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Subrogation against a contractual beneficiary – a new limitation to insurer’s subrogation?

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Introduction

It is not uncommon to see insurance provisions in contractual relationships where the parties’ interests are distinct from each other. Such terms are varied; that is, some may require a co-insurance for all the parties involved, whilst others include an undertaking by one party to insure his interest in the subject matter of the contract. The issue that derives from such insurance provisions, however, is the same: if one of the contracting parties suffers loss as a result of the other contracting party’s negligence, and if the insurer indemnifies the loss, will the insurer have a subrogation right towards the party who caused the it? The two reference points which can be used to answer this question are the underlying contractual relationship between the parties and the terms of the insurance contract. The following points have been taken into account by courts that have discussed this issue: the subrogation waiver clause in the insurance contract, the underlying contract which either requires a co-insurance or contains an undertaking by one party about insurance, and a circumstance in which neither the insurance contract contains an express waiver of subrogation, nor the underlying contract provides any insurance provision.

This issue is complex, as will be seen throughout this paper. The objective of this paper is to explore the route of such a complexity and, after analysing the various different opinions presented by the courts, to discuss a solution which fits easily within the established principles of the law on insurers’ subrogation.

Subrogation

An insurer confers a contractual right on the assured by a contract of indemnity with the effect of putting the assured in the same position in which the assured would have been had the event not occurred, but in no better position. This contractual right, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against. In addition to the insurance contract, if the assured has a

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1 Insurance contracts are divided into two different categories when more than one party’s interests are insured by an insurance contract. A joint insurance is where the co-assured parties’ interests are identical. A typical example of this is insurance of their house by husband and wife. In a composite insurance, the parties’ interests are distinct. For instance, insurance of the employers’ and the contractors’ interests which arise from a construction contract. Whilst, in theory, the difference between a joint and a composite insurance is clear-cut, in practice, it is seen that joint insurance is referred to where the contract is composite in its nature. In this work, we will use ‘joint names insurance’ to express where the co-assured parties’ interests are distinct from each other.
2 Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyd’s Rep. 541, 544, Sir Peter Webster. The principle of indemnity in insurance may differ in some respects to other types of indemnity. For a very detailed analysis of indemnity see Courtney W, Contractual Indemnities, Hart publishing, 2014; MacGillivray on Insurance Law 13th Ed, Sweet and Maxwell, 2015, para 24-002.
3 Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyd’s Rep. 541, 544, Sir Peter Webster
right to claim the same loss from a third party, upon indemnifying the assured for the insured loss, the insurer stands in the place of the assured and can claim against the third party to the extent that he has paid the loss. The person originally sustaining the loss was the assured; but after he is indemnified, the insurer steps into the assured’s shoes. The source of this principle was stated to be ‘the plainest equity’ that could be. Subrogation does not create a fresh right but transfers a right of action. As a result, unless the assured assigns his rights against the third party to the insurer, the insurer has to use the name of the assured. Consequently, the rights and defences that would be available between the assured and the insurer will be available without change between the third party and the insurer.

The court cases have established some limitations to subrogation. The question that this paper addresses is, as noted above, whether the insurer can exercise his subrogation right against the co-assured who caused the loss insured against. Various cases in which the interpretation of the insurance and the underlying contract was at the heart of the matter are discussed in the following paragraphs.

Reference 1) Insurance contract – Express waiver of subrogation

The first reference point is the contract of insurance. By an express waiver of subrogation, the insurer agrees at the outset of the contract that it will not exercise its subrogation right against the parties who are covered by the waiver clause. A company may be named as the principal assured and its affiliated and associated companies may appear under the “additional assured” section of the policy. The reason for such an arrangement is usually that the additional assureds have a business relationship with the principal assured. For example, the principal assured is a commodity trader and an associated company is the carrier of the commodity that belonged to the principal assured. The additional assured’s reliance on the insurer’s express waiver of subrogation may be challenged by the insurer on the basis that the additional assured is not covered by the waiver clause. However, third party rights under a contract are such that a co-assured may benefit from the waiver clause if the insurance contract either expressly states this or confers a benefit on the co-assured.

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4 Mason v Sainsbury (1782) 3 Doug. K.B. 61; Randal v Cockran (1748) 1 Ves. Sen. 98; Castellain v Preston (1883) 11 Q.B.D. 380
5 Randal v Cockran (1748) 1 Ves. Sen. 98; See also Colinvaux’s Law of Insurance 11th Ed, 2016, para 12-001
6 Randal v Cockran (1748) 1 Ves. Sen. 98; Lord Napier and Ettrick v RF Kershaw Ltd (No.1) [1993] A.C. 71. For the other doctrines that tried to justify subrogation see Clarke M A, The Law of Insurance Contracts, Informa (last update December 2016), para 31-2; Colinvaux’s, para 12-004,12-005; MacGillivray, para 24-015 et seq.
7 Simpson & Co v Thomson (1877) 3 App. Cas. 279.
8 Mason v Sainsbury (1782) 3 Doug. K.B. 61; Dickenson v Jardine (1867-68) L.R. 3 C.P. 639
9 The London Assurance Company v Sainsbury (1783) 3 Doug. K.B. 244; Simpson & Co v Thomson (1877) 3 App. Cas. 279;
10 For instance the assured cannot sue himself and as a result, where the assured caused a loss to himself, there is no third party against whom the insurer may exercise a subrogation right Simpson & Co v Thomson (1877) 3 App. Cas. 279; Further, the insurer may only subrogate up to the amount that the insurer paid to the assured Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1962] 2 Q.B. 330. For a list of ‘Limits on the Insurer’s Rights’ Clarke, para 31-5 et seq.
13 The Contracts Rights of Third Parties Act 1999 s.1(1)
The co-assured may expressly be named in the contract or may be stated as a group of people.\(^\text{14}\)

Further, a subrogation waiver clause is not a blanket abandonment of all claims against the co-assured.\(^\text{16}\) If the policy provides co-assured A with cover of a narrower scope than the cover provided by it to the principal assured B, it will only be in respect of loss and damage falling within that narrower scope of cover that subrogated claims are excluded with respect to A. Moreover, benefits of a clause which provides waiver of subrogation “…against any Assured and any person, company or corporation whose interests are covered by this policy…” is confined to insured losses.\(^\text{17}\) In *National Oilwell (UK) Ltd v Davy Offshore Ltd*,\(^\text{18}\) the cover provided to the co-assured contractor was limited in scope to the period of time before delivery to the principal assured of the item of equipment in relation to which the subrogated claim was advanced. Consequently, that claim was to be excluded only if, and to the extent that, the cover provided to the contractor under the terms of the policy would protect it against such loss, damage or expense relating to its own equipment arising in the circumstances in which such loss, damage and expense actually occurred.\(^\text{19}\)

A conflict between *National Oilwell (UK) Ltd v Davy Offshore Ltd* and *The Surf City*\(^\text{20}\) is worth mentioning here, although it was resolved by the Contracts (Rights of Third Parties) Act 1999. In *National Oilwell*, Colman J held that the clause confined the effect of the waiver to claims for losses that are insured for the benefit of the party claimed against under the policy. In *The Surf City*, Clarke J rejected the argument that the express waiver of subrogation clause did not operate against the owner of *the Surf City* because the insurer indemnified a third party but not one of the assureds. In *The Surf City*, the policy insured the named assured as well as “their affiliated and/or subsidiary companies as their respective interests may appear.” The insured ship, who was owned by a subsidiary of the principal assured, exploded while loaded with cargo of naptha and gas oil. The insurer paid out to the cargo owner and brought a subrogation action against the shipowner. Clarke J rejected the insurer’s argument to the effect that the subrogation waiver clause did not operate where it had paid not the original assured but the consignee buyer as the assignees of the contract. Clarke J held that the purpose of the clause was to protect the assured. The assured would naturally wish to ensure that if cargo was lost in circumstances in which the buyer rejected the documents, he would be able to recover from his insurers without the insurer being able to claim the money back from his subsidiary as owner of the carrying ship. The fact that the assured’s subsidiary would be protected where the assured was paid under the policy did not mean that it was not to be protected where the insurer paid the c.i.f. buyer and not the original assured.

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\(^{14}\) *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] 2 C.L.C. 1097  
\(^{15}\) *Crowson v HSBC Insurance Brokers* (unreported, 26 January 2010): company appointed insurance broker to obtain policy insuring directors of the company against liability. Broker failed to do so. Held: that directors had an action against the broker under the 1999 Act, because the term was for their benefit under s.1(1)(b) and they had been identified by class under s.1(3)  
\(^{17}\) *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582  
\(^{18}\) [1993] 2 Lloyd's Rep. 582  
\(^{19}\) [1993] 2 Lloyd's Rep. 582, 615  
\(^{20}\) [1995] 2 Lloyd's Rep. 242
If the express waiver clause does not operate because, for instance, the claim falls outside the scope of the waiver clause, it does not always follow that the insurer can exercise his right of subrogation against the person who has a contractual relationship with the assured (and who caused the loss indemnified by the insurer). Underlying contract terms are varied and the matter is ultimately resolved by construing such terms to find out the parties’ objective intention under the contract.

Reference 2) Construction of the underlying contract terms

Once the insurer steps into the assured’s shoes, the insurer and the assured are regarded as one. The insurer can exercise his right of subrogation only if a third party is liable for the loss that the assured suffered. In a co-insurance context, liability of an assured towards the other co-assured is determined in reference to the underlying contract between them.22 The key issue with regard to the reference to the underlying contract is whether or not the contracting parties’ liability is excluded or retained by the terms of the contract. This will also require consideration of whether or not the underlying contract provides that one party will take out insurance in the name or for the benefit of all the contracting parties.

a) The underlying contract requires co-insurance – construction of terms

The aim of construing contractual terms is to identify the parties’ intention objectively. One of the main principles of contractual construction is that the underlying contract should be construed as a whole. The basis of subrogation is that a third party is liable for the loss insured and the insurer’s payment does not discharge the third party’s liability. The clause at the heart of the matter is the co-insurance provision. Two different questions are raised here: (a) is a co-insurance provision in the underlying contract sufficient to construe that the defendant’s liability is excluded, so long as the matter is covered by the insurance policy? (b) Alternatively, is the co-insurance provision not to extinguish but only to satisfy the co-assured’s liability under the underlying contract? The natural outcome of (a), if the answer is affirmative, is that there will be no liability that may be argued in a subrogation action. If an affirmative answer to (b) is preferred, the liability would exist, and the function of insurance is to satisfy such liability which would then entitle the insurer to a subrogation action against the co-assured who caused the loss.

The abovementioned questions basically derived from Rix LJ’s analysis of the matter in Tyco Fire & Integrated Solutions (UK) Limited v Rolls-Royce Motor Cars Limited,23 which involved the construction of a new green-field-site manufacturing plant in West Sussex. Tyco Fire & Integrated Solutions (UK) Ltd, one of the contractors at the site, provided fire protection services including a sprinkler system. One of the mains supply pipes burst and caused an escape of water, damaging both the works carried out by Tyco and other parts of the plant. Tyco has repaired the damage to the works but as for the damage to other parts of the development, Tyco argued non-liability since the contract between Tyco and Rolls Royce provided for

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23 [2008] 1 C.L.C. 625
joint names insurance which relieved Tyco of liability for its negligence. The contract between Rolls Royce and Tyco on the one hand provided that Rolls Royce was to maintain, in the joint names of Rolls and Tyco, insurance of existing structures. On the other hand, it also required Tyco to indemnify Rolls Royce against “any damage, expense, or loss whatsoever suffered by Rolls Royce or incurred to any third party to the extent that the same arises out of or in connection with any breach of the contract or any negligence or breach of statutory duty on the part of Tyco.” Rix LJ distinguished the following two circumstances: (1) the underlying contract clearly provides that there is to be no liability of a contractor to his employer in the area of the regime for joint names insurance; (2) there is no such clarity in that direction, but on the contrary, if anything, there is, or appears to be, clarity in another direction, namely in favour of the contractor’s continued liability to his employer for his negligence. In case (1), Rix LJ found that ‘the true basis of the rule is the contract between the parties’ works in a straightforward way but his Lordship was of the view that in (2) it was not the case. Cooperative Retail Services Ltd v Taylor Young Partnership Ltd illustrates case 1 in the way that the contract between the employer and the contractors required the contractor to take out a joint names policy for all risks insurance for the full reinstatement value of the works and to maintain that policy until practical completion. The contract expressly precluded any liability in negligence on the part of the main contractor to the employer for loss and damage to the works which may have been caused by fire prior to the date of practical completion. Instead, the funds necessary to pay for the restoration of the physical damage caused to the works by fire, including the associated professional fees, were to be provided by means of insurance under the joint names policy. Lord Bingham interpreted the contract to the effect that the employer would be effectively indemnified by the insurers’ provision of a fund enabling it to pay contractors for repairing the fire damage. The insurers could not then make a subrogated claim against the contractor because he was a party co-insured with the employer under the policy, and the insurers would be obliged to indemnify the contractor against any liability which might be established - an obvious absurdity. On the other hand, in Tyco, Rix LJ distinguished CRS and held that the liability provision must not be ignored in assessing a claim by one co-assured (or by the insurer in the assured’s name in subrogation) against another.

There are other English cases which have discussed the insurer’s subrogation against either a co-assured or a party who may be a contractual beneficiary to the insurance and all those cases will be mentioned in the following paragraphs with respect to the classifications of the principle adopted in them. Most recent to writing this piece, in Gard Marine & Energy Ltd v China National Chartering Co Ltd, the Supreme

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24 Rolls-Royce had not, in fact, taken out any insurance in the joint names of Tyco and itself, but it was common ground that the issue between the parties had to be resolved just as if it had.
25 [2008] 1 C.L.C. 625, para 76
27 See also Scottish & Newcastle Plc v GD Construction (St Albans) Ltd [2003] Lloyd's Rep. I.R. 809, para 27. The employer was required to take out a joint names policy for the employer and the contractors and the contract also explained that “‘Joint Names Policy’ means a policy of insurance which includes the Employer and the Contractor as the insured and under which the insurers have no right of recourse against any person named as an insured, or pursuant to clause 6.3.3 recognised as an insured thereunder”. In this case CRS was approved and the express “no right of recourse” provision in the underlying contract was found even stronger than CRS to express subrogation immunity.
28 [2017] 1 Lloyd's Rep. 521
Court, in obiter, discussed extensively the two questions set out under (a) and (b) above. The facts of the case are as follows: the “Ocean Victory” was a bulk carrier built in China in 2005 and demise chartered to Ocean Line Holdings Ltd (OLH) in the same year. The owners and demise charterers were associated companies in the same group. There were then time charterparties entered into between OLH and China National Chartering Co Ltd (Sinochart) and Sinochart and Daiichi Chuo Kisen Kaisha (Daiichi). All the charterparties provided an undertaking to trade the vessel between safe ports. After completing her voyage from Saldanha Bay in South Africa to Kashima, the “Ocean Victory” grounded at Kashima and eventually broke into two. Gard Marine & Energy Ltd (Gard), one of the vessel’s hull insurers at the time of her loss, took assignments of the rights of OLH and OVM in respect of the grounding and total loss of the vessel. Gard subsequently brought a claim against Sinochart (which Sinochart passed on to Daiichi) in its capacity as assignee of those rights and claimed damages for breach of the charterers’ undertaking to trade only between safe ports.

At first instance, Teare J held in favour of Gard: the charterer breached the safe port provision and Gard was awarded substantial damages. The Court of Appeal allowed the appeal on the grounds that there was no breach of the safe port undertaking on the part of the charterers. Obiter, the Court of Appeal also held that Gard’s action would not be sustainable given the insurance provisions of the demise charterparty.

The Supreme Court unanimously dismissed the appeal on the safe port issue. This ruling rendered unnecessary to discuss whether Gard has a right of action against the time charterers but “because the question is of some general importance”, the Supreme Court discussed it in detail with their Lordships’ view being divided 3/2 in favour of the charterer. The issue was whether the joint names insurance requirement in clause 12 of the demise charter provided for the demise charterers to procure insurance for the vessel at their own expense against marine, war and protection and indemnity risks, for the joint interests of themselves and the head owners.

Their Lordships, including the minority view, acknowledged that, in the case of co-insurance where the insurance is taken out for the wrongdoer assured as well as the assured who suffered loss, the insurer’s subrogation right is not exercised. The co-insurance of employer, contractor and subcontractors under standard forms of building contract is one of the obvious examples of this case. The Supreme Court were then divided in choosing whether reason (a) or (b) above is the ground for not allowing the insurer’s subrogation action against a co-assured. The questions raised in the two cases, Tyco and Gard Marine, are identical; however, in the latter, each of their Lordships discussed the abovementioned questions from different angles.

It should first be noted that the basis of Gard’s claim, on which the demise charterer was in a position to claim damages from a sub-charterer for the loss of a ship of which he is the bailee but not the owner, was that he is himself liable to the head owner under the demise charter. If the demise charterers are not so liable then they have suffered no loss in respect of the vessel and have no claim to pass on to the

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29 See [2017] 1 Lloyd's Rep. 521; Lord Sumption, para 93; Lord Toulson, para 129
30 Clause 12 of the demise charter provided for the demise charterers to procure insurance for the vessel at their own expense against marine, war and protection and indemnity risks, for the joint interests of themselves and the head owners.
32 Lord Sumption referred to two more possibilities (a bailee’s possessory title and the principle of transferred loss); however, these two were not discussed in detail as the insurer confined their case to the above.
intermediate charterers. This then led to the discussion of the questions which are at the heart of the matter.

Lord Clarke and Lord Sumption represented the minority views. Lord Clarke emphasised the rules of contractual construction; that is, the demise charterparty must be given the meaning which, taking into account the background known to both parties, it would reasonably be understood to bear. This led his Lordship to conclude that, in circumstances where the demise charterparty contains a clear safe port warranty, any exemption of the demise charterers from liability in damages for breach of the safe port warranty is expected to be clearly expressed. Interpreting clause 12 in the present context as an exhaustive code of the rights and liabilities of the parties would render clause 29, which contains a safe port undertaking, nugatory. Teare J was influenced by Tyco in permitting Gard’s cause of action. At the Supreme Court, only Lord Clarke referred to Tyco (through reference to Teare J) and his Lordship agreed that it was intended that the demise charterer would be liable to the owner for breach of the safe port warranty, notwithstanding that they were joint assured. Lord Sumption, who agreed with Lord Clarke, expressed further analysis of the matter.

Lord Sumption adopted (b) above. His Lordship relied on the general rule that insurance recoveries are ignored in the assessment of damages arising from a breach of duty. As a result, based on public policy, insurance recoveries are intended to inure to the assured’s benefit alone in consideration of the premium paid. Moreover, protecting insurers’ subrogation rights is necessary as an important part of the economics of insurance. Lord Sumption concluded that, against the third party wrongdoer, the insurance payment is res inter alios acta - in the words of his Lordship (loosely translated), none of his business.

Lord Mance’s analysis was very concise and straightforward and stated that the absence of an express subrogation waiver in clause 12 meant that it never occurred to the parties that there could be such claims as those disputed in the present case. Payments made under marine and the war risks insurances go to owners (or their mortgagees) and charterers for their respective interests in the hull. Permitting a claim against the charterer would mean satisfying and at the same time imposing liability on the charterers again the owners. Taking into account the scheme in the present context, his Lordship was persuaded that that is clearly not what the parties intended. Lord Toulson, with whom Lord Hodge agreed, emphasised another purpose of maintaining a joint names insurance, which is to avoid litigation between the co-assureds, and clause 29 did not subvert that intention.

b) The underlying contract contains a co-insurance provision – implied term

It has been observed through the different court cases that another aspect from which the underlying contract may be analysed is finding an implied term in the contract to the effect that, due to the joint names insurance provision, the parties impliedly agreed

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33 [2017] 1 Lloyd’s Rep. 521; para 49
34 [2017] 1 Lloyd’s Rep. 521; para 52
35 [2017] 1 Lloyd’s Rep. 521; para 102
36 His Lordship named this as the collateral payments exception and referred to Bradburn v Great Western Railway Co (1874) LR 10 Ex 1; Parry v Cleaver [1970] AC 1.
37 [2017] 1 Lloyd’s Rep. 521; para 142
that they would look to the insurer for their loss but not to each other. The result is the same as interpreting the contract in the manner explained above, but the addition here is that a term is implied in the contract. In *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd*, Elias LJ applied Lord Hoffman’s speech in *Attorney General of Belize v Belize Telecom Ltd* where he said that:

“...the implied term must “go without saying”, it must be “necessary to give business efficacy to the contract” and so on. ... There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean...?”

Some other views, on the other hand, expressed the necessity of implying a term for “officious bystander” or “business efficacy” reasons. In *Hopewell Project Management Ltd v Ewbank Preece Ltd*, Mr. Recorder Jackson, Q.C., *obiter*, stated that it would be nonsensical if those parties who were jointly insured under a Contractors All Risks policy could make claims against one another in respect of damage to the contract works. The deputy judge was prepared to imply a term in the underlying contract to this effect because such a result could not possibly have been intended by those parties. In *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd*, Ellias LJ explained that the question of how risks have been allocated between insurers and assured has to be construed by reference to the terms which the parties have agreed. It could not have been the intention of the parties that the insurers should be able to enforce rights of indemnity against a co-assured where the co-assured was indemnifying the very same risk as the insurers. Implied the term is simply making express what the parties must have intended.

In *Tyco* however, Rix LJ stated that, although a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears, an implied term cannot withstand express language to the contrary. The judge pointed out that it is unusual for an insurer to sue his own insured to recover insurance proceeds due under his own policy, but it must be recalled that he does so in the name of and under the right of another party, viz the employer.

In *Gard Marine* the majority decision was not based on the implied term although Lord Mance stated that the reason why owners have no claim against charterers for the loss of the vessel was “it is understood implicitly that there will be no such claim.” On the other hand Lord Clarke, in his dissenting view, rejected either to read clause 12 excusing the demise charterer’s liability to the owner or to imply a term to that effect.

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38 [2015] Lloyd's Rep. I.R. 95. Elias LJ proceeded on the basis that the present case did not raise an issue of co-insurance at all in the strict sense. The parties settled after the trial and the judgment was delivered by the Court of Appeal only because of a request by Rathbone and the Court of Appeal’s view that the points were of some importance.

39 [2009] 2 All E.R. 1127


45 [2008] 1 C.L.C. 625, para 76

46 [2008] 1 C.L.C. 625, para 77

47 [2017] 1 Lloyd's Rep. 521, para 122

48 [2017] 1 Lloyd's Rep. 521, para 53
c) **The underlying contract contains a co-insurance provision – construction of insurance contracts**

Construction of the insurance contract may reveal two different justifications for the insurer’s inability to exercise his subrogation rights against a co-assured. The first is circuity of action, namely that insurers who have paid out to an assured for loss or damage cannot bring a subrogated claim against a co-assured who is himself insured in respect of the very same loss or damage, because he himself would make a claim under the policy. Lloyd J expressed on two different occasions that the reason for not permitting the right of subrogation in the present context was not a fundamental principle to this effect but rests on ordinary rules about circuity.  

“Whatever be the reason why an insurer cannot sue one co-assured 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. The same would also apply in the case of contractors and sub-contractors engaged on a common enterprise under a building or engineering contract. Even if I still had reservations of the kind which I tried to voice in *The Yasin*, I would feel obliged to bury them in the light of the decision of the Supreme Court of Canada in the *Commonwealth Construction Co.* case, a decision which was not cited in *The Yasin*...”

The circuity principle was disfavoured in later cases and some other justifications have been developed as discussed above.

The alternative rationale relies on an implied term (as opposed to above, here the term is implied in the insurance contract) whereby insurers, having paid co-assured A, are precluded from suing co-assured B. Business efficacy necessitates such an implication, that is that exercising subrogation rights against a co-assured would be completely inconsistent with the insurer’s obligation to the co-assured under the policy. Permitting otherwise would result in a situation where the insurer would claim from the co-assured the loss or damage to the very subject-matter of the insurance in which this co-assured has an insurable interest and a right of indemnity under the policy. The insurer cannot at once promise to indemnify a person against

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50 Petrofina (UK) Ltd v Magnaload Ltd [1984] Q.B. 127, 140.
51 Some views in literature supported that the implied term in insurance contract is the most convincing rationale in this respect as it arises out of the insurer’s obligations to the co-assured parties. Ward D, “Joint names insurance and contracts to insure: untangling the threads” [2009] L.M.C.L.Q. 239, 240; N Beresford N /Turnbull J found that the most convincing rationale is that of an implied term in the insurance contract. See Insurance Disputes, ed by Mance and et al, 3rd ed, 2011, Chapter 9, para 9-45 and 9-55
53 Stone Vickers v. Appledore Ferguson Shipbuilders [1991] 2 Lloyd's Rep. 288, at 302. Colman J’s judgment was reversed by the Court of Appeal [1992] 2 Lloyd's Rep. 578 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. There was therefore no privity of contract between the suppliers and the head contractors. The Court of Appeal did not consider the rest of the judgment.
loss or damage whether or not negligently caused—and obtain a premium on that footing—whilst reserving the right to recoup that loss from him if another insured makes a claim under the policy.  

**d) No co-insurance provision but the defendant is an intended beneficiary**

Emphasis has been made on an insurance provision in the underlying contract which does not necessarily include a co-insurance but ultimately insurance of a contracting party. Who will pay for the insurance premium is determined by the underlying contract. The non-insured party may be required to contribute to the insurance cost and at the same time he may undertake some contractual liabilities. If construing the contract leads to the conclusion that the parties truly intended that the insurance is for the joint benefit of the parties, this would be enough for the courts to determine the matter. In the context of tenancy agreements, the fact that the tenant was not an insured person has not precluded the courts from finding that the insurance was for the benefit of the landlord as well as the tenant. The insurance provision, depending on the other terms of the underlying contract, is likely to be interpreted as leaving no liability on the defendant with regard to the matters that are covered by the insurance contract. Therefore, clear words of express exclusion of liability are not needed. The insurer’s subrogation right is not denied; however, such a right is bereft of content as there is no claim to which the insurers’ right to subrogation can attach. In other words, the underlying contract between the co-assureds denudes the subrogation right of any substance and thus precludes its exercise. These principles also apply in the abovementioned case where the underlying contract provides a co-insurance requirement.

The principle of ‘the insurance position must not be ignored’ was applied in *The Evia (No. 2)* where the underlying contract did not contain a joint insurance obligation, but it was clear that the defendant was the intended beneficiary. In this case, the charterparty war risks clause provided that, if the vessel was ordered into a war risk zone, the owners were entitled to insure against the risk of loss or damage to the vessel and recover the premiums from the charterer. The House of Lords were of the view that, on the assumption that there was a breach of the safe port obligation, the charterers, having paid for the extra war risk insurance, were freed from any liability that they had for breach of that obligation. This was the case although the charterer was not a co-assured. In *Gard Marine*, only Lord Clarke referred to *The Evia (No. 2)* to distinguish it since Lord Clarke rejected that clause 12 was an exhaustive code of

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55 Ward, 243  
56 *Fresca-Judd v Golovina* [2016] EWHC 497 (QB)  
57 *Mark Rowlands Ltd v Berni Inns* [1986] QB 211; *Quirkco Investments Ltd v Aspray Transport Ltd* [2013] Lloyd's Rep. I.R. 55  
58 *Mark Rowlands Ltd v Berni Inns* [1986] QB 211; *Fresca-Judd v Golovina* [2016] EWHC 497 (QB)  
59 *Fresca-Judd v Golovina* [2016] EWHC 497 (QB). If the underlying contract provides that insurance is to be “in joint names as their interest may appear”, the agreement is likely to be construed as being an agreement to insure for the parties’ joint benefit. *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2015] 1 Lloyd's Rep. 381, para 78 (Court of Appeal).  
60 *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd* [2015] Lloyd's Rep. I.R. 95, para 115, Beatson LJ.  
62 [1983] 1 A.C. 736
the rights and liabilities of the parties. In *The Evia (No. 2)*, the relevant consideration is not the conditions of any insurance policy but the fact that the underlying contract makes provision for the effecting of extra insurance at the charterer’s expense. Similar considerations were applied in *Mark Rowlands Ltd v Berni Inns* in which the tenant was contractually required to pay “insurance rent” equal to the sum paid by the landlord to insure the premises pursuant to a landlord’s covenant to insure. The tenant’s negligence caused a fire which damaged the premises. The court construed the tenancy agreement to the effect that the landlord’s loss was to be recouped from the insurance moneys and that, in this event, the landlord were to have no further claim against the tenant for damages in negligence. Holgate J applied the *Rowlands* principle in *Fresca-Judd v Golovina* where he held that the fact that the defendant pays for the premium might be a strong indication that the loss should not be claimed from the defendant, but the main determining issue is the insurance provision that the landlord agreed to insure the premises. In *Judd*, the tenant was not under any obligation to contribute to the cost of the insurance. The contract provided that the rent would cease to be payable in case the premises were inhabitable, which persuaded the judge that the risk was transferred to the insurer, not to the tenant, for instance, if the premises were damaged by flood and became inhabitable until they were repaired.

**Analysis**

Due to diverse opinions on the question addressed in this work it was necessary to set out the various types of interpretation above. The author submits that the following considerations should be taken into account whilst investigating which of the abovementioned opinions fits best in the settled principles of insurance law.

**Who is first liable?**

When, in *Mason v Sainsbury*, Lord Mansfield CJ asked “Who is first liable?”, his question was directed not to any issue of chronology but to establishing where the primary responsibility lay to make good the loss. This question should be the starting point in the interpretation of the underlying contract terms. As Lord Toulson stated in *Gard Marine*, the question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss.

As opposed to the majority view, in *Gard Marine*, Lord Sumption stated that the starting point should be the principle that insurance recoveries are ignored in the...
assessment of damages that the third party can claim from a third party. Indeed, this is one of the justifications of insurers’ subrogation. However, the question of ‘who is first liable’ is to be raised before discussing the collateral payment exception that Lord Sumption referred to. Subrogation allows the paying party to recover from the primary source of indemnity. The question of ‘who is the primary indemnifier’ is best addressed by reference to the parties’ various relationships and the context of the liability concerned. If the party who has the primary liability to pay the loss pays out in full, that discharges the obligation of any other indemnifier. If, on the other hand, the paying party’s liability is secondary, then the payment is res inter alios acta and does not discharge the liability of the primary party. In principle, a recovery upon a contract with the insurers is no bar to a claim for damages against the wrongdoer as the insurer’s payment does not extinguish the third party’s liability. However, for the reasons stated above, this principle does not apply when the defendant to the subrogation action is a co-assured or where the insurance is for the benefit of the parties to the underlying contract. It is not further required that the insurer must pay in order to have this outcome. If the parties agreed to claim the loss from the insurer only and not from each other, there is no right to transfer to the insurer; there are no shoes to borrow. In Mark Rowlands Ltd v Berni Inns, the insurance money was not res inter alios acta so far as the tenant was concerned. The terms of the tenancy agreement were that the property would be rebuilt from the proceeds of the insurance claim and accordingly, there was no claim in negligence that could be brought against the tenant. The contracting party whose negligence caused the loss may be liable on the other hand, if the innocent party’s loss is not covered by the insurance contract.

Moreover, when an insurer subrogates into the assured’s rights, insurer and assured are regarded as one. The right of the insurers is merely to make such a claim for damages as the assured himself could have made. In the co-insurance context, it is arguable that when the insurer pays one of the co-assureds, the insurer and all the co-assureds are regarded as one with respect to the claims that fall within the insurance contract. The assured cannot sue himself, as established by Simpson & Co v Thomson in which two ships that belonged to the same owner collided. The underwriters paid the insurance effected on the lost ship, and then claimed to rank pari

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71 Merkin R/Steele J, Insurance and the Law of Obligations, OUP, 2013, at 130
74 Mason v Sainsbury (1782) 3 Doug. K.B. 61
78 [1986] QB 211
79 This may be expressed in the underlying contract. See Fresca-Judd v Golovina [2016] EWHC 497 (QB)
80 Mason v Sainsbury (1782) 3 Doug. K.B. 61
81 Simpson & Co v Thomson (1877) 3 App. Cas. 279; Caledonia North Sea Ltd v London Bridge Engineering Ltd [2002] 1 Lloyd’s Rep. 553 para 11 Lord Bingham
82 (1877) 3 App. Cas. 279
passu, with the owners of cargo destroyed, in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage. Having reiterated that the insurance was a contract of indemnity, it was held that it would be “little short of an absurdity” that the underwriters should, in the first place, indemnify the assured for the consequences of the negligent navigation according to their contract, and immediately afterwards, recover the amount back from the very same assured as damages occasioned by his negligent navigation. This, in fact, expresses the same principle that Lloyd J mentioned with respect to the circuity principle. Whether the reason is circuity or not, all the views which deny the insurer’s subrogation agree that subrogation does not fit easily in this context. Subrogation becomes irrelevant for the lack of any shoes to borrow. Colman J stated in National Oilwell (UK) Ltd v Davy Offshore Ltd\(^83\) that any attempt by an insurer after paying the claim of one assured to exercise rights of subrogation against another would, in effect, involve the insurer seeking to reimburse a loss caused by a peril (loss or damage even if caused by the assured’s negligence) against which he had insured for the benefit of the very party against whom he now sought to exercise rights of subrogation.\(^84\) In rejecting a subrogation action against a co-assured, Colman J said\(^85\) “As a matter of logic Lord Cairn’s reasoning would lead to the same result, namely that there would be no available right of subrogation, if the owner of the guilty ship had been a co-assured under the policy on the innocent ship for the same perils.” If underwriters had attempted to sue him by subrogation he could also resist the claim on the grounds that he was as much the assured in respect of the relevant perils as if he were the same person as the owner of the innocent ship. As Lord Mance commented in Gard Marine, adopting option (b) would mean treating the present co-insurance as if it involved two separate and severable insurances, leaving charterers exposed, without liability cover, to claims for breach of charter or duty brought by owners in respect of loss of the hull. Clearly, that is not what the parties intended by including a co-insurance provision in the underlying contract. Further, the parties’ must have also intended to avoid disputes between them, which becomes even clearer in a context such as that of Gard Marine where the owner and the demise charterers are associated companies in the same group. As a result, it becomes no answer that demise charterers may not have a claim against a sub-charterer in the case, for instance, that they were trading the vessel on their own account or the sub-charterer traded on different terms to the demise charterparty.\(^86\)

A further response to the collateral payment exception which Lord Sumption referred to is that one of the main reasons why parties take out insurance is that they need to be covered for the consequences of their own negligence. The \textit{prima facie} position where a contract requires a party to that contract to insure, should be that the parties have agreed to look to the insurers for indemnification rather than to each other. This was again stated to be the case –although \textit{obiter} – in Rathbone Brothers v Novae Corporate where the underlying contract consisted of an employer’s indemnity

\(^{83}\) [1993] 2 Lloyd’s Rep. 582, 613-614
\(^{84}\) [1993] 2 Lloyd’s Rep. 582, at 613-614
\(^{85}\) [1993] 2 Lloyd’s Rep. 582, at 614
granted to an employee.\textsuperscript{87} In \textit{Rathbone}, Ellias LJ was prepared to imply a term in the underlying contract to the effect that it was intended to provide supplemental protection only once the claim against the insurance company had been exhausted.\textsuperscript{88} Moreover, the fact that the guilty co-assured paid the premium, justified treating insurance as the primary liability.\textsuperscript{89}

In \textit{Gard Marine}, clause 13 of the charterparty provides an express waiver of subrogation by the owner against the charterer. Clause 13 was optional if it is voluntarily applied, and clause 12 was to be considered deleted. The parties did not expressly agree that clause 13 applied, and therefore, clause 12 did. Lord Clarke found that by deleting clause 13, the demise charterers chose not to be bound by clause 13.\textsuperscript{90} Lord Toulson referred to BIMCO's explanation for the optional alternative of clause 13 which was that sometimes a vessel is bareboat chartered for only a short period and it may make sense for the owners to carry on with the insurances which they are likely to have in place. For example, in insurance of passenger vessels bareboat chartered for a short cruise or ferries hired just for a short summer season, it is normal practice that the shipowners continue with the insurances for their own account. In such a case, clause 13 would be an obvious choice. Although dissenting in this case, Lord Sumption also recognised that clause 13 is designed for a very different kind of chartered service.\textsuperscript{91}

It should be further noted that precluding insurers’ subrogation rights in the circumstances stated above is not contrary to “justice, reasonableness and public policy”.\textsuperscript{92} This was an additional support for the conclusion stated above.\textsuperscript{93} Enforcing insurers’ subrogation rights in those cases may lead the contracting parties to seek their own insurance to cover their liability for the same risks. This would introduce additional and unnecessary insurance costs. Moreover, the benefit conferred upon the contractor by the other contractor’s undertaking to insure would, to that extent, be negated.\textsuperscript{94} Further, one of the commercial purposes of maintaining a co-insurance is to avoid litigation between the parties to the underlying contract and the bringing of a subrogation claim in the name of one against the other.\textsuperscript{95}

\begin{footnotes}
\footnote{\textit{Rathbone Brothers Plc v Novae Corporate Underwriting Ltd} [2015] Lloyd's Rep. I.R. 95 Rathbone Trustees granted to PEV, a solicitor and an employee of Rathbone, a joint and several indemnity of up to £40 million for liabilities arising from the performance of his services, other than liabilities arising from fraud or wilful misconduct. The consultancy agreement between PEV and Rathbone provided that Rathbone was to provide PEV with Professional Indemnity Insurance for work done and services provided to clients. The beneficiaries of the Walker Trust commenced proceedings against the trustees, including PEV, alleging breach of professional and fiduciary duty from whether the insurers were entitled to recoup their payment from Rathbone by way of subrogation, ie, in reliance upon the indemnity clause in the contract between PEV and Rathbone.}
\footnote{\textit{Rathbone Brothers Plc v Novae Corporate Underwriting Ltd} [2015] Lloyd's Rep. I.R. 95, para 104, Ellias LJ}
\footnote{\textit{Mark Rowlands Ltd v Berni Inns} [1986] QB 211}
\footnote{\textit{Fresca-Judd v Golovina} [2016] EWHC 497 (QB)}
\footnote{\textit{Fresca-Judd v Golovina} [2016] EWHC 497 (QB) para 77}
\footnote{\textit{Gard Marine & Energy Ltd v China National Chartering Co Ltd} [2017] 1 Lloyd's Rep. 521, Lord Toulson, para 142}
\end{footnotes}
What if insurers do not pay?

Does the outcome on the issue of insurer’s subrogation in co-insurance (whether subrogation is prevented or granted) depend on whether or not the insurance moneys have yet been paid? The insurer may not pay, for instance, because the co-assured who claimed under the insurance contract was in breach of the insurance contract or the duty of fair presentation of the risk. A joint names insurance in the present context is composite in the nature that the parties’ interests are separable; therefore, insurers’ defences against one party leave intact another party’s defence. Clearly, whether or not the insurer has a sustainable argument against the co-assured’s claim is not a concern in analysing another co-assured’s rights under the insurance. Alternatively, if the insurer rejects liability because the claim is excluded from the policy cover, and the underlying contract does not require co-insurance in that respect, this would be outside the scope of the co-insurance provision.

Another consideration, the effect of which was discussed in Gard Marine, is insurer’s insolvency. If the insurer’s insolvency occurs before loss, the lack of insurance cover at that stage might be considered as breach of the underlying contract which should be remedied by the party who is responsible for arranging the insurance. On the other hand, insolvency after a loss raises separate problems. Breach of the underlying insurance term which requires co-insurance is not breached given that the insurance was in force at the time of the loss. If option (b) is adopted, the risk of the insurer’s insolvency would fall back on the party who caused the loss given that the liability between the co-assureds was not satisfied by the insurer. A link with the question ‘who is first liable’ becomes clear. In Gard Marine, Lord Sumption proposed that option (b) ensures compensation of the damages by the party who caused the loss in the case that, for some reason, the insurer did not pay. The demise charter terminates upon the total loss of the ship: the demise charterer would be bound to pay damages, not because he was responsible for the lack of insurance but because he was liable for the destruction of the ship in breach of his contract. Lord Mance, on the other hand, found insurer’s insolvency a remote eventuality which could not be a guide to the meaning of clause 12 (or 13). Further, in the present context and its scheme, the risk lies where it falls. Lord Mance considered as an alternative argument, although contractually the charter terminates as of the date of any total loss, that the risk lies by implication on the party responsible for maintaining the insurance during the charter period. His Lordship concluded, and Lord Hodge and Lord Toulson agreed, that it was unnecessary on this appeal to decide which of these two alternatives would apply given that the focus of the interpretation was quite different to insurer’s insolvency.

Delay in payment raises a different question to which the answer would be that either party is at liberty to sue the insurers to judgment. Alternatively, the co-assured who

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96 [2008] 1 C.L.C. 625, para 79 Rix LJ
97 [2017] 1 Lloyd's Rep. 521, para 103
98 Clause 12d
100 [2017] 1 Lloyd's Rep. 521, para 123.
caused the loss is not a co-assured in the absence or unavailability of insurance cover and will be liable for the loss.

It should be remembered that there may be circumstances where the insurance cover does not meet the full liability, in which case the co-assured can take advantage of that payment to the extent that the liability is discharged by the insurance monies and treat it as discharging pro tanto its own obligations. It is open to the parties to expressly agree at the outset that the contractor would be liable for the loss that the other contracting party suffered, in case the insured risk is not satisfied by the insurer. Similarly, the insurer may exercise his subrogation right against a person co-assured where the co-assured defendant’s breach of policy has (a) caused the policy to be avoided vis-à-vis himself, or (b) made it impermissible for the defendant to claim under the policy.

Insurable interest

As established by the English courts, a sub-contractor involved in a construction project has a pervasive insurable interest in the entire contract works, although his involvement in the work may be limited to only some part of the work. Stone Vickers v. Appledore Ferguson Shipbuilders involved a contract in which the head contractor of a shipbuilding contract agreed with a sub-contractor who was going to supply a tailshaft for the vessel. It was argued that the supplier would not have an insurable interest in the whole contract works. The terms of the sub-contract holds the sub-contractor liable to the owner of the property for loss of or damage to such property caused by that sub-contractor’s fault. It was held that the supplier of a part to be installed into the vessel or contract works under construction might be materially adversely affected by loss of or damage to the vessel or other works by reason of the incidence of any of the perils insured against by the policy in question. The view is that there is no reason in principle why such a sub-contractor should not also have sufficient interest in the whole contract works to be included as co-assured under the protection of the head contractor’s policy. In Stone Vickers,
Colman J added that “If the risk insured against is loss of or damage to the subject-matter of the insurance and the co-assured is interested in the entire subject-matter, rights of subrogation cannot be exercised to sue him for causing tortiously or in breach of contract loss of or damage to that same subject-matter unless he does so wilfully or fraudulently.” To come to this conclusion, it is sufficient that the policy insures the co-assured sub-contractor against such loss or damage to the subject-matter of the policy. It is not necessary to question whether the co-assured’s liability is insured under the same policy. Moreover, as mentioned above, when the sub-contractor’s insurable interest has been found, the courts have been willing to imply a term in the insurance contract that for the insurer exercising subrogation rights would be in breach of the implied term. Additionally, as seen in Mark Rowlands, if a person such as the tenant had no more than a limited interest in the subject matter of the insurance, there was no principle of law which precluded him from asserting that an insurance effected by another person was intended to ensure for his benefit to the extent of that interest. This outcome does not depend on whether the insurable interest of the person concerned was in the whole of the subject-matter or part of it.

In the practice of cargo insurance, the usual target of a recovery action will be the bailee of the cargo. A bailee has sufficient insurable interest to insure the cargo in his own name. A haulier or a carrier may be co-assured under the contract insuring the cargo. In such a case, if he negligently damages the cargo, when the insurer indemnifies, the cargo interest cannot recover from the haulier as he is insured under the same contract. This is the case even though his liability is not insured under the insurance policy. Commercial convenience justifies the insurable interest point, i.e. that the assured bailee insures the goods as it would be very inconvenient if they were not permitted to insure the goods they are entrusted. Lloyd J emphasised in Petrofina 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, of allowing the head contractor to take out a single policy covering the whole risk; that is to say, covering all contractors and sub-contractors in respect of loss of or damage to the entire contract works. Otherwise each sub-contractor would be compelled to take out his own separate policy. This would mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross-claims in the event of an accident. Furthermore, the cost of insuring his liability might, in the case of a small sub-contractor, be uneconomic. The premium might be out of all proportion to the value of the sub-contract. If the sub-contractor had to insure his liability in respect of the entire works, he might well have to decline the contract. The purpose of this arrangement was to keep to a minimum the difficulties that are bound to arise where several different parties are working on a construction site. It had the obvious advantage to the suppliers. There was, therefore, no privity of contract between the suppliers and the head contractors. The Court of Appeal did not consider the rest of the judgment.

111 Dunt J, Marine Cargo Insurance, 2nd ed, 2015, Informa, para 16-09
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 in the
event of loss or damage to the works from a cause such as fire.115

Lord Sumption recognised that the demise charterer could be entitled to insure on the
same basis as the owner. In line with the principles stated above, his Lordship held
that the demise charterer has insurable interest although it is not a liability but a
property insurance. The demise charterers stood in a legal or equitable relation to the
insurable property due to their liability to the head owner as a bailee and time
charterer. The measure of any liability of the demise charterer, in the case of the ship
being lost or damaged, would be the same as the measure of the owner's loss. This
ruling, although Lord Sumption supported the opposite, reinforces option (a) for the
reasons stated above, i.e. where the demise charterers are entitled to insure on the
same basis as owners, this leaves no room to treat the co-insurance as if it provides
covers, which entitles the owner to claim only and leaves the charterer with liability,
i.e., with no insurance cover. Further, it was held in Cruise and Maritime Services
International Ltd v Navigators Underwriting Agency Ltd116 that a party whose name is
inserted in the insurance contract as a co-assured, is not entitled to claim under the
contract unless they have insurable interest. Accepting option (b) would mean treating
the co-assured demise charterer as if his name only appears there with no benefit of
the insurance contract. On the other hand, the fact is exactly the opposite.

Conclusion

Why does equity allow insurers to subrogate into the assured’s rights against the party
who is liable for the insured loss? One way of explaining is that the equity is a right of
restitution based upon unjust enrichment or the reaping of an unfair advantage.117 The
objective is to prevent the wrongdoer from escaping from liability after the right
holder has received a payment from the claimant.118 By precluding the insurer’s
subrogation in the abovementioned cases, does the law contradict with these basic
principles of subrogation? The answer should take into account the following: there
should be an enforceable claim in the first place from which the guilty party has
arguably escaped.119

Moreover, subrogation aims to prevent over-compensation of the assured.120 In the
case of indemnity policies, the assured is not permitted to make a profit and this is a
very common justification for subrogation.121 If the assured is not permitted to bring a

115 Cooperative Retail Services Ltd v Taylor Young Partnership Ltd [2002] Lloyd's Rep. I.R. 555, para 14, Lord Hope
116 [2017] 1 Lloyd's Rep. 575
117 James, 152; Mitchell C, “The law of subrogation”, [1992] LMCLQ 483, at 486; Some skepticism has been expressed as to whether this has helped in any way to explain insurance subrogation, see Merkin/Steele, 100; see also Colinvaux’s, para 12-003.
118 Mitchell, 486.
119 [2015] 1 Lloyd's Rep. 381, para 93
120 See Clarke, para 31-7A ‘The Case for Subrogation’.
121 Merkin/Steele, 111; See MacGillivray, para 24-001.
subrogation action against a co-assured, this objective of subrogation will not be
defeated. The possibility of double recovery is not possible as the insurance provision
in the underlying contract will exempt the liability of a contracting party so long as
the matter is covered by the insurance.

It is concluded that the methodology to interpret the insurance and underlying
insurance to determine whether the insurer can exercise a subrogation right is as
follows:

(1) Does the insurance contract contain a subrogation waiver clause?:
(a) Yes - no subrogation against contractual beneficiary (who may or may not be
co-assured)
(b) No – Refer to the underlying contract

(2) Does the underlying contract provide a joint insurance clause?
(a) Yes – subrogation right cannot be exercised against the co-assured.
(b) No – refer to the underlying contract as it may still contain an insurance
provision albeit not expressly a joint insurance

(3) Does one party to the underlying contract agree to insure his interest?
(a) Yes – depending on the interpretation of the party’s intention, it is likely
that this insurance will be interpreted for the benefit of the defendant as
well as the assured.
(b) No, the contract is silent – it will ultimately be the interpretation of the
underlying contract but it is likely in this case that there is nothing in the
contract precluding the insurer from exercising his rights of subrogation.

(4) In 2(a) and 3(a) above, if the defendant to a subrogation action paid the
premium, it may be taken as an indication that the parties agreed to claim the
loss from the insurer but not from each other.\(^\text{122}\) However, the premium
payment clause is a persuasive matter but not determinative on its own.

\(^{122}\) Approved obiter in *Cape Distribution Ltd v Cape Intermediate Holdings Plc* [2016] EWHC 1119
(QB)