

Sky & Mace v Riverstone Managing Agency & ors [2024] EWCA Civ 1567



The Court of Appeal ("COA") clarifies coverage for deterioration and development damage in a recent Construction All Risks ("CAR") policy dispute.

In *Sky UK Ltd & Mace Ltd v Riverstone Managing Agency Ltd & Ors* [2024] EWCA Civ 1567 (see the judgment [here](#)) the COA provided useful guidance on a number of issues in this CAR policy dispute. Of particular interest to insurers and insureds alike, is the consideration of whether such policies cover not only damage sustained during the period of insurance (the "POI"), but also foreseeable deterioration and development damage that occurs after the policy expires. The COA confirmed that an insured can recover for damage that deteriorates and/or develops after the POI, as long as the damage originated from insured damage during the POI.

Background

The claim arose from the construction of Sky's new global headquarters in 2014. The roof of the building, which included the largest timber flat roof in Europe, was constructed using wooden cassettes laid on timber beams. After installation, the cassettes were exposed to substantial rainfall before being permanently waterproofed, leading to water ingress. This caused wetting, swelling, and alleged irreversible decay in the cassettes. Sky, together with its contractor, filed claims under their CAR policy.

The Policy and Dispute

Section 1 of the policy covered contract works and provided the following Insuring Clause:

"The Insurers shall, subject to the Terms of this Contract of Insurance, indemnify the Insured against physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever ..."

The POI was set from the commencement of the project in 2014 to one year after its completion.

It was common ground that the water ingress had occurred during the POI, but that the deterioration process that followed had occurred beyond the cover period. Whilst the insurer said that the dampness could have been remedied sooner, they did not suggest the policyholder had failed to act as a prudent uninsured and take reasonable steps to mitigate their loss.

Insurers contended that for damage to be covered, it had to require immediate repair or replacement within the POI. They argued that wet timber could be dried and restored, meaning no covered damage had yet occurred. Any subsequent rot and decay necessitating repair, they claimed, developed outside the POI and was therefore excluded. In other words, the water ingress in itself was not the "deathblow" setting in motion the inevitable decay. Rather, the deterioration damage followed from the failure to appreciate and respond to the water ingress in order to remedy it.

High Court Decision

In the High Court, Sky and its contractor advanced their claims on the basis that they were entitled to recover not only for damage that occurred during the POI but also for deterioration and development damage that emerged after the policy had expired. They argued that such progressive damage was a natural consequence of the insured peril and, therefore, should fall within the scope of indemnity under the policy.

Insurers, on the other hand, took a strict interpretation of the Insuring Clause, contending that coverage was limited to damage that physically manifested within the defined POI. They argued that any worsening or spread of damage after the insurance period ended was outside the scope of coverage, even if it was caused by damage sustained during the POI.

The High Court, presided over by HHJ Pelling KC, ruled in favour of the insurers on this point. While the Judge accepted that the timber cassettes had suffered damage within the POI - specifically due to water ingress - he held that the indemnity under the policy extended only to the cost of repairing the damage that existed as of the last day of the POI. In his view, the Insuring Clause defined the extent of the insured peril and did not provide for ongoing or developing damage beyond the POI.

A key part of HHJ Pelling KC's reasoning, was his interpretation of *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2010] 1 AC 180, a case concerning the scope of cover under a reinsurance contract. He relied on this authority to conclude that the Insuring Clause imposed a temporal limit on coverage and that any further damage occurring outside that timeframe - however foreseeable or causally linked to the insured peril - was not recoverable under the policy.

The Judge also rejected Sky's claim for investigation costs related to the damage. He reasoned that such costs were only recoverable if they directly related to repairing insured damage. Because he had concluded that post-policy-period deterioration and development damage was not covered, he held that certain investigation costs were speculative and not indemnifiable under the policy.

Additionally, HHJ Pelling KC sided with insurers on the issue of deductibles and aggregation. Insurers argued that each damaged cassette represented a separate loss, meaning that multiple deductibles should apply, thereby significantly reducing the claim's value. While the Judge did not fully accept this argument, he nonetheless found that insurers' liability was limited by the terms of the Deductible Clause, which he interpreted as applying to individual instances of damage rather than to a single, overarching cause.

The COA Judgment

On appeal, Sky challenged the High Court's restrictive interpretation of the policy, arguing that the Insuring Clause did not impose a temporal limit on recovery in the way insurers suggested. Instead, Sky contended that the policy indemnified against damage occurring within the insurance period and also covered the foreseeable consequences of that damage - namely, the deterioration and development damage that continued after the policy expired.

The Court of Appeal, in a unanimous decision delivered by LJ Popplewell (with whom LJ Phillips and LJ Snowden agreed), overturned the High Court's ruling. The COA held that the policy covered not only damage that physically manifested within the POI, but also the natural and foreseeable consequences of that damage, including further deterioration and spread.

The COA emphasised that an insurer's obligation is triggered the moment an insured peril materialises. This means that once the damage process begins within the policy period, insurers cannot evade liability just because the consequences unfold over time.

In reaching this conclusion, LJ Popplewell recapped the nature of the insurance contract:-

1. The insurance is a promise to hold the insured harmless *"in the sense that the insurer promises that the assured will not suffer the insured damages"*.
2. This means that the insurer is in breach of contract the moment the insured peril occurs, triggering the common law remedy for the insured to claim damages for breach of the insurers' primary obligations.
3. In other words, LJ Popplewell noted, as established in case law, a property insurance claim is not a claim for enforcement of a claim to pay money. Rather, this is a claim for unliquidated damages.

Whilst LJ Popplewell acknowledged that the parties can agree otherwise, departure from the normal remedies requires a clear manifestation within the contract that this is the intention. He further noted: *"The Insuring Clause defines the damage to which the insurer's primary obligation attaches, [...] It does not purport to define or confine the loss for which the insurer is liable in damages when in breach of promise ..."*

The COA therefore found that all damages were covered, even though they continued to develop post the POI.

The COA also reversed the High Court's decision regarding investigation costs. HHJ Pelling KC had disallowed certain costs on the basis that they related to speculative opening-up works, rather than the repair of insured damage. LJ Popplewell disagreed, holding that investigation costs were recoverable, so long as they were reasonably incurred to determine the extent and nature of the damage.

As to the aggregation issue, the COA held that the relevant "event" was the decision not to install a temporary roof, rather than the damage to each cassette. LJ Popplewell found that the term "any one event" was a classic aggregation provision, meaning that losses should be grouped together based on their common cause rather than their individual manifestations.

CPB Comment

Insurers have sought permission to appeal to the Supreme Court. Whether the case shall proceed further remains to be seen, but for now, the ruling stands as an important precedent in construction insurance disputes.

It serves as a stark reminder of the need for careful and precise drafting in CAR policies. The COA reinforced that an insurance policy must clearly specify any limits on coverage, particularly with regard to damage that occurs after the POI. Insurers are cautioned that general terms in the insuring clause, such as *"damage occurring during the Period of Insurance"* will not automatically preclude recovery for damage that develops after the policy expires, if it can be shown to have been proximately caused by insured damage during the period.

The decision underscores the need for insurers to clearly articulate any exclusions or limitations on coverage for such damage, as ambiguity in policy wording may result in costly litigation and potentially adverse outcomes, as seen in this case.

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Any questions

If you have any questions regarding the issues raised in this article, please get in touch with Dean or Lisbeth.



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