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CO-INSURED'S SUBROGATION IMMUNITY – HOW TO EXPRESS AND WHAT TO EXPRESS IN THE UNDERLYING CONTRACT

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Co-insured's subrogation immunity – how to express and what to express in the underlying contract

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ABSTRACT

Co-insurance is common in the construction industry. However, as the case law illuminates clearly, it has caused significant complexities and perhaps surprising outcomes for the defendant co-insureds. Whilst the law appears by no means to be clear and certain, it is suggested that the balance is shifting towards the underlying contract in which the parties' intention and authority would be found firstly as to the identity of the parties to be co-insured and secondly the scope of the cover to be obtained under the co-insurance policy. The terms of the insurance contract will then be read together with the underlying contract. It is essential that the details of what the parties meant to agree in the underlying contract are explicitly and precisely stated in the insurance contract to ensure that the insurance policy terms will not be interpreted as either ambiguous or not meant to insure the defendant at all or, if insured, not co-extensively with the other co-insured(s).

Keywords: Subrogation, subrogation immunity, co-insurance, underlying contract, definition of 'insured', co-extensive cover, exclusion of liability

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1 Introduction

The law does not allow an action between two or more insured persons under the same policy against the same risk.[1] The consequence for subrogated claims by insurers who have indemnified one such co-insured is uncertain. This issue is mainly observed in the construction industry[2] but is also a known practice in, for instance, tenancies[3] and charterparties.[4] Although the purpose of co-insurance is to keep to a minimum the difficulties that are bound to arise where several different parties are involved in constructing a project or embarked on another endeavour with a common objective,[5] co-insurance has historically given rise to some potentially complex issues,[6] insurer's subrogation recovery being at the heart of them.

In principle, it is arguable that since the insurer steps into the assured's shoes via subrogation, and the insurer cannot acquire any broader rights than the assured themselves would have, if one co-insured cannot make a claim against another, neither can the insurer. However, the matter is hardly ever as clear-cut as being a general principle of law as such. Any attempt to conclude whether the insurer is barred from recovering from a co-insured requires looking closely at (1) the meaning and scope of the underlying agreement between the parties and (2) the terms of the insurance contract.

This paper suggests that for the insurer's subrogation claim to be allowed against the guilty co-insured, it must be apparent from the express wording of the insurance contract and the underlying agreement that the party who claims to be co-insured is either not co-insured at all, or if co-insured the insurance cover is not co-extensive with the other insured party(ies). Whilst such clarity was observed in, among others, *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd,*[7] *National Oilwell (UK) Ltd v Davy Offshore Ltd*[8] and *Haberdashers'*

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1 *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35, [2017] 1 WLR 1793, [99] (Lord Sumption JSC).
2 *FM Conway Ltd v Rugby Football Union* [2023] EWCA Civ 418, [2023] Lloyd's Rep IR 336 (CA), [1].
3 *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211.
4 *The Ocean Victory* (n 1).
5 *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 WLR 1419, [14] (Lord Bingham).
6 *Conway* (n 2), [1].
7 Above, n 5.
8 [1993] 2 Lloyd's Rep 582.

Aske's Federation Trust Ltd v Lakehouse Contracts Ltd,[9] it was less evident if at all, in *FM Conway Ltd v Rugby Football Union.*[10] It is submitted that the ratio of the *Conway* case leads to more counter-arguments and questions than answers and leaves the approach of the trial judge[11] and the Court of Appeal[12] very much in doubt.

2 No subrogation claim against co-insured

Whether the insurer's subrogation action against a co-insured would be allowed has no clear answer either way. One way to examine the issue may be as follows.

Suppose that insured 1 and insured 2 are co-insured under the same policy, in which they have an interest in the entire subject matter insured. Additionally, the insurance provides cover for the same period for both, and the insurance policy terms apply for each party to the same extent. Assume also that insured 1 suffered a loss due to insured 2's negligence, and the insurer fully indemnified the loss. Any attempt by the insurer after paying the claim of insured 1 to exercise rights of subrogation against insured 2 would, in effect, involve the insurer seeking to reimburse a loss caused by a peril against which he had insured for the benefit of the very party against whom now a subrogation action is sought.[13]

Nevertheless, difficulties arise when the insurance policy under which the insurer has paid is on the property, and the claim against the co-insured is due to their liability. In such a case, the argument would follow that the policy cover is not co-extensive for all the co-insureds in the same way, and the fact that the policy did not expressly list the co-insured's negligence as an insured peril, there is no obstacle for the insurer's subrogation recovery against them. A further challenge that the defendant co-insured here may face is that the interests of each party involved in the insurance contract are different: whilst one co-insured has a proprietary

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9 [2018] EWHC 558 (TCC), [2018] Lloyd's Rep IR 382.

10 Above, n 2.

11 *Rugby Football Union v Clark Smith Partnership Ltd* [2022] EWHC 956 (TCC), [2023] Lloyd's Rep IR 315.

12 Above, n 2.

13 *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep 288 (appeal allowed on the limited grounds that on the proper construction of the relevant documents, the suppliers had not proved that the head contractors had any intention to insure the suppliers). The Court of Appeal did not consider the rest of Colman J's ruling: [1992] 2 Lloyd's Rep 578 (CA). In this paper, Colman J's judgment in the Commercial Court is referred to: see *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 613.

interest, the defendant co-insured does not, or the latter has only interest in liability. Further, the defendant may, arguably, not fall within the definition of 'insured' in the policy. This last point is classified as a matter or authority and intention[14] that there was neither an authority on the person took out the policy, nor did they intend, to insure the defendant under the policy. Whether any of these assertions would support the insurer's subrogation action against the guilty co-insured may be determined as a matter of interpretation of the contractual arrangements (underlying contract and insurance) or by an implied term in either contract.

3 Issue 1: Property or liability

In *The Yasin*,[15] Lloyd J had acknowledged that an insurer cannot normally exercise a right of subrogation against a co-insured because of ordinary rules about circuity. The judge, however, added that the 'circuity' rule would not prevent the insurer from recovering from the defendant co-insured if the policy covered the proprietary interest only, whereas the insurer's action was for liability. In other words, for subrogation to be barred, the policy must cover the defendant's liability.

The law has progressed since then. In a later case, *Petrofina (UK) Ltd v Magnaload Ltd*,[16] Lloyd J found the contrast he had drawn in *The Yasin* fallacious[17] and applied *Commonwealth Construction Co Ltd v Imperial Oil Ltd*,[18] which he said[19] had not been cited in *The Yasin*.[20] Lloyd J held that an insurer could not sue one co-insured in the name of another, whether the reason was circuity or as a matter of a general principle of law. Such a principle would apply because of the parties' common understanding that they would not pursue each other for their liabilities. Lloyd J held that the *Petrofina* case[21] was indistinguishable from the *Commonwealth Construction* case,[22] where the Supreme Court of Canada held that in the case of a building or engineering contract, where numerous different sub-contractors may be engaged, there can be no doubt about the convenience from everybody's point of view, including the insurers',

[14] *National Oilwell*, ibid.
[15] [1979] 2 Lloyd's Rep 45.
[16] [1984] QB 127.
[17] Ibid, 140.
[18] [1978] 1 SCR 317.
[19] Above n 16, 140.
[20] Above, n 15.
[21] Above, n 16.
[22] Above, n 18.

that the head contractor takes out a single policy covering loss of or damage to the entire contract works. Otherwise, each sub-contractor would be compelled to take out their own separate policy, which would mean extra paperwork, overlapping claims and cross-claims in the event of an accident. It might also lead to premiums that are so costly that the sub-contractor declines to contract. It was hence both necessary and convenient to recognise that the whole project is insured for each party, who are assumed to have agreed not to claim against each other in case of a loss to the project. The driving force in *Commonwealth*[23] and subsequently in *Petrofina*[24] seems to be the common purposes the co-insureds pursue: the completion of the construction and sparing the necessity of fighting between themselves should an accident occur involving the possible responsibility of one of them.

Many subsequent English cases reiterated that co-insurance had the obvious advantage of making it unnecessary for any investigation to be carried out into the duties owed to each other by the various parties under their respective contracts.[25] Colman J in *National Oilwell* agreed that the defendant co-insured is immune from subrogation even though the loss was caused by its negligence. It could stand in the same position as the principal assured as regards a loss caused by its own breach of contract or negligence.[26] In the words of Colman J, allowing the insurer to recover from the defendant co-insured 'would be to subject the co-assured to a liability for loss and damage caused by a peril insured for his benefit'.[27]

4 Issue 2: Insurable interest

It is clear from the *Commonwealth*[28] and *Petrofina*[29] cases that a sub-contractor engaged in contract works may insure the entire contract works and its own property. The insurer's subrogation action against such sub-contractor is, in principle, impermissible, as also set out in the abovementioned cases. These points, however, have to be supplemented with the

[23] Above, n 18.
[24] Above, n 16.
[25] *Cooperative Retail* (n 5) [14]; *National Oilwell* (n 13); *Stone Vickers Ltd* (n 13); *The Ocean Victory* (n 1) [142] (Lord Toulson).
[26] Above (n 13), 613-614.
[27] Ibid, 614.
[28] Above, n 18.
[29] Above, n 16.

insurable interest that each party must have to justify the sub-contractor's entitlement under the insurance contract, which then prevents the insurer's subrogation recovery against them.

In the case of true joint insurance, such as insurance of a jointly owned property, for instance, the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrogation is impermissible.[30] The type of co-insurance subject to this paper is technically named 'composite' insurance despite the common usage of 'joint'. In composite insurance, the interest each co-insured holds are separate: a mortgagee and mortgagor are both interested in the mortgaged ship, but each interest can clearly be separated.

In major construction projects, contractors' risks insurance covers physical loss and damage to the works and materials on site caused by the risks provided by the policy taken out in a composite form.[31] Many authorities acknowledged and accepted that[32] when such a policy is taken out by, say, a head contractor for the benefit of the contractor and the sub-contractors, each has a pervasive interest that relates to the entire property, albeit from different angles. The contractual arrangement that opens the doors of the job site to them recognises an insurable interest in all contractors.[33]

An analogy between a bailee, which can insure goods in its custody, and a head contractor insuring the entire project (the work) for the benefit of the contracting parties appears to have persuaded the authorities that such pervasive interest applies to the contracting parties involved in the project. The bailee possesses the goods under the contract with the owner and is responsible for the goods, which entails the possibility of liability. Therefore, it can insure and recover the entire value held in trust for the owner, the amount attributable to their interest.[34] Although the sub-contractor may not be given the possession of the entire work, it may also be liable to the property owners because of the terms of the sub-contract.[35]

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30 *Petrofina (UK) Ltd* (n 16) 139; *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd* [2014] EWCA Civ 1464, [2015] Lloyd's Rep IR 95.

31 *Cooperative Retail* (n 5) [14] (Lord Hope).

32 *Commonwealth Construction* (n 18), *Petrofina* (n 16); *National Oilwell* (n 13); *Stone Vickers* (n 13); *Cooperative Retail* (n 5).

33 *Petrofina* (n 16) 139; *Rathbone Brothers Plc* (n 30), [41] (Elias LJ).

34 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 El & Bl 870; *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] AC 45 (HL).

35 *National Oilwell* (n 13); *Stone Vickers Ltd* (n 13).

The determining question is if a sub-contractor who, for instance, supplies a part to be installed to the work, might be materially adversely affected by loss of or damage to the work by reason of the incidence of any of the perils insured against by the policy in question.[36] If the answer is in the affirmative, they have sufficient interest in the whole contract works to be included as co-insured under the protection of the head contractor's policy.[37] They can recover the whole of the loss insured, holding the excess over their own interest in trust for the others.[38] This is also due to the commercial need and convenience of avoiding liability debates between the parties involved in the construction.

It should be noted that the scope of the insurance cover may not be co-extensive amongst several co-insureds. Generally, co-insurance cover is taken out because of an agreement to that effect in an underlying contract between the parties. However, X, on behalf of himself and Y, may make a contract with A whereby the rights and obligations between Y and A will not be co-extensive with those between X and A.[39] Hence, the insurers might agree to co-insure parties on terms which differ from each other so that one party may have less extensive coverage than another co-insured under the same policy.[40] The policy is to be read together with the underlying contract to find out firstly whether the party who alleges to be co-insured is insured under the policy and, secondly, whether the insurance provides a co-extensive cover for all the co-insureds. If the policy contains an express subrogation waiver, depending on its wording, the abovementioned two issues would also conclude whether the defendant co-insured comes under the scope of the express subrogation waiver.

The leading case on the matter is *National Oilwell (UK) Ltd v Davy Offshore Ltd*,[41] in which National Oilwell (UK) Ltd (NOW) agreed to supply a subsea wellhead completion system to be used as part of a floating oil production facility which Davy Offshore Ltd (DOL) was constructing for use on the Emerald Field in the North Sea. The dispute arose when NOW claimed against DOL the amount of certain unpaid invoices for work done and equipment delivered by NOW. In its counterclaim, DOL argued that NOW had delivered defective parts

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36 *Stone Vickers*, ibid.
37 Ibid.
38 *Petrofina (UK) Ltd* (n 16)*; Commonwealth Construction* (n 18).
39 *New Zealand Shipping Co v AM Satterthwaite & Co (The Eurymedon)* [1975] AC 154 (PC).
40 *National Oilwell* (n 13).
41 Ibid.

and claimed damages exceeding NOW's claim. In response, NOW argued that no claim could be brought against them given that DOL's loss was indemnified under the Builders All Risks policy to which NOW was also a party.

Colman J assumed that NOW, in breach of the agreement, delivered equipment late and that parts were defective. If NOW were insured under the policy, they were entitled to recover for the losses claimed by DOL.

NOW was a party to the insurance contract, but the critical question was the extent to which it was co-assured. This was found in cl 14.2, which provided: 'The Purchaser shall on behalf of and in the joint names of the Purchaser and … all sub-contractors insure on an "All Risks" basis the Work and materials in the course of manufacture until the time of delivery...'

The cover provided to NOW was, therefore, limited in scope to the period of time before delivery to DOL of the item of equipment in relation to which the subrogated claim was advanced. Under cl 14.3(ii) of the agreement, NOW was obliged to procure general third-party insurance covering NOW's liabilities up to US$1m. Colman J's interpretation was that such loss and damage resulting in NOW's liability could only be occasioned after NOW delivered equipment to DOL. This meant that NOW was covered under DOL's policy as a co-insured until the time of delivery of each item comprised in the work and under its own liability policy thereafter.[42] Nothing in the agreement itself granted any broader authority to DOL. Nor did anything pass between the parties during the pre-contractual negotiations which could amount to the giving by NOW to DOL of authority to effect cover of the width NOW contended for.[43] Further, under the contract between DOL and NOW, the risk in the property in question passed to DOL upon delivery so that DOL's obligation to procure insurance cover up to the delivery of each item would be commercially consistent with the passing of risk and property in the equipment.[44]

[42] Ibid, 598.
[43] Ibid.
[44] Ibid.

5 Issue 3: Intention and authority

The insured may make an insurance contract, or it may be purported to be made on their behalf.[45] The person for whom the agent professes to act must be ascertainable at the time. It is unnecessary that he should be named, but there must be such a description of him as it shall amount to a reasonable designation of the person intended to be bound by the contract.[46] Where a contract of insurance is expressed to insure a named insured together with a class of others unnamed for their respective rights and interests, someone who qualifies as a member of that class can sue on the policy.

However, the definition of 'insured', on its face, is not conclusive in stating whether the defendant is a co-insured. The governing factor in determining the person or class of persons who came within such a clause or is entitled to ratify and take advantage of the contract contained in it is the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he did so.[47] Such intention may be detected from the communications between the parties involved, from the language of the policy and the language of the underlying contract.

In the *National Oilwell* case, the policy described 'insured' as: 'Davy Corporation plc and/or Subsidiary and/or Associated Companies and/or Sub-Contractors of whatever tier ...'. The 'Other Assureds' were '… person or party (including but not limited to contractors and/or sub-contractors and/or suppliers) with whom the Assured(s) … have entered into agreement(s) and/or contract(s) in connection with the subject matters of this Insurance …'.

Colman J rejected the argument that 'all subcontractors' referred to all DOL's and NOW's sub-contractors.[48] It was, however, common ground that the definition of 'Other Assureds' was in terms wide enough to cover NOW, who was a supplier to DOL of the equipment under the

[45] *Watson v Swann* (1862) 11 CB (NS) 756.

[46] A policy may be ratified by the person who was either not named or ascertained in the policy but was contemplated at the time the policy was made. A stranger who had given the agent no orders to effect a policy for them clearly cannot ratify the contract: *Watson*, ibid; *Keighley, Maxsted & Co v Durant* [1901] AC 240 (HL).

[47] *Boston Fruit Co v British and Foreign Marine Insurance Co* [1906] AC 336 (HL), 343.

[48] Above, n 13, 597.

sub-contract and was a company with whom DOL had made a contract in connection with the subject matter insured.

The determining question is whether that principal assured was contracting with the authority of another and, if so, whether it was, in effecting the insurance, acting to give effect to that authority.[49] The burden of proof of intention is on the person who alleges to be insured and, therefore, benefits from the insurance.[50] The claimant charterer failed to prove such an intention in *Boston Fruit Co v British and Foreign Marine Insurance Co*,[51] in which the insurance obtained by the shipowner was on the ship, 'as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does may or shall appertain in part or in all'. It was held that neither in the charterparty nor elsewhere was there any sufficient evidence to justify the inference that the policy effected by the owners was intended to be effected on behalf of the charterers.

The *Boston* case applied in *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd*,[52] in which AS agreed to build an oceanographic research vessel and sub-contracted with SV for the supply of the propeller. The marine insurance taken out by AS included 'Sub-Contractors as additional co-assured for their respective rights and interests. Without recourse against any Co-assured.' During sea trials, the propeller supplied by SV made a noise, which resulted in certain modifications being made to the propeller. AS claimed against SV for several costs, including the cost of modifications to the propeller and the re-running of the sea trials. SV argued they were a co-insured in the AS marine policies. In giving the only reasoned judgment of the Court of Appeal, Parker LJ held it was clear from the *Boston*[53] case that for the purposes of ascertaining intention, one may look not only at the policy documents but also at the contract between the assured and the alleged co-assured. Lack of communication between AS and SV prior to or after the policy, the fact that the sub-contract did not require AS to insure in the joint names of themselves and SV and the main contract did not state that SV would be

[49] *Watson* (n 40); *National Oilwell* (n 13), 596; *Graham Joint Stock Shipping Co v Merchants Marine Insurance Co (The Ioanna) (No.1)* [1924] AC 294 (HL).
[50] *The Ioanna*, ibid.
[51] [1906] AC 336 (HL).
[52] Above, n 13.
[53] Above, n 51.

one of the sub-contractors instead indicated that SV was not meant to be co-insured under the AS' policy.

Parker LJ added that the words 'agreed include Associated and Subsidiary Companies and/or Sub-contractors as additional co-assured for their respective interests' could not mean that all sub-contractors unidentified and incapable of identification at the time were automatically covered. The wording meant that declarations naming or properly describing sub-contractors would be accepted.[54]

A concise summary of the relevant authorities was provided by Colman J[55] in *National Oilwell* that:

> (1) Where at the time when the contract of insurance was made the principal assured or other contracting party had express or implied actual authority to enter into that contract so as to bind some other party as co-assured and intended so to bind that party, the latter may sue on the policy as the undisclosed principal and co-assured regardless of whether the policy described a class of co-assured of which he was or became a member.
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> (2) Where at the time when the contract of insurance was made, the principal assured or other contracting party had no actual authority to bind the other party to the contract of insurance, but the policy is expressed to insure not only the principal assured but also a class of others who are not identified in that policy, a party who at the time when the policy was effected could have been ascertained to qualify as a member of that class can ratify and sue on the policy as co-assured if at that time it was intended by the principal assured or other contracting party to create privity of contract with the insurers on behalf of that particular party.
>
> (3) Evidence as to whether, in any particular case, the principal assured or other contracting party did have the requisite intention may be provided by the terms of the policy itself, by the terms of any contract between the principal assured or other

[54] Above, n 13, 584.
[55] Ibid, 596-597.

> contracting party and the alleged co-assured or by any other admissible material showing what was subjectively intended by the principal assured.

Crucially, Colman J explained that the purpose of ascertaining DOL's subjective intention was not to construe the policy but to ascertain whether NOW became a party to it to the full extent of its scope of cover or only to the limited extent of its scope of cover. Whether one who qualifies as a member of a specified class of co-assured can take the benefit of the policy was a matter to which the subjective intention of the principal assured was directly material. In the *Conway* case,[56] it is observed that Colman J's expressed view in *National Oilwell*[57] was how the trial judge attempted to address the issue. Counsel for Conway asserted on appeal that 'the judge determined the first preliminary issue by reference to a test that is irrelevant in the present context' and 'the judge's incorrect characterisation and analysis of the question he had to address permeates the entire judgment'.[58] The issue in the *Conway* case was identified as authority and intention. On that basis, Conway was found not to have been insured under the all risks insurance policy to the extent the loss was caused by its defective performance of the contract. It is naturally open to the courts to discuss if the person who alleges to be co-insured is insured under the policy. However, based on the facts and some of the courts' findings, as their ratios develop, there appear to be strong grounds for counsel's arguments on appeal. Nevertheless, Coulson LJ, who gave the only reasoned judgment at the Court of Appeal, found Eyre J's rulings 'unassailable'.[59]

Before examining the *Conway* case in detail, it is necessary to explain the judicial justifications for finding the insurer's subrogation recovery against the defendant co-insured impermissible.

6 Justification for the bar

In *Simpson & Co v Thompson*,[60] two sister ships collided. The assured whom the insurer indemnified for the damage to the innocent ship also owned the guilty ship.[61] The court ruled that, as a basic principle, subrogation could not be obtained against the insured himself. As

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[56] Above, n 2.
[57] Above, n 13.
[58] Above, n 2, [59].
[59] Ibid, [54].
[60] (1877) 3 App Cas 279.
[61] *Petrofina* (n 16)*,* 139; *Simpson*, ibid.

discussed in relation to insurable interest above, true joint insurance regards the co-insureds as also one. In composite insurance, however, the interests are severable, yet due to the special contractual relationship and much-needed commercial convenience, it is recognised that each co-insured has an interest in the entire project. The rule itself is not in doubt that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other with respect to an insured loss.[62] Subsequently, the insurer's subrogation action against one of the co-insureds for the loss suffered against another is denied. However, a precise and unanimous reason for such a bar for the insurer has not been formulated.[63] However, there appears to be consensus that[64] the justification for subrogation immunity is not circuity.[65] The doctrine seems to create more controversy than solutions as it opens the door for an argument that the co-insured was not insured for its liability, whereas the subject matter insured is property.

The outcome of numerous cases in which views were expressed either as ratio decidendi or obiter is that a solution can be found in one of the following three ways: by interpretation of the underlying contract, by implying a term either in the insurance or in the underlying contract or by the combination of two interacting with each other.[66]

Those favouring an implied term found it necessary to give effect the mutual intention of the insurers, and the principal assured that as to the risk covered by the policy, there would be no right of recovery against the other co-insureds who might have caused the loss.[67] Exercising subrogation rights under the circumstances would be completely inconsistent with the insurers' obligation to the co-insured under the policy. Consequently, the purported exercise by insurers of rights of subrogation against the co-assured would be in breach of such a term

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62 *Cooperative Retail Services* (n 5), [7] (Lord Bingham).

63 *Rathbone Brothers Plc* (n 30), [68] (Elias LJ).

64 Lloyd J said in *Petrofina* (n 16), 140: 'Whatever be the reason why an insurer cannot sue one co-insured in the name of another, and I am still inclined to think that the reason is circuity, it seems to me now that it must apply equally in every case of bailment, whether it is the goods which the bailee has insured, or his liability in respect of the goods.'

65 See *Cooperative Retail Services* (n 5), [65]. This was obiter given that the underlying contractual regime, as the House of Lords found, was determining whether the parties could claim from each other, which impacted the insurer's subrogation action.

66 See *Palliser Ltd v Fate Ltd (In Liquidation)* [2019] EWHC 43 (QB), [2019] Lloyd's Rep IR 341 for a useful summary of the different approaches expressed by the judiciary.

67 *Stone Vickers* (n 30); *National Oilwell* (n 13) 614.

and would accordingly provide the co-insured with a defence to the subrogated claim.[68] Colman J stated that Lord Cairn's reasoning in *Simpson and Co v Thompson*[69] would be a bar for the insurer's subrogation if the owner of the guilty ship had been a co-assured under the policy on the innocent ship for the same perils. The guilty co-assured was as much assured with respect to the relevant perils as if he were the same person as the owner of the innocent ship.[70]

The insurer cannot claim any greater rights than the insured if the ground for asserting that the underlying contract between the insured and the third party denudes subrogation of any substance and thus precludes its exercise.[71] In the ordinary way, and absent any contractual exemption, limitation, or statutory immunity, a party who breaches a contract with or commits a tortious act against another is liable to that other.[72] It is, however, open to the contracting parties, subject to certain statutory constraints not relevant for present purposes, to vary by agreement the ordinary rules which impose legal liability for breaches of contract or tortious acts on those responsible for committing them.[73] On the proper construction of the underlying contract, it may be concluded that the co-insured parties would have either no rights to claim their losses against each other or only have a right to the extent that there is a shortfall following receipt of the insurance money.[74] Such an outcome may be reached through the underlying contract provision, which imposed on one party to take out a joint names insurance covering the other contracting parties. By agreeing to be co-insured, the parties envisaged that the insurer would bear the primary liability for the loss in question. If liable at all, the co-insureds would be the secondary source of indemnity. This interpretation may operate with the assistance of an implied term in the underlying contract to the effect that co-insureds cannot sue one another for damage in respect of which they are jointly insured.[75] As a result, there is no right of recovery between the contracting parties to pass on

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68 Ibid.
69 Above, n 51.
70 Above, n 13.
71 *Rathbone Brothers Plc* (n 25) [67](Elias LJ).
72 *Cooperative Retail Services* (n 5) [3] (Lord Bingham).
73 Ibid, [4].
74 Ibid. See also *Rathbone Brothers Plc* (n 25) [67] (Elias LJ).
75 *Tyco Fire & Integrated Solutions (UK) Ltd (Formerly Wormald Ansul (UK) Ltd) v Rolls-Royce Motor Cars Ltd (Formerly Hireus Ltd)* [2008] EWCA Civ 286, [2008] Lloyd's Rep IR 617, [75]-[76].

to the insurer. This is not defeating the right to subrogation itself; rather, it is leaving that right empty of any content in the particular case.[76]

Contractual provisions vary, and every contract must be interpreted according to its terms. As held in *National Oilwell*,[77] the co-insurance provision may envisage different levels of cover for different co-insureds.

Two issues are distinct from each other: whether the defendant is a co-insured and whether the underlying policy term or the contract of insurance provided a more limited cover to the defendant co-insured than the co-insured argues. These two might also overlap. However, they are the matters to be discussed by referring to, reading, and examining the terms of the underlying contract and the insurance. Unfortunately, in the *Conway* case,[78] the courts' reasoning appears neither here nor there. First, it is not obvious if Eyre J admitted that Conway fell within the definition of 'insured' in the all risks insurance, whereas Coulson LJ seems to suggest that it certainly is. Secondly, the matter was identified as one of authority and intention, but not an interpretation of contractual terms, yet Lord Toulson was cited with approval where his Lordship stated that the issue was to be resolved by construing the underlying contract. None of the clauses in the underlying contract were addressed or construed. The conclusion reached by Eyre J and approved by Coulson LJ was that the RFU neither had the authority nor intention to insure Conway for the loss claimed against Conway. The precise reason for the conclusion, however, was not articulated.

7 *FM Conway v Rugby Football Union*

In 2012,[79] the Rugby Football Union (RFU) undertook substantial works of demolition, construction, and upgrading (the project) to prepare a stadium for the World Cup in 2015. This project concerned the installation of high-voltage power cables in buried ductwork. The RFU engaged Clark Smith Partnership Ltd (Clark Smith) to design the ductwork and FM Conway Ltd (Conway) to install it. On 19 June 2012, the RFU sent Conway a letter (the Letter of Intent)

[76] *Rathbone Brothers Plc* (n 25) [67] (Elias LJ); [115] (Beatson LJ).
[77] Above, n 13.
[78] Above, n 2.
[79] Ibid.

which stated, 'If the Contract is concluded between us, the terms of the Contract will supersede this letter which will thereupon cease to have any further effect'.

The installation of the power cables in buried ductwork also included pulling the cables through the ductwork. Neither Conway nor Clark Smith undertook this part of the work. However, the RFU contended that there were defects in the ductwork, which caused damage to the cables when they were pulled through it. The RFU claimed against the all-risks insurers, RSA, for replacing the damaged cables and rectifying the ductwork itself. The RFU argued that the damage was caused by the defects in Clark Smith's ductwork design and deficiencies in Conway's workmanship. Clark Smith sought a contribution under the Civil Liability (Contribution) Act 1978[80] because Conway was liable to the RFU for the same damage. Conway argued that it benefited from the all risks policy obtained by the RFU to the same extent as the RFU.

Under the all risks policy that the RFU obtained, the insurer agreed to indemnify the insured 'against physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever…'. The insured property was 'Permanent works, materials…, temporary works, equipment, machinery, supplies, …and all other property used for or in connection with the Project'. The definition of property insured encompassed the damaged cables, which led to the RFU's claim against RSA.[81]

7.1 Was Conway 'insured' under the all-risks policy?

The policy defined the insured as, among others, the RFU and 'All other contractors and/or sub-contractors of any tier … Each for their respective rights and interests'.

Eyre J found that Conway was not identified as a party to the Policy. Even if it had been identified, the judge said

> Being named as an insured does not without more make a person a party to the insurance contract. A person who is named as an insured but who is not otherwise a

[80] C 47.
[81] Above, n 2, [21].

> party to the insurance contract does not become a party to the contract simply by reason of having been named in it.[82]

Eyre J held that Conway existed at the time of the policy, and its identity as an intended contractor or sub-contractor could have been ascertained at that time. However, the judge held that Conway's position could not be determined solely by reference to the policy terms. Conway was not named in the definition of 'the Insured'. The reference to 'the contractor for each Project' in sub-paragraph (b) was, according to Eyre J, ambiguous as the project was defined as being the totality of the upgrading works and as 'involving 17 Sub Projects'. The judge stated that Conway came within the scope of sub-paragraph (c) of the definition as being within the term 'all other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project insured hereunder'. Nevertheless, the judge found it impossible to identify from the terms of the policy alone whether Conway was within (b) or (c).[83]

On appeal, Coulson LJ, on the other hand, said, 'it is plain that they [Conway] fell into one or the other of those categories and were therefore capable of identification as an Insured under the policy'.[84]

However, the overall conclusion reached by both judges was that Conway was not insured for the loss claimed in the present action.

7.2 The contract between the RFU and Conway

Clause 6.2 had been amended from the standard JCT contract and provided thus under the heading 'Liability of Contractor – injury or damage to property':

> The Contractor shall be liable for and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal insofar as any such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the Works or of any obligation pursuant to clause 2.38 and to the extent the same is due to any negligence,

[82] Above, n 11, [86].
[83] Ibid, [87].
[84] Above, n 2, [20].

> breach of statutory duty, or omission or default of the Contractor or of any of the Contractor's Persons. This liability and indemnity is subject to clause 6.3 and, where Insurance Option C (Schedule 3, paragraph C1) applies, excludes loss or damage to any property required to be insured thereunder caused by a Specified Peril.

Clause 6.4 required Conway to take out and maintain insurance concerning its liability as referred to in cl 6.1 (which addressed liability for personal injury or death arising out of or in the course of the Works) and cl 6.2.

Clause 6.8 defined 'All Risks Insurance' as:

> insurance which provides cover against any physical loss or damage to the work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage …

'Joint Names Policy' was defined as:

> a policy of insurance which includes the Employer and the Contractor as composite insured and under which the insurers have no right of recourse against any person named as an insured, or, pursuant to clause 6.9, recognised as an insured thereunder.

With respect to cl 6.7 and Sched 3 Insurance, Option C was to apply. Insurance Option C had the sub-heading 'Insurance by the Employer of Existing Structures and Works in or Extensions to them', and it provided:

> C.1 The Employer shall take out and maintain a Joint Names Policy in respect of the existing structures (which from the Relevant Date shall include any Relevant Part to which clause 2-33 refers) together with the contents thereof owned by him or for which he is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils up to and including the date of issue of the Practical Completion Certificate or last Section Completion Certificate, or (if earlier) the date of termination of the Contractor's employment (whether or not the validity of that termination is contested). The Contractor shall authorise the insurers to pay all monies from such insurance to the Employer.

Option C further provided :

> C.2 The Employer shall take out end maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees) and (subject to clause 2-36) shall maintain such Joint Names Policy up to and including the date of issue of the Practical Completion Certificate or, if earlier, the date of termination of the Contractors employment (whether or not the validity of that termination is contested). The obligation to maintain the Joint Names Policy under this paragraph C.2 shall not apply in relation to any Section after the date of issue of the Section Completion Certificate for that Section.

Eyre J recognised that the project manager of the RFU, H, believed that a comprehensive project insurance policy covering all the contractors would be taken out.[85] The RFU's stadium director had told H that comprehensive ground insurance was being obtained. The intention was to obtain a reduction in the tender prices because the tenderers would not need to include the cost of insurance in their tenders. In his testimony, M, Conway's Director of Civil Engineering, confirmed that H told him that the RFU saw this as a way of saving costs and 'also avoiding issues created when one contractor claimed against another'.[86] Although Eyre J found the witnesses honest and careful, he held that the understanding of H and M was not accurately reflected either in the agreement between the RFU and Conway or in the insurance policy. The judge found it more prevailing that the parties were substantial entities dealing at arm's length; they were acting through several professionals, including solicitors and insurance brokers, and they could have made it more explicit in their contractual arrangements that the insurance indemnity would be the sole avenue for redress for damage of the kind which occurred.[87] Eyre J added[88] that although the benefit of a co-insurance in the sense Conway argued can readily be understood, it was hard to see any benefit to the RFU in

[85] Above, n 11, [95].
[86] Ibid, [102]
[87] Ibid, [110].
[88] Coulson LJ agreed: above, n 2, [57].

an arrangement that prevented it from claiming against a contractor where the latter had failed to perform properly.[89]

Although the judge held and Coulson LJ upheld that the correct approach was to examine the matter under the contract between the RFU and Conway, neither judgment interpreted the contractual wordings above. Eyre J stated, and Coulson LJ agreed that the JCT contract sets out a detailed structure for allocating risks and responsibilities.[90] However, none of such contractual clauses was assessed by either of the judges and they did so without considering the authorities deciding similar matters previously. Instead, their approach was whether Conway was insured and, if so, if the cover included the damage now RSA claims against Conway by way of recoupment. The conclusion reached by both the trial judge and the Court of Appeal was that under the Letter of Intent, the policy, the contract and the terms of Option C, the RFU was obliged to take out insurance, which gave Conway cover in respect of physical loss or damage to the work executed or to site materials. However, looking at those documents alone, insurance regarding the cost of rectifying damage caused by Conway's defective works was excluded.[91] This conclusion appears to have been reached by addressing the issue as a question of authority and intention,[92] although both judges referred to the underlying contract as a key to resolving the issue. Their method appears to be that they required an express clause in Option C demanding the RFU to effect insurance on behalf of Conway, pursuant to which Conway would be insured against the cost of rectifying damage caused by Conway's own defective work.[93]

With respect, it is submitted that the interpretation of the contract terms would have likely led to a different outcome. At this point, it is worth highlighting *Cooperative Retail Services*,[94] where the contractual terms discussed did not significantly differ from those in the *Conway* case.

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89 Above, n 11, [111].
90 Ibid, [110].
91 Ibid, [91].
92 Ibid, [85].
93 Ibid, [22].
94 Above, n 5.

7.3 Cooperative Retail Services Ltd (CRS): what does the contract provide?

Similar to cl 6.2 and 6.4 in the RFU contract mentioned above, in *Cooperative Retail Services*, the underlying contract provided that 'the contractor … shall be liable for, and shall indemnify the employer against, any loss or damage to any property in so far they arise out of or in the course of the carrying out of the works …' (cl 20.2). The contractor was required to take out and maintain insurance in respect of claims arising out of such liability. However, insurance of work was excluded from either such liability or the insurance mentioned earlier (cl 20.3). For the work, the contractor was required to take out a joint names policy for all risks insurance.

Further, in *Cooperative Retail Services*, cl 22A.4.1 stated that

> if any loss or damage affecting work executed or any part thereof or any site materials is occasioned by any one or more of the risks covered by the joint names policy, upon discovering the said loss or damage, the contractor shall forthwith give notice in writing both to the architect and to the employer of the extent, nature and location thereof.

Clause 22A.4.3 stated that 'the contractor with due diligence shall restore such work damaged, replace or repair any such site materials which have been lost or damaged'. Clause 22A.4.4 stated that

> Additionally, the contractor, for himself and for all nominated and domestic sub-contractors who are … recognised as an insured under the joint names policy … shall authorise the insurers to pay all monies from such insurance in respect of the loss or damage referred to in clause 22A.4.1 to the employer.

The sub-contract between the contractor and the sub-contractor provided that

> the sub-contractor shall be liable for and indemnify the contractor against any expense, liability, loss, claim or proceedings in respect of any loss, injury or damage whatsoever to any property real or personal in so far as such loss, injury or damage arises out of or in the course of or by reason of the carrying out of the sub-contract works. (Clause 6.3)

Clause 6.4 went on to say that such liability and indemnity did not include 'any damage to works by one or more of the specified perils, whether caused by negligence, breach of

statutory duty, omission or default of the sub-contractor …' Clause 8.A.1 provided that 'the contractor shall ensure that the sub-contractor is either recognised as an insured under the joint names policy referred to in the main contract or the insurers waive any right of subrogation they may have against the sub-contractor'. The main and sub-contracts were supplemented by the warranty by which the sub-contractor warranted that it had exercised and would exercise all reasonable care and skill in the design of the sub-contract works.

In the Court of Appeal in *Cooperative Retail Service*, Brooke LJ held[95] that the main contract and the sub-contract meant that if a fire occurred, instead of litigating the matter between themselves, they should look to the joint names insurance policy to provide the fund for the cost of restoring and repairing the fire damage. They would bear other losses themselves, for which they were required to take out their own insurance. Notably, the House of Lords[96] held that the contractor could not be liable to the employer as long as the contractual scheme had worked itself out.

The key question was, 'what does the contract provide?' Lord Hope of Craighead said:

> There is no doubt that both the main contract and the sub-contract contain provisions which have the effect in the clearest terms of excluding liability for damage to the works, work executed and site materials due to the negligence, breach of statutory duty, omission or default of the contractor and the sub-contractor respectively: see clause 20.3 of the main contract and clause 6.4 of the sub-contract.[97]

More importantly, Lord Hope added

> It is also plain that the purpose of the all risks insurance which the contractor is required to take out and maintain in joint names of the employer, the contractor and the sub-contractors is to provide funds for the reinstatement of the works in the event of their being damaged up to and including the date when the certificate of practical completion is issued, whatever the cause of the fire.

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95 *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd* [2001] Lloyd's Rep IR 122 (CA), [43-45]. The House of Lords agreed (above, n 5).

96 Ibid.

97 Ibid, [46].

Further, cl 22A.4 dealt with what was to happen in the event of loss or damage affecting work executed or any site materials occasioned by any one or more of the risks covered by the joint names policy. Clause 22A.4.3 requires the sub-contractor, with due diligence, to restore the work that has been damaged by the fire, to replace or repair any site materials that have been lost or damaged by it and to proceed with the carrying out and completion of the works. Clause 22A.4.4 requires them to authorise the insurers to pay all monies that are payable from the insurance in respect of the fire to the employer, who is required in his turn to use this money to pay the contractor and the associated professional fees for the restoration work.

Lord Hope[98] concluded that

> The position therefore is that there is no liability to pay compensation on either side. The employer has no claim for compensation against the contractor. All he can do is insist that the contractor must proceed with due diligence to carry out the reinstatement work and must authorise the release to him of the insurance monies. The contractor has no claim for compensation against the employer. All he can do is insist that the employer must use the insurance monies for payment of the cost of carrying out the reinstatement work. It makes no difference whether the fire was caused by the negligence of the contractor or one of his sub-contractors or of the employer or of some third party for whose acts or omissions neither of the parties to the contract is responsible. The ordinary rules for the payment of compensation for negligence and for breach of contract have been eliminated. Whatever the cause of the fire, the obligation of the contractor is to carry out such work as is needed to put the matter right. His obligation is to restore the fire damage at his own cost, except in so far as the cost of doing so is met by sums recovered under the joint names insurance policy.

In *Cooperative Retail Services*, the meaning and effect of the main contract was to exclude the contractor's liability to the employer and the subcontractor's liability to the contractor for loss and damage caused by the fire in so far as this was due to its breach of contract. The insuring provisions in the underlying contracts distinguish 'insurance in respect of the Works and Project' on the one hand and 'other insurance' on the other. A similar structure is observed in

[98] Ibid, [48].

the contract between the RFU and Conway. Clause 6.2 sets out the circumstances under which Conway would be liable to the RFU, and cl 6.4 requires Conway to take out insurance to cover such liability. However, the liability referred to in cl 6.2 excludes liability to the insured property under the all risks policy. The RFU was required to take out a joint names all risks policy, which would be a separate cover to the one demanded from Conway under cl 6.4. Under cl 6.2, cl 6.4, cl 20.2, and cl 20.4, Conway was required to take out third-party liability insurance for the loss caused by Conway to the property other than the work but caused in the course of the work. This was one of the matters at the heart of *Cooperative Retail* Services, and one would expect the terms of the underlying contract between Conway and the RFU to be assessed from such a perspective. Nevertheless, Eyre J refused to examine *Cooperative Retail Services'* relevance as the judge found that in that case, 'it was common ground that the effect of the co-insurance was that the claimant's insurers could not exercise rights of subrogation to bring a claim against the contractors because the building owner and the contractors 'were all insured against the same risk under the same insurance policy'.

It is submitted that the contractual arrangements between the RFU and Conway[99] reflected the same considerations applied in the *Cooperative Retail Services* case. Nonetheless, Eyre J held that the terms of the Letter of Intent and the Contract make no reference to such an arrangement and are indicative of a very different arrangement, but the judge neither articulated the details of those provisions nor referred to any specific contractual clauses addressing such alternative measures.[100]

Further, if, as held by Eyre J and Coulson LJ, the parties to the underlying contract intended and agreed that Conway's liability to the RFU would be excluded from the joint names insurance, the judgments do not mention what clause exactly addressed such liability. Rix LJ[101] previously noted that, in *Cooperative Retail Services*, Lord Hope was

> contemplating that the provision for joint names insurance under a construction contract between an employer and a contractor would give rise to an implied term that neither party could make claims against the other in respect to damage caused to the

[99] Above, n 2.
[100] Ibid, [125].
[101] Above, n 68, [18].

> contract works covered by the risks against which the policy insured both parties. Presumably, however, the position might be different if on the express terms of their contract, one party might be liable to indemnify the other for its breach, default or negligence.

An implied term cannot withstand express language to the contrary.[102] Indeed, such an implied term was rejected in *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd*,[103] where the contractual scheme was similar to the one between the RFU and Conway[104] but with two significant differences. Clause 6.3 provided that the sub-contractor 'shall be responsible for the sub-contract works and any loss or damage to all work executed…' Under cl 6.4, 'the sub-contractor shall take out and maintain suitable all risks insurance in respect of any loss or damage to all work executed and materials and goods for use in connection with the sub-contract works for their full reinstatement value…' Although the sub-contractor fell within the definition of 'Insured' in the contractors' Project Insurance Policy, an implied term in the underlying contract to the effect denuding the insurer's subrogation rights could not withstand against the express term of cl 6, which was regarded as *the central crux*[105] of the case by Fraser J.[106]

On the other hand, in *Conway*,[107] the employer was required to take out an all risks insurance in joint names policy, and Conway was identifiable as the 'Insured' in the policy obtained by the RFU. Although the *Haberdasher's*[108] case was referred to, neither Eyre J nor Coulson LJ mentioned the point above, namely the central crux of *Haberdasher's.*[109]

If Conway's liability was not insured as Eyre J and Coulson LJ decided, the question then arises 'what was the objective of purchasing a joint names policy by the RFU under which Conway was identifiable as a co-insured'? If the policy did not insure Conway's interest in the way argued in the case, what other interest(s) of Conway exactly was meant to be insured under

[102] Ibid, [77].
[103] Above, n 9.
[104] Above, n 2.
[105] Emphasis added.
[106] Above, n 9, [69].
[107] Above, n 2.
[108] Above, n 9.
[109] Ibid.

the policy? No mention of these points is to be found in the *Conway* case.[110] On the other hand, all could be answered if the contractual clauses had been assessed considering the ratio decidendi of many authorities, including the *Petrofina*[111] and *Commonwealth*[112] cases.

Further, the court's ruling in *Conway* is not in line with *The Ocean Victory*,[113] which was regarded by Coulson LJ as the leading case[114] on the issue.[115] In *The Ocean Victory*, the vessel was demise chartered by the owner to OLH, who then time chartered her to Sinochart, who sub-chartered the vessel to Daiichi. The ship grounded in Japan, and the shipowner's claim was paid by the hull insurers who, as assignees of demise charterers, brought a claim against Sinochart, which Sinochart passed on to Daiichi, for damages for breach of the charterers' undertaking to trade only between safe ports. The UK Supreme Court held that there was no breach of the safe port warranty in this case. Therefore, it was strictly unnecessary for the court to decide whether, if there had been a breach, there would have been any liability in damages. However, the question is of some general importance,[116] and the Supreme Court discussed in great detail whether the charterers would have been immune from the insurer's subrogation action had there been a breach. Lord Clarke of Stone-cum-Ebony JSC and Lord Sumption JSC disagreed with the majority view that the insurer's subrogation action was barred due to the co-insurance provision in the demise charterparty. In reference to *Cooperative Retail Services* and *Mark Rowlands Ltd v Berni Inns Ltd*,[117] Lord Mance JSC held that the subrogation immunity in this context is now best viewed as resting on the natural interpretation of or implication from the contractual arrangements giving rise to co-insurance.[118] The insurer's claim here would be for the charter's breach of the safe port warranty, namely, breach of a contractual term and, therefore, contractual liability. This did not prevent Lord Mance from deciding in the way his Lordship did. He emphasised that hull

[110] Above, n 2 and n 11.
[111] Above, n 16.
[112] Above, n 18.
[113] Above, n 1.
[114] For further consideration of the Supreme Court's ruling in *The Ocean Victory*, see R Aikens, 'Safe Port Undertakings, "Abnormal Occurrences" and Insurance Clauses in Demise Charters' [2017] LMCLQ 468, 472-473; E Blackburn and A Dinsmore, 'Joint Insurance Issues in *The Ocean Victory*: The Roads not Taken' [2018] LMCLQ 50.
[115] Above, n 2, [48].
[116] Above, n 1 [129] (Lord Sumption JSC).
[117] Above, n 3. In that case, it was held that the loss was to be paid by the insurers, and in that event, the landlord was to have no further claim against the tenants for damages in negligence.
[118] Above, n 1, [114].

insurance covers losses whether or not it is due to the fault of any party.[119] In line with the *Petrofina*[120] and *Commonwealth*[121] cases, Lord Mance held both the ordinary marine and the war risks insurance were property insurances on the vessel's hull. Payments made under them went to the shipowners or their mortgagees and charterers for their respective interests in the hull. The implied understanding arising from the co-insurance scheme was that there would be no liability for the hull value in the event of a total loss, whether or not the insured value had yet been disbursed.[122]

Lord Toulson JSC, whose judgment was referred to with approval by Coulson LJ[123] and Eyre J,[124] recognised the critical question of whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This was a matter of construction.[125] The joint insurance provision in the underlying contract dealt with the consequences of loss or damage to the vessel, regardless of whether it resulted from negligence or other fault of the demise charterer (or a sub-charterer). The commercial purpose of maintaining joint insurance in such circumstances was to provide a fund to make good the loss and avoid litigation between them or bringing a subrogation claim in the name of one against the other.

7.4 The RFU's all risks insurance policy

Eyre J stated that the principle that an insurer cannot bring a subrogated claim against a co-insured of the party to whose rights the insurer is subrogated operates as if a waiver of subrogation were to that extent implied into the insurance policy between the insurer and the co-insured.[126] Not surprisingly, however, none of the insurance provisions – except for the waiver of subrogation – were discussed as Coulson LJ said the matter was not a 'question of construing the Policy; instead, it was a question of authority and intention'.[127]

[119] Ibid.
[120] Above, n 16.
[121] Above, n 18.
[122] Above, n 1, [122].
[123] Above, n 2, [49].
[124] Above, n 11, [60].
[125] Above, n 1, [139].
[126] Above, n 11, [79].
[127] Above, n 2, [85].

The insurance provisions, however, would support Conway's arguments that 'The General Memoranda' included the following Multiple Insureds' Clause:

> It is noted and agreed that if the Insured described in the Risk Details comprises more than one insured party each operating as a separate and distinct entity then (save as provided in this Multiple Insureds' Clause) cover hereunder shall apply in the same manner and to the same extent as if individual Contracts of Insurance had been issued to each such insured party provided that the total liability of the Insurers to all of the insured parties collectively shall not exceed the Sums Insured and Limits of Indemnity …
>
> It is further understood that the insured parties shall at all times preserve the various contractual rights and agreements entered into by the insured parties and the contractual remedies of such parties in the event of loss or damage.
>
> Insurers hereby agree to waive all rights of subrogation which they may have or acquire against any insured party…

General Condition 9, 'Primary Insurance', stated: 'It is expressly understood and agreed that this Contract of Insurance provides primary cover for the Insured …'

It is submitted that the above point also supports Conway's counsel's argument on appeal that the test adopted by the judge was irrelevant and that the characterisation and analysis of the question were incorrect. Eyre J said:[128]

> For me to find that the Policy was taken out on the basis alleged by Conway and with the intention and authority it now asserts there would need to be compelling evidence to counter the inferences from the natural reading of the Letter of Intent and the Contract. There is no such evidence.

8 Express waiver clause

It is submitted that the underlying contract and all risks insurance were designed in a way that where Conway was to be insured with the RFU, the damage to the work would be covered by

[128] Above, n 11, [125].

the all risks insurers, who would be barred from recouping the loss from Conway. This was set out by the contract terms between the RFU and Conway and was also reflected in and reiterated by the insurance terms. For the judges in the *Conway* case, only one provision of the insurance was relevant: the insurer's express waiver of subrogation. In the all risks policy, Clause 1(f) of the General Memoranda was as follows: '(f) Insurers hereby agree to waive all rights of subrogation which they may have or acquire against any insured party ...'

Eyre J stated that the waiver would apply to Conway only if and to the extent that the RFU and Conway were co-insured by the same insurer in respect of the same loss to the same extent.[129] Since the judge ruled that Conway was not co-insured with the RFU to the extent of the losses currently in issue, clause 1(f) did not operate to protect Conway.

In the Court of Appeal, Coulson LJ held that so long as Conway was not insured under the RFU's all risks policy, barring the insurer's subrogation rights, would be, in the circumstances, granting Conway insurance protection by the back door.

Unfortunately, it was also found irrelevant that cl 6.9 of the underlying contract provided[130] that the RFU was to ensure that the Joint Names Policy referred to in paragraph C.2 of Schedule 3 included 'a waiver by the relevant insurers of any right of subrogation which they may have against [Conway] in respect of loss or damage by the Specified Perils to the Works or relevant Section, work executed, and Site Materials …'

The following passage, extracted from Eyre J's judgment, states that

> If RSA were Conway's insurer in respect of these losses then the right being exercised would be one of subrogation against Conway. However, that is not the position and the rights which RSA is exercising against Conway are not rights of subrogation against Conway. Instead the right which RSA is exercising against Conway is the RFU's right to compensation for the loss caused to the RFU by Conway. RSA has acquired by virtue of its right of subrogation *against* the RFU the right to bring proceedings for that loss against Conway in the name of the RFU but the claim being made in that way is not a

[129] Ibid, [131].
[130] Under the heading 'Sub-contractors – Specified Perils cover under Joint Names All Risks Policies'.

> claim arising out of RSA's right of subrogation *against* Conway and so is unaffected by the waiver of such rights.[131]

With respect, it is unclear what the judge meant in the above paragraph.

In the *National Oilwell* case,[132] Colman J similarly held that the waiver was confined to claims for losses which were insured for the benefit of the party claimed against under the policy. The clause before Colman J was worded, 'Underwriters agree to waive rights of subrogation against any Assured and any person, company or corporation whose interests are covered by this policy'. Importantly, in *National Oilwell*,[133] the underlying policy terms made it clear that the insurance for the sub-contractors would be limited to the time of the propeller's delivery. The fact that the subrogation waiver operated until that period also made sense within the contractual arrangements. Eyre J's holding is, therefore, in principle, not wrong. However, the issue in *Conway*[134] is the incorrect characterisation of the matter, which permeated throughout the judgment.

9 Insurer's insolvency

The insurer's insolvency was not discussed in *Conway.*[135] It is, however, relevant to address the issue given that this was one of the reasons for Lord Sumption JSC's rejection of subrogation immunity in *The Ocean Victory*,[136] and as will be addressed below, it has also been referred to a number of other authorities.

If the co-insurance provision in the underlying insurance means that no liability would arise between the parties, and if this results in the insurer's subrogation right to be left empty, there is an issue regarding what outcome would follow if the insurer becomes insolvent.

[131] Above, n 11, [131].
[132] Ibid.
[133] Ibid.
[134] Above, n 13.
[135] Ibid.
[136] Above, n 1, [103].

Lord Mance JSC answered this question in *The Ocean Victory* as 'the risk lies where it falls'.[137] In *Tyco*,[138] Rix LJ attempted to articulate this as in the case of an insurer's insolvency. If, upon the contract's true construction, the regime for joint names insurance has supplanted and excluded any liability on the contractor's part to compensate or indemnify the employer, that risk will fall on the employer. If, however, the true construction is that the contractor's liability is supplanted only to the extent of a recovery obtained from the insurer, then the risk of the insurer's insolvency would appear to fall back on the contractor.[139] With respect, it is submitted that the correct approach is that the insurer's insolvency will be analogous to the contractor failing to take out a joint names insurance as required by the terms of the underlying contract. Hence, the contractor's failure would result in its liability for breach of contract, which is entirely separate and distinct from the liability of those who caused or contributed to the loss claimed by one party against another. Lord Hope[140] said in *Cooperative Retail Services* that the parties' agreement to claim from the insurer instead of from each other did not encompass the case where the party who had agreed to obtain a joint names policy failed to do so.

10 Conclusion

Many compelling counter reasons can be argued in response to Coulson LJ, where his Lordship found Eyre J's analysis 'entirely in accordance with the authorities'.[141] It is respectfully submitted that Conway and the RFU had agreed that an all-risks joint names policy would be taken out to cover the losses to the work indemnified by RSA. Ultimately, each dispute under a contract must be decided on the terms of that contract. Numerous authorities dealt with several difficulties in answering the questions concerning a co-insured's subrogation immunity. In light of those authorities, in the *Conway* case, the liability provisions in the underlying contract, read together with the joint names clause, meant that there would be no claim to which RSA's right to subrogation could attach so far as the loss was insured by the

[137] Ibid, [123].
[138] Above, n 75.
[139] Ibid, [79].
[140] Above, n 5, [71].
[141] Above, n 2, [112].

all risks insurance. Unfortunately, although many such authorities were cited in the *Conway* case, the central crux of those cases appears to have been missed.