



Latent Defects

*French Cuff Ltd v Markel
American Insurance Company
("Alize")*

2009 U.S. App. LEXIS 6998
(11th Cir. 2009)

In 2003 French Cuff purchased a new 64ft catamaran. Three years later damage was discovered during voyage:

- Vertical crack in aft bulkhead on port hull.
- Progressed towards aft transverse support structure.
- Port hull separated from aft transverse support structure.
- Port hull flexing up and down.

Markel's naval architect found:

- Cracks and fractures on bulkheads.
- Bulkheads also buckled and delaminated.
- Deck too flexible.
- Chainplates badly engineered and one had failed.

Naval architect believed that causes of damage were:

- Bulkheads - The foam core was either too thin or too crumbly.
- Deck - Either the foam core or failure to build internal frames.
- Aft crossbeam not properly secured.
- Chainplates - Badly designed (as well as badly made).

Claim under hull policy:

- Exclusion for damage caused by manufacturer's defects or defects in design.
- BUT exclusion does not apply to "latent defects".
- "Latent defect means a flaw in material of vessel's hull or machinery not [readily] discoverable."

Markel successfully applied for summary judgment at first instance:

- A latent defect could not also be a manufacturing or design defect.
- No evidence of a latent defect, therefore damage had to be due to design or manufacturing defects.
- Exclusion applied accordingly.

Court of Appeal disagreed:

- No justification, as matter of language, that manufacturing/design defects and latent defects were mutually exclusive.
- Markel's argument on that point was an attempt to write the latent defect exception out of the policy.

Were the defects identified “flaws in the material”?

- Discussion was limited to the foam.
- Perfectly good foam, but unsuitable for purpose.
- Dictionary definition includes a “feature that mars the perfection of something, a fault, a defect”.
- Despite the circular nature of that definition, Court of Appeal concluded that unsuitability could be a “flaw in material”.

- Therefore unsuitable but sound foam was a latent defect, which meant the exception to the exclusion potentially applied.
- For purposes of summary judgment Markel conceded that unsuitable foam was not “discoverable by common means of testing”.

Inherent Vice

*Global Process Systems Inc v
Syarikat Takaful Malaysia
Bhd (“Cendor Mopu”)*

[2009] EWCA Civ 1398, Court of Appeal
(Civil Division)

Oil rig carried on a barge with legs in the air suffered damage:

- Fatigue cracking caused legs to break off.
- Cracking came from:
 - repeated bending,
 - under the seagoing motion of the barge.

Owners had policy on ICC(A) terms for all risks.

- Pre-trip survey.
- Checks and repairs half-way.

High Court findings of fact:

- Weather conditions within normal range.
- With hindsight, chances of loss were very high but not inevitable.
- Legs failed not because of half-way repairs, but despite them.

High Court finding on proximate cause:

- Inherent inability of legs to withstand normal incidents of the voyage - i.e. the seagoing motion and seas around Cape of Good Hope.
- “These legs were never going to make it round the Cape.”
- Inherent vice made out. Claim failed.

Court of Appeal's view on inherent vice:

- Cargo (or hull) cannot withstand “ordinary incidents” of specific voyage.
- “Ordinary incidents” - wind and waves commonly understood as bound to occur.
- **Not** wind and waves that were bound to occur.
- **Not** “reasonably foreseeable” conditions.

Court of Appeal disregarded recent “ordinary incidents” tests:

- “Conditions no more severe than reasonably expected.”
- “Normal hazards” - e.g. short periods of high wind.
- “Conditions well known to occur but relatively uncommon.”
- *Mayban v Alston Power Plants* [2004] 2 Lloyd’s Rep 609 (Moore-Bick J).

Result in Court of Appeal:

- Fatigue cracking plus leg-breaking wave was needed.
- Evidence showed (just) that a leg-breaking wave not a certainty.
- The rig was properly stowed and surveyed.
- Therefore inherent vice not made out. Claim succeeded.

Given likelihood of damage with hindsight, Court of Appeal made comments on risks faced by insurers:

- They know what risks they are being asked to assume.
- (Here the insurer asked for a pre-trip survey.)
- They have the protection of non-disclosure and misrepresentation rules.
- Also have contractual freedom on terms.