

CLYDE&CO

IMIA CONFERENCE - MOSCOW 2005

**DESIGN EXCLUSION WORDINGS (DE1995/LEG1996)
AND PHYSICAL LOSS OR DAMAGE**

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Application of exclusions depends how you define:-

- **Defect**
- **Damage**
- **Insured property**
- **Part**

How do you define an elephant?!

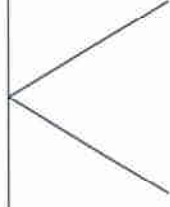
THE BASIC ALL RISKS COVER

In Gaunt's Case (1921) the House of Lords stated that:

“All risk insurance covers a risk not a certainty; it is something which happens to the subject matter from without not a natural behaviour of that subject matter being what it is...”

STRIKING A BALANCE

**Cover for damage from
design defects**



**Guaranteeing
the work**

DEFECTS/DESIGN EXCLUSIONS

**LEG 1996 CLAUSES
DE 1995 CLAUSES**

- 1. Outright exclusions.
LEG 1. DE 1.**
- 2. Cover for consequential damage.
LEG 2. DE 2-4.**
- 3. Exclusion for improvement/betterment.
LEG 3. DE 5.**

HOW TO DISTINGUISH
“DAMAGE” FROM “DEFECT”?

The Arnould definition of defect:-

“A condition causing premature failure which is present in the relevant part ... when it is constructed or installed ... or which comes into existence as a result of the way in which the relevant part was designed, constructed or installed.”

PILKINGTON V. CGU (2004)

“Damage” requires physical injury resulting in an altered state.

“In the context of insurance law [such a finding] makes commercial sense of an agreement which is designed to protect the insured against liability for physical damage to physical property and not to afford an indemnity by way of guarantee for the quality and fitness of the commodities supplied.”

WHEN DOES DEFECT DEVELOP INTO DAMAGE?

- Rodan v. CU (1997) - Soggy soap powder**
- “Nukila” (1997) - Defective jack-up legs**
- Skanska Construction (2002) - Defective concrete slab**
- Transfield (1996) - Leaking silos**
- Cementation Piling (1994) - Leaking berms**

“NUKILA” - 1997

- Avoid metaphysical argument.
- Distinction is “a matter of fact and degree” .
- *“Something different from, something over and above and incrementally greater than the defect itself”*
- *“Imminence of loss or damage is not the same as damage: damage is physical damage which has occurred” .*

When you need to identify consequential damage, how do you define:-

- **Other property injured?**
- **Part?**

NB: Importance of “first impression”.

Don’t “Divide the indivisible”

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THE SEASIDE LEISURE COMPLEX

