flooding there would have been no slippage without which damage would not (have) occur(red). Slippage was the direct result of flooding. I find it curious that exclusion of landslip was not put in the context of flooding".

6. The appellant has challenged the judgment on two grounds:

   (i) that the learned judge erred in finding that on the evidence before him there had been a flood within the accepted meaning of that term as used in the policy of insurance between the parties on August 4, 1998, in the vicinity of Norbrook Mount in the parish of Saint Andrew; and

   (ii) that having accepted the evidence of the defendant's experts that the damage to the plaintiff's property resulted from landslip, the learned judge erred in declining to give effect to the policy exclusion of liability for damage caused by subsidence or landslip.

7. Mr. Morrison, Q.C., for the appellant, condensed the issues thus:

   - was there a flood?
   - if there was a flood, was the loss excluded?

He advanced the view that the authorities suggest that on the evidence before the learned trial judge there was no flood in that there was no sudden violent eruption of water. Further, he said, referring to the finding that there was slippage which caused the damage, it does not follow that if there was no

flooding there would not have been any slippage. He submitted that the finding of flooding was an unreasonable one. If he were wrong on that submission, he submitted that the finding that there was landslip was sufficient to bring the case within the exception. The judge, he said, should then have entered judgment in favour of the appellant.

8. Mr. Bailey, on the other hand, submitted that the judge's first task was to decide what was a flood. He agreed with the judge's use of the dictionary definition, and submitted that the word "supersaturation" (used by the experts) can be interchanged with "inundation". For the purposes of the policy, once the soil is supersaturated or inundated, flood conditions exist, he submitted. The damage, he said, was caused by the flood and the landslip was caused by the flood. The slippage was the last factor leading to damage.

Mr. Bailey was of the view that there was sufficient evidence given by the respondent and the several experts to allow the learned judge to comfortably conclude that there had been a flood which caused the damage that was proven.

9. The evidence of the respondent was that there had been very heavy rainfall for an entire day, and that the insured premises were "flooded with water"; "high up water running down hill and into no.2" (page 49 of the record). Peter Jervis and Associates, consulting engineers, prepared a report on the damage a mere four days after the occurrence. The aim of this report was to determine the cause of the collapse of the retaining wall as well as related

damage to the remaining structures. The report summarized the situation in relation to the collapse of the retaining wall thus:

> "...it is evident that almost all of the backfill had been supersaturated because the downpour came before the drainage system had been completed, leading to severe lateral loading to the wall and consequent collapse. Most of the fill material essentially 'poured' down the slope exposing the original hillside profile in the vicinity of the pool".

In respect of the pool, deck, pump room and gym, the foundations which were originally set in the backfill have been fully undermined. The report continues:

> "There is no economical way to recover the plump and level, and structural integrity of the severely deflected walls and deck, so this section of the structure has to be replaced. The fact that this level of failure did not transmit through the rest of the structure gives good testament to the quality of the virgin ground's bearing capacity, as well as the construction of the pool".

Mr. Jervis was called by the respondent and , in his viva voce evidence, he expressed the view that he did not believe that landslip or subsidence caused the damage to the wall.

10. Mr. Neville Betty, a civil engineer, also gave evidence at the instance of the respondent. Prior to that, he had commented in writing that the water in the backfill brought about by the continual rain increased the active pressure on the wall by a minimum of 50%. This increase in active pressure overloaded the retaining wall causing it to topple over. This was not a case of soil slippage, he

said. Under cross-examination, however, Mr. Betty said that the failure of the wall "could be slippage but not necessarily so".

11. The evidence of Messrs Jervis and Betty, taken as a whole, laid the cause of the collapse to the large movement of water resulting in:

(a) saturation;
(b) undermining of the backfill; and
(c) increased pressure on the wall.

The learned judge rejected Mr. Jervis on the basis that he had given contradictory opinions as to the cause of the collapse of the various parts of the wall. So far as Mr. Betty was concerned, the learned judge was not impressed with him as a witness. However, he did find a portion of Mr. Betty's evidence useful. This was in respect of "soil slippage". Mr. Betty, it should be noted, had described himself as managing director of Hill Betty (Engineers) Limited, specializing in soil and aggregate testing. He had been from 1965 to 1970 a soil engineer employed to the Public Works Department. He is a consultant in the assessment of soil, its bearing capacity and composition. In his written report, Mr. Betty had described himself as a soils and materials engineer. It should be noted that Mr. Betty did not test the soil in question; his comments were based on observation.

12. The learned judge expressed a preference for the opinions of the experts called by the appellant. Firstly, in a report dated the 10th August, 1998, Mr. John Thomson, an engineer since 1951, stated that it is probable that the shear strength of the ground was reduced by the heavy rain which had occurred. He

attempted to qualify his position by saying that the configuration of ground and wall was unstable with no safety factor against the effects of soil saturation and or vibration. In his viva voce evidence, he stated that after examining the collapse his conclusion was that the ground below the retaining wall had failed and allowed it to slide downhill, base and all:

> "The wall failed because ground beneath and behind it lost its strength resulting in movement ground and wall it supported - influenced by saturation",

he said. Secondly, Mr. Andrew Irving, a geotechnical engineer of Civil Engineering Research and Testing Ltd, formed the opinion that the collapse was isolated and

> "...could not be considered a classic landslide due to lack of certain features such as a scarp or a toe".

His view was that the collapse of the wall was as a result of the soil having failed because the ground was supersaturated; and

> "...the ground failure was a direct result of the bearing capacity of the underlying soils being exceeded by a combination of two factors, one, the increased loads imposed and two, the reduced shear strength of the underlying soils both as a result of the supersaturation that occurred. It should be noted that the construction activity above which had the dual effect of reducing the protective vegetative cover and increasing the overland flows, was in our opinion the significant factor in increasing the levels of water behind the wall and saturating the soils".

13. The appellant's reliance on **Young v. Sun Alliance and London Insurance Ltd** [1976] 3 All ER 561 is misplaced. It is so because the flood in that case was something which had come about "by seepage or by trickling or

dripping from some natural source" (p.563f) and the Court had there held that in the context of the policy a flood was intended to mean some abnormal occurrence, that is, a large movement or an irruption of water and not mere seepage from a natural source. In the instant case, that there was a violent and large movement of water over a considerable area for an extended period cannot be doubted, based on the evidence of the respondent. In **Young v Sun Alliance** (supra), the covered peril included loss, destruction or damage from 'storm, tempest or flood' whereas in the instant case, it is loss or damage directly caused by 'storm or tempest, gale, hurricane, cyclone, windstorm, flood, seawave or tidal wave' as well as "flood" by itself. In the instant case, the violent and abnormal situation spoken of by Shaw, LJ at page 563h (in **Young v Sun Alliance)** as being characteristic of a flood has been more than satisfied.

14. The appellant also cited **Anderson v. Norwich Union Fire Insurance Society Ltd** (1977) 1 Lloyd's Law Reports 253 and **Oddy v. Phoenix Assurance Co. Ltd** (1966) 1 Lloyd's List Law Reports 134 both of which do not seem to take the arguments advanced any further. In the former, the Court of Appeal of England dismissed an appeal against a finding that none of the damage complained of was shown to have been caused by the risk insured against. At page 254, Cairns, L.J. said:

> "It would appear that the way the plaintiff was putting his case was based on the contention that this was a storm, because that is the way that Judge Richards dealt with it all the way through. After the judgment had been concluded and when costs were being discussed, the plaintiff very properly drew the

> Judge's attention to the fact that the insurance was not only against storm but also against flood...and the Judge made it clear that even on the basis of flood he would still dismiss the claim. The reasons for that appear from the part of the judgment following his decision that in his view a heavy fall of rain was not a storm, because the Judge went on to say: "Assuming it was a storm" - and it might equally well be said, "Assuming it was a flood" - "had the plaintiff established that the heavy rain caused the damage?". He came to the conclusion that he had not established it".

In the latter case, Veale, J. at first instance held that the wall was insufficient in design and collapsed from pressure of water which built up behind it over a long period of time, and that no violent wind had caused any part of the wall to fall. At page 136, he said : "There is no doubt that it was a thoroughly unstable wall".

15. Finally, consideration has to be given as to whether the loss was directly caused by the flood, as required by the policy. The appellant has contended that the exception clause prevails in that there was a landslip as found by the judge. In his judgment, the learned judge expressed himself in a way which suggested that he felt the case **In re Etherington and the Lancashire and Yorkshire Accident Insurance Company** [1909] 1 K.B.591 provides the answer so far as causation was concerned. He relied on a passage at page 599 in the judgment of Vaughan Williams L.J. which reads thus:

> "The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train

> of events must be regarded as the proximate cause of the death which results".

In that case, an insurance policy covered death within three months of the assured suffering any bodily injury caused by violent, accidental, external and visible means. It excluded from coverage death resulting from disease or other intervening cause even though the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby. The assured fell while hunting. He suffered shock which coupled with wetting from the ground on which he had fallen resulted in a lowering of his vitality, and the development of pneumonia. The Court of Appeal in England affirmed the judgment of Channell, J. that the death was directly caused by accident within the meaning of the policy, and that the case did not come within the proviso therein.

Vaughan Williams L.J., having reviewed the facts, said at pages 598 to 599:

> "Under these circumstances, I really do not think I need trouble myself with going at length into the cases to see how the Courts have in particular cases dealt with the question whether the peril insured against, whether peril of the sea or accident or fire, or whatever it might be, was the proximate cause of the loss or injury so as to bring the case within the operation of the policy. In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident".

16. In my opinion, the learned judge was not in error when he held that the loss suffered by the respondent in this case was covered by the terms of the

policy, and that the exception clause was of no moment. Here was a situation in which the insurer took the risk in respect of property where construction was still in progress. There was flooding of the property which resulted in landslip and damage. It is my view that the landslip referred to in the policy as excluding liability is not such as relates to flooding: it is landslip that occurs naturally in the movement of the land due for example to location and gradient. I am in agreement with my learned brothers that the appeal should be dismissed with costs being awarded to the respondent.

ORDER

DOWNER, J.A.

Appeal dismissed. Costs to the respondent to be taxed if not agreed.