Hilary Term
[2011] UKSC 5
On appeal from: [2009] EWCA Civ 1398

JUDGMENT

Global Process Systems Inc and another (Respondents) *v* Syarikat Takaful Malaysia Berhad (Appellant)

before

Lord Mance
Lord Collins
Lord Clarke
Lord Dyson
Lord Saville

JUDGMENT GIVEN ON

1 February 2011

Heard on 28 and 29 July 2010

Appellant	*Respondent*
Steven Gee QC Peter Stevenson (Instructed by Hill Dickinson LLP)	Gordon Pollock QC Claire Blanchard QC (Instructed by Watson, Farley & Williams LLP)

LORD SAVILLE

1. This case is concerned with a marine insurance policy on cargo dated 5 July 2005, which incorporated the Institute Cargo Clauses (A) of 1 January 1982. The policy covered "all risks of loss or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7…" Clause 4.4 excluded "loss, damage or expense caused by inherent vice or nature of the subject matter insured" from the cover provided by the policy.

2. The subject matter of the insurance was the oil rig *"Cendor MOPU."* This oil rig had been laid up in Galveston, Texas. In May 2005 it was purchased by the respondents (the assured under the policy) for conversion into a mobile offshore production unit ("MOPU") for use in the Cendor Field off the coast of East Malaysia. The insurance covered the loading, carriage and discharge of the oil rig on the towed barge *"Boabarge 8"* from Galveston in the United States to Lumut in Malaysia. The total sum covered was Malaysian Ringgits 38m (US$10m) with a deductible of US$1m. The premium was US$378,000.

3. The oil rig, originally called the "*Odin Liberty*", was built in Singapore in 1978. It is what is called a "self elevating mat supported jack-up rig," consisting of a watertight working platform called the jackhouse, which can be moved (jacked) up and down three legs extending to the seabed, according to the sea depth at the drilling location. There is a mat at the bottom of the legs that sits on the seabed when the rig is in operation.

4. The legs are massive tubular structures, made of welded steel cylindrically shaped, with an outside diameter of 12 feet and a length of 312 feet. Each weighed 404 tons. The jacking system worked by engaging steel pins into what were called pinholes in the legs. These pinholes were apertures some 16 inches wide and 10 inches high. Each leg had 45 sets of pinholes at 6 foot intervals.

5. The rig was carried on the barge with its legs in place above the jackhouse, so that the legs extended some 300 feet into the air.

6. The voyage began on 23 August 2005. On 10 October 2005 the tug and barge arrived at Saldanha Bay, just north of Cape Town. There some repairs were made to the legs and the voyage resumed on 28 October. North of Durban on the evening of 4 November 2005, the starboard leg broke off at the 30 foot level and fell into the sea. The following evening the forward leg broke off at the same level,

and some 30 minutes later the port leg broke off at the 18 foot level. Both these legs also fell into the sea. It is the loss of the three legs that is the subject matter of the claim under the policy.

7. The loss resulted from metal fatigue in the three legs. Fatigue is a progressive cracking mechanism resulting from repeated or fluctuating (cyclic) stresses each at a level lower than that required to cause fracture of an uncracked component. Generally, there are three stages to the fatigue failure of any component, namely initial cracking, propagation of the cracking and finally complete fracture.

8. The initial cracking occurs in regions of stress raising features, such as corners or notches, where stresses are concentrated. In the present case, the corners of the pinholes were stress raising features. The initial fatigue cracks occurred there and then propagated until they reached a point where they were subjected to what was described as a "leg breaking" stress that completely fractured the weakened leg. Once the first leg had failed, the stresses on the remaining legs increased.

9. The stresses in the present case were generated from the effect that the height and direction of the waves had on the pitching and rolling motion of the barge and thus on the legs. It was common ground that what the barge experienced was within the range of weather that could reasonably have been contemplated for the voyage.

10. That the legs of the rig were at risk of fatigue cracks during the voyage was known from the outset and the legs were inspected at Galveston by experts appointed by the assured and approved by the insurers. It was a condition of the policy that the appointed surveyors Noble Denton approved the arrangements for the tow. These surveyors issued a Certificate of Approval on 23 August 2005. In this certificate they required that the legs be reinspected when the barge reached Cape Town (roughly the half way point) for crack initiation in way of the six levels of pinholes above the mat; so that remedial work could be undertaken should it be found necessary.

11. When the rig was examined at Saldanha Bay it was found that there had occurred a considerable degree of fatigue cracking around the pinholes; and some repairs were made in order to reduce the stress concentrations in these areas. Self-evidently, however, the repairs did not prevent the final failure of the legs a few days later.

12. The insurers rejected the claim for the loss of the legs and the matter came for trial before the Commercial Court. At the trial one of the arguments advanced by the insurers was that the loss was the inevitable consequence of the voyage, and that since insurance was against risks, not certainties, they were under no liability for the loss of the legs. The judge, Blair J, [2009] 2 All ER (Comm) 795, rejected this argument, concluding at para 87 "that the failure of the legs as this rig was towed round the Cape was very probable, but it was not inevitable." As he put it:

> "…a developed crack would not, on its own, have been sufficient to cause one of the legs to come off. That required in addition a 'leg breaking' or 'final straw' stress that finally fractured the weakened steel. As Mr Colman [one of the experts called at the trial] put it, 'you've got to catch it just right, if you want to make it actually fail all the way round.'"

13. The insurers do not challenge the judge's conclusion.

14. One of the arguments advanced by the assured at the trial was that the loss resulted from the failure to effect adequate repairs at Saldanha Bay. This argument too was rejected by the trial judge, on the grounds that the loss occurred despite the repairs and not because of them. The assured does not challenge this conclusion.

15. What Blair J decided was that the insurers had proved that "the proximate cause of the loss was the fact that the legs were not capable of withstanding the normal incidents of the insured voyage from Galveston to Lumut, including the weather reasonably to be expected." In his judgment this meant that the cause of the loss was inherent vice within the meaning of the policy and that accordingly the insurers were not liable for the claim.

16. The Court of Appeal [2010] 1 Lloyd's Rep 243, para 64 took a different view and concluded that the proximate cause of the loss was an insured peril in the form of the occurrence of a "leg breaking wave", which resulted in the starboard leg breaking off, leading to greater stresses on the remaining legs, which then also broke off. The insurers now appeal to the Supreme Court.

17. Both at first instance and in the Court of Appeal, the judges expressed their task as seeking to find the "proximate cause" of the loss. The reason for this is to be found in the Marine Insurance Act 1906, which was entitled "An Act to codify the Law relating to Marine Insurance." Section 55(1) of this Act provides that:

> "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

18. In general terms therefore, whether or not a loss is covered by a marine policy depends on ascertaining its proximate cause.

19. Although there were some authorities before the Marine Insurance Act 1906 that appeared to proceed upon the basis that the relevant cause was that closest in time to the loss, it is now well settled that this is not the test for proximate cause*:* *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350. The proximate cause is that which is proximate in efficiency; and, as Bingham LJ put it in *T M Noten BV v Harding* [1990] Lloyd's Rep 283, 286-287:

> "Unchallenged and unchallengeable authority shows that this is a question to be answered applying the common sense of a business or seafaring man."

20. It was common ground between the parties that it was for the insurers to prove that the loss was proximately caused by inherent vice or nature of the subject matter insured. The central issue before this court was as to the meaning of this exception to the cover.

21. Although in the present case, as pointed out above, this exception is spelt out in the Institute Cargo Clauses, it also appears in section 55(2)(c) of the Marine Insurance Act 1906, which provides:

> "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."

22. It is not suggested that the exception under consideration bears a different meaning from that in the Marine Insurance Act 1906, though if there are two proximate causes, one of which is covered and the other which is (as here) specifically excepted, it appears settled that the loss is not recoverable under the insurance: *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn*

Ltd [1974] QB 57; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32.

23. In the present case the two remaining candidates for "proximate cause" are perils of the seas, in the form of the stresses put upon the rig by the height and direction of the waves encountered by the barge, and inherent vice or nature of the subject matter insured.

24. Both parties to this appeal relied upon the definition of inherent vice or nature of the subject matter insured given by Lord Diplock in *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122. In that case a cargo of soya beans was insured against risks of heating, sweating and spontaneous combustion. The goods arrived in a heated and deteriorated condition. The insurers denied liability on the grounds that the proximate cause of the damage was inherent vice or nature of the subject matter insured, for which they were not liable under section 55(2)(c) of the Marine Insurance Act 1906; and that the cover only extended to heating, sweating or spontaneous combustion brought about by some external cause. The House of Lords decided that as a matter of construction the policy did "otherwise provide" within the meaning of the opening words of section 55(2)(c) so that the perils of heating, sweating and spontaneous combustion arising from inherent vice or nature of the subject matter insured were covered. It was in this context that Lord Diplock, at p 126, stated that:

> "This phrase (generally shortened to "inherent vice") where it is used in section 55(2)(c) refers to 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."

25. The insurers submitted that applying this definition to the present case, the first question was whether at Galveston, assuming the ordinary course of the contemplated voyage, without any intervening adverse fortuity, the rig had within itself internally the risk of deterioration, which they described as "the inherent vice at Galveston"; while the second question was whether the inherent vice at Galveston was the proximate or one of the proximate causes of the loss. They submitted that Lord Diplock had made it clear that it was not enough to negative inherent vice to have some external fortuity. The external fortuity had to intervene so that it negatived causation of the loss by the unfitness of the goods which existed on shipment. In the present case, it was submitted, the actual sea conditions, albeit themselves fortuities, were within the range that could reasonably have been contemplated for the voyage. In other words, it was submitted that those sea conditions occurred in and as part of the ordinary course

of the contemplated voyage. The submission was, therefore, that there had been no intervention of any fortuitous external accident or casualty, so that the loss was proximately caused by the inherent vice at Galveston.

26. The insurers sought support for these submissions from some passages from the judgment of Donaldson LJ in the court below in the same case ([1982] 1 Lloyd's Rep 136, 150); from the decision of the Court of Appeal in *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283; and from the decision of the British Columbia Court of Appeal in *Nelson Marketing International Inc v Royal and Sun Alliance Insurance Co of Canada* (2006) 57 BCLR (4th) 27.

27. There is nothing to suggest that Lord Diplock was in agreement with the definition of inherent vice suggested by Donaldson LJ, namely that a loss is proximately caused by inherent vice if the natural behaviour of the goods is such that they suffer a loss in circumstances in which they are expected to be carried. Such a definition pays scant regard as to how and in what circumstances the loss occurred.

28. In *T M Noten BV v Harding* [1989] 2 Lloyd's Rep 527; [1990] Lloyd's Rep 283 industrial leather gloves were shipped from Calcutta to Rotterdam. On arrival the good were found to be wet, stained, mouldy and discoloured. The judge at first instance (Phillips J) decided that the damage had been caused by moisture, which had been absorbed by the goods in the humid atmosphere of Calcutta and had then evaporated and condensed on the top of the container, before falling back on the goods and damaging them. Phillips J decided that the proximate cause of the damage was external to the goods, even if a characteristic of the goods had helped to create that external cause; and that accordingly the defence of inherent vice failed.

29. The Court of Appeal overruled this decision. As already observed, it was in this case that Bingham LJ made clear that the ascertainment of the proximate cause was a question to be answered applying the common sense of a business or seafaring man. The answer that the Court of Appeal gave was that the goods deteriorated 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 damage was caused because the goods were shipped wet." It is noteworthy that in that case it was accepted on behalf of the assured that if the damage complained of had been caused by excessive moisture in the gloves, but without the intervening process of condensation on the roof of the containers, the position would have been different. Bingham LJ described this suggested distinction as "owing more to the subtlety of the legal mind than to the commonsense of the mercantile." This case therefore is one where, applying commonsense, the proximate cause of the damage was the moisture in the cargo,

and the fact that it evaporated from the cargo before condensing and falling back on the cargo was neither here nor there. There was, as Bingham LJ pointed out, no untoward or unusual event of any kind. It was not unusually hot in Calcutta or particularly cold in Rotterdam. "There was, on the evidence, no combination of fortuitous events, and the defendant never undertook to insure the plaintiffs against the occurrence of hot and humid weather in Calcutta during the monsoon.": p 289.

30. The British Columbia Court of Appeal in *Nelson Marketing International Inc. v Royal and Sun Alliance Insurance Co of Canada* 57 BCLR (4th) 27 followed this decision in a case where shipments of laminated truck flooring were damaged by moisture absorbed by the flooring in the course of manufacture, which on the voyage had evaporated and condensed in circumstances which were not established to be other than what was expected in the ordinary course of the voyages in question. There was no fortuitous external occurrence causing the deterioration. As Lowry JA put it, at p 35: "Rather, on the evidence adduced, it was attributable to the nature of the subject matter of the insurance."

31. In the two cases under discussion, there was simply no external fortuitous event or series of events which could sensibly be described as the proximate cause of the damage. In my judgment these cases do not provide authority for the proposition that inherent vice or nature of the subject matter insured is established by showing that the goods in question were not capable of withstanding the normal incidents of the insured voyage, including the weather reasonably to be expected. What they do establish is that where the only fortuity operating on the goods comes from the goods themselves, the proximate cause of the loss can properly be said to be the inherent vice or nature of the subject matter insured and so (in the absence of provisions to the contrary) falls outside the cover.

32. However, the case that is authority for the proposition contended for by the insurers is the decision of Moore-Bick J in *Mayban General Insurance v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep 609.

33. In that case the cargo was a transformer, which was seriously damaged by the violent movements of the vessel due to the action of the wind and sea. However, Moore-Bick J held that goods tendered for shipment must be capable of withstanding the forces that they can ordinarily be expected to encounter in the course of the voyage and that if the conditions encountered by the vessel were no more severe than could reasonably have been expected, the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage. The judge went on to find that the conditions encountered were neither extreme nor unusual in the sense that they were encountered often enough for mariners to regard them as a normal hazard. He accordingly held that the insurers were not liable for the damage, since the cover

excluded loss damage or expense caused by inherent vice or nature of the subject-matter insured. In the present case Blair J regarded this case as applying the correct test; the Court of Appeal declined to do so.

34. In my judgment *Mayban General Insurance v Alstom Power Plants* was wrongly decided. It should be noted that it was apparently common ground between the parties to that case that an inability of the cargo to withstand the ordinary perils of the seas amounted to inherent vice, so that the meaning of inherent vice was not argued out. Furthermore, none of the authorities on the meaning of perils of the seas was cited to the judge.

35. The assured submitted, in my judgment correctly, that the effect of applying the test adopted by Blair J would be to reduce much of the purpose of cargo insurance, for the cover would then only extend to loss or damage caused by perils of the seas that were exceptional, unforeseen or unforeseeable, and not otherwise. This, it was submitted, would go far to frustrate the very purpose of all risks cargo insurance, which is to provide an indemnity in respect of loss or damage caused by, among other things, all perils of the seas.

36. Blair J rejected this submission on the grounds that the real question was as to the proximate cause of the loss; and that the approach of Moore-Bick J did not entail that in order to qualify as a peril of the sea, the weather had to be extraordinary. However, although of course the proximate cause of the loss or damage is indeed the real question, this does not to my mind answer the point made by the assured, which is that on the test adumbrated by Moore-Bick J, the assured is not covered in respect of loss or damage to cargo caused by unexceptional or foreseen or foreseeable perils of the seas.

37. Put another way, the ordinary form of all risks cargo insurance would, if Moore-Bick J was right, not provide cover for losses attributable to the unseaworthiness of the cargo ie loss or damage caused by the inability of the cargo to withstand the ordinary perils of the seas. The reasons for this are as follows.

38. According to section 39 of the Marine Insurance Act 1906, seaworthiness means "reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured."

39. The meaning of "perils of the seas" in the Act is contained in the "Rules for construction of policy" contained in Schedule 1, where the phrase is defined as referring "only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." Thus section 55(2)(c) of the 1906 Act

(and the Institute Cargo Clauses) make clear that ordinary wear and tear caused by the sea (or otherwise) is something for which the insurer does not provide cover. It is to be noted that the word "ordinary" attaches to "action" not to "wind and waves", so that if the action of the wind or sea is the proximate cause of the loss, a claim lies under the policy notwithstanding that the conditions were within the range which could reasonably have been anticipated: the *Miss Jay Jay* [1985] 1 Lloyd's Rep 264, 271.

40. Section 39 of the 1906 Act implies a warranty into a policy covering a vessel for a voyage, that at the beginning of the voyage the vessel shall be seaworthy for the purpose of the particular adventure insured. The effect of the warranty is that if the vessel is not seaworthy the insurer is not liable for any loss or damage, whether or not that was proximately caused by the unseaworthiness. In a time policy there is no such implied warranty, though under section 39(5) where the ship is sent to sea in an unseaworthy state with the privity of the assured, the insurer is not liable for any loss attributable to unseaworthiness. Of course, as Mustill J pointed out in the *Miss Jay Jay*, at p 272, where an unseaworthy vessel sinks entirely through its own inherent weakness, rather than from the operation of a peril of the seas which it should have been able to withstand, the insurer will also not be liable.

41. As to goods, section 40(1) of the 1906 Act provides that in a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy. Although seaworthiness is not defined in this section, there is no reason to suppose that it bears a different meaning from that in section 39: *E D Sassoon & Co v Western Assurance Co* [1912] AC 561.

42. Under the 1906 Act therefore, the fact that the goods are not reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured, does not automatically deprive the assured of cover. There is no equivalent to the provisions relating to time policies, where loss or damage attributable to unseaworthiness at the outset known to the assured is excluded.

43. The provisions of the 1906 Act do not fit easily with the proposition that inherent vice or nature of the subject-matter insured means that unseaworthy goods are not covered against loss or damage attributable to that unseaworthiness. The effect of that proposition would be that whereas the ship owner under a time policy would be covered against loss attributable to the unseaworthiness of the vessel at the outset to which he was not privy, the cargo owner would not be covered against loss attributable to unseaworthiness of the cargo, whether or not he was privy to the fact that the cargo was unseaworthy. There is nothing in the 1906 Act or in the preceding authorities which to my mind lends support to such a distinction. Furthermore, if inherent vice or nature of the subject-matter insured

did include unseaworthiness, then, contrary to section 39(5), the insurer could escape liability under a time policy for loss and damage attributable to unseaworthiness even if the assured was not privy to that unseaworthiness.

44. Our attention was drawn to a number of authorities relating to the meaning of perils of the seas, as well as other cases relating to the question of inherent vice or nature of the subject-matter insured. I can find nothing in those authorities which lend support to the test applied by Blair J. On the contrary, cases such as *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 and the *Miss Jay Jay* make clear that perils of the seas are not confined to cases of exceptional weather or weather that was unforeseen or unforeseeable; while inherent vice or nature of the subject-matter insured has never (before the decision in *Mayban* [2004] 2 Lloyd's Rep 609) previously been defined as encompassing any fortuitous external accident or casualty that was unexceptional or foreseen or foreseeable.

45. In these circumstances I do not accept the construction put by the insurers on the definition given by Lord Diplock in *Soya v White* [1983] 1 Lloyd's Rep 122, 126. In my judgment what Lord Diplock was saying, as the assured submitted, was that where goods deteriorated, not because they had been subjected to some external fortuitous accident or casualty, but because of their natural behaviour in the ordinary course of the voyage, then such deterioration amounted to inherent vice or nature of the subject-matter insured.

46. As already noted, Blair J held that the real question was as to the proximate cause of the loss. In this he was correct. The question is one of fact, to be decided on common sense principles. Where in my view the judge erred was in giving the phrase inherent vice or nature of the subject-matter insured too wide a meaning and, as the other side of the coin, giving the risk of perils of the seas too narrow a meaning, by in effect including in the former and excluding from the latter external fortuities that were unexceptional or which were foreseen or foreseeable; and then answering the question of fact on this erroneous basis. All or virtually all goods are susceptible to loss or damage from the fortuities of the weather on a voyage; this does not mean that such loss or damage arises from the nature of the goods; it arises from the fact that the goods have encountered one of the perils of the seas. In my judgment in the present case the proximate cause of the loss, applying commonsense principles, was not inherent vice nor indeed ordinary wear or tear or the ordinary action of the wind and waves, but an external fortuitous accident or casualty of the seas. This took the form of the rolling and pitching of the barge in the sea conditions encountered catching the first leg at just the right moment to produce stresses sufficient to cause the leg to break off, thereby leading to increased stresses on the remaining legs and their subsequent breakage.

47. It remains to note that if, as the insurers submitted, and Blair J held, the proximate cause of the loss was inherent vice because the legs were not capable of withstanding the normal incidents of the insured voyage from Galveston to Lumut, including the weather reasonably to be expected, it difficult to see how the case could be one where there were two proximate causes, since ex hypothesi it would be the inability of the legs to withstand the stresses, not the stresses themselves, that would be the proximate cause. Thus in my judgment this is not a case in which it could be concluded that there was more than one proximate cause of the loss.

48. For these reasons I would dismiss this appeal.

LORD MANCE

Introduction

49. In the Victorian era, the "proximate" cause in marine insurance was readily associated with the last cause in point of time: see eg *Thompson v Hopper* (1856) 6 E & B 172, 937; *Dudgeon v Pembroke* (1877) 2 App Cas 284; in the parallel bill of lading context, *Thomas Wilson, Sons & Co v Owners of the cargo per the Xantho (The "Xantho")* (1887) 12 App Cas 503, 514, per Lord Bramwell; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyds Rep 264, 271 per Mustill J, as well as "Fault and Marine Losses" [1988] LMCLQ 310 (Sir Michael Mustill). The modern focus on the "real efficient cause" was finally established at the highest level after the enactment of the Marine Insurance Act 1906, in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350. From that moment, the proximate cause became a matter of judgment and less easy to identify with certainty.

50. Lord Saville has outlined the facts. On the present appeal, the rival candidates as cause of the loss of the three legs of the oil rig *Cendor MOPU* are, on the one hand, a fortuitous external accident or casualty falling within the concept of "all risks of loss or damage" in clause 1 of the relevant Institute Cargo Clauses (A) (the respondent insured's case) and, on the other hand, inherent vice of the rig within clause 4.4 of the Clauses (the appellant insurers' case). In the alternative, if both can and should be regarded as concurrent causes, insurers submit that the respondents' claim must fail, because clause 4.4 is a specific exclusion. This point may not have been clearly identified below, but it is essentially one of law, and insurers are in my view entitled to argue it.

51. By inherent vice, insurers do not mean some characteristic of the rig which was bound to lead to the loss of its legs. Inevitability is not the test of inherent vice, just as lack of inevitability is no proof of a fortuitous external accident or casualty. Inevitability is excluded in this case by Blair J's finding that the failure and consequent loss of the legs was, although "very probable, …. not inevitable" ([2009] 2 All ER (Comm) 795, paras 89 and 104). So it is unnecessary to discuss whether and to what extent there exists a further principle of insurance law, that loss which is inevitable is irrecoverable. If both parties know that loss is inevitable, there may be no risk or insurance at all, although in endowment insurance the risk lies in the uncertainty when death will occur. If the assured alone knows that the loss is inevitable, one would expect him to fail, if only on grounds of non-disclosure. If neither party knows, then inevitability resulting from inherent characteristics of the goods will, in the absence of express provision, bar recovery on the grounds of inherent vice. Whether inevitability resulting from outside causes will do so seems an open question. Would it be an answer to war risks insurers to prove that an insurance on cargo was placed at a time when the cargo was already on an aircraft in flight with a timed bomb due to go off in ten minutes in its cargo hold? Such questions do not require further examination here.

52. Putting insurers' case at its highest, it may be argued that, because the insured rig was unable to withstand all bad weather conditions which it would foreseeably meet during the insured venture, the assured cannot recover in respect of the resulting loss of or damage to the rig legs. If presented as a rule of law or even of evidence, this would make lack of fitness for the insured venture (or lack of "cargoworthiness") a condition precedent to recovery for loss or damage which would not have been suffered had the goods been fit for the venture. This would be a coherent thesis, but it finds possible support in only one decision, and that recent: *Mayban General Insurance Bhd v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep 609 (Moore-Bick J). Its acceptance would place a stringent limit on the scope of marine insurance cover, which could not infrequently lead to disputes about the fitness of cargo to travel, and leave CIF buyers in doubt about whether to look to their insurers or sellers or both, quite possibly in different fora.

53. Mindful no doubt of this, Mr Steven Gee QC does not advance any so definite proposition of law. In his submission, unfitness for the foreseeably bad weather conditions on the voyage is no more than a powerful pointer towards a conclusion that loss or damage occurring as a result of such conditions was proximately caused by inherent vice. When Moore-Bick J said in *Mayban*, at para 21, that, if the conditions encountered by the vessel were no more severe than could reasonably have been expected, then "the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage", he had in context only been stating a commonsense conclusion. In every such case, it was a matter of evidence and judgment whether the loss or damage was due to the peril of the sea or the inherent characteristic or

"vice" of the cargo or both. Here, Blair J had taken that approach and had found that, "Taking the evidence as a whole, ….. the proximate cause of the loss was the fact that the legs were not capable of withstanding the normal incidents of the insured voyage …, including the weather reasonably to be expected" (para 111). There was no basis upon which to disturb this assessment of the facts.

The Marine Insurance Act 1906

54. The statutory background includes provisions dealing directly with the fitness of the vessel in the case of hull insurance (section 39) and of the goods and carrying vessel in the case of cargo insurance (section 40). Section 40(1) provides that that there is no implied warranty that the goods or moveables insured are seaworthy, while section 40(2) provides that there is an implied warranty that the carrying ship is, at the commencement of the voyage, not only seaworthy as a ship, but also reasonably fit to carry the goods or moveables to the contemplated destination. The historical origins and rationale of these differing approaches need not detain us, though, looking at them through modern eyes, one could suggest reasons why they might have been framed in a reverse sense, ie to have provided for a warranty of the goods' seaworthiness and no warranty of the ship's seaworthiness.

55. However that may be, modern cargo clauses very substantially modify section 40(2), providing (in the case of the present Clauses) by clause 5(2) that insurers waive any breach of the implied warranties which section 40(2) contains, unless the assured or their servants "are privy to such [un]seaworthiness or unfitness", and for good measure also excluding by clause 5(1) any loss or damage arising from unseaworthiness or unfitness of the vessel at the time of loading of the insured goods where the assured or their servants are so privy.

56. In circumstances where the Act addresses the subject of initial unseaworthiness or unfitness of both the goods and the carrying vessel by express provisions, but leaves the parties free to vary and supplement such provisions as they may wish, it might be thought odd if such unseaworthiness or unfitness could also be a direct test of insurers' liability for any particular loss or damage under the separate heading of inherent vice, dealt with in section 55(2)(c). The answer advanced by Mr Gee for the insurers is that there is a great difference between a warranty, which, from the moment of its breach, discharges from all liability for any loss or damage whether or not causatively linked (*Bank of Nova Scotia v Hellenic Mutual War Risks Underwriting Association (Bermuda) Ltd* (*The "Good Luck"*) [1992] 1 AC 233) and a qualification or exclusion which only affects loss or damage arising from the matters covered by the qualification or exclusion. A historical riposte might then be that the famously and sometimes unfairly stringent principles governing insurance warranties were themselves the product of the

Victorian view of causation referred to in para 56 of this judgment. If the only relevant cause is the last cause in time, then a prior breach of a simple contractual obligation regarding fitness could have been regarded as irrelevant. Hence, the development of the concept of a warranty which, if broken, automatically discharged from liability for loss or damage, irrespective of how such loss or damage was in law to be regarded as caused.

57. Even prior to the 1906 Act, however, it is clear that thinking had developed in at least some areas. In case of deliberate casting away, the law looked behind the immediate cause of loss. Another, more relevant here, instance is crystallised in section 39(5), providing that, in a time policy on a ship, there is no implied warranty of seaworthiness at any stage of the adventure, but that, "where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness". The Act thus recognised in relation to hull insurance the possibility of excluding liability for what would otherwise have been loss or damage by the immediate cause of a peril of the sea, where the loss or damage could, more remotely, be attributed to unseaworthiness of the vessel to which the assured was privy. When the Act was passed, the language "loss *attributable* to unseaworthiness" catered for the Victorian reluctance to look behind the last cause in time to any previous cause. How far the word "attributable" now allows regard to be had to causes which would, under modern conceptions, not be regarded as proximate appears undecided, and may in turn depend upon how far modern conceptions of proximity can, in cases of unseaworthiness, lead the eye back beyond the immediate cause to initial unseaworthiness as the real, dominant or effective cause. That is of course the essential issue in this case. However, it can, I think, still be said that the express treatment of the subject of seaworthiness in hull insurance in section 39(5) highlights the absence of any like provision in respect of cargo insurance and so the oddity of treating section 55(2)(c) as, in effect, containing such a provision when it refers to inherent vice. The oddity is further highlighted under the present Clauses, when one considers the careful restriction in clauses 5.1 and 5.2 of the relevance of breaches of the implied warranties of seaworthiness and fitness of the vessel to circumstances where the assured was privy to such breaches.

58. Under the rules for the construction of an SG policy in the form set out in Schedule 1 to the 1906 Act "or other like form": "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves". The present policy was not in or in like form to the SG policy form, but it covered only fortuitous accidents or casualties, not the ordinary action of the winds and waves or other elements: *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283 (see further paras 62-63 below). The term "inherent vice", introduced in section 55(2)(c) to define the scope of marine cover, is not statutorily defined, but Mr Gee relies upon the definition advanced by Lord

Diplock in *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122, 126:

> "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".

Under this definition, the critical questions are what are meant by the "ordinary course of the contemplated voyage" and the "intervention of any fortuitous external accident or casualty". Mr Gee submits that the ordinary course of the contemplated voyage includes all foreseeable weather conditions; on this basis, the triggering by foreseeably bad weather of goods' unfitness for the insured adventure, giving rise to loss or damage of the goods, occurs in the ordinary course of the voyage, and there is nothing that can or should be described as a fortuitous external accident or casualty. Mr Gordon Pollock QC for the assured submits, in contrast, that, if goods are lost by what would otherwise be an insured peril, in particular a peril of the seas, then there is a fortuitous external accident or casualty and, by the same token, an event outside the ordinary course of the contemplated voyage. It is, he submits, no answer to this that the fortuity consisted in weather conditions of a foreseeably unfavourable kind, which the goods were not fit to withstand. It will be observed that, applied to Lord Diplock's definition: (i) Mr Gee's submission would effectively reintroduce the idea of a condition precedent of fitness, which (as I have noted in paras 52-53 above) Mr Gee actually disclaims, while (ii) Mr Pollock's submission effectively means that any intervening fortuitous external accident or casualty will preclude a conclusion that inherent vice was the cause of loss, a submission which does not reconcile with the Court of Appeal authority of *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32. The danger of treating judicial dicta as if they constituted statutory definitions is well-known, and it will be necessary to consider intermediate possibilities between these two positions.

The case-law

59. It is clear from Lord Diplock's language ("risk of deterioration") in *Soya v White*, [1983] 1 Lloyd's Rep 122, 126, from the subject-matter of that case and from authority cited to the House in it (identified by Mr Gee's diligent research from the printed case prepared by Robert Alexander QC and Bernard Rix for insurers) that the focus there was on the simple case of cargo having some inherent tendency on shipment which simply manifested itself under ordinary conditions of carriage, for example a tendency to "effervesce and generate the fire which consumed it" (*Boyd v Dubois* (1811) 3 Camp 133). In such a case, there is nothing more than the development of the cargo's inherent characteristic. Such a case was

clearly also in the forefront of the court's mind in *Koebel v Saunders* (1864) 17 CB (NS) 71, where Willes J said, at p 78, that "in the case of an insurance on goods, it is no answer to say that they were in an unfit condition to be shipped, unless it is shewn that the loss arose from that unfitness". Byles J, at p 79, described "the more ordinary instances" of loss of goods by some inherent vice or weakness as consisting "of fruit, flour, or rice, which are liable to heat or perish on the voyage". But he also referred to the less ordinary instances "of tender animals unfit to bear the agitation of the sea, gun-cotton, or the like".

60. Mr Gee relies upon Byles J's reference to tender animals unfit to bear the agitation of the sea as indicating that inherent vice includes unfitness to withstand foreseeably unfavourable weather conditions. This puts too much weight on a passing reference. It is not clear that by "the agitation of the sea", Byles J had anything in mind beyond "the ordinary action of the wind and waves". If he did, his dictum stands in contrast with the decisions in *Lawrence v Aberdein* (1821) 5 B & Ald 107 and *Gabay v Lloyd* (1825) 3 B & C 793. In both cases, recovery was allowed in respect of death of or injury to animals violently occasioned by storm and consequent agitation of the seas. An exception "warranted free from mortality" was interpreted as excluding only indirect loss from natural causes which could, but for such a warranty, have been treated as produced by perils of the seas, for example being driven off course with consequent exhaustion of the ship's provisions leading to the animals' starvation. The court noted that insurers' contrary suggestion largely undermined the point of taking out any insurance on the animals at all. Not surprisingly, there was no suggestion in either of these cases that the death was due to the animals' own inability to withstand the voyage.

61. Each side can draw some possible support for their respective positions from *N E Neter & Co Ltd v Licenses and General Insurance Co Ltd* [1944] 1 All ER 341. A cargo of casks and bags of china clay out-turned damaged, as a result of the stoving in of the casks on a voyage during which there had been heavy weather. Tucker J dismissed the claim on the ground that the plaintiffs had not proved that the proximate cause of the loss was the rough weather. It appeared to him "equally consistent with defects in the casks, accidents during loading, bad stowage, rough weather, or accidents during or after discharge" (p.343). But he went on to say that, had it been shown to be the heavy weather, he would have held there to have been a loss by perils of the sea, even though there was nothing abnormal or unexpected in the weather on such a voyage in the month in which it occurred. He said:

> "Having regard to *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, the *Xantho* case (1887) 12 App Cas 503, and *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, and the recent Privy Council decision in *Canada Rice Mills, Ltd v Union Marine and General Insurance Co*

> *Ltd* [1941] AC 55, I think it is clearly erroneous to say that, because the weather was such as might reasonably be anticipated, there can be no peril of the seas. There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss, and I think such an element exists when you find that properly stowed casks, in good condition when loaded, have become stoved in as a result of the straining and labouring of a ship in heavy weather. It is not the weather by itself that is fortuitous; it is the stoving in due to the weather, which is something beyond the ordinary wear and tear, of the voyage. This appears to me to be "something which could not be foreseen as one of the necessary incidents of the adventure". It was "an accident which might happen, not an event which must happen", to quote the language of Lord Herschell in *the Xantho*."

62. The general description of perils of the sea assists Mr Pollock, but the dictum that on the facts the stoving in of the casks was due to such a peril, they being "in good condition when loaded" is consistent with Mr Gee's case for insurers. It may be regarded as a precursor of the reasoning and decision in *Mayban* [2004] 2 Lloyd's Rep 609. In contrast, I do not think that Donaldson LJ's remarks about inherent vice in *Soya v White* [1982] 1 Lloyd's Rep 136, 150 on which Mr Gee also relied, bear or assist on the present issue. I agree in this respect with what Lord Clarke says in paras 123-125.

63. Insurers rely strongly on *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283, a case of all risks insurance on the Institute Cargo Clauses (All Risks). The decision shows that inherent vice can embrace a predisposition to injury by a train of events that is, firstly, not purely internal and, secondly, depends upon a combination of external events that it foreseeable, but by no means certain to occur. Lack of inevitability is, as I have said (para 51 above), no proof that there was in the insurance sense a fortuitous external accident or casualty. The damage to the gloves in *Noten* occurred because, on loading in their cartons into their container, they had a moisture content reflecting the humidity of the Calcutta atmosphere, and because the container was in Rotterdam discharged into a markedly colder atmosphere, where it cooled, setting up convection currents within the container which carried moist air from the gloves to the container roof where the air condensed, falling back down in droplets onto the cartons of gloves and damaging them. The Court of Appeal held that there was no "untoward or unusual event of any kind", "no combination of fortuitous events, and the defendant never undertook to insure the plaintiffs against the occurrence of hot and humid weather in Calcutta during the monsoon" (p 289, per Bingham LJ). The same thought was expressed by Roche J in *Whiting v New Zealand Insurance Co Ltd* (1932) 44 Lloyd's Rep 179, 180, when he said: "Moist atmosphere is not an accident or incident that is covered. It is more or less a natural test or incident

which the goods have to suffer and which the underwriter has not insured against". That being so, the insurers submit that there was also nothing unusual about the weather conditions or "leg-breaking wave" in this case, and the real cause of the loss of the three legs was their unfitness to withstand weather conditions which were ordinary and foreseeable incidents of the insured voyage.

64. In *Noten v Harding* [1990] 2 Lloyd's Rep 283 the damage occurred in conditions and a way which were both foreseeable and entirely ordinary. The damage was not covered because the conditions under which it occurred were entirely ordinary atmospheric conditions, the gloves essentially damaged themselves under such conditions through their own moisture content, and it was not sensible to describe them as having sustained any fortuitous external accident or casualty at all in the sense required under all risks cover. In the present case, the gradual exhaustion of the legs' fatigue strength under the ordinary action of wind and waves during the voyage and the consequent development of cracking can be analysed in similar fashion (see further at para 81 below).

65. In contrast, the sudden breakage of the first leg, followed by that of the other two legs, is much more readily understood as involving a marine accident or casualty. It was neither expected nor contemplated. It only occurred under the influence of a leg breaking wave of a direction and strength catching the first leg at just the right moment, leading to increased stress on and collapse of the other two legs in turn. Each of the three legs was lost in turn overboard to the bottom of the sea. Such a combination of events was, the judge found, "very probable, but it was not inevitable" (para 87). The chain of events has many of the characteristics of a loss by perils of the sea. The questions which remain bearing on the appropriateness of such a classification relate to (i) the evident probability that the rig would meet a leg-breaking wave and (ii) the undoubted fact, on the judge's findings, that the root problem was the unfitness of the legs for the insured venture, in that they lacked sufficient fatigue strength to withstand the stresses imposed by the ordinary motion of the seas and were thus exposed to the very considerable risk of a leg breaking wave hitting the rig at the right moment. I will return to these questions later in this judgment (paras 81-86 below).

66. In *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, 502 Lord Macnaghten noted that: "In marine insurance it is above all things necessary to abide by settled rules and to avoid anything like novel refinements or a new departure". This rule of conservatism can be carried too far. Nevertheless, the absence of any clear authority for insurers' approach prior to *Mayban* [2004] 2 Lloyd's Rep 609 is striking. It seems unlikely to have been due to unquestioning acceptance, by insurers and assureds alike, of the correctness of that approach. This is, I think, even less likely when one examines the hull insurance and carriage by sea cases, upon which the court received instructive submissions.

The hull insurance and carriage by sea cases

67. In *Dudgeon v Pembroke* (1877) 2 App Cas 284, a vessel insured under a time policy from 22 January 1872 sailed on 3 February 1872 from London for Gothenburg, arriving on 7 February but taking on more water than would be expected. She set out again for London with a cargo of oats on 11 February, but started to labour and take on so much water in a heavy rolling sea on 12 February that her fires had to be put out and, when her pumps eventually became clogged with oats, she grounded on the Yorkshire coast and was lost. The defendant underwriter argued that she "went to sea without being fit to encounter the ordinary risks of going to sea, not the extraordinary risks of storms", that a policy of insurance was "only a contract of indemnity against risks which could not be foreseen, or by ordinary care be provided against" and that there was on this basis no loss by perils of the sea: pp 289-290. Lord Penzance, after recording that in a time policy there is no implied warranty of seaworthiness, turned to the argument that the vessel's unfitness to encounter the perils of the sea prevented the loss being regarded as one by perils of the sea. Dismissing it, he said, at pp 295-296:

> "It will at once occur to your Lordships, upon the raising of such a question, that it applies as much and as fully to a voyage policy as to a time policy. If a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable, then, quite independently of the warranty of seaworthiness, which applies only to the commencement of the risk (in its several "gradations", as Erle J in *Thompson v Hopper* 6 E & B 172, 181 called them), the underwriters would be at liberty, in every case of a voyage policy to raise and litigate the question whether, at the time the loss happened, the vessel was, by reason of any insufficiency at the time of last leaving a port where it might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability.
>
> If that be the law, my Lords, the underwriters have been signally supine in availing themselves of it. …… The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine".

Mr Pollock, understandably, relies on this passage.

68. In *Dudgeon v Pembroke,* counsel for the underwriter relied before the House, as Mr Gee does before the Supreme Court, upon *Fawcus v Sarsfield* (1856)

6 E & B 192. In that case, the vessel, leaking water, put into a port to be repaired in circumstances where she had, on sailing from Liverpool, been unseaworthy and unsound, and "did not encounter any more severe weather than is usual and ordinary on such a voyage or than a ship reasonably fit for the voyage could have encountered without damage or injury: and …. the necessity for her going into port to be repaired arose from the defective state of the ship when she sailed" (p 204). The vessel's owner sought to recover the expense occasioned by reason of putting into the port for repairs. The Court of Queen's Bench accepted the defendant underwriter's plea and dismissed the claim. Mr Gee relies upon this as indicating that unseaworthiness can outweigh in significance the impact of subsequent perils of the seas. That in my view reads too much into the decision. The Court of Queen's Bench was at pains to emphasise that the arbitrator had found "most explicitly that [the loss] did not arise from any peril insured against, but from the vice of the subject of insurance" and that the only answer attempted by the plaintiff was that "the unseaworthiness might have arisen from some peril in an antecedent voyage …, part of an adventure of which the voyage stated in the declaration and plea was a continuation". Rejecting this latter suggestion, the court said that it was "quite clear, from the finding of the arbitrator, that the adventure did begin at Liverpool: that this was the first voyage; and that the unseaworthiness arose from the vice of the thing insured, and not from the perils of the sea in any antecedent part of the adventure" (p 205).

69. Lord Penzance must, as Mr Gee points out, have been familiar with *Fawcus v Sarsfield*, having been counsel in it for the underwriter in his earlier incarnation as Mr Wilde. In *Dudgeon v Pembroke* he was exact in his loyalty to the basis on which it was decided. He noted that it was a case of partial loss in which the decision followed from the arbitrator's finding, and that there was therefore a "total absence …. of all authority" for the proposition advanced by the underwriter in *Dudgeon v Pembroke*. At first instance in *Dudgeon v Pembroke* (1874) LR 9 QB 581, 596 Blackburn J had understood underwriter's plea in *Fawcus v Sarsfield* as "an allegation that the loss was from wear and tear, aggravated by the original bad state of the vessel" and said that, on that basis, "the plea was no doubt good". In *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1985] 1 Lloyd's Rep 264 (Mustill J) and [1987] 1 Lloyd's Rep 32 (CA), *Fawcus v Sarsfield* has been treated as a case of "debility" or "loss … disassociated from any peril of wind or water, even if these form the immediate context of the loss, and constitute the immediate agency (for example, the percolation of water through an existing flaw in the hull) by which the loss takes place" (per Mustill J, p 272); and see per Slade LJ, p 41. But, whether the case is described as wear and tear or inherent vice, the arbitrator's finding in *Fawcus v Sarsfield* was treated as the end of the matter, and is explicable on the basis that nothing that occurred during the voyage could be called a peril of the sea, accident or fortuity. The case does not help insurers on the present appeal.

70. *Thomas Wilson, Sons & Co v Owners of the cargo per the Xantho (The "Xantho")* (1887) 12 App Cas 503 involved a claim under a bill of lading for non-delivery of goods lost by reason of a collision between the *Xantho* as carrying vessel and another vessel. The owners of the *Xantho* relied upon an exception of perils of the sea. Cargo-owners maintained that "To bring a case within 'perils of the sea', there must be some extraordinary violence of the elements, something inevitable or overwhelming" (p 507), so that, even if the only cause of the collision was the negligence of the other vessel, the owners of the *Xantho* could have no defence. The House emphatically rejected this submission, saying that it was beyond question that "if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea" and "that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea" (p 509, per Lord Herschell). It said that in this respect the meaning of the phrase was the same in the case of a bill of lading as in a marine policy (p 510), although in the case of a bill of lading fault of the shipowner leading to the vessel succumbing to a peril of the sea may, depending upon the terms of carriage, disentitle the shipowner to the protection of such an exception.

71. There are statements in the speech of Lord Bramwell which may be taken to suggest that any entry of water in sufficient quantities to sink a vessel is axiomatically a peril of the sea (see eg pp 513-514). These go too far, as illustrated by *E H Sassoon & Co v Western Assurance Co* [1912] AC 561, where an insurance claim for damage to a cargo of opium failed because the damage was due the percolation of sea water through the rotten hull of a wooden hulk moored in a river and used as a store, as well as, more recently, *Rhesa Shipping SA v Edmunds (the Popi M)* [1985] 1 WLR 948. A fortuitous external accident or casualty, whether identified or inferred, is necessary, but it need not be associated with extraordinary weather. Lord Buckmaster put the matter as follows in the Privy Council in *Grant, Smith and Co v Seattle Construction and Dry Dock Co* [1920] AC 162, 171-172:

> "It is not desirable to attempt to define too exactly a 'marine risk" or a 'peril of the sea', but it can at least be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred. …..
>
> …..
>
> It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be

> impossible. An insurance against 'the perils of the sea or other perils' is not a guarantee that a ship will float, and in the same way in the present case had such a policy been effected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely disassociated from any peril by wind or water."

72. In *Mountain v Whittle* [1921] AC 615, the insured vessel, a houseboat, was towed alongside a tug some seven and half miles to Northam. Her topside seams were leaky and defective. The breast wave thrown up by the two vessels caused water to mount up against the seams and enter and sink the houseboat. Some four feet of water entered in 100 minutes towing at a moderate speed. *Mountain v Whittle* establishes that it is no necessary answer to a claim for loss by perils of the sea that the loss only occurred because the vessel was unseaworthy. Indeed, after negativing the existence of any warranty or defence under section 39(5) of the 1906 Act, Lord Birkenhead LC, with whose speech Viscount Haldane and Viscount Cave agreed, turned without further consideration of unseaworthiness to the question whether the vessel had met with any peril of the sea (p 618-619). On this point, it was noted that the fact that "loss caused by the entrance of sea water is not necessarily a loss by perils of the seas" (p 626, per Viscount Finlay). In the event, the House upheld concurrent decisions of the courts below that the breast wave "amounted to a peril of the seas just as must as if it had been occasioned by a high wind" (p 626), and that sinking by such a wave was "a fortuitous casualty; whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage" (pp 630-631, per Lord Sumner). But the speeches also describe the breast wave as of "unusual size" (p 619, per Lord Birkenhead), as "wash of an extraordinary character" (pp 626-627, per Viscount Finlay) and as "exceptional" (p 630, per Lord Sumner), and Viscount Finlay delivered a dictum that "There must be some special circumstance such as heavy waves causing the entrance of the sea water to make it a peril of the seas" (p 626).

73. The extent to which a peril of the sea must involve extraordinary weather was considered in *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375. The High Court of Australia was concerned with a loss which occurred a few hours after leaving port in calm seas and for no apparent reason, after rapid entry of water into the insured vessel's engine room. The judge had found that there was no latent defect (eg in the pipe-work) and that the vessel was seaworthy on leaving port. The High Court held that, in these circumstances, there was an inference of some unidentified accident or fortuitous event. Since *Rhesa Shipping Co SA v Edmunds (The "Popi M")*, more attention might have been given, in this jurisdiction at all events, to a finding that no cause had been shown to be more probable than not. Leaving that aside, in a judgment with which all other members

of the High Court concurred, Mason J rejected Visc Finlay's dictum as a statement of principle, saying (p 385):

> "The old view that some extraordinary action of the wind and waves is required to constitute a fortuitous external accident or casualty is now quite discredited (*The "Xantho"* (1887) 12 App Cas, 509). It is true that in *Mountain v Whittle* [1921] 1 AC 615, 626 Viscount Finlay spoke of the need for the insured to show 'some special circumstance such as heavy waves causing the entrance of the sea water to make it a peril of the sea', but his Lordship's remark was directed to the facts of that case. … Had it not been for the magnitude of the tug's breast wave, the loss would have been attributed to wear and tear or to the ordinary action of the wind and waves".

74. The severity of the weather required for a loss by perils of the sea was further considered, at first instance, in *Frangos v Sun Insurance Office Ltd* (1934) 49 Ll L Rep 354. A 36-year-old vessel insured under a time policy sank en route from Cardiff to Istanbul. Insurers alleged that unseaworthiness was a, if not the sole, cause, relying on the fact that "really the weather was not very severe" and that "there was a series of happenings with regard to this old ship which were not naturally accounted for by the weather which prevailed" (p 358). Roche J accepted that the vessel may not have been seaworthy in various respects, including in the area of the afterpeak tank and/or No 4 hold (p 368). However, "being satisfied that there was weather prevailing which, although not extraordinary, was nothing like the calm weather of a harbour, or anything of that sort", he found "that the immediate cause of the springing of the leak was the labouring of the ship", that water then entered the hold and afterpeak, causing the coal cargo to shift and the vessel to list, and leading to the entry of water into the engine room which sank the vessel. He regarded the case as governed by *Dudgeon v Pembroke*, "because even though it is doubtful in this case, as in that case, whether the vessel was, in fact, seaworthy or not, yet a loss caused by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy, the other cause which is not within the policy being unseaworthiness" (p 359).

75. Finally, in *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32, a yacht insured under a time policy suffered damage due to delamination of her hull on a voyage from Deauville to Hamble in sea conditions "markedly worse than average, but not so bad as to be exceptional" (p 270). She had been ill-designed and ill-made (p 272). If properly designed and built according to the manufacturer's description, she would have made the passage without damage (p 270). It was "hard to look at the facts … without being struck by the idea that the root of all the trouble was the act of [her

manufacturers] in putting into circulation a boat which was wholly unfit for its purpose" (p 270). Nevertheless, the owner recovered for the hull damage both before Mustill J and in the Court of Appeal. In a key, but controversial, passage on the law, Mustill J said this, at p 271:

> "Second, as to causation. It may be that the doctrine of proximate cause has undergone some reassessment since the days when the most important cases on the present topic were decided. In those days the ultimate cause was more readily identified as the proximate cause than might be the case today. Nevertheless, it is clearly established that a chain of causation running – (i) initial unseaworthiness, (ii) adverse weather; (iii) loss of watertight integrity of the vessel; (iv) damage to the subject-matter insured – is treated as a loss by perils of the seas, not by unseaworthiness: see, for example, *Dudgeon v Pembroke* …. and *Frangos v Sun Insurance Office* ….".

Mustill J went to say that:

> "…. the immediate cause was the action of adverse weather conditions on an ill-designed and ill-made hull. The cases show that this is sufficient to bring the loss within the words of a time policy in the standard form" (p 272).

76. In "Fault and Marine Losses" [1988] LMCLQ 310, 350 footnote 101, Sir Michael Mustill later commented extra-judicially that "A severe critic might wonder whether the trial judge had in mind just what had happened to the doctrine of causation since *Dudgeon v Pembroke*". This itself may however be too severe, in view of Mustill J's express mention of that change in the passage at p 271 cited above. Further, it might be thought relevant that the 1906 Act, crystallising statutorily the concepts of perils of the seas and inherent vice, was enacted against the background of the Victorian authorities, and before the definitive emergence of the modern conception of proximity (see para 49 above).

77. In the Court of Appeal in the *Miss Jay Jay* the legal position was, however, analysed in different terms. The court rejected a submission that any prior unseaworthiness could be disregarded as irrelevant, but it interpreted the passage on p 271 in Mustill J's judgment consistently with that rejection. It understood him as having been concerned simply to identify whether perils of the sea were *a* proximate cause of the loss, not as suggesting that "unseaworthiness, followed by a loss due to a peril of the seas, can never be relevant": [1987] 1 Lloyd's Rep 32, 37, 41 per Lawton and Slade LJJ. The question on this basis was "whether on the

evidence the unseaworthiness of the cruiser due to the design defects was such a dominant cause that a loss caused by the adverse sea [conditions] could not fairly and on commonsense principles be considered a proximate cause at all" (p 37, per Lawton LJ). Slade LJ took the same view, regarding it as clear on "a commonsense view of the facts" that "both these two causes were …. equal, or at least nearly equal, in their efficiency in bringing about the damage" (p 40). That being so, the court referred to the general principle of insurance law that, where there are two proximate causes of a loss, one insured under and the other not expressly excluded from the policy, the assured will be able to recover: see p 40, per Slade J. Slade LJ (at p 41) also distinguished cases of debility, where the ordinary action of wind and waves leads to damage, as cases where the action of wind and waves is treated as the sole proximate cause of the damage, citing in this connection *Fawcus v Sarsfield* 6 E & B 192. Another way of looking at such cases is that there is no accident or fortuity.

Analysis - law

78. Standing back, it is clear that the hull cases lend no support by analogy to a submission that, where a cargo is unfit for the insured venture, then loss or damage which would have been avoided but for such unfitness, falls to be regarded as a loss due to inherent vice, rather than due to any marine peril which may have triggered and exploited the unfitness. Mr Gee submits that Lord Diplock's reference [1983] 1 Lloyd's Rep 122, 126 to "the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage" is wide enough to cover any case where the goods are unfit to withstand any weather conditions which may foreseeably be encountered on the voyage. Only extraordinary weather conditions overwhelming goods fit to withstand all foreseeable vicissitudes would on this basis attract cover. This is clearly not the law in hull insurance, as all the cases show; and, if that is right, then I see no reason why it should be the law in cargo insurance, particularly when the concept of inherent vice is introduced into the 1906 Act by section 55(2)(c) covering both types of marine cover.

79. Mr Gee's more developed submission is more difficult to meet, and has support in the Court of Appeal's approach in the *Miss Jay Jay* [1987] 1 Lloyd's Rep 32. It is that it is in any case a matter of "common sense" judgment, whether initial unfitness or the intervention of a subsequent peril or both is or are the proximate cause(s) of loss. Despite Slade LJ's differentiation of pure debility cases, the Court of Appeal was not presumably suggesting that, where initial unseaworthiness or unfitness *and* unfavourable weather conditions beyond the ordinary action of wind and waves have both played a role, the court must always treat both as equal or nearly equal proximate causes. That would have been to recognise a rule of law different in formulation, but nonetheless of a type that the court held that Mustill J would have been wrong to introduce. There is high

authority for the proposition that the real or dominant cause is to be ascertained by applying the common sense of a business or seafaring man: see eg *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283, 287 per Bingham LJ. In *Noten v Harding*, common sense was applied to identify the point in a single process, not involving any obvious fortuity, which represented the cause. In circumstances like those in *the Miss Jay Jay* or the present case, two separate causes may be identified, initial unfitness and a peril of the seas through which it works, and it is unclear how in practice they would be weighed and balanced. This is highlighted by Mustill J's comment in *the Miss Jay Jay* [1985] 2 Lloyd's Rep 264, 270, cited in para 69 above, that it was "hard to look at the facts without being struck by the idea that the root of all the trouble was the act of [her manufacturers] in putting into circulation a boat which was wholly unfit for its purpose". Yet, in the *Miss Jay Jay* the finding that the weather was "markedly worse than average but not so bad as to be exceptional" sufficed to make perils of the sea an equal cause: see p 41 [1987] 1 Lloyd's Rep 32, 41 per Slade J. I am not attracted to a solution which depends upon identifying gradations of adverse weather conditions.

80. More fundamentally, if Lord Diplock's formulation in *Soya v White* [1983] 1 Lloyd's Rep 122, 126 is correct, then it is difficult to find in it any place for the weighing exercise that is suggested by the Court of Appeal's approach in the *Miss Jay Jay*. If inability to withstand foreseeably bad weather conditions does not prevent damage sustained as a result being attributed to perils of the sea, (i) that must be because Lord Diplock's reference to "the ordinary course of the contemplated voyage" was not intended to embrace the weather conditions foreseeable on such a voyage, but was rather used as a counterpoint to a voyage on which some fortuitous external accident or casualty occurred and (ii) there is no apparent limitation in Lord Diplock's qualification "without the intervention of any fortuitous external accident or casualty" – in other words, on the face of it, anything that would otherwise count as a fortuitous external accident or casualty will suffice to prevent the loss being attributed to inherent vice. On this interpretation, Lord Diplock was laying down a test which appears to me consistent with the reasoning in *Dudgeon v Pembroke* 2 App Cas 284, the *Xantho* 12 App Cas 503, *Grant Smith and Co and McDonnell Ltd v Seattle Construction and Dry Dock Co* [1990] AC 162 and of Mustill J in the *Miss Jay Jay* [1985] 2 Lloyd's Rep 264. It fits with Tucker J's identification in *Neter* [1944] All ER 341, 343 of the "stoving in due to the weather, which is something beyond the ordinary wear and tear, of the voyage" as "something which could not be foreseen as one of the necessary incidents of the adventure". It fits with the definition in the 1906 Act of perils of the seas as not including "the ordinary action of the winds and waves", a definition which draws attention to the question whether the winds and waves have had some extraordinary effect, rather than whether they were extraordinary in themselves.

81. On this basis, it would only be if the loss or damage could be said to be due either to uneventful wear and tear (or "debility") in the prevailing weather conditions or to inherent characteristics of the hull or cargo not involving any fortuitous external accident or casualty that insurers would have a defence. In the scheme of the 1906 Act, that would not appear to me surprising, bearing in mind the case law against the background of which the Act was enacted and the juxtaposition in section 55(2)(c) of "ordinary wear and tear, ordinary leakage and breakage" with "inherent vice or nature of the subject-matter insured" as well as with "any injury to machinery not proximately caused by maritime perils". While not myself attempting any exact definition, ordinary wear and tear and ordinary leakage and breakage would thus cover loss or damage resulting from the normal vicissitudes of use in the case of a vessel, or of handling and carriage in the case of cargo, while inherent vice would cover inherent characteristics of or defects in a hull or cargo leading to it causing loss or damage to itself - in each case without any fortuitous external accident or casualty. Ultimately, I am persuaded that authority and principle do point to the correctness of Lord Diplock's definition, and that it bears the meaning indicated by points (i) and (ii) in the preceding paragraph. If this exposes insurers to risks which they are not prepared to accept, they may of course seek to provide otherwise, either by special provision or by amendment of the standard clauses upon which most hull and cargo insurance is now underwritten.

Analysis – the facts

82. My real concern on the present appeal has been whether the loss claimed did not fall within even the restricted test which I have stated in the previous two paragraphs. The case comes close to the line. It is helpful to start with the position before the first leg fell. Mr Pollock went so far as to submit that, even the cracking of the legs which occurred on passage across the Atlantic and which necessitated repair in South Africa constituted a fortuitous external accident or casualty outside the ordinary course of the contemplated voyage, for which the assured could have sought to recover under the insurance, apart from the deductible of RM 3.8m each and every loss. I would not accept that there could have been any such insurance claim, any more than the Court of Appeal did: see the reference in this connection to normal wear and tear in para 64 of Waller LJ's judgment. So far as appears, the cracking was the simple product of the exhaustion of the fatigue life of the legs on passage under the influence of the ordinary action of the wind and waves, and did not therefore involve any fortuitous external accident or casualty. It was also a risk that was expected as likely to materialise during the voyage (see paras 85-86 below), and one which it cannot sensibly have been thought that insurers would take on. The critical question is therefore whether the sudden fracturing and loss of the three legs overboard into the Pacific falls into a different category or was no more than a loss due to their inherent vice. Mr Gee is entitled to say that, on this

point, considerable respect is due to Blair J's assessment of the facts, so long as he directed himself by reference to the right test and considerations.

83. Blair J formed a judgment about the proximate cause, treating the facts as raising two possible candidates. On the one hand, he recorded that once a lot of the fatigue life had been used up and there were cracks everywhere, "then all you need is probably the two, three, four-metre sea states that the Cape waters can provide", and that the "agreed range of wave heights demonstrates that waves in excess of three metres were in fact regularly experienced during the second stage of the voyage" (para 49). On the other hand, he noted that a developed crack would not itself have been sufficient to cause one of the 300 feet high legs to come off, but that that "required in addition a 'leg breaking' or 'final straw' stress that finally fractured the weakened steel". As Mr Colman [insurers' expert] put it:

> "'…. remember we have a leg which is 12 feet in diameter, a circumference of about 40 feet. So even quite a lot of these little cracks still leave a very large amount of good steel an inch and a half thick. This isn't light plate; this is very heavy steel, and that's an enormously strong structure. So you've got to catch it just right, if you want to actually make it fail all the way round'" (paras 48 and 87).

Once one leg failed, the circular motions of the others and the stresses to which they were subjected increased, and their failure was accelerated. Blair J also described the weather as being "within the range that could reasonably have been contemplated (albeit the claimants' expert puts it at the upper end)" (para 110), a description covering all foreseeable weather conditions, including those sufficient to give rise to a loss by perils of the sea. Finally, Blair J chose as the relevant proximate cause the unfitness of the rig for the voyage, because in his view (para 111):

> "The real problem lay with the inherent inability of the legs to withstand the normal incidents of the voyage. … As [Mr Colman] put it – 'I don't think that these legs were ever going to make it round the Cape'. That in my opinion is the reality of this case".

84. Close though these statements come to it, the judge was not actually addressing the question how far the emergence of a leg-breaking wave striking at just the right moment in the first leg's circular movement and leading to fracture and loss of a leg could be regarded as an entirely normal event, still less how far the resulting loss of any of the legs could be regarded as an equivalent to wear and tear or debility. To my mind, however, the bare recital of what happened is

difficult to fit into any normal conception of what Lord Diplock [1983] 1 Lloyd's Rep 122, 126 described as "deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage". As I noted earlier in this judgment (para 64), the loss had many obvious characteristics which one would associate with a fortuitous marine accident or casualty, and that, in my opinion, is how the loss of the rig's three legs can and should be seen.

85. I add this. Although, as Mr Gee urged, the meaning of inherent vice will, at least normally, be the same in principle under all marine policies, its application in any particular case must depend upon the nature and characteristics of the goods being insured and of the insured venture. Here, I note that the assured was asked, before the policy was placed, to state, under the heading Rig History, whether the rig had previously experienced any buckling of its legs, and it disclosed that the port aft leg had indeed experienced buckling during a previous dry tow in 1996 (also in fact off South Africa). Originally, insurers maintained and pleaded that this had not been disclosed, but the plea was abandoned. It appears that insurers' sight of the relevant email disclosing the information was in fact noted on the placement slip. It was, furthermore, made an express condition of the insurance that

> "Survey Clause or Pre Shipment Survey including Loading and Unloading, Tow Out to be supervised by approved and nominated Surveyor. Noble Denton has been nominated and approved".

86. Noble Denton duly surveyed the rig for insurers before it sailed on the voyage from Galveston. It was well recognised that stresses would be imposed on the legs by virtue of the motion of the waves, and Noble Denton sought to establish the legs' remaining fatigue life. In a report on 23 August 2005, Noble Denton concluded that the legs in way of the pinholes might have insufficient fatigue live left to undertake the full tow to Lumut, and required that the legs be re-inspected in South Africa and remedial work be undertaken there as found necessary. Fatigue life is assumed to be expended when a damage ratio of unity (1.0) is achieved. At the time of the 23 August report, the damage ratio was thought to be well below unity. But before the rig arrived in South Africa, experts acting for the assured had completed calculations which led to a spectral analysis dated 21 September 2005, in which the damage ratio was now put at 2.13, well above unity. An unsatisfactory feature of this case, as the judge said (para 28) is that this report never reached Noble Denton, before they concluded that the rig could commence the second stage of its voyage from South Africa. The judge also found that the joint inspection in South Africa did not cover the set of pinholes at the 18 foot level, and that the only repairs were to pinhole corners where a crack had actually initiated (para 78). However, he found that the latter omissions were not relevant, in that, whatever repairs were or could practicably have been carried out in South Africa would have made no difference (para 83).

87. Whether disclosure of the spectral analysis of 21 September to Noble Denton could and would have made any difference does not appear. No suggestion has in any event been made that this is of any relevance to the scope or validity of the cover. What does appear from the above is that the parties appreciated both the need to put into a South African port for inspection and the likelihood that some cracking would there be found and some repairs would have to be undertaken. That reinforces the conclusion which I have already drawn that the cost of such inspection and repairs could not be covered. But it also appears that the parties' attention was closely focused on the overall risk of carrying the rig with its three legs protruding over 300 foot into the air in circumstances which could, depending upon a range of uncertainties, lead to the loss of one or more of the legs. In the event, the rig suffered the further loss of all three legs, not just because cracking appears to have developed further or sooner than expected, but ultimately only after the first, and then each other, leg was caught, in just the "right" way, by a leg-breaking wave. To hold that the insurance did not cover such a loss, if it materialised, would seem to deprive it of much of its utility. These considerations support a conclusion that there is no incongruity in treating the loss of the three legs overboard which the rig actually experienced as involving fortuitous external accidents or casualties insured under this all risks insurance, rather than as due to inherent vice. In common with the Court of Appeal, although not entirely for the same reasons, I would therefore reach that conclusion.

Concurrent causes

88. I add some words with regard to the submission made by insurers to meet the hypothesis, which I have not accepted, that the loss should be attributed to two equal or nearly equal proximate causes, in the form of both inherent vice and perils of the seas. Assuming that to be possible, the question would then have arisen as to the effect of the express exception of inherent vice contained in clause 4.4 of the Institute Cargo Clauses (A). It was said in the *Miss Jay Jay* [1987] 1 Lloyd's Rep 32, 40 that, if there were two causes, one of which was expressly excluded, then the assured would fail; and reference was made in this connection to dicta in *P Samuel & Co Ltd v Dumas* [1924] AC 431, 467 per Lord Sumner and to *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd* [1974] QB 57, 75. I would wish to leave open the applicability of this approach in the present context. First, clause 4.4 on the face of it simply makes clear the continuing relevance in the context of all risks cover of the limitation on cover against perils of the sea provided by section 55(2)(c). There seems to me some oddity in treating clause 4.4 as leading to a fundamentally different result from that which would have applied had section 55(2)(c) alone been in question. Second, the focus of the cases cited in the *Miss Jay Jay* and of the more recent case of *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] 2 Lloyd's Rep 604 was upon true exceptions which took out of cover against an insured risk a specific type of situation giving rise to such risk. The present hypothesis is of two concurrent risks

arising independently but combining to cause a loss. While it may be that the same principle applies (as the Court of Appeal's dicta in the *Miss Jay Jay* suggest), I would at least wish to hear argument on that. I need not go further into this aspect, upon which I have formed no concluded views.

Conclusion

89. For the reasons I have given, I would also dismiss this appeal.

LORD COLLINS

90. I agree that the appeal should be dismissed for the reasons given by Lords Saville, Mance and Clarke. The policy covered "all risks of loss or damage to the subject matter insured except as provided in clauses 4, 5, 6 and 7…" The exclusion from cover in clause 4.4 was "loss, damage or expense caused by inherent vice or nature of the subject matter insured." Section 55(1) of the Marine Insurance Act 1906 provides:

> "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

91. By section 55(2)(c) of the Act:

> "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."

92. The two inter-related questions are whether the loss was proximately caused by a peril insured against, namely perils of the seas, or whether cover is excluded because the failure occurred as a result of the inherent vice in the rig. The excessive sophistication of the argument on this appeal has been caused by treating Lord Diplock's definition of inherent vice in *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122, 126, as if it were a statutory provision. In that case a cargo of soya beans arrived in a heated and

deteriorated condition. It was insured against risks of heating, sweating and spontaneous combustion. It was held by the House of Lords that the policy did "otherwise provide" within section 55(2)(c) so that the perils of heating, sweating and spontaneous combustion arising from inherent vice or nature of the subject matter insured were covered. Lord Diplock said (at p 126) that:

> "This phrase (generally shortened to 'inherent vice') … refers to 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."

93. It would seem that this definition was derived in part (without attribution) from *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41: see p 47 per Lord Birkenhead LC, quoting from the unreported judgment of Rowlatt J at first instance, which was reversed on the facts. The question of the effect of weather conditions did not arise in *Soya GmbH Mainz Kommanditgesellschaft v White* and the printed cases on that appeal suggest that they did not form any part of the argument.

94. In this case the policy was for all risks, which included perils of the seas. At common law and under rule 7 of Schedule 1 to the Marine Insurance Act 1906, perils of the seas "refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." The reason is that "the purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things": *Paterson v Harris* (1861) 1 B & S 336, 353, per Cockburn CJ. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen: *Thomas Wilson Sons & Co v Owners of the Cargo per the Xantho* (1887) 12 App Cas 503, 509, per Lord Herschell.

95. Prior to the abolition of juries in civil cases, the question whether the loss was caused by perils of the sea or inherent vice would have been a question for the jury: see, eg, *Dudgeon v Pembroke* (1874) LR 1 QB 581. Today what was "the real or dominant cause" or proximate cause is a question to be answered applying the common sense of a business or seafaring man: *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283, 286-287, per Bingham LJ. In that case industrial leather gloves shipped from Calcutta to Rotterdam were found on arrival to be wet, stained, mouldy and discoloured. It was held, applying Lord Diplock's formula, that the gloves "deteriorated 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" (at p 288). The damage was caused because the gloves were shipped wet, and on the evidence there was "no combination of fortuitous events", and the insurers "never undertook to insure the plaintiffs against the occurrence of hot and humid weather in Calcutta during the monsoon" (at p 289).

96. A comparable case (involving unseaworthiness in hull insurance) on the other side of the line was *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1985] 1 Lloyd's Rep 264, affd [1987] 1 Lloyd's Rep 32. A yacht was insured under a marine policy for loss or damage directly caused by (inter alia) "external accidental means" (which was treated as being materially the same as "perils of the seas": p 272). The yacht suffered damage in the Seine estuary on a voyage from Deauville to Hamble. The sea conditions in the Seine estuary "were such as a person navigating in those waters could have anticipated that he might find" and "the conditions were markedly worse than average, but not so bad as to be exceptional" (p 270). The yacht was in such a condition, by reason of defects in design and construction (which were held to be latent defects), as to be unseaworthy for the passage, but it would have been able to survive if the sea conditions had been no worse than usual. If properly designed and built according to the manufacturer's description, the yacht would have made the passage without suffering damage. Mustill J held that the loss was due to the fortuitous action of the wind and waves. The weather was not exceptional but "the immediate cause was the action of adverse weather conditions on an ill-designed and ill-made hull" (p 272). The decision was affirmed in the Court of Appeal on the basis that there were two proximate causes, namely unseaworthiness due to design defects and an adverse sea. Where there were two concurrent and effective causes, and one was within the policy, the insurers had to pay. Both Lawton and Slade LJJ treated the exercise as one of the application of a commonsense view of the facts: pp 37, 39-40. Slade LJ approved (at 38) Mustill J's statement that the word "accidental" made explicit what was in any event implicit, namely that there was no recoverable loss in the absence of a fortuitous event. There is nothing in the decision of the Court of Appeal which is inconsistent with Mustill J's approach or (making due allowance for the fact that it was not an inherent vice case) with Lord Diplock's formulation.

97. In the present case the failure of the legs happened as a result of the effect of the height and direction of the waves on the pitching and rolling motion of the barge and therefore on the steel legs. It was known from the outset that the legs of the rig were at risk of fatigue cracks during the voyage. The weather which the barge experienced was within the range of weather which could reasonably have been contemplated for the voyage. The sudden breakage of the first leg, followed by that of the other two legs occurred under the influence of a leg breaking wave of a direction and strength catching the first leg at just the right moment, leading to increased stress on and collapse of the other two legs in turn. The failure was, Blair J found, very probable, but it was not inevitable. Even though the failure occurred,

in Lord Diplock's phrase, in "the ordinary course of the contemplated voyage" the way in which it occurred was fortuitous. The proximate cause was the result of a fortuity, and not the susceptibility of the legs to crack as a result of metal fatigue.

LORD CLARKE

98. Lord Saville has set out the relevant facts and I will not repeat them. I agree with him that the appeal should be dismissed. I set out the essential reasons which have led me to that conclusion because this is an unusual case on the facts and raises an issue of some general importance in the law of marine insurance.

99. The question is whether on the facts found by the judge, the (or a) proximate cause of the loss of the rig was "inherent vice or nature of the subject matter insured" within the meaning of clause 4.4 of the Institute Cargo Clauses (A). That is because loss so caused is specifically excluded by clause 4.4. The same expression is used in section 55 of the Marine Insurance Act 1906 ("the Act"), which provides, so far as material:

> (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
>
> (2) In particular,
>
> …
>
> (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."

It is common ground that, if the loss was proximately caused by inherent vice or nature of the subject matter insured, the insurers are not liable even if the loss was also proximately caused by a peril insured against: see eg the cases referred to by Lord Saville at para 19 above.

100. On the facts, there were as I see it, two physical causes of the loss, the physical state of the rig and the "leg breaking" stress caused by the state of the sea at the time the first leg fractured. The judge held that the state of the sea was within the range of weather that could reasonably have been contemplated on the voyage. It was thus an ordinary incident of the voyage. However, the judge also held that, although the failure of the legs was probable, what the Court of Appeal called a "leg-breaking wave" was not inevitable. The insurers do not challenge this finding. As I read his judgment, the judge held (or would have held) that, but for his conclusion that the proximate cause of the loss was inherent vice, the loss was proximately caused by a fortuity and was thus within the all risks cover in the policy.

101. The Court of Appeal expressly considered whether, even if the loss was not inevitable, the loss was caused by ordinary wear and tear and thus not recoverable under the policy. It held that, on the judge's findings of fact, the loss was not caused by ordinary wear and tear but by a fortuity and thus (subject to the correct approach to inherent vice) by a peril insured against, the cover in this case being against all risks. As Waller LJ (with whom Carnwath and Patten LJJ agreed) put it at [2010] 1 Lloyd's Rep 243, para 64, it was not that the legs simply suffered severe metal fatigue and cracking, which would be fair wear and tear, but that the rig met what proved to be a leg breaking wave which was not bound to occur in the way that it did on any normal voyage round the Cape of Good Hope. The fortuity was the occurrence of the leg breaking stress which caused the loss of the legs. For my part, I would accept that analysis. As Lord Mance puts it at para 64, the sudden breakage of the first leg only occurred under the influence of a leg breaking wave of a direction and strength catching the first leg at just the right moment, leading to increased stress on and collapse of the other two legs in turn.

102. It is common ground that all risks cover includes cover in respect of loss or damage caused by perils of the seas. On the approach of the Court of Appeal, the leg breaking stress and the loss of the legs were proximately caused by a peril of the seas because the expression "perils of the seas" is defined in para 7 of the "Rules for Construction of Policy" in Schedule 1 to the Act as follows:

> "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

Mustill J made the position clear in *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1985] 1 Lloyd's Rep 264, 271 in these terms:

> "The cases make it quite plain that if the action of the wind or sea is the immediate cause of the loss, a claim lies under the policy notwithstanding that the conditions were within the range which could reasonably have been anticipated. All that is needed is (in the words of Lord Buckmaster in *Grant, Smith & Co v Seattle Construction and Dry Dock Co* [1920] AC 162, 171:
>
>> '… some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred.'

Mustill J then referred to a number of well-known cases to the same effect: *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, 527, *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1941] AC 55 and *N E Neter & Co Ltd v Licenses and General Insurance Co Ltd* (1944) 77 Ll L Rep 202, 205. The *Miss Jay Jay* went to the Court of Appeal but these principles were not affected by its decision: see [1987] 1 Lloyd's Rep 32.

103. Thus, on the facts of a particular case, the loss or damage may be caused by ordinary wear and tear or by the ordinary action of the wind and waves, as those expressions are used section 55(2)(c) of the Act and in para 7 of Schedule 1 to the Act respectively. In such a case the loss or damage may not be inevitable but will nevertheless be irrecoverable. The cases make it clear that, at any rate in a perils of the seas case, the critical question is whether or not the conditions of the sea were such as to give rise to a peril of the seas which caused some fortuitous accident or casualty. It is important to note that the cases show that it is not the state of the sea itself which must be fortuitous but rather the occurrence of some accident or casualty due to the conditions of the sea.

104. Some of the cases and, indeed, some of the academic writings discuss how adverse the sea conditions have to be to be capable of amounting to a peril of the seas: see, for example Mustill J in the *Miss Jay Jay* and Professor Howard Bennett's article entitled "Fortuity in the Law of Marine Insurance" [2007] LMCLQ 315, 330-331. It seems to me that such a discussion is rarely fruitful, since the question in each case is whether the sea conditions were such as to have caused a fortuitous accident or casualty. It is not necessary to discuss this issue further in the instant case because the effect of the judge's findings of fact as interpreted by the Court of Appeal was that the failure of the legs was not inevitable or caused by ordinary wear and tear or the ordinary action of the winds and waves but, subject to his conclusions on inherent vice, fortuitous.

105. As I see it, the above analysis is entirely consistent with that of Lord Mance. It follows from it that the insured are entitled to recover under the policy unless the damage was caused by "inherent vice or nature of the subject matter insured" within the meaning of section 55(2)(c) of the Act and clause 4.4 of the Institute Cargo Clauses (A). Put another way, the question is whether the physical condition of the leg constitutes "inherent vice or nature of the subject matter insured".

106. Both parties rely upon the meaning given to that expression by Lord Diplock in *Soya Gmbh Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122, where the issue was whether inherent vice was a peril insured against, in so far as it consisted of a tendency for the cargo to become hot, to sweat or to combust spontaneously. It was held that it was. It was further held that deterioration from heat and sweat in the course of the voyage was not inevitable. Lord Diplock's summary of the facts included the statement that "no incident was shown to have occurred upon the voyage whereby the moisture content present in the bulk on shipment had been increased from any external source". Lord Diplock said, at pp 125-126:

> "The facts as I have summarized them for the purpose of determining the question of construction of the HSSC policy in the instant case, assume that the loss resulting from the deterioration of the soya beans during the voyage was proximately caused by the 'inherent vice or nature of the subject matter insured'. This phrase (generally shortened to 'inherent vice') where it is used in section 55(2)(c) refers to a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of the 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 accident or casualty."

By "HSSC policy" Lord Diplock meant a policy covering "heat, sweat and spontaneous combustion": p 124.

107. It was submitted by the insured that the last few words of that quotation at pp 125-126 are critical to the definition of inherent vice. It was submitted that it follows from Lord Diplock's definition that, where a peril of the seas is a proximate cause of the damage, there is no inherent vice because inherent vice refers to the inherent condition of the goods that is the sole cause of loss or damage. Otherwise the words "without the intervention of any fortuitous external accident or casualty" would be given no meaning. It would have been sufficient to say that inherent vice means the risk of the deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage.

108. By contrast, it was submitted by the insurers that Lord Diplock was distinguishing between (1) a loss caused by the internal state of the goods initially on shipment and (2) a loss caused by an external accident or fortuity in the course of the voyage. They emphasized Lord Diplock's references to (1) "… the risk of deterioration of the goods *shipped*" and (2) "… without the *intervention* of any fortuitous external accident or casualty" (emphases added). It was submitted that, applying Lord Diplock's definition, two questions arise on the facts of this case: first, whether at Galveston, assuming the ordinary course of the contemplated voyage, without any intervening adverse fortuity (including weather, wind and waves), the rig had within itself internally the risk of deterioration, which the insurers called "the inherent vice at Galveston"; and second, whether the inherent vice at Galveston was the or a proximate cause of the loss of the legs, which they called "the causation issue".

109. The insurers invited an affirmative answer to both questions. They submitted in essence that there was here inherent vice because the rig was not fit to withstand the wind and waves which might reasonably be contemplated on the voyage. They submitted that on the causation issue there were to be taken into account the nature and severity of the unfitness and whether there was some external accident or fortuity which (a) caused the loss of the legs and (b) prevented the inherent vice at Galveston from being causative, as either the sole proximate cause or one of two proximate causes. It was accepted that the stress caused by the leg-breaking wave was a fortuity but it was submitted it was no more than a fortuity to be expected in the ordinary course of the contemplated voyage and thus, as it was put in the insurers' case "a fortuity within the risk of inherent vice".

110. For my part, I prefer the approach of the insured. In my opinion, there are a number of problems with the insurers' approach. The first is that their approach fails to give effect to the natural meaning of the words "without the intervention of *any* fortuitous external accident or casualty" (emphasis added). The distinction between different types of external fortuity, namely on the one hand fortuities to be expected in the ordinary course of the contemplated voyage or fortuities "within the risk of inherent vice" and on the other hand exceptional fortuities, is in my view inconsistent with the use of the word "any' in Lord Diplock's definition of inherent vice.

111. The second problem with the insurers' approach is that it appears to me that the natural meaning to be given to Lord Diplock's definition is that, if there is an "intervention of any fortuitous external accident or casualty" the law treats the loss as caused by that fortuitous external accident or casualty and not by inherent vice. In referring to "any fortuitous accident or casualty", Lord Diplock must I think have had in mind the definition of perils of the seas in Schedule 1 to the Act which I have quoted above, namely that it refers "only to fortuitous accidents or casualties of the seas". Moreover, there is no reason to think that he did not fully

appreciate that perils of the seas include perils caused, as Mustill J put it [1985] 1 Lloyd's Rep 259, 271, by conditions within the range which could reasonably have been anticipated. Although the statutory definition of perils of the seas was not referred to in *Soya v White* [1983] 1 Lloyd's Rep 122, which did not involve perils of the seas, Lord Diplock would clearly have had it in mind in formulating his definition. As I see it, by in effect invoking the statutory definition of perils of the seas, he was defining "inherent vice" in opposition to perils of the seas, thereby avoiding any overlap between the insured risk and the excluded risk. Thus where, as here, a proximate cause of the loss was perils of the seas, there was no room for the conclusion that the loss was caused by inherent vice.

112. To my mind that conclusion is supported by the authorities, with the exception of certain dicta of Donaldson LJ in the Court of Appeal in *Soya GmbH v White* [1982] 1 Lloyd's Rep 136 and of the decision of Moore-Bick J in *Mayban v General Insurance BHD v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep 609.

113. In para 70 of his judgment in the Court of Appeal in the instant case Carnwath LJ quoted this passage from the second edition of *Arnould's Treatise on the Law of Marine Insurance and Average* (1857), vol II, pp 782-783:

> "… the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice …"

As Carnwath LJ observed, such views remain relevant because of the fact that the Act was a codifying statute and *Arnould*'s approach, with its emphasis on something inherent in the subject matter insured, as opposed to the impact of external factors, has proved remarkably resilient over the ensuing 150 years.

114. This is not to say that external factors are entirely irrelevant when determining whether there was inherent vice, as for example (as Carnwath LJ said at para 70) atmospheric conditions hastening the deterioration of the gloves in *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283. I agree with Waller LJ (at para 56) that inherent vice can be a cause even though some outside agency may have played a part, as for example the motion of the waves in Byles J's example (in *Koebel v Saunders* (1864) 17 CB(NS) 71, 79) of a cargo of tender animals which were "unfit to bear the agitation of the sea". I also agree with Waller LJ that *Arnould* almost certainly intended his definition to be understood as meaning that inherent vice would be the sole cause where any other outside causative factor would not be a peril insured against. That is in essence what Lord Diplock's definition amounts to, at any rate in the context of perils of the seas.

115. Both parties relied upon the decision of the Court of Appeal in *Noten* [1990] 2 Lloyd's Rep 283 but in my opinion it provides support for the submissions made on behalf of the insured. The issue in *Noten* arose out of wet damage to gloves stowed in containers. The claim was under an all risks warehouse to warehouse policy. The gloves had been stowed in the containers in a wet condition. The cause of the damage was the condensation on the inside of the top of the containers and falling on to the gloves. The gloves had absorbed moisture from the humid atmosphere in Calcutta, had either lost or gained a little moisture within the containers in the course of the voyage to Rotterdam and were damaged in Rotterdam as a result of the containers being discharged into a temperature markedly colder than the temperature in the mass of the gloves. The containers then cooled which in turn caused a convection of air currents which led to the condensation and thus to moisture falling on the gloves. The judge, Phillips J [1989] 2 Lloyd's Rep 527, held that the insured were entitled to recover on the basis that the damage was caused by the dropping of water from an external source.

116. The Court of Appeal [1990] 2 Lloyd's Rep 283, in which Bingham LJ gave the only substantive judgment, allowed the insurers' appeal. His reasoning may be summarised in this way. The question was what was "the real or dominant cause of the damage", which was to be answered applying the common sense of a business or seafaring man, whom Bingham LJ described as a "hypothetical oracle": p 287. Such a person would not understand how the water which caused the damage could be regarded as coming from a source external to the goods but would regard the gloves as the obvious and sole source of the water. He asked himself this question. If, then, the damage was proximately caused by the excessively moist condition of the gloves when shipped, given the conditions in which they were and were expected to be carried, was that caused by an insured peril or was it within the exception of inherent vice or nature of the goods?

117. Bingham LJ directed himself by reference to section 55(2)(c) of the Act and set out Lord Diplock's definition of inherent vice in *Soya v White* and then quoted from para 782 of volume II of 16th edition of *Arnould's Law of Marine Insurance and Average* (1981), which has echoes of the second edition quoted above, as follows:

> "Upon the same ground, the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition. Accordingly, where meat shipped at Hamburg became putrid through delay on the voyage occasioned by tempestuous weather, and was necessarily thrown into the sea, it was

> held to be no loss within the meaning of the policy. So, if spontaneous combustion is generated by the effervescence or other chemical change of the thing insured, arising from its having been put on board wet or otherwise damaged, the underwriter is not liable; but it lies upon him to show clearly that the fire really arose from this cause.
>
> The suggestion has sometimes been made that inherent vice means the same thing as damage that must inevitably happen, but this is not so. The distinction is between damage caused by any external occurrence, and damage resulting solely from the nature of the thing itself. Damage from inherent vice may be just as capricious in its incidence as damage caused by perils of the seas."

118. Bingham LJ then expressed his conclusion thus at p 288:

> "If the factual cause of the damage to these gloves has been correctly identified, then I think it plain that that was an excepted peril under these policies. The goods deteriorated 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 damage was caused because the goods were shipped wet. For the reasons already given I regard it as immaterial that the moisture travelled round the containers before doing the damage complained of."

119. Those conclusions seem to me to support the insured's case in this appeal. As *Arnould* put it, the distinction is between damage caused by any external occurrence and damage resulting solely from the thing itself. On the facts Bingham LJ concluded that the goods deteriorated 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. He was there applying Lord Diplock's definition and it is plain that, if he had held, as the judge had done, that there was such a fortuitous event, the defence would have failed because it could not then have been said that the damage resulted, in *Arnould's* phrase, solely from the nature of the thing itself. Bingham LJ, in rejecting an alternative basis upon which the claim was put, further emphasized (at p 289) the importance of establishing a fortuity if the insured was to succeed. It seems plain that Bingham LJ and (through him) the Court of Appeal were adopting *Arnould's* test, so that if damage resulted from the fortuity there could be no inherent vice. An application to the instant case of the analysis of the Court of Appeal in *Noten* would in my opinion lead to the conclusion that the insured are entitled to succeed on the basis of the fortuitous leg-breaking stress found by the judge.

120. Both parties placed some reliance on the decision of the Court of Appeal of British Columbia in *Nelson Marketing International Inc v Royal & Sun Alliance Insurance Co of Canada* (2006) 57 BCLR (4th) 27. The facts are similar to those in *Noten*. The claim was under an all risks marine insurance in respect of wet damage to a shipment of laminated hardwood flooring. The laminated wood had absorbed moisture while awaiting shipment in Malaysia. The heat to which the flooring was exposed during the course of the voyage caused the moisture to escape from within the wood and to condense on the surface of the flooring under the plastic covering.

121. The judge at first instance held that the insured were entitled to recover on the basis that, although the moisture that damaged the flooring was internal to the flooring, the external environmental conditions in the holds of the vessels caused the damage. The Court of Appeal allowed the insurers' appeal. In setting out the relevant principles to be applied, Lowry JA, who gave the only substantive judgment, referred to the passages in *Noten* set out above. He then summarised the correct approach at para 13 of his judgment as follows:

> "Thus, to succeed on a claim under an 'all risks' cargo policy, 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."

It followed from this, he continued at para 23, that "the issue is only whether what did cause the loss was fortuitous and not attributable to the inherent nature of the flooring". There being no evidence that the conditions in the vessels constituted a fortuitous occurrence, he concluded that the loss was attributable to the nature of the wood cargo.

122. As I see it, *Nelson* provides further support for the insured's case that the critical distinction is between damage caused by an external fortuity and damage resulting solely from the intrinsic nature of the insured goods.

123. Reliance was however placed on the obiter dicta of Donaldson LJ in *Soya v White* [1982] 1 Lloyd's Rep 136. They appear in a part of his judgment in which he gave reasons for differing from the judgment of Lloyd J [1980] 1 Lloyd's Rep 491 at first instance on causation. At p 150, Donaldson LJ set out part of that judgment and said this:

> “I fully accept his finding that the cause of the loss was the condition under which the soya beans were carried, but I disagree with his conclusion that this does not constitute a loss proximately caused by inherent vice. As I have said, in my judgment a loss is proximately 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. This is the test under a contract of affreightment and the shipowner in this case could have pleaded inherent vice in answer to a claim for damage to the cargo. In holding that inherent vice is only proved if the soya beans could not withstand *any* normal voyage of that duration, the judge was introducing a different concept, namely that of certainty of loss. That is [a] quite different defence. It is in any event subject to the qualification that it must be a certainty which is, or should be, known at least to the assured.”

124. The insurers relied upon the proposition that inherent vice was proved if the natural behaviour of the cargo was such that it suffered a loss in the circumstances in which it was expected to be carried. Lord Diplock did not express a view upon that proposition, save to say that the only point of difference between the judgments at first instance and in the Court of Appeal related to an issue of causation which, on the view taken by the House of Lords, did not arise and upon which no argument was heard. In these circumstances Lord Diplock did not express a view upon the above passage one way or the other.

125. As it seems to me, Donaldson LJ was not considering the issue which arises on this appeal. He was not considering a definition of inherent vice in the terms subsequently stated by Lord Diplock, with the agreement of the other members of the House. In so far as his approach is inconsistent with Lord Diplock’s definition as explained above, I would not accept it.

126. The same is true of the reasoning of Moore-Bick J in *Mayban* [2004] 2 Lloyd’s Rep 609, in which cargo in the form of a transformer was damaged in the course of a voyage. The transformer was insured under a policy which, like this one, covered all risks and was subject to the Institute Cargo Clauses (A) terms. As the judge observed at para 97 in a passage quoted by Waller LJ at para 21, Moore-Bick J said at his para 21:

> “It was common ground that the immediate cause of the damage to the transformer in the present case was the violent movement of the vessel due to the actions of the wind and sea. These in themselves were certainly events of a fortuitous nature and they were external to the cargo, but were they the real cause of the loss? The action of the

> winds and waves is, of course, an inevitable incident of any voyage and is therefore a hazard to which all goods carried by sea are necessarily exposed. Goods tendered for shipment must therefore be capable of withstanding the forces that they can ordinarily be expected to encounter in the course of the voyage and these may vary greatly depending on the route and the time of year. In a case such as the present, therefore, the competing causes, namely, perils of the sea and inherent vice, are to a large extent opposite sides of the same coin. If the conditions encountered by the vessel were more severe than could reasonably have been expected, it is likely that the loss will have been caused by perils of the sea (though even then there might be evidence that the goods would have suffered the same degree of damage under normal conditions). If, however, the conditions encountered by the vessel were no more severe than could reasonably have been expected, the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage."

127. Moore-Bick J further said, at para 26, that the relatively short periods of high wind encountered on the passage were neither extreme nor even unusual in the sense that they are encountered often enough for mariners to regard them as a normal hazard, concluding that a cargo that could not withstand exposure to conditions of that kind could not be regarded as fit for the voyage. In the result, he held that the loss was caused by the inability of the transformer to withstand the ordinary conditions of the voyage rather than by the occurrence of conditions which it could not reasonably have been expected to encounter.

128. The insured submitted that Moore-Bick J was wrong to hold that, if the conditions encountered by the vessel were no more severe than could reasonably have been expected, the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage and was thus inherent vice. I would accept that submission. It does not appear that the principles were in issue before the court and the only cases cited were *British and Foreign Marine Insurance Co Ltd v Gaunt* [1921] 2 AC 41, *Soya v White* [1983] 1 Lloyd's Rep 122 and *Noten* [1990] 1 Lloyd's Rep 283. In particular, the cases which examine the correct approach to perils of the seas, notably the *Miss Jay Jay* [1985] 1 Lloyd's Rep 264 and the cases referred to by Mustill J (see above), were not referred to. If they had been, I am confident that Moore-Bick J would have held that the damage was caused by perils of the seas, that it was not a case of inherent vice and that it was within the scope of the all risks cover.

129. The 16th edition of *Arnould's Law of Marine Insurance and Average* was published in 1981 and referred, at para 782, to the decision of Lloyd J in *Soya v White* [1980] 1 Lloyd's Rep 491. A third volume of the 16th edition was published

in 1997 and contained a discussion of both *Soya v White* and *Noten*, at paras 217-224. It noted at para 222 that Donaldson LJ and Lord Diplock attached significantly different meanings to inherent vice. As I read the text, it preferred the approach of Lord Diplock.

130. The 17th edition was published in 2008. In the first two paras of para 22-25 it reproduced the paras from volume II of the 16th edition quoted above (para 116). It then quoted the parts both of the speech of Lord Diplock and of the judgment of Donaldson LJ referred to above and stated that the concept of inherent vice was defined in "somewhat different terms" but this time said that there was no reason to suppose that Lord Diplock disagreed with Donaldson LJ's approach or that he intended to give the concept of inherent vice a narrower meaning than had been indicated in the Court of Appeal. Para 22-25 concluded by saying that *Arnould's* view, which had been supported in subsequent editions, that a loss can only be said to be caused by inherent vice when it is solely due to the nature or condition of the insured property had, therefore, now to be qualified.

131. Para 22-26 was in these terms:

> "After *Soya v White* (above), inability to withstand the ordinary incidents of the voyage is clearly an appropriate test of inherent vice. It can no longer be said that inherent frailty is to be distinguished from inherent vice, or that the concept of inherent vice is necessarily inapplicable where external factors have contributed to the loss or damage to the insured.
>
> Inherent vice will afford a defence where the sole cause of loss is the internal decomposition or deterioration of the subject matter insured, unless the policy otherwise provides. This is the case envisaged under section 55(2)(c) of the Act. *Where the loss results both from the inability of the insured ship or cargo to withstand ordinary incidents of the voyage and from some fortuitous but not unusual external occurrence, it may sometimes be appropriate to conclude that inherent vice was so much the dominant cause that it ought to be viewed as the sole proximate cause of loss; but, in many cases, the appropriate conclusion will be that the loss was due to a combination of causes of approximate equal efficiency.* In those circumstances, if the external cause is an insured peril and if there is no express exclusion of inherent vice, the assured will be able to recover; if there is an express exclusion of inherent vice, the claim under the policy will be defeated."

132. Those conclusions undoubtedly support the case for the insurers in this appeal, although it is right to say that in a footnote to the first part of the passage that I have italicised, *Arnould* refers to *Mayban* [2004] 1 Lloyd's Rep 609, contrasts the hull cases which it notes were not cited in *Mayban* and says that the "controversial result" of the case, if applied generally, is that it would restrict the scope of cover in respect of heavy weather damage under the Institute Cargo Clauses (A) to wholly exceptional weather conditions. In doing so it quotes from *Bennett, Law of Marine Insurance* 2nd ed (2006), para 15.54. The footnotes also refer to the *Miss Jay Jay* [1985] 1 Lloyd's Rep 264.

133. Like the Court of Appeal, I have reached the conclusion that the analysis in para 22-26 of the 17th edition is wrong and that the analysis in volume II of the 16th edition (and in earlier editions) is to be preferred.

134. In reaching my conclusions I have been much assisted by the article by Professor Bennett [2007] LMCLQ 315 referred to above, especially at p 346, where he said that section 55(2)(c) of the Act operates not as an implied contractual exclusion but as a clarification on the scope of cover. As he put it, it amplifies the proximate cause rule articulated in section 55(1) and provides an example of a circumstance of a loss not proximately caused by a peril insured against.

135. If the approach of the insurers is correct, there is loss as a result of inherent vice where loss or damage is caused by the inability of the cargo to withstand the ordinary perils of the sea, or put another way, by the unseaworthiness of the cargo, since (as Lord Saville has noted at para 38) seaworthiness is defined by section 39 of the Act as being "reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured". I agree with Lord Saville, for the reasons he gives at paras 40 to 43 above, that the provisions of sections 39 and 40 of the Act do not sit easily with the insurer's submissions.

136. There was some discussion in the course of argument about what were called the hull cases. However they were cases of hull insurance in which the issue was usually whether the unseaworthiness of the vessel or an insured peril was the proximate cause of the loss or damage. The meaning of inherent vice was not addressed. So they are of no assistance on the issue in this appeal, save perhaps to note that they support the approach to perils of the seas discussed above. In so far as they are relevant, I agree with the analysis of Lord Mance at para 66 et seq.

137. The approach of the insured seems to me to have the virtue of simplicity. The sole question in a case where loss or damage is caused by a combination of the physical condition of the insured goods and conditions of the sea encountered in

the course of the insured adventure is whether the loss or damage is proximately caused, at least in part, by perils of the seas (or, more generally, any fortuitous external accident or casualty). If that question is answered in the affirmative, it follows that there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or excluded risk.

138. The approach also seems to me to accord with commonsense, at any rate in a case like this. It would be commercially unacceptable if cover for loss arising as a result of the interaction of perils of the seas and the nature of the goods were reduced to situations where the conditions of the sea were not reasonably foreseeable. As Professor Bennett puts it, at p 348 of his article:

> "…assureds do not procure insurance against losses that they consider fanciful. Rather, it is precisely because commercial experience indicates a certain level of probability of a particular type of loss that the reasonable person considers insurance a sensible and prudent investment. If, however, goods have to be fit to withstand reasonably foreseeable perils or the loss will be considered to be proximately caused by the inherent vice of the goods, or at least not by a 'risk' within the meaning of the 'all risks' insuring clause, much of the point of cargo insurance disappears. 'All risks' cover would be confined to loss or damage occasioned only by wholly unusual perils or wholly unusual examples of known perils."

139. This can be seen on the facts of this case. Both the insured and the insurers appreciated that there were potential risks of fatigue failure as a result of a combination of the fatigue strength of the rig's legs and the stresses induced by the sea conditions, which would of course depend upon the weather conditions. It was because of such risks that the insurers insisted upon the rig being inspected by Noble Denton at Galveston and being subsequently inspected at Cape Town, where (as Lord Saville explains) fatigue cracking was found and repairs carried out. Fatigue failure was thus one of the risks which both parties had in mind and which it seems to me to be fair to say that both parties intended should be the subject of the insurance. I mention this not as part of a conclusion which depends upon the particular arrangements made in this case but as an indication of what commercial men would have expected.

140. For these reasons I too would dismiss this appeal. In doing so, I would stress two matters. The first is that this seems to me to be a most unusual case. The critical finding of the judge was that the leg-breaking stress was fortuitous and was caused by a peril of the seas. It is important to note that if, in this case and contrary to the findings of the judge, the casualty had been bound to occur the insured

would have failed. (I express no view on the interesting questions raised by Lord Mance at the end of para 51 above). The second is that, as I see it, the insured would not have been entitled to recover in respect of the cost of repairing every fatigue crack but only in respect of the loss of the legs because only the latter has been held to be caused by a peril insured against. It is a reasonable inference that some cracking was bound to occur. This point is not however relevant to the issues between the parties if, as the judge noted, quantum is not in dispute.

CONCLUSION

141. For the reasons I have given, I agree with Lord Saville and Lord Mance that the appeal should be dismissed.

LORD DYSON

142. For the reasons given by Lord Saville, Lord Mance, Lord Collins and Lord Clarke, I agree that this appeal should be dismissed.