

# **INHERENT VICE**

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# Inherent vice

"[T]he 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. "

- *Soya v White* [1983] 1 Lloyd's Rep 122 (HL) at 126 per Lord Diplock

# It's a contract stupid

- (Self-explanatory, and directed at the presenter.)

# Inherent vice – some marine examples

- *Noten v Harding* [1990] 2 Lloyd's Rep 283 (CA): Leather gloves in containers on a voyage from Kolkata to Rotterdam. Gloves absorbed moisture in humid Kolkata; moisture released in cool Rotterdam.
- *Nelson v Royal & Sun Alliance* (2006) 57 BCLR (4<sup>th</sup>) 27: Shipment of laminated hardwood flooring from Malaysia to Vancouver. Moisture escaped from wood and condensed on surface.
- *The Cendor MOPU* [2011] UKSC 5. MOPU towed from Galveston, Texas, to Malaysia.

# The Cendor MOPU in happier times



# Don't try this around the Cape of Good Hope ...



# *The Cendor MOPU* [2011] UKSC 5

Key point:

- There can be a fortuitous external accident even when the weather and waves are ordinary. That is because the focus is on **the action of** the wind and waves. If the action is ordinary, not covered. But if the action is fortuitous – such as the arrival of a leg-breaking wave – then the loss is covered.

# Onus of proof

- Even in “all risks” cover, the onus is on insured to show that loss was caused by a fortuitous event.
- *Nelson v Royal & Sun Alliance* (2006) 57 BCLR (4<sup>th</sup>) 27:  
“the insured must establish, by direct evidence or by inference to be drawn from the available evidence, that an external fortuitous occurrence caused the deterioration of the cargo as distinct from the cargo having simply succumbed to the ordinary incidents of the voyage because of the cargo’s inherent nature or susceptibility.”



# Non-marine analogues (or variations)

- Some basic concepts:
  - The insured risks – eg, “accident” or “all risks”.
  - The insured event – loss of or damage to property caused by an insured risk.
  - The financial loss resulting from that insured event – usually the cost of repair or replacement; sometimes loss in market value.

# Some basic concepts

Exclusions usually reflect one of those three concepts:

- Some exclude particular risks: damage caused by faulty workmanship (or by inherent vice).
- Some exclude particular types of loss or damage, or types of property. Eg, damage to property that has a fault or defect in it: *CA Blackwell v Gerling* [2008] Lloyd's Rep IR 529.
- Some exclude particular types of financial loss. Eg, the cost of rectifying the faulty workmanship.

# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

- During the construction of a building the building's windows were scratched by the cleaners hired to clean them. All windows had to be replaced.
- The building's owner and the general contractor claimed the cost of replacing the windows under a builder's risk policy.

# A few windows (scratch-free)



EPCOR Tower, Edmonton Alberta

# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

“This policy section does not insure:

“(b) **The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.**”

# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

- Paragraph [84]: “Whether certain damage falls within the resulting damage exception to the faulty workmanship exclusion will greatly depend on **the scope of the contractual obligation** pursuant to which the faulty workmanship was carried out.”
- Bristol’s obligation under its service contract “was limited to cleaning the Tower’s windows after they had been properly installed. Redoing Bristol’s faulty work did not require Bristol to install windows in good condition”.

# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

- That approach has some superficial attraction.
- But surely the scope of Bristol's contractual obligation was to clean the windows without damaging them. After all, there is no suggestion that Bristol didn't clean the windows well; the fault lay only in Bristol scratching the windows.

# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

- Wagner J concluded: “the cost of the windows replacement represents ‘resulting damage’ and is covered under the policy”.
- That conflates “cost” and “damage”. It overlooks the basic distinction between “damage to property” and “cost of making good”.



# ***Ledcor Construction v Northbridge Indemnity Insurance [2016] SCC 37***

- The exclusion, in its own terms:
  - Excluded “the cost of making good faulty workmanship”
  - Unless “physical damage results”, in which case the policy insured that resulting damage.
- So the exclusion specifically provided that resultant damage was covered.