Flooding definition decision keeps insurer's position afloat

Landel Pty Ltd & Anor v Insurance Australia Ltd [2021] QSC 247

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AT A GLANCE

- *Landel Pty Ltd & Anor v Insurance Australia Ltd* is the third Queensland instalment in 'flood definition' cases, which arise from the unfortunate events of the 2011 Brisbane floods and the 2019 Townsville floods.
- In this matter, the insured lodged two claims for damage caused by monsoonal rain events and consequent flooding in and around Townsville. One was accepted and the other was deemed to be caused by flooding, to which a sublimit applied.
- The insured disputed the flooding coverage assessment and advanced two main arguments in support of a 'run off' case, which both ultimately failed.
- The case shows that circumventing the now well-established confines of flood definitions continues to be problematic for insureds.
- *Landel* also provides important guidance on expert evidence in Queensland litigation.

BACKGROUND

The insured owned a shopping centre in Townsville, Queensland, and held a modified ISR Mark IV policy with CGU (ISR Policy).

In late January and early February 2019, there were significant monsoonal rain events and consequent flooding in and around Townsville. On 31 January 2019 water entered the insured's shopping centre through the roof and discharged out of drains in loading docks at the back of the centre causing damage. The insured lodged claims with CGU under the ISR Policy for the roof and centre damage.

On 8 March 2019, CGU accepted that the ISR Policy responded to damage caused by the water entering through the roof and the loading dock drains. However, CGU regarded the balance of the damage as having been caused by flooding, to which the ISR Policy's sublimit of $250,000 applied.

The insured claimed indemnity under the policy for the whole of the damage, arguing that physical circumstances of the inundation were not within the definition of flood in the ISR Policy, rendering the $250,000 sublimit inapplicable. The coverage dispute was litigated in the Supreme Court of Queensland.

THE ISR POLICY

The ISR Policy contained the relatively standard insuring and basis of settlement clauses. Of interest though was the ISR Policy's flood exclusion, which excluded cover for *'…physical loss, destruction or damage occasioned by or happening through: (a) flood, which shall mean the inundation of normally dry land by water overflowing from the normal confines of any natural watercourse or lake (whether or not altered or modified), reservoir, canal or dam."*

Although the clause was worded as an exclusion, it actually had the purpose of defining how and when the ISR Policy's sublimit for flood cover applied.

POLICY RESPONSE

As is common with coverage disputes concerning flood exclusions, both parties relied heavily on expert evidence and hydraulic modelling in framing their respective cases.

The insured's flood expert gave evidence that the damage was caused by water runoff from a local catchment area. The insurer's experts argued that the damage was caused by overflow from the surrounding waterways, consistent with the wording of the ISR Policy's flood definition.

The insured advanced two main arguments in support of its 'run off' case. Both arguments ultimately failed, and the insured was otherwise unable to overcome the hurdle imposed by the *'Wayne Tank'* principle.

The First Argument

The insured first sought to rely on *LMT Surgical Pty Ltd v Allianz Australia Insurance Ltd*[1], which was a decision of the Court arising from the Brisbane floods. Relying on *LMT,* the insured submitted that the runoff was not an altered or modified natural watercourse because it had flowed through culverts. The Court disagreed, noting that the culverts in *LMT* were a functional replacement for an earlier drain that did not follow the path of the natural watercourse or arrive at the same destination as the prior natural watercourse. In *Landel*, the culverts simply allowed water to travel in much the same position as it always had.

The Second Argument

The insured also argued that once water encountered a table drain as part of its overland flow from Gordon Creek or the Gordon Creek diversion, it should stop being regarded as water that was overflowing Gordon Creek or the diversion and should be regarded as water that was overflowing a table drain.

The second argument was similar to that advanced in the case of *Provincial Insurance,*[2] where it was put that the damage in question was not 'occasioned by' nor did it 'happen through' a flood because the water that entered the insured's premises and caused the damage was not from a natural watercourse.

The argument was ultimately rejected by the Court in both *Provincial* and *Landel*. Where the inundation of normally dry land by water causes other water to be forced into the insured's premises and occasion damage, that damage is still *'occasioned by or happen[s] through'* the escape caused by a flood. The reasoning applied here is also consistent with the Court's decision in *Wiesac Pty Ltd v Insurance Australia Ltd,*[3] another important flood definition case to come out of the Brisbane floods.

The Wayne Tank Hurdle

The insured's case also ran into trouble in attempting to negotiate the long-standing principle set down in the famous *Wayne Tank* case.[4] In *Wayne Tank*, it was held that if a loss is caused by two causes operating at the same time and one is expressly excluded from the policy, the policy 'does not pay'.

The *Wayne Tank* principle dealt a further blow to the insured's efforts to differentiate between water that caused the loss which fell within the ISR Policy's flood definition, and water which may have also

[1] [2014] 2 Qd R 118
[2] *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd & Ors* (1991) 25 NSWLR 541
[3] [2019] 1 Qd R 198
[4] *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] 1 QB 57,

caused damage emanating from another source. The preferred expert modelling showed that a significant amount of the water had overflowed from natural watercourses, so the insured's efforts to identify water from other sources was futile.

GUIDANCE ON EXPERT EVIDENCE

The judgment includes a noteworthy section designed to give litigants in Queensland some helpful reminders on the state's expert evidence regime. The points it addresses include:

- While lawyers must not coach expert witnesses or influence their reports, it is permissible and desirable that lawyers become involved in editing of export reports so that they are comprehensible.
- In Queensland, it must be remembered that draft expert reports are disclosable.
- There is a potential to compromise independence where experts (retained by one side) meet before the preparation of any written reports.
- It is not appropriate for an expert to provide a 'line by line' commentary in response to the other side's expert report.
- Expert witnesses are not to concern themselves with legal issues and it is not appropriate to brief experts with a copy of the policy wording in coverage disputes.
- In the context of a coverage dispute, an expert initially retained by the insurer may not be regarded as truly independent.
- No criticism is to be levelled at lawyers meeting with experts, or potential experts, before there is anything put in writing, although it is good practice to brief an expert in writing once a decision has been made to retain them, so as to avoid the impression something ulterior is going on.

KEY TAKEAWAYS

Landel highlights the difficulties for insureds in bringing claims from significant rain events where evidence is needed to show that the damage was not caused by inundation of normally dry land by water overflowing from the normal confines of any natural watercourse, particularly where the insured's situation is close to significant natural watercourses. The case also exemplifies how the '*Wayne Tank*' principle can provide an important protection for insurers.

In *Landel,* Her Honour's helpful reminders regarding the practices that need to be employed in the expert retention process are timely. In particular, insurers should note that experts initially retained by insurers or adjusters in coverage disputes may not always be regarded as truly independent. To avoid this issue, insurers may want to consider seeking legal guidance when they are at that juncture in a coverage dispute.

NEED TO KNOW MORE?

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