

Sky & Mace: Damages through the roof

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Insurers have sought the permission of the Supreme Court to appeal the decision of the Court of Appeal in *Sky UK Limited & Mace Limited v Riverstone Managing Agency Ltd & Ors*¹ concerning several key principles of property insurance law. This case concerned damage to the roof of Sky's headquarters in West London during its construction by Mace. The roof is the largest flat timber roof in Europe. The roof suffered extensive water damage during construction (it rained). Rain in England is a fortuity, like death: it is going to happen, you just don't know when. The mistake here was a design one: the decision by the designer not to make provision for a temporary roof during the construction.

Sky and Mace had a Construction All Risks policy in place. It covered the period of construction plus a one-year maintenance period thereafter: 1 February 2014 to 15 July 2017 (the "Period of Insurance"). The insuring clause in the policy provided as follows:

"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 question for the court was about the extent of damage suffered by the time the Period of Insurance concluded. The water ingress during the Period of Insurance had wetted the internal timber components of the roof which were designed to stay dry and, consequently, had not been treated with preservative. The insurer argued two main points: first, that wetting of timber was not of itself "damage" and second, that where the wetting of timber caused irreversible swelling of timbers and structural decay (which was accepted by insurers as "damage") it was covered only to the extent that such swelling and decay occurred during the Period of Insurance and that neither the worsening of timbers ("Deterioration") nor the spread of trapped moisture to other timber components ("Development") were covered to the extent that they occurred after the Period of Insurance.

Is wet wood damaged wood?

Insurers said that to be damaged within the meaning of the policy, the timbers would have had to reach a condition requiring immediate replacement or repair – until then they were not damaged and wetting which could be cured by drying out was not damage. The Court of Appeal disagreed. It investigated the meaning of damage by examining the approach of the courts to the meaning of that word as used in the Criminal Damage Act 1971.

The most closely analogous case was said to be *R v Fiak*.² Mr Fiak had been arrested and was being held in a police cell. In his cell he was provided with an unused new mattress and a clean dry blanket. Already being held on suspicion of assaulting a police officer, he plumbed new depths by stuffing his blanket in the lavatory and repeatedly flushing it. In the process the blanket got wet and he flooded his cell and the two adjoining ones. It was

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¹ [2024] EWCA Civ 1567.

² (2005) 3 PLR 211, the Court of Appeal Criminal Division was concerned with whether there was damage within the meaning of the Criminal Damage Act 1971.

argued on behalf of Mr Fiak that he had done no damage since the blanket could be cleaned and dried as could the cell floors.

In the absence of a statutory definition of “damage” the court in *Fiak* looked to the Concise Oxford Dictionary definition of damage as “harm or injury impairing the value or usefulness of something”. This concept of “impairment” of value or usefulness was key. When applied in other cases dealing with the Criminal Damage Act it had been established that the impairment could include temporary as well as permanent impairment of value or usefulness. The court determined that while Mr Fiak’s soaking of the blanket and the flooding of cells were remediable (i.e. by drying the blanket and the cells out), there was damage within the meaning of the Criminal Damage Act because the value or usefulness of the property was impaired. The fact that the impairment was minor or transient did not matter, it would still amount to damage – a wet blanket isn’t very useful, nor is a wet cell. For the Court of Appeal, the meaning of damage in the Criminal Damage Act was analogous to that in the policy. It follows that wetting of the internal timbers in the roof structure - which were supposed to be dry, just as a blanket and a cell floor is supposed to be dry - amounted to damage to those timbers.

What about Deterioration and Development of damage after the Period of Insurance – is that covered?

The insurers said that they should be liable for the contractual measure of indemnity. The insuring clause limited that to damage to Property Insured “occurring during the Period of Insurance” and they should therefore not be liable for damage occurring after the Period of Insurance.

The Court of Appeal adopted a back-to-basics approach in analysing this question. Insurance against damage to property is treated in law as a promise by the insurer that the insured will not suffer damage to its property. That is the insurer’s primary obligation to the insured. The moment damage occurs the insurer is in breach of its contractual promise and is liable in damages to the insured. This is the secondary obligation of the insurer under the contract and is the same as the secondary obligation that applies to all contract breakers. This principle is succinctly set out in the judgment of Lord Sumption in *The Renos*:

“A claim on an insurance policy is a claim for unliquidated damages. The obligation of the insurer is to hold the assured harmless against an insured loss, from which it follows that where the insurance is against physical damage to property the insurer is in breach of that obligation as soon as the damage occurs.”³

As matter of contract law, damages in such circumstances are intended to put the insured in the position it would have been in had the breach not occurred (i.e. had the damage not occurred). In these circumstances the proper

³ *Connect Shipping Inc v Sveriges Angfartygs Assurans Forening (The Renos)* [2019] UKSC 29, [2019] 2 All ER (Comm) 627 at para [10]. In an aside the Court of Appeal observed that this primary obligation of the insurer led to an injustice. If the insurer’s primary contractual obligation is to prevent the damage occurring, there is no primary obligation by way of a promise to pay money, instead there was a secondary obligation to pay damages. In English law, however, damages are not available for a failure to pay damages. This meant that no remedy was available for insureds where an insurer caused loss by unreasonably delaying payment of a claim. The Court of Appeal noted, with apparent approval, that this injustice has been corrected by the enactment of s.13A of the Insurance Act 2015 which makes it an implied term of insurance policies that an insurer must pay a claim within a reasonable time. A breach of that implied term gives rise to a right in damages but applicable principles of foreseeability (which means foreseeability at the time the policy is taken out) and remoteness make it challenging to make a successful claim for damages under s.13A – the law reports are certainly not littered with examples of such awards being made. Section 13A was not relevant to the *Sky & Mace* claim since the policy inceptioned before s.13A came into force.

measure of damages would, in principle, be the cost of repair caused by the wetting of the timbers. Under contract law, the Deterioration and the Development of damage would be covered because, under relevant contractual principles, they flow from the damage the insurer had contractually promised wouldn't happen. That is subject, however, to some alternative agreement between the parties in the contract that limits the damages for which the insurer is liable. The policy deductible and limit are examples of this. The insurers pointed to the insuring clause as another. They argued that the parties to the insurance had agreed that the measure of damages for which the insurer would be responsible was defined (and limited) by the insuring clause as the damage occurring during the Period of Insurance.

The Court of Appeal observed that, as a basic rule of construction, any limit on the contractual remedy of damages would have to be set out in clear words. This was not achieved by the identification of a temporal limit on the insured damage in the insuring clause. It did not work because the insurer's argument confused damage (the peril insured by the policy as the primary obligation of the insurer) with damages (the secondary obligation of the insurers for allowing the peril to occur). The view of the Court of Appeal was that the insuring clause defines the damage to which the primary obligation of the insurer attaches and "It does not purport to define or confine the loss for which the insurer is liable in damages when in breach of promise". The insuring clause, therefore, had nothing to do with the insurer's secondary liability for damages. This means that:

"If the insured damage has caused further damage, then subject to the usual principles of mitigation and remoteness etc, the insurer is liable for the loss resultant upon suffering that further damage."⁴

It didn't matter if the further damage (in this case the Deterioration and Development) happened after the Period of Insurance.

The principle this confirms was also succinctly summarised described by Lord Sumption in *The Renos*: "The fact that the policy expired before the loss has fully developed will not affect the assured's right to recover under it in full."⁵

The Court of Appeal's confidence that this was the correct legal analysis was reinforced by a consideration of the commercial consequences of the insurer's position. The Court observed that if the insurer's reasoning were adopted the consequence would be that Deterioration and Development occurring after expiry of cover would be uninsurable even though they flow from the peril the insurance covered because no subsequent insurer would be prepared to cover the Deterioration and Development at all or for an economic premium and that, in any event, continuing damage would not be insurable since it would not be a fortuity – it was already in motion.

Next Steps – Insurers seek to test whether the Court of Appeal's reasoning is watertight

Insurers have lodged an appeal with the Supreme Court. They have posed the Supreme Court some humdinger questions that go to heart of the principles of insurance law as they affect property covers. They have asked the Supreme Court to consider whether the Court of Appeal was wrong in holding that:

1. Insurers can be liable for damage occurring after expiry of the relevant policy.

⁴ [2024] EWCA Civ 1567 *para* 48.

⁵ *Connect Shipping Inc v Sveriges Angfartygs Assurans Forening (The Renos)* [2019] UKSC 29, [2019] 2 All ER (Comm) 627 at *para* [10].

2. The insurers' primary obligation is to prevent the occurrence of an insured event.
3. The insurers breached their contract with Sky by their failure to prevent water entering the cassettes (the individual components of which the roof was constructed) and damaging the timbers.

Questions 2 and 3 question basic tenets of property insurance. We'll have to wait and see if the Supreme Court is willing to bring the roof down on these principles. If they do, Sky will definitely make the news.