

Property Insurance Update

December 2009

Special update: UK flood claims – future trends

With more rain and widespread damage in Cumbria recently, severe flooding is becoming a common occurrence in the UK. This report looks at the increasing flood risk, what “flood” means in legal terms, and Government aims to reduce and manage the risks that floods pose.

The increasing flood risk

Climate change – crescendo up to Copenhagen in December.

A new report commissioned by the ABI in the run-up to Copenhagen and published on 3 November, “The Financial Risks of Climate Change,” considers the implications of increases in temperature of two, four and six degrees. The main result for the UK is more rain and associated inland flooding. Wales and the South West could be worst affected.

The most common causes of flooding in the UK are: [More...](#)

Case notes

Defining the peril

The following cases look at how the courts have interpreted the word “flood” in insurance policies and construction contracts.

Young v Sun Alliance and London Insurance Ltd. (C A 1977)

The plaintiff’s house had been built on meadow land. [More...](#)

Computer & Systems Engineering PLC v John Lelliott (CA 1991)

Damage caused by escaping water from a fractured sprinkler system was caused... [More...](#)

Rohan Investment Ltd v Phillip Cunningham and Others (CA 1998)

The appellants were the buildings and contents insurers of the respondents’ premises in London which suffered considerable damage [More...](#)

Tate Gallery Board of Trustees v Duffy Construction Ltd (TCC 2007)

This involved a contract to carry out the hard landscaping involved in a major upgrade of the Tate Gallery. [More...](#)

Changes in the law

An EU Floods Directive published two years ago aims to reduce and manage the risks that floods pose to human health, the environment, cultural heritage and economic activity. Closer to home there is a draft Flood and Water Management Bill, published in April 2009, which aims to give effect to the UK Government’s response to Sir Michael Pitt’s Review, ‘Learning Lessons from the 2007 Floods’ and ‘Future Water,’ the UK Government’s Water Strategy for England published in February 2008. [More...](#)



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As part of our commitment to corporate social responsibility we are proud to support The Anthony Nolan Trust as our current Charity of the Year (www.anthonynolan.org.uk).

This is a summary of recent developments. It should not be regarded as a substitute for advice on how to act in any particular case. For further information please contact one of the authors.

The increasing flood risk

Climate change – crescendo up to Copenhagen in December.

A new report commissioned by the ABI in the run-up to Copenhagen and published on 3 November, “The Financial Risks of Climate Change,” considers the implications of increases in temperature of two, four and six degrees. The main result for the UK is more rain and associated inland flooding. Wales and the South West could be worst affected.

The most common causes of flooding in the UK

- **River flooding:** occurs when a watercourse cannot cope with the water draining into it from the surrounding land. This can happen, for example, when heavy rain falls on an already waterlogged catchment.
- **Coastal flooding:** results from a combination of high tides and stormy conditions. If low atmospheric pressure coincides with a high tide, a tidal surge may happen which can cause serious flooding.
- **Surface water:** flooding occurs when heavy rainfall overwhelms the drainage capacity of the local area. It is difficult to predict and pinpoint, much more so than river or coastal flooding.
- **Sewer flooding:** occurs when sewers are overwhelmed by heavy rainfall or when they become blocked. The likelihood of flooding depends on the capacity of the local sewerage system. Land and property can be flooded with water contaminated with raw sewage as a result. Rivers can also become polluted by sewer overflows. Remediation costs are higher with this kind of flooding.
- **Groundwater:** flooding occurs when water levels in the ground rise above surface levels. It is most likely to occur in areas underlain by permeable rocks (aquifers). These can be extensive, regional aquifers, such as chalk or sandstone, or may be more local sand or river gravels in valley bottoms underlain by less permeable rocks. This is not a significant source of flooding in Wales.

Dams, canal embankments etc.

Failure of these is less common, but they can cause major incidents. Many of these structures are old and in need of increasing maintenance. Short cuts may be taken in the current economic climate.

Changes in land use

- Building on flood plains
- Farmers filling in ditches
- Concreting over large areas
- Allowing developments to connect to already overloaded sewers (England – not permitted in Scotland, for example)



[Back to contents](#)

Limitations of the Environment Agency's flood map

[Back to contents](#)

The Environment Agency's Flood Map for England and Wales is published on the internet at www.environment-agency.gov.uk

Currently the Environment Agency can supply only flood risk data relating to the chance of flooding from rivers or the sea.

Recent CII talk - Lord Smith, Chairman of the Environment Agency

In 2007 insurers had to deal with over 165,000 claims, equivalent to four years' worth of claims in one year. 15,000 households required alternative accommodation.

Lord Smith's message: The Environment Agency's part is to improve resilience and resistance to flooding; insurers' part is to provide incentives which the EA cannot. He compared the situation with the 18th century when insurers developed fire insurance, with the use of fire marks on properties.

He said we were experiencing a "new kind of rain" – hitherto there has tended to be a curtain of rain passing from west to east; now there are more instances of large amounts of rain in single locations, for example, in 2007 Hull, Tewkesbury, Doncaster and Gloucester. Climate change will exacerbate this.

Looking specifically at London's flood risk, the Thames Barrier, installed in the 1980s, is thought capable of doing its job for another 70 years with minor adjustments and proper maintenance. It is raised five or six times a year – more than in the past. However, it protects only from tidal floods. It provides no protection from other causes of flooding, eg river flooding, surface water flooding, inadequate drainage. It gives people a false sense of security, so they are not adequately prepared.

London already has a problem with floods. Four underground stations were closed this summer due to flooding: Victoria, Edgware Road, Paddington and Hyde Park. There are major infrastructure risks. There are, for example, some 1,000 electricity substations. Then of course there are the consequences for business in the country's leading commercial centre.

Plans are now being developed to manage London's surface water, as a cross-borough initiative. Concreting over land, for example, now requires planning permission, and superstores are being encouraged to have car parks which rain can drain through to the land beneath rather than to a watercourse or drain.

The EA is encouraging insurers to do the following:

- Assist in the rebuilding of flooded properties so that they can be more resistant and resilient (and potentially more saleable)
- Reduce premiums and excesses where people have protected their homes, and signed up to the EA flood alert system
- Keep up the work of the ABI's Property Committee's research on long term agreements for flood cover

[Back to contents](#)

Case notes

Defining the peril

The following cases look at how the courts have interpreted the word “flood” in insurance policies and construction contracts.

Young v Sun Alliance and London Insurance Ltd. **(CA 1977)**

The plaintiff’s house had been built on meadow land. He insured it with the defendants under a householder’s policy which gave protection by paragraph 8 against loss, destruction or damage from “storm, tempest or flood” and by paragraph 9 from “Escape of water from or frost damage to any water, drainage or heating installation.” In 1973 water entered the downstairs lavatory and it rose to a depth of three inches. It was found that the water was due to the diversion beneath the lavatory of some natural source of water. The plaintiff had elaborate repairs carried out and claimed an indemnity from the defendants on the ground that the water was a “flood” within paragraph 8 of the policy. The key passages from the judgment are:

“...it seems apparent that what the policy was intending to cover, whatever may be the colloquial use of the word “flood” in common parlance, were three forms of natural phenomena which were related not only by the fact that they were natural, but also that they were unusual manifestations, certainly of those phenomena: that is to say, “storm” meant “rain accompanied by strong wind”; “tempest” denoted an even more violent storm; and “flood” was not something which came about by seepage or by trickling or dripping from some natural source, but involved “an overflowing or irruption of a great body of water” as one of the definitions in the Shorter Oxford English Dictionary puts it. The slow movement of water, which can often be detected so that the loss threatened can be limited, is very different from the sudden onset of water where nothing effective can be done to prevent the loss, for it happens too quickly.

“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 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.”

“...the phrase in the policy is “Storm, tempest or flood,” and ... the word “flood” is used as a word in ordinary English usage to cover a situation which may be very different from the situations to which the words “flooded” or “flooding” are appropriate. ...It is not without relevance that paragraph 9, the next paragraph in the policy, refers to the “Escape of water from or frost damage to any water, drainage or heating installation.” So “flood” is something different for the purposes of this policy from an “escape of water.”

As a result, the water in the lavatory was not a flood.



[Back to contents](#)

[Back to contents](#)

Computer & Systems Engineering PLC v John Lelliott (CA 1991)

Damage caused by escaping water from a fractured sprinkler system was caused neither by “flood” nor “bursting of pipes” within clause 22C:1.3 JCT Standard Building Contract (1980 Edition). In the context of the condition in the contract “flood” imported the invasion of the property by a large volume of water caused by a rapid accumulation or sudden release of water from an external source usually, but not necessarily, confined to the result of a natural phenomenon such as storm, tempest or downpour. The bursting of tanks, apparatus or pipes was confined to the rupture of tanks, apparatus or pipes from within, typically caused by the exertion of forces such as expansion or pressure within the vessel or pipe itself.

Rohan Investment Ltd v Phillip Cunningham and Others (CA 1998)

The appellants were the buildings and contents insurers of the respondents’ premises in London which suffered considerable damage in January/February 1995 when water flowed into the property having accumulated on the flat roof of the premises. There had been three to four inches of water on the roof on 30 January 1995 which had probably accumulated since 15 January and had resulted from the blockage of the drainage outlet by leaves and twigs. A large volume of water had entered the property either over the top of the flashings or through some defect in the flashings.

The Court of Appeal decided:

- The word “flood” should be given its ordinary and natural meaning and the criteria in the Young case and in the Computer Systems case should not be rigidly applied.
- The question as to whether a flood had caused the damage was a question of degree taking into account the size and character of the premises.
- Flooding could be the result of weather extremes or as a result of a slow build up of water. It need not necessarily result from a natural phenomenon. In considering whether there had been a flood it was the water which entered the property and caused the damage which should be examined and not the volume of water outside or its source.
- A flood is a flood whatever its originating cause and the fact that the outlet had been blocked did not change that.

Tate Gallery Board of Trustees v Duffy Construction Ltd (TCC 2007)

This involved a contract to carry out the hard landscaping involved in a major upgrade of the Tate Gallery. The water main supplying the site was damaged, and Duffy was instructed to repair it, which involved reconnection of the flexible pipe conveying water from the main to the site. The connection assembly included a coupling and a valve. During a long weekend when the valve was shut, fluctuating water pressure and the lack of external restraint caused the coupling to slide away, allowing water to escape. The water had filled a large hole which Duffy had excavated and then entered the basement of the gallery through vents and stairways, filling it to a depth of 1.4 metres.

[Back to contents](#)

[Back to contents](#)

[Back to contents](#)

Tate's insurance policy in respect of the project extended cover to all trade contractors, including Duffy, for loss or damage due to specified perils as defined in the 1980 JCT standard form of building contract, including "flood" or "bursting or overflowing of water tanks, apparatus or pipes".

The judge decided:

- Two pipes joined by a coupling collectively constituted a "pipe", and on the facts pleaded there had been a "bursting" for the purposes of the contract. There must have been a specific moment at which the integrity of the system was broken and the water began to escape. Whether there had been the same degree of violence which normally attended a "burst" was a relevant consideration but did not change the character of the event. The crucial features were the build-up of internal pressure and the separation of the unit into its composite parts.
- Given the huge volume of water involved, the way in which it had entered the building, the abnormality of the event, the area and character of the property and despite the fact that the water did not come from a natural event such as a rainstorm, there had been a "flood" for the purposes of the contract.

Changes of approach to "flood"

No doubt as a result of uncertainty following these decisions, many insurers are getting away from using the word "flood" altogether. In an all risks policy a typical exclusion might be as follows:

- Excluding destruction or damage by:
 - (a) the escape of water from the normal confines of any natural or artificial water course (other than water tanks, apparatus or pipes) or lake, reservoir, canal or dam;
 - (b) inundation from the sea
- (whether resulting from storm, tempest or otherwise)

It is worth briefly revisiting the five common causes of flooding to see what this would exclude:

- River flooding – excluded
- Coastal flooding – excluded
- Surface water flooding – not excluded
- Sewer flooding – depends on a sewer being an "artificial water course", and also on what has escaped being "water" – sewage probably not excluded
- Groundwater flooding – this would depend on an aquifer being a water course, which is not necessarily a straightforward issue

In conclusion, it may be worth considering linking insuring clauses and exclusions to the different sources of flooding, rather than relying on the use of everyday English words which as we have seen have been the subject of rather different approaches by the courts.

[Back to contents](#)

Changes in the law

[Back to contents](#)



An EU Floods Directive published two years ago aims to reduce and manage the risks that floods pose to human health, the environment, cultural heritage and economic activity. Closer to home there is a draft Flood and Water Management Bill, published in April 2009, which aims to give effect to the UK Government's response to Sir Michael Pitt's Review, 'Learning Lessons from the 2007 Floods' and 'Future Water,' the UK Government's Water Strategy for England published in February 2008.

The Directive

The Directive requires member states to carry out a preliminary assessment by 2011 to identify the river basins and associated coastal areas at risk of flooding. They then need to draw up flood risk maps by 2013 and establish flood risk management plans focused on prevention, protection and preparedness by 2015.

The Directive, rather like the Environment Agency's flood map, does not appear to deal with surface water, sewers or ground water.

The Flood and Water Management Bill

The Bill featured in the Queen's Speech on 18 November 2009, and it appears likely, whether or not this Government brings it in or the Conservatives, that it, or something like it, will become law. The intention is for it to:

- deliver improved security, service and sustainability for people and their communities
- be clear who is responsible for managing flood risk
- protect essential water supplies
- modernise the law for managing flood risk and reservoir safety
- encourage more sustainable forms of drainage
- enable water companies to control more non-essential uses of water during droughts
- make it easier to resolve misconnections to sewers.

Here are three comments that have been made about the Bill

The Association of British Insurers: *"Managing the UK's rising flood threat better is crucial for the five million properties at risk of flooding. It is also essential to ensure that flood insurance remains widely available. We welcome this Bill, which should represent an overhaul in flood management and which we have long campaigned for. Its progress into law should be a priority."*

The Country Land and Business Association: *"The huge challenge is ensuring that local authorities have funding to manage flood risk and maintenance at a local level, this issue needs some serious commitment to fill the expertise and knowledge gap."*

[Back to contents](#)

continued overleaf



Changes in the law continued...

The Environment Agency: *“...a clear division of executive roles, with the Environment Agency taking a strategic overview position, is needed while local authorities deal with local flood risk management. This is key to ensuring that the system works for all involved.”*

Any effect on subrogation?

It is too early to say whether the Bill will make it easier for those who have suffered from flooding to recover damages, but anything which clarifies the responsibility for managing flood risk must make this more of a possibility. In the background, of course, the law of tort – nuisance, negligence, *Rylands v Fletcher*, breach of statutory duty – continues to provide subrogation opportunities in appropriate cases.

[Back to contents](#)