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FORTUITY OR SUSCEPTIBILITY – THE BRITISH COLUMBIA COURT OF APPEAL CONFIRMS THAT AN INSURER IS NOT LIABLE TO INDEMNIFY UNDER AN 'ALL RISKS' POLICY FOR DAMAGE RESULTING FROM AN INHERENT NATURE OR SUSCEPTIBILITY

The British Columbia Court of Appeal has recently ruled and confirmed that for an insured to succeed on an action pursuant to an 'all risks' policy of marine cargo insurance for damage to the cargo, it must demonstrate that the damage to the cargo was caused by an external occurrence, and not caused by the inherent nature of the cargo.

FACTS AND BACKGROUND

In *Nelson Market International Inc. v. Royal & Sun Alliance Insurance Company of Canada,* 2006 BCCA 327, the court considered a situation where the insured submitted a claim to its insurer for damage to cargo pursuant to an "all risks" policy of marine insurance.

The cargo in *Nelson Market* consisted of kiln-dried wood which had been fastened into laminated hardwood planks. The planks were highly susceptible to moisture. Upon arrival at destination it was discovered that the planks were damaged by moisture. The insured sought coverage under its policy and the insurer denied.

THE RULING

At trial, the insured argued that damage to the flooring had been caused by moisture due to rainfall. The court, however, rejected this and preferred the evidence of the insurer's expert who testified that the moisture that caused the damage was absorbed at the mills, after the flooring was manufactured, while awaiting shipment. In essence, the trial judge found that the moisture that caused the damage came from the property itself rather than external source.

This finding of fact was extremely important. The Court of Appeal stated that, "…*to succeed on a claim under an 'all risks' cargo policy, the Insured must establish…that an external fortuitous occurrence caused the deterioration of the cargo as distinct from the cargo having simply succumbed to the ordinary incidents of the voyage because of the cargo's inherent nature or susceptibility.*" As such, the insurer was not liable to indemnify under the policy.

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GENERAL PRINCIPLES AND APPLICATION

This case highlights a central principle which underpins first party 'all risks' property policies; that is, the trigger for coverage requires an external fortuitous act and that an inherent defect in the insured property that creates a loss does not give rise to coverage. It is well established that "all risks" does not mean "all losses". It means losses caused by fortuitous circumstances, namely accidental losses, as opposed to losses that are bound or certain to happen, given the nature of the property insured.

While an 'all risks' policy may indeed have an exclusion clause that deals specifically with inherent or latent defects, this simply mirrors the 'trigger' for coverage. This is important, particularly in terms of the burden of proof when these matters are litigated. It is trite law to say that the insured has the burden of proving coverage and that the insurer has the burden of proving exclusions. In the context of the above, however, this effectively means that it is the insured who bears the burden of showing the loss was caused by an external fortuitous event, rather than an inherent or latent defect in the subject matter of the insurance.

Indeed, it was this burden which ultimately doomed the insured in *Nelson Marketing* as the Court of Appeal found that the evidence as led by the insured could not support any finding that the conditions in the vessels were "*exceptional such as to constitute fortuitous occurrences that caused the damage to the flooring*".

IMPLICATIONS TO THE INDUSTRY

Insurers should remain alive to the fact that in the absence of a latent or inherent defect exclusion clause in the context of a first party 'all risks' policy, the insured must still demonstrate that the loss was caused by fortuitous external circumstances.

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