Extract from *Commercial Law in Zambia: Cases and Materials* **(forthcoming) by Mumba Malila. (Unedited version, strictly for private circulation)**

Chapter Six - Insurance

6.1. Introduction: Nature and Definition of Insurance

Commercial activity necessarily entails risks. Take a sale of goods transaction, for instance; the seller may fail to deliver the goods contracted to be sold, or the buyer may not pay, or the goods may be delivered but they may be defective, or they may fail to do the job for which they were bought, or the goods may be delayed, lost or damaged in transit etc. In each of these circumstances, there is some potential loss to one party or the other. Even a seemingly straight forward commercial arrangement like a mortgage, may present risks which the parties may on face value take for granted. The mortgaged property may be gutted down by accidental fire; the mortgagee may die as the market value of the mortgaged property declines, etc. Ordinarily, businesses seek to minimize risks by using appropriate terms in their contracts with trading partners to allocate particular risks between the contracting parties (eg exclusion clauses which relocate risks).

At common law losses lie where they fall ie on the party liable. In some cases the law may shift these losses from that party to a wider group or to a person more able to pay. In this regard arrangements are designed to protect the person who bears the risk. The commonest and most efficient means of guarding against risk is by insuring against it. A contract of insurance is

effectively a contract by which a person pays someone else – the insurer – to bear the risk. Insurance is in essence a risk sharing devise.

An insurance contract may broadly be defined as an agreement in which a person called the insurer agrees for consideration called the "premium" to pay a sum of money or to provide services for the benefit of another person called the insured or the assured on the occurrence of a specified event whose happening is uncertain. Sometimes contracts of insurance have been defined as aleatory contracts because they depend on an uncertain event or contingency.

6.2. Historical Development of Insurance.

Insurance as it is known today is largely associated with the development in maritime commerce in Europe As was the case with much of banking law, modern insurance law has its origins in the crucible of practices of Italian merchants of the fourteenth centaury who would arrange to insure their vessels and cargoes against the risk of sea travel. It was these enterprising traders from the thriving commercial cities of Northern Italy who introduced into England the custom of insuring their marine into ventures. A merchant or shipper who want to insure against perils from the sea voyages would circulate among the merchants gathered, a piece paper containing a description of the ship, its cargo, the nature of the voyage, the character of the crew and the name of the captain. It was under this information that those who wished to become insurers would write their names and the amount of the risk they were willing to assume, hence the term 'under-writer'.

Merchants would agree in return for a fee, to undertake a share of the risk of their fellow merchant's trading ventures. Besides the fee, the merchants who partook in these insurance arrangements naturally benefited from the fraternal links that such arrangements brought forth.

Maritime risks and risk of losing ships and cargoes at sea therefore precipitated the practice of medieval insurance and dominated insurance for many years. Disputes arising out of contracts of insurance were decided according to the prevailing custom and practice of merchants. It was this mercantile custom that became the foundation of all the laws and codes subsequently enacted upon the subject of insurance[1]. However, for many years after its introduction, the law of insurance was unknown to the common law courts. The common law played little or no part in the regulation of insurance disputes as most insurance disputes were as a rule settled by arbitration of mercantile men. In 1756 however, Lord Mansfield, upon being appointed Chief Justice of Court of Kings Bench and during his career as Judge, became conspicuous in making the contract of insurance the subject of careful study. It was during this time that, "from foreign ordinances, writings and usages of trade", Lord Mansfield drew and shaped the principles of insurance law[2].

In 1601 merchants secured the establishment by statute of a chamber of assurance that was outside the normal legal system. Maritime insurance retained its prominent position for a long time and in England from the later part of the seventeenth centaury was increasing transacted at a coffee house in the city of London owned by a man called Lloyd. The law of insurance

[1] F Warner (ed) , Richards on the Law of Insurance, 5th Edition, (New York; Baker Voorhis & Co. Inc., 1952) p52
[2] Ibid.

therefore formed part of the lex mercatoria and as with many aspects of commercial law, and in particular the law relating to banking and bill of exchange it was only in the eighteenth centaury that insurance contracts came under the jurisdiction of the common law courts.

The adage that necessity is the mother of invention, proved true in the growth of insurance as it does in other spheres of life. A number of events that happened in Europe acted as catalysts in the growth of insurance. For insurance, the grate fire of London of 1666 made the people aware of the kind of damage that could be caused by fire and hence fire insurance came into being. The aftermath of the first World War saw a gradual increase in the number of vehicles on the British roads. Consequently, the number of accidents also increased. As deaths caused by motor vehicles increased, people became significantly concerned with the need to mitigate the resultant loses. Social interest become virtually concerned in two ways, first, the enormous amount of injury caused by motor vehicles created a problem of compensation which, because of its size, could hardly remain a matter of individual concern; and second, resulting burden of litigation and its consequence imposed a stain upon judicial administration which threatened serious harm to the whole institution. This meant that those injured through the fault of motorists were not always able to obtain compensation because the negligent motorist might have been uninsured and without sufficient resources to pay damages. This was because at common law a person injured by reason of another person's wrong doing has no right of action against insurance who have undertaken to indemnify wrong doers; his only cause of action is against the other person who has committed the wrong whether the wrong whether the wrong falls to be regarded as a as a tort or

as a breach of contract[1]. This position in the law led the British Parliament to pass the Road Traffic Act, 1930 which made it compulsory for every vehicle driver to have, or be covered by, an insurance policy which covers him in respect of all liability for the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on the road. This Act imposed for the first time in British history, a statutory obligation on the user of all motor vehicles to provide security against their legal liability for causing death of or bodily injury to third parties or take out insurance cover for such liabilities.

6.3. The Emergence and Development of Insurance Law in Zambia.

The history of insurance in Zambia dates back to the era of colonial rule when Zambia was then known as Northern Rhodesia. During that time there were a number of private insurance companies that carried out insurance business. These insurance companies were run by private individuals and were largely controlled from Salisbury, in Southern Rhodesia. This meant that the rules and requirements regulating insurance practice were based on the various practices of the various countries of origin of particular insurance companies, especially those of England. In this regard the rules and practices of Lloyds of London were of utmost importance in guiding the satellite offices that were formed in Rhodesia. Insurance in Zambia remained a matter of private enterprise for many years before independence.

[1] Cack & Shulam, "Study of Law Administration in Connecticut; in Cases and Materials on Tort by H Shulam and FJames Jr (eds) Brookln : The Foundation Press Inc., 1952 p 637

After independence, however, in 1967 the Zambian Government sought to acquire control over insurance business in the country. It was argued that the prevailing system whereby the insurance profits were externalized without due regard to the needs of the less privileged and without much concern for national development, was unsatisfactory. The Zambian President then, Dr. Kenneth Kaunda put the position thus:

> "… in order to avoid the possibility of the emergence of local over mighty commercial barons… insurance… would be under the local
> forms of ownership, management and control …"[1]

This led the Zambian Parliament to pass the Insurance Companies (Cessation and Transfer of Business) Act[2] in 1970, whose main aim was to introduce a national insurance business solely carried out by the Zambia State Insurance Corporation.[3] It was anticipated that by passing this Act the services and facilities of insurance would reach every Zambian including the less privileged since there would be adequate and effective supervision as insurance as it "would then be under the local forms of ownership, management and control." The formation of the state owned monopoly, the Zambia State Insurance Corporation was accompanied by a Presidential directive that twenty six foreign based insurers should transfer their assets to

[1]K.D. Kaunda, Humanism in Zambia, (Lusaka: Government Printer, 1967) pp 63-64

[2]The Chapter 711 of the Laws of Zambia. See Part 111 Section 4 (3) which provides that, (after 31st December, 19971) no person other than the Corporation shall carry on any insurance business, or enter into any contract of insurance in Zambia.

[3] Then Chapter 705 of the Laws of Zambia.

the Corporation. Up until 1992, the Zambia State Insurance Corporation remained the only institution permitted under Zambian law to transact insurance business.

6.4.The Regulation of Insurance Business in Zambia

Insurance in Zambia today is governed by the Insurance Act Number 11 of 1997. The common law, no doubt continues to play a significant part in insurance as it does in other spheres of life. The present Insurance Act repealed the former Insurance Act [1]. The new Act was necessited by the imperious need to strengthen control and regulation of the insurance industry following the deregulation of the insurance market in 1992. Many locally registered insurance companies came on the scene bring about a competitive customer-oriented approach to the market. In spite of the competition that liberalization brought about, the market is fairly small. Most insurance companies operating in Zambia are composite companies writing both life and non life insurance business including pensions. The Pensions and Insurance Authority is the body responsible for the supervision of the insurance industry in the country. The Pensions and Insurance Authority came into existence in 1997, some five years after the liberalization of the insurance business in Zambia. The Authority operates under the auspices of the Minister of Finance. Although the Pensions and Insurance Authority is outside the civil service, it does not have a distinct legal personality, and therefore, operates essentially as an agency of the Minister of Finance. The Registrar of pensions and Insurance is appointed under the Pension Scheme Regulation

[1] Chapter 392 of the laws of Zambia

Act[1] . His duties with regard to insurance are however outlined in section 99 of the Insurance Act as follows;

"(l) The Registrar shall have the functions and powers conferred on him by or under this Act or any other written law.

(2) Subject to this Act the duties of the Registrar shall include-

(a) the formulation and enforcement. of standards in the conduct of the business of insurance with which a member of the insurance industry must comply;

(b) directing insurers and re-insurer on the standardization of the contracts of compulsory insurance;

(c) directing an insurer or a re-insurer where he is satisfied that the contract of insurance issued by the insurer or re-insurer is obscure or contains ambiguous terms or terms and conditions which are unfair or oppressive to the policy-holders, to clarify, simply, amend or delete the wording, terms or conditions, as the case may be, in respect of future contracts;

(d) formulate standards for the conduct of insurance business:

(e) make recommendations to the Minister on any matter affecting the insurance industry;

(f) advise the Government on adequate insurance protection and national assets and properties; and

(g) perform such other functions as the Minister may assign to him.

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[1] No. 26 of 1996

(3) In the performance of his functions, the Registrar shall at all times have regard to the need to-

(a) protect the rights, benefits and other interests of policy holders and any beneficiaries of policies of insurance and:

(b) monitor the solvency insurance principles insurance business of insurers and maintain sound insurance principles and practice in the conduct of insurance business

(4) The Registrar shall as soon as reasonably practicable after each year ending on 31st December, furnish to the Minister a report on the working of this Act during that year.

It will be seen from this provision that the Registrar's duties and functions include the formulation and enforcement of standards in the conduct of the business of insurance which members of the insurance industry must conform with.

Licensing of insurers is done by the Pensions and Insurance Authority. In terms of section 4 of the Act, no insurance business can be undertaken in Zambia without a license issued under the Act. This requirement is curiously repeated in section 11 of the Act. By section 10 of the Act, a company desiring to carry on insurance business in Zambia is required to submit to the Registrar; the Articles of the company; a statement of assets and liabilities; details of share capital; financial projections; copies of all documentation to be issued to policy holders including policies and proposal forms, and such other documents and information as the Registrar may require.

The Registrar issues a licence which is valid for one year but subject to renewal.

The Minister of Finance is empowered by section 41 to prescribe, by statutory instrument, the minimum paid-up share capital to be maintained by a licensed insurer. Insurers are obliged under section 45 to submit solvency statements within ninety days after the end of each financial year. Section 67 empowers the Registrar to require the insurer to to maintain assets of such value as appears desirable to ensure that the insurer is able to meet his obligations. Section 45 requires insurers , within ninety days after the end of each financial year to file audited insurance accounts prepared in accordance with the regulations These capital adequacy and solvency requirements are intended to safeguard the interests of the insuring public

The Registrar has vast powers to met out disciplinary sanctions on erring members of the insurance industry. These include power to suspend, revoke, or refuse to renew a license held under the Act.

6.5. Formation and formalities of the insurance contract

The process of formation of a contract of insurance is the elementary general contract law process of offer and acceptance; the offer being contained, usually but by no means necessarily, in the proposal form. The contract must be supported by consideration and intention to create legal relations. Consideration and intention are often satisfied almost automatically and consideration of these two elements of the contract of insurance is, therefore, hardly necessary.

Offer and Acceptance

The learned authors of *MacGillivray and Parkington on Insurance Law*[1] explain the formation of a contract in the following terms.

> *" In order that the building contract shall be concluded there must be an offer put forward by one party to the contract and acceptance of it by the other. An offer is usually made by the proposer who completes a proposal form and sends to the insurers for their consideration. Counter proposals may however be made by the insurers so that negotiations may end with the insurers making a final offer of insurance cover to the applicant which is up to him to accept by for instance tendering the premium due."*

In much the same way, Lowe[2] explains that:

"The usual procedure followed is for the person seeking insurance to complete a proposal form which is then submitted to the insurers. If they reject the proposal, there is no contract. If they accept it a contract may come into existence but the precise moment at which it does so is essentially a question of construction of the relevant documents. Thus if acceptance provides (as it sometimes does) that no insurance can take place until the first premium is received' it is clear that there will be no cover until the premium is paid or tendered and it has been suggested that even if the premium is tendered the insurers are at liberty to change their minds and decide not to proceed."

Communication of Acceptance.

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[1] 6th Edition paragraph 201 at page 86

[2] Robert Lowe, Commercial Law , 4th Edition p390

Once an offer has been made, it remain for an acceptance of that offer to be given. In the absence of an acceptance, there will be no contract. As rightly observed, an acceptance will be of no effect in law unless the parties have agree upon every material terms of the contract they wish to make. The material terms of a contract of insurance are: the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. As to all these, there must be *consensus ad idem* that is to say an express agreement or the circumstance must be such as to admit a reasonable inference that the parties tacitly agreed. Without such agreement, it would be impossible for the court to give effect to the parties' contract except by virtually writing the contract for them, which is not the function of the courts to do.[1]

Formalities.

English law prescribes no requirements as to form or other qualities for an insurance contract to satisfy for it to be valid. This technically means that an oral insurance contract, as long as it can be proved, will be valid and binding between the parties, provided of course, that there is agreement on the material terms. In practice, apart from cases involving temporary cover, insurance contract are normally embodied in a document known as a policy. Section 75 of the Zambian Insurance Act[2] provides that;

[1] Mac Gillivray and Parkinson on Insurance Law, Opcit p 201
[2] No. 27 of 1997

"*No person shall issue a policy containing printed provisions which are not in clear type face with letters of a size not less than eight point.*

This may seem to suggest that an insurance policy ought to be in writing. This assumption would however not be necessarily correct in view of other provisions such as section 80 of the Act which states that;

"A policy issued to any person before or after the commencement of this Act shall not be invalid, nor shall it be unenforceable by that person, by reason only of the fact that the person contravened or failed to comply with the provisions of any enactment in force applying to that policy."

Schr v Policyholders Protection Board (1993) 3 All ER 396

6.6. Agents in Insurance Business

Most insurance business is conducted through agents. These are either insurance agents, so called, or insurance brokers. Under this topic therefore, we shall examine the principles relating to the important features of each of the agents in the insurance industry, these agents being, (i) the insured's agents and (ii) the insurer's agents.

Both the relationships between the insured and his agent and the insurer and his agent are governed by the ordinary principles of the law of agency. This means that the agent's authority will be either actual authority or ostensible authority. It is actual authority where the agent is authorized to make the insurance

contract with the third party. This authority is of two kinds, namely, (i) express actual authority where it is given orally or in writing and (ii) implied actual authority where the agent exercises those powers which are reasonably incidental to the authority given, or which third parties will be free to imply that the agent has.

In addition to the usual contractual duties that agents have under the common law principles of agency, agents in insurance business also have certain duties and obligations both to their principals and to the insuring public. These are imposed by the statute. Breach of those statutory duties attract penalties under the insurance Act which may include imprisonment.

Insurance Brokers

Insurance brokers occupy a rather peculiar place in the insurance industry. A person seeking insurance may chose to approach an insurance company directly or may do so through an agent known as a broker.

The Zambian Insurance Act defines the term "broker" in section 2 as " a person who, on behalf of an insured person or a person who intends to take up an insurance policy, arranges insurance policies" This definition makes it plain that an insurance broker is an agent of the person seeking insurance.

Brokers are middlemen between insurance companies and those persons requiring insurance. Brokers are meant to be experts in insurance and in the insurance market, but it is not uncommon for quacks to masquerade as insurance brokers and therefore swindle the unsuspecting public. Insurance brokerage business is therefore, carefully regulated. Under the Insurance Act, there are numerous provisions intended for the regulation of brokers and

the insurance brokerage business. In terms of section 5 of the Act, no person shall engage in insurance brokerage business unless the person is a company licensed under the Insurance Act. The term "company" as used in that section has the same meaning as company under the Companies Act. This provision, already, limits brokerage business in Zambia to limited companies. In terms of section 13 of the Act, a person shall not carry on insurance brokerage in Zambia unless that person is registered as such under the Act. The Act goes further to state that a broker shall be issued a broker's license by the Registrar of Insurance. To qualify for an insurance brokerage license, a person must have a minimum of ten years experienced as a licensed agent. A license given by the Registrar to a broker remains in force for a term of one year, or for such shorter or longer term as may be specified in the license, but shall be renewable on application made in accordance with the regulations made from time to time under this Act.. Serious penalties attend to anyone holding out as an insurance broker when he is in fact not licensed.[1] Further more, under section 20 of the Act, a broker is not allowed to carry on any business other than insurance brokerage, unless firstly, the Registrar has, in writing, approved the business as reasonably ancillary to insurance brokerage carried on by the broker; and secondly, the proportion of turnover of the insurer attributable to the non-insurance business in any financial year does not exceed such proportion as the Minister may, by statutory instrument, prescribe. In order to prevent insurance companies or related

[1] By section 22 of the Act, any person who falsely holds himself out to be licensed under the Act shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding twenty thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

parties from having interest in insurance brokerage business, which if allowed would inevitably lead to conflict of interest, section 31 of the Act states that an insurer, any subsidiary company of an insurer or any director of an insurer or any of its subsidiary companies, shall not, directly or indirectly hold shares in, or have any other financial or controlling interest in the affairs of a broker or insurance agent. Any person who contravenes the provisions of that section is guilty of an offence and is liable to fine. Furthermore, under section 134 (2) it is a requirement that every licensed broker should be a member of the insurance Broker's Association of Zambia and should subscribe and conform with the Association's Code of Conduct.
The Registrar has power to suspend for a period of not less than one year, any insurer or broker who refuses, neglects or fails to join the Insurance Broker's Association of Zambia.

There is absolutely no doubt from these few sections that insurance brokerage business in Zambia is closely regulated.

Brokers advise would-be insurers on their insurance requirements by prescribing what the best policies would be for any particular would-be insurers his the circumstances peculiar to them. Brokers help persons seeking insurance in the completion of the proposal form. They make it very clear, or at least they should, to people intending to take out insurance, that the proposal form is the basis of the insurance contract and as such any non-disclosure of material fact or any concealment thereof makes the contract voidable by the aggrieved party.

Upon the completion of the proposal form the brokers forwards it to the insurance company and during that same time negotiate the premium to be paid. At this stage in the transaction the broker plays a very important role in that he tires by all means, when negotiating with the insurer, to arrive at a competitive rate and

terms favorable to the would-be client. This role of the broker clearly is to the advantage of the would-be client because better and more favorable terms may be arrived at which would not have been the case had he gone directly to the Corporation.

Assuming the policy has been taken up by the insurer, the broker plays a further role of interpreting the contents of the policy to the client. The broker, in other words, advises the client on the perimeters of the policy he has taken. For instance, in the case of a comprehensive motor insurance cover, such advice may be to the effect that such policies do not extend to cover damage or loss due to an accident resulting from the use of a motor vehicle with worn out tires. This is because such use of a motor vehicle would be in breach of the implied condition on road worthiness.

The broker also plays the role of processing insurance claims on behalf of a client. In so doing the broker arranges for speedy payment and ensures that the final payment is acceptable to the client. The broker also arranges on behalf of the client what are termed :tailor-made or package polices" to suit each client's requirements. This is so in situations where a particular client is exposed to some peculiar risk which is not covered by any of the polices presently offered by the Corporation. In such a case the broker arranges for a policy especially made for the particular client with the insurer. A brokers is clearly an agent of the insured, but it is undeniable that he may also act for the insurer.

The law generally takes the position that the agent of an insurance company in completing a proposal form for a proposer is acting as an agent of the proposer, and not on behalf of the company.

Newsholme Brothers v Road Transport & General Insurance Co., Ltd (1929) ALLER 442

A proposer for a motor insurance policy gave answers to the questions in proposal from orally to the agent of agent an insurance company. These answers were written down incorrectly by the agent. The proposer then signed the form, which stated that it was to be the "basis" of the contract, and that he warranted the truth of the statements contained in it. The insured claimed for a loss under the policy, but the insurance company repudiated liability on the ground that there had been a misstatement in the proposal form.

Held, by the Court of Appeal that the action failed. Knowledge of the agent that certain answers as filled in were incorrect was not notice to the company, since the agent of the proposer.

SCRUTTON, L. J. (at page 451) If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of this his negligence by saying that the person he asked to fill up for him is the agent of the person to whom the proposal is addressed.

GREER, L. J. (at page 454) I also take the view that notice to agent whose duty was to obtained a signed proposal from and

send it to the company, was not notice to the company of anything inconsistent with the signed proposal form, and that in filling up the form, whether he mistook the instructions of the insured, or whether he intentionally filled in something different from what he was told, he was not acting as the agent of the company, but as the agent for the insured.

Broker's Authority to issue Cover Notes

Even though insurance brokers are paid a commission by the insurer they are nevertheless agents of the insured, but may be considered as agents of the insurer for some purposes such as in the delivery of the policy and in the payment of the first premium. Although in truth only an insurer can accept an offer for a full contract of insurance, insurance brokers are often given authority to conclude binding cover notes. The fact that brokers are entrusted with blank cover notes seems to be sufficient to confer upon them implied actual authority or apparent authority to act on behalf of the insurer whose cover notes they issue.

Mackie v European Assurance Society (1869) 21 LT 102.

The insured effected a policy of insurance of his mill and warehouse through W, at the time an agent of the Commercial Union. In due course, W became an agent of the defendant. When the insured's policy with Commercial Union expired, the insured asked W for a new policy. W gave the insured a cover note, which was also some form of a receipt, for a month in the name of the defendant. This was notwithstanding the fact that at the time the insured did not realize that the insurer was different

and despite the fact that the defendant no longer transacted fire business.

Held, that there was a binding temporary contract of insurance between the parties. As W was provided with cover notes, the defendant had conferred authority on him to bind them.

Brokers Duty of Care.

Since the broker is said to possess the knowledge and expertise in the insurance market, he is expected to exercise due care and skill in advising the would-be clients. As such the broker can be held liable by the client for professional negligence if the advice given turns out to be wrong. Therefore, the brokers, to cover themselves from such liability, take up an insurance cover called a Professional Indemnity Policy. This policy provides cover in relation to damage or loss that the client might suffer from as a result of relaying on the wrong advice of the broker.

Mariane Inqurid Winther v. Arbon Languish and Southern Ltd **EALR p. 292 (1966)**

Plaintiff was widow and administratrx of the will of (W) who died in a flying accident on August 3, 1964, when piloting a jointly owned aircraft and claimed damages for alleged neglect of the defendant, an insurance broker to renew a policy of insurance which, had it been renewed would have entitled the estate of (W) to a sum of $2000. The policy of insurance was an admitted liability personal accident policy and covered the period May 8, 1963 to May 7, 1964 and for such further periods as might be agreed. The policy was originally issued to “Golden Mighlanders and related to a piper Tei-pacer aircraft but by an addendum dated March 23 1964 and with the agreement of a

giving of underwriters in London, the name of the assured was charged to those of (f) and (w) the new local owners – under this policy the passengers of the aircraft including the pilot were entitled to a sum of $2000, in the event of death resulting from body injury. There was also in existence during this period another policy of insurance the "hull policy" which was similarly acquired and which covered physical damage to the aircraft liability to the public and to passengers but afforded no cover to the pilot. Both the policies were due to expire on May 7, 1964 and manager of the defendant wrote to plaintiff informing him of this and suggested a discussion of the policies prior to the renewed date. It was alleged that on May 4, 1964, the plaintiff called on broker and gave him definite instructions to renew the policies. On May 5 the defendant, sent a cable to its London representatives with directions to renew the hull policy and said the would advise later as regards the admitted liability policy and subsequently on May 11, suggested that the later policy should be allowed to lapse. On June 3, 1964 © wrote to plaintiff informing him that the hull policy had been renewed for a further twelve months an June 15, both (f) and (w) called on © to ascertain the cover afforded by the policies and was as swell that all was in order and on July 8 (f) received a further letter with debit note for additional premium but not indicating whether it related to both insurances or to only one of them. It was common ground that the business of an insurance broker in regard to effecting or renewing of an aircraft insurance with underwriters in London or elsewhere was a specialized class of insurance business and further that the defendant was the owners agent for wansferan the two policies to themselves for advising them upon the policies and for renewing the null policy. It was contended on behalf of the plaintiff that if she had instructed (to renew the policy in question and later owing to a genuine misunderstanding did not appreciate and nor instructions and as a result failed to renew the policy, the defendant was answerable for a breach of the duty to

take care which wrote from the general relationship existing between the parties.

Held. (i) the of insurance broker and assured between the defendant (E) the owners gave rise to a duty of care on the part of the defendant independent of – contract.
(ii) the defendant had not sufficiently discharged the duty of care cast open it and was answerable for the damage which resulted.

Besides using a broker, a person wishing to insure his property or his life, would do so through an agent designated as such by the insurer. Consequently, one finds that insurance law abound with may instances of the application of the law of principal and agent. An insurance agent is a representative of an insurance company and has such powers as considering and accepting risks, executing insurance contracts and effecting their delivery. These agents have an apparent authority to do anything in respect to which the principal can do in the conduct of insurance business and as such the insurer is bound by a variety of acts of these agents such as the elimination from the printed policy of a vital provision, and rescission of the insurer's cancellation of a policy.

The last method, and the most commonly used by persons seeking insurance, is that of approaching the insurer directly in the negotiation and execution of an insurance policy. Once the insurer has accepted the policy, irrespective of whether the would-be client had approached it directly or through the broker or agent, and has paid the premium then he is said to be adequately insured in respect of the risks covered by the policy he has taken.

In the event of loss of damage occurring to the insured and is covered by the policy he will them have to make a claim with insurer. The insured will have to make his claim by filing in a

Claim Form containing the details of the loss or damage he has suffered.

The Proposal Form

The law requires the adoption of a fair and reasonable construction of the questions and answers in a proposal form in order not to cause unnecessary injustice to the parties.

Austin v Zurich General Accident & Liability Insurance Co. Ltd **(1944) 77 Lloyds Rep. 409**

A proposal form for motor insurance contained the question; "Do you suffer… from loss, or loss of use, of limb or eye, defective vision or hearing or form any physical infirmity?" The proposer said "No". The insurance company maintained that his eyes must be defective because he wore "thick" glasses.

Held, by the King's Bench Division, that the answer was a true one. His eye sight was sufficient for the purpose of driving, and thereon was not "defective" within the meaning of the proposal form.

TUCKER, J. (at page 415) With regard to the alleged defective to the alleged defective vision, the evidence showed that he wore "thick" glasses. There was no evidence before me as to the significance of "thick" glasses as distinct from any other glasses. Although Austin was not altogether convincing with regard to discrepancies in his evidence at the trial and at the inquest, in the absence of any contradictory testimony before me there was no material on I could find that there was any defect in Aldridge's

vision when wearing glasses, or that the necessity for wearing them in any way affected his driving. The evidence was that he was good shot and billiards player and that he drove without difficulty by day night. It is to be observed that the question is not, “Do you wear glasses?” The company do not, therefore, regard the wearing of glasses in itself as a material question. It is well known that a high proportion of people use glasses for reading but not for long distance sight, and have perfect vision for driving purposes, yet in a sense their vision is defective. I cannot suppose such people are required to answer “Yes” to this question. Its meaning must be construed in relation to the circumstances in which it is put, and I think that when occurring in a proposal form for motor insurance, it is limited to defects in vision which in some degree affect the competence of the assured as a motor driver and have not been corrected by glasses or other means. I am therefore of opinion that the answer in this respect was not untrue.

Condogianis v Guardian Assurance Co. Ltd.
(1921), 125 L.T. 610

A proposal form in respect of a fire policy contained question stating, “Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed, any other proposed, or any other property? If so, state when and name of company”. The answer which was given was, “Yes” “1917”. “Ocean”. This answer was literally true since he had claimed against the Ocean Insurance Co. in respect of the burning of a motor car. But he had omitted to state that in 1912 he had made another claim against the Liverpool and Globe Co. in respect of the burning of another motor car.

Held, by Judicial Committee of Privy Council, that the answer was not a true one.

LORD SHAW OF DUNFERMLINE (at page 612) . . .The principle of fair and reasonable construction of the question must also be applied in the other direction, that is to say, there must also be fair and reasonable construction of the answer given; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided.

With these matters in view, what is a just and reasonable construction of the words in the question: "Has proponent ever been a claimant on a fire insurance company? If so, state when and name of company".

It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insured who had been formally a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place. The argument of the Appellant, however, was that it was sufficient to answer the question: Has proponent ever been claimant…? If so, state when and name of company" by answering in the singular and giving one occasion and one alone. Accordingly, if, say, several years ago a proponent had been a claimant under an insurance policy, it would be sufficient for him to mention the further fact that every year since that occasion he had also been a claimant upon insurance companies for fire losses. It appears to their Lordships quite plain that this would be no good answer to the question: "Has proponent ever been a

claimant? If so, state when". In short, when that question is reasonably construed, it points to the insurer getting the benefit to what has been the record of the insured with regard to insurance claims. This was distinctly its intention and in their Lordships' opinion is plainly its meaning. To exclude, however, from that record what might in the easily supposed case be all its most important items, however numerous these might be, and all its most important question in the singular, which again in the easily supposed case might be a colourless instance favourable to the claimant, would be to answer the question so as to misrepresent the true facts and situation and to be of the nature of a trap..

Temporary Cover and Cover Notes

The purpose of a cover note is to give temporary insurance cover whilst the proposal is being fully considered and until a policy is granted or refused. This is a common practice in virtually all types of insurance, but are more prevalent in motor insurance. Cover notes are fully effective contracts of insurance.

Julien Praet Et Cie, S.A v H G Poland Ltd (1960) I Lloyd's Rep. 420

PEARSON, J. (at page 428) Traditionally, the underwriting room at Lloyd's, and a Lloyd's broker who has prepared the proposed policy presents a slip giving details of the proposed risk to the underwriter, and the underwriter, if he finds the risk acceptable, insures it by initialing the slip. The policy is ten prepared and issued. The Lloyd's broker is the agent of the assured. The underwriter deals only with the Lloyd's broker and not with any

outside broker, nor with the assured. This procedure, if it had to be maintained in its full rigour without relaxation or modification, would impede foreign insurance business and would make motor insurance business impossible.

The typical motorist is an impatient person in the sense that, having bought a car, he wishes to take delivery and drive off in it at once, and he would not be willing to wait for the traditional steps to be taken at Lloyd's before he could obtain cover. Therefore, even in the United Kingdom, there has to be the familiar system of the cover note, which is issued at once on receipt of a proposal, and covers the assured and puts the underwriters on risk for the period while the proposal is being considered and until a policy is either granted or refused. There are hundreds of motor distributors and dealers and other persons in the United Kingdom who are authorized to issue cover notes on behalf of Mr. Poland's for "H.P" policies are made. Great care is taken, however, to comply with the requirements of Lloyd's. The authority to issue cover notes is applied for and granted through a Lloyd's broker, and the proposed are sent to him and presented by him to the underwriter, and he receives the policy from the underwriter and sends it to the assured as his agent. The underwriter looks to Lloyd's broker for the premium, and has his account with the Lloyd's broker. The main insurance is duly at Lloyd's, and the preliminary cover note, which is inevitably granted outside Lloyd's by a person acting as for the underwriter, is regarded as merely an incidental or ancillary matter.

This decision was affirmed by the Court of Appeal (1945), 78 LIoyds Rep. 185), though this point was not in issue on appeal.

Hercules Insurance G. Limited v Trivedi & Co Limited (Tanganyika) EALR. (1962) p. 358

The respondent company having submitted to the appellant company a proposal form for insurance against burglary to cover part of its stock in trade received a letter from the appellant company an January 14, 1959, refusing to insure part of the stock only but offering a policy covering the entire stock. The respondent company accepted this offer by letter dated February 13, 1959, whereupon the appellant company issued a burglary policy dated 17 at 4.p.m. standard time. However on February 16 the respondents company premises having been burgled and goods to the value of over Shs. 5,000/- stolen, the respondent company which replied declining its recognize the claim on the ground that they were to on risk" at the time. Pursuant to a clause in the policy providing for arbitration the respondent company then applied in the district court for a written arbitration agreement between the parties to be filed in court. This application was dismissed on the ground that the respondent company had not satisfied the court that the contract of Insurance was in force at the material time. On appeal the high court reversed the magistrates decision and ordered that the agreement be filed with consequential orders as to the appointment of an arbitration and the issue he should decide. The appellant company then appealed and submitted that since no contract of insurance was in force at the material time, the arbitration clause would not apply. For the respondent company it was argued that their letter of February 13 put the appellant company on risk either as from the date of the original proposal or from the date of posting the letter of February 13.

Held: the claim made by the respondent company was not a claim under the contractual document, namely, the policy, but was a

claim under the preliminary contract between the parties for insurance; the real dispute between the parties has, therefore one of rectification depending upon the existence of the alleged preliminary contract and the arbitration clause in the policy did not extend to a dispute as to rectification of the term of the policy.

Appeal allowed. Judgment and decree of the High Court sit aside and decree of the district court restored.

Insurance Agents

An insurance agent is defined in section 2 of the Insurance Act as " a person who not being a salaried employee of an insurer (a) initiates insurance business; or (b) does any act in relation to the receiving of proposals for insurance, the issue of temporary insurance cover-notes or the collection of premiums; on behalf of an insurer"

Unlike an insurance broker who is generally the agent of the person seeking insurance, therefore, the insurance agent is the agent of the insurer. As with brokers, insurance agents are bound by the various agency rules that bind agents generally under the common law. In addition, there are various statutory provisions governing insurance agents as such. In terms of section 16 of the Act, a person can not carry on business as an insurance agent in Zambia unless that person is registered as such under the Insurance Act. Section 16(2) states that,

"except as provided by section twenty, the Registrar shall issue an insurance agent's licence to-

(a) any individual who, in the opinion of the Registrar, is of good repute and who specifies the Registrar that he has suitable qualifications and experience to perform the duties of an insurance agent; or

(b)any company that, in the opinion of the Registrar, is of good repute and which satisfies the Registrar that its managers and employees have suitable qualifications and experience to enable the company to perform the duties of an insurance agent".

No insurers not is allowed to accept business from unlicensed agents. It is an offence under section 23 of the Act, for an insurer to accept any insurance business from an unlicensed insurance agent.

Section 31 proscribes the holding by an insurer, any subsidiary company of an insurer or any director of an insurer or any of its subsidiary companies whether directly or indirectly, of shares in, or have any other financial or controlling interest in the affairs of an insurance agent.

6.7. Conditions and Warranties.

A contract of insurance will in practice consist not only of the policy document, but the completed proposal form where that is the case, and any other relevant documents such as renewal notices etc. An insurance contract may contain three types of contractual terms, namely, warranties, conditions and clauses descriptive of the risk. It does not always have to have these three types of terms.

Warranties

The warranty in insurance law is treated differently from a warranty in the general law of contract. A warranty in insurance is a term upon breach of which the insurer is discharged from all liability as from the date of the breach. Warranties in insurance contracts must be strictly complied with, and it does not matter whether the breach is unrelated to the loss that occurs. Warranties are in essence promises made by the insured regarding the fact or the thing he undertakes to do or to refrain from doing. These warranties may be of three types, namely warranties as to the existing or past state of affairs, warranties as to future conduct or events and warranties of opinion. These warranties may be created in different ways . they may be in the policy document itself or they may be in the proposal form, i.e. the "basis of the contract clause." The basis of the contract clause is normally contained at the foot of the proposal form. The questions, answers and declarations on the proposal form are made the basis of the contract, providing that any incorrect or untrue details furnished will entitle the insurer to avoid the contract.

For many years it has been conventional to regard a warranty as a fundamental term of the contract whose breach entitled the insurer to repudiate the contract. In some instances, there has even been a tendancy to declare that the insurer has the right to avoid the contract or that the contract is rendered voidable, so that in truth the language used is the same as that used for non disclosure and misrepresentation, situations where the contract can be avoided bythe operation of the general principles rather than as a result of specific contractual provisions.

West v National Motor and Accident Insurance Union (1954) 1 Lloyd's Rep. 463

The insured was alleged to be in breach of warranty as to the value of the property insured. The insurers, while relying on the terms of the contract to enforce an arbitration clause in the contract, rejected the insured's claim.

Held, that by relying on the term of the contract to enforce the arbitration clause, the insurers had waived their right to avoid the contract, which was the only right they had.

Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck. ((1991) 2 WLR 1279

The insured ship owner , in breach of warranty contained in the the rules of the ship owner's mutual insurance club of which the insured was a member, took the ship to into a prohibited area (the Persian Gulf at the time of the Iran –Iraqi conflict) . The benefits of the insurance had been assigned to a bank , which had lent money to the insured and was a mortgagee of the ship. The insurers who had been notified of the assignment made an undertaking to advise the bank promptly if the ship ceased to be insured. The insurer failed to advise the bank until some weeks after it had discovered the breach of warranty and the loss of the ship. At this time the bank decided to make a further advance to the insured, which it would never would have made had the insured lived up to its undertaking to notify the bank promptly.

Held by the House of Lords, that the breach of warranty in a marine policy automatically discharged the insurer from liability,

in accordance with section 33 of the Marine Insurance Act 1906. the bank's claim for damages on the basis that the club had acted in breach of the undertaking, was upheld as the insurance had automatically ceased.

There indeed appears to be no reason why the principle in **Good Luck** can not be extended to no-marine insurance. In **Hussain v Brown**[1] the Court of Appeal held that breach of a no-marine insurance warranty leads to "automatic cancellation of the cover"

Conditions

There is a tendency to consider conditions and warranties as if they were the same. Conditions may appear in the same part of the policy as warranties and some conditions may in fact be warranties. While warranties must be strictly complied with, it seems that some conditions may be dispensed with if they are unnecessary. A breach of a condition is actionable only if it cause the loss.

Conditions are collateral promises or obligations imposed on the insured with regard to the claims procedure, or giving the insured certain rights, usually a mere amplification of the rights already available to the insured under the general law such as subrogation rights.

Questions sometimes arise as to whether under insurance policies with arbitration clauses the insured is obliged the condition of obtaining an obtain an award before suing his insurer.

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[1] (1996) Lloyd's Rep. IR 147

R.B. Sirdaw v. The New Asiatic Insurance Co. Ltd., and Another **EALR 1957 282**

The plaintiff sued for Shs. 42,500/- damage by fire to a building he owned. The insurance was effected with the first defendant which had several months before the fire issued a policy in respect of the building. The second defendant was the insurance agent through whom the plaintiff arranged the business including payment of premium. After the fire there were discussions between the parties regarding the amount of the damage and the first defendant obtained an assessment of the damage. No agreement was reached and ultimately the first defendant repudiated any liability on the ground that the premium for the policy had not been paid. The plaintiff then sued the first defendant as insurer and, in the alternative, sued the second defendant who had been instructed to pay the premium to the first defendant. By the time the case came before the court for trial, the parties had agreed that (a) the first defendant should admit liability on the policy and the action against the second defendant should be dismissed and (b) that the court should decide who should pay the costs of the second defendant, and also whether the first defendant was bound by an award already made by an arbitrator as to the amount of the damage and who should pay the costs of the argument in respect of the points upon which the decision of the court was sought. The plaintiff claimed that under a condition in the policy it was incumbent on him to obtain an award as to damage before suing. This condition read "If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator…."

The first defendant contended that in the circumstances of the case, the condition was inapplicable.

Held. It was necessary for the plaintiff to obtain that award as a condition precedent to his action, the award was binding and there would be judgment for the plaintiff for Shs.42,500/- against the first defendant with costs including the costs of the arbitration and award judgment for the plaintiff.

Cases referred to:
Woodall v. Pearl Assurance Company, Ltd., [1919] 1 K.B. 593.
Heyman v. Darwins Ltd., [1942] 1 ALL ER 337.
Jureidini v. The National British & Irish Millers Insurance Co., Ltd., [1915] A.C. 499.

The burden of proving a breach of condition lies on the insurers.

Bond Air Services v Hill **(1955) 2 AII E.R. 476**

A condition in an aircraft insurance policy stated that the insured was to observe the statutory regulations relating to air navigation. Another condition provided that:- "The observance and performance by the insured of the conditions of policy… are conditions precedent to the insured's right to recover". The aircraft crashed and the insured claimed under the policy. But the insurers maintained that burden of proving that he had complied with the conditions lay on the insured.

Held, by the Queen's Bench Division, that this contention failed. It was the duty of the insurers to prove that the assured had broken a condition if they wished to avoid liability under the policy.

LORD GODDARD, C.J. (at page 480)

I cannot find that these cases[7] have ever been regarded, either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relive him from liability in respect of particular loss. The respondent's contention, no doubt, is that, by providing that the observance of conditions is to be a condition precedent to his liability to pay, the policy has shifted the onus on to the claimants. It is enough to say that in this court *Stebbing -v- Liverpool and London and Globe Insurance Co., Ltd.*[8] concludes the matter. In that case there were words to exactly the same effect as here, namely that compliance with the conditions should be a condition precedent to any liability on the part of the insurer, and the court decided that the burden of proving the falsity of an answer which amounted to a breach of warranty was on the insurer… As those two cases[7] were not in the Exchequer Chamber, they are open to review in the Court of Appeal. The learned arbitrator in the present case has had that effect of provision as to the observance of claimants' undertakings is to give to them the quality of warranties, so that a breach would absolve the respondent of liabilities for a loss occurring when the claimants were in breach, but has held that the onus of proof is not affected; and I agree with him. The parties to a policy can use words which will relieve insurance of the onus and cast it on the assured, as they may with regard to any other matter affecting an insurer's liability; see for instance, the judgment of SCRUTTON, L. J., in Re Hooley and Chemical Co., Ltd and Royal Insurance Co., Ltd. [9] But, in my opinion, much clearer words than are used here would be necessary to change what I think, certainly for a century and probably for much longer, has always been regarded as a fundamental principle of insurance law, namely, that it is for the insurers who wish to rely on a breach of condition to prove it.

Tinline v Whitecross Insurance (1921), 125 L.T. 632

An insurance company must indemnify a motorist, who has insured against third party risks, even where the third party's death has been cause by such negligence on his part as to manslaughter.

The insured had taken out a motor car policy covering him in respect of third party risks, he negligently killed a pedestrian whilst driving at an excessive speed, and was found guilty of manslaughter. He claimed an indemnity under the policy in respect of the damages which he had to pay, but the insurance company claimed that it was not liable on the ground that it would have been against public policy to give effect to the contract.

Held, by the King's Bench Division, that this contention failed; and the company was liable.

BAILHACHE, J. (at page 632) This policy indemnifies the assured against sums which he shall become legally liable to pay to any other person as compensation for accidental personal injury. It is to be borne in mind that a man does not become liable to pay compensation for accidental personal injury unless the accident is due to his negligence. Consequently the policy is one which obviously insures the assured against the consequences of the negligence- not only the consequences of negligence in general, but the consequences of his own negligence in particular. He is insured against the rules of an accident caused by own negligence. The defendants say that although that is perfectly true, yet where the negligence is so gross and excessive, and the

result is that a person is killed and the crime of manslaughter is committed, the policy does not indemnify him against the civil consequences of that crime, because it is against pubic policy to indemnify a man against the civil consequences of his criminal act. Speaking generally, I think it is true to say that it is against public policy to indemnify a man against the consequences of a crime which he knowingly commits, and in the word "crime" I include the breach of any statutory duty which renders a man liable to fine or imprisonment.

In motor accidents where the assured is the driver of the motor car, perhaps in ninety-nine cases out of a hundred the accident is due to the breach by the driver of some statutory duty. Many of these accidents are due to driving at excessive speed. That was the case here. Driving at a speed exceeding the speed limit is a breach of statutory duty, and it is a breach of statutory duty which subjects the offender to fine or imprisonment; and if the ordinary law were to be applied to these third-party indemnity cases, it seems to me it would be a defense to say: it is true that you did not intend to commit the crime of manslaughter; it was an accident; but you committed the crime owing to, and as a consequence of, your breach of a statutory duty- namely, driving in excess of the speed limit, or driving to the danger of the public, or on the wrong side of the road; and if the ordinary law were to be applied, it is difficult to see that that would not be an answer to any case under these third-party indemnity insurances.

But it is notorious that in point of fact and of experience that defense is never raised, and I do not think it has been very much thought of.

…I want it to be clearly understood that if this accident had been due to an intentional act on the part of the plaintiff, this policy could not possibly protect him, but then if man driving a motor

car at excessive speed intentionally runs into a man and kills him, the result is not manslaughter but murder, the reason being that manslaughter is the result of accident and murder is not, and it against accidents only that this policy insures…

6.7. Insurable Interest

An insurable interest is an essential requirement of all contracts of insurance. There is no single authoritative definition of insurable interest, but it is used to describe the assureds interest in the subject matter of the loss at the time of such loss, which the terms of any particular insurance contract require. The assured must have some legal or equitable interest in the subject matter of insurance otherwise the contract will be void. But this rule is obviously not without qualification.

By insurable interest we mean that the insured must have a particular relationship with the subject matter of insurance. If the insured has no insurable interest in the subject matter, the contract is illegal, void or simply unenforceable depending on the type of insurance.

The requirements of insurable interest was introduced on public policy considerations. Before its introduction, people were making wagers in the form of insurance polices on the lives of people with whom they had no connection. This was against public policy as it could lead to murder. Consequently the English Parliament passed the Life Assurance Act, 1774 to defeat these wagers. This Act is part of Zambia's received law.

To better understand the nature of insurable interest, one ought to be very clear about the subject matter of insurance.

The subject matter of insurance may be some corporeal or material property of value, for example, a motor car or a house. Alternatively, it could be an event, the happening of which would create a legal liability, for instance, the insurance effected by a doctor insuring himself against a possible claim by patients for professional negligence, or indeed a lawyer against claims for professional negligence. In marine insurance, the ship or the cargo it carries could be the subject matter of the insurance. In a life policy, the life of the assured is the subject matter of the insurance. In all classes of insurance, whatever it is that is the subject matter of the insurance it will normally be stated and described in the schedule to the policy.

A distinction is sometimes made between the subject matter of the insurance and the interest of the insured in the subject matter, which is often referred to as the subject matter of the contract. This distinction, academic though it may sound, is of significance because it is an established rule of insurance law that the insurance policy does not insure the subject matter of insurance as such, but the interest of the policy holder in the subject matter of insurance. While the subject matter of insurance may be property, life or liability, the subject matter of the contract is the financial interest or insurable interest of the policy holder in the subject matter of the insurance. Assume for example, Kalumba purchases a motor vehicle for K30 million and insures it against accident, fire and theft with Madison Insurance Company for its full purchase value. The subject matter of the insurance is the motor vehicle, but the subject matter of the contract is Kalumba's pecuniary interest in the motor vehicle, in this case the sum of K30 million. If whilst the policy is still in force, Kalumba sells the car to Dubeka, the insurance contract would terminate because the interest insured against has ceased to exist.

The authority for the proposition that the insurance policy does not cover the subject matter of the insurance, but the insured's pecuniary interest in the thing or event insured against is the leading case of **Castellain v Preston**[1] where the court stated among other things that

"What is it that is insured in a fire policy? Not the bricks and materials used in building the house, but the interest of the insured in the subject matter of the insurance."

The essentials of insurable interest may be summarized in three propositions thus:

(a) there must be property, life or limb, rights, interest or potential liability devolving upon the insured capable of being insured against.

(b) such property, life or limb, right interest or potential liability must be the subject mater of the insurance; and

(c) The insured or policy holder must bear some relationship recognized by law, to the subject matter whereby he would benefit by the safety of the property, life or limb, rights interest or freedom from liability, and he would be prejudiced by any loss, injury damage or creation of liability.

There are essentially two reason for the requirement ogf insurable interest. The first of these reasons has to do with the moral hazard. When the insured has insurable interest in the property subject of insurance, he will be less tempted to destroy the property insured. Secondly, the concept of indemnity in

[1] (1883) 2QB 380

insurance law implies that the insured cannot recover more than the loss. If the insured has suffered no loss, it would be inequitable to unjustly enrich him.

Insurable interest cases

Owner

A legal owner of a property obviously has an insurable interest in the property. This includes a co-owner and a tenant for life.

Trustee

A trustee has a legal interest in the subject matter of insurance and may therefore have an insurable interest. This includes the executor of an estate. Although ordinarily probate either from the High Court or from the Local Court, as the case may be, is necessary to complete the trustee's title, yet before probate he has title sufficient to enable him to ensure. The economic interest of the trustee lies in his desire to avoid liability on trust property. A beneficiary under a trust has an equitable interest in the trust property and thus he too has an insurable interest in it.

Receiver

A receiver in bankruptcy has a legal interest sufficient for an insurable interest. His duty is to take care that the property is preserved as reasonably as it may be for the benefit of all concerned and to this end is entitled to use funds in his hands to protect property for which he is responsible against normal risk.

Seller of Land

A seller of land who has conveyed it and has been paid the purchase price has no further insurable interest in the land sold[1].

The owner of land who has contracted to sell it out has yet to convey it retains a legal interest sufficient to enable him insure it.

Seller of Goods

A seller of goods has an interest in the goods in some cases as owners and in other cases as risk bearer, or as unpaid sellers having security rights under the Sale of Goods Act 1893. Until he has divested himself of all the rights and duties relating to goods, the seller has an his interest.

Unpaid Seller- has right of stopped in transition but until that is exercised, no insurable interest.

Buyer of Goods

A buyer of goods will be deemed to have no insurable interest in the goods unless he has them in his possession or they are at his risk or he has made an advance payment for then.

In the Canadian case of **Clark v Scottish Imperial Insurance Co.**[2], a shipbuilding contract obliged the buyer to make advance payments for the works and to have the ship when completed as security for the advances. The buyer decided to take fire insurance on the shipbuilding. Before the shipbuilding was completed, it was destroyed by fire. The insurance company sought to repudiate liability on grounds that the buyer had no

[1] See Ecclesiastical Commissioners v Royal Exchange Assurances Co. (1895) 11 TLR 475
[2] (1879) 4 SCR 192

insurable interest in the work. The Supreme Court however held that he had an insurable interest and could therefore recover because the subject matter of the contract had been subsequently appropriated and the Plaintiff could claim an equitable lien out of the same.

Mortgagor

A mortgagor retains an insurable interest in the goods even if his debt is greater than the value of the goods insured.
A mortgagee also has insurable interest.

Bailees

Bailees are non owners, e.g. carriers or warehouse owners who have possession of property as bailees. These have insurable interest in the property because they would be liable if the property is lost.

Life
An individual has an insurable interest in his own life to an unlimited amount. A married person has an insurable interest in the spouse's life.[1] A finance has no insurable interest in the life of his intended spouse.

Lucena v Craufurd **(1806) 2 BOS & PNR 269**

[1] Initially, it was the wife who was regarded as having insurable interest in the life of her husband, but since the decision in Griffin v Fleming (1900) 1KB it is now settled that a husband has an insurable interest in the life of his wife.

The Crown Commissioners insured a number of enemy ships which had been captured by British vessels but were still on the high seas. The statute which gave them authority to capture enemy ships empowered them to take charge of such ships only when they reached British ports. A number of ships were lost at sea before they reached port. The issue was whether or not the Commissioners had an insurable interest in the ships.

Held, by the House of Lords, that they did not.

LAWRENCE J at page 302

"A man is interested in a thing to whom advantage may arise or prejudice happen form the circumstances which may attend it . . . and whom it importeth, that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole, or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some thing to, or concern in the subject matter of the insurance, which relationship or concern by the happenings of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainly of advantage or benefit, but for those risks danger he may be said to be interested in the safety of the thing. To be interested in preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may very different; of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended. . . ."

Note: The dictum of Lawrence J in *Luceana* clearly propounded a wider factual expectation was cited by Kerr LJ in Mark *Rowland Ltd v Berni Inns Ltd* (1986) QB 228 even if it does not appear to represent current English law as shown in many decisions including *Macaura v Northern Assurance* (below) Indemnity insurance generally requires the assured to have an interest in the insurance other than that created by the contract itself or other wise he will incur no loss through the happening of the event insured against and if the insured has no interest then the insurer will have a good defense to any claim under such contract if he chooses to raise it.

A shareholder has no insurable interest in the assets of a company.

Macaura v Northern Assurance Co., Ltd (1925) ALL ER. REP. 51

The appellant was owner of a timber estate. He assigned the whole of the timber to a company called Irish Canadian Saw Mills Limited. The appellant owned almost all the shares in that company. In the course of its operation the company owed him a substantial amount of money. He insured the timber against fire but it was gutted down by fire. He claimed on the policy. The insurance company repudiated liability on grounds that the appellant had no insurable interest in the timber.

Held, by House of Lords, that this contention succeeded, and that the action failed.

LORD SUMMER (at page 55) This appeal relates to insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmill Co, Ltd., of Skibbereen, co. Cork. He had no lien or security over it, and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire-nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no "legal or equitable relation to" the timber at all. He had no "concern in" the subject assured. His relation was to the company, not to its goods, and after the fire he directly prejudiced by the paucity of the company's assets, not by the fire.

In a sale of goods contract, once the buyer rejects the goods delivered as not conforming to the contract, he will not be deemed to have insurable interest and can, therefore, not insure the property in his name.

Livio Carli & Others v Satem & Mohamed Bashanifer & Others **(1959) EALR 701**

The plaintiffs, a Yugoslavian cement company, and their agent at Aden agreed to sell to the first defendants 200 tons of cement described as "Dalmatian Portland cement B.S.S./12/1947 of Yugoslavian Origin. "Two lions brand". The first defendants insured the shipment with the second defendants. The cement

which arrived at Aden was of "Sahona Towers" brand which the first defendants refused to accept as not being in accordance with the description. According to the plaintiffs the first defendants had orally agreed to the change in brand and to a change in the description from "two lions brand to "Standard Portland Dalmatian Cement". After refusing to take delivery the cement was damaged by rain whilst lying at the wharf and later the first defendants assigned the insurance policy to the second plaintiffs as assignee. The insurers claimed that as the first defendants had disclaimed any interest in the policy they themselves could not have claimed, and in consequence, their assignment of the policy to the plaintiff after the loss occurred was of no effect. The plaintiff suggested that there was an implied or equitable assignment of the policy which arose from the nature of the transaction and that it was valid.

Held the first defendants had not agreed to a change of brand or in the description of the cement and accordingly the plaintiffs had failed to tender to the first defendants cement according to the agreed description; since this was a sale by prescription, the first defendants were entitled to refuse to accept the delivery. When the first defendants rejected the goods they ceased to have any interest in the cement, and there was nothing for them to assign; accordingly the plaintiffs had no insurable interest at the time of the loss. There is no implication that by custom or otherwise in contracts of this description the seller is deemed to be a party to the insurance policy from the out set

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Datoo & Another v Estate Duty Commissioner

(1967) EALR 208 (High Court of Tanzania)

The Estate Duty Commissioner had charged and levied duty on the proceeds of two policies of insurance on the life of the deceased. The policies were taken out by the deceased on his own life in 1960 and on January 22, 1962, he executed a transfer of them in favour and his wife with a proviso that in the event of his wife precede ceasing him or of the policy materials for some event other than death, the policy should revert to the deceased. The deceased continued to pay the premiums until the date of his death on May 10, 1965. An aped was made under S. 32 of the Estate Duty Act, 1963 (T)

Held: (i) The deceased still had an interest in the policies and from the nature of the Assignment, he was still competent during his lifetime to disposing of the property in the policies.
)ii) the deceased had a substantial interest in the property and had retained a benefit to himself in the proceeds of the policies.

6.8.The Principle of Utmost Good Faith

Another fundamental principle governing insurance transactions is that of utmost good faith or the doctrine of non-concealment as it is known in the United States of America.

Under general contract law the rule is that each party to the contract is entitled to make the best bargain he can and, as long as he does not make a false or fraudulent statement, he need not draw the attention of the other party to anything that might influence his judgment..

Insurance contracts are in a different category. The knowledge as regards the nature of the risk proposed for insurance is almost always exclusively possessed by one side. The proposer knows

all about the risk at the time he is proposing for insurance, whilst the insurer knows nothing and has to rely on the proposer to supply him the information to assess the risk. In order to make insurance transactions fair for all parties the law has elevated insurance contracts to the status of contracts *uberrimae fidei*, that is to say contracts of the utmost good faith. The practical effect of this principle is that each party to the contract must not only refrain from actively misleading the other, but must disclose and not conceal any material information relating to the proposed insurance. The law obliges the parties to disclose all material facts. A material fact is one which would affect the mind of a prudent insurer in deciding whether or not to accept the proposal, and on what terms he would accept. It is *"a fact which would affect the judgment of a prudent and rational underwriter in considering whether he would enter into a contract at all or enter into it at one rate or another." "a fact which would affect the judgment of a prudent and rational underwriter in considering he would enter into a contract at all or enter into it at one rate or another."*[1]

The legal basis of the principle of utmost good faith and the duty of disclosure imposed by it was discussed at length by the court in the case of **Carter v Boehm**[2] in which Lord Mansfield had the following to say:

"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trust to his representations, and proceeds upon confidence that he does not keep back any circumstances in his knowledge to

[1] Rivas v Gerussi (1880) 6QB 222
[2] (1766) 3 Burr 1965

mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement. Good faith forbids either party, by concealing what he privately knows to draw the other into from his ignorance of that fact and his believing the contrary."

Where the assured is asked to answer to specific questions the parties are taken to have agreed that the facts involved in answering the question are material but this does not nonetheless affect the duty to disclose material facts not covered by the questions unless of course, the way the question are drafted have this effect.

The test whether a fact is material or not is an objective one and it is irrelevant that a particular insurer would not have been influence or that the assured considered the fact immaterial.

The duty imposed by the principle of *uberimae fidei* is threefold: (1) a duty to disclose material facts, and (2)a duty not to misrepresent material facts and (3) a duty not to make fraudulent claim.

Mutuality of the Duty of Disclosure

Insurance would equally be void against the underwriter if he concealed material facts, for example, if he insured a ship on her voyage, which he privately know to be arrived an action would lie to recover the premium. The duty of good faith which gives rise to the duty of disclosure is a reciprocal duty owed not only

by the insured to the insurer but also by the insurer to the insured. This position in itself did not appear to have any real significance until the decision in **Banque Financière de la Cité SA v Westgate Insurance Co. Ltd**[1]. In that case the judge of first instance applied such a duty on an insurer and proceeded to award damages for breach of that duty. Both the Court of Appeal and the House of Lords held that the only remedy for breach was the usual one of avoidance of the contract.

The duty to disclose is only confined to facts actually known to the party on whom the duty falls.

There is no duty to disclose what in unknown. The onus of proving on the balance of probabilities that there has been no disclosure of a material fact, is upon the insurer who allege it. There is no doubt that the onus is a difficult one to discharge because it requires the proof of a negative ie. that insured did not disclose a material fact.

Facts which the Insured does not have to disclose

There are certain facts which the law regards as immaterial and no one can be penalized for failing to disclose them. Notorious facts need not be disclosed. Similarly facts which should be known by an insurer in the ordinary course of his business need not be disclosed. For example, a prospective insured in Zambia need not disclose to an insurance company that mini buses and taxis are more prone to road accidents than vehicles driven by priests and sisters.

Concealment or "Suppressio veri"

[1] (1991) 2AC 249

It is possible for a person to truthfully answer the questions in a proposal form and yet be in breach of the principle of utmost good faith as a result of a concealment of the suppression of the truth. This is illustrated by the case of **London Assurance v Mansell.**[1] The proposal form of an insurance company which was completed and signed by the proposer (Mr. Mansell) contained these questions: "Has a proposal ever been made on your life at any other office or offices? If, so, when? Was it accepted at the ordinary premium, or at an increased premium, or declined?" To these questions, the insured answered as follows: "insured now in two offices for £1,600 at ordinarily premium rates. Polices effected last years."

The insurance company accepted the proposal on the basis of these answers. The truth however was that several insurance offices had declined to insure the life of the proposer. On these facts the court held that there had been a breach of the principle of utmost good faith by the insured on account of his concealment of material facts, and the insurance company was entitled to avoid the contract.

Breach of the duty of disclosure renders the insurance contract avoidable at the option of the aggrieved party, usually the insurer. Similarly a misrepresentation has the same effect, except that a fraudulent misrepresentation also entitles the aggrieve person to claim damages for deceit. In practice there are three or four courses of action open to an insurer who has discovered a misrepresentation or breach of the principle of utmost good faith.

(a) The insurer may repudiate liability

[1] (1879) 11 CLD 363

(b) As the contract is only voidable not void, the insurer may overlook the breach and allow the contract to stand.

(c) The insurer may bring an action for delivery up and cancellation of the policy. In Zambia, this is probably the wisest course of action open to an insurer in respect of motor insurance in view of the provision of section 88 of the Road Traffic Act No. 11 of 2002 which compels an insurer to meet the claims of third parties claiming from the insured despite the fact that there might have been a breach of duty on the part of the insured.

(d) Finally, if the policy has matured for payment, the insurer may refuse to make any payment and leave the insured to institute proceedings, which the insurer may answer by pleading breach as a defense.

Where the proposal is made the "basis" of the contract, any mis-statement in it, material or not, is a ground on which insurance may avoid liability under the policy.

Dowsons Ltd v Bonnin (1922) ALL E.R 88

The proposers for an insurance of a lorry against fire stated that it was kept at "46, Cadogan Street, Glasgow". The proposal was made the "basis" of the contract. In fact, the vehicle was garaged at a farm on the outskirts of the city. It was destroyed by fire. In an action on policy,

Held, by the House of Lords, that the insurers were entitled to repudiate liability because of the misstatement by the proposer, even though it was not a material one.

VISCOUNT HALDANE (at page 93) It is clear that the answer was textually inaccurate. I think that the words employed in the body of the policy can only be properly construed as having made its accuracy a condition. The result may be technical and harsh; but if the parties have so stipulated, we have no alternative, sitting as a court of justice, but to give effect to the words agreed on. Hard cases must be allowed to make bad law. The proposal- in other words- the answers to the questions specifically put in it, is made basic to the contract. It may well be that a mere slip, in a Christian name, for instance, would not be held to vitiate the answer given if the answer were early in substance true and unambiguous. *Falsa demonstratio non nocet.* But that is because the truth has been stated in effect within the intention shown as to the address at which the vehicle would usually be garaged can hardly be brought within this principal of interpretation in construing contracts. It was a specific insurance, based on a statement which is made a foundational if the parties have chosen, however carelessly, to stipulate that it should be so. Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including in that question, are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfillment of which is rendered by stipulation foundational to its enforceability.

Misrepresentation or concealment of material facts will entitle the insurer to avoid the contract only if the same was given at the time the proposal for insurance was made, and not after the policy was insured.

Nlodwa v Republic (1968) ALR 582

The Appellant was charged in the second grade subordinate court, Blantyre, with two offences against the Road Traffic Ordinance (cap 146). In the first count the charge was that, being holder of a provision license, the appellant drove without "L" plates. In the second count he was charged with willfully doing an act, which disentitled him to claim under his policy of insurance, contrary to section 72 of the Ordinance. The Appellant was convicted on both counts and fined £2 and £10 respectively.

The appellant appealed against sentence only but on appeal the court also considered whether the charge on the second count revealed any offence.

Held: Section 72 as amended, of the Road Traffic Ordinance (cap 146) which makes it an offence to make any false statements or do any act which will disentitle the person concerned to claim under the policy, applies only in respect of proposals for insurance; it is not applicable to statements made or acts done after the policy has been issued.

Section 72 provides that:

"If any person for the purpose of obtaining a policy of insurance is required by section 61 of the Ordinance makes any false statements knowing it to be false, in consequence whereby the policy is liable to be avoided, or willfully does any act which disentitles him to claim under the policy he shall be guilty of an offence and liable upon conviction in the case of first offence to a fine not exceeding £200 and imprisonment for one year and in the case of a second or subsequent offence to a fine not exceeding £400 and imprisonment for two years.

Order accordingly.

Patel v Old Mutual Fire & General Insurance Co. of Zambia Ltd **(High Court for Zambia)**

DOYLE, C.J . . . The Plaintiff also called a Mr. Morris, a man experienced in insurance business. He stated that were a matter had been reported to another insurance company and no claim made for or against the insured, this would be immaterial for another insurance company for the purpose of insurance by the latter.

The Defendant called a Mr. Tobias Muyonde who had been an immigration assistant on 1st December 1968, at Luangwa Bridge. At 9.45 p.m that day a bus had pulled up at the immigration post and it was followed by an oil tanker – which it is agreed the oil tanker concerned in this case. The tanker stopped a yard or so behind the bus. He went to the tanker and asked the driver for papers. The driver did not seem to understand. Witness spoke to him in English and in Nyanja but neither him nor the person sitting beside him understood. Witness left to get a colleague. He came back and found both men missing from the tanker. He told the bus driver to move off and walked away. As he did so there was an explosion.

Subsequently the witness was shown photographs of Wilson Chinyuma and Joseph Chanda by the police. He identified Joseph Chanda as the man in the driver's seat and Wilson Chinyuma as the man sitting beside him. Although it was dark, he said he had been able to see the men for a short time in the light given by the parking lights of the bus. He admitted that he had originally said that the man sitting beside the driver was bearded.

Other witnesses called by the defendant who had examined the same deposed to finding bullets and a buckle from web equipment in or about the scene. The tracker had been carrying diesel oil and was almost completely disintegrated by the explosion. A burnt out automatic weapon – sub-machine gun- was found in the remnants of the cab. A fire extinguisher was found which appeared to have been in an explosion. The bus was burnt out and contained charred bodies.

A Major Love was also called. He is an explosives expert in the Zambian Army. He examined the scene and the fire extinguisher which appeared as if it had violently exploded. He found holes in a girder forming part of the chassis of the tanker. The fire extinguisher was chemically examined and had signs of having contained plastic explosives. Major Love carried out several experiments and came to the conclusion that the explosion had occurred in the fire extinguisher which had contained, in his estimate about 20-25 lb of plastic explosive. In his opinion the extinguisher had been secured against the girder and had been detonated by a burning fuse. The rate of such a fuse would be thirty seconds to a foot. To learn how to use such fuse and a detonator would be simple enough. He considered that the explosion attached to the girder and had not been inserted at the scene.

The defendant called a Mr. Purchase, Administrative Manager of the defendant company. He deposed that no report had been made to his company in respect of the accident to vehicle EC 311. He referred to the Policy and thought that if that accident had been reported he would have wished to make inquiries. The renewal of the policy in respect of EC 3283 was on the basis that no material accident had taken place and was effected on approximately October 5, 1967.

Mc Robbie, also an insurance expert, gave evidence for the defendant. He was Assistant Branch Manager to the Commercial Union and had insured vehicle EL 311. The accident to that vehicle had been reported to his company and he had investigated it. He considered it to be a material accident to be reported to insurer if required by the policy to do so. He agreed, however, that if such an accident had occurred to a vehicle insured with another insurer and no claim had been made either for or against the insured and the claim had been reported, he would neither have refused insurance or required an increased premium.

There is really not a great deal of conflict of evidence on the facts of this case. I accept the evidence of Plaintiff's husband and I accept with one reservation, the evidence given by the defense as to the incident which destroyed the vehicle. I do not accept the evidence given by Mr. Muyonde of identification except to the extent that the persons were of African race. He himself admits that he saw the men only for a short time in the light given by parking lights of the bus. The latter could hardly be a high-powered source of illumination. He agreed that at first he had said that the passenger was bearded. He identified the person in the driver's seat as Joseph Chanda yet the latter could not drive. Neither man seemed to understand him though he spoke in English or Nyanja, languages which both Wilson Chinyuma and Joseph Chanda's case, who had been in steady employment for five to six years with the Plaintiff, that these two men would take part in an enterprises which was intended to damage the Luangwa Bridge and could and did cause the deaths of a number of innocent Zambian bus passengers. The presence of the sub-machine gun and military equipment also points away from Wilson and Joseph. Had they been bribed to take the explosives to the bridge, why should they take a sub-machine gun and webbing equipment?

On the evidence, I am satisfied that the vehicle was blown up by an explosive charge placed in a fire extinguisher and attached to a girder forming part of the chassis of the vehicle. I am satisfied that the explosive was placed and detonated by persons other than Wilson and Joseph. I draw the inference that at some stage on its journey back from Malawi, the vehicle was hi-jacked and Wilson and Joseph done away with by persons who wished to damage or destroy the Luangwa Bridge and who seized the vehicle for that purpose. Who these people are is a matter of conjuncture, but it seems likely that they came from Mozambique, the frontier of which is only a few yards from Zambian frontier in the Luangwa bridge area. The explosive was placed against the girder and the vehicle then driven to the spot. Again this points to the hi-jacking having taken place close to the bridge as it is unlikely that the vehicle would be driven all the way from Malawi with the explosive in *situ*. From the fact that the sub-machine gun, bullets and traces of webbing equipment were found and the fact that the perpetrators had asses to a fairly large amount of plastic explosive, it seems to me that they where members of some military of para-military organization whose interests would be served by damaging communications in Zambia. Whether these were forces of a neighboring State acting officially or unofficially or whether they were freedom fighters or guerillas hoping to disturb relations between two neighboring States is a matter of conjuncture. In coming to my conclusion that the perpetrators were from some organized body, I take note as a notorious fact that there have been hostilities in Mozambique between freedom fighters and the government forces there.

That there was not in fact more damage done was due to the fact that the tanker was carrying diesel and not petrol.
The action falls to be decided on the forgoing facts. I will deal first with that part of the defense based on question 20 of the

proposal for insurance. The proposal was made on October 5, 1966, and question 20 reads as follows-

"20 Have there been any accidents or losses (whether resulting in a claim or not) during the past three years in connection with any motor vehicle owned or driven by or for you? If so given full details below."

The answer made to that question on October 5,1966, was "No" and it is not disputed that that answer was correct at the time. The policy was subsequently renewed on October 5, 1967. The declaration at the bottom of the proposal form contains, *Inter alia*, the following-

" I/We submit this proposal to the Old Mutual Fire and General Insurance Company of Zambia Ltd, and I/we hereby declare and warrant that the answers given above the are true and correct in every respects and are deemed to be warrants and shall be promissory during the currency of this insurance and I/we agree to give immediate written notice to the Company of any alteration of the risk herein submitted; and subject to such notice the payment of each renewal premium shall be considered to have re-affirmed the answers to the questions in this proposal. That I/we have not concealed any important circumstances that ought to be communicated to the company.

It was submitted by the defense that as an accident had admittedly occurred to another vehicle EL 311 of the plaintiff in January 1967, the answer to that question should have been "yes". The declaration had re-affirmed the answer as "no". As this was incorrect and a warranty, the policy could be avoided.

I agree that on the proposal from the answer "no" was a warranty. If the plaintiff had been required specifically to make a fresh

answer to question 20 when she renewed the policy on October 1967 and had answered “no”, this would clearly have been in breach of the warranty. The declaration does not however, make such a specific and unqualified requirement. It first contains an agreement by the plaintiff to give immediate written notice to the company of any alteration of the risk. It then states-
“ …subject to such notice, payment of each renewal shall be considered to have re-affirmed the answers to the questions…”

[1] Clearly the defendant is not requiring notice of circumstances, including accidents which do not alter the risk. If the company had wished notice of all accidents, it could have clearly said so. Instead it required notice of accidents alerting the risk. This is fully understandable as motorists frequently have minor accidents, e.g. a dented fender entering a garage, which are of no interest to the Company unless a claim is made.

[2] Counsel for the defendant did submit an argument that it was for the company to decide whether the risk was altered and that therefore all accident should be reported. I do not accept this. Whether the risk is altered is a question of fact. If an insured person fails to report an accident, he takes the risk that it might turn out to be such an accident a alters the risk. If it does, he may suffer. If it does not, fact that he has not reported it does not prejudice him.

In this case there was conflicting evidence on whether the accidents was material. The plaintiff’s experts said the accident was not material and need not be reported. The defendant’s Administrative Manager said the accidents should have been reported so he could make inquires. Another insurance witness called by the defense said that accident was material and should have been reported. He admitted, however in cross-examination that should have been the same position as the defendant

company, and the accident and circumstances had been reported to him, it would not have caused him to refuse the insurance or to increase the premium.

In my opinion the effect of the evidence of the last witness was that the risk was not altered. The distinction which the defendant's witnesses were making between materiality and alteration of risk was somewhat difficult to follow. It seems, however, to be in effect what was submitted by defense counsel-namely that the accidents necessitated a report so in fact it turned out that the risk was not altered.

I have already stated that I do not agree with this proposition. I do not agree that on wondering of declaration the plaintiff was required to report accidents which did not alter the risk. I find a fact that this was such an accident. I do not consider that the defendant, having led plaintiff not to report such an accident by the terms of the declaration, can rely on the answer "no" as being an incorrect answer and a breach of warranty enabling the avoidance of the policy.

In so far as there is any distinction in respect of the materiality of the answer or that the accidents did not may be an important circumstance which should have been communicated, I consider that the same considerations apply and the policy cannot be avoided on this ground.

The vehicle was insured for use for social, domestic and pleasure purposes and for the business or occupation of the insured. Excluded from the risk, however, was use " for the carrying of explosives" or "for any unusual or specifically hazardous purpose" I consider that the first of these defences fails for the following reasons-

[3] (1) The use was not by the accused or with his authority but was a use made of the vehicle by third parties who had stolen the vehicle. The vehicle had clearly been taken with an intent to deal with it in such a manner that it could not be returned in the condition in which it was at the time of the taking vide the definition of theft in section 236 (2) of the Penal Code. Although loss by theft is not pleaded, it would seem to me unreasonable that, the vehicle having been stolen and liability having arisen, the insurance can avoid the policy if the vehicle I then destroyed while being used by the thieves in some matter excluded from the cover of the policy. I do not consider that the limitation on use applies to by third parties unauthorized by against the wishes of the insured person.

[4] (2) It is clear that the explosives were moved by means of the vehicle for some distance, probably short, prior to the explosion. They were not, however, in the load carrying part of the vehicle. I do not consider that the exclusion applied to small quantity of explosives which were affixed to the chassis for the purpose of blowing up the vehicle. (3) the carriage of the explosives had ceased and it was not intended that the vehicle would move again except, of course, through the air in various disintegrated parts. The loss was caused by deliberate act which was in no way related to the carriage which had ceased.

The defense relating to use for an unusual or hazardous purpose also fails in my opinion for the first reason given in the last mentioned defense. I also don't consider that the words "unusual or specifically hazardous purpose" are apt to exclude a deliberate blowing up of the vehicle. They relate to the use of the vehicle as a vehicle and in a manner which causes it to run some unusual or specifically hazardous risk. They do not refer to the use of the vehicle, but as some form of bomb or land mine.

I consider that this defense fails. The last defense is based on general expectation 5 which, *inter alia,* excludes loss due to "act of foreign enemy hostilities or warlike operations (whether war be declared or not). Counsel for the plaintiff has made the point that this defense is not raised on the pleadings. I agree that those words are not specifically directed to the defense which only refers in general terms to General Expectation 5. Also the particulars are no their face confusing as they refer to paragraphs of the original defense and not given before the amended defense was filed. I consider in context, however, that it was clear to plaintiff that the defense related to the words quoted from exception 5 and I do not consider that the point raised by counsel for the plaintiff is valid.

[5] I have already held that the explosion was caused by some organized body with intent in damaging or destroying the Luangwa Bridge. I have been unable to draw a definite conclusion as to that particular body was responsible. If the act were done by Government forces of Mozambique whether officially or unofficially, that clearly would be warlike act of one Government against another. If it were done by guerilla or freedom fighters with the aim of disrupting relations between Zambia and Portugal, it was done as an act in the fight carried on by such persons against the Government in Mozambique. Although the act was outside Mozambique and was against innocent third party, I consider that it was a warlike act. I consider, therefore, that in context of the struggle for freedom in Mozambique this attempt to damage or destroy the Luangwa bridge comes fairly within the word "hostilities or warlike operations" I consider that this is positively so. General exception 5, moreover, places upon the Plaintiff the onus of providing that a loss was not to due to any of the causes referred to in General Expectation 5. The plaintiff has in any case in my view failed to discharge this onus.

I consider, therefore, that the claim fails and that there must be judgment for the defendant.

I could have decided the case solely on the last ground, but have dealt with all defenses in case there is an appeal. I would add that had I found in favour of the Plaintiff I would have valued the vehicle at K4000.

A number of authorities were cited by counsel on both sides. That I have not thought it necessary to refer to them is due to my view of the facts and is no reflection on counsel. There will be judgment for the defendant with costs.

The Motor Union Insurance Co. Ltd. v A K D Damba (Uganda) 1963 E.A.L.R. 271.

The plaintiff an insurance company, filed a suit against the defendant insured, under S. 104 (4) of the Traffic Ordinance, 1951, for a declaration that the company was entitled to avoid a motor insurance policy issued to him on the grounds that the same was obtained by non-disclosure of material facts/and or by representation of facts where were false in some particulars. For the defendant it was contended that the proceedings were incompetent until a judgment has been given in a case brought against the defendant as a result of which the defendant could chain to be indemnified under the policy of insurance. It was common ground that no action had been stated against the defendant under the policy. The proposal firm had been filed in by the plaintiffs agent and it was alleged that full and accurate disclosures were made orally to him by the defendant.

Held: The proviso to Sub – S. (4) of S. 104 of the Traffic Ordinance, 1951, was not applicable as no action hed been stated against the defendant under the policy.
the action was competent. The defendant's evidence was not truthful the plaintiff company's agent had no information other than that disclosed in the proposal form, but even if the had, that information could not be imputed to the plaintiff company.

It is well established that a contract of insurance is *uberrimae fidei* and therefore requires utmost good faith from both parties during the making of it. Non disclosure of a material fact or a representation of a false fact in some material particular renders the contract avoidable. Non disclosure of a material fact as such may not by it self be a ground for damages, the only remedy available would appear to be the avoidance of the contract. The contract being *uberrimae fidei* the insurer is entitled to be put in possession of all material information possessed by the insured" "Up 240 the plaintiff company is entitled to the declaration sought because it has satisfactorily discharged the anus which is upon it of stabilizing that the certificate were obtained by the defendant by the non disclosure of a material fact".

Jubilee Insurance Co. Ltd. v John Sematengo
(1965) E.A.l.R 233 (Uganda)

The plaintiff an insurance company, filed a suit against the defendant insured for a declaration that the company was entitled to avoid a motor insurance policy issued to him on the grounds that the same was obtained by non disclosure of material facts and by misrepresentation of facts which were false in some material particular. It was common ground that there was no action commenced and pending or a judgment obtained against the defendant. For the defendant it was submitted that having

regard to the provisions of S. 104 (4) of the Traffic Ordinance 1951 the action was not maintainable in law because action had been taken nor judgment obtained against the defendant which the defendant Gold claim to be indemnified by the plaintiff company. The judge found that the insurance policy was obtained by the non disclosure of a material fact and by a representation of fact which was false in some particular.

Held (1) the purpose and intent of the provisions of S 104 (4) of the Traffic Ordinance 1951 is to enable an insurance company to avoid an insurance policy on the ground of non disclosure of a material fact or misrepresentation of fact which is false in some material particular, regardless of any provisions in the insurance policy.

(2) it is not necessary that before an action for declaration can be maintained in law, an action must have been commenced and pending or a judgment obtained against the insured and accordingly the action was maintainable in Law.
Declaration as prayed

Sir UDO UDOMA CJ: "Unless the policy has been cancelled before liability to a third party is incurred and the certificate of insurance has been surrendered by the insured, insured are not intended to rely upon non-disclosure or misrepresentation by the assured as ground upon which to avoid liability to that third party who has obtained judgment against the insured in respect of death or bodily injury arising cut of the use of the assured motor vehicle on the road. In order to avoid such liability to a third party the insurer to avoid such liability to a third party the insurer most go further and commence proceedings within a specified line, for a declaration that he is or was entitled to avoid the assured policy upon the ground of non disclosure or in is

representation of a material fact, apart from the terms of the policy"

Even if a proposer gives a seemingly true answer to a question in a proposal form he is not necessarily protected if the statement is false when taken in relation to other relevant facts which are not stated.

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South British Insurance Co. Ltd v Samiullah
(1967) EALR 659

The respondent had a motor policy with the appellant insurance company covering his car against theft, which policy expired on November 7, 1964. On November 20 1964 the respondent learnt that his car had been stolen, and later that day he went to the offices of the appellant and handed over a cheque for the renewal of premium, which he had been told, would be a condition precedent to the issue to him of a new policy valid from November 7. Still later on November 20 the respondent having collected his new policy, notified the appellant that he wanted to make a claim as his car had been stolen. A Mr. Hicks, the manager of the appellant's motor insurance department there and then concluded from what he was told by the respondent that the respondent must have known that the car had been stolen before receiving the new policy. Instead of repudiating the policy, however, the appellant later wrote to the respondent rejecting the claim as not coming within the policy; and later still the appellant cashed the respondent's cheque for the premium and after further lapse of time on May 10, 1965, it paid the respondent the amount of his claim. The appellant then, on May 20 1965 sued the respondent in the High Court claiming the return of the amount

paid. The plaint as originally framed alleged that no theft had in fact occurred and that the money was paid over on a fraudulent representation by the respondent that the car had been lost by theft. But in November 1965 the Plaint was amended to allege in the alternative that the appellant was entitled to avoid the policy because it had been obtained by the respondent wrongfully concealing that the car had been stolen before the insurance had been effected. At the trial the appellant conceded that the car had in fact been stolen. The trial judge found that at the time. The trial judge found that at the time he got the policy the respondent knew of the theft which would have entitled the appellant to repudiate, but in the circumstances the appellant had waived its right to repudiate, relying inter alia on the delay in amending the plaint. The appellant appealed and the respondent cross-appealed. One of the points argued by the appellant was that the amended plaint related back to the date of the original plaint so that the judge should not have found that there was a delay in repudiating the policy amounting to a waiver.

Held: (i) even if an amended plaint does relate back to the date of the original plaint for some purpose, such relation cannot generate so as to preclude a judge from taking note of the date of the amendment if such date is material to the issues for decision (as it was in this case);

(ii) on the facts the trial judge should have found that the appellant had knowledge on the day when the insurance was effected that the respondent had concealed a material fact before the contract of insurance was effected;

(iii) that from that moment, or a reasonable time thereafter, the appellant should have repudiated the policy;

(iv) that when it paid the claim the appellant had constructive notice (through Hicks) of the facts and could not recover the money (Bilbie v. Lumley (1802) 2 East 469)

Appeal dismissed. Cross-appeal allowed

6.9. The Principle of Indemnity

All contracts of insurance except life insurance, personal accident and sickness insurance are contracts of indemnity. In this class of insurance the amount that is recoverable is measured by the extent of the pecuniary loss sustained through the happening of the event upon which the insurer's liability arises.

When an insurance contract is said to be a contract indemnity, it means that in the event of a loss resulting from a risk insured against, the insured t shall be placed in the same position that he was in immediately before the happening of the event insured against. The insured is not, under any circumstances, to recover more than his actual financial loss.

As long as the object of the contract is indemnification the contract remains one of indemnity even if the value of the potential loss is higher than the actual loss.

In the leading case of **Castellain v Preston**[1], the principle of indemnity was described by the English Court of Appeal in which was stated, among other things, as follows:

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[1] (1883) 11 QBD 380

> *"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy (and that equally applies to accident policy other than personal accident) is a contract of indemnity and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. This is the fundamental principle of insurance law and even a proposition brought forward which is at variance with it, that is to say, which either will prevent the insured from obtaining a full indemnity, or which will give the assured more than a full indemnity, that proposition must certainly be wrong."*

Although in practice is it possible for the insured to recover less than complete indemnity, for example, where he under insurers, it is illegal and against public policy for the insured to recover more than his actual loss. The law takes the position that it is in the overall interest of the public that an insured should forbidden from making a profit from what is essentially a misfortune. It is easy to appreciate why this should be so. If the insured were allowed to gain by the loss or destruction of his insured property there would, understandably be a temptation to destroy it and this would be injurious to the interest of the public generally.

Insurance contract such as those of life insurance and some accident insurance policies which provide that the insured will be paid a specified sum of money on the happening of a specified event are clearly not indemnity insurance contracts.

Valued polices provided an exception to the general principle of indemnity. Under a valued policy the insurer and the insured

agreed before hand on the sum payable in the event of a loss, so that in the event of a total loss the agreed sum or value is recoverable by the insured even though it may exceed his actual loss.

In the case of **Darrel v Tibbits**[1] a landlord let out a property to a tenant under a lease agreement which obliged the tenant to repair the property in the event of damage by fire. The property was also insured by the landlord against fire. In due course a fire occurred and occasioned considerable damage to the property. The Landlord successfully claimed under the fire insurance policy. Later on the tenant repaired the property. It was held that the insurer could recover the monies paid to the landlord under the policy since the landlord had not suffered any loss.

Practical Application of the Principle of Indemnity

In motor insurance, where there is a total loss ie. the insured's vehicle is damaged beyond economic repair, the insured is paid the market value of the vehicle immediately after the accident. The sum insured is the maximum liability of the insurer. Where there is only partial loss to the insured's vehicle, the insurer indemnifies the insured by paying for the cost of repairing the damage, where the vehicle is reparable. In some cases the damaged vehicle is still repairable but because the estimated cost of repair would exceed the market value of the vehicle after it has been repaired, the insurer might decide to deal with the claim as constructive total loss. In that case the insurer indemnifies the assured by paying him the pre accident market value of the vehicle or the value of a vehicle of similar make, type, age and condition.

[1] (1880) 5QBD 560

Once an insurer settles a claim either as a total loss or as constructive total loss, and provided the insured has been fully indemnified, the insurer automatically becomes entitle to the salvage or remains of the insured vehicle and may deal with it as he deems fit. The principle of indemnity would be defied if the insured retained the salvage after being indemnified.

In general, the test adopted by insurers as a guide in determining the amount that would suffice to indemnify the insured is the "market value" test, ie., the market value of lost or damaged property at the time and place of the event resulting in the loss or damage.

As already pointed out, the law does not regard personal accident and life assurance policies as contracts of indemnity because of the obvious difficulties that would arise in any attempt to fix and monetary value on human life and limb. In relation to life assurance the effect of this position is that there is legally no limit on the number of life policies that a person may take out on his own life.

The maximum is that the insured must not take with both hands. This means that if the insured has been indemnified by his insurer to the full extent of his loss, he is bound to transfer to the insurer any rights which he may have against a third party in respect of the loss.

If the insured parts with or ceases to have any interest in the subject matter of the insurance then the insurance comes to an end. Insurance law takes the position that in the event of a loss or damage arising after the insured has sold or parted with the property insured, he cannot be said to have suffered any loss for which he must be indemnified. Besides an insurance contract is a personal contract in the sense that it is personal to the particular

insured and the particular insurer. In **Rogerson v Scottish Auto Mobile & General Insurance Company**,[1] the plaintiff owner insured his motor vehicle for twelve months. A few months later, he exchanged the car for another one. The new car was involved in an accident and the insured put in a claim in respect of the damage to the new car. The claim was rejected by the insurers on the ground that they did not insure the new car. It was held that the insurance company was not liable to meet the claim because the subject matter of the insurance had been changed.

Zambia State Insurance Corporation v Serios Farms Ltd (1987) ZR 93

The respondent took out with the appellant three insurance policies in respect of their maize crop covering the risk, *inter alia*, of reduced yields due to drought. It was in evidence that the effect of the drought depended on, among other things, that stage of the growth of the crop when the deficiency in the rainfall occurs. The respondent had a number of fields under cultivation, some of which did quiet well and exceeded the insured harvests. Other fields did rather poorly. A clause in the policies required expeditious notification of any possible claim by telex, telephone, or any fastest means. On 13th January 1983 and 7th March 1983,the appellant' agricultural inspector was informed orally by the respondent's farm manager- while the two were engaged in inspecting the fields- of a possible claim due to drought. The dispute on this matter, that is to say whether such conversation took place or not, was resolved on an issue of credibility. The respondent did notify the appellant's representatives and followed this up with correspondence. The respondent later claimed indemnity under the policies in the sum of K245,867.33

[1] (1931) 48 TLR 17

as extra damages over the amount due under the policies for consequential loss suffered as a result of the appellant's refusal to pay the claim. In addition the trial court awarded K100,000 general damages for inconvenience. Interest was awarded at the rate of 13%. The appellant appealed against the award of extra sums over and above the drought-loss. The respondent has been kept out of his money, and a fair average rate of interest should be applicable.

Held: It would be unrealistic to ignore the fluctuations in the rate of interest when the respondent has been kept out of his money and a fair average rate of interest should be applicable.
An insurance policy only covers the losses which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract. Non-pecuniary losses may be covered if they were within the contemplation of the parties as not unlikely to result from the breach. In the case of inconvenience, the damages have normally regarded as equivalent to an award of damages for detention of debt.

NGULUBE, D.C.J., The major part of the appeal is concerned with some extra sums of money which were awarded as damages over and above the amount due as indemnity under the policies. The respondents had pleaded and claimed in the case additional sums, namely, K177,170.28n allegedly lost because they planted a smaller hectarage of maize in the next season allegedly because of the appellant's refusal to pay the claims. . .

The Plaintiff had by July 1983 budgeted to crop 780 hectares of maize but due to the Defendant's deliberate refusal to pay as aforesaid the plaintiff had to reduce planting by 249.36 hectares and the plaintiff therefore, claims from the defendant K177,170.28 expected income 249.36 hectares of maize not

planted due to the defendant's negligence in refusing to pay the plaintiff's claim."

According to the evidence the appellant's refusal to pay in the respondent's failure to plant their full hectarage of maize due to financial difficulties such as inability to fulfill their obligations to their bankers who had previously provided overdraft facilities. The respondents had also had claimed general damages which the learned trial commissioner assessed at K100,000. The appellant has appealed against the award of these extra sums over and above the drought loss.

The ground of appeal against the general damages is that the learned trial commissioner misdirected himself in law by awarding K100,00 as general damages because on a contract of insurance the loss is confined to the loss or damage to the subject matter of the insurance but does not extend to consequential loss. The ground against the award of special damages was that the learned trial commissioner misdirected himself in law in awarding to the respondent K177,170.28 special damages because this claim was speculative and not based on what the respondent had actually lost. The upshot of Mr. Mwamba's arguments was against these awards was that these general and other special damages were alien to the policies and that it was, therefore, a misdirection in law on the part of the learned trial commissioner to have made these awards. He submitted that there was no authority to support the payment of damages on account of non-payment or late payment of money under an insurance policy. He relies, *inter alios,* on paragraph 3 of vol.25 4th Edition, of Halsbury's Laws of England which discusses the principles of indemnity and reads:

"*3. The principle of indemnity. Most contracts of insurance belong to the general category of contracts of indemnity in the*

sense that the insurer's liability is limited the actual loss which is *in fact proved. The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event must infact result in pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He can not recover more than the sum insured, for that sum is all he has stipulated for by his premiums and it fixes*
the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of the loss. The contract being on of indemnity, and indemnity only, he recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be and whatever the premiums he may have paid, calculated on the basis of that estimate."

Mr. Mwamba also relied on paragraph 3683 of Chitty on contracts, 25th Edition, in particular the following:

"Nature of loss. Contracts of insurance providing cover for loss or damage are constructed so as to extend only to loss of or damage to the subject-matter of the insurance itself. The loss of profits and other consequential losses, such as loss of salary after an accident, or loss in value of uninjured goods due to damage to other goods, are not covered unless expressly stipulated."

. . . it is obvious that the principles applicable to a contract of insurance, and as discussed in the passages we have quoted, are not in dispute. An insurance policy only covers the loss which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract. There was no such stipulation suggested in this case and the awards complained of cloud not

possibly be supported on the basis that the contract of insurance in questions provided for them.. . .

In our considered view, the award of general damages for inconvenience in the present case was not within the principles for the award of such damages and the award must be set aside.

As we see it, what the contract of insurance entitled the respondents to be paid the amount of loss due to drought, which was one of the events insured against. Because payment was not made at the proper time, the respondents have been adequately compensated by an award of interest for being kept out of their money. The further award of K100, 000 as general damages for inconvenience was without legal support and could not be made in such a case. In sum, the appeal succeeds on the two major points taken up by Mr. Mwamba. The awards of K177, 170.28 and K100, 000 are set aside. The costs of this appeal follow the outcome and are to be taxed in default of agreement.

A contract of fire insurance is an indemnity insurance

Castellain v Preston **(1881-5) ALL ER Rep. 493**

Preston had signed a contract to sell a house. It was damaged by fire before the sale had been completed, and the insurance company, in ignorance of the sale, paid him £330 due under the policy. Afterwards the sale was completed, and he received the full purchase price for the house from the buyer. The insurance company claimed that the contract of fire insurance was one of indemnity, and that the amount of the purchase price, which Preston had received, should be taken into account in calculating the loss he had suffered.

Held, by Court of Appeal, that this contention succeeded.

BRETT, L.J. (at page 495) Every contract of marine or fire insurance is a contract of indemnity, and of indemnity only, the meaning of which is that the assured in case of a loss is to receive a full indemnity, but is never to receive more. Every rule of insurance law is adopted in order to carry out this fundamental rule, and if ever any propositions is brought forward, the effect of which is opposed to this fundamental rule, it will be found to be wrong. There are many propositions bearing on the question, and many rules may be glanced at which are well known in insurance law. The doctrine in order to carry out the fundamental rule. It is a doctrine which is in favour of the assured, because where the loss is not an actual total loss, but is what as a matter of business, is treated as equivalent to a total loss, this rule is adopted to carry out the fundamental doctrine and give the assured a full indemnity. Grafted on that doctrine came the doctrine of abandonment, which is only applicable to cases of constructive total loss, and is introduced in favour of the underwriters, so that they may have to pay no more than an indemnity. So it appears that these two doctrines were introduced in order to carry out the two limits of the fundamental doctrine to which I have referred, namely, that the assured shall get a full indemnity, and that he shall get no more.

6.10. The doctrines of Subrogation and Contribution

Subrogation

Subrogation in insurance law refers to the right of one person to stand in the place of another in order to avail himself of that other's rights and remedies. In the American case of **Anold v Green** [1], subrogation was defined as "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity are good conscious ought to pay it."

It is the right of the insurer who has granted indemnity by paying the insured's claim to receive the advantage of every right of the insured against the third parties which may reduce or extinguishes the insurer's loss. In this sense therefore, subrogation vindicates the principle of indemnity. Subrogation is a corollary to the principle of indemnity and its purpose is to protect the more fundamental principle of indemnity by making impossible for the insured to make a profit from his insured loss as would have been the case if he were allowed to collect his loss from the third party responsible for the loss. For example, where an insured motor vehicle is involved in an accident through the fault of a third party, the insured car owner would have a cause of action for recovery for the loss suffered. Yet, if he successfully claims on the policy of insurance, he must subrogate his rights against the third party to the insurer. An insurer becomes entitled to exercise subrogation rights once a claim is settled and the insured is indemnified.

The insured is in bound in equity to lend his name to any proceeding that the insurer may chose to take against the third party.

One theory on the origin and basis of the doctrine of subrogation is that it stems from equity. Clearly that is the school of thought which the court in **Anold v Green** (supra) subscribed to. Another

[1] 161 NY 566

theory is that it is based on implied terms in the contract of insurance.[1]

The doctrine of subrogation applies to indemnity insurance and has no application to life assurance.

In **John Edwards & Co. v Motor Union Insurance Co.**[2] it was held that the right of an insured person to claim compensation from a third party in tort or contract is not in any way affected or diminished by the fact of his having received an indemnity from his insurers. Such an insured person having been indemnified by his insurers may still claim from the third party, but whatever monies he recovers from the third party must be held by him in trust for the insurers to the extent of their outlay.

Extent of Subrogation

In exercising his subrogation rights, the insurer is entitled to an amount equal to what he has paid to the insured. Any recovery over and above or in excess of the insurer's outlay must be handed over to the insured. For example, Hampande buys a motor vehicle for K100million. He insures it for K50m. In an accident that occurs as a result of Kasheta's negligence, the vehicle is damaged beyond economic repair. All that Hampande can claim from his insurer is the sum insured of K50 million. If the insurers in exercising their subrogation rights against Kasheta succeed in recovering the full value of the car, namely K100 million, they are only entitled to keep the sum of K50 million and the balance of K50 million must be handed over to Hampande. In this regard it is not far fetched to argue that Hampande in fact is being unjustly enriched.

[1] See for example Orakpo v Manson Investments Ltd. (1978) AC 95
[2] (1922) 2UB 243

What is perhaps interesting is how the courts have dealt with the issue of interest. Where the insured recovers interest from the third party, the part of the interest which corresponds to the period since the indemnification of the insured by the insurer can be claimed by the insurer. In the case of **H Cousins & Company v D & C Carriers Limited** [1] the insured's goods in transit disappeared in December 1965. The insured was indemnified for the loss by the insurer in August 1966. Later that year in November 1966, the insured recovered the value of the goods from the carries. On the issue of interest, the Court of Appeal held that interest was recoverable, and that in order to give business efficacy to the contract of insurance and to ensure that the plaintiff owner were not over compensated it was necessary to imply a term into the contract of insurance, that the insured could retain any interest awarded for the period before August 1966 but the interest awarded for the period after that date should go to the insurer.

Contractual Exemption or Limitation of subrogation

Where the insured agrees with a third party that the liability of the third party shall be excluded or limited, the rights enforceable through the principle of subrogation by the insurer are restricted to the same extent..[2]

Alteration of the Principle of Subrogation by Conditions in a Policy.

Under the general law the right of subrogation is vested in the insures after they have paid the claim made against them by the

[1] (1971) 2QB 230
[2] See Lister v Romfold Ice & Cold Storage (1957) AC 555

insured, not before. It is however not uncommon to embody in a policy of insurance a clause or condition providing that the insurer may exercise his subrogation rights before payment has been made to the insured for the loss covered by the policy of insurance. The effect of such clause is to modify the common law doctrine of subrogation to the extent that the insurer may be subrogated to the insured's rights and remedies even before payment has been made.

It is the insured's duty to assist the insurer to exercise his rights of subrogation. Such a duty is implied in law and is usually amplified by the contract of insurance. The answered is under a duty to do nothing which prejudices the insurer's rights, e. g if he releases or compromises with persons who are under the liability to him in respect of the loss insured against, he will be liable to the insurer for the full value of the rights compromised.

Contribution

A person may take out as many insurance policies as he chooses against the same risks and in the event of loss he may claim payment from any insurer as he desires. The term contribution in insurance law has been described as the right of an insurer who has paid under a policy to call upon other insurers equally or otherwise liable for the same loss to contribute to the payment to the insured.

As a legal doctrine contribution has its origins in the English Courts of equity where it was first developed as a means of ensuring the equitable distribution of liability amongst joint or debtors or joint wrong doers. For example if Mandona and Chileshe both motorists, by their contributory negligence cause damage to Kubota's wall fence, their collective acts of negligence make them jointly and severally liable to Kubota, and

Kubota may claim damages from either Mandona or Chileshe or from both of them. If he claims in full from Mandona, Mandona having paid Kubota in full, is entitled to obtain contribution from Chileshe, the joint tortfeaser.

In insurance law, contribution arises where there is one or more insurance polices in force at the same time coving the same subject matter, the same interest and the same risk. As stated above, nothing can prevent a person from effecting more than one policy of insurance in respect of the same risk. However, the principle of indemnity insists that the sum total of his recoveries under all polices must not exceed his actual financial loss.

A person may, for example, insure his vehicle comprehensively with Professional Insurance company and Madison Insurance Company for the same period and against the same risks, but in the event of loss, he can only recover the exact amount of his loss i.e. a full indemnity and no more from either Professional Insurance Company or Madison Insurance Company. The principle of contribution allows the insurer who has paid in full in these circumstances to recover a proportionate contribution from the other insurer.

There is secondary meaning of contribution in insurance law i.e. the participation of the insured himself in remedying a wrong.

The doctrine of subrogation will prevent the assured from recovering more than full indemnity.

Castellain v Preston (1881-5) ALL ER 493

BRETT, L.J. (at page 495) . . .The doctrine of subrogation is another proposition which has been introduced in order to carry out the fundamental rule. It was introduced in favour of the underwriters, in order to prevent their having to pay more than a full indemnity, not on the ground that the underwriters were sureties, for they are not so always, although their rights are sometimes similar to those of sureties, but in order to prevent the assured recovering more than a full indemnity.

The question is whether the doctrine as applied in insurance law can be limited. Can it be limited to putting the underwriters in the place of the assured in order to enable them to enforce a contract or a right of action? Why should we limit it to this, if the effect of so doing would be to entitle the assured to more than a full indemnity? In order to apply the doctrine properly we must go into the full meaning of subrogation, which is the placing of the assurance in the position of the assured. In order fully to carry out the fundamental principle we must carry out the doctrine of subrogation so far as to say that, as between the underwriter and the assured, the underwriter is entitled to every right, whether of contract fulfilled or unfulfilled, or in tort, enforced or capable of being enforced, or to any other right, legal or equitable, which has accrued to the assured, whereby the loss can be has been diminished. That is the largest form in which I can put the rule. I use the words “every right” because I think the doctrine requires to be carried to that extent.

Hunts Travel Services Ltd v Pioneer General Insurance Ltd **(1973) EALR 559**

(Uganda)

The appellant was held to be soughtly liable with one Okoti to a claimant in respect of a satisfy the judgment in full and then sued the respondents the insurers of Okoti. The high court held that the appellant was a stranger to any contract between Okoti and the respondent and that subrogation could not apply.
The appellant appealed contending that subrogation did not only arise out of contract but also out of interest enrichment and that it was the rights of the claimant to which the appellant sought to be subrogated. For the respondent it was contended that while the respondent would have had to defense to an action by the claimant it would have had a defense to a claim by Okoti to an indemnity.

Held the appellant paid a debt owed by it (E) not by another. The appellant could not succeed to the rights of claimant as she had no subsisting rights. The appellant had no claim against the respondent

Appeal dismissed

Spry J at page 560 . . .Hunts could in theory recover Sh 30 000/- from Okoti by way of contribution ….Hunts can have no right of action against pioneer in contract since there is no privity of contract between them, and there is no statutory right of action. There can be no question of succeeding to the rights of Mrs. Mamheimer as she has no subsisting right.

6.11. Construction of Insurance Policies

The terms construction of polices refers to the rules that the courts would apply in the event of their being called upon to interpret the terms of insurances polices. The object of all interpretation of the document is to ascertain and give effect to

the intention of the parties to the transaction, and the intention of the parties is to be ascertained from the document itself.

Ordinary words

An insurance policy is interpreted like any other contract or written instrument. This means that terms, words and phrases used in the policy are to be understood in their natural, ordinary and popular sense unless the context shows that a different meaning was intended, or unless by usage of a particular trade, they have acquired a different meaning.

Thompson v Equity Fire Insurance Co. (1910) AC 592

A shopkeeper took out a fire policy which exempted the insurer from liability for loss or damage occasioned while "gasoline is stored or kept in the building insured" The shopkeeper had a small quantity of gasoline for cooking only. A fire occurred and caused considerable damage.

Held that the insurer was liable for the loss. The words "stored or kept" in their ordinary meaning implied a significant quantity and brought up the notion of warehousing or keeping in stock for trading.

Gordon Leslie Ltd. v General Accident Fire & Life Assurance Corporation plc (1998) SLT 391

A haulage contracting company insured its lorries and loads against theft, unless a lorry was locked and the keys removed

when it was unattended. The company had a long standing practice whereby the drivers would leave the keys in the ignition when the locked the lorries in the insured's premises. This was to facilitate removal in the event of fire. Over a weekend, one driver left the key in the ignition of lorry at the insured's premises. The lorry and its load of vodka was stolen.

Held, that the exception applied only when the vehicle was actually physically attended by the driver whilst goods were in transit When the lorry was parked over night, there was no question of it being unattended in the meaning of the exception.

Technical words.

The general rule that words are to be given their popular ordinary meaning is subject to certain qualifications. Technical words or legal words are to be given their technical or legal meaning. For example, where the word "riot" appears in an insurance policy it must be given its meaning in criminal law.[1] Any ambiguity in the meaning the words will be construed *contra proferentem* against the person who inserted them. This rule is not really intended to give any special advantage to the insured as such but is meant to deprive the insurer of any undue advantage he might gain from

[1] In London & Lancashire Fire v Boland (1924) AC 836. A policy on a baker's shop against loss by burglary, housebreaking and theft provided exemption to the insurer from loss by, or happening through, or in consequence of among other things, "riot" Armed men entered the shop and stole money from the shop. There was no actual violence used, and no other disturbance. It was held that incident constituted a riot and therefore the insured could not recover. The court held that the term 'riot' was a technical term which in criminal law required only three people executing a disturbance such as might cause alarm to a reasonable person.

his position as the maker of the policy. In **Houghton v Trafalger Insurance Co**.[1]a four seater motor vehicle was covered by a policy that excluded liability if it was used to carrying a load in excess of that for while it was constructed. On the day of the accident, the car was carrying two extra passengers. The court considered the meaning of the word "loads" in the policy and held that it was intended to cover lorries built to carry specified load and did not apply to carriage of passengers.

Whole Policy

In interpreting the terms of a policy the whole policy must be read in order to ascertain the real intention of the parties. Where the proposal from is expressly incorporated in the policy it must be read with the policy as part of the contract of insurance. In practice, virtually all proposal forms used by insurers contain a declaration to the effect that the information contained in the proposal form has been incorporated in the policy and will form the basis of the the contract.

6.12. The Nature of Cover and Loss

It is not every loss that will bring about the insurer's liability to settle the claim. The loss must be covered by the policy. Cover in this context refers to the insurer's promise and obligation to pay or make good the loss in certain circumstances. These circumstances may be referred to as the event insured against and are always defined by the insurance contract. The nature of the event, the time and place of its occurrence and the nature of

[1] (1954) 1 QB 247

the loss suffered in the case of indemnity insurance must be within the contractual definition.

Insurance business is not a gambling business. Insurance contracts cover events which are uncertain either as to their occurrence or as to the time of the occurrence. An insured will therefore not recover for certain loses such as those arising in the ordinary course of affairs, for example, depreciation and wear and tear unless there is an express stipulation in the contract allowing him to do so. Even the so called "all risk cover" policies do not mean cover literally against all risks. In **British and Foreign Marine Insurance v Grant**[1] Lord Summer stated that all risk insurance is not cover against all causes of loss but against all risk of loss: it covers a risk and not a certainty. Lord Bikenhead added that all risk "cannot of course be held to cover all damage however caused, for some damage is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies."[2]

English law imposes conceptual limits as part of the definition of all risk covers. These limits are sometimes referred to as implied exceptions are that the loss must be fortuitous (accidental) and lawful to insure. As regard to fortuity, the rule is that loss is fortuitous unless it was inevitable at the beginning of cover or at the time the contract was made or it was caused by the willful misconduct of the insured.

Ordinary wear and tear is generally excluded. Inherent vice, i.e., a defect in the subject matter tending to its loss (some defect latent in the thing itself) present at the time of the insurance cover commenced and materializing during period of cover is not

[1] (1921) AC 41
[2] Ibid p 46

eligible for cover. In such instances the event lacks fortuity in the sense that it is bound to happen sooner or later during the period of cover.[1]

By their very nature, certain contracts cover instances of inherent vice. Life assurance, for example, covers arising death from disease as well as accident.

6.13. Public Policy

It has been the general policy of the courts to declare contracts with a tendency to lead to crime, immorality or other effects prejudicial to the public as void on grounds of public policy. Public policy as Burrough J remarked in that famous dictum in **Richardson v Mellish**[2] is indeed an 'unruly horse.' In insurance law, it is important to consider the public policy dimensions of any insurance policy or any claim made under a policy of insurance. A cardinal guiding principle is summed up in the maxim *ex turpi causa non actio* (no action can arise from a wrongful cause). Secondly it is a fundamental principle of the common law that a man may not profit from his own crime or wrongful conduct. Since insurance contracts are understood as intended to protect the insured against misfortune and not against own willful misconduct, the insured who intentionally and without lawful justification brings about the event insured against will not generally be allowed to recover. This includes the willful act of the insured's agents

[1] See Taylor v Dumbar (1869) LR 4 CP 206, Noten v Harding (1990) 2 Lloyd's Rep. 283
[2] (1824) 2 Bing. 229 at 252

These rules reflects public policy that cover should not extend to loss or damage deliberately caused by the insured. The rule contrasts with the general presumption that cover does extend to loss caused by the negligence of the insured.

Geinsmar v Sun Alliace and London Insurance
(1977) 2 Lloyd's Rep. 62

The insured smuggled certain items of jewellery into Britain without declaring them and paying the applicable taxes as prescribed by law. For this reason, these goods were liable to be forfeited. The insured these together with other goods with the defendant insurers. The goods were later stolen.

Held that the insured could not recover in respect of the jewellery, as to allow recovery in those circumstances would enable the insured to benefit from his deliberate criminal act, even though the profit was sought indirectly under the policy of insurance.

Bresford v Royal Insurance **(1938) AC 586**

The decease insured his life. With a view to benefiting his personal representative, he shot himself. At the time the insured shot himself, he was sane, and his act amounted to a crime since suicide was a crime then. His personal representative sought to claim under the policy.

Held, that he could not recover. Public policy did not allow a person to benefit from his criminal act. "The absolute rule is that the courts will not recognize a benefit accruing to a criminal from his crime. His executor or administrator claims as his

representative, and , as his representative, fails under the same ban."

MacMillan LJ. (at page 605) I feel the force of the view that to increase the estate which a criminal leaves behind him is to benefit him. . . And no criminal can be allowed to benefit in any way by his crime.

Gray v Barr **(1970) 2KB 554**

The insured's wife had been having an affair with the claimant's husband. On the fateful day, the insured returned home and did not find his wife. He suspected that she was with Gray, the claimant's husband. He picked up his loaded gun and headed for Gray house with a view to frightening him. At Gray's house, the insured and Gray were then involved in a scuffle on the stairs. In the course of the struggle, two shots went off the gun, the second one killing Gray. The insured was prosecuted but was acquitted of both murder and manslaughter. The deceased's wife then brought a civil action in tort against the insured. The latter joined the insurer, claiming that they were liable to indemnify him under the policy which provided that he would be indemnified if the loss was "caused by accident."

Held by the Court of Appeal, that the insured was in fact guilty of manslaughter. Public policy required that he could not recover from his insurers the damages he was liable to pay to the claimant in tort. The act of carrying a loaded gun and threatening violence with it was a willful and culpable act.

The rule against recovery for willful misconduct is confined to the misconduct of the insured or his agent. Other assured persons

with separate interest in the same subject matter may recover to the extent of their interest unless their interest is so inseparably connected with that of the wrong doer that his loss or gain necessarily affects all of them.

Cases involving third party policies rain peculiar considerations. An insured who deliberately commit a wrong against athird party for which the insured is liable in damages in tort would generally not be covered by the insured's liability insurance. Ther appears to be a conflict in public policy considerations here. While the deliberate wrongful act of the insured should be discouraged, there is the important public policy consideration in attempting to deny a third party victim from receiving damages.

Tinline v White Cross Insurance Association (1921) 3 KB 327

The insured took out a third party cover in respect of death or injury arising out of the use of his motor vehicle. The insured was involved in an accident which resulted in the death of the a pedestrian. The insured was at the time of the accident driving at an excessive speed. He was prosecuted and convicted of manslaughter. The question was whether the insures were liable to indemnify the insured against the damages he was liable to pay in tort.

Held that the insurers were liable to indemnify the insured in spite of the fact that the insured was in essence benefiting from his criminal action.

James v British General Insurance Co. (1927) 1 KB 311

The insured took out cover against liability for death or injury to third parties arising from the use of his car. While in a state of intoxication, the insured so negligently drove his vehicle as to cause an accident in which a pedestrian was killed. The insured was convicted of manslaughter.

Held that the insured was nonetheless obliged to indemnify the insured for liability in tort to the third party.

Haseldine v Hosken (1933) 1 KB 822

A solicitor had a professional indemnity policy. He suffered loss by entering into a champertous agreement and sought to enforce his professional indemnity policy. He pleaded that he did not know that he was committing the common law misdemeanor at the time of the agreement.

Held by the Court of Appeal, that he could not recover.

SCRUTTON LJ "It is clearly contrary to public policy to insure against the commission of an act, knowing what act is being committed, which is a crime, although the person committing it may not at the time know it to be so."

6.14. Causation

The doctrine of Proximate Cause.

This is concerned with the rules which are employed in the insurance industry to determine whether or not a loss which is the subject matter of a claim was covered by an insured peril. In

order to make the insurer liable to indemnify the insured, the loss must be a direct consequence of a peril insured against. In other words, the insured will not be allowed to recover from the insurer unless the loss is caused by an event covered by the insurance contract.

In **Pawsey v Scottish Union & National Insurance**[1] proximate cause was defined as follows:

" Proximate cause means the active efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started or working actively from a new or independent source."

The proximate cause of the loss insured against is not necessarily the latest cause. The courts will seek the direct, dominant, effective and efficient cause of loss, In determining what the proximate cause of a loss is, the courts have consistently declared that the guide is common sense, and causation is to be understood as the man in the street would understand it. Thus, in **Becker Gray& Co. v London Assurance Corporation**[2] Lord Summer stated inter alia.

"… cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the common sense cause, and though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance…"

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[1] " The Times" 17th October 1908

[2] (1918) AC 101. See also Wayne Tank and Pump v Employer's Liability Co. (1973) 2 Lloyds Rep. 237 per Lord Denning .

In **Marsden v City and County Insurance**[1] a shopkeeper insured his plate-glass against loss or damage arising from any cause except fire. In due course, fire broke out in the insured's neighbor's property, prompting a mob to gather. The mob then rioted and in consequence, broke the plate- glass. The court had no difficulty in holding that the riot and not the fire was the cause of the loss and that therefore the insured could recover. Like wise in **Winicofsky v Army and Navy Insurance**[2] insured goods were stolen from some premises during an air raid. The court held that the theft, and not the air raid was the cause ofr the loss.

Although in theory, the doctrine of proximate cause and the rules applied in determining the proximate cause are clear, in practice, difficult cases do arise when it is not so easy to determine the proximate cause of loss, especially where the loss is caused by a series of events one of which might be a peril or perils excepted by the policy.

An insured peril is the risk or danger insured against e.g. in a fire policy, fire is the insured peril. An excepted peril, on the other hand, is one specifically excluded by the wording of the policy. It differs from an insured peril which is not specially mentioned in the policy. For example, most comprehensive motor polices issued in Zambia today specifically state under General Exception that the insurer shall not be liable in respect of damage to the insured's vehicle caused by strikers and rioters. In this case strikers and rioters are expected perils under ordinary Zambian motor policy.

[1] (1865) LR 1 CP 232
[2] (1919) 88 LJKB 111

The English Court for many years adopted a rule that considered the last cause in point of time as being the proximate cause.

Thus in **Lawrence v Accidental Insurance Co. Ltd**[1] the deceased had taken out an insurance policy that covered death in case of personal injury caused by accidental means but not death from injury caused by fits. While standing on a platform at a train station had a fit, fell under a passing train and was killed. The court held that the proximate cause was the impact of the train (peril) and not the fit (exception).

The court's reasoning was simply that if a man has a fit on a station platform, it is likely that he will fall under a train. If he does fall under the train, injury is probable and death is not unlikely.

Similarly in **Winspear v Accident Insurance Association**[2], the deceased was insured against personal injury or death "caused by accidental, external and visible means", but excluding such an accident if caused by or arising from natural disease. While fording a steam, the insured suffered an epileptic fit, fell into the stream and drowned. The court held that the cause of death was accidental, namely the drowning and not the fit. The loss was therefore caused by the peril insured against.

The decision of the House of Lords in **Leyland Shipping Co. Ltd. v Norwich Union**[3] changed the perception of looking at causation in terms of the last cause in point of time. In that case, An insured ship was torpedoed by an enemy boat during the hostilities of first world war. It was then towed to a quay in the

[1] (1881) 7 QB 216
[2] (1880) 6QBD 42
[3] (1918) AC 350

outer harbour at Le Havre and moored in the harbour were it was relatively safe, but owing to low levels of water, she could not be brought safely in the inner harbour. The weather deteriorated and caused the ship to bump the quay. The port authorities feared that the ship would sink there and obstruct the quay which was required for Red Cross embarkation. They accordingly ordered the ship out. She was taken out to a breakwater, where the master hoped to continue to take off cargo but, buffeted by the heavy seas, she soon sank. The ship owner contented that this was a loss by perils of sea (peril). The insurer argued that this loss was a consequence of hostilities (exception). The House of Lords held that the proximate cause was the torpedo and therefore that the claim failed. Loss by explosion and incoming seawater was the inevitable consequence of the torpedo. In Jason v Batten[1] the insured took out a policy that provided benefits to the insured if he suffered "in any accident bodily injury resulting in and being- independently of all other causes- the exclusive, direct and immediate cause of the injury or disablement". The exception in the policy was with respect to "death, injury or disablement directly caused by or arising or resulting from or traceable to. . . any defect or infirmity which existed prior to the accident." Following a motor accident, the insured suffered a a coronary thrombosis. Apparently, the coronary artery which had been blocked by a clot had been narrowed by disease existing before the accident. The court held that the insurers were not liable. The pre-existing disease was an efficient cause of the loss, though clearly the stress brought about by the accident precipitated the thrombosis. Assuming that the clot was an injury arising from the accident, it was not independently of all other causes the the exclusive cause of the insured's disablement.

Rules and guidelines in determining causation.

[1] (1969) 1 Lloyd's Rep 281

There are several guideline designed to assist the process of determing the proximate cause, particularly where there is a dispute between the insured and the insurer as to whether the loss occurred by reason of the peril, or the exception.

If there is a single cause, and that single cause is an insured peril, then the proximate cause of the loss is an insured peril and there is a valid claim under the policy. The difficulty, however, lies in determining the proximate cause where there are concurrent and interdependent cause.

Where there are several concurrent causes and no excepted perils are involved, provided one of the causes is an insured peril, the loss is recoverable. If however, there are excepted perils involved and it is not possible to separate the damage caused by the insured peril from that caused by the excepted peril, then the insurers are not liable. Where it is possible to separate the causes, insurer will be liable for that part of the loss caused by the insured peril but not for that part caused by the excepted peril.

Thus in **Wayne Tank & Pump Ltd v Employers' Liability Assurance**[1] new equipment was installed by Wayne Tank under contract for Harbutt's Plastcine. It was switched on to warm up overnight prior to trial run and was left unattended, so that nobody noticed that the piping part of the equipment and wholly unsuitable for the use to which it was put. It melted and ignited. But for that kind of piping (exception cause No.1) there would have been no fire. But for the absence of proper supervision overnight (peril cause No.2) the fire would have not occurred as the melting would have been observed in time to prevent the fire.

[1] (1974) QB 57

Wayne Tank was insured by the defendants under a public liability policy which excluded liability arising from damage caused by the nature or condition of any goods supplied by the insured. There were two concurrent causes, one covered the other excepted. The two causes were dependent in that one did not lead to the other but also interdependent in that neither would have led to the fire but for the other.

The Court of Appeal unanimously held that the cause of the loss was the defective nature of the equipment. This decision clearly accorded with authority such as the Leyland Shipping case, whereby the original cause predominates unless it can be established that it merely facilitated the subsequent cause which totally changes the situation to bring about the loss.

Concurrent and Independent causes.

Where there are two or more concurrent and proximate causes- one a peril and the other an exception, and these two are independent in the sense that each one would have caused the loss without the other, the insured may recover only that part of the entire loss attributable to peril. However where it is not possible to separate the damage caused by the insured peril from that caused by the excepted peril the insurer are not liable.

In **Ford Motor Co. of Canada -v- Prudential Assurance Co**.[1] the insured took cover against property damage and business interruption resulting from among other things, riot but excepting loss "caused by cessation of work or by change in temperature. Some workers were dismissed and this led to industrial action including a riot. In the course of a riot, the rioters cut off the electrical power in the Ford plant. As soon as the riot broke off or

[1] (1958) 14 DLR 7

soon thereafter, there was a cessation of work and lack of maintenance, with damage immediately caused by a fall in the temperature a day or two later. Some loss to the plant was caused by both the riot (peril) and cessation of work (exception), operating concurrently and independently. Each would have caused the part of the loss(property damage and business interruption) without the operation of the other. The Supreme Court of Canada held that the insured could recover only in respect of the part of the total loss which would have been caused by the riot alone.

The position in the United States contrasts sharply with that obtaining in Canada. Thus in **Guaranty National Insurance Co. v North River Insurance Co.**[1] **the** insured hospital had taken out cover against loss resulting from failure to maintain the windows in a secure state but not failure to keep patients under proper observation. A psychiatric patient jumped to death from the window of her room on the fourth floor of the hospital. The hospital was held liable for the death. Each of the two causes operating alone ie. ,failure to maintain the windows in a secure state and failure to keep the patient under proper observation would have been a sufficient cause of liability. The United States Federal Court held under the law of Texas, that the insurer was liable in full.

In English law the decision would probably have been different because English contract law hold the position that where a person fails to perform a contract as a result of a cause for which he is liable and (b) a cause for which he is not liable, each being sufficient to cause non-performance, that person is not liable.

Successive connected causes: peril- exception – loss

[1] 909 Fd 132

Where an insured peril leads inevitable to an exception and then to loss, the proximate cause us the peril In **Mardorf v Accident Insurance Co.**[1] the insured had taken out a policy that covered death by accident and not "death caused by or arising wholly or in part from diseases or other intervening cause even though the disease or other intervening cause may either directly or otherwise be brought on or result from accident." The insured arrived home from work. While removing his socks, he scratched his leg with his thumb nail. Nearly a week later, a doctor indicated that the wound was septic. Septicemia set in by the tenth day and, in spite of the doctors' efforts he died of septic pneumonia on the twentieth day. It was held that the insurers were liable. Once the germ had been introduced at the time of the accidental scratch, death was in the circumstances, including the current state of medicine, inevitable.

In **Re Etherington & Lancashire & Yorkshire Accident Insurance Co**.[2] the deceased had taken out a personal accident insurance policy from the insurers. The policy covered the deceased (or his dependants) against death or disability arising from accidents, but not a result of sickness. The deceased went hunting and fell from his horse into a ditch. The accidental fall was not enough to kill him, but owing to the long exposure to the rain and cold, he caught pneumonia from which he died. The dependants of the deceased sought to claim from the insurers on the ground that the deceased had died as a result of the injuries sustained from the accident fall. The insurers rejected the claim on grounds that the cause of death was sickness i.e., pneumonia and that the injury sustained from the fall was only a remote cause. The court held that the death was due to accident.

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[1] (1903) 1 KB 584
[2] (1909) 1 KB 591

Reasonable Effort to Avoid or Minimize loss

A question may be asked as to whether loss which occurs as a result of an attempt to mitigate greater loss will be excepted. In **Canada Rice Mills Ltd v Union Marine & General Insurance Company**[1], the master of a ship which was carrying rice in the heavy seas, ordered the ventilators to the holds to be closed to prevent the incursion of sea water. The lack of ventilation in the holds led to damage to the rice. The Privy Council held that this was a loss though perils of the sea and that it was covered by insurance and that the closing of the ventilators was not a separate or independent cause but a direct result of a peril. In **Stanley v The Western Insurance Co**.[2] the court stated:

> "Any loss resulting from an apparently necessary *bona fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of furniture out of the window, or even the destroying of a neighbors house by an explosion for the purpose of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy"

Nemchand Premchand Shah & Another v South British Insurance Co. Ltd. (1965) E A L R 679 (Kenya)

The appellants were insured with the respondent against loss of good as a result of house breaking causing actual visible damage

[1] (1941) AC 55
[2] (1868) LR 3 EX 71 at 74

to the premises or part thereof. The appellant made a claim in respect of the value of certain goods, which had disappeared from the premises. The respondents rejected the claim and the appellants brought these proceedings contending that the premises had been broken into and the good stolen. Evidence called by the respondent at the trial showed that it was highly improbable that the premises had been broken into. The trial judge found that the appellants had failed to satisfy him that the loss resulted from the house breaking and dismissed the action.

On appeal the appellant argued that it was not for them to prove how their shop was broken into and that on evidence the burden of proving that the theft had taken place was shifted to the respondent and that the trial judge had wrongly rejected their contention that a theft and a breaking out would be covered by the policy.

Held an assured need only prove that loss was caused by some event covered by the policy, but of this case is that the loss was caused by a breaking in or a breaking out then his avoidance most prove it, which the appellant here had failed to do, not having satisfied the court that there was wither a breaking in or a breaking out.

Nasser Mohamed Omer v Prudential Assurance Co. Ltd **(1966) E A L R 79 (Kenya)**

The appellant claimed that he was entitled to indemnity from the respondent company against the loss of his motor car, which the trial judge indicated had been driven deliberately into the sea by an employee of the appellant. The insurance policy provided that the respondent would indemnity the appellant against loss or damage to the motor vehicle by accidental collusion. The basis

of the appellant's claim was that the car accidentally went into the sea and was damaged. It was common ground that the driver was acting in the course of his employment. The trial judge dismissed the case on the ground that the appellant had failed to prove that the loss or damage was due to accidental collusion.

On appeal it was argued that there had been collusion, that it had been accidental and that the damage the car had suffered from immersion in salt water was a direct result of the collusion.

Held; the entry of the car into the sea was not an 'accidental collusion' and accordingly under the terms of the policy the appellant was not entitled to claim any indemnity for the loss of the car. The entry of the car into the sea was not accidental as it had been driven deliberately by the employee of the appellant even though the appellant had no knowledge of it.

Kanti & Co. Ltd British Traders Insurance Co. Ltd **(1965) EALR 108 (Kenya)**

The appellant company insured seven cases of enamelware during transit from Liverpool to Nairobi with the Respondent Insurance Co. The insurance cover was against "All risks of loss or damage subject to the Institute cargo clauses (All risks). By cl. 1 of these clauses the insurance attached from the warehouse of the place of commencement of transit to the final warehouse at destination and by cl. 6 the insurance was against all risks of loss or damage to the subject matter insured but did not extend to loss, damage or expense proximately caused by delay or inherent vice or nature of the matter. It was not in dispute that the enamelware started the journey undamaged but on arrival in Nairobi though the cases appeared to be in good condition a very high percentage of the enamelware inside was found to be badly chipped. The

appellant company therefore filed an action in the resident magistrate's court claiming Shs. 1505/50 as estimated damage. At the hearing an insurance surveyor stated in evidence that the main cause of the damage was motor transport as, due to the continual jolting, the packing had settled or become loose. He also stated that in his opinion the packing was probably sufficient for rail transport but insufficient for road transport. The trial magistrate found as a fact that transport by road between Mombassa-Nairobi was not contrary to the terms of the insurance policy, that the packing was reasonably adequate, that the appellant company had proved that some fortuitous circumstance had occurred to the goods and that it was not for it to show how the goods were damaged, that the respondent company had failed to prove that the damage was caused by inherent vice in the packing and accordingly gave judgment for the amount claimed. On appeal, the Supreme Court reversed the trial magistrate's decision on the ground that the appellant had failed to discharged the light onus that lay on it to prove that a casualty had occurred which resulted in the damage. On appeal to the Court of Appeal, it was argued for the appellant company that having regard to the facts found by the trial magistrate, the approach of the Supreme Court was wrong in law in that it placed upon the appellant company an onus, which did not lie upon it.

Held: From the extent of the damage the court had no doubt that in law the appellant company had discharged the onus of proving that the damage had resulted from a casualty;

(i)In this case, as damage from inherent vice was damage from an excepted risk, if respondent company could have shown that the damage was directly caused by inadequate packing it would have been entitled to judgment; this was precisely what the respondent

company sought to do before the trial magistrate but on the balance of probabilities, was rejected.

(ii)The Supreme Court had erred in law in placing on the appellant company any onus of showing that the damage did not arise from inadequate packing Appeal allowed.

Appeal allowed

Zambia State Insurance Corporation Ltd v Northern Breweries Ltd (2000) ZR 42 (Supreme Court of Zambia)

This is an appeal and cross-appeal against a decision of the High Court in which the learned trial judge ordered the appellant, Zambia State Insurance Corporation Limited to pay the full insured sum of K50,000,000 together with interest at current bank deposit rate from the date of the writ of summons up to the date of judgment and thereafter at 6% until full payment made. The learned trial judge dismissed the respondent claim for consequential loss.

Briefly the facts which are that the Respondent, Northern Breweries, took up an insurance policy generally known as the Boiler and Pressure Vessel Insurance Policy. The policy was to indemnify the respondent against:-

> *"(a) damage to the boiler and other apparatus in the schedule of the policy and to other property of the insured*
>
> .
>
> *(b) liability of the insured at law for damage to property not belonging to the insured;*

(c)liability of the insured at law on account of fatal or non-fatal injuries sustained by any person except where such injuries arises out of and in the course of employment of such person by the insured caused by Explosion or collapse as defined in the Policy of any boiler or other apparatus described in the schedule of the policy occurring either in the course of ordinary working or as a result of external impact or fire, "Explosion" is defined in the policy a sudden and violent rending or tearing apart of the permanent structure of a boiler of or other apparatus by force of internal steam or fluid pressure causing bodily displacement of the structure or any parts thereof and accompanied by the forcible ejectment of its content. Except in the case of a steam test at a pressure not exceeding the maximum pressure permitted by the inspecting Authority, the term "Explosion" shall not mean failure under any test. "Collapse" is defined as the sudden and dangerous distortion of any part of a boiler or other apparatus by bending or crashing caused by steam or fluid pressure whether attended by rapture or not, it shall not mean slowly developing deformation due to any cause.

Except in case of a steam test at a pressure not exceeding the maximum pressure permitted by the Inspecting Authority the term "Collapse" shall not mean failure under any test. The boiler in question is described in the scheduled as "one Babcock Wilcox steam boiler" – chain grale stocker No.50630"

The incidents leading to the calamity are that on the 2nd August 1994, the main boiler at the Respondents' plant was shut and the light fuel oil boiler (LFO) in issue was switched on. On being switched on it was discovered that it was cutting off and the low

water audible alarm could come on. A check was conducted and it was found that there was sufficient water and the feed water pump was running. As there appeared to have been an electrical fault an electrician by the name of Mkhalipi was called who temporarily repaired the fault by bridging it not on the connecting block in the panel and the boiler continued operating without giving false low water level alarms.

Hours later after the boiler was running under the temporary repair the whole boiler exceedingly hot indicating that there was no water. Another electrician attended to it and he unabridged the temporary connection done by Mkhalipi and immediately the low water alarms came on. The boiler was switched off. Because of the bridging done by Mkhalipi the low water level controls could not operate and as such operators could not detect the low water level condition in the boiler and kept running even when there was no water inside. As a result of the absence of the water in the boiler, the fire furnace and tubes overheated and subsequently collapsed. The respondents' made a claim under a policy; but the respondent repudiated the claim. The appellants issued summons claiming K50,000,000-00 (fifty million kwacha) under the Policy; also damages for consequential loss and interest. The consequential loss calculated as special damages came to K115,966,062 (one hundred and fifteen million, nine hundred and sixty six thousand, and sixty two kwacha.) The learned trial judge found that the damage to the boiler did not amount to "collapse" as defined under the policy. He found that the boiler was damaged as a result of Mkhalipi's negligence in bridging the connection and forgetting to unbridge it when knocking off. Despite the finding of negligence on the part of Mkhalipi the learned trial judge held that the respondent insured their machinery in order to protect itself against the conduct of the likes of Mkhalipi and that was why insurance companies are

there for and therefore the damage fell within the confines of the policy and gave judgment in favour of the respondent. On appeal,

Held, that the learned trial judge having found that collapse of the boiler was not a collapse as defined in the policy misdirected himself in holding that insurance companies are there to cover negligent acts. Negligence was specifically excepted in the policy.

CHIRWA JS . . .The result of the appeal will depend on the interpretation of the insurance policy. The term "coll*apse" is said to mean the sudden and dangerous distortion of any part of the boiler or other apparatus by bending or crushing caused by steam or fluid pressure whether attended by rapture or not, it shall not mean slowly developing deformation due to any cause. Except in the case of a team test at a pressure not exceeding the maximum pressure permitted by the Inspecting Authority the term "collapse" shall not mean failure under any test".*

The learned trial judge found that what happened to the boiler was not "collapse" within the definition given in the policy. The crushing was not caused by steam or fluid pressure. All the reports show that there was breakdown in the boiler because of low water level caused by non-switching on of the warning alarm controls caused by the bridging to the circuit done by one Mkhalipi. The judge was on firm ground in finding that the boiler did not collapse. Having so found, can the appellant be ordered to pay under the policy?

. . . Insurance policies covering mobile chattels such as ships and motor vehicles do anticipate a negligent operation of chattels. It is doubtful with static chattels such as boilers. In our present case, there was a willful act by Mkhalipi in bridging the circuit.

He never unabridged it. There is no evidence that he told anybody when knocking off that he had bridged the circuit. The policy specifically states that it does not cover "*(4) damage and/or liability caused by the willful act or willful neglect of the insured".* It is common cause that the insured is a company and acts through its servants and it becomes vicariously liable for its servants actions. . . In the present case, the trial judge, having found that the collapse of the boiler was not a collapse as defined in the policy misdirected himself in holding that the collapse was caused by the negligent act of Mkhalipi, that insurance companies are there to cover such acts of Mkhalipi; that they are there to cover such acts and that the Respondents having taken up the Policy, negligence was covered. These situations were specifically excepted in the Policy. We therefore allow this appeal, the policy was repudiated by the appellant as the damage was not covered by the Policy. The cross-appeal automatically falls away. The appellant will have his costs here and in the court below, in default of agreement to be taxed.

Jupiter General Insurance Co. v Rajabali Hasham & Sons (1960) EALR 592

A motor insurance policy indemnified the insured against loss or damage to his vehicle occasioned inter alia by accidental collision, theft or malicious act but had a clause excluding loss or damage occurring whilst the vehicle was being driven by any person other than the insured or someone authorized by him. There was also an endorsement on the back of the policy warranting that the insurers should not be liable if the vehicle at the time of the accident was being driven by a person who was not sober. The insured instructed his driver to take the car to the garage and leave it there for the night but the driver ignoring this

order took the car for a private frolic became drunk and had an accident, which damaged the car beyond repair. In an action by the insured for the value of the vehicle the defense of the insurance company pleaded that the driver was not at the material time an authorized driver but omitted to plead the endorsed warranty. The trial judge found for the Plaintiffs whereupon the insurance company appealed and at the opening of the appeal moved for leave to amend the defense by pleading the warranty. Since the omission to plead the warranty was shown to be due to inadvertence and, had the warranty been pleaded originally, no further evidence would have been needed nor would the course of trial have been altered. The amendment was allowed. Counsel for the Appellant insurers then abandoned all grounds of appeal save that related to the warranty. The Respondents' main contention was that the driver had converted the car to his own use when he took the car on a private frolic, that this was a malicious act and that the drunkenness of the driver at the time of the accident was immaterial.

Held: by taking the vehicle unlawfully the driver had committed an act of conversion contrary to s. 284 of the Penal Code which was a malicious act; the malicious act was an insured risk materializing at the time of conversion when neither the warranty nor any other exception applied; it was also a continuing act and included the acts of the driver in pursuance thereof and the Respondents who had lost the vehicle were entitled to recover under the policy.

Appeal dismissed.

There is a loss by "fire" even where the property insured is destroyed or damaged by fire in a sitting-room grate.

Harris v Poland (1941) 1 ALL R 204

A woman insured her jewellery under a comprehensive policy insuring her *(inter alia)* against loss by fire. She was nervous about its safety, so she hid it in the sitting-room grate. Later, forgetting about the jewellery, she lighted the fire, and the jewellery was damaged. The insurers contended that there was no loss by "fire", since the damage had been caused by a fire in a place where the fire was intended to be, i.e. in the grate.

Held, by the King's Bench Division, that it was a loss by "fire".

ATKINSON, J. (at page 208) I can see no reason whatever for limiting the indemnity given by the police in the way claimed by the defendant. In my judgment, the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire. The words of the policy are just as descriptive of one as they are of the other, and I cannot read into the contract a limitation which is not there. To enable me to accept the contention of the underwriters, I should have to read something into the contract, some such words as, "unless the insured property is burned by coming in contact with fire in place where fire is intended to why be" Why should I ? What justification can there be for so doing? To what absurdities would it lead? A red hot cinder jumps from the fire and sets on fire some paper of value. Admittedly, there is liability. A draught from the window blows the same paper into the same fire. Are the words in the policy any less applicable to latter than they are to the former? A draught blows the flame of a candle against a curtain. Admittedly, there is liability. What if the

curtain is blown against the flame of candle, however? Surely the result must be the same. If it is not the same, the result is an absurdity. If it is the same, why should the result be different if one substitutes: a fire in a grate for the lighted candle in a candlestick? Unless I am bound by authority to the contrary, or unless I can fine a consensus of opinion to the contrary among textbook writers indicating a generally accepted interpretation of these words, I must give effect to the view I have formed.

Kantilal Motich v Eagle Star Insurance Co. Ltd Kenya **(1971) EALR 24**

The plaintiff brought an action against the defendant for a declaration that the defendant was liable to pay him the amount of a judgment recovered by him against a person insured by the defendant under a policy of compulsory vehicle insurance.

The defendant company insured a motor vehicle owner in respect of any liability for damages which might be incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle. By the covered exceptions in the policy the defendant was not to be liable in respect of any liability incurred whilst the vehicle was being used otherwise than by the insured. While the vehicle was being used for business purports and was being driven by the insured employee, it was involved in a collision which the plaintiff sustains injuries in respect of which he recovered judgment against the insured for damages. The judgment was not satisfied and the plaintiff instituted the present proceedings for a declaration that under S. 10 of the insurance (Motor Vehicle Third Party Risks) Act (cap 405) the defendant was liable to pay him the amount, and for payment of the amount to him.

The plaintiff contended that the policy exceptions were conditions within the meaning of S. 18 of the Act and were ineffective because of the provisions of the section, since the policy in compliance with the provisions of S. 5 (b). Insured the use of the vehicle by the insured irrespective of the person who was actually drawing it and the purpose for which it was being used. The defendant contended that the policy exceptions merely laid down the extent of the cover, by defining the insured use.

Held that the plaintiff was not precluded by the policy exceptions from recovering the amount of the judgment, and gave judgment for the plaintiff for the declaration sought.

Interpretation of an insurance policy follows the general rules of interpretation of contracts. Where a phrase in an insurance policy is ambiguous, the court may apply the *contra proferentem* rule, i.e. it will be construed against the insurers.

English v Western (1940) 2AII E.R. 515

A 17 year- old boy took out a motor insurance policy covering his liability for injury to all persons except, *inter alia*, in respect of "death or injury to any member of the assured's household" traveling in the insured's car with the insured. He and his sister both lived with their father. His sister was injured in a motor accident caused by the negligent driving of the insured. The insures claimed that they were not liable because the exception in the policy excluded liability for "death of or injury to any member of the assured's household", and that these words meant death of or injury to any member of the same household of which the insured was a member.

Held, by a majority of Court of Appeal, that the words could mean "any member of a household of which the assured was the head". Since there was a doubt, the words should be construed against the insurers. Consequently they were liable on the policy.

CLAUSON, L.J. (at page 519) . . . A man may be related to a household in two ways, he may be member of the household or he may be the head of the household. The insurance company, while insuring the insured against his liability to passengers, excepts in its own favour his liability to a passenger who is a member of the insured's household. The question is, accordingly, whether or not, on the true construction of the policy, the exception covers not only the narrower class of members of a household of which the plaintiff is the head, but also the wider class of members of a household of which the plaintiff is a member. BRANSON, J., took the view that the more natural meaning of phrase is covering the wider class- namely, members of the household of which the plaintiff is member.

The question seems to me to be the relationship connoted in this phrase by the possessive pronoun which, in the actual clause, is concealed beneath an apostrophe "s". It appears to me that the word "his" may equally well connoted the one relation which I have stated as the other. In other words, in my judgment, either of the two competing meanings of the

SLESSER AND CLAUSON, L.JJ.; GODDARD, L.J., dissenting.

The phrase "a member of the assured's household" is possible and natural, and, accordingly, there is, in the truest sense, an ambiguity in the phrase. There is no doubt that, if the phrase used in the policy is in this sense ambiguous, that meaning which is less favourable to the insurance company which has put forward

the policy must be chosen. It may well be that one would have expected the insurance company, possibly for very good reasons, to have intended the phase to carry the wider connotation, but that seems to me to be quite immaterial if one once reaches the conclusion that the phrase is ambiguous. If the insurance company desired the wider meaning to be placed upon it, it was their duty to make that desire clear by using unambiguous language.

For these reasons, I find myself bound to hold that the phrase exception covers only the narrower class, the members of a household of which the plaintiff is head, and, accordingly, the case is a case outside the exception, and the company is liable.

South British Insurance Co. Ltd. v Samiullah
(1967) EALR 659

The respondent had a motor policy with the appellant insurance company covering his car against theft, which policy expired on November 7, 1964. On November 20 1964 the respondent learnt that his car had been stolen, and later that day he went to the offices of the appellant and handed over a cheque for the renewal of premium, which he had been told, would be a condition precedent to the issue to him of a new policy valid from November 7. Still later on November 20 the respondent having collected his new policy, notified the appellant that he wanted to make a claim as his car had been stolen. A Mr. Hicks, the manager of the appellant's motor insurance department there and then concluded from what he was told by the respondent that the respondent must have known that the car had been stolen before receiving the new policy. Instead of repudiating the policy,

however, the appellant later wrote to the respondent rejecting the claim as not coming within the policy; and later still the appellant cashed the respondent's cheque for the premium and after further lapse of time on May 10, 1965, it paid the respondent the amount of his claim. The appellant then, on May 20 1965 sued the respondent in the High Court claiming the return of the amount paid. The plaint as originally framed alleged that no theft had in fact occurred and that the money was paid over on a fraudulent representation by the respondent that the car had been lost by theft. But in November 1965 the Plaint was amended to allege in the alternative that the appellant was entitled to avoid the policy because it had been obtained by the respondent wrongfully concealing that the car had been stolen before the insurance had been effected. At the trial the appellant conceded that the car had in fact been stolen. The trial judge found that at the time. The trial judge found that at the time he got the policy the respondent knew of the theft which would have entitled the appellant to repudiate, but in the circumstances the appellant had waived its right to repudiate, relying inter alia on the delay in amending the plaint. The appellant appealed and the respondent cross-appealed. One of the points argued by the appellant was that the amended plaint related back to the date of the original plaint so that the judge should not have found that there was a delay in repudiating the policy amounting to a waiver.

Held: (i) even if an amended plaint does relate back to the date of the original plaint for some purpose, such relation cannot generate so as to preclude a judge from taking note of the date of the amendment if such date is material to the issues for decision (as it was in this case);

(ii) on the facts the trial judge should have found that the appellant had knowledge on the day when the insurance was

effected that the respondent had concealed a material fact before the contract of insurance was effected;

(iii) that from that moment, or a reasonable time thereafter, the appellant should have repudiated the policy;

(iv) that when it paid the claim the appellant had constructive notice (through Hicks) of the facts and could not recover the money (Bilbie v. Lumley (1802) 2 East 469)

Appeal dismissed. Cross-appeal allowed.

6.14. Premiums

In **Lewis v Norwich Union Fire Insurance Co**.[1] a premium was defined as the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance.

The premium is the price for which the insurer undertakes his liability. It is the price for which the policy is bought. Premium may be consideration other that money payment, for example, in mutual insurance it may consist of a liability to contribute to the losses of other members of the mutual society. The members in a mutual society are both insured and insurers. What they offer as premium is their liability to contribute to the losses of other members and as insurers they receive as premium the right to have their own loss paid when ever it happens. If a policy of insurance is under seal, and hence does not require consideration to support it, no premium is strictly speaking, necessary.

[1] (1916) AC 519

Time of Payment

Prepayment of the premium is not in law, a condition precedent to the making of a complete contract of insurance. Premium must be paid at the time stipulated in the contract of insurance. If no time has been stipulated, the premium must be paid within a reasonable time.

Where the insured has allowed the insured credit for the premium, the insurer is liable to pay in the event of loss before payment. Non payment will not avoid the policy and is no defense to an action on the policy. In which event the insurer is entitled to deduct the amount of the premium from the loss payable.

It is almost universal practice for insurance other than marine insurance, to provide that the contract shall not take effect until the premium has bee paid. In such cases the courts will not give effect to the insurer unless the premium has been paid.

The Zambia Insurance Act provides in section 76 (1) that ;

"A contract of general insurance shall cease to operate if a premium is not paid within sixty days after the due date of the premium, or within such period as the contract may stipulate."

The Act has addressed previous concerns by the insuring public who would pay the premium to brokers who failed to remit the same to the insurer. Difficulties arose when the loss insured against occurred, and in the process of claiming, it was then established that the broker never remitted the premium to the insurer. Given the general position that a broker is the agent of

the insured, the insured stood in a relatively weak position. Section 76(2) of the Insurance Act now provides that;

"For the purposes of this section, a premium paid to a broker who arranged the contract shall be deemed to have been paid to the insurer."

The import of this provision is not very easy to ascertain. It is unclear whether for all other purposes other determining the validity of the contract of insurance under section 76 payment of premiums to a broker is not to be regarded as payment to the insurer. The provision of the Insurance Act do not as yet, appear to have been a subject of serious judicial determination in Zambia.

Payment to Agent

Payment must be to the insurer or to an agent with actual or apparent authority to receive payment of premium for the insurer. Brokers have a statutory obligation under the Act to transmit premiums. Under section 21 of the Act;

"(1) Where any premium on a policy is paid to a broker by a client, the broker shall, within sixty days of due date of the premium, transmit the premium, less any agreed commission or other charges payable by the insurer to the broker, to the insurer who is the issuer of the policy concerned.

(2) If the broker contravenes this section, the amount of any claim payable by the insurer under the policy in respect of an event occurring after the expiry of the period of sixty days referred to in subsection (1) and before transmission of the premium as required by this section (I), shall be a debt due to the insurer from the broker.

(3) Notwithstanding sub clause (2) any broker who contravenes this section shall be guilty of an offence and be liable, on conviction, to a fine not exceeding twenty thousand penalty units.

It is possible for insurance cover to be provided at a rate of premium to be established later. KIRBY v CONSINDIT SPA (1969) I Lloyds Re.75

Days of Grace

Days of grace refer to an extra period of time to pay premium allowed to the insured by the contract. Many polices invariably provide for a number of extra days within which a renewal premium may be paid.

In a life policy the contract remains in force during the days of grace although the premium has not been paid on time; time is not of the essence of the contract until the days of grace have expired. Where the assured dies during the days of grace and before the next premium is paid, there is cover[1].

In other classes of insurance the insurer's liability will depend on the wording of the policy. If the unpaid premium is for renewal of cover, the days of grace may be one of the two kinds: (a) there is no cover but an offer to renew cover, which starts if and when the offeree accepts the offer and pays premium. The offer lapses after the days of grace have passed and (b) there is interim cover until the offeree insured decides to contract for the full period or not- this is the usual interpretation in the case of motor insurance.

[1] Stuart v Freeman (1903) KB 47

Recovery of Premium

Premiums paid to the insurer are recoverable in a number of instances. Where premiums are paid for a consideration which has wholly failed they are recoverable under the general law of contract[1] and action to recover it would be in restitution, or qusi contract for money had and received.

Where the policy is void *abinitio* without any fault attributable to the insured, the position is that the policy has never attached and therefore, the insurer has never been placed on risk (no liability). The premium is returnable.

Where a policy is illegal and the parties are in *pari delicto* the premiums paid under such contract cannot be recovered.[2]

The insured will however recover premiums paid if he can show that the insurer is more in the wrong than the insured- that they are not in *pari delicto*.

Where fraud can be proved against the insurer the insured can repudiate the contract rescind it and recover the premium[3]

Premiums may also be returned by mutual agreement in certain events.

6.15. Third Party Rights – Motor Vehicle Insurance

[1] Tyrie v Fletcher (1777) 2 Cowp. 666
[2] See Harse v Peal Life Assurance Co (1904) 1 KB 558
[3] See Refuge Assurance Co. v Kettlewell (1909) AC 243

Regina v Chunga (1962) A L R. 247

The accused was charged in a magistrate's court with driving without valid insurance. The accused had an insurance policy which contained a condition excluding the insurer's liability if the vehicle was being driven by a person other than one who, inter alia, held a driving license. He was convicted.

On affirmation, the court considered the burder of proof relating to the accused to holding a driving license and went on to consider whether the condition in question was repugnant to S. 829 the Motor Traffic Ordinance (Cap. 146) thus making the insurance valid.
Section 82 "save as in this ordinance expressly provided, any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or would to be done after the happening of the event giving rise to a claim under the policy shall be of no effect connection with such claim' as are mentioned in Section 78 and not excluded by Section 179 of this ordinance.

Held: A certificate of insurance is merely evidence that there is a policy in existence and its terms is merely evidence that there is a policy in existence and its terms in no way affect the limitations imposed in the policy, which remains the only document creating any liability on the insurances.

Conclusions in a motor vehicle insurance policy descriptive of the scope of the insurance merely set out the risks covered as conditions precedent to the accident; they are unaffected by the terms of Section 82 of the Motor Traffic Ordinance (cap. 146) which only invalidates conditions relating the insurers from

liability by reason of some act or omission occurring after an accident which in the absence of such conditions would be covered by the policy.

A provision in a motor vehicle insurance excluding liability of the driver of the vehicle is unlicensed will validly exclude the insurers liability and be unaffected by section 82 of the Motor Traffic Ordinance.

Conviction upheld.

The insurer's obligations to indemnify is not an absolute obligation

Regina v Mangana **(1963) ALR 498**

The appellant was charged in the subordinate court of the third class in Lilongwe, with permitting a person to drive a motor vehicle on the road without disqualified from driving contrary to section 17 of the Motor Traffic Ordinance (cap 146) and with permitting a person to drive a motor vehicle on the road without being covered by insurance contrary to section 77 of the Ordinance.

The appellants' vehicle was driven by one of his employees who, unknown to the appellant was charged with the two offences indicated above and convicted. It was argued on appeal that the convictions should be set wide in the ground of the appellant's lack of "mens rea", that the insurance policy created an absolute liability on the insurance company in spite of breach of condition of user; and that the contract of insurance was not voided by such breach as it was unknown to the policy holder.

Held: Permitting a disqualified person to drive a motor vehicle contrary to section 17 as the Motor Traffic Ordinance is an offence of absolute liability and may be convicted even though they occurred is unaware of the disqualification.
Permitting the use of a motor vehicle while not insured, contrary section 77 of the Motor Traffic Ordinance (cap 146) is an offence of absolute liability and may be committed even though the accused is ignorant of the fact there is no policy of insurance covering the vehicle, or that one of the conditions of the user has been broken

An endorsement to the policy of motor insurance that nothing contained in the policy shall affect the right of any person to recover an amount due by virtue of the motor vehicle ordinance does not create an absolute liability on the insurer but merely refers to his obligation under section 82 of the ordinance to accept liability in spite of certain breaches of the terms of the contract of insurance by the accused. section77(1) subject to the provisions of this part6v it shall not be lawful for any person to use ,or to cause or permit any other person to use a motor vehicle … on a road unless there is in force in relation to the user of the vehicle by that person or that other person as the case may be such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this part "
Order accordingly

Zambia State Insurance Corporation Ltd v Musutu & African National Congress & Msangala (1993-1994) ZR 133

In a road traffic accident, the vehicle of the first respondent was in collision with a vehicle belonging to the second respondent driven by its servant, the third respondent. The appellant was joined as defendant under the terms of the Roads and Road Traffic Act, cap 766 and in its defense claimed firstly that if it did not insure the second respondent's motor vehicle as alleged, and in the alternative, that it should notify the appellant of any claims brought against it. The trial Court held that the appellant was liable to pay the first defendant for the damages caused to the motor vehicle, under s 137 of the Act. The appellant appealed, arguing that its liability under s 137 was only for damages arising out of personal injury or death as set out in s 135.

Held: From the wording of s 135, the purpose of IX of the Act is to provide for compulsory third party insurance in respect of death or bodily injury only. A policy giving insurance in respect of damages to property is not a policy issued for the purposes of part IX of the Act and therefore no direct claim against an insurance company in respect of such damage can arise under s 137 or otherwise.

Gardner JS, delivered the judgment of the court
This is an appeal against the judgment of High Court judge holding that the appellant was statutorily liable to compensate the first respondent for damage to a motor vehicle and resulting damages.
The facts of case were that in road traffic accident the vehicle of the first respondent was in collision with a vehicle belonging to the second respondent driven by its servant, the third respondent, in the course of his duties. The appellant was joined as defendant under the terms of the Roads and Road Traffic Act, cap 766, and its defense claimed firstly that it did not insure the second respondent's motor vehicle as alleged, and in the alternative, that

it should notify the appellant of any claim brought against it. At the trial little or no defense a to the liability was put forward, and the learned trial judge found that the accident had occurred solely due to the negligence of the third respondent while driving in the course of hi duties on the business of the second respondent. The appellant did not press its denial of the existence of an insurance policy, and the learned trial judge found that under s 137 of the Act, the appellant was liable to pay the first respondent for the damages arising out of the damage to his motor vehicle. It was specifically held by the learned trial judge that the appellant's liability under s 137 was not limited solely to damages for bodily injury or death.

The appellant now appeals against that finding on its behalf. Mr. Mundashi has urged us to find that s 137 make an insurance company directly liable to a third party only for damages arising out of personal injury or death as set out in s 135.
Mr. Makato, on behalf of the second and third respondents, argued that the appellant should have entered a condition appearance if it were right in the contention that it was not liable for damage which occurred to the first respondent's motor vehicle and ensuing loss as claimed in the writ, and further that the appellant should have raised a preliminary issue to the same effect at the trial. As to the merits of the case Mr. Kakoma adopted the arguments of Mr. Maketo. In its defense the appellant put the first respondent to proof that there was an insurance policy in existence to support the claim, but no insurance policy was produced. It appears to have been accepted by the Court and the parties that there was some form of comprehensive insurance that which insured the second respondent against liability for damage to third parties' property. There was no doubt that the appellant maintained its argument at the trial that although there may have been an insurance policy, the terms of s 137 of the Act did not make the appellant liable for

damage to the first respondents motor vehicle. There is no rule of practice which makes it mandatory for conditional appearance to be entered or for preliminary point to be taken before the trial., and Mr. Kokoma's argument in this respect cannot succeed. The essential question in this appeal is whether a third party who has suffered damage solely to property, in this case a motor vehicle, has the right to recover the damages from an insurance company which has legitimate ground to repudiate liability to a policy holder because such a policy holder did not give notice of the claim in accordance with terms of the policy

This situation is dealt with in s 138 of the Act, which reads as follows:-

> 'Any condition in a policy given under this part providing that, in the event of some specified thing being done or omitted to be done no liability shall arise under the contract , or connection with any claim in respect of which policy holder is required to be insured by virtue of the provisions of this party:

Claims for which a policy holder is required to be insured are set out in s 135 which read, in part as follows:
In order to comply with the requirements of this part, a policy of insurance must be a policy which –
(b) insures such person, person or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of , or bodily injury to any person caused by, or arising out of the use of the motor vehicle or trailer on a road; It follows, therefore, that a condition that enables an insurance company to avoid liability is only of no effect in connection with claims in respect of bodily injury or death,. So far as claims in respect of damage are concerned, any breach of condition by a policy holder will

effectively prevent a third party from claiming from the insurance company.

In view of the fact that the effect of s137 was dealt with in the Court below we should comment that, in constructing the meaning of that section, all the words must be taken into account and given effect to because no words in a statute maybe regarded as otiose. Section 137 reads as follows;

Any person having a claim against a person insured in respect of any liability in regard to which policy of insurance has been issued for the purpose of this part shall be entitled in his own name to cover directly from the insurer any amount not exceeding the amount recovered by the policy, for which the person insured is liable to the said person having claim.

The words for the purpose this part govern the claim and the policy, and such purposes must be ascertained in order to construe the meaning of the section. Its clear from the wording of s 135 set out above that the purpose of part IX of the Act is to provide for compulsory third party insurance in respect of death or bodily injury only. A policy giving insurance in respect of damage of property is not a policy issued for the purpose of part IX of the Act and therefore no direct claim against an insurance company in respect of such damage can arise under s 137 or otherwise. For the reasons we have given we confirm that, where the only damage suffered by the third party is damage to property, no action lies directly against an insurance company under s137 of the Roads and Road Traffic Act, nor in view of the fact that there is no privity of contract, doses any such action lie otherwise. We also confirm that, where damage to property is the only damage suffered, a breach of condition by a policy holder, if proved, effectively bar a claim under the policy.

The question of whether or not there was an effective breach of any condition by the second respondent was not dealt with in Court judge for that issue to be resolved.
The appeal is allowed with costs to the appellant in this Court and in the Court below.

Allanson Njugi v British India General Insurance Co; Ltd **(1965)** E.A.L.R p. 58 Kenya.

The defendant insurance company operated in Kenya through it, chief agents and the chief agents had a number of sub agents, one of which was a firm called U.M.C. U.M.C in turn had as agent one who and through him the plaintiff obtained a motor insurance policy with the defendant. In the chief agents office there was a representative who was referred to in the correspondence as the branch manager of the defendant. The policy was issued for a period of 12 months to October 16, 1963. The premium was Shs. 2, 285 175 of which Shs. 600 – was paid but an April 4, 1963 (N). wrote a registered letter to the plaintiff threatening to cancel the policy if the sum of Shs. 487/75 was not paid within seven days. In the meantime (N). did not hand over the policy or certificate of insurance but issued cover notes from time to time as they were registered by plaintiff. As no payment was received within the specified time (N) in April 16 1963 returned the policy and certificate of insurance to U.M.C with a request to cancel the policy. U.M.C. in turn passed this request to the "branch manager" and the policy was cancelled by an endorsement to the policy dated May 15, and expressed to take effect from April 15. The plaintiff had called an (N) an April 23 and had given him a post acted cheque for the balance of the premium and the cheque was duly paid in May 17. On recent of the cheque (N) requested the "branch manage" through U.M.C not to cancel the policy and

to reinstate it. On May 18 this request was refused and U.M.C was informed that the policy had already been cancelled. Nevertheless efforts were made by (N) and U.M.C to have the policy reinstated issued a cover note in June and in July a further cover note was issued by U.M.C who sent a copy to the branch manager and informed him that they were arranging to obtain the completed proposal form. On Ay 24 (N). asked the plaintiff submitted a claim under the policy claims Shs 15,000/ - in respect of damage to the vehicle and a declaration that the defendant was not entitled to rejodiate in respect of pendis chains by third parties. The defendant's defense was that the policy was cancelled with effect from April 16, under conclusion 7 of the policy which provided that the defendant must cancel the policy by sending seven days notice by registered letter to the plaintiff and that the plaintiff having signed a fresh proposal on August 24 was estopped from denying the cancellation of the original policy.

Held the letter of April 4, was not a notice of cancellation as contemplated by the parties when they agreed to the condition because the letter in its terms was conditional when it should have been clear and unambiguous and because it was not within the authority of (N) to cancel the policy.
Us the letter was in no sense a cancellation by notice in accordance with condition 7 of the policy and should be construed as a warning rather than a notice intended to have operative effect.
W (N) had no authority, express or implied to procure the cancellation of the policy on behalf of the plaintiff & in purporting to cancel it the defendants did not comply with the condition by giving the requisite notice E accordingly the cancellation was ineffective (W) the alleged estoppel had not been leaded with sufficient particularity to entitle the defendants

to rely on it, and in any case no valid estoppel had been established by evidence Judgment for plaintiff.

6.16. Illegal contracts

In certain situations an insurance contract may be void for illegality. An insurance contract may be illegal void for for one of the following reasons:

(a) It was entered into to achieve a purpose which is illegal and contrary to public policy. For example a contract entered into with an insurer who has no insurance license issued under the Insurance Act would be illegal.

(b) Where property is used unlawfully, for example, where the property insured is used for an unlawful purpose.

House of Manji Ltd v Liverpool Marine Insurance Co. Ltd **(Kenya) E.A.L.R. p.693**

The plaintiffs were manufacturers of biscuits which they distributed for sale through out East Africa. In 1958 they arranged with the defendants to insure their products whilst in transit to their customers by road, rail or air by means of a marine insurance ‘open cover” contract by which the plaintiffs are bound to declare each (E) every elipment of goods to the defendants and in respect of each of which the defendants would issue a policy. In practice the defendants used to issue a certificate of insurance for each shipment which it was agreed had the same effect as a policy. In May, 1961, the plaintiffs dispatched a consignment of biscuits from Nairobi to Kampala by a contractors hours. It was

common ground that the transporters had no "B" license for the vehicle as required by S. 4 of the Transport licensing Act [k] and in their declaration the plaintiffs did not specify the vehicle as they should have done. The defendants duly issued a certificate as insurance for the consignment. Before it reached its destination the lorry was involved in an accident as a result of which a portion of the consignment was damaged and a number of cartons and tins of biscuits disappeared. The plaintiffs claimed damages of which the defendants said they were not liable on the grounds that the carriage was illegal and that the plaintiffs failure to inform the defendants that unlicensed transport would be used was no disclosure of a material fact.

Held (i) the plaintiffs were well aware that unlicensed transport was being normally employed by them and they were aware of it in the particular case with which the suit was concerned.

(ii) the breach of statutory requirement contained in S. 4 of the Transport Licensing Act (K) went to the knout of the enterprise and adventure and was not merely collateral to it.

(iii) the defendants were not liable to pay damages to the plaintiffs once an unlicensed lorry was used to transport the goods.

(iv) there was sufficient evidence to show that the employment a unlicensed transport involved any substantial increase in the risk; accordingly the defendants had failed to show that the failure of the plaintiffs to inform them that unlicensed transport would be used as non-disclosure of a material fact.

Action dismissed.

Mac Gillvary on Insurance Law 5th Edn vol. 1 Para. 508, states the principle thus**:**

"*If the interest of the assured is tainted with illegality he cannot recover on his policy. The law will not admit the validity of an insurance which assists or encourages the insurers or assured in the commission of an unlawful act.*

Every breach of statutory duty on the part of the ship-owner does not avoid the insurance. The illegality must go to the root of the enterprise and a lot merely collateral to its prosecution."

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6.17. Repudiation of Policies and Liability

An insurer faced with a claim from the insured may in certain circumstances be justified to refuse to settle the claim. Repudiation may be sanctioned by the law for various reasons. For example, the loss may not be covered in the policy, or the insured may not have insurable interest in the subject matter of the contract, or public policy dictates that the claim be declined. The range of situations that will justify repudiation of a claim include ;

(a) The contract being void for illegality

(b) Non disclosure , misrepresentation and fraud.

(c) Breach of other terms of the insurance contract.

Most of these situations have been covered in detail in various topics discussed.