

## BRIEFING NOTE

**CONSTRUCTION ALL RISKS INSURANCE: COVER FOR DAMAGE THAT STARTS DURING AND DEVELOPS OR DETERIORATES AFTER THE PERIOD OF INSURANCE  
SKY UK LIMITED & ANOTHER v. RIVERSTONE MANAGING AGENCY LIMITED & OTHERS [2024] EWCA CIV 1567****Justyn Jagger****14 February 2025****Introduction**

Last year, our firm ran a series of articles and webinars concerning legal developments as to the construction and application of the London Engineering Group (“**LEG**”) extensions found in Construction All Risks (“**CAR**”) insurance policies. Subsequently, the English Court of Appeal handed down a landmark decision in respect of the insurance cover provided by a CAR policy for damage arising out of the construction of Sky UK’s global headquarters. That judgment confirms that if the insured took all reasonable mitigation steps, cover is available for damage that starts during the policy period and continues to develop after the policy period expires.

**Facts**

Between 2014 and 2016, Mace Limited constructed a building known as Sky Central in Osterley, West London, which building was insured under a CAR policy. The roof comprised 472 individual wooden cassettes, into a substantial number of which water had entered and remained for periods during construction leading to wetting of internal timbers. That wetting caused swelling and structural decay during the policy’s period of insurance (“**POI**”).

After the POI expired (i) the condition of the timbers that were already wet deteriorated by way of further swelling or decay (referred to as deterioration damage) and (ii) damage developed in additional parts of timbers by way of water spread, specifically capillary migration of moisture, or vapour condensation (referred to as development damage).

The issues before the Court fell to be decided on the basis that the condition of the roof at trial was the natural and foreseeable consequence of the ingress of water during the POI and the remediation costs were not attributable to any failure of the insureds to act reasonably.

**Decision**

The Court of Appeal made four key findings on points of insurance law.

First, the Court confirmed that damage in the context of a construction insurance claim means *“any change to the physical nature of tangible property which impaired its value or usefulness to its owner or operator”* even if such damage is temporary, transient or repairable. In this case, the water ingress into the wooden cassettes constituted damage. This finding is consistent with a line of English and Commonwealth authorities, specifically *Gwynt y Mor OFTO PLC v Gwynt y Mor Offshore Windfarm Limited [2020] EWCA 850* and others.

Second, once it is established that insured damage occurred during the POI, the indemnity is not limited to the cost of repairing or replacing only that damage that had occurred at or before the end of the POI. Provided that the insured takes reasonable steps in mitigating the damage, the indemnity could extend to the cost of repairing or replacing any damage which occurs during the POI and then develops or deteriorates after the POI has expired.

Third, the reasonable cost of investigating the nature and extent of damage is recoverable, whether or not damage is found in every location investigated. The indemnity is not limited only to those locations where damage is found to have occurred, developed or deteriorated.

Fourth, for the purposes of aggregation, and applying any deductible, a decision can be an event in circumstances in which all damage arising out of any one event is to be aggregated if, on a factual analysis, that decision was taken at a particular time, place and way.

#### **Judicial Observation**

The Court made the following observation in delivering (and justifying) its judgment:

*“In the context of a major construction project, if damage has occurred during the period of the policy, it will often be necessary to take some time to investigate and remedy it, which may very likely last well beyond the expiry of the period of insurance. Indeed, the damage may not even be discovered until after expiry notwithstanding that it occurred before. It would be readily foreseeable that in some circumstances the passage of time would increase the scope of the damage, whether to the already damaged part of the building (deterioration) or to some other part (development), without any fault on the part of the insured. A businessperson in the shoes of the assured would reasonably expect to be compensated for the consequences of the insured damage deteriorating or developing, absent a contract term excluding such recovery. Such reasonable expectation would be confounded if it is the insured not the insurer who has to bear the additional financial consequences which inevitably follow from the insured damage having occurred during the policy period. That would be regarded as the antithesis of what property insurance is for.*

*Moreover, it would have serious and unacceptable consequences, because it would make deterioration and development damage occurring after the expiry of the period of insurance uninsurable under any separate and subsequent property insurance cover. If cover for the subsequent period were sought after the damage was in progress, no doubt insurers would seek to exclude it or at the least charge a prohibitively higher premium. Even if the assured were already to have taken out a policy for the subsequent period, prior to any damage occurring, it would not respond to continuing damage, because the deterioration and development damage would not be a fortuity.*

*The Insurers’ case would also present assureds with an unfair and uncommercial dilemma as to whether to undertake a reasonable but time consuming and measured process of investigation and remedy, at the cost of suffering financial loss from uninsured deterioration or development damage in the meantime, or of avoiding further loss due to uninsured deterioration or development damage by adopting an urgent solution at the risk of insurers being able to assert a failure to act reasonably in mitigation.”*

**Comment**

The Court of Appeal's decision is very helpful in the consideration and assessment of both construction and industrial all risks claims. Specifically, in the power generation industry in which damage to machinery often occurs, develops or deteriorates over several years and throughout the insuring periods of both construction and (multiple) industrial all risks policies.

By attaching the costs of repairing or replacing that damage to the policy during which the damage first occurred, debates as to the insurers on risk may now be avoided. Absent any clear exclusions within the policy, and provided that all reasonable mitigation steps have been taken, the insurers on risk when the damage first occurred are likely to be held liable to indemnify the costs of investigating, repairing or replacing that damage and any deterioration or development damage that occurs after the period of insurance has expired.

In Asia, two important consequences may follow.

First, insurers may consider engaging more constructively with policyholders in circumstances in which damage to power generating machinery is identified during routine inspections. Specifically in determining whether turbine or other machinery should be operated to the next scheduled outage or shutdown immediately for inspection, in both cases agreeing to indemnify the insured for any property damage or business interruption loss that may follow.

Second, the organising committee of the Asia Power Forum may consider inviting independent speakers to explain important legal developments over the past three years, including the Sky UK decision, that clarify the ambit of CAR and IAR coverage and meet many of the points often raised by claims handlers and adjusters in response to significant insurance claims. Maintaining a fundamental knowledge of the law that governs many CAR and IAR policies sold in Asia is critical as the Singapore insurance market looks to compete with other global insurance centres and to achieve optimal standards of claims handling and adjusting.

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