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Recent Developments in English Marine Insurance Law

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Introduction

Recent Case Law

- “The Cendor MOPU” [2011]
- “Green Island” [2010]

The Cendor MOPU

- Global Process Systems Inc & Another –v- Syarikat Takaful Malaysia Berhad [2011]

- What is the case about?

  Court considered the concepts of “inherent vice” and “perils of the sea” under ICC(A) 1982 and Marine Insurance Act 1906

The Facts

- Assured purchased a self elevated jack-up rig “Cendor MOPU” for conversion into a mobile offshore production unit (MOPU) for use in the Cendor Field in East Malaysia

- The rig was insured under a marine cargo policy dated 5 July 2005 incorporating ICC(A) ‘82

- The total sum covered under the policy was US$10million (deductible of US$1million). The premium was US$378K

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The Cendor MOPU

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Cendor MOPU and Boabarge 8

- The rig was to be carried on the towed barge “Boabarge 8” from Galveston, Texas (USA) to Lumut, Malaysia via Cape Town

- The rig had 3 extendable legs, 3.65m in diameter and 95m long, made of welded steel. Each leg weighed 404 tons

- The rig was carried on the barge with its legs extended 91m into the air

- Voyage commenced on 23 August 2005
- Rig arrived at Cape Town on 10 October
- Pursuant to policy terms the legs were examined for metal fatigue and repairs were performed to a number of fatigue cracks that had appeared
- On 4 November the starboard leg broke off and fell into the sea. On 5 November the forward and port legs broke off within 30 minutes of each other

- The assured claimed for the loss of the rig’s 3 legs
- Insurers declined the claim on the grounds of inherent vice and/or that the loss was an inevitable consequence of the voyage

- The assured relied upon clause 1 of ICC(A) ’82, which provides:

  “This insurance covers all risks of loss of or damage to the subject matter insured except as provided in clauses 4, 5, 6 and 7 below.”

- It was contended that the damage was caused by perils of the sea

- Insurers relied upon clause 4.4, which provides:

  "In no case shall this insurance cover

  …….

  loss or damage or expense caused by inherent vice or nature of the subject-matter insured"

Commercial Court

- The court of first instance found:
  - the loss was probable but not inevitable; but
  - the cause of the loss was inherent vice, based on the premise 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….including the weather reasonably to be expected."*

Court of Appeal

- The assured appealed the first instance decision and the Court of Appeal allowed the appeal

- The Court of Appeal found that the proximate cause of the loss was an insured peril (perils of the sea) in the form 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 Court of Appeal relied upon the finding of the Commercial Court that the loss of the starboard leg was caused by a *“leg breaking wave of a direction and strength catching the first leg at just the right moment…”*

- This finding was based upon the evidence of insurer’s expert witness

- In evidence the expert stated:

  "…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"

Supreme Court

- Insurers appealed to the Supreme Court

- The Supreme Court dismissed the appeal on the grounds that the loss was proximately caused by a peril insured against, namely, perils of the sea and not inherent vice

- The following principles can be drawn from the case:
- (i) Proximate cause is NOT the closest in time but is that which is proximate in efficiency (i.e. the dominant cause). It is to be determined by applying the common sense of a business or seafaring man

- (ii) Inherent Vice arises where the goods deteriorate 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**

- To put it another way - if damage is caused by an external force or occurrence (i.e. a leg breaking wave), then there is no inherent vice

- (iii) A peril of the sea occurs where an accident or casualty is caused by or arises out of the conditions of the sea

- The state of the sea itself does not have to be unforeseeable or extreme, as it is the effect of the sea on the insured property that is the relevant issue

General Comments

- In its analysis of the case, the Supreme Court made some interesting comments and observations:

- (i) Insurers alleged that inherent vice arises where loss or damage is caused by the inability of the cargo to withstand the ordinary perils of the sea.

- This was rejected on the basis that it would effectively impose a warranty of seaworthiness upon cargo owners contrary to s.40(1) Marine Insurance Act 1906

- (ii) If loss or damage is in part caused by an insured peril and in part by an uninsured peril, then the policy will respond

- (iii) If loss or damage is in part caused by an insured peril and in part by an exclusion under the policy, then the policy will NOT respond

- (iv) Clause 4.4 ICC(A) may not operate as an exclusion, but as a clarification of the scope of cover

(v) The stress cracks that appeared were the product of the condition of the legs and the ordinary action of the wind and waves and were not caused by any fortuitous external accident or casualty.

Therefore, if the legs had been lost as a result of a catastrophic failure arising out of the stress cracks alone and not as a result of the operation of the “leg breaking wave” then the claim would not be covered

"The Green Island"

- Geofizika DD v MMB International Ltd v Greenshields Cowie & Co Ltd [2010]

- What is the case about?

  A dispute between CIP buyer, CIP seller, and seller's freight forwarder. The court was required to consider the duties of a CIP seller; and the role and obligations of a freight forwarder

- Reminder - CIP: "carriage and insurance paid to…"

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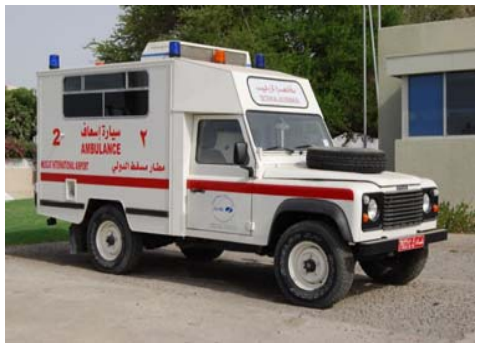
The Facts

- Sale of 3 ambulances for oil/gas geophysical project in Libya
- £74,952 sale price on CIP Tripoli terms
- Seller engaged freight forwarder to arrange carriage/insurance (contract subject to the BIFA Conditions 2005)
- Freight forwarder to arrange Ro-Ro carriage by sea from England to Tripoli



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CIP Terms – The Seller's Duty

- Seller pays cost of carriage to named destination
- Carriage must be on usual terms by a usual route and in a customary manner
- Buyer bears the risk of loss or damage to the goods during carriage and any additional costs incurred after delivery
- Seller must procure insurance against buyer's risk
- **Cover is on minimum terms (ICC(C))** – any additional cover required by buyer must be agreed with seller or arranged separately by the buyer

The Freight Forwarder's Duty

- To exercise reasonable care and skill in arranging the contract of carriage and insurance in accordance with CIP terms

The Contract of Carriage

- Booking confirmation: “ALL VEHICLES WILL BE SHIPPED WITH “ON DECK OPTION” this will be remarked on your original bills of lading...”
- Shipping line invoice: “RO-RO cargo”
- Clause 7 of BOL: “Goods, whether or not packed in containers, may be carried on deck or under deck without notice to the Merchant...”
- No remark concerning on-deck carriage on face of BOL

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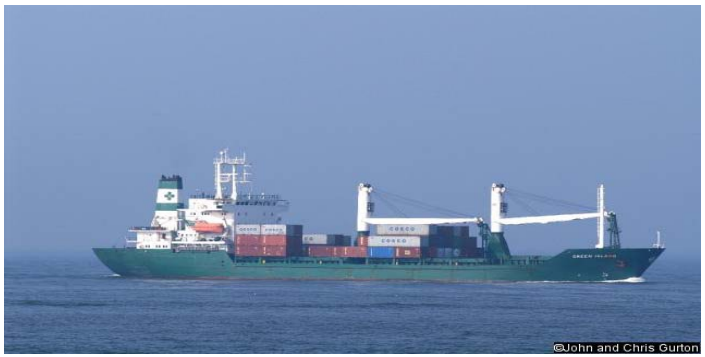
The Contract of Insurance

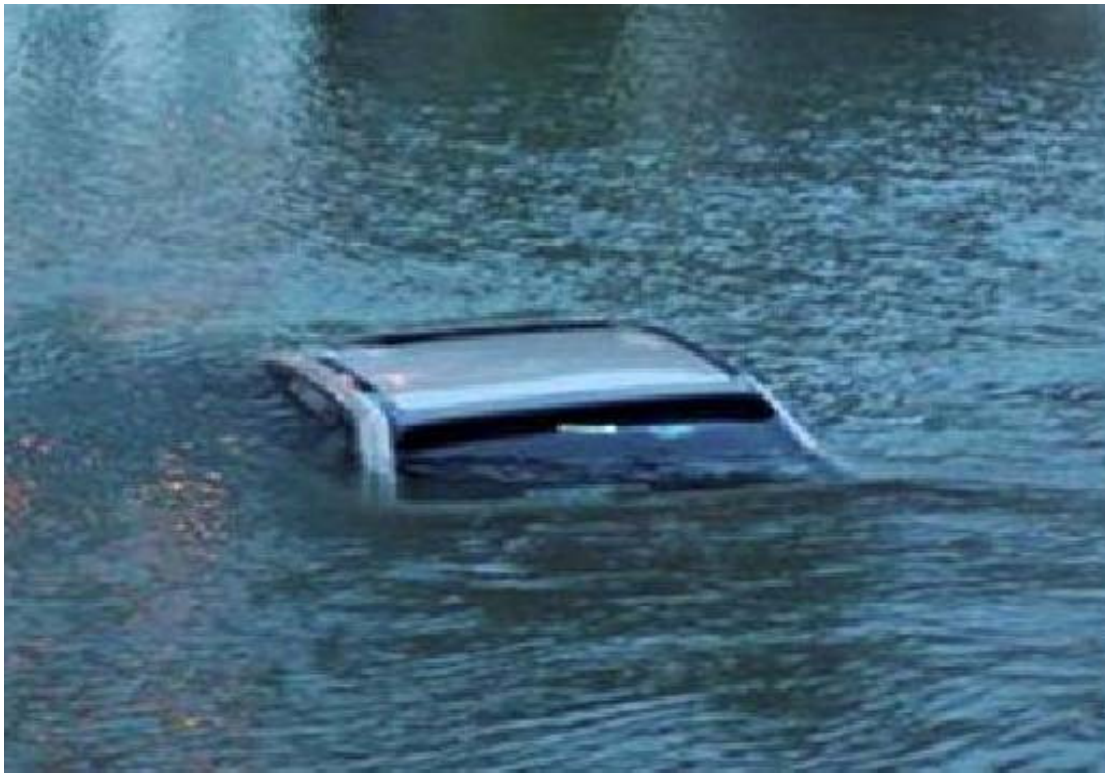
- Insurance procured on 4 December 2006 (vessel sailed on 29 November)
- Declared on open policy with marine cargo insurers
- ICC(A) (all risks) BUT warranted shipped under deck



The RoRo Assumption

- Freight forwarder booked the vehicles to be carried RoRo and assumed this meant the vehicles would be carried under-deck (hence warranty to insurers)
- The shipping line did not understand RoRo to mean under-deck
- Vehicles loaded on-deck on a general cargo vessel (not RoRo vessel), unprepared and unsecured for on-deck carriage

The inevitable happened



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The Claim

- What should have happened
  - cargo insurers pay full value of goods to buyer
  - cargo insurers make (limited) subrogated recovery from carriers
  - everyone is happy

- What did happen
  - no insurance – cargo insurers avoided cover for breach of (under deck) warranty
  - buyer out of pocket for two lost vehicles (£57,890) plus hire charges (c. £90,000)
  - buyer made limited recovery of £50,000 from carriers (incurring considerable costs)
  - buyer pursued seller for breaches of duty as CIP seller
  - seller pursued freight forwarder for an indemnity

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Mercantile Court

Liability – (i) Contract of Carriage

- Antecedent agreement – freight forwarder said shipping line had agreed not to carry on deck but RoRo - i.e. below deck
- Evidence: advertised RoRo service, telephone conversation, booking note, lack of remark on face of bill
- The Judge disagreed:-
  - no unequivocal instructions to ship below deck
  - RoRo does not mean below deck
  - terms of alleged antecedent agreement too vague to override liberty clause (clause 7 of BOL)
- Freight forwarder and therefore seller in breach

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Mercantile Court

Liability – (ii) Contract of Insurance

- CIP seller must procure an insurance contract which “matches” the contract of carriage
- Contract of carriage permitted carriage on deck - contract of insurance warranted shipped under deck, therefore policy voidable
- Central issue was the false warranty; “minimum cover” was irrelevant as ICC(A) cover was actually procured
- Freight forwarder and therefore seller in breach

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Mercantile Court

Liability – (iii) indemnity from freight forwarder

- Duty to exercise reasonable care and skill
- Specialist freight forwarder - knows what is required to create CIP compliant contracts of carriage and insurance
- Failure to detect clause permitting carriage on deck and the false warranty amounts to negligence

- Clause 26(A)(ii) BIFA limits liability to 2 SDRs/kg = c.£7,000
- Clause 11(B) BIFA "*Insofar as the Company agrees to effect insurance, the Company acts solely as agent for the Customer and the limits of liability under clause 26(A)(ii) of these conditions shall not apply...*"
- Court held that main issue was freight forwarder's failure to check before giving the false warranty to insurers, therefore case falls within clause 11, not clause 26 and no limit of liability applies

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Mercantile Court

Outcome

- Buyer succeeded in principle
- Hire charges significantly reduced
- Damages of c. £37,000 plus interest and indemnity costs
- But buyer required to give credit of £41K in respect of its settlement with shipping line
- Seller entitled to full indemnity from freight forwarder, including its own legal costs

Court of Appeal

- The Court of Appeal found:

- (i) There was no right to ship on deck and as such a contract of carriage was obtained on usual terms. The terms of the booking agreement (antecedent agreement) prevented the carrier from shipping the goods on deck in the absence of an endorsement on the face of the BOL

- (ii) The obligation of a CIP seller was to procure cover on ICC(C) terms. There was no evidence of an agreement between buyer and seller to amend CIP contract to require insurance on ICC(A)

Court of Appeal

- (iii) The freight forwarder was negligent in giving the false warranty to insurers as they were obliged to check the facts they were warranting were true. Consequently the seller failed to procure a valid contract of insurance

- (iv) However, the freight forwarder's negligence (and the seller's failure) did not cause any loss as ICC(C) terms did not provide cover for washing overboard in any event i.e. valid insurance would not have covered the loss

- (v) There was no obligation under a CIP contract to ensure that the contract of carriage and contract of insurance "match"

Buyer appealed to the Supreme Court…

- …but permission to appeal was refused

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