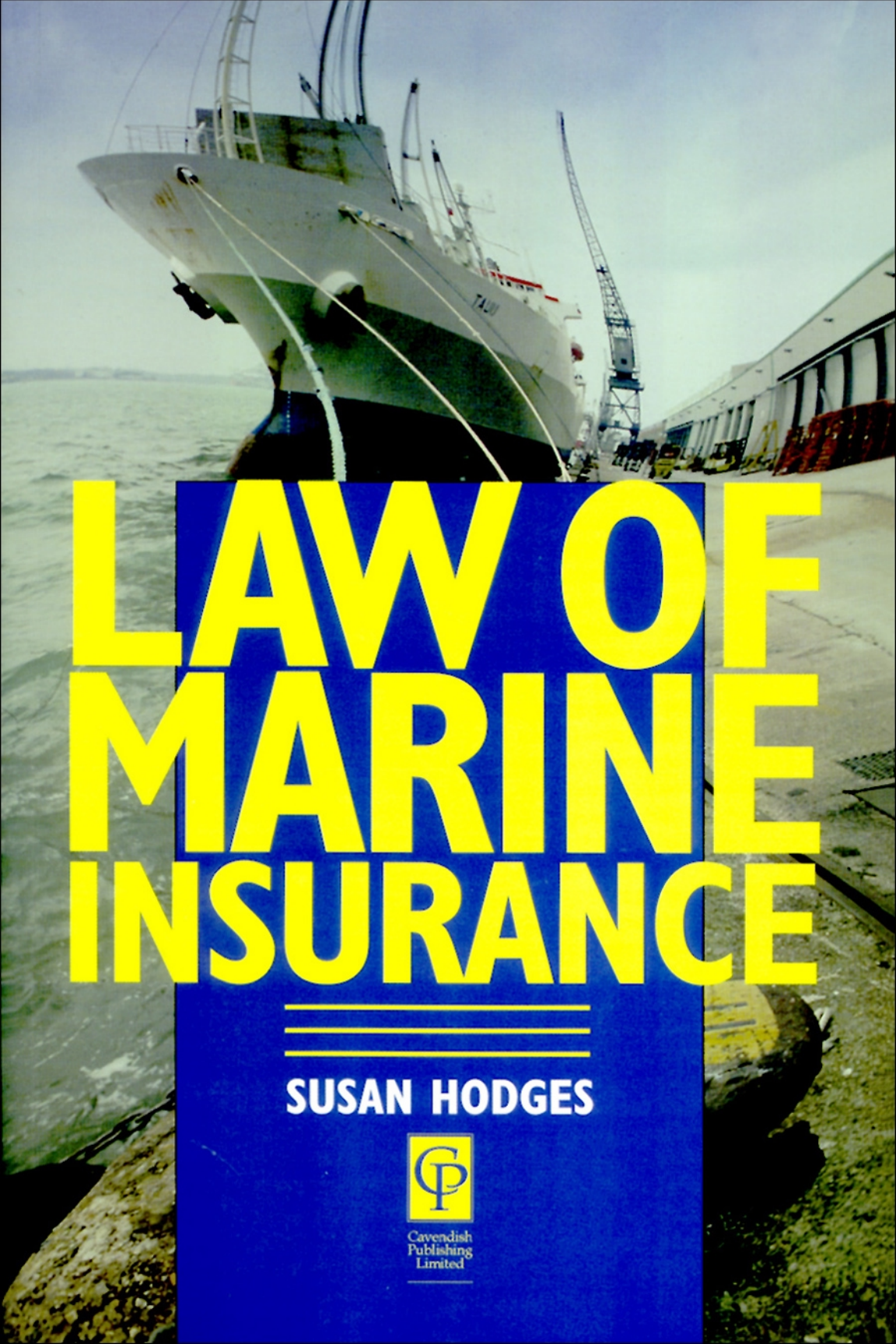

LAW OF MARINE INSURANCE

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CHAPTER 10

EXCLUDED LOSSES

INTRODUCTION

The main statutory excepted losses set out in s 55(2) of the Act are examined in this chapter. They are of particular relevance to the Institute Hulls Clauses for, unlike the ICC, the ITCH(95) and the IVCH(95) do not have a general exclusion clause. It is noted that all the statutory exclusions are expressly reiterated in the ICC.[1] The excluded losses in s 55(2) are of general application; and the opening phrase 'in particular' serves to reinforce the fact that they are specific examples flowing from the general rule spelt out in s 55(1) that an insurer is only liable for 'any loss proximately caused by a peril insured against, but … he is not liable for any loss which is not proximately caused by a peril insured against'. With the exception of the defence of wilful misconduct under s 55(2)(a), all the other causes of loss, though expressly excluded by the said section, may nevertheless be insured under a policy. This is allowed by the opening words to s 55(2)(b) and (c), 'unless the policy otherwise provides'. This chapter will focus only on the main exceptions, namely, a loss 'attributable to the wilful misconduct of the assured'; a loss 'proximately caused by' delay;[2] ordinary wear and tear; ordinary leakage and breakage; and inherent vice or nature of the subject-matter insured.

WILFUL MISCONDUCT OF THE ASSURED

Section 55(2)(a) excepts an insurer from liability for any loss attributable to the wilful misconduct of the assured. Unlike the other exceptions contained in s 55(2), the parties cannot contract out of this exception. In other words, this statutory exception cannot be overridden. Though the section is of general application, nevertheless, each of the ICC has its own provision on the subject worded as follows: 'In no case shall this insurance cover loss damage or expense attributable to wilful misconduct of the Assured'.[3]

The rationale for the rule is based primarily on 'the general principle that no man can take advantage of his own wrong'.[4] Furthermore, the wilful character of the act takes the fortuitous element out of the cause of loss. Thus, such a cause cannot be regarded as a risk: that the purpose of insurance is to protect an assured against risks, perils and accidents, and not against deliberate and intentional acts which would inevitably result in the damage or destruction of the subject-matter insured, must be borne in mind at all times.[5]

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1 Additional exclusions can be found in cl 4 of the ICC (A), (B) and (C).

2 For the legal effect of the words 'attributable to' and 'proximately caused by' in s 55(2)(a), see Chapter 8.

3 Note that the 'Assured' here is the cargo owner, not the shipowner.

4 *Per* Salmon J, *Slattery v Mance* [1962] 1 All ER 525 at p 526.

5 See the remarks made by Collins LJ in *Trinder, Anderson & Co v Thames Mersey Marine Insurance Co* [1898] 2 QB 114 at p 127, CA.

Meaning of 'wilful misconduct'

'Wilful misconduct' is not defined by the Act, but was a well-known concept in the law of marine insurance even before the passing of the said Act. The scuttling of a ship at the behest of her owner is, of course, the most obvious and common example of an act of wilful misconduct.[6] The success of any claim for a loss, whether based on fire, barratry or perils of the seas, is dependent upon the critical fact that the assured himself has not procured the loss of his own ship. Any evidence to the effect that the shipowner had connived at or was privy to the deliberate sinking of the vessel would be proof adequate for the defence of wilful misconduct. But, as 'ships are not cast away out of lightness of heart or sheer animal spirits',[7] the court must be satisfied that the allegation has been proved, if not to the highest criminal standard of beyond reasonable doubt, at least to a high standard of proof.[8]

The defence of wilful misconduct was frequently referred to as being embodied in the maxim *dolus circutu non purgatur*. In a well-known speech by Mr Justice Willes in *Thompson v Hopper*,[9] he said that:

> '*Dolus* ... stands for *dolus malus*, and cannot mean simply any thing which may lead to the damage of another … if *dolus*, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract, express or implied between the parties.'[10]

Words such as 'fraud', 'wrong', 'a sinister intention', 'a breach of contract' and 'a violation of some legal duty' were employed by Mr Justice Willes to explain the meaning of the term.

In *The Trinder Case*,[11] Lord Justice Collins issued the caution that: 'Nothing short, therefore, of *dolus* in its proper sense will defeat the right of the assured to recover …'. An element of wilfulness, a conscious determination to bring about a loss, and a design to achieve a certain result are the familiar characteristics of an act of wilful misconduct. Merely carrying out an act which is usual and expected under the contract of insurance is not such an act. For instance, in *Papadimitriou v Henderson*,[12] a case of an insurance on war risks, Lord Goddard

6 This explains the scarcity of judicial comment on the meaning of the term, and for the observation made by McPherson J in *Wood v Associated National Insurance Co Ltd* (1985) 1 Qd R 297 at p 301, CA that '... there is remarkably little authority on the meaning of the expression "wilful misconduct"'. Indeed, it is interesting to note that the dispute in nearly all the reported cases on wilful misconduct pleaded by the insurer as a defence to a claim by a shipowner for a loss either by perils of the seas, barratry, or fire was in relation to the question of the burden and standard of proof. These cases are fully discussed in Chapter 11.

7 *Per* Lord Sumner in *La Compania Martiartu v The Corpn of the Royal Exchange Assurance* (1924) 19 Ll L Rep 95 at p 99, CA. This case is discussed in greater depth in Chapter 11.

8 For a discussion on the standard of proof required in a case where wilful misconduct is pleaded as a defence to a claim for loss caused by perils of the seas, barratry, and fire, see Chapter 11.

9 In the Exchequer Chamber, (1858) El Bl & El 1038 at p 1047.

10 Cited with approval by Collins LJ in the Court of Appeal in *The Trinder Case* [1898] 2 QB 114 at p 127, CA.

11 *Ibid*, at p 128.

12 (1939) 64 Ll L Rep 345.

held that a shipowner was not guilty of wilful misconduct even if he had tried to proceed with his contract voyage in the presence of danger. 'There must always,' he said, 'be a risk of capture during a war, which is the very reason why shipowner and merchants insured against war risk'. The position, however, would be different if the shipowner had deliberately sent his ship forward in order to run a blockade. In such a circumstance, an inference may be drawn that 'he was not endeavouring to carry out the voyage, but was endeavouring to get his ship captured, and that, of course, would be wilful misconduct'.

The defence of wilful misconduct is invariably pleaded by an insurer in the form of an allegation that the shipowner was guilty of procuring and/or conniving at the casting away of the ship or setting her alight. It is employed as a means of rebutting the plaintiff's claim that the loss was fortuitous by reason of perils of the seas, or that it was barratrous by reason of the wilful and deliberate act by the master or crew.

If an act of wilful misconduct is proved, a loss by perils of the seas is automatically negated. According to Viscount Finlay in *Samuel v Dumas*:[13] 'Scuttling is not a peril of the sea; it is a peril of the wickedness of man.' The line between a negligent and a wilful act was drawn by Viscount Cave as follows: 'the expression "perils of the sea", while it may well include a loss by accidental collision or negligent navigation, cannot extend to a wilful and deliberate throwing away of a ship by those in charge of her'.[14]

Act of reckless disregard

The next question to be considered is whether an act which is something less than positive, less than intentional, such as an act of reckless disregard or indifference, can amount to 'wilful misconduct' within the meaning of the section. The facts of the Australian case of *Wood v Associated National Insurance Co Ltd*[15] are particularly suitable for this discussion, as the conduct of the shipowners, though flagrant, was short of wilful. They had sent the ship to sea knowing full well of the potential danger to which she was exposed, and that her crew (none of whom was competent) would not be able to cope in an emergency.

It is clear from the evidence that the plaintiffs had never intended by their conduct to cause the loss of the vessel. Nonetheless, their reckless disregard in exposing the vessel to the perils of navigation, knowing that it was not in a condition fit to encounter the possible risks, was held by the Australian Court of Appeal to constitute an act of 'wilful misconduct'. The facts of the case are indeed interesting, for they are capable of generating a host of related legal issues, namely, causation, unseaworthiness under a time policy, and the defence of wilful misconduct. Even though both wilful misconduct and

13 [1924] AC 431 at p 459. Also discussed in Chapter 9.

14 *Ibid*, at p 448. Scuttling, though not a peril of the seas, may nevertheless constitute barratry, if it be committed against the wishes of the owners. The concepts of barratry, perils of the seas and wilful misconduct are mutually exclusive.

15 (1985) 1 Qd R 297, hereinafter referred to as *The Wood Case*.

unseaworthiness were pleaded by the insurers in justification of their refusal to pay under the policy, the Court of Appeal, however, chose to analyse only the issue as to whether the behaviour of the assured amounted to 'wilful misconduct' under the Australian section corresponding to s 55(2)(a) of our Act.

Mr Justice McPherson, whose judgment was adopted by all the other judges, relied heavily on American cases to arrive at his decision. He had also, interestingly enough, cited with approval an obscure *obiter* remark made by Mr Justice Kennedy of the lower court in *The Trinder Case*[16] to the effect that the term 'wilful' included 'a reckless disregard of possible risks'. Furthermore, he thought that Lord Denning MR, from the remarks he had made in *The Eurysthenes*,[17] would find his interpretation of the section acceptable. To this collection of cases, Mr Justice McPherson could have also added a comment, in support of his decision, made in passing by Lord Wrenbury in *The Warilda*[18] that: '... if the loss occurs through the wilful negligence or wilful act of the assured', the loss would not be recoverable.

The Wood Case has brought within the concept of 'wilful misconduct' a lesser form of misbehaviour – that of 'an act of reckless disregard'. That the circumstances of the case played a significant role in influencing the decision of the court has to be emphasised. The conduct of two of the three owners was, to say the least, blatantly irresponsible and careless to the extreme; their behaviour was of total disregard for the safety of the lives of those on board. As the judge astutely observed, they would probably not have run the risk had she not been insured. Thus, the principle laid down has, it is submitted, to be read in its proper context. It has to be stressed that 'privity' alone is not sufficient to convert the act of an assured to one of wilful misconduct. All the facts of the case point to a very high degree of recklessness and indifference, so much so that it was more than just turning a blind eye.

There does not appear to be any authority in this country which has directly held that an act of reckless disregard *per se* amounts to wilful misconduct. Under British law, all the cases in relation to time policies were mainly concerned with s 39(5) of the Act, where just being 'privy' to sending an unseaworthy ship to sea is sufficient to disentitle the assured of his right to indemnity for any loss 'attributable to' such unseaworthiness.[19] As discussed earlier, s 39(5) is applicable only if such unseaworthiness to which the assured is privy to is a cause or 'forms part of the cause of the loss'.[20]

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16 8 Asp MLC 300 at p 301; on appeal [1898] 2 QB 114, Kennedy J said: '... as regards conduct of the assured exonerating the underwriters ... the line is to be drawn as regards the conduct of the assured at acts which are done knowingly and wilfully, including in the term wilfully a reckless disregard of possible risks …'.

17 *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] 1 QB 49 at p 66, CA. But a close examination of the speech made by Lord Denning will reveal that this supposition is difficult to sustain, as his comments were all made in reference to the concept of 'privity' under s 39(5), and not to 'wilful misconduct' under s 55(2)(a).

18 *Attorney-General v Adelaide SS Co Ltd* [1923] AC 292 at p 308, HL.

19 See Chapters 7 & 8.

20 *Per* Roche J, *Cohen, Sons & Co v Standard Marine Insurance Co Ltd* (1925) 21 Ll L Rep 30.

As different terms are used in ss 39(5) and 55(2)(a), it is not unreasonable to assume that there must be a difference in meaning between 'privity' and 'wilful misconduct'.[21] In *The Eurysthenes*,[22] Lord Justice Roskill was content with merely stating that 'privity' was not the same as 'wilful misconduct'; whilst Lord Geoffrey Lane left the matter open with the remark that: 'In many cases, no doubt, sending a ship to sea knowing that it is unseaworthy will amount to wilful misconduct, but not necessarily so'. Regrettably, he did not elaborate when such an act would amount to wilful misconduct. However, Arnould, who shares the same view, has provided an illustration:[23]

> 'It is possible to conceive cases where, with the privity of the assured, an unseaworthy ship may be sent to sea without any real misconduct on his part. For instance, in time of war, a shipowner fearing an attack upon a naval port may very properly order his vessel to sail at once, although he knows that she is not perfectly seaworthy in all respects.'

The above remarks have clarified that the notions of privity, negligence, and wilful misconduct are separate, but may overlap in certain circumstances. They have been described by Arnould as follows: '... "privity" in this subsection [s 39(5)] does not necessarily carry any connotation of fault: it is not the same as negligence, nor is it the same as wilful misconduct, although in many cases sending to sea in an unseaworthy state may also be either negligence or misconduct'.

It has been said that if privity and wilful misconduct were to mean the same thing, then s 39(5) would be rendered otiose or superfluous. Such a deduction is not quite correct: s 39(5), which applies only to a time policy, is concerned with 'privity' of sending an unseaworthy ship to sea, whilst s 55(2)(a) on wilful misconduct is wider in scope. Section 55(2)(a) applies to all policies, and the ship which the assured has wilfully scuttled does not have to be unseaworthy. As was seen, in a time policy, the assured simply being 'privy' to the particular unseaworthiness which the loss is 'attributable to' is sufficient to free the insurer from liability for that loss. The result would still be same if he had wilfully cast away the ship whether she be seaworthy or not. In a voyage policy, however, both privity and unseaworthiness are immaterial in so far as s 55(2)(a) is concerned.

Sending a ship to sea merely with knowledge that the ship is unseaworthy is not in itself sufficient to amount to an act of wilful misconduct. Proof of something more – an intention to commit something sinister – is required to constitute wilful misconduct. The fact that a shipowner has knowledge of the vessel's condition of unseaworthiness does not necessarily mean that he intends to scuttle her, or intends to commit an act of wilful misconduct, when he sends her to sea in that state. Whether an inference could be drawn from a particular set of facts that the assured must have intended to commit an act wilful of misconduct is a question of fact to be determined by looking at all the

21 Section 55 applies to both voyage and time policies, whereas s 39(5) is relevant to a time policy only.

22 [1977] 1 QB 49 at p 66, CA.

23 Arnould, para 720, footnote 62.

circumstances of the case. The line between privity and wilful misconduct may in certain circumstances be difficult to draw, but nevertheless, it has to be drawn.

It is interesting to note that the trial Judge in *The Wood Case* held that the loss was attributable to both unseaworthiness *and* wilful misconduct,[24] whilst Mr Justice McPherson of the Court of Appeal came to the firm conclusion that the latter was the proximate cause of the loss.[25] This finding is by itself sufficient to dispose of the case, without the need for recourse to be made to s 39(5). Such a cause of loss is not a peril insured against.[26]

The Wood Case should not be construed as having established the rule that the act of knowingly sending an unseaworthy ship to sea *on its own* is sufficient to constitute wilful misconduct. More than just being 'privy' to the sending of an unseaworthy ship to sea is required, before such an act would be classified as wilful misconduct.

Wilful misconduct of 'the assured'

It has to be emphasised that it is the wilful misconduct only of the 'assured' which is relevant. This raises the interesting question of whether an act of wilful misconduct committed by the shipowner could affect the right of an innocent party (such as a mortgagee or a cargo owner), who is himself not guilty of any wilful misconduct, from recovering under a policy of insurance.[27] Starting from the premise that if the proximate cause of the loss is wilful misconduct, then, the loss, being not fortuitous, is not recoverable as a loss by a peril of the seas. This should logically hold true whether the claimant is the shipowner himself or any person, whether suing as original assured or as an assignee, claiming under a policy of marine insurance.

The innocent mortgagee

A mortgagee could bring an action against an insurer either as an original assured or as assignee of a policy. As an original assured, his rights against the insurer are separate and independent of those of the shipowner – as it is not a joint interest;[28] his claim cannot, as a rule, be tainted by the misconduct of

24 The trial judge held that loss was attributable to unseaworthiness *and* wilful misconduct; in consequence the insurer was entitled to rely on the defences provided by ss 39(5) and 55(2)(a). It is submitted that the decision of the trial judge is preferred; a sensible treatment was given to the facts of the case, and the conclusion drawn as regards the cause of the loss was fair and realistic. Also, the legal principles were accurately described and correctly applied.

25 In *Thompson v Hopper* (1858) El Bl & El 1038; 120 ER 796; a pre-statute case, the shipowner was alleged to have knowingly sent an unseaworthy ship to sea; but as neither unseaworthiness nor the act of wilful misconduct had occasioned the loss, and perils of the seas was held to have proximately caused the loss, the plaintiffs succeeded in their claim.

26 See *Samuel v Dumas* [1924] AC 431, HL, where the deliberate casting away of a ship was held not to be a peril of the sea and the loss was, therefore, not recoverable.

27 See cl 4.1 of the ICC (A), (B) and (C); and cl 4.7 of the ICC (B) and (C).

28 A mortgagee and a shipowner, though they may share the same policy, may be separately insured: see s 14(2), which allows any person having an interest in the subject-matter insured to insure on behalf of or for the benefit of other persons.

another party, in this case the shipowner. An assignee, on the other hand, is not in such a privileged position, as he does not have any better right than the assignor; this necessarily means that should the assignor be guilty of wilful misconduct, he would certainly be prevented from recovering under the policy.

In *Samuel v Dumas*,[29] however, the mortgagee's interest under the policy was separate, thus falling within the first of the above two classes. Thus his interest, which was original and not by way of assignment, should not be affected by the fraud of the shipowner. Viscount Finlay in the House of Lords raised the legal issue as thus:[30]

> 'Can the innocent mortgagee recover? Can he, in virtue of his independent right as one of the assured under the policy, claim in respect of the loss of the vessel? This will be found to resolve itself into the inquiry whether the loss can be considered as a loss by perils of the sea. It follows that, to recover, the mortgagee must show that the sinking of the vessel by the entrance of the sea which followed from the scuttling can be considered as a loss by perils of the sea, as otherwise, the loss would not be from a peril covered by the policy.'

As there was no loss in this case by a peril insured against, the appeal of the mortgagee must fail, regardless of the fact that he was a perfectly innocent party. As the loss was not *prima facie* recoverable under the policy that was the end of the matter: the fact that the mortgagees themselves, as an original assured, were not guilty of wilful misconduct is irrelevant. As a loss by scuttling is not a peril of the seas, any claimant, however pure and innocent, will not be able to recover under the standard hulls policy.[31]

For a different reason, the mortgagees in *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd*[32] were also unable to claim under their policy. As they were suing as assignee, they had no better right than the assignor, the shipowners. As the shipowners themselves were unable to recover for their loss because they were guilty of wilful misconduct, the mortgagees, though innocent, were also barred from recovery.

Wilful misconduct of a co-owner

Whether an innocent owner could be prevented from recovering under a policy by an act of wilful misconduct committed by a co-owner was considered on appeal, though not seriously, in *The Wood Case*.[33] As only two of the Wood family were involved in the control and management of the ship, it was queried whether the loss could be said to be attributable to the wilful misconduct of all three so as to taint the claim of the third member of the family.

It is interesting to note that instead of saying that the loss was not caused by a peril insured against, as scuttling was not a loss by a peril of the seas,[34] the Appeal Court preferred to rely on the finding that the third assured, having left

29 [1924] AC 431, HL.

30 *Ibid*, at p 451.

31 *Cf* dissenting judgment of Lord Sumner, *ibid*, at p 470–471.

32 (1923) 17 Ll L Rep 44 and 241, HL.

33 (1985) 1 Qd R 297.

34 *Samuel v Dumas* [1924] AC 431 was neither cited by the lower court nor the Appeal Court.

the control of the vessel with his two co-owners, was 'not now in a position to urge that the loss was not attributable to any wilful misconduct on his own part'.[35] It is also observed that the Appeal Court had decided that the conduct of the two active members of the family was committed in the capacity of owners and not as master of the ship. The purpose of this was to clarify that their conduct was not barratrous in nature.[36]

The position in relation to a claim by a co-owner for a loss by barratry is different. The case of *Jones v Nicholson*[37] has established that an owner may recover for a loss caused by the barratrous act of a co-owner acting in the capacity as master of the insured ship. As a loss by barratry is *prima facie* recoverable, there is no reason why an innocent co-owner may not claim for a loss under a policy. Provided that he himself (as an 'assured') is not guilty of the want of due diligence, the loss is recoverable as a loss by barratry.[38]

As 'fortuity' is not an essential element for the peril of fire, an innocent co-owner is in the same position as an innocent single shipowner whose ship has been barratrously scuttled. Provided that the party who is bringing the action is himself not in any way involved in setting the ship on fire, he should be able to claim under the policy as a loss by fire.[39]

Proof of wilful misconduct

Discovery of ship's papers

A trilogy of cases – namely, *Astrovlanis Compania Naviera SA v The Linard, The Gold Sky*,[40] *Palamisto General Enterprises SA v Ocean Marine Insurance Co Ltd, The Dias*,[41] and *Probatina Shipping Co Ltd v Sun Insurance Office Ltd, The Sageorge*,[42] – all decided in the early 1970s, have clarified the legal position regarding the question of discovery of ship's papers. It would appear from the interesting historical account given by Lord Denning in *The Sageorge* that the practice in marine insurance as regards discovery before the delivery of defence is an exception to the general rule. The justification which was given for the rule was that, 'The underwriters have no means of knowing how a loss was caused: it occurs abroad and when the ship is entirely under the control of the assured'. It was thought that the practice, which arose 'in the days of sailing ships when underwriters in Lloyd's Coffee House were completely in the dark as to the loss of the vessel', was no longer appropriate 'in the present day when underwriters at Lloyd's get information as soon as anyone of a loss, and of the circumstances in which it occurred'.

35 (1985) 1 Qd R 297 at p 308.

36 *Westport Coal Co v McPhail* [1898] 2 QB 130 CA was cited by the Appeal Court.

37 (1854) 10 Exch 28 at p 38; see also *Westport Coal Co v McPhail*, *ibid.*

38 See the proviso to cl 6.2 of the ITCH(95). The law of barratry is discussed in Chapter 12.

39 Loss by fire is examined in Chapter 9.

40 [1972] 1 Lloyd's Rep 331, CA.

41 [1972] 2 Lloyd's Rep 60, CA.

42 [1974] 1 Lloyd's Rep 369, CA.

The Court of Appeal was prepared to continue with the practice of discovery because it may serve a useful purpose in scuttling cases, but it was not prepared to make the order automatically. In each case, 'The judge should see whether or not it is a proper case for it'. In other words, it is now in the discretion of the judge whether to make the order and whether to order a stay pending compliance with an order for ships papers. The right to an order for discovery and stay of proceedings are no longer automatic rights.[43]

Burden and standard of proof

It would appear that the burden and standard of proof for the defence of wilful misconduct vary according to the nature of the plaintiffs' claim. As the matter of wilful misconduct is generally pleaded as a defence, the burden of proof, as a general rule, lies with the defendants. The law, at least in relation to a loss caused by a peril of the seas and fire, is clear that the burden lies with the defendants. The plaintiffs would, of course, have to present a *prima facie* case that the loss was fortuitous in case of perils of the seas, and that there was a fire on board in the case of fire, before the defendants would be called upon to give their defence. At the end of the day, the plaintiffs have to prove only on the balance of probabilities that the loss was so caused. The defendants are not required, even if the defence of wilful misconduct was alleged as the cause of loss, to prove the criminal standard of beyond a reasonable doubt.[44]

However, in relation to a claim for loss by barratry, the legal position both as regards the burden and standard of proof is less clear. There are two points of view on the subject, which may be more conveniently discussed elsewhere.[45]

DELAY

Section 55(2)(b) states:

> 'Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.'

Like the other exceptions listed in s 55(2)(c),[46] it is possible for the parties to contract out of this statutory exception. Except for expenses payable by reason of cl 2 in relation to general average and salvage charges, the ICC has, through cl 4.5, retained this exception in almost identical terms.[47] As only ship and goods are mentioned, one could be tempted to deduce that the exception does not apply to freight; consequently, a freight insurer would be liable for loss of freight caused by delay. However, the loss of time clause, cll 15 and 11 of the Institute Time Clauses Freight and Institute Voyage Clauses Freight respectively,

43 See Orders 18, r 12 and 72, r 7 of the Rules of the Supreme Court.

44 See Chapter 11.

45 See Chapter 11.

46 But not s 55(2)(a).

47 Clause 4.5: In no case shall this insurance cover – loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under cl 2 above).

provides that: 'This insurance does not cover any claim consequent on loss of time whether arising from a peril of the sea or otherwise.' It is observed that 'consequent on' is used here, whereas 'proximately caused by' is used in s 55(2)(b).[48] The term 'proximately caused by' signifies that a loss remotely occasioned by delay is neither affected by s 55(2)(b) nor cl 4.5.

The principle embodied in the rule, in particular, that an insurer is not liable even though the delay may be caused by a peril insured against, may be traced to a very old case, *Tatham v Hodgson*,[49] where a cargo of slaves who were insured upon a voyage died as a result of insufficient provisions occasioned by extraordinary delay in the voyage because of bad weather. Even though perils of the seas, a peril insured against, was responsible for the delay, the court identified mortality by natural death as the proximate cause of loss. As public policy appears to be the underlying consideration for the decision of the court, this case cannot be said to be the true origin of the rule.[50]

The other two well-known cases on delay are *Taylor v Dunbar*[51] and *Pink v Fleming*.[52] In the case of the former, the loss, if it were decided under the Act, would fall squarely within the terms of s 55(2)(b). Delay was held the proximate cause for the loss of the cargo of meat which was rendered putrid during the voyage. That the delay was occasioned by tempestuous weather was not regarded as relevant. Justice Keating feared that if he were to allow recovery, he would be establishing a dangerous precedent, as many cargoes are necessarily affected by the voyage being delayed. In the second case, citing *Taylor v Dubar* with approval, the proximate cause was also held to be delay when the ship on which the goods were carried was damaged in a collision which caused her to be laid up for a considerable period of time for repairs.

The decision of *Pink v Fleming* has to be distinguished from that in *Schloss Brothers v Stevens*.[53] The fact that the latter was an all risks, as opposed to an enumerated risks, policy was crucial to the outcome of the case. Mr Justice Walton pointed out that, 'if all accidental causes of damage were included ... all that has to be considered is whether the damage that happened was the direct result of some such accidental cause, and I consider that it was the direct result of an accidental cause'. As the delay occasioned was abnormal and extraordinary, the loss was recoverable. This necessarily means that the word 'ordinary' has to be read into cl 4.5 of the ICC (A); in so far as the ICC (B) and (C) are concerned, being for enumerated perils, all forms of delay, whether ordinary or extraordinary are excepted.

48 For the meaning of the words 'consequent on', see Chapter 8.

49 (1796) 6 Term Rep 656.

50 The judges felt that if they were to hold the insurer liable for the loss, it would encourage the captains of slave ships to take an insufficient quantity of food for the sustenance of their slaves.

51 (1869) LR 4 CP 206.

52 (1890) 25 QBD 396, CA.

53 [1906] 2 KB 665.

ORDINARY WEAR AND TEAR

Section 55(2)(c) of the Act, which is of general application, declares that 'the insurer is not liable for ordinary wear and tear'.[54] However, its opening words allow exceptions to be made to the general rule; but so far there is no reported case where a policy is found to have departed from the general rule.[55] Each of the ICC, including the ICC (A), which insures against 'all risks', has its own express provision, cl 4.2, excepting the insurer from liability for such a loss. An insurer of the ITCH(95) and the IVCH(95), however, has to rely on s 55(2)(c) for this exclusion.

Why a loss caused by ordinary wear and tear is made an exception is not difficult to understand. If one were to begin with the premise that insurance is against risks, accidents and fortuitous events, the answer becomes obvious. A loss caused by ordinary wear and tear is not a risk, but an inevitable phenomenon: that things will deteriorate with age, usage, and wear and tear is a natural and expected progression of events. There is nothing fortuitous or accidental about a loss generated by general or inherent debility. And as the very essence of insurance is to insure against risks and not certainties, such a loss is not covered, not even in an all risks policy. Furthermore, it is expressly excluded by r 7 of the Rules for Construction from the notion of 'perils of the seas': loss or damage caused by the 'ordinary action of the winds' does not fall within the scope of 'perils of the seas'.[56]

Whether the adjective 'ordinary' qualifying 'wear and tear' adds anything to the definition has never been discussed. It was inserted, presumably for emphasis, in contradistinction with an 'extraordinary' loss. The answer to this query can be found in *Soya GmbH Mains Kommanditgesellschaft v White*,[57] where Lord Justice Donaldson of the Court of Appeal, who delivered a most comprehensive judgment on the subject of risk, referred to the following passage of an early edition of Arnould with approval:[58]

> 'No ship can navigate the ocean for any length of time, even under the most favourable circumstances, without suffering a certain degree of decay and diminution in value, which is generally comprised under the term wear and tear; for this, however considerable, if it arises merely from the ordinary operation of the usual casualties of the voyage, the underwriter is never liable: he is only liable when the damage sustained is something beyond this, and has been caused by the direct and violent operation of one of the perils insured against.'

54 Note that whereas no qualification is made in s 55(2)(c); the exception of delay in s 55(2)(b) is expressly stated to be applicable only to 'ship or goods'.

55 In *Wadsworth Lighterage & Coaling Co Ltd v Sea Insurance Co Ltd* (1929) 45 TLR 597, CA, Scrutton LJ thought that it would be 'very unusual' for a policy to provide otherwise.

56 In *Sassoon & Co v Western Assurance Co* [1912] AC 563, PC; water had percolated through a leak caused by the rotten condition of the hulk causing damage to a cargo of opium, the subject-matter insured. The Privy Council held that the loss sustained by the cargo was not caused by perils of the seas.

57 [1982] 1 Lloyd's Rep 136 at pp 145–146, CA; on appeal to the House of Lords [1983] 1 Lloyd's Rep 122, hereinafter referred to simply as '*The Soya Case*'.

58 Arnould, *Marine Insurance* (1857, 2nd edn), para 285.

Any abnormal or exceptional damage sustained under an enumerated risks policy will be recoverable only if the assured is able to refer to a specific peril as the proximate cause of loss. In an all risks policy, he need only give evidence to show that, by reason of the exceptional character of the damage, the loss must have arisen fortuitously.

In *Wadsworth Lighterage and Coaling Co Ltd v Sea Insurance Co Ltd*,[59] the assured failed to recover for the loss of a barge which, although she had been sunk by the entry of sea water, was held not to have been occasioned by perils of the seas: a loss by ordinary wear and tear was the proximate cause for her loss.

Recently, in *The Caribbean Sea*,[60] the subject of wear and tear was raised in relation to the Inchmaree clause. Before proceeding to discuss the legal implications, it would be helpful to be familiar with the relationship between s 55(2)(c) and the Inchmaree clause. Unless the policy otherwise provides, s 55(2)(c) excepts an insurer from liability for any loss or damage caused by 'ordinary wear and tear' and 'inherent vice or nature of the subject-matter insured'. In the case of the latter, cl 6.2.1 (the Inchmaree clause) of the ITCH(95)[61] and cl 4.2.1 of the IVCH(95) have 'otherwise provided' that, *inter alia*, 'loss of or damage to the subject-matter insured caused by ... any latent defect in the machinery or hull' is covered: whereas, any loss or damage caused by wear and tear is not so otherwise provided and is, consequently, not an insured risk. Mr Justice Goff, relying on the reasoning given by Mr Justice Scrutton in the case of *CJ Wills and Sons v The World Marine Insurance Co Ltd* confirmed that:[62] '... the balance of authority indicates that, where the defect is attributable to ordinary wear and tear, there can be no recovery under the Inchmaree clause.'

The distinction between 'ordinary wear and tear' and 'latent defect' in machinery or hull is of utmost importance: the former is an excluded loss, whilst the latter is an included loss. Thus, a judge has in each case to determine whether latent defect or ordinary wear and tear in machinery or hull is responsible for the loss. In *The Caribbean Sea*,[63] the defective design of a nozzle, which was held to constitute a latent defect,[64] developed fatigue cracks at a welded joint causing water to enter the ship which led to her sinking. The ship was clearly lost through a combination of causes, namely, latent defect and the ordinary working of the ship (which caused the fracture to open up before the end of her natural life).

The court had to apply the rule of *causa proxima* to determine whether latent defect or ordinary wear and tear was the proximate cause of the loss. Mr Justice Goff held that the former was the proximate cause of the loss, even though the

59 (1929) 45 TLR 597, CA.

60 [1980] 1 Lloyd's Rep 338, QBD.

61 Previously cl 6.2.3 of the ITCH(83).

62 (1911) *The Times*, 14 March; (Note) in [1980] 1 Lloyd's Rep 350.

63 [1980] 1 Lloyd's Rep 338, QBD. See also the recent case of *Promet Engineering (Singapore) Pte Ltd v Sturge and Others, The 'Nukila'* [1996] 1 Lloyd's Rep 85 QBD.

64 It would be more convenient and appropriate to examine this aspect of the case when the Inchmaree clause is discussed: see Chapter 12.

'defective design has had the effect that defects would inevitably develop in the ship as she traded'.[65] The claim was held recoverable under the Inchmaree clause.

The solution in each case lies in a proper determination of the proximate cause of the loss.[66]

In relation to cargo, ordinary wear and tear would refer to damage or loss sustained through the ordinary stresses and vicissitudes of the voyage: chafing, normal transit risks of dust and dirt combined with atmospheric moisture,[67] or any inevitable damage caused by the handling of the cargo would constitute ordinary wear and tear.

ORDINARY LEAKAGE AND BREAKAGE

An insurer is excepted from liability for ordinary leakage and breakage, a natural and inevitable loss, by s 55(2)(c) of the Act. Under cl 4.2 of the ICC, only 'ordinary' leakage is expressly excepted. Why 'breakage' has been omitted from the list is unclear; but this does not mean that it is not an excepted risk because, unless the policy otherwise provides, s 55(2)(c) prevails.

Ordinary leakage

The meaning of 'leakage' was considered in *De Monchy v Phoenic Insurance Co of Hartford & Another*,[68] where it was argued that to constitute 'leakage' there had to be visible signs or stains on the casks. This contention was swiftly dismissed by the House of Lords with the comment that leakage meant, 'any stealthy escape either through a small hole which might be discernible, or through the pores of the material of which the casks is composed'. The loss of the turpentine, which has the propensity to vaporise and disappear even through the material of sound and tight receptacles, without any external sign, was held to have been lost by leakage.

It is observed that only 'ordinary' leakage is excepted both by the Act and by the ICC. This necessarily means that if the loss is by exceptional leakage, it would be covered if it could be shown that it was accidentally or fortuitously

65 In *CJ Wills & Sons v The World Marine Insurance Co Ltd* (1911), *The Times*, 14 March; (Note) [1980] 1 Lloyd's Rep 350, a defective weld which resulted a link in a chain breaking was also held to have been caused by latent defect. The rationale was that if the weld had been sound and without the defect in the link, though worn, would have ample strength to stand the strain.

66 In *The Popi M* [1985] 2 Lloyd's Rep 1, HL, the decayed and deteriorated condition of the vessel was raised as a defence, but as the plaintiffs were unable to discharge the burden of proof which was on them and had left the court in doubt as to the cause of loss, the House had no choice but to apply the 'third alternative' to dismiss their claim. For a discussion of the 'third alternative' rule, see Chapter 11.

67 See *Theodorou v Chester* [1951] 1 Lloyd's Rep 204; and *Whiting v New Zealand Insurance Co Ltd* (1932) 44 Ll L Rep 179 at p 140, where Roche J said: 'Moist atmosphere is not an accident or peril that is covered. It is more or less a natural test or incident which the goods have to suffer and which underwriter has not insured against.'

68 (1929) 34 Ll L Rep 201.

caused.[69] Under the ICC (B) and (C), loss by leakage, whether ordinary or extraordinary is not recoverable.

Insurance against leakage

There are only two reported cases of leakage, both of which were concerned with the interpretation of a clause in the policy insuring specifically against leakage. In *Traders & General Insurance Association Ltd*,[70] barrels of soya-bean oil were insured as: 'To pay average, including the risks of leakage in excess of 2%'. During the voyage, the vessel met with stormy weather and a considerable quantity of oil was found to have been lost. Whether the word 'leakage' meant leakage as a peril insured against, or merely as a cause of loss from a peril insured against was the main issue in the case. Mr Justice Bailhache held that the word was intended to cover leakage *simpliciter,* that is, 'leakage of any kind whatever might be the cause of it. Leakage caused by a peril insured against would be covered in any event, and it would have been unnecessary to say anything about it'.

In *Dodwell & Co Ltd v British Dominions General Insurance Co Ltd*,[71] barrels of oil carried in *The Glenstrae* were insured to include 'risks of leakage irrespective of FPA', and in *The Protesilaus* to include 'risk of leakage from any cause whatever'. When the vessels arrived at their destinations, it was found that 12% and 60% of the oil carried in *The Glenstrae* and *The Protesilaus*, respectively, had leaked. In the case of the former, Mr Justice Bailhache held that the underwriters were liable only for the extra leakage due to sea transit. The normal or ordinary leakage of five%, out of the total of 12%, was deducted from the amount recoverable; the rationale being that these barrels would have leaked even if there had been no sea transit at all. As regards the 60% loss, no deduction was made: because of the comprehensive wording of the clause, the whole of the leakage to which these barrels of oil were subjected to was recoverable.

The above authorities illustrate that an express clause insuring simply against leakage would not be adequate to protect an assured for a loss caused by 'ordinary leakage'. To contract out of the statutory exception, a wide and comprehensive clause would have to be used.

Ordinary breakage

The risks of ordinary breakage of fragile goods is a matter which both parties to the contract of insurance must surely expect to occur during the course of even the most ordinary of voyages. As such a loss is inevitable it is, 'unless the policy otherwise provides' excepted in all the ICC.

69 Such as when the barrels or casks have been mishandled.

70 (1921) 38 TLR 94.

71 (Note) in [1955] 2 Lloyd's Rep 391.

In an all risks policy, however, breakages which are not ordinary in character would be covered if accidentally or fortuitously caused. Unlike the case of an enumerated risks policy, the assured does not have to prove that a specific peril had caused the loss. He is required only to give evidence reasonably showing that the loss was due to an accident or casualty. Provided that there is nothing 'ordinary' about the breakage, it would be recoverable.

INHERENT VICE OR NATURE

Section 55(2)(c) of the Act excepts an insurer from liability for 'inherent vice or nature of the subject-matter insured'. In relation to insurances on hulls and machinery the term 'latent defect' is generally employed to describe such a cause of loss, but with regard to cargo, the expression 'inherent vice' is more appropriate and has, therefore, been retained by cl 4.4 of all the ICC. As cover for a loss of or damage caused by latent defect in machinery or hull under the Inchmaree clause, cl 6.2.1 of the ITCH(95) and cl 4.2.1 of the IVCH(95) will be discussed later, this part will consider only insurance of cargo.

An examination of the meaning of the term 'inherent vice' has first to be undertaken before any worthwhile study of case law can be made regarding the interpretations of the clauses which have been inserted into policies providing for insurance against damage to or loss of cargo occasioned by inherent vice.

Meaning of 'inherent vice'

What constitutes inherent vice? To the layman, the matter is simple: the natural process of fruit decaying;[72] flax loaded in a damp condition which are liable spontaneously to combust; wine turning sour; hemp effervescing and generating a fire;[73] meat becoming putrid; flour heating; the growth of mould and mildew; and the heating sweating and spontaneous combustion of certain commodities are common examples of inherent vice. Decay, corruption and internal decomposition are its characteristics. But, as can be gleaned shortly, the legal aspects of the term has caused some confusion.

Though the leading authority on the subject is clearly *The Soya Case*,[74] it is best, because of the complexity of the issues raised, to reserve its discussion to a later stage. The distinction between an external and internal cause is the criterion used for the purpose of determining whether a loss has or has not been caused by inherent vice. To elicit this distinction, the two cases relating to the

72 In *Bradley v Federal Steam Navigation Co* (1927), 27 Ll L Rep 221 at p 395, Lord Sumner, in a case dealing with a contract of carriage, described the inherent nature of the apples which were damaged as follows: 'whether they were simply weaker than their neighbours or had some idiosyncrasy – was such that they could not stand the voyage. They decayed, not because of the ship or of the sea or of the route, but because they were apples which were not fit to make the voyage in an ordinary way.'

73 See *Boyd v Dubois* (1811) 3 Camp 133; as there was no proof that the fire had originated from the damaged state of the hemp, the plaintiffs were able to claim under the policy.

74 [1983] 1 Lloyd's Rep 122, HL.

growth of mould and mildew on cigarettes, namely, *Birds Cigarette Manufacturing Co Ltd v Rouse and Others*[75] and *Sassoon and Co v Yorkshire Insurance Co*[76] will first be discussed.

In *The Birds Cigarette Case*,[77] a cargo of cigarettes, which was insured, arrived badly mildewed; some of them were found to be soaking wet with salt water which obviously came from without – that is, an external source; and others were wet with fresh water, apparently as a result of evaporation from within. Mr Justice Bailhache without question allowed the claim for the former,[78] but the loss of the latter, which he had described as being foredoomed to mildew and were practically rendered useless by the excess of moisture that was in them, was held to have been caused by inherent vice and, therefore, not recoverable. But where sea water had accelerated the destruction of these cigarettes, he was prepared to apportion the loss.[79]

Following from this, the next logical question which arises is that considered in *The Sassoon Case*,[80] namely, whether a clause insuring against 'mould and mildew' *simpliciter* was adequate to render an insurer liable for a loss by mould and mildew, but resulting from inherent vice. In this case, cigarettes insured for damage by 'mould and mildew' arrived at its destination, after a considerable period of delay, badly mildewed. The plaintiffs claimed that as the loss was caused by mould and mildew, it was covered by the express term. The defendants, however, pleaded that the goods were not damaged by any peril insured against, but by inherent vice.

That mould and mildew are liable to grow on certain commodities for any number of reasons is common knowledge: it could be produced by an internal or an external cause. Lord Justice Atkin agreed with the trial judge, Mr Justice Roche, that a distinction had to be drawn between 'mould and mildew which are the result of inherent vice or the nature of the subject-matter of the insurance, and mould and mildew which are produced by some external fortuitous cause'.[81] On the evidence adduced, all the judges of the Court of Appeal were in agreement that the loss was 'the result of some fortuitous circumstance and not the result of inherent vice'. And as the defendants were unable to prove that the growth of mould and mildew was due to the inherent nature of the goods, judgment was awarded against them.

Lord Justice Atkin took the opportunity to query, even though it was unnecessary for him to do so because the loss in question was fortuitously

75 (1924) 19 Ll L Rep 301, KBD.

76 (1926) 16 Lloyd's Rep 129, CA, hereinafter referred as *The Sassoon Case*.

77 (1924) 19 Ll L Rep 301, KBD.

78 See also *Whiting v New Zealand Insurance Co Ltd* (1932) 44 Ll LRep 179, where the insurers were held liable for mould damage to paper hats which were incurred because of the wooden cases in which they were stored were left standing in pools of water on the quay: damage caused by moisture from without is not a loss by inherent vice.

79 The breach of the warranty ('warranted no complaints') in the warehouse policy was by itself sufficient to defeat the plaintiff's claim.

80 (1923) 16 Ll L Rep 129, CA.

81 *Ibid*, at p 133.

caused, whether the clause covered a loss by mould and mildew generated by inherent vice. He expressed his sentiments as follows:[82]

> 'It seems to me conceivable if apt words are used that an assured might cover a loss occasioned by mould which he does not know enough about ... In this particular case ... there is something to be said for the view that the intention of the parties here was to cover mould or mildew arising from *any cause whatsoever*;[83] that is one of the matters that was in the mind of the assured.'

It has, however, to be stressed that the above remarks were *obiter*. According to this interpretation, the said clause performed two functions: it not only provided insurance coverage for mould and mildew however caused, but also served to operate as an exception to the general rule as stated in s 55(2)(c) that an insurer is not liable for inherent vice or nature of the subject-matter insured.

Lord Justice Scrutton, however, appears to have held a different point of view. This can be ascertained from the following proposal he made:[84]

> '... if it could be shown that this mould or mildew resulted entirely from the condition of the goods when shipped and must have resulted from that condition when shipped as an ordinary incident of the voyage then the underwriters would not be liable ...'

It is interesting to note that Lord Justice Scrutton did not treat the clause as providing an exception to the general rule that an insurer is not liable for inherent vice. He regarded it only as a provision for insurance coverage against 'mould or mildew' fortuitously caused. His views on this matter are more clearly expressed when he later said:[85]

> '... where you are insuring against a specific peril and have to show some damage caused by that specific peril, subject to that reservation that if the peril results from the condition of the thing itself, the underwriter is relieved.'

The third Judge, Lord Justice Bankes, also could not resist the temptation of raising the question,[86] but he, however, stood firm in refusing to provide an answer.

The most recent case on the subject is *Noten BV v Harding*,[87] where mould and mildew was responsible for damage sustained by a cargo of gloves. The Court of Appeal reversed the factual finding of the trial judge,[88] and held that

82 *Ibid*.

83 Emphasis added. These words would include mould and mildew arising from inherent vice. But whether they would construed as being wide enough to cause an insurer to be liable for inevitable damage occasioned by inherent vice has to be considered.

84 (1923) 16 Ll L Rep 129 at p 132.

85 *Ibid*.

86 *Ibid*, at p 131. The question being whether: 'the assured are entitled to go so far as to say when an underwriter takes such a risk he cannot be held to contend the damage complained of was due to inherent vice'.

87 [1990] 2 Lloyd's Rep 283, CA.

88 [1989] 2 Lloyd's Rep 527, QB. The trial judge, Phillips J, found that the damage was caused by the dropping of water from a source external to the goods on to the goods; he did not consider significant the fact that the moisture originally came from the goods before being placed in the container, which moisture escaped only to fall back onto the goods later.

the loss was caused by inherent vice or nature of the subject-matter. The outcome was summarised by Lord Justice Bingham as follows:[89]

> '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 … I regard it as immaterial that the moisture travelled round the containers before doing the damage complained of.'

As the moisture originated from the gloves and not from other cargo or sources independent of any cargo, it was held that the gloves were in effect the author of their own misfortune.[90] Once again, the distinction between an internal and external cause was drawn.[91]

Lord Justice Bingham took the opportunity to comment on the phrase 'inherent vice or nature of the subject-matter insured'. He thought that the words 'inherent vice', taken alone, were misleading, implying some defect in the goods when, in fact, there was nothing defective about the gloves, only that its (hygroscopic) nature or natural behaviour was such that it will absorb moisture when placed in a humid atmosphere.

With the exception of *The Sassoon Case*, all the above cases, though they have to a certain extent defined the concept of inherent vice, have not, however touched upon the issues pertaining to inevitable damage caused by inherent vice, and the possibility of providing coverage therefor. These problems were exhaustively discussed in the Court of Appeal in *The Soya Case*[92] and *The Sassoon Case*. Lord Diplock, sitting in the House of Lords in the former case, acknowledged the existence of the problem, but preferred not to provide a solution, as it was unnecessary for him to do so.

For a proper understanding of the legal issues, it is necessary to set out the details of the facts of *The Sassoon Case*. A cargo of soya beans insured under an HSSC (Heat, Sweat and Spontaneous Combustion) policy arrived in a heated and deteriorated condition. At the risk of being tedious, it is necessary to mention that the House had accepted the fact that soya beans containing a moisture content of:

89 [1990] 2 Lloyd's Rep 283 at p 288, CA.

90 The remarks uttered by Wright J in *C T Bowring & Co Ltd & Another v Amsterdam London Assurance Co Ltd* (1930) 36 Ll L Rep 309 at p 327 KBD, to the effect that even if the moisture (which caused damage to a cargo of nuts) came from the particular cargo that were insured to later cause damage to itself, must now surely be considered as erroneous in the light of the Court of Appeal's ruling in *Noten BV v Harding* [1990] 2 Lloyd's Rep, 283. That Bingham LJ was not at all impressed with this comment made by Wright J can be seen at p 288 of his judgment. Whereas it was impossible in *The Bowring Case* to trace the origin of the moisture which damaged the nuts, it was in *The Noten Case* directly traceable to the insured cargo of gloves.

91 In *Bowring & Co Ltd & Another v Amsterdam London Assurance Co Ltd , ibid*, 'sweat' damage which resulted from an external cause was held to be covered; whereas the 'heating' damage due to the wet condition of the nuts (an internal cause) when shipped was not.

92 [1983] 1 Lloyd's Rep 122.

- more than 14% will inevitably deteriorate during the course of even a normal voyage;[93]
- between 14 and 12%, (for convenience referred to as the 'grey area') suffer a risk of heating, and may or may not deteriorate during the course of an ordinary voyage; and
- less than 12% are not at risk of heating[94]

The soya beans shipped fell within the 'grey area', and as nothing untoward happened during transit, the assured could not argue that the loss was caused by a casualty or by an external cause. Thus, the main issues were whether the loss was caused by inherent vice and, if so, whether it was covered by the HSSC policy.

'Inherent vice' was defined by Lord Diplock in general terms as:[95]

> '... 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.'

The operative word in this definition is 'risk'. He then continued to say:

> '*Prima facie*, this risk is excluded from a policy of marine insurance unless the policy otherwise provides ... and the question of construction ... is whether the standard HSSC policy does otherwise provide.'

The House had no problem whatsoever in arriving at the conclusion that the loss was caused by inherent vice and that the standard HSSC policy did 'otherwise provide', so as to perform the function of displacing the *prima facie* rule laid down in s 55(2)(c) that the insurer is not liable for 'inherent vice or nature of the subject-matter insured'. The insurers were accordingly held liable for the loss.

The above enunciation of the law appears to be simple enough, but leaves unanswered an important question relating to losses falling within the first category, namely, where the occurrence of a loss is not a risk or a casualty, but a certainty. What would have been the outcome of the case 'if, unknown to the assured, the moisture content of the beans on shipment had been so high as to make such deterioration inevitable'?

Known certainty of loss

Before the decision of *The Soya Case*,[96] it was at one time thought that 'inherent vice' pertained only to damage or loss (of cargo) which were bound to occur by

93 According to Waller LJ, underwriters would not carry a risk when the moisture is over 14%, because 'it would not be a risk it would be a certainty'.

94 As no risk is involved, the shipper as a matter of common sense would not insure for such a loss.

95 [1983] 1 Lloyd's Rep 122 at p 126, HL.

96 Certain remarks made by some of the Law Lords in *The Gaunt Case* [1921] 2 AC 41 at p 57, have brought about this misconception of the law: Lord Sumner, for instance, had tarred inherent vice with the same brush as certainty when he stated that the assured need only give evidence reasonably showing that the loss arose due to 'a casualty, not a certainty or to inherent vice or wear and tear'. See Waller LJ's interpretation of this statement in the Court of Appeal in *The Soya Case* [1982] 1 Lloyd's Rep 136 at p 141.

reason of the vice or nature of the subject-matter. Lord Justice Waller of the Court of Appeal noted that:[97] 'In some of the authorities inherent vice is used to describe a certainty and is used in contradistinction to a risk'. Inherent vice was regarded as something which will inevitably cause damage. The understanding was that because such a loss was a certainty, no risk was involved and, therefore, it could not be covered by a policy of insurance, and was hence expressly excluded by s 55(2)(c). This had led the trial judge, Mr Justice Lloyd, to describe 'the relationship between inherent vice and inevitably of damage, as defences to a claim under the Marine Insurance Act' as 'elusive'.[98] Equally sharp and accurate in his observation was Lord Justice Donaldson when he expressed surprise in *The Soya Case* that the subject had never really been considered 'in isolation'. 'Cross currents', he said, 'which may or may not be relevant to the defence of inherent vice *simpliciter*' have caused the matter to be pushed aside.[99]

That there are essentially two types of inherent vice is deducible from the judgments of all the Law Lords. One type of inherent vice will inevitably cause a loss, rendering the loss a certainty; and the other belongs to a class (the grey area) which may or may not cause damage to or loss of the subject matter insured. The latter does not create problems: such a risk[100] is as a general rule excluded by s 55(2)(c), and whether the general rule is to be displaced is in each case a question of construction of the terms of the policy. Whether the former, described as a 'known certainty of loss' is insurable will now be considered.

Section 55(2)(c) itself, through its introductory words 'unless the policy otherwise provides', allows insurance against loss or damage by inherent vice. But whether insurance against a loss by inherent vice of that specie which is bound to occur, that is, against a certainty of loss, is contemplated by these opening words is indeed an interesting legal point.

In the Court of Appeal, Lord Justice Waller in *The Soya Case* and Lord Justice Scrutton in *The Sassoon Case*[101] held the view that insurance coverage for losses of known certainty was not possible. Disapproval was expressed by Lord Justice Waller as follows:[102]

> 'If inherent vice means something that will certainly happen, it is not a risk but a certainty. It is therefore not something against which insurance can be taken. If, however, it is a cause of damage which may or may not happen because of conditions within the substance itself, then it will be excluded unless the risk is specifically covered.'

The basis of his objections lies in the rudimentary principle of insurance law that a contract of insurance is against risks, and not certainties. If one were to

97 [1982] 1 Lloyd's Rep 136 at p 141, CA.

98 [1980] 1 Lloyd's Rep 491.

99 [1982] 1 Lloyd's Rep 136 at p 144, CA.

100 Such a risk of loss by inherent vice was described by Bingham LJ in *The Noten Case* [1990] 2 Lloyd's Rep 283 at p 287, CA, as capable of being 'as capricious in its incidence as damage caused by perils of the seas'.

101 (1926) 16 Lloyd's Rep 129 at p 130, CA.

102 [1982] 1 Lloyd's Rep 136 at p 141, CA. The passage from the judgment of Atkin LJ, cited earlier, seems to imply that only insurance where there is an element of risk may be undertaken.

return to basics and cite the remarks of Chief Justice Cockburn in *Paterson v Harris*, the premise becomes clear:[103]

> 'But 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.'

The word 'inevitably', followed by 'ordinary course of things', clearly refers to a loss which in the ordinary course of events is bound to arise.

Lord Justice Donaldson in *The Soya Case* was, however, more liberal in his thinking; he was prepared to accept the fact that it was possible to insure against a 'known certainty', but as this was highly unlikely to occur in practice, he was not too perturbed by it. He stated:[104]

> 'This is not to say that known certain losses cannot be the subject matter of a contract of indemnity; merely that very clear words will be required since it is highly improbable contract for someone to make in the course of his business as an insurance underwriter.'

It would appear from the above discussion that the problem is reducible into three categories, two of which were raised by Lord Justice Donaldson,[105] and the third by Mr Justice Lloyd (in the court of first instance) in *The Soya Case*:[106]

- If the certainty of the loss is known to the assured and not to the underwriter, there is really no problem, as other defences such as non-disclosure and even fraud, will be available to the underwriter.
- Where the certainty of loss is known to both parties, it would be difficult, except on the principle that insurance is about risks and not known certainties, to refuse exemption for loss.
- Where the certainty of loss is unknown to both parties, it would be difficult to argue that no risk is involved. Mr Justice Lloyd could see no reason why this could not be the legitimate subject-matter of a policy of insurance.[107] As its propensity to self-destruct is unknown to both parties, it could be argued that that in itself is an element of risk. But whether known or unknown to the parties, a loss resulting from inherent vice is, unless specifically insured against, not recoverable.

In conclusion, it is fair to say that the legal position in this regard is unclear. Two schools of thought have been offered by the Court of Appeal, and the House of Lords has refused to provide an answer to the question. But the preponderant view seems to be that if the vice or nature of the cargo is such that it will in the course of time inevitably destroy or damage itself, the loss is not fortuitous but a certainty, and would not, therefore, be recoverable under any of the standard forms of cargo policies of insurance, not even one for 'all risks'.

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103 (1861) 1 B & S 336, where the claim was made for injury to a cable by sea water. The defence raised was that the damage was the necessary result of the exposure of the cable to sea water. This passage was cited with approval by Bankes LJ in *The Sassoon Case* (1923) 16 Lloyd's Rep 129 at p 130, CA.

104 [1982] 1 Lloyd's Rep 136 at p 149, CA.

105 *Ibid*.

106 [1980] 1 Lloyd's Rep 491 at p 504.

107 *Ibid*.

The reason being, as discussed earlier, an 'all risks' policy insures only against risks of, and not inevitable, losses. These problems await judicial ruling.

Insufficiency or unsuitability of packing

Berk v Style[108] is the authority which has extended the concept of inherent vice to include its packaging. The defective paper bags in which the cargo of kieselghur was packed were held to constitute inherent vice. This aspect of the decision was much criticised, but the problem is now academic, as cl 4.3 of all the ICC excepts the insurer from liability for 'insufficiency or unsuitability of packing or preparation of the subject-matter insured'.[109]

A month later, in *Gee and Garnham Ltd v Whittall*,[110] Mr Justice Sellers invoked the same principle which he had formulated in *Berk v Style*,[111] and held that damage sustained by a part of a cargo of kettles caused by water-staining due to the use of unseasoned wood wool (inadequate packing) was a loss which came within the exception of 'inherent vice' and was, therefore, not recoverable.[112]

'Unless the policy otherwise provides'

As discussed above, even an unqualified clause insuring against:

- 'all risks';[113]
- 'all and every risk whatsoever however arising';[114]
- 'all risk and every risk whatsoever and all loss or damage from whatsoever cause arising';[115] and
- 'all risks of loss and/or damage from whatsoever cause arising',[116]

have all, for one reason or another, been held to be insufficient to protect an assured for damage to or loss caused by inherent vice. In the main, they were construed as not being sufficiently clear or precise to cover damage to or loss of cargo by reason of inherent vice. The critical word is 'risks' implying that only accidental or fortuitous causes of loss are covered. The reasons why a loss caused by the first type of inherent vice, that which will inevitably occur, is not recoverable under such a policy are twofold. First, such a loss is neither accidental nor fortuitous: because it is a loss of known certainty, no risk is

108 [1955] 3 All ER 625, QBD.

109 In fact, for the purpose of cl 3, 'packing' shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants.

110 [1955] 2 Lloyd's Rep 562, QBD.

111 [1955] 3 All ER 625, QBD.

112 Some of the kettle which were damaged by rain while on the quay were held recoverable.

113 See *Schloss Brothers v Stevens* [1906] 2 KB; *The Gaunt Case* [1921] 2 AC 41; and *T M Noten BV v Harding* [1990] 2 Lloyd's Rep 283, CA.

114 See *London & Provincial Leather Process Ltd v Hudson* [1939] 3 All ER 857 at p 861, KBD.

115 See *Gee & Garnham Ltd v Whittall* [1955] 2 Lloyd's Rep 562, QBD.

116 See *Berk v Style* [1956] 1 QB 180, QB.

involved. Secondly, inherent vice is expressly excepted by s 55(2)(c) of the Act and cl 4.4 of the policy. The second type of loss arising from inherent vice, that which may or may not occur, though a risk, is not recoverable because of the second reason.

Even a clause as wide as that found in *Overseas Commodities Ltd v Style*[117] is liable to be given a narrow construction. A cargo of canned pork was insured against 'all risks of whatsoever nature and/or kind. Average irrespective of percentage. Including blowing of tins. Including inherent vice and hidden defects. Condemnation by authorities to take place within three months of the date of arrival in final warehouse …'.

Mr Justice McNair, after having acknowledged that the parties had contracted out of the statutory protection, nevertheless, felt that in view of the peculiar nature of the subject-matter insured – namely, pasteurised and not wholly sterilised pig produce – some limitation must be placed on the said clause. He stated that:[118]

> '…it seems inconceivable that the underwriters should, with their eyes open, have accepted liability for loss by inherent vice developing at any time in the future, since such a produce must inevitably, if not consumed within a limited period, suffer loss from inherent vice, for, being perishable, it necessarily contains the seeds of its own ultimate destruction.'

Unless the intention of the parties is unambiguously expressed, the courts would be inclined, taking into account commercial realities, practice of the trade, the nature of the subject-matter insured and any other factors relevant to the case, to give a sensible construction to any clause which endeavours to impose liability on an insurer for a loss which he has been given statutory exemption. Unless clear words are used, a court would be reluctant to strip him of this protection.[119]

An assured, desirous of insuring his cargo specifically against inherent vice, would, in the light of the above cases, have to be selective in his choice of words. In particular, he should take heed of the advice given by Mr Justice Sellers in *Berk v Style*:[120]

> 'Having regard to the established law in the matter, if the plaintiffs had wished to insure against inherent vice – if, indeed, they could have done so at any reasonable premium – they should have used specific words to that effect, or at least have had cl 6 or the relevant part of it struck out.'[121]

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117 [1958] 1 Lloyd's Rep 547.

118 *Ibid*, at p 560.

119 A clause insuring against damage from 'sweating and/or heating when resulted from external cause' would not, of course, be adequate to insure against inherent vice: see *Bowring & Co Ltd & Another v Amsterdam London Insurance Co Ltd* (1930) 36 Ll L Rep 309.

120 [1956] 1 QB 180 at pp 186–187.

121 The equivalent to cl 4.4 of the current ICC. In *Biddle, Sawyer & Co Ltd v Peters* [1957] 2 Lloyd's Rep 339, QBD, a clause 'against all risks of whatsoever nature from whatsoever cause arising including condemnation and blowing of tins or decomposition of meat. Excluding inherent vice unless causing blowing of tins' read in isolation could be interpreted (in view of the double negative) to have included inherent vice if it had caused blowing of tins. But as the exception clause, one similar to cl 4.4, was not struck out, it was held that the effect was to exclude from the risks covered any form of inherent vice.