NUS Centre for Maritime Law Working Paper 22/06

NUS Law Working Paper No 2022/018

SUBROGATION OF MARITIME CLAIMS

Professor Rob Merkin KC and Aybüke Naz Durmuş
University of Reading

[Uploaded October 2022]

Subrogation and maritime claims

Professor Rob Merkin KC [*] and Aybüke Naz Durmuş[ǂ]

This paper discusses the scope of subrogation as it operates for maritime claims. There is hardly a claim that does not involve insurers as both hidden claimants (by way of subrogation) and hidden defendants (under liability covers). Typical claims include those by cargo owners or their banks against shipowners and charterers, collision actions and general average claims by shipowners against cargo owners/charterers. Shipowners are insured under hull and machinery policies for first party losses and, by P&I Clubs, against liability for collision and cargo claims, cargo owners are insured against loss of or damage to cargo and for general average contributions, lending banks are insured against mis-delivery and buyers are insured against trade debt defaults. However, the codified regime governing these relationships — s 79 of the Marine Insurance Act 1906 (UK) — is an incomplete and, in some circumstances, inaccurate statement of the law as it had developed up to 1906. The paper examines some of the deficiencies in the regime as well as novel issues that have arisen since the law was codified.

Keywords: Marine insurance, subrogation, maritime claims, collision, general average, cargo claims.

[*] Professor of Law, Reading University; Honorary Professor of Law, University of Auckland; Distinguished Professor, School of Comparative Law, China University of Politics and Law, Beijing. This working paper is an extended version of the speech delivered by Professor Merkin at the Singapore Shipping Law Forum 2022 hosted by the Centre for Maritime Law, National University of Singapore, and held in Singapore on 20 October 2022.

[ǂ] PhD candidate, Reading University.

1 Introduction: the nature of subrogation

As legal doctrines go, subrogation is one with an enviable pedigree. Insurance cases were not systematically, let alone reliably, reported until the middle of the 18th century, but many principles were well established and applied in the marine insurance market by then. Subrogation was amongst them. As early as 1782 in *Mason v Sainsbury*,[1] a case involving damage caused to buildings by rioters, Lord Mansfield was able to say that 'every day the insurer is put in the place of the assured'. The underlying concept of subrogation is a simple one. Insurance is a contract of indemnity under which the assured is to be held harmless, and so the assured cannot make a profit from its insurers. If there is another source of recovery, the insurers rather than the assured have the right to benefit from that source.

There is an ongoing debate as to whether subrogation in insurance arises in equity,[2] or at common law as an implied incident of the contractual relationship between the parties. It is nevertheless the case that the earliest authorities emanated from the Chancery courts and referred to subrogation as being founded on equitable principles, and it is only comparatively recently that judges and academics have questioned the basis from which discussions of subrogation should operate. The issue has arisen largely from the various contexts outside insurance — most important, lending — in which subrogation has been relied upon, and these have been seized upon in attempts to generate general principles of subrogation consistent with the wider notion of unjust enrichment. That raises the

[1] (1782) 3 Doug 61.

[2] The views of SR Derham, *Subrogation in Insurance Law* (Law Book Co 1985) and the House of Lords in *Napier and Ettrick (Lord) v Kershaw* [1993] 1 Lloyd's Rep 10.

fundamental question whether unjust enrichment principles that conflict with the relative simplicity of insurance subrogation should be allowed to prevail.

The law seems to have settled for the proposition that subrogation is a contractual arrangement inherent in a contract of insurance, but equity provides the remedies for its enforcement.[3] That is a sufficient starting point for the discussion that follows.

The indemnity principle underlying insurance subrogation carries with it by necessary implication the notion that the insurers are indemnifiers of last resort, so that if a third party is required to provide payment to the assured, the loss ultimately falls on the third party and not the insurers. That is the case even where the third party is a contractual indemnifier, although not when there is another insurer on risk for the same loss: the latter situation is governed by the contribution principle set out — if only partially — in s 80 of the Marine Insurance Act 1906 (UK) (the 1906 Act).[4] That was so held by the House of Lords in *Caledonia North Sea Ltd v British Telecommunications Plc*,[5] the fallout from the explosion on the Piper Alpha North Sea oil rig on 6 July 1988 which resulted in the deaths of 165 of the 226 on the rig at the time, as well as the destruction of the rig itself. Insurers paid and sought to exercise subrogation rights against the third-party contractors responsible for the explosion. The litigation took a bizarre turn on the 381st day of a 391-day trial in the

---

3 *Banque Financière De La Cité v Parc (Battersea) Ltd* [1999] 1 AC 221; *AXA SA v Genworth Financial International Holdings Inc* [2019] EWHC 3376 (Comm).

4 *North British & Mercantile Insurance Co v London, Liverpool, & Globe Insurance Co* (1877) 5 Ch D 569. There is nothing in s 80 to indicate how the loss is to be apportioned between the insurers, other than the statement that the liability is apportioned. See *O'Kane v Jones* [2002] Lloyd's Rep IR 261 for a discussion of the various possibilities. To be fair to Chalmers, there was no judicial authority on the point up to 1906, and the legislation carefully avoided any codification of market practice even where it had usurped the law. That may be seen to be the case in respect of, eg, the insurance of mechanical breakdown and the determination of the date on which a constructive total loss was to be ascertained.

5 [2002] Lloyd's Rep IR 261.

Court of Session. An overnight thought by the lawyers for the contractors that the case should be one of contribution rather than subrogation as both the insurers and the contractors were contractual indemnifiers, was accepted by Lord Kaplan. However, that was decisively rejected on appeal and ultimately by the House of Lords, which confined the contribution principle to co-insurers.

2 Codification

Sir Mackenzie Chalmers' codification of maritime insurance law in the 1906 Act[6] sets out the principle as follows:

79. — Right of subrogation

(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

[6] The 1906 Act is unsatisfactory in a number of other respects. See Rob Merkin, *Marine Insurance: A Legal History* (Edward Elgar 2021), Ch 17; Robert Merkin and Sarah Derrington, 'Marine Insurance Act: Magnificent Achievement or Monstrous Aberration' in D Rhidian Thomas, *Modern Law of Marine Insurance*, vol 4 (Informa Law from Routledge 2016) 1–42. The 1906 Act was the last in a series of codifying measures produced under his hand. The esteemed legal historian Professor Catherine Macmillan, when asked in conversation what she thought of Chalmers' drafting as a whole, offered the view that the quality was 'solid lower second'.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Chalmers' own commentary on the section recognised that the codification was incomplete, in that it drew no distinction between valued and unvalued policies where there was underinsurance,[7] but as will be seen in what follows that is far from its only deficiency. There was in addition a most curious drafting decision, namely, to run together the two entirely separate concepts of subrogation and salvage. The former is concerned with the transfer of intangible legal rights and the latter deals with the fate of the insured subject matter. While both flow from the indemnity principle, they differ in one fundamental respect. Salvage, the right of an insurer to take over what remains of the insured subject matter, is available only after a total loss, actual or constructive,[8] whereas subrogation relates to any sum available to the assured from an alternative source irrespective of the extent of the loss. By codifying the law according to whether the loss is total or partial, rather than whether subrogation or salvage is at stake, there is a rather clumsy repetition of the subrogation principle in the two subsections. That said, seemingly nothing turns upon the two slightly different formulations. In all cases, the insurers must

---

7 MD Chalmers and Douglas Owen, *The Marine Insurance Act 1906* (Butterworth 1907), an annotated discussion of the legislation. This was an updated version of their *Digest of the Law of Marine Insurance*, which had appeared in 1901 and 1903 editions as annotated works on earlier drafts of the Marine Insurance Bill while wending its tortuous 12-year path through Parliament.

8 Little is heard of salvage in non-marine insurance for the simple reason that there is no concept of constructive total loss: if there is actual total loss, by its definition in s 57 of the 1906 Act (which applies also to non-marine insurance) there is little or nothing worth saving.

have paid the sum due under the policy and the insurers are thereby entitled to 'all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss'.

What is perhaps surprising about s 79 is that it covers a topic as complex as subrogation in two more or less identical and unhelpful sentences. That is to be contrasted with other provisions of the legislation, where issues are dealt with, in some instances, in unnecessary painstaking detail and based upon individual decided cases: the list of illustrations of insurable interest and provisions on constructive total loss (s 60), average (s 66) and return of premium (s 84) are clear examples of that tendency. It is far from obvious why subrogation was treated in such a cursory fashion, particularly at the expense of at least four key decisions of the House of Lords.

So much for the structure of the 1906 Act. It is now necessary to turn to the deficiencies.

3 The circumstances in which subrogation arises

Section 79 states that subrogation arises only where insurers have made payment for an insured loss. That is clearly a correct statement of equitable principles. The earliest reported case on the point is *May v Hawkyns*,[9] where the assured's cargo was stolen by pirates. The insurers, having paid for the loss, exercised subrogation rights, and recovered

[9] (1573) SS XI, p 149.

in detinue the value of the cargo from persons who had purchased the cargo from the pirates. *Mason v Sainsbury* made the same point where insurers sought to recover their payments from the local hundred which was under a statutory duty to indemnify the owners of premises for riot damage. The principle was that payment by the insurers did not discharge the third party from liability to the assured, in that any insurance claim was to be left out of account in the assessment of the assured's rights against the third party. Somewhat surprisingly, as late as 1838 in *Yates v Whyte*[10] it was still thought to be open for argument that a third-party wrongdoer was discharged from liability once the insurers had paid for the loss. That had indeed been ruled by the jury in that case, which reduced the claim for damages against the vessel at fault in a collision case on the basis that the assured had received payment from the insurers. The suggestion that the decision in *Mason v Sainsbury* should be confined to statutory riot damage claims was rejected and the jury's verdict against full recovery was overturned.

The section fails to add that equity demands that a subrogation action is to be brought in the name of the assured rather than the name of the insurers,[11] with all the consequences that that carries for substantive and procedural defences that the third party may have against the assured. That is a somewhat surprising omission, given that the point had been determined by the House of Lords in *Simpson & Company v Thomson, Burrell*[12] where their Lordships ruled that insurers could not exercise subrogation rights where the damage to the vessel was caused by another vessel also owned by the assured: it was not possible for

---

[10] (1838) 4 Bing NC 272. See also *Martineau v Kitching* (1871–72) LR 7 QB 436; *Midland Insurance Co v Smith* (1881) 6 QBD 561; *The Thyatira* (1883) 8 PD 155; *London Assurance Corp v Williams* (1893) 9 TLR 257.

[11] *The John Bellamy* (1869–72) LR 3 A & E 129.

[12] (1877) 3 App Cas 279. See also *Midland Insurance Co v Smith* (1881) 6 QBD 561.

an assured to sue itself. The Act also omits any reference to the fact that procedural requirements affecting the assured's claim against the third party must be satisfied by the insurers.[13]

The 1906 Act is silent on two situations akin to subrogation where the indemnity principle kicks in to prevent double recovery. They have traditionally been referred to as part of the subrogation principle and although they are conceptually different, they do form a part of the overall structure although — as suggested below — they do not necessarily stand and fall together.

The first is where the assured has received payment for the loss from a third party before any insurance claim is made. In such circumstances, there is no loss for which the insurers can be liable so that the claim against them must fail under the indemnity principle. That was established in *Godsall v Boldero*,[14] a life insurance case, albeit one subsequently overruled[15] on the basis that a life policy is not one of indemnity, so that the assured is entitled to accumulate all available recoveries. Strictly speaking, in the non-life context this is not subrogation in the pure sense defined by s 79, and although this situation is not referred to in the 1906 Act it is implicit in the need for a 'loss'.

The second is where the assured has received payment from the insurers and is then paid again from a different source. The existence of a right of suit against a third party does not

---

[13] *Wilson v Raffalovich* (1881) 7 QBD 553.
[14] (1807) 9 East 72.
[15] *Dalby v India & London Life Assurance Co* (1854) 3 CB 365.

prevent an insurance claim,[16] so the assured is not under an obligation to pursue the third party in advance of claiming from insurers,[17] but if an insurance indemnity is provided and the third party then pays, the insurers are entitled to pursue the assured for that further payment in order to prevent double indemnity. Once again, this is not a subrogation action as such, and would today be classified as a restitutionary claim for unjust enrichment, but the early cases on the point simply refer to 'the plainest equity'.[18] *White v Dobinson*[19] took the point even further and allowed insurers who had paid a collision damage claim an equitable lien over damages equal to the sum paid by them that were awarded to the assured in arbitration against the owners of the offending vessel.

4 The amount recoverable by subrogation

The language in s 79 of 'all rights and remedies' does not by its terms impose any limit on recovery. However, that is misleading. In the case of a valued policy, the valuation is conclusive as between assured and insurers,[20] so that insurers who have paid the agreed value are entitled to any sum payable or paid by the third party up to the agreed value. It was even suggested in *North of England Iron Steamship Association v Armstrong*[21] that there was support for the view that insurers who paid agreed value could insist upon

16 *Cullen v Butler* (1815) 4 Camp 289.
17 *Dickenson v Jardine* (1867–68) LR 3 CP 639.
18 *Randal v Cockran* (1748) 1 Ves Sen 98. See also *Blaaupot v Da Costa* (1758) 1 Eden 130 on similar facts. These cases are discussed below. The assured in *Yates v White* would on this basis doubtless have been deprived of the double indemnity granted by the jury.
19 (1844) 14 Sim 273.
20 *North of England Iron Steamship Association v Armstrong* (1870) LR 5 QB 244; *Bruce v Jones* (1863) 1 H & C 769; 1906 Act, s 27(3).
21 (1870) LR 5 QB 244.

recoveries even if they exceeded the agreed value. That proposition was supportable by the notion that an insurer who paid for a total loss was entitled to recover the entirety of the insured subject matter by way of salvage, and it followed that a payment for a total loss should similarly attract all available recoveries. However, there was earlier authority that an insurer could never recover more than it had paid,[22] and *Armstrong* was duly doubted by Lord Blackburn in *Burnand v Rodocanachi*.[23] Chalmers' drafting did nothing to resolve the point, although it was finally resolved by a rejection of this aspect of *Armstrong* a century later in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*.[24]

Valued or not, marine insurance — unlike non-marine insurance — recognises that if there is underinsurance, the assured is treated as co-insurer for the uninsured sum.[25] The common law average principle is correctly enshrined in s 81 of the 1906 Act. The implications of that rule for subrogation were not, however, specified in the legislation even though they were clarified in *The Commonwealth*,[26] a case decided when the Bill was passing its final stages. Here, the insured vessel was insured for £1,000 although the actual value was £1,350. The P&I Club insuring the negligent owners paid £1,000 into court, the issue being how that was to be allocated as between the assured and the insurers. The Court of Appeal chose to apply the average principle, holding that the assured and the insurers were co-insurers in the proportions 350/1,350 to 1,000/350 and apportioned the recovery accordingly. Doubtless it was thought that the restatement of the average

22 *Blaaupot v Da Costa* (1758) 1 Eden 130.
23 (1882) 7 App Cas 333.
24 [1962] 2 QB 330
25 *Steamship Balmoral Co Ltd v Marten* [1902] AC 511.
26 (1907) 10 Asp MLC 538.

principle dictated the result in *The Commonwealth*, although the fact that the point had to be litigated demonstrates that it was probably worthy of codification.

5 Recoveries attracting subrogation

An obvious omission from the legislation was any attempt to define the nature of payments from a third party that were regarded as diminishing the assured's loss for subrogation purposes. The reference to 'all the rights and remedies of the assured in and in respect of that subject-matter' is extremely broad. The phrase 'rights and remedies of the assured in' strongly points to legal rights and remedies, but the alternative 'and in respect of' coupled with the use of the second 'and' indicates that a disjunctive interpretation is required. Thus, the section may be read as meaning that there is subrogation in respect of anything relating to the subject matter. That is consistent with the classic statement of Bowen LJ in, admittedly not a marine case, *Castellain v Preston*:[27]

> [A]s between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such a right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished …

[27] (1883) 11 QBD 380.

The ambiguity in the legislation is all the more surprising because Chalmers had the benefit of the ruling of the House of Lords in *Burnand v Rodocanachi*,[28] a case that arose in a 20-year context that had occupied much of the diplomatic efforts of the British Government in general, and Selborne LC in particular. The cession of the Southern US states early in 1861 and President Lincoln's declaration of a rebellion placed the British Government in an almost impossible quandary, which it effectively dodged by declaring neutrality without formally recognising the Confederacy as sovereign State. The US remained a friendly nation, so the provisions of the Foreign Enlistment Act 1819 prohibited the equipping of vessels in British shipyards for hostile use against the US. Two vessels, the *Alabama* and the *Florida*, were equipped contrary to the legislation, and managed by subterfuge to escape the British shores destined for Confederate hands before the British Government could intervene. A third, the *Shenandoah*, was refitted and recrewed in Melbourne. All three thereafter wreaked havoc on US commercial shipping, the *Alabama* alone capturing or destroying some 69 vessels and cargo to a value of nearly US$5 million.

One of the *Alabama*'s victims was the *Lamplighter*, which was sunk along with a cargo of tobacco belonging to the assured. The tobacco was insured under two valued policies for £15,000, although this was short of its actual value by £6,557 7s 3d. Payment up to full value was made by the insurers, but subsequently the assured received from the US Government the sum of £2,803 17s 2d. The source of the payment was a compensation fund of US$15 million established from the proceeds of an arbitration award in 1872 in which the Tribunal found that Britain had infringed its international obligations by allowing

[28] (1882) 7 App Cas 333.

the escape of the vessels and was liable accordingly.[29] The insurers laid claim to the sum paid to the assured by way of subrogation. As the policy was valued, and the valuation was conclusive so that loss was deemed to be £15,000, the insurers' claim appeared to be unanswerable. That view was strongly supported by two of the earliest subrogation cases, *Randal v Cockran*,[30] and *Blaaupot v Da Costa*,[31] in each of which insurers who had paid shipowners for vessels unlawfully seized by Spanish privateers were entitled to sums recovered from the offending vessels by way of reprisals and provided by way of compensation by Commissioners for Distribution. The sums were paid irrespective of the insurance arrangements for the lost vessels. The argument in *Blaaupot* that the fund was not designed to indemnify for physical loss but by way of personal compensation was rejected without serious discussion. The House of Lords in *Burnand*, in a judgment remarkable for dispensing with the need to hear full argument, distinguished these cases and held that there was no right of subrogation. The reasoning is far from clear, their Lordships deciding variously that the US compensation fund was not one indemnifying for physical loss but rather was a personal payment; that the sum was a gift; and that in the circumstances the valuation was not conclusive. It is difficult to avoid the conclusion that Lord Selborne, who had been Solicitor-General at the time of the *Alabama*'s escape, the leading British negotiator of the terms of the arbitration,[32] counsel for Britain in the arbitration itself, and the presiding judge in *Burnand*, was well aware of the political

[29] This fascinating story has been told many times, best from a British point of view by Lord Bingham, 'The *Alabama* Claims Arbitration' (2005) 54 ICLQ 1, reprinted in Tom Bingham, *Lives of the Law: Selected Essays and Speeches 2000–2010* (OUP 2011) 13–40, and by Johnny Veeder in Caron, Schill, Smutny and Triantafilou (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015), Ch 7. See also Rob Merkin, *Marine Insurance: A Legal History* (Edward Elgar Publishing 2021), Chs 11–14.

[30] (1748) 1 Ves Sen 98.

[31] (1758) 1 Eden 130.

[32] Enshrined in the Treaty of Washington 1871.

implications of any judgment that allowed the funds paid by Britain by way of war reparations to be channelled back into the London market.

It is noteworthy that in *Stearns v Village Main Reef Gold Mining Co Ltd*,[33] a non-marine case decided shortly before the passing of the 1906 Act, subrogation was permitted in very similar circumstances. Insurers of gold seized by the Transvaal Government paid for a total loss, unaware that the assured had earlier received a payment of a third of the value of the gold from that Government on condition that the mine continued to work. The Court of Appeal, upholding an action for repayment of that sum by the assured, held that *Burnand* had decided no more than that a payment by a third party for uninsured loss is not caught by subrogation. That is undoubtedly a correct proposition, but something of an ex post facto justification of *Burnand* rather than its actual principle.

Perhaps Chalmers regarded *Burnand* as an aberration, or at the very least a decision whose reasoning was so elusive as not to merit any attempt at codification. With hindsight that has proved to be correct. The Court of Appeal in *Colonia Versicherung AG v Amoco Oil Co*[34] later decided that the explanation of *Burnand* in *Stearns* should be followed, that the payment was by way of personal compensation representing uninsured loss, and that where a payment was made by a tortfeasor it was all but inconceivable that the payment was anything other than one to reduce loss. Hirst LJ in *Colonia* noted that *Burnand* turned on the finding that the sums paid were not in respect of the loss and so they could not

[33] (1905) 10 Com Cas 89. See also *The Dora Forster* [1900] P 241.

[34] [1997] 1 Lloyd's Rep 261. See the most recent discussion of this line of cases in *Stonegate Pub Co v MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm), holding that furlough payments by the UK Government to firms forced to close by the COVID-19 lockdown in 2020–2021 fell to be deducted from payments from insurers under business interruption policies.

reduce the loss. In *Colonia* the point was made that in the commercial setting it is to be presumed that payments made by a third party are designed to reduce the loss and thus are subject to subrogation principles.

6 The indemnity requirement

Although s 79 requires payment by the insurers, it does not touch upon the question whether it is necessary for the payment to provide a full indemnity. However, it may be that the matter is by implication governed by other provisions of the 1906 Act. In the case of a valued policy no issue arises because the valuation is conclusive under s 79(3) so that payment of the policy moneys is an 'agreed' indemnity even though there is a shortfall. In the case of an unvalued policy, the average principle in s 81 means that full payment under the policy is by definition a full indemnity, with the shortfall being borne by the assured in the deemed capacity of co-insurer. The complexities that arise in the non-marine market where subrogation recoveries are insufficient to cover the assured's loss are created by the considerations that the policy is unlikely to be valued and that average will rarely apply. It suffices to say here that the House of Lords in *Napier and Ettrick (Lord) v Kershaw*[35] adopted a 'recover down' approach which equates the position to insurance in layers, the underlying concept being that the risk of loss necessarily diminishes as it proceeds up through the layers, as reflected in the reducing premium charged, so that the highest layer insurer has first claim on any recoveries. Translated to a simple insurance case, uninsured

[35] [1993] 1 All ER 385.

loss is paid first, followed by insured loss, and the deductible (which is treated as self-insured) comes last.

7 The nature of the insurers' payment

Another House of Lords' decision not expressly referenced in the 1906 Act but decided during the early stages of its Parliamentary journey is *King v Victoria Insurance Co Ltd*.[36] The issue there raised was whether the third party had the right to rely upon the potentially voluntary nature of the payment made by the insurers. It could be argued that the words 'when the insurer pays' in both subss (1) and (2) do not import any discussion of the reason that the insurer has paid. In *King* the Bank insured its interest in a cargo of wool, some of which was lost when punts belonging to the Government broke loose and collided with the lighter onto which the wool was being loaded. The insurers paid the Bank even though there was a plausible argument that the policy did not respond until loading was complete. The House of Lords allowed the subrogation action on the basis that:

> it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves.

The scope of the *King* principle was recently discussed in an important maritime case by the Full Federal Court of Australia, *AAI Ltd v Technology Swiss Pty Ltd*,[37] the message from which is that not every payment by the insurers can be regarded as reducing the insured loss, and that no subrogation rights exist in respect of a payment by the insurers outside

---

[36] [1896] AC 250. See also *Scaramanga v Martin Marquand & Co* (1885) 53 LT 810.

[37] [2021] FCAFC 168.

the scope of the indemnity provided by the policy. In December 2014 TSP shipped a consignment of fog cannons from Melbourne to Bangkok, the CIF value being $770,095.58. The freight forwarder, FPS, arranged for carriage on board the *CMA CGM Quartz*. The fog cannons were damaged in the course of transit, and this was discovered on arrival at Bangkok. TSP's marine cargo policy issued by AAI had a limit of indemnity of $500,000 for any one conveyance, subject to a per loss deductible of $250. A claim was made in January 2015, and AAI accepted liability subject to agreement on quantum. The parties were in dispute as to whether the fog cannons could be repaired for around $200,000 (AAI's case) or were a constructive total loss in that the repaired value was less than repair plus transportation costs (TSP's case). The fog cannons were placed in a bonded warehouse pending resolution. Proceedings were commenced in August 2015 and AAI paid the $200,000 (minus deductible) and agreed to pay the costs of storage on proof that they had occurred. A successful mediation followed, and the Deed of Settlement dated 1 June 2017 provided that TSP agreed to discontinue the proceedings and to accept a further $425,000 'in full and final settlement of the Insurance Claim, the Storage Costs Claim, the Proceeding and the Dispute'. TSP then commenced proceedings against FP, and in November 2019 recovered $863,758.70 made up of the invoice value of the fog cannons ($738,615.40), freight costs ($16,526.94) and interest up to judgment ($108,616.36). In addition, TSP recovered its costs in the action. As a result, TSP received $625,000 from AAI and $738,615.40, an aggregate way in excess of the CIF value of the fog cannons.

AAI commenced proceedings for the sums received by AAI from FPL. There was no dispute over AAI's right to be subrogated to $200,000 of the sum received from TSP, representing that part of the Deed of Settlement with AAI set aside for the fog cannons. However, AAI asserted that the additional $450,000 paid by it to TSP under the Settlement had gone to reducing the insured loss, so that the sum was also recoverable from TSP. The Full Federal Court disagreed. Upholding the first instance judgment of Allsop J, the Full Court held that it was necessary to determine to what the $450,000 payment related. There were uninsured losses of legal costs ($277,260.16) and storage costs ($30,969.42), totalling

$308,229.58. That sum fell outside the indemnity for the fog horns, leaving a balance of $116,770.06 recoverable by AAI. The lesson from this case is that any settlement must allocate the sums to the various heads of claim by the assured, and in the absence of allocation it is to be assumed that uninsured losses are to be paid off first. Derrington J rejected any reliance on *King* for the proposition that a bona fide settlement attracts subrogation rights to the fullest extent:

> [The] submission, that all that is required for a right of subrogation to arise is merely the making of a payment by an insurer honestly or in good faith as part of a commercial settlement simply to remove litigation, cannot be accepted. That approach, which elides any requirement of an intention that the payment is made to reduce the insured's loss, is at odds with the established authorities. It is also inconsistent with the nature of subrogation as a concomitant of the obligation to indemnify which fully crystallises when the obligor performs an act of indemnification.

This comment was made with the marine decision in *Wellington Insurance Co Ltd v Armac Diving Services Ltd*[38] in mind. In this case, following a loss, the assured commenced legal proceedings. The parties thereafter entered into a settlement under which it was agreed that the assured would abandon all of its claims in return for payment. A dispute then arose as to respective entitlements to a recovery from a third party. The British Columbia Court of Appeal ruled that the settlement was not one that related to insured loss but instead was designed to kill off the litigation and to avoid the publicity of legal proceedings.

[38] (1987) 38 DLR (4th) 462.

8 Securities

There is much authority for the proposition that, for the purposes of a subrogation claim, the person seeking to exercise subrogation rights gets no more than for which he bargained. The point has arisen in the context of the use of funds borrowed by C from A to pay off a secured loan owing to B. If A has not himself bargained for a security, his subrogation rights are restricted to a claim in debt against B, and A has no right to be subrogated to the security granted to B. To quote Oliver J in *Paul v Speirway Ltd*,[39] 'the [claimant] obtained all that he bargained for and it would not, I think, be equitable that he should now assert some further right for which he did not bargain.' By contrast, if A's loan was secured, then the position is that identified by Walton J in *Burston Finance Ltd v Speirway Ltd*:[40]

> [W]here A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor …. . It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged in whole or in part by the money so provided by him.

39 [1976] Ch 220, 234. See also *Re Rusjon Ltd* [2007] EWHC 2943 (Ch); *Re Automotive Group Ltd* [2019] EWHC 2771 (Ch).

40 [1974] 1 WLR 1648, 1652. See also *Banque Financière De La Cité v Parc (Battersea) Ltd* [1999] 1 AC 221; *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch); *National Westminster Bank plc v Mayfair Estates Property Investments Ltd* [2007] EWHC 287 (Ch).

Most of the authority has concerned the situation where A's security has failed, typically for want of registration.[41] As is apparent from the above quote from Walton J, A remains entitled to be subrogated to B's securities, and the role of subrogation has in this scenario is to replicate that element of the transaction whose absence made it defective.[42]

In every insurance subrogation case decided in England, the insurers have by their subrogation action sought to claim damages in the form of a tortious or contractual claim held by the assured against the third party. The question whether an insurer is subrogated to any securities available to the assured in the enforcement of the claim is potentially an important one, and has been considered by Philip Jeyaretnam JC in the Singapore High Court in *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc*.[43] In December 2013 the Government of Singapore, through the Defence Science and Technology Agency, entered into a Geometra Worldwide Movers Pte Ltd under which Geometra was to transport by sea a cargo of military cargo in containers. The contract required Geometra to obtain an irrevocable and unconditional performance bond for 5% of the agreed price, which could be called in following any default or breach by Geometra of its obligations. Geometra obtained the required performance bond from Sompo, and by its terms Sompo agreed to pay the Government an amount not exceeding a maximum of S$352,700 on receipt of the Government's first demand in writing. In the course of

[41] As in *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291; *Anfield (UK) Ltd v Bank of Scotland plc* [2010] EWHC 2474 (Ch); *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch); and *Menelaou v Bank of Cyprus plc* [2015] UKSC 66. Cf *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 (voidable charge).

[42] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32.

[43] [2021] SGHC 152.

discharging the cargo in March 2015, a container was lost overboard. The loss was quantified at S$200,945.56, and was paid by the Government's insurers, RSA, who sought to exercise subrogation rights against Sompo. It was not disputed that RSA had a subrogation action against Geometra. The question was whether RSA had a choice of proceeding against Geometra or Sompo. The claim was denied by Sompo on the ground that subrogation rights did not extend to the Performance Bond. The Court relied upon the words 'all rights and remedies of the assured in and in respect of the subject-matter insured' in s 79(2) and concluded that the Performance Bond related to the loss suffered by the Government as a result of the breach of the contract of carriage. Had the Government called in the Bond, there would not have been any loss and RSA would have been discharged from liability. Equally, if the Government had been indemnified by RSA and then claimed on the Bond, it would have had to account to the Government for the sums received.

It might be argued by analogy with the mortgage cases that RSA had bargained only for an unsecured subrogation claim against Geometra, that the existence of the Performance Bond was a windfall, and that, in terms of *Paul v Speirway*, it was not equitable that RSA 'should now assert some further right for which [they] did not bargain'. The analogy is of course far from perfect because an insurer — unlike a lender — has no necessary expectation that it will recover any payment made to the assured, and indeed the loss may have nothing to do with the acts or omissions of a third party. It is also arguably the case that, while the Government would have had no claim against RSA if Sompo had paid on the Performance Bond, and if the Government had received both the sums under the Performance Bond and the policy then there would have been an account due to RSA, it does not automatically follow that RSA would have had a 'pure' subrogation claim against Sompo if the Government had made no claim on Sompo. In the end the point did not arise, because RSA took an assignment of the Government's rights, including the right to be paid by Sompo. The case nevertheless demonstrates a tension between ordinary insurance subrogation, which by the definition in the 1906 Act clearly covered the claim against Sompo, and the principles of unjust enrichment as extended to subrogation claims.

9 Prejudicing subrogation rights

Section 79 is silent on the scope of any duty on the assured not to take steps prejudicing the insurers' subrogation rights. However, there were authorities indicating that the right of subrogation was not merely a negative concept designed to preclude recovery in excess of indemnity but conferred positive rights upon insurers. In *Dufourcet & Co v Bishop*[44] a bargain to do away with subrogation rights was overturned. The assured under a freight policy paid advance freight for a cargo to be carried by a shipowner. The cargo was lost, and the assured entered into an agreement with the shipowner that the latter would pay for the cargo and the assured would then look to its own insurers for the loss of freight. The Court held that the agreement was not binding on the insurers and that, having paid the assured, they were entitled to exercise subrogation rights. The facts of a non-marine case, *West of England Fire Insurance Company v Isaacs*,[45] were equivalent, but the insurers pursued the assured rather than the third party. Lord Esher, without citing authority,

[44] (1886) 18 QBD 373.
[45] [1897] 1 QB 226.

regarded the claim as ‘perfectly right, and in accordance with the law of insurance’. *Isaacs* as a non-marine case fell outside the scope of the codification, and it may be that the question of the duty of the assured to protect insurers’ subrogation rights was not sufficiently covered by authority to justify codification.

It is almost too obvious to be worthy of stating that subrogation rights cannot arise before there is a loss. The question then arises as to the position of an insurer who finds that, due to the pre-loss activities of the assured, there is no recourse to the third party responsible for the assured’s loss. Where the assured has entered into arrangements with a third party giving exemption from liability, and the insurance policy is then taken out, the only right available to the insurers is to rely upon non-disclosure (or, if a lie has been told, misrepresentation). In principle there are serious barriers to a successful plea. First, if the arrangements are standard in the relevant trade, the insurer is deemed to be aware of them and there is no duty in respect of them. That emerges from *Tate & Sons v Hyslop*,[46] where the assured cargo owner’s arrangement that there was to be no recourse to the lighterman in the event of damage to the cargo was found by the jury to be a standard arrangement that did not require disclosure, although on appeal the Court of Appeal was satisfied that there was sufficient evidence to overturn the jury’s finding on that point. That aside, an insurer has no rights in respect of non-disclosure unless it can be shown that the risk would have been accepted only on a higher premium or different terms, and premiums are generally not calculated on the assumption that there may be subrogation recoveries.

[46] (1885) 15 QBD 368. See also *Marc Rich & Co AG v Portman* [1996] 1 Lloyd’s Rep 430, a point which did not arise on appeal: [1997] 1 Lloyd’s Rep 225.

A more complex point arises where, after the insurance has incepted but before any loss has occurred, the assured has entered into arrangements which remove or limit rights of recourse against a third party who potentially faces liability for any loss. It is difficult to think of any basis upon which the insurers have rights in the absence of an express policy provision: there is no continuing duty of utmost good faith, and a general prohibition on increase of risk is not relevant to the situation where the risk has not increased but only the ability of the insurers to seek recourse for their indemnity. The absence of any rights in advance of loss was confirmed in *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd*.[47]

10 Subrogation immunity[48]

10.1 The immunity principle

It has already been seen that subrogation proceedings have to be brought in the assured's own name, with the consequence that subrogation rights cannot be exercised against the assured. The position is complicated where there are two or more assureds, one of whom has been responsible for the loss. There was almost no authority on this scenario before the passing of the 1906 Act, and although the measure recognises that separate interests may exist, it has nothing to say about insuring them under a single policy.

47 (1969) 123 CLR 228.

48 This section of the paper is derived from the second author's ongoing PhD thesis at the University of Reading. Thanks are extended to the Republic of Turkey Ministry of National Education for providing a fund for these studies.

Co-insurance is of two broad types: joint insurance and composite insurance. The former concerns the situation where the assureds' interests in the subject matter of the insurance are joint and indivisible. The most common — and possibly only — example of joint insurance is matrimonial property, although this could impinge on the marine market in the case of a pleasure craft.[49] The rights of joint assureds stand and fall together, and there is no possibility of a subrogation action against a joint assured although deliberate misconduct by either will defeat the rights of both.[50] One particularly typical example of joint insurance is where a husband and a wife insure their jointly owned property.[51]

Where the rights of the co-assureds are divisible, the assureds are covered for their respective rights and interests. In most cases the rights of each co-assured are independent of those of the others,[52] although there is some dispute as to whether that is because there is a single policy with different assureds or a group of parallel policies embodied in the same document, the latter view having obtained modern currency.[53] Many marine contexts give rise to co-insurance, including co-ownership of a vessel in divisible shares, owner and charterer, owner and mortgagee, owner and manager, owner and carrier, and contractor and sub-contractors. Typically, one of the parties to a contractual relationship (the primary assured) will agree to insure on behalf of itself and the others, and it is now

[49] *Gate v Sun Alliance Insurance Ltd* (1995) 8 ANZ Insurance Cases 61–251.

[50] *P Samuel & Co Ltd v Dumas* [1924] AC 431, 445 per Viscount Cave.

[51] Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (OUP 2017) para 10.65.

[52] But that is not the case where the insurers' defence is one that relates to the risk as a whole, eg, the absence of an insured peril, as in *P Samuel & Co Ltd v Dumas* [1924] AC 431, where scuttling by the assured defeated the rights of the co-assured bank on that basis.

[53] *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Inc & Vero New Zealand Ltd* [2015] NZSC 59, applied without detailed analysis by Cockerill J in *Corbin & King Ltd v AXA Insurance UK Plc* [2022] EWHC 409 (Comm).

settled that a policy taken out by the primary assured creates privity of contract by way of agency if the primary assured is required or authorised to insure,[54] the primary assured objectively intends to insure on behalf of a third party (which follows automatically if there is an obligation to insure), and the policy extends to the third party by name or class.[55] It is not sufficient that the policy by its terms fortuitously encompasses the third party in the absence of a prior agency relationship between the assured and the third party.[56]

The Contracts (Rights of Third Parties) Act 1999, which by s 1 confers enforcement rights on an identified or identifiable third party, appears to add nothing to this analysis. If there is no contractual duty on the primary assured to insure on behalf of co-assureds, it can scarcely be said that the primary assured objectively would have intended to do so, so even if the policy refers to third parties the 1999 Act will not be engaged: it might be thought that the right to enforce would be negatived by s 1(2): 'if on a proper construction of the [insurance policy] it appears that the parties did not intend the term to be enforceable by the third party'.

It is unnecessary here to trace in detail the history of the search for the source of subrogation immunity for a co-assured. It suffices to say that at one time immunity was said to derive from the circuity of an insurer pursuing a policyholder itself entitled to an indemnity,[57] or alternatively from an implied term in the policy that any claim that the primary assured might have against the co-assured could not be exercised by the

54 Ratification is permissible to fill any deficiency in authorisation, even after the loss has occurred: Marine Insurance Act 1906, s 86.

55 *Rugby Football Union v Clark Smith Partnership Ltd* [2022] EWHC 956 (TCC).

56 *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC).

57 *The Yasin* 1979] 2 Lloyd's Rep 45; *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127.

insurers.[58] However, it is now settled that the immunity stems from the contractual arrangements between the co-assureds, based on risk allocation.[59] An agreement by the primary assured to insure on behalf of the co-assureds operates as a grant of immunity for losses falling within the scope of the co-insurance obligation.[60] In most cases there is an explicit reference to the co-assured paying or contributing to the premium, and to date there is no case in which an obligation to insure has not been matched by a premium obligation. However, that payment of the premium seems to be both inherent and implicit in risk allocation. If a shipowner instructs a yard to repair a vessel and promises to insure against construction risks, the shipowner has agreed to look to the insurers rather than the yard in the event of loss, and there is no need for the yard to insure against such risks. Accordingly, the price charged to the shipowner will not include an element for insurance. Thus, it suffices that the parties have by their agreement fixed where the risk is to lie and is not open to the insurers to subvert that provision by subrogation proceedings.

The operation of co-insurance immunity in the shipping industry has been discussed in two recent English decisions, that of the Supreme Court in *Gard Marine & Energy Ltd v China*

[58] The authorities for the implied term in the insurance policy are *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *Cape Distribution Ltd v Cape Intermediate Holdings* [2016] EWHC 1119 (QB). The authorities for the contract between the parties are *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17; *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286; *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd* [2014] EWCA Civ 1464; *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; *Cape Distribution Ltd v Cape Intermediate Holdings* [2016] EWHC 1119 (QB); *Gard Marine & Energy Ltd v China National Chartering Co Ltd, The Ocean Victory* [2017] UKSC 35; *Herculito Maritime Ltd v Gunvor International BV* [2021] EWCA Civ 1828; *Rugby Football Union v Clark Smith Partnership Ltd* [2022] EWHC 956 (TCC).

[59] *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] 1 CLC 625.

[60] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582 and *Deepak Fertilisers & Petrochemical Corp v Davy McKee (London) Ltd* [1999] 1 Lloyd's Rep 387 both illustrate that the insuring obligation may be limited to specific risks, so that the primary assured (and thus its subrogated insurers) retain a right of recourse in respect of losses caused by events falling outside that obligation.

National Chartering Co Ltd, The Ocean Victory,[61] and that of the Court of Appeal in *Herculito Maritime Ltd v Gunvor International BV*.[62]

10.2 *The Ocean Victory*

The *Ocean Victory* was owned by OVM, and demise chartered to OLH under a Barecon 89 Standard Bareboat Charter to which a safe port warranty had been added. The parties agreed that hull insurance would be taken out by OLH in their joint names. OLH sub-chartered the vessel to Sinochart, which in turn sub-chartered it to Daiichi under a time charter. The two sub-charters similarly included safe port warranties. Daiichi's instructions were to load the cargo in South Africa, for discharge at the port of Kashima in Japan. The vessel faced bad weather in Kashima, ran aground and became a total loss. The hull insurers, Gard, indemnified OVM and, having taken an assignment of the rights of OVM and OLH as co-assureds, commenced proceedings against Sinochart for breach of the safe port warranty. Sinochart in turn commenced an action against Daiichi. There were two issues: whether the safe port warranty had been broken; and, if so, whether the sub-charterers were liable against the owners. At first instance[63] Teare J found for Gard on both points. His decision was reversed on both points by the Court of Appeal.[64] In the Supreme Court, there was unanimity that the safe port warranty had not been broken, and that the vessel had just encountered unfortunate extreme bad weather. That meant that the

[61] [2017] UKSC 35.
[62] [2021] EWCA Civ 1828.
[63] [2013] EWHC 2199.
[64] [2015] EWCA Civ 16.

subrogation issue did not arise. However, a powerful Supreme Court divided 3:2 on that question, ultimately answered against Gard.

One of the key issues in the case was the difference between the alternative cll 12 and 13 of the Barecon 89 charter. Under cl 12, the demise charterer pays for the hull insurance and there is no reference to rights of recourse. Under cl 13 the owner pays for the hull insurance on terms that there is no right of recourse against the demise charterer. In *The Ocean Victory* OVM and OLH had opted for cl 12. The argument of the sub-charterers was that cl 12 provided a complete code for the treatment of insured losses, and that the parties could not have intended that OLH as demise charterer would be liable to OVM as owner for any breach of the safe port warranty. As OLH did not face any liability, there was no basis upon which OLH could seek indemnification from the sub-charterers. Gard's response was that the charterparty properly construed meant that OLH was liable to OVM for breach of the safe port warranty, and it was only payment by Gard that discharged OLH's liability. However, the sub-charterers were not parties to the demise charter and could not rely upon its terms for the discharge of OLH's liability: accordingly, the liability remained in place. They faced an action by Gard as the assignee of OLH's right of indemnity.

The majority, consisting of Lords Mance, Toulson and Hodge, determined that cl 12 of the demise charter covered the risk of loss of or damage to the vessel, and prevented OVM from recovering the vessel's value from OLH in the event of a breach of the safe port warranty. The insurance was to be maintained by OLH in the joint names of OVM and OLH, the commercial purpose of the arrangement being to provide a fund to make good any loss without litigation between them. That necessarily precluded a subrogation action in the absence of deliberate misconduct. The safe port warranty was not intended to undermine that purpose. The majority was also of the view that the liability of the demise charterer was not discharged by the payment of the insurer, but rather never arose in the first place, that being the natural construction of the co-insurance arrangement.

The minority view of Lords Clarke and Sumption was that cl 12 did not prevent the exercise of subrogation rights against OLH for the breach of the express safe port warranty. It had been the intention of the parties by adding the warranty that the liability of OLH and Gard would co-exist in case of a loss caused by breach of the safe port warranty. OLH's liability was not excluded but rather was satisfied by the insurance payment, and therefore OLH could make a claim against the sub-charterers.

The majority view was greeted with some surprise by the shipping industry.[65] BIMCO saw this decision as an opportunity to deal with the insurance and total loss provisions of the new Barecon 2017, and updated the relevant document with the aim of ensuring such recoverability.[66] The effect of *The Ocean Victory* was to extend subrogation immunity to third parties who were not privy to the allocation of risk arrangements in the head charter, by granting immunity to the head charterer so that there was no liability to be passed down the line. This may have been no more than an exercise by Gard to pass the loss onto the sub-charterers' insurers. However, the crucial point in *The Ocean Victory* is that it turned

---

[65] Edward Yang Liu, '*Gard Marine & Energy Ltd v China National Chartering Co Ltd, The Ocean Victory [2017] UKSC 35*' (2017) 17 STL 4 5; Elizabeth Blackburn and Andrew Dinsmore, 'Joint Insurance Issues in *The Ocean Victory*: The Roads Not Taken' [2018] LMCLQ 50.

[66] Anna Wollin, 'Coexisting Liabilities — *The Ocean Victory* and Commercial Practice' (2017) 17 STL 10 1.

not upon the interpretation of the insurance or the nature of subrogation, but squarely on the construction of the charterparty.

10.3 The benefit of the insurance

The principle arising from *The Ocean Victory* is that of risk allocation. The fact that the risk allocation is formalised in the insurance policy itself, in the form of co-insurance, does not make any difference. In other words, even though there is no co-insurance, the risk allocation arrangements between the assured and third parties will be binding on the insurers. That point was initially made in a series of landlord and tenant cases[67] where the landlord promised to insure in return for a contribution to the premium by the tenant, and it was held that the arrangement had the effect of requiring the landlord to look exclusively to the insurers for any loss falling within the scope of the promise to insure. That principle was recently applied in a shipping context in *Herculito Maritime Ltd v Gunvor International BV, The Polar*.[68] Here, shipowners chartered a vessel on terms that they were obliged to insure against war risks, and the charterers were under a corresponding obligation to pay the insurance premiums. Bills of lading incorporating the terms and conditions of the charterparty were issued to the cargo owner. The vessel was seized by Somali pirates and held for eight months. A ransom was eventually paid by the insurers for its release. General average was declared, and the insurers sought to recover a proportion of their payment from the charterers and the cargo owners. The Court of Appeal dismissed the claim against the charterers. The obligation of the shipowners to insure and the charterers to pay the

[67] *Mark Rowlands v Berni Inns Ltd* [1986] QB 211; *Barras v Hamilton* 1994 SC 544; *Quirkco Investments Ltd v Aspray Transport Ltd* [2011] EWHC 3060 (Ch); *Frasca-Judd v Golovina* [2016] EWHC 497 (QB).

[68] [2021] EWCA Civ 1828.

premium operated to allocate the risk to the shipowners, so that in the event of the need to pay the ransom they would look only to the insurers under the policy and not to the charterers by way of general average contribution.

However, the claim against the cargo owners was allowed. The Court of Appeal held that the terms of the charterparty had been incorporated into the bills of lading in unmanipulated form, and the insurance provisions related solely to the 'charterers'. Construing that word as referring to the holders of bills of lading would distort its meaning. That aside, there had been no agreement as to how premiums were to be allocated as between the charterers and the cargo owners, so the latter group could not in any event bring themselves within its terms. In short, there was simply no agreement between the shipowners and the cargo interests that the former's insurance would be for the latter's benefit.

It is suggested that the Court of Appeal's judgment should not be read as meaning that if the third party does not pay or contribute to the premium, the third party is not entitled to the benefit of the insurance. An obligation to insure taken assumed by a shipowner in favour of third parties is plainly designed to transfer the risk of loss from those third parties to the shipowner and thus its insurers. Even if nothing is said about insurance premiums, the third parties will have relied upon the promise and modified their own insurance arrangements accordingly. If the clause in *The Polar* had said nothing about premiums, the result would have been the same. The price paid by the charterers for the hire would have reflected the shipowners' obligation to insure. As for the cargo interests, no promise had been made to them so the inability to calculate the premium was simply a makeweight point. There is authority in the context of the construction industry that a statement by the employer or head contractor that it is taking out insurance does not amount to a promise to waive any claims against sub-contractors.[69] However, that does not mean that there cannot be such a promise even in the absence of a premium payment condition.

There is one important qualification to the 'benefit of the insurance' principle, and that is that it must be compatible with the insurance itself. In *Canadian Transport Co Ltd v Court Line Ltd*[70] the parties agreed that 'owners to give time charterers the benefit of their protection and indemnity club insurances so far as club rules allow'. The Club rules provided that 'no assignment or subrogation by a member of his cover with this Association to charterers or any other person shall be deemed to bind this Association to any extent whatsoever'. The House of Lords unsurprisingly held that the benefit of insurance clause was ineffective.

10.4 Subrogation waiver

Commercial relationships may make it reasonable for the assured to desire that the insurers do not exercise subrogation rights against particular third parties, eg, where a number of vessels are in the overall control of an individual or company but owned by a network of one-ship companies, or where the carrier and shipowner are in the same corporate group. The traditional means of doing so is by including a subrogation waiver clause in the policy.

[69] *Surrey Heath BC v Lovell Construction* (1990) 48 BLR 108; *National Trust v Haden Young* (1994) 72 BLR 1.
[70] [1940] AC 934.

Before the passing of the Contracts (Rights of Third Parties) Act 1999 it was thought to be unlikely that a subrogation waiver clause could be enforced by the third party, and the prospects of enforcement by the assured in the form of injunctive relief were never tested. However, it rarely mattered. The common law permitted a person other than the primary assured to rely upon a subrogation waiver clause if that person was a co-assured and thus privy to the clause, but the clause operated only in respect of the risks for which the co-assured was covered. In other words, the subrogation waiver clause simply followed the scope of the co-insurance, and accordingly gave no additional protection.[71] Again, if the third party was not a co-assured but the insurance was for its benefit under the *Gunvor* principle, the subrogation waiver clause would not be necessary because the insurers would have no right of subrogation in any event. A subrogation waiver clause thus only mattered where the third party was neither a co-assured nor a beneficiary of the policy, but that was the very situation in which the third party could not rely upon the subrogation waiver clause. There was no case in which an assured sought injunctive relief against the insurers to prevent breach, nor was there ever any attempt to claim damages.[72] It was suggested in *The Surf City*,[73] a case in which the Bulk Oil Clauses 1962 stated that there would be no subrogation right against a cargo being carried by an affiliated or a subsidiary company, that the equitable nature of subrogation precluded an insurer from exercising

[71] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC).

[72] Damages for the assured in such a case would be purely nominal, as the assured would not be able to establish any loss to itself and the assured would not be able to recover the third party's loss.

[73] *The Surf City* [1995] 2 Lloyd's Rep 242 (QB).

subrogation rights in breach of a promise to the assured not to do so,[74] but that was too slender an authority to give comfort.

The 1999 Act, while giving a third party the right to rely upon a contract term for its benefit, does not give any different result. The problem is once again s 1(2), which permits third party reliance only if that was the intention of the parties to the insurance contract. In the absence of co-insurance or conferral of the benefits of the policy, that is unlikely to be the case.[75] A subrogation waiver clause is, therefore, almost certainly of no actual value.

---

[74] Canadian and Australian cases came to the same conclusion: *Fraser River Pile & Dredge Ltd v Can-Drive Services Ltd* (1997) 98 BCAC 138; *Woodside Petroleum Development Pty Ltd v H&R-E&W Pty Ltd* (1999) 20 WAR 380.

[75] That was the reasoning in *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC).