For One or For All: Joint and Composite Insurance Policies

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Introduction

Since their development in the 14th century, insurance policies have been the most adaptable of commercial instruments in that they are contracts whose purpose is to transfer risk from one person - the assured - to another person - the insurer. The transfer is not carried out as part of a larger project where both the risk-transferor and the risk-transferee invest money and assets and agree to an allocation of risk as part of their commercial investment. The transfer of risk under an insurance policy is carried out in exchange for cash, the premium, and nothing more. It represents an ingenious commercial innovation which attends most of the world's investments and transactions even as the globe moves from its modern to post-modern phase.

One of the significant developments in insurance policies is their readiness and ability to accommodate more than a single interest. The classic insurance policy insures one person in respect of a single subject-matter insured with one insurer, albeit against a multitude of risks or perils. If all insurance policies were so constrained, they would have limited commercial appeal. Accordingly, insurance policies have for a long time allowed the insurance of multiple interests with multiple insurers. Indeed, most commercial insurances placed in the London market are placed in a subscription market, where the risk is shared between numerous subscribing insurers.[1] Memorably, in *The Zephyr*,[2] Hobhouse, J referred to the separate contracts entered into between each of the parties as a "bundle of contracts" embodied in a single contractual document, ordinarily a slip:

> "The slip at all times remains a document which purports to be a composite bundle of contracts between each of the assured (or reassured) on the one side and each of the insurers (or reinsurers) on the other side. That is its nature as a contractual document in accordance with the practice of the market and for this purpose there is no difference between original insurances and reinsurances."

This arrangement will have a number of consequences, especially if each underwriter is operating and contracting separately. The time at which each contract of insurance is concluded with each insurer will be different, depending on when each underwriter signs his or her initials to the slip. This difference in timing will in turn dictate when the duty of fair presentation of the risk will come to an end, as the duty ceases when the contract is concluded. It also means that there may be different defences available to each insurer depending on the circumstances in which each contract is formed. Such complications may be overridden at least in part by a number of underwriters authorising a leading underwriter to agree to the terms of a contract on their behalf. We shall return to this "composite bundle of contracts" referred to by Hobhouse, J in a moment.

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[1] This is reflected in sect. 24(2) of the Marine Insurance Act 1906: "*Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured*". See *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] 2 Lloyd's Rep 287, 290-291.

[2] [1984] 1 Lloyd's Rep 58, 69-72, 81.

The insurance of multiple interests is represented in one or both of two ways. First, it is possible for more than one subject-matter to be insured in one insurance policy. In a property policy, this will frequently involve the insurance of a number of items of property, whether they are buildings, motor vehicles, artworks, stamps, or ships. If the property can be identified at the time of the writing of the risk, the property will be identified in a policy schedule, perhaps with provision for the addition of further property. It is a question of construction of the relevant insurance policy whether the insurance of each item of property is a separate insurance contract. A fleet policy will very often provide that "Each vessel deemed to be a separate insurance". Where, however, the property cannot be identified but it is expected that there will be a flow of property to be insured during the policy period, other mechanisms are deployed for this purpose, such as floating policies or open covers, to insure the shipment of commodities or the storage of stock as and when such goods come into the assured's hands.[3] In a liability or financial loss policy, the multiple subject-matters will be more closely tied to the identity of a particular assured or a particular item of property.

Second, it is possible for the interests of more than one assured to be insured in the one policy document. An assured is a party to an insurance contract. A person who may benefit from an insurance policy, but who is not a party to the contract, is more commonly identified as a beneficiary or loss payee. An assured may find itself a party to an insurance contract by a number of different means. The assured may be named in the policy; the assured may be identified in the policy as falling within a described class (*e.g.* associated or subsidiary companies), or the assured may sue or be sued on a contract by reason of an agent having concluded the contract for the assured as its principal, whether the assured is unnamed or undisclosed.[4] This paper is concerned with the composite nature of policies insuring multiple assureds.

Joint policies

This paper refers in its title to "joint" and "composite" insurances. These words have been used interchangeably over the years,[5] and it is therefore easy to ignore the technical distinction between them. Joint policies are something of a rare bird. There was a time when they may have been more plentiful, but today they have been side-lined into a particularly narrow category, principally because innocent assureds might unnecessarily be prejudiced by the guilty conduct of their co-assureds under a joint policy.

Joint policies are policies of insurance which insure two or more assureds, whose interests are "joint", that is whose interests are "inseparably connected so that a loss or gain necessarily affects" all of the co-assureds in the same way and to the same extent.[6] An example, or perhaps the only instance, of joint interests is the interests of

[3] See MacDonald Eggers, "Cargo Insurance and Open Covers", in *International Trade and Carriage of Goods*, (Informa, 2016), ch. 14.

[4] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *O'Kane v Jones* [2003] EWHC 2158 (Comm); [2004] 1 Lloyd's Rep 389; *Talbot Underwriting Ltd v Nausch Hogan & Murray* [2005] EWHC 2359 (Comm); [2006] 2 Lloyd's Rep 195, para. 28-34 (Cooke, J)); affd [2006] EWCA Civ 889; [2006] 2 Lloyd's Rep 195.

[5] See *e.g.* the policy language in *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm); [2013] Lloyd's Rep IR 253.

[6] *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd* [1940] 2 KB 388, 404-406.

"joint tenants" of property (as opposed to tenants in common). Indeed, in *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd*,[7] this was the only example given by the Court of Appeal of a truly joint insurance:

> "That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property—and I use that phrase in the strict sense—an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered".

This relationship was considered in *Direct Line Insurance plc v Khan*,[8] the assureds were joint owners of the insured house and at least one of the assureds made a fraudulent claim under the relevant policy. The Court of Appeal considered the position of the co-assured if that co-assured was innocent of any fraud. Arden, LJ referred to the House of Lords' judgment in *P Samuel & Co v Dumas*,[9] and the distinction between joint and composite insurance:

> "In that case there was one policy insuring both the mortgagee and the owner of the ship and it was held that the mortgagee was not affected by the owner's fraud in scuttling the ship. In the passage on which Mr Nicol relies Viscount Cave said: "It may well be that, when two persons are jointly insured and their interests are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance: (Phillips on Marine Insurance, Vol I, page 235). But in this case there is no difficulty in separating the interest of the mortgagee from that of the owner; and if the mortgagee should recover on the policy, the owner will not be advantaged, as the insurers will be subrogated as against him to the rights of the mortgagee." In this passage, it seems to me, that, contrary to Mr Nicol's submission, Viscount Cave is dealing with a situation of two separate interests rather than the instance where both parties have connected or joint interests under the policy."

It was submitted before the Court of Appeal that this state of the law, applicable to joint policies, represents "a flawed policy and results in a disproportionate penalty on her as an innocent party". The response of the Court was to refer to a different line of authority dealing with the remedies available to an insurer in the event of a fraudulent claim, namely that the entire claim - both the genuine and dishonest parts of the claim - is rendered forfeit.[10] However, one cannot help feeling that this is not an answer to the policy objection.

There had been a time, especially in respect of liability policies, when it was considered that where more than one assured might bear a joint liability, for example those involved in a partnership, their insurance would be characterised as a joint, as opposed to a composite, policy. However, given the commercial consequences for innocent assureds, that now appears unlikely.[11]

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[7] [1940] 2 KB 388, 404-405.
[8] [2001] EWCA Civ 1794; [2002] Lloyd's Rep IR 364, para. 15-16, 20.
[9] [1924] AC 431, 445.
[10] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209.
[11] *Cf. Fisher v Guardian Insurance Co of Canada* [1995] 123 DLR (4th) 336, 350 (British Col. CA); *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262, 275-276. As regards partnerships and corporate groups, see *Brit Syndicates Ltd v Grant Thornton International* [2008] UKHL 18; [2008] 2 All ER 1140; *HLB Kidsons*

Composite policies

Composite policies insure multiple assureds for their separate or several interests. This means that, unlike joint assureds, the composite assureds' interests must be distinct, even if an insured loss or damage may result in a like measure of indemnity available to each assured. The interests insured by a composite policy may be "pervasive" in the sense that the interests insured are such that any one assured may recover completely for a loss under the policy and thereafter account to the other assureds. Such pervasive interests do not make the policy a "joint" policy; it remains a composite policy, if the insured interests are distinct.[12] Further, the fact that there is a connection between those interests, for example both assureds having an interest in the same item of property insured, does not mean that their interests are joint. Examples of composite policies are those which insure the owners and bailees of property, the owners and mortgagees of property, landlords and tenants, the owner and charterer of a ship and the owners, contractors and sub-contractors of property under construction.[13] In *General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd*,[14] Sir Wilfrid Greene, MR said:

> "Such a policy, in my judgment, may be more accurately described as a composite policy, because it comprises, for reasons of obvious convenience, in one piece of paper the interests of a number of persons whose connection with the subject-matter of the insurance makes it natural and reasonable that the whole matter should be dealt with in one policy."

How many contracts?

In *The Zephyr*, Hobhouse, J described the slip as enshrining "a composite bundle of contracts between each of the assured (or reassured) on the one side and each of the insurers (or reinsurers) on the other side". Section 24(2) of the Marine Insurance Act 1906 makes it clear that each of the multiple insurers subscribing to the slip is entering into a contract separate from each of the other insurers. It follows, certainly by the terms of Hobhouse, J's own description, that each of the multiple assureds insured by the slip is entering into a contract separate from each of the other assureds. Hobhouse, J was describing a contractual scenario where each of the insurers' interests were several; it would follow that each of the assureds' interests are also several.

If the policy is composite, there is a separate contract of insurance between each insurer on the one hand and each assured on the other hand. That means that if there are two insurers and ten assureds, there are in fact twenty

v Lloyd's Underwriters [2007] EWHC 1951 (Comm); [2008] 1 All ER (Comm) 769, para. 80-97; [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8.

[12] *Petrofina (UK) Ltd v Magnaload Ltd* [1983] 2 Lloyd's Rep 91, 95-96; *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep 440, 448-450; *Cape Distribution Ltd v Cape Intermediate Holdings plc* [2016] EWHC 1119 (QB); [2016] Lloyd's Rep IR 499, para. 174-182.

[13] See, *e.g.*, *Samuel & Company Limited v Dumas* [1924] AC 431; *Tomlinson (Hauliers) Ltd v Hepburn* [1966] AC 451; *Petrofina (UK) Ltd v Magnaload Ltd* [1983] 2 Lloyd's Rep 91; *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] QB 199; *New World Harbourview Hotel Co Ltd v Ace Insurance Ltd* [2011] Lloyd's Rep IR 230, para. 81-89; aff'd [2012] HKCFA 21; [2012] Lloyd's Rep 537; *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm); [2013] Lloyd's Rep IR 253, para. 165-167.

[14] [1940] 2 KB 388, 406.

separate and independent contracts of insurance represented by the one contractual document, whether it be a slip or a policy.[15] In *New Hampshire Insurance Company v MGN Ltd*,[16] Potter, J said at first instance:

> "The claimants, on the other hand, have argued that in these circumstances the principle to be applied is that, where an independent interest is separately insured, there can be no question of avoiding the policy for non-disclosure quoad that interest unless the person so insured was privy to the non-disclosure. Equally, save to the extent that the contrary may be expressly provided for, breach by one assured does not constitute breach by any other assured, in entitling insurers or Chubb to avoid against such other assured … In my view, the claimants are correct in their statement of the principle prima facie applicable in the case of composite insurance. While it is common to speak in terms of avoiding a policy of insurance, the right to avoid for non-disclosure relates to the contract of insurance made with the individual assured, of which there were a number in this case … I do not accept Mr. Rokison's argument that the manner of the broking and negotiation of the insurance raises an insuperable difficulty in relation to allocation and return of an appropriate proportion of premium upon avoidance."

On appeal, the Court of Appeal affirmed Potter, J's judgment, although Staughton, LJ reserved the question whether there were separate contracts of insurance, but said nothing to disagree with Potter, J's decision at first instance. Staughton, LJ said with respect to the previous law:

> "… in General Accident Fire and Life Assurance Corporation v. Midland Bank Ltd., [1940] 2 K.B. 388 Sir Wilfred Greene, M.R. said (at p. 404): "… there can be no objection to combining in one insurance a number of persons having different interests in the subject-matter of the insurance, but I find myself unable to see how an insurance of that character can be called a joint insurance. In such a case the interest of each of the insured is different. The amount of his loss, if the subject-matter of the insurance is destroyed or damaged, depends on the nature of his interest, and the covenant of indemnity which the policy gives must, in such a case, necessarily operate as a covenant to indemnify in respect of each individual different loss which the various persons named may suffer. In such a case there is no joint element at all." That, as it seems to us, is this case. The companies that formed the Maxwell group had separate interests to insure, and not a joint interest in the same property. That must have been known to the insurers, in the light of the companies' disparate businesses … We agree with the Judge that all the contracts of insurance were composite in nature, there being more than one insured and each being insured separately … Technically one ought to enquire whether for each layer in each year there was one contract, or as many contracts as there were companies insured. And if the former, can a contract be avoided for non-disclosure as against one or some of the insured, but not against others? We feel that we are relieved from the need

[15] *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262, 276-277; *New World Harbourview Hotel Co Ltd v Ace Insurance Ltd* [2011] Lloyd's Rep IR 230, para. 81-89; aff'd [2012] HKCFA 21; [2012] Lloyd's Rep 537; *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated & Vero New Zealand Ltd* [2015] NZSC 59, para. 137-153. See Colinvaux & Merkin's Insurance Contract Law, para. A-0600 - 601; *Chitty on Contracts*, (32nd ed., 2015), para. 42-011.

[16] [1997] LRLR 24, 42-43 (Potter, J), 57-58 (Staughton, LJ).

> to answer those questions by the authority of the House of Lords, in the passage already quoted from *P. Samuel & Co. Ltd. v. Dumas*. That, it is true, was not a case of non-disclosure but of wilful misconduct by one of two persons insured. But in our opinion the principle that the innocent party can still recover if it is a separate insurance must equally apply"

Nevertheless, in *Arab Bank plc v Zurich Insurance Co*,[17] Rix, J appeared to consider that the Court of Appeal was endorsing Potter, J's approach. After considering the Court of Appeal's decision, Rix, J said:

> "It seems to me that the Court of Appeal were saying that in the typical case of a composite policy where there are several assureds with separate interests, the single policy is indeed a bundle of separate contracts. That is the prima facie position under a composite policy, without any need for a meticulous examination, for instance, to see whether separate premiums have been agreed for the various interests."

The "separate contract" analysis is not entirely free from doubt. Indeed, in *American Motorists Insurance Co v Cellstar Corporation*,[18] Mance, LJ - dealing with private international law issues - suggested that a corporate group policy could not be divided into more than one contract:

> "the policy is a composite policy, under which the different interests of Cellstar and its subsidiaries are insured, as and when they are at risk in respect of shipments in which they are involved: see *General Accident Fire and Life Assurance Corporation Ltd* v *Midland Bank Limited* [1940] 2 KB 388. That does not mean, however, that the policy is severable into the series of separate policies or insurances. Cellstar, and those subsidiaries who are party to the contract, are on the face of it jointly responsible for premium. Amico has in fact sued Cellstar (alone) in Texas for the whole of a balance of premium said to be unpaid, while Cellstar asserts that it has paid all premiums due. Non-disclosure in relation to any aspect of risk would (at least under English law) render the whole policy voidable"

It is striking, however, that Mance, LJ did not refer to the authorities referred to above and indeed appear to use the words "policy", "insurance" and "contract" interchangeably. Indeed, the context of that decision renders it of less relevance than the authorities considered above.

The analysis adopted by Rix, J and Potter, J more properly reflects the ordinary legal position in the case of a composite policy, namely that there is a separate contract for each insured.[19] This analysis is also that adopted by the Law Commission in its Report No. 353 on Insurance Contract Law dated July 2014, which led to the draft bill which was enacted as the Insurance Act 2015. The Law Commission said (at paragraphs 7.15-7.16):[20]

> "In some situations, one party may enter into a contract on behalf of others. In such cases, who "the insured" is, and will continue to be, is a question of construction of the particular contract. There are three possible outcomes.

[17] [1999] 1 Lloyd's Rep 262, 276-277.
[18] [2003] EWCA Civ 206; [2003] Lloyd's Rep IR 295, para. 13, 21, 36.
[19] See *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated & Vero New Zealand Ltd* [2015] NZSC 59, para. 137-153.
[20] See also para. 8.59.

(1) The parties are joint insureds under a joint policy. This means that they must all make a fair presentation of the risk. A failure by one will affect the contract for all others.

(2) The parties are composite insureds, so that each is a separate insured under a bundle of insurance contracts. Each insured must present its own risk fairly (either personally or through the main insured who acts as their agent). However, a failure by one will affect only that party's insurance. The other parties will be unaffected.

(3) The beneficiaries of the policy are third parties who are not parties to the contract at all. They are not "the insured" and have no separate duties to present information.

Where a holding or parent company arranges insurance on behalf of all group or subsidiary companies, the courts have so far tended to regard the interests of the companies as composite rather than joint, and have treated the single policy as a bundle of insurance contracts."

If the insurance is "joint", it should follow that there is only one insurance contract, but the authorities are not as clear as they might be. There probably should be a single insurance contract in the rare case of a joint policy, because that policy insures one interest, even though that interest belongs to two or more assureds. If it were otherwise, there would be no explanation for the differing extents of the right of avoidance in the respective cases of a composite policy and a joint policy.[21]

The duty of fair presentation of the risk

The duty of fair presentation of the risk is a duty which is imposed by the common law upon the parties to an insurance contract. It is a duty which was codified by section 18 of the Marine Insurance Act 1906. That section was held to be declaratory of the common law applicable both to marine and non-marine insurance contracts. The Insurance Act 2015, which applies to contracts or contractual variations agreed on or after 12th August 2016, maintains the duty of fair presentation and, although the duty is formulated in different terms, the substance of the duty remains the same.

Section 3(1) of the Insurance Act 2015 provides that "Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk". That duty requires disclosure of every material circumstance which the insured knows or ought to know (section 3(4)(a)). Similarly, section 18 of the Marine Insurance Act 1906 provided that "… the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured …". Under both these formulations, it is the making of the insurance contract which defines the end-point of the duty of fair presentation. Section 3 of the 2015 Act and section 20 of the 1906 Act deal with representations made by an assured as part of the presentation of the risk. It is notable that section 20 of the 1906 Act refers to a representation made by an agent of the assured, but section 3 of the 2015 Act makes no reference to an agent's representations, but it is unlikely that this is intended to mean that a representation made by an agent will not be attributable to the assured who is the principal of that agent or indeed that an assured will not be responsible for representations made by an agent on behalf of that assured.

[21] *New World Harbourview Hotel Co Ltd v Ace Insurance Ltd* [2011] Lloyd's Rep IR 230, para. 81-89; aff'd [2012] HKCFA 21; [2012] Lloyd's Rep 537.

As each assured under a composite policy is a party to an insurance contract separate from each of the co-assureds, that means that each assured is under a duty of fair presentation which is defined by what that assured knows or ought to know. In its Report dated July 2014, the Law Commission further commented (at para. 8.59):

> "Multinational or global corporation with subsidiaries – this will depend on how the particular insurance policy is structured. As we have discussed, we think that this type of policy would usually be construed as a number of separate composite contracts of insurance. On this basis, each entity would be an "insured" with fair presentation obligations …"

Accordingly, a failure by any one assured to comply with the duty of fair presentation, which induces the insurer to agree to the insurance contract in question, will entitle the insurer to exercise the remedies available for an unfair presentation of the risk set out in section 8 and Schedule 1 of the 2015 Act (namely, avoidance, re-writing the insurance contract or paying a proportionately reduced claim), depending on whether or not the unfair presentation was deliberate or reckless and on the nature and extent of the insurer's inducement.

If therefore there is a composite policy insuring, say, four co-assureds, and one of those co-assureds fails to disclose or misrepresents a material circumstance, inducing the insurer's agreement to the policy, but the other co-assureds have not breached the duty of fair presentation, the insurer is entitled to the remedies available under the 2015 Act in respect of the insurance contract with the co-assured in breach of the duty, but is not entitled to these remedies against the other co-assureds.[22]

However, the position may be complicated by the fact that one co-assured may be involved in the presentation of the risk by or on behalf of another co-assured. Accordingly, if one co-assured provides another co-assured with information which is inaccurate and the latter passes that information on to the insurer (via the broker), the former may be taken to be responsible for the misrepresentation, because it has procured another person to present the misrepresentation to the insurer.[23]

Under the pre-Insurance Act 2015 law, an assured would be deemed to have known information which it ought to know in the ordinary course of business. This may well have included information known to an agent of the assured, including persons who procured a policy or completed a proposal form on behalf of an assured. In *New Hampshire Insurance Company v MGN Ltd*:[24]

> "The question posed in issue G asks whether non-disclosure, etc. by any one assured would in itself constitute non-disclosure by others, or itself give rise to a right to avoid as against those others. As I have indicated, the answer in principle is 'no'. However, in the context of the Maxwell group, the interrelationship of various of the companies and the overlapping employment and functions of a number of their servants and officers, are likely to have created situations whereby an officer of company A, as well as exercising functions in company B, would also have had knowledge of the affairs of company C and/or the actions or intentions

[22] *MacGillivray on Insurance Law*, (13th ed., 2015), para. 17-034.
[23] *Cf. The National Exchange Company of Glasgow v Drew* (1855) 2 Macq 102, 145; *Cargill v Bower* (1878) 10 Ch D 502, 513-514.
[24] [1997] LRLR 24, 43.

> of its officers of such a kind that he would have been under parallel duties of disclosure and/or obligations of good faith in respect of all three"

In *HLB Kidsons v Lloyd's Underwriters*,[25] Gloster, J summarised the earlier authorities as follows:

> "The issue in New Hampshire v MGN was whether, having regard to the terms of the policy in that case, breach by one assured of its duty of good faith entitled insurers to avoid the policy as against all other assureds, even if they were innocent of the first assured's wrongdoing. Potter J (whose judgment was upheld on appeal) held that on its proper construction the policy was a composite one, with the effect that non-disclosure by one assured did not, in itself, constitute non-disclosure by other assureds; see in relation to Issue G at 42-3, per Potter J, and at 57–8, per Staughton LJ. I do not accept Mr. Harvey's submission that the principle to be derived from this case is that in composite policies breach of or non-compliance with any policy term by one assured will not affect other assureds. The decision was confined to the question of non-disclosure … Moreover, as Potter J stressed at page 43, he only decided that non-disclosure by one assured would not "in itself" constitute non-disclosure by others and left it open as to whether in the context of the Maxwell group, non-disclosure by an officer of one assured might constitute non-disclosure by another assured if the relevant officer was also authorised to act on behalf of, or carry out functions for, other assureds. Plainly, therefore, Potter J was not saying that agency and attribution principles had no role to play in composite policies. Staughton LJ agreed that Potter J's observations on this matter should stand (at 58)."

The position is largely the same under the Insurance Act 2015, save that the scope of knowledge which would be attributed to the assured under the 2015 Act is, if anything, wider than the knowledge which might be attributed under the pre-existing law (although the Explanatory Notes, at paragraph 56, suggest that the 2015 Act reflects the previous law in this respect). Under sections 3(4) and 4(5) and (6) of the Insurance Act 2015, an assured is obliged to disclose material circumstances which the assured ought to know, namely what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means). This includes information held within the insured's organisation or by any other person (e.g. an agent or co-assured) (section 3(7)). Accordingly, information held by one assured may be attributable to another assured pursuant to these provisions.[26]

In addition, there is a new attribution of knowledge provided for in sections 3(4) and 4(3) of the Insurance Act 2015. This is not an instance of "deemed" or "constructive" knowledge, but of actual knowledge of an assured who is not an individual. Under section 4(3), an assured is taken to know that which is known to any one member of its "*senior management*" (which is defined in section 4(8)(c)), who might well be assureds under a policy procured by the company as a policyholder (e.g. under a D&O policy), and, in addition, that which "is known to one or more of the individuals who are responsible for the insured's insurance".[27] Under section 4(8)(b), an

[25] [2007] EWHC 1951 (Comm); [2008] 1 All ER (Comm) 769, para. 93. This aspect of the decision was not discussed on appeal: [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8.

[26] See Law Commission Report no. 353 dated July 2014, para. 8.91.

[27] There is an exception in respect of confidential information known to the individual through a business relationship with a person not connected with the insurance: sect. 4(4)(b).

individual is responsible for an assured's insurance "if the individual participates on behalf of the insured in the process of procuring the insured's insurance (whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity)".[28] This provision may well apply to co-assureds, at least insofar as the co-assured's knowledge is to be attributed is an individual.

Accordingly, under the Insurance Act 2015, if one co-assured under a composite policy is guilty of a non-disclosure or misrepresentation, inducing the insurer to agree to the insurance contract, the insurer has a remedy against that co-assured, but not against any other co-assured if that other co-assured is innocent of that non-disclosure or misrepresentation. If the co-assured is aware of material information and another co-assured should have made enquiries of the former co-assured pursuant to its duty of reasonable search, the latter may be taken to know what the former co-assured knows. In that event, the insurer may have a remedy against both co-assureds. If a co-assured has procured an insurance policy on behalf of itself and on behalf of other co-assureds and, in presenting the risk, the former co-assured is guilty of a non-disclosure or misrepresentation, inducing the insurer to agree to enter into the insurance contract, the insurer may exercise a remedy against the former co-assured, as well as against the other co-assureds, because the former acted on behalf of the other co-assureds as their agent, assuming that the knowledge or conduct of the agent can be attributed to the principal.

This is consistent with the fact that the remedy of avoidance under the Marine Insurance Act 1906 and the Insurance Act 2015 and the additional remedies under Schedule 1 to the Insurance Act 2015 are defined by reference to the relevant "contract", rather than the relevant insurance document, such as a policy or a slip.[29] This analysis, and this statutory language, also means that if there is a joint insurance policy, in the true sense of the word "joint", a material non-disclosure or misrepresentation by one co-assured inducing the making of the insurance contract by the insurer will entitle that insurer to exercise remedies in respect of the insurance contract, even if the other co-assureds - or more properly joint assureds - are innocent of any breach of the duty of fair presentation of the risk.[30]

Wilful misconduct and fraudulent claims

If loss or damage is sustained to an insured interest, by reason of an assured's wilful misconduct, the insurer is not liable to indemnify the guilty assured.[31] If there is a composite policy insuring two assureds who both have an insurable interest in one item of insured property, and one of the assureds deliberately causes damage to the property for the purposes of making a fraudulent insurance claim, the other assured will not be deprived of the right to claim an indemnity because of the co-assured's wilful misconduct.[32] The same principle applies to any

[28] See Explanatory Notes, para. 53.

[29] *New Hampshire Insurance Company v MGN Ltd* [1997] LRLR 24; *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262; *New World Harbourview Hotel Co Ltd v Ace Insurance Ltd* [2011] Lloyd's Rep IR 230, para. 81-89; aff'd [2012] HKCFA 21; [2012] Lloyd's Rep 537.a

[30] *New Hampshire Insurance Company v MGN Ltd* [1997] LRLR 24, 42 (Potter, J), 57 (Staughton, LJ).

[31] Sect. 55(2)(a) of the Marine Insurance Act 1906. See *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 622; *State of the Netherlands v Youell* [1997] 2 Lloyd's Rep 440; [1998] 1 Lloyd's Rep 236.

[32] *Samuel & Company Limited v Dumas* [1924] AC 431; *The State of the Netherlands v Youell* [1997] 2 Lloyd's Rep 440, 446-450; *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm); [2013] Lloyd's Rep IR 253, para. 165-167.

fraudulent insurance claim made by an assured under a composite policy. The insurer may have a defence against only that assured who is guilty of the fraud. It may also have a defence against an assured on whose behalf the fraudulent assured was acting in presenting the claim, assuming that the conduct of the fraudulent assured can be attributed to the innocent assured.[33]

By contrast, in the case of a joint insurance policy, the insurer will have a remedy against all of the joint assureds, even if only one of those assureds are guilty of a fraudulent claim.[34] Similarly, if one of the assureds is guilty of wilful misconduct, the insurer can defend a claim by any of the joint assureds.[35]

The Insurance Act 2015 sets out a new scheme of remedies in the event of a fraudulent claim under an insurance contract. Under section 12, in the event of a fraudulent claim, the insurer is not liable for the insurance claim (presumably, meaning the entire claim in line with the pre-2015 Act law)[36] and is entitled to recover any sums paid in respect of that claim, and the insurer is also entitled to terminate the insurance contract as from the date of the fraudulent act so that the insurer may refuse all liability to the assured under the contract in respect of a relevant event occurring after, but not before, the time of the fraudulent act.

Section 13 of the Insurance Act 2015 deals with the insurer's remedy for a fraudulent claim in the case of "group insurance". This provision is expressed to apply where a contract of insurance is entered into with an insurer by a person ("A"), the contract provides cover for one or more other persons who are not parties to the contract ("the Cs"), whether or not it also provides cover of any kind for A or another insured party, and a fraudulent claim is made under the contract by or on behalf of one of the Cs ("CF"). In that event, section 12 applies as if the cover provided for CF were provided under an individual insurance contract between the insurer and CF as the assured; and the insurer's rights under section 12 are exercisable only in relation to the cover provided for CF, and the exercise of any of those rights does not affect the cover provided under the contract for anyone else.

It is difficult to apply section 13 to joint and composite insurance, because its premise is that the "Cs" are not parties to the relevant insurance contract. This could not possibly apply to joint insurance. However, it might apply to composite insurances in that the contract to which the fraudulent co-assured is a party is not the same as the other contracts to which the innocent co-assureds are a party. That interpretation seems to be at odds with the Explanatory Notes, at paragraphs 106-112. In particular, the Notes state that

> "Group schemes are an important form of insurance. Many schemes are set up by employers to provide protection insurance for their employees. The policyholder is typically the employer, who arranges the scheme directly with the insurer. The group members (typically employees) have no specific status. As they are not policyholders, if a group member makes a fraudulent claim, the insurer's remedies are uncertain."

It is therefore unlikely that section 13 is applicable to the typical composite or joint insurance policy in the event of a fraudulent insurance claim by one co-assured. It is likely that section 13 caters for a particular type of group

[33] *Direct Line Insurance plc v Khan* [2001] EWCA Civ 1794; [2002] Lloyd's Rep IR 364, para. 41; *Savash v CIS General Insurance Ltd* [2014] EWHC 375 (TCC); [2014] Lloyd's Rep IR 471, para. 58.
[34] *Direct Line Insurance plc v Khan* [2001] EWCA Civ 1794; [2002] Lloyd's Rep IR 364.
[35] *Samuel & Company Limited v Dumas* [1924] AC 431, 445.
[36] *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209; *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112; [2005] Lloyd's Rep IR 369.

insurance, namely where one entity procures a policy in its own name for the benefit or ultimate benefit of a number of other persons who, for whatever reason, are not a party to any relevant insurance contract.

Rights of subrogation

Upon payment of an insurance claim, the insurer is subrogated to all of the rights of the assured in respect of the insured loss.[37] Complications arise where the insurer indemnifies one co-assured in respect of an insured loss, the insurer is subrogated to that assured's rights, and that assured has rights of action, at least in principle, against a co-assured. The general principle is that the insurer cannot exercise subrogation rights against co-assureds to the extent that the co-assured could recover an indemnity in respect of the same loss under the composite or joint policy,[38] or against other persons for whose benefit the insurance contract was entered into.[39] If the co-assured is not covered for the same loss, the insurer can exercise rights of subrogation against that co-assured, unless such rights are waived in the policy or the defendant can rely on an exemption from liability in the contract between the co-assureds.[40]

Occasionally, the insurance policy will include a "waiver of subrogation" clause which is a promise by the insurer not to pursue subrogation rights against a specified class of persons such as a co-assured.[41] Such clauses were at common law enforceable only by the assured, not by the third party.[42] Since 2000, however, the third party may be able to enforce the waiver of subrogation clause pursuant to the Contracts (Rights of Third Parties) Act 1999, unless that Act is the subject of an exclusion in the insurance policy.

[37] See sect. 79 of the Marine Insurance Act 1906. See MacDonald Eggers, "The Place of Subrogation in Insurance Law: The Deceptive Depths of a Difficult Doctrine", in Rhidian Thomas (ed.), *The Modern Law of Marine Insurance - Volume Four*, (Informa, 2016), ch. 9.

[38] *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 603-604, 612-615; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm); [2005] 1 Lloyd's Rep 307, para. 12; *Board of Trustees of the Tate Gallery v Duffy Construction Ltd* [2007] EWHC 361 (TCC); [2007] Lloyd's Rep IR 758, para. 54-64; *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286; [2008] 2 All ER (Comm) 584; *cf. Cape Distribution Ltd v Cape Intermediate Holdings plc* [2016] EWHC 1119 (QB); [2016] Lloyd's Rep IR 499, para. 174-183.

[39] *Mark Rowlands Ltd v Berni Inns Ltd* [1986] 1 QB 211; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 604-606; *Quirkco Investments Ltd v Aspray Transport Ltd* [2011] EWHC 3060 (Ch); [2013] 1 Lloyd's Rep IR 55, para. 43-45; *Frasca-Judd v Golovina* [2016] EWHC 497 (QB); [2016] Lloyd's Rep IR 447; *Cape Distribution Ltd v Cape Intermediate Holdings plc* [2016] EWHC 1119 (QB); [2016] Lloyd's Rep IR 499, para. 184-190.

[40] *Rathbone Brothers plc v Novae Corporate Underwriting* [2013] EWHC 3457 (Comm); [2014] Lloyd's Rep IR 203, para. 60-72; [2014] EWCA Civ 1464; [2015] Lloyd's Rep IR 95; *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2015] EWCA Civ 16; [2015] Lloyd's Rep IR 295, para. 74-92 (subject to appeal to the Supreme Court).

[41] See *e.g. BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm); [2005] 1 Lloyd's Rep 307.

[42] *Cf.* the position in Australia: *Woodside Petroleum Development Pty Ltd v H & R-E & W Pty Ltd* (1999) 20 WAR 380, 390-391, 401; and in Canada: *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* [2000] 1 Lloyd's Rep 199. See also *The Surf City* [1995] 2 Lloyd's Rep 242.

Late payment of insurance claims

Sections 28-30 of the Enterprise Act 2016 introduce, with effect from 4th May 2017, into the Insurance Act 2015 a provision - section 13A - which imposes an implied term into all insurance contracts that the insurer must pay insurance claims within a reasonable time[43] (allowing for investigation and assessment of the claim). If there is a breach of this implied term, it is contemplated that the assured will have remedies (*e.g.* damages) available at common law (and otherwise) in addition to the payment of the claim under the policy and statutory interest.[44] If the insurer shows there are reasonable grounds for disputing the claim, there is no breach while the dispute is continuing.

Questions will arise how damages are to be assessed and awarded in circumstances where the claimants (the assureds) and the defendants (the insurers) are parties to a composite policy. For example, if there are five assureds and ten insurers, with a separate and distinct contract of insurance between each of them, it will logically be incumbent on each assured which has suffered a breach to prove its own independent loss as against each of the insurers in breach of the implied term. This may create difficulties where the insurers have acted in breach towards one assured, but not another. Further complications arise where some of the insurers have acted in breach of the implied term, but not others, and where the question arises whether the insurers in breach are liable for the entirety of the loss suffered by the claimant assured. No answers are offered in this context, merely a reminder that care will be needed to develop the principles to be applied in awarding compensatory remedies for breach of this new implied term.

Conclusion

Important issues depend on the correct characterisation of a policy which insures multiple assureds (and indeed multiple subject-matters), not only whether the policy is composite or joint (which is easy enough), but also whether there are one or more relevant insurance contracts. The insurer's remedies and defences for breach of the duty of fair presentation, wilful misconduct and fraudulent claims depend on such characterisation. The issues extend beyond this, not least in subrogation, but may extend further, for example in respect of the remedies available to an assured for the late payment of damages. The joint or composite nature of an insurance policy give rise to fundamental and important concepts and will have ramifications for the parties to the insurance transaction in a variety of ways. Clarity of principle, as ever, is necessary to avoid any needless uncertainty attending this sector of commercial law.

[43] What constitutes a reasonable time depends on all of the circumstances of the case, including the type, size and complexity of the claim, compliance with regulatory rules and factors beyond the control of the insurer (sect. 13A(3)).

[44] Explanatory Notes, para. 258-262, 264: "Under the current law in England and Wales, there is no obligation to pay valid insurance claims within a reasonable time … Both Law Commissions recognised that the position in England and Wales was unexpected and difficult to justify on a policy or legal basis. They recommended that insurers in the UK should be under a legal obligation to pay sums due within a reasonable time, and that a policyholder should have a remedy where an insurer failed to do so. The measure in this Act implements the key recommendations made by the Law Commissions on this issue."