

BRIEFING NOTE

**Defective or Damaged? Inevitable or Fortuitous?
Just Take a Step Back in Time, with or without the Time Bandits**

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Introduction

The movie *“Time Bandits”* was released in 1981. And it’s a cracker. Written by Terry Gilliam, starring Sean Connery and John Cleese and with a soundtrack by George Harrison, it follows a group of little guys as they travel through time “borrowing” artefacts from the likes of Agamemnon, Robin Hood and Napoleon. Upon its release it was described as *“a remarkable time travel fantasy utilising superb homemade special effects”*, in much the same way that loss adjusters today view large construction and industrial property claims after notification.

But why is that movie relevant to complex insurance claims? Because with the benefit of time travel, we can expose the fantasy of the now common response to complex property damage claims being chanted so frequently by the loss adjusting community: *“Very sorry but the property is not damaged, it’s defective. And those defects were inevitable, not fortuitous.”*

Defective or Damaged?

The difference between property that is defective and property that is damaged is that property that is damaged has experienced a change in its condition during the insuring period that has caused a loss in the property’s utility or value. Property that is in a defective condition has not suffered that change. Instead, the defect has been discovered during the insuring period before it caused or manifested in any adverse change in the property’s condition.

When explained in these terms, the distinction is quite plain. But it can be easily masked when the ubiquitous insurance market panel law firm describes the presence of the various types of damage suffered as defects that are merely a feature of the insured property or the natural condition of that insured property resulting inevitably from the way or manner in which it has been constructed. Removing that mask requires the assistance of time travel.

When a claim is notified, the insured property is in a defective condition, either because it has transitioned from a sound condition to a defective condition during the policy period, in which case it has been damaged, or because it was in a defective condition from the start of the policy period and the defect, in the design, workmanship, or materials, is merely discovered. So, to describe property as merely defective is (conveniently) to ignore the question that has to be asked: was it always defective or has its condition changed during the policy period?

The importance of analysing what has (or has not) happened during the policy period to establish whether a change, and therefore damage, has (or has not) occurred is set out in *Promet Engineering (Singapore) Pte. Ltd. vs Sturge (The Nukila) [1997] 2 Lloyd’s Rep 146*. That

case considered the defective condition of a jack up rig and the occurrence of damage by reason of defective welding. It held that damage had occurred as cracking had initiated at the defective weld and, during the insuring period, propagated around the circumference of the spud can attached to one of the legs of the rig. Yes, the spud can was in a defective condition but, by reason of that adverse physical change as the crack developed, it was also damaged.

Inevitable or Fortuitous?

Having demonstrated that damage has occurred, the next issue will be to establish that the occurrence of that damage was fortuitous or accidental. Because it is all too easy for the panel lawyer, with an Honours degree in hindsight and a Doctorate in achieving billable hours, to proclaim that the damage was inevitable and should not be indemnified by Insurers.

It is correct that insurance only responds to damage that is fortuitous. It does not respond to damage that is a certainty. If it did then the insurance industry would collapse. But the insurance industry relies on premiums and, for the payment of additional premium, is willing to cover damage that is the inevitable result of a defect in the design, workmanship and materials of the property in which that defect subsequently manifests as damage. The distinctions are subtle and easily ignored with the remark that damage was inevitable. So, it is important to step back into the time machine and then proceed one step at a time.

The starting point is to consider the extent of cover that was purchased at the time when the policy incepted. The policy will exclude types of damage that are inevitable rather than fortuitous, such as wear and tear which is a maintenance cost carried by the cover holder. The policy may also exclude certain causes that may inevitably give rise to damage, such as defective design, workmanship and materials. But if the insured has bought back cover for damage resulting from these causes, by way of DE5 or LEG3 exclusions, the policy responds.

If the exclusions or buy backs do not apply then the issue of inevitability or fortuity is to be considered when the policy incepted with the knowledge then available, not when the damage occurred. And it is to be assessed subjectively not objectively such that foreseeability is irrelevant. See *Leeds Beckett University vs Travelers Insurance Co. Ltd [2017] EWHC 558*.

What this means is that damage that is the inevitable result of carrying out the works is not insured. But damage that is the inevitable result of the way in which the works are carried out is insured, subject to the policy conditions and exclusions. To take the case of pipelaying in a highway. The cutting and ripping up of the tarmac is inevitable so that damage is not covered. But if a water pipe is ruptured because of a failure to locate the existing services then that damage is covered, because it results from the way in which the works were carried out.

Last Word

Insurance is simple. But loss adjusters and panel lawyers make it complex, to raise arguments that enable the claim to be settled at a discount that justifies the fees they charge. And it is for that reason that cover holders need assistance from firms such as Sharpe & Jagger LLC, to

review the policy cover, analyse the facts and cut through the white noise and nonsense of the claim adjustment. Time Bandits we are not. Sean Connery and George Harrison, maybe.

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