Clause 7(a) of the policy stated:

"The insured shall on the happening of any **event which may result in a claim** under this policy at their own expense give notice thereof to the company **as soon as reasonably possible** and provide particulars of any other insurance covering such events as are hereby insured and shall as soon as practicable after the event or such further time as the company may in writing allow, submit to the company a claim in writing and give the company such proofs, information and sworn declarations as the company may reasonably require."

The Financial Services Tribunal (FST) commented on the clause in relation to the facts of case as follows:

- The "event which may result in a claim" was the collapse of the wall and the injury to the visitor (the third party).
- Notice must be given "as soon as reasonably possible". An insured cannot postpone notifying the insurer until a third party has made a claim against the insured.

Where an insurer wishes to disavow liability based on a breach of a policy term, it bears the onus to prove the breach. The insured does not have to prove it did not breach the term.

The FST said whether Old Mutual Insure (OMI) discharged the onus to prove a breach of clause 7(a) is a factual inquiry. The question to be answered was whether OMI has proved that Million Dollar Farms had not given notice of the incident as soon as it was reasonably possible for it to do so in the circumstances. Alternatively, has OMI proved that it was reasonably possible for Million Dollar Farms, in the circumstances, to have given notice earlier than 15 February 2019?

The FST quoted from the comments by Judge Malcolm Wallis in *Thompson v Federated Timbers & Another* (2010) who was confronted with a clause in the same terms as clause 7(a) of OMI's policy: "The requirement that the notification be made so soon as reasonably possible must mean so soon as is reasonably practicable in all the circumstances. The inquiry is a factual one. And the answer will depend upon the circumstances of each particular case."

The FST said OMI had not provided evidence why, in the circumstances, it was reasonably possible for Million Dollar Farms to have notified OMI of the incident earlier than it did.

In correspondence to OMI following the rejection of the claim, Million Dollar Farms claimed, among other things, that the tenant had not mentioned the possibility of a claim against the applicant, and the visitor had not had previous contact with it.

In a letter sent to the ombud after the determination had been made, Million Dollar Farms stated that despite being insured, it has often carried small losses and is not in the habit of claiming for smaller losses; its representatives were not aware of the extent of the third party's injuries; and they did not know that the third party would make a claim.

In its response to Million Dollar Farms' reconsideration application, OMI argued, "the severity alone of the incident should have prompted the applicant to act in compliance of the policy in both notifying us as insurer of the incident and submitting details of the claim to us".

OMI's also submitted that "the incident was of such a severe nature that the usual academic questions of what is considered reasonable expectations of a potential claim in the circumstances become moot".

But the FST said these arguments were not evidence. OMI led no evidence to prove the breach and accordingly has not proved that Million Dollar Farms acted in breach of clause 7(a).