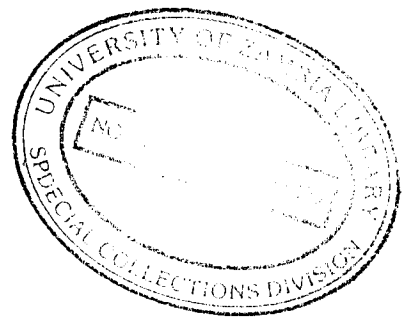


**CLASH OF INSURANCE LAW PRINCIPLES: MADISON  
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V. KONKOLA COPPER MINE**

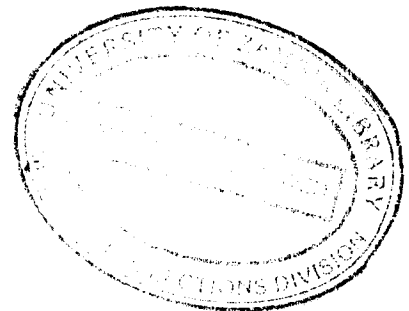


**BY**

**CHOOLOWE MWANAKULANGA**

**2012**

**UNZA**



**CLASH OF INSURANCE LAW PRINCIPLES: MADISON GENERAL INSURANCE  
COMPANY LIMITED AND ANOTHER V. KONKOLA COPPER MINES.**

**BY**

**CHOOLOWE MWANAKULANGA**

A dissertation submitted to the University of Zambia in partial fulfilment of the award of  
Bachelor of Laws Award

2012

**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

I hereby recommend that the Directed Research prepared under my supervision by:

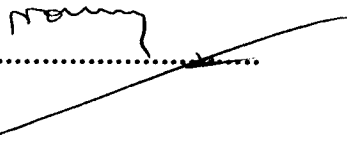
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**CLASH OF INSURANCE LAW PRINCIPLES: THE CASE OF MADISON GENERAL  
INSURANCE COMPANY LIMITED AND BEAVER SERVICES LIMITED V.  
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.....

**Mr. Mumba Malila, SC**

11/05/12  
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**Date**

**DECLARATION**

I, **CHOOOLWE MWNANAKULANGA, COMPUTER NUMBER 28023030** hereby declare that the contents of this Directed Research are entirely based on my own findings and no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of Bachelor of Laws Degree. I have in no manner used another person's work without due acknowledgment of the same to be so.

I hereby bear the absolute responsibility for errors, defects or any omissions herein.

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**SIGNATURE:** 

**DATE:** 11/05/12

## **ABSTRACT**

In everyday usage insurance does not appear as complicated as it actually is, and to the lay person it is no more than payment of premiums and making of claims when a loss occurs. However, there are a lot of complexities that are at play in insurance contracts especially in the application of the various principles of insurance law. This paper recognises that a failure to understand the principles of insurance leads to a clash among some of the principles of insurance law. It has recognised from the case of *Madison General Insurance Company Limited and Beaver Services Limited v. Konkola Copper Mines (Madison Insurance Claim)* that the existence of a covenant to insure bestows immunity on a third party from insurer subrogation. The paper explains in brief insurance law, the nature of insurance contracts and the principles governing such contracts, it however, mainly focuses on three principles of insurance law; insurable interest, subrogation and non-disclosure. It explains each principle in detail and illustrates how clashes arise among these three principles and also analyses the decision in the *Madison Insurance Claim*. After such analysis, the findings of this paper are that the existence of a covenant to insure and the subsequent non-disclosure of its existence to the insurer give rise to the clash among the named principles of insurance. The research paper has in its conclusion recommended ways in which to avoid conflict in the application of insurance law principles. These involve a two-tier mechanism to avoiding *insurer subrogation mirage*, eliciting disclosure, recognition of the existence of tort immunity from subrogated claims and legislative action by the inclusion of insurance principles in the Insurance Act.

**DEDICATION**

To my mother and father

## **ACKNOWLEDGEMENTS**

Mum, dad, Vasi and Sweets, thanks for believing in me and encouraging me. I would not have come this far without you.

Mr N. Nchito and Mr M. Nchito thank you so very much for giving me the opportunity to work for you, had I not worked in your Law Firm, I would not have had an opportunity to set eyes on the case that is now the subject of this Directed Research.

As for my supervisor, what can I say? It has been such a privilege to have Mumba Malila SC as supervisor. I must admit, there has not passed a day that I have not been bragging my head off about having the Attorney General as my supervisor. Your guidance and approval of each one of my chapters gave reassurance and hope that there was sense in what I otherwise thought to be senseless. Truly grateful for your time, because even after your appointment as AG, you continued to spare time for my questions and yet there were matters of State importance for you to attend to.

Augustine thanks for the submissions, they were a great help. Tom thanks for the time you took to help me with my research, the few sessions with you really opened up my mind. Suwo me love, thanks for letting me work on the case with you, telling me to consult Tom and always pushing me to meet my deadlines just so Mr Malila does not think am a joker.lol. Mr Ndalameta thanks for your oblig which was both a source of inspiration and guidance. Monde, Maggie, Lweendo, Nakasamba, Kaumbi you guys are awesome, thanks for giving me ideas when I was stuck and always giving an ear to my constant complaints about my topic. To all my people, even though I cannot quite point out a contribution, thanks a lot.

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## Operational Definitions

**Subrogation:** the substitution of one person for another so that the person substituted succeeds to the rights of the other. Thus an insurer who indemnifies his insured against loss may be subrogated to the insured person's rights against a third party whose negligence caused the loss.<sup>1</sup>

It is sometimes defined as the mode which equity adopts in order to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it.<sup>2</sup>

**Insurable interest:** insurable interest is a very essential requirement of any contract of insurance. The following is a working definition taken from a leading work on insurance:

where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the diminution of any right recognised by law, or in any legal liability, there is an insurable interest in the happening of that event of the possible loss or liability<sup>3</sup>

**Non-disclosure:** the failure by one party, during negotiations for a contract, to disclose to the other a fact known to him that would influence the other in deciding whether or not to enter into the contract. A full duty of disclosure exists only in the case of contracts *uberrimae fidei*, which as earlier mentioned insurance contracts are. If the person insured tells an untruth, the contract will be voidable for misrepresentation; if this person also suppresses a material fact, it will be voidable for non-disclosure.<sup>4</sup>

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<sup>1</sup> E. Martin, *Oxford Dictionary of law 7<sup>th</sup> ed.* (New York: Oxford University Press, 2009)

<sup>2</sup> *Arnold v. Green* 161 NY 566

<sup>3</sup> D. Browne, *MacGillivray on Insurance Law relating to All Risks Other Than Marine 5<sup>th</sup> ed.* (London: Sweet & Maxwell, 1961)

<sup>4</sup> *Oxford Dictionary of Law 7<sup>th</sup> ed.*

**Immunity from subrogation:** immunity is defined as freedom or exemption from legal proceedings<sup>5</sup>, similarly immunity from subrogation is exemption from being pursued for the amount of the indemnity. There usually tends to be confusion between immunity from subrogation and waiver of the right of subrogation; some scholars have considered the two to be one and the same thing but these two are very different as will be seen later in this research paper.

**Waiver of right to subrogation:** The Waiver of Subrogation prohibits the insurer from attempting to seek restitution from a third party that causes any kind of loss to the insured. This type of arrangement is permissible under certain circumstances where the insured could be held liable for a claim that is paid.

When an insurer waives subrogation, it waives its right to sue in the name of the insured and recover damages from certain third parties. These third parties, whether by agreement or by implication, may be additional insureds, named insureds, unnamed insureds or even third party beneficiaries. Where an insurer commences a subrogated action against any of these third parties, the third parties can raise the argument that the action cannot be maintained against them because there has been a waiver of subrogation.

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<sup>5</sup> Oxford Law Dictionary, 7<sup>th</sup> ed

## CHAPTER ONE

### THE NATURE AND PRINCIPLES OF INSURANCE LAW

#### **1.1. Introduction**

In everyday usage insurance does not appear as complicated as it actually is, and to the lay person it simply is payment of premiums and making of claims when a loss occurs. To such a person it merely is as its definition denotes; a contract by which a person or company agrees, in return for a premium, to pay a sum of money to another person or company on the happening of a certain event, or to indemnify the insured against loss caused by the risk insured against.<sup>1</sup> On the face of it, it may appear so, but there are a lot of complexities that are at play in insurance contracts. Insurance law is governed by special principles that many an insured and sometimes the insurer do not understand. For instance, a principle such as subrogation may seem pretty clear but much to the surprise of the insurer and the insurer's lawyer, there are ways in which a right to subrogation may be lost which they have no idea about.

Today insurance is a cardinal element in everyday life, be it in commercial transactions or in the personal sphere.<sup>2</sup> With the increase in its use, it is important that the insured as well as the insurer understand the various principles of insurance law that are at play, as well as the conflicts arising among them that Zambian jurisprudence does not explain. These principles demand specialist knowledge and it is against this backdrop that this research seeks to address issues arising from the application of these principles.

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<sup>1</sup> R. Lowe, *Commercial Law 5<sup>th</sup> ed.* (London: Sweet & Maxwell, 1976), 368

<sup>2</sup> Lowe, 368

Various principles of insurance law tend to collide in their application, often when the insurance company has to make good the loss and also when the insurer makes a claim against a third party. An illustration of such collision is evidenced in the case of *Madison Insurance Company and Beaver Service Limited v. Konkola Copper Mines*<sup>3</sup>(Madison Insurance Claim). With reference to the *Madison Insurance Claim*, this exposition will focus on only three principles of insurance law, namely; subrogation (with particular focus on waiver of subrogation and immunity from subrogation), utmost good faith (commonly referred to as *uberrimae fidei*) in particular non-disclosure, and thirdly insurable interest. It is hoped that with time, all parties to an insurance contract will understand fully the complexities of the principles governing their relationship.

The main question that this research paper has to determine is which principle of insurance takes precedence? In relation to this paper the question is which principle among insurable interest, subrogation and non-disclosure supersedes the others?

## **1.2. Principles of Insurance Law**

Before addressing the issue of conflicting principles of insurance it is pertinent to understand the nature of a contract of insurance. In *Prudential Insurance Co. v. Inland Revenue Commissioners*<sup>4</sup> Channell J defined a contract of insurance as one whereby one party (the insurer) promises in return for a money consideration (the premium) to pay to the other party (the assured) a sum of money or to provide him with a corresponding benefit upon the occurrence of one or more of the specified events whose happening is uncertain. In essence insurance is a risk sharing device.

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<sup>3</sup> 2010/HPC/0075

<sup>4</sup> [1904] 2 K.B. 658

At the core of insurance law is the principle of utmost good faith, also known as *uberrimae fidei*. Under general contract law the rule is that each party is entitled to make the best bargain he can as long as there is no false or fraudulent statement made. However, this is not the case for insurance contracts for the reason that the knowledge of the nature of the risk is known by one side of contractual relationship. The effect of this principle is that each party to the contract must refrain from actively misleading the other but must disclose all material information relating to the proposed insurance. The principle imposes a threefold duty namely: 1) the duty to disclose material facts, 2) duty not to misrepresent material facts; and 3) duty not to make a fraudulent claim.<sup>5</sup> This paper will only disclose (1) duty to disclose material facts.

Another very important characteristic of a contract of insurance other than life assurance is that it is a contract of indemnity, which implies that the insured cannot recover or retain for his own benefit more than his actual loss. In the event of a loss resulting from a risk insured against, the insured must be placed in the same position he was in immediately before the loss occurred. It is said that it is in the overall interest of the public that an insured be prohibited from making a profit from a misfortune.<sup>6</sup>

Closely related to this principle of indemnity is the principle of subrogation. Lord Blackburn summarised perfectly the doctrine of subrogation in the following quotation:

“When there is a contract of indemnity...and a loss happens, anything which reduces or diminishes that loss reduces the amount which the indemnifier has to pay, and if the indemnifier has already paid it, then if anything that diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.”<sup>7</sup>

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<sup>5</sup> M. Malila, *Commercial Law in Zambia: Cases and Materials* (Lusaka: UNZA Press, 2006), 481

<sup>6</sup> R. Lowe, 399-400

<sup>7</sup> *Burnand v. Rodocanachi* (1882) 7 App. Cas. 333 at p. 339

What this quotation means is that an insurer who has paid an indemnity is subrogated to the rights of the insured against any third party who is liable to the insured in respect of that loss or damage. If the insured receives a sum of money from a third party in respect of the loss or damage covered by the policy, the principle of subrogation requires him to hold this sum on trust for the insurers, to the extent of any sum paid by them.<sup>8</sup>

Essential to any contract of insurance is the principle of insurable interest, which is defined later in this chapter. It is essential because the whole essence of insurance is the protection of some interest of the insured. It requires that the insured have some interest in the subject matter of insurance.

Having the importance of each one of these principles in mind, there is a need to investigate the clashes that arise among them in their application and how such clashes are resolved. With each principle being of utmost importance, it is pertinent to make a determination of which one of them supersedes the other given a set of facts where these principles are at odds. The case of *Madison General Insurance and Beaver Service Limited v. Konkola Copper Mines* shows a conflict arising among some of the principles of insurance law when a determination of a third party's liability had to be made.

There is therefore a need to revisit this case in order to establish the contribution it has made to insurance law, particularly in resolving clashes arising among the various principles of insurance.

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<sup>8</sup> R. Lowe, 406-407

### **1.3. Overview of the study**

This study is aimed at giving a fuller understanding of the principles of insurance. It aims to highlight the clashes that arise in the application of the various principles of insurance and suggests how they may be resolved.

The justification for this study is the need to elucidate the effect that the misapplication of the principles of insurance has on the insured's rights to make a claim as well as the effect on the third party. The lack of understanding of the principles is what gives rise to wrong claims on the part of the insured and payment of unjustified amounts of compensation to the insurer on the part of the third party.

The findings of this research are bound to be of relevance to the segment of society in which insurance law is a key element. It will bring about vigilance in the construction of insurance clauses in day to day contracts as well as in the meeting of the requirement of insurance where requested.

In achieving its objectives this research will use the pluralist approach which entails use of general law which includes statutes, received systems of law, codifications of customs and customary law in the courts because black letter law does not adequately cover the principles of insurance. It will extract information from books, journals and academic articles and other research paper presentations that have analytically addressed the principles of insurance law and the issues arising from their application. In addition, this study will refer to case law from other jurisdictions on the same matter, as well as the internet.

Sampling techniques will not arise because this work will be qualitative as is typical of most legal research works.

Chapter two of this research paper will isolate and explain in detail the selected principles of insurance law, concluding by bringing to light the research problem. The third chapter will give a full analysis of the case of *Madison General Insurance and Beaver v. KCM* and demonstrate the clash of insurance principles and how the Court resolved this clash. It will also look at how other jurisdictions have approached the problem of clashing insurance law principles. The final chapter will underline the conclusions arrived at from the investigations carried out in the preceding chapters. It will also give recommendations and suggested modifications where necessary.

#### **1.4 Conclusion**

This chapter has explored the nature of an insurance contract and the definitions of the terms insurable interest, subrogation, waiver of subrogation, immunity from subrogation as well as non-disclosure. As highlighted, all the mentioned principles are cardinal to any contract of insurance. Both the insured and the insurer have duties towards each other in relation to these principles, for instance both parties have the duty to disclose. This paper will essentially explore the clashes that arise in the application of the principles of insurance law as for example the effect of non-disclosure of a material fact by the insured on the right of subrogation of the insurer. It will also in brief, consider whether there is need for legislation on insurance to encompass the principles of insurance law and their application. The paper will further refer specifically to the issues of non-disclosure, insurable interest and waiver of and immunity from subrogation as addressed in the case of *Madison General Insurance and Beaver Service Limited v. Konkola Copper Mines* to make a determination of its contribution to the law of insurance in Zambia.

## **CHAPTER TWO**

### **THE CLASHING PRINCIPLES OF INSURANCE: INSURABLE INTEREST, NON-DISLOSURE AND SUBROGATION**

#### **2.1 Introduction**

Essentially, this chapter will look at the principles of insurable interest, non-disclosure and subrogation in detail. It will begin by explaining each principle individually, after which it will link these principles to underscore the clashes that arise among them, such as that between insurable interest of a third party and the insurer's right to subrogation and that between non-disclosure of a material fact by the insured and the insurer's right to subrogation.

#### **2.2 Insurable Interest**

As already highlighted in chapter one, insurable interest is a very significant element of insurance. MacGillivray states that it is the assured's pecuniary interest in the subject matter of the insurance arising from a relationship to it recognised in law. By insurable interest is meant 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.<sup>1</sup>

To understand the nature of insurable interest, it is important to be very clear about the subject of insurance. The subject matter of insurance may be some corporeal or material property of value, for example mining machinery or a house. It could also be an event, the happening of which

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<sup>1</sup> M. Malila, *Commercial Law in Zambia: Cases and Materials* (Lusaka: UNZA Press, 2006), 474

would create a legal liability, for instance insurance effected by a contractor insuring himself against claims for accidents occurring on the construction site.

A distinction is at times 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. The distinction even though very academic is of significance because it is a well established rule of insurance law that the insurance policy does not insure the subject matter but rather the interest of the policy holder in the subject matter. The subject matter of insurance is usually the property but the subject matter of the contract of insurance is the financial interest of the policy holder in the subject matter.<sup>2</sup>

Generally, a person with insurable interest is privy to a contract of insurance. However, one can acquire insurable interest even if not privy to a contract of insurance. For instance, a tenant through a covenant to insure with his landlord acquires insurable interest as long as the covenant was meant to be for the benefit of both the landlord and the tenant.<sup>3</sup>

In the Canadian decision *Mark Rowlands Ltd. V. Berni Inns Ltd*<sup>4</sup> the insurers appealed contending among other things that the tenants were not co-insured with the landlords under the insurance contract and had no insurable interest in the building and that the purpose of the landlords' covenant to insure and reinstate the demised premises out of the policy moneys was to relieve the tenants from their corresponding repairing obligations and accordingly in the absence of an express exemption, exemption from liability for fire caused by negligence could not be regarded as inherent in the lease.

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<sup>2</sup> M. Malila, 475

<sup>3</sup> *Mark Rowland Limited vs. Berni Inns Limited* (1986) 3 All ER 473

<sup>4</sup> (1986) 3 ALL ER 473

The appeal was dismissed for among other reasons the fact that if a person with a limited interest had an insurable interest in the subject matter of insurance, there was no principle of law which precluded him from asserting that an insurance effected by another person was intended to insure for his benefit to the extent of his interest in the subject matter, whether the insurable interest of the person effecting the insurance comprised the whole of the subject matter or only a limited interest in it. On its true construction, the lease did not deprive the tenants of an insurable interest in the continuing existence of the building, nor did it expose them to any prejudice if it was destroyed. It followed that the tenant had insurable interest as tenant of part of the building and the insurance effected by the landlords insured for the benefit of the tenants as well as for the landlords themselves.

Put simply, if the third party has insurable interest as a result of a supervening covenant to insure, they cannot be liable for any liability that arises for instance that under negligence.

The principle of insurable interest is slowly becoming nugatory in some jurisdictions such as Australia where section 17 of the Insurance Contracts Act 1984 provides that one need not have an equitable or a legal right in property to be indemnified by insurance,<sup>5</sup> that is, as it is today in such jurisdictions insurable interest takes an inferior position to principles such as subrogation; but as the decision in the *Madison Insurance Claim* stands, the position in Zambia given the circumstances of the Madison case is that insurable interest supersedes the principle of subrogation at any given time, for an insurer cannot claim against someone with an insurable interest.

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<sup>5</sup> N. L. Jones et al., *MacGillivray on Insurance Law Relating to All Risks Other than Marine 11<sup>th</sup> ed.* (London: Sweet & Maxwell, 2008), 167

### 2.3 NON-DISCLOSURE

As already alluded to, contracts of insurance are contracts of utmost good faith. The principle imposes a threefold duty: 1) duty to disclose material facts, 2) duty not to misrepresent material facts; and 3) duty not to make a fraudulent claim.<sup>6</sup> Relevant to this treatise is (1) duty to disclose material facts. The principle of non-disclosure imposes a duty on both the insured and the insurer to disclose material facts. Material facts being those that would influence the mind of a prudent insurer in granting the contract of insurance should he decide to do so.<sup>7</sup>

The consequence of breach of this duty is that either party to the contract can avoid the contract. Although this duty applies to both parties to a contract of insurance, the duty mainly lies on the insured. The duty to disclose on the part of the insured extends only to facts known (or deemed in law to be known) by the insured and not by the insurer. Fletcher Moulton L.J. in *Joel v. Law Union and Crown Insurance*<sup>8</sup> stated that one cannot disclose that which he does not know, the obligation therefore, necessarily depends on the knowledge that one possesses. The duty of the insured to disclose material facts terminates when the contract is made, however the insured is under a duty to disclose to the insurer even after the contract has already been made, any fact that may alter or affect the insurer's right of subrogation.

If the assured has failed in his duty of making full disclosure, the insurer may, on discovering the full facts, elect to avoid the contract of insurance, and he may do so either before or after a loss has occurred. The contract cannot therefore be said to be automatically avoided by non-disclosure; it remains in force until avoided by the insurer. In short, if the insurer does not avoid the contract it remains in force. If the insurer pays out to an insured that has breached the duty to

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<sup>6</sup> M. Malila, 481

<sup>7</sup> M. Malila, 482

<sup>8</sup> (1908) 2 K.B. 863

disclose, that insurer is taken to have waived his right to avoid the contract. The question one would then ask is whether an insurer who makes such payment also waives his right of subrogation? This will be discussed in later in this chapter.

According to **Browne**, facts affecting the insurers' right to subrogation may be material and must be disclosed. He further states that there is no obligation on the insured to disclose arrangements whereby others may be relieved from liability and get the benefit of insurance unless the insured knows that it would affect the premium if known to the insurers or there is a condition in the policy specifically subrogating the insurers to all rights of the insured against the third party<sup>9</sup> as was in the *Madison Insurance Claim*. Additionally, in *Tate v. Hyslop*<sup>10</sup> it was held that any agreement which reduces the liability of a third party is a material fact requiring disclosure, since it affects the insurer's rights of subrogation.

It would appear that an insured who does not disclose facts that affect the insurer's right of subrogation would be liable to the insurers for any loss that he causes them for this amounts to a breach of the duty to disclose material facts.

Robert Lowe in his book states that if the insured compromises his rights against a third party (for example, by giving a tenant a release under seal from his covenant to repair) he in effect destroys or modifies his insurers' right of subrogation and he is liable to them for any loss which he causes them. The insured therefore has the duty to disclose to the insurer any fact which affects the insurer's right of subrogation.<sup>11</sup>

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<sup>9</sup> D. Browne, *MacGillivray on Insurance Law Relating to All Risks Other than Marine 5<sup>th</sup> ed.* Vol 1. (London: Sweet & Maxwell Limited, 1961)

<sup>10</sup> (1885) 15 Q.B.D. 368, 377

<sup>11</sup> R. Lowe, *Commercial Law 5<sup>th</sup> ed.* (London: Sweet & Maxwell, 1976), 407

## 2.4 SUBROGATION

Subrogation can be defined as the substitution of one person for another so that the person substituted succeeds to the rights of the other. Thus an insurer who indemnifies his insured against loss may be subrogated to the insured person's rights against a third party whose negligence caused the loss.<sup>12</sup> It is sometimes defined as the mode which equity adopts in order to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it.<sup>13</sup>

Lord Blackburn summarised perfectly the doctrine of subrogation in the following quotation:

When there is a contract of indemnity...and a loss happens, anything which reduces or diminishes that loss reduces the amount which the indemnifier has to pay, and if the indemnifier has already paid it, then if anything that diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back<sup>14</sup>

What this quotation means is that an insurer who has paid an indemnity is subrogated to the rights of the insured against any third party who is liable to the insured in respect of that loss or damage. If the insured receives a sum of money from a third party in respect of the loss or damage covered by the policy, the principle of subrogation requires him to hold this sum on trust for the insurers, to the extent of any sum paid by them.<sup>15</sup>

The nature of the doctrine of subrogation is described in greater detail at page 610 of MacGillivray on Insurance Law as conferring two distinct rights on the insurer. The first right is to receive the benefit of all rights and remedies of the assured against third parties which if satisfied will extinguish or diminish the ultimate loss sustained. The second is to claim from the

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<sup>12</sup> Oxford Dictionary of law 7<sup>th</sup> ed. (New York: Oxford University Press, 2009)

<sup>13</sup> *Arnold v. Green* 161 NY 566

<sup>14</sup> *Burnand v. Rodocanachi* (1882) 7 App. Cas. 333 at p. 339

<sup>15</sup> *R. Lowe*, 406-407

assured any benefit conferred on the assured by third parties with the aim of compensating the assured for the loss in respect of which the assured has been indemnified. This research paper is primarily concerned with the first right.<sup>16</sup>

Notwithstanding the insurer's right of subrogation, it is common practice in insurance for the right of subrogation to be expressly waived in the insurance policy by the insurer. Yet the right of subrogation could also be lost in other ways, some of which could be surprising to an insurer as well as the insurer's lawyer. One such means is the exclusion of liability through a covenant to insure between an insured and a third party as is illustrated by the Madison case.

The insurer can lose its right of subrogation consensually; this is what is usually referred to as waiver of right of subrogation. More often than not, there is great difficulty in drawing a distinction between waiver of subrogation and immunity from subrogation for there seems to be a thin line distinguishing the two.

Gregory S. Miller in his article on subrogation explains waiver of subrogation in detail. He states that when an insurer waives subrogation, it waives its right to sue in the name of the insured and recover damages from certain third parties. These third parties, whether by agreement or by implication, may be additional insureds, named insureds, unnamed insureds or even third party beneficiaries. Where an insurer commences a subrogated action against any of these third parties, the third parties can raise the argument that the action cannot be maintained against them because there has been a waiver of subrogation.<sup>17</sup>

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<sup>16</sup> N.L. Jones et al (2008), 610

<sup>17</sup> G.S. Miller, "Waiver of Subrogation," accessed 28 October, [http://www.rmc\\_agr.com/french/\\_ui/publications/waiver\\_of\\_subrogation.pdf](http://www.rmc_agr.com/french/_ui/publications/waiver_of_subrogation.pdf)

When there is a waiver of subrogation, an insurer agrees voluntarily not to exercise rights of subrogation. This usually arises in the context of a waiver clause in a policy.<sup>18</sup> It is submitted that a waiver of subrogation actually involves two separate provisions:

- a) A waiver of subrogation clause contained in the contract between the parties and;
- b) A provision in the insurance policy or an endorsement to that policy, granting permission to the insured to waive in writing, recovery rights against others.<sup>19</sup>

It has always been thought by many legal practitioners as well as insurers that a waiver of subrogation must be consensual and thus express; so, for as long as the insurer has not included in the insurance policy a term allowing the insured to exculpate a third party that causes loss, there cannot be a waiver of subrogation. However, it would seem that immunity from subrogation arising from a covenant to insure between the insured and a third party determines the insurer's right of subrogation even though not expressly stated in the contract of insurance.

Canadian jurisprudence though only of persuasive value is the leading authority on subrogation. The Supreme Court of Canada, through a trilogy of cases, has recognized that (1) a landlord's covenant to insure leased premises is a covenant for the benefit of the tenant and prevents the landlord from bringing a claim, subrogated or otherwise, against the tenant; and (2) a tenant's covenant to pay or contribute to the insurance premiums for the leased premises immunizes the tenant from any claims from the landlord, subrogated or otherwise, and transfers the risk of loss to the landlord.<sup>20</sup>

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<sup>18</sup> J. Birds, *Birds' Modern Insurance Law 7<sup>th</sup> ed.* (London: Sweet & Maxwell, 2007), 329- 330

<sup>19</sup> [www.mwl\\_law.com/cm/articles22735.asp](http://www.mwl_law.com/cm/articles22735.asp) visited 22/02/12

<sup>20</sup> G.S.Miller, 4

The Court of Appeal cited with approval the Canadian decision of *Greenwood Shopping Plaza Ltd v Neil J Buchanan Ltd*<sup>21</sup> in which it was stated thus:

...The landlord's insurer has, by subrogation no greater right than has its insured and thus it also cannot sue the tenant for any insured loss.

What this means is that if the insured cannot exercise any rights against the third party neither can the insurer, for the insurer has against the third party only the rights that the insured has.

As has already been stated, a right to subrogation will be lost if the insured enters into a covenant to insure with a third party which inures for the benefit of both the insured and the third party. The covenant to insure immunises the third party from any action against him by the insurer since such third party becomes a co-insured.

According to *Chitty*<sup>22</sup>, an insurer is not entitled to sue one co-insured if it was intended by the assured and that other person that any loss should be recouped solely from the insurance moneys.

The insurer therefore, cannot exercise its right of subrogation against a co-insured third party, whose privity to the contract of insurance arises from a covenant to insure. However, as discussed under the principle of non-disclosure even before a loss has occurred, the insured is under a duty not to contract so as to diminish or exclude rights to which the insurer would become subrogated upon paying for the loss. When the insured compromises his rights against a third party (for example, by giving a tenant a release under seal from his covenant to repair) he in effect destroys or modifies his insurers' right of subrogation and he is liable to them for any loss which he causes them.<sup>23</sup>

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<sup>21</sup> (1979) 99 DLR (3d) 289

<sup>22</sup> *Chitty on contract, Specific contracts*. 29<sup>th</sup> ed. Vol 11. (London: Sweet & Maxwell, 2004), 1214

<sup>23</sup> *Chitty on Contracts*, 1215

This means that the insurer has a right of action against the insured who compromises its right of subrogation for the loss that the insured suffers from an act of a third party. It would appear that an insured must disclose any fact relating to the insurer's right of subrogation. Failure to do so makes the insured susceptible to liability.

It is in attempting to establish the liability of a third party just so the right to subrogation can be exercised that there arises a clash among the various principles of insurance law. As aforementioned due to non-disclosure of the existence of a covenant to insure by the insured, the insurer usually takes out an action against the third party. But this is a wrong action, even if the third party was not privy to the contract between the insurer and the insured, he has insurable interest arising from the covenant to insure and the non-disclosure does not affect the third party because the duty is on the insured. So if the insurer suffers loss as a result of the insured compromising its right to subrogation, according to Lowe, the insurer must recover its loss from the insured and not the third part for such third part is protected from any liability.

## **2.5 The Clash**

Having considered and explained in detail, in so far as is relevant to this research paper, the three principles of insurance law, the conflicts then arising from their application are:

1.) as between insurable interest and subrogation; that once a covenant to insure has been effected by the insured with a third party, which covenant excludes the third party from any liability, the insurer cannot exercise its right of subrogation against such third party with the argument that the third party has no insurable interest and was not privy to the contract of insurance. This is because the covenant to insure bestows upon the third party insurable interest and thereby immunity from subrogation. The question then is, is the principle of insurable

interest more superior to that of subrogation? Given the research, it would appear that at any given time, the principle of insurable interest supersedes that of subrogation because the right of subrogation cannot be exercised on one with insurable interest.

2.) as between non-disclosure and subrogation; that an insurer that pays out to the insured who has breached the duty of disclosure waives its right to avoid the contract of insurance and in effect also waives its right of subrogation against a third party. An insurer's remedy for breach of the duty to disclose material facts by the insured is to avoid the contract of insurance. If the insurer pays out to the insured who is in breach and loses its right to avoid the contract, it cannot then proceed after the third party for compensation. The question then is whether the principle of non-disclosure overrides that of subrogation. It would appear that the principle of non-disclosure supersedes that of subrogation because the failure to disclose material facts by the insured compromises the insurer's right of subrogation.

## **2.6 Conclusion**

This chapter has explained in detail the principles of insurable interest, non-disclosure and subrogation. It has linked these three principles and has highlighted that a clash arises between the principle of insurable interest and subrogation when the insured enters into a covenant to insure which exculpates the third party from any liability. In this clash the principle of insurable interest supersedes that of subrogation because the right of subrogation cannot be exercised against a co-insured. As between subrogation and non-disclosure, the conflict arises when the insured does not disclose to the insurer facts that compromise the insurer's right of subrogation. In this clash the decision by the insurer to pay out to the insured who has breached the duty to disclose affects the insurer's right of subrogation. The next chapter analyses the *Madison*

*Insurance Claim* and illustrates how a clash of insurance law principles arose as a result of the existence of a supervening covenant to insure.

## **CHAPTER THREE**

### **THE MADISON INSURANCE CLAIM**

#### **3.1 Introduction**

On 26<sup>th</sup> August 2010 the High Court of Zambia passed, what can be termed as a seminal judgment on an issue that has never before been a subject of judicial consideration in Zambia. For the first time in Zambia, the High Court in the case of *Madison General Insurance Company Limited and Beaver Services Limited v. Konkola Copper Mines Plc (Madison Insurance Claim)* addressed what, according to this research paper, can be referred to as a clash of insurance principles. In as much as this decision has received acclamation, it is not without criticism. This chapter will analyse the decision and explain how the Court addressed the issue on clashing principles of insurance and also look at the reasoning implored by the Court in arriving at the said decision and the criticisms advanced against this decision.

#### **3.2 Brief facts of the Madison Insurance claim**

This is a case in which the claim issued by the plaintiffs Madison Insurance Company limited (insurer) and Beaver Services Limited (insured) against the defendant Konkola Copper Mines Plc (third party) was for damages allegedly occasioned upon the insurer by the third party's alleged refusal or failure to indemnify the insurer under its claimed rights of subrogation. The claim arose out of an insurance policy between the insurer and the insured. The third party was not a party to this insurance contract, that is, it was neither a co-insured nor was it named in the policy of insurance.

The All Risk Insurance Policy taken out by the insured contained a subrogation clause which allowed for the insurer on its own to claim by way of subrogation. Clause 6 provided thus:

The insured shall not at the expense of the insurers do and concur in doing and permit to be done all such acts and things as may be necessary or required by the insurers of any right or remedies, or of obtaining relief of indemnity from parties (other than those insured under this policy) to which the insurers are or would become entitled or which is or would be subrogated to them upon their paying for or making good any loss or damage under this policy...

Subsequent to taking out this policy, Beaver Services Limited entered into a contract of service with Konkola Copper Mines (KCM). The underlying commercial transaction between the insured and the third party contained a clause 6.2 which gave rise to a covenant to insure the machinery that the insured was going to use in the performance of the contract, as the insured was a contractor engaged by the third party to carry out work at the third party's commercial premises. Clause 6.2.1 reads thus:

The contractor shall effect a policy of insurance against injury to persons and damage to property in the joint names of itself and the Employer and any sub-contractor appointed by the contractor against legal liabilities for the death of or bodily injury to third parties and loss of or damage to their property caused by or arising out of the execution of the contract. Such insurance policy is to be effected with an insurer acceptance to the employer and in terms to be approved by the engineer, which approval shall not be unreasonably withheld.

Contrary to the covenant to insure, the insured did not take out insurance in the joint names of itself and the third party, and any sub-contractor appointed by the insured as was required by clause 6.2 of the Service Contract. It is important to note that the covenant to insure was clearly expressed to insure for the benefit of both the insured and the third party.

A fire broke out and the machinery which was the subject of insurance was destroyed. There was no dispute as to the third party's negligence in respect of the fire. The insured was indemnified by the insurer, and joining the insured as the second plaintiff, the insurer proceeded to issue a

writ of summons against the third party in exercise of its rights of subrogation under clause 6 of the insurance contract. Having in mind the covenant to insure, Wood J observed that the controversy which had to be determined was whether or not a subrogated claim was plausible in law in light of these circumstances.

A clash of insurance principles arose on the determination of the effect of the covenant to insure on the third party's liability.

### **3.3 Crux of the arguments**

The crux of the insurer's argument was that the subrogation clause in the contract of insurance was applicable and so the insurer could therefore claim the money it paid the insured. Further it was argued that the insurer was not aware of the covenant to insure and the third party had no insurable interest, therefore the third party could not escape liability.

Counsel for the third party on the other hand submitted that subrogation did not arise because there was a supervening covenant that was given by the insured to the third party and taken to cover by an insurance policy for the risk of loss from fire, even fire that may have been caused by negligence. It was argued that since the insured could not sustain a claim against the third party under the contract, neither could the insurer.

Counsel for the insurer cited the case of *John Edwards and Company v. Motor Union Insurance Company*<sup>1</sup> in support of the insurer's right of subrogation. To distinguish the authorities cited by plaintiff's counsel from the Madison Insurance claim, Wood J pointed out that in the *Madison Insurance Claim* the insured took out an insurance policy prior to entering into a service contract

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<sup>1</sup> (1922) 2 UB 243

with the third party which contract required the insured to have insurance cover in the joint names of itself and the third party as well as any sub-contractor appointed by the insured.

In furtherance of the third party's arguments counsel for the defendant cited a few English and Canadian decisions highlighting the point that subrogation did not arise where there was a supervening covenant to insure exonerating the third party from any liability that could possibly arise. One such decision was the case of *Mark Rowlands Ltd v. Berni Inns Ltd*<sup>2</sup>; the brief facts of that case are that the landlords let the basement and ground floor of their premises to the tenants. Under the term of the lease, the tenants covenanted to pay such sums (the insurance rent) equal to the amount spent by the landlords in maintaining insurance of the demised premises. The lease further provided that in the event of the premises being destroyed by fire the tenants would be relieved from the repairing obligations under the lease and the landlords would apply the insurance moneys in reinstating the premises. When the building was destroyed by a fire caused by the tenant's negligence it was held that since under the terms of the lease the insurance had been effected for the joint benefit of the landlords and the tenants, the insurers could not make a subrogated claim against the tenants.

In the same case, the insurer had raised the argument that the tenant was not a co-insured and did not have any insurable interest. As regards this particular issue, it was held that on its true construction, the lease did not deprive the tenants of any insurable interest in the continuing existence of the building, nor did it expose them to any prejudice if it was destroyed. It followed that the tenants had an insurable interest as tenants of part of the building and the insurance effected by the landlords insured for the benefit of the tenants as well as for the landlords themselves.

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<sup>2</sup> (1986) 3 ALL ER 473

The court of appeal in deciding the *Mark Rowlands case* cited with approval the Canadian decision of *Greenwood Shopping Plaza Ltd v Neil J Buchanan Ltd*<sup>3</sup> in which it was stated thus:

...The tenant can rely on the landlord's covenant to insure and can refrain from insuring against any liability to the landlord for its own negligence. The landlord then must look only to its own insurance if it suffers loss and cannot sue the tenant for loss that it had promised to insure. The landlord's insurer has, by subrogation no greater right than has its insured and thus it also cannot sue the tenant for any insured loss.

Counsel for the third party also referred to an article authored by Lindsay Kenney, a partner in Lindsay Kenney LLP, a Canadian law firm. The learned author of this article provides a concise review of Canadian jurisprudence on the issue of waiver of and immunity from subrogation. It should be noted that the Canadian Supreme Court was the forerunner on this area of the law.

In terms of this article, and this is supported by English and Canadian decisions such as the ones cited above, the law on waiver and immunity from subrogation is:

- a) A third party may resist a subrogated action on the basis either that there was a waiver of subrogation by the insurer in the insurance policy or that the third party is immune from subrogation;
- b) Immunity from subrogation may arise from an express or implied covenant to insure intended to be for the benefit of the insured and the third party in a contract between the two;
- c) Where such a covenant to insure is found to exist, it is irrelevant whether there has been an express waiver of subrogation. The Covenant to insure confers immunity from subrogation on the third party from a common sense angle; if the insured cannot sue the third party because the insured was under obligation to insure, there are no rights for the insurer to step into;

d) In order to confer immunity, the words of the covenant must clearly and unambiguously show that it was meant to expressly or impliedly inure for the benefit<sup>4</sup>

This was cited by counsel for the defendant to oppose the plaintiff's submission that for the right to subrogation to be resisted there must be an express waiver.

Counsel for the plaintiff submitted that the plaintiff had not been aware of the covenant to insure so the third party could not escape liability. However, counsel for the defendant submitted that if the insurer's only quarrel is that they were not aware of a covenant restricting the right to subrogation in the contract between the assured and a third party, their remedy lies against their assured who is always obliged to disclose material facts to the insurer. This obligation in contracts *uberrimae fidei* (contracts of utmost good faith) a status that insurance contracts enjoy, is a continuing one. There is no privity between the insurer and the third party and therefore no obligation on the third party to disclose the fact of the covenant to the insurer. Notably, this is not an issue that has even arisen in the many cases cited on the subject to the Court.

Applying the reasoning of the *Mark Rowlands case* as well as the other cited authorities, the Court held that clause 6.2 of the contract of service was a covenant with and for the benefit of the Defendant which provided that the insured would keep the machinery insured against loss by fire, including fire caused by anyone's negligence. The third party could rely on the insured's covenant to insure and could therefore refrain from insuring against any liability to the insured for its own negligence.

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<sup>4</sup> G. S. Miller, "Waiver of Subrogation," accessed 28 October, 2011, [http://www.rmc agr.com/french/ ui/publications/waiver\\_of\\_subrogation.pdf](http://www.rmc agr.com/french/ ui/publications/waiver_of_subrogation.pdf)

After a consideration of the facts and the law, the Court dismissed the claim holding that the insurer had no subrogated right of claim against the third party by reason of the immunity implied in the covenant to insure.

As regards the argument that KCM had not been co-insured nor had any insurable interest, the decision in the mark Rowlands case was applied. In that case it was stated that a third party with very little interest in the subject matter could acquire insurable interest emanating from the covenant to insure. This has been particularly addressed in chapter two of this research paper in the section discussing insurable interest.

Counsel for Madison Insurance raised the argument that the insurer was not aware of the covenant to insure between the insured and the third party; therefore it could still exercise its right of subrogation. In delivering its judgment, the High Court did not address this particular issue.

The judge decided in favour of the defendant and agreed with the defendants reasoning as regards the covenant to insure. It was held that the nature of the covenant to insure is such that the third party acquired tort immunity from a subrogated claim.

### **3.4 The clash explained**

What prompted the discussion of subrogation, insurable interest and non-disclosure as the clashing principles of insurance law were the unusual circumstances of the Madison claim. Having analysed the facts thoroughly, it would appear that the clash arose as a result of a lack of understanding that the right to subrogation can be lost in a way that the insurer as well its lawyer may have never imagined, such as a covenant to insure. It is important to note from outset that at

The core of the confusion is the lack of appreciation of the effect of a covenant to insure on the insurer's subrogation rights and the third party's liability.

In this case the clash between subrogation and insurable interest arose from the fact that when the insured had taken out an insurance policy for the machinery, it was prior to the contract of service with the third party which contract contained a covenant to insure as aforementioned in the facts, the insurance contract between Madison Insurance and Beaver contained a subrogation clause entitling the insured to exercise its right of subrogation against third parties who were liable to the insured. The insurer in attempting to exercise its rights of subrogation argued that the third party was not privy to the contract of insurance between itself and the insured; therefore it had no insurable interest in the machinery for it to be free from any liability.

As was explained in chapter two of this research paper, a person with insurable interest cannot exercise the right of subrogation exercised against him. In resolving this conflict between a third party's insurable interest and the insurer's right of subrogation, the court applied the decision in the *Mark Rowlands case* in which it was illustrated that a third party, even though having very little or no interest in the subject matter of insurance, can acquire insurable interest through the insured's covenant to insure. Similarly, in this case KCM even though not privy to the contract of insurance between Madison Insurance and Beaver Services Limited acquired insurable interest from the covenant to insure which was insured for the benefit of both KCM and Beaver. According to the explanation given in chapter two, an insurer cannot exercise its right of subrogation against a third party who acquires insurable interest from a supervening covenant to insure.

The other notable clash existing in this particular case is that between the principle of subrogation and that of non-disclosure. Notably, this was not addressed by the court but non-disclosure is one of the issues that arose in this case. Counsel for the defendant submitted that if the insurer's only quarrel is that they were not aware of a covenant restricting the right to subrogation in the contract between the assured and a third party, their remedy lies against their assured who is always obliged to disclose material facts to the insurer. This obligation in contracts *uberrimae fidei* (contracts of utmost good faith) a status that insurance contracts enjoy, is a continuing one. There is no privity between the insurer and the third party and therefore no obligation on the third party to disclose the fact of the covenant to the insurer. The plaintiff had contended that it was not aware of any supervening covenant to insure existing between Beaver Services Limited and KCM; therefore, it could not be asserted that Madison Insurance as the insurer could not exercise its right to subrogation. Having discussed the law on non-disclosure and subrogation in chapter two it would appear that the clash between non-disclosure and subrogation arose from the fact that Beaver Services neglected to disclose to Madison Insurance the existence of a covenant to insure between itself and KCM. According to the decision in *Tate v Hyslop*<sup>5</sup> any agreement which reduces the liability of a third party is a material fact requiring disclosure, since it affects the insurer's rights of subrogation. It was the insured's duty to disclose to the insurer the existence of a covenant to insure as this reduces the third party's liability and affects the insurer's right of subrogation.

There was a duty on Beaver services to disclose to Madison Insurance the existence of the covenant to insure arising from the contract of service between itself and KCM. Failure to disclose a material fact by the insured entitles the insurer to avoid the contract. The question that

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(1885) 15 Q.B.D. 368, 377

those from the facts of the Madison claim is whether the decision by Madison to indemnify Beaver Services for the loss of the equipment when Beaver Services had breached its duty to disclose material facts led to a waiver of its right to subrogation. If Beaver had disclosed the existence of the covenant to insure, Madison would not have paid out the claim because the nature of the risk insured against would have changed. However, Madison paid out and due to the non-disclosure of the existence of the covenant it could not exercise its right of subrogation against KCM. In this particular set of facts, the non-disclosure compromised the right of subrogation.

## 5 Commentary

Having considered the law set out above and the decision of the court, one is left to ask the question 'with the existence of a covenant to insure, exonerating the third party of liability, how often did the Madison insurance claim find itself in the High Court of Zambia?

The explanation would lie in understanding the legal environment that existed before the Madison insurance claim. This research paper will consider two factors in explaining this. First, there is a lack of understanding of the application of the principles of insurance law, for example the majority of insurers as well as the insurers' lawyers do not appreciate that the rights of subrogation could be lost through a covenant to insure. A consequence of this lack of understanding it would appear is the belief that insurer subrogation exists such that even a barred subrogated claim could still be made against a third party.

The second factor is that the law relating to tort immunity from subrogation arising from a covenant to insure in Zambia is very unclear. The dearth of domestic jurisprudence in this area of

insurance law justifies this claim. A review of case law<sup>6</sup> and the relevant legislation (the Insurance Act<sup>7</sup>) fortified the view that there is a lack of sufficient jurisprudence on the principles of insurance law and the effects of their application.

The importance of the Madison Insurance Claim in light of the effect of a covenant to insure on the principles of insurance law cannot be overemphasised; this case has presented the court with an opportunity to clarify the law on covenants to insure and the effect on the principles of insurance law. Whether the court utilised this opportunity to its fullest will be addressed later in this chapter.

### **3.6 A brief critique of the Madison Insurance claim**

The *ratio decidendi* in the Madison Insurance Claim is a much appreciated development in insurance law in Zambia. Wood J clearly illustrated that misconceptions on insurer subrogation are not to be entertained by the court.

In effect, the court established that if, on a true construction of the contract or agreement, a covenant to insure was intended for the benefit of both the insured and the third party, the third party when commits a tort, cannot be sued by the insured in the event of damage caused by an insured risk and the insurer can be in no better position.

As earlier alluded to, the existence of a covenant to insure that immunises a third party from liability is a material fact that the insured ought to disclose to the insurer, failure to which the insured would be in breach of the duty of utmost good faith, non-disclosure in particular. One would have expected the court to clarify the law on how non-disclosure affects the insurer's right

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<sup>6</sup> For example in the case of *Freshint Limited & Kawambwa Tea Company Limited* SCZ Judgment No.33 of 2008 the Supreme Court of Zambia made reference to, but did not get into detail about subrogation

<sup>7</sup> Chapter 392 of the Laws of Zambia

of subrogation. However, the court did not seize the opportunity to clarify the law on this issue, so to date; this area of the law remains unclear.

The court's observation was that the controversy which had to be determined was whether or not subrogation applied to the *Madison Insurance Claim*. From the wording of this statement one would be led to think that the law on insurer subrogation in Zambia is well established. Quite the contrary, the court's judgment did not make any reference to any Zambian authority. With full knowledge and awareness of a lack of domestic jurisprudence on the subject of insurer subrogation, one would think the court would have seized this opportunity to clarify the law on this subject as well as shed more light on supervening covenants to insure and the clashes that often suffice. The court did no such thing and approached this case with what would seem to be an assumption that the law on this subject was very clear.

Although the holding of the court admittedly recognises the effect of a supervening covenant to insure, it is the contention of this research paper that the court glossed over important issues arising from the facts of the *Madison Insurance Claim*.

### **3.7. The decision on the Madison Insurance Claim: A missed opportunity?**

As already mentioned, this decision is one deserving of praise. It established that a third party liable in tort cannot be sued by the insured in the event of damage or destruction by a risk insured against and the insurer is in no better position, taking the true construction of a covenant to insure that it was intended for the benefit of both the insured and third party. This gives a little recognition of immunity from tort liability in relation to subrogated claims.

However, taking into consideration the importance of the subject of immunity from tort liability arising from a covenant to insure, one would have expected high judicial activism than that

shown by Wood J in the *Madison Insurance Claim*. Taking a look at the case, one would quickly notice the lack of domestic jurisprudence on insurer subrogation in the context of covenants to insure and the clashes of insurance law principles then arising. It is surprising that the court did not fully acknowledge that the *Madison Claim* is a first of its kind in Zambia and therefore justified special and full attention from the court, especially on the effects on the rights of the insurer.

The court did not sufficiently clarify the law to bring it at par with other jurisdictions that have developed to the extent of recognising that immunity from subrogation resulting from a covenant to insure is a defence for a third party who would otherwise be liable. The court could have considered more Canadian jurisprudence (which is the forerunner on this subject) to clarify the Zambian position on covenants to insure. It could be argued that the court did not require more than it already had, what was needed was an intentional and forceful judicial pronouncement meant to clarify the law on insurer subrogation, and therefore, covenants to insure and apparent clash of insurance law principles. Unless there had been an appeal, which there was not, The *Madison Insurance Claim* is a missed opportunity in elaborating the law on insurer subrogation. Hope is only in another claim of a similar nature coming before the High Court of Zambia

### **3.8 Conclusion**

In summation, it could be said that the *Madison Insurance Claim* decision addressed an issue in insurance law, which has never before been a subject of litigation. This claim brought to light the fact that a lack of a full understanding of the principles of insurance law can lead to a clash arising in the application of some of these principles. In resolving the clashes that arose in this case, the decision clarified for the first time that immunity from subrogation by way of a

covenant to insure is a defence for a third party who under ordinary circumstances would have been liable. It also clarified the fact that a third party can acquire insurable interest from a supervening covenant to insure even though not privy to the contract of insurance subsisting between the insured and the insurer. In as much as this decision has made a major contribution to insurance law in Zambia, it can be argued that the court did not give it the attention it deserved, for it was a golden opportunity for the court to fully clarify the law on insurer subrogation in Zambia. However, the court did not seize this opportunity and therefore the case can be said to be a missed opportunity. Wood J's judgment was not explicit on the law of insurer subrogation. The next chapter will look at the way forward after this missed opportunity to make explicit the law on covenants to insure and their effect on insurer subrogation.

## **CHAPTER FOUR**

### **CONCLUSION: THE WAY FORWARD (PROPOSED SOLUTIONS)**

#### **4.1 Introduction**

Having come to the end of this paper entitled: “A clash of Insurance Principles: The case of *Madison General Insurance Company Limited and Beaver Services Limited v. Konkola Copper Mines Plc*” this chapter seeks give account of the discourse in previous chapters and to make recommendations for a way forward in Zambia as regards the problems arising in the application of the principles of insurance law especially when there exists a covenant to insure. It attempts to suggest solutions to the problems identified against the backdrop of the *Madison Insurance Claim* discussed in chapter three of this treatise.

It will be recalled that in deciding the *Madison Insurance Claim*, the court held that the insurer could not claim against the third party because of the fact that the covenant to insure existing in the contract between the insured and the third party barred the insurer’s right to subrogation. It has been established that a covenant to insure even though quite apart from the contract of insurance bestows upon a third party immunity from subrogation.

An examination of the Madison Claim in chapter three brought to light problems of little or no knowledge on insurer subrogation in Zambia by the insurer itself and the insurer’s lawyers; and secondly a gap in the law emanating from the scarcity of Zambian jurisprudence on immunity from insurer subrogation arising from a covenant to insure

#### **4.2 Recognising immunity from a subrogated claim**

As has already been mentioned, one of the major problems leading to a clash of insurance law principles is the failure to recognise a third party’s immunity from subrogated claims. One way

in which this immunity arises is through a covenant to insure. In Canada, as can be seen from the Canadian authorities discussed in chapter two and three of this treatise, courts have upheld this in landlord-tenant situations whereby the landlord covenants to obtain insurance to cover the premises or the tenant contracts to pay insurance as part of the rent.<sup>1</sup> Therefore, the legal principle developed by the Canadian Supreme Court is that a covenant to insure in an agreement gives rise to immunity from tortious liability on the third party or indeed a co-insured or unnamed insured. It can be seen that in the *Madison Insurance Claim* decision the court extended the application of tort immunity from subrogation from just landlord-tenant situations as acknowledged by the Canadian decisions to another commercial agreement. The extension of application of the doctrine of tort immunity is purely the discretion of the courts, which when faced with a real situation can exercise judicial activism. However, as has been suggested in chapter three the court did not employ judicial activism and failed to realise that the issue of immunity from subrogation as well as the conflicts arising from such immunity presented itself before the court for the very first time in Zambia.

As a first step, the court could have acknowledged and clarified that the Canadian and English cases it relied on recognise immunity from insurer subrogation in the context of landlord-tenant relationships, whereas, having recognised the general principle of immunity from subrogation, it was applying the principle in a situation that went beyond the landlord-tenant relationship. If the court had done this, it would have made clear the general position of Zambia law on the issue of immunity from insurer subrogation in relation to covenants to insure.

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*Mark Rowlands v. Berni Inns Ltd* (1986) 3 All ER 473

It is important to note that even though the *Madison Insurance Claim* is a missed opportunity, it has stirred Zambian Jurisprudence in the right direction as regards immunity from subrogated claims.

Mzumara in his thesis entitled ‘Insurer Subrogation in Zambia: A jurisprudential analysis of the doctrine of tort immunity from a subrogated claim,’ terms the mistaken belief in the existence of insurer subrogation as *insurer subrogation mirage*<sup>2</sup>. Borrowing this term, this research paper recommends that to solve the problem of conflicting principles of insurance it is important to detect *insurer subrogation mirage*. Mzumara<sup>3</sup> in his work suggests a two-tier mechanism for detecting *insurer subrogation mirage* which will be discussed later in this chapter.

Against the background that failure to appreciate the doctrine of immunity from liability arising in the context of a covenant to insure leads to *insurer subrogation mirage* this paper recommends the two-tier test as suggested by Mzumara, which with the correct application could prove helpful to the insurer and the insurer’s lawyer faced with the same problem as in the *Madison Insurance Claim*. The mechanism will significantly contribute in filling the lacuna in the law resulting from a lack of appreciation of the fact that insurer subrogation can be lost by immunity arising from a covenant to insure. If the Madison Insurance lawyers had insight of this two-tier test, the parties could have been saved a lot of time and costs resulting from litigation.

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<sup>2</sup> T. Mzumara. “Insurer Subrogation in Zambia: A Jurisprudential Analysis of the Doctrine of Tort Immunity from a Subrogated Claim” (Masters thesis, University of Cape Town, South Africa, 2011), 3

<sup>3</sup> T. Mzumara, 54

### **4.3. The two-tier test**

#### **4.3.1 Stage one**

The first step to applying the two-tier mechanism as suggested by Mzumara is to establish the insurer's right to subrogation. For an insurer to exercise its right to subrogation, three conditions have to be fulfilled; i) the insurer must establish that the insurance is one of indemnity, ii) that the insurer has made payment to the insured under the insurance policy; and iii) that the insurer's rights of subrogation are not excluded by a term of the policy of insurance.<sup>4</sup> Once these conditions have been met, stage one of the two tier test can said to have been satisfied. If any one of these conditions is missing, it entails that the insurer has no exercisable right of subrogation and the enquiry need not be taken any further.

#### **4.3.2 Stage two**

Provided that stage one is satisfied, the next step is to determine, notwithstanding that the three conditions have been met, whether the insured has a right of action when all circumstances surrounding the case have been considered. This second part of the two-tier mechanism is based on the principle that if the insured has no right of action against the third party, the insurer cannot be in a better position than the insured. If the determination is in the negative, the implication is that there is no exercisable right of subrogation. If however, the determination takes an affirmative approach, there is need to make a further enquiry as to whether there exists an underlying contract (express or implied) between the insured and the third party that bars or has terms which may be construed as barring subrogation. If this second question is answered in the affirmative, it could suggest an absence of rights of subrogation.

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<sup>4</sup> C. Mitchell and S. Watterson. *Subrogation: Law and Practice ed.* (London: Sweet & Maxwell,2007), 324

### **4.3.3. Justification for the two-tier mechanism**

This test is simple and effective, it is intended to provide lawyers and litigants and potential litigants with a way out of the trap of the belief that there exists a right of subrogation when there is none (*insurer subrogation mirage*). Once parties are free of this trap or misconception, there will not arise any clash among the principles of insurance law, seeing that these conflicts only arise as a result of the lack of appreciation of immunity from tort liability arising from a covenant to insure. Application of the two-tier test will save the court time and the litigants or potential litigants money which would otherwise have been spent on litigation.

### **4.4. Cure to the dearth of Zambian jurisprudence on Insurance Law principles**

One of the problems that have been identified in this research paper is the lack of provision in the Insurance Act of any law on the principles of insurance law. The lawyers and the courts have had to rely or is it, rely heavily on common law on this particular subject. It is the lack of express provision in our own legislation that leads to confusion in the application of these aforementioned principles of insurance. Recommendation is that the law on insurance in Zambia should be revised so as to expressly provide for insurance principles and also how to resolve conflicts arising among them in their application, for it is very important to be governed by sound principles of insurance. The insurance Act should encompass the principles as expounded in the Madison Insurance Claim.

### **4.5. Eliciting disclosure to the insurer**

It has been argued that a term in an agreement requiring one party to insure may determine the liability of the other party. The gist is that the party obliged to insure bears the risk of the event insured against such that even if the event is brought about by the fault of the other, the latter is

not liable to the one with the obligation to insure and therefore neither is he liable to the insurer by means of subrogation. This follows from the argument that a covenant to insure creates immunity from liability in the context of a subrogated claim.

The insurer is rarely aware of such immunity and his lawyer through no negligence tends to make a claim against the third party, which claim is wrong. The effect of this immunity on the insurer is that the insurer cannot exercise its right of subrogation against a third party. As has already been discussed in both chapters two and three, the presence of a covenant to insure is a material fact which affects the insurer's right to subrogation and must therefore be disclosed by the insured who has entered into an agreement with a third party. Suggesting that the insurer be the one to elicit disclosure of this material fact could sound redundant. The truth, however, is that this could be a real problem for the insurance industry in that insurers would be losing their subrogation rights without even being aware of it, as was the case in the *Madison Insurance Claim*. Credit be given to the *Madison Insurance Claim* for bringing to light the necessity for such disclosure.

#### **4.6. Conclusion**

This research has identified that a lacuna in the law and a lack of appreciation of the doctrine of tort immunity from insurer subrogation resulting from a covenant to insure is what gives rise to what this paper has termed as a clash of insurance law principles. It has established from the facts of the *Madison Insurance Claim*, that when there exists a covenant to insure which the insurer is not aware of, a conflict between the insurer's right to subrogation and the third party's insurable interest (which emanates from the covenant to insure) arises. It has also established that

when an insured does not disclose the existence of a covenant to insure, the non-disclosure affects the insurer's right to subrogation.

The research has also identified ways in which a clash of insurance principles can be avoided. One such way is the two-tier mechanism which requires the determination of the insurer's rights of subrogation, taking into consideration the various facts surrounding each case. Another way is through eliciting disclosure, this is to say that the insurer must elicit to the insured to disclose the existence of a covenant to insure which determines a third party's liability. Thirdly, a legislative approach to bridge the gap in the law on insurer subrogation since the *Madison Insurance Claim* is a missed opportunity to clarify the law on this particular subject. An illustration of legislative action is by including in the Insurance Act<sup>5</sup> the principles of insurance law and anything incidental to their application.

All in all a lack of clarity on the law on insurer subrogation should not discourage insurer's for there are ways as has been explained by which they can escape the trap of *insurer subrogation mirage* and the adverse consequences resulting from it.

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<sup>5</sup> Chapter 392 of the Laws of Zambia

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