

SUBROGATION IN ENGLAND AND WALES

THE LEGAL PRINCIPLES

- The doctrine of subrogation according to the English Courts
- Practical issues
- Prejudice – acts and omissions of the insured
- Restrictions on Insurers' rights
- Agreements with the Insured

- What is subrogation?
- Roman law
- In insurance – two limbs:
 - “Step into the insured’s shoes”
 - Entitlement to recover from insured any benefits received from third parties.

18th Century Cases

Randall v Cochrane (1748) 27 ER 916

(The War of Jenkins' Ear)

Lord Hardwicke:

“The plaintiff insurers had the plainest equity that could be ... the person originally sustaining the loss was the owner but after satisfaction made to him, the insurer ... the assured stands as trustee for the insurer in the proportion of what he [the insurer] paid.”

Mason v Sainsbury (1782) 3 Doug 61

Lord Mansfield:

“Every day the insurer is put in the place of the insured. The insurer uses the name of the insured. The case is clear. The [Riot] Act puts the local authority in the place of the trespassers and upon principles of policy I am satisfied that it is to be considered as if the insurers had not paid a farthing.”

Castellain v Preston (1883) QBD 380

Brett LJ:

“As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured ... whether such right consists of contract ... or in remedy for tort ... or in any other right ...”

Marine Insurance Act, 1906, Section 79

When do subrogation rights vest?

3 Conditions

- Indemnity insurance
- Payment to the Insured
- No exclusions

Payment to the insured

Page v Scottish Insurance Corporation (1929)

No right of subrogation or no right to proceed
with the claim?

(Boag v Standard Marine Insurance Company
(1937))

The Right to Control Proceedings



Commercial Union v Lister (1874) LR 9 Ch App 483

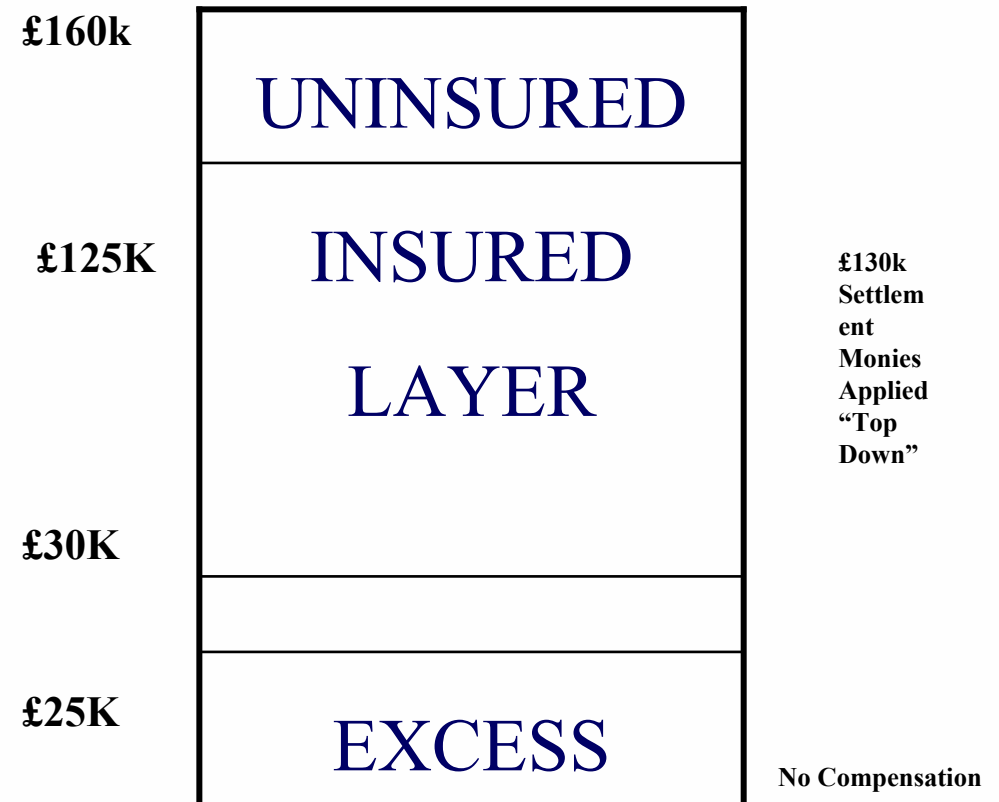
Insured can settle but should not disregard insurers' interests.

“[insured] is entitled to bring an action ... and is bound ... as there is one cause of action ... to bring the action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance company.”

- Proceedings in insured's name only unless assignment
- Bankruptcy / liquidation of Insured
- Windfall
- Lack of cooperation

Allocation of recoveries

- Old rule
- Napier & Ettrick v Kershaw Ltd
[1993] 1 Lloyd's
Rep 197



Insurer's Rights

1. As affected by acts or omissions of the Insured
 - (i) Prior to the first party claim having been paid by the Insurer; and
 - (ii) Post payment of the first party claim having been paid by the Insurer
2. Cases where the courts have interpreted matters against Insurers

Insurer's Rights : General Principle



It is a long standing principle that the Insured is not permitted to prejudice Insurer's rights.

See:

West of England Fire Ins. Co v Spooner (1897)

Horse, Carriage & General Ins. Co v Petch (1916)

Insurer's Rights : Remedy



Depending on the circumstances, Insurers

1. *May* be able to repudiate liability under the policy; though
2. *Will* be able to make a claim for damages for the loss or diminution of their rights

Insurer's Rights : Release or settlement before payment by the Insurer



Best case for Insurers – can *only* repudiate liability under the policy if the policy terms allow.

Otherwise – Insurers will be able to make claim for damages for the loss or diminution of their rights.

Insurer's Rights : Acts or Omissions



Acts – the examples so far.

Omissions – it is unlikely that the Insured will prejudice Insurers' rights by doing nothing.

However, note Noble Resources Ltd v Greenwood, Vasso (1993).

Insurer's Rights : Acts or Omissions



Noble Resources Ltd v Greenwood, Vasso (1993)

Clause within the policy (also clause 16 of the Institute Cargo clauses):

“It is the duty of the assured and their servants and agents in respect of loss recoverable hereunder:

(a) to take such measures as may be reasonable for the purposes of averting or minimising such loss; and

(b) to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised”

Insurer's Rights : Some Cases



Note:

Mark Rowlands v Bernie Inns (1986)

Norwich City Council v Harvey (1989)

Contrast:

Stone Vickers Ltd v Appledore Ferguson Ship Builders Ltd (1992)

Davey Offshore Ltd v National Oilwell (UK) Ltd (1993)

- Rights to vest early
- Insurers control claim and settlement
- Assistance by insured : witnesses, documents
- Right to pro-rata : Note Napier can leave insurers with nothing
- Costs/liability for adverse costs award