

Subrogation and Recovery in the Property and Casualty Insurance Markets

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Conflicting Interests and Competing Rights

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Competing Interests and Competing Rights

Why do Conflicts Arise?

No Consistent Policy to the Law

The risk is covered by Insurance so the law should?

Prevent any Subrogation

or

Encourage Subrogation

Competing Interests and Competing Rights

Why prevent Subrogation ?

Wasteful

Encourages Litigation

Windfall benefit to insurer

Conflict of Duty to Insured

Competing Interests and Competing Rights

Why Encourage Subrogation ?

Promotes Responsibility for Safe Working

Reduces Insurance Cost of Safe Operators

Redistributes Real Cost to Negligent Party

(But sometimes risk has nothing to do with fault.)

Competing Interests and Competing Rights

Case Theory for a Subrogated Recovery

We should win this case because:-

We have the right to sue

We have a cause of action

We have a viable target

We have have the evidence

There is no bar to subrogation – (the rebound !)

Competing Interests and Competing Rights

Why might the action rebound?

Barriers to subrogation – how, where and when?

What's in the Judges Tool Box

Implied Terms

Contractual Scheme

Conflict of interest

Circuity of Action

Just & Equitable

Competing Interests and Competing Rights

Some Basic Rules:- (Quick Revision) 1

**Subrogation is a manifestation of basic rule that the insured shall not make a profit from his loss –
Castellain v Preston 1883**

It is automatic – policy wording helps but not essential

It only arises on payment but wording may modify

**Subrogated Insurer cannot keep more than he paid
(Yorkshire Insurance v Nisbet Shipping 1962)**

It is not an Assignment (Morris v Ford Motor 1973)

Competing Interests and Competing Rights

Some Basic Rules:- 2

Subrogation Rights have a higher priority than other creditors in a liquidation (Morley v Moore 1936)

Applies only to Indemnity Insurance (Simpson v Thomson 1877)

It applies to all benefits of the insured that may diminish the loss (Castellain v Preston)

The Insured cannot refuse to permit subrogation – unless policy term

Competing Interests and Competing Rights

Waiver of Subrogation and Non-Disclosure

Edwards John & Co v Motor Union 1922

Competing Interests and Competing Rights

Conflicts in bringing Subrogation Actions

With the target

With the insured

Competing Interests and Competing Rights

A Suggested Classification:-

Employee Cases – (really social policy)

Common Enterprise Cases

Presumed Benefit Cases

Equitable Privilege Cases

Competing Interests and Competing Rights

Social policy

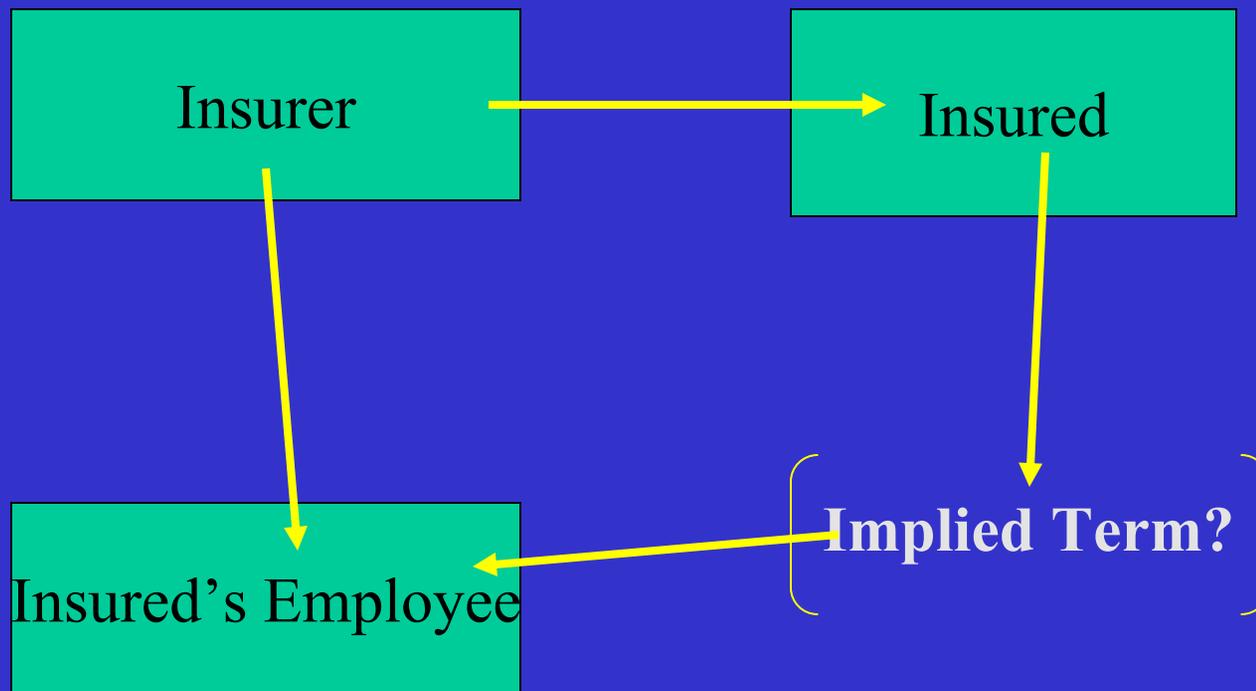
Employee Cases –

Lister v Romford Ice 1957

Morris v Ford Motor Co 1973

Competing Interests and Competing Rights

Employee Cases



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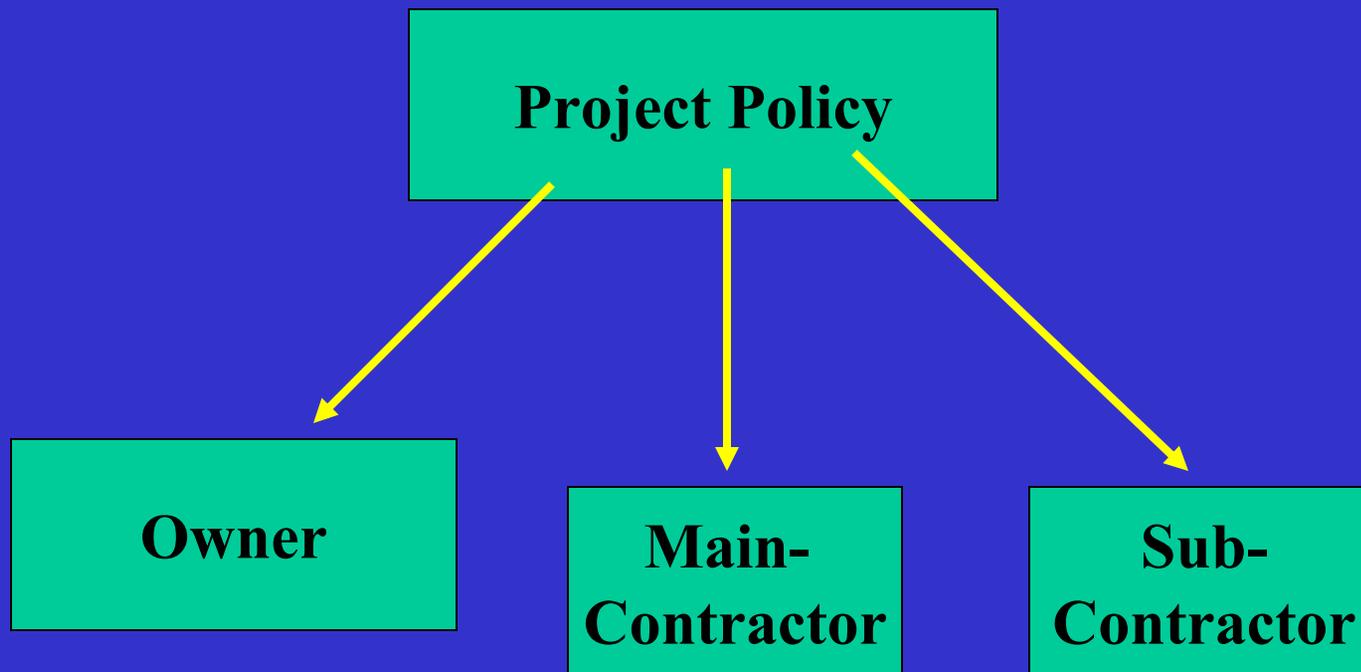
Common Enterprise Cases

“Whatever be the reason why an insurer cannot sue a co-insured in the name of another.... The same would also apply in the case of contractors and sub-contractors on a *common enterprise* under a building or engineering contract”

Lloyd J. in Petrofina

Competing Interests and Competing Rights

Joint or Composite Insurance Cases



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Joint Insurance

Petrofina v Magnaload 1983 2 Lloyds 91

**Stone Vickers Ltd v Appledore Ferguson
1991 2 Lloyds 288**

The Contracts (Rights of Third Parties) Act 1999

Competing Interests and Competing Rights

Joint Insurance

When and how do you find it?

Does it have limits?

In time ?

In scope ?

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The theory is easy to grasp

These cases are usually very complicated

A diagram usually helps

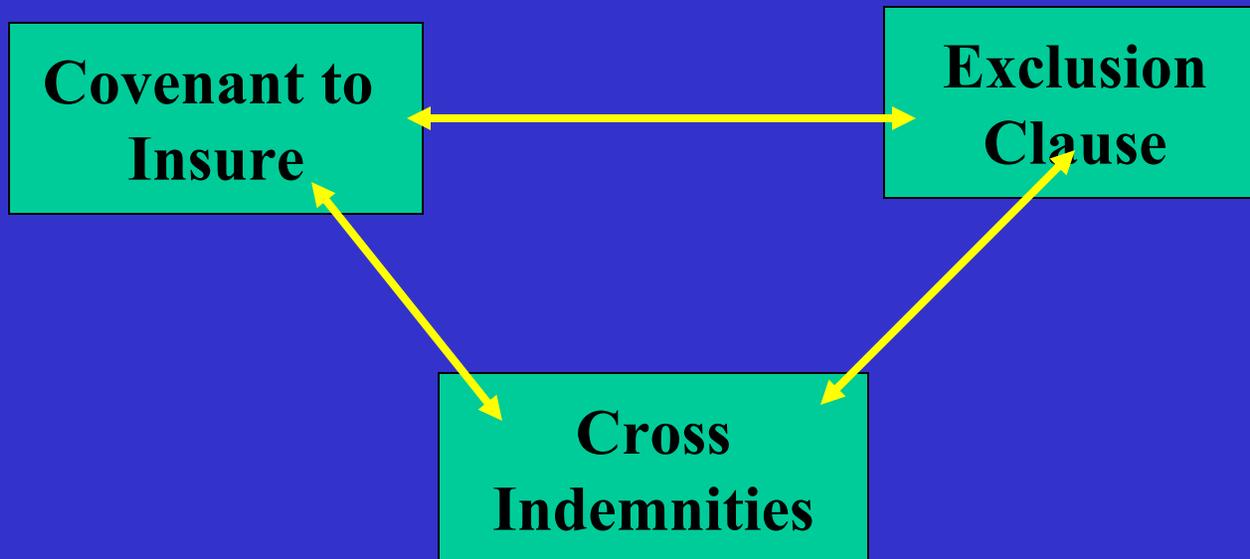
Tips for lawyers

read the whole document before trial!

don't over delegate!

Competing Interests and Competing Rights

Indemnity & Waiver



Competing Interests and Competing Rights

Examples:-

Indemnity & Waiver

Deepak v ICI & Others

CA 1999 1 Lloyds 387

Deepak – Simplified facts

Davy built the plant for Deepak

ICI Licensed the Technology

Plant handed over

Plant Blows Up

Deepak's insurers pay and attempt to subrogate

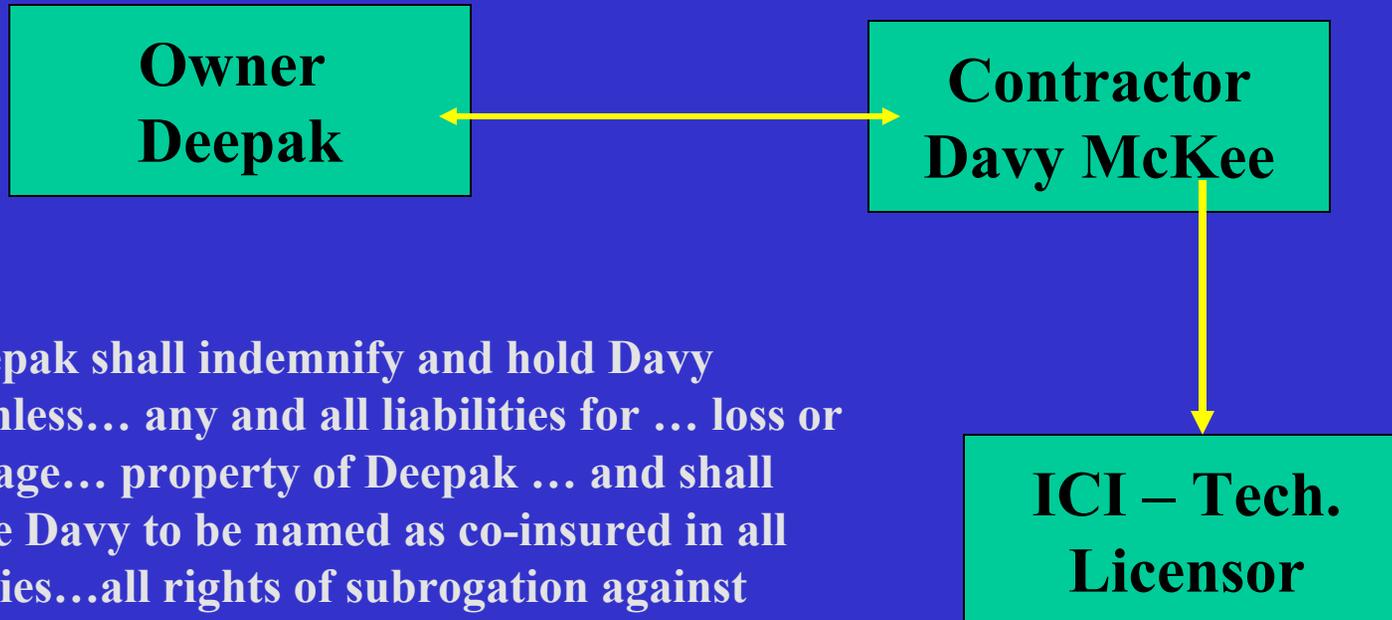
Davy and ICI are targets

Alleged loss caused by misrepresentation by Davy and/or ICI

Of ICI's technology

Issue can Deepak sue Davy and or ICI ?

Deepak Fertilisers v ICI and Davy McKee 1998



“Deepak shall indemnify and hold Davy harmless... any and all liabilities for ... loss or damage... property of Deepak ... and shall cause Davy to be named as co-insured in all policies...all rights of subrogation against Davy being waived”

Deepak – Simplified facts

The Insurance Issue:

Could Davy rely on the indemnity ?

If so would it protect against damage after handover

Would it include “negligent misrepresentation” ?

Did the insurance (after handover) co-insure Davy ?

Was the waiver of subrogation effective ?

Deepak – Simplified facts

And the Court of Appeal said:-

Could Davy rely on the cross indemnity ? No

“Despite the wide wording “against any and all liabilities” the language is not in our judgement appropriate to provide an Indemnity against the consequences of Davy’s breach of an Express contractual term”

“... in the absence of language expressly so indicating, the natural inferences that the indemnity was not intended to apply after the completion of construction.... An indemnity For the full life of the plant ... would be a very surprising provision”

Tip for lawyers:-

Don't assume that the contract draftsman even knew what he intended to do.

It is not just what does it mean – its really what can the other side make it look like it means

Never lose sight of the overall context.

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

New Headquarters - Fire during construction –

- 1. CRS = Client**
- 2. Wimpey = main contractor**
- 3. Hall = Elect Sub cont – (DOM 1)**
- 4. Taylor Young = Architects**
- 5. Hoar Lea = Elect & Mech Consulting Engs**

Joint Names CAR policy for 1, 2, & 3

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

Q. So who are the subro targets?

A. The professional team – Architect and Consulting Eng.

Subrogation Issue

Could the target bring the Main and Dom. Sub cont. Into contribution or would it bounce back?

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

Analysis

Under CLCA 78 – contrib is only available from:-

“ any person liable in respect of the same damage”

Question

**Could main Contractor and Sub Contractor be liable if
they were named insureds under the joint CAR ?**

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

And the CA said:

“To put it quite simply, they like CRS, had entered into contractual arrangements which meant that if a fire occurred, they should look to the joint insurance policy to provide the fund for the cost of restoring and repairing fire damage ... rather than indulge in litigation with each other.”

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

Even better –

“... the agreed assumptions on which on which this preliminary issue was tried set the case off on the wrong foot ... They assumed a breach of obligation by Wimpey and Hall in spite of of the presence of a contractual framework involving the institution of a joint names all risks insurance policy and of a contract which precluded the need for any investigation into the existence or otherwise of legally enforceable duties in the event of fire during the course of the works.”

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

AF interpretation:-

This case is very significant because what Brooke LJ is saying is not that Wimpey and Hall were liable but they had the Joint CAR as a defence to subrogation - namely a “shield” defence but I think he is saying there was no duty because of the contractual scheme so the contractual scheme prevented there even being a tort liability.

Cooperative Retail Services v Taylor Young Partnership Ltd 2000 2 AE 865

AF interpretation:-

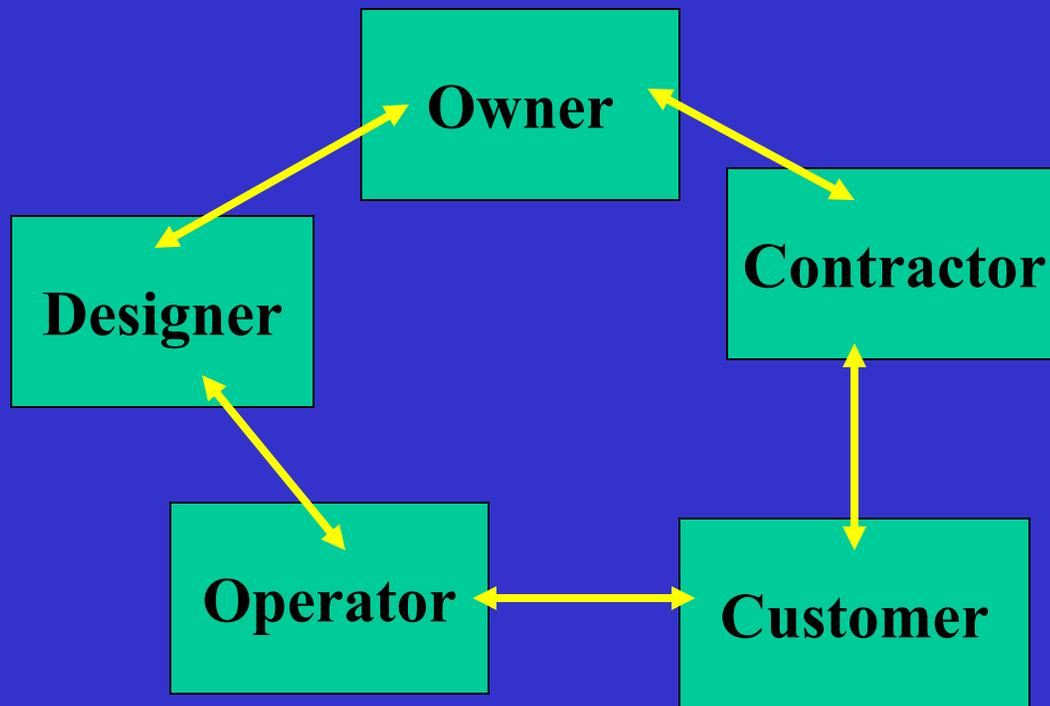
Why does this matter?

Remember that a joint tortfeasor is liable for 100% even if someone else cause 99% of the loss.

So the contractual arrangements between the victim and the other potential contributories are going to be the key issue in determining how much you end up paying and you probably don't have a clue what they are until its too late! (*hope you sleep well tonight!*)

Competing Interests and Competing Rights

Common Enterprise Cases
Example PFI Power station



Competing Interests and Competing Rights

Common Enterprise Cases

Fraser River Pile v Can-Dive Services

Sup. Ct.(Can.) 2000 1 Lloyds rep.199

Competing Interests and Competing Rights

Common Enterprise Cases

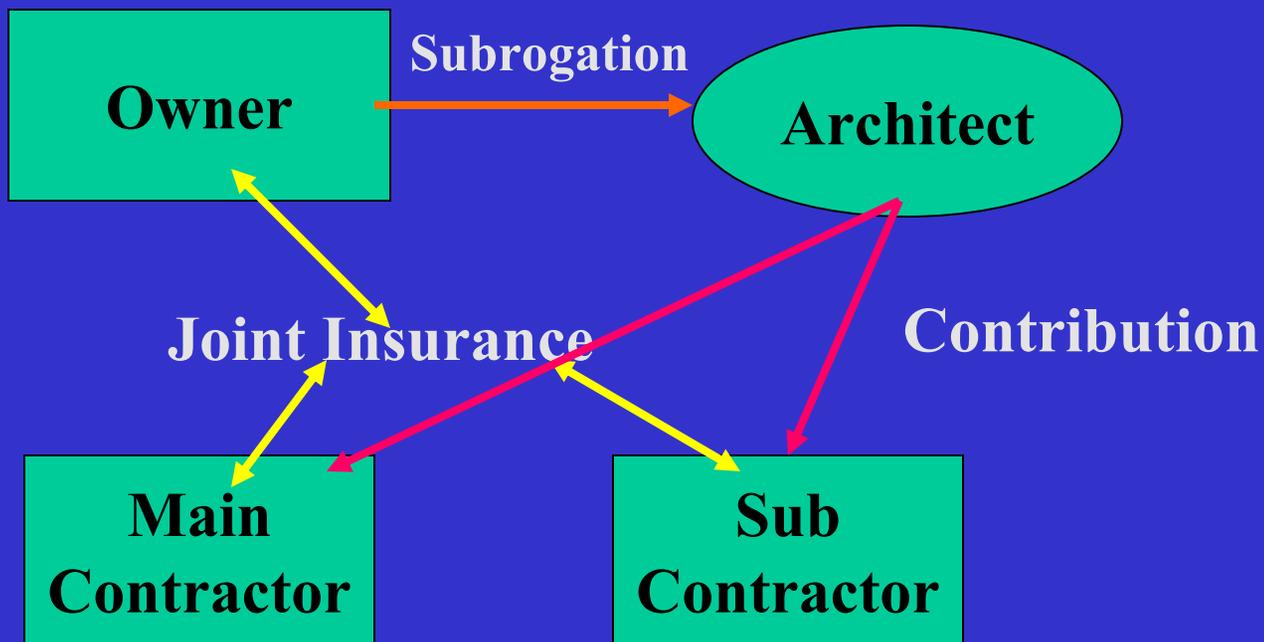
Co-operative Retail v Taylor Young

2000 1 All ER Comm 865

Competing Interests and Competing Rights

Co-operative Retail v Taylor Young

2000 1 All ER Comm 865



Contrast with-

Norwich City Council v Harvey

CA 1989 1 All ER 1180

JCT Main Contract fire “sole” risk of the owner

Sub – contractor not party to Main Contract

Nothing in Sub Contract to exempt from liability

Held Sub-Contractor not liable for negligently causing fire

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British Telecom v Roberts 1999 2 All ER 241

JCT Contract with main Contractor

**Joint CAR Policy Owner and Main Contractor and
nominated Sub - Contractors**

Domestic Sub-Contractor cause fire

**Did insurance provision make it unjust and unreasonable to
subrogate against Sub-Contractor?**

Competing Interests and Competing Rights

British Telecom v Roberts 1999 2 All ER 241

And the HOL said:-

“However in considering the nature of the risk insured by the insurer the fact that the insurer will have a right of subrogation against a domestic contractor... will legitimately effect the question of premium”

Competing Interests and Competing Rights

Presumed benefit Cases –

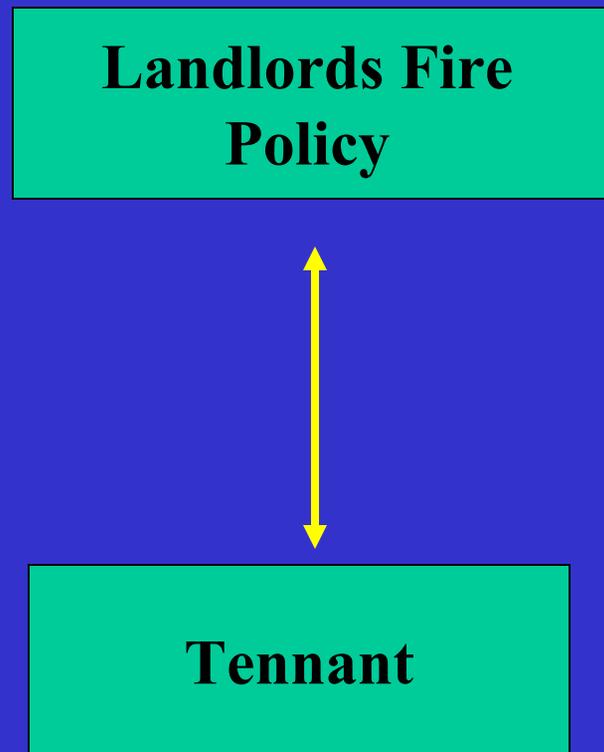
Mark Rowlands v Berni Inns 1986 CA

Contrast with

Lambert v Keymood 1977 2 EGLR 70

Competing Interests and Competing Rights

Presumed Benefit Cases



Competing Interests and Competing Rights

Equitable Privilege Cases?

Morris v Ford Motor Company (1973 2 Lloyd's 27)

**In principle the same as Lister v Romford Ice but
CA refused to permit subrogation.**

**Denning clearly considered that there was a
general power to deny subrogation if it was “just
and reasonable” to do so.**

Competing Interests and Competing Rights

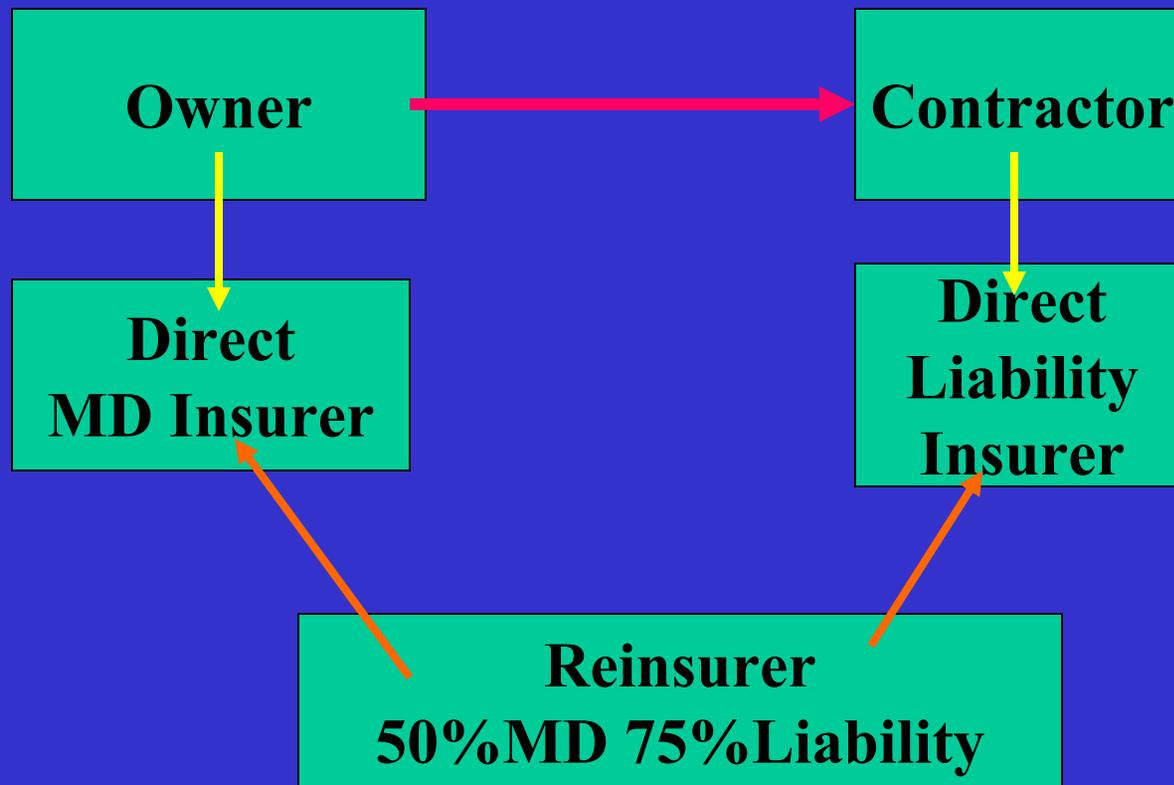
Conflicts at the Reinsurance Level

Simple Example

Insure Owner for 50% and Reinsure Main Contractor for 75%

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Reinsurance Conflicts



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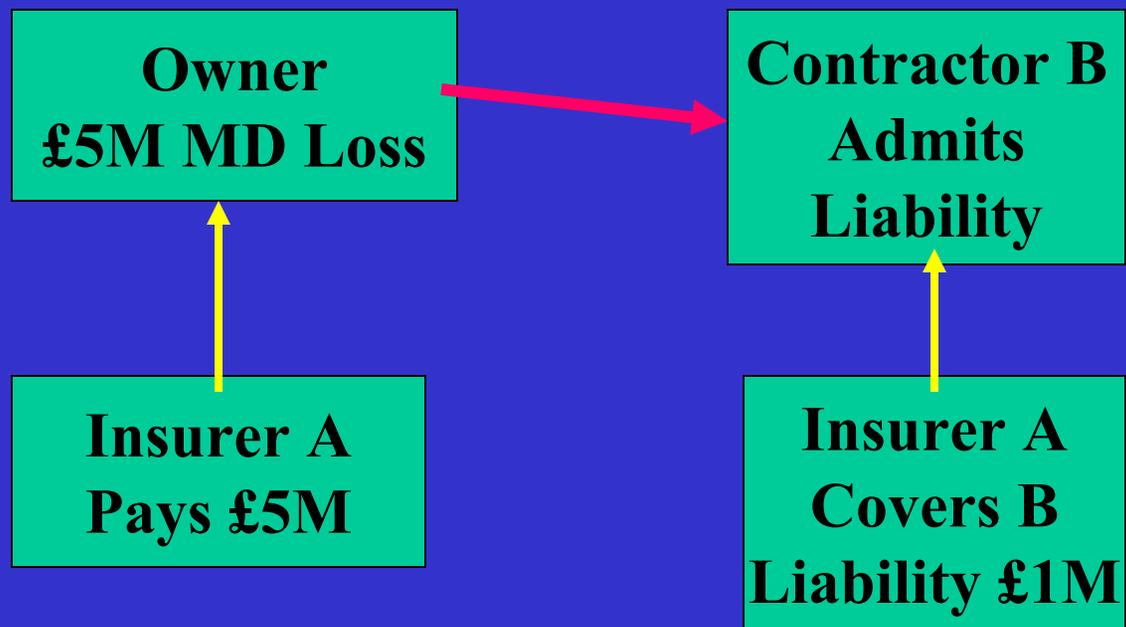
Sums Insured Conflicts

**Insurer A insures property for Material Damage –
pays £5M on fire caused by Contractor B**

**Insurer A insures Contractor B for £1m max
Third Party Liability**

Competing Interests and Competing Rights

Sums Insured Conflicts



Can Insurer A subrogate for £4M ?

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Programme Conflicts

Insurer A insures Property in course of construction for £10m Material Damage in favour of Owner and £10m Contractors liability in favour of Contractor

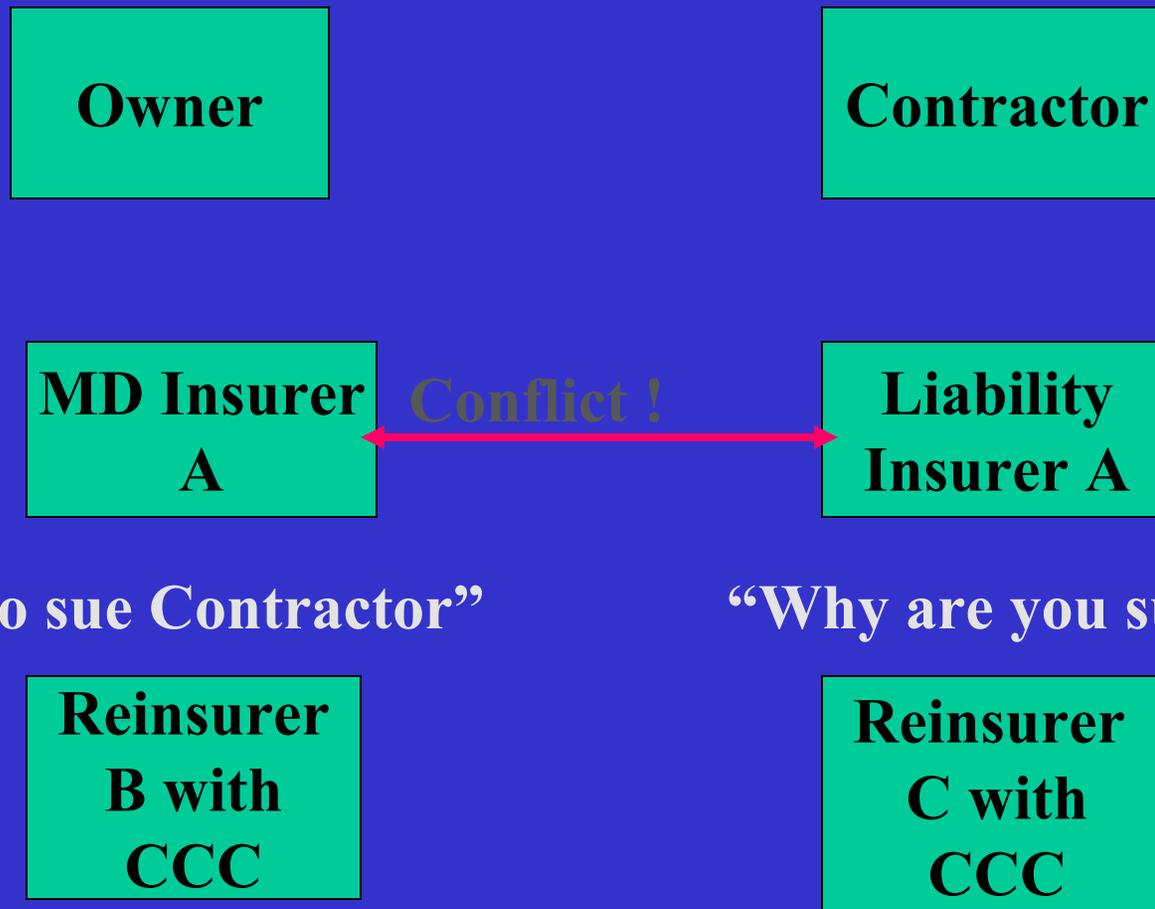
Reinsurer B reinsures Material Damage cover 90%

Reinsurer C reinsures Contractors Liability cover 90%

Both R/I's have Claims Control Clauses

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Reinsurance Conflicts



“Go sue Contractor”

“Why are you suing me?”

What should Insurer A do ?

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Conflict - Underinsurance

Insurer A pays Insured B £5M (policy limit) for fire material damage to Insured B

B suffered actual MD loss of £10M but was underinsured and average applied.

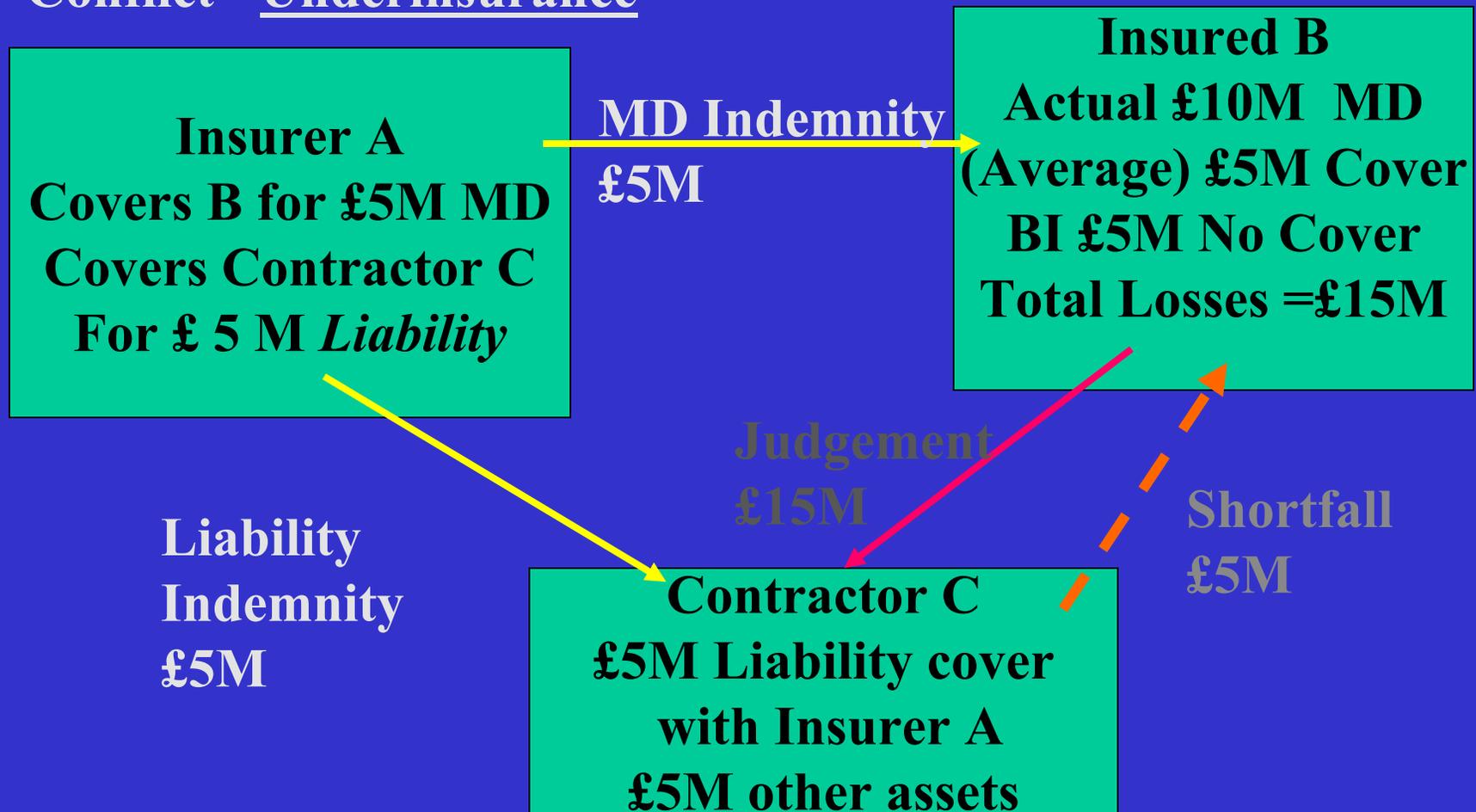
B also suffered B.I. Loss from same fire of £5M

C caused the fire and admits liability. C has £5M liability cover with Insurer A and net assets of £5M

Who gets what?

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Conflict - Underinsurance



Does B have to Account to A for £5M ?

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Who Controls the Claim ?

The concept of Dominus Litis

What is meant by a full indemnity ?

Duty to protect subrogated rights

Who pays the costs ?

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Practical Problems:- Uninsured Loss

What if Contractor makes an admission only in respect of the Material Damage and argues that B.I. Loss is too remote and not recoverable?

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Practical Solutions:- (Before the Loss)

In the Policy Wording

Waiver of Subrogation Rights

Insured's Consent to Subrogation

Control of Subrogation

Respective Priorities

Costs Sharing

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Practical Solutions:- (After the Loss)

Litigation Management Agreement

Consent to Subrogation Action

Co-operation with Evidence

Inclusion of Uninsured Loss

Emergency Decision Making

Apportionment of Costs and Recoveries

Can you impose a duty not to cause a conflict?

Will it comply with SRA Practice Rules?

Competing Interests and Competing Rights

Paying for it?

Conflicts between Insured and Direct Insurer

Conflicts between Cedent and R/I's

Competing Interests and Competing Rights

Paying for it?

Traditional

or

CFA

Competing Interests and Competing Rights

Paying for it?

Who should be a party to the CFA –

Original Insured

Insurer

Both

Competing Interests and Competing Rights

Paying for it?

What should be in the CFA?

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What if you loose?

Use of ATE

Why not?

Risk Based Capital Requirements – CP 190

Solvency II

Limitations of ATE – most are really cat covers.

Issues based costs – a serious problem.

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Confessions of a CFA virgin:

The risk assessment

The biggest risk is always the unknown

Costs estimates will always be wrong

Getting paid may take twice as long as you expect.

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The Future:

Outsourcing recoveries

Whole portfolios

Commutating Recoveries – sell the right to recover?

Thank God – he's stopped talking!

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