

When it rains it pours – Full Federal Court hands down 'common sense' decision

*Acciona Infrastructure
Australia Pty Ltd v Zurich
Australian Insurance
Limited [2023] FCAFC 47*

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At a glance

- On 28 March 2023, the Full Federal Court handed down its judgment on a separate question concerning the operation of an exclusion for damage to contract works caused by rain.
- The separate question was brought by the Acciona and Ferrovial joint venture (JV) and involved the competing contentions of how the words “location insured” in the exclusion should be construed.
- The Full Court agreed with the insurers’ contention, confirming the usual rules around interpreting an insurance contract.
- This judgment brings greater clarity on how claims for rain damage should be assessed, which is important given the increasing frequency and severity of rain events.

Background

The JV was contracted by NSW Roads and Maritime Services to construct a 19.5km section of highway between Warrell Creek and Nambucca Heads in northern NSW (the Project). The JV was insured under a contract works policy for the Project underwritten by Zurich, Allianz and XL (insurers).

The JV claimed cover for alleged damage to contract works caused by multiple rain events during 2016 - 2018. Part of the dispute related to Exclusion 3.12 of the policy. This clause excluded damage to certain materials caused by rain, except where the rain event was a one-in-20-year level event (1:20 Event). The terms of the exclusion are:

“Earthwork Materials and Pavement Materials

*It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the Policy or endorsed thereon, the **Insurers will not indemnify the Insured for loss or damage due to rain on earthwork materials and or pavement materials, except where such loss or damage is due to an event with a minimum return period of 20 years for the location insured** on the basis of the 24 hours statistics prepared by the Bureau of Meteorology for the nearest station to the location insured, or such independently operated weather station situation near or adjacent to the location insured.”*
[emphasis added]

There were multiple weather stations located on and near the Project, including at the southernmost and northernmost ends of it. In June 2016, a rain event occurred that allegedly caused damage to insured property across the entirety of the Project (some 19.5km). However, while the southernmost weather station recorded a 1:20 Event, the northernmost weather station did not.

The JV argued that as long as it could show a 1:20 Event anywhere across the entirety of the Project, the writeback applied, and the entire loss should be covered.

The separate question

“Location insured” (as used in the exclusion) was not a defined term. However, the policy contained other defined terms, such as “Project Site” (i.e. the entire Project) and “situation” (with one such situation being the entire Project), that related to certain locations and Project boundaries. The separate question was:

Does the “location insured” mentioned in exclusion clause 3.12 of the Policy refer to the “Project Site” (as defined), or to the location within the Project Site, or lost or damaged “Insured Property” (as defined)?

The JV contended that the term “location insured” (as used in the exclusion) should be interpreted as “Project Site”. It followed that the data recorded by the southern weather station should apply to the entirety of the Project to bring the alleged damage that occurred in the northern section of the Project within the writeback. Insurers, on the other hand, argued that the exclusion must be read to identify the relationship between the rain event and its causal impact on the area of loss.

“Common Sense” policy construction

Ultimately, the Full Court agreed with the insurers and held that the term “location insured” (as used in Exclusion 3.12) extended only to the area in which the relevant damage occurred, and should not be read (as the JV contended) to cover the entire “Project Site”.

In doing so, the Court observed that: “...as a matter of common sense, it might be thought that, in an exclusion dealing with cover for damage to certain materials by unusually heavy rain, the chosen area for ascertaining what is unusual as to its heaviness would be that area at or about which the damage occurred...”¹

The Full Court developed this reasoning to say that: “It is much more logical to fashion the description of the degree of relevant rainfall intensity by reference to rainfall which had been experienced at, or at least relatively near to, the location of the resulting loss or damage.”²

The Full Court further observed that:

- accepting the JV’s construction of the exclusion would lead to unbusinesslike outcomes, and is unlikely to have been intended by the parties³
- the phrase “location insured” could sensibly be understood as “that location where the damage occurred for which the insurance would be relevant”,⁴ and

¹ Paragraph [23].

² Paragraph [23].

³ Paragraph [25].

⁴ Paragraph [27].



- if the parties had intended “location insured” to refer to the entire Project, they could have used the defined term “Project Site” in Exclusion 3.12.⁵

The Court also rejected the JV’s contention that the defined term “situation” could be substituted for the term “location insured”, as that suffered from the same “illogicality that results from seeking to ascertain whether damage was caused by a one-in-twenty-year rainfall event by reference to the rainfall at a distant weather station, ignoring that which is most proximate.”⁶ Instead, the Court held that “location insured” is more apt to identify an area within a “situation” where the intense rainfall occurred.⁷



⁵ Paragraph [31].

⁶ Paragraph [40].

⁷ Paragraph [42].

Implications for insurers

The judgment confirms the usual rules around interpreting an insurance contract. The main takeaway is that for any exclusion to have bite, the potent effect of the exclusion (and any writeback) must have a causal relationship with the loss.

This judgment brings greater clarity on how claims for rain damage should be assessed. It is likely to have general application on rain-impact exclusions across many first party policies, and is particularly important given the increasing frequency and severity of rain events, and growing investment in major civil infrastructure.

Wotton + Kearney acted for insurers in this matter.

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