NEWSSTAND

Wave goodby to inherent vice exclusions? *Global Process Systems v. Syarikat Takaful Malaysia Berhad* in the Court of Appeals

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In late 2009, the Court of Appeal handed down a judgment which added to a large body of case-law on inherent vice. A key principle in the law of marine insurance, loss caused by inherent vice is typically excluded from cover under "*all-risks*" policies of cargo insurance. The Court of Appeal unanimously overturned the first instance decision of the Commercial Court, finding in favour of the claimant insured, and narrowing the test used to determine whether damage sustained by the cargo of a vessel was caused by inherent vice, or the covered "*perils of the sea*".

The claimants in *Global Process Systems Inc & Anor v Syarikat Takaful Malaysia Berhad* [2009] EWCA Civ 1398 purchased a jack-up oil rig in May 2005, with hopes of converting it into a mobile offshore production unit. Carried on a barge with its legs extended 300 feet in the air, the rig was transported from Texas, around the Cape of Good Hope, to its new home in Lumut, off the coast of East Malaysia.

At some point north of Durban, the starboard leg succumbed to fatigue cracking, caused by the repeated bending of the legs under the motion of the barge as it was towed. Within hours, the remaining two legs (under increased pressure after the first leg had come apart from the rig) had also broken off, and all three fell to the bottom of the sea, leaving the rig in need of substantial and costly repairs. Expert evidence given at the trial suggested that, on its own, a developed crack would not be sufficient to cause a leg to come off. A 'leg-breaking' stress was required in addition, causing the final fracture.

Incorporating Institute Cargo Clauses (A), the claimant's insurance was stated to cover "*all risks of loss or damage*" except that "*caused by inherent vice or nature of the subject matter covered*". A dispute therefore ensued as the insurer claimed the loss of the legs was due to inherent vice, and the insured submitted that the immediate cause of loss was a leg-breaking wave (a "peril of the sea"). The key issue to be decided was whether the proximate cause of the loss was an external factor (ie the weather conditions) or the inherent vice of the rig itself.

First Instance Judgment
At first instance, Mr Justice Blair, relying on the judgment of Mr Justice Moore-Bick in *Mayban General Assurance BHD v Alstom Power Plants Ltd* (2004) EWHC 1038 (Comm), held that the proximate cause of loss was the fact that the legs were not capable of withstanding the normal

incidents of the insured voyage from Texas to Lumut, including the weather "*reasonably to be expected*".

In the absence of a statutory definition of inherent vice, Lord Diplock's definition from *Soya GmbH Mainz KG v White* (1983) 1 Lloyd's Rep 122 HL was accepted by both parties. This states that inherent vice is:

"...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."

As such, Blair J found that the loss fell within the inherent vice exclusion and was not covered by the policy.

Court of Appeal Judgment

The key issue to be decided on appeal was whether inherent vice was the sole and proximate cause of the loss, as the insurers claimed, and therefore whether or not the loss was excluded under the "*all-risks*" policy. This required an examination of other possible causes, and whether they could be considered proximate. In the shipping context of this case, the other possible causes of the loss were the conditions of the voyage, and more specifically the weather encountered by the vessel carrying the rig.

Lord Justice Waller, having considered the authorities on this point, held that *"...it is only if a peril insured against is not a proximate cause that inherent vice can be the sole and proximate cause"*. The most relevant "*peril insured against*" in this case, was a "*peril of the sea*", ie a fortuitous external accident or casualty caused by the weather experienced by the vessel at sea.

As noted, at first instance Blair J made reference to the inability of the legs to withstand the weather "*reasonably to be expected*". On appeal, Waller LJ narrowed the range of weather conditions which would be considered an "*ordinary incident*" of the voyage, to those which would be "*bound to occur*". Waller LJ explained that the answer to the question of whether a loss was caused by inherent vice:

"…cannot be found by reference to what might reasonably be foreseeable as the ordinary incidents of that voyage, but by reference to wind or wave which, it would be the common understanding, would be bound to occur as the ordinary incidents on any normal voyage of the kind undertaken."

It was therefore only in cases where the weather encountered was "*bound to occur*" as part of the voyage in question that it could be said that inherent vice was the sole and proximate cause of the loss. In the present case, a leg-breaking wave caused the starboard leg to fall off. Although with the benefit of hindsight, this incident may have been highly probable, that *"high probability was unknown to the insured and that was a risk against which the appellants insured."* There was an external and fortuitous event which was the sole and proximate cause of the loss and therefore inherent vice could not apply to exclude cover under the policy. Accordingly the appeal was allowed and the decision of Blair J reversed.

Significance of this Decision
At the time of writing, no notice has been filed indicating an intention to appeal to the Supreme Court, and no reference was made in the judgment to permission to do so.

The judgment in *Global Process* narrows the test for inherent vice and broadens the range of events which may be considered fortuitous external accidents. It is now clear that inherent vice will not be deemed the sole proximate cause of a loss simply because the other external events experienced were "*reasonably to be expected*". This may make it easier for an insured to defend an insurer's claim that cover is excluded from an "*all-risks*" policy because the loss was due to inherent vice.

Although this case concerned marine cargo insurance, the decision will have ramifications for insurers of other classes of business in which inherent vice exclusions are common, for example property insurance. Insurers should be wary of placing too much reliance on an inherent vice exclusion in circumstances where there are other events which were not "*bound to occur*" that may have caused the loss.