UK APPEAL COURT PROVIDES AUTHORITATIVE GUIDANCE ON CONSTRUCTION ALL RISKS INSURANCE POLICIES

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UK Litigation and Dispute Resolution Alert

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In the UK Court of Appeal decision in *Sky UK Limited and Mace Limited v. Riverstone*, authoritative guidance has been provided on certain key principles that apply to Construction All Risks insurance policies.

The decision is of great importance to those involved with the insurance of construction projects because it provides helpful clarification on: (i) the meaning of "damage" under these policies, (ii) recovery of foreseeable damage occurring outside of the policy period, (iii) the recoverability of investigation costs, and (iv) the mechanics of aggregation and deductibles.

BACKGROUND

From 2014 to 2016, Sky's global headquarters (Sky Central) was constructed by Mace Limited (Mace) as the main contractor under a Design and Build Contract. For the purpose of the construction, Mace alongside Sky UK Limited (Sky) were insureds under a Construction All Risks (CAR) insurance policy, which ran from 1 February 2014 (commencement of the project) to 15 July 2017 (one-year post-completion).

Sky Central's roof covers an area of about 16,000 square metres and is said to be the largest timber flat roof in Europe. The roof is made up of 472 individual wooden cassettes, which were installed between December 2014 and May 2015. Following installation, the cassettes were left waiting for permanent waterproofing, and it later became apparent that rainwater had entered the cassettes from an early stage. By March 2015, standing water was found inside the gutter compartments of 27 cassettes which had entered these cassettes and remained there, leading to a wetting of internal timbers. The ingress of water mostly occurred during the construction and therefore within the policy period. The appeal concerned crucial issues under the CAR policy arising from this extensive water damage.

COURT OF APPEAL DECISION

The Meaning of "Damage" Within the Insuring Clause

The insuring clause in the CAR policy provided that insurers would "indemnify the Insured against physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever…"[1] The parties disagreed on whether the wetting of the internal timbers was itself "damage". The insurers argued that, to constitute "damage", the timbers needed to have reached a condition where they required immediate replacement or repair. They argued that wetting that could be cured by drying out was not "damage".

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The Court disagreed and determined that, in line with criminal law authorities, “damage” amounted to “any change to the physical nature of tangible property which impair[s] its value or usefulness to its owner or operator.”[2] There was no reason to take a different approach—this was the natural and ordinary meaning of “damage”.

It followed that the insurers' position—that “damage” required the cassettes to have reached a stage which impaired their structural performance and integrity—was rejected. The entry of moisture into the cassettes was a tangible physical change to the cassettes as long as the presence of water, if left unattended, would affect the structural stability, strength, functionality, or useable life of the cassettes (or would do so if left unremedied).

Recovery of Foreseeable Development and Deterioration Damage Occurring Outside the Policy Period

The Court noted that, by a well-established line of authority, a property insurance claim is a claim for unliquidated damages, which means the measure of recovery is based on the common law principles governing damages for breach of contract. The general objective of damages for breach of contract is to put the innocent party back in the position they would have been in had the breach not occurred. While it is open to the parties to the insurance contract to modify the measure of damages that the general law provides for, the exclusion of the usual remedies must be expressed in clear words. As a result, the cost of remedying the foreseeable deterioration and development damage—which occurred after the policy period but resulted from insured damage occurring during the policy period—was within the measure of recovery under the policy.

The Court also noted that this conclusion accords with business common sense. A businessperson in the shoes of the insured would “reasonably expect to be compensated for the consequences of the insured damage deteriorating or developing, absent a contract term excluding such recovery.”[3] If this was not the case, there would be “serious and unacceptable adverse consequences” because it would make deterioration and development damage occurring after the policy period uninsurable under any subsequent insurance cover.[4]

Investigation Costs

Concerning the recoverability of investigation costs, the Court determined that, as a matter of principle, where insured damage has occurred for which damages are recoverable under the policy of insurance, the costs of investigating the extent and nature of the damage (including any development and deterioration damage) are recoverable if they are “reasonably incurred in order to determine how to remediate it”.[4] Thus, the reasonable costs of investigation of what is reasonably necessary to remedy insured damage was “self-evidently” part of the “full cost of repairing or reinstating” insured damage.[6]

Aggregation and Deductibles

Lastly, the Court considered whether a deductible of £150,000 “any one event” (the Retained Liability Provision) applied once to the whole of the claim or applied separately in respect of damage to each individual cassette. At first instance, the judge had decided that one deductible of £150,000 applied to Sky's claim because the proximate cause of the water ingress was the deficient design of the works that failed to provide for a temporary roof over the cassettes during construction. The decision not to provide this roof was therefore the “any one event” for the application of the deductible.

The insurers appealed on the basis that the judge had erred in his construction and application of the Retained Liability Provision by: (a) treating the relevant single “event” as the design decision not to use a temporary roof;

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and (b) in failing to identify each individual cassette as the “part” or “parts” of the property insured to which the Retained Liability Provision applied. The insurers argued that the term “event” applies to the damage suffered not the cause of the damage—meaning there were numerous “events” for the purposes of this deductible.

The Court dismissed the insurers' appeal, noting that “any one event” is an expression used in aggregation clauses both for the purposes of deductibles and policy limits and, in this context, has a well-established meaning, which both parties were taken to have been aware of. “Event” refers to the cause of the damage, not the damage itself, and a decision (in this case not to provide a temporary roof) could amount to an “event” for these purposes. “Any one event” is a classic term for the aggregation of losses by reference to the cause of the losses.

CONCLUSION

The key points for policyholders to note from this decision are:

- Damage can involve any change to the physical nature of tangible property that impairs its value or usefulness. Property can be damaged even if such damage is capable of remedy.
- Recovery is not necessarily confined to damage physically present at the time the policy expires. Unless the policy provides otherwise, the costs of remedying the foreseeable deterioration and development damage are recoverable under the contractual principles that govern common law damages, even if such damage extends beyond the policy period.
- Once it is established that there is insured damage, reasonable investigation costs incurred in investigating the cause and extent of the damage should be recoverable.
- Lastly, reference to “any one event” in the context of an aggregation clause determining the number of policy deductibles meant the event causing the damage—not the damage itself.

The firm's renowned Insurance Recovery and Counseling practice group is dedicated to assisting policyholders in reviewing policy terms, managing the notification process, and maximizing recoveries on insurance claims, seeking to avoid litigation and other costly dispute resolution processes where possible.

FOOTNOTES

[1] [2024] EWCA Civ 1567, [2].

[2] [2024] EWCA Civ 1567, [107].

[3] [2024] EWCA Civ 1567, [80].

[4] [2024] EWCA Civ 1567, [81].

[5] [2024] EWCA Civ 1567, [89].

[6] [2024] EWCA Civ 1567, [90].

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