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**UNIVERSITY OF SOUTHAMPTON**

**FACULTY OF LAW, ARTS & SOCIAL SCIENCES**

School of Law

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**DOUBLE INSURANCE AND CONTRIBUTION**

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**Nisha Mohamed**

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## **TABLE OF CONTENTS**

### **INTRODUCTION**

BACKGROUND	6
AIMS AND OBJECTIVES	7
STRUCTURE AND METHODOLOGY	8
OUTCOMES	15

### **PART A: DOUBLE INSURANCE**

#### **CHAPTER 1: DOUBLE INSURANCE**

1.1 The meaning of Double Insurance	16
1.2 Methods of interpreting wordings in policy with double insurance clauses	21
1.3 Contribution as a general concept	24
1.4 Return of Premiums when the Insurer Refuses to Pay	27
1.5 Legislative Framework of the Return of Premium	29
1.6 Position Prior to Legislation	29

#### **CHAPTER 2 THE RIGHTS OF AN ASSURED**

2.1 The devices Insurers use to avoid indemnifying an assured: Are they fair?	32
2.2 Escape Clause against Excess Clause	34
2.3 Escape Clauses against Escape Clauses	38
2.4 Excess Clause against Excess Clause	38
2.5 The effect of Rateable Proportion Clauses	39
2.6 Clauses in combination: Excess or Escape Clauses against Rateable Proportion Clauses	40

## **CHAPTER 3: Legislative Provisions – Section 45 Insurance Contracts Act 1984**

3.1 s45 Insurance Contracts Act 1984 : “Other Insurance” Clauses – The Australian legislation barring double insurance exclusion clauses and whether the English Law needs the same?	45
3.2 s45 Insurance Contracts Act 1984 –“Other insurance” provisions	49
3.3 Meaning of “the insured”– any difference from “any insured” or “an insured”	52
3.4 The meaning of “entered into”- include non-party insured?	53
3.6 s45: The Exceptions	56
3.6.1 Exception 1: Not being a contract of insurance required to be effected by or under a law, including the law of a State or Territory	61
3.6.2 Exception 2: s45 (2) Subsection (1) does not apply where some or all of the loss is not covered by a contract of insurance that is specified in the first-mentioned contract.	63
3.7 The meaning of “Specifically” under s45 (2)	64
3.8 The Requirement for an assured to Notify the Assured: Validity of s45 (1)	68
3.9 s45 and its impact on Excess Clauses, Exclusion Clauses and Rateable Proportion Clauses and when the clauses work in combination	77
3.10 True Excess Liability in a Policy	79
3.11 Clauses: Achieving the Aims of the ALRC	87
3.12 Severance of void parts in clauses	95
3.12 Is there sufficient protection for the Insurer?	97
3.13 Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd: The Appeal	97
3.14 Review of the Insurance Contracts Act 1984	105
3.15 Analysis of the cases	107
3.16 The Effect of the “Other Insurance” Clause- the American View	109
3.17 The Canadian Position on Double Insurance	112
3.18 Possible Alternatives	115
3.19 Possible Solutions to the Clauses: Is there a solution?	116

## **PART B: CONTRIBUTION**

### **CHAPTER 4 THE MEANING OF CONTRIBUTION**

4.1 When does contribution arise?	121
4.2 Balancing the Interest of the Insurer and the Assured	122
4.3 Contribution: Common Law or Statutory?	124

### **CHAPTER 5 WHEN THE RIGHT OF CONTRIBUTION ARISES**

5.1 Factors which have to be present for Contribution	126
5.2 Same Subject Matter Common to Both Policies and Each Policy must cover the Same Interest in the Same Subject Matter	126
5.3 Each Policy must cover the Same Risk	130
5.4 The Policies Must be in force and valid	140

### **CHAPTER 6 THE RIGHTS OF AN INSURER TO SEEK CONTRIBUTION AND ENFORCEMENT**

6.1 The rights of an insurer to seek contribution	142
6.2 Methods of calculating insurer's liability for insurance	144
6.2.1 Maximum Potential Policy	144
6.2.2 Independent Actual Liability	145
6.2.3 Common Liability Test	147
6.3 Criticisms and possible solutions	149
6.4 Volunteers in Indemnifying and the Right of Recovery	151
6.5 Whether Incidental overlaps allow a contribution?	154

## **CHAPTER 7: ASBESTOS LITIGATION FROM AN INSURANCE PERSPECTIVE**

7.1 Development of the cases regarding Mesothelioma	160
7.2 Mesothelioma Litigation and its impact	161
7.2.1 The decision in Fairchild v Glenhaven Funeral Services Ltd	163
7.2.2 Fairchild v Glenhaven Funeral Services Ltd: The Court of Appeal Stage	172
7.2.3 Bolton Metropolitan BC v Municipal Mutual Insurance Ltd	172
7.2.4 Barker v Corus : revisiting Fairchild	175
7.2.5 Durham v BAI (Run Off) Ltd- A review of the cases	179
7.3 Reasoning of the Mesothelioma case: What is the possible solution and does it apply to double insurance?	192

## **CHAPTER 8      CONTRIBUTION UNDER COMMON LAW AND ITS EQUITABLE POSITION**

8.1 Contribution under Common Law and equity	204
8.2 Joint Liability and Contribution: its implication for insurance	204
8.3 The implementation of the Civil Liability (Contribution) Act 1978	208

## **CHAPTER 9      CONCLUSION**

<b>Articles</b>	220
<b>Books</b>	222
<b>Reports</b>	223
<b>Legislation</b>	224
<b>Table of cases</b>	224

## **1. Background: The Theory of Double Insurance**

Fraud is always a concern when an insurer issues a policy to an assured. An assured can take out numerous policies and claim indemnity under all the policies, which would result in the assured receiving more than he is entitled to. Is the fear of fraud justifiable and are such exclusions or limitations in insurance contracts preventing recovery where there is other insurance effective? Further, is there sufficient protection for insurers by way of contribution from other insurers.

It is beneficial to look at the history and development of the law of insurance, to understand how the law relating to double insurance has developed and the factors the courts may take into account when deciding such issues.

The courts in many jurisdictions have tried to deal with the problems which have arisen as a result of such clauses. The courts have also dealt with the question of whether the assured is or should be given any protection when double insurance arises, and if so, whether the insurer has to pay out under the insurance policy.

However, where there are rateable proportion clauses with other types of clauses, the solution is not that clear. It is quite common for judges, when dealing with such cases, to conclude that the case before it is not a case of double insurance. In some cases, even though the trial judge may hold that the case before him, on the facts, were sufficient to give rise to double insurance, on appeal, the appeal courts have come to the conclusion that the facts of the case do not give rise to one of double insurance. This clearly shows what a difficult concept double insurance is. This has resulted in the courts not actually being able, even till now, to provide any real solid rules or guidelines on double insurance<sup>1</sup>.

Further, even though an assured has taken out insurance with numerous insurers he will not

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<sup>1</sup> Although recently in *National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd* [2010] EWHC 773 (Comm), Gavin Kealey QC sitting as Deputy High Court Judge, tried to provide some guidance.

be able to recover more than the loss he has actually suffered. This is the general principle of indemnity. The next problem for an assured is then, from which insurer the assured can seek recovery from. Is there a particular order when seeking recovery or can he recover from whichever insurer he chooses? At the moment, the law on this is also unclear.

## **2. Aims and Objectives**

On researching the issues raised by double insurance, it seems that the Australian approach to double insurance could be a possible way forward for English Law, with some amendments. It could be argued that this would require the enactment of legislation which would take time, however, as seen from the historical discussion below, the law always developed to meet the changing needs of the industry, the rights of the parties and for policy reasons.

In Australia, the Australian Law Reform Commission in its Report No 20 went through the authorities in England dealing with the clauses and concluded that they were “difficult to follow and impossible to reconcile”. In Australia as a result of the Report, specific legislation was implemented. This was in the form of s45 of the Insurance Contracts Act 1984. Emphasis was placed more towards the protection of the assured as opposed to the insurer. Under this section any “Other insurance” would be considered void, unless they fell within the two exceptions under s45 (1) and s45 (2) of the legislation. Under s45 (1) this would be where it was not a contract of insurance required to be effected by or under law, including the law of a State or Territory. Under s45 (2), it provides that s45 (1) does not apply where some or all of the loss is not covered by a contract of insurance that is specified in the first mentioned contract. The benefit of this is that the assured does not need to worry if he will be paid or not. All the assured needs to do is choose which insurer he wants to seek recovery from and he will immediately be entitled to recover for his loss. This is also specifically provided for under legislation under s76 of the Act. It will then be for the insurers to look towards other insurers to get contribution. This is a much better approach, due to the fact that the assured has paid such large sums of premium over the years in the



hopes of getting paid when a loss is incurred. However, there are still problems with the legislation as it does not clearly state that for the insurance policy clause to be excluded from the provisions of the legislation, it would have to be established that it is in fact a true excess clause. The cases in Australia so far have not dealt with this particular issue in such express terms.

### **3. Structure and Methodology**

This thesis is structured as follows:

Part A deals with double insurance. Double insurance arises in many situations. In some cases, the assured himself may be unaware that he has taken out double insurance. The main issue raised by double insurance is whether an assured who has taken out policies with more than one insurer should be permitted to claim from any one of the insurers which he has taken out the policy with. The bargaining position of the insurer and the assured is an important issue that has to be looked at when trying to understanding the way double insurance operates. Therefore when looking at the problems raised by the law of double insurance the law of indemnity and contribution must be taken into consideration. As can be seen from the cases and literature in this area there are still many unresolved areas. A comparison of the law in England, where the law permits an insurer to exclude or limit his liability by including such clauses in the insurance contracts, and Australia, where there is legislative provisions in place which treats such provisions in contracts as void, subject to some exceptions.

A contract of insurance has been defined as a contract involving two parties, the Insurer and the Assured, in which the insurer would receive a premium and in return for the premium, pay a sum of money on the happening of an event which the assured has obtained the insurance on.<sup>2</sup> Some form of consideration was usually required, but not in every situation, where money would be paid out on specific events happening, which has to be uncertain,

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<sup>2</sup>*Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663.

for example, in terms of the time the event is likely to happen.<sup>3</sup> The nature of the event happening may be distinguished in the following categories: (1) marine insurance; (2) fire insurance; (3) life insurance; and (4) accident insurance.<sup>4</sup> These classes are distinguishable according to the manner of how the assured has suffered a loss due to the specified event.<sup>5</sup> However it has to be noted that there are contracts which do not fall within the category of indemnity, such as life insurance, personal accident insurance and sickness insurance.<sup>6</sup>

The earliest types of insurance to develop were in the form of marine, life and fire, and their development arose due to the increase in business between parties and countries. During this period the principles which dealt with marine insurance were laid down. Around the 17<sup>th</sup> century it can be seen that there was competition from other jurisdictions. Liability insurance was not heard of during the 18<sup>th</sup> Century.

Furthermore, principles such as contribution and subrogation also developed and were accepted as part of the legal structure. It has been argued that an insurer cannot rely on the legislative provision of the Civil Liability (Contribution) Act 1978, which states that there is joint liability regarding the same damage or debt and that an insurer may recover contribution. This was due to liability being governed by common law principles. The development of the principles of subrogation were important too, especially when deciding whether an insurer should claim under contribution or whether an insurer could claim under subrogation, as there are differences between the two. Contribution deals with situations of the interests between the insurers, whilst subrogation deals with the insurer stepping into the shoes of the assured against third parties. The courts were of the view that the correct approach was by way of contribution. For indemnity type of insurance, the earliest written form evidencing transaction such as marine insurance, can be seen in the first text of

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<sup>3</sup>*Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663

<sup>4</sup> The names given are usually conventional and for convenience only: General Principles of Insurance Law E.R. Hardy Ivamy (6<sup>th</sup> Ed) (1993), p.7

<sup>5</sup> General Principles of Insurance Law E.R. Hardy Ivamy (6<sup>th</sup> Ed) (1993), p.7

<sup>6</sup> General Principles of Insurance Law E.R. Hardy Ivamy (6<sup>th</sup> Ed) (1993), p.7

insurance in 1488<sup>7</sup>, the earliest policy of insurance was in 1547, the first decision on marine policies that the court had to decide on was in 1588 and court which dealt with Hull cases alone was introduced in 1601<sup>8</sup>. The history of fire insurance can be seen since the Great Fire of Great London which happened in 1666 and the first property insurer being formed in 1680. The Fire Life Insurance Duty Act 1782 was introduced. Fire policy cases reached the courts by the Eighteenth Century.

Regulation of the insurance market started in 1576 and the Chamber of Assurance was established. Its development was due to the merchants taking out insurance policies which covered the same risk, which caused introduction of the requirement for registration for policies involving marine.<sup>9</sup> The problem that arose in cases, as was seen in the case of the Battle of Lagos, where there was the destruction of merchant ships causing loss, and where the underwriters were not in a position to pay out for the loss suffered. The Merchant Insurers Bill 1693 which tried to introduce some form of protection to the assured was strongly opposed by creditors and as a result, no legislation was implemented.<sup>10</sup> Later there was the introduction of the South Sea Company in 1711, which was structured in a way where the Company agreed to assume a substantial proportion of the National Debts in return for its shares, and the Company would get exclusive trading rights in the Americas.<sup>11</sup> There were problems which arose from such arrangements, such as speculative and fraudulent trading.<sup>12</sup> As a result of this, The Bubble Act 1720, was passed which provided some form of control, which required that it was permitted under the Act of Parliament or Royal Charter.<sup>13</sup> The Bubble Act applied specifically to marine insurance, which at the time was dominated by Royal Exchange Assurance and London Assurance, which had done so for a century.<sup>14</sup> The effect of The Bubble Act made it difficult for new companies to be set up. This piece of legislation, it was thought, was not successful when it

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<sup>7</sup> de Santanerna, *On Insurance and Merchants' Bets*

<sup>8</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-1

<sup>9</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-6

<sup>10</sup> G. Clayton, *British Insurance* (1971) pp.53 -54

<sup>11</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-6

<sup>12</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-6

<sup>13</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-6

<sup>14</sup> Second Cumulative Supplement of 2013 to Colinvaux's *Law of Insurance* (9<sup>th</sup> Ed, 2010), para A1-6

was introduced<sup>15</sup>. Prior to that, there was no regulation of the finances of marine insurers, and protection for non-life insurance did not come into effect until 1909.

The vast majority of the policies at the time were marine and non-life insurance, which was not indemnity insurance, which did not raise double insurance issues. As can be seen above, property insurance was only then in its infancy. This was why at the time the market was dominated by marine insurance issues, which was dominated by Lloyd's underwriters. It was only later that there was the development of Mutual societies which were organized by shipowners. The mutual associations would provide support to its own members when losses were suffered, and money was taken from a common fund, and if the money in the funds were not sufficient, then the society would call for more money from the members.<sup>16</sup> Further, double insurance was at the time considered to be a sign of fraud, so these decisions were quite significant.

Double insurance dates back as far as 1758 when Lord Mansfield CJ<sup>17</sup> tried to provide a definition of what he thought double insurance to be. The whole concept of double insurance was to provide protection to an assured so as to enable him to make a claim for a loss he has suffered by insuring the same subject matter, covering the same loss with numerous insurers at the same time. This was due to the risk that if the assured only insured the loss with one insurer and if that insurer went into liquidation, the assured would be left with no protection even though he has paid a substantial amount towards the premium.

A few reasons for taking out insurance with numerous insurers could be because the assured wanted to increase his cover or the insurance policy was taken out due to a mistake.

However there are certain requirements that have to be present before an assured can actually successfully make a claim under double insurance. One of the key requirements is that the insurance taken out must be on the same property, but what is not clear is whether it

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<sup>15</sup> Second Cumulative Supplement of 2013 to Colinaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-6

<sup>16</sup> Second Cumulative Supplement of 2013 to Colinaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-6

<sup>17</sup> *Godin v London Assurance Co.* (1758) 1 Burr 489

has to be on identical property or whether it would be sufficient if another policy in effect covers a substantial part of the property already insured<sup>18</sup>. The general position is that double insurance occurs when two insurance policies cover the same risk which has given rise to the claim<sup>19</sup>. Further, the policies must cover the same interest and the same assured.

Generally speaking, the first step for the assured is the hurdle of having to establish whether the case is in fact one which falls within the category of double insurance or not. If it does not, then all the issues discussed below will not arise. Assuming that it is concluded by the courts that the case is in fact one of double insurance, then the next step is to see the wording of the policy and whether the assured can make a claim under the policy. What usually happens is that when an assured suffers a loss and then seeks to make a claim from the insurer, the insurer will point to a clause or in fact, clauses in the policy which clearly states that they are not required to indemnify the assured if there is other insurance present. The policy may also require as one of the conditions that notification be given where other insurance is present or that the assured should not take out any other policy during the subsistence of the policy.

Problems usually start at this stage as the assured may not himself have been aware of the existence of other insurance. This could be due to a third party taking out insurance for the assured or where the assured forgets to cancel a previous policy. In some cases, it is very common for different organisations to offer the same cover free of charge. This can be seen when banks, for example, offer travel insurance or health insurance which arise when an individual opens a bank account. Further, breakdown insurance could arise when the individual purchases a car.

However, from an insurer's point of view, why should he have to pay out when the assured agreed to the terms of the policy. Why should it be the insurer's problem when the assured himself did not read the terms of the policy to see what terms he was actually signing up

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<sup>18</sup>MacGillivray on Insurance Law (11<sup>th</sup> Ed) 23-003. There is no case law on this point.

<sup>19</sup>*Bovis v Commercial Union Assurances* [2001] 1 Lloyd's Rep.416,418

for? It could be argued that there should be freedom of contract between the parties. But on the other hand, it could be said why should the insurer not pay up when the assured has paid a premium. The sort of protection that is provided to the assured arises in situations where one insurer becomes insolvent, insurance is taken out by another without the knowledge of the assured<sup>20</sup>, he himself may have taken out two policies without knowing<sup>21</sup>, the assured may have forgotten to cancel previous policies or to increase the amount of his coverage<sup>22</sup>.

Over the years the insurers have developed numerous ways to limit liability and this is usually in the form of clauses in the insurance policies. These are excess clauses, exclusion clauses and rateable proportion clauses. Under an excess clause, an insurer will only have to pay out if the first policy covering the loss does not cover the whole amount, and the insurer will only pay the excess amount. An exclusion clause excludes payment altogether and a rateable proportion clause will make the insurer liable up to a certain proportion of the loss. It is commonly seen that, say for example there are two policies, Policy A and Policy B, Policy A and Policy B may have the same type of clauses or Policy A and Policy B may have a combination of all the three types of clauses.

This area of law is still uncertain in England, although the courts have on numerous occasion tried to provide some guidance, but have not been successful. In some cases, where the same type of clause exists in both policies, such as excess or escape clauses, the courts have stated that they are self cancelling and the insurer would have to contribute equally to the assured. Where there are rateable proportion clauses in both policies they will also cancel out each other. It is important to see if this is the correct approach and whether a legislative provision can be devised to provide a solution to this area.

There are many cases and literature of the American position on double insurance. The courts in England have been very vocal in emphasizing that these cases provide no assistance to them. In any event, America still has the same problems as can be seen in

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<sup>20</sup>*Portavon Cinema Co. Ltd v Price and Century Insurance Co. Ltd* [1939] 4 All ER 601

<sup>21</sup>*The Sydney Turf Club v Crowley* (1972) 126 CLR 420

<sup>22</sup>*Nisner Holdings Pty Ltd v Mercantile Mutual Insurance Co. Ltd* [1976] NSWLR 406

England and it has still not yet been able to resolve them even after 60 years! The Canadian cases also suggest that the American approach is not favoured and the way that the Canadian courts approach double insurance and the clauses is also slightly different.

Part B will cover the issue of contribution. It is only once the double insurance has been established, will this arise. An interesting area and problem which has not been resolved is the methods of calculation for contribution between insurers. This usually arises where one insurer has paid out for the loss sustained by the assured in full and then seeks contribution from the other insurers, which he is entitled to do. The courts have devised three main methods of calculation. They are the 'maximum liability' rule, the 'independent liability' test and the last one, the 'common liability' approach. The application of the three of these formulas can lead to very different results in terms of contribution when the same figures are used. This again has led to uncertainty and can be confusing. The court's approach to contribution is that they will apply whichever method leads to fair, just and equitable results. Therefore one possibility is whether a 50:50 division in contribution.

Another area which could give some assistance on how contribution could be distributed is by looking at Mesothelioma cases. The courts have gone so far as to say that each of the employers will be 100% liable. This allows a claim to be made against anyone of the employers. The issue will then arise as to whether there is double insurance, as the policies are not concurrent but consecutive. If that is correct, then the issue of contribution does not need to be looked at.

Further, the courts were of the view that the Civil Liability (Contribution) Act 1978 did not apply to cases of double insurance. Therefore the principles of equity which have developed from the principles of co-surety cases, which have concluded that all are liable to the creditor, and the principles of tort and equity generally will be looked at, from a double insurance perspective.

#### **4. Outcomes**

After researching this topic, the following solutions to the problem is suggested:

If there is double insurance, then regardless of the type of clause used and its wording, if there is double insurance, all insurers have to indemnify the assured equally, and it will then be for that insurers to seek contribution amongst themselves; or

Follow the Australian position under s45 of the Insurance Contracts Act 1984 and conclude that all such clauses will be void, and provide for exceptions according to s45(2), but that it only apply to true excess clauses.

## **5. Structure of Thesis**

Chapters 1, 2 and 3 deals with double insurance and its application from an assured's perspective. Double insurance arose originally due to the fear of insolvency, but this fear is less likely to appear in the present time. . However, double insurance still can arise when a policy incidentally or accidentally overlaps. Such a situation can be commonly found today where a household policy and motor policy may cover the same subject matter. It could also arise where persons are insured under one policy and is also a co-insured under another policy. A typical situation would be a motor policy, where the owner of the car has taken out a policy which would cover those who drive his car, however the driver of the car may have taken out his own insurance cover.

An example of where double insurance arose, was the decision of *O'Kane v Jones*<sup>23</sup>, which is discussed in detail below. To summarise, in *O'Kane v Jones*, there were two policies which covered the vessel's hull and machinery. The insured's ship manager took out additional cover as he was worried that cover would be cancelled as a result of non-

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<sup>23</sup> *O'Kane v Jones* [2005] Lloyd's Rep 1R 174



payment of premium, without actually checking whether the policy was in fact cancelled. The problem was the original policy was still valid. Therefore there was double insurance. It can be seen that double insurance can arise out of a mistake.

The Chapters discuss the provision in Australia in the form of

s45 of the Insurance Contracts Act 1984, and whether similar legislative reforms, which have restricted the rights of the insurer to limit their own liability, can apply in the United Kingdom. The legislative framework of s45 will hold all such exclusion clauses and limiting of liability clauses void. This does not however, hold the whole clause in the contract void, just the parts of the clause which limits or restricts liability. Whether in fact it would be a good thing for the United Kingdom to adopt such a legislative framework or whether amendments should be made to the Australian position to suit the United Kingdom market is discussed.

Another issue when dealing with double insurance and the clauses is that there can be a combination of the clauses (i.e excess, escape, rateable proportion) in numerous policies. The courts have tried to provide some guidance but there is no formulae given. It can be seen that the issue in this area is unresolved. Insurers are concerned about double insurance, and as a result of the clauses, try to shift their responsibility to other insurers by relying on the limitation or exclusion clauses. A possible solution is that the courts can conclude that where the policies exclude liability or limit liability, that those clauses are void and that the assured is permitted to choose whichever insurer he wishes and make a claim for the loss suffered. It is then for the insurer to seek contribution from the other insurers. This is dealt with in Chapters 4, 5 and 6.

In particular, the issue of how contribution works when a claim has been made by the assured, the numerous calculations that can be adopted by the insurers and the courts discretion as to which particular method of calculation should be adopted. The three methods that have developed include maximum potential liability, independent actual liability and the common liability test. The position of a volunteer has been looked at and whether an insurer who has made payment on a voluntary basis, can make a claim for

contribution. The court have been of the view that this is not possible. There is also discussion on contribution and its constraints, when one looks at general law principles.

Chapter 7 deals with Mesothelioma claims. The issues raised in this chapter are novel and it can be seen that there has been an attempt by the court to amend rules to cater to a particular factual situation. The issue in Mesothelioma cases, originally arose in tort cases. The issue that the courts dealt with was the application of the “but for” test and how the test could be adjusted to cater to the unfairness that would arise if the “but for” test was to be strictly applied. This chapter looks at whether a similar approach can be adopted in a double insurance situations where unfairness can arise, where an assured is left with nothing after paying premiums, if the courts were to allow the insurers to rely on the exclusion clauses, limiting liability clause and “other insurance” clauses.

The main point is that it is difficult to identify the year of cover, when there are a range of policies which cover the same claim. As a result of this, it is difficult to know how an insurer should respond when a claim is made. Furthermore, it is unclear what the position is if there are other policies in existence at the same time, and how the other policies will be affected. The problem with Mesothelioma cases, was the exact period when the exposure was caused and when the disease was contracted. The cases draw a distinction between ‘injury sustained’ and ‘disease contracted’. This chapter covers the matter of liability of the employers in such cases where the employee has been exposed to asbestos, and when death results many years later. The problem of identifying which employer is liable when there are numerous employers and which policy or policies was in force at the time. i.e problems with coverage across policy years which is exemplified in asbestos litigation. Again, there has been differing views from the courts. The case which first discussed the issue was *Fairchild v Glenhaven Funeral Services*<sup>24</sup>, where the court concluded that liability was joint and several, and that the employee could sue whichever

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<sup>24</sup> [2003] 1 A.C. 32

employer he wanted to for 100%. This was then challenged on the basis that each tortfeasor was responsible for their own conduct to which they had materially contributed to the risk of injury. It was soon realized that there were problems with this, for example, the means of allocation, time on risk or periods of intense exposure, and as a result the legislature decided that it was important to resolve the problems by way of legislation. This was done in the form of Compensation Act 2006, which now imposes full liability. The thesis looks at whether the same principles can apply to double insurance cases. The issue of whether there is a single indivisible loss for each year or separate loss for each year is also looked at. The issue then became whether in such cases the rules regarding contribution could then apply across policy years, and if this was permitted, then how would it be applied. Could this be on a time on risk basis?

## **PART A**

### **CHAPTER 1: DOUBLE INSURANCE**

#### **1.1 The meaning of Double Insurance**

The definition of double insurance can be found in statute in the form of s32 (1) Marine Insurance Act 1906. This was due to introduction and development of the Bubble Act 1720 and how the Lloyd's Coffee House functioned, when they first opened in 1688.<sup>25</sup> At the time individuals could provide marine insurance but it was later considered to be insufficient.

Before the introduction of the Bubble Act 1720, there were over 150 merchants who had marine policies valued in the millions.<sup>26</sup> The law developed at the time to grant a marine insurance monopoly to two chartered insurers.<sup>27</sup> The importance of marine insurance was more prevalent during the time of the war, and although the two chartered companies who had priority due to the legislative provision, Lloyd's underwriters did have majority of the work and market share.<sup>28</sup> However, there were still problem and methods were devised to avoid the requirement of paying out when a loss was suffered. This can now also be seen in policies which use the "Other insurance" clause to limit or exclude liability. Legal forms were being created to force individual subscribers to be held jointly and severally liable for debts when they arose.<sup>29</sup> The courts have now clearly stated that the law of contribution is not limited to marine insurance. It can be seen that insurers are always trying to devise ways to ensure that payment of debts need not be made. A key feature of double insurance is that each insurer must insure against the same risk although

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<sup>25</sup> Sutton's Law of Insurance in Australia 1999 (3<sup>rd</sup> Ed) para 25.1. Further see cases *Morgan v Price* (1849) 4 Exch 615 and *Rogers v Davis* (1777) 2 Park (8<sup>th</sup> Ed).

<sup>26</sup> Second Cumulative Supplement of 2013 to Colinvaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-7

<sup>27</sup> Second Cumulative Supplement of 2013 to Colinvaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-7

<sup>28</sup> Second Cumulative Supplement of 2013 to Colinvaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-7

<sup>29</sup> Second Cumulative Supplement of 2013 to Colinvaux's Law of Insurance (9<sup>th</sup> Ed, 2010), para A1-7

the insurance need not be identical.

The concept of double insurance developed in the earlier cases which dealt with marine insurance such as *Newby v Reed*<sup>30</sup>, *Rogers v Davies*<sup>31</sup>; *Bousfield v Barnes*<sup>32</sup>; *Morgan v Price*<sup>33</sup> and *Bruce v Jones*<sup>34</sup>. The Courts in *North British Insurance v London, Liverpool & Globe Insurance*<sup>35</sup> saw an extension of those principles to cover other types of liabilities. The Courts have stated that even where there is an overlap which is of a minor nature there will be no double insurance<sup>36</sup>. There is a distinction between double insurance and contribution when dealing with incidental overlaps. Where there are incidental overlaps in the policy, there could still be double insurance. The position of contribution is less clear. It could be argued that there is no need for such distinction, as this is all about unjust enrichment, so if both parties are liable, there should be contribution. The next issue will then be how apportionment would be done between the insurers. This is an important consideration from an insurers' point of view.

The principle of "double insurance"<sup>37</sup> has been called different things in different countries, such as dual insurance<sup>38</sup> or stacking<sup>39</sup>. Stacking is more accurately defined as placing losses in the policy year which is of most advantage to the assured or reinsured. The basic principle is that it will apply when two or more insurers cover the same type of policy, which means that each

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<sup>30</sup>(1763) 1 Wm B1 416

<sup>31</sup> (1777) 2 Park (8<sup>th</sup>ed) 601

<sup>32</sup> (1815) 4 Camp 228

<sup>33</sup>(1849) 4 Exch 615

<sup>34</sup> (1863) 1 M & R 769

<sup>35</sup> (1877) 5 Ch D 569

<sup>36</sup>*Union Marine Insurance Co Ltd v Martin* (1866) 35 LJCP 181. In *Union Marine Insurance* the court looked at the intention of the parties and concluded that the first policy terminated when the second policy came into force.

<sup>37</sup>*Collyear v CGU* [2008] NSWCA 92. Also see *Godin v London Assurance Co* (1758) 1 Burr 489. In the article Insurance between Neighbours: Stannard v Gore and Common Law Liability for Fire J Environmental Law (2013) 25 (2):305 by Jenny Steel, she noted that although there was a duty to insure your neighbor, this would create double insurance in the sense that both parties are well advised to insure, this was not double insurance in the technical sense. This was because, for example, the victim's fire insurance, if called upon to pay, would have a subrogation claim against the tortfeasor, so the loss would lie entirely with the tortfeasor (or the tortfeasor's public liability insurers).

<sup>38</sup> As called in Australia. See *GIO General Ltd v Insurance Australia Ltd t/as NRMA Insurance* [2008] ASTSC 38

<sup>39</sup> As called in America. Staking denoted the availability of more than one policy...providing reimbursement of the losses of the insured. See *Breaux v American Family Mutual*, 553 F 3d 447 (6 Cir,2009) and *Farm Bureau Mut Ins Co v Ries*, 551 NW 2d 316 (Iowa,1996)

policy must indemnify the same loss against the same assured<sup>40</sup>.

In England, the definition was given legislative effect due to the enactment of s32 (1) of the Marine Insurance Act 1906. There was obviously a need to give protection by the implementation of legislation. Although there is nothing preventing an assured from taking out numerous policies, as insurance contracts are essentially contracts of indemnity, the assured cannot recover more than his full indemnity<sup>41</sup>. If the assured decides to make a claim from one insurer in full, then he cannot make another claim to seek recovery from another insurer<sup>42</sup>. This would ensure that the interests of the insured and assured are balanced. From which insurer the assured decides to make a claim against for the recovery of the loss is not determined in any particular manner. He can choose to claim for any amount from the insurer as he thinks fit.<sup>43</sup> It is then for the insurer to ask the other insurers to pay their portion which had been paid out by the insurer under the first policy.<sup>44</sup> The Courts were keen to ensure that the insurers were not defrauded as a result of numerous policies being taken out and where claims were made under such policies.

Section 32 (2) of the Marine Insurance Act 1906 deals with situations where the assured is overinsured by double insurance<sup>45</sup>. This section deals with situations giving rise to a valued<sup>46</sup> and

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<sup>40</sup>GIO General Ltd v Insurance Australia Ltd t/as NRMA Insurance [2008] ASTSC 38.

<sup>41</sup>*Morgan v Price* (1849) 4 ExCh 615; *Godin v London Assurance Co* (1758) 1 Burr 489; *Newby v Reed* (1763) 1 Wm B1 416; *Rogers v Davis* (1777) 2 Park's Marine Insc 8<sup>th</sup> Ed (p601); *North British and Merchantile Insurance Co v London, Liverpool and Global Insurance Co* (1877) 5 ChD 569, CA; *Scottish Amicable Heritable Securities Association v Northern Assurance Co* 1883 11 R (ct of Sess) 287 and *Wolensberg v Royal Co-operative Collecting Society* (1915) 84 LJKB 1316. Also see *Bruce v Jones* (1863) 1 H & C 769. This is the position no matter how many policies the assured has taken out.

<sup>42</sup>*Hebon v West* (8163) 3 B & S 579 and *Sims v Scottish Imperial Ins Co* (1902) 10 SLT 286. Where double insurance by an insured will be treated as being 'one insurance', therefore he then cannot seek recovery from the other insurer.

<sup>43</sup>*Newby v Reed* (1763) 1 Wm B1 416; *Rogers v Davies* (1777) 2 Park (8<sup>th</sup>ed) 601; *Bousfield v Barnes* (1815) 4 Camp 228; *Morgan v Price* (1849) 4 Exch 615; and *Bruce v Jones* (1863) 1 M & R 769.

<sup>44</sup>*Newby v Reed* (1763) 1 Wm B1 416; *Davis v Gildart* (1777) 2 Park's Marine Insc 8<sup>th</sup> Ed, p.424; *Godin v London Assurance Co* (1758) 1 Burr 489; *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887, CA. Also see *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250.

<sup>45</sup> Under s32(2)(a) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act; (b) where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject matter insured; (c) where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable values, for any sum received by him under the policy and (d) where the assured

unvalued policy<sup>47</sup>, where the subject matter is the same and has been overvalued. Section 32 (2)(b) is based on decision of *Bruce v Jones*<sup>48</sup>. Therefore, if you have a valued and an unvalued policy and the loss suffered is covered in full under the unvalued policy, the assured can only make a claim against the valued policy first, not for the full sum but only for the difference. In the case of *Bruce v Jones*, there were several valued policies of insurance which were effected upon the same vessels which had been valued differently and where upon a total loss the assured would receive only a certain amount under some of the policies. In another policy he would only be allowed to recover the difference between the amount received and the agreed values under that policy. The owner of the ship took out four insurance policies which where the agreed values of the ships in the sum of 3000l, 3000l, 5000l and 3200l and upon a total loss received under the three former policies in the sum amounts to 3126l.13s.6d. The shipowner sued under the latter policy. The court considered that between the assured and the underwriter of that policy that the value of the ship was 3200l and therefore the assured was only entitled to recover the difference between the sum fixed as the value of the ship and 3126l.13s.6d.

Identical provisions can also be found in New Zealand and Australia, but in the latter, it only applies to marine. This is in the form of s33 Marine Insurance Act 1908 for the former and s38 Marine Insurance Acts 1909 for the latter. Under s33 where there are two or more policies which have been taken out by the assured on the same adventure and interest or part of it and where the sum that he has insured exceeds the indemnity which is allowed by the Act, then he will be considered to be over insured by double insurance.<sup>49</sup> Where this is the case, the assured can claim payment from the insurers in any order he thinks fit, unless the policy provides differently or the Act states that he is not entitled to receive any sum in excess of the indemnity.<sup>50</sup> Where it is

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receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their rights of contribution amongst themselves.

<sup>46</sup> A valued policy is a policy which specifies the agreed value of the subject-matter (Marine Insurance Act 1906 s27 (2). Where there is no fraud, it will be conclusive of the insurable value of the subject-matter as to whether the loss is total or partial (see s27(3) Marine Insurance Act) A value fixed by the policy is not conclusive for the purpose of determining whether there has been constructive loss (s27(4) Marine Insurance Act 1906)

<sup>47</sup> An unvalued policy is one which does not specify the value of the subject matter but subject to the limit of the sum insured, leaves the insurable value to be ascertained subsequently: s28 Marine Insurance Act 1906. Also see s16 Marine Insurance Act 1906.

<sup>48</sup> (1863) 1 H & C 769 which overruled *Bousfield v Barnes* (1815) 4 Camp 228

<sup>49</sup> s33(1) Marine Insurance Act 1908

<sup>50</sup> s33(2)(a) Marine insurance Act 1908

a valued policy, credit must be given against the valuation for sums he has received under any other policy, without regard to the actual value of the subject matter insured.<sup>51</sup> If it is an unvalued policy, he must also give credit, as against the full insurable value, for sums that he has received under any other policy.<sup>52</sup> The position in England is that where the assured has received any sum which is in excess of the amount permitted under the Act, he will be deemed to hold this sum in trust for the insurer, according to the rights of contribution among themselves.<sup>53</sup> The same wording can be found in s38 of the Marine Insurance Act 1909.

In Australia, similar principles can be found in *Albion Insurance Co Ltd v GIO (NSW)*<sup>54</sup> where Menzies JJ stated:

“There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each policies. The assured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of contribution between insurers has been evolved... There is no reason why the doctrine should not apply to insurance against liability to third parties and there is every reason in principle that it should. The doctrine however only applies when each insurer insures against the same risk, although it is not necessary that the insurance should be identical. Thus one insurer may insure properties A and B against fire and the other insurer may only insure property A against fire. Again, one policy may be for a limited amount and the other may be for an unlimited amount. One policy may cover the risk of a whole voyage and the other may cover only part of the voyage. Differences of this sort may affect the amount of contribution recoverable but they do not bear on the question whether

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<sup>51</sup> s33(2)(b) Marine Insurance Act 1908

<sup>52</sup> s33(2)(c) Marine Insurance Act 1908

<sup>53</sup> s33(2)(d) Marine Insurance Act 1908

<sup>54</sup> (1969) 121 CLR 342. This approach has been followed in other cases such as *John v Rawlings* (1984) 3 ANZ Ins Cas 60-564; *Boy v State Insurance General Manager* [1980] 1 NZLR 87; *Australian Eagle Insurance Co Ltd v Mutual Acceptance (Insurance) Pty Ltd* [1983] 3 NSWLR 59 (CA); *GIO(NSW) v QBE Insurance Ltd* (1985) 2 NSWLR 543 and *QBE Insurance Ltd v GIO (NSW)* (1986) 4 ANZ Ins Cas 60. Further see the judgment of Kitto J who stated that what resulted in the right of contribution was the simple fact that each contract was a contract of indemnity and covered the identical loss that the same assured sustained. This was due to the fact that the insured only received one satisfaction. In the decision of *State Government Insurance Commission v Switzerland Insurance Australia Limited (Trading as a Federation Insurances)* [1995] SASA 5490, at para [14], the full court of the Supreme Court of Australia confirmed that this was the correct approach and even went as far as saying that there could be no doubt that this was the law.



or not each insurer has insured against the same risk so as to give rise to some contribution. The element essential for contribution is that, whatever else may be covered by either of the policies, each must cover the risk which has given rise to the claim. There is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which had given rise to the insured's loss or liability.”

The principles of double insurance can be found in numerous jurisdictions such as England, Australia, Canada, Germany, the People's Republic of China, Singapore and the United States for example. The scope and wordings in these jurisdictions vary, as some provisions can be found in legislation. The advantages for the assured in taking out double insurance have been evident. There are problems however when payment from the insurers are sought when a loss is incurred.

## **1.2 Methods of interpreting wordings in policy with double insurance clauses**

It will be evident that there are differences in the wordings of the policies but the ultimate result and effect may be the same. This could be in the form of excluding or limiting liability. In Australia, however, the legislature has even gone so far as to conclude that all such clauses would be void, except in very limited circumstances.

In *Body Corporation 398983 v Zurich Australian Insurance Limited*<sup>55</sup> the issue for the court was the interpretation of the Natural Disaster Damage Clause of the policy. The clause had the effect of limiting the amount which was payable by Zurich for natural disaster damage where there was cover which was provided for under statute. It provided that “the Insurers liability will be limited to the amount of loss in excess of the Natural Disaster Damage Cover.” This case looked at the situation where there was a contractual exclusion or limiting of liability and a legislative provision dealing with situations where there was double insurance. The court stated that when interpreting the contract, one had to look for the meaning intended by the parties to that contract. This is to be done on an objective basis, by looking at what a reasonable and properly informed

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<sup>55</sup> [2013] NZHC 1109

third party would consider the parties to have intended. One would have to look at the background knowledge that would reasonably be available to the parties at the time. The courts would generally look at the plain and ordinary meaning of the contract and will only displace it where there were strong grounds to persuade the court that something had gone wrong regarding the contractual language that has been used that would justify this course.<sup>56</sup> These principles the court went on to say were the same principles that would apply to insurance contracts.<sup>57</sup>

The court stated that there was double insurance in this case because the statutory cover and the Zurich policy both would respond to the Body Corporate's loss in relation to the Salisbury Apartments. Section 30(1)<sup>58</sup> of the Earthquake Commission Act 1993 had an "other insurance" clause. Under this provision only damage which exceeded the cover of the contract under the insurance contract and any deductible would be provided for. The Zurich policy also contained "other insurance" clauses<sup>59</sup>, GC09 and MD15. The wording of the GC09 policy, when read in isolation, meant that the Zurich policy would respond only after all other cover had been exhausted. However the provision in s30 (3)<sup>60</sup> would defeat the clause. The parties agreed that s30(2) applied<sup>61</sup>, which stated that subsection (1) of the section shall not apply with respect to any contract of insurance made otherwise than under this Act to the extent that the contract provides for cover in the excess of the amount to which cover is provided under this Act. The court then had to decide what was Body Corporate's entitlement and whether its entitlement

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<sup>56</sup> The cases referred to were *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444,470-47 at [19], [61]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [14]-[15]

<sup>57</sup> *Trustees Executors Ltd v QBE Insurance (International) Ltd* (2010) 16 ANZ Ins Cas 61-874

<sup>58</sup> This section states that where on the occurrence to any property of natural disaster damage against which it is insured under any of section 18 to 20, or section 22, of this Act, the property is also insured against that damage under any contract or contracts made otherwise than under this Act, the insurance of the property under this Act (to the amount to which it is so insured) shall be deemed to be in respect of so much of that disaster damage as exceeds the sum of – (a) the total amount payable under that contract or those contracts in respect of that natural disaster damage; and (b) the proportion of the natural disaster damage to be borne by the insured person under the conditions applying to the insurance of the property under the Act. This section was similar to s18 Earthquake and War Damage Act 1944 (EQWD Act).

<sup>59</sup> GC09 and MD15

<sup>60</sup> Subsection (3) states that notwithstanding anything to the contrary in any contract whereby any property is insured against natural disaster damage otherwise than under this Act, where the property is or has at any time also been insured against that natural disaster damage under any of the sections 18 to 20, or section 22, of this Act, the contract shall have effect in all respects as if the property were not and had never been insured under this Act.

<sup>61</sup> If it did not, and in absence of MD15, then Zurich's policy would have to respond first.

would be the same if s30 (2) applied<sup>62</sup> or would it be less<sup>63</sup>. The court held that the wording in MD15 was specifically added to trigger s30 (2). The words “will be limited to” are important as it emphasizes that the cover under the policy is only cover in excess of the statutory cover, which means that s30(2) will not be triggered. The court did not think that it was justified to read into MD15 words which were not needed to make sense of the clause. It could be argued that if the court were to do this, this would go beyond the intention of the parties. The definition of “loss” in Clause MD15 bore its ordinary meaning of being deprived of something or of the diminution of possession resulting from a change in conditions. This would have to be the actual loss.

The High Court in Singapore in the decision of *Lopac Insurance Bhd v American Home Assurance Co*<sup>64</sup> was asked to consider whether extrinsic evidence could be admitted to help assist the court to construe the annual policy which had been issued. The primary issue was whether the annual policy also covered the claimant’s claim which would then raise issues of double insurance. The extrinsic evidence which Lopac sought to adduce was in the form of affidavits from employees of the Group and its insurance broker. The decision of the Assistant Commissioner was to refuse the production of extrinsic evidence. In a detailed analysis<sup>65</sup> by the court it was held that extrinsic evidence could be admissible. The Plaintiff argued that the facts of *Lopac Insurance Bhd v American Home Assurance Co* were similar to the decision of *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* where the reason for the production of extrinsic evidence was to show that the insured had taken out the second policy only because they were told to do so by their insurance broker and after they were informed that their first policy did not cover liability to workmen injured while onboard the vessel. In that case

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<sup>62</sup> which was Body Corporate’s argument

<sup>63</sup> as was contended by Zurich

<sup>64</sup> [2011] SGHC 257, at para [1]

<sup>65</sup> The Evidence Act (Cap 97, Rev Ed 1997), sections 93 (which states that when the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such a matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.), section 94 (When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions...) and the case of *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 (SLR(R )) 509.

Phang JC was of the view that such extrinsic evidence was relevant, admissible and persuasive in the Defendant's favour<sup>66</sup>. He concluded that even assuming that a comparison of the policies alone was insufficient to determine the case in the defendant's favour, the production of the extrinsic evidence would clearly have accomplished this. Although, in that case Phang JC concluded that there was no double insurance as the two policies covered different risks. In the present case the High Court stated that there was nothing to stop Lonpac from introducing extrinsic evidence to explain the risks that was intended to be covered by the policy between Lonpac and REL.

The Singaporean position, it could be argued, would be helpful when there is a dispute by the parties as to the policy terms, apart from those as expressly stated in the documents itself which were intended to be included by the parties and the parties are aware. Although the decision in *Lonpac Insurance Bhd v American Home Assurance Co* was between two insurance companies, it could be said that the same principles would apply to an insurer and assured position. This approach could however on the other hand cause problems, especially when dealing with contracts where the claim is made years later and such witnesses or affidavits would be harder to obtain or where the insurance company itself had gone into liquidation. It therefore may be better to rely solely on the documentation which was produced as a result of discussions between the parties to ascertain their intentions, and apply a more objective test.

### **1.3 Contribution as a general concept**

If the assured has insured the same subject matter covering the same loss with a few insurers under the doctrine of double insurance<sup>67</sup>, then the insurer who has paid out<sup>68</sup> can then look to the

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<sup>66</sup> The Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R0 1029 which stated that the remarks of Phang J with regard to the admissibility of extrinsic evidence was obiter. The court however in *Lonpac Insurance Bhd v American Home Assurance Co*, considered that it was wrong to suggest that the Court of Appeal in Zurich in Zurich confined China Insurance to its facts.

<sup>67</sup> These principles can also be seen in the UNCTDA Model Clauses on Marine Hull and Cargo Insurance, cl10.5. which deals with co-insurance. 10.5.1 provides that where two or more insurers are liable under this insurance, each insurer is liable only for his proportion of the claim, which is the proportion that his subscription bears to the sum insured, and shall on no account be held jointly liable with his co-insurers. In *Tai Ping Insurance Co Ltd v Tugu Insurance Co. Ltd and Another* [2001] 2 HKC 401, Hon Mr. Justice Stone concluded that there was double insurance based on (1) both policies cover the loss of the goods by theft/robbery; (2) both policies cover the same interest; (3) both policies were in force at the time of the loss; and (4) both the policies were legally enforceable at

other insurers for contribution. This is due to the equitable doctrine of contribution<sup>69</sup> which only applies to insurers<sup>70</sup> and not to the assured. This is because the assured has already been indemnified for his loss. In *Godin v London Assurance Co*<sup>71</sup> Lord Mansfield stated that: "If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro-rata to satisfy that loss against which they have all insured." This position has been codified in legislation in the form of s80 Marine Insurance Act 1906 which provides that:

Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under the contract. If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to maintain an action for contribution against the other insurers, and is entitled to the remedies as a surety who has paid more than his proportion of the debts.

Under s80 (1) an insurer would have to contribute rateably to the loss in proportion to the amount he is liable to pay under the policy contract.<sup>72</sup>

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the time.

<sup>68</sup>*Williams v North China Insurance Co* (1876) 1 CPD 757

<sup>69</sup> This is based on the principle of equity: *Godin v London Assurance Co* (1758) 1 Burr 489. In *Mathie v Argonaut Marine Ins Co* (1925) 21 LI LR 145 it was stated that under common law the assured is not required to disclose to the insurer that he has previously taken out insurance with another insurer which covers the same risk, unless there is a degree of over-insurance which is likely to give rise to fraud.

<sup>70</sup> This is the position for co-insurers and the equitable doctrine of contribution is confined to indemnity insurance and operates to prevent the insured from being unjustly enriched: *Insurance Law: Doctrines and Principles* John Lowry and Philip Rawlings (2<sup>nd</sup> Ed) (2005) p.270. Also see *Caledonia North Sea Ltd v BT plc* [2002] Lloyd's Rep IR 261; *Family Insurance Corporation v Lombard Canada Ltd* [2002] S.C.J No.49 where Bastarache J stated as follows: "It is a well-established principle of insurance law that where an insured holds more than one policy of insurance that covers the same risk, the insured may never recover more than the amount of the full loss but is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary. The selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk. This doctrine of equitable contribution among insurers is founded on the general principle that parties under a coordinate liability to make good a loss must share that burden pro-rata. It finds its historic articulation in the words of Lord Mansfield C.J in *Godin v London Assurance Co* (1758) 1, Burr.489,97 E.R. 419 at 420: If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro-rata, to satisfy that loss against which they have all insured."

<sup>71</sup>(1758) 1 Burr 489. Also see *American Surety Co of New York v Wrightson* (1910) 16 Com Cas 37.

<sup>72</sup>*O'Kane v Jones* [2005] Lloyd's Rep IR 174, *American Surety Co of New York v Wrightson* (1910) 103 LT 663,

Therefore there are two aspects to double insurance. The first is that the insured cannot recover more than his indemnity but he can choose which policy to claim from and secondly, the insurer who pays the claim is then entitled to seek contribution from the other insurers.<sup>73</sup> The origins of contribution was decided by the Courts of Equity when deciding the control and direction of the cause of the action arising under deeds or contracts, and not with the creation of independent and separate causes of action.<sup>74</sup> Matters which were usually the subject of law were in some circumstances within the realm of equity. This usually would include situations where the legal remedy was not available, where the equitable remedy was more efficient, or that the procedure in equity resulted in a more favourable position to the parties. The approach taken by the Courts of Chancery permitted them to adjust the parties' rights in a manner not particular at law, and by bringing all the parties interested before it to avoid multiplicity of suits.

Contribution it was said would fall within this category.<sup>75</sup> Although it was understood that contribution could be modified by contract, contribution was not based on contract, but was based on the principles of natural justice. Payment by one person liable will release the others from the principal demand and they are required to contribute as a return for this benefit. This will only apply where all the parties are liable to a common demand.<sup>76</sup> Further, the right arises on an equity which requires someone who has taken a premium to share the burden of meeting the claim.<sup>77</sup> The policy must be in force at the time of the loss and no contribution would arise where

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*Williams v The North China Insurance Co; Boag v Economic Insurance Co Ltd* [1954] 2 Lloyd's Rep 581, *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Law Reports 44 (where there were two instruments covering same loss but differing in scope), *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1993] 2 Lloyd's Law Report 143 (where the second insurer repudiated for breach of warranty or misrepresentation), *Drake Insurance Plc v Provident Insurance Plc* [2004] Lloyd's IR 277, *Monksfield v Vehicle and General Insurance Co* [1971] Lloyd's Rep 139 (assured failed to give notice of potential claim, whether second insurer was liable to contribute after payment by the first insurer. Also see decision in *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*, *Godin v London Assurance Co* (1785) 1 Burr 489, *Petrofine (UK) Ltd v Magnaload Ltd* [1984] QB 127, *North British and Mercantile Insurance Co v London, Liverpool and Global Insurance Co.* (1877) 5 Ch D 569 (meaning of 'covering the same property').

<sup>73</sup> Insurance Law: Doctrines and Principles John Lowry and Philip Rawlings (2<sup>nd</sup> Edition) 2005

<sup>74</sup> *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Law Reports 44, per Gibson L.J.

<sup>75</sup> *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Law Reports 43 and Halsbury's Laws of England 4<sup>th</sup> ed., 1976 Vol.16 (Equity) at para 1214 referred to in *Drake*.

<sup>76</sup> Halsbury's Laws of England 4<sup>th</sup> ed., 1976 Vol.16 (Equity) par.1252

<sup>77</sup> *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1991] 2 Lloyd's Law Reports 43

the policy had become void or where the risk had not yet attached.<sup>78</sup>

As there will be in existence numerous policies, the apportionment of the loss will be done according to various rules of practice that has been adopted more or less uniformly by the different insurers.<sup>79</sup> It is different in practice where a distinction is drawn between whether the policies are ‘specific’, which means that they would not be subject to average and those on the other hand which will be subject to average.<sup>80</sup>

The courts have been keen for a more flexible approach when dealing applying the principles of equity and have adjusted the rights of the parties when it considered it necessary to do so, even if it departs from the law at the time. This approach should be adopted and favour should be given ultimately to the assured.

#### **1.4 Return of Premiums when the Insurer Refuses to Pay**

The area of concern for an assured is why should he have to bear the risk of the possibility of not recovering anything under the numerous insurance contracts which he has taken out, due to the insurer or insurers successfully arguing that they have no obligation to pay out by relying on the clauses in the insurance policy which excludes them from liability, either in full or partially, after the assured has paid out money on high premiums. This area has raised some complex issues, such as whether the assured should be able to claim a rateable return of his premium from each insurer, in a manner representing the amount by which he is over-insured by double insurance.<sup>81</sup> To ease the unfairness which results in double insurance, the return of premiums and how much, would be something that may balance out the interests of both the insurer and the assured, where the former is always at a better position than the latter. The assured has to agree to the amount of premium stated in the policy or otherwise he will not be able to find cover to insure against that loss. However as can be seen from the law as it stands it may be difficult to

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<sup>78</sup>Halsbury’s Laws of England 4<sup>th</sup> ed., 1976 Vol.16 (Equity) par.539

<sup>79</sup> General Principles of Insurance Law (6<sup>th</sup> Edition)(1993) ER Hardy Ivamy, 523

<sup>80</sup> General Principles of Insurance Law (6<sup>th</sup> Edition)(1993) ER Hardy Ivamy, 523

<sup>81</sup>Colinvaux’s Law of Insurance Hong Kong 2<sup>nd</sup> Ed (2010) 11.040.

give protection to the assured through this method. Therefore other methods have to be looked at.

The issue of the return of premiums was raised in the case of *Tyrie v Fletcher*<sup>82</sup> where it was decided whether under the circumstances of the case, a proportionate part of the premium ought to be returned or not. The court at the time decided to approach the case from general principles applicable to all policies of insurance and approached the case from two angles. The first, is where the underwriter has received his premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return the premium. Alternatively, if the risk of the contract of indemnity has commenced, there shall be no apportionment or return of the premium. The court was of the view that the latter approach was the correct one. In *Tyrie*, the court held that no premium should be returned once the risk was entire. The Plaintiff, who was the assured, sued the defendant, an underwriter for the return of part of the premium he had paid out. The Plaintiff argued that the premium ought to be returned as the compensation estimated for the risk of twelve months, was much more than adequate to the risk actually run in the case which was only two months. Further that from the nature of the insurance, both parties knew that risk was divisible and that if it ceased before twelve months that the whole of the premium would not be retained by the defendant. This argument was put forward on the basis that where there was a suitable compensation for a given risk, the risk had turned out to be different from what was expected. The argument put forward by the defendant was that as soon as the ship sailed from the port in London, the policy attached for the whole time it was insured against. There was no calculation of the premium per month but that it was one entire gross sum of 91% stipulated and paid for twelve months. Therefore the contract was entire, without any intention or thought of division, or apportionment. The position would be different where the risk did not attach and would therefore result in the return of the premium. Here it is one entire indivisible risk which would not warrant the return of the premium.

Although the insurance industry itself has its own practices which have developed over the years,

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<sup>82</sup> (1772) 2 Cowp 666



these practices would usually be for the benefit of the insurance company. This will normally be because of the better bargaining power that the insurance company has over the insured. The assured can either decide to accept the terms of the insurance policy or look for other insurance.

### **1.5 Legislative Framework of the Return of Premium**

The principles in *Tyrie* can now be found in legislation in the form of the Marine Insurance Act under s88 to s90. There are exceptions where the premiums are in fact returnable. These include where the consideration has totally failed and there has been no fraud or illegality on the part of the insurer or his agents<sup>83</sup>; to the extent of any part of the premium proportionate to an apportionable part of the consideration which has totally failed<sup>84</sup>; where the policy is void, or is avoided by the insurers from the commencement of the risk as long as there is no fraud or illegality<sup>85</sup>; where the insured has no insurable interest and the policy was not effected by way of gaming or wagering<sup>86</sup>; to the extent of a proportionate part of the premium, where the insured has over-insured under an unvalued-policy<sup>87</sup> or where he has over- insured by double insurance<sup>88</sup> or where the policy contains a stipulation for the return of premium on the happening of a certain event, and that event happens<sup>89</sup>. Under s82 (a)<sup>90</sup> where the premium is recoverable then the insured can seek recovery of it from the insurers. Under s82 (b)<sup>91</sup> if it has not been paid, then it shall be retained by the insurer or his agent.

### **1.6 Position Prior to Legislation**

Prior to the legislation being implemented, in the case of *Fisk v Masterman*<sup>92</sup>, the issue that had to be determined by the court was whether the underwriters were bound to return part or all of

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<sup>83</sup> Marine Insurance Act 1906 s84(1), (3)(b).

<sup>84</sup> Marine Insurance Act 1906 s84(2)

<sup>85</sup> Marine Insurance Act 1906 s84(3)

<sup>86</sup> Marine Insurance Act 1906 s84(3)(c)

<sup>87</sup> Marine Insurance Act 1906 s84(3)(e)

<sup>88</sup> Marine Insurance Act 1906 s84(f)

<sup>89</sup> Marine Insurance Act 1906 s83

<sup>90</sup> Marine Insurance Act 1906

<sup>91</sup> Marine Insurance Act 1906

<sup>92</sup> (1841) 8 M & W 165

the premiums, and if they are required to return the premiums, in what proportion and upon what principle should the calculations be made. The court did permit the return of premiums in the event of double insurance. The court held that the assured was entitled to a return of premium on the amount of the over-insurance to which the underwriters who subscribed to the policies, when the vessel had arrived safely, were to contribute rateably in proportion to the sum insured by them respectively. That was the amount of over-insurance to be ascertained when taking into account all the policies. No return of premium prior to that date could be returned. In *Fisk*, insurance was taken out on a cargo by sea by five policies and further insurance was taken out on six different policies. All the policies together exceeded the amount of the value of the subject matter insured, but the former policies did not. The Court referred to *Marshall on Insurance*<sup>93</sup> and stated that the Court was not at liberty to distinguish between the two insurances and therefore the return must be made on both policies at rateable proportions.

This can now be found in the form of s84 (3)(f) which permits a proportionate part of the several premiums to the assured where the assured has overinsured by double insurance. However, this will only apply where if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of that policy, and when double insurance is effected knowingly by the assured no premium is returnable. It seems that this may extend to cases of property and liability policies as usually policies usually stated the limited circumstances which any part of the premium is to be returnable<sup>94</sup>.

Therefore although it may be an attractive argument to say that the law should be that the premiums should be returned to the insured where there is double insurance, the possible arguments against that is the specific legislation in place which has severe restrictions and as a rule, premiums are indivisible. Further it is possible that losses under a policy may not be

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<sup>93</sup> (3<sup>rd</sup> edition) p.649 which stated: "All the underwriters upon policies in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their respective subscriptions, without regard to the priority of their dates. If by several policies, made without fraud, the sum insured exceed the value of their effects, these several policies will in effect, make but one insurance, and will be good to the extent of the true interest of the insured; and in case of loss, all underwriters on the several policies shall pay according to their respective subscriptions, without regard to the priority of their dates. And it follows from thence that all underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions.

<sup>94</sup>Colinvaux's Law of Insurance Hong Kong (2<sup>nd</sup> Ed) 11.040

affected by double insurance.

## CHAPTER 2 THE RIGHTS OF AN ASSURED

### 2.1 The devices Insurers use to avoid indemnifying an assured: Are they fair?

An assured approaches an insurer to insure property he may own in the hopes that if a situation arises which results in a loss to the property that he should be able to make a claim which covers the loss that he has suffered. However, this is not always as easy as it sounds due to the mechanisms in place which are frequently used by the insurer, either limiting liability or excluding liability completely. This is done by including various clauses into the contract. In some cases you can have complicated combination of the Clauses. The device used by the insurer usually falls into the following categories: (1) exclusion clauses, (2) rateable proportion clauses, (3) excess and (4) Other insurance clauses<sup>95</sup>. Sometimes the insurer or insurers will include a combination of such clauses in the policy which causes difficulty and which may leave the assured without any cover for the loss he has suffered. The cases in this area are still uncertain due to the courts in a substantial number of cases avoiding having to deal with the issue by stating that the case before them is not one of double insurance or the lack of standard

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95 These “other insurance” clauses will be included in an insurers standard form policies. Other insurance Clauses usually come in the following form: (1) those which absolve an insurer from liability should other insurance covering the same risk be in existence or be effecting during the period of cover, unless the insurer is notified in writing of that other insurance; (2) the clause restricts the insurer’s liability to the loss in excess of that covered by other insurance; and (3) the clause restricts the insurers liability to a rateable proportion of any sum payable in the event of any loss. The aim of these clauses is to cover situations where the insured has effected two policies against the same risk, they will also be expressly applied to any policy in existence or effected in relation to any risk or any property covered by the instant policy. It is therefore crucial for the insured to appraise each policy carefully to see whether the policy in contemplation covers a risk or item of property already insured to avoid the pitfall of such a provision. The advantage obtained from the use of such clauses includes protecting insures from fraudulent over-insurance, facilitate the investigation of claims, and to allow the insurer to seek contribution where appropriate from one another. See *The Measure of Indemnity under Property Insurance Policies* by A. A. Tarr Canterbury Law Review Vol 2 (1983). The wordings used to draft such clauses will usually be in the following form: “The insured shall give notice in writing to the insurer of any insurance or insurances already effected, or which may subsequently be affected, covering the rest hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this policy by or on behalf of the insurer before the occurrence of any loss or damage, all benefit under this policy shall be forfeited.” “If other insurance exists which applies to a loss or would have applied if this policy did not exist, this policy will be considered excess insurance and the insurer is not liable for any loss or claim until the amount such other insurance is used up.” “If other valid insurance with any other insurance covering a loss also covered by this policy, other than insurance that is specifically stated to be in excess of this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of the other insurance.” : *The Law of Liability Insurance*, Derrington and Ashton (2<sup>nd</sup> Edition) p,675,676

principles that could be adopted in other cases where similar situations arise.

If the insurer chooses to include clauses in the policy limiting or excluding liability which has been agreed to by the assured, then why should the insurer not be permitted to do so. Although when one states that the assured has “agreed” to the terms of the policy, how accurate is this statement, as it is very common that an assured may not read and understand fully the terms of the policy he contracts into. On the other hand, why should the assured lose out when he has paid the premiums or high premiums under the policy. From the perspective of the insurer these devices have been put in place originally to prevent fraud by the assured where the assured may make a claim to recover against two insurers where he is overinsured, after destroying the insured policy himself. Therefore an insurer should be allowed such protection.

In Australia, the insurance market is more of a consumer market, which is slightly different from the insurance market in the United Kingdom. There is not much in Australia in the form of re-insurance. Instead in Australia the market covers life, health and property, unlike the United Kingdom, which covers marine insurance. However, from the development of the law and the cases, it can be seen that the issues that have arisen often involve commercial policies and it could be argued that the same approach could apply in the United Kingdom insurance market, despite the differences in the contracts. It has been the case that major commercial risks tend to be insured out or co-insured with Australia and other jurisdictions.

An escape clause will completely exclude the liability of the insurer if an event occurs which is stated in the policy as having such effect. Usually this will be where other insurance is in existence. An excess clause will be triggered to cover only the excess where there is another policy in existence. Therefore the other insurance will have to respond first and it is only after this has been paid off does the policy with the excess clause pay off what is remaining. The third method that has been adopted by insurers is the rateable proportion clause, which limits the insurer’s liability to paying a proportional rate for the loss suffered by the assured. It is quite common for the insurer to draft the clauses in such a way so as to ensure that its liability to indemnify will be limited. The usual way in which to avoid what has been drafted and agreed in

the policy is to show that the wording of one of the policies is not absolute. For example, this is what happened in the Canadian decision in the Supreme Court of Nova Scotia. This was the case of *Evans v Marine Medical Care Inc.*<sup>96</sup> where there were two policies in existence, one a group hospital plan which excluded cover for similar benefits if there was another contract in existence which covered the same loss. The other policy was a motor liability policy which provided that if there was a hospital plan in force, then it would not be liable to pay out. Here the Supreme Court looked at the wording to see if the wording was absolute or not. When interpreting the wording used in both policies, it concluded that the hospital plan was conditional upon payment being made by some other policy. Due to the clear wording that was used in the motor policy, the hospital policy would have to respond first. The hospital expenses plan was operative only where sums were actually payable under some other policy. The court seems to be suggesting that the wording has to be looked at first; this is common with most insurance cases. However, the court is indicating that anything which is conditional would not be absolute. Therefore if the wording is clear, as it was in this case, then there would not be a problem to identify which policy is the excess policy. However, problems will and do arise where there is similar wording in numerous policies. In such a situation, the position may not be so clear.

As can be seen from the following cases, the courts have still not been able to provide any clear guidance on the effect of the clauses.

## **2.2 Escape Clauses against Escape Clauses**

Where the wording of an escape clause is clear and unambiguous, the other policy will have to pay out. What is the position however, where both policies contain such clauses? Are both insurers liable or is neither of them liable or is only one of them liable to indemnify? This issue

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<sup>96</sup>87 DLR (4<sup>th</sup>) 173 (1992). *SHC Capital Ltd v NTUC Income Insurance Co-Operative Ltd* [2010] SGHC 224; *Nanyang Insurance Co Ltd v Commercial Union Assurance Plc* [1996] 1 SLR(R) 441 and *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 WLR 734. Also see *Chui Man Kwan v Bank of China Group Insurance Co Ltd* [2008] HKEC 1190, where cover was converted to an excess policy where another policy is present has the same effect, if no similar provision is present. In *Chui Man Kwan*, the wording in Tugu policy was as follows (this was an excess clause): If at the time of any claim under this policy there is any other insurance indemnifying any person or insured who are entitled to be indemnified under this policy, this policy is not to be called upon in contribution and, subject to the policy limits of indemnity, is only to pay any amount if and so far as not recoverable under such other insurance.

was discussed in *Gale v Motor Union Insurance Co*<sup>97</sup> where there Roche J held that both companies were liable rateably, each company paying half, as the material clauses should be read together as relating to, explaining and qualifying one another. The clauses in question that were found in both motor car risks policy which provided that if the risk was covered by another policy the insurer will not be held liable and secondly, where there were two policies covering the risk were in existence, then the insurer would be liable to pay rateably. The court considered that both clauses should be read together and that the second qualified the first. Roche J however suggested that this was the position on the true reading of the clauses but the position would be different if the policy did not have a rateable proportion clause but stood alone as an exclusion clause. If that was the case, then he was of the view that neither insurer would be liable. If this approach is correct and followed, then this would result in the insured being left with no protection for the loss he has suffered.

The court in the case of *Weddell v Road Traffic and General Insurance Co Ltd*<sup>98</sup> shed some light on this by concluding that the clauses do not cancel out each other, rather they should be construed as excluding from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold that both companies be liable, subject to any rateable proportion clause present. The decision shows that the court will reject the notion that the clauses would cancel out each other and the result would be that each insurer is liable. The Weddell case was followed in *Structural Polymer Systems Ltd and Another v Brown*<sup>99</sup> where Moore-Bick J stated that where there are no extraneous factors which could affect the amounts payable to each insured, that it could not possibly be in anyone's interest if in fact the insurers were liable, individually or collectively, in an amount at least as great as that paid under the settlement. This therefore reconfirms the approach that where you have a policy where the clauses lead to exclusions of liability that arises, the insured is and should be entitled to recover under two policies.

Templeman L. J. in *National Employers Mutual General Insurance Association Ltd. v*

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<sup>97</sup> [1928] 1 KB 359

<sup>98</sup> [1932] 2 KB 563

<sup>99</sup> [1999] C.L.C 268

*Haydon*<sup>100</sup> supported the conclusions in *Weddell*. In *Haydon*, the Court of Appeal concluded that there was in fact no double insurance. This was a case dealing with a firm of solicitors where proceedings were brought against them for professional negligence. The solicitors settled the claim. There were two policies which were the NEM's Professional Indemnity Policy (the NEM policy) and the Law Society's Professional Indemnity Insurance (the Master Policy). The solicitors were insured under the NEM policy which required notification to be given. The NEM policy consisted of Clause (i) under the heading General Exceptions to All Sections, and Clause 3<sup>101</sup> under the heading Conditions. The Master Policy contained two clauses, Clause 2 and Clause 5. Clause 2<sup>102</sup> contained an indemnifying provision and Clause 5<sup>103</sup> which contained a provision limiting the insurer's liability. Neither of the policies contained a rateable proportion clause. Stephenson L.J. stated that the case turned on the construction of the two policies looked at as a whole and the General Exception (i) in the NEM policy and General Exclusion 5(b)(iii) in the Master Policy. He discussed the approach taken by the first instance Judge, Lloyd J who was of the view that this was a "classic case of double insurance", which resulted in contribution from the defendants on a 50% basis. He also considered that the exclusion clauses in the two policies were of no distinction even though the Master Policy was narrower than the NEM Policy. However he went on to say that both exception clauses or exclusion clauses were drafted in a strict sense in form and in substance and that even if the exclusion clause was not drafted in the strict sense, it would still be difficult to distinguish them. He went on to apply *Weddell*'s case on this basis and followed the principle that the policies should be looked at independently, the

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<sup>100</sup>[1980] 2 Lloyd's Rep. 149, 156, Also see Arnold's Law of Marine Insurance and Average, 17<sup>th</sup> Edition, 2008, Sweet & Maxwell

<sup>101</sup> If during the period of insurance the solicitor became aware of and gave notice to, the insurance company of an occurrence which might subsequently give rise to a claim, then subsequent claims arising would be deemed to have been made during the subsistence of the policy.

<sup>102</sup> Clause 2: On the terms and conditions herein contained the insurers shall indemnify the Assured against all loss to the Assured whensoever occurring arising from any claim or claims first made against the Assured or the Firm during the Period of Insurance in respect of any description of civil liability whatsoever incurred in connection with the Practice.

<sup>103</sup> Clause 5 sets out the general exclusions, of which (b) is the relevant exclusion:

"(b) This insurance shall not indemnify the Assured in respect of any loss arising out of any claim:... (iii) in respect of any circumstance or occurrence which has been notified under any other insurance attaching prior to the inception of this Certificate;"



exclusion clause would cancel out each other, resulting in both insurers becoming liable and a contribution claim could be made. This would be the position if each policy would be liable but for the presence of the exclusion clauses in the policies. He therefore found for the NEM.

However, the two clauses, the Court of Appeal considered, were clearly distinguishable from each other and that the claim was only covered by the NEM policy and not by the Master Policy. It was of the view that the label given to the clauses was not important and that the policies had to be read as a whole. The position is that when notice was given by the solicitors to NEM on 24 March 1976, NEM bore the risk completely unless indemnity was covered by the other policy. This would have been the position if it were not for the presence of the NEM policy. This was because the Master Policy only gave cover after 24 March and not before that date which meant that “the insured is or would but for the existence of this Policy be entitled to indemnity under any other Policy” would not apply. However due to the effect of Clause 3, even though notice was given on 24 March, it was deemed to have been made during the existence of the policy which meant that the solicitors were not insured under the Master Policy. Although it has been commented that the distinction between clauses prevents liability from arising, and a clause which excludes accrued liability, is too fine to be justified and the approach taken by Lloyd should be the correct approach.<sup>104</sup>

The above principles have been followed<sup>105</sup> in the courts of Singapore in the case of *SHC Capital Ltd v NTUC Income Insurance Co-operative Ltd*<sup>106</sup> where the High Court had to deal with whether there was double insurance, whether or not liability had been properly indemnified and whether there was a right to seek contribution or reimbursement by voluntary payment. The court applied the principles as laid down in England such as *American Surety Co of New York v Wrightson, Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd*<sup>107</sup> and *Weddell v Road Transport & General Insurance Co Ltd*. The High Court also re-iterated the principles

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<sup>104</sup>Colinvaux’s Law of Insurance 8<sup>th</sup> edition 2010

<sup>105</sup> Principles of Insurance Law (Lexis Nexis, 6<sup>th</sup>ed, 2005) at p.1233

<sup>106</sup> [2010] SGHC 224

<sup>107</sup> [1985] 1 WLR 734

regarding contribution and followed the English provisions<sup>108</sup>. However, as can be seen from the above discussion, no clear guidance has been given.

### 2.3 Escape Clause against Excess Clause

It is possible that the two clauses would not be self cancelling due to the existence of the second policy which will provide cover unless there is another clause in existence providing cover. If not, then the first policy is negative by the existence of the second policy.<sup>109</sup>

### 2.4 Excess Clause against Excess Clause

It is also common for policies to have excess clauses in both policies. In *Austin v Zurich General Accident and Liability Insurance Company Limited*<sup>110</sup>, the court followed similar reasoning as in *Weddell's* case and concluded that both companies would be held liable. In *Austin*, Zurich issued a motor car insurance policy to A providing for extension of cover to persons driving the car with the insured's permission on the condition that the terms of the policy were observed. As a

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<sup>108</sup> At para [36] where it was stated: "The right of contribution exists as between co-insurers who have insured the same assured against the same risk, in respect of the same subject matter: *MacGillivray on Insurance Law Relating to All Risks Other Than Marine* (Sweet & Maxwell, 11<sup>th</sup> ed, 2008) at para 23-001 ("*MacGillivray*"). Thus, when two insurers are liable for the same loss, the insurer called upon to make payment may have the right to seek payment from the other insurer: *MacGillivray* at para 23-032. The concept of contribution is similar to another concept known as reimbursement, save for a slight difference. In the case of contribution, it is essential that both the plaintiff and defendant are jointly and/or severally liable to the same third party in respect of the same debt: see *Moule v Garrett* (1871-1872) LR 7 Ex 101 at 104; *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 ("*Bonner*") at 178 and Mitchell, *The Law of Contribution and Reimbursement* (Oxford, 2003) ("*Mitchell*") at para 1.06. In the case of reimbursement, the plaintiff and defendant do not need to be jointly and/or severally liable to the third party in respect of the same debt. It would suffice if the plaintiff is compellable or compelled under the law or by necessity to discharge the defendant's debt and was not acting officiously in so doing: *Halsbury's Laws of England*, 4<sup>th</sup> edition Reissue vol 40(1) at para 63 ("*Halsbury's Law of England*, vol 40(1)"); cf Goff and Jones, *The Law of Restitution* (Sweet & Maxwell, 7<sup>th</sup> ed, 2007) ("*Goff and Jones*") at para 15-001 which states that the plaintiff must have been compelled by law to make a payment in order to obtain reimbursement. An example of a claim in reimbursement is where a surety who was called upon to pay a sum of money on the default of the principal debtor or some other person who is principally liable makes a claim against the principal for a full indemnity: *Halsbury's Laws of England*, vol 40(1) at para 65. Another example may be found in *Exall v Partridge* (1799) 8 TR 308, where the claimants' goods which were on land leased to the defendants, were seized by the landlords in distress of rent. The claimant, having paid rent to obtain the release of goods, successfully obtained recoupment (another word for reimbursement) from the defendants."

<sup>109</sup> Colinvaux's Law of Insurance 8<sup>th</sup> edition 2010

<sup>110</sup> [1945] KB 250

result of an accident the plaintiff was sued and his insurers settled the claim. The Plaintiff then brought proceedings under his own name for the benefit of the insurers. Liability was denied by Zurich who claimed that notification had not been given. The Plaintiff's policy was insured under the Bell policy. The Zurich Policy contained certain limitations. One of them provided that the person indemnified would not be entitled to indemnity if there was the existence of any other policy. The General Condition in the policy also stated that the company would not be liable (except under section 6) to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense. The Bell policy also provided that if there was other indemnity or insurance, the underwriters shall not be liable to pay or to contribute except in excess of the sum actually recovered or recoverable under such indemnity or insurance. Tucker J<sup>111</sup> considered the facts of the present case to be indistinguishable from the decision in *Weddell's* case and decided to follow that decision and that liability to indemnify should be shared by the companies equally.

## 2.5 The effect of Rateable Proportion Clauses

Another common clause that can be found in insurance policies<sup>112</sup> is the rateable proportion clause and in some cases, there would be a combination of other clauses as well. For the rateable proportion clause to have any effect, double insurance must be present, which means that they cover the same interest and the same loss. This clause was introduced due to an assured seeking contribution from one single insurer even though there were other insurers to which a claim could be made, which then resulted in the insurer seeking contribution from the other insurers<sup>113</sup>.

There have been similar situations to those arising in *Weddell's*<sup>114</sup> case where an insurer refused

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<sup>111</sup> In the Court of Appeal in *Austin v Zurich* [1945] KB 250

<sup>112</sup> For example: "If at the time of any claim...there shall be any other insurance covering the same risk or any part thereof the company shall not be liable for more than its rateable proportion thereof." See *Insurable Disputes* (3<sup>rd</sup> Edition) - Double Insurance John Dunt and Wayne Jones Chapter 10

<sup>113</sup> *North British & Mercantile Insurance Company v London, Liverpool and Globe Insurance Company* (1877) 5 Ch D

<sup>114</sup> *Weddell v Road Transport and General Insurance Co* [1932] 2 KB 563. The use of ratable proportion clauses can be seen in the High Court of Delhi at New Delhi in *M/s. Jalpac India Ltd v United India Insurance Company Limited W.P.(C) No.7525/2005* at para [18]

to indemnify due to a breach of the terms and conditions in the policy<sup>115</sup> and as a result the assured can only recover a proportion of his claim from the insured in question. Although the effect of a rateable proportion clause is his rights may be limited as to which insurer he proceeds against, this does not affect his rights to indemnity. The contribution takes place when the claim is made and not when contribution is sought by the insurers. The most serious disadvantage to the assured when such clauses are present is the risk of the insolvency of any of the insurers will be removed from the remaining insurers and imposed upon him.<sup>116</sup>

## **2.6 Clauses in combination: Excess or Escape Clauses against Rateable Proportion Clauses**

What is the position then when there is a combination of the clauses? An excess clause in a policy means that the policy will only have to pay up when another policy in existence have been exhausted. If such a clause is present in one policy and the other policy has a rateable proportion clause, the effect will be that the rateable proportion clause will not be triggered because there is no other policy in effect.

Deputy Judge Gavin Kealy QC, in a recent decision, provided some useful guidance on the interpretation of such clauses and their effect when in combination when there was double insurance, even though in that case, he concluded that there was no double insurance. In the decision of *National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd*<sup>117</sup>, the preliminary issues which dealt with the correct interpretation of the policies, were (1) whether on the construction of the HSBC policy there was no cover provided due to the construction of the NFU policy and cancellation of it due to no conflicting clause; and (2) whether the NFU policy contained a general pro rata clause. Here, he held that this was not a case of double insurance<sup>118</sup> but still went on to give a thorough review of the cases. There were two insurers, National Farmers Union Mutual Insurance Society ('NFU'), insured the buyers and

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<sup>115</sup> For example, failing to notify

<sup>116</sup> Colinvaux's Law of Insurance 8<sup>th</sup> edition 2010

<sup>117</sup> [2010] 1 CLC 557

<sup>118</sup> Double insurance according to the principles as laid out in *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130, 138

HSBC Insurance (UK) Ltd ('HSBC') insured the sellers. The parties exchanged contracts for the sale of The Old Hall, the property which was the subject matter of a trust. A fire broke out between the dates of exchange of contracts for sale and completion. The sellers having been paid the full purchase price on completion, and having suffered no loss, they did not claim under their policy with HSBC. The Buyers made a claim and were indemnified by NFU. NFU then sought a contribution from HSBC. The key terms of HSBC's building policy were set out in Section One.<sup>119</sup> The HSBC policy also contained claims applicable to the whole of the insurance.<sup>120</sup> The NFU policy contained a number of standard sections of cover for a wide variety of risks, the only relevant section provided for building are insured against damage by the following....Fire. There were a number of General clauses.<sup>121</sup> The question which arose was whether there was double insurance, NFU argued on the basis that HSBC's policy provided buildings cover to the Buyers against the risk of damage to the buildings. HSBC argued that since the buyers were insured by another insurance policy for the building, then on the construction of their policy, their liability was limited to that of an excess insurer attaching in excess of the cover provided to the buyers by the NFU policy. Gavin Kealey QC on an analysis of the construction of the wording of the clauses concluded that HSBC policy was subject to the exception that an indemnity would not be provided if the Buyers had taken out their own building insurance which covered the same risk as the HSBC policy. Here the Buyers did. As a result of this, the NFU policy regarding the 'Other insurance' provision was not triggered, making NFU liable to pay the full extent without pro rata apportionment, subject only to the indemnity limit for buildings cover in that policy. Kealey QC concluded that there was only one policy covering the buyer for the fire and damage to The Old Hall, which therefore did not trigger the "Other insurance policy in the NFU policy.

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<sup>119</sup> The insurance covers the buildings for physical loss or physical damage. It did not pay out if the building was insured under any other insurance.

<sup>120</sup> Claims under Condition 2 stated: "OTHER INSURANCE. We will not pay any claim if any loss, damage or liability covered under this insurance is covered wholly or in part under any insurance except in respect of any excess beyond the amount which would have been covered under such other insurance had this insurance not been effected."

<sup>121</sup> "If when you claim there is other insurance covering the same accident, illness, damage or liability, we will pay our share. This does not apply to an accident or illness insured under the Accident to the family or Personal accident and illness sections of your policy, or under the Contents section—"Additional insurance"...."

The Buyers were not insured at the same time by the NFU and HSBC policies and therefore there was no double insurance present.

He first stated the principles of double insurance and the rules for contribution<sup>122</sup>. He went further to say that it was the objective contextual background against which the policies which were to be construed and not speculate about the real intention of the parties. He then went on to deal with the three main classes of policy insurance (1) escape/exclusion clauses; (2) rateable proportion clauses and (3) excess clauses, and the decided cases. Although he concluded that the authorities and well established principles were of limited value in assisting to provide a clear consensus of analytical approach, he seems to be limiting that view to the confines of the facts of the present case.<sup>123</sup> He did not find the decision in *Weddell* of much help due to the difference in wording of the clauses.<sup>124</sup> Although he did go further and discuss Roche J's analysis in *Gale v Motor Union Insurance Co*<sup>125</sup> and *Loyst v General Accident, Fire and Life Assurance Corp*<sup>126</sup>, and discarded the possibility of the penultimate sentence in his analysis of escape provisions in each policy as being qualified and explained by the rateable proportion clause, on the condition that the escape clause only applied if there was another clause policy present completely indemnifying the insured, as that if there had been no rateable proportion provision this would mean that the effect of the escape clause in the policy would have deprived the insured completely. The reason being that it would not be consistent with subsequent authorities which have concluded that escape policies in both policies cancel out each other making the insured liable to pay rateably.

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<sup>122</sup>*Eagle Star Insurance Co. Ltd v Provincial Insurance PLC* [1994] 1 AC 130, 138, *Legal and General Assurance Society Ltd v Drake Insurance Co. Ltd* [1992] QB 887, *Investor Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *Pratt v Aigaion Insurance Company SA* [2009] 1 Lloyd's Rep 225

<sup>123</sup> [2010] 1 CLC 557

<sup>124</sup> Although commenting that Rowlatt J was stating that in the context of this case an 'escape' clause includes in the category of co-existing cover any insurance that does not contain an equivalent escape clause. He went on to observe that such provision in each policy which Rowlatt J was dealing with only operated as secondary cover, present only in absence of primary cover, although concluding that this was not a recognised principle. According to this analysis, NFU cover would be primary cover and the HSBC would be secondary cover, which would mean that HSBC's cover was not available to them.

<sup>125</sup> An escape clauses in both the Bell and Zurich Policy. An Excess Clause in the Bell policy and a Rateable proportion clause in the Zurich policy.

<sup>126</sup> [1928] 1 KB 359

He further went on to differentiate the analysis in *Gale* on the basis that the rateable proportion clause in the NFU policy only took effect if there was no other insurance covering the same damage which was already covered by the NFU policy.

He then turned his attention to the decision of Tucker J in *Austin v Zurich General Accident & Liability Insurance Co Ltd*<sup>127</sup>, which followed *Gale* and *Weddell*. In that case analysis, Tucker J when dealing with excess and rateable proportion clauses, stated that the facts of the case were indistinguishable from that of *Weddell* and should be followed. Tucker J concluded that indemnification of 50% by the company was not applicable. Gavin Kealey QC commented that this conclusion was wrong, and the effect of both policies containing escape clauses, meant that they cancelled out each other, and each insurer was liable to pay rateably. Since in *Weddell* one of the policies<sup>128</sup> contained an escape clause but the other policy<sup>129</sup> neither contained an escape clause or rateable proportion clause. This did not however mean that the latter policy was liable to pay out 50% or liable under some rateable proportion. Gavin Kealey QC seems to think that if it were not for the condition precedent, Cornhill would be 100% liable, subject only to such monetary limit of indemnity as the policy provided. This is the correct approach to be taken.

In *Austin*, the Bell policy contained an escape clause and the Zurich policy contained a rateable proportion clause, after the escape clauses in both policies had been cancelled out. Gavin Kealey QC considered it wrong that this would result in both the policies agreeing to pay its insured, if covered by other insurance, 50% of the insured's loss. He considered the correct conclusion would be that the Zurich policy would indemnify to the extent of its limit, without contribution from the Bell policy, above which excess cover would be made by the Bell policy.<sup>130</sup>

Although concluding that as the wording was materially different from the decision of *Austin* he went further to say that if one were to treat the rateable proportion clause in the NFU clause as

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<sup>127</sup> [1945] KB 250

<sup>128</sup> The Road transport policy

<sup>129</sup> The Cornhill policy

<sup>130</sup> This was the alternate argument that HSBC raised and to which Gavin Kealey QC relied upon judgments from the United States, such as *Greater Northern Ins Co v Mount Vernon Fire Ins Co* 798 NE 2d 167 (NY 1999) and *Jones v Mexdow Inc* 430 A 2d 488 (DC 1981) App at 489, 491-4)

same as the excess clause in the HSBC policy, and if they were in competition or conflict, then the conclusion would be the same as that reached by Tucker J.<sup>131</sup>

As stated above, Gavin Kealey QC said that these authorities provided no guidance to the case at hand and went on to cite New Zealand and Australian decisions. Referring to the Australian Law Commission Report No. 20 which referred to the English cases which lead to the enactment of s45 Insurance Contracts Act, he stated what the Reform's view was on the position of the English cases. It concluded that the interactions between the clauses are difficult to follow and impossible to reconcile.<sup>132</sup> He decided that more assistance was to be gained from the New Zealand case of *State Fire Insurance v Liverpool & London Global Insurance*<sup>133</sup>, where the majority judgment was given by Hutchison and Cooke JJ, which was preferred by Gavin Kealey QC. In *State Fire* the Court drew a distinction between the clause in the State Policy and concluded that the rateable proportion clause should be subordinate to the indemnity provision and any inconsistency was to be decided in favour of granting primacy to the indemnity clause and the excess provision within it. Such an approach resulted in coverage operating as excess to the Board's. Hutchinson J stated that the case the court had to deal with was not one where it had to reconcile the clause to ensure that an absurd result does not occur, which is what the English cases concerned. The Court he said was dealing with resolving the conflict between the clauses giving indemnity in the State Policy and the contribution provision in that policy. The answer was that the rateable contribution should be subordinate to the clause giving indemnity because of the endorsement on the State Policy which is a special provision, unlike the rateable proportion clause which is a general clause. The State Policy would only be invoked after the rights of the Globe policy have been exhausted. This was due to the State Policy being considered as an excess policy. Gavin Kealey QC adopted the same approach when deciding NFU by concluding that the qualified extension of buildings cover to the Buyers is not itself

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<sup>131</sup> He looks at the authorities in the US courts: *Great Northern Ins Co v Mount Vernon Fire Ins Co* 798 NE 2d 167 (NY 1999) and *Jones v MedoxInc* 430 A 2d 488 (DC 1981) App at 489,491-4. Although he referred to US cases and was referred to US case, he considered that the US authorities provided little assistance.

<sup>132</sup> See page para 49 of judgment

<sup>133</sup> [1952] NZLR 5. In *State Fire Insurance*, there were two policies. The first policy contained an excess clause and a rateable proportion clause. The second policy contained a rateable proportion clause only.



further qualified by the generally applicable Claims Conditions in HSBC's policy. The former was a special provision taking precedence over the latter to the extent of any conflict between the two but also the latter was subordinate to the former so far as the existence of liability was concerned. The NFU policy covered the Buyers without qualification for the risk of loss or damage to the buildings of The Old Hall by fire. This meant that no buildings insurance covering the same risk was extended to cover the Buyers and as a result, no double insurance was present.

### **CHAPTER 3: Legislative Provisions – Section 45 Insurance Contracts Act 1984**

#### **3.1 s45 Insurance Contracts Act 1984: "Other Insurance" Clauses – The Australian legislation barring double insurance exclusion clauses and whether English law needs the same?**

In Australia there is specific legislation prohibiting double insurance altogether. Any double insurance will make the insurance contract void, unless they fall within the exceptions under s45 (1) or (2).<sup>134</sup> It should be noted that it is the double insurance provision in the policy which is void, and not the entire contract.

The problems raised by double insurance were illustrated in the Australian Law Reform Commission, Report on Insurance Contracts, Report No 20 (1982).

The Commission dealt with and looked at the issues in 4 stages: (1) before the Contract; (2) during the Contract; (3) cancellation and renewal of the Contract; and (4) when a claim is made. In particular, what rules should apply where there is double insurance.

The guiding principles that were considered for the proposals were the need to strike an appropriate balance between the economic costs and the benefits. This was consistent with the

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<sup>134</sup>s45 Insurance Contract Act 1984

views of the Campbell Committee whose recommendations were designed to improve the operation of the insurance market by making sure that the insured was provided with sufficient information. There were some major recommendations. For example, the assured should be entitled to a copy of the policy. It was thought that there should be regulations for standard cover and any variation should be brought to the attention of the assured. Apart from regulations, the laws relating to misleading conduct should also be continued. Another recommendation was when determining the insured's duty to disclose, the test should be what the insured knew or what a reasonable person in the insured's circumstances would have been known, to be relevant to the assessment of the risk. A similar approach should be taken for misrepresentation too. At present the law requires the disclosure<sup>135</sup> of material facts be made by both the insurer and assured, with regard to what the risks covers and whether one would be able to make a claim under the policy.<sup>136</sup> The court<sup>137</sup> went on to say in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd*, that what would be material would be matters that a prudent insured would take into account when deciding whether he should place the risk with that insurer.

Where there were attempts of fraud by the insured the court should ensure that the loss suffered by the assured would not be seriously disproportionate to the harm caused by the fraud. Further, 'Other Insurance' Clauses should be ineffective unless they fall within a certain category. It was thought that the insured should be entitled to choose whichever insurer he wanted to claim from, and it was then up to the insurer to seek contribution from the other insurers.<sup>138</sup>

The Report correctly pointed out that if an insured has made a claim in good faith, they should be entitled to recover the loss from the insurer. If an insured was to reject the claim, then it would be of serious concern. It went on to conclude that a system which persistently disappoints the

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<sup>135</sup> It should be noted however that the Consumer Insurance (Disclosure and Representations) Act 2012, which considers disclosure provisions, and which has been dealt with in the draft bill 2014, only concerns the disclosure by the assured and does not affect this point.

<sup>136</sup> *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B 665,770-772

<sup>137</sup> [1990] 1 Q.B 665,722

<sup>138</sup> Summary of ALRC Report

reasonable expectations<sup>139</sup> of the insured can hardly claim to represent a fair balance between the competing interest of the insured and the insurer.<sup>140</sup> It is this approach which should be the underlying reasoning when deciding what should be the correct formulations of the principle of double insurance.

This paper gave an excellent overview of the problems of 'Other insurance' Clauses in insurance policies. It was as a result of the discussions in the paper that Australia decided to put in place legislation in the form of s45 Insurance Contract Act 1984 to avoid the problems raised by double insurance. This could provide a useful framework for the English courts to adopt.

The Draft Legislation was attached to the Report. The present s45 was originally s46 in the Draft Legislation. No amendments were made to s45 which was adopted in its entirety. The rationale<sup>141</sup> was due to the uncertainty caused with the clauses due to the assured receiving nothing at the end of the day or only receiving part of it. The balancing of interest between the assured and the insured seemed to be disproportionate. It was thought that the inclusion of a term usually used in the policies warning the assured of the consequences of claiming twice under the policy did not assist in the reduction of the insured's fraudulent intentions. The insurer could include in the policy the requirement that the assured to provide details of any other insurance present, so as to enable the insurer to claim contribution from the other insurers. This would also allow for the insured to obtain more details of the likelihood of over-insurance occurring. Further an insured should be permitted to exclude liability where there is a genuine excess policy present.<sup>142</sup>

Therefore looking at the Australian position, one may ask, does this legislation actually solve the problems caused by double insurance? Should English law follow the Australian position for double insurance? If it is followed, should it be adopted in its entirety or with amendments?

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<sup>139</sup> *Seagate Hotel Ltd v Simcoe & Erie General Insurance Co* (1981) 27 B.C.L.R. 89 (CA) , *McFarlane J.A and Commercial Union Association co. Ltd v Hayden* [1977] 1 Lloyds L.R.1.

<sup>140</sup> Background of ALRC Report

<sup>141</sup> para 147 Explanatory Memorandum to Bill

<sup>142</sup> para 148 of explanatory memorandum in ALRC Report

The Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) looked at the concerns that were raised which lead to the legislation. The Commission was concerned <sup>143</sup> with the uncertainty caused to the insured. The usual problem that would arise was when there were a combination of the clauses, such as exclusion clauses, excess clauses and pro-rata clauses, which would in some cases, result in the assured not being provided with any form of protection on suffering a loss. There was no protection against fraud as such. The Commission was of the view that the 'other insurance' clauses should be rendered ineffective. The position it was thought was that an assured should be able to collect from one insured and it was then for the insured to seek contribution from the others. The recommendation that if such a clause was ineffective it would not have any effect on layered policies where each policy is for a discrete range of the total risk and where no overlap occurs.

The way the earlier cases <sup>144</sup> were decided would allow the assured to make a claim under the second policy, and under the second policy, it was possible that the assured would not have sufficient protection or any protection. This would be the case if the requirement of notification had not been given where there was other insurance. There have been attempts by the court to get around this problem <sup>145</sup>, where the cover note, it was said, did not fall within "other insurance" under the first policy. <sup>146</sup>

Another type of problem was the presence of all types of exclusion clauses <sup>147</sup> in the insurance contracts. In some cases, there would be a conflict of the clauses. The cases at the time of the Commission's Report <sup>148</sup> were considered 'difficult to follow and impossible to reconcile'. There

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<sup>143</sup>p.177 of the Report. In the People's Republic of China, for example there is statutory requirement for notification in Article 41 Order of the President of the People's Republic of China (No.11) where the insured or the proposer may change the beneficiary by written notice to the insurer. The insurer shall endorse the change on the policy or other insurance certificate or attach an endorsement slip to the insurance contract or insurance certificate upon receipt of the notice. Change of the beneficiary by the proposer is subject to the insured's consent.

<sup>144</sup>*Nisner Holdings Pty Ltd v Mercantile Mutual Insurance Co. Ltd* [1976] 2 NSWLR 406

<sup>145</sup>*Steadfast Insurance Co. Ltd v F & B. Trading* (1971)125 CLR 578

<sup>146</sup>See also *Deaves v C.L.M. Fire and General Insurance Co. Ltd.* (1979) 23 ALR 539 where the principles in *Steadfast Insurance Co.* were followed.

<sup>147</sup>Exclusion, Excess and Rateable proportion clauses

<sup>148</sup>*Gale v Motor Union Insurance Co* [1928] 1 KB 359, *Weddell v Road Transport and General Insurance Co Ltd*

were numerous issues and areas of concern which were identified. In any event, the legislature was of the view that the proper way to give sufficient protection was in the form of legislation. This is a possible solution to the problems as seen in English law. However, problems in the wording and interpretation of legislations will become evident after the passage of time when the law is able to develop in this area. Ultimately, although a fair balance should be struck between the parties, the interest of the assured should be the paramount concern, due to the bargaining positions of the parties. It cannot be disputed that insurance companies have the upper hand when drafting the wording of the policies. The Australian approach<sup>149</sup> to double insurance should be looked at to see if any assistance can be obtained.

### **3.2 s45 Insurance Contracts Act 1984 –“Other insurance” provisions**

It is beneficial to list out the exact wording of the legislation of the Australian Provision, as the courts have tried to define what the words in the legislation mean and what effect they have. The cases that deal with the section may shed some light as to what type of cases the section would apply or if in fact they should have a limited application.

Section 45 of the Insurance Contracts Act 1984<sup>150</sup> is drafted in the following terms:

- (1) where a provision included in a contract of general insurance has the effect of limiting or excluding liability of the insurer under the contract by reason that the insured has entered into some other insurance, not being a contract required to be effected by or under a law, including a law of State or Territory, the provision is void.
- (2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance

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[1932] 2 KB 563, *Austin v Zurich General Accident and Liability Insurance Co. Ltd* [1945] KB 250, *State Fire Insurance General Manager v Liverpool and London and Global Insurance Co. Ltd* [1952] NZLR 5 and *National Employee's Mutual General Insurance Association Ltd v Haydon* [1979] 2 LI R 235

<sup>150</sup> This piece of legislation only applies to insurance contracts which come into existence after this Act: *Nisner Holdings Pty Ltd v Merchantile Mutual Insurance Co. Ltd* [1976] 2 NSWLR 406. It would not apply to policies which contained a policy issued or renewed: *The Law of Liability Insurance*, Derrington and Ashton (2<sup>nd</sup> Edition) p.106 (2-242)

that is specified in the first-mentioned contract) deals with “Other insurance” provisions.

The wording of Section 45 will only apply to contracts of general insurance. If the effect of that provision is to limit or exclude the insurer's liability on the ground that the insured has entered into some other contract of insurance, the provision will be void. If at the time an insurance contract is entered into, there is other insurance in existence, then when a claim arises, the section will be triggered. It does not matter whether the other insurance contract was entered into before or after the contract of general insurance. The section does not apply to provisions which have been entered into by third parties on behalf of the insurer or naming the insurer as a beneficiary. This would mean that it would be possible to sever the underlying insurance clause or it would not allow for the general application of the section. It should be noted that this will not be the position for all cases. This was held in the decision of *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd*<sup>151</sup>.

It would be fair for both parties, more so to the assured, if no distinction is made as to when the “other insurance” policy was entered into. This is more so where such policies are entered into without the assureds’ knowledge by a third party. The issue of severance should be decided on a case by case basis. The court should have regard to the intent of the legislation when deciding such cases. Although fairness should be a factor to take into consideration, more protection should be given to the assured due to the vulnerable position the assured usually finds himself in. Although the wording specifically makes reference to “at the time an insurance contract is entered into”, the timing should not matter as the insurer or the assured himself may not even know of the existence of other insurance contracts. This will not be a problem if the assured knew of the existence of other insurance which he or a third party took out on his behalf.

Further, although one could argue that severance should be open to the courts when dealing with

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<sup>151</sup>(2009) 253 ALR 364. Also see *Austress- PSC Pty Ltd and Carlingford Australia General Insurance Ltd v Zurich Australian Insurance Ltd* delivered 1 May 1992.

such contracts, it may be difficult for the courts to identify in which type of cases severance should be permitted. This may be a difficult task for the courts. It could be said that to allow the courts the option of allowing for severance could lead to the law of double insurance becoming even more confusing.

In *Speno*, there was a contract between Speno and Hamersley which provided that Speno would be solely liable for and had to indemnify Hamersley against any common law liability for personal injury to Speno's employees. There was also a requirement under the contract that Speno would arrange liability insurance to cover Hamersley's interest as principal. This insurance policy was taken out with Zurich. Two employees were injured under the Speno-Hamersley contract due to the negligence of Hamersley. In the District Court, Speno was held liable to indemnify Hamersley, which totalled some \$1.26 million. Zurich however indemnified Hamersley this amount, and then sought contribution from Hamersley's own insurers, Metals & Minerals Insurance Pte (MMI) on the basis that Hamersley was doubly insured. MMI then commenced proceedings against Speno claiming that it was entitled to rights which were held by Hamersley against Speno under MMI's obligation to contribute. Zurich claimed that the underlying insurance clause in the Hamersley policy was void due to the operation of s45 (1) Insurance Contracts Act. This was defended by MMI on the basis that the underlying insurance clause in the Hamersley Policy meant that there was no insurance because it was Speno who entered into the policy with Zurich. There were also arguments by MMI that the relief sought was not available in equity<sup>152</sup>.

The trial judge concluded that because s45 (2) did not save the underlying insurance clause in the Hamersley Policy, MMI could not rely upon it because this section does not apply to 'other insurance' clauses where such clause has not been effected by the person who has already been indemnified by the insurer claiming contribution. The court was of the view that the MMI policy

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<sup>152</sup>see para 57 of Judgment

resulted in an excess layer policy where insurance was entered into on Hamersley's behalf or when it entered into insurance on its own behalf. It therefore seems that the courts are not open to attempts by an insurer to seek contribution by subrogating his rights under a contractual indemnity owed by a third party, because the third party may not have suffered had the third party complied with the requirement to indemnify the insured.

Therefore if the assured is making a claim as beneficiary, s45 does not come into play. The issue would then be, if there was co-insurance present, and that policy was named or identified, would the section apply. It seems that courts make a distinction where you have a situation of a beneficiary and an assured. However, the legislation does not make such a distinction. To now provide such a distinction would lead to the assured, if he was a beneficiary, unable to rely on s45 to hold that such clauses were void.

One of the other issues raised in *Speno* was whether severance was excluded under s45 (1) where a provision made the term ineffective by seeking to deny or limit liability where there is the existence of double insurance. The court held that severance was permitted as this was what the legislature had intended. If severance is permitted it would give the courts flexibility when deciding cases and when balancing the rights and interests of the parties. It therefore could be argued that this is what the legislation permitted judges to do, although it could also be argued that the legislature had not expressly provided for severance in the legislation. It would be very easy for the court to conclude that the clause was void, even though no firm basis for doing so had been provided.

### **3.3 Meaning of “the insured”– any difference from “any insured” or “an insured”**

In *Transfield Pty Limited v National Vulcan Engineering Insurance Group Limited*<sup>153</sup> the court was dealing with a situation where the sub-contractors themselves were the insured, like the principal contractor making the claim for indemnity. The learned judge preferred the approach

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<sup>153</sup> [2002] NSWSC 830



where each party is to be considered as a separate entity in the same manner as if a separate policy had been issued to each of them, as stated in the cross-liability clause. He noted that the way the insurers had drafted the policy was to ensure that a claim could not be made under Section C where it could not be made under Section B, where the damage was sustained by the insured's own property. He went on to state that if there was a doubt, that should be resolved in favour of the insured.<sup>154</sup> For the exclusion clause to have the effect as stated by the insurer, the words would have to read either "any insured" or "an insured" rather than "the insured". He looked at the purpose of the policy and noted the practical difficulties with issuing separate policies. It was sufficient to issue one policy which contained a cross-liability clause, and the relevant parties could each be insured by a policy which responded to any particular claim made by a party.

A policy should be looked at on its own facts. Even if there are authorities which have similar wording the courts must look at a case on a case by case basis. The courts must look at the exclusion clause together with the indemnity clauses<sup>155</sup>. This has been the approach in the case of *Stolberg v Pearl Assurance Co Ltd*<sup>156</sup> of the Canadian Supreme Court. The words "the insured" or "insured party" used in the policies are immaterial and the correct approach would be that this refers to the insured entity who has incurred a liability and who is seeking indemnity under the policy.<sup>157</sup>

### **3.4 The meaning of "entered into"- include non-party insured?**

In *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* ("Zurich")<sup>158</sup>, the

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<sup>154</sup> *C E Heath Underwriting & Insurance (Aust) Pty Ltd v Edwards Dunlop & Co Ltd* (1992-1993) 176 CLR 535 at 541-452

<sup>155</sup> This approach has been followed in Hong Kong in the case of *Dragages Et Travaux Publics (HK) Ltd and Another v RJ Wallace and Others* [2004] 1 HKC 478, 489 at para [23]

<sup>156</sup> (1971) 19 DLR (3d) 343

<sup>157</sup> [2004] 1 HKC 478, 489 at para [25]

<sup>158</sup> [2009] HCA 50.

High Court discussed the background to the legislation and the meaning of the term “entered into”. The issue which the court focused on was whether the insured had “entered into” a contract within the meaning of s45.

In *Zurich*, there was a contract entered into between Hamersley and Speno. Speno’s insurance policy required Speno to indemnify Hamersley and itself against claims made by employees involved in an accident, and to name Hamersley as an insured. This policy was taken out with Zurich. In addition to this policy, under Hamersley’s own contract with Metals & Minerals there was an “other insurance” clause. Under this policy, Speno was named as the beneficiary and not as the assured.

In *Zurich*, there is an interesting discussion on the background of s45 and the intention of the legislature. As mentioned, the term “entered into” was not defined in the draft Insurance Contracts Bill proposed by the ALRC. s48<sup>159</sup> which was also recommended by the ALRC to be included into the legislation, made it permissible for a non-party to a general contract who is specified or referred to in the contract to also be covered and able to recover from the insurer. As there was no distinction made in the Report or Explanatory Memorandum between double insurance including a non-party and where the insured is named and is relevant to the contract, the court was of the view that the word “entered into” did not include a non-party insured. Speno therefore had not come under the provision of s45 (1) as having “entered into” the contract. It is

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<sup>159</sup>Entitlement of named persons to claim (1) Where a person who is not a party to a contract of general insurance is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends, that person has a right to recover the amount of the person's loss from the insurer in accordance with the contract notwithstanding that the person is not a party to the contract. (2) Subject to the contract, a person who has such a right: (a) has, in relation to the person's claim, the same obligations to the insurer as the person would have if the person were the insured; and (b) may discharge the insured's obligations in relation to the loss. (3) The insurer has the same defences to an action under this section as the insurer would have in an action by the insured.

interesting to note that although stating that there was no distinguishing, the court went on to rule that non-party would not coming within the definition of “entered into”. Further, would there be a difference if such a distinction were to be made. There should not be such a distinction.

It is understandable why the definition of “entered into” was not provided for, as to do so would place an unnecessary restriction on the courts when deciding whether a case would fall within the definition of “entered into”. This is also due to the fact that each case should be dealt with on a case by case basis and allow for flexibility. Although the result should be a fair one, a more favourable result for the assured should be achieved.

The difficulties faced when interpreting the construction of such clause can also be illustrated in the decision of *Vero Insurance Limited v QBE Insurance (Australia) Limited*<sup>160</sup>. In this case, there was the issue of whether a subcontractor who has a contract of insurance with a particular insurer meant that the subcontractor had entered into a contract with that insurer. In *Vero*, an employee was injured during work for a contractor, Priceright Construction Pty Ltd (Priceright) who worked for Barclay Mowlem Construction (BMC). Vero indemnified BMC and then sought contribution from QBE on the basis of double insurance as the same risk was insured. QBE claimed that it was not liable to contribute due to the exclusion clause, stating that it would not need to indemnify if there existed a more specific insurance cover. The Supreme Court agreed with the Referee’s decision and concluded that BMC had not “entered into” a contract of insurance with Vero. Here Vero’s policy was ‘effected by’ the contractor<sup>161</sup> and the contractor in this case was not a party to Vero’s policy. The contractor was treated as a ‘non-party insured’ and did not come within the parameters of the definition of ‘Named Insureds’ under Vero’s policy. Therefore s45 did not apply and contribution could not be sought. Einstein J pointed out that this should be the correct approach and refused to depart from the Referee’s decision, unless the

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<sup>160</sup>[2011] NSWSC 593

<sup>161</sup> As this was done through the Department’s agency and broker at the time

referee had come to his conclusion based on a wrong approach or the parties who appeared did not have sufficient opportunity to argue the points. As neither of these factors were present, the court concurred with the Referee's decision.

It is unclear whether such principles apply only to a subcontractor situation, construction insurance policies or whether it has a more general application<sup>162</sup>. This case suggests that if the insurer specifies wide categories of named assureds in such policies, this would limit their rights for contribution, as these insurers can now rely on "other insurance"<sup>163</sup> clauses in the other policies to limit or exclude liability. It is likely that the insurer will now devise ways to draft the insurance policies in terms more favourable to themselves. However, this would now leave the assured, who were not parties to the original insurance contract, without protection if the insurer confines the category of persons who are treated as assureds in a more restrictive manner. This surely cannot have been what the legislature intended. Further the case does not provide any assistance as to whether a named insurer would fall within the category of a contracting party when you have a situation where there are 'other insurance' clauses.

### **3.5 The term "Other insurance"**

The decision of *Zurich Australia Insurance Limited* was revisited by the Supreme Court of Queensland, which has shed some light on s45 and the use of the words "Other insurance" in contracts and whether s45 renders such use void. In *Nicholas v Wesfarmers Currangh Pty Ltd*<sup>164</sup> the plaintiff, an employee, brought proceedings against Wesfarmers Currangh Pty Ltd ("Currangh"), the operator of the mine he was working in, and *G & S Engineering Services Pty*

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<sup>162</sup> These policies are usually known as 'floater' or 'open cover policy'

<sup>163</sup> In this case the "Other Insurance" clause read as follows: "The Liability of the Insurer to indemnify the Insured...shall not extend to any of the following:...Liability for which a separate insurance protection has been effected by the Named Insured...except as provided for by Memorandum 6.1..."[which provided that QBE would indemnify any losses that were not recoverable under, or in excess of, the separate insurance]."

<sup>164</sup>[2010] QSC 447. In an article written by Justice Michael Ball titled Double Insurance and Contribution at para [8], he was of the view that it was appropriate to extend the meaning of "entered into" to encompass those circumstances as suggested by McMeekin J.

*Ltd* (“G & S Engineering”), his employer. A liability policy providing indemnity was insured with QBE by Currangh. G & S Engineering also had a policy with Brit. Currangh made a claim against Brit which was refused on the basis that the “Other Insurance” clause in its policy limited its liability, as the QBE policy was not a policy “entered into” by Currangh but by Currangh’s parent company whose benefit extended to Currangh. The QBE policy has a similar clause to Brit’s. Brit stated that the QBE 386 policy was “valid and collectible insurance” and that Condition 5<sup>165</sup> acted as an excess policy above the 386 policy. Further that the QBE 386 policy was not a policy “entered into” by Currangh within the definition of s45, but that it was in fact entered into by the parent company, Wesfarmers Limited (Wesfarmer), and the benefit of which extended to Currangh.<sup>166</sup>

Brit placed much emphasis on the *Zurich* decision on the basis that Currangh was a non-party beneficiary and therefore s45 (1) does not apply. The court however, was of the view that the facts in *Zurich* were slightly different than those in the present case. The question, it was said, was of a broad application. McMeekin J said at para [27] as follows: “If a company enters into a contract of insurance on behalf of the group of companies, of which it is the parent company and the others its wholly owned subsidiaries, does it enter the contract of insurance, at least so far as s 45(1) is concerned, on behalf of each company independently, or does it act merely as the subsidiaries’ agent, or is it the only party “entering into” the contract? If the characterisation in either of the first two alternatives was accepted then the method of entering into the contract of insurance would satisfy the precondition triggering the application of s 45(1).”

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<sup>165</sup> “5. Other Insurance- Where allowable by law, this Policy is excess over and above any other valid and collectible insurance and shall not respond to any loss until such times as the limit of liability under such other primary and valid insurance has been totally exhausted.”

<sup>166</sup> Currangh stated that the matter could be resolved by answering: (1) Is the “Other Insurance” clause(condition 5) in the Brit insurance policy void by reason of the operation of s45(1) of the Act and (2) If that condition is not void: (i) does it, on its proper construction, exclude QBE 386 policy from the category of “valid and collectible insurance”;(ii) should the Brit policy be construed as if the condition did not exist?”

The applicant's position was preferred, which was the entering into the contract of insurance with QBE by Wesfarmers should be seen as an entry into that contract by Currangh within s45 (1)<sup>167</sup>. It is interesting to note that McMeekinJ, said that his decision was straightforward and based his reasoning on two main reasons. The first, was that he looked at the characterization of the relationship between Wesfarmer and Currangh as being one of principal and agent due to the payment by Currangh to Wesfarmer of significant proportion of the premium paid to QBE. If this view was wrong, he went on to state that it would be appropriate to extend, based on the facts before him, the meaning of "entered into" to cover Wesfarmers actions because to do so otherwise, would encourage the mischief which the legislation wanted to prevent. Further, he was of the view that Currangh does not become an insured by some form of extended definition of insured person, as it is a named insured in the QBE policy. He stated that the legislation intended the "commercial convenience and practice" to be taken into account, through the use of agents, and that in the long title to the Act, a fair balance should be struck between the interest of insurers, the insured and other members of the public, so as to enable terms included into contracts to operate fairly. He did not think that it was appropriate to make the working of the clause dependent on whether one chooses to act through an agent, or on one's behalf, when effecting insurance.<sup>168</sup>

However if the courts were just to look at the characterization of the relationship between the parties, this may not be sufficient, as this could lead to unjust results. The court was correct to go a step further and ensure that the ultimate result should be prevent the parties from trying to avoid falling within the confines of s45 (1).

McMeekin J tried to distinguish *Zurich's* decision<sup>169</sup> on the basis that it was not an agency

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<sup>167</sup> [2010] QSC 447, para 29

<sup>168</sup> para 32, and reference was made to Gleeson CJ in *East End Real Estate Pty Ltd v C E Health & Casualty & General Insurance Ltd* (1991) 25 NSWLR 400 at 404.

<sup>169</sup> (2009) 240 CLR 391

situation, and that the decision should only be confined to its own facts.<sup>170</sup> The Supreme Court was of the view that a more extended meaning should be given to the words “enter into” taking into consideration the mischief that the legislation was trying to prevent. This was due to the relationship between Wesfarmer and Currangh was one of principal and agent. Even if this was not the case, the Court was still willing to conclude that due to the relationship between Currangh and Wesfarmer, the entering into the policy by the head company on behalf of itself and one of its subsidiaries, is an entering into the contract of insurance by the subsidiary.

It may look as if there is a departure from the decision in *Zurich*, to now cover beneficial third parties, but it seems that the court in *Zurich, Currangh and Wesfarmer*, had left open the possibility of extending the meaning “enter into” to include cases where there exists at the time some sort of close relationship, such as a parent and subsidiary, or one where there is a relationship of agent and principal, between the beneficiary and the party effecting the contract, which would treat the beneficiary as having “entered into” the contract itself. The Court rejected the argument put forward by Brit that two-preconditions would have to be satisfied for s45 to operate: (1) that Currangh had entered into the QBE 386 policy and (2) Currangh was a contracting party to the Brit policy.

As Currangh was an existing subsidiary and ascertainable, the existing relationship would not be altered by the situation where Wesfarmers purported to act for others who were not ascertainable and could not at the time have given authority.<sup>171</sup> He went on to say that Wesfarmers’ actions in entering into the QBE 386 policy was undertaken as agent for Currangh, so far as the policy put QBE on risk for Currangh’s potential claims, and therefore Currangh has, for the present case, “entered into” the QBE 386 policy.<sup>172</sup>

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<sup>170</sup>para 35

<sup>171</sup>para 47

<sup>172</sup>para 48

The approach adopted by McMeerkin J is to try and avoid a situation where the insurer could try and get around the situation that s45 was trying to prevent. He therefore adopted a very wide analysis to come to the chosen conclusion as to what would fall under “entered into”. However, Meerkin J’s analysis is based more on the principles of whether there is the existence of agency<sup>173</sup> and whether there is consent or not, despite the lack of direct evidence, such as an agency agreement.<sup>174</sup> He considered that it was sufficient, and it was a fundamental point, that Currangh paid for the insurance and payment to Wesfarmers indicated strongly towards Wesfarmers not acting on its own behalf in obtaining the insurance but, acting on behalf of Currangh<sup>175</sup>. Further, there was an arrangement of mutual consent in effecting the QBE policy<sup>176</sup>. There would be no need for the court to decide the point of double insurance where there is no agency, and where no consent is given.<sup>177</sup> The wide approach adopted is more in keeping with the intention of s45. Although he was of the view that all parties interest should be balanced. It is submitted that the insured’s rights should be given more protection.

Again, it can be seen that the cases in this area are inconsistent as fine distinctions are being drawn by the courts, and therefore no firm guidance can be obtained from the cases. Here the court was dealing with a parent company situation, and in the other cases that were looked at, the court was dealing with an employer and employee situation. However, it could be argued that the position of an employee and employer situation should be the same as a contractor, parent company, subsidiary and agency situation. This approach on its surface would provide consistency and be of commercial convenience and practice. However, for a parent and subsidiary situation it will be, in some cases, if not most cases, very difficult to ascertain the exact relationship, due to the way the companies are structured. Such uncertainty will lead to parties trying to avoid the application and effects of s45.

The courts role when deciding such cases should be to ensure that a balanced approach be

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<sup>173</sup>para 37

<sup>174</sup>para 42

<sup>175</sup>para 38

<sup>176</sup>para 38

<sup>177</sup>Sutton’s Law of Insurance in Australia 1999 (3<sup>rd</sup>) para 25.22.



adopted but that ultimately the assured protection should take precedence over the insurers'. Further, the courts should come to a conclusion, based on the facts of each case, which would result in the prevention of the mischief of the legislation.

Another decision which touched upon s45(1), was the decision of *Australasian Medical Insurance Ltd & Anor v CGU Insurance Ltd*<sup>178</sup>, where the insurers issued a policy which covered risks of QML, a partnership of pathologists, who were insured under a professional indemnity with AMIL. CGU were insurers who had at the time issued a policy risk which covered certain risks associated with the conduct of QML's pathology practice. AMIL indemnified QML when a claim was made against the partners and stated that CGU's policy covered the same risk. AMIL claimed contribution as between co-insurers. AMIL claimed that the special condition excluding liability was void due to the effects of s45. The court considered that as QML suffered no loss due to indemnification by AMIL who did not seek to structure the claim as one of subrogation but instead in its own right as co-insurer, it was therefore an unnecessary party to the action. The court held that s45 did not apply as the policies covered different risks. The parties had no intention the court found, for CGU's policy to cover the practitioners at QML because they had their own policies which covered them. There was therefore no double insurance.

It is therefore easy for the court to conclude that the case is not one of double insurance. However, although it can be said that the courts are again trying to differentiate the cases using the "different risk" criteria, this is in fact one of the basic criteria for establish whether there is double insurance or not. Therefore this case does not add much to the discussion of s45 as such.

It can be seen from the courts' approach in the above cases, that the courts will apply a more expansive interpretation when it comes to the meaning of "enter into" under s45. This is consistent with the intention of the ALRC and when s45 came into effect, which is to ensure that

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<sup>178</sup>[2010] QCA 189

the assured is provided with some sort of protection when making a claim. If parties do not want s45 to apply, such exclusion clauses would have to be drafted carefully. Parties must make sure that the contract has to be clearly drafted if the contracting party is effecting the contracts for the benefit of other parties. In the ALRC it did however provide two exceptions where the protection does not apply. The first is where the other insurance is compulsory, either by or under law, including the law of the State or Territory.<sup>179</sup> The second situation is where primary and excess layers are involved.

### **3.6 s45: The Exceptions**

#### **3.6.1 Exception 1: Not being a contract of insurance required to be effected by or under a law, including the law of a State or Territory**

The wording of s45(1) clearly states that an insurer is allowed to exclude or limit its liability, where the contract is a contract of general insurance, if the contract is required to be effected by or under a law, such as the law of a State or Territory. If this is the case, the contract will not be void.

The issue in *WorkCover Queensland*<sup>180</sup> was whether the insurers, Royal & Sun Alliance Insurance Australia Limited, under a public liability insurance policy were liable to indemnify the head contractor, Barclays Mowlem Construction Pty Ltd (Barclay Mowlem) against its liability where an employee of a sub-contractor was injured. The employee claimed against the subcontractor and the construction company. WorkCover contended that there was double insurance and that both it and the lead insurer should be liable to indemnify Barclay Mowlem, admitting that it was liable to pay Barclay Mowlem under the policy issued under s46(1) of the Workers' Compensation Act 1990 (Qld).<sup>181</sup> At the time there were three policies that were

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<sup>179</sup>s45(1)ICA

<sup>180</sup>(2001) 11 ANZ InsCas 61-489. This decision was not followed in *Transfield Pty Limited v National Vulcan Engineering Insurance Group Limited* [2002] NSWSC 830.

<sup>181</sup>46(1) provides: If an employer uses the labour of a worker whose services are lent or hired to the employer by another, cover under a policy maintained by the employer extends to indemnify the employer against legal liability existing independently of his Act to pay damages in respect of injury to the worker arising out of or in the course of

issued. The argument put forward by the lead insurer was that its policy, under clause 8 (Other Insurance), only provides excess over and above that which is recoverable under the other valid and collectible insurance. Wilson J was of the view that Barclay Mowlem, as an employer was required to effect the policy, to which WorkCover had agreed to provide indemnity under that policy. It was a policy that Barclay Mowlem was “required to be effected by or under a law”. The intention of the ALRC was that an insurer would be allowed to exclude liability where there was in existence workers’ compensation insurance or compensation for death or injury arising out of the use of a motor vehicle. This was consistent with s9 of the Insurance Contracts Act 1984.<sup>182</sup> Therefore the court concluded that the Royal policy, due to its exclusion clause<sup>183</sup>, did not need to indemnify Barclay Mowlem and if this was not correct, liability would only be excess cover only<sup>184</sup> by not being found void by s45(1).

**3.6.2 Exception 2: s45 (2) Subsection (1) does not apply where some or all of the loss is not covered by a contract of insurance that is specified in the first-mentioned contract.**

This subsection raises interesting issues about situations where there is excess layers of cover and the court’s approach when deciding the approach, application and construction of s45 (2). This can commonly be found where there are principal controlled policies and where there are contractors’ covers, such as in the construction industry.

It would be beneficial to look at the background and the intention of the ALRC, as a starting point. The ALRC discussed the effects of “Other Insurance” Clauses which predominantly fall into three categories. These were excess, exclusion and rateable proportion clauses. It was of the view that all three such clauses should be held to be ineffective as they had no purpose to serve.

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work for which the worker’s labour is being so used.”

<sup>182</sup>that it did not apply to a contract entered into for the purpose of a State law relating to workers’ compensation or compensation for death or injury arising out of the use of a motor vehicle. See para [14] and [15] of Judgment. Also see para 54 the ALRC Summary of Recommendation.

<sup>183</sup>clause 3(a)

<sup>184</sup>in accordance with clause 7, clause 8 and endorsement 3 of the policy

Instead, where the assured has insured his risk with numerous insurers he should be able to recover the whole loss from whichever insurer he wants to. It is then for that insurer to seek contribution from the other insurers. In this way, the assured has more protection, which is what was intended by the ALRC.<sup>185</sup>

When discussing the exceptions to the legislation, the Summary of Recommendations<sup>186</sup> clearly emphasized that a true excess liability policy to cover an insured's liability which is over and above that covered by another insurer, which has been specifically identified in the excess policy, will not be void under the section.<sup>187</sup> The section therefore does not apply to a layered policy covering certain, more specific types of total risk and where there is no overlapping of such risks.

### **3.7 The meaning of “Specifically” under s45 (2)**

Therefore what does the word “specifically” in s45 (2) mean? The Recommendation itself does not provide any definition.<sup>188</sup> Some guidance can however be found in the decision of *HIH Casualty and General Insurance Co v Plum Construction Pty Ltd*<sup>189</sup> where reliance was placed on the decision of *Austress- PSC Pty Ltd and Carlingford Australia General Insurance Ltd v Zurich Australian Insurance Ltd*<sup>190</sup>.

In *HIH Casualty & General Insurance Ltd*, HIH's argued that the CU Construction Policy responded to Constructions ' claim for indemnity on the basis that the HIH policy was dealing with principal-arranged insurance<sup>191</sup> which permitted HIH to escape its liability under its own

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<sup>185</sup>see ALRC para 289

<sup>186</sup>para 54

<sup>187</sup>Also see para 148 of the Explanatory Memorandum

<sup>188</sup> In *Zurich Australian Insurance Ltd & Minerals Insurance Pte Ltd* [2007] WASC 62, it suggested that this may be by name, description or by name.

<sup>189</sup>(2000) 11 ANZ Ins Cas 61-477

<sup>190</sup>delivered on 1 May 1992 QDC 2052/91, unreported decision of Judge Robin QC, DCJ of the Queensland District Court

<sup>191</sup> "The Other insurance' exclusion

policy provided that CU was impaled under the CU policy; and further, HIH argued that there was double insurance which gave rise to contribution between the insurers.<sup>192</sup> HIH's argument was rejected. CU and Construction accepted the claim for indemnity,<sup>193</sup> and argued that they were not liable by referring to the exclusion clause provided for under Clause 6(b). The trial judge agreed that CU's Construction Policy did not respond because Construction's claim did fall within exclusion clause 6(b), and also held that HIH could not place reliance upon Condition 7 of its own policy due to it being rendered void under s45(2). This was because the CU Construction Policy was not specified in the HIH Policy. Mason P was of the view that there was no basis for reading unexpressed words to expand the exclusion. He read the words "in respect of which insurance is required by virtue of any legislation relating to motor vehicles" as qualifying the words "any Vehicle or any attachment to any Vehicle" at the opening of sub-clause (b). It was "perfectly understandable" why the drafter of the clause did not pay attention in identification of the persons upon whom such requirement lay.<sup>194</sup> Although agreeing with the trial judge's conclusion which led to the result that the CU Construction Policy did not respond to Construction's claim, the Judge still went on to deal with the significance of Condition 7. The issue which would have to be determined was whether the words "the policy of insurance provided by the Principal" in Condition 7 was sufficient to "specify" the CU policies within s45 (2). Mason P agreed with the trial judge having held that it was too general and not of sufficient specificity to satisfy s45 (2).

Mason P also dealt with the decision of *Austress-PSC Pty Ltd and Carlingford Australia General Insurance Ltd v Zurich Australian Insurance Ltd*<sup>195</sup> where he looked at the decision of Robyn QC DCJ where the relevant provision was stated as " any other Policy of Indemnity or Insurance in favour of or effected by or on behalf of the Insured applicable to such Occurrence". He went on to state:

".....to be construed as requiring reference to `other insurance' to be specific, as opposed to a

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<sup>192</sup> (2000) ANZ Ins Cas 61-477, para 18

<sup>193</sup> although contingently upon HIH filing in its remaining claim

<sup>194</sup> (2000) ANZ Ins Cas 61-477, para 26

<sup>195</sup> 1 May 1992 QDC 2052/91

description in general words capable of extending to the other insurance, if the provision under examination is to survive being struck down by sub-s.(1). It seems to me the underlying notion is that the insured and the insurer have tailored their own bargain to take account of the impact of other contracts"

Although Mason P went on to state that he thought that it was unnecessary to seek a definitive meaning of the sub-section, he was of the view that the exception in sub (2) should be construed narrowly.

On the facts<sup>196</sup> of the case before him, Mason P went on to say that the wording did not identify any particular policy with any particular insurer. Further that the type of insurance that the proprietor had to take out was described in the building contract in the broadest generality with no reference being made to conditions or exclusions. It is interesting to note that he concluded that the HIH policy was not in form or in substance a type of layered policy or excess insurance. The use of the words "a policy of insurance" that was stated to be "principal-arranged" only went further to emphasise the "futuraity, contingency and lack of relevant specificity". The use of the words "a policy of insurance" it was held, lacked the requirements for it to fall within the exceptions of s45 (2), as " specified<sup>197</sup>". Reliance was placed on Professor Sutton's interpretation of what would be sufficient for there to be compliance with s45 (2)<sup>198</sup>, who suggested as follows:

"...refers to the situation where contract A provides cover in relation to a loss that is not covered by contract B and contract B is specified in contract A. In that case, the section has no application to contract A. What constitutes specification is not defined but it must mean that contract B need not be precisely named but must be sufficiently described so as to be capable of identification, and the requirement of specification makes it clear that only true excess liability

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<sup>196</sup> Condition 7 of the HIH policy which stated:

**PRINCIPAL-ARRANGED INSURANCE**

In the event of the named Insured entering into an agreement with any other party (who for the purpose of this clause is called 'the Principal') pursuant to which the Principal has agreed to provide a policy of insurance which is intended to indemnify the named Insured for any liability arising out of the performance of the Works then the Company(ies) will (subject to the terms and conditions of this Policy) only indemnify the named Insured for such liability not covered by the policy of insurance provided by the Principal. Also see Clause 6(b).

<sup>197</sup> (2000) 11 ANZ Ins Cas 61-477, para 45

<sup>198</sup> Insurance Law in Australian 3rd Edition (1999)

policies are intended to be exempted from the operation of s45(1)."

He then went on to refer to further academic text which is worth repeating here, which was at paragraphs 40 and 41 of his judgment:

" 40 Derrington and Ashton, *The Law of Liability Insurance*, (1990) take a slightly narrower view of s45(2), stating (at p378) that:

"The position under the Insurance Contracts Act 1984 is that a provision of this type which has the effect of limiting or excluding the liability of the insurer is void, except for an "excess" policy in respect of another policy which is specified in the policy containing the condition. Accordingly, even that form of condition which made the policy containing it an excess policy in the event of other insurance, and which was so effective in the past, is ineffective unless it specified the other insurance.

Because of the purpose of s45, it is most probable that the specification of the policy to which it is to be an excess is so general that it would not meet the requirement of sub-s(2) which would except it from the general avoidance which sub-s(1) visits upon conditions relating to other insurance. (sic) Otherwise, the scope of the section is obviously intended to be far-reaching by its reference to the result, so that it may well be found to apply to all such conditions and provisos except those in an excess policy that is related to a specific and named policy.

41 Kelly and Ball, *Insurance Legislation Manual* 3rd ed (1995) suggest at p132 that "specified" means that the actual contract must be identified in the excess policy - otherwise the excess policy would not be a "true excess policy".

After applying this to the wording of the CU Construction Policy, he considered that it would not satisfy the requirement of being "specified". He did go on to say, "that it could be possible that a clearly defined class of insurance such as "X's standard Construction Policy with an excess of Y"

would suffice, although he reserved his position on the likely possibilities.

Although he does not go further to discuss this, it would seem that for the policy not to fall foul of s45 (1), it has to be “specified” in the other insurance for it to be a true excess clause. A narrow approach would afford more protection to the assured and it is such an approach which should be considered. A similar approach was followed in *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd*<sup>199</sup> where the court found that the clause in the Hamersley policy was not saved by s45(2) due to the Zurich policy not being specified as required by s45(2).<sup>200</sup>

The comment made by Mason P that wording used in the policy lacked specificity. However what wording should be used when dealing with a “principal- arrangement” was not specified. It would be difficult to do so, as issue that arises in future is case specific. There must be flexibility. It has been suggested that these cases and the courts restrictive approach should not be taken too far and that the contractual intention of the parties is a factor that should also be taken into account<sup>201</sup>. This approach is correct. Further, due to the way companies are structured, it may be a requirement that the subsidiary obtains local cover while the parent company takes out a “top and drop” policy.<sup>202</sup> A Head contractor may also adopt a similar approach. As of now, the courts still have not been able to provide clear guidance as to what would be “specific” enough to fall within the exception of s45 (2). It seems that the underlying objective of protecting an assured seems to be achieved as a more strict approach is taken by the courts. However, this may have the opposite effect as the insurer may use other methods to try and get around this problem.<sup>203</sup> Although, some may argue that some protection is better than no

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<sup>199</sup>(2007) 209 FLR 247

<sup>200</sup>Also see *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* where the court came to a similar conclusion and found that the MMI policy was not a genuine excess layer as the other policies were not specific enough.

<sup>201</sup> Sutton’s Law of Insurance in Australia 1999 (3<sup>rd</sup>)

<sup>202</sup>Sutton’s Law of Insurance in Australia 1999 (3<sup>rd</sup>) para 25.24. A top and drop policy will take effect as an excess cover and which drops down to take the place of the primary cover after it has been exhausted.

<sup>203</sup>see [http://taglaw.com/files/Doing%20Business%20Guides/Doing%20Business%20in%20Australia%20\(Construction%20Liability\).pdf](http://taglaw.com/files/Doing%20Business%20Guides/Doing%20Business%20in%20Australia%20(Construction%20Liability).pdf) (last visited as at 19.5.2012) for an interesting discussion on the devices used to limit recovery



protection at all.

There are two main types of policy which deal with other insurance. The first one is where the insured places an obligation on the assured to notify the insurer of existing or subsequent insurances covering the same risk. The second is where there is no such obligation on the assured but where it will exclude or qualify liability of the insurer in the event of other insurance.<sup>204</sup>

### **3.8 The Requirement for an assured to Notify the Assured: Validity of s45 (1)**

Therefore, one issue that has to be resolved is does inclusion of a notification clause in the policy have the effect of making the clause void under s45 (1)? Further, whether the saving provision under s45 (2) will be triggered? In *Nisner Holdings Pty Ltd v Mercantile Mutual Insurance Co. Ltd*<sup>205</sup> the courts held that where there is a failure to notify, the most that the assured can recover in terms of losses is only the amount that is insured under the second policy. The second policy was additional cover which would only, if effected, cover an insured up to the increased value of the premises over and above the first policy. Both policies required that notification be made where there was other insurance in effect. The assured however failed to notify the first insurer of the second policy, the court held that the second policy was not an excess policy and as a result, the first policy could be avoided. The Supreme Court concluded that there was double insurance in this case. Therefore the assured was only able to recover the amount provided for in the second policy.

Apart from this, an insurer may adopt other ways of trying to limit an assureds' chance of successfully claiming under the policy. This is usually done by utilizing three main types of clauses. The first is by way of an escape clause, excess clause and rateable proportion clause. This is the mechanism that is still used in English law as well as in other common law jurisdictions. Questions that have to be considered include: How are these clauses affected by the provision of s45? Will the application of s45 (1) result in the clauses being held void by the

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<sup>204</sup>See Australian Law Reform Commission, Report on Insurance Contracts, Report No. 20 (1982), p.172-174, para 280-281

<sup>205</sup>[1976] 2 NSWLR 406

court? What is the position if there is a combination of the different type of clauses?

Where there are two policies in place and there is a notification requirement one has to see how such provisions are drafted. Although the court in general will apply a much more stringent approach and will in most cases find against the insurer.<sup>206</sup> The cases are consistent with the intention of the ALRC that the assured should be protected. In *Steadfast Insurance Co Ltd v F & B Trading Co Pty*<sup>207</sup> the High Court of Australia was dealing with a forfeiture provision in a policy where there was a condition that notice had to be given of other insurance, which was a requirement in both policies. The Court was of the view that the mere fact that a policy providing for conditions upon breach which results in the company escaping liability does not mean that no insurance has been effected. In *Steadfast*, a policy which covered loss for damage to property was renewed by Steadfast. The policy contained a clause which required that notice be given if any Insurance or Insurances had been effected, if not, all benefit under the policy would be forfeited. A cover note was obtained before loss had occurred with Queensland. No notice of this cover note was given to Steadfast. The court reaffirmed the Supreme Court's view that no forfeiture was permitted due to the failure to notify as the cover note did not fall within the meaning of Steadfast's policy that the insurance with Queensland had been "effected". What had to be taken into account was the nature and operation of the condition which was not fulfilled. Therefore the second policy did not attach, which meant that there was no breach of the first policy requiring notice. It could be argued that this is the correct approach where there is clear evidence that the policy has not been effected.

The wording of s45<sup>208</sup> would cover cases where there is "other insurance" present and notification of such policies should be made by the assured. In *Steadfast Insurance Co Ltd v F & B Trading Co Pty*, Menzies J correctly pointed out the well established principle that where there is a term of an insurance policy which has provisions for forfeiture of benefits, it shall be

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<sup>206</sup>*Federation Insurance Ltd v Wason* (1987) 163 CLR 303; *Goldman v Southern Union General Insurance Co of A'asia Ltd* [1930] SASR 275; *Hordern v Commercial Union Assurance Co* (1884) 5 LR (NSW) 309 and *National Protector Fire Insurance Co Ltd v Nivert* [1913] AC 507.

<sup>207</sup>(1971) 143 CLR 578

<sup>208</sup> Insurance Contracts Act 1984

construed strictly against the insurer.<sup>209</sup> Also, that insurance will only be effected when what has been done attaches risk of loss to another insurer.<sup>210</sup> Menzie J referred to the Privy Council decision *Equitable Fire and Accident Office Ltd and The Ching Wo Hong*<sup>211</sup> where the appellant denied liability on the basis that the policies that were entered into had become null and void due to the failure on the part of the respondents to give the company notice of an additional insurance which was taken out by the respondents with Western Assurance Company, without the consent required under the wording of the policy. This was one of the conditions indorsed on the policies. However, prior to the fire a policy has been executed by the director of Western Company in favour of the respondents. The premium was never paid under this policy. The court stated that the issue that had to be decided was whether the premium having not been paid either wholly or partially, the policy executed by the Western Assurance Company ever became effective<sup>212</sup>. Lord Davey looked at the plain language of the condition and decided that it would apply as well to the first premium as to any renewal premium, or in fact it applied primarily to the first premium. The instrument it was said must be looked at as a whole for the purpose of ascertaining the intention of the parties and the effect of the document, so far as possible, must be given to every part of it.<sup>213</sup> Therefore the condition qualifies and restricted the engagement of the company and as a result converted what would have otherwise have been an absolute engagement into a conditional one. The words “having paid” which was used in the policy is usually expressed as the consideration for the company’s engagement which would have become accurate when the engagement became effective. The court was of the view that consideration must be actually be paid and not just expressed to be paid. The clause was clearly expressed in the instrument that notice was required, and it was made clear that no liability would attach until the premium had been paid. The court was of the view that it was not conditional execution, but of what was executed which was important.

It could be said that the requirement for notice would give protection to the insurer. However, the

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<sup>209</sup> *Steadfast Insurance Co Ltd v F & B Trading Co Pty* (1971) 125 CLR 578

<sup>210</sup> *Equitable Fire and Accident Office Ltd v The Ching Wo Hong* (1907) AC 96 and *Home Insurance Co of New York v Gavel* (1927) 3 DLR 929.

<sup>211</sup> (1970) AC 96

<sup>212</sup> (1970) AC 96 at p.99

<sup>213</sup> (1970) AC 96 at p.100

assured may still face the problem of not being aware of other insurance in place. This again does not give protection to the assured. The court must therefore give more protection to the assured, especially where the assured is facing the likelihood of not having any protection.

Another case which was referred to in *Steadfast Insurance Co Ltd v F & B Trading Co Pty* was *Home Insurance Co of New York v Gavel*<sup>214</sup> a Canadian decision which also deals with a statutory condition in the policy, which was the 9<sup>th</sup> statutory condition in the first schedule to The Fire Insurance Policies' Act R.S.N.S, 1923 c.211. Although the wording differs from s45<sup>215</sup>, and specifically deals with fire insurance, the underlying intention of the legislation is similar. The statutory condition states as follows:

“The insurer is not liable for loss if any prior insurance with any other insurer, unless the insurer’s assent to such prior insurance appears in the policy or is endorsed thereon, nor if any subsequent insurance is effected with any other insurer, unless and until the insurer assents thereto, or unless the insurer does not dissent in writing two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time before the subsequent or further insurance is effected.”

The issue on the appeal was whether any such subsequent insurance had been effected within the meaning of the condition. It had been argued by the respondents that the policy never attached and as a result there was no insurance which was effected. To support this argument the decision in *Equitable Fire and Accident Office Limited v The Ching Wo Hong*. The appellant on the other hand relied on the Canadian case of *Manitoba Assurance Co v Whitla*<sup>216</sup> where Mr. Justice Sedgwick was of the view that where there was effecting of new insurance without the assent required, would permit the insurance company to exercise its right to void the policy. He reaffirmed the previous cases as to whether the new insurance was in the first event valid or

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<sup>214</sup> [1927] S.C.R. 481

<sup>215</sup> Insurance Contracts Act 1984

<sup>216</sup> (1903) 34 Can S.C.R. 191 at p.206.

invalid, if there was a new contract of insurance in fact, the de facto second insurance made void the first. The Supreme Court of Canada on reviewing and considering the cases concluded that Mr. Justice Sedgwick's conclusion and the Canadian cases were no longer binding and chose to follow the English decision of *Equitable Fire and Accident Office Limited v The Ching Wo Hong*. The issue was whether, within the meaning of the statutory condition, "any subsequent insurance was effected with any other insurer".<sup>217</sup> Here the policy with North Company, who was the appellant never attached. He went on to say that due to the express wording in the statutory condition, i.e "the insurer is not liable for loss if there is any prior insurance with any other insurer", meant that if there was such prior insurance, the condition applied, and no insurance under the policy was effected.<sup>218</sup> The condition of the policy did not contemplate a subsequent contract of insurance in fact, but a subsequent insurance which was effective.<sup>219</sup> He stated that the attempt now to vivify the contract so as to relieve the appellant from liability must fail.<sup>220</sup>

As s45<sup>221</sup> also deals with situation where "other insurance" has been effected and notification is required, it may be helpful to see how the above principles could be applied in English law. Both s45 and the statutory provision under the 9<sup>th</sup> statutory condition in the first schedule to the First Insurance Policies' Act, R.S.N.S, 1923, c 211 both have provisions where there will be a voiding of the policy. The Canadian provision expressly states that the insurer is not liable if there is prior insurance with another insurer, unless certain requirements are present, in general, consent has to be obtained. The Canadian courts were of the view that where there was another policy which was taken out but it was not considered by the courts to be effective, and where there was a requirement in the policy to notify of subsequent insurance, as the risk never attached, the subsequent insurance without consent had not been breached.

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<sup>217</sup> [1927] 3 DLR at p.913

<sup>218</sup> [1927] 3 DLR at p.913

<sup>219</sup> [1927] 3 DLR at p.913

<sup>220</sup> [1927] 3 DLR at p.913

<sup>221</sup> Insurance Contracts Act 1984

According to *Home Insurance Co of New York v Gavel* the second policy would be “abortive”. If this was the case, then there would not be the need to consider the issue of whether there was double insurance. The position would have been different had there been a situation where there were two policies and the latter policy gave notice and the other did not.<sup>222</sup>

Therefore the subsequent insurance policy must be effective. It would seem correct to say that it would not be sufficient to void the first insurance policy on the basis that the previous insurer had not been notified.

The wording in s45 Insurance Contracts Act 1984 would, it seems, cover situations where notification is required, as the phrase “by reason that the insured has entered into some other insurance” was used. It has been suggested that a notification clause would not “survive” due to s45 (1) and would not be assisted by s45(2) unless specific reference to them are made in the first-mentioned contract.<sup>223</sup> However the wording in the legislation indicates that such clauses would make the clause in the contract completely void. Some may argue that it would be a very drastic approach for the courts to hold that the clause would be considered void. Instead, a less drastic approach should be adopted. The position would be better if English law were to implement similar but a more practical approach to the issue and the legislation were to be read and worded as follows:

- (1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, all benefit under the policy shall be forfeited, unless the insurer assent is provided for in the policy for any previous insurance or is endorsed thereon by the insurer; and
- (2) where the subsequent policy is an effective policy at the time the previous policy is

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<sup>222</sup> Sutton’s Law of Insurance in Australia 1999(3<sup>rd</sup>) 25.25

<sup>223</sup> Sutton’s Law of Insurance in Australia 1999(3<sup>rd</sup>) 25.25

entered into.

This would lead to a more balanced approach when balancing out the interests of the assured against the insurer. In any event the court should look at the contractual intention between the parties. How much regulation should be in place? Why is it that the insurer has to bear the brunt of the burden? However, the alternate proposed legislation could see a wider interpretation of the use of the words “all benefit under this policy shall be forfeited” being applied as was indicated by the court in *Steadfast Insurance Co Ltd v F & B Trading Co Pty*. Menzie’s J was of the view that although literally speaking, they related to forfeiture of existing benefits, to prevent any risk from attaching, the company could be held not liable for the loss upon the happening of the risk. Therefore the courts could, on the facts before it, conclude that such forfeiture would apply to any loss whether present or future.

Gibbs J in *Deaves v CML Fire & General Insurance Co*<sup>224</sup> moved away from the decision in *Steadfast* and concluded that failure to give notice under the second policy, by either stating or indorsing the particulars in or on the C.M.L policy, subject to the question waiver, resulted in the second insurer not being liable to pay out under the policy, due to the condition on which its liability attached had not been fulfilled. Therefore here the second insurer could rely on the forfeiture provision. In *Deaves v CML Fire & General Insurance Co* the insured had a fire insurance policy with the Queensland State Government Insurance Office. They then tried to cancel the policy. Later they arranged for further insurance with the respondents, CML did not notify them when asked by the respondent’s representatives, of the other insurance which was still in place. Further there was no endorsement made on any policy of other insurance in place. The majority<sup>225</sup> decision of the High Court agreed that there was a breach of the requirement under the policy that notification be given in writing. He went on to accept the argument put forward by the appellants that the fact that a cover note only was issued raised an additional

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<sup>224</sup>[1979] HCA 12. The court interestingly rejected the Canadian cases which had similar provisions which resulted in the assured being able to recover stating that they represented a substantial departure from accepted canons of constructions. This was due to the uncertainties caused if such an interpretation was adopted. See *Manitoba Assurance Co v Whitlam* (1903) 34 SCR (Can) 191, *Australian Agricultural Co v Saunders* (1875) LR 10 CP 668.

<sup>225</sup> Gibbs ACJ, Stephen and Mason JJ (with Jacobs and Murphy JJ dissenting)

question of whether the cover note itself was to be covered under the requirement of Condition 3, or at least to that part of the condition which required written notice to be given. Further that once the question was answered in the affirmative the fact that the second contract was in the form of a cover note was immaterial<sup>226</sup>. He went on to say that *Steadfast's* decision was authority for the proposition that unless Queensland State Government Insurance Office insurance had been cancelled, the failure to give notice in writing of that insurance to the respondents, and to state or endorse the particulars in or on the CML policy, entitled the consequence, subject to any question of waiver, that CML did not become liable under its policy.<sup>227</sup> Further that this would mean that no insurance had been subsequently effected. This was the distinguishing feature from *Steadfast's* case.<sup>228</sup>

If the insurer knows that the assured has not disclosed certain information which is within his knowledge, the insurer cannot take advantage of it.<sup>229</sup> The usual problem that occurs frequently in double insurance cases is that the assured may not himself be aware that other insurance is in existence. For example, an insured may take out travel insurance himself for a trip he is about to go on. Without his knowledge, his employer may then take out insurance for him. The assured when he opens a bank account may have the benefit of an insurance policy being taken out on his behalf under some promotion the bank provides. Here you have a situation where the assured would not be in a position to notify of the other policies. The cases<sup>230</sup> have clearly established an assured is only required to notify of the existence of other insurance only if he is aware of it. If the policy has been renewed without him knowing or if it was not reasonable for him to be aware that it has been renewed, then there is no breach for the failure of the notification condition. Therefore s45 (1) will apply to "other insurance" clauses which has the effect of making such clauses void. However, if the insurer is to seek to exclude such provision from applying, he must make sure that there it has been "specifically" referred to in the policy. This will be narrowly

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<sup>226</sup> 23 ALR at p551

<sup>227</sup> 23 ALR at p551

<sup>228</sup> This view was followed by the Supreme Court of Victoria in *GRE Insurance Ltd v QBE Insurance Ltd* [1985] Vic Rp 9 by Anderson J

<sup>229</sup> *Australian Agriculture Co v Saunders* (1875) LR 10 CP 886

<sup>230</sup> *Western Australian Bank v Royal Insurance Co* (1908) 5 CLR



applied which again, gives protection to the assured, by requiring the insurer to pay up where there is double insurance and allows the assured to choose who to seek recovery from and in which order. If legislation such as s45 were to be passed in English law, the original purpose to which “Other insurance” clauses was first adopted for, which was to detect fraud and allow for contribution amongst insurers<sup>231</sup> can still be achieved.

Further, another provision which goes hand in hand with s45 of the Act is s76<sup>232</sup> which was also recommended by the Australian Law Reform Commission. The provision does not permit an assured receiving an indemnity above that which he is entitled to under the policy<sup>233</sup>. The insurer will have to indemnify the assured fully but only up to the extent of the loss he has suffered.<sup>234</sup> This has also been the position at Common Law.<sup>235</sup> Further, if it is later realized that the assured received an amount which is over that to which he is in fact actually entitled to under the policy, he shall be treated as holding the sum that he has received in excess on trust for the insurers.<sup>236</sup> Section 76(1) will only apply where there is a case of double insurance, where the loss arises out of the same risk covering the same interest on the same subject matter.<sup>237</sup> The liability has to be actual and not potential.<sup>238</sup>

As the ALRC suggested, with the implementation of s45, the assured will be protected as he will be paid immediately<sup>239</sup>. The section specifically provides that the assured is entitled to immediate recovery from any one or more of those insurers. Therefore this will mean that once a claim has

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<sup>231</sup> *Davjoyda Estates Pty v National Insurance Co of NZ Ltd* (1965) 69 SR (NSW) 381

<sup>232</sup> s76 Insurance Contracts Act 1984: (1) When two or more insurers are liable under separate contracts of general insurance to the same insured in respect of the same loss, the insured is, subject to subsection (2) entitled immediately to recover from any one or more of those insurers such amount as will, or such amounts as will in the aggregate, indemnify the insured fully in respect of the loss; (2) nothing in subsection (1) entitles an insured: (a) to recover from an insurer an amount that exceeds the sum insured under the contract between the insured and that insurer; and (b) to recover an amount that exceeds, or amounts that in the aggregate exceed, the amount of the loss; (3) Nothing in this section prejudices the right of an insurer or insurers from whom the insured recovers an amount or amounts in accordance with this section to contribution from any other insurer liable in respect of the same loss.

<sup>233</sup> s76(2) Insurance Contracts Act 1984

<sup>234</sup> s76(1) Insurance Contracts Act 1984

<sup>235</sup> Also see s38(2)(a) Marine Insurance Act 1909

<sup>236</sup> s38(2)(d) Marine Insurance Act 1909 which provides that: Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their rights of contribution amongst themselves.

<sup>237</sup> Sutton's Law of Insurance in Australia 1999(3<sup>rd</sup>) 25.17

<sup>238</sup> Sutton's Law of Insurance in Australia 1999(3<sup>rd</sup>) 25.17

<sup>239</sup> s76(1) Insurance Contracts Act 1984

been made against one insurer, the insurer will then have to go on to seek contribution from the other insurers.

### **3.9 s45 and its impact on Excess Clauses, Exclusion Clauses and Rateable Proportion Clauses and when the clauses work in combination**

From the above discussion on the clauses, it can be seen how an insurer limits his liability by utilizing such clauses. These clauses are commonly found as standard wordings in insurance contracts. It is usually the case that an assured is oblivious to such wording until a claim arises and the assured is then informed that the insurer will not be liable to indemnify or if he is, then the amount would be of a limited sum, due to one of these clauses being present in the insurance policy.

It is interesting to note that the Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) under its heading, "Conclusion", in paragraph 289 put forward its recommendations. It is stated that the Commission was concerned with the effect of 'other insurance' clauses on the 'interests of the insured'. The Commission was focused on the insured's perspective and how the clause working individually and/or in combination affected the assured. The law as it stood at the time the Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) came out, was considered as lacking in protection for the assured. England has not carried out a similar review of the law but it can be said that if they were to do a similar exercise, the same considerations would be looked at. Protection of the assured should be what is considered paramount.

The Commission was of the view that the methods used by the insurers to try and limit their liability through by using the clauses either standing alone or in combination to do so. The original use of such clauses was to prevent fraud by the assured by taking out numerous policies. The use of such clauses to prevent such fraud has not been successful.<sup>240</sup> If fraud is detected,

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<sup>240</sup> Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) para 289

then this will not bar the insurer from refusing to pay out under the policy. The Commission went on to say that at most, the effect of all the clauses were to act as a disincentive. The suggested solutions which the Commission thought would achieve the same result was to ask appropriate questions in the proposal form or claim forms. It was considered that a request in the proposal form for details of other insurance would allow the insurer to see if there was any over-insurance. This would then give the insurer a chance to decide whether they wanted to accept the policy or not.<sup>241</sup> However, the insurer is likely to have a better bargaining position than the assured.

It is interesting to note that the suggested Draft legislation proposed by the Commission was adopted whole without changes or discussion, although the original section was under s46. Although the Commission made the following recommendation, none of these suggestions appear in the Draft legislation. There is no provision in the legislation which states what the wording in the proposal or form should be. This may not be necessary, as s45 is drafted to void such clauses, although certain exceptions are provided for.

However, would adding such wordings in the proposal and claims form actually solve the problem that arises with double insurance? The problem still remains, for the assured himself may not have been aware of the presence of such 'other insurance'. Further the failure to notify under policy could lead to different results depending on the type policy which has been taken out and the wording used in the policy, for example, whether it is a bare condition or a condition precedent. The insurer will still then be able to look at the policy and point to the wording to say that according to the clause or clauses in the policy that their liability will be completely excluded or it will be limited.

The Commission stated in the report that there was no substantial justification for the inclusion in the policy of such 'other insurance' clauses. Although the wording in the report states that

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<sup>241</sup> Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) para 289

there is no 'substantial' justification<sup>242</sup>, one has to consider whether it would have to be substantial or if, as long as there was some justification, it would be sufficient for such clauses to be included in the insurance policy. The Commission further stated that the "reasonable expectation" of the assured would be defeated. The interest of the parties to the insurance contract should be looked at. The insurers should also have some sort of protection.

### **3.10 True Excess Liability in a Policy**

In paragraph 290 of the Report, under the heading "Limits on Recommendations", the Commission stated that the recommendations would have no effect on layered policies when dealing with co-insurance where each policy is for a discrete range of the total risk and where no overlap occurs. This will have no effect on the policy as it will not be considered to be double insurance.

There were certain exceptions discussed which were as follows: "First, it should be made clear that the issue of a true excess liability policy to cover the insured's liability over and above that covered by another insurance which is specifically identified in the excess policy is not effected. Secondly, insurers should be able to restrict the scope of the cover afforded by a policy in order to excluded liability which is also covered by an insurance (whether or not then in existence) which is made compulsory by statute such as workers compensation insurance or motor vehicle third party insurance."

Although the first exception was considered, the words were not specifically included in the wording of the legislation under s45. Therefore if legislation were to be devised for England which is based on the Australian model, the wording of the first exception could be by included. The legislation could read and be worded as follows:

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<sup>242</sup> Australian Law Reform Commission, Report on Insurance Contracts, Report No.20 (1982) para 289

(1)Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, the provision is void, unless it is a true excess liability policy.

This would seem to give priority to excess clauses, although the wording used by the Commission was “true excess clause”. This would seem to suggest that priority should be given to excess clauses. This will still cause problems however when you have a situation where there would be a combination of clauses. There will be situations where you have a combination of excess clauses or there will be combination of all the clauses.

The Commission did not consider or deal with the situation where there were rateable proportion clauses or escape clauses, in the way they dealt with true excess clauses.

It is worth looking at the decision in *National Employers' Mutual General Insurance Association Ltd v Haydon*<sup>243</sup> in deciding what would be considered a “true excess” clause. The analysis by Lloyd J was that as there were many different kinds of exclusion clauses, there was “no sensible distinction” between the two exclusion clauses. It did not matter how wide the wording of the policies were drafted. In the present case he was of the view that the Master Policy was drafted in a much narrower way than the NEM policy even though both were exclusion clauses. He seemed to be satisfied that as long as the clause limited cover then it should and would be treated as an exclusion clause, even though by looking at the wording in the policy, it could not be treated as such in a “strict sense”. He preferred to look at the substance rather than the form of the clauses. He then went on to interpret the wording of the NEM policy by using the natural construction of the language in the clause.

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<sup>243</sup> [1980] 2 Lloyd's Rep 149

Although the Court of Appeal reversed the decision of Lloyd J, his analysis is useful to see what the Court of Appeal considered as relevant factors to take into consideration. Stephenson J stated<sup>244</sup> that the principles in *Weddell v Road Transport and General Insurance Co. Ltd*<sup>245</sup> were to be applied. Although he did not agree that there was double insurance on the facts of the case, he did go on to say that if those two were indistinguishable in their effect as was stated by Lloyd J, the Court should invoke the equitable principle of contribution between co-insurers<sup>246</sup>. The reason for this was to avoid the absurdity and injustice of holding that a person who has paid premiums for cover by two insurers should be left without insurance cover because each insurer has excluded liability for the risk against which the other has indemnified him<sup>247</sup>. He correctly went on to say<sup>248</sup> that it did not matter whether the clauses were rightly labelled exceptions or exclusions. What had to be asked was what in each case was covered by the policies when they were read as a whole, which included the clauses.<sup>249</sup> Bridge LJ also agreed that the principles of *Weddell* should be applied as this produces the only just and sensible result.<sup>250</sup> He went on to agree with Rowlatt J's observation that an absurd result would occur if one were allowed to say that in such circumstances that whichever policy one looks at it is always the other which is effective. To adopt such an approach would mean that insurers would use this method to escape liability and the assured would be left without cover.<sup>251</sup> It did not according to him depend upon any general principle of law, but upon the true construction of the policies applied to the relevant circumstances.<sup>252</sup>

The decision is interesting for the effect it would play in a s45 situation when dealing with a claims based policy<sup>253</sup>. The analysis and interpretation of Clause 5(b)(ii) of the Master policy,

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<sup>244</sup> [1980] 2 Lloyd's Rep 149,152

<sup>245</sup> (1931) 41 Ll.L.Rep 69

<sup>246</sup> [1980] 2 Lloyd's Rep 149,152

<sup>247</sup> [1980] 2 Lloyd's Rep 149,152

<sup>248</sup> [1980] 2 Lloyd's Rep 149,153

<sup>249</sup> [1980] 2 Lloyd's Rep 149,153

<sup>250</sup> [1980] 2 Lloyd's Rep 149,154

<sup>251</sup> [1980] 2 Lloyd's Rep 149,154

<sup>252</sup> [1980] 2 Lloyd's Rep 149,154

<sup>253</sup> A claims made policy is where the insurer is liable to meet all claims made against the assured during the currency of the policy, although the policy also permitted the assured to notify circumstances likely to give rise to a claim within the policy period and thereby bring those within the scope of the cover: see Sutton's Law of Insurance

according to the Court of Appeal, was that the clause did not try to exclude liability, where the risk which was being excluded, was covered by some other policy being in existence but that it excluded liability absolutely for claims which arose from past occurrences which had been notified under any other assurances and that as a result there was no reason why the exclusion of the claim covered by the clause should not be effective.<sup>254</sup>

He then went on to deal with the point on contribution and concluded the policies should be looked at independently and that as a result, the clauses would cancel out each other and each insurer would then be liable to pay out for the loss suffered. Contribution should therefore be permitted.

s45 Insurance Contracts Act 1984 clearly states that provisions that have the effect of “limiting or excluding the liability” of the insurer clearly relates to the clauses in the insurance which have been used by the insurers to either prevent the assured from recovering completely or permitting recovery by the assured but the amount that can be recovered would be limited.

The Supreme Court of Western Australia dealt in some detail with the wordings and effect of s45 in *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd*<sup>255</sup> which is very useful. Zurich brought proceedings to claim contribution from Metals & Minerals Insurance Pte Ltd (MMI) on a rateable proportion for monies paid out by Zurich, due to MMI being liable to indemnify Hamersley for liability owed to Nolan and Oatway<sup>256</sup> (employees of Speno who entered into an agreement with Hamersley) under Hamersley’s policy. The liability owed by MMI is the same as the liability under Zurich’s Policy to which Zurich has indemnified Hamersley, Hamersley was therefore doubly insured, which means that Zurich could claim for contribution. This was to be calculated on either a maximum liability method or the independent

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in Australia 1999(3<sup>rd</sup>) 25.29

<sup>254</sup> [1980] 2 Lloyd’s Rep 149,153,155 and 156

<sup>255</sup> (2009) 240 CLR

<sup>256</sup> see *Speno Rail Maintenance Australia Pty Ltd* per Malcom CJ(at 306), per Ipp J (at 309) and per Wheeler J(at 324)

actual liability method.

MMI denied liability arguing that the “Special Clause” in the Hamersley policy which provided that where Hamersley was indemnified under insurance coverage which was effected on Hamersley’s behalf by third party, the Hamersley policy will then be treated as excess insurance over the applicable limit of indemnity of the underlying insurance policy. Further, that Hamersley is not doubly insured and as a result Zurich is not entitled to contribution. Zurich pleaded that due to s45, the “Special Clause” relied on was void and could not be relied upon.

The discussion and analysis by the Supreme Court of Western Australia<sup>257</sup> and the parties may be useful in trying to analyse how s45 works, before dealing with the High Court’s analysis.

As to whether injury to the employees occurred, that was not disputed. There would have to be presence of the insurance covering the same risk and for the parties’ liabilities to co-ordinate. If this is present then the issue of whether there is contribution will arise. Obviously MMI did not want to make contribution and tried to argue that due to the Hamersley policy and its wording, the Hamersley policy only acted as an excess policy over the limit of indemnity under the Speno policy and therefore there was no co-ordinate liability as originally argued.

Zurich tried to argue and relied on the established principles in *Albion Insurance Co Ltd v Government Office of NSW*<sup>258</sup> that where the principle that an assured can insure his interests doubly but that the assured was only entitled to receive the amount of his loss. To do so, the assured may seek to insure his interest and risk with two independent insurers. Once it could be established that the independent insurers were liable then the doctrine of contribution would arise. The comment made by the majority in *Albion Insurance Co Ltd* is correct and is stated as follows:

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<sup>257</sup> [2007] WASC 62

<sup>258</sup> [1969] HCA 55



"It seems to us that it is not the principle but the application of the principle which has given rise to the problems that now falls for decision."

This in fact is the problem that falls on most, if not all, double insurance cases. The principles seem straight forward but when applied lead to very different results. However, what these "principles" are, and if they are in fact principles, is unclear

The Supreme Court agreed with MMI's argument that if there was no obligation for MMI and Zurich to indemnify Hamersley, then there can be no entitlement to contribution.<sup>259</sup> MMI asked the court to look at the effect of the underlying insurance clause.

The "Underlying Clause" provided that if the insured was indemnified under such other Insurance effected by or on behalf of the Insured, which was not an Insurance specifically effected as Insurance excess of this Policy, where indemnity is available for a claim, then such other insurance, which is referred to as the Underlying Cause, would then be treated as Excess Insurance over the applicable Limit of Indemnity of the Underlying Insurance, but that it would be subject to terms and conditions of the Policy. This in effect meant that the Hamersley Policy operated as an excess policy over the limit of indemnity which had been provide for under the Speno Policy. Hamersley's policy would only be called upon until the limit of Zurich's liability of \$2mill had been reached. This situation would not arise because the amount that would have to be indemnified would only be below \$2 million. Therefore no contribution has to be made from MMI.

The Supreme Court went on to look at the decision in *Australian Eagle Insurance Ltd v Mutual Acceptance (Insurance) Pty Ltd*<sup>260</sup> which was headed "General Exclusion" and not "Underlying Insurance", although it had similar wordings as the Hamerseley policy. In *Australian Eagle Insurance Ltd*, the decision in *State Fire Insurance General Manager v Liverpool and London and Globe Insurance Co Ltd*<sup>261</sup>, Hutchinson and Cooke JJ looked at what would fall within the

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<sup>259</sup> para 27

<sup>260</sup> (1983) 3 NSWLR 59

<sup>261</sup> [1952] NZLR 5

definition of "excess" clause, and looked at the clause according to its terms, rather than how it was described because of the difficulty in reconciling the principles on double insurance where there were such "excess" clauses. So, the correct approach would therefore be that an excess policy would only be called upon once the insured's own insurer paid out first for the loss that had been suffered by the insured. Only then would the "excess" clause be under an "obligation" to indemnify.

The principles in the New Zealand decision were viewed more favorably than the English authorities, which were more of a guide and it seems, as a mechanism to assist in the reaching of a conclusion different from that of the English cases.

However, does this really provide assistance? By giving labels to the clauses, such as "Underlying Clauses" may not be enough. The true intent would also have to be looked at. It will be unlikely that the wording of the clauses in the policies will be exactly the same. This was noted in Zurich where the case of *Re Calf & Sun Insurance Office*<sup>262</sup> was discussed and where Johnson J although admitting that the relevant wording of the underlying insurance clause in the Hamersley Policy, even though not exact, were "sufficiently similar" to the wording of the "excess" clause in State Fire Insurance General Manager, and this would allow the court to reach the same conclusion as to "its effects". He went on to say that the natural meaning of the wording of the underlying insurance clause in the Hamersley Policy would lead to the same effect. This would seem to be a convenient way of reaching a conclusion without actually providing any guidance. Further, would it be sufficient that the wording was sufficiently similar.

In deciding whether the Hamersley policy is a "true excess" of liability policy, would depend , according to Johnson J, on whether the underlying insurance clause offends s45(1) and if it did, whether it would fall within the saving provision under s45(2). MMI argued that the Hamersley Policy was not a true excess of loss policy because of the general wording used, which resulted in it lacking definition, and failing to avoid the mischief that was provided for under s45. The court did not agree with the suggestion by Zurich that the meaning and purpose of s45 was plain.

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<sup>262</sup> [1920] 2 KB 366

The words "the insured has entered into some other contract of insurance" raised considerations as to the way in which an insured can be covered by another insurance contract and whether it could be said that in all cases that the insured "entered into" the other contract of insurance.<sup>263</sup> The court looked at the history behind the legislation. Johnson J after having looked at the history was of the view that where the doctrine of contribution was developed to prohibit an insured from obtaining or retaining a double benefit, and that overcoming the potential for double insurance by way of an "excess" clause was a solution, although the adverse effects of which almost wholly outweigh the adverse effects of an insured insuring himself against the same risk twice<sup>264</sup>. She went on to say that she appreciated that in some situation that the fact of double insurance may be unknown but that this point remained valid. Further, that in any event, there were less potentially onerous methods of overcoming the risk of double insurance arising.

### **3.11 Clauses: Achieving the Aims of the ALRC**

Another matter that had to be considered was whether the clause as drafted achieved the aim as envisaged by ALRC and whether the clause was capable of being construed as creating a prohibition on all "other insurance" provisions.<sup>265</sup>

In deciding this, the case of *Austress- PSC Pty and Carlingford Australia General Insurance Ltd*<sup>266</sup>, was dealt with as it was a case which dealt with s45 in some detail. In *Austress- PSC*, Robin DCJ was of the view<sup>267</sup> that s45 (2) did not apply on the facts of the case, as s45 (2) must be construed as requiring the reference to "other insurance" to be specific, as opposed to a description of general words which were capable of extending to the other insurance, to ensure that the clause is not struck down by s45(1).

It is worth looking at the facts of *Austress- PSC* and the analysis of Robin DCJ. *Austress-PSC*

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<sup>263</sup> para 38

<sup>264</sup> para 40

<sup>265</sup> para 50

<sup>266</sup> DCT of Qld; 1 May 1992 per Robin DCJ

<sup>267</sup> at 6

was a case where you had numerous parties. The second Plaintiff entered into a CIC Policy where by the terms were that it would indemnify AW Edwards Pty Ltd (AW) and its subsidiaries. This included the first plaintiff, Austress, who was a contractor and entered into an agreement to supply and install rock anchors with Remm Pty Ltd, regarding the construction of the Myer Centre. However, the defendant (Zurich) had also issued a policy of insurance for the construction of the Myer Centre (Zurich Policy). Under a sub-contract, Austress became legally obligated to indemnify Remm and legally liable to the Council for damage and the cost of rectification works. The first Plaintiff made payment to Remm and the Council. No contribution was made by Zurich which covered Remm only and which liability was only covered for an amount in excess of \$100000. There was an excess clause in the CIC policy<sup>268</sup>. Zurich claimed that s45 (1) came into play and so the clause was to be treated as void. Robin DCJ concluded that the policy came within the confines of s45<sup>269</sup> but limited the liability by the words "indemnity or insurance....effected by or on behalf of the Insured." Further,<sup>270</sup> that reference to "other insurance" must be specific and not a description in general words. He went on to say that he did not agree that the suggestion that an insured who benefits in some way from, but is not named in the policy, would mean that the policy could be said to have "entered into some other contract of insurance".

Reliance was place on the case of *Stretch v State Insurance General Manager*<sup>271</sup> where the language used was looked at and it was noted that it would have been a simple matter for the draftsman to have included the words "by whomsoever effected". These words have not been included in the legislation and should not be read as having been included when interpreting the wording of the legislation. Interestingly enough Johnson J did not agree with the analysis that s11 (9) when applied to the words "the entering into of a contract of insurance" was limited to those entered into by the parties to that contract. Instead, an extended meaning should apply to include agreements to extend or vary the contract in the case of life insurance contracts and to extend the meaning of any other contract of insurance to making an agreement to renew, extend

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<sup>268</sup> Providing that Carlingford would not be liable in respect of the occurrence except for any excess beyond the amount payable under another policy of indemnity or insurance" in favour of or effected by or on behalf of the Insured applicable to the occurrence"

<sup>269</sup> at [5]

<sup>270</sup> at [6]

<sup>271</sup> (1984) 3 ANZIC 60-577 at 78,467-6B

or vary the contract. Further, reinstatement of any previous contract of insurance was included as well.<sup>272</sup>

Surely if the legislature had intended to include such a broad definition to include "by whomsoever effected" and to widened it in such a way suggested by Johnson J in paragraph [58], the legislature would have expressly done so. However, one has to always look at the mischief the legislation was trying to prevent. The wording in the legislation is specific to "the contract by reason that the insured has entered into some other contract of insurance". "Insured" must be read as referring to the insured under the policy. Johnson J's approach of a much wider interpretation would definitely give more protection to the insured. This is how the legislation should be read if in the end the assured would be unable to recover anything or only permitted to recover a certain amount from the insurer when a claim is made.

However whether Johnson J is correct in saying that when a policy is arranged into by a third party that authorisation by the insured of the other insurance policy was a pre-requisite for there to be double insurance is correct, is doubtful. One of the problems of double insurance which the legislation attempted to stop was where you had a situation where a third party may have entered into an insurance contract with an insurer without the assured knowing. This as mentioned before was a common occurrence. If no authorisation had been obtained, then to hold that there is no double insurance would leave the assured without any protection and he would then be unable to recover anything. This would be out of no fault on the part of the assured. Surely, this cannot be what the legislature intended.

Similar wording was used in the Claims policy which was dealt with by Robin DCJ<sup>273</sup>, where he was of the view that what was void was "the provision" which had the defined effect. He concluded that the provision was void but interestingly went on to say that the way in which the insured might have saved the situation was by replacing the words "or effected by or on behalf of" by "not being a Policy effected by or on behalf of". However, this would not be necessary when it would have the same effect without those words. Robin DCJ was correct in concluding

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<sup>272</sup> para 58

<sup>273</sup> at 5-6

that one did not have to look to what was necessary to implement the policy of the Act in circumstances of a particular claim.<sup>274</sup>

Although disagreeing with the analysis taken by Robin DCJ, the conclusion of Johnson J he considered was not flawed. Johnson J agreed with Zurich's argument<sup>275</sup> that when one looks at the ALRC Report and considers what is sought to be achieved by prohibiting underlying insurance clauses, nothing could be plainer than that all of these kinds of provisions were to be avoided, including those created an excess policy where the insured benefited from a policy taken out or entered into by another. This was so where the insured was unaware of such policy. This would seem to be the intent of the legislature when reading the wording used. Another one of Zurich's arguments was that one should also look at the wide-ranging changes to the law of insurance in sections which can be found in the legislation: such as s 21 with non-disclosure; s 13 by implying a term into contracts of insurance whereas previously it had operated as a principle of law; s 76 with respect to contribution between insurers; and s 48, third party beneficiary right to recover.<sup>276</sup>

When discussing what would be 'specific' enough to fall within the exception of s45 (2), Johnson J stated that the following clause and wording would be an example of the level of specification needed:

"Insuring Agreement A - Combined Public and Products Liability", in particular to the "Exclusions" which include the following paragraph:

"Notwithstanding this Exclusion (1) this Insuring Agreement (A) shall indemnify the Insured in accordance with the terms, conditions and endorsements of the Overseas Employers' Liability Insurance issued by American Home Assurance Company Policy Number MG69898 Limit of Indemnity A\$5,000,000 (the Underlying Insurance) with which this Policy shall run concurrently;

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<sup>274</sup> para 9. The wording of the Hamersley Policy Underlying Insurance included the words "on behalf of the insured".

<sup>275</sup> para 68

<sup>276</sup> para 75

## PROVIDED THAT

Underwriters shall be liable only for sums in excess of the Limit of Indemnity provided by the Underlying Insurance."

However Johnson J did not accept that an underlying insurance clause which did not specify the other insurance to that degree would not come within s45(2), therefore allowing for some flexibility on the part of the insurer.<sup>277</sup> This should not be the correct approach. The more stringent the compliance with s45(2), would result in better protection to the assured which must have been the intention of the legislature.

Zurich in submission asked the court to look at the decision of *HIH Casualty & General Insurance Ltd v Plum Construction Pty Ltd & Anor*<sup>278</sup> where although the wording of the policy was different in form, the similar intention, it was suggested was something the courts should look at. This was due to the similarity of the business structure where you had many and varied sub-contractor with which they were required to arrange public liability insurance to include the Principal's interest and indemnify the Principal against personal injury claims which were made by the sub-contractor's employees<sup>279</sup>. Therefore would similar intention be sufficient.

In *HIH Casualty & General Insurance Ltd* the effect of s45(1) was to void Condition 7 as it was too general and not sufficient enough to fall within s45(2). Mason P commented that there was no substantial justification for such "other insurance" clauses, after listing the clauses out, on the basis that all of these types of clauses would have the effect of, as the ALRC stated, defeating the reasonable expectations of the assured. Further, that all such clause should be rendered

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<sup>277</sup> para 80

<sup>278</sup> [2000] 11 ANZ Insurance Cases 61-477

<sup>279</sup> Condition 7 of HIH's policy was headed "PRINCIPAL-ARRANGED INSURANCE" and was in the following terms (at [30]): "In the event of the named Insured entering into an agreement with any other party (who for the purpose of this clause is called 'the Principal' pursuant to which the Principal has agreed to provide a policy of insurance which is intended to indemnify the named Insured for any liability arising out of the performance of the Works then the Company(ies) will (subject to the terms and conditions of this Policy) only indemnify the names Insured for such liability not covered by the policy of insurance provided by the Principal."

ineffective.<sup>280</sup> It was argued by Zurich that there was no difference "in substance" between the clauses that MMI relied on and that which was found in the HIH policy. Emphasis was placed on "futurity, contingency and lack of specificity", and it was argued that the Hamersley Policy did not have specificity or identification "sufficient" to avoid the mischief that Parliament wanted to avoid.

It was also argued by MMI that the s45, due to the wording used, such as "by reason that the insured has entered into some other contract of insurance" had the effect of limiting or excluding the liability of the insurer. This was based on (1) the express wording used in s45 (1); (2) the distinction between a party to an insurance contract and a person who benefits from a contract; (3) the distinction of the provision in s48 of the Insurance Contracts Act and (4) the rational of the ALRC recommendations.<sup>281</sup>

MMI stated that s45 only applied to certain contract. This was evident from the wording of s45 where it stated that it covered general insurance. It was further argued that the term "liability" was a "key" word and there were two ways of looking at the word: (1) it means a potential or contingent liability, on the first issuing of the insurance contract by the insurer; and (2) it refers to "actual liability", which is incurred when the event it has been insured against occurs, and the insurer then has to be called upon to satisfy that obligation to indemnify<sup>282</sup>. Professor Sutton's view which stated that one looks at the potential liability as opposed to the actual liability, was said to be wrong. Rather actual liability was what one looked at, as it would be more practical to do so. Further, reliance was placed on the structure of the provision which used "...limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance". The use of past tense "has entered into" and not "or may enter into" was used as justification for this. Also, the words "has the effect of limiting or excluding" and not the use of "limit or excludes" suggests that the one looks at the effect of the provision in the circumstances which have accrued or in the circumstances which have occurred. Further, the use of the words "by reason that" are words of causation, which means that they are questions of fact to be dealt with in retrospect.

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<sup>280</sup> para 35-36

<sup>281</sup> para 92

<sup>282</sup> This is assumed on payment of the premium and once the contract has been entered into



It seems highly unlikely that the legislature had intended the legislation to be read in such a complicated fashion. The approach taken by Johnson J was that defining liability in such a way would assist in the proper construction of the provision. She went on to say that if the validity of the provision were under consideration when a claim was made on the policy or the claim was the subject of litigation, then the words "or may enter into" would not be needed. This was because at the time of consideration of the provision, the "other contract of insurance" would have been entered into. The section would apply to "other contracts" entered into both before and after the contract with the "other insurance".<sup>283</sup> This can only be what the legislature had intended if it was to afford more protection to the insured. To distinguish between liability before and or after would limit the scope of s45.

Johnson J commented, correctly, that a more natural meaning of the words should be adopted and the fact that, when it came to legislative drafting, there could be different ways of saying the same thing.<sup>284</sup> It would have to be emphasised that the main intent of the legislature should and must not be overlooked.

Further her Honour was content on applying a more technical approach in reaching her conclusion. This was as a result of MMI arguing that the underlying insurance clause could be read in a distributive sense which was looking at a clause which related to contracts entered into by the insured and a clause relating to contracts which have been entered into on behalf of the insured. MMI argued that the clause was drafted in an economic expression, where both situations should and could be read in the Insurance Contracts Act.<sup>285</sup>

Her Honour then went on to say that read in this way the provision was void in so far as it concerned contracts effected by the insured, not in so far as it concerned contracts entered into on behalf of the insured. This approach is difficult to understand due to the precise wording of the legislation. However, she agreed that the clause could be read distributively. The Hamersley

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<sup>283</sup> para 102

<sup>284</sup> para 103

<sup>285</sup> para 136

Policy operated as an excess policy in two situations: (1) where Hamersley had effected or entered into another insurance policy covering the same risk and (2) where another insurance policy covering the same area of risk had been effected by Hamersley. The appropriate approach to the interpretation of s45(2) should be to give the words of the section their natural meaning where an insured has either entered into another contract of insurance covering the same risk or where the insured has the benefit of a third party which covers the same risk. These situations clearly have the effect of limiting or excluding the liability of the insurer under the policy due to its effect of converting a policy which indemnifies the insured for the whole of the loss to a policy which insurers for any excess over the applicable limit of indemnity of the underlying insurance policy. Such policies would be void if they were entered into by the insured.<sup>286</sup>

Although her Honour correctly identified the effect, approach and intent of the Act and legislation<sup>287</sup>, she still went on to say at para 142 as follows:

“142 .Nevertheless, in my view, the only way in which to achieve that result is to give to the expression "the insured has entered into" and the words of which it is comprised, a meaning they simply do not have; that is, I believe I can achieve that interpretation only by manipulating the English language to confer a meaning that is inconsistent with the natural and proper meaning. The Concise Oxford Dictionary definition of "enter into" is to "engage in (conversation, agreement, inquiry etc); to bind oneself by (recognizances, treaty, contract)". When one considers the words "enter into" in the phrase "the insured has entered into", it is evident that it involves the insured himself carrying out the activity and, in the relevant context, being the party to the insurance policy. I do not accept that the particular words employed are consistent with the arrangement involved in the Speno Policy, notwithstanding the status of Hamersley under that agreement as an insured. Further, I am not persuaded that it is appropriate to adopt any of the "devices" suggested by either party to achieve the particular result. Therefore, I accept the construction determined by Robin DCJ in Austress-PSC Pty Ltd and Carlingford Australia General Insurance Ltd (supra) although for different reasons.

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<sup>286</sup> para 139, 140 and 141

<sup>287</sup> at para 141

143. The final issue with respect to subsection (1) is whether, as MMI submits, the underlying insurance clause can be read in a distributive sense with the result that so much of the clause which does not offend s 45(1) remains valid. For the reasons to which I have already referred, while I accept that the underlying insurance clause does address two different circumstances, it is the case that, as Robin DCJ noted, the clear words of s 45(1) is that it is the provision which is void; the provision being the underlying insurance clause in the Hamersley Policy. As I have already noted, I accept that this is a technical result which arises simply because of economical drafting. However, it remains the case, as I have noted, that the available material indicates that it was the ALRC's recommendation, which to all intents and purposes appears to have been accepted by the legislature (although it does not appear to have been successfully translated into legislation) that all types of "other insurance" clauses should be prohibited. On that basis, although the result is technical, it is not necessarily inconsistent with the intention behind the implementation of s 54.

144. Essentially, I believe that s 45(1) requires amendment to achieve the purpose which I accept was intended by the legislature acting on the recommendation of the ALRC."

As correctly pointed out the interpretation of the words by the courts should be according to the natural rules of interpretation. However, it could be said that the courts should interpret the wording of the legislation which would lead to a more favourable result to the assured. This is consistent with the intent behind the recommendations of the ALRC.

### **3.12 Severance of void parts in clauses**

The second issue which was discussed was whether there should be severance due to the structure of the way s45 (1) is worded. That is whether the whole clause should be found void or whether that part should be severed. This was looked at in terms of the term "provision". Her Honour concluded in her analysis that "provision" was within the meaning of the section and ruled that the whole clause was void.

The analysis of her Honour, with respect, is confusing. After concluding that the provision is

void where the insured himself has entered into the "underlying insurance policy", she then goes on to say that the only way to reach this conclusion was to give the phrase "the insured has entered into" a meaning it did not have and that s45 had to be amended so it could have the effect that she intended.

When one reads the Explanatory Memorandum (Insurance Contracts Bill 1984), it lists the 5 situations where double insurance may arise, namely (1) to increase an insured's cover; (2) the insured may not realize that the policies overlap; (3) the insured may forget to cancel the first policy; (4) the insured may be protecting himself from first insurer's insolvency and (5) to make a profit by claiming twice for the same loss but under the different contracts of insurance. There are two main types of policy provisions which deal with "the insurance" which were stated as follows<sup>288</sup> : (1) imposes on the insured an obligation to notify the insurer of existing or subsequent insurances affecting the same risk; and (2) where the policy does not place any obligation on the insured but excludes or qualifies the liability of the insurer in the event of other insurance. If the insured fails to notify the insurer then the insurer may deny liability, in the event there is a loss which the insured suffers to the extent that the second insurance is inadequate to cover the loss.

Clearly, the first type allows the insurer to exclude liability for a potential claim completely for losses flowing from a particular event. The second type shifts the cover from one insurer to another insurer.

The clauses that are used fall into three main categories. The first one is where the provision purports to exclude liability altogether in the event of other insurance. The second one limits the insurer's liability to a rateable proportion of the loss. The insured then has to bring two actions, which may still result in the insured suffering an overall loss if the other insurance is insufficient or if the claim against the other insurer is defective. The third type covers provisions which limit the liability of the insurer to any amount by which the loss exceeds the amount recoverable from the insurer. This will then convert a policy into an excess policy without appropriate reduction in

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<sup>288</sup> para 144 Explanatory Memorandum

the premium.<sup>289</sup>

There is no need for her Honour to reach her conclusion by such a tedious analysis. No matter which way you look at the clauses, either in isolation or in combination, the ultimate result will be to limit or exclude the indemnity which the insured is entitled to obtain after paying high premiums. The whole point of the legislation is to prevent all such clauses from taking effect, and as a result should be void. The legislation itself has catered for situations where there may be a saving provision of such clauses under s45 (2). It is only where there is a genuine or true excess clause would the clause be held not to be void. Whether there is a true excess clause is what the courts should be focusing on.

Further, the use of the words in s45 (1) which make specific reference to "not being a contract required to be effected by or under a law, including a law of a State or Territory" as situations where such limitations or exclusions would not be void,<sup>290</sup> would seem to suggest that in general, the whole clause will be void unless they fall within this exception.

### **3.12 Is there sufficient protection for the Insurer?**

Although it may seem unfair on the part of the insurer, the Explanatory Memorandum considered that there were certain mechanisms in place which the insurer could use to assist themselves. This shows that the interests of the insurer were also taken into account. These were listed in paragraph 147 which was stated as follows: (1) that the provision of informing the assured that he may not recover anything or that he would be only allowed to recover a portion of his loss could be, at most a mechanism to warn the assured against making a claim for the same loss twice; the same effect could be achieved by including a warning to that effect in the proposal; (2) more details could be asked for in the proposal and claims form, so the insurer will be aware of the likely insurers from which he would be able to claim contribution from and (3) that the requirement of requesting for more detail in the proposal or claims form would allow an insurer to consider whether there was any significant degree of over-insurance and to later decide

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<sup>289</sup> Mason P in *HIH Casualty & General Insurance Ltd* (1997) 9 ANZ Ins Cas 61-358 at para 34 and ALRC para 281

<sup>290</sup> ALRC para 290

whether he wants to accept the risk or not. This should be sufficient protection for the insurer, although it could be said that this again would not provide much help, as an assured may not know of the existence of another policy, and such details cannot be provided for. However, the insurer should not be allowed to use this against the assured, if the assured has honestly and to the best of his knowledge filled out the forms.

### **3.13 Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd: The Appeal**

*Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd*<sup>291</sup> decision went on appeal to the Court of Appeal and then onto the High Court of Australia<sup>292</sup>. The issue which had to be decided was whether the Court of Appeal erred in failing to find that section 45(1) of the Insurance Contracts Act 1984, on its true construction, renders void the whole of the relevant provision of the First Respondent's policy of insurance and not just the offending element of it. The Court of Appeal it was considered wrongly held that the 'other insurance' or 'underlying insurance' provision in the First Respondent's policy of insurance was capable of being, and should be, read distributively so as to sever elements from that provision and thereby misconstrued, or alternatively misapplied, section 45(1) of the Insurance Contracts Act 1984.<sup>293</sup>

However, on appeal the decision by her Honour that, s45(1) did not avoid an "other insurance" provision in an insurance policy where such provision relates to another insurance to which the insured is not a party but where he is a named non-party beneficiary, was not challenged. The High Court considered that this was a question of law which was central to the determination of the appeal.<sup>294</sup> It was further argued that the Appeal should be upheld on the ground that section 45(1) of the Insurance Contracts Act 1984 operated in such a way that the phrase 'the insured has entered into some other contract of insurance' applied to the situation where a person had the benefit of a contract of insurance even though not a party to that contract of insurance himself or herself.<sup>295</sup>

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<sup>291</sup> [2007] WASC 62

<sup>292</sup> [2009] HCA 50

<sup>293</sup> para 10

<sup>294</sup> para 8 and 28

<sup>295</sup> para 10

The High Court went through the legislative history of s45. Identifying that before the legislation had been enacted, there were a variety of bewildering variety of laws which governed insurance contracts. These were Common law and Imperial, State and Commonwealth statutes (this was repealed when the Act came into effect.) This was similar to the position in England, where the law is still in a state where Australia was prior to the implementation of legislation in Australia. This is another reason why legislation may lead to clear guidance when dealing with double insurance.

The High Court then went on to deal with the statutory framework of s45, by referring to other legislation<sup>296</sup> within the Act and cases. The expression "entered into" was considered to be critical to the constructional question raised by the appeal<sup>297</sup>. s11 (9) of the Insurance Contracts Act provided a non-exhaustive definition<sup>298</sup>. No specific definition of what would fall within "entered into" was provided for under the ALRC. The Australian, Senate, Insurance Bill 1983, stated that the intent of the Bill was to impose on the insurer and insured such obligations before the contract is entered into and would also apply to situations where they renew, extend, vary or reinstate an existing contract and where they were to make a new contract. s11(11) Insurance Contracts Act also suggests that it is anything which is done before a particular contract has been entered into and this would include that which is done at the time when the contract is entered into. s48 was also looked at which covered the position where a party who is not party to the contract of general insurance that has been specified or referred to in the contract as a person which the insurance policy has extended to cover, has the right to recover the amount of loss suffered under the contract.<sup>299</sup>

The question of construction was whether the words "entered into" had the effect of limiting the application of s45 to "other insurance" provisions which affected contracts of insurance to which the insured was a party. The ordinary meaning, that is "take upon oneself (a commitment, duty,

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<sup>296</sup>*Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 424, s8(1),(2), s9, s11(9) Insurance Contracts Act

<sup>297</sup> para 18

<sup>298</sup> para 18

<sup>299</sup> Although 48(3) could be relied upon by the insurer. s56 (1) was also discussed which covered fraudulent claims. Section 76 which covered the right of contribution between insurers.

relationship, etc), bind oneself by, or subscribe to, an agreement”<sup>300</sup> was used which the court said was reflected in s11 (9) and other sections. They then went on to look at s48 and concluded that it did not deem a non-party insured as a party to the contract and therefore could not receive the benefits either contractually or in equity on him.

As a result of this analysis the court did not accept the provision suggested of amending s45 by Zurich which was as follows:

"Where a provision ... has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured [including a person entitled under s 48] has entered into [an arrangement giving it cover under] some other contract of insurance ... the provision is void."

This approach should not be the proper one to be adopted. If the legislature had intended for such a construction, it would have been included. This would clearly narrow the intent and extent to which s45 was to operate. There would be situations where the insured may not be aware of the fact that he is a non-party to a contract but may benefit in some way under the contract. Again, the insured will be left in a position where he may receive limited indemnity or be completely excluded from recovery for the loss that he has sustained. It is interesting to note that the High Court was aware of the mischief of s45, as French CJ, Gummow and Crennan JJ stated as follows:

"The text of the provisions of the Act with which s 45 must be read points inexorably to the conclusion that s 45 is only concerned with "other insurance" provisions affecting double insurance where the insured is a party to the relevant contracts of insurance. It does not allow room for a construction which would include a non-party insured among the ranks of those who have "entered into" the relevant contract. The inclusion of persons not parties to the relevant contract would be inconsistent with the ordinary or any plausibly extended meaning of "entered into" in relation to contracts. In so saying, it must be acknowledged that the purpose of s 45 as appears from the ALRC Report and the relevant Explanatory Memorandum is not so confined as

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<sup>300</sup> para 23



to indicate such a construction. There is no distinction made in the Report or the Explanatory Memorandum between "other insurance" provisions purporting to affect double insurance which includes non-party insurance, and double insurance where the insured is a party to the relevant contract. The most that can be said is that the Report seems to have proceeded upon the assumption that the problem of "other insurance" clauses arose in cases in which the insured was a party to both contracts. However, notwithstanding the generality of the mischief to which s 45 was directed, the words "entered into" are not capable of encompassing a non-party insured." However, even though noting the lack of distinction made in the Explanatory Memorandum and the ALRC, and acknowledging the way the ALRC proceeded in its analysis, the High Court still chose to conclude that the words were not capable of including a non-party insured.

The High Court was of the view that only part of the clause would be found void. This approach has to be wrong and the view as expressed by Johnson J<sup>301</sup> is the correct one to be adopted. In her analysis she took into consideration what would be a fair balance between the interests of the insurers, insured's and other members of the public even though it may not fully overcome the ills identified by the ALRC, but would in any event strike a fair balance between competing interest.<sup>302</sup>

What implications will this decision have and will this decision provided sufficient guidance of the mechanism of s45? The decision of the High Court suggests that where you have a situation where a non-party, for example a principal, is named in an insurance policy but is not a party to the contract with the insurer, and assuming that no consideration has passed between them, the "other insurance" contract will not be void. However, if the principal is actually named in the policy, then s45 will take effect and be held to be void.

Does this mean that the insured will now be protected from the mischief that the legislature had intended? Again, it will be easy for an insurer to devise ways to get around the working of s45, so as to enable them to argue that s45 did not apply to the contract. The insured will not be protected.

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<sup>301</sup> para 42

<sup>302</sup> para 72

The next issue which the High Court dealt with was the Zurich policy and whether it was sufficiently specified so as to fall within s45 (2). The argument put forward by MMI was that the parties can specify something in numerous ways.<sup>303</sup> MMI's argument, interestingly enough, was that s45 (2) effectively leaves it up to the parties to choose their own expression. Her Honour agreed with the whole range of ways in which parties in a given contract might choose to specify something.<sup>304</sup>

However, in light of the legislative effect of the section, her Honour, considered that it was important to look at the term "specified", which would have to identify a specific contract of insurance or class of contract rather than talk about terms as was the case in the Hamersley Policy, as it is too general, and as it simply referred to "insurance coverage" which had been effected by the Insured or other parties who are involved, though unspecified, in the projects.

It is helpful to look at the literature which was relied on to define what would come under "specified" as stated, but undefined in the legislation itself, under s45(2). Reliance was place on *HIH Casualty & General Insurance Ltd* and the analysis of Mason P, where reference was made to the academic literature.<sup>305</sup>

When dealing with the issue of specificity as required under s45(2), her Honour, although accepting that there were a whole range of ways in which parties in a given contract might choose to specify something, if one were to look at the purpose of the section and at the term "specified", it would identify a specific contract of insurance or class of contract rather than talking about a contract in the sort of terms that are used in the underlying insurance clause in the Hamersley Policy, which was particularly general due to the use of the words "insurance coverage" effected by the insured or other parties involved though unspecified projects.<sup>306</sup>

Her Honour then concluded that one would not be able to specify a contract which had not yet

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<sup>303</sup> [2007] WASC 62, at para 147

<sup>304</sup> [2007] WASC 62, at para 147

<sup>305</sup> para 150 to 153

<sup>306</sup> para 147

come into existence, and as a result precise details could not be provided. However, she went on to say that one could go beyond just speaking in general terms of the clauses being considered. What is required is the need to specify the other policy in such a way that it is clearly understood which policy or which group of policies are being referred to and the purpose of the policy. This would have to be sufficiently clear so as to easily identify that the policy which is under consideration was indeed intended to be a true excess of liability under those particular circumstances.<sup>307</sup> She accepted the argument put forward MMI that although the form of class referred to in the decision of *HIH Casualty & General Insurance Ltd* was more precise, the decision could still be relied upon to suggest that specification by class would be sufficient. Further, that if a contract could not be clearly specified then the class of contract would be sufficient.<sup>308</sup>

Dictionary<sup>309</sup> definitions were looked at to define the words “specific”<sup>310</sup>, “specify”<sup>311</sup> and “specified”<sup>312</sup>. The argument put forward by MMI was that one should look at the natural meaning of the term “specify”, and suggested three methods where specification could be identified. These were: (1) specified by name, policy number, parties; (2) by class (according to that of *HIH Casualty & General Insurance Ltd*); and (3) specified by description. It went on to argue that it was sufficient for one to accept that a contract maybe specified by class, which was sufficiently described in the *Hamersley Policy*, which satisfied the requirement under 45(2). Further that since the underling insurance policy was effected by that party for the benefit of the insured as an identified entity and not just as a member of an unascertained class, as it was reference made to a particular principal, and not just any principal. Also, reference to “not being affected as insurance excess of this policy” narrowed the class. Her Honour although accepting that this proposition would remove one type of “other insurance”, it did not particularly, or

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<sup>307</sup> para 155

<sup>308</sup> para 156

<sup>309</sup> Macquarie Dictionary

<sup>310</sup> (1) having a special application, bearing or reference; specifying, explicit or definite; (2) specified, precise or particular; (3)peculiar or proper to something, as qualities, characteristics, effects etc; (4) of a specific or particular kind.

<sup>311</sup> (1) to mention or name specifically; (2) to give a specific character to; (3) to name or state as a condition; and (4) to make a specific mention or statement.

<sup>312</sup> MMI said that the word “specified” is capable of including “Kind” s opposed to something more precise.

sufficiently, narrow the field.<sup>313</sup>

An argument which she thought was of considerable force was that of situation where you were dealing with a small builder and a situation where you were dealing with an entire worldwide organization where there were subsidiaries. In the later it would be difficult to clearly identify the specific policy. This would be more so where if, to satisfy the requirement under s 45(2) the name, number, insurer or something more specific would be required. This would be unduly onerous, if not impossible due to the constant change of contractual arrangements. In this situation what would be required would be to specify the policy, to the extent that it could be ascertained whether the policy with the underlying insurance clause was indeed intended to be an “excess” policy.<sup>314</sup>

MMI suggested that a more practical approach be taken and that certain factors should be taken into account. MMI argued that there should be a various degrees of specification such as: (1) the number of “primary” insureds named in the policy; (2) the nature and size of the business conducted by those insureds; (3) the territorial application of the policy; (4) the extent to which the primary insureds may be expected to enter into arrangements which provide alternative insurance cover; and (5) the practical difficulties of identifying by name and policy number (i.e the extent to which it is reasonable to specify a second policy by reference to class).<sup>315</sup> Her Honour conceded that it would be difficult to identify with any greater specificity than when compared to class. In such a situation it would be necessary to consider the specification to also consider the acknowledgement in the underlying insurance clause and concluded that Hamersley policy had insufficiently specified the other insurance contract for it to fall with the provisions of s45(2)<sup>316</sup>. Although agreeing with the analysis of Mason P in *HIH Casualty & General Insurance Ltd*, that such wording would be broad and as a result it would be inadequate, she did not go further than that and said that what was required for it to be specified, was that the policy must be by name, policy number or insurer. However a necessary requirement to provide sufficient information concerning the class so that one would be able to identify the policy within

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<sup>313</sup> para 161

<sup>314</sup> para 162

<sup>315</sup> para 163

<sup>316</sup> para 164

that class as providing primary cover, and the policy with the “excess” clause providing cover for loss over and above the limit of the other policy.<sup>317</sup>

She went on to say that the extensive and varied nature of Hamersley’s interest were the very factors which would require some greater level of specificity other than the fact that Hamersley entered into arrangements which included joint ventures, sub-contracts and other commercial arrangements which it was, as put, “customary” for insurance coverage to be taken out by other parties. Her Honour was of the view that this added absolutely nothing about the nature of the insurance to be provided by MMI under the Hamersley Policy.<sup>318</sup>

Interestingly, her Honour did not actually identify what she would consider to have been sufficient information for it to fall within the saving provision in s45 (2), as she did not find it necessary to do so. Although, she did not consider that it was particularly difficult to consider the various classes of contracts requiring the other party to obtain insurance to Hamersley’s benefit, to specify the criteria in relation to each class of contract.

As a result of her analysis, her Honour concluded that, the clause was void and that MMI could not place reliance on s45.<sup>319</sup>

On appeal to the High Court her Honour’s analysis regarding s45 (2) was not part of the matters the High Court had to deal with. However looking at her analysis, it is clear that although she does not agree with too broad a wording, it is not necessary either to identify a particular policy. She suggested a half way point, where it would be enough to provide sufficient information concerning the class so as to be able to identify the policies within the class as providing the primary cover.

This approach again, sheds no light on how one is to interpret and approach the workings of s45 (2). If her analysis is to be followed, this would still leave the assured and the insurer in an

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<sup>317</sup> para 165

<sup>318</sup> para 167

<sup>319</sup> para 169

uncertain position, because it is unclear what would be considered to be “provide sufficient information”. Further, how is one to characterize in what types of situation what particular information would have to be provided. The words “customary” in the underlying policy is extremely wide.

### **3.14 Review of the Insurance Contracts Act 1984**

Although this Review was conducted in 2004, and there have been decisions since, but the problems as stated above remain. One of the main issues would be whose interest takes priority, the insurer or the insured’s. As mentioned above, the “stakeholders” look at the section in terms of the discrimination to the insurers. Reading the section in narrower fashion would ensure more protection for the insured which was surely what the legislature had intended.

In June 2004, there was a Review of the Insurance Contracts Act 1984 (CTH) which was headed the Final Report on Second Stage: Provisions other than Section 54<sup>320</sup>. Chapter 8 dealt specifically with limiting the ability to exclude or limit liability because of another contract of insurance. After stating what the legislation was, it went on to deal with the concerns of the stakeholders who were of the view that subsection (2) should be clarified due to the uncertainties which have been discussed above, i.e how much specificity is needed when naming the other insurance covers. The case of *HIH Casualty and General Insurance Ltd v Plum Constructions Pty Ltd*<sup>321</sup> was referred to. The Law Council of Australia then requested that the law needed to be clarified, “in particular it is necessary to signify whether a reference in an excess of loss policy to the underlying insurance solely by reference to a class of insurance is sufficient to invoke section 45(2).”<sup>322</sup>

The Review Panel was of the view that a narrower approach to subsection 45(2) was consistent with the “policy intent.” Reliance was placed on the decision of Mason P<sup>323</sup>. Submissions<sup>324</sup> were

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<sup>320</sup> by Alan Cameron and Nancy Milne

<sup>321</sup> (2000) 11 ANZ Ins Cas pp.61-477

<sup>322</sup> Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54, at paragraph 8.22

<sup>323</sup> in *HIH Casualty and General Insurance Ltd v Plum Constructions Pty Ltd*

made which argued that the way the legislation was currently drafted, section 45 discriminated against Australian insurers. Paragraph 8.24 stated as follows, "The argument is that insurers not subject to the IC Act are able to include valid 'other insurance' clauses in their contracts, but Australian insurers cannot due to section 45 (unless they can fall within the subsection 45(2) exception).<sup>325</sup>,"

### **3.15 Analysis of the cases**

The main issue that the Supreme Court, Court of Appeal and the High Court were focused on was what was the underlying policy rather than deciding what would be a "true excess" and under what situation would there be a "true excess" layer. In a layered policy the underlying policy was to be treated as a primary layer. There was no need for the courts to spend time discussing the need to identify the underlying policy as being a member of a class of policies itself being capable of identification. This is already the primary layer. Focus should be placed on the wording of s45(1)(b) which clearly states, " Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance...". As can be seen from the analysis of Johnson J, she was of the view that when deciding whether the Hamersley policy was a "true excess", that it would depend on whether the underlying insurance clause offended s45 (1), and if so, whether s45(2) would save it. Emphasis was placed on the second part of the wording of s45 (2) which states, "...that is specified in the first-mentioned contract."

The issue that has to be decided is simple, that is, whether the clause is to fall within the saving provision of s45 (2), and whether that clause is in fact a "true excess" clause. A "true excess clause" which has been defined as a policy which had the effect of the policy being excess and

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<sup>324</sup> Submissions by (1) Law Council of Australia dated 27 April 2004; (2) Professional Indemnity Insurance Company Australia Pty Ltd dated 21 April 2004; (3) Issue Paper from Consumers' Federation of Australia and (4) Issues Paper from the Australian Medical Association of Australia Limited dated 21 April 2004; and (5) national Insurance Brokers Association of Australia

<sup>325</sup> Reference was made to submissions by the Insurance Council of Australia Limited dated 2004; Law Council of Australia dated 27 April 2004; Phillips Fox dated 21 April 2004; Australian Medical Association of Australia Limited dated 21 April 2004; and Issues Paper from Consumers' Federation of Australia. The Review Panel was of the view that the suggested that the intended territorial application of the IC Act would address these concerns.

treated as over and above any other valid and insurance policy, which would only respond to any loss sustained until such time as the limit of liability under the such primary and valid insurance has been totally exhausted first.

The tests that have been laid down by the courts are too complicated and confusing. It is surely not the intention that the legislation should be read in this manner. There is no need to actually provide sufficient information as to enable the parties to identify the policies within that class as providing primary cover. In most cases, if not all cases, the excess layer policy will make absolutely no reference to the underlying policy, the reason being that, the underlying policy, which is the primary layer, may not have been in place at the time, because the assured may not have decided what policy to take out or whether such policies should be taken out. This must be the case especially if one was to look at the position and relationship of parent and subsidiary companies and how policies are to be taken out in such situations. In these situations, we could be looking at a large number policies. It could be the case that the parent company takes out a policy which has the effect of being a global policy. The parent company then requires the subsidiary to take out a primary layered policy (i.e the underlying policy) which is to be treated as a local policy. One then has a situation where the parent company's policy will act as an excess layered policy and only respond once the local policy of the subsidiary company is exhausted. This has been referred to as a "top and drop" policy.<sup>326</sup> It has been said that top and drop insurers are taking only a residual risk and are charging premium accordingly.<sup>327</sup> The requirement that such a system be in place is usually contractual in nature.

It would be almost impossible for a smooth operation of a company if there was a specific requirement that the primary policy be stated in specific terms, only general terms would be practical.<sup>328</sup> Although it could be argued that a more balanced approach be taken, more protection should be given to the insured. In such situations, again like other such excess clause arrangements, the main issue is whether the excess policy is in fact a "true excess" policy. The focus should not be on the primary layer, but must be on the excess layer.

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<sup>326</sup> Sutton's Law of Insurance in Australia (1999) 3<sup>rd</sup> Edition para 25.24

<sup>327</sup> Sutton's Law of Insurance in Australia (1999) 3<sup>rd</sup> Edition 25.24

<sup>328</sup> Sutton's Law of Insurance in Australia (1999) 3<sup>rd</sup> Edition 25.24



It could be said that s45 should only cover situations where the effect of the clause in the policy was to completely refuse to pay out anything, such as “escape clauses”. Further, clauses such as “excess clauses”, where the insurer will state that his liability would only be above that of any other policy which is effective at the time, so his liability will only take effect when all the other policies respond, and “rateable proportion clauses”, where the insurer will state that the assured can only get a certain proportion of the loss<sup>329</sup> should not come within s45 because the insurer is still required to make payment for the loss to the assured and does not completely deny liability, which could be said would leave the assured without any protection. Further, if there is an excess clause it would be difficult to try to get around s45(1) by specifying the subsequent policy in the first- mentioned contract.

From the discussion of the above cases and the analysis of the courts’ interpretation, s45 may look complex, but the way the courts went about doing this was unnecessary. The advantage of s45 Insurance Contracts Act being applied in England would have the effect of holding excess, rateable proportion and exclusion clauses void, unless “specified”. Further, the exception should only apply if it is one of a true excess clause. If that were the case, then the problems which arose regarding the clauses and the effect of the clauses under the English cases will not occur. This would be the position where you have similar types of clauses.

If that is the case, then the authorities suggest that the proper approach would then be for the assured to choose whichever insurer he wants to make recovery from and then it will then be for the insured to seek contribution from the other insurers.<sup>330</sup>

### **3.16 The Effect of the “Other Insurance” Clause- the American View**

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<sup>329</sup> The apportionment was of the assureds’ recovery as opposed to permitting the assured from recovering the whole amount. This in turn would postpone the apportionment question to a contribution claim amongst the insurers: see Sutton’s Law of Insurance in Australia 1999(3<sup>rd</sup>) 25.26

<sup>330</sup> *GRE Insurance Ltd v QBE Insurance Ltd* [1985] VR 83

Although the American position did not provide any guidance to Deputy Judge Kealey, it may be worthwhile to briefly mention what the position in the United States of America relating to double insurance is and whether these principals can be used in s45. The problems created by “other insurance” provisions<sup>331</sup> and the ensuing litigation were extensively covered in many law review journals during the fifties and sixties on this topic. It is incredible and somewhat disconcerting that some thirty years later the circular riddle of “other insurance” continues to plague insureds and the courts.<sup>332</sup> For ‘other insurance’ clauses to apply, there must be concurrent policies over the same interest. Its origins stem from policies dealing with property insurance in response to the supposed moral hazard of fraud and carelessness inherent when one’s property is overinsured.<sup>333</sup> Such clauses are also present in automobile liability insurance.

It is interesting to note that after some 60 years this issue has still not been resolved by the courts. In America, it seems that reason for this is due to the circular reasoning by the courts in trying to provide a solution, which ultimately stems from the wording of the policies by the insurance industry.<sup>334</sup> An example of this can be found in the leading case of *Lamb-Weston Inc. v Oregon Auto. Ins. Co.*,<sup>335</sup> where the plaintiff, Lamb-Weston, Inc leased a truck which was driven by its driver on its way to have the brakes repaired and crashed into the warehouse. The plaintiff settled its claim with the warehouse owner through a loan receipt fund arrangement with its carrier, St. Paul. Oregon Motor Insurance Company (Oregon), the defendant which insured the truck refused to pay the Plaintiff’s claim, even though not disputing the payout by St. Paul. The

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<sup>331</sup> The types of ‘other insurance’ clauses: Excess clauses which provides that liability of the insurer will be limited to the amount by which the loss exceeds the coverage provided by all other valid and collectible insurance. An escape clause avoids all liability for loss when there is other valid and collectible insurance. A pro rata clause states that a prorata share of the loss, up to the limits of its policy shall be paid by the insurer. An excess escape clause provides that the insurer is liable for that amount of loss exceeding other available coverage and that the insurer is not liable when other insurance has limits equal to or greater than its own.

<sup>332</sup> See the article by Linda Kogel Hasse in 25 S.D.L Rev 37 (1980): Is there a solution to the Circular Riddle? The Effect of ‘other insurance’ clauses on the public, the courts, and the insurance industry

<sup>333</sup> *State Farm Mutual Auto Insurance v Bogart* 717 P.2d 449, 451 (Ariz.) (1986) and also see Comment, Concurrent Coverage in Automobile Liability Insurance, 65 COLUM. L. REV. 319, 320(1965)

<sup>334</sup> *Miller v National Farmers Union Property and Cas. Co.*, 470 F.2d 700, 701 (8<sup>th</sup> Cir.) (1972)

<sup>335</sup> 219 Or. 110, 341 P.2d 110, 76 A.L.R.2d 485 (1959)

court on appeal held that both the Defendant and St. Paul must share the liability equally. There the court stated that regardless of the nature of the clause used, i.e either escape, excess or pro rata, these were repugnant and each should be rejected in toto. Justice Perry stated the absurdity of attempting to provide a difference between primary and secondary insurance, and suggested that one must look at the insurance policies to see if they are conflicting 'other insurance'. If so, then the court will nullify them. It seems that this would solve the problem of the conflicting clauses, and at the same time safeguards the rights of the policy holder.<sup>336</sup>

The main approaches used by the courts to resolve the problem of the conflicting "other insurance" clauses are firstly, holding the more specific insurer liable to the exclusion of the more general insurer. The courts determine the extent of liability of two concurrent liability insurers by assuming that they are in fact not double insurers at all because of the more specific coverage provided by one. The latter is deemed the primary insurer and the other insurance is secondary only. This approach was criticised as ignoring the 'other insurance' clauses of the respective policies and the courts have resorted to other approaches rather than determining who is the 'specific' insurer.<sup>337</sup> Secondly, holding the insurer of the primary tortfeasor primarily liable<sup>338</sup>. Thirdly, applying the "other insurance" clauses contained in that policy issued subsequent to the other policy. It has been suggested that this approach is ill-fitted as a rational basis for determining liability in automobile cases and was born as a result of convenience as oppose to reason. It lacks logical foundation and as a result the courts have ignored its use, as it is considered immaterial which policy was written first since its vital only that each was in effect at the time of the accident<sup>339</sup>. Fourthly, interpreting the clauses respective policies.<sup>340</sup>

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<sup>336</sup> Automobile liability Insurance- Double Coverage and the effect of the "Other Insurance" clauses by Harl H. Haas 1 Willamette L.J. 458 1959-1961

<sup>337</sup> See discussion in Automobile liability Insurance- Double Coverage and the effect of the "Other Insurance" clauses by Harl H. Haas 1 Willamette L.J. 458 1959-1961, 843

<sup>338</sup> This approach has been rejected due to the difficulty of choosing the primary tortfeasor from among parties to an action.

<sup>339</sup>: see Automobile Insurance—Effect of Double Coverage and "Other Insurance" Clauses, 38 MINN.L. REV 838,847.

<sup>340</sup> This approach has been used to resolve the problem of double coverage by looking to the 'other insurance' clause in an attempt to reconcile the conflicting clauses. : see Automobile Insurance—Effect of Double Coverage and "Other Insurance" Clauses, 38 MINN.L. REV 838,841.

When dealing with combination clauses, in *Viger v Geographical Services Inc.*<sup>341</sup> where there were two policies, a liability policy which contained a pro-rata clause and a P & I policy which contained an escape clause. The court gave effect to the escape clause over the pro-rata which resulted in the P & I policy not having to respond to the loss.<sup>342</sup> However in other parts of the United States the courts have not given priority to escape clauses<sup>343</sup>. It would therefore be advisable that insurers to avoid liability should include escape clauses.

Some principles are similar to the English approach and the Australian approach. The use of exclusion clauses were not looked upon favourably and the courts were open to the idea of nullifying such provisions, which is similar to s45, which voids such clauses. Further, they were in favour of providing more protection to the assured. Therefore the suggestion by the courts in *Lamb-Weston Inc.* would be consistent with the Australian position of s45 (1).

### 3.17 The Canadian Position on Double Insurance

The American position due to the uncertainty of the decisions has been criticized by the Canadian courts as well. The approach in Canada is slightly different, although there are no cases in Canada which have decided the issue of escape clauses and excess or pro-rata clause. Where there are two clauses which are in conflict, the court will first approach it in terms of the intent of the insurers which can be evidenced by looking at the contents of the policies.<sup>344</sup> This was the

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<sup>341</sup>[1972] AMC 2113. Affirmed on appeal to the Fifth Circuit Court of Appeal (476 2d 1288)

<sup>342</sup> Also see *Lodrigue v Montegut* [1978] AMC 2272

<sup>343</sup> *Graves v Traders and General Insurance Co.*, 241 So.2d 116. Here the Louisiana Supreme Court held that where you have two clauses such as an escape clause and excess clause, they cancelled out each other and as a result liability was apportioned. Also see *Offshore Logistics Services v Mutual Marine* 462 F.Supp 485.

<sup>344</sup> See E.R.H. Ivamy, *General Principles of Insurance Law* (3<sup>rd</sup> ed.1975) at pp.312-13, where he stated: "The cardinal rule of construction is that the intention of the parties must prevail. But the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances." Also see Couch *Cyclopedia of Insurance Law* (2<sup>nd</sup> Ed.1983), vol. 16 at p.498: Intent of Insurers as controlling: where it was stated: "There is authority that the liability of insurers under overlapping coverage policies is to be governed by the intent of the insurers as manifested by the terms of the policies which they have issued. Thus, it has been said that where two or more liability policies overlap and cover the same risk and same accident, the respective liabilities of the insurer must rest upon a construction of the language employed by the respective insurers, and not upon the so-called "primary tortfeasor doctrine" or upon any arbitrary rule or circumstance."

case in *Simcoe & Erie General Insurance Co. v Kansa General Insurance Co.*<sup>345</sup>. The Canadian court have tried on numerous occasions<sup>346</sup> to avoid the circular reasoning adopted where the insurer would argue that to see if the particular insurer was liable what had to be looked at was whether the other insurance would function as the primary policy if the other policy was not in existence. The other insurer would then argue that its policy was excess to the other policy in place. This argument does not resolve the problem of which policy provides primary coverage<sup>347</sup>. McEwan J<sup>348</sup> stated, “Beyond a certain point I do not think it makes much sense to arbitrate what amounts to a kind of drafting ‘tag’. The clauses are irreconcilable. Applying the principles set out in the cases the excess clauses are inoperative.” The courts tend to hold that where there is “Other insurance” clauses they tend to cancel out each other, and because the cancel out each other, both the policies provide primary coverage which results in both insures paying out equally to the applicable limits of each policy or until none of the loss remains<sup>349</sup>. The intention which the

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<sup>345</sup>(1994), 93 B.C.L.R. (2d) 1 (C.A.) which was affirmed on appeal at (1981) 27 B.C.L.R.89. In this case there were two policies in place which covered personal injury. Both these policies had “other insurance” clauses. One policy contained a pro-rata clause and the other an excess clause.

<sup>346</sup> (1999) 10 C.C.L.I (3d) 58

<sup>347</sup>*McGeough v Stay N’ Save Motor Inns Inc.* 116 D.L.R.(4<sup>th</sup>)

<sup>348</sup> (1999) 10 C.C.L.I (3d) 58

<sup>349</sup>*McGeough v Stay N’ Save Motor Inns Inc.* 116 D.L.R. (4<sup>th</sup>) and *Dominion of Canada General Insurance Co. v Wawanesa Mutual Insurance*. (1985), 64 B.C.L.R. 122(S.C). In *Dominion of Canada General Insurance Co v Wawanesa Mutual Insurance Co*, the court was of the view that the insurance companies would share the liability. Proudfoot J went on to say that to give effect to the excess clauses of the policies would create an absurd result where no one would pay. She then went on to refer to Brown and Menezes, *Insurance Law in Canada* (1982) p.349 at para 15:2:11 which discussed *Weddell v Road Tpt & Gen. Ins. Co.*, where both policies had excess clauses. The authors stated as follows: “This consequence was avoided in the English case of *Weddell v Road Transport & General Insurance Co* where a driver of an automobile was involved in an accident and incurred liability as a result. His liability was insured by a driver’s policy and also under the terms of the policy of the owner of the vehicle. Each policy contained a clause denying liability if the risk was covered by other insurance. Rowlatt J considered that ‘it is unreasonable to suppose that it was intended that clauses such as these should cancel each other....with the result that, on the ground in each case that the loss is covered elsewhere, it is covered nowhere’. Accordingly, the judge held that as a matter of construction the category of co-existing cover contemplated by each clause did not include cover ‘which is expresses to be itself cancelled by such co-existence.’ the result was that each insurer contributed half the amount of loss as if neither policy contained a double insurance provision. This is a sensible approach.” In *Family Insurance Corp v Lombard Canada Ltd*, 1999 CanLII 6253 (BC SC), where there were two policies were not identical and the first question the court stated was whether the clauses could be reconciled. This would be done by determining by the intent of the two insurers as revealed by the content of the policies which were issued by them. Reference was made to *Simcoe & Erie General Insurance Co v Kansa General Insurance Co* (1994) 93 B.C.L.R (2d) 1 (B.C.C.A) per Hinds J at p.9., and it was concluded that the clauses were irreconcilable and the excess clauses then became inoperative. The above principles were applied in *Lumbermen’s Underwriting alliance v Axa Pacific Insurance Co* 57 BCLR (4<sup>th</sup>) 293, at [49] and [50].

court seeks to determine is found by looking at the means by and extent to which each insurer has sought to limit its liability to the insured when the insured has purchased other policies covering the same risk. The interpretation exercise is concerned with determining the intentions of the insurers vis-à-vis the insured.<sup>350</sup> In *Family Insurance Corp. v. Lombard Canada Ltd.*<sup>351</sup>, the Supreme Court of Canada, in the judgment of Bastarache J, agreed that although it was correct that the intentions of the insurers prevail, the inquiry was of necessity limited to the insurers' intentions vis-à-vis the insured. When dealing with insurance contracts the entire agreement was found within the policy itself and evidence of the intention between the parties must be sought in the words they choose. Where there is a dispute between insurer and insured on the other hand, where the provisions are unambiguous then reference needs to be made to the surrounding circumstances. Where the dispute is then between insurers, then there is no reason to look outside the policy. If there was no privity of contract between the parties, the unilateral and subjective intentions of the insurers, who were not aware of the existence was irrelevant. In *Family Insurance Corp*, the insurers tried to utilise provisions in their respective policies which contained clauses limiting their own liabilities. The Court<sup>352</sup> raised concerns about this area of law and stated that "the reconciliation of competing and apparently irreconcilable insurance policy provisions has plagued the Court". Here the owner of a stable and owner of the horse was sued by Patterson who was injured when he fell from a horse. His claim was settled by the insurers of the owner of the stable, Family Insurance Corporation, under a homeowner/residential insurance policy. The owner was also at the time insured by Lombard Canada Ltd. under a Commercial General Liability Policy. The wording of the policies were different but both contained "other insurance" clause which claimed to be "excess coverage" to

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<sup>350</sup>*Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48. In *Seagate Hotel Ltd v Simcoe & Erie General Insurance Co.* (1981) 27 B.C.L.R. 89 (C.A) where McFarlane J.A stated: "The second matter, which in my opinion is a very important consideration to keep in mind here, is that the court is not asked to interpret a contract made between the appellant and the respondent companies. The issue depends upon the interpretation and the application of two contracts, both insurance policies, the first being a contract between the appellant and the insured and the second the contract between the respondent and the insured."

<sup>351</sup> [2002] SCC 48

<sup>352</sup>Bastarache J. He was of the view that this would be a good opportunity for the Supreme Court to clarify the law in this area.

any other insurance coverage held by the insured.

It can be seen that the Canadian courts tend to follow the so called principles in England where there would be a cancelling out<sup>353</sup> of the policies which would result in an equal payment out from the insurers. This would be a less drastic approach, as opposed to holding that such exclusion clauses would be completely void, like the position in Australia. It is interesting to note that the Canadian courts draw a distinction between the insured and the insurer and insurers between themselves, when deciding what factors should be looked at when interpreting the clauses and intent. This distinction would suggest that the courts by allowing surrounding circumstance to be looked at, would allow for better protection of an assureds' right.

### **3.18 Possible Alternatives**

The first step is to ascertain whether there is double insurance or not. If there is, then one will have to look at the wording in the policy to see what effect it has on contribution. If the clauses are identical in nature, the courts are more likely to conclude that such clauses cancel out each other. This will enable the assured to seek indemnity for the loss suffered from whichever insurer he wants to claim from. Clauses which limit or exclude liability in one policy and provide for a rateable proportion clause in another will have the effect of the former clauses trumping the latter. If there is an escape clause with an excess clause, then the excess clause will have to provide cover unless another clause is present to provide cover. Although it may be suggested that the courts' approach still affords protection to the assured, where there is double insurance, the question is, does this provide sufficient protection to the assured who has paid out large amounts on premiums? Due to the problems caused by these clauses on their own or when in combination, it may also be suggested that an easy way out for the courts is to conclude that there is no double insurance.

The NFU case does not provided any new principles on the law of double insurance but has

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<sup>353</sup> However, in *Evans v Maritime Medical Care Inc* 1991 CanLII 2478 (NS CA), the Supreme Court of Nova Scotia considered it unnecessary to resort to the principles as stated by the authors in Brown and Menezes (see fn 342 above) and instead relied on the clear wording of the policy and held that the MMC policy in that case did not contain an exclusion clause.

provided some clarification on the existing law. However, the NFU decision still does not resolve the problems in relation to the wordings and combination of the clauses.

Therefore the possible solutions to the problem of double insurance could be as follows:

If there is double insurance, then regardless of the type of clause used and its wording, if there is double insurance, all insurers have to indemnify the assured equally; or

Follow the Australian position under s45 of the Insurance Contracts Act 1984 and conclude that all such clauses will be void, and provide for exceptions according to s45(2), but that it only apply to true excess clauses.

It seems that the better option to solve this problem, is to enact legislation similar to that in Australia. As a result of s45(1)<sup>354</sup> the Common Law position where you have a policy with an excess or escape clause and another policy with a rateable proportion clause, and the escape and excess clause prevailing over the rateable proportion clause are no longer effective<sup>355</sup>. The assured can now choose to seek indemnity from whichever insurer he wants to and it will then be for the insurers to seek contribution amongst themselves. This is not the concern of the assured. This would have the effect of making clauses which limit liability if there is other insurance present to be void. This will set out to achieve what the legislature had intended to do which was to provide certainty to an assured. This is exactly what would be beneficial to the assured.<sup>356</sup> The insurer on the other hand is protected as they receive premiums. Australia has already had the legislation in place since 1984, after a detailed Report was commissioned by the Law Reform Committee, which puts England in a better position to make changes or amendments to potential legislation in England if similar legislation is implemented.

### **3.19 Possible Solutions to the Clauses: Is there a solution?**

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<sup>354</sup> Insurance Contracts Act 1984

<sup>355</sup> s76 Insurance Contracts Acts 1984

<sup>356</sup> Although some may argue – does this mean that contractual intention of the parties can be ignored?



As can be seen from the above discussion, the courts have tried to provide solutions to the likely effects of the clauses when looked at in isolation or when looked at together, in combination.

The question is whether one can actually find a solution to the complexity of the issues the clauses create. Although I have suggested that England should follow the legislative provisions of Australia by implementing similar legislation, with modification, when dealing with the issue of true excess clauses, there are some who will argue that Parliament would be slow to do so. Further it could be said that the law should not move away from the years of parties being free to enter into contractual agreements and for the parties themselves to decide the terms that have and should be included in such contracts. This would mean that if the parties choose to include a clause which excludes liability completely, then they should be permitted to do so without restrictions being placed by the courts<sup>357</sup> or legislature.

This argument may be correct but ultimately the interests of the parties and in particular, whose interests, should protection be given to, has to be considered. For insurance contracts, they at present do not fall under the Unfair Contract Terms Act 1977 and cannot therefore receive the protection afforded under it.

There has been a lot of discussion as to whether the unfair consumer contract terms principles have a role to play in the insurance market. One would have to look at the historical effect of the insurance market and the attempts made to give protection to consumers. The Bubble Act 1720 was the first steps towards a legislative framework to give some consistency to the insurance market. This however only dealt with commercial transactions and the main concern of consumers was the likelihood of the insurance company closing down or payments of policies not being honoured. Workmen's Compensation was introduced in 1897, but there were still problems with the regulation and the development of a consistent structure regarding consumer insurance matters. Discussion and the proposed recommendations can be found in the Law Reform Committee's Report in 1957<sup>358</sup>, but again these did not go through. More resistance was

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<sup>357</sup> *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 339 at [29]

<sup>358</sup> Report 5, Cm 62

also seen when proposals were put forward in 1980.<sup>359</sup> However, there was some change in the form of the Unfair Contract Terms Act 1977. Further protection was found in the formation of the Insurance Ombudsman Bureau who followed the guiding principle of good insurance practice. Another piece of legislative initiative to provide protection was the Financial Services and Markets Act 2000, however, this was catered more towards giving recognition to bodies such as the ombudsman.

Due to the numerous bodies and societies that were set up, this led to decisions being inconsistent, which led to uncertainty. Guidelines then developed in the 1986 Statement of Practice, Insurance Conduct of Business Rulebook and then the Insurance Conduct of Business Sourcebook.

The Unfair Terms in Consumer Contracts Regulations 1999 did not cover insurance, unlike consumer contracts which were covered. However, the decisions of the Office of Fair Trading and the Financial Services Authority have played a significant role in the insurance market, where the impact of the Regulation is evident. When dealing with consumer contracts, one can see that a common thread is one of fairness, which the Regulation sets out. The principle encapsulates good faith, the rights of the parties and the detriment to the consumer. It has been argued that the Regulations have little application in insurance contracts.<sup>360</sup> Further it has been seen from the cases<sup>361</sup> that the courts will look towards the law established in insurance cases and the Regulations in place in the industry. The exceptions to the 1999 Regulations<sup>362</sup> are also of no relevance in England, even though the question to be asked is whether the terms are core or ancillary. This is unclear and is of no guidance, and has no more application due to the principle that ambiguity removes the privilege exception conferred upon the former.<sup>363</sup> However, it would seem that the law of general insurance and the establishment of regulatory bodies are sufficient to give protection to consumers.

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<sup>359</sup> Law Com No 104

<sup>360</sup> Unfair Terms In Insurance Contracts: A Solution In Search of A Problem (2012) 23 Ins LJ 272

<sup>361</sup> *Bankers Insurance Co v South* [2003] EWHC 380 (QB); *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EHC 2156 (Comm); *Direct Line Insurance plc v Fox* [2009] EHC 389 (QB)

<sup>362</sup> For example Reg 6 and Reg 8.

<sup>363</sup> (2012) 23 Ins LJ 272, 279

The legislation in Australia does control the policy terms, for example like that in s45 Insurance Contracts Act 1984, not to mention other sections.<sup>364</sup> The regulative structure consists of the Australian Prudential Regulatory Authority, which derives its powers from statutes such as the Australian Securities and Investment Commission Act 2001 and Corporations Act 2001. Later the establishment of the Financial Ombudsman Service was formed. There was also the development of the General Code of Insurance Practice which required openness, fairness, and honesty when dealing with customers.<sup>365</sup>

Therefore it is clear that Australia has the benefit of the Insurance Contracts Act 1984 and consumers are protected under the Unfair Contract Terms Regulations 1999, but it does not apply and provides no assistance to insurance contracts. In 2009 there was discussion regarding consumer protection laws and whether a more general consumer based protection should be introduced. This was seen in the Trade Practices Amendment (Australian Consumer Law) Act 2010<sup>366</sup>. As can be seen from the case of *Jetstar Airways Ptd Ltd v Free*<sup>367</sup> that there has been a diversion from the test of unfairness. One now has to look at the statutory requirements under s12BG(1)<sup>368</sup>. It seems that emphasis is placed on the balances between the parties, their rights and obligations. Another further requirement is that the term is one that is not reasonably necessary to give sufficient protection to the party, the insurer, who would have the benefit provided by the term and thirdly, the likely detriment that the term would cause. However, after extensive discussion, it was concluded by the Unfair Terms in Insurance Contracts DRAFT Regulation Impact Statement for consultation that the unfair contract terms legislation was difficult to apply in insurance contracts.<sup>369</sup> The reason for this is that it does not provide protection when one is dealing with regulated policy terms, insuring clauses and exclusions. It had been suggested that failure to read insurance contracts are not problems of unfairness.<sup>370</sup> Therefore it would be more beneficial if separate legislation was imposed similar to that of s45, rather than relying on unfair contract term provisions. However, it should be noted that the

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<sup>364</sup> For example s8,13,14,34-36,37A-37E,37,42,43,44,45,53,60 and 52 Insurance Contracts Act 1984.

<sup>365</sup> para 1.19

<sup>366</sup> Section 12BF to 12BM

<sup>367</sup> [2008] VSC 539

<sup>368</sup> Trade Practices Amendment (Australian Consumer Law) Act 2010

<sup>369</sup> See Report dated March 2012

<sup>370</sup> (2012) 23 Ins LJ 272,286

proposals as suggested in Australia lapsed when the Australians announced their general elections in 2013.

At present, since similar legislation to s45 has not been considered in England, based on the law as it stands, one then has to consider whether there is another solution possible when considering the clauses.

Ultimately, the interest of the assured should be looked at and considered more favourably. First, the elements of the requirement of double insurance must be present before one can start to consider the likely or possible formula that could be applicable. The main consideration when devising a formula would be the protection of an assured.

Therefore where you have similar clauses of one specific type in the insurance contract and Policy A provides for a non-contribution clause and Policy B does not, then the assured can then seek contribution from the insurer that provides for cover, namely Policy B. When there is a situation where Policy A and Policy B both have a clause which are both in the form of exclusion clauses, which are identical, then they cancel out each other and this would mean that both Policy A and Policy B are and should be held liable to pay the assured. To hold otherwise, would result in the assured without any form of protection.

Where you have a situation where you have more than one clause in the insurance policies, then where the clause is one of rateable proportion clause, the rateable proportion clause should take priority and both policies have to pay out equally. However, in such situations where there are also present excess clauses, then only if it is a true excess clause, will the excess clause take priority over the rateable proportion clause. If the clause is a true excess clause, then it takes priority.<sup>371</sup>

This would ensure protection of the assured, who if double insurance arise, must get the benefit of being paid out for the loss he has suffered. It would then be up to the insurers themselves to

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<sup>371</sup> This should be the correct position and not the position as was decided in the case of *Austin v Zurich General Accident and Liability Insurance Co Ltd* [1945] KB 250

seek contribution from one another.

## **PART B**

### **CHAPTER 4 THE MEANING OF CONTRIBUTION**

#### **4.1 When does contribution arise?**

Before the issue of contribution arises, all the elements of double insurance must be present. There has to be certain factors present for there to be double insurance. The long established principles are as follows: the policies must cover (1) the same subject matter, (2) same assured, (3) same risk, (4) same period of cover and (5) same scope. Apart from this, there is a requirement that the policies which are in existence at the time must respond to the loss when a loss arises. Further, that the insurer is not paying out as a volunteer, but due to their legal

relationship, is required to pay out on a loss<sup>372</sup> when an event happens. In practice when dealing with non-marine insurance policies, the assureds' rights are more often than not circumscribed by the terms of the policies which will have provisions against double insurance excluding, or limiting the insurers liability if other insurers are involved in the same risk. This means that the assured will have generally little choice but to go to all the insurers to recover his loss.<sup>373</sup>

In England, there have been numerous occasions where the court has concluded that there is no double insurance. However there have been situations where the trial court may conclude that there is no double insurance but on appeal, the appellate courts conclude that there is in fact double insurance. Therefore the defining line by application of the above principles may not be as clear as one expects or hopes them to be.

Contribution affects insurers, in terms of whether an insurer has to pay out under an insurance policy and if so, to what extent. Contribution does not apply to an assured. Another important issue is whether the insurer who has paid out under a claim can then seek contribution from other insurers, and in what order. The principles in *Newby v Reed*<sup>374</sup> which were laid down by Lord Mansfield<sup>375</sup>, have been approved and followed.

#### **4.2 Balancing the Interest of the Insurer and the Assured**

When balancing the interest between the insurer and the assured, it could be said that both interests are balanced. From the assureds' point of view, the benefit of double insurance is the ability to take out numerous insurance policies<sup>376</sup>, and then make a claim against any one of the insurers, on the happening of a loss. From the insurers' point of view once payment has been

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<sup>372</sup> It has been suggested that where there is a rateable proportion clause which limits the plaintiff's liability to 50% of the loss this would be considered as voluntary: see Double Insurance and payment of another's debt (1993) 109 LQR 51

<sup>373</sup> See Insurable Disputes (3<sup>rd</sup> Edition) - Double Insurance John Dunt and Wayne Jones Chapter 10

<sup>374</sup> (1763) 1 Wm B1 416

<sup>375</sup> The course of practice was that upon a double insurance, though the insured is not entitled to two satisfactions; upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers.

<sup>376</sup> Of course assuming the criteria of double insurance is satisfied i.e the policy cover the same assured, the same interest, the same subject-matter and the same peril or risk.

made out to the assured, the insurer can then go on to claim contribution from a particular insurer or all insurers.<sup>377</sup> However, methods have been devised that ultimately lead to the insurer not paying out or only having to pay out to a minimum extent. This is always done by including in the contracts policies clauses or wordings.<sup>378</sup> The result of this was to deprive the insured of the only potential advantage of double insurance acquired by paying additional premium (i.e that of having the choice against which insurer to proceed) and secondly, eliminating the multiple debtor situation.<sup>379</sup> The “other insurance” exclusion will allow the insured with the choice of only one insurer, as opposed to two or more insurers.<sup>380</sup> For “rateable proportion” clauses the amount that has to be contributed will be the proportion as stated in the policy. The two insurers remain liable, but there is no overlapping liability, and the assured must seek indemnity from both of them.<sup>381</sup>

It could be said that if this was the result of such clauses, then the courts or the law should permit the use of such clauses. However, to do so would leave the assured with no protection in situations where he has insured the interest with just one insurer who subsequently becomes insolvent, which was why double insurance was permitted in the first place<sup>382</sup>. In an article entitled, Double Insurance and Payment of Another’s Debt<sup>383</sup> an interesting question was raised. This was as follows, “Why should the risk of insolvency of one insurer be imposed on the insured when the premium which the other insurer received was calculated on a full liability basis and when the insurer had no right to expect that another party would share the obligation?”

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<sup>377</sup> Support has been found in *North British & Mercantile Insurance Co v London, Liverpool and Globe Insurance Company* (1877) 5 Ch D 569; *Commercial Assurance Co Ltd v Hayden* [1977] 1 Lloyd’s Rep 1, *Bovis Construction Ltd v Commercial Union Assurance Co Plc* [2001] 1 Lloyd’s Rep 416 and *American Surety Co of New York v Wrightson* (1910) 16 Com Cas 37 (although this was a case dealing with fidelity guarantee). The Australian decision of *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342

<sup>378</sup> These include “other insurance” clauses or excess clause, rateable proportion clauses and exclusion clauses.

<sup>379</sup> Double Insurance and Payment of Another’s Debt (1993) 109 LQR 51

<sup>380</sup> Double Insurance and Payment of Another’s Debt (1993) 109 LQR 51

<sup>381</sup> Double Insurance and Payment of Another’s Debt (1993) 109 LQR 51

<sup>382</sup> MacGillivray and Parkington, *Insurance Law* (8<sup>th</sup> Ed) p.772

<sup>383</sup> Double Insurance and Payment of Another’s Debt (1993) 109 LQR 51 (1993) 109 LQR

It could be argued that the three clauses, (1) “other clauses”, (2) “ratable proportion clause” and (3) “excess clause” should be done away with. An insurer already has the benefit of seeking contribution from other insurers who the assured has insured with. The insurer should then not be permitted to have the added benefit of, by inclusion of such clauses, limiting the assured right of recovery. The assured should still be entitled to choose whichever insurer he wishes to claim from, as the assured is in any event paying such high premiums. A possible solution could be to exclude all such clauses from the insurance policies and permit the assured to take out as many insurance policy he wishes, pay high premiums as required and then choose whichever insurer he wants to claim from.

This will then alleviate the need to wait for a resolution of the disputes, if one occurs, between the insurers if one of the insurers claims that he is not liable to pay out under the policy, say for example where there is a situation where the assured fails to notify under the terms of the policy of an accident. The assured will not have to worry about the potential litigation between the insurers, and as to who is liable, although, there could arise a situation where both insurers claim that neither is liable, unlike the usual situation where one of the insurer is liable, or free from liability or where liability is proportionally reduced. In *Legal & General v Drake Insurance Co. Ltd*<sup>384</sup>, the court refused to allow for contribution on the basis of the rateable proportion clause.

#### **4.3 Contribution: Common Law or Statutory?**

Generally contribution can be sought where there are numerous insurers who state that they will be liable for the loss suffered by the assured for the same loss. However, the issue still remains, from which angle should one be focusing on – the assureds or the insurers. There has been discussion in the case of *Bovis Construction Ltd v Commercial Union Insurance Co Ltd*<sup>385</sup> as to whether contribution was permitted on (1) the basis of the contractual relationship between the parties or (2) whether it should be permitted due to the equitable principle or (3) was it permitted

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<sup>384</sup> [1992] 2 W.L.R 157

<sup>385</sup> [2001] Lloyd's Rep. I.P 321s



under some statutory provisions. Steel J concluded that it was based on equitable principles and the Civil Liability (Contribution) Act 1978 did not apply. This was crucial to prevent the assured from receiving more than he was entitled to be indemnified for. Therefore it cannot be said that as the assured has agreed to the terms of the insurance policy, so he must be satisfied with the final result due to the policy wordings. If one were to look at it on the basis of equitable principles, then this would include the issue of fairness.

In *Austin v Zurich General Accident and Liability Insurance Co Ltd*<sup>386</sup> MacKinnon L.J dealt with a technical point, which was, who was the correct party to bring a claim under double insurance. He was of view that as the claim of Bell, the insurer of the Plaintiff, was one of contribution against the Zurich company on the principle of double insurance, and that such a claim ought to be brought in the name of the underwriters against the defendant company and that it could not be pursued in the name of the assured under the guise of a claim by way of subrogation. Here the courts were emphasizing the distinction between subrogation and double insurance.<sup>387</sup> Confusion can arise when there are two or more policies involved. The principles of subrogation ensure that the assured will not receive more than the indemnity that he is entitled to. Contribution on the other prevents any injustice arising between insurers. However there have been occasions which have arisen where contribution and subrogation happen at the same time.<sup>388</sup>

There is a summary in *Caledonia North Sea v London Bridge Engineering and Others*<sup>389</sup> where Lord Caplan stated that the principle behind contribution was succinctly put by Professor Gloag<sup>390</sup> where he stated as follows:

“It is a general principle, dependent on equity, that where several persons are liable for the same debt, each, though he may be liable in solidum to the creditor, is liable only for a proportionate

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<sup>386</sup> [1945] KB 250

<sup>387</sup> *Caladonia North Sea Ltd v British Telecommunications plc and Others* [2002] Lloyd’s Rep IR 261 which stated that they were mutually exclusive.

<sup>388</sup> Colinvaux’s Law of Insurance 8<sup>th</sup> Edition (2010) p.414

<sup>389</sup> [2000] Lloyd’s Rep IP 249, 257

<sup>390</sup> Gloag on Contract 2<sup>nd</sup> Ed page 206

share in a question with his co-debtors, and, if he is forced to pay more, has a right of relief against them. This principle, though it has been chiefly illustrated in questions between co-cautioners and insurance companies who have undertaken the same risk, does not depend on any specialty in the law of cautionary obligations or insurance, but proceeds upon a principle of law which must be applicable to all countries, that where several persons are debtors, all shall be equal.”

He went on to say that an important factor is that the parties should have undertaken the same risk to the same common creditor. Although noting the distinction between an ordinary contract and a contract of insurance, he concluded that it was clear from the authorities that the contracts which give rise to the joint debt need not be identical. The question was whether in relation to the creditors, had the debtors obliged themselves for the same debt? Insurance, whatever its special features, is basically an indemnity to cover losses arising from a particular event. It is difficult to argue that any alternative position should apply.

## **CHAPTER 5 WHEN THE RIGHT OF CONTRIBUTION ARISES**

### **5.1 Factors which have to be present for Contribution**

As stated above the right of contribution will only arise if certain conditions are present and satisfied: (a) there is double insurance, in that the two policies cover the same assured, the same interest and the same period and are more or less of the same scope; (b) both policies respond to the loss; and (c) the paying insurer has paid under legal liability and not as a volunteer.<sup>391</sup>

### **5.2 Same Subject Matter Common to Both Policies and Each Policy must cover the Same**

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<sup>391</sup>Colinvaux’s Law of Insurance 8<sup>th</sup> Ed (2010)

## Interest in the Same Subject Matter

In the case of *North British and Mercantile Insurance Co v London, Liverpool and Global Insurance Co*<sup>392</sup> Messel J dealt with the condition of double insurance. There were two policies in effect and problems arose due to the drafting of the clauses in the policies which stated that they would not be liable to contribute more than their rateable proportions where other insurance was present. There was a fire which broke out destroying some grain which was stored with Barnett & Co which belonged to Rodocanachi & Co., who had similar policies covering grains stored at different locations. When reading the condition, Messel J stated that as the wharfinger's conditions were not just insuring the assured's property but the property which they were holding on trust or on commission, for which they were responsible, this was an important consideration when construing the conditions. The word "property" which was used in the conditions does not mean the actual chattel but the interest of the assured person. According to him, the words "covering the same property" in Condition 9 could not mean the actual chattel, as an absurd result would occur. He concluded that such words were included where the same property, that is the subject-matter of the insurance, and the interests are the same<sup>393</sup>. It is interesting to note that he was of the view that the condition must be read in a sensible way and that one should not assume that these, "great companies" as he called them, intended to entrap their policyholders and to destroy the value of the contract of indemnity by reason of the accidental contract of somebody

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<sup>392</sup>(1877) 5 ChD 569, CA per Jessel MR at 577. In this case, there was a floating policy by the wharfingers (Barnett & Co) which insured against loss and damage by fire of large amounts of grain and seed which was owned by Rodocanachi & Co who were merchants (they issued a merchants' policy) and stored with Barnett & Co. The floating policy was subject to the conditions of average with conditions. The material conditions on the back of the policy were as follows: " 9. If, at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage. 10. In all cases where any other subsisting or insurances, whether effected by the insured or by any other person, covering any other property hereby insured, either exclusively or together with any other property on such property in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner." The Supreme Court of Singapore has followed these principles in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* (formerly known as *Liberty Citystate Insurance Pte Ltd*) [2005] 2 SLR 509, at para [9] to [17] of the decision.

<sup>393</sup> It would never apply to, for example, cases of a tenant for life, or a first mortgagee and second mortgagee, both insuring the same goods.

else, which had no connection with the subject matter of the contract, or with the price paid for the insurance.

That may have been his view of how insurers should behave, but when dealing with insurance contracts the insurer will always have a much stronger bargaining power. This can be seen from the cases that have developed<sup>394</sup>. Insurers will rely on such clauses to try and exclude liability or at least limit the amounts they have to pay out. Messel J went on to say that it was his duty to make the instrument rational, and to make it a contract such as a person in the city of London would be likely to enter into, and not one which would be utter absurdity. To argue that whether the clauses in the instrument would lead to an absurd result should be something left to the judges, would not be helpful. From the cases<sup>395</sup>, it can be seen that judges themselves may not be in any better position in providing a solution, which has resulted in conflicting decisions by the judges and authorities over the years.

However, what first has to be established is the policy must cover the same assured and just because the policies relate to the same object which has been insured is not sufficient.<sup>396</sup> The rule will not apply where you have a situation where there are different interest although the subject matter that has been insured with numerous insurers.<sup>397</sup> It is essential that each policy must identify the same assured in respect of the same loss.<sup>398</sup> In *GIO General Limited v Insurance Australia Limited t/as NRMA Insurance*<sup>399</sup>, Master Harper looked beyond the manner

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<sup>394</sup>*Gale v Motor Union Insurance* [1928] 1 KB 359; *Weddell v Road Traffic General Insurance Co* [1932] 2 KB 563; *Structural Polymer Systems Ltd and Another v Brown* [1999] C.L.C 268; *National Employers Mutual General Insurance Association v Haydon* [1980] 2 Lloyd's Rep 149; *Austin v Zurich General Accidental and Liability Insurance Company Ltd* [1945] KB 250 ; *State Fire Insurance General Manager v Liverpool and London and Globe Insurance Co Ltd* [1952] NZLR 5

<sup>395</sup> For example *Gale v Motor Union Insurance* [1928] 1 KB 359; *Weddell v Road Traffic General Insurance Co* [1932] 2 KB 563; *Structural Polymer Systems Ltd and Another v Brown* [1999] C.L.C 268; *National Employers Mutual General Insurance Association v Haydon* [1980] 2 Lloyd's Rep 149; *Austin v Zurich General Accidental and Liability Insurance Company Ltd* [1945] KB 250 ; *State Fire Insurance General Manager v Liverpool and London and Globe Insurance Co Ltd* [1952] NZLR 5

<sup>396</sup>*Nichols & Co v Scottish Union and National Insurance Co* (1885) 14 R (Ct of Sess) 1094; *Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co* (No 2) (1886) 18 LR Ir

<sup>397</sup>*GIO General Ltd v Insurance Australia Ltd (t/as NRMA Insurance)* (2008) 15 ANZ Insurance Cases 61-761; *Insurance The Laws of Australia* (2010) Anthony A. Tarr, Juliet-Anne Tarr and Malcolm Clarke para [22.1.3770].

<sup>398</sup>*GIO General Ltd v Insurance Australia Ltd (t/as NRMA Insurance)* (2008) 15 ANZ Insurance Cases 61-761

<sup>399</sup> (2008) 15 ANZ Insurance Cases 61-761

in which the original claim by the injured person was framed<sup>400</sup> and stated that this was not capable of being determinative of whether or not dual insurance applied. Generally, the wording of the policy is usually looked at by the courts. It seems that just because a particular wording is used should not be automatically assumed that this would be all the courts would look at in deciding the intentions between the parties. The circumstances of the case which lead to the wordings should also be looked at. This is the approach in Canada.

Although the distinction between insurable interests in the same subject matter<sup>401</sup> seems easy to comprehend<sup>402</sup>, it is not that clear. For example in *Boag v Economic Insurance Co Ltd*<sup>403</sup>, there was in place a Lloyd's all risk transit policy which was issued to cover tobacco and cigarettes which were on transit by motor vehicle from the time of taking over until delivery, including loading and unloading anywhere in England and whilst temporarily off-loaded in the course of transit. There was a fire at the assured's premises where the lorry was driven to. There was a fire policy which was also in place which covered the premises where the goods were driven to. The issue was whether the all risk transit policy came within the definition of the assured's own stock-in-trade at the insured's premises. The court held that it did not, and it was not covered by the fire policy. Therefore the issue of contribution did not arise.

In the Australian case of *Davjoyda Estates Pty Ltd v National Insurance Co of New Zealand Ltd*<sup>404</sup>, where the court<sup>405</sup>, when dealing with a trustee and beneficiary situation, concluded that

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<sup>400</sup> Here whether as a claim by an employee against an employer or as a claim against the owner or driver of a motor vehicle.

<sup>401</sup> In *American Surety Co. of New York v Wrightson* (1910) 27 T.L.R. 91, where it was stated that the principle of the insurance covering the same subject matter is not confined to property insurance and will apply to any property. Also see *Godin v London Assurance Co* (1758) 1 Burr 489 and *North British & Mercantile Insurance Co* (1877) 5 Ch D 569. In *Elf Enterprise (Caledonia) Ltd v London Bridge Engineering Ltd and Others* [2000] Lloyd's Rep. 581 where the court reconfirmed that the law has rejected any attempts to confine contribution to particular categories of insurance. The question ought to be settled on the basis of principle rather than by reference to any rigid classification such as insurance and non-insurance.

<sup>402</sup> *Boys v State Insurance Australia Ltd (t/as NRMA Insurance)* (2008) 15 ANZ Insurance Cases 61-761; *Strech v State Insurance General Manager* (1984) 3 ANZ Insurance Cases 60-577 (NZHC)(landlord and tenant); *North British & Mercantile Co v London, Liverpool & Globe Insurance Co* (1877) 5 Ch D 569 (bailor and bailee); *Hills Flooring Ltd v WH Foote & Co Ltd* (1985) 3 ANZ Insurance Cases 60-646(NZHC); *Portavon Cinema Co Ltd v Price & Century Insurance Co Ltd* [1939] 4 All ER 601; *American Surety Co of New York v Wright* (1910) 27 T.L.R. 91; *Boag v Standard Marine* [1937] 2 K.B 113.

<sup>403</sup> [1954] 2 Lloyd's Rep 581

<sup>404</sup> (1965) 69 SR(NSW) 381.

there would be double insurance even though there was what seemed to be different rights, which according to the judge was “precisely the same thing”. It has been commented<sup>406</sup> that this obiter statement is incorrect. This is because there was a significant difference in the interest between that held by the trustee and that held by the beneficiary. The burden to insure will be provided for in the trust deed or the will creating the relationship, but problems may arise if the beneficiary sought to become the registered proprietor of the real property subject to the trust.<sup>407</sup>

In *Tip Top v State Insurance*<sup>408</sup> there were two policies, the first covered property of the assured or any property where the assured was in some way responsible for and the other policy was in the form of a loan receipt which was issued by the bailor’s own insurer and which covered the same property. The court held that the same subject matter was covered.

Here again, the problem of whether there is double insurance or not, in terms of insurable interest in the same subject matter is not clear in all cases.

### **5.3 Each Policy must cover the Same Risk**

Another factor which must be satisfied is that both policies must cover the same risks<sup>409</sup>. The cases such as *Bovis Construction Ltd v Government Insurance Office of New South Wales* (1967)<sup>410</sup> and *Albion Insurance Co Ltd v Government Insurance Office of New South Wales*<sup>411</sup> state that if the policy covers the risk that has given rise to the claim in more than one policy, that

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<sup>405</sup> Brereton J

<sup>406</sup> Sutton, *Insurance Law in Australia and New Zealand* (1980) p.466

<sup>407</sup> *Insurance The Laws of Australia* (2010) Anthony A. Tarr, Juliet-Anne Tarr and Malcolm Clarke

<sup>408</sup> (2002) 7 NZBLC 103,564

<sup>409</sup> See *Marine Insurance Act 1906*, s32 (1), *Arnould’s Law of Marine Insurance and Average*, 17<sup>th</sup> Edition (p.1537) para 32-04, *MacGillivray & Parkington on Insurance Law*, 11<sup>th</sup> Edition p.659 para 23-004.

<sup>410</sup> 121 CLR 342

<sup>411</sup> (1969) 121 CLR 342

would be sufficient.<sup>412</sup> Again, as can be seen, the cases are not clear. It would seem that whether the policies cover the same risk bears more heavily on the insurer. If it is not present, this would mean that the insurer may not be able to seek contribution from the other insurers.

Further, the cases<sup>413</sup> seem to suggest that there has been a development of the test which has been used to ascertain whether the risk has been covered in both policies. The courts do not place much emphasis on whether there is temporary or partial overlap under policies which cover different classes of business, as long as the insured subject matter in question came within each of them.<sup>414</sup>

Looking at the early case of *Australian Agricultural Co. v Saunders*<sup>415</sup>, the court<sup>416</sup> was concerned with whether there was double insurance and whether on the construction of the policy, the goods were “insured elsewhere”. The assured insured some 3000 pounds of wool which were in bales. The wording of the policy stated that the insurance covered the wool against fire, “in any shed, or store, or station, or in transit to Sydney by land only, or in any shed or store, or on any wharf in Sydney, until placed on board ship.” Once this policy was taken out, at a later stage another policy, which was a marine insurance policy<sup>417</sup>, was taken out as well. Under this policy, the subject matter that was covered was a shipment of wool which was transported from Newcastle in New South Wales to Sydney and then to London. This however, also included “trans-shipment or landing or reshipment at Sydney”. The defendants’ policy

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<sup>412</sup> Therefore the policies do not have to be co-extensive.

<sup>413</sup> *Albion Insurance Co. Ltd v Government Insurance Office of New South Wales* (1969) 121 C.L.R. 342; *Australian Agricultural Co v Saunders* (1875) L. R 10 C.P 668; *National Mutual Fire Insurance Co. Ltd v Insurance Commissioner* (1985) 3 A.N.Z Insurance Cases 60-652; *Zurich Insurance Co v Shield Insurance Co* [1988] I.R. 174; *American Surety Co of New York v Wrightson* (1910) 103 L.T. 663

<sup>414</sup> *Australian Agricultural Co v Saunders* (1875) L.R 10 C.P 668 and Colinvaux’s *Law of Insurance Hong Kong* 2<sup>nd</sup> Ed (2010). Although this approach has not been followed by the English courts and they are of the view that the short-term or coincidental does not constitute double insurance when dealing with the right of contribution.

<sup>415</sup> (1875) L. R 10 C.P. 668

<sup>416</sup> by the Court of Exchequer Chamber

<sup>417</sup> The policy term included a clause : “ Lost or not lost at and from the river Hunter to Sydney per ship or steamers and thence per ship or steamers to London, including the risk of craft, from the time that the wools are first waterborne, and of transshipment and landing and reshipment at Sydney.”

provided that it was a condition of the policy that if wool was “insured elsewhere”, notice of such insurance was to be given to them, if not, then this would lead to the policy becoming void. The Plaintiffs did not notify the defendants of this new policy. There was a fire at the warehouse where the wool was stored in Sydney for reshipment. There was a claim made by the Plaintiffs under the first policy for the loss suffered. The court agreed with the Court of Common Pleas that the plaintiffs were entitled to recover. The court was of the view that the latter policy would not cover the goods which were kept on land, but it only covered marine risks. This meant that the goods did not fall within the meaning of “transshipment, landing, and reshipment at Sydney”, while it was being stored in the warehouse and this resulted in no double insurance. This in turn meant that the goods were not “insured elsewhere”<sup>418</sup> which would then require notice<sup>419</sup> to be given of the second policy<sup>420</sup>. In some cases, notification of subsequent policies may be a condition precedent, as was in the case of *Kempton v National Fire Insurance Co.*<sup>421</sup> This as mentioned above could be problematic for an assured who is unaware of the existence of such insurance.

It has been commented<sup>422</sup> that the effect of the judgment was that if there was insurance provided for in other policies it did not mean that they would cover insurances of a different nature which overlapped in part, and that the phrase should be limited to policies covering the same class of business and the same subject matter.<sup>423</sup>

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<sup>418</sup> this was held to mean “a specific insurance of the same risks, and that the words were not satisfied in the case of different policies upon different policies upon different risks, by the mere possibility of one overlapping the other under some possible circumstances.”

<sup>419</sup> There have been cases where if there is a waiver of notification requirement in one policy, where the policies overlap, then there is no double insurance:

<sup>420</sup> There have been situations where the assured has taken out a subsequent insurance policy but the latter policy never came into existence, and the court has stated that there is no double insurance: *Steadfast Insurance Co Ltd v F & B Trading Co Ltd* (1971) 125 CLR 578. In the United States the general approaches of the courts is to favour the insurer and are of the view that if further insurance is taken out it is likely to lead to the property being destroyed to claim indemnity. In Germany, the German Insurance Contract Act provides that in such situations, the assured must inform the each insurer of the existence of other insurance, without undue delay. : Commentaries on the Recent Amendment of the Insurance Law of the People’s Republic of China Regarding Insurance Contracts from the Perspective of Comparative Law, Washington University Global Studies Law Review, (Vol 10) Issue 4 749, 779, 780.

<sup>421</sup> (1886) 5 NZLR (SC) 47

<sup>422</sup> by Professor Robert Merkin

<sup>423</sup> Colinvaux’s Law of Insurance Hong Kong 2<sup>nd</sup> Ed (2010) p.416



However it can be seen that again the law in this area is also not certain. The case of *American Surety Co of New York v Wrightson*<sup>424</sup> was such a case. In *American Surety* the Plaintiffs were an American insurance company which issued a policy<sup>425</sup> agreeing to pay an American bank for any loss or damage which occurred out of any loss or damage which was caused by the dishonesty of any of the employees which came within the amount which was attached to the schedule. Another policy at Lloyd's<sup>426</sup> was taken where the underwriters were liable for loss caused by the dishonesty of employees and also for loss sustained by the loss or destruction on the owners' premises of bonds, banknotes and owing to fire or burglary." The employee who had been insured had misappropriated a sum of \$2869 and the bank claimed for full indemnity from the bank of \$2500. The balance of \$180 was then claimed under the Lloyd's policy. Both these sums were paid and it was agreed that under the policies the loss was covered. The only issue was the amount of contribution that was to be apportioned between the insurers. It is interesting to note that he was of the view that there was no double insurance present.

Hamilton J first looked at the wording of the policies and compared them. He concluded that on reading the instrument there was great dissimilarity between their scope and their capital. He looked at the headings given under the policy, one was called a security ship bond and the other was called a guarantee. However both policies were insurances and they both indemnified National Park Bank of New York against losses to its property caused by certain perils insured against. He looked at what was covered under the policy and the time period. He noted that the policies covered different items and different periods. The plaintiffs' policy insured against the bad faith and dishonesty of the scheduled employees, and no other risks, and the insurance for a period of twelve months, commencing 1<sup>st</sup> June in each year. The other policy on the other hand covered periods of commencement with 18<sup>th</sup> November in each year and covered not only the loss to the assureds' property by bad faith and dishonesty but in addition loss by their negligence,

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<sup>424</sup> (1901) 103 L.T. 663

<sup>425</sup> One of the employees was guaranteed up to \$2500.

<sup>426</sup> this was for the sum of \$40000

and in addition loss by the dishonesty addition losses by fire, and covered them locally not merely on their own premises, but if the documents were in transit in their own hands, or in the hands of their clerk or servants throughout the limits of Greater New York. The Lloyd's policy contained self-renewing clause which clearly stated that any loss happening, subject to a further premium of so much per cent. Looking at these factors he concluded that although the common elements of insuring against loss by dishonesty and bad faith of the employers differ considerably in scope, in terms of the hazard covered and the persons and things bringing those hazards into operation.

This view is interesting as it would suggest that it would not matter whether the policy is accidentally overlapping. However why should this be any different. If there is incidental overlapping then there should be double insurance, and contribution should be permitted. Further, if the insurers themselves are of the view that there is an overlapping of cover, then why should this not be the case. However, consideration must be given to the law of double insurance. The court has to conclude that there is the presence of double insurance before the matter of contribution thorough apportionment can be decided. It would of course be different if there was a dispute as to whether the policies covered the same risk and then for the court to decide on the matter. Further, one may argue, why should the scope of coverage be identical in the policy or the financial scope or the requirement that the scope of the policy has to be the same. A possible reason could be because it would not be possible to apportion any specific part of the premium paid under the wider policy to the subject-matter in question.<sup>427</sup>

The courts<sup>428</sup> in *Zurich Insurance Company v Shield Insurance Company Limited*<sup>429</sup> had to deal with the issue of whether the same risk was covered by both policies. The two policies were a motor insurance policy and an employers' liability policy. Under the motor insurance policy the plaintiff had to indemnify Q for any negligent driving of Q's motor car and had to indemnify the driver if a person who was driving the motor car was doing so with Q's authority. The defendant on the other hand under an employers' liability policy was liable to indemnify Q against liability

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<sup>427</sup>Colinvaux's Law of Insurance Hong Kong 2<sup>nd</sup> Ed (2010) p.417

<sup>428</sup> Supreme Court of Ireland

<sup>429</sup> [1988] I.R.174

to pay compensation for injury, accident or disease sustained by any employee of Q, arising out of and in the course of his employment with Q. S, an employee was seriously injured when his motor car, which was owned by Q and, in which he was a passenger, collided with a bus. D was driving. D and S were both travelling in the course of their employment. S recovered a substantial sum and Q could claim indemnity from D for the full award. The court held that while the liability to afford indemnity under each of the policies could arise on the happening of the same event, neither the interest of the insured under those policies nor the risks assumed by the plaintiff and defendant respectively were the same. The liability covered by the motor policy was Q's vicarious liability as the owner of the motor car, for the breach by the driver of a duty owed to the public in general and not for any breach of a duty which was owed by Q to S as his employer. The employers' liability policy covered the liability of Q for breach of its duty to take care in relation to S's safety in the performance of his duties due to his employment. As a result, the right to contribution did not arise.

In *Elf Enterprise (Caledonia) Ltd v London Bridge Engineering Ltd and Others*<sup>430</sup> the courts again came to the same conclusion on incidental overlaps. The claim was for death and personal injuries on the Piper Alpha platform in 1988, where the insured had no right to be indemnified by third parties who had granted the insured the contractual indemnities which was covered by the insurance policy. If such a claim was advanced by the insurers it would have to be done by way of a right to contribution from the indemnifier. The defenders asked to make good to the pursuers any loss which had resulted through the death or injury of any of the defenders' employees. The action was brought on indemnities. Elf Enterprise (Caledonia) Ltd (formerly OPCAL) seeking reimbursement of some £130,000,000 which was paid to the families of the men killed in the explosion and fire on Piper Alpha off-shore platform in 1988, and to survivors from contractors who had been engaged by them when operating the platform.<sup>431</sup> The insurance covered the liabilities of Piper Alpha oil platform for the death or personal injuries to persons employed on platform. There was also a contractual obligation by the contractors to indemnify operators

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<sup>430</sup> (1997) Times, 28 November

<sup>431</sup> It is interesting to note that the issue of contribution was only raised after 381 days of proceedings. The court stated that this was a fundamental argument.

against death or injury to contractors' employees unless caused solely by negligence or willful misconduct of the operators. The wording of the indemnities varied as between the contracts. The general principle was that a party could only recover under the indemnity for the loss which was incurred. It was argued by the defenders that the plaintiff could not seek compensation twice as they had already been indemnified twice. This was on the basis that the losses which were covered and the beneficiaries of the insurance and the indemnities were the same. Lord Caplan stated that two indemnifiers were jointly and severally liable, and if one had paid out more than his share he is entitled to seek relief from his co-obligants of a pro-rata share<sup>432</sup>. The court went on to say that the right of subrogation was different as the right of relief laid with the co-obligant directly<sup>433</sup>. On the facts of the present case, the court concluded that their obligations had been different but that both the insurers and contractors were pledged to have covered the same loss. Further there was nothing on the terms of the policy in Parr's Bank where the insurers have been obliged by their sureties to contribute towards any payment made by the sureties. The court correctly pointed out that the issue in the case was whether the parties had undertaken the same risk to the same common debtor. He agreed that the contracts which gave rise to the debts did not have to be identical in nature and once a party had recovered the whole loss under two or more indemnities covering the same loss, then the party would not be entitled to enforce his indemnity against the non-paying indemnifier as he had already satisfied his loss. The insurers of OPCAL and the participants did not have any right of subrogation in respect of the indemnities granted by the defenders. The reason was that they had no title or interest to sue. The only way open to the insurer was to recover by way of a separate action under contribution.

It has been commented that the above reasoning is flawed.<sup>434</sup> This is because it overlooks (a) the different nature of the two contracts, which would of itself preclude contribution (their insurable interests were also different); (b) the consequences that had the contractor paid out first, they could have sought contribution from the insurers even though they were not parties to the insurance contract and had paid no premium for protection under it; and (c) the long standing

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<sup>432</sup>Gloag Contract (2<sup>nd</sup> edition); *Moss v Penman* (1993 SC 300)

<sup>433</sup> He referred to *Sickness and Accident Assurance Association Ltd v General Accident Assurance Corporation Ltd* (1892) 19 R 977 and *Albion Insurance Co Ltd v Government Insurance Office* (1969) 121 CLR 342

<sup>434</sup>Colinvaux's Law of Insurance of Hong Kong 2<sup>nd</sup> Ed (2010) p.418.

rule applicable to subrogation, namely, that payment by the insurers entitles them to the rights of the assured against any third party who is not an insurer covering the same risk by way of double insurance. The House of Lords reversed the decision of Lord Caplan, and they held that the insurers were entitled to exercise rights of subrogation, as the law was settled that where an insurer had paid in full to an assured for loss that was covered by a contract of insurance between them, he could enforce in his own name, any right which was present to the insured.

Lord Bingham in the House of Lords stated that the issue was whether, as the operator contended, a subrogated claim properly made in its name by its insurer, who has indemnified it under a policy of insurance, to enforce a contractual right of the operator against the contractor or was it, as the contractor contended, a claim for contribution by one party liable to indemnify the operator against another? He preferred the view of the operator.<sup>435</sup>

It is interesting to look at the Australian position<sup>436</sup> to see what factors the courts will look at to see if the policies cover the same risks. In *Albion Insurance Co Ltd v Government Insurance Office of New South Wales*<sup>437</sup>, the court re-affirmed that there was double insurance when an assured is insured against the same risk with two independent insurers and that to insure with two insurers was lawful but that the assured could not receive more than the loss he has suffered and for which there is indemnity under each of the policies. The insured can then choose which insurer he wished to seek contribution from. Although it has to be noted that both insurers had to be liable, and if that is the case, then the doctrine of contribution will come into effect. Although the principles as laid down by Lord Mansfield's decision applied to marine insurance it is agreed that this principle now extends generally to insurance which provides the insured with an indemnity.

The High Court of Australia dealt with this in *Albion Insurance Co Ltd v Government Insurance*

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<sup>435</sup> Agreeing with the decision of the Judges of the Inner House

<sup>436</sup> Australia has the same requirements for there to be the presence of double insurance: *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 (Barwick CJ, McTiernan and Menzies JJ); *Allianz Australia Insurance Ltd v Territory Insurance Office* (2008) 23 NTLR 186; *GIO General Ltd v Insurance Australia Ltd (t/as NRMA Insurance)* [2008] ACTSC 38.

<sup>437</sup> [1969] CLR 342

*Office (NSW)*<sup>438</sup> where Street J in the lower courts applied the principles as laid down in the decision of *Government Insurance Office of New South Wales v Royal Exchange Assurance of London*<sup>439</sup>. In the present case, the Plaintiff was the insurer of A & V Bence Pty Ltd under an employees' indemnity principle where liability to employees was covered under the Workers' Compensation Act under an Endorsement for Common Law Liability.<sup>440</sup> The Defendant also had insured the same company but this was under the Motor Vehicles (Third Party Insurance) Act. Under the Motor Vehicles (Third Party Insurance) Regulations, the third party policy provides as follows: "Such insurer hereby agrees that during the period commencing and terminating as shown above, and during any period for which the insurer may renew this policy, the insurer shall insure the owner and any other person who drives the motor vehicle, whether with or without the authority of the owner, against all liability (except a liability referred to in subsection two of section ten of the said Act) incurred by the owner and/or the driver in respect of death of or bodily injury to any person caused by or arising out of the use of the motor vehicle in any part of the Commonwealth of Australia."

At the time of the accident, both policies were current and enforceable. According to Street J he was of the view that none of the exceptions which were available under the policies applied on the facts of the present case, Therefore he was of the view that both the employers indemnity policy which was issued by the Plaintiff and the third party policy issued by the Defendant contained provisions providing indemnity to A & V Bence Pty Ltd in respect of liability on its part to pay damages to the employee for his injuries. The three member court<sup>441</sup> agreed that the doctrine of contribution applied to insurance against liability to third parties and went further to say that it only applies, however, when each insurer insures against the same risk and that it is not necessary that they be identical. They provided an example where one insurer insures

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<sup>438</sup>(1969) 121 CLR 342. In *Commercial & General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374, the High Court of Australia re-iterated that the right to contribution between co-insurers which was recognised by the decision in *Albion*, could never amount to a complete indemnity but must be always confined to rateable contribution. This is the equity which can be relied on for rateable contribution.

<sup>439</sup> (1965) 82 WN (Pt.1)(NSW) 468

<sup>440</sup> "Subject to the terms and conditions of this Policy it is hereby declared and agreed that the Insurer will indemnify the Employer against liability to pay damages at Common Law or under the Compensation to Relatives Act 1897 as amended, for, or in respect of, personal injury to any employee who is a worker within the meaning of the Workers' Compensation Act, 1926-1954, and who at the time of the injury is in the direct employment of the Employer and is engaged in an employment to which this policy expressly applies."

<sup>441</sup>Barwick CJ, McTiernan and Menzies JJ

properties A and B against fire and the other insurer may only insure property A against fire. One policy may be for a limited amount and the other may be for an unlimited amount. One policy may cover the risk of a whole voyage and the other may cover only part of the voyage. These differences may only cover the amount of contribution recoverable but do not bear upon the question of whether or not each insurer has insured against the same risk so as to give rise to some contribution. This is the correct approach to be followed, even if there is only an incidental overlap. The court correctly pointed out the essential element for contribution, that whatever else may be covered by either of the policies, each must cover the risk which has given rise to the claim. The court went on to say that there was no double insurance unless each insurer is liable under his policy to indemnify the insured in whole part or in part against the happening which has given rise to the insured's loss or liability. The court departed from the views of Myers J and concluded that the insured company insured against the same risk with both the plaintiff and the defendant. The court was of the view that the matter could be easily resolved by making enquiries whether payment by one insurer of the policy holder's claim for indemnity would provide the other insurer with a defence to a like claim against it. The answer was that it did, on the basis that the policy holder had been indemnified once payment was made to him. The reason for this was that as he had already received all that he was entitled to receive under both policies so that payment by one insurer would discharge both. As payment made by one of the insurer was beneficial to both of them, and the fact that contribution is equity.<sup>442</sup> The three judges<sup>443</sup> approach is correct. This approach should be adopted by the English Courts.

In Australian Insurance Law (2<sup>nd</sup> Edition)(1991) by A.A. Tarr, Kwai-Lian Liew and W. Holligan it was illustrated how this approach was applied to the decision in the case of *Australian Agricultural Co. v Saunders*<sup>444</sup> and it was concluded that if the test as laid down in *Albion Insurance Co Ltd v G.I.O*<sup>445</sup> (N.S.W) was to be applied in Saunders, the conclusion that there

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<sup>442</sup> This principle applies to other classes of insurance which were also contracts of indemnity. See *North British and Mercantile Insurance Co v London, Liverpool, and Globe Insurance Co* (1877) 5 Ch Div 569. Although Counsel in *Albion Insurance Co Ltd v Government Insurance Office(NSW)* (1969) 121 CLR 342, when referring to the decision in *American Surety Co of New York v Wrightson* (1911) 27 TLR 91 the stated that the comments were obiter and did not actually touch upon the issue. Also see *Borg Warner (Aust) Ltd v Switzerland General Insurance Co. Ltd* (1989) 5 A.N.Z. Insurance Cases 60-905 and *Compare Newland v Nominal Defendant* [1983] 1 Qd R. 514

<sup>443</sup> Barwick C.J, McTiernan and Menzies JJ

<sup>444</sup> (1875) L.R. 10 C.P. 668

<sup>445</sup> (1969) 121 CLR 342

was double insurance present would be “inevitable”. The authors went on to say that the fire and marine insurance policies when applying their ordinary meaning of applying to wool in the warehouse awaiting transfer onto a ship and that the payment by the insurer would have provided a defence to the fire insurer.

In Sutton’s Law of Insurance in Australia (1999) (3<sup>rd</sup> Edition) it was commented that when looking at Saunder’s decision that the issue arose in the context of a policy term, and the issue was not one of whether there was contribution or not. It was said that the two situations should not be treated in the same way and that the Insurance Contracts Act 1984 which removed the effect of the policy terms which although restricting coverage preserving the contributions claims, meant that there was no reason for the rules of contribution to apply in such actions.

However, if one looks at the decision in *Nisner Holdings Pty Ltd v Merchantile Mutual Insurance Co Ltd*<sup>446</sup> the English view was followed in concluding that where there was incidental overlap it would not automatically mean that there was double insurance.<sup>447</sup> The Australian position is that contribution will exist between different types of policy even if the overlap between the policies is incidental. All that is necessary is that both insurers are liable for the same loss.<sup>448</sup> This seems to be the correct approach that should be taken. This allows for more flexibility.

In *New Zealand Municipalities Co-operative Insurance Company Ltd v South British Insurance Co Ltd*<sup>449</sup> the High Court held that the same risk was not covered where one of the policies covered the negligent act of the employees who were on board and the other policy, this was not provided for, although covering vicarious liability.

#### **5.4 The Policies Must be in force and valid**

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<sup>446</sup> [1976] 2 NSWLR 406

<sup>447</sup> Although this case was not dealing with the issue of contribution.

<sup>448</sup> Sutton’s Law of Insurance in Australia (1999) 3<sup>rd</sup> Edition

<sup>449</sup> High Court, Christchurch, 29 July 1983 (A165/81)



When insurance policies are taken out by the assured, each of those policies must be legal<sup>450</sup> at the time when the loss has happened<sup>451</sup> and should not have lapsed<sup>452</sup>. This is another crucial requirement for double insurance to be present. *Sickness & Accident Assurance Association Limited v The General Accident Assurance Corporation*<sup>453</sup> dealt with the issue of double insurance and contribution. In this case, the court had to deal with the policy which was effective when the premium had not been paid. Here the claim had been paid for by the insurance company to the tramway company for the loss that had been suffered. The insurance company then decided to bring an action under the right of contribution against another insurance company for the money that had been paid out. This was done on the basis that the risk covered was identical. Lord Low held that the pursuers had the right to sue. It is interesting to look at the facts of the case. The agreement that was entered into clearly stated that the policy covered a tramway against accidents which were caused by their vehicles to third parties for a period of 12 months from 24<sup>th</sup> November 1888 inclusive. This was however subject to the condition that there could be no insurance effected until the premium had been paid. There was an accident however, which happened on 24 November, before the premium had been paid under the terms of the contract. The court held that as there was no attachment to the second policy, as the requirement that the premium had to be paid had not been complied with, then there was no double insurance. Further, the decision of *Monksfield v Vehicle and General Insurance Co Ltd*<sup>454</sup> had clearly stated that where there is a clause which provides the insurer with the right to repudiate its liability under the policy, as a result of the breach of a condition which was included therein, there will be no right for contribution.<sup>455</sup>

The same principles can be found in Australia where the courts have said that it would be unfair

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<sup>450</sup> An example used where a policy uses a PPI Clause where the production of such a policy itself would be sufficient for proof of interest. Such clauses would not lead to a double insurance situation arising and such clauses will be considered void. This has been provided for by s4 Marine Insurance Act 1906: see Insurance Disputes: Double Insurance: (3<sup>rd</sup> Edition) John Dunt and Wayne Jones Chapter 10.

<sup>451</sup> See cases such as *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1994] 1 AC 130; *Sickness & Accident Assurance Association Ltd v General Accident Assurance Corp Ltd* (1892) 19 R 977; *North British & Merchantile Insurance Co Ltd v Public Mutual Insurance Co (NZ)* (1935) 54 NZLR 678; *Monksfield v Vehicle & General Insurance Co Ltd* [1971] 1 Lloyd's Rep 139; *QBE Insurance Ltd v Fortis Insurance Ltd* (1999) [1999] VSC 212

<sup>452</sup> *Ocean Accident and Guarantee Corporation v Williams* (1915) 34 NZLR 924,927-929, per Denniston J

<sup>453</sup> (1892) 19 R 977

<sup>454</sup> [1971] 1 Lloyd's Rep 139

<sup>455</sup> A similar approach can be seen in the decision of *Eagle Star Insurance co Ltd v Provincial Insurance plc* [1993] 2 Lloyd's Rep 143.

to the insured where you had a situation where the assured had no knowledge of the existence of other insurance.<sup>456</sup> In New Zealand, the Supreme Court in the decision of *North British & Mercantile Insurance Co Ltd v Public Mutual Insurance Co of NZ*<sup>457</sup> applied the English authorities<sup>458</sup> to adopt a broad view. The court stated that the subject matter of the insurance included that which was common to both the contracts, that is, the use of the trailer with a motor-car and the use of the motor-car with a trailer.

## **CHAPTER 6 THE RIGHTS OF AN INSURER TO SEEK CONTRIBUTION AND ENFORCEMENT**

### **6.1 The rights of an insurer to seek contribution**

When an insurable interest is insured by numerous insurers, problems as to the proportion of each insurer's contribution may arise. The basic principles of equity, that is one of reason, justice

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<sup>456</sup>*Commercial Union Assurance Co New Zealand Ltd v Murphy* [1989] 1 NZLR 687; *Western Australia Bank v Royal Insurance Co* (1908) 5 CLR 533

<sup>457</sup> [1935] NZLR 678, 683-684

<sup>458</sup> *Godin v London Assurance Co* (marine insurance), *North British and Mercantile Insurance Co v London, Liverpool, and Globe Insurance Co* (fire insurance); and *Welford and Otter-Barry's Fire Insurance*, 3<sup>rd</sup> Ed.362 and *Welford's Accident Insurance*, 2<sup>nd</sup> Ed.323. These cases were referred to at p.683

and fairness, are usually applicable<sup>459</sup>. The Court should and will take into consideration all matters which go towards ensuring a just result<sup>460</sup>. An insured cannot seek to recover more than the loss sustained by him. An insured can choose to recover his loss from any insurer, and it is then for that insurer to seek contribution from the other insurers<sup>461</sup>. The issue then arises as to how then should the proportion be divided? Usually this will be dependent on the terms of the policy itself. If the policy provides for the method of apportionment, that will be followed, and if no such provision exists, then it will be divided according to a pro rata basis. There was analysis as to whether there was a need for a rateable proportion clause.<sup>462</sup> It was considered that previously due to the equitable right of contribution in all circumstances, this would usually result in finding or obtaining payment from co-insurers. However, where the clause was different from that in Hayden's case, and similar to that in *Weddell v Road Transport*, the conclusion reached would be different where if there is double insurance, one insurer's liability would be reduced due to either a breach of condition or because he is insolvent<sup>463</sup>. In some cases the policy may provide for an 'other insurance' clause where similar principles apply. In some cases there will be combination of the clauses.

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<sup>459</sup>*Albion Insurance Co. Ltd v G.I.O.(N.S.W.)*(1969) 121 CLR 342 , *GRE Insurance Ltd v QBE Insurance Ltd* [1985] VR 83 and *Albion Insurance v GIO* (N.S.W) (1969) 121 CLR 342. Kitto J stated how he considered the principle should be applied as follows: "What attracts the right of contribution between insurers, then, is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they create, but simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained; for that is the situation in which 'the insured is to receive but one satisfaction'...and accordingly all that insurances are 'regarded as truly one insurance': *Sickness and Accident Assurance Association Ltd v General Accident Assurance Corporation Ltd* (1892) 29 ScLR836 at 837]." Further see *Accident Compensation Commission and Another v Baltica General Insurance Co Ltd and Others* [1993] 1 VR 467, 480

<sup>460</sup>*Government Insurance Office of New South Wales v Crowley* (1975) 2 NSWLR 78 (S Ct NSW/Helsham CJ in Eq.); *GRE v QBE*, at 103-104, per McGarvie J. *American Surety Company of New York v Wrightson* (1910) 103 LT 663 (KBD/Hamilton J).

<sup>461</sup>*Hebdon v West* (1863) 3 B & S 579

<sup>462</sup>Rateable proportion clause means that proportion which would be borne by any insurer if the assured had been entitled to look and had looked, to him alone and that insurer had exercised his right to claim equitable contribution from other insurers.

<sup>463</sup>[1932] 2 KB. 563 This particular situation arising is very fact specific as was the case in Hayden. See also *Commercial Union* where the wording provided as follows: If at the time of any claim arising under this Section there shall be any other insurance covering the same risk or any part thereof the Company shall not be liable for more than its rateable proportion thereof. Lloyd's policy provided for: If any claim covered by this Policy is also covered in whole or in part by any other insurance, the liability of the Underwriters shall be limited to their rateable proportion of such claim.)

Before embarking on the types and methods of calculations used it must first be shown that both insurers must be liable and actually liable for the loss.<sup>464</sup> Ex gratia payments made by an insurer, who then seeks to claim contribution from the other insurer will not be entitled to recovery<sup>465</sup>. According to section 80(1) of the Marine Insurance Act<sup>466</sup> it provides:

“Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract”

There are three methods of calculation which lead to different conclusions (1) the maximum potential liability, (2) the independent actual liability and (3) the Common liability. There is no requirement that the Court follow one method, it is entirely discretionary, to which the above mentioned equitable principles apply.<sup>467</sup> This however causes uncertainty for insurers. However, looking from an assureds' point of view it will not really matter to him because he would have received his share of indemnity for the loss he has suffered. Therefore would it be better for there to be one fixed method of calculation for all claims or should the courts do away with the current methods of calculations that have evolved? It seems that this may be hard to do where, in most cases, insurers are liable for different sums or the sum exceeds the liability of one but not the other<sup>468</sup>.

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<sup>464</sup> Although see *HIH Casualty & General Insurance Ltd v FAI General Insurance Co Ltd* (1997) 9 ANZ Ins Cas 61-358, which was a case dealing with settling of third party claims against an insured.

<sup>465</sup> See *Sydney Turf Club v Crowley* [1971] 1 NSWLR 274. Although, subrogation may be a possible option in such cases. Also see *Layne & Bowler (Australasia) Pty Ltd v Pearson Machine Tool Co Ltd* (unreported, 25 November 1984) dealing with workers compensation liability and where the court originally stated that the insurer could seek recovery by contribution from other insurers who had also provided cover in respect of injuries which occurred in previous years. However see *Manufacturer's Mutual Insurance Ltd v National Employer's Mutual General Insurance Association Ltd* (1990) 6 ANZ Ins Cas 61-038 where the courts took the opposite view and considered that the correct approach would be to look at each year separately to which policy covered that particular year.

<sup>466</sup> This also applies to non-insurance cases.

<sup>467</sup> *Government Insurance Office of New South Wales v Crowley* [1975] 2 NSWLR 78 per Helsham J at (84 - 85), although it was not expressly stated it could be seen that the approach taken was of a discretionary nature.

<sup>468</sup> In the People's Republic of China, the law was amended in the form of Insurance Law of the PRC, arts.56, which states that in the event of double insurance, the proposer shall notify all the insurers concerned of the relevant information with respect to such double insurance; the total sum of indemnity payments made by all insurers concerned in double insurance shall not exceed the insured value. Unless specified otherwise in the contract, the insurers concerned shall be liable for indemnity payment in proportion to their respective sum insured and the total

## 6.2 Methods of calculating insurer's liability for insurance

### 6.2.1 Maximum Potential Policy

Under the maximum potential liability the contribution of the insurer having lesser liability is limited to the proportion that its maximum liability bears to the aggregate of maximum liabilities under both policies<sup>469</sup>. In *Commercial Union Assurance Co Ltd v Hayden*<sup>470</sup> the court held that where there were two insurers with differing upper limits for claims the inference was that they were both accepting the same level of risk up to the lower of the limits and a "rateable satisfaction" would be an equal division of liability up to the lower limits. Under the maximum potential liability method, the contribution of the insurer having the lesser liability is limited to the proportion that its maximum liability bears to the aggregate of maximum liabilities under both policies<sup>471</sup>.

Contribution of the insurer having the lesser liability is limited to the proportion that its maximum liability bears to the aggregate of maximum liabilities under both policies<sup>472</sup>.

### 6.2.2 Independent Actual Liability

Under the independent actual liability method, the contributions are assessed according to the proportions that the independent liability of each insurer, if it were the only insurer, bears to the total of such independent liabilities<sup>473</sup>.

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amount of sum insured; the proposer of double insurance may, with respect to the portion of the total amount of the sum insured which exceeds the insured value, request each insurer to return the premiums pro rata. Further, double insurance has been defined as insurance where a proposer enters into insurance contracts with two or more insurers in respect of the same insured subject matter, the same insurable interest and the same insured event, while the total sum insured exceeds the insured value.

<sup>469</sup>*Drayton v Martin* (1996) 67 FCR 1, *Commercial Union Assurance Co Ltd v Hayden* [1977] 1 QB 804

<sup>470</sup>[1977] 1 QB 804

<sup>471</sup>*Drayton v Martin* (1996) 67 FCR 1 at 37 - 38

<sup>472</sup>CCH, Australian and New Zealand Insurance Reporter, para.27-140.

<sup>473</sup>*Drayton v Martin* (1996) 67 FCR 1, at 37 – 38; *Commercial Union Assurance Co Ltd v Hayden* [1977] 1 QB 804. Where Policy A provided a formula for sharing liability and another policy, Policy B, was silent as to this, Policy A could not bind the insurers of Policy B. In these situations the courts in Canada have also tended to favour the Independent Liability approach: *Dominion of Canada General Insurance Co v Wawanesa Mutual Insurance Co*.

There have been cases where the courts have concluded that what test to apply did not matter and liability would be based on 50% apportionment. A case in point would be *WorkCover Qld v Suncorp Metway Insurance Ltd*<sup>474</sup>, where parties agreed to apportionment on a 50% basis and liability of each insurer was to indemnify to an unlimited extent for the full amount of damages suffered by the insured. The payment by WorkCover Queensland freed Suncorp Metway Insurance Limited from liability to the insured for its rateable proportion, as its potential liability was for the full amount of the claim. The contribution should be 50%. In *WorkCover Qld*, Jerrard JA concluded that there was double insurance in existence between WorkCover and Suncorp which entitled the Suncorp, as co-insurer to pay an equal contribution to an assured which WorkCover had indemnified. The facts of these proceeding arose from proceeding which commenced at an earlier stage. Here there was a transport business partnership and an employee was injured while driving the prime mover, which was owned and registered under the name of Mr. White of the partnership as required under the Motor Vehicle Insurance Act 1936 (Qld). At the time there were insurance policies in effect for accident insurance which was between WorkCover and the Whites, who made up the partnership. As a result the Whites were entitled to indemnity under this policy. WorkCover took over the proceedings from the employee against the Whites. A compromise was reached and WorkCover paid the employee \$632,183.67 together with \$40,000 as agreed costs. The trial judge held that where there was sufficient identity of the insured which resulted in double insurance, which meant that equality was equity and therefore required Suncorp Metway to contribute \$336,091.83. Jerrard JJ did not find the argument that Suncorp's contribution should be 50% of Mr. White's indemnified liability, and therefore only 25% of the sum which was settled up was attractive, even though he found that this argument was a forceful one. The reason for this was that it was contrary to the decided case from the New South Wales Court of Appeal of *AMP Workers' Compensation Services* and considered that the calculation by the trial judge should be followed, i.e Suncorp's contribution should be 50%.

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(1985), 64 B.C.L.R. 122 (S.C) This case was approved in *Milos Equipment Ltd v Insurance Corporation of Ireland* et al 47 B.C.L.R (2d) 296 at 302.

<sup>474</sup>[2005] QCA 155

An example of the tests would be as follows:

*Maximum Potential Liability*

Example A (where the difference between the respective policy is not that great:

Policy A £1000000 Policy B £500000 Loss suffered: 10000

The maximum liability apportionment under both policies = Policy A + Policy B is £1500000

Policy A pays  $1000000 \times 10000 = 6667$

1500000

Policy B pays  $500000 \times 10000 = 3334$

1500000

*Independent Actual Liability Apportionment*

The total independent liabilities is 20000.

Policy A pays  $10000 \times 10000 = 5000$

20000

Policy B pays  $10000 \times 10000 = 5000$

20000

Example B (where the difference between the respective policy is greater):

Policy A £2000000 Policy B £50000 Loss suffered: £10000

The maximum liability apportionment under both policies = Policy A + Policy B is £2500000

Policy A pays  $2000000 \times 10000 = 8000$

2500000

Policy B pays  $50000 \times 10000 = 2000$

2500000

Independent Actual Liability Apportionment

The total independent liabilities is £60000.

Policy A pays  $10000 \times 10000 = 1667$

60000

Policy B pays  $50000 \times 10000 = 8333$

60000

### 6.2.3 Common Liability Test

This method of calculation requires each party to be liable up to the limits of the lower-valued policy, and surpluses will be covered by the insurer with the higher policy. An example would be as follows:

Policy A is capped at £100,000 and Policy B is capped at £250,000. If the loss incurred is £100,000, then the liability will be divided equally between them. If the loss is £150,000, then the sum will be divided equally between the insurers and the extra amount will be borne by the insurer with the higher policy.

What is the position where the policy does not cover a specific loss but a wide range of events? In the decision of *GIO v Crowley*<sup>475</sup>, the court considered that the maximum liability test may do justice and equity where there is some direct bearing between the loss and policy, as opposed to some wider range of events. The amount of insurance cover could not enable one to ascertain in a fair manner the proportion of loss each insurer should bear for the loss in question. In *GRE*

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<sup>475</sup>(1975) 2 NSWLR 78



*Insurance Ltd v QBE Insurance Ltd*<sup>476</sup>, a dispute arose between two insurance companies regarding individual liabilities of each of them for damages caused by a fire to certain buildings each having issued cover notes. The QBE sought contribution from GRE of a rateable proportion of \$800,000 to which the latter was liable for, the court however ordering GRE pay \$373,333.33 together with \$111,079.93 interest and costs to QBE. QBE had a Contribution clause (Clause 10) which stated that, "If at the time of any destruction or damage to any property hereby insured, there be any other subsisting insurance or Insurances, whether effected by the Insured or by any other person or persons, covering any of the property, the Company shall not be liable to pay or contribute any more than its rateable proportion of such destruction or damage." QBE then sued GRE for contribution but later amended its claim to add the vendor and the purchaser as plaintiffs and to add a claim based on subrogation. Here the court settled for the independent liability test stating that there were competing bases. O'Bryan J held QBE was entitled to contribution from GRE according to the principles based on equity, as each insurer was liable under its particular policy rateable proportions and if not liable as a matter of equity, then QBE would be entitled to recover from GRE in a similar rateable proportion. The Court of Appeal however concluded that this was the wrong approach and that there was no right of contribution where only one insurer is liable<sup>477</sup>. There was no subrogation as the insured had no claim against GRE as no cover have been effected at the time of the occurrence of the loss or damage, therefore there was no right that was capable of being assigned or subrogated to QBE.

The *GRE v QBD* decision was followed in *William John Drayton, Nancy Mae Drayton, Bruce William Drayton and Ross Drayton v John Leslie Martin, the National Mutual Life Association of Australasia Limited and Roger Budd Agencies Pty Limited Fai General Insurance Company Limited* (Cross Claimant)<sup>478</sup>— the judge concluded that the independent liabilities test applied as there was nothing to suggest that the application of such test would not lead to a just and

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<sup>476</sup>[1985] VR 83

<sup>477</sup>*North British and Mercantile Insurance Co v London Liverpool and Globe Insurance Co* (1877) 5 Ch D 569; *Sickness and Accident Assurance Association v General Accident Assurance Corporation* (1892) 19 R (Ct of Sess) 977; Sutton, *Insurance Law in Australia and New Zealand*, 1980, p. 459; Hardy and Ivamy, *General Principles of Insurance Law*, 4th ed., p. 526; Halsbury, 4th ed., vol. 25, para. 539.

<sup>478</sup>[1996] FCA 1504 (24 May 1996)

equitable result.

### 6.3 Criticisms and possible solutions

These three tests have been applied at the discretion of the courts, where there is no express agreement. The application of each test has not been straightforward.

There was an interesting discussion in the case of *Zurich Australian Insurance Limited v Metals & Minerals Insurance Pte Ltd*<sup>479</sup> where Johnson J was referred to the authorities and the approaches of the courts when deciding which approach should be used when deciding contribution. In *Zurich*, *Zurich* argued that the correct approach as regards to contribution should be that of the maximum potential liability method. *MMI* on the other hand argued that in the case of liability insurance, the correct approach should be that the independent actual liability approach. Johnson J agreed that the Court is entitled to apply some variant of the two types of approaches if there are particular circumstances which make it necessary to depart from the principal methods if a just result is to be achieved. He was of the view that as the maximum potential liability method<sup>480</sup> had been rejected on numerous occasions by the courts in both Australia and Great Britain when dealing with liability insurance, that approach should not be followed. The arguments in favour of the independent actual liability were more compelling. To follow the maximum potential liability would lead to gross distortion of reason, justice and fairness because it would mean that the insurer would be liable for only a small amount of total liability, which would be result if it were to be followed in *Zurich's* case.

On the surface, the application of the maximum potential liability may be an attractive method to adopt as it results in the same proportion throughout the range of possible claims, regardless of the sum of loss claimed. However, the Courts are more likely to apply the independent actual liability method<sup>481</sup>. Although applying both methods lead to different results the Courts will

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<sup>479</sup>[2007] WASA 62

<sup>480</sup>The ALRC Report No.20 also aired its dissatisfaction with this approach as well, as lacking any legal or other principle

<sup>481</sup>*Government Insurance Office (NSW) v Crowley* [1975] 2 NSWLR 78; *GRE Insurance Ltd v QBE Insurance Ltd*

approach each case on the basis of just, fair and equitable manner.

In *Tai Ping Insurance Co Ltd v Tugu Insurance Co Ltd & Anor*<sup>482</sup> the Counsel in that case tried to argue that the court should not use either the maximum liability test or the independent liability test. Instead the court should adopt a third approach called the “other interest” approach, which must and should take into account the “other interests” the subject of the policy. In this case, it was the particular loss involving the property of all six companies which was considerably more than the maximum limit of liability under the Tugu/General Accident Policy. Counsel did not put forward any authorities to support this “ingenious and diverting” argument. The court although agreeing that this was an innovative course, concluded that this could well amount to a recipe for potential inequity in the context of a contribution exercise which looks at equitable principles when dealing with the facts of the case. The court correctly pointed out that such an application could lead to a large number of variables arising which would extend beyond the well-known parameters of the maximum liability test and the independent liability basis. The learned judge placed reliance on Professor Bird’s analysis of the complexities which could arise, even where there were situations of only two insurers. This approach is correct especially when you have, as was pointed out by Professor Bird, sums which have been insured which are not the same or the policies have different ranges so it becomes difficult to calculate the ranges<sup>483</sup>.

#### **6.4 Volunteers in Indemnifying and the Right of Recovery**

The general principal is that contribution can only be made if both insurers were liable at the date of the loss, and not if liability only arises afterwards. The contract must cover identical loss<sup>484</sup>,

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[1985] VR 83. Also see *John v Rawling* (1984) 36 SARA 182 where an employee had died in a trailer accident, where the trailer and the utility were both insured with different insurers, in addition to the workers compensation insurance which was also in existence. Pryor J rejected the argument put forward that each insurer should be liable rateably for the loss according to each insurer’s actual liability. He held that each insurer was liable in respect of the same losses equally. It was of no significance that one insurer’s liability arose in two contracts.

<sup>482</sup>[2001] 2 HKC 401,406 H-I

<sup>483</sup>[2001] 2 HKC 401,408 A-B

<sup>484</sup>see *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342 per Katto J at 353, cf *Bovis Construction Ltd v Commercial Union Insurance Co Plc* [2001] 1 Lloyd’s Rep 416

the assured, the subject matter in question, the interest and risk have to be the same. According to *Legal & General v Drake Insurance*,<sup>485</sup> the court was of the view that double insurance must exist before contribution arises and this is at the date of the loss. A right to repudiate would be a good defence to a claim for contribution if the assured had been in breach of condition prior to the loss.<sup>486</sup> In *Legal & General Assurance Society* the driver of a car was insured under two policies covering different periods. Under the Drake policy, and similarly under the Legal and General Policy, immediate notice in writing, a condition precedent, was required. A rateable proportion clause was included stating that payment would not be made or contribution made more than its rateable proportion if there was any other insurance present. The Court of Appeal re-confirming the principles of Lord Mansfield stated that an insurer is entitled to recover from another insurer in cases of double insurance, not based on contract but based on equity and that burdens should be shared equally<sup>487</sup>. Another issue is what happens where notice is a condition precedent and liability of an insurer to indemnify only arising when notice is given, and such notice is not given due to the insured claiming only against one of the insurers. The court was of the view that interpretation of the clauses was necessary and 'potential' liability would suffice, but validity of the claim was also an important factor that had to be considered. Even though the parties are permitted either to exclude or modify the right of contribution by contract, they cannot modify or exclude the equitable right to contribution. The Court of Appeal held that the plaintiff's could recover only a contribution in respect of Mr. Arora but as contribution was to be made by claimant in excess of his rateable contribution between co-insurers, no claim in contribution could be made. Contribution had to be made but limited to the amount in the rateable proportion clause. A third party who has obtained judgment against an assured in respect of liability required to be insured under the Act<sup>488</sup>, can enforce the judgment against the insurer, notwithstanding any provision contained in the policy of insurance, such as the rateable proportion clause. Section 148<sup>489</sup> strictly prevents policy defences but the insurer must exercise his right of recourse to obtain the benefit of monies paid out as a volunteer. Therefore Legal and

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<sup>485</sup>[1992] QB 887

<sup>486</sup>Colinvaux's Law of Insurance 8<sup>th</sup> edition 2010

<sup>487</sup>Qui senti commodum sentire debet et onus

<sup>488</sup>s149 Road Traffic Act 1972 (re-enacted)

<sup>489</sup>Road Traffic Act 1972

General Assurance Society Ltd did not do so and were only able to recover 50% from Drake.

The decision of *Drake Insurance* has been criticised by academics such as Goff and Jones<sup>490</sup> where the authors stated that (1) Drake Insurance protest did not magically oblige it to make the payment; (2) the rateable proportion clause was not the subject of litigation in *Eagle Star* and (3) the insurer was liable to third party for the whole loss did not mean that it was entitled to claim contribution from the co-insurer. The authors went on to state that the Court of appeal's decision could be justified, based on the fact that the defendant insurer had an arbitral award in his favour.

The Privy Council in *Eagle Star Ltd v Provincial Insurance plc*<sup>491</sup> had to consider the position where both policies contained rateable proportion clauses. One cancelled before the accident and another cancelled after the accident. Lord Woolf noted that both parties had an obligation to indemnify third parties under the legislation and concluded that the contractual approach was appropriate as their respective liabilities to the person insured would indicate the scale of the double insurance. The incidence of liability was not the date at which the insurer was discharged from liability. According to Lord Woolf's logic<sup>492</sup>, both insurers each should contribute to its statutory liability in the same proportion, based on their contractual duty. In this case both insurers had this.

It is interesting to note that the Court of Appeal in *Drake Insurance plc v Provident Insurance plc*, where the facts were very similar to that of *Legal and General Insurance* decision, came to a different view. According to *Drake Insurance*, if in a co-insurer situation, a rateable proportion clause is present and one of the insurers does not seek or pursue contribution from the other co-insurer prior to paying the insured or does not check whether a situation of double insurance arises, then the court will treat that insurer as a volunteer. It is crucial it seems for such a request to be made. In *Drake Insurance plc v Provident Insurance plc*, Drake had a policy with Mrs. Kaur who was driving her husband's car and injured Mr. Beach. Drake Provident who had insured

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<sup>490</sup> at para 14-036

<sup>491</sup> [1994] 1 AC 130

<sup>492</sup> although not dealing specifically with the voluntary payment point

Mrs. Kaur, had paid out first. Drake then sought to recover. Provident refused to pay on two grounds: (1) it had validly avoided Mr. Singh's policy for non-disclosure and (2) due to a special clause in Drake's Policy. Drake's liability in a case of double insurance was only to the extent of half the loss. The arbitration award was not binding and the avoidance was also invalid which resulted in there being double insurance. Lord Justice Rix decided that the important question was the circumstances of the case before a decision could be made on Drakes right to recover contribution. If litigation had preceded the payment by Drake, then the voluntary payment point would not have existed and it would not make sense if a sensible settlement which could have been made is not made until litigation proceedings between Drake and Legal and General conclude. It was therefore concluded that the claimants were able to recover as they were not volunteers. Lord Justice Rix went further and stated that he did not see what difference s151 road Traffic Act <sup>493</sup> should make.

Similar principles have been followed in Singapore as well, such as in the case of *SHC Capital Ltd v NTUC Income Insurance Co-operative Ltd*<sup>494</sup>, where the High Court<sup>495</sup>.

The problems arising in Drake do not arise in Australia due to s45 Insurance Contracts Act 1984 cancelling the effects of a rateable proportion clause or other clauses which seek to limit the liability of the insurer.<sup>496</sup> In *Limit (No.3) Ltd v ACE Insurance Ltd* <sup>497</sup>the excess layer sought 100% indemnity having paid on the ground that they were on risk. The primary layer insurer denied liability. The Supreme Court of New South Wales held that as the excess layer insurer was not liable at the date of loss, no contribution arose.

## **6.5 Whether Incidental overlaps allow a contribution?**

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<sup>493</sup>s149 preceding Act

<sup>494</sup> [2010] SGHC 224

<sup>495</sup> at para 46

<sup>496</sup>See also *SHC Capital Ltd v NTUC Income Insurance CO-operative Ltd* [2010] SHGC 224, although the facts did not raise an issue of contribution as the claimant argued that sole liability rested with the defendant, the court stated that the sole question was whether the claimant paid as a volunteer.

<sup>497</sup>(2009) NSW 514

The general principle is that an assured cannot recover more than he is indemnified for. The court will not conclude that double insurance exists unless there is an overlapping policy. The importance of this is that it is usually the case that insurance contracts will include a pro-rata clause by the insurer<sup>498</sup> if double insurance exists.

A policy covering the same risk and same property alone may not result in double insurance. It is common for there to be multiple insurance policies taken out over the same interest in the subject matter.<sup>499</sup> It is the assured's interest in the subject matter that is important.<sup>500</sup> Further where there is an overlap, all policies must respond to the claim. The policy must be legal and in force at the time of the loss. In addition to these requirements other conditions that must be satisfied include: (1) all the policies concerned must comprise the same subject-matter; (2) must be effected against the same peril<sup>501</sup>; (3) must be effected by or on behalf of the same assured and (4) no policy must contain any stipulation by which it is excluded from contribution.<sup>502</sup> The policy must not be void.<sup>503</sup> Further the risk under the policy must not have attached.<sup>504</sup>

There will be no overlap in cases where the policy is consecutive, as was the case in *National*

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<sup>498</sup>*Godin v London Assurance Co* (1758)97 E.R. 419(K.B)

<sup>499</sup>*GIO General Ltd v Insurance Australia Ltd* [2008] ACTSC 38 - in determining whether the same interest has been insured, it is necessary to disregard the nature of the claim made by the assured and instead have regard to the straightforward question of whether the policy cover the same loss. For a discussion on the 'extended contribution' principle see *AMP Workers Compensation Services (NSW) Ltd v QEB Insurance Ltd* [2001] NSWCA 267 and *Zurich Australian Insurance v GIO General* [2011] NSWCA 47. Also see *Allianz Australia Workers Compensation (NSW) Ltd v NRMA Insurance Ltd* [2007] ACTSC 2 for a different view.) In *Zurich Australian Insurance Limited v The Workers Compensation Nominal Insurer* [2013] NSWSC 915, the Supreme Court refused to extend the principle of contribution to a situation where there is no common obligation owed by two insurers to a single insured.

<sup>500</sup>*North British and Mercantile Ins. Co v London, Liverpool and Globe Ins. Co.* (1877) 5 Ch.D 569

<sup>501</sup>In *Lumbermen's Underwriting Alliance v Axa Pacific Insurance Co* [2006] B.C.J No.1439(S.C), there were two policies which insured different risks. A fire occurred where GBA, the contractors were logging on land licensed to Pacific, the contractors. Full-scale firefighting procedures were carried out. This exceeded forest management statutes which required all reasonable steps to be taken. The costs amounted to \$1.5million. Lumbermen's who provided cover for Pacific's firefighting costs paid out and sought contribution from AXA, as GBA had a comprehensive CGL policy with them. The two policies covered different risks. The AXA policy responded to third-party claims against an insured. The CGL covered GBA if it was sued by Pacific to claim for fire-fighting costs. The court found that GBA had caused the fire although not being able to point to exactly what started the fire. AXA was not able to show that GBA had any legal liability for the fire. Therefore there was no overlapping coverage.

<sup>502</sup>Ivamy E.R (1993) *General Principles of Insurance Law*, 6<sup>th</sup> Edition, Butterworths, London, UK.

<sup>503</sup>Lord Woolf in *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1994] 1 AC 130(PC)

<sup>504</sup>*Equitable Fire and Accident Office Ltd v Chung Wo Hong* [1907] AC 96.

*Employers Mutual General Insurance Association Ltd v Haydon*.<sup>505</sup> It is also common for different assured having different interest in the same property, where each insurer has his own interest on his behalf. There will not be any double insurance present. Likely cases where double insurance may not be present, if each insures their own interest, may include owner and bailee of goods, mortgagor and mortgagee, landlord and tenant or vendor and employer and contractor.<sup>506</sup> Other areas where double insurance may not be present include where a primary policy and a later excess of loss policy is taken out, as was the case in *Pacific Employers Insurance Co v Non-Marine Underwriters*<sup>507</sup>. Neither would double insurance arise where there is a primary policy and an increased value policy<sup>508</sup>

The court in *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co*.<sup>509</sup>, held that there was no double insurance as each party had insured his own interest.<sup>510</sup> As there was no double insurance, no pro-rata payment was necessary. This principle was further reinforced in the decision of *Boys v State Insurance General Manager*.<sup>511</sup>

It is also very common for there to be insurance taken out on the same premises by a landlord and tenant. The courts have held that as the landlord and tenant had insured their interest separately, the landlord was not entitled to the benefit from the tenant's insurance contract.<sup>512</sup> In *Andrews v Patriotic Assurance Co (No.2)* the landlord and tenant insured the same building.

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<sup>505</sup>The court did not agree with the trial judge's application of *Weddell v Road Transport & General Insurance Co Ltd* [1932] 2 KB 563. He based his decision on there not being co-existing cover.

<sup>506</sup>*North British & Mercantile Insurance Company v London, Liverpool & Globe Insurance Co* (1877) 5 Ch D 569, 577 per Jessell MR

<sup>507</sup>71 DLR (4<sup>th</sup>) 731

<sup>508</sup>*Boag v Standard Marine Insurance General Manager* (1984) 3 ANZ Ins Cas 60-577 (HC NZ)

<sup>509</sup>(1877) 5 Ch.D 569

<sup>510</sup>In that case, under the custom of that particular trade, the wharfingers were liable for any loss arising, regardless of the cause. The wharfingers insured grain in their warehouse with the Defendant. The merchants insured the grain with the Plaintiff Company, which contained an exclusion clause, limiting their liability on the existence of other insurance to a rateable contribution. A fire broke out damaging the goods. The wharfingers paid out. An application was made to the court to ascertain who should be liable.

<sup>511</sup>[1980] 1 NZLR 87. The court held that there was no double insurance present. The interest of the mortgagee who insured the dwelling on an indemnity basis and the further cover taken out by the mortgagor for replacement cost additional to the indemnity value under the mortgage policy. The mortgagee did not know that the mortgagor had done so. The parties had therefore insured different interests in the same subject matter. It did not matter that the sum recovered would be held on trust for the mortgagor. See *Westminster Fire Office v Glasgow Provident* (1888) 13 App Cas 699.

<sup>512</sup>*Andrews v Patriotic Assurance Co. (No.2)* (1886) 18 L.R. Ir.355.



There was a covenant to repair. There was no covenant to insure. A fire broke out. The tenant recovered the loss in full from his own insurers but did not reinstate the premises, due to bankruptcy. The landlord then sought to recover from his insurer, who claimed that liability was only on a pro-rata basis.

Where the parties each relies on his own insurers to pay for the loss, no double insurance is present. Although if the assured does derive a benefit from another's insurance, then there would arise a situation where there would be double insurance, even though their interest was different. This is what happened in the case of *Portavon Cinema Company Ltd v Price*<sup>513</sup>. The Plaintiff here brought proceedings under two fire insurance policies issued by Lloyd's underwriters. The Lloyd's underwriters were represented by Mr. Edward Steane Price and Century Insurance Company Ltd. The Plaintiff were lessees of Empire Cinema. These policies were concurrent at the time in respect of Empire Cinema. The Plaintiff claimed 14,766 under the policy for building, fixtures, furnishings, films &c. The landlords were insured by Woodward Theatres Ltd., against loss or damage to the Empire Cinema.

Also see *Nichols & Co v Scottish Union and National Insurance Co* (1885) 2 T.L.R.190, where the society rules required that property mortgaged to the building society would have to be insured in the name of the trustees. The member would have to pay the premiums. A mill was sold to A & Co by the society. A & Co then mortgaged the property to the society. It later insured the property for their own benefit with Y & Co. Under the two policies there was provision made for payment only on a pro-rata basis. Loss was suffered and A & Co's sued its insurers. The court held that the society did in fact have an interest in both parties, as the arrangement that they were in effect using the insurance money to pay off the debt. This triggered double insurance and the pro-rata clause was applicable, although this decision was doubted in *O'Kane v Jones, The Martin P*<sup>514</sup>. The court questioned the correctness of the decision

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<sup>513</sup>[1939] 65 L.L.Rep 161

<sup>514</sup>[2004] 1 Lloyd's Rep.389

in *Nicholas*. It concluded that *Nicholas* did not establish the proposition that there is double insurance for the purposes of MIA if different assureds with different insurable interests in the same property, even if one may have to hold all or part of the proceeds of any insurable claim in trust or for the account of the other.<sup>515</sup> MacGillivray on Insurance Law<sup>516</sup> stated that the better view in circumstances like those in *Nicholas & Co v Scottish Union and National Insurance Co.* was that each party insures his own interest and can recover in full against his insurer; since the mortgagor has a contractual right to have the debt paid off by the mortgagee, the mortgagor's insurers will be subrogated to that right after payment by them to the mortgagor. Although neither the mortgagor, nor his insurer, can compel the mortgagee to make any recovery, the overall result would probably be that the loss fell on the insurers of the mortgagee.<sup>517</sup>

Where there are successive mortgages, if the insurance policies are taken out in the name of a loan company by the proprietors in each case and in the name of the mortgagees in reversion, the courts have held that there will be no double insurance.<sup>518</sup>

This principle can be seen in the case of *Clarke v Fidelity Fire Insurance Co. of New York*<sup>519</sup> where the court held that there was no overlapping. In *Clarke*, Clarke insured the house against destruction by fire. A statutory condition was imposed where there was "other insurance". A separate policy was taken out by the mortgagee to insure against his interest in the building. The court held that the homeowner was owner in possession and the mortgagee was the holder of a security to indemnify him against losses on his loan, and as there was no "other insurance", the homeowner could claim for her loss in full. The case of *Davjoyda Estates Pty Ltd v National Insurance Co of NZ Ltd*<sup>520</sup> is another example of where the court held that there was no double insurance. This was a case where one was dealing with a vendor and purchaser situation, and where both had insurable interest, even though the risk may pass to the purchaser. In such cases

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<sup>515</sup>page 424 of judgment

<sup>516</sup>11<sup>th</sup> Edition at p.666

<sup>517</sup>*Boys v State Insurance General Manager* [1980] 1 NZLR 87

<sup>518</sup>*Scottish Amicable Heritable Securities Association v Northern Assurance Co.* (1883) 11 R. 287

<sup>519</sup>[1925] O.J.No.144 (Ont.C.A)

<sup>520</sup>(1965) 69 SR (NSW) 381 (FC). Also see *The Western Australian Bank v. The Royal Insurance Co.* (1908) 5 C.L.R. 5

it is common for the purchaser to be usually advised to cover the full value of the improvements. The vendor will retain the existing insurance until completion. Two premiums were usually be paid between the contract stage and stage of completion on one property.

There was no overlapping policy as each assured was insuring his own interest. In *Allianz Australia Workers Compensation (NSW) Ltd v NRMA Insurance Ltd*<sup>521</sup>, a claim made by Workers' Compensation insurers against a motor vehicle third party insurer for contribution. Mr. Noel Harris was employed by Trueform Pty Ltd. He was injured while unloading a semi-trailer during his course of employment. The semi-trailer consisted of a prime mover and trailer owned by Trueform. The Plaintiff was Trueform's workers' compensation insurer. The Defendant was the authorized insurer of both the prime mover and the trailer. Proceedings were commenced for personal injury. The court held that where the defendant in proceedings was not identical with the insured under the third-party policies, and where the registered owner would not be liable if sued, the claim for contribution must fail.

Primary or excess coverage cases where there are numerous insures could result in them not covering the same risk because they are covering different layers of risk. The way such layered covers work means that the primary policy will have to respond first due to the insurer's liability attaching when the loss insured happens<sup>522</sup>. Any coverage over and above that of the primary policy is known as an 'excess' policy. Another type of policy is known as an umbrella policy which includes (1) standard form excess coverage and (2) broader coverage.<sup>523</sup> Therefore in such cases, it is unlikely for there to be double insurance.

Therefore if there is no double insurance, the insurer will have to seek recourse through subrogation<sup>524</sup>, through Covenants under the contract<sup>525</sup> or contractually.

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<sup>521</sup>[2007] ACTSC 40

<sup>522</sup>*McKenzie v Dominion of Canada General Insurance Company* (2007) 86 O.R.(3d)419

<sup>523</sup>*See Trenton Cold Storage v St. Fire & Marine Insurance Co.* (2001), 146 O.A.C. 348 (C.A)

<sup>524</sup>*North British and Mercantile Insurance Co. v London, Liverpool and Globe Insurance Co.* (1877) 5 Ch.D.569

<sup>525</sup>*Andrews v Patriotic Assurance Co.* (1886) 18 L.R.Ir. 355.

## **CHAPTER 7: ASBESTOS LITIGATION FROM AN INSURANCE PERSPECTIVE**

### **7.1 Development of the cases regarding Mesothelioma**

It could be argued that double insurance does not apply to mesothelioma cases, due to the

structure of the policies. However, this issue is unresolved and there has been discussion<sup>526</sup> as to whether double insurance does in fact occur in asbestos cases and if so, the next issue would be one of how contribution would be distributed between the insurers. Mesothelioma operates across long periods and different policies of insurance. This is the first time that issues of construction of such policies has arisen between different insurers during different policy years, possibly under different forms of liability cover in particular, liability insurance and personal injuries (i.e employers' liability and public liability). There is also the difficulty of identifying the defendant insurer, as it is unclear which policy applies. This chapter sets out the background to the Mesothelioma problem, and shows how the issue of contribution arises from it. There has been very little literature on this particular aspect. This chapter discusses the issues not resolved by English courts and whether in fact the issue of double insurance applies, and if so, when and how it may arise. The development of legislation (i.e The Compensation Act 2006) to try and resolve the issue of distribution of liability and the amount of liability.

There is no double insurance where there is the existence of consecutive policies, as opposed to the presence of concurrent policies that would result in double insurance. A further issue which arises is whether there is a single indivisible loss in every year or separate losses in each year. In such situations, there may not be any double insurance. It would still be interesting to look at whether the principles of s45 would have a role to play in such cases, and if so, what this role would be.

For these questions to be answered, it is important to go through the analysis of the decisions in this area which have developed, such as *Fairchild v Glenhaven Funeral Services Ltd*<sup>527</sup>, *Durham v BAI(Run off) Ltd*<sup>528</sup>, *Barker v Corus*<sup>529</sup>, *Sienkiewicz v Grief(UK) Ltd*<sup>530</sup>, *Bolton Metropolitan Borough Council v Municipal Mutual Insurance*<sup>531</sup>, *Rainy Sky SA v Kookmin Bank*<sup>532</sup>,

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<sup>526</sup> *Phillips v Syndicate 992 Gunner* [2004] Lloyd's Rep IR 418

<sup>527</sup> [2003] 1 AC 32

<sup>528</sup> [2012] 1 WLR 867

<sup>529</sup> [2006] 2 AC 572

<sup>530</sup> [2011] 2 AC 229

<sup>531</sup> [2006] 1 WLR 1492

<sup>532</sup> [2011] 1 WLR 2900

*International Energy Group Ltd v Zurich Insurance Plc UK*<sup>533</sup> and *Phillips v Syndicate 992 Gunner*<sup>534</sup>. One interesting issue is whether there was in fact a need for the courts to develop the principles in the way that they did.

The passing of the Compensation Act 2006 will also have to be looked at after Parliament was of the view that there should be intervention in the form of legislation regarding the issue of whether and when liability should be joint or several. This was due to the effects of the decision in *Barker v Corus*. The cases developed from the perspective of tort and the issue of causation, when one was looking at the issue of which employer was liable. The legislature thought that protection was needed, and laws were passed. The same outcome should be adopted when implementing legislation similar to that of s45. This specific issue was not discussed in ALCR.

## **7.2 Mesothelioma Litigation and its impact**

### **7.2.1 The decision in *Fairchild v Glenhaven Funeral Services Ltd***

It is important to understand the history and medical aspect of the disease of mesothelioma. It is therefore necessary to look at the approach that the courts felt were necessary to deal with the issue. A good starting point is the judgment of Lord Bingham of Cornhill who summarised the disease in the decision of *Fairchild v Glenhaven Funeral Services Ltd*. Since the 1930s the implications of inhaling large quantities of asbestos dust have been studied<sup>535</sup> and understood in greater detail<sup>536</sup>. He stated<sup>537</sup> as follows:

"Thus in the case of asbestosis the following situation may arise. C may contract asbestosis as a result of exposure to asbestos dust while employed by A, but without such exposure involving any breach of duty by A. C may then work for B, and again inhale quantities of asbestos dust which will have the effect of aggravating his asbestosis. If this later exposure

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<sup>533</sup> [2013] EWCA Civ 39

<sup>534</sup> [2004] Lloyd's Rep IR 418

<sup>535</sup> In relation to the risk of contracting asbestosis and other pulmonary diseases.

<sup>536</sup> Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry by Merewether and Price and the Asbestos Industry Regulations 1931

<sup>537</sup> [2003] 1 AC, 42, para 6

does involve a breach of duty by B, C will have no claim against A but will have a claim against B. B will not escape liability by contending that his breach of duty is not shown to have had any causative effect."

He went on to say<sup>538</sup>:

"From about the 1960s, it became widely known that exposure to asbestos dust and fibres could give rise not only to asbestosis and other pulmonary diseases, but also to the risk of developing a mesothelioma. This is a malignant tumour, usually of the pleura, sometimes of the peritoneum. In the absence of occupational exposure to asbestos dust it is a very rare tumour indeed, afflicting no more than about one person in a million per year. But the incidence of the tumour among those occupationally exposed to asbestos dust is about 1,000 times greater than in the general population, and there are some 1,500 cases reported annually. It is a condition which may be latent for many years, usually for 30-40 years or more; development of the condition may take as short a period as 10 years, but it is thought that that is the period which elapses between the mutation of the first cell and the manifestation of symptoms of the condition. It is invariably fatal, and death usually occurs within 1-2 years of the condition being diagnosed. The mechanism by which a normal mesothelial cell is transformed into a mesothelioma cell is not known. It is believed by the best medical opinion to involve a multi-stage process, in which 6 or 7 genetic changes occur in a normal cell to render it malignant. Asbestos acts in at least one of those stages and may (but this is uncertain) act in more than one. It is not known what level of exposure to asbestos dust and fibre can be tolerated without significant risk of developing a mesothelioma, but it is known that those living in urban environments (although without occupational exposure) inhale large numbers of asbestos fibres without developing a mesothelioma. It is accepted that the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled: the greater the quantity of dust and fibre inhaled, the greater the risk. But the condition may be caused by a single fibre, or a few fibres, or many fibres: medical opinion holds none of these possibilities to be

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<sup>538</sup> [2003] 1 AC, 43, para 7

more probable than any other, and the condition once caused is not aggravated by further exposure. So if C is employed successively by A and B and is exposed to asbestos dust and fibres during each employment and develops a mesothelioma, the very strong probability is that this will have been caused by inhalation of asbestos dust containing fibres. But C could have inhaled a single fibre giving rise to his condition during employment by A, in which case his exposure by B will have had no effect on his condition; or he could have inhaled a single fibre giving rise to his condition during his employment by B, in which case his exposure by A will have had no effect on his condition; or he could have inhaled fibres during his employment by A and B which together gave rise to his condition; but medical science cannot support the suggestion that any of these possibilities is to be regarded as more probable than any other. There is no way of identifying, even on a balance of probabilities, the source of the fibre or fibres which initiated the genetic process which culminated in the malignant tumour. It is on this rock of uncertainty, reflecting the point to which medical science has so far advanced, that the three claims were rejected by the Court of Appeal and by two of the three trial judges."

The *Fairchild v Glenhaven Funeral Services Ltd* decision was an appeal by employees who over the years had developed mesothelioma due to their working conditions. It was argued that due to the breach of duty by the defendants of failing to protect the claimants from the risk of contracting the disease, this had led to the employees inhaling substantial quantities of asbestos dust or fibers. The judge was of the view that in two<sup>539</sup> of the three cases in the appeal, that what was required, was for the plaintiff to establish that on a balance of probabilities that a particular tortfeasor had exposed that employee to the asbestos dust which had the effect of causing the disease. In the third case<sup>540</sup>, the judge concluded that each of the employers had contributed to the employee being exposed to asbestosis dust and fibers, and as a result, materially contributed to the employees' developing the disease, and ruled that the liability should be apportioned between the employers.

The requirement that the employee had to prove that the employer was the one who exposed him

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<sup>539</sup> Judith Fairchild (the 1st Claimant) and Doreen Fox (the 2nd Claimant)

<sup>540</sup> Edwin Matthews (the 3rd Claimant)



to the asbestos dust can, unless the employer is the only employer who the employee has worked for, proved extremely difficult. Placing such a burden on the employee would, from an insurance perspective, leave him with no protection at all. However, the approach adopted by the Court of Appeal was similar.

### **7.2.2 Fairchild v Glenhaven Funeral Services Ltd: The Court of Appeal Stage**

The case went on appeal to the Court of Appeal who were of the view that the disease was a indivisible disease which was triggered on a single unidentifiable event by one or more of the tortfeasors, and that it could not be safely concluded, on a balance of probabilities, as to which of the tortfeasors and which period of exposure, could be said to have exposed the employee to asbestosis or the fibers. The issue of causation had to been established, which was required to prove the tort. This had not been done and so the defendants in the case, and the first two appellants' case were dismissed by the Court of Appeal. The Court of Appeal however allowed the appeal of the third appellant. As a result, the matter was then taken further to the House of Lords.

Lord Bingham had stated<sup>541</sup> that the essential questions which underlined the appeal before could be expressed as follows, which is worth repeating in full:

"If (1)C was employed at different times and for differing periods by both A and B, and (2)A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that asbestos dust (if inhaled) might cause a mesothelioma, and (3) both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust, and (4) C is found to be suffering from a mesothelioma, and (5) any cause of C's mesothelioma other than the inhalation of asbestos dust at work can be effectively discounted, but (6) C cannot (because of the current limits of human

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<sup>541</sup> [2003] 1 AC, 40, para 2

science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling asbestos dust during his employment by A or during his employment by B or during his employment by A and B taken together, is C entitled to recover damages against either A or B or against both A and B? To this question (not formulated in these terms) the Court of Appeal (Brooke, Latham and Kay LJ), in a reserved judgment of the court reported at [2002] 1 WLR 1052, gave a negative answer. It did so because, applying the conventional "but for" test of tortious liability, it could not be held that C had proved against A that his mesothelioma would probably not have occurred but for the breach of duty by A, nor against B that his mesothelioma would probably not have occurred but for the breach of duty by B, nor against A and B that his mesothelioma would probably not have occurred but for the breach of duty by both A and B together. So C failed against both A and B. The crucial issue on appeal is whether, in the special circumstances of such a case, principle, authority or policy requires or justifies a modified approach to proof of causation."

This was a case which looked at the tort of liability from a completely different angle and perspective, and it was then to be decided whether the principles as laid down applied generally or had this case redefined the causation (that is the "but for" test) to only apply in cases which dealt with mesothelioma.

The usual position for cases of personal injury require the plaintiff to prove that there is a duty owed, the duty owed has been breached, the plaintiff has suffered a loss or damage, and that the breach lead to the damage. Therefore, but for the breach, the Plaintiff would not have suffered the damage. The Plaintiff has to prove this on a balance of probabilities<sup>542</sup>. The House of Lords was asked to consider whether on the present facts, which were considered to be of a special nature, it should vary or relax the general principles of causation.<sup>543</sup> The House of Lords also had to look at the situation where there was more than one tortfeasor who could have exposed the victim to the disease but the victim was unable to point to a particular tortfeasor due to the nature

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<sup>542</sup> [2003] 1 AC, 44, para 8

<sup>543</sup> [2003] 1 AC, 44, para 8

of the disease. Further what would be the situation where there was a "mechanical application" of the general principles and what the results would be, and whether it would be appropriate in these sort of cases.<sup>544</sup>

Lord Bingham went through a detailed analysis of all the literature and cases from various jurisdictions, and pointed out that although the problem was universal, the approach to it was not universal.<sup>545</sup> Although it would seem that in certain countries the Plaintiff would lose his claim based on the test applied, i.e causation, and in others, the courts seem eager to obtain the end result of allowing the Plaintiff to succeed in his application.<sup>546</sup> Lord Bingham, stated as follows<sup>547</sup>:

"Whether by treating an increase in risk as equivalent to a material contribution, or by putting a burden on the defendant, or by enlarging the ordinary approach to acting in concert, or on more general grounds influenced by policy considerations, most jurisdictions would, it seems, afford a remedy to the plaintiff. Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome."

Clearly, his approach was to ensure that the end result was a just one, although clearly being

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<sup>544</sup> [2003] 1 AC, 44, para 9

<sup>545</sup> [2003] 1 AC, 66, para 32

<sup>546</sup> [2003] 1 AC, 66 para 32

<sup>547</sup> [2003] 1 AC, 66, para 32

aware of the fact that such a result could lead to a clash of policy considerations.<sup>548</sup> Therefore it could be argued that this should be the correct as no matter what factors are looked at, the ultimate one should be that of providing a remedy to the employee.

The court went on to look at the arguments put forward by the parties. The appellants' arguments would result in the employer being held liable even though the damage may not have been caused by him. The risk was said to be greater when more tortfeasors were involved but they were not present before the court, as they had gone into liquidation or disappeared.<sup>549</sup> In such situations why should the employer be held liable when causation has not been shown to exist by the Plaintiff. The alternative argument put forward placed more emphasis on strong policy arguments which favoured compensating the Plaintiff who had suffered substantial and serious harm. In such situations, who's interests should take priority in such litigation. Lord Bingham was of the view that the imposition of such liability on a "duty-breaking" employer was heavily outweighed by the injustice of denying redress to a victim.<sup>550</sup> He based his finding on the view that to find otherwise, would result in an employer who exposes his employee to asbestos being completely immune against mesothelioma and not asbestosis, by deciding to employ only persons who had been previously exposed to excessive quantities of asbestos dust.<sup>551</sup> In reaching this conclusion, he placed weight on the decision of *McGhee v National Coal Board*<sup>552</sup> where Lord Wilberforce stated that the employers should be liable for an injury, and should suffer the consequence of the impossibility, foreseeably inherent in the nature of the pursuer's injury of segregating the precise consequences of the employers default.

The above analysis resulted in the House of Lords agreeing that if a claimant is able to show that conditions (1) to (6) have been satisfied, he would be entitled to sue not just against one tortfeasor but he would be able to sue both, as used in this example, A and B for their conduct of exposing the employee to the risk, to which he should not have been exposed to in the first place, and to which they should have protected him from. Emphasis was again laid on policy

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<sup>548</sup> [2003] 1 AC, 66, para 33

<sup>549</sup> [2003] 1 AC, 66, para 33

<sup>550</sup> [2003] 1 AC, 66, para 33

<sup>551</sup> [2003] 1 AC, 67, para 33

<sup>552</sup> [1973] 1 WLR 1, 7

considerations. It seems that what should be received in terms of compensation from the employer is nothing less than full compensation, which means, 100%. Lord Bingham went on to suggest that it was open to the employer to seek contribution against each other or any other employer liable in respect of the same damage in "the ordinary way".<sup>553</sup>

What is of significant importance is that Lord Bingham seems to be suggesting that his opinion or conclusion was to be directed to cases where each of the conditions as stated above, that is condition (1)-(6), would have to be satisfied and to no other cases. This means that this variation or introduction of a new test would only apply to specific cases. He did go on to say that it would be unrealistic to suppose that the principles which have been laid down in *Fairchild* would not over time be the subject of "incremental and analogical development."<sup>554</sup> He disagreed with Lord Hutton's approach and preferred the view that the ordinary approach of causation should be varied rather than drawing legal inferences which were inconsistent with the proven facts. It is interesting to note that the courts do take a flexible approach and are willing to depart from established principles to reach a just result in favour of an employee. This should also be the approach when looking at insurance contracts which deal with double insurance. If the courts are willing to depart when the case warrants it, it could also be suggested that the courts would give more protection to the assured and rule that contracts which try and exclude liability are completely void.

Lord Nicholls agreed with the other lordships and was of the view that the scope of the defendant's liability should be extended due to the "unattractiveness" which would result if the plaintiff was left without a remedy. The facts of the present case he stated was a good example where policy decisions would warrant a departing from the usual threshold of the "but for" test<sup>555</sup>, although noting that considerable constraint would be called for where there is an attempt to relax the threshold "but for" test of causal connection<sup>556</sup>. There must be good reason for departing, which must be sufficiently weighty to justify depriving the defendant of the protection

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<sup>553</sup> [2003] 1 AC 68, para 34

<sup>554</sup> [2003] 1 AC 68, para 34

<sup>555</sup> [2003] 1 AC 70, para 41

<sup>556</sup> [2003] 1 AC 70, para 43

of the test which is normally and rightly afforded to him.<sup>557</sup>

Lord Hoffmann considered it important to deal with the issue of whether causation was a question of fact or a matter of common sense.<sup>558</sup> In his opinion, the causal requirements were just as much part of the legal conditions for liability as the rules which prescribed the kind of conduct which attracts liability or the rules which limit the scope of that liability.<sup>559</sup> Further he considered that the concepts of fairness, justice and reason were connected with the rules which governed what would be the requirements to conclude that the conduct was tortious<sup>560</sup>. The significant features in the present case which would warrant a departure from the long-standing principles were (1) the duty which specifically required the protection of employees by preventing them to being unnecessarily exposed to the risk of being exposed to a particular disease; (2) the duty was intended to create a civil right to compensate for injuries which were relevantly connected to the breach; (3) the greater the exposure to asbestos, the greater the risk it is for one to contract the disease; (4) except where there has been only one significant exposure to asbestos, medical science cannot prove whose asbestos is more likely to have produced the cell mutation which caused the disease; and (5) the employee has contracted the disease to which the employee should have been protected<sup>561</sup>.

Lord Hoffman was of the view that to now put in place a requirement that there be proof of a link between the defendant's asbestos and the disease contracted by the claimant, would empty the duty of content, unless one was dealing with a situation where you had a single-employer. He did leave open the possibility of the court in future occasions formulating different casual requirements in these class of cases. This may be correct but there are unlikely to be many cases where there is a single- employer, especially cases of this sort.

Therefore if the above five requirements were in place, the next issue would be which rule would result in a more just result and conform to policy considerations in regard to common law and

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<sup>557</sup> [2003] 1 AC 70, para 43

<sup>558</sup> [2003] 1 AC 70, para 50

<sup>559</sup> [2003] 1 AC 70, para 54

<sup>560</sup> [2003] 1 AC 70, para 56

<sup>561</sup> [2003] 1 AC 74, 61

statute to ensure that employees do not contract asbestos-related diseases. He raised the question of whether a rule should be in place in a situation, where the employer in breach of his duty would be held liable for the injury to the employee because of the creation of a significant risk to the employees' health, even though the physical injury caused could have been caused by someone else. Or a rule that would apply only where the employee has been subjected to risk by a breach which is caused by a single employer, which would result in the employee not having any remedy.<sup>562</sup> After carrying out a balancing exercise, Lord Hoffman was of the view that it would be wrong to impose a causal requirement which excluded liability.

After discussing in some detail the decision of *McGhee*<sup>563</sup> on the principle of authority, he erred on the side of caution and stated that *Wilsher's*<sup>564</sup> decision indicated the dangers of over-generalisation,<sup>565</sup> although admitting that the principle was capable of development and application in new situations.<sup>566</sup>

Lord Hutton also went through a detailed analysis of the authorities.<sup>567</sup> He again confirmed the decision of *McGhee* and was of the view that it was in the interest of justice that it should be a matter of law that that approach is the correct approach to be followed by trial judges where the facts were similar to the present one, where the claimant could prove that the employer's breach of duty materially increased the risk of him contracting a particular disease and the disease occurred, but where on the medical knowledge which stood at the time, it was unable to prove by medical evidence that the breach was a cause of the disease.<sup>568</sup> He was not of the view that *McGhee's* approach suggested that a new principle was being laid down, where there was medical evidence of the exact cause could not be shown.<sup>569</sup> Justice will be achieved if the burden is placed on the employer who has breached a duty imposed on him and who has materially increased the risk of the employee contracting the disease, to pay damages rather than concluding that the employee is not entitled to damages and is unable to receive any

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<sup>562</sup> [2003] 1 AC 75, 63

<sup>563</sup> *McGhee v National Coal Board* [1973] 1 WLR 1

<sup>564</sup> *Wilsher v Essex Area Health Authority* [1988] AC 1074

<sup>565</sup> [2003] 1 AC 77, para 73

<sup>566</sup> [2003] 1 AC 77, para 74

<sup>567</sup> [2003] 1 AC 78, para 79-117

<sup>568</sup> [2003] 1 AC 91, para 108

<sup>569</sup> [2003] 1 AC 91, para 109

compensation.<sup>570</sup> Further he noted that as the argument had been put forward as to whether there should be apportionment, he was of the view that the liability should be joint and severally, which meant that each employer would be liable in full for the claimant's damages, although it was open to a defendant to seek contribution against one of the other employers who were held also liable for causing the disease.<sup>571</sup> However, Lord Hutton confined his opinion to the specific circumstances of the present case.

Lord Rodger echoed similar findings as the other Lords. He was of the view that the House of Lords should look at the state of the evidence of the medical knowledge at the present moment and that one should leave the problems of the future to be resolved when they occur at a later stage.<sup>572</sup> He went through the law of different jurisdictions to conclude that it was possible, if certain conditions<sup>573</sup> were present. He stated as follows:

"First, the principle is designed to resolve the difficulty that arises where it is inherently impossible for the claimant to prove exactly how his injury was caused. It applies, therefore, where the claimant has proved all that he possibly can, but the causal link could only ever be established by scientific investigation and the current state of the relevant science leaves it uncertain exactly how the injury was caused and, so, who caused it. *McGhee* and the present cases are examples. Secondly, part of the underlying rationale of the principle is that the defendant's wrongdoing has materially increased the risk that the claimant will suffer injury. It is therefore essential not just that the defendant's conduct created a material risk of injury to a class of persons but that it actually created a material risk of injury to the claimant himself. Thirdly, it follows that the defendant's conduct must have been capable of causing the claimant's injury. Fourthly, the claimant must prove that his injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing. In *McGhee*, for instance, the risk created by the defenders' failure was that the pursuer would develop dermatitis due to brick dust on his skin and he proved that he had developed dermatitis due to brick dust

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<sup>570</sup> [2003] 1 AC 94, 114

<sup>571</sup> [2003] 1 AC 95, 117

<sup>572</sup> [2003] 1 AC 97, 125

<sup>573</sup> See [2003] 1 AC 118, 170



on his skin. By contrast, the principle does not apply where the claimant has merely proved that his injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the defendant's wrongful act or omission. Wilsher is an example. Fifthly, this will usually mean that the claimant must prove that his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way. A possible example would be where a workman suffered injury from exposure to dusts coming from two sources, the dusts being particles of different substances each of which, however, could have caused his injury in the same way. Without having heard detailed argument on the point, I incline to the view that the principle was properly applied by the Court of Appeal in *Fitzgerald v Lane*<sup>574</sup>. Sixthly, the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where, as in McGhee, the other possible source of the injury is a similar, but lawful, act or omission of the same defendant"

He did however, reserve his position as to whether these principles would be applicable where the other possible source of injury was similar but lawful act or omission of someone else or a natural occurrence.<sup>575</sup>

### **7.2.3 Bolton Metropolitan BC v Municipal Mutual Insurance Ltd**

This case deals with a policy which includes the provision for an excess clause, which arises in cases dealing with issues of double insurance. In *Bolton Metropolitan BC v Municipal Mutual Insurance Ltd*<sup>576</sup>, the employer was the local authority who occupied a building site where there was an employee who had accidentally inhaled asbestos fibres between 1960 and 1963. As a result the employee started to develop chest symptoms in 1990 and later he was diagnosed with mesothelioma in January 1991. He later died in 1991. There was a settlement reached with the

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<sup>574</sup> [1987] 1 QB 781

<sup>575</sup> [2003] 1 AC 119, 170

<sup>576</sup> [2006] 1 WLR 1492

widower and as a result the claimant sought to obtain recover through the public liability insurance policy against, Municipal Mutual Insurance Ltd (MMI). The public liability policy had been in force since 1980, which provided for indemnity by the Company to the insured in respect of all sums which the insured shall become legally liable for to pay as compensation which arose out of (a) accidental bodily injury or illness (fatal or otherwise) to any person other than any person employed under a contract of service...with the insured if such injury or illness arose out of the course of employment...occurs during the currency of the policy and arises out of the exercise of the functions of a local authority. There was a further provision<sup>577</sup> which acts as an excess clause and provides that if there is any occurrence which gives rise to a claim under the policy, and there is at the time another insurance policy in place, which is also applicable to the claim, then the company shall not be liable in respect of the claim, except in the amount of the excess beyond the amount which would be payable under such other insurance, had the present policy not been in force. Another requirement of the policy was that written notification had to be given, which had not been in this case by the second defendant. At trial the judge ruled that the first defendant was liable to pay the claimant and further, that the second defendant was not liable because it was not on cover when the injury had occurred and since no notification had been given to the second defendant. On appeal, the first claimant's case was dismissed and the court rejected the argument put forward that injury occurred at the point when there was inhalation of the fibres, that is, when there was accidental injury. It was inconsistent because the contract between the parties is an agreement to indemnify against liability and there should not be liability when there is initial exposure or initial bodily reaction to this kind of exposure. Bolton should not be liable where they could be required to be indemnified under any public liability insurance policy. Further it was well established that the words "injury" or "damage" in indemnity agreements would not include injury or damage which will happen in the future.<sup>578</sup> Longmore LJ went on to say that the proximity of the word "accidental" to "bodily injury" did not mean that both the accident and the injury have to be within the currency of the policy<sup>579</sup>. All that was necessary was that the injury occurs within the period of the policy and that it has to be caused accidentally. He specifically stated that the triple trigger theory did not

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<sup>577</sup>Condition 6 of the policy.

<sup>578</sup>Cases that were referred to was *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 147, 157

<sup>579</sup>[2006] 1 WLR 1492, 1502

apply to employers' liability policy at present.

It has been stated<sup>580</sup> that the *Bolton* decision provides that public liability policies provide retrospective cover, which results in the incurring of liability when the negligent act occurs before the inception of cover but resulting in injury during the period of cover. This is however contrary to the framework of the operation of public liability policies which are designed to give current or prospective cover, as retroactive cover only applies to claims made policies that respond to earlier negligent acts.<sup>581</sup> Therefore public liability policies now exclude liability for exposures in earlier years which give rise to injury during the currency of the policy<sup>582</sup>.

There was discussion in *Bolton* as to whether there was the issue of double insurance and whether there was contribution. That is, whether CU could deny liability on the basis that *Bolton* had failed to give the notice of the accident or claim that was required, and whether as a result, MMI could argue that there was double insurance and then be entitled to claim contribution from CU. The trial judge ruled that there was no contribution. Although the Court of Appeal did not want to decide whether the decision in *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*<sup>583</sup> or the decision of the Privy Council in *Eagle Star Insurance Co Ltd v Provincial Insurance Plc*<sup>584</sup> was correct Longmore LJ did however state that the Court of Appeal had the power to do so. Further Longmore LJ stated that he preferred the reasoning of the Privy Council which relied on the basis that the doctrine of contribution could be modified by contract and that the matter should be considered by reference to the parties' contractual liabilities. In his view, an insurer is entitled to say that he has only agreed to insure on certain terms and that he ought to be able to rely on that position against his insured and against his co-insured. It would not be a case of double insurance if one of the insurers agrees to be liable without imposing any condition precedent to liability in relation to notice requirement and another insurer says that he will only be liable if due notice is given of an accident or claim has been given.<sup>585</sup> There was a difference where you had a situation where the co-insurer who was himself a party to an

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<sup>580</sup>Merkin and Steel, *Insurance and The Law of Obligations*, Oxford University Press, 2013 (Chapter 12) 12.3.2

<sup>581</sup>Merkin and Steel, *Insurance and The Law of Obligations*, Oxford University Press, 2013 (Chapter 12) 12.3.2

<sup>582</sup>Merkin and Steel, *Insurance and The Law of Obligations*, Oxford University Press, 2013 (Chapter 12) 12.3.2

<sup>583</sup> [1992] QB 887

<sup>584</sup> [1994] 1 AC 130

<sup>585</sup> [2006] 1 WLR 1492, 1508, para 38

arrangement which after there was a loss suffered, relieved him from liability to his insured and a situation where you had a co-insured who tries and relies on a term of contract which existed at the time of loss.<sup>586</sup>

The use of the words “injury”, “accidental” and “bodily injury” arises in insurance policies, and would, in most cases, cover periods where this results during the period of cover. To read the policy in the above manner, that is, that there was no requirement that the accident and the injury had to happen in during the period of the policy, when dealing with cases that does not involve mesothelioma, cannot be correct. If that were the case, it would be limited to cases which would involve injury, in particular, which were injury to the body. This is too restrictive. Therefore where there was any matter which was covered by the insurance policy, and if there were clauses in the policy which excluded or limited liability, the court should exercise its discretion to hold that all these clauses cancel out each other and should have no effect. This would be in line with the objectives of s45.

#### **7.2.4 Barker v Corus: revisiting Fairchild**

The next case in the string of decisions was *Barker v Corus*<sup>587</sup>. Barker's decision revisited the decision of Fairchild and led to more uncertainty in the area of liability principles in mesothelioma claims. In *Barker*, there were in fact three cases. The first involved the claimant's husband who had been exposed to asbestos during his working life for a period of some three years, while working for his first employer who had become insolvent, the defendant, and finally while he was self-employed. The judge in this case ruled that the defendant's liability was joint and severable with the insolvent company, to which the Court of Appeal was in agreement. In the other two cases, there were a number of employers involved, and the employees had died as a result of exposure to asbestos. The problem was that most of the employers had become insolvent and proceedings were then brought against the remaining ex-employers. Again, the judge was of the view that liability of the defendants was joint and several. The Court of Appeal here agreed with this conclusion. As a result of this, the defendants appealed the above ruling.

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<sup>586</sup> [2006] 1 WLR 1492, 1508, para 38

<sup>587</sup> [2006] 2 AC 572

Lord Hoffmann gave his reasons, with which the other Lords agreed with, with Lord Rodger of Earlsferry dissenting. Lord Hoffmann reiterated the emphasis placed by the House of the exceptional nature of such cases, in terms of the nature of liability, as he was also one of the judges on the *Fairchild* decision. He noted the importance of the court on relying on fairness to come to their conclusion, and how the court had applied an exceptional and less demanding test for the necessary casual link between the defendant's conduct and the damage.<sup>588</sup> The two important issues that were raised in the appeal were (1) what were the limits of the exception of the decision in *Fairchild* and (2) what is the extent of the liability?

The difference between the facts of *Fairchild* and the facts of the present case, was that here not all the exposures which could have caused the disease involved breaches of duty to the claimant or were within the control of the Defendant<sup>589</sup>. One question which the court had to decide was that if this was the case, would the exception as laid down in *Fairchild* extend to such situations? Further, the court went on to state that if this were not the case, then, the issue would be whether Corus was liable for all the damages suffered to the Claimant, here Barker, or only for its aliquot contribution to the materialised risk that he could have contracted mesothelioma.<sup>590</sup> In the other two appeals it was not challenged that their cases did fall within the exception of *Fairchild*, but what had to be decided was the issue of joint and several or only several liability.<sup>591</sup>

Lord Hoffmann noted the differing views and mechanisms<sup>592</sup> of the lordships in their attempt to confine the approach of the extent of the principle of liability. Also, the situation where the employee himself had contributed to the significant exposure in some way had not arisen in *Fairchild*, and was not dealt with by the lordships. His understanding of the analysis by the other lordships, for example, Lord Bingham's view required that all possible sources of asbestos should involve breaches of duty to the claimant. Lord Rodger he thought, went further to allow for non-tortious exposure by the defendant who was in some way responsible for a tortious

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<sup>588</sup> [2006] 2 AC,580, 1

<sup>589</sup> [2006] 2 AC 580, 3

<sup>590</sup> [2006] 2 AC 580, 3

<sup>591</sup> [2006] 2 AC 581,4

<sup>592</sup> [2006] 2 AC 582, 8-10

exposure but did not go on to deal with situations where there was possibility of liability where there had been non-tortious liability. The other lords did not as such formulate the issues in terms which excluded the possibility of liability when there was non-tortious exposures.<sup>593</sup> Although ultimately agreeing that the formulations on the exceptions that were expounded in *Fairchild* were not confined if different situations arose.<sup>594</sup>

The decision in *McGhee* was discussed and its implications, where there were situations like that in *McGhee* which resulted in other possible sources of the injury which was similar, but lawful, act or omission in relation to the same defendant. Lord Hoffmann was of the view that it did not matter whether the tortfeasor who committed the non-tortious act was the same tortfeasor who committed the tortious act. The *Fairchild* exception would allow for situations where it would not matter whether the exposure to the defendant was tortious or non-tortious, caused by natural causes or human agency or if it was attributed to the defendant himself.<sup>595</sup> This would only be relevant to whether and to whom responsibility could also be attributed to, but that where there was an argument of a causal link between the defendant's conduct and the claimant's injury, it was decided that it did not matter.<sup>596</sup> An essential condition, as Lord Hoffmann put it, for the operation of the exception was that the difficulty in proving that it was the defendant who caused the damage was due to the existence of other potential causative agents which operated in the same way.<sup>597</sup> The mechanism which caused the damage must be the same.<sup>598</sup>

In relation to apportionment, Counsel for the defendant argued that as liability was approached in a novel way that apportionment should also be looked at in the same way. Lord Hoffmann again focused on the protection of the Claimant and the likely consequences of not following the "normal principles" which were that this was an indivisible injury. This would be the position even though it may cause problems to the defendant where you had a situation where as time went by and the number of employers remaining solvent and traceable was

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<sup>593</sup> [2006] 2 AC 583, 11

<sup>594</sup> [2006] 2 AC 583, 11

<sup>595</sup> [2006] 2 AC 585, 17

<sup>596</sup> [2006] 2 AC 585, 17

<sup>597</sup> [2006] 2 AC 587, 24

<sup>598</sup> [2006] 2 AC 587, 24

diminishing.<sup>599</sup> Therefore liability should be joint and severable, to prevent the claimant from being out of pocket where there was a possibility that the tortfeasor was insolvent.

The interesting development in *Barker* was the discussion of whether liability was for the risk or for the injury. If the court were to characterise the damage by basing the liability on the wrongful creation of a risk or a chance of causing the disease, and which the damage caused by the defendant is the creation of such a risk or chance, then it would not matter that the disease, namely mesothelioma, would be indivisible.<sup>600</sup> Chances it was said, were infinitely indivisible and different people could be separately responsible to a greater or lesser degree for the chances of the event happening.<sup>601</sup> These cases, it was correctly pointed out, involves uncertainty as to the cause of a known outcome, which was mesothelioma, and Lord Hoffmann considered that it was possible for the courts to quantify, as he put it, "the chances of X having been the cause of Y just as well as the chance of Y being the outcome of X." Again the issue of fairness was considered, in relation to the characterizing of the damages as the risk of contracting mesothelioma. He was of the view that fairness should be considered and if a person may be liable then, liability should be divided according to the possibility that one or the other may be liable.

Damages should be apportioned according to the defendants' contribution to the risk, according to the time of exposure for which the defendant was responsible, with allowance being made for the intensity of exposure and the type of asbestos.<sup>602</sup> This issue was not discussed before the House but the House commented that the parties, their insurers and advisers should devise practical and economical criteria for dealing with them.<sup>603</sup>

Again, fairness is a common factor that the courts take into account. Although, the issue of contribution would be more relevant when deciding the amount of damages that should be awarded from a tort perspective, from an insurance perspective, contribution will not be relevant

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<sup>599</sup> [2006] 2 AC 588, 30

<sup>600</sup> [2006] 2 AC 589, 35

<sup>601</sup> [2006] 2 AC 589, 35

<sup>602</sup> [2006] 2 AC 594, 48

<sup>603</sup> [2006] 2 AC 594, 48

to the issue of the amount of damages to be awarded. As the courts were dealing with a case where the illness or cause itself was very uncertain and indivisible, liability, should be of a joint and severable nature. When looking at a double insurance situation, the court should view such cases as being unique and exceptions should apply, like the *Fairchild* decision to such cases. Fairness should be an overriding objective when deciding such cases. Liability between the insurers should be of a joint and severable nature. This would give protection to the assured.

### **7.2.5 Durham v BAI (Run Off) Ltd- A review of the cases**

The next case in a line of authorities which reviewed *Fairchild*, *Barker* and *Bolton* in some detail was the decision of *Durham v BAI (Run Off) Ltd*<sup>604</sup> (referred to as "Trigger"). This case was subsequently referred to as the Trigger Litigation<sup>605</sup>. In Trigger, claims were brought against the employers' insurers who had policies under the employers liability insurance in situations where the employee had died from mesothelioma due to inhaling asbestos fibers during their employment when employed with the employer. There were policies in place which covered the period from 1940 to circa 1998. The specimen policies were worded differently in each policy, although stating that the policy would operate where there was disease which was "sustained" and/or when disease was "contracted during the policy period in question". Personal representatives of the deceased sued under Third Parties (Rights against Insurers) Act 1930, employers who had paid out but wanted to obtain indemnity under their employers' liability insurance, and five employers' liability insurers (BAI (Run Off) ("BAI"), Excess Insurance Co Ltd, Independent Insurance Co Ltd, Municipal Mutual Insurance Ltd ("MMI") and Zurich Insurance Co.)

This case dealt with employers' liability insurance and looked at the relationship and the activities between the employer and employee. After the implementation of the Employers' Liability (Compulsory Insurance) Act 1969, all employers are required to maintain the approved policies under the Act. The argument put forward by the insurers was that under such employers' liability insurance, the policy would only respond where the disease of mesothelioma was

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<sup>604</sup> [2012] 1 WLR 867

<sup>605</sup> Merkin and Steel, Insurance and The Law of Obligations, Oxford University Press 2012 Chapter 12



developed, or manifested itself, during the relevant period of insurance, which could have occurred years back. The employers and the personal representatives on the other hand argued that the insurance policy must respond to the disease of mesothelioma which develops and manifests itself at a much later stage and that once the victim has been exposed during the insurance period then the tortfeasor should be liable as the law places such responsibility on the tortfeasor. It was stated that these alternative bases of response (or "triggers" of liability) have been loosely described as an occurrence (or manifestation) basis and an exposure (or causation basis).<sup>606</sup> Burton J decided that relevant insurances would only respond on an exposure basis and the majority<sup>607</sup> in the Court of Appeal agreed, especially where there was insurance which covered disease "contracted" during the relevant periods. The Court of Appeal however concluded that where there was a policy which covered disease "sustained" then the policy would only respond on an occurrence or manifestation basis.

Burton J held that all policies which were claims against the insurers were made, should respond where it was decided that the employer was liable on the basis that the inhalation by the employees was during the policy period. This was upheld by Rix, Smith and Stanley Burton LJ when it went on appeal and where they were of the view that this was the position where the policy provided for cover for diseases "contracted" during the period of insurance but permitted the insurers appeal, where the policy provided for cover for diseases "sustained" during the policy period.

Burton J stated<sup>608</sup> that single fiber theory as put forward in *Fairchild's* case had been discredited and that the analysis of Lord Rodger, who provided an alternative explanation was fully accepted. He went on to state that it was common ground that the asbestos fibers in the body could not be causative of mesothelioma during the last 10 years immediately prior to death, as the process started before that.<sup>609</sup> He noted the problems that such disease raised for the purposes of the Employers' Liability Act 1880, which required that the employee show that employer has caused the injury and for the purposes of s4 of the Act, the sustaining of the injury was only to

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<sup>606</sup> [2012] 1 WLR 872, 3

<sup>607</sup> Rix and Stanley Burton LJ

<sup>608</sup> [2009] 2 All ER 42,31

<sup>609</sup> [2009] 2 All ER 42,31

refer to injury which had been so caused. Due to the unfairness which resulted, the Workmen's Compensation Act<sup>610</sup> was passed by Parliament. He also noted the decision in *Fairchild* and *Barker v Corus*, and was of the view that the majority view was that found at paragraph [48]<sup>611</sup> of the judgment. However, as a result of the decision in *Barker v Corus*, Parliament decided that it was necessary that legislation be passed in the form of the Compensation Act 2006, in particular section 3, which specifically deals with mesothelioma jurisprudence.

Section 3<sup>612</sup> is an interesting piece of legislation, in relation to damages, which requires some attention. Under the section, reference is made to "the responsible person" who has negligently or in breach of statutory duty caused or permitted the victim to be exposed to asbestos and as a result the victim had contracted mesothelioma due to the exposure to the asbestos. Further that due to the nature of the mesothelioma and the lack of determination with any certainty due to the state of medical science, whether such exposure caused the victim to become ill and liability falls on the shoulders of the responsible person, in connection with damage caused to the victim by the disease, either by reason of having materially increased a risk or for any other reason. Liability under s3(2) will make the responsible person liable in whole for the damage caused to the victim by disease, this would still apply regardless of whether the victim was also exposed by persons other than the responsible person, as liability would be regarded as joint and several with any other responsible person. Therefore as can be seen, one solvent employer will be facing liability when the employee showing that they had been tortuously exposed to asbestos while being exposed to it during their employment.

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<sup>610</sup> in 1897, 1900, 1906 and 1925

<sup>611</sup> Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it only applies only when the claimant has contracted the disease against which he should have been protected. And in cases outside the exception as in *Gregg v Scott* ... a risk of damage or loss of a chance is not damage upon which an action can be founded. But when the damage is apportioned among the persons responsible for the exposure to asbestos which created the risk, it is known that those exposures were together sufficient to cause the disease.

<sup>612</sup> Mesothelioma: damages (1) This section applies where - (a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos, (b) the victim has contracted mesothelioma as a result of exposure to asbestos, (c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason). 2. The responsible person shall be liable - (a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos - (i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or (ii) by the responsible person in circumstances in which he has no liability in tort), and (b) jointly and severally with any other responsible person."

The next issue which was discussed was that of insurer's liability under the Employers' Liability insurance which is owed by the employer to the employee, until the establishment and ascertainment of which there is no right of indemnity by the employer against the insurance company<sup>613</sup>. It is the wording of the insurance policy that has to be looked at. The issue as pointed by Burton J was that the question of once the employer is held to be liable to the employee, as to what trigger or key unlocks a relevant period of cover, when looking at the wording of the insurance policies in place at the time.<sup>614</sup> Burton J correctly identified that that issue was what would be the temporal limitation where you have a Employers' Liability Policy which provided for indemnity against liability for compensation for bodily injury or disease which was suffered by a person to contract of service which arises out of or in the course of the employee's employment by the employer. He then went to state that there were five kinds of liability insurance triggers which were relevant to Employers' liability insurance, which were as follows: (1) occurrence or event, which was at the date of breach; (2) causation/exposure; (3) occurrence of loss/damage, which was also known as injury of fact; (4) manifestation/diagnosis/notice; and (5) claims made. It was stated that (i) – (iv) are all known as “events occurring”, which should be contrasted with (v).<sup>615</sup> Employers' Liability it was said, was causative, which required that liability of the employer has to be shown and that the injury must have arisen out of the employment, which to that extent had to be caused by the employer. Public liability insurance on the other hand does not have an employment relationship in existence.

Burton J concluded that both words ‘sustained’ and ‘contracted’, are required to be construed in their context and within the factual matrix, and the words ‘caused’ or ‘be caused’ are to be construed as meaning the same as a causation test. On the present case, such a reading is consistent with the commercial purpose of Employers' Liability. Burton J said that this construction is consistent with public policy, when considering the Workman's Compensation Act and the courts' approach of giving protection to the employee who could look to the insured's employers, taking into consideration the likelihood that there would be a change of

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<sup>613</sup> *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363

<sup>614</sup> [2009] 1 All ER 52, 59

<sup>615</sup> [2009] 2 All ER 53, 59

insures during the period of the employees' employment. Further that including the wording 'caused' or to have a 'sustained' wording, which is construed as meaning, 'be caused' was the only way to achieve consistency with public policy and the Act, so protection would be given "irrespective of what may happen thereafter"<sup>616</sup> He went on to say that on a construction of the words which apply on a causation or exposure basis, 'contracted', inflicted, was wide enough to mean 'be caused'. Looking at the wording of the policies, injury is 'sustained' when it is 'caused' and the disease is 'contracted' when it is 'caused'.<sup>617</sup>

The Supreme Court was of the view that a review of the principles as discussed at First Instance and at the Court of Appeal was necessary<sup>618</sup>. Reference was made to the wordings of the policy which were reproduced in Annex A, which the insurers argued that the policies would not respond to many of the mesothelioma claims because the claims only emerge in the 1980s. This was clearly in the hopes to avoid paying out under the insurance policies. The words that were relied on were crucial. These were the words "sustain" whether in connection with the phrase "personal injury by accident or disease" or "bodily injury or disease" or in the conjunction "injury or disease...sustained or contacted" or "injury sustained or disease contracted". The majority in the Court of Appeal were of the view that "sustain" looked *prima facie* at the experience of the suffering employee rather than its cause. Therefore this would not cover situations where the mesothelioma was sustained long afterwards.

The Court of Appeal in its judgment again went through the leading authorities in mesothelioma claims. In a split decision, Smith LJ in his analysis agreed with what was stated by Burton J. The majority, comprising of Rix and Stanley Burnton LJJ partially disagreed with the decision of Burton J.

Rix LJ when dealing with the issue of the construction of the wording 'sustain' injury, which he considered to be crucial in terms of wording in all the policies, stated that the concept of

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<sup>616</sup> [2009] 2 All ER 108, 240

<sup>617</sup> [2009] 2 All ER 111, 243

<sup>618</sup> [2012] 1 WLR 873, 6-10

sustaining injury in its normal sense refers to the suffering of injury<sup>619</sup>. Injury he thought only occurred when it was suffered, or is incurred, or when it occurs, or is inflicted upon one. The judge's approach, Rix LJ thought, left one with ambiguity, by substituting the word 'caused' with the word 'sustained'. Therefore, the issue was, was one to look at the injury or was one to look at the cause of the injury. Rix LJ stated that sustaining injury prima facie looks to the injury rather than its cause.<sup>620</sup> These were standard wordings which were included in contracts which would be renewed by the parties on a yearly basis, and in some cases, tariff wordings were used which tended to adopt the causative approach.<sup>621</sup> This approach starts with the concept of sustaining injury and then goes on to state that what will have to occur in the policy year is not the injury itself but the cause of that injury, as usually the words "if any person under a contract of service...shall sustain bodily injury or disease caused during the period of insurance"<sup>622</sup> Although he noted the conflict which may arise when looking at it in conjunction with the Employers' Liability insurance but such a definition would not be an absurd or meaningless or irrational interpretation.<sup>623</sup> He equated it with the way the court defines "injury occurring" that is used in public liability insurance. He noted and seemed to suggest that although it is mesothelioma and its "extraordinary circumstances" which was where such a test is usually applied,<sup>624</sup> he went on to say that it would also be possible that the test could also be used in other forms of cancers.

Further, the words "disease contracted" was important and could be looked at in two ways. If the phrase is to be looked at together with the words 'injury sustained' then this would seem to suggest that this would be dealing with the onset of the disease and not looking at the origin of the disease, which would be consistent with the *Bolton Metropolitan BC* case's interpretation. On the other hand one could look at it in a commercial sense with regard to the purpose of the Employers Liability insurance contracts, which looks at the casual origins of the disease in the employee's exposure to noxious activities which he is subject to during his employment. He preferred the later one, and held that prima facie the phrase 'disease contracted' refers to the time

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<sup>619</sup> [2011] 1 All ER 672, 230

<sup>620</sup> [2011] 1 All ER 673, 233

<sup>621</sup> [2011] 1 All ER 673, 234

<sup>622</sup> [2011] 1 All ER 673, 234

<sup>623</sup> [2011] 1 All ER 673, 235

<sup>624</sup> [2011] 1 All ER 673, 235

of the disease's causal origins.<sup>625</sup>

In terms of injury, Rix LJ felt that he was bound to the decision of *Bolton Metropolitan BC*, which clearly stated that there was no injury until the injury's onset, even though he was of the view that he had serious doubts about its correctness. He went on to discuss the decision of *Fairchild*, *Barker* and *Rothwell* and concluded that on his analysis that where mesothelioma develops, it is the exposure, and the risk of mesothelioma which is the damage, and as a result the employer should be liable.<sup>626</sup> He reached this based on the *Barker's* case where Lord Hoffman stated that the underlying purpose of Fairchild exception 'is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage', and where the risk has materialised.<sup>627</sup> Such an understanding would, in his view, lead to the time of the creation of the risk, the creation which should also be the time of the cause of action, which is caused by the risk and injury or damage which leads on to the mesothelioma. This he claimed reflected a common sense approach and was consistent with the medical literature at the time. Bolton's decision<sup>628</sup> was precedent and although he stated that he was bound, he still went on to state why he did not agree with the case.

Justice would be done if such a conclusion was followed, which requires the employers to cover for liability which arose out of injuries which the employee obtained during the employment in any given policy year where such injuries arise out of the employee's exposure to the insured employers' activities in that year. He went on to say that this would in some ways prevent the "unknowable and serendipitous mystery"<sup>629</sup> of the problems of mesothelioma, which was when the onset starts. This would result in the situations arising where one would not be able to say whether and which employer the employers liability fell on, or if it fell within one wording or another, or whether it was not covered at all.<sup>630</sup> If one were to follow the analysis of Rix LJ, he considered that this would result in the precedent of the *Bolton* decision not applying or

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<sup>625</sup> [2011] 1 All ER 675, 245

<sup>626</sup> [2011] 1 All ER 681, 281

<sup>627</sup> [2011] 1 All ER 681, 281

<sup>628</sup> Where the court stated that there was no actionable injury at the time of exposure, and did so in a case where mesothelioma developed.

<sup>629</sup> [2011] 1 All ER 682, 285

<sup>630</sup> [2011] 1 All ER 682, 285

extending to other types of diseases. Further, he was of the view that this would also be in line with other jurisdictions. He ultimately concluded that the word sustain meant sustain, but that 'disease contracted' looked towards the causative origins.

Smith J agreed with the decision of the judge, but on doing so came to his conclusion based on the principal ground that the sustained wording should be read in such a way that would result in the user's meaning at the time of the policies in question and by looking at the factual matrix of the policies at the time when reading the policies, which had the same effect of causation. This is due to the acceptance of the change of the medical knowledge being different at different points of time. Burton LJ agreed with Rix J's decision but disagreed on the Independent analysis<sup>631</sup> and his conclusion regarding the decision that the 1969 Act required causation wording. Further, whether employee included ex-employee was another factor to be considered.

Lord Mance JSC, in the Supreme Court, decided that the correct way to resolve the interpretation of the words was to avoid looking at the meaning of the single words or phrases but one had to look at the insurance contracts more broadly. Five factors were looked at that were indicative of a causative approach being preferred. The first was the wordings on their face required the course of employment to be contemporaneous with the sustaining of injury, although "sustain" would equate more with occurrence. Secondly, there would be a close link between the actual employment undertaken during each insurance period and the premium which was agreed to be payable for the risks that were undertaken by the insurer during that period. Thirdly, there would be a potential gap in cover where there was an employers' breach of duty in a period which only led to injury or disease in another further period, if one were to look at the insurance policies only addressing risks during the period of the policy. Fourthly, employers would be left open to the possibility that the insurers may not renew the policy, even though such situations may not arise in large number of cases. However, Lord Mance JSJ was of the view that Rix LJ, failed to take into account the decision of *Rainy Sky SA v Kookmin Bank*<sup>632</sup> where it was considered that where there was more than one interpretation, it would be appropriate to adopt an interpretation with business common sense. Further that even 1% of cases where there may be no

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<sup>631</sup> [2011] 1 All ER 696, 350

<sup>632</sup> [2011] 1 WLR 2900,30

cover was not insignificant.<sup>633</sup> The fifth point was the issue of territorial scope, where one would have a result of the disease experienced during employment covered even though it was caused by pre-employment exposure, and a situation where disease cause by employment not covered if only experienced while the employee was working abroad.

The wording of the BAI and MMI policies would still lead to uncertainty regarding disease and the difference between "injury sustained" and "accidents arising" as it could be read either as deliberate or as suggesting that no significance was attached to the difference or that the real concern was causation.<sup>634</sup>

Lord Mance then went on to deal with relevant parts of the history and the wordings of the Workmen's Compensations Acts, agreeing with the analysis by Rix LJ<sup>635</sup>.

Lord Mance agreed with Smith LJ's conclusion that public liability and employers' liability gave rise to different considerations, which according to Smith LJ was necessary as on the factual matrix he felt that they were dealing with Employers' Liability rather than public liability policies.<sup>636</sup> This was due to the effect of the particular terms and consideration<sup>637</sup> which to be taken into account. He then went on to proceed on the basis that *Bolton Metropolitan* was not binding on the court, without discussing the accuracy of the decision but basing it on the fact that it was unnecessary to decide what the position would be if one were to deal with public liability insurance.

He agreed with the Court of Appeal that the word "contracted" looked at together with disease looks to the initiating or causative factor of the disease. The word "sustained" may at first glance refer to the development or manifestation of such an injury or disease as it impacts employees, the only approach which is consistent, would be to look to the initiation or causation of the accident or disease which injured the employee. Therefore this would be when the disease was

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<sup>633</sup> [2012] 1 WLR 880, 26

<sup>634</sup> [2012] 1 WLR 881

<sup>635</sup> [2011] 1 All ER 605

<sup>636</sup> [2011] 1 All ER 692, 328

<sup>637</sup> [2012] 1 WLR 877, 18-28, 42-47



caused or initiated even though it would only develop and manifest at a much later stage. The case of *Fairchild* which imposed liability for the mesothelioma on persons who have exposed the victim to asbestos and as a result created the risk of mesothelioma is not a rule which, as he put it, even as between employers and employees, would deem that the employee has suffered injury or disease when there was exposure. Even if it is viewed that liability is retrospective on the employers, the insurance policies do not insure risk of physical injury or disease, but only actual injury or disease<sup>638</sup>.

However, what is important from a double insurance aspect is the application of the insurance provided for mesothelioma victims. This issue only became significant when raised by Lord Phillips, who stated that exposure to the risk of mesothelioma was the correct analysis of the *Fairchild* rule and that exposure could not satisfy the concept of injury or the concept of causation for the purposes of the policies. Lord Mance on the other hand, went on to state that if Lord Phillips is correct in his approach and analysis, then this meant that all the present insurance claims would fail, not to mention the majority of the claims that were settled by other insurers or by present insurers. The only exception he said would be situations where an employee exposed to asbestos when employed by only one employer who had at the time been insured with only one insurer throughout. The conclusions which the decision of *Fairchild*, *Barker* and *Sienkiewicz* provides is that of a special rule which provided for a deeming provision, that once an employer had exposed an employee to asbestos and as a result that employee suffered mesothelioma, then the insurance policies should pay out. Therefore the decision of *Fairchild* would create liability not for the disease but “for the creation of the risk of causing the disease”. Further, that according to Lord Phillips analysis, no assistance would be given to employers and employees from the conclusion that a person who suffers from mesothelioma was caused or initiated in any particular policy period. This he stated would suggest that even if the employers’ policy responded, when there are injuries caused or initiated during their period, the employer and employee would fail for want of proof.<sup>639</sup>

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<sup>638</sup> [2012] 1 WLR 891, 52

<sup>639</sup> [2012] 1 WLR 893, 58

Lord Mance did not agree with this analysis after referring to the decisions in *Fairchild* and *Barker*, and the House of Lords decision which rejected this fictional approach, that each exposure would have caused or materially contributed to the disease<sup>640</sup>. Further that the liability was not the causing of the disease but for materially increasing the risk of the mesothelioma<sup>641</sup>. After a closer analysis of *Barker*, Lord Mance stated that one could conclude that the common law position after the *Barker* decision was concerned with the issue of the “causal requirements” or “causal link” between the defendant’s conduct and the disease. Of course, the precondition that the person actually develops mesothelioma was required<sup>642</sup>. The cause of action would lie where the victim could have been exposed by the employer previously, and not because that the employee had been, and therefore mesothelioma may have been suffered by him. In relation to the exposure, is that some exposure to the asbestos by someone, something or some event had led to the mesothelioma.<sup>643</sup> Therefore, the cause of action is “for” or “in respect of” the mesothelioma and the defendant who exposes a victim of mesothelioma to asbestos will be responsible “for” and “in respect of” both that exposure and the mesothelioma, which later develops.<sup>644</sup>

The main issue of the present appeals was on what basis the employers’ liability insurance policies respond as a matter of construction, where you have situations which fell with the framework of *Fairchild* and *Barker*. Lord Mance went on to say that the employer must accept situations and the possibilities where the common law would develop to a stage where the employer’s liability would be increased, if they were within the limits of the relevant insurance

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<sup>640</sup> [2003] 1 AC 32, para 31,61,104

<sup>641</sup> [2003] 1 AC 32, para 31,36,40,53,61 and 113

<sup>642</sup> As was stated in *Barker*.

<sup>643</sup> [2012] 1 WLR 893, 65

<sup>644</sup> [2012] 1 WLR 893, 66

and insurance period.<sup>645</sup>

He considered the liability only arose where because of the incurring of the disease and is for the disease.<sup>646</sup> The liability arises when the employer had exposed the victim to the disease. The same would apply in situation where there is vicarious liability. The way the insurance policies should be read, is that of a causative basis which would effectively cover any liability which arises during the employers' activities during the period of coverage, and only if liability for mesothelioma flows from the negligent exposure during an insurance period is covered by the policies, otherwise the policy would not respond.<sup>647</sup> For the purposes of insurances, a more justified approach when dealing with insurance would be one where the liability of mesothelioma following the exposure to asbestos which was created when the policy of insurance was in effect and during the insurance period, would provide a sufficient "weak" or "broad" causal link for the disease to be regarded as "caused" within the insurance period.<sup>648</sup> The law would be unjust for there on the one hand to be a deeming provision of causation of the disease which could have created policy liability, and on the other, insist that the risk for such cases would be for the risk of causation. The risk, he went on to say was no more than an element or condition necessary to establish liability for the mesothelioma. The 2006 Act was, in his view, there to impose liability on the employer for the mesothelioma.

For the purposes of the policy, the negligent exposure of the employee to the asbestos could have a sufficient causal link or being sufficiently causally connected with subsequently arising of mesothelioma, in which case the policy will respond to the claim. The fundamental focus of the policies, he regarded, was on the employment relationship and activities during the insurance period and on liability arising out of and in course of them, which would result in the liability attaching.

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<sup>645</sup> [2012] 1 WLR 893, 70

<sup>646</sup> [2012] 1 WLR 893, 72

<sup>647</sup> [2012] 1 WLR 893, 72

<sup>648</sup> [2012] 1 WLR 893, 73

Lord Clarke when dealing with the insurers and whether the policy would respond, was of the opinion that the employers' liability insurers would be liable to indemnify the employers in respect of that liability. Further he was of the view that once it was held that on the present facts that the employers were liable to the employees, it would be remarkable if the insurers were not liable under the policies.<sup>649</sup>

Lord Phillips's analysis is an interesting one and some commentators have said that his analysis and conclusion is wrong.<sup>650</sup> He raised a few questions which he thought would lead to some difficulty if an employer was unable to prove that an employee's mesothelioma was caused in whole or in part by any particular period of exposure to asbestos dust. This would mean that the employer would not be able, once the special rule was applied and he was held liable, on a balance of probabilities, that the liability was initiated in any particular policy year. If this were the case, then the issue would be, how could the employer prove that his liability fell within the scope of cover, even if the policy bore the construction contended for by the employers and which was upheld by the court? Lord Phillip was of the view that the court should not redefine the special rule which would enable the claims to be brought under the employers' liability policy. He went on to say that the object of the special approach in the decision in *Fairchild* and *Barker* was there to enable that where an employer had breached his duty, which was owed to the employee, did not escape liability because of the scientific uncertainty which was present in relation other types of cases. Lord Phillips felt that it would be "judicial law-making" of a different dimension if the courts were able to create such a fiction as to the policy years in which mesothelioma cases were initiated in order to render liable insurers who could not otherwise be able to show that they were in fact liable.<sup>651</sup> He considered that if there was a compelling reason that a means should be founded which would result in employers' liability insurers liable, he thought that this would be a matter for Parliament and not for the courts. It would, in his view be

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<sup>649</sup> [2012] 1 WLR 893, 88

<sup>650</sup> Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, page 364

<sup>651</sup> [2012] 1 WLR 893, 135

wrong in principle for the Supreme Court to depart from the reasoning of the majority in *Barker* for the only reason and purpose of imposing liability on the employers' liability insurers.<sup>652</sup>

In *Durham*, there was emphasis placed on the wordings of the policies and how they should be read, causation and whether liability should fall on a "responsible person" who was connected with damage caused to the victim by the disease. These play an important part when one deals with mesothelioma cases, although it has been suggested that these requirements could be branched out other diseases. It can be seen that the courts realized the problem with this unique type of situation and the likely unfairness which was could arise, and as a result further protection was implemented in the form of legislation. It could be argued that a similar approach should be adopted for other cases or situations where double insurance could arise. Similarly, a legislative framework in the form of s45 could be developed in England, to resolve the unfairness which has arisen in double insurance cases.

### **7.3 Reasoning of the Mesothelioma case: What is the possible solution and does it apply to double insurance?**

The issue of causation is relevant to double insurance because it is unclear which policy applies and so the defendant insurer cannot be identified.

As can be seen from the above discussion of the authorities and the reasoning of the courts, there have been different ways of approaching the issue of mesothelioma cases. It is not disputed that such cases are unique. It can also be seen how the courts have attempted to grant the protection to such victims where you have a situation where it would be almost impossible for the claimant to be able to point his finger at one particular employer, when you have a situation where you have numerous employers, as to who is liable for the injury suffered by the employee. The same

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<sup>652</sup> [2012] 1 WLR 893, 137

applies to situations of double insurance and which insurer to sue then becomes relevant. This results in the insurer arguing that it is not liable as their policy does not cover the period in question.

The courts have stretched the general rules of causation and extended it all the way to provide protection to the victim. In relation to the liability of the employer in such situations, the issue then is whether the courts approach should also apply to situations where you have double insurance. It could be argued that the Australian legislation under s45 could provide a solution in cases where double insurance would arise.

From an employees' perspective, he would not have to worry as to whether he will get paid or not, where you have a situation where there are numerous employers, as under tort law he can pick any employer he wishes. Accordingly, the employer can make a claim against the insurer in every year of exposure and for every act of exposure which is on risk for any one year during which it is alleged that the exposure may have taken place. Further, if an insurer has paid out under a policy, whether the insurer can then go on to seek contribution from other insurers. The courts removing the requirement of the causative effect will permit an assured to sue whichever insurer he wishes. This will be the case, only if there is in fact a situation of double insurance arising. The insurer will now be liable to pay in full, i.e 100%, of the loss which has arisen. It could be argued that there is no double insurance (i.e because there are no concurrent policies in place) for mesothelioma cases and therefore no contribution arises. The policies are consecutive in nature, and which respond to different exposures.

The employer does not need to respond to a request by the insurer to identify a particular year, because there is a claim for every year. This request may only be relevant for dealing with any reinsurance claims.

Under the law of tort, the position is that there is entitlement to compensation.<sup>653</sup> Issues regarding payment of the liabilities will only be looked at in terms of mere practice and is only of

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<sup>653</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329

subsidiary concern.<sup>654</sup> One of the reasons why this is so, is the view that liabilities are usually paid for by the insurance that has been taken out and the legislative provision in place, such as Employers' Liability (Compulsory Insurance) Act 1969.<sup>655</sup> This legislation specifically provides for a requirement that the employer who carries any type of business in Great Britain, to take out insurance, and is required to maintain insurance for liability for bodily injury or diseases which the employee may get.<sup>656</sup>

There has been suggestion that the *Fairchild*, *Bolton* and *Durham* have been far from satisfactory<sup>657</sup> and that there is no need for the analysis as put forward by the courts as to the distinguishing of the types of wordings used as to whether there is cover or not. The problem is that there is room to argue whether "sustained" is genuinely unambiguous in its meaning.<sup>658</sup> It is the principles of contractual interpretation and looking at the intentions of the parties which should be relevant when interpreting the contractual terms of the contract entered into between the parties. If such an approach was adopted then such an ambiguity would not arise.<sup>659</sup> The reasoning of the judges meant that whether the employer is covered or not depended on the wording of the policy, for example, where the wording was stated as "injury sustained" would be uninsured against exposes. However, if the wording used was "injury sustained or disease contracted", this would suggest that there was cover present and that those making a claim under the policy would be covered.<sup>660</sup> This does not, it has been argued, reflect the contractual intention of the parties.

According to the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>661</sup>, the House of Lords provided principles in terms of how the wording in the contracts

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<sup>654</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329

<sup>655</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 330

<sup>656</sup> Section 1(1)

<sup>657</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 331

<sup>658</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 331

<sup>659</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 331

<sup>660</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 331

<sup>661</sup> [1998] 1 W.L.R. 896

should be construed. The interpretation the court said was to be ascertained by looking at the document and to see what a reasonable person having all the background knowledge which would reasonably been available to the parties when they entered into the contract has.<sup>662</sup> Further, what would fall under background would be absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.<sup>663</sup> Therefore, should one have to look at the actual wording or should one have to look at the intention of the parties when they entered into the contract. The way the law had developed when it reached the Court of Appeal stage could create potential problems such as what sort of “injuries” would be actually be necessary before they fall within the confines of the insurance policy, which would be unsatisfactory to define due to the changing nature of the mesothelioma cases, where a more definite understanding could be provided when the medical literature is more abundant.<sup>664</sup> It has been argued that the commercial purpose of the parties should take significance over the actual wordings that the parties choose, as it could always secure the rights and duties which had been defined in the terms, but contextual interpretation should not be confined in such a way.<sup>665</sup>

The Court of Appeal decision, has been argued<sup>666</sup> to be wrong in the following four respects (1) that the distinction raised by the courts regarding “injury sustained” and “disease contracted” is artificial; (2) the ruling seriously undermines the legislative provision in place, which is the 1969 Act; (3) the wider policy context<sup>667</sup>; and (4) the Court of Appeal did not distinguish<sup>668</sup> the decision in *Bolton*.

For point (1), it is unclear why the courts should read into the words in such a way that was not what was intended by the parties in the first place. These words have been standard wordings in the policies and could be one argument in favour of its continuing use in Employers Liability

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<sup>662</sup> [1998] 1 W.L.R 896, 912

<sup>663</sup> [1998] 1 W.L.R 896, 913

<sup>664</sup> R Merkin and J Steele, ‘Compensating Mesothelioma Victims’ (2011) 127 LQR 331

<sup>665</sup> R Merkin and J Steele, ‘Compensating Mesothelioma Victims’ (2011) 127 LQR 333

<sup>666</sup> R Merkin and J Steele, ‘Compensating Mesothelioma Victims’ (2011) 127 LQR 333,334

<sup>667</sup> When one looks at the Fairchild decision and the Compensation Act 2006

<sup>668</sup> As the Court of Appeal could not do so.



Policies.

For point (2), the whole point for the implementation of the Employers' Liability (Compulsory Insurance) Act 1969 was to give protection to the employee by ensuring that the employer takes out such insurance on behalf of the employee. The ambiguity in the terms of the contract<sup>669</sup> is not required for contextual issues for it to be considered relevant, but the ambiguity in the wording "disease contracted" could have been considered as interchangeable when considering or using the phrase "injury sustained".<sup>670</sup> There should not be a distinction when dealing with other types of cases.

For point (3), it has been said that the process of trying to determine how words are used by the parties, that parties had drafted many years back in such cases, and apply them to unforeseen circumstances is an artificial exercise.<sup>671</sup> It seems unlikely that after the legislature decided to implement the Compensation Act as a result of the decision in *Barker* to protect the victim, that it would now remove such protection.<sup>672</sup>

For point (4), it has been suggested that when looking at tort law, one will not look at the physical harm that has been caused but the earlier cause.<sup>673</sup> This was compatible with the decision of *Rothwell v Chemical & Insulating Co Ltd*<sup>674</sup>. The issue that one has to focus on is the injury that has been caused and not the damage in an insurance policy.<sup>675</sup> The markets have criticised the decision in *Bolton* when one looks at the effects that the obligation that has now been placed on a public liability insurer to provide cover for torts which have occurred some four decades ago.<sup>676</sup> The effect now is that injury cover is now almost changed to claims made cover, which creates retroactivity for public liability policies, which does not seem to be the intended effect.<sup>677</sup> This does not apply in situations where you have employers' liability policy due to the

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<sup>669</sup>See *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] 3 W.L.R. 1424.

<sup>670</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 333

<sup>671</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 333

<sup>672</sup> R Merkin and J Steele, 'Compensating Mesothelioma Victims' (2011) 127 LQR 333

<sup>673</sup> R Merkin and J Steel, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329, 334

<sup>674</sup> [2007] 4 All ER 1047

<sup>675</sup> R Merkin and J Steel, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329, 334

<sup>676</sup> R Merkin and J Steel, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329, 334

<sup>677</sup> R Merkin and J Steel, 'Compensating Mesothelioma Victims' (2011) 127 LQR 329, 334

effect of the decision in *Durham*, which provided that once you have clear wording in an occurrence-based policies, the employee has to be working for the employer at the time of the exposure and at the time of the injury.<sup>678</sup> The problem with the suggested approach is that occurrence-based policy will not cover the employers' liability to pay compensation to the former employee, as public liability and employers' liability policy will only achieve their purpose when one is operating on an exposure based structure.<sup>679</sup> Further, if the Supreme Court overturns the *Durham* decision, another issue which is of importance is the allocating responsibility as between the consecutive annual insurers if there is only employer, as the courts have now stated that there is no need for the employee to identify any single year of exposure, due to the protection now given to the employee, due to the unique situation that has arisen in such cases, for him to bring his claim.<sup>680</sup> This has implications when dealing with the issue of double insurance and issues of contribution.

Further when one looks at the 1969 Act itself, no specific provision or wording is made for what type of policy would have to be taken out to comply with the wording of the Act<sup>681</sup>. One view<sup>682</sup> is that Rix LJ was correct in his approach that an exposure-based cover was the only type of policy which would be able to satisfy the wording of the 1969 Act, this was subject to the insurer having a right of recourse to the employer if the policy was otherwise written on an injury basis. The reason why Rix LJ's view is more logical is that the policy, if it is an occurrence –based policy, will only apply to current employees, this would mean that all the ex-employees who had contracted mesothelioma would not be given any protection or be able to recover under the policy, as they must remain employed at the date of the onset of the injury.<sup>683</sup> If one were to follow the analysis of Stanley, Burnton and Smith LJ<sup>684</sup>, this would leave out employees who have left the employment of their employer. Further the legislation does not make express provision for ex-employees to be covered and to do so would lead to the prohibition of

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<sup>678</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 334

<sup>679</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 334

<sup>680</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 334

<sup>681</sup> this was the view of the Stanley Burnton and Smith LJ

<sup>682</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 335

<sup>683</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 335

<sup>684</sup> Who agreed with Burnton's decision

contractual exclusions for liability which arose from previous acts.<sup>685</sup>

Lord Mance's approach, that is one where the insurance contracts must be looked at in broad terms is correct and should be the way such contracts are looked at when trying to interpret the construction of the contracts. Although it has been argued that the courts do not need to look at the wording of policy and that what one has to look at is instead the intention of the parties. This may be correct but ultimately you have to look at the wording to ascertain the intention of the parties.

As the employee already has protection afforded to him under the law of tort, it could be argued that the only concern then is for the protection of insurers in respect of whether they can seek contribution from other insurers once an insurer had already paid out under the policy. Lord Clarke correctly pointed out that it would be remarkable if the insurers were not liable under the policies. If that is the case, then surely an approach that would be most beneficial to the insurer would be if the deemed causation approach is followed.

It is important to note the differences in application of the deemed causation approach and the new tort approach which have been suggested by the courts as likely outcomes. It should also be borne in mind the type of medical condition that was before the courts. The difficulty to identify the exact time a victim has come into contact with asbestos either accidentally or through his work as an employee has been discussed in the case, in particular *Fairchild's* case and shown by the medical evidence. This therefore had led to the development of the special rule.

According to the *Fairchild* decision, which adopts the causative approach, the employee can choose to sue either or both of his employers. The employer can then submit the claim to his insurer to recover the whole loss for any year. If the new liability of materially increasing the risk of mesothelioma is followed, then the burden would be on the employer to have to point to a particular exposure which had caused the injury, this may prove difficult and this would result in the employer unable to submit his claim.<sup>686</sup> Another possible interpretation was it would render

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<sup>685</sup> R Merkin and J Steel, *Compensating Mesothelioma Victims* (2011) 127 LQR 329, 335

<sup>686</sup> Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, 12.3.4,

liabilities uninsured, even though there is a legislative requirement to do so.<sup>687</sup> Further there may be problems of re-insurance problems, where the re-insurer will refuse to pay out if a particular could not be identified.

However matters may become complicated due to the type of liability insurance<sup>688</sup>. It could be possible that one year the insurance taken out is under a causation policy which would make the employer liable and another year the policy may be that of an injury policy. The employer may choose different insurers during different years. Further each insurance policy could also be different. The significance will be apparent depending on the year of exposure and the year the injury is suffered by the employee. The date of the trigger is important and one has to look at the status of the employee.<sup>689</sup>

These cases, although mainly dealing with the tort aspect of litigation, also have to be looked at from the perspective of the insurers and the likely implications for them. Application of different tests leads to different results. The case of *Durham* is of broad significance.<sup>690</sup> The courts approach of the cases is a “transparent illustration of holistic law making, identifying an injustice in the application of the rule in causation and then allowing the matching of insurance with the modified approach”.<sup>691</sup> This is the correct approach if a more balanced and fair approach is to be achieved.

However, in some cases the policies may not be concurrent, which is one of the requirements for double insurance. The policies may still include rateable proportion clauses. The type of cases where this situation arises can be found in cases where the insurer pays out for the loss that has been suffered. These cases usually involve the inhalation of asbestos, where it is impossible to know whether any particular inhalation of the asbestos, which occurred many years previously

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page 374

<sup>687</sup>Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, 12.3.4, page 375

<sup>688</sup>Liability insurance can be divided into a causation basis, injury basis and claims made basis.

<sup>689</sup>Merkin and Steel, *Insurance and The Law of Obligations*, Oxford University Press 2013 (Chapter 12) 12.3.1

<sup>690</sup>Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, 12.3.4, page 375

<sup>691</sup>Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, 12.3.4, page 375

plays a part in contributing to the death of the employee. This is what happened in the decisions of *Phillips v Syndicate 992 Gunner*<sup>692</sup>, *Fairchild v Glenhaven Funeral Services Ltd*<sup>693</sup> and *Barker v Corus (UK) Ltd*<sup>694</sup>. There have been differences of opinion, such as whether each employer was liable to the employee or was each employer liable only for its proportionate share, but the decision in *Fairchild* has been considered to be the correct approach that the courts will take. In the case of *Fairchild*, although not directly dealing with rateable proportion clauses, held that the employers were liable for the loss suffered to the employee. Situations like those in *Fairchild* would arise when (a) two separate potential causes exposes the claimant to the same risk, one involving the act of the defendant, (b) either one gives rise to the risk and (c) one does, but (d) neither of which can as a matter of probability be shown to have done so. This position now extends, due to the decisions in *Barker* and *Sienkiewicz v Grief (UK) Ltd*<sup>695</sup> to any case where an act or omission exposing a person to asbestos, which may have caused mesothelioma, but where it was not possible to show as a matter of probability. In *Barker* it was then concluded that any person's liability should be proportionate to the extent that he had exposed another to the risk of mesothelioma. However, this was reversed due to the enactment by Parliament of the Compensation Act 2006<sup>696</sup>, which now has the effect of making each such person liable in respect of the whole of the damage<sup>697</sup> caused by the mesothelioma. Under this legislation the Financial Services Authority has the power to make rules for compensation to such victims where employers' liability insurers have become insolvent where claims are made before 1 December 2001. Therefore in *Sienkiewicz*, it seemed that this Act assumes liability and only

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<sup>692</sup> [2004] Lloyd's Rep IR 418. Also see *Durham v BAI(Run Off) Ltd* [2012] 1 W.L.R. 867 and *International Energy Group Ltd v Zurich Insurance Plc UK* [2012] EWHC 69 (Comm)

<sup>693</sup> [2002] 3 WLR 89

<sup>694</sup> [2006] 2 W.L.R 1027

<sup>695</sup> [2011] 2 A.C.229. In *Sienkiewicz*, there were two mesothelioma claims, where the court stated that with the present state of medical knowledge victims were unable to prove on a balance of probabilities the source of exposure to asbestos which initiated the process which caused the illness, where only one defendant could be proved to have tortiously exposed the victim and where the victim could have been exposed to asbestos due to environmental circumstances, this would be no different if the victim was in fact able to point to multiple defendants. The court should apply the special rule devised under common law and s3 of the Compensation Act 2006 for multiple defendants, where what would have to be established by the victim was that the defendant had breached his duty by exposing the victim to asbestos fibers and this materially increased the risk that he would develop mesothelioma. Material meaning more than minimal. This was for the judge to decide. The test for causation had no place in such cases.

<sup>696</sup> Whether by reason of having materially increased a risk or for any other reason: s3(1) (d)

<sup>697</sup> s3(2)(a)

alters the measure of recovery<sup>698</sup>. Eady J provided some guidance in the decision of Phillips. In *Phillips*, the deceased employee had been exposed to asbestos dust for a period of time and contracted malignant mesothelioma. The defendant relied on express terms of the employer's liability policy which stated that if there was other insurance covering the same liability when a claim arose, the underwriters would not be liable to pay or contribute more than their due proportion of any such claim. It was also argued that the rateable proportion clause should be implied into the contract to give business efficacy. Eady J concluded that the wording used by the insurers would not be sufficient to cover situations where there are successive policies of insurance which covered different periods and different risks. He also did not see the need to imply into the contract that a rateable proportion clause to give it business efficacy. The latter cases<sup>699</sup> state that the conclusion should be for the purposes of insurance, liability for mesothelioma following upon exposure to asbestos created during an insurance period involves a sufficient "weak" or "broad" casual link for the disease to be regarded as "caused" within the insurance period.

First of all there is only a peak in such case due to the exposure which happened to an employee which took place decades ago but only recently have the effect so exposure to asbestos arisen. The fact that these events took place a long time should not matter. By the decision of Fairchild and the implementation of legislative provisions in the form of Compensation Act 2006, it is obvious that there was a need to provide protection to employees. These are cases where it would almost impossible to point the finger at any one particular employer where you have a situation where there are numerous employers. In some cases, the employer that the employee had worked with may have become insolvent, which would leave the employee without any protection or where the insurance company of the employer that he was working for no longer exists. There would not be a problem where the employee worked for only one employer and the insurance company which the employer insured with is still in existence. It is crucial that the way that the law has developed that the insurance claims should not fail in such cases. Fairness is a matter that should be at the forefront of the courts' mind when dealing with such issues. Therefore Lord

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<sup>698</sup> Lord Phillips PSC, Lord Rodger and Lord Brown of Eaton-under-Heywood JJSC (para 70, 131 and 183)

<sup>699</sup> *Durham v BAI (Run off) Ltd* (SC(E)) [2012] 1 WLR 867, 899

Phillips approach should not be the approach that the courts should follow and there does not have to be legislation in place as suggested by Lord Phillips. It is sufficient for the courts to deal with it.

If there is only one employer then the situation may not be complicated, especially if the employer has been insured with the same insurer. The issue of double insurance will arise in such cases where there is one employer, who takes out insurance to cover that particular employee and there is a period of cover which overlaps. However it could be said that is no overlap between the parties but that the policies are one of a consecutive nature, which does not fall within the definition or principles of double insurance. In *Phillips v Syndicate 992 Gunner*, Eady J stated that successive periods of insurance cover will not be treated as dealing with the same liability.

When an employee looks towards his employer to compensate him 100 per cent, the employer then has to look towards his insurers. The insurer, if he is on risk when there was exposure to the employee would have to pay out under the policy. The matter of concern to the employer is whether the insurer has been the same throughout or where there have been different insurers during different number of years or where the amount recoverable varies due to the exhaustion through other claims or policy terms.<sup>700</sup> If the insurers are still in operation, then the employer can seek to recover full indemnity from them<sup>701</sup>.

The issue is whether an insurer on risk would have to be fully liable or whether this should be done on an apportionment basis, so as not to be liable for the full amount of the loss. Lord Mance JSC's view is correct when he stated that the increase of an employer's liability is a risk which the insurers must accept. He then went on to deal with the declaratory theory as laid out by Eady J in *Phillips*. Further it was suggested that liability should be 100 per cent.<sup>702</sup> Since the law has developed in this area to entitle the employee to recover 100 per cent. The correct position would

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<sup>700</sup>Merkin and Steele, *Insurance and The Law of Obligations*, Oxford University Press 2013, Chapter 12, 12.4, page 376

<sup>701</sup> Of course which insurer he seeks to recover from would be something the employer has to consider carefully.

<sup>702</sup> This was confirmed in the decision of *International Energy Group Ltd v Zurich Insurance Plc UK* [2013] EWCA Civ 39

then be for the employer to receive 100 percent indemnity from whichever insurer he chooses.<sup>703</sup>

However, it could be argued that there is in fact no contribution because each insurer is only liable to the risk for a particular period of time or year and that there are no concurrent policies in place. This is not correct. For these sorts of cases, and as the Supreme Court in *Durham* has confirmed, there is only one claim which the employee can make and this is not a situation where you have separate claims. There is a single indivisible loss. Therefore the rules of double insurance will apply to such cases. If this is correct, if an employer picks one insurer to seek full indemnity, the insurer that was chosen could then seek contribution from the other insurers. It should be noted that the loss does not have to be shown to have arisen in one particular year. This could be done under the Civil Liability (Contribution) Act 1978 which applies in this case, which is unlike other cases where this Act would not apply, under s3. Here one responsible person can then claim contribution from another, his proportion of liability.

It has been suggested that the common law should not redefine liabilities so they are not susceptible to being insured by policies which exist at the time, and then claim that the result is a principled result.<sup>704</sup>

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<sup>703</sup> This would be consistent with the approach in *Fairchild* and the Compensation Act 2006.

<sup>704</sup> Merkin and Steel, *Insurance and The Law of Obligations*, Oxford University Press 2013 (Chapter 12) 12.1.1



## CHAPTER 8 CONTRIBUTION UNDER COMMON LAW AND ITS EQUITABLE POSITION

### 8.1 Contribution under Common Law and equity

The term 'common law' has been used in numerous contexts. In some cases it has been described as the law which has developed through case law. This is different from statutes. It has been described as the body of rules which were originally developed by Chancery courts, before the Supreme Court of Judicature Acts 1873 and 1875 came into effect.<sup>705</sup> Lord Mansfield, it could be argued, approved of the development of parties bringing contribution claims in unjust enrichment<sup>706</sup>, and he further developed the principles of co-sureties into principles of contribution<sup>707</sup> from Scottish law.<sup>708</sup> In England, the Civil Liability (Contribution) Act 1978 is of importance when looking at contribution and it is important to look at whether it will apply to cases of insurance.

### 8.2 Joint Liability and Contribution: its implication for insurance

In most cases liability will arise where a loss of damage has been suffered by a claimant due to the torts committed by a tortfeasor. In some situations, there may be joint liability by tortfeasors, which will have an impact on how the liability should be distributed. These situations include where the tortfeasors could be jointly liable, or cause the same damage or cause different damage to the claimant. The definition of a tortfeasor can be ascertained by identifying whether the cause

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<sup>705</sup>The Law of Contribution and Reimbursement, Charles Mitchell, Oxford, (2003), 4.03 p.66

<sup>706</sup>*Deker v Pope* (1757) Selw NP (1812 edn), Vol 1, 71-2

<sup>707</sup> For example in the case of *Mahoney v McManus* 36 ALR 545, 549-550, at para [17] as follows: "A surety is entitled to contribution from his co-sureties so that the common burden is born equally and so that no surety is required, as between himself and his co-sureties are bound jointly, jointly and severally, or severally, and whether by the same or different instruments, and whether or not the sureties knew of each other's existence, provided that they are liable in respect of the same debt. The right to contribution arises when a surety has paid or provided more than his proper share of the principal debt ... The amount of contribution recoverable depends on the number of sureties who are solvent at the time when contribution is sought and on the proportion for which each is liable.....The doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation. The operation of such a principle should not be defeated by too technical an approach.. "

<sup>708</sup> JH Baker, *The History of Quasi-Contract in English Law*, in WR Cornish et.al (eds), *Restitution: Past, Present and Future* (1998) 37,46

of action against each tortfeasor is the same, whether they are both responsible and if the same evidence can be used to bring the action. If so, then it could be said that they are joint tortfeasors<sup>709</sup>. This would not be the case where each is independently responsible for a separate tort and the two torts cause the same damage.<sup>710</sup> This arrangement is also common from a double insurance perspective where you have numerous insurers and who are responsible under the policy for the loss that has been suffered by the assured. In the case of *The Koursk*<sup>711</sup> Scrutton L.J. stated that the same damage did not mean the same tort, and therefore does not mean the same cause of action.<sup>712</sup> Where there are numerous tortfeasors and where there is a distinct cause of action against each tortfeasor, then each tortfeasor will only be liable for the part of damage which he is responsible for.<sup>713</sup> If the amount which the tortfeasor will be liable for is not stipulated, then the amount will be distributed equally between the tortfeasors<sup>714</sup>. This is similar to the position that was raised in the case of *Barker v Corus (UK) Plc*<sup>715</sup>, and could be relevant in cases of other industrial diseases where there were several former employers who owed a duty of care to the claimant and had breached that duty of care<sup>716</sup>. This could also be the position for double insurance cases.

Another important matter is to ensure that the Claimant only receives the amount that he is entitled to. This was a concern when looking at joint tortfeasors and several tortfeasors who had caused the same damage. When dealing with a situation where there were joint tortfeasors, it was considered that each would be responsible for a separate tort and successive actions could be brought against them although the damage was one and indivisible.<sup>717</sup> There is now legislative protection in the form of s3 Civil Liability (Contribution) Act 1978. This section covers proceedings against persons who are jointly liable for the same debt or damage, and states that

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<sup>709</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-03

<sup>710</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-03

<sup>711</sup> [1924] P.140

<sup>712</sup> at P.140 at page 156. In *The Alexandros T, Re* [2013] UKSC 70, the United Kingdom Supreme Court looked to see whether there was a same cause of action. The court was of the view that there should be "le meme objet et la meme cause". (although not specifically dealing with double insurance but dealt with claims which mirror each other in England and Greece)

<sup>713</sup> *Performance Cars Ltd v Abraham* [1962] 1 Q.B 281, where the court was dealing with successive independent tortfeasors.

<sup>714</sup> *Bank View Mill v Nelson Corp* [1942] 2 All E.R. 477 at 483

<sup>715</sup> [2006] 1 A.C. 572

<sup>716</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-06

<sup>717</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-07

Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage. The courts are also reluctant to permit a Claimant from bringing action against numerous defendants for the same damage suffered. This was the situation in the case of *Talbot v Bekshire County Council*<sup>718</sup> where the court relied on res judicata, stating that as the Plaintiff's claim against the Council arose out of substantially the same facts as the cause of action<sup>719</sup> as the passenger's claim which had been made out and the Plaintiff's appeal was dismissed. The courts have in such situations stayed or struck out the litigation for abuse of process.<sup>720</sup> It would therefore be better for a Claimant to sue all likely defendants<sup>721</sup>. Wigram V-C in the decision of *Henderson v Henderson*<sup>722</sup> stated that parties to the litigation should bring forward their whole case and the courts will not permit the same parties to open the same subject of litigation on a matter which might have been brought forward as part of the litigation.<sup>723</sup>

In the case of *Gardiner v Moore*<sup>724</sup>, Thesiger J dealt with the situation where if there was a release of one joint tortfeasor, would it release the others. Although not a point which he relied on to decide the case, he was of the view that where there was a release by one joint tortfeasor, either by way of deed or by accord and satisfaction, it would release all the others. In some situations there could be the possibility of double recovery due to the wording of the Civil Liability (Contribution) Act 1978, and it has been suggested that it would be better to suggest that prior to accepting settlement, to expressly leave the option of bring proceedings against the other concurrent tortfeasors.<sup>725</sup>

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<sup>718</sup> [1994] Q.B.290

<sup>719</sup> [1994] Q.B 290, 298

<sup>720</sup> *Brisbane City Council v Attorney General for Queensland* [1979] A.C. 411,411G

<sup>721</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-08

<sup>722</sup> 3 Hare 100

<sup>723</sup> 3 Hare 100,p114-115

<sup>724</sup> [1969] 1 Q.B 55 at 92F

<sup>725</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-11, where the case of *Jameson v Central Electricity Generating Board* [2000] 1 A.C 455 was discussed.

It has always been the case and the correct approach, that the remedies that are provided for under contribution or reimbursement are restitutionary in nature and the main purpose behind this is to prevent the likelihood of unjust enrichment of a defendant who has been conferred a benefit by the Plaintiff's payment.<sup>726</sup>

The courts have also drawn a distinction between the common law and equitable principles of liability. It was stated in the decision of *Bonner v Tottenham and Edmonton Permanent Investment Building Society*<sup>727</sup>, Vaughan Williams LJ, that the common law principles required a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant as the defendant receives a benefit from the payment. He went on to give examples of situations where there is an assignee of a lease, or pro tanto, in situations where the surety pays first and then looks towards his co-surety for contribution. The position in equity is different as the scope of interests are wide and would include a community of interest in the subject-matter to which the burden would attach and is enforced against the Plaintiff alone, together with the benefit of the defendant, even though there is no common liability to be sued. This meant that the Plaintiff could recover in equity, even though there existed no common liability to sue.

Further, the equitable principle requires that the burden will be borne equally between the parties even if there are requirements of the law or the parties themselves agree that burden will be attached by one of the parties for the benefit of others who are associated with him for that interest.<sup>728</sup> Clauson LJ in *Whitham v Bullock*<sup>729</sup>, applied such a principle when dealing with the lessee of land who had assigned the lease partly to X and partly to Y. In this case it was held that as the Plaintiffs paid the whole amount which was claimed by the landlord under the treat of the process of distress<sup>730</sup>, the Court was of the view that they were permitted to seek reimbursement

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<sup>726</sup>*Grupos Torras SA v Al-Sabah* (No.5)[2001] Lloyd's Rep Bank 36 at 64.

<sup>727</sup>[1899] 1 Q.B. 161. This has been followed in the decisions of *FBI Foods Ltd – Aliments FBI Ltee v Glassner* 86 BCLR(3d) 136; *Friend v Brooker* [2009] HCA 21 at [44]; *Whitham v Bullock* [1939] 2 KB 81 at [87]

<sup>728</sup>*Whitham v Bullock* [1983] 2 KB 81

<sup>729</sup> para [89]

<sup>730</sup>Friedmann, Double Insurance and Payment of Another's Debt (1993) 103 LQR 51 at 53, discussed the public interest factor in trying to settle claims, but also the problem of where payment is made where the Plaintiff pays out when they are not liable to make such payment. The problem he identified was that the payor was not the debtor as such, and the rules of contribution would not apply. England does not look favourable to those who would come under the category of "volunteers".

from the defendant.

As stated above, the doctrine of contribution is not confined to double insurance but also to co-sureties. The principles of contribution when dealing with a co-surety situation is similar and the burden still apply equally even though they are not aware of the existence of each other's existence. However, they must be liable in respect of the same debt. The amount which is recoverable depends on the number of sureties.<sup>731</sup> The common burden applies due to the common obligation of the co-sureties.

### **8.3 The implementation of the Civil Liability (Contribution) Act 1978**

The Civil Liability (Contribution) Act 1978 developed due to the way the common law developed regarding the liabilities that arose where there was damage, which were the same and applied to the tortfeasors, who had liabilities which were joint and several.<sup>732</sup> The law, it was thought should cater for contribution between the tortfeasors.<sup>733</sup> There were problems which arose where the tortfeasor who was not the party who committed the wrongdoing, and there was only one tortfeasor who was liable, although the damage was the same.<sup>734</sup> As a result of the recommendation of the Law Commission's Report, the Civil Liability (Contribution) Act 1978 was enacted by Parliament. There have been suggestions<sup>735</sup> that the Civil Liability (Contribution) Act 1978 is not without its problems.

It is worth looking at the wording of the legislation to see in what, if any, situation the Civil Liability (Contribution) Act 1978 would apply to double insurance and the principles of contribution when dealing with double insurance.

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<sup>731</sup> *Mahoney v McManus* (1981) 36 ALR 545, 549-550. This was confirmed in *Stratti v Stratti* [2000] NSWCA 358

<sup>732</sup> For some examples of this can be seen in the cases of *Weld-Blundell v Stephens* [1920] AC 956, *Horwell v London General Omnibus Co. Ltd* (1877) 2 Ex D 365,379 and *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397.

<sup>733</sup> This can be seen in the Law Revision Committee's *Third Interim Report* of 1934. Legislation such as the Law Reform (Married Women and Tortfeasors) Act 1935 was implemented, s6(1) but was inadequate to meet the needs of recovering contribution.

<sup>734</sup> *The Law of Contribution and Reimbursement*, Charles Mitchell, Oxford, (2003), 4.20 p.79

<sup>735</sup> *The Law of Contribution and Reimbursement*, Charles Mitchell, Oxford, (2003) 4.27 p. 82

The general principle was as stated in *Merryweather v Nixon*<sup>736</sup> that where the damage is the same, then, regardless of whether it is a joint tortfeasor or several tortfeasors causing it, there could not be contribution or indemnity between them unless there was an express or implied agreement. The Civil Liability (Contribution) Act 1978 has changed that, and now permits contribution to persons who are liable for the same damage.<sup>737</sup>

According to the Civil Liability (Contribution) Act 1978, the long title to the Act makes provision for contribution between persons who are jointly and severally liable for the same damage and in certain cases where two or more persons have paid or may be required to pay compensation for the same damage. Under s1 (1) any person who is liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with him or otherwise. This is however subject to the other provisions in the Act itself. The other sections in the Act list out certain situations where liability may cease in respect to the damage in question. Section 6(1) provides that a person is liable in respect of any damage for the purposes of the Act if the person who suffered it is entitled to recover compensation from him in respect of the damage, regardless of the legal basis of his liability.

The decision by the Court of Appeal of *Royal Brompton Hospital NHS Trust v Hammond*<sup>738</sup> dealt with s1(1) and 6(1) of the Civil Liability (Contribution) Act 1978, and Lord Steyn felt it necessary to read s1(1) with the interpretation section of s6(1). He agreed that the 1978 Act should be given a broad interpretation. The critical question before the court was in relation to the words “liable in respect of the same damage”. He did not feel that the words would justify an expansive interpretation of the words “the same damage” to mean substantially or materially similar damage, due to the likely unfairness that would arise and the uncertainty of the application of the law. The correct approach was to interpret and apply a correct evaluation and

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<sup>736</sup> (1799) 8 T.R. 186

<sup>737</sup> s1(1)

<sup>738</sup> [2002] 1 WLR 1397

comparison of claims alleged to quantify for contribution under s1 (1).<sup>739</sup> The natural and ordinary meaning of the words of “the same damage” is sufficient<sup>740</sup> and that “no glosses, extensive or restrictive, were warranted”<sup>741</sup>.

As mentioned above, another issue was whether the Civil Liability (Contribution) Act 1978 applied to contributions claims between indemnity insurers, when one looks at the liability to pay damages when situations arise where you have a breach of a contract term, which does not involve the requirement to pay a debt. It has been stated that whether contribution claims between indemnity insurers falls within the confines of the Civil Liability (Contribution) Act 1978, depends on the exact wording of the relevant policies.<sup>742</sup> Further, the preferred view was stated in the case of *Bovis Lend Lease Ltd v Saillard Fuller & Partners*<sup>743</sup>, which was that liability for ‘damage’ under the 1978 Act was made because the insurer had to pay damages for a breach of the contract which was stated under s6 (1), on the basis that the insurer had committed a wrong by not preventing the insured from suffering a risk.<sup>744</sup>

The case of *Bovis Construction Ltd and Anor v Commercial Union Assurance Co Plc*<sup>745</sup> clearly settled the issue of whether an insurer could rely on the Civil Liability (Contribution) Act 1978, and the issue of subrogation. In *Bovis*, there were two claims that were made. Firstly, a claim made by the first claimants, Bovis Construction Ltd (Bovis) relying on their policy of insurance, and the second was that of the insurers, Eagle Star Insurance Co Ltd (Eagle Star), relying on their right to contribution. Eagle Star had at the time insured Bovis under a public liability policy. There was also another insurance company called Commercial Union Assurance Ltd (CU) which had insured Rosehaugh Estates Ltd (Rosehaugh), to which Bovis was also insured at the time. There was then a claim by CU seeking indemnity or contribution for the amount of

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<sup>739</sup> [2002] 1 WLR 1410, para 27

<sup>740</sup> [2002] 1 WLR 1410, para 27

<sup>741</sup> [2002] 1 WLR 1410, para 27

<sup>742</sup> The Law of Contribution and Reimbursement, Charles Mitchell, Oxford, (2003) 4.43 p. 88

<sup>743</sup> [2001] 77 Con LR134, 184-5

<sup>744</sup> The Law of Contribution and Reimbursement, Charles Mitchell, Oxford, (2003) 4.44 p. 89

<sup>745</sup> [2001] Lloyd’s Rep IP 321. The principles were followed by the Supreme Court of Appeal of South Africa in *Samancor Ltd v Mutual & Federal Insurance Company Limited & Ors* (Case Number 565/03)

damages and costs which were paid by Bovis to General Accident Life and Assurance Ltd (GA), who were the assignees of Rosehaugh. A contract was then entered into between Bovis and Rosehaugh regarding the managing of the construction to which Bovis was in charge. Rosehaugh would be required to obtain and maintain an insurance policy which covered their liabilities for injury and damage to the property which resulted during the contract period. This cover was to be taken out in joint names of Rosehaugh and Bovis. Further joint name insurance had to be taken out for all executed works, goods and materials which were to be incorporated into the works, construction works and other materials. This policy was taken out in the name of Rosehaugh and Bovis with CU. An “all risks” was included in Section 1 and another part of the policy was for a “public liability”. It was argued that the Civil Liability (Contribution) Act 1978 applied and as a result the claimant should be entitled under Section 3. If this is correct then they would be entitled to indemnity or contribution. Bovis receiving a claim from GA referred the claim to CU, which repudiated the claim on the basis that the claim was not one which the policy covered. Due to this Bovis had to turn to its own liability insurer, Eagle Star who had provided the indemnity for the amount that was given to GA.

Repudiation by CU was not accepted. CU however argued that that claim was not covered by either Section 1 or Section 3, and that since indemnity was already provided for by Eagle Star before the proceedings had started, Bovis should not be entitled to obtain contribution.

The court then went on to look at the issue of double insurance. Judge Steel J started by looking at the position of Bovis’s claim, before he went on to look at Eagle Star’s Claim. The first “hurdle” was that since Eagle Star had already made payment to Bovis, they should not be allowed to make a claim under another policy.<sup>746</sup> Judge Steel J stated that the right to contribution as between insurers existed where there was a situation where you have more than one policy which covers the risk which gives rise to the claim. He relied on the cases of *Albion Insurance Co Ltd v Government Insurance Office of New South Wales*<sup>747</sup> and confirmed the

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<sup>746</sup> Reliance was placed on the cases of *Sickness & Accident Assurance Association v General Accident Assurance Corporation Ltd* (1892) 19 R 977.

<sup>747</sup> [1969] CLR 342



decision of *Caledonia North Sea Ltd v London Bridge Engineering*<sup>748</sup>. On the facts of the present case, Bovis was unable to satisfy the elements required and it was for that reason alone their claim must fail.

Another argument put forward was that the claim should be successful, based on a breach of the Civil Liability (Contribution) Act 1978 so that both Bovis (through the management contract) and CU (under the policy) were liable to Rosehaugh. Judge Steel J held<sup>749</sup> that there was no liability against CU under the heading of “in respect of the same damage” as Bovis. This meant that Rosehaugh could not claim against CU for compensation as CU had no “responsibility for the damage” which Rosehaugh had received. Therefore no apportionment of liability could be received. He went on to say that to hold otherwise would lead to an overriding of the principles which related to contribution between the insurers. Bovis’s liability for flood damage and CU’s liability under the policy of insurance would not fall within the confines of “in respect of the same damage”. The case of *Royal Brompton Hospital National Health Service Trust v Hammond*<sup>750</sup> was relied on to emphasise the point that it was not the same damage.

Where there are terms in the contract which exclude liability or there is the presence of limitation clauses, and where the damage is covered by a joint names insurance policy, contribution cannot then be sought. This was the position in the case of *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd*<sup>751</sup>. In this case there was a standard form contract which was entered into with the main-contractor, W Ltd. The Defendants were architects and engineers. The electrical subcontractors were H Ltd who were hired by W Ltd under a standard form subcontract. In addition to this H Ltd entered into a warranty agreement with the building owner and W Ltd. Liability was excluded for damage caused before practical completion to the works which were due to the contractors’ negligence or breach of statutory duty, under the main contract. The contractors were required to take out policies in their joint names for all risks insurance which provided cover against loss or damage to the works in respect of specified perils, which included

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<sup>748</sup> [2000] 1 Lloyd’s Rep IP 249

<sup>749</sup> [2001] Lloyd’s Rep IP 321,326 at para 27

<sup>750</sup> [2000] Lloyd’s Rep PN 643

<sup>751</sup> [2002] 1 W.L.R.1419. Although different considerations apply where there is one co-defendant liable for the deceit, where the party then cannot rely on the exclusion or limitation clauses, as was seen in the case of *Nationwide Building Society v Dunlop Haywards (DHL) Ltd and Cobbetts (A Firm)* [2010] 1 W.L.R. 258.

fire. A fire broke out prior to practical completion and the Defendants issued proceedings under sections 1 and 6 of the Civil Liability (Contribution) Act 1978 against W Ltd and H Ltd as liable for the fire damage from whom the owners of the building were entitled to compensation from. This was a Part 20 action and the judge stated that such a claim could not be brought by the Defendant. This decision was appealed and the Court of Appeal looked at the structure of the contractual scheme and concluded that it provided for the restoration and completion of the damaged works which was funded under the joint names policy and that the building owner and the contractors would each bear other losses themselves. There was no requirement for the contractors to compensate the building owner for the damage caused by the fire and as a result, the Defendant could not seek contribution under the 1978 Act. The House of Lords analysis was that the usual rules which apply to compensation for negligence and breach of contract did not apply here, and that the building contractor could only require reinstatement works to be carried out and authorise the insurance money to be paid out. The contractors could not ask the building owner for compensation from the building owner, and all that could be required was that insurance money which were used for payment of those works be made. Further according to s6 (1), H Ltd were not the category of persons compensation could be sought by the building owners.

As stated above, as the Civil Liability (Contribution) Act 1978 does not apply to double insurance cases, an insurer cannot rely on the provisions of s1(4) of the 1978 Act, which provides that contribution may be obtained where that person has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established. Contribution will be recoverable where there is damage and it has to be the same damage that results as the person claiming contribution. Damage is to be given its natural and ordinary meaning as stated in the case of *Royal Brompton Hospital NHS Trust v Hammond (No.3)*<sup>752</sup>.

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<sup>752</sup> [2002] 1 W.L.R 1397,1410

In terms of apportionment generally, under s2(1) of the 1978 Act, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question. Further, under s2(2) of the 1978 Act, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. Factors which the courts take into consideration include the faults of the respective parties and causative relevance<sup>753</sup>. In cases involving double insurance, if double insurance is established, the issue of contribution then arises. The courts will then calculate contribution based on the maximum liability, independent liability and common liability.

When dealing with liability in tort, it is very common for the parties who have committed the tort to seek contribution or indemnity from a third party, for example their insurers. In most cases this would be done by way of an agreement<sup>754</sup> or required by Statute<sup>755</sup>. This has to now be looked at in relation to the legislative provision under s7(3) of the 1978 Act provides specifically that the right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect— (a) any express or implied contractual or other right to indemnity; or (b) any express contractual provision regulating or excluding contribution; which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act). Therefore this section provides that statute will supersede the common law position.<sup>756</sup> It has been further suggested however, that the 1978 Act does not render

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<sup>753</sup>*Downs v Chappell* [1997] 1 W.L.R 426,445

<sup>754</sup>*Spalding v Tarmac Civil Engineering Ltd* [1967] 1 W.L.R.1508. For example in the decision on *Spalding v Tarmac Civil Engineering Ltd* [1967] 1 W.L.R 1508, both the first and second defendant were liable for the loss. The first defendant was liable under the Factories Act 1961 and the second defendant was liable under the tort of vicarious liability. The wording of the clause which was stated in the liability would fall solely on the second defendant for claims which arose from operating the excavator by the driver. In this case, indemnity from the first defendant could be obtained from the second defendant. However, where the claimant failed to take precautions himself, then no contractual indemnity in respect of the damages which would be payable to third party could happen, unless it had been expressly or impliedly provided for.

<sup>755</sup>*Sims v Foster Wheeler Ltd* [1966] 1 W.L.R. 1508

<sup>756</sup>Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-33

an agreement for indemnity which was originally void, valid.<sup>757</sup> The problem with the apportionment of damages and the way the 1978 Act and common law operates could result in uncertainty because of the different results that could occur, and it has been stated that where there is a contractual indemnity, which is provided for against liability for an unintentional tort, it will be considered valid.<sup>758</sup> Further, when dealing with an employer and employee situation, the same principles of joint tortfeasor will apply, and the employer would be able to claim contribution from the employee, where the employee is negligent.

An interesting case dealing with subrogation and indemnity is the Court of Appeal decision of *Morris v Ford Motors Co.Ltd*<sup>759</sup>, although the point regarding the right of subrogation was not pleaded or argued, Lord Denning was of the view that where the risk of a servant's negligence was covered by insurance, his employer should not seek to make the servant liable for it. Just and equitable principles apply. It was not just and equitable for Fords to allow their names to be lent to the cleaner to sue their servant R, neither was there an implied term that the cleaners should be entitled to.<sup>760</sup> In *Morris v Ford Motors Co.Ltd* Fords had employed a firm of cleaners to clean the factory under a contract which contained general clauses, one of the clauses provided that the cleaners were bound to indemnify Fords against their liability to Morris, who was an employee at the firm of cleaners. The plaintiff was injured due to the negligence of Fords' servant, R. Third party proceedings were brought against the cleaners who claimed an indemnity as provided for in the contract. R was then brought in as a fourth party under the doctrine of subrogation, to enjoy the rights which Fords has against R. Lord Denning commented that the decision in *Lister v Romford Ice and Cold Storage Co. Ltd*<sup>761</sup> was an unfortunate decision and should not be followed.

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<sup>757</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-33

<sup>758</sup> Clerk and Lindsell on Torts (20<sup>th</sup> Ed) Sweet and Maxwell, p.273, para 4-34

<sup>759</sup> [1973] Q.B. 792

<sup>760</sup> [1973] Q.B.792, 801,802

<sup>761</sup> [1957] A.C. 555

In *Drayton v Martin*<sup>762</sup> Sackville J stated that an insurer under an indemnity policy who was seeking contribution from a co-insurer must establish (1) it is liable to indemnify the insured under its own policy; (2) it has paid out sums in respect of that liability; (3) the co-insurer is also liable under its policy to indemnify the insured; and (4) the co-insurer had not paid out moneys to meet its liability to the insured.

It is then important to look at the issue of when does subrogation rights arise and when are there issues of contribution, and their distinction. It has been stated that in the broad sense, the doctrine of contribution and subrogation are complimentary in nature.<sup>763</sup>

The difference between contribution and subrogation is that for contribution, there is usually the existence of more than one insurance contract. Under contribution the insurer can seek contribution from other insurers, if one of the insurers has paid out to the assured.<sup>764</sup> Subrogation on the other hand involves the presence or the requirement that the assured who has taken out insurance obtains the amount of indemnity for which he is entitled to<sup>765</sup>, and to which the insurers can step into the shoes of the assured and exercise its rights against third parties. Therefore, subrogation does not allow one to enforce a right of indemnity which would not have been enforceable. This is due to the principles of indemnity and the prevention of a person obtaining indemnity twice. The well- established principle<sup>766</sup> that where a person is entitled to two or more indemnities is not permitted to enforce more than one of them.

In the decision of *Austin v Zurich Insurance*<sup>767</sup>, MacKinnon L.J and Uthwatt J, when dealing with the issue of subrogation and contribution, and deciding who would be the correct party to bring the proceedings, stated that this issue was a very technical matter. MacKinnon L.J was of the view that if the case was one of subrogation, then the claim should rightly be brought in the

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<sup>762</sup>(1996) 137 ALR 145. This was followed in the *Lumley General Insurance Limited v QBE Insurance (Australia) Limited* [2008] VSC 216

<sup>763</sup>*Stratti v Stratti* NSWCA 358

<sup>764</sup>Colinvaux's Law of Insurance Hong Kong 2<sup>nd</sup> Edition (2012)

<sup>765</sup>Colinvaux's Law of Insurance Hong Kong 2<sup>nd</sup> Edition (2012)

<sup>766</sup>*The Sydney Turf Club v Crowley* [1972] 126 CLR 420, 423-424. In this case, the court was dealing with a partnership situation.

<sup>767</sup> [1945] 1 KB 250

name of Austin himself, however, on looking at the matter closely, he went on to state that Bell's claim was one of contribution and not subrogation, as they were looking to recover from Zurich company, through double insurance. The correct party to bring the proceedings was the underwriters against the defendants. MacKinnon L.J did not think that it was appropriate to bring a subrogation claim, which in fact should be brought as contribution claim. Uthwatt J agreed that as the Plaintiff had already obtained indemnity from one of the insurers, he cannot then seek to obtain indemnity for something that he has already been indemnified for. When dealing with two insurers then the correct approach would be one of contribution.<sup>768</sup>

The case of *Caledonia North Sea Ltd v London Bridge Engineering*<sup>769</sup>, was a decision which was appealed from the decision of the Inner House of the Court of Session<sup>770</sup> to the House of Lords. This case has been referred to as the Piper Alpha Case. In 1988, there was an explosion which destroyed the Piper Alpha oil platform, injuring and killing numerous persons. The employees were employed by the contractors so as to build and maintain the platform. There had been settlements already reached regarding the victims claims. The issue however was that contractually, between the operator of the platform and the contractor, who at the time had employed the victims, the liability of the financial costs that were suffered as a result of the settlements. The amount of the settlement which was accepted by the operator, other participants and their respective insurers were at levels far greater than the amount that would have been awarded by the Scottish Courts but less than what would have been awarded in Texas. It was after settlement figures were given and agreed to with the claimant, that the contractors were asked to pay indemnity to the operator and the other participants, to which they refused. Due to the numerous insurance policies in place at the time, the insurers of the operator and other participants decided to pay the whole of the settlement figures, apart from a small sum. The terms of the agreements in place required the contractors to indemnify the operators where as a result of the contractor's default, the operators may incur a liability. The indemnity provision was found in Clause 15(1) under Contractor's Indemnities, in particular Clause 15(1)(c). As a result of the agreements in place, the insurers paid out, and then went on to bring proceedings by

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<sup>768</sup> [1945] 1 KB 250,258

<sup>769</sup> [2002] Lloyd's Rep IP 261

<sup>770</sup> 2000 SLT 1123, Ct of Sess (Inner House)

claiming subrogation rights against the contractors.

The issue that had to be dealt with was (1) whether on a proper construction of the contract between the parties, the operator was entitled to indemnity in respect of claims arising from the death or injury of the contractor's employees in circumstances where the contractor was not liable at common law or for breach of statutory duty in respect of the death or injury in question; (2) whether insofar as the action was a subrogated claim, the contractor's liability to the operator had been discharged by the payments made by the underwriters; (3) whether on a proper construction of the contract between the parties recovery of the excess above the Scots law value of the claims was excluded by cl.21 which provided that they should not be liable for indirect or consequential losses suffered.<sup>771</sup>

When dealing with the issue of subrogation Lord Bingham agreed with the conclusions which were expressed by Lord MacKay where he stated that it was a well established principle that an insurer who has fully indemnified an insured against a loss which has been covered by a contract of insurance between them may ordinarily enforce, in the insurer's own name, any right of recourse available to the insured<sup>772</sup>.

The trial Judge's reasoning was overruled on appeal. The argument which was put forward was that Caledonia's rights were not extinguished as a result of the insurers paying out, and would mean that they would be entitled to proceed on the basis of a subrogated action in Caledonia's name. If this was correct then the insurers would be able to bring the proceedings in the name of the original right-holder. However, it was then argued by the contractors that Caledonia's rights and contractual obligation to indemnify no longer existed the moment the insurers satisfied Caledonia's loss under their contractual responsibility. The correct party to the proceedings

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<sup>771</sup> As stated in the Headnote [2002] 1 Lloyd's Rep 553, 554

<sup>772</sup> He relied on the cases of *Randal v Cockran* (1748) 1 Ves. Sen.98; *Mason v Sainsbury*, (1782) 3 Dougl.61, which was cited by Lord Mackay; *London Assurance Co. v Sainsbury*, (1783) 3 Dougl.246; *Yates v Whyte* (1838) 4 Bing. N.C 272; *Dickenson v Jardine*, (1868) L.R. 3 C.P. 639

should have been in the insurer's name.

Interestingly on appeal the court looked at who under the contract would be liable for the sum that was to be paid out, and concluded that in fact the contractor's rights and obligations were not extinguished or discharged. Lord Hoffman<sup>773</sup>, in particular dealt with it in terms of stating the general principle is that a person cannot claim more than he is entitled to, so he can only be indemnified once. He stated that there were numerous ways that one could give effect to such principles, such as a person should be entitled to subrogation against those who were liable, and is usually adopted when the liability is of a secondary party of the other party liability. Another method would be to state that one payment would discharge the liability, which applies when the liability of the party who has made payment was in fact the primary or are equal and co-ordinate. It has been suggested that this analysis is wrong<sup>774</sup> for the reason being (1) that this goes against the authorities in countries such as Australia and Canada<sup>775</sup> which had laid down the principle that there could be a discharge of a third party's contractual liability to indemnify the insured once payment was made by an indemnity insurer's payment, although the insurer could receive full payment from a third party; (2) that this does not conform to the decision in England, as 100% contribution could be ordered by the court against tortfeasors and (3) when a surety pays the principal debtor's liability has been discharged. Further, procedural problems may arise with this argument as the insurer would be forced to decide before proceedings have actually commenced to decide that it would be able to obtain the whole of its payment or only some of its payment but not up to 100%.

However, the distinction is a clear one and in cases of double insurance the Civil Liability (Contribution) Act 1978 does not apply.

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<sup>773</sup> [2002] 1 Lloyd's Rep 553, 571

<sup>774</sup> The Law of Contribution and Reimbursement, Charles Mitchell, Oxford, (2003) 9.14 p. 181

<sup>775</sup> For example, *Trenton Works Lavalin Inc v Panalpina Inc* (1994) 126 Nova Scotia Reports(2d) 287 (Nova Scotia High Court) and *Sydney Turf Club v Crowley* (1971) 1 NSWLR 324 The Law of Contribution and Reimbursement, Charles Mitchell, Oxford, (2003) 9.14 p. 181



## CHAPTER 9 CONCLUSION

This thesis has tried to illustrate the problems which occur when situations of double insurance arise. This is a frequent problem that arises when insurance policies are taken out with numerous insurers. It can arise (1) by mistake, (2) where the assured is not aware of the existence of other policies and (3) where an assured over insures his property. The main issue of double insurance is whether an assured who has taken out policies with more than one insurer should be permitted to claim from any one of the insurers where a policy has been taken out.

The type of clauses that can be found in insurance policies are: escape clauses, excess clauses, rateable proportion clauses and other insurance clauses. The main reason for insurers imposing these clauses is to prevent the possibility of fraud, ie. where the assured is indemnified for more than the loss he has suffered. In some cases, there can be a combination of these clauses which can be complex. An escape clause completely excludes the liability of an insurer if an event occurs which is specifically provided for under the policy. An excess clause applies to cover the excess where there is another policy in existence. A rateable proportion clause limits the insurer's liability, to the proportional rate for the loss suffered by the assured. The problem with the existence of such clauses is that the assured will be left with no cover, even though they had paid premiums (in some cases high premiums). In particular, the insurer can refuse to pay out for the loss incurred by the assured by relying on exclusion clauses or limiting the amount that could be recovered. The assured pays a high premium in the hopes that when a loss is incurred, the assured can look to the insurer to ensure that payment will be made. When balancing the interests between the parties, the interest of the assured is paramount. The insurer can impose terms of notification in the policy to ensure that if an assured knows that there is another policy in existence, this should be disclosed. The insurer can then decide how this will affect the terms of the policy. This could then be done by way of limiting or excluding liability completely. This would only be possible if the assured knows that there is a policy already in existence. In cases where the assured is not aware of other policies in existence, the insurer should not be allowed to rely on such limiting or exclusion provisions. In some jurisdictions, this has been given legislative effect.

A comparative study of the courts in England, USA, Canada, Australia, South Africa, China, Singapore and India reveals the Courts struggling to avoid dealing with double insurance situations by concluding in many cases that on the facts, double insurance does not arise. The law in the other jurisdictions is unclear and unsatisfactory. There is a lot of literature on double insurance from America, but the UK courts have stated clearly that these authorities provide no guidance in the UK. The Canadian courts have preferred to follow the English authorities.

The requirements for the existence of double insurance are that the insurance policies cover (1) the same subject matter, (2) the same assured, (3) the same interest, (4) the same risk and (5) the same policy period. Furthermore, there have been cases where the lower courts may rule that there is no double insurance, but on appeal it is held that double insurance exists, and vice versa. If double insurance arises, the cases have shown that the courts are more likely to hold the insurers liable, and payment should be made to the assured. This usually results in the similar clauses (e.g. excess/excess or ratable proportion/ratable proportion) ‘cancelling out’ each other and both insurers paying out up to the total of the loss with the insurers fighting it out between themselves subsequently. However a better solution to the problem, which could lead to more certainty, is in the form of legislative provisions similar to Australia with some modifications. The thesis looks at the provisions in Australia, mainly under s45 Insurance Contracts Act 1984 and the effects of the implementing similar provisions into English law. Although it could be argued that this would be a drastic step, as the common law position is sufficient to protect the interests of the parties, the legislature in Australia considered that it was beneficial to impose statutory provisions to give similar protection.

It is unlikely that the UK will follow Australia by imposing a similar statutory framework in the near future. Therefore from a common law perspective I conclude that a workable possible solution to double insurance would be as follows:

If there is double insurance, regardless of the type of clause present and its wording, an assured should be able to choose whichever insurer he wishes to recover for the loss he has suffered, and the insurers will then have to seek

contribution amongst themselves.

This would give greater protection to the assured, particularly consumer assureds, which should be the ultimate aim of the courts. It must be noted that contribution only arises when there is double insurance. There are three methods for calculating contribution (1) Independent Actual Liability, (2) Common Liability Test and (3) Maximum Potential Liability. The judge has absolute discretion as to which method of calculation is appropriate, depending on the facts of the case.

The English provision should read that where an insurer includes terms such as excess, ratable proportion and escape clauses in the policies, they should all be held void. Again, it should only be the reference to such clauses which will be void, and not the whole term of the contract. This is the position that Australia has adopted. The assured can then make a claim from whichever insurer he wishes to claim for the loss he has suffered. This should be general position, but exceptions should be provided which are similar to the Australian provision, which expressly provide that such clauses will not be void only in situation where there is a true excess liability in a policy or where there is a requirement under statute. The English legislature has been slow to implement legislation, but such legislative provisions should be enacted to give more protection to the assured.

If English law does not implement such legislative provisions, then the courts should change the common law position. The cases at present in this area have not provided much assistance. The courts should in such circumstances rule that the combination of the clauses is irrelevant and that in such situations, the clauses cancel out each other and each insurer will be equally liable under the policies. The assured can chose to seek indemnity from anyone of the insurers. The insurer who had paid out, can then seek contribution from the other insurer, thorough common law principles of contribution. This may seem drastic, but the courts in England have devised a similar result when dealing with Mesothelioma cases, where an employee is now entitled to recover damages of 100% from whichever employer he wishes to. The same principles should also apply in cases of double insurance, although it can be argued that Mesothelioma cases are few in number and therefore such exception should be permitted. Furthermore, another argument

could be whether in fact there is double insurance in such cases, as there are numerous policies over many years and identifying whether there is overlap of policies and when the period of overlap may be is difficult. The above suggestions could provide a possible solution to the problem of double insurance, a situation which constantly arises in insurance policies. However there are a lot of unresolved questions, partly because of the way that the new wordings of the clauses have developed, which have been developed by using 18<sup>th</sup> Century principles. There is also a lack of coherence from the courts and other jurisdictions which could provide some guidelines or principles in this area. In any event, whichever method or principles the courts adopts, in a consumer market, the ultimate beneficiary who should be protected are the assured.

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