

Marine Insurance; All Risks Insurance

Fortuitous loss, inherent vice and proximate cause

*It might ordinarily be thought (as Lord Sumner appeared to think in British and Foreign Marine Insurance Co v. Gaunt [1921] 2 AC 41 at 57) that loss caused by inherent vice cannot be considered fortuitous. Mr Justice Blair's decision in **Global Process Systems Inc v Syarikat Takaful Malaysia Berhad** [2009] EWHC 637 (Comm) provides a helpful reminder that fortuity and inherent vice are not always mutually exclusive. The case is discussed by David Turner QC and Clare Dixon of 4 New Square.*

Global Process Systems: the facts

The Cendor MOPU was an offshore oil rig. It consisted of a working platform which could be raised and lowered on the rig's three legs according to the depth of the sea in which the rig was positioned. The legs each weighed about 404 tons and were about 300 feet in length and the platform would be held at the correct height by the insertion of locking pins into "pinholes" (an inapt term to describe essentially regularly spaced rectangular openings in the legs, each with a cross-sectional area of 160 square inches). As with any rectangular opening in a metal load-bearing structure, stresses were liable to concentrate at the corners of the pinholes, which might ultimately to failure through "stress concentration", more simply known as metal fatigue. The risk of stress concentration was mitigated but not eliminated by the rounding of the corners of each pinhole.

In July 2005, after a six-year lay-up, the rig began a journey from Texas to Malaysia. The rig was transported with its legs in place and (with no concessions to dignity) sticking up into the air. Seven weeks later the rig reached Saldanha Bay in South Africa, where some repairs were performed to eliminate cracking which had occurred on the first leg of the voyage. There was no intention, still less attempt, to re-set the fatigue life of the rig's legs.

Within days of the rig's departure on the second leg of its journey, all three of its legs had fallen off.

The technical explanation for the failures was common ground: fatigue cracking propagated to a critical point, so that when a "final straw" event occurred (when roll angle, direction of motion and the location of the crack all converged) the leg gave way. It was also common ground that the weather and sea conditions encountered during the tow were within the parameters which might have been expected.

The Policy and the Dispute

The claimants obtained all risks insurance to cover the rig from the commencement of loading operations in Texas to the completion of discharge in Malaysia. The policy incorporated ICC(A) terms and, therefore, included an exclusion which stated: "*In no case shall this insurance cover...loss, damage or expense caused by inherent vice or nature of the subject matter covered*".

Two issues fell to be determined: first, whether the loss was fortuitous and therefore *prima facie* within the scope of cover provided; second, if so, whether the proximate cause of the loss was inherent vice so that the exclusion applied.

Fortuity/Inevitability

Carriage of the rig would subject the legs to additional stresses due to the motion of the barge and the effect of the weather and waves encountered. The ability of the rig's legs to withstand the voyage was therefore dependent upon their remaining fatigue life. Fatigue life is deemed to be expended once a factor of unity ratio of 1.0 is achieved.

Following the departure of the rig from Texas, consultants produced a spectral fatigue analysis for the legs which showed factor of unity ratios as high as 2.13. At trial, the experts agreed that this figure was an underestimate of the expenditure of fatigue life: the claimant's own expert estimated the factor of unity ratio as being 2.90 (a figure the Court considered to be too low), while the defendant's expert suggested a figure greater than 5.0. As the judge observed, these figures all predicted failure. On the assumption that between 2.5 and 2.8 fatigue lives would be expended during the tow, the Court concluded that each leg would be subject to a risk of failure of 99.6%.

In the light of such evidence, Insurers argued that the loss was inevitable and therefore not fortuitous. The Court rejected this argument on the following grounds:

1. Establishing "fortuity" was a low hurdle for an insured;
2. "Inevitability" was to be judged at the inception of the policy;
3. "Inevitability" means certainty;
4. While the failure of one or more legs was highly probable, it was not inevitable:
 - a. Probability, however high, did not amount to inevitability;
 - b. It was significant that fatigue cracking itself would not lead to failure without the intervention of some "final straw" event. The occurrence of such an event would depend upon what the judge termed "imponderables" such as the sea state.

Inherent vice and proximate cause

The insured asserted that (1) inherent vice referred to the natural behaviour of the insured cargo without external intervention; and (2) the proximate cause of the loss was the failure to ensure that adequate repairs were carried out at Saldanha Bay.

To make good its arguments on the first point the insured relied upon a dictum of Lord Diplock in *Soya GmbH v White* [1982] 2 Lloyd's 122 at p.126 that "*[inherent vice] means a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty...*". The insured appears to have stressed the need for there to be no external intervention, pointing out that cases such as *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264 and [1987] 1 Lloyd's Rep 32, indicate that a loss in ordinary weather conditions could be due to the perils of the sea: thus if the sea state was within the range to be expected, if it played any role in the loss then the loss was not due to inherent vice; it therefore

followed that *Mayban General Insurance v. Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep 609 had been wrongly decided by Moore-Bick J.

These arguments failed:

1. In the Court of Appeal in the *Soya GmbH* case [1982] 1 Lloyd's Rep 136 at pp.149-150, Donaldson LJ had indicated that a loss would be caused by inherent vice "*if the natural behaviour of the goods is such that they suffer a loss in the circumstances in which they are expected to be carried*". Blair J considered that Lord Diplock's formulation contained no material difference from that of Donaldson LJ. Both tests required consideration of the inherent ability of the goods to withstand the ordinary incidents of the voyage;
2. The same approach had been applied by Moore-Bick J in the *Mayban* case, which did not create a rule of evidence whereby the loss would be attributed to inherent vice in the absence of any exceptional weather;
3. Applying the "*common sense of a business or seafaring man*" (*Noten v Harding* [1990] Lloyd's Rep 283 *per* Bingham LJ at pp.286-287), the legs failed because they were incapable of withstanding the ordinary incidents of the voyage. They did not fail because of the repairs at Saldanha Bay, but despite them.

Commentary

The judge's conclusions on the expert evidence indicate that there was never any *real* chance that the legs would survive the voyage, an impression confirmed by the judge's view that the defendant's expert had expressed the reality of the case when stating "*I don't think these legs were ever going to make it round the Cape*". That the loss was nevertheless still considered to have been fortuitous suggests that establishing fortuity is not merely a low hurdle but probably a non-existent hurdle for an insured in all but the most exceptional of cases. If that is right, an insurer would only be able to advance a lack of fortuity as a ground for defending a claim where the loss is attributable to the insured's wilful misconduct.

If the insured's assault on the decision in *Mayban* had been upheld, then inherent vice exclusions might have become as ineffectual as the requirement for fortuity. Insurers will therefore be relieved that the assault failed.