1983 January 31

[SAVVIDES, J.]

NICOLAS DROUSHIOTIS (IMPORT-EXPORT) LTD.,
Plaintiffs,

v.

L'UNION DES ASSURANCES DE PARIS (I.A.R.D.)
FIRE ACCIDENT AND GENERAL INSURANCE CO. LTD.
OF FRANCE, THROUGH THEIR CYPRUS AGENTS
PROTECTION INSURANCE AGENCIES LTD.,
Defendants.

(Admiralty Action No. 49/79).

Admiralty—Practice—Third party notice—Unconditional appearance—Does not affect the right of a third party to apply to have the third party notice set aside—Order 16A, rules 7(1)(c) and (3) of the English R.S.C. in force in England on the day preceding the Independence Day of Cyprus.

Admiralty—Practice—Third party proceedings—Function and scope of—Doctrine of subrogation—Claim against insurers under marine insurance policy for insured value of cargo which was totally lost—Insurers have no cause of action against the third party (the ship-owners) because they failed to pay plaintiff's claim and in default of such payment no right of subrogation can be exercised—And because, in the absence of a legal assignment by plaintiff to defendant of its right of action against the third party, the defendant company could not, by using its own name, institute proceedings against the third party, even in case the claim was paid, as the right of subrogation can only be exercised by an action in the name of the insured—Third party notice struck out.

The plaintiffs, a firm for imports and exports, brought the above action against the defendants claiming £27,060 (sterling pounds) under a marine insurance policy being the insured value of a cargo of beetroots shipped by the plaintiffs, on board the S.S., "BAABDA" for carriage from Limassol, Cyprus to a

U.K. port, and which cargo was totally lost and was never delivered to its destination. The defendant entered an appearance and filed an application for joining as parties in the proceedings the owners of motor vessel "BAABDA" on which the goods were loaded for carriage to the United Kingdom, namely, Associated Levant Lines (S.A.L.) of Beirut Lebanon and for leave to issue and serve on them a third party notice. The application was not opposed by the plaintiff and an order was made granting leave to issue a third party notice and for substituted service of same on the Associated Levant Lines (S.A.L.) of Beirut, owners of the motor vessel "BAABDA".

After service was effected on the third party such party entered an unconditional appearance on the 8th November 1979, and on the 3rd December, 1979 filed the present application praying:

"(a) That the order giving leave to join the third party as third party be set aside.

(b) That the order giving leave to serve the third party out of the jurisdiction be set aside and

(c) for an order that all further proceedings against the third party be stayed."

Held, (1) on the effect of an unconditional appearance on the right of the third party to apply to have the third party notice set aside:

That a third party after service upon him of a third party notice has to enter appearance within 8 days from service or within such further time as may be directed by the Court or Judge and specified in the notice (R.S.C. Order 16A, r.4) and then he may wait to raise his objection to the issue of the notice at the hearing of the summons for third party directions when the Judge may refuse the application with the result that the third party proceedings are terminated (R.S.C. Order 16A, r. 7(1)(c)) or after appearance he may file an application to set aside the proceedings (R.S.C. Order 16A, r. 7(3)); and that, therefore, the contention of counsel for defendant that the entry by the third party of unconditional appearance amounts to a waiver of its right to oppose third party proceedings, must fail.

(*Asimenos and Others v. Chrysostomou and Another* (1982) 1 C.L.R. 145 at p. 165 followed).

(2) *After dealing with the function and scope of third party proceedings–vide pp. 26–31 post and with the doctrine of subrogation–vide pp. 31–39 post:*

That in the circumstances of the present case the defendant company has no cause of action against the third party because it failed to pay plaintiff's claim under the policy of insurance for the loss sustained by the plaintiff and in default of such payment no right of subrogation can be exercised; and because in the absence of a legal assignment by plaintiff to defendant of its right of action against the third party, the defendant company could not, by using its own name, institute proceedings against the third party, even in case the claim was paid, as the right of subrogation can only be exercised by an action in the name of the insured; that since the defendant had no cause of action against the third party, it is unnecessary to be examined whether, in the exercise of the Court's discretion, this is a proper case in which the third party proceedings should be allowed to continue; and that, therefore, the application succeeds and the third party notice is hereby struck out with costs in favour of the third party against the defendant.

Application granted

Cases referred to:

Asimenos and Others v. Chrysostomou and Another (1982) 1 C.L.R. 145 at p. 165;

Nigerian Produce Marketing Co. Ltd. and Another v. Sonora Shipping Co. Ltd. and Others (1979) 1 C.L.R. 395;

Churair and Sons v. Snatiren Shipping (1980) 1 C.L.R. 183;

Myers v. N. & J. Sherick Ltd. [1974] 1 W.L.R. 31 at p. 35; [1974] 1 All E.R. 81 at p. 85;

Barclays Bank v. Tom [1922] All E.R. Rep. 279 at p. 280;

Chatsworth Investments v. Amoco Ltd. [1968] 3 All E.R. 357;

Nelson v. Empress Assurance Corporation Ltd. (Faber Third Party) [1905] 2 K.B. 281;

Benecke and Others v. Frost and Others [1876] 1 Q.B.D. 419;

Swansea Shipping Co. Ltd. v. Duncan, Fox and Co. [1876] 1 Q.B.D. 644;

Burford v. Clifford [1932] 2 Ch. D. 122 at p. 140;

Edwards & Co. v. Motor Union Insurance Co. [1922] L.J. K.B. Vol. 91 p. 921 at p. 923;

Castellain v. Preston [1883] 11 Q.B.D. 380 at p. 388;

H. Cousins & Co Ltd. v. D.C. Carriers Ltd. [1972] 2 Q.B.D. 230; 1 All E.R. 55;

Oriental Fire and General Insurance Co. Ltd v. American President Lines Ltd. [1968] 2 Lloyd's Rep. 372; 5

Morris v. Ford Motor Co. [1973] L.R. Q.B.D. 972 at p. 800-801;

K. Chellaram & Sons (London) Ltd. and Another v. Overtania Shipping Co. Ltd. (1982) 1 C.L.R. 699;

Cia Colombiana de Sequros v. Pacific Steam Navigation Co. [1963] 2 Lloyd's L.R. 479 at p. 493; 10

Trendax Trading Corporation and Another v. Credit Suisse [1980] 3 All E.R 721; [1981] 3 All E.R. 520 at p. 531 (H.L.);

Page v. Scottish Insurance Corporation [1929] L.T.R. Vol. 140 p. 571 at p. 575. 15

Application.

Application by the third party for an order setting aside the order giving leave to defendant to join the applicant as third party.

E. Ioannou (Mrs.), for *St. McBride*, for applicant-third party. 20

St. Ambizas for *A. Timothy (Mrs.)*, for respondents-defendants.

Cur. adv. vult.

SAVVIDES J. read the following decision. The plaintiff is a firm for imports and exports and brought this 25 action against the defendants claiming under a marine insurance policy £27,060 (Sterling Pounds), being the insured value of a cargo of 12,490 nettings of beetroots shipped by the plaintiffs on board the S.S. "BAABDA" on or about the 28th June, 1978 for carriage from Limassol, Cyprus, to a U.K. 30 port, and which cargo was totally lost and was never delivered to its destination.

The defendant entered an appearance and filed an application for joining as parties in the proceedings the owners of motor vessel "BAABDA" on which the goods were loaded for carriage 35 to the United Kingdom, namely, Associated Levant Lines (S.A.L.) of Beirut, Lebanon and for leave to issue and serve on them and third party notice. When the application came

up for hearing before the Court, counsel appearing for the defendant stated that the application was intended for leave to issue a third party notice and for substituted service of such notice on the third party. The application was not opposed 5 by the plaintiff and an order was made granting leave to issue a third party notice and for substituted service of same on the Associated Levant Lines (S.A.L.) of Beirut, owners of the motor vessel "BAABDA".

After service was effected on the third party such party entered 10 an unconditional appearance on the 8th November, 1979 and on the 3rd December, 1979 filed the present application praying:

"(a) That the order giving leave to join the third party as third party be set aside.

(b) That the order giving leave to serve the third party 15 out of the jurisdiction be set aside and

(c) for an order that all further proceedings against the third party be stayed"

Counsel for applicant-third party in arguing his case before the Court, contended that the case was not a proper one for 20 the issue of a third party notice, as the plaintiff's claim against the defendant is based upon a marine policy of insurance to which the third party is a stranger, whereas the claim of the defendant against the third party is based on a bill of lading entered into between the third party and the plaintiff to which 25 the defendant is a complete stranger. Counsel contended that the third party in these proceedings is not concerned with the dispute between the plaintiff and the defendant as to whether under the terms of the insurance policy there was an insurable loss and the question as to how the loss of the beetroots arose, 30 is not a matter connected with such issue.

Counsel for the respondent, on the other hand, contended that the right to claim in respect of a marine insurance policy arises out of loss of insured cargo on the third party's ship and not out of the policy itself. Without a contract of carriage, 35 counsel submitted, there would not have been an insurance policy and without a loss there is no obligation to indemnify. It follows, counsel contended, that plaintiff's claim is in respect of the loss of its beetroots and the circumstances of such loss

are the paramount consideration relating to the plaintiff's claim and the terms of the insurance policy are incidental thereto. The grounds of the claims against the third party are based on the third party's liability as carrier both in contract and/or in tort for the negligence of such party in failing to take care and/or prevent the loss of the said cargo which, loss, the third party should have reasonably foreseen. Counsel conceded that the right of subrogation of the defendant did not arise until payment was made under the policy but submitted that in the event of the defendant found liable to indemnify the plaintiff for the loss of the said beetroots, it would be just and equitable and proper that in the same proceedings the plaintiff's rights against the wrongdoer responsible for the loss should be pursued and determined. Finally, she contended that the fact that the third party entered an unconditional appearance, amounts to a waiver of any right of contesting the validity of the third party notice.

Both counsel have very ably advanced their arguments and directed the attention of the Court to a number of authorities on the matter and I wish to express to both of them my appreciation for the elaborate manner in which they have conducted their respective case.

I shall deal first, shortly, with the contention of counsel for the defendant regarding the effect of an unconditional appearance on the right of the third party to apply to have the third party notice set aside. The answer to this, is found in the decision of this Court in *Asimenos Nicos and others* v. *Maroulla Paraskeva Chrysostomou and Another* (1982) 1 C.L.R. 145 at p. 165 as follows:

> "The objection that the third party entered an unconditional appearance which is taken to mean that the third party waived his right to oppose such notice, cannot stand. In accordance with the rules, a third party after service upon him of a third party notice has to enter appearance within 8 days from service or within such further time as may be directed by the Court or Judge and specified in the notice (R.S.C. Order 16 A, r. 4) and then he may wait to raise his objection to the issue of the notice at the hearing of the summons for third party directions when the Judge may refuse the application with the result

that the third party proceedings are terminated (R.S.C. Order 16 A, r.7(1)(c) or after appearance he may file an application to set aside the proceedings (R.S.C. Order 16A, r. 7(3))".

5 Therefore, the contention of counsel for defendant that the entry by the third party of unconditional appearance amounts to a waiver of its right to oppose third party proceedings, fails.

Under our Admiralty Rules there is no special provision regulating third party proceedings, but in view of rule 237
10 which provides that:

"In all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed".

15 the provisions in the Rules of the Supreme Court as applied by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction and as regulating third party proceedings become applicable in Cyprus. The Rules so applicable are the ones in force in England on the day preceding the Inde-
20 pendence Day of Cyprus (15.8.1960) as provided by section 29(2) of the Courts of Justice Law, 1960 (Law 14/60). (See, in this respect, *Asimenos Nicos and others* v. *Maroulla Paraskeva Chrysostomou and another* (supra), *Nigerian Produce Marketing Co. Ltd. & another* v. 1. *Sonora Shipping Co. Ltd., and* 2.
25 *The ship "ASPYR"* (1979) 1 C.L.R. 395, and *Churair & Sons* v. *Snatiren Shipping* (1980) 1 C.L.R. 183).

The relevant provisions applicable are to be found in The Annual Practice 1960 under Order 16A. Rule 1 of such Order, reads as follows:

30 "1(1) Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third party)

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating
35 to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them. 5

the Court or Judge may give leave to the defendant to issue and serve a 'third party notice'.

(2) The Court or Judge may give leave to issue and serve a 'third party notice' on an ex parte application supported by affidavit, or, where the Court or Judge directs a summons to the plaintiff to be issued, upon the hearing of the summons". 10

One of the material changes brought about to this Rule in England after 1960 and which, for the reason mentioned earlier, is not applicable in Cyprus, is that the wording of rule 1(1)(c) has been amended by deleting after the words "subject-matter", the words "is substantially the same as some question or issue arising between the plaintiff and the defendant" and the scope of this Rule has apparently been widened (see per Goff, J. in *Myers* v. *N. & J. Sherick Ltd.* [1974] 1 W.L.R. 31, 35; [1974] 1 All E.R. 81, 85). 15 20

As to the function and scope of third party proceedings the position has been elucidated by Scrutton, L.J. in *Barclays Bank* v. *Tom* [1922] All E.R. (Rep.) 279 at p. 280 as follows: 25

"It is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks that if he is liable, he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has clearly nothing to do, not being concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly 30 35

on different materials, with the risk that a different result might be arrived at.

The object of the third party procedure is therefore, in the first place, to get the third party bound by the decision given between the plaintiff and the defendant. In the next place, it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant And, thirdly, it is directed to saving the extra expense which would be involved by two separate independent actions. With these objects in view the third party order usually provides that the third party may appear at the trial between the plaintiff and the defendant".

And further down at the same page:

"It seems to me that the proper view to take on this part of the third party procedure is that taken by COZENS-HARDY, L.J., in *McCheane* v. *Gyles* (No. 1) [1902] 1 Ch. at p. 301—namely, that

'The Act, therefore, treats the third party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party,'

with the result that the defendant may defend himself in any way in which any defendant in an action at the suit of a plaintiff may defend himself, among which modes of defence is included the making of a counterclaim".

In the same case Eve, J., concurred and, after expressing his agreement with what was said in *McCheane* v. *Gyles*, he concluded as follows at p. 281:

"It is clear that the service of the third party notice does not make the person on whom it is served a defendant to the action, but it seems to me that it does make him a defendant quod the person serving the notice. That seems to be the reasonable view to take, because the main object of the procedure was to obviate the need for two

actions. In the main action the rights of the plaintiff and the defendant are determined without reference to the defendant's claims over against the third party, but when those rights have been ascertained it is then open to the person brought in by the third party to have all relevant disputes determined between him and the person serving the notice:" 5

The procedure to be followed by a third party on whom service of third party notice, issued by leave of the Court, is effected, is explained in The Annual Practice 1960 vol. I, as follows at p. 383: 10

"The plaintiff (*The Bianca*, 8 P.D. 3) or the third party (*Barton* v. *L. & N.W. Ry.*, 38 Ch. D. 147; D.C.F. 81) may apply to discharge the order after appearance (*Benecke* v. *Frost*, 1 Q.B.D. 419). The application is made in Q.B.D. by summons to the Master (Chitty F., 296). It is sometimes made in Ch. D. by motion (see *McCheane* v. *Gyles* (No. 1), [1902] 1 Ch. p. 289), but the more convenient course in all cases is to apply on the hearing of the application for directions; the Master can then dismiss the application (r. 8(1)(c)) and so terminate the proceedings. But application may be made to set aside the proceedings at any time under r. 7(3); see *Greville* v. *Hayes*, [1894] 2 Ir. R. 20; *Furness* v. *Pickering*, [1908] 2 Ch. 224. A co-defendant served under r. 12 must wait until the summons for directions, as there is no order to appeal against (*Baxter* v. *France*, [1895] 1 Q.B. 455)". 15 20 25

The question as to whether third party proceedings should be allowed has been considered in a number of cases by the Courts in England. In *Chatsworth Investments* v. *Amoco Ltd.* [1968] 3 All E.R. 357, though a case decided under the new Rules of the Supreme Court whereby the scope of the Rule as in force in 1960 was widened, Russell, L.J., although he found that the relief claimed by the defendants against the third parties was connected with the subject matter of the plaintiffs' action, he decided that the third party proceedings should be struck out. The reason for doing so, as explained by him in his judgment, was because, since the third parties were in no way connected with the argument between the plaintiffs and the defendants in the action on the agreement of 1963, 30 35 40

and the plaintiffs were not concerned with the argument between the defendants and the third parties as to the agreement of 1965, the Court should not put those parties to unnecessary costs and so should exercise its discretion to refuse to permit the 5 third party proceedings. Widgery, L.J., at p. 363 of the same case, though in entire agreement with the judgment of Lord Russell, has this to add:

"Between 1883 and 1929 third party proceedings were restricted to claims for contribution or indemnity and this 10 led to the exclusion of such proceedings in many cases in which they appear to be eminently desirable. Thus in *Pontifex* v. *Foord**, a lessee sued for breach of the repairing covenant in his lease was not able to bring in his sub-lessee as a third party although the repairing covenant 15 in the sublease was indentical with that in the headlease. Again in *Martin* v. *Whale*** a buyer of goods from a seller who had no title could not bring in the seller as a third party when sued by the true owner for recovery of possession.

20 Now that the scope of third party proceedings has been extended, it would, I think, be unfortunate if the terms of R.S.C., Ord. 16, r. 1, were given a restricted interpretation. The court's discretion to disallow third party proceedings in appropriate cases is an adequate safeguard 25 against abuse".

In *Nelson* v. *Empress Assurance Corporation Limited*, (*Faber, Third Party*), [1905] 2 K.B. 281, which was an action against an underwriter upon a policy of marine insurance, the defendant applied for leave to issue and serve a third party notice upon 30 the underwriter upon a policy of reinsurance. On appeal from an order of the Master, granting leave to issue and serve a third party notice which was affirmed by a judge at Chambers, the Court of Appeal held that the contract of reinsurance was not a contract of "indemnity" so as to form ground for 35 third party proceedings within the meaning of Order 16.

In *Benecke & Others* v. *Frost & Others* [1876] 1 Q.B.D. 419, in which the claim against the defendants was for not accepting

* [1884] 12 Q.B.D. 152

** [1917] 1 K.B. 544 affd C.A. [1917] 2 K.B. 480.

183 chests of shellack, the defendants contended that they were acting as brokers for disclosed principals whom they cited as third parties claiming to be indemnified by them against liability and further alleging that the shellack was not according to the quality contracted for and, therefore, the defendants and their principals respectively were not bound to accept same. One of the alleged principals moved the Court to set aside the third party notice. Blackburn, J., in refusing to grant the motion, had this to say at p. 422:

"The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries". (The Act to which he was referring was the Judicature Act 1873).

In *Swansea Shipping Co. Ltd.* v. *Duncan, Fox & Co.* [1876] 1 Q.B.D. 644, which was an action brought for breach of charter-party by which the defendants agreed to discharge a cargo of nitrate of soda as fast as the custom of the Port of Discharge would allow and an application was made to join the purchaser of the cargo as third party, though the whole question between the plaintiffs and the defendants, and the defendants and the third party was not identical, Jessel, M.R., in granting leave to join the third party, had this to say at pp. 649-650:-

"On the whole, therefore, it does appear to me that a material question is common both between the plaintiffs and the defendants and between the defendants and the third persons, as to whether the ship was discharged as fast as the custom of the Port of Leith allowed".

As to the meaning of the words "substantially the same", in *Burford* v. *Clifford* [1932] 2 Ch. D. p. 122, Lawrence, L.J. had this to say at p. 140:

"The words 'substantially the same' should, I think, be interpreted as 'the same in substance although not in form' ".

In view of the nature of third party proceedings which is analogous to a cause instituted by the defendant against the third party, a question which poses for consideration is whether

the defendant being an insurance company disputing plaintiff's claim on the policy of insurance has a cause against the third party, by subrogation to a right arising from breach of contract between the plaintiff and the third party and vested in the
5 plaintiff (a) without having admitted liability on the policy of insurance and having paid plaintiff's claim, and (b) whether it could bring an action in its own name and not that of the insured.

The doctrine of subrogation has been considered and its
10 origin explained in *Edwards & Co.* v. *Motor Union Insurance Co.* [1922] L.J. K.B. Vol. 91, p. 921 by McCardie, J., at p. 923 as follows:

"The doctrine of subrogation must be briefly considered. It was derived by our English Courts from the system of
15 Roman Law. It varies in some important respects from the doctrine as applied in that system, and indeed, the actual term 'subrogation' does not, I think, occur in Roman law in relation to the subjects to which it has been applied by English law—see Dixon on the Law of Subrogation
20 (Philadelphia, 1862), ch. i. The doctrine has been widely applied in our English body of law as, for example, to sureties and to matters of ultra vires as well as to insurance. *In connection with insurance it was recognised ere the beginning of the eighteenth century.*

25 In *RANDAL* v. *COCKRAN*, decided in 1748, it was held that the plaintiff insurers, after making satisfaction, stood in the place of the assured as to goods, salvage, and restitution in proportion for what they paid. As the Lord Chancellor (Lord Hardwicke) said: 'The plain-
30 tiffs had the plainest equity that could be'. It is curious to observe how this doctrine of subrogative equity gradually entered into the substance of insurance law, and at length became a recognised part of several branches of the general common law. In *MASON* v. *SAINSBURY* (3 Doug.,
35 at p. 64), Lord Mansfield said: 'Every day the insurer is put in the place of the insured'. Buller, J., in the same case, in approving judgment for the plaintiff insurer, said (3 Doug., at p. 64): 'Whether this case be considered on strictly legal principles, or upon the more liberal
40 principles of insurance law, the plaintiff is entitled to recover'. The more liberal principles were based on

equitable considerations; and in the well-known case of *BURNAND* v. *RODOCANACHI* (51 L.J. Q.B., at p. 552; 7 App. Cas., at p. 339), Lord Blackburn said in reference to a marine policy; 'if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back'. This equity springs, I conceive, solely from the fact that the ordinary and valid contract of marine insurance is a contract of indemnity only. The point was put most clearly by Brett, L.J., in *CASTELLAIN* v. *PRESTON* (52 L.J. Q.B., at p. 370; 11 Q.B.D. at p. 386), when he said: 'The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only'. That is the principle embodied in section 79 of the Marine Insurance Act, 1906. If, then, subrogation is based on indemnity, it is well to consider the features flowing from subrogation. This matter is neatly stated in Porter on Insurance (6th ed.), p. 236, as follows: 'This right rests upon the ground that the insurer's contract is in the nature of a contract of indemnity, and that he is therefore entitled upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogaged to the right of action of the assured against them'. See, too, Arnould on Marine Insurance (10th ed.), vol. ii., s. 1, 226, and MacGillivray on Insurance, p. 733.

If once the claim is paid, then as a matter of equity, the rights to recover against third persons pass from the assured to the insurer, although the legal right to compensation remains in the assured, and although actions at law must be brought in the name of the assured and not of the insurer—see *LONDON ASSURANCE CO.* v. *SAINSBURY*, and *KING* v. *VICTORIA INSURANCE CO.*

As pointed out in MacGillivray (p. 740), it follows from this equity that if the assured, upon tender of a proper

indemnity as to costs, refuses the use of his name, the insurer can by proceedings in equity compel him to give the use of his name. This has long been settled law". (reference to MacGillivray is in respect of the 5th Ed.
5 Vol. 2, para. 1899, p. 922).

Subrogation is the right of an insurer who has paid a loss to receive the benefit of all the rights and remedies of the insured against third parties, which, if satisfied will extinguish or diminish the ultimate loss sustained (*Castellain* v. *Preston*, [1883] 11
10 Q.B.D. 380, *H. Cousins & Co. Ltd.*, v. *D & C Carriers Ltd.*, [1971] 2 Q.B.D. 230; 1 All E.R. 55).

The extent of the doctrine was described by Brett L.J. in *Castellain* v. *Preston* (supra) at p. 388, as follows:

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

(The above dictum was applied in *H. Cousins & Co. Ltd.* v. *D & C Carriers Ltd.* (supra)).

The right to compensation remains in the insured and an insurer who is subrogated to the rights of the insured can bring
30 his action only in the name of the insured. (See *Edwards & Co.* v. *Motor Union Insurance Co.* (supra) in which all previous authorities are reviewed. Also *Oriental Fire and General Insurance Co. Ltd.* v. *American President Lines Ltd.* [1968] 2 Lloyd's Rep. 372).

35 In McGillivray & Parkington on Insurance Law, 6th Ed. at p. 786 under para. 1883, it reads:

"When the insurer exercises rights of subrogation in the name of the insured, the law ignores the fact that the insurer

is the real plaintiff. Thus if an insured, in whose name an action is brought by a domestic insurance company, resides abroad, an order may be made for security for costs (*Gough* v. *Toronto and York Radial R.W. Co.* [1918] 42 O.L.R. 415). 5

And, further, at page 787, para. 1884:

"If the insured refuses to allow the insurer to use his name as a plaintiff, the insurer may institute an action against the defendant in his own name, join the insured as a second defendant and ask the Court to order him to lend his 10 name to the action as a plaintiff or, perhaps, ask for an order that the first defendant pay damages to the second defendant and for a declaration that the second defendant holds such damages on trust for the insurer".

The doctrine of subrogation and the question as to whether 15 an insurer can bring an action in his own name, has also been expounded by Lord Denning, M.R. in *Morris* v. *Ford Motor Co.* [1973] (L.R. Q.B.D., 972, at pp. 800 and 801, as follows:

"This is a contract which contains an indemnity. As such, it gives rise to a right in the indemnifier to be subrogated 20 to the rights of the indemnified. But it is necessary to analyse this right. In particular, to see whether it gives the indemnifier a right to sue in the name of the indemnified.

Let me first distinguish it from a contract of suretyship. When a surety pays off the debt, he is entitled in his own 25 name to sue the principal debtor for the amount, or to sue his co-sureties for contribution. He is entitled to any securities which may have been given for the debt by the principal debtor to the creditor. These rights do not depend upon contract, but upon the established 30 principles of the courts of equity. It was so stated by Sir Samuel Romilly in his argument in *Craythorne* v. *Swinburne* (1807) 14 Ves. Jun. 160, 162, which was approved by Lord Eldon L.C., at p. 169. Also by Lord Selborne L.C. and Lord Blackburn in *Duncan, Fox & Co.* v. *North* 35 *and South Wales Bank* [1880] 6 App. Cas. 1, 12, 18, 19.

Now I turn to contracts of indemnity. Where an insurer, or any other person who enters into a contract to indemnify

another, pays the amount of the loss or damages to the insured, he is entitled to the advantages of every right of action of the assured, whether in contract or in tort which may go in diminution of the loss: See *Castellain* v. *Preston* [1883] 11 Q.B.D. 380; *H. Cousins & Co. Ltd.* v. *D. & C. Carriers Ltd.* [1971] 2 Q.B. 230; this entitlement, too, does not depend on the contract itself but on the 'plainest equity'. At any rate, Lord Hardwicke L.C. said so: see *Randal* v. *Cockran* [1748] 1 Ves. Sen. 97 as explained in *Yates* v. *Whyte* (1838) 4 Bing. N.C. 272, 283. But this entitlement does not amount to an assignment of the right of action. It does not entitle the insurer or indemnifier to sue in his own name a wrongdoer who has caused the loss or damage. See *London Assurance Co.* v. *Sainsbury* [1783] 3 Doug. K.B. 245; *Simpson & Co.* v. *Thomson* [1877] 3 App. Cas. 279. In order to sue the wrongdoer, the insurer or indemnifier must use the name of the insured or party indemnified: See *Mason* v. *Sainsbury* [1782] 3 Doug. K.B. 61. But the important point to notice is this: the insurer had no right at law to make use of the name of the assured. If the assured did not consent to it, the insurer had to go to a court of equity to compel him to allow it. And the court of equity could impose such terms as it thought fit. Take this case: suppose an insurer, without the consent of the assured, brings an action in the name of the assured against the wrongdoer. The action fails, and costs are awarded against the assured. The insurer does not pay the costs. He may be insolvent and not have the money to pay the costs. In that case the assured would have to pay the costs himself. That cannot be right. So it was always held that, if an insured did not consent to his name being used, the insurer had to go to a court of equity to compel him to allow his name to be used: see *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330, 339, per Diplock J. A court of equity would only compel it on such terms as were just and equitable. It might, for instance, insist on the insurer giving security for the costs: see *John Edwards & Co.* v. *Motor Union Insurance Co. Ltd.* [1922] 2 K.B. 249, 254. Strangely enough, no case has been found in the reports in which a court of equity has been asked to

compel a man to give his name to be used in action of tort. At any rate Mr. Arthur Cohen, Q.C., one of the best lawyers of the last century, did not find one: see *King* v. *Victoria Insurance Co. Ltd.* [1896] A.C. 250, 256. So I do not suppose I could. But, the very fact that the insurer had to go to a court of equity shows that the right of the insurer to sue in the name of the assured arises in equity and not by virtue of an implied contract. 5

I should say, for sake of completeness, that if the insured assigns his rights of action to the insurers and notice of the assignment is given to the wrongdoer, the insurer can now sue in his own name: see *Compania Colombiana de Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101. But, otherwise, unless the assured consents, the insurer has to resort to equity." 10 15

(see also the judgment of this court in *K. Chellaram & Sons (London) Ltd. and another* v. *Overtania Shipping Co. Ltd.* (1982) 1 C.L.R. 699).

In *Cia, Colombiana de Seguros* v. *Pacific Steam Navigation Co.* [1963] 2 Ll.L.R. p. 479 at p. 493, Roskill, J. had this to say: 20

"So much, then, for the authorities. What is the principle to be adduced from them? I think it can be stated in this way. Where, before 1873, equity would have compelled the assignor to exercise his rights against the contract breaker or tortfeasor for the benefit of the assignee, those rights can, since 1873, be made the subject of a valid legal assignment and, subject to due compliance with the requirements of the statute as to notice, can be enforced at law. Equity always, before 1873, compelled an assured to lend his name to enforce his underwriter's rights of subrogation against a contract breaker or tortfeasor. It follows, therefore, that the only possible objection to such rights being now enforceable at law is that such enforcement would involve the enforcement of a bare cause of action in contract or in tort. But, as Mr. Littman urged upon me, if that is so, why did equity act as equity did act before 1873 in relation to the enforcement of subrogation rights? I think the answer is because the enforcement of such rights was never regarded as the enforcement of a bare cause of 25 30 35

action, but as the enforcement of a cause of action legitimately supported by the underwriter's interest in recouping himself in respect of the amount of the loss which he had paid under the policy as a result of the acts, neglects or defaults of the actual contract breaker or tortfeasor."

And at page 494:

"I think, therefore, that in principle Mr. Littman's submission on this first point is correct. I think that an assignment by an assured to his underwriter of the assured's rights against the contract breaker or tortfeasor is enforceable by the underwriter in the underwriter's own name, provided, of course, that the other requirements of Sect. 136 of the Law of Property Act, 1925, are satisfied. It follows that I reject the argument that King's case, sup., was wrongly decided. It should be noted that though often cited, it has never been criticized."

The *Calombiana* case was considred in *Trendtex Trading Corporation and another* v. *Credit Suisse* [1980] 3 All E.R. 721 by the Court of Appeal and its decision was affirmed by the House of Lords, (see, [1981] 3 All E.R. 520 at p. 531.) Lord Denning, M.R. in delivering the judgment of the Court of Appeal at page 743, drew the distinction between subrogation and legal assignment of a right of action as follows:

"Take next a case where a man sells goods on an instalment basis, and after a time the buyer repudiates the contract and the repudiation is accepted. The seller is left with a claim for the price of the unpaid instalment and damages for repudiation. The seller can certainly assign the debt to a purchaser. Can he not also assign the chose in action for damages? The point was discussed by McCardie J.. in *County Hotel and Wine Co. Ltd.* v. *London and North Western Railway Co.* [1918] 2 K.B. 251. He saw nothing in public policy to prevent the assignment."

The insurer's right of subrogation, however, cannot be exercised until he has made payment under the policy. In *Page* v. *Scottish Insurance Corporation,* [1929], L.T.R. vol. 140, page 571, Scrutton, L.J. had this to say in this respect at p. 575:

"Subrogation is quite a different thing. It is a kind of

equitable right of underwriters who have indemnified the assured, seeking to minimise their loss by using for their own benefit any legal rights which the assured could have enforced in respect of the subject-matter insured. But in the case of subrogation the underwriter cannot sue in his own name. His rights are the rights of the assured. In the well-known case of *Simpson and others* v. *Thomson and others* (38 L.T. Rep. 1; 3 Asp. M.C. 567; 3 App. Cas. 279), where there was a collision between ships, both owned by the assured, and each was negligent, the underwriter was unable to get the benefit of the owner's claim against money paid into court by the second ship in limitation of liability proceedings because he could only get it out by saying the first ship had a right against the second ship, and as the owner could not sue himself there was no money that the underwriter could get the benefit of. But I had always understood that the underwriter had no right to subrogation unless and until he had fully indemnified the assured under the policy. When he had fully indemnified the assured he then had the equitable right to diminish his loss by using in his own favour and in the name of the assured any rights the assured could use against a third party in respect of the subject-matter of the loss.

There are a series of cases in which that has been said. I look at *Castellain* v. *Preston* (49 L.T. Rep. 29; 11 Q.B. Div. 380), where Brett, L.J. said (11 Q.B. Div. at p. 389): 'He cannot be so subrogated (into a right of action) until he has paid and made good the loss.' I look at *Darrell* v. *Tibbitts* (42 L.T. Rep. 797; 52 Q.B. Div. 560) and I find Brett, L.J. saying (42 L.T. Rep., at p. 799; 5 Q.B. Div., at p. 563): 'The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against.' That is after the assured has been paid by the insurers for

the loss. I turn to the House of Lords in *Simpson and others* v. *Thomson and others* (sup.), and in the case of the two ships I find that Lord Cairns, L.C. says (38. L.T. Rep., at p. 2: 3 App. Cas., at p. 284): 'I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see now the right can be asserted at all.'

I think one is confirmed in one's idea that that is the law by the fact that when the marine insurance law was codified - and I know of no difference as to subrogation between fire and marine insurance - sect. 79 of the Marine Insurance Act 1906 begins: 'Where the insurer pays for a total loss .... he thereupon becomes entitled to take over the interest of the assured'."

(see also *Trendtex Trading Corporation and another* v. *Credit Suisse* (supra) and *Morris* v. *Ford Motor Co.* (supra)).

With the above authorities in mind I have come to the conclusion that, in the circumstances of the present case the defendant company has no cause of action against the third party for the following reasons:

(a) It failed to pay plaintiff's claim under the policy of insurance, for the loss sustained by the plaintiff and in default of such payment no right of subrogation can be exercised.

(b) In the absence of a legal assignment by plaintiff to defendant of its right of action against the third party,

> the defendant company could not, by using its own name, institute proceedings against the third party, even in case the claim was paid, as the right of subrogation can only be exercised by an action in the name of the insured. 5

Having found that the defendant had no cause of action against the third party, I deem it unnecessary to examine whether, in the exercise of my discretion, this is a proper case in which the third party proceedings should be allowed to continue. 10

In the result, the application succeeds and the third party notice is hereby struck out with costs in favour of the third party against the defendant.

Application granted. Third party notice struck out. 15