



SUPREME COURT OF NORWAY

J U D G M E N T

given on 7 November by the Supreme Court composed of

Justice Bergljot Webster
Justice Per Erik Bergsjø
Justice Arne Ringnes
Justice Ingvald Falch
Justice Thom Arne Hellerslia

HR-2024-2040-A, (case no. 24-011351SIV-HRET)
Appeal against Agder Court of Appeal's judgment 24 November 2023

Å Energi Vannkraft AS

(Counsel Johnny Johansen)

Renewables Norway (intervener)

(Counsel Runar Hansen)

v.

Tryg Insurance NUF

(Counsel Bjarne Andreas Meidell)

(1) Justice **Ringnes:**

Issues and background

- (2) The case concerns a claim for insurance payment after damage to a hydropower plant. The question is whether the insurance term “sudden and unexpected damage” is met.
- (3) Rygene power plant is a run-of-river power plant by the Nidelva River in Grimstad municipality. The power plant was established in 1978 and was previously owned by Agder Energi AS. Following the merger between Agder Energi AS and Glitre Energi AS in the autumn of 2022, Å Energi Vannkraft AS (Å Energi) became the owner.
- (4) The power plant was insured with Tryg Forsikring NUF (Tryg) during the period from 2016 to 2021.
- (5) During an inspection of the power plant on 13 December 2019, an abnormal sound was heard from the runner chamber, and the turbine was stopped for further examination. Several cracks were detected in the runner chamber, and the two halves of the chamber had shifted and slid apart. This caused the turbine blades to hit the wall and make an abnormal sound. Closer examination revealed that water had entered the back of the chamber. Consequently, large sections of the concrete had crumbled away, and the ribs, screws and other fastening equipment had loosened and/or rusted to pieces.
- (6) The power plant was shut down for further investigations and repairs. The entire turbine with the runner chamber had to be replaced, and casting was necessary at the back of the chamber. The power plant was therefore shut down from 19 December 2019 to mid-February 2021. The costs amounted to approximately NOK 48 million for repairs and NOK 29 million for operational interruption, totaling approximately NOK 77 million.
- (7) The damage was reported to Tryg on 30 December 2019. Tryg engaged Envista Forensics, which carried out inspections and investigations at the power station. Envista’s damage report concluded that the runner chamber’s malfunctioning necessitating its replacement was due to a “long-term degradation rather than a single catastrophic event”.
- (8) Å Energi engaged Sweco Norway AS. Sweco, too, concluded that the damage to the equipment had developed over time – slowly in the beginning and rapidly in the final phase. Sweco also stated that the damage could only be detected in the final phase. Even after thorough inspections, it would have been almost impossible to detect it earlier.
- (9) On 28 May 2021, Tryg rejected Å Energi’s claim for insurance coverage, stating that the damage did not occur during the insurance period and did not meet the insurance agreement’s requirement of being sudden physical damage.
- (10) On 22 June 2022, Å Energi brought an action against Tryg claiming payment of NOK 77,286,353 plus interest on overdue payments. Tryg disputed the claim.
- (11) On 13 April 2023, Agder District Court found in favour of Tryg. Å Energi was ordered to pay costs of NOK 1,672,451 to Tryg.

- (12) The basis for the ruling was that the damage had developed over time and led to gradual deterioration of the runner chamber. In the District Court’s view, this could not be considered sudden physical damage.
- (13) Å Energi appealed to the Court of Appeal. Renewables Norway intervened in support of Å Energi.
- (14) On 24 November 2023, Agder Court of Appeal ruled as follows:
- “1. The appeal is dismissed.
 2. Å Energi Vannkraft AS represented by the chair of the board is, within two weeks of service of the judgment, to pay to Tryg Insurance NOK 1,953,286 in Court of Appeal costs.
 3. Renewables Norway represented by the chair of the board is, within two weeks of service of the judgment, to pay to Tryg Insurance NOK 100,350 in Court of Appeal costs.”
- (15) The Court of Appeal’s reasoning was mainly the same as that of the District Court.
- (16) Å Energi has appealed to the Supreme Court. The appeal concerns the application of the law and the findings of fact. Renewables Norway has intervened in support of Å Energi.
- (17) The justice responsible for the preparation of the case has decided to limit the appeal, for now, to the question of whether “sudden damage” has occurred, see section 30-14 subsection 3 of the Dispute Act.
- (18) Written statements from the parties and expert witnesses have been submitted, but the circumstances of the case are essentially the same as in the Court of Appeal.

The parties’ contentions

- (19) The appellant – *Å Energi Vannkraft AS* – contends:
- (20) Å Energi is entitled to insurance coverage for the costs of replacing the turbine including the runner chamber and for the operational interruption loss. The damage was an engine collapse due to internal causes, which occurred suddenly and unexpectedly.
- (21) The parties agree that the cause of the damage was the gradual deterioration of the support structure at the back of the runner chamber due to years of erosion and corrosion, and that this led to the collapse of the runner chamber itself.
- (22) It was not possible to detect the erosion and corrosion as it progressed, and the damage was highly unusual and completely unexpected.
- (23) The gradual deterioration of the runner chamber is the *cause* of the damage, but the *actual physical damage* is the collapse of the runner chamber, which occurred over a short period of time, and was thus “sudden” under the insurance terms.

- (24) The term “sudden” refers to the manifestation of the damage, which is the moment when the damage objectively became apparent to the outside world. In a natural linguistic understanding, the expression refers to damage that appears suddenly, i.e. without warning.
- (25) When interpreting the insurance agreement, it is of significance that it is an “all risk” insurance.
- (26) Gradual deterioration due to rust or other corrosion may be the *cause* of sudden and unexpected physical damage. This follows from section 4.4.9 of the insurance terms.
- (27) Invisible deterioration within the machine, typically material fatigue, wear and corrosion is common, and being insured against this type of damage is economically crucial. If the insurance does not cover such damage, the policy essentially becomes an accident insurance against external influences. The *purpose* of the term “sudden” is to delimit the coverage against damage that the policyholder has a reason to prevent and avert. This substantiates that the insurance must cover damage that cannot be detected.
- (28) Å Energi’s interpretation also has support in Court of Appeal case law and in practice from the Financial Services Complaints Board.
- (29) Å Energi Vannkraft AS asks the Supreme Court to rule as follows:
- “1. The Court of Appeal’s judgment is set aside.
 2. Å Energi is awarded costs in the Supreme Court.”
- (30) The intervener – *Renewables Norway* – supports Å Energi’s contentions and emphasises:
- (31) Material fatigue that develops over time and abruptly leads to damage is typical for the power industry. According to a clear and long-term industry practice, the term “sudden and unexpected damage” includes gradual damage that leads to a sudden and unexpected collapse. This is supported by the two expert witnesses’ statements and the statement from Å Energi’s insurance broker. It is also substantiated by the presented overview over settlement practice, including Tryg’s, which must be given weight in the interpretation.
- (32) The Court of Appeal’s interpretation of the insurance terms implies that the main risk for power plant owners – which is interior damage – will not be covered. In that case, Tryg will only cover damage caused by exterior factors, which will be contrary to the “all risk” concept.
- (33) Financial Services Complaints Board practice is not clear, and several rulings decisions are based on the interpretation asserted by Å Energi. This interpretation also has strong support in policy considerations. It ensures foreseeability, continuity and security, and provides a simple legal rule. Tryg’s interpretation, in turn, will create an unclear state of the law, necessitating new insurance solutions for the entire energy sector.
- (34) Renewables Norway asks the Supreme Court to rule as follows:
- “Renewables Norway is awarded costs in the Supreme Court.”

- (35) The respondent – *Tryg Insurance NUF* – contends:
- (36) The Court of Appeal’s judgment is correct. The insurance terms explicitly regulate what is covered. “Damage” means physical influence with negative physical effects on the insured object, and it is not a requirement that the damage is visible. Nor is it a requirement that it has been visible to the insured. It is solely a question of whether the damage has objectively occurred.
- (37) The term “sudden” means that the damage occurs abruptly or within a very short time. It strikes there and then, as opposed to having developed over time.
- (38) Section 4.4.9 of the insurance terms does not contribute to the interpretation.
- (39) Tryg’s interpretation is supported by the purpose of the condition, which is to exclude gradual damage. The policyholder’s coverage needs are not relevant where the wording is clear. In this case, Å Energi’s asserted coverage needs cannot prevail over a natural understanding of the wording.
- (40) Tryg’s interpretation has support in both Court of Appeal case law and Board practice, as well as in rulings from the Danish and Swedish supreme courts.
- (41) The runner chamber is the insurance object. It has suffered a continuous, steady and long-term deterioration. There was no collapse, but a controlled shutdown.
- (42) The invoked settlement practice conflicts with both Court of Appeal case law and Board practice and cannot be considered substantiated.
- (43) Tryg Insurance NUF asks the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. Tryg Insurance is awarded costs in the Supreme Court.”

My opinion

The interpretation of the insurance term “sudden and unexpected physical damage”

- (44) The insurance agreement between Å Energi and Tryg concerns an energy insurance for production and distribution of electricity. It covers, among other things, insurance for machines and movable property, and interruption in the hydropower production.
- (45) The relevant insurance term is found in section 4.1 and reads:
- “The insurance covers sudden and unexpected physical damage that occurs during the insurance period.”
- (46) This term is common in property insurance, and it aims to limit the coverage to foreseeable losses, see Hans Jacob Bull, *Insurance law*, 1st edition 2008 page 218:

“We often say – somewhat imprecisely – that the insurance is to provide coverage for sudden and unexpected damage, damage that the insured cannot anticipate and against which he will have problems guarding himself.”

(47) The parties agree that the damage necessitating the replacement of the runner chamber was unforeseeable. This implies that the damage was objectively unexpected, see Hans Jacob Bull and Trine-Lise Wilhelmsen, *Insurance law*, 2nd edition 2024 page 253. Also, it is not disputed that Å Energi has fulfilled its obligation under the insurance agreement to keep the plant in a proper and operable condition and to carry out inspections.

(48) The issue at hand is whether sudden physical damage has occurred. The principles for interpretation of insurance terms are summarised in HR-2020-1262-A paragraph 28:

“Insurance terms must be interpreted objectively and based on a natural linguistic understanding, see the *Cigna* judgment in Rt-1997-1807 on page 1813. Even insurance agreements in consumer relationships must be interpreted in that manner, see Rt-2014-379 paragraph 16. It follows from *Cigna* that the purpose of the insurance is relevant for the interpretation. And, in the event of doubt regarding the understanding of the insurance terms, ‘the ambiguity should normally affect the company’ – the so-called ambiguity rule.”

(49) If the expression to be interpreted is an established technical term, this understanding will form the basis, see Rt-2014-379 paragraph 16. Next, in the same paragraph, it is specified that “[t]he insurance company’s internal view and practice, and the policyholder’s subjective expectations, have more limited significance” in the interpretation.

(50) Å Energi contends that the insurance is an “all risk” insurance, and that this is significant to the interpretation. I do not agree. The decisive factor is whether the damage is covered by the insurance terms specified in section 4.1.

(51) The word “*damage*” means a negative physical effect on the insured object. The damage occurs when the cause or the effect materialises in negative physical consequences for the object’s material, surface, construction or structure, see Bull and Wilhelmsen’s *Insurance law* side 252. This understanding of the damage concept is implemented in Board practice, see the decisions FinKN-2019-354, FinKN-2020-640 and FinKN-2024-424.

(52) The damage may be either visible or hidden. It may result from conditions within the object itself, for instance when a machine becomes non-functional due to the sudden and unexpected failure of a machine part, or due to external factors like flood or lightning.

(53) The word “*sudden*” means that the damage occurs quickly, with little or no warning, see Bull and Wilhelmsen *Insurance law* page 250. According to long-standing Board practice, damage that develops within one day or 12 to 13 hours is “sudden”, while damage that develops over a longer period is not, see FinKN-2024-723. As this case stands, I will not take a general position on this.

(54) The purpose of the relevant insurance term is to exclude from coverage *damage that develops gradually over time*. In Bull’s *Insurance law* page 219, the following is set out:

“‘Sudden’ in such cases refers to damage ‘striking’ there and then, and not damage that develops gradually over time. When the companies refuse to cover such gradual damage,

the reason is often that the policyholder in these cases, at least in principle, will have the possibility to take precautions – the damage does not come as a surprise to him.”

- (55) The same understanding of “sudden” in corresponding insurance terms is applied in Swedish law, see the Swedish Supreme Court’s judgment 25 January 2024 in case T 4849-22, paragraph 23:

“The requirement that the damage is “sudden” implies that the process is instantaneous; it is not possible to prevent its development or scope. This limitation in the insurance coverage aims to exclude damage that develops gradually over time.”

- (56) However, damage that occurs suddenly as a result of a *factor that has been active over time* will be covered by the insurance, see Bull and Wilhelmsens *Insurance law* pages 249–250:

“According to the wording, it does not matter whether the cause/factor develops over time and is foreseeable, as long as the damage occurs suddenly and unexpectedly. Case law and Board practice confirm that the formulation ‘sudden damage’ does not mean that the cause of the damage must occur suddenly.”

- (57) An example of this is the Insurance Complaints Board’s statement from 10 May 2004, in case FSN-5193. The ceiling of the freezer room in the policyholder’s building had collapsed due to the extra strain from ice. The Board noted that “the weight of the ice had built up over time, but, nonetheless, the circumstance that the ceiling collapsed must undoubtedly be considered sudden and unexpected damage.”

- (58) Therefore, when assessing whether sudden physical damage has occurred, one must distinguish between *the cause* of the damage and *the effect* – the actual physical damage. Damage in the form of gradual deterioration of the object – as already pointed out – is not sudden physical damage. However, if this deterioration suddenly and unexpectedly leads to new damage, this damage may be covered by the insurance terms. I refer to Andreas Arntzen, *Insurance Law*, 1995 page 239, addressing the so-called “deformation phenomena”. His example is when “a machine part deforms and ‘wears out’ over time”:

“If it is established that the machine can no longer be trusted, the replacement of the machine part will be a maintenance matter. But if the fatigue limit is exceeded, so that the machine suddenly breaks down, it is an insurance matter.”

- (59) Against this background, my view is that the internal damage development, depending on the circumstances, also may be the cause of sudden damage to the object. This requires an individual assessment, to which I will return.

- (60) I note that gradual deterioration to an insured object may lead to sudden damage to *other* insured objects. An example is damage to machines and equipment on factory premises because the building collapses as a result of gradual weakening of load-bearing elements. Another example is a hole developing in an oil tank due to prolonged rusting, leading to pollution damage. In such cases, the underlying damage development will be considered a *causal factor* for the sudden damage to other insured objects apart from that subjected to the deterioration.

- (61) Å Energi has argued that “sudden” refers to the moment the damage becomes visible, and that any preceding hidden damage development must be considered to have caused the ultimate damage.

- (62) In my view, the wording in section 4.1 of the insurance terms does not support this alternative interpretation. As mentioned, the wording does not differentiate between visible and hidden damage. Furthermore, a natural linguistic understanding links “sudden” to when the damage occurred, irrespective of its visibility.
- (63) I also find no basis in Board practice or legal literature for isolating the final phase of a gradual damage development as a separate damage incident merely because that is when the damage was detected. The concept of damage is not linked to when the damage was detected, but rather, as pointed out, to when it occurred.
- (64) Å Energi further contends that section 4.4.9 of the insurance terms indicates that damage caused by rust and other corrosion is considered a *causal factor* for damage, but not an independent damage incident. Under this provision, the company is not liable for:
- “Damage due to the building or the building’s liquid and gas pipes and radiators being significantly deteriorated by rust, corrosion, other fatigue or wear.
- (65) My understanding is that this exclusion from coverage is specifically aimed at damage to objects other than the building, liquid and gas pipes, and radiators. In any case, I cannot see that the provision provides a basis for interpreting the damage concept in section 4.1 restrictively so that it excludes rust damage.

The individual assessment

- (66) Rygene power plant was built in 1978. The runner chamber – the insured object – is made of stainless steel and assembled from two halves fastened together with screws/bolts in a flange. The exterior of the chamber has horizontal and vertical ribs made of carbon steel. The chamber is encased in concrete to protect it from rust. Within the chamber, five runner blades rotate with great force due to the water pressure around them. The distance between the blades and the chamber wall is approximately one and a half millimetres.
- (67) The damage leading to the collapse of the runner chamber started with the gradual washing out of the concrete encasing it, allowing water to enter and create rust. The Court of Appeal has described the further damage development as follows:
- “This has caused the concrete at the back of the chamber to erode and be washed away. This, in turn, has caused the ribs, fastenings, screws and the runner chamber itself to rust in contact with water. As a consequence, several of the ribs have been damaged and come loose, bolts holding the chamber halves together have come loose or fallen out, and the two halves of the runner chamber have slid apart. There have been cracks and displacements in the runner chamber, and the turbine blades have come into contact with the walls. This created the abnormal sound that was heard during the inspection in December 2019.”
- (68) Based on the statement from Nicholas Crosby, a consultant for Envista Forensics, I find as a fact that the damage developed over decades, but that it accelerated towards the end. After the rusting and destruction of the bolts holding the chamber halves together, the damage spread to the flange and the chamber. Cracks developed in the stainless steel lining, and the chamber halves shifted vertically in relation to each other. This phase of the damage development may have taken two to four weeks. Because of the displacement, the runner chamber became unbalanced, and the blades started hitting the wall. This was when the damage was detected

due to “a helicopter sound” from the chamber. This final phase, which led to the collapse of the runner chamber, happened quickly – within one to two days.

- (69) In my *legal assessment*, I initially note that the damage is directly linked to the runner chamber – and not to damage to other objects. Hence, the question is not whether the collapse of the runner chamber is the cause of any sudden damage to other parts of the power plant.
- (70) It is also clear that the destruction of screws and bolts, and the consequential damage to the flange and the cracking and displacement of the chamber halves, is *physical damage*.
- (71) As already explained, interior deterioration that leads to sudden new damage, may be eligible for coverage. In the event of a successive damage development as in this case, where one damage incident causes new damage that ultimately makes the engine collapse, the question is whether the collapse must be considered a *separate damage incident*, so that the preceding damage development must be considered the *cause* of the ultimate collapse.
- (72) In *our case*, this approach cannot succeed. The collapse of the runner chamber, as I understand it, was the result of further development of the same gradual damage. The collapse itself does not seem sudden in the light of the preceding deterioration to which the chamber had been subjected. Therefore, it would not be correct to isolate the final – and brief – stage in the sequence of events as a separate damage incident. In my view, the gradual deterioration and the successive damage to the runner chamber should be evaluated in coherence and as a whole in relation to the insurance term.
- (73) Hence, it is not necessary for me to examine whether the final stage of the damage development, about two days, would have fallen within the term “sudden”.
- (74) Å Energi and the intervener, Renewables Norway, have argued as a policy consideration that the Court of Appeal’s interpretation will significantly limit the coverage for damage that the power plant industry both needs and has believed to be covered.
- (75) As mentioned, it follows from Rt-2014-379 paragraph 16 that the policyholder’s subjective expectations are of limited significance to the interpretation. In my view, this policy consideration cannot carry much weight in our case.
- (76) Consequently, I have concluded that Å Energi’s appeal cannot succeed.

Conclusion and costs

- (77) I find that the appeal must be dismissed.
- (78) Tryg is the successful party and will be awarded costs in the Supreme Court under the main rule in section 20-2 of the Dispute Act. A claim has been made for NOK 1,133,666 including VAT. Of this, NOK 848,771 plus VAT constitutes legal fees and NOK 58,162 plus VAT constitutes fees to the expert witnesses.
- (79) Of the total amount, the claim against the intervener amounts to NOK 75,937.

(80) Counsel's claim is in excess of a reasonable fee for a two-day hearing. However, the case is a dispute between two commercial parties that has raised an issue of great principle and economic significance in insurance matters. It has been necessary to go into detailed technical matters, and neither Å Energi nor the intervener has objected to the claims. Therefore, I find it appropriate to award costs in line with the statement of costs.

(81) I vote for this

J U D G M E N T :

1. The appeal is dismissed.
2. In Supreme Court costs, Å Energi Vannkraft AS will pay to Tryg Insurance NUF NOK 1,057,729 within two weeks of the service of this judgment.
3. In Supreme Court costs, Renewables Norway will pay to Tryg Insurance NUF NOK 75,937 within two weeks of the service of this judgment.

Justice **Hellerslia:** I agree with Justice Ringnes in all material respects and with his conclusion.

Justice **Falch:** Likewise.

Justice **Bergsjø:** Likewise.

Justice **Webster:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

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3. In Supreme Court costs, Renewables Norway will pay to Tryg Insurance NUF NOK 75,937 within two weeks of the service of this judgment.