Insurance for the benefit of third parties - behind the Mark Rowlands Principle

Article

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Meixian Song*

Abstract

The line of authorities principally starting from Mark Rowlands have been predominantly interpreted as having established a principle that the contractual bargain of the underlying contract alone provides a single reference to address whether the insurance is also effected for a third party's benefit, and even directly to a third party's subrogation immunity. This paper argues that the extended application of the decision is questionable from two points of view. First, the underlying contract is only one of the factors that are discussed here for ascertaining if an insurance policy is also made for a third party's benefit. Secondly, this paper submits that an indemnity insurance for a third party's benefit is essentially a separate issue from a third party's subrogation immunity. However, as the case law has developed, the Mark Rowlands principle has been radically misinterpreted and followed incorrectly in the way that the two issues seem to be conflated.

Keywords: Insurance for third party's benefit, contract interpretation, "Mark Rowlands principle", insurable interest, subrogation immunity.

1. Introduction

Most contracts, especially commercial contracts, make it very clear where risks lie. Non-performance and defective performance are common key subjects of risk allocation in the contract. For example, in a tenancy agreement, the parties will carefully allocate the risk for non-payment of rent and any damage that may be caused by the defective use of the premises. Insurance provisions have been frequently found in leases for commercial and residential premises; these have been of particular significance in situations where the property is damaged by the tenant. Frequently, the contracting parties share a common expectation that first-party insurance will provide a solution to making good losses, normally by obtaining first-party cover for the subject-matter of the "underlying contract" (ie the property or goods).[1]

One of the key arguments centres on for those benefit such insurance is taken out. Insurance for the benefit of an unnamed party in insurance contracts may entitle such a party to claim the insurance indemnity in the insurance contract, instead of it being claimed by the named insured. Another possible effect is to exonerate this third party from liability in negligence or in contract so that an insurer should not be allowed to exercise subrogation rights against it. Subrogation means, if the insured has a right to claim the same loss from a third party, upon indemnifying the assured for the insured loss, the insurer stands in the place of the insured and can claim against the third party to the extent that the insurer has paid the loss.[2] Subrogation immunity can prevent an insurer of an indemnity insurance from exercising such a right against an otherwise liable third party for the purpose of

* Lecturer in Law, University of Southampton.

[1] Merkin and Steele, *Insurance and Law of Obligations* (OUP 2013) 37. First-party insurance protects against loss of or damage to the insured's own person and real or intangible property or financial interests. Third-party insurance covers their risk that insured may face financial or other liability to another.

[2] *Mason v Sainsbury* (1782) 3 Doug. K.B. 61; *Castellain v Preston* (1883) 11 Q.B.D. 380.

mitigating the insurance payment. A third party beneficiary may intend to claim the benefit of the insurance in either instance.

However, there is in practice, very often, a division between the underlying contract and the insurance contract, particularly regarding the question: for whose benefit is insurance taken out? One problem is that parties to the underlying contracts simply tend to assume that the insurance provision in their own contract is sufficient. Notably, in the landlord-tenant setting, the lease, when properly construed, clearly provides that the insurance indemnity will provide sole recovery of an insured loss, albeit caused by the other party's negligence or breach, whereas the tenant's name is not endorsed on the first-party insurance for the property so as to record its interest in the insurance.

The principle is that where it was the intention of the parties that the loss should be recouped out of the insurance monies, with no further recourse against the tenant, the existence of the insurance is considered in determining whether the landlord had suffered any loss.[3] Not limited to the landlord-tenant context, the line of authorities principally starting from *Mark Rowlands*[4] have been predominantly interpreted as having established a principle that the contractual bargain of the underlying contract alone provides a single reference to address whether the insurance is also effected for a third party's benefit and even directly to a third party's subrogation immunity.[5] This paper argues that the extended application of the decision is questionable from two points of views. First, the terms within the underlying contract is only one of the factors for ascertaining if an insurance policy is also made for a third party's benefit. Other factors, as will be discussed, include the insurance contract terms, the insurable interest and the payment of a premium respectively. Secondly, *Mark Rowlands* is mostly referred to as laying down a rule relating to subrogation immunity, whereas the case is primarily concerned with the issue of an indemnity insurance for a third party's benefit. It is true that a first-party insurance effected for a third party's benefit will allow an unnamed party in an insurance contract to claim insurance indemnity or subrogation immunity. However, the dissent of this paper lies with the way in which the case law has developed, which conflates the issues of an indemnity insurance for a third party's benefit and a third party's subrogation immunity. Rather, the paper claims that these are two separate legal issues. On revisiting *Mark Rowlands*, and examining the principle, this paper aims to shift our focus to the issue of first-party insurance effected for a third party's benefit, instead of insurance subrogation.

This paper will first set out the divide between the underlying transaction and a related first-party insurance in both law and in practice. Given the division, it is key to understanding how the two contracts converge when the insurance is for the benefit of the other contracting party (eg a tenant) who may cause the loss by defective performance in the underlying contract (a lease). This paper will then analyse the *Mark Rowlands* decision and discuss the line of authorities which developed the principle. Although the cases which followed have rightly focused on contractual interpretation of the terms and intentions of the underlying contract in English law, the question of insurance for a third party's benefit seems to have been confused with the issue of subrogation immunity by courts. Focusing on the determination of an insurance for a third party's benefit, this paper will then

[3] The Hon Lord Justice Lewison; Nicholas Dowding, QC; The Hon Mr Justice Morgan; Martin Rodger, QC; Edward Peters (eds), *Woodfall's Law of Landlord and Tenant* (Sweet & Maxwell 2021) [11.104].
[4] *Mark Rowlands Ltd v Berni Inns* [1986] Q.B. 211.
[5] *Bank of New York Mellon v Cine UK Ltd and others* [2021] EWHC 1013, [153] In this case, the High Court decided if a commercial tenant need to pay rent during the Covid-19 pandemic.

consider the factors other than the terms of the underlying contract only, including the insurance contract terms, the insurable interest and the payment of a premium respectively. Finally, this paper concludes that there has been radical reinterpretation of the *Mark Rowlands* principle by the English cases which followed, and the *Mark Rowlands* principle should be more carefully interpreted and followed.

2. Background: The Contract and Insurance Divide

To address the question of insurance for a third party's benefit, it is, from the outset, necessary to clarify a few elementary and central questions in respect of first-party insurance consequential to an underlying contract.

The contracting parties in the underlying contract can allocate their risks by express terms, among which insurance and indemnity provisions form part of a sophisticated risk-allocation mechanism. Two forms of insurance may be relevant to the contracting parties in terms of the risk allocation in their underlying contract, namely, first-party insurance and liability insurance. First-party property insurance can cover losses including: physical damage to the subject-matter of the contract and/or consequential losses caused by the breach and pure economic loss, such as loss of income or consideration by means of business interruption insurance. A party may also choose to insure directly against his potential liability which may arise out of performing the contract. However, most forms of third-party liability insurance do not cover pure breach of contract claims; this is because of the general rule that liability cover relates to imposed-liability rather than assumed-liability.[6]

In the context of property insurance consequential to a landlord-tenant relationship, since a tenant of the property has an insurable interest in it,[7] the terms of the insurance contract can be those appropriate to a first party and not limited to those appropriate to liability insurance. Where the tenant is under an obligation to insure or to repair, this interest will be the full value of the property. However, the landlord, as the owner of the property, also holds an insurable interest for the full value of the property, even where the tenant is liable to repair. Nevertheless, the parties may simply, and more likely, choose to take one property insurance policy, expecting the insurance to be taken out for their mutual benefit on the basis of the lease alone. Under such circumstances, the insurance contract is taken out by the landlord, the premiums are directly or indirectly paid by the tenant and the obligation of the landlord is to repair or reinstate the premises in the event of loss with the use of the insurance indemnity. However, the interest of the tenant is not often expressly endorsed in the insurance contract.

Considering that it is very rare for the two contracts to be negotiated and entered into together, it is not unusual for the intentions of the landlord and the tenant to not manifestly match with the terms of the insurance contract. It is also fatuous to assume that the parties to the underlying contract are in a position to know all the operations

[6] (n1) 186. Taking Protection and Indemnity Insurance as an example, it offers a wide-ranging cover to a member's statutory and contractual liabilities. A shipowner with full protection and indemnity cover will be insured against liabilities in respect of everything from catastrophic oil spills, dramatic and costly collision, compensating passengers for loss of luggage and cargo claims under carriage contracts. Shipowners' liability arising from oil pollutions, for example, fall into the category of "imposed-liability" on the basis of the relevant international conventions; by contrast, shipowners' payment to cargo damage either by settlement for commercial consideration or legal reasons under a charterparty or a bill of lading is more likely to be "assumed liability" as opposed to "imposed liability".

[7] The classic definition of "insurable interest" is set out in *Lucena v Craufurd* 127 E.R. 630, 321 (Lord Eldon) as a 'right in property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the part'. See details in "Part 5".

behind insurance contracts.[8] The contract of insurance is, in principle, governed by the rules derived from the general law of contract; however, over the years it has attracted some principles of its own to the extent of creating a law of insurance.[9] As in indemnity insurance (typically property insurance),[10] the insured 'in case of a loss is to receive full indemnity, but is never to receive more'. [11] This is known as the principle of indemnity of insurance. Complementing the indemnity principle, is the insurers' right of subrogation that entitles insurers, on making good the indemnity, to succeed to all the ways and means by which the person indemnified might have protected himself or reimbursed himself for the loss.[12] As will be discussed, the independent operation of insurance law principles and the terms of the insurance contract ought to be considered by judges when a third party intends to claim that the insurance is taken out for his benefit.

Against this backdrop, the two related contracts are made and read separately. The traditional and dominant perception of insurance is that it is a contract transferring the risk of loss from the insureds to the insurers.[13] An insurer agrees to hold the insured harmless for the risk and any loss suffered by the insured in exchange for a premium.[14] Insurance indemnity is generally considered to be an independent promise between the insured and the insurer, and is not designed to relieve a third party from its legal liability. The clear dichotomy between the insurance and the underlying contract is typically embodied in the common law collateral payments rule. As noted by Lord Sumption in *The Ocean Victory*:[15]

> "The starting point is the general rule that insurance recoveries are ignored in the assessment of damages arising from a breach of duty… This can conveniently be called the collateral payments exception. ... The effect of the collateral payments exception is that as between the insured and the wrongdoer who has caused the loss, they are not treated as making good the former's loss or as discharging the latter's liability. The assumption underlying it is that as far as the wrongdoer is concerned, insurance is res inter alios acta, ie, loosely translated, none of his business. The rule thus stated falls to be modified in a case where insurance manifestly is the wrongdoer's business because, for example, he is a co-insured and/or the insurance is taken out for his benefit."[16]

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[8] John Birds, *Birds' on Modern Insurance Law* (3rd edn, Sweet & Maxwell 2019) 10-05.
[9] *ibid*, 1-01. The most notable difference between insurance contracts and the general run of contracts is the duty of fair presentation of insureds (Insurance Act 2015, s.3(1)) which replaces the doctrine of utmost good faith which applies only to insurance contracts.
[10] Property insurance is the paradigm of indemnity insurance. In contrast to non-indemnity insurance, also called contingency insurance, such as life assurance. Property insurance is the paradigm of indemnity insurance.
[11] *Castellain v Preston* (1883) 11 Q.B.D. 380, 338.
[12] *Simpson & Co v Thomson* (1877) 3 App.Cas. 279, 284.
[13] Kenneth Abraham, 'Four Conceptions of Insurance' (2013) 161 U Penn Law Rev 653, 658. *See* also Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 Modern Law Review 820-845, 821-823. Some noteworthy attempts in case law to provide a definition or some explanation on the meaning of the contract of insurance can be seen in *Prudential Insurance Co v Commissioners of Inland Revenue* [1906] 2 KB 658; *Department of Trade and Industry v St Christopher Motorists' Association Ltd* [1974] 1 All ER 395; *Medical Defence Union Ltd v Department of Trade* [1980] Ch 82.
[14] *Yeoman Credit Ltd v Latter* [1961] WLR 828 831; *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 A.C. 135 (Lord Goff).
[15] [2017] UKSC 35, [2017] 1 Lloyd's Rep. 521.
[16] *ibid,* [98].

An insurance contract is normally regarded as concluded for the benefit of the insured or co-insureds. Proceeding on the basis that the insurance covers the relevant loss, as rightly pointed out by Lord Sumption, an insurance affected by an insured may still be intended to insure for the benefit of the insured and a third party who is not named as a co-insured. This seems to mean that, in insurance contract law, a third party beneficiary should effectively be treated the same as a co-insured. However, the question at stake is the applicable legal tests in identifying such a third party to a first-party insurance, such as property insurance consequential to a landlord-tenant relationship.

In brief, first-party insurance consequential to an underlying agreement often exists and operates in multipartite relationships involving, eg, landlord, tenant and insurer. To ascertain the primary question of whether a first-party insurance contract is also affected for the benefit of a third party (eg a tenant), we should understand that there are the following potential issues to be considered: 1) the dichotomy between the intentions of the parties to the insurance contracts and those of the contracting parties to the underlying contracts; 2) the terms of insurance contract and the underlying contract respectively upon sensible construction and; 3) the divergent requirements of insurance contract law and the general law of contract. This provides the theoretical grounds for indicating the practical and legal issues of this paper, which in turn raises the interpretative approach as adopted and developed in the *Mark Rowlands* line of authorities where the multipartite legal relationships converge.

3. The (Questionable) Development of the *Mark Rowlands* Principle

Mark Rowlands was said to be the first case in the United Kingdom in which the insurer of a building sought to exercise rights of subrogation to sue a tenant for a fire caused by the tenant's negligence; it had never happened before because the insurance industry had always appreciated, hitherto, that such an action could not succeed.[17]

In *Mark Rowlands*, there were two insurance contracts. The tenant covenanted to insure the basement for third party and property owner's liability risks. The landlord covenanted to keep the landlord's premises, including the demised premises, insured against loss or damage from the insured risks, *inter alia*, fire. The landlord insured the building under an insurance contract to which the tenant was not a party and on which it was not named. However, the tenant paid, covered by the rent, the sum paid by the landlord to insure the basement of the whole premises, being a fair proportion of the premiums paid by the landlord, to insure the whole building against loss or damage by, *inter alia*, fire. The entire building was damaged by fire due to the negligence of the tenant. The insurer indemnified the landlord's loss under the insurance contract and brought an action in the landlord's name against the defendant, seeking to recover, as damages for negligence, the sum paid out to the insured landlord.

On appeal, two issues were considered: the first was whether the landlord should be regarded as having insured the entire premises for the joint benefit of the landlord and of the tenant; the other was, where a tenant as well as his landlord benefits from the landlord's insurance, whether that fact, together with lease provisions, were sufficient to exonerate the tenant from liability in negligence.[18] As to the first question, the court held that the insurance was for the benefit of both the landlord and the tenant. Provided that the tenant had an insurable interest in the subject matter of the insurance contract, there was no legal principle to prevent effect being given to the

[17] (n1) 218, according to Counsel for the tenant, Michael Harvey QC and Roger Harr.
[18] *ibid,* 230.

common intention that the insurance contract would insure the [whole building] for the benefit of both parties.[19] It was held to be sufficient to demonstrate an insurable interest that the tenant was interested in the continued existence of the building so that it could carry on using the area demised to it.[20] Having confirmed the fact that the insurance was also affected for the tenant's benefit, the court went on to hold that, upon the terms of the tenancy agreement, only the landlord was to recover his loss from the insurance money rather than the tenant. It was therefore concluded that the landlord and the insurer had no right of action for negligence against the tenant.

Kerr LJ's words, which later became the "*Mark Rowlands* principle" were that:

> "the intention of the parties, sensibly construed, must have been that in the event of damage to the let premises by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event the landlord was to have no further claim against the tenant for reparation for such damage in negligence".[21]

Kerr LJ also noted that the persons insured under the insurance contract did not name the tenants. The judge held that such a fact did not deprive it of that right since the provisions of section 2 of the Life Assurance Act 1774 requiring the inclusion of the names of beneficiaries in insurance policies, applied only to insurances which provided for the payment of a specified sum upon the happening of an insured event, and not to indemnity insurances.[22] The insurers' rights of subrogation against "other parties" were expressly preserved, but Kerr LJ considered that it was common ground that this provision did not add anything to the ordinary rights of insurers at common law.[23] Although Kerr LJ rightly pointed out that the insurer's right of subrogation depended upon the rights of the landlord, the judgment did not, upon sensible construction, question the fact that the insurance contract did not manifestly match with the intentions and terms of the lease. Instead, Kerr LJ accepted that the absence of endorsement to the tenant in the insurance contract was, evidently, only as the result of an oversight and not because there would have been any objection to it.[24]

Adopting the words of Kerr LJ above, in *Barras v Hamilton*[25] the court held that the intention of the parties had been that the landlord was to recoup his losses from the proceeds of the insurance contract in the event of damage by fire to the subjects let to the tenant from whatever cause. Consequently, it was held that there should be no further claim against the tenant by the landlord or his insurers. In *Fresca-Judd v Golovina,*[26] Holgate J clearly referred to the above words of Kerr LJ as the "*Rowlands* principle".[27] Following the principle, the judge found that the legal issue in this case should depend upon the proper construction and effect of the tenancy agreement. It was then concluded that the terms of the lease demonstrated a common intention that the insurance contract

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[19] *ibid,* 226.
[20] *ibid,* 227 and 228.
[21] *ibid,* 212.
[22] *ibid,* 211.
[23] *ibid,* 223 and 224.
[24] *ibid,* 224.
[25] 1994 S.C. 544.
[26] [2016] EWHC 497. The lease required the owner to maintain insurance against damage caused by water. The tenant failed to leave the heating on during her absence, as required in the contract, and extensive damage was caused to the property. The insurer indemnified the owner, and then brought a subrogated claim against the tenant to recover its outlay.
[27] *ibid,* [33].

would benefit both the landlord and the tenant, even where the tenant was responsible for the damage and no subrogated claim could then be brought.

Holgate J considered a line of authorities, starting from *Mark Rowlands,* and finally concluded that the court should construe the terms of the tenancy agreement in order to determine how the parties had agreed to allocate risk between themselves and that there would be a variety of indicators. Specifically speaking, a covenant by a landlord with his tenant to insure the demised premises in return for mutual obligations by the tenant would be an important indicator that the parties intended that the tenant (a) need not take out insurance for the risk covered by the landlord and (b) would not be liable for any loss or damage suffered by the landlord falling within the scope of that which the landlord had agreed to cover.[28] The strength of that indicator would depend upon the other terms of the tenancy, including whether they provided some alternative explanation for the covenant to insure. The stronger indicator would be that the tenant would be contractually obliged to pay for, or to contribute towards, the cost incurred by the landlord of insuring the premises and other relevant indicators. [29]

As pointed out by Holgate J,[30] although the landlord and tenant cases referred to by the parties concerned claims for damages in negligence, there is clear authority to support that the *Mark Rowlands* principle applies to contractual liabilities as well as to negligence. For example, in *The Ocean Victory*,[31] the ship was chartered by the owners to demise charterers who were associated companies in the same group. Marine insurance (first-party insurance) was in the joint names of the owners and demise charterers with, amongst others, the insurer. The vessel was then time chartered by the demise charterers to the first time charterer who then chartered the vessel to the last sub-charterer. This constituted a string of charterparties for the use of the ship. All the charterparties provided an undertaking by the charterers to trade the vessel between safe ports. The vessel was damaged in port while under the order of the last sub-charterer and the resulting dispute involved the question of whether the port was unsafe in order that the whole string of charterparties were breached. In addition to the issue of port safety, the Supreme Court was asked to consider whether the insurer was entitled, pursuant to their subrogated rights, to bring a claim against the demise charterer and sub-charterers for breach of the safe port undertaking.

Like the *Mark Rowlands* principle, the majority of the Supreme Court focussed on the terms of the underlying contract, holding that the insurance scheme in the demise charterparty was clearly intended to be comprehensive. The shipowner and the demise charterer intended their insurance arrangement to provide a fund to settle losses, eschewing unnecessary litigation on contractual liability to allocate risks and losses between them.[32] It was held that there was no scope for a subrogated claim by the insurer.

As shown above, the underlying principle adopted by the courts is the presumed intention of the parties regarding risk allocation and for whose benefit the insurance is to insure. As Merkin and Steele suggest, such a process is readily apparent.[33] It should be accepted that the intention of the contracting parties in the lease is an essential benchmark which should be considered meticulously by courts in order to ascertain if the insurance contract is

[28] *ibid,* [48].
[29] *ibid*.
[30] *ibid,* [36].
[31] [2017] UKSC 35.
[32] *The Ocean Victory* [114], [144].
[33] (n1) 186.

also affected for the tenant's benefit. For example, the judge held in *Lambert v Keymood Ltd*[34] that a bare covenant by a landlord to arrange and pay for insurance did not of itself raise a conclusive presumption that any insurance taken out also insured for the benefit of the tenant. As a result, insurers may exercise their subrogated rights from a landlord against a breaching tenant. It is also noteworthy that in *Haberdashers Aske Federation v Lakehouse Contracts,*[35] since the sub-contractor did not become an insured under the project insurance due to it being clearly agreed that the sub-contractor must take out its own insurance in the sub-contract, the sub-contractor was not entitled to rely on the waiver of subrogation term in the project insurance.[36]

However, this does not mean the construction of the terms of the underlying contract is the only basis for justifying the benefit of a third party in a first-party insurance contract consequent to an underlying transaction. Looking closely at *Mark Rowlands*, it may be misleading when Kerr LJ said that the question of whether the insurance contract was also affected for the tenant's benefit was not the "decisive" issue.[37] However, upon a careful reading, the argument as to the insurance for the tenant's benefit was rendered not decisive only because it did not provide a direct question answer to the issue of subrogation immunity claimed by a third party to the insurance contract. Rather, it has been made clear in his judgment that the issue of insurance for the tenant's benefit is the primary and essential requirement in ascertaining that there was no scope for a subrogated claim by the insurer against the negligent tenant. Secondly, when considering a similar case in the construction industry, *Petrofina (UK) Ltd v Magnaload Ltd*,[38] Kerr LJ found that it was, at most, only of indirect relevance and distinguishable on its facts for the tenant's claim, due to the defendants being co-insured with the plaintiffs under the same policy. They were, accordingly, not restricted to the contention that the insurance had been affected, in part, for their benefit, as the defendant was in *Mark Rowlands*. Being a co-insured with the plaintiff under the same policy, it necessarily followed that the plaintiff's insurers in these two cases were unable to assert any right of subrogation.[39] Kerr LJ then referred to a trilogy of Canadian cases regarding the same issues.[40] As Kerr LJ clearly pointed out, a common feature of these cases is that no-one appears to have questioned the right of the tenants to contend that the landlords had insured the premises for the benefit of the tenants as well as for the landlords.[41] Kerr LJ went on to say:

> "[W]hat divided the members of the Supreme Court on each occasion was the question whether *this fact*, together with other provisions in the leases similar to those in the present case, was sufficient to entitle the court to conclude that the tenant was also exonerated from liability in negligence".[42]

It seems to be unclear whether the insurance for a third party's benefit should be a matter of fact, as it was treated in the Canadian cases, or a matter of law that should be more than a matter of contractual interpretation on the terms of the underlying contract. As can be seen in *Fresca-Judd,*[43] the court has not paid attention to the important

[34] [1999] Lloyd's Rep IR 80.
[35] [2018] EWHC 558 (TCC).
[36] *ibid,* [72].
[37] (n4) 225.
[38] [1984] Q.B. 127.
[39] (n4) 229.
[40] *ibid*. The three cases in question were *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*(1975) 55 D.L.R. (3d) 676, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.* (1975) 57 D.L.R. (3d) 248 and *T. Eaton Co. Ltd. v. Smith* (1977) 92 D.L.R. (3d) 425.
[41] *ibid*, 230.
[42] *ibid*.
[43] [2016] EWHC 497.

details of the tenant's insurable interest and the explanation of why the tenant's interest was not endorsed in the insurance contract, which was addressed separately before deciding the tenant's subrogation immunity in *Mark Rowlands*. Instead, having simply relied upon a detailed examination of the clauses of the lease, Holgate J came to a conclusion that it was the common intention of the landlord and tenant under their agreement that the landlord's insurance would be for the benefit of both parties and that the tenant was entitled to the insurance immunity (even where the tenant is responsible in fact). Is the so-called *Mark Rowlands* principle a radical reinterpretation of Kerr LJ's judgment by the following cases in English law?

In brief, it is apparent that if the parties to the underlying contract have no such intention, then the insurance contract will not be regarded as affected for their joint benefits However, the question to be considered is whether their intention, as construed by the terms of the underlying contract alone, is sufficient to conclude that the insurance contract is effectively made for the joint interests of both parties to the underlying contract. While the contractual interpretation of the terms of the underlying contract has been well-developed in English law through the *Mark Rowlands* line of authorities, the analysis of the legal requirements of insurance for a third party's benefit, despite its importance, is much less advanced. Therefore, having revisited the *Mark Rowlands* decision, the next part of this paper will consider factors other than the terms of the underlying contract: the insurance contract terms, insurable interests and the payment of a premium.

4. The Terms of the Insurance Contract

When a third party is seeking to claim the benefit of an insurance contract, the starting point is naturally to ask whether the insurance contract itself is stated to be enforceable by, or for the benefit of, an identifiable third party.[44]

In accordance with the Contracts (Third Party Rights) Act 1999 ("the 1999 Act"), third parties may enforce the terms of a contract where: an express right has been granted to do so in the agreement, or the contract confers a benefit to a third party. The 1999 Act will not apply if it is clear from the contract that it was not the intention of the parties to confer rights on the third party, or the contract excludes the application of the Act.[45] The parties referred to in this section are the insured and the insurer in the context of insurance. For example, in *Bank of New York Mellon v Cine UK Ltd and others*, [46] the High Court decided whether a commercial tenant needed to pay rent during the Covid-19 pandemic. As far as insurance was concerned, one of the tenant's contentions was that the lease should be read as providing that the rent was to be recovered by landlord insurance, in consequence of which the landlords could only look to the insurers for payment. In the policy, the insured was named as the landlord only. [47] Master Dagnall found that, upon the wording of the policy, the insurance contract of rent was aimed at the benefit of the landlord rather than the tenants.[48] It was held that the *Mark Rowlands* line of authorities were not concerned with what is covered by the relevant insurance but with whether such cover, as exists, can be taken advantage of by the tenant, and if so how.[49]

[44] Rob Merkin, 'Colinvaux's Law of Insurance' (12th edn, Sweet & Maxwell 2019) [12-085].
[45] section 1(2).
[46] [2021] EWHC 1013.
[47] No evidence was produced regarding the insurance policies in place.
[48] *ibid,* [162]-[164].
[49] *ibid,* [168].

Purporting to "confer" a benefit in this context means that one of the purposes of the bargain (rather than one of its incidental effects to its performance) was to benefit the third party.[50] The Law Commission once drew a distinction between "a promise to confer a benefit on a third party" and "a promise of potential benefit to a third party".[51] The idea behind this distinction was that, for a third party to be able to sue under the insurance contract, the insurance contract must contain a promise to provide an indemnity to that third party. In the former case, A promises B that he will provide primary performance to C. For instance, when the landlord's insurance expressly excludes any right of recourse against a wrongful tenant in a subrogation waiver clause, such a clause may generally be enforceable by the tenant who is not a party to the insurance contract in terms of the 1999 Act.[52]

In contrast, where A promises performance to B**,** so that B can achieve his desired aim of conferring a benefit on C, it was held that C can be an intended object of A's promise only in the sense that A knows that the standard of his performance to B will have consequences.[53] The House of Lords in *White v Jones*[54] held that the prospective beneficiaries had an action in the tort of negligence against the solicitor. However, the analogy was not apparent, as it was not natural to presume that the first-party insurance taken out by a landlord intended to confer legal rights on the unnamed tenant.

Nevertheless, to fall within the 1999 Act, the third party must either be expressly identified in the contract by name or, as answering a particular description or being a member of a particular class.[55] Where a third party is unnamed or described in the policy, it is worth noting that section 83 of the Fire Prevention (Metropolis) Act 1774 ("1774 Act") allows, in the case of fire insurance, a person who has an interest in the demised premises to apply to the insurers before the insured makes a claim, whether or not the intended beneficiary of the property eg a tenant in regard to landlord's insurance.[56] It was also said that since 1900 there have been fewer than ten reported cases that mentioned section 83 and considerably fewer that actually applied it. *Vural Ltd v Security Archives Ltd*[57] is one such case and is worth mentioning. Under the terms of its lease the defendant landlord was required to keep the premises insured and to apply any insurance monies it received to repair and reinstate the property. After a fire incident, the landlord did not make a claim under the insurance contract. It was held that the 1774 Act allows the person who has interest in the demised premises, but is not the insured person, to apply to the insurers before the insured makes a claim. It is noteworthy that according to the Law Commission introductory paper, section 83 was not specifically intended to create a right for a person who is not a policyholder to gain from a policy of insurance. At its inception, the interested parties appear to be used mainly as a tool to prevent the policyholder from gaining from insurance fraud; instead, section 83 has been used to overcome certain difficulties

[50] *Dolphin Maritime v Sveriges Angartygs* [2009] EWHC 716 (Comm) [75].
[51] Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 83.
[52] (n 47) [12-085], *see* also *Haberdashers Aske Federation v Lakehouse Contracts* as mentioned above.
[53] (n 54).
[54] *White v Jones* [1995] A.C. 207.
[55] section 1(3).
[56] It was maintained that the fear of fire was the dominant concern in 18th century urban England, however, there is no reason not to extend s.83 as it is currently interpreted to other risks to property. *See* s.83 of the Fires Prevention (Metropolis) Act 1774 Summary of Responses <www.lawcom.govuk/app/uploads/2015/03/ICL_s83_Fires_Prevention_Act_responses.pdf> accessed on 8 June 2021. In the ongoing Law Commission Insurance Contract Law project, the Law Commission has concluded that there is not a strong case for reform on this law, *See* s.83 of the Fires Prevention (Metropolis) Act 1774 Summary of Responses, [1.28].
[57] (1990) 60 P & CR 258.

with policies that benefit third parties.[58] Moreover, the Third Parties (Rights against Insurers) Act 2010 and its predecessor, the Third Parties (Rights against Insurers) Act 1930, aim to assist a third party in receiving compensation for losses caused by an insolvent person or company who has liability insurance.[59] However, there is no equivalent or similar statutory intervention on the first-party indemnity insurance.

Furthermore, section 2 of the Life Assurance Act 1774 requires the insertion of the names of beneficiaries into insurance policies. In *Mark Rowlands,* Kerr LJ held that the section only applied to insurances that provided for the payment of a specified sum upon the happening of an insured event and not to indemnity insurances.[60] However, not applying the section and/or even the 1999 Act does not necessarily render an indemnity insurance contract irrelevant for determining if an insurance contract purports to confer a benefit to a third party in law. Moreover, not falling within the scope of the two Third Parties (Rights against Insurers) Acts does not provide a legal basis to the argument that the same requirement should not be recognised in law as for indemnity insurance. It is noteworthy that Kerr LJ explained that the absence of endorsement to the tenant in the insurance contract was evidently only as the result of an oversight and not because there would have been any objection to it.[61] In the absence of anything in the policy, at least a "plausible" explanation of such an omission was given by Kerr LJ.

Considering insurance immunity, it is the insurer who will stand in the shoes of the insured, so it is recognised that the insurer's subrogation rights depend upon the insured's right against the third party. That is to say, if the insured landlord, upon construction, intends to discharge the tenant's potential liability by the terms of the lease, the insurer will not have better rights than the insured. It is for this reason that, in the absence of anything in the policy itself, it is recognised that the subrogation immunity of the third party can simply depend upon the agreement between the insured and the third party in which the scope of the insured's rights are defined.[62] The *Mark Rowlands* principle appears to propose that, since the underlying contract alone can sufficiently disallow insurance subrogation, the contract alone also sufficiently justifies the insurance benefit for a party. However, as this paper suggests, such a change of basis and understanding is unsatisfactory. The *Mark Rowlands* principle may well be regarded as one designed to confer upon the unnamed beneficiary of an insurance, immunity from subrogation proceedings;[63] however, as seen from the reflection of *Mark Rowlands*, the interpretation of the underlying contract in terms of subrogation immunity must not be confused with the issue of an indemnity insurance for a third party's benefit.

Although inferences drawn from the covenants in the lease can clearly show the intentions of the landlord and the tenant, in that the insurance will be placed for their joint interests, it is questionable whether the terms of the

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[58] Law Commission Reforming Insurance Contract Law Introduction Paper <www.lawcom.gov.uk/app/uploads/2015/03/ICL_s83_Fires_Prevention_Act.pdf> 1.14, accessed 8 June 2021.

[59] Before the 1930 Act was enacted, "privity of contract" meant that a person who obtained judgment against an insolvent insured defendant had no direct claim to the insurance monies. The 2010 Act introduces a less complex and potentially cheaper procedure for claiming directly against the liability insurer of an insolvent defendant.

[60] (n 4) 211.

[61] (n 4) 224.

[62] As confirmed in *Napier v Hunter* [1993] AC 713, in the absence of anything in the policy itself, when the insured prejudices the insurer's position, the only possible recourse which the insurers might possess is the right to avoid the insurance contract for non-disclosure of the fact that the insured had contracted out of his subrogation rights. *See* also (n 8), 347.

[63] (n 47)[12-097].

underlying contract (ie the covenants in the lease) alone are one of the decisive factors (or perhaps just circumstantial factors in some cases) in determining if the insurance contract is also affected for a third party who is not mentioned in the insurance. In *Fresca-Judd*, Holgate J noted that the Court of Appeal in *Mark Rowlands* also relied upon considerations of "justice, reasonableness and public policy" in providing supplementary support for its conclusion. Holgate J considered that allowing the insurer to recover the insurance indemnity from the tenant by subrogation would introduce additional and unnecessary insurance costs and that there was no evidence that subrogation recoveries affect the assessment of risk, give rise to additional costs, require the tenant to obtain its own insurance or potentially have a negative effect on rental values.[64] This consideration may also not be a common basis for placing first-party insurance consequent to an underlying transaction.

Therefore, where there is nothing in the policy, nor even a "plausible" explanation of such omission as given by Kerr LJ in *Mark Rowlands*, the terms of the underlying contract (ie the covenants in the lease) alone are an arguably correct place to determine whether the insurance contract is also affected for a third party who is not mentioned at all in the insurance part. The next section will discuss another factor, namely, a third party's insurable interest in the subject-matter insured.

5. Insurable Interest: a Third Party Who is Akin to An Insured

Where an insurance contract is enforceable by, or for the benefit of, a third party, the third party seems effectively to be placed in a position akin to that of a co-insured, in that he has the right to claim for the loss or enjoy subrogation immunity.[65] Insurance for the insured's interest has a basic and unique requirement that the insured party must have an insurable interest in the subject-matter insured, the absence of which will render the insurance contract void or simply unenforceable.[66] There is some consideration of the importance of a third party's insurable interest, whether being named or unnamed in the policy. If this third party does not have an insurable interest in the insured subject-matter, it follows that he should not be regarded as an insured person and thus should not seek insurance indemnity or subrogation immunity.

The concept of insurable interest[67] was conceived in insurance law to prevent the evils of wagering and the concern that those without any interest in the property might bring about loss in order to gain the proceeds. The classic definition of insurable interest is set out by Lord Eldon in *Lucena v Craufurd* as:

> A "right in property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."[68]

In *Mark Rowlands*, Kerr LJ clearly said that the intention of the insured and a third party in respect of the insurance for the third party's benefit cannot be inferred if the third party had no insurable interest in the subject matter of

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[64] *Fresca-Judd v Golovina* [78]-[80] However, Mitchell's research into actuarial practice in the British insurance industry showed that the large motor insurers who responded to his survey all stated that amounts recovered via subrogated claims were included in their records of recoveries of claim payments, which, in turn, had an influence on premium rates, Charles Mitchell, 'Defences to an Insurer's Subrogated Action' (1996) LMCLQ 343-367, 358.

[65] (n 47) [12-085].

[66] Life Assurance Act 1774, s.1 and Marine Insurance Act 1906, s. 4.

[67] This has been discussed at length on many occasions elsewhere, not least in the Commissions' own literature. *See* <lawcommission.justice.gov.uk/areas/insurance-contract-law.htm> accessed on 14 August 2021.

[68] (1806) 2 Bos & PNR 269 [321].

the insurance.[69] Having simply considered Lawrence J's definition of insurable interest, the judge concluded that the tenant had an insurable interest in the continuing existence of the building, rather than a merely limited interest.[70] Therefore, it was concluded that although the insurance had been affected by the landlord, it was intended to insure for the tenant's benefit to the extent of the tenant's interest in the subject-matter of the insurance.[71] It is perhaps because a tenant's insurable interest was settled in *Mark Rowlands* that in the following line of authorities, such as *Fresca-Judd*, it was not essential to discuss the requirement of insurable interest.

When an insured or a beneficiary third party seeks to claim payment of an insurance indemnity, it is apparent that the issue of insurable interest is necessary for a decision to be made as to whether such a party is, upon a loss, entitled to the full value.[72] On the contrary, it is doubtful whether it is necessary to find a co-insured (a fortiori a third party) had a full interest in order to disallow subrogation.[73] However, as suggested in *Colinvaux*, under the modern approach that focuses on the contract between the parties, the proper approach is to determine the scope of the immunity conferred by the contract and whether it goes beyond liability for property in which B has no insurable interest. If there is no insurable interest, typically in the co-insurance situation, it may be more difficult to construe the first-party insurance contract as giving immunity; however, a finding of pervasive insurable interest may overcome the problem.[74]

For example, in *Deepak Fertilisers and Petrochemical Co* v *ICI Chemicals & Polymers Ltd*,[75] the Court of Appeal construed the purpose of a contractor's "all-risks" insurance[76] narrowly and concluded that sub-contractors have an insurable interest only in the works (currently) under construction and on which they were working; after completion, a sub-contractor would only suffer loss in respect of damage to the property if he was held liable for it and such a loss could only be protected by liability insurance.[77] Given the fact that the basis for a sub-contractor's interest in the entire construction works has been distinguished in two forms in construction insurance, it also becomes questionable whether first-party insurance and the law of insurance always gives the cover that the parties of the underlying contract intend to effect. As for pervasive insurable interests, various rulings culminated in the Court of Appeal decision in *Feasey v Sun Life Assurance Corporation of Canada*,[78] where Waller J advocated for a flexible approach to determining insurable interests through the classification of insurable interests into four groups of interests.[79]

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[69] (n 4) 226-227.
[70] *ibid,* 227 and 228. As mentioned in Birds (n 8) 66], any tenant of property has an insurable interest in the demised property. Where the tenant is under an obligation to insure or to repair, his interests will be the full value of the property under a first-party insurance.
[71] *ibid,* 211 and 226.
[72] Typically in the context of bailee and bailor relationship, for example*, Hepburn v A Tomlinson (Hauliers) Ltd* [1966] A.C. 451. The carriers of the goods (the bailee) held limited interest in the goods but effected a full value cargo insurance in which the owners were clearly named. The House of Lords held that the carrier was entitled to recover the full value of the goods under the cargo insurance for the benefit of the owners.
[73] (n 8), 74.
[74] (n 47) [12-076].
[75] [1999] Lloyd's Rep 387; *see* also *National Oilwell* v *Davy* [1993] 2 Lloyd's Rep 582.
[76] First-party insurance against the physical loss to construction work.
[77] *ibid,* [67].
[78] [2003] EWCA Civ 885, [2003] Lloyd's Rep IR 637.
[79] *ibid,* [92].

However, it should be emphasised that the requirement of an insurable interest, as in insurance immunity, should be distinguished from that of insurance for a third party's benefit. Based upon Kerr LJ's decision, it seems fair to say that to put an unnamed third party in a position akin to a (co)insured, an insurable interest is necessary in order to establish that the first-party insurance is affected for their joint benefit and, hence, to claim insurance indemnity and to disallow subrogation.

6. Paying Premiums and Interest in the Insurance Proceeds

Paying premiums is generally not viewed as a prerequisite in law for a party to be a co-insured, as long as one of the insureds pays for the premium. An insurance policy will define who is insured under it and include parties other than the payer of the premium. However, as for a party who actually pays for the premium but becomes unnamed in the insurance contract, the paying of the premium may entail some different meaning in law.

In principle, it would be unjust and unreasonable to hold that the money that an insured prudently spends on premiums as well as the benefit from it should affect to the benefit of the tortfeasor.[80] Glidewell LJ in *Mark Rowlands* drew a distinction and added that, where it was the tenant/wrongdoer who paid an appropriate part of the insurance premium on an insurance contract which the landlord took out under a contractual obligation to the defendant, the defendant was therefore entitled to the benefit of that insurance contract.[81]

However, Holgate J in *Fresca-Judd v Golovina* clearly rejected the submission that *Mark Rowlands* was confined to the situation where the tenant was under an express obligation to pay the relevant premium. In other words, it was held that the application of the *Mark Rowlands* principle did not require that the tenant covenants to pay insurance rent, or some other sum dedicated to covering the cost of the insurance taken out by the landlord for the demised premises.[82] In fact, as Holgate J rightly observed, the level of rent payable for premises can be affected by whether the landlord takes on the obligation to repair and/or insure premises.[83] The judge explained further that even when there is no dedicated provision for the payment by the tenant of the entirety of the cost of insurance, where a tenant pays a full open market rent (without a premium) he will normally be paying for, or at least substantially contributing towards, the cost of the landlord's various obligations, including any covenant to insure.[84]

Such a presumption of insurance rent may well be fair and sound in the context of a landlord-tenant relationship. However, a curious extension of the *Mark Rowlands* principle is seen in *The Ocean Victory* which involved marine insurance. There is often a head charterparty that is the underlying contract relevant to the insurance arrangement of the hull and machinery cover. Following the head charterparty is a string of charterparties, which will form a chain of breaches and actions in law if the vessel is damaged due to the breach by the sub-charterers at the end of

[80] *Parry v Cleaver* [1969] UKHL 2, 14 (Lord Reid).
[81] (n 4) 234.
[82] (n 67) [49].
[83] *ibid*.
[84] *ibid,* [50]. Reversely, according to *Woodfall's Law of Landlord and Tenant* (Sweet & Maxwell 2021) [7.166], it is very common for leases of parts of multi-occupied property to provide for the landlord to insure the property and to recover the cost of insurance either by way of a separate insurance rent, or as part of a service charge. But where a lease of a flat on its true construction did not so provide, it was held that no term obliging the tenant to reimburse the landlord in respect of insurance premiums was to be implied.

the chain. There is no "implicit understanding" that sub-charterers would be directly or indirectly contributing to the insurance premium as agreed in the head charterparty.

In the Court of Appeal judgment, after considering *The Evia No.2*[85] and *Mark Rowland,* Longmore LJ said:

> "Thus even in a case where there was no provision for joint insurance but the insurance was paid for by the 'guilty' party, the insurance was held to cover the liability of that party and no rights of subrogation existed. Clear words to exclude that possibility were not required, once it was evident that the insurance was intended to be for the joint benefit of the parties."[86]

Such an interpretation of the *Mark Rowland* principle seems to advance that the fact that a third party has paid the premium of an insurance policy (as opposed to a contractual duty to pay) is able to make the payer an interested party in such an insurance policy.

The Supreme Court decision did not go so far as to focus on the legal effect of payment of premium or a duty to pay premium in terms of claiming an interest in the insurance indemnification. Although, having approved the Court of Appeal decision, the majority (consisting of Lord Mance, Lord Toulson and Lord Hodge) made clear that the issue was a matter of construction.[87] It concluded that the proper construction of the relevant terms in the underlying contract (ie head charterparty) was that there was to be an insurance-funded solution in the event of loss or damage to the vessel by marine risks. It went on, if the demise charterer had been in breach of the safe port clause, it would have been under no liability to the owner for the amount of the insured loss because it had made provision to look to the insurance proceeds for compensation. Consequently, the sub-charterers were relieved from liability as a result of the insurance position between the head owners and demise charterers.

This causes an entirely different legal problem: the breaching sub-charterers were not held responsible in law for any compensation owed to the insurers due to not being able to prove that s/he is legally liable for paying any compensation to the co-insured demise charterer under the earlier charterparty. The reason why the breaching sub-charterer is not liable for paying compensation to the charterers beforehand, as was held in *The Ocean Victory*, is the finality of the insurance arrangement as agreed in the head charterparty. The absurdity of the situation lies in the fact that where the breaching sub-charterers are neither a co-insured nor a third-party beneficiary of the marine insurance contract, the third party may effectively receive a wrongful windfall from the insurance of others, without having paid a premium.

As can be seen from above, the *Mark Rowland* principle approves a tenant's interest in the property insurance policy based upon the condition of the tenant's payment of premium arising from the contractual duty in the lease. Holgate J in *Fresca-Judd v Golovina* interpreted that, because of the special nature of rent and how the renting market works, an express contractual duty of the tenant to pay premium is not required for applying the principle in the tenant-landlord relationship. In *The Ocean Victory*, it seems that both the Court of Appeal and the Supreme Court have made radical re-interpretation and application of the *Mark Rowland* principle to an issue arising from a completely different commercial business and market. Longmore LJ in the Court of Appeal suggested that where the "guilty" party paid for the insurance, it was held to cover the liability of that party and no rights of subrogation

[85] [1983] 1 AC 736.
[86] [2015] 1 Lloyd's Rep 381 [77], [2015] EWCA Civ 16.
[87] See *Herculito Maritime v Gunvor International BV* [2021] EWCA Civ 1828 [41].

existed. On the contrary, although not focusing on the factor of paying premium, the Supreme Court's decision effectively gave a "free-ride" of insurance indemnity to a third party who has no contribution to the premium whatsoever.

After *The Ocean Victory*, *Herculito Maritime v Gunvor International BV*[88] focused on the exact issue of paying premiums and interest in insurance indemnification. The vessel was seized by Somali pirates and held as ransom. General average was declared in respect of the ransom payment and the shipowner claimed the amount that was due from the cargo owners. The claim was defended by the cargo owners for not paying the general average contribution, on the ground that the shipowner's only remedy in the event of having to pay a ransom to pirates was to recover under the terms of insurance policies, the premium for which was payable by the voyage charterer.

To answer this question we should begin, as the court did, with discussing contracts of carriage. Traditionally, there are two main instruments used in the carriage of goods by sea: the charterparty and the bill of lading. The key distinction is that a charterparty is a contract for the use of the ship, whereas a bill of lading is an instrument mainly used for the carriage of goods.[89] In the hands of the charterer, the bill of lading does not generally have contractual significance, as the shipowner and the charterer are to be bound by the voyage charterparty. By contrast, in the hands of parties other than the charterer (eg cargo receivers), the bill of lading may effectively constitute a contract with the contractual carrier (ie shipowners).[90]

Given the separate operations of the charterparty and the bill of lading, Sir Nigel Teare in the first instance held that, in circumstances where owners and charterers had agreed that, if owners insure against war risks, charterers would pay the insurance premium, then, prima facie, the parties have agreed to look to the insurers for indemnification in respect of losses caused by such risks, rather than to each other.[91] However, as for the position of cargo owners under the bill of lading, he concluded:

> "[t]o incorporate into the bills of lading the Owners' agreement in the charter party not to seek contribution for piracy losses would be a mechanical operation of the incorporation clause because it divorced the Owners' agreement not to seek a contribution from the Charterers' agreement to pay the premium which had given rise to the former agreement and because it failed to take into account that the holders of the bill had not agreed to pay the premium."[92]

Males LJ in the Court of Appeal affirmed the above judgment, and pointed out that key to the argument was the construction of the contract contained in, or evidenced by, the bill of lading, which incorporated the terms of charterparty. Males LJ found that the present case is a weaker case than *The Ocean Victory* for concluding that the shipowner agreed not to seek a general average contribution from the charterer. However, the point is that it is unnecessary to decide this question, as the issue at stake is concerning the position of cargo owner in the bill of lading as opposed to the charterers.[93] Males LJ concluded that the charterparty terms requiring the charterer to pay for the additional war risks and Kidnap &Ransom insurance were *prima facie* incorporated into the bills of

[88] [2020] EWHC 3318 (Comm), app'd [2021] EWCA Civ 1828.
[89] Paul Todd, *Principles of Carriage of Goods by Sea* (Routledge 2015) 4.
[90] *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 55 Ll L Rep 159; *The El Amria and The El Minia* [1982] 2 Lloyd's Rep 28.
[91] [2020] EWHC 3318 (Comm)[81].
[92] *ibid,* [110].
[93] *ibid,* [43]-[44].

lading, but that they should not be manipulated so as to impose a liability on bill of lading holders to pay the premium.[94] It is noteworthy that the judge said:

> "there is nothing in the bills (or the charterparty) to say how liability for the premium would be apportioned between different bill of lading holders. But an individual bill of lading holder would want to know for how much of the premium it was liable".[95]

Therefore, Males LJ seems to return to the right path of following the *Mark Rowland* principle by considering whether a third party is under a contractual duty expressly or implicitly to pay for the insurance premium so that they could qualify to enjoy the interest of insurance indemnity or subrogation immunity.

7. Conclusion

Mark Rowlands provides a potential analogy to many transactions with a first-party insurance funded solution; however, this paper has carefully examined whether the case embodies a general principle and whether the so-called "*Mark Rowlands* principle", as applied and developed by later cases, is effectively true.

Having revisited *Mark Rowlands*, this paper has found that the decision has taken account of all the factors of the terms of the insurance contract – the requirement of insurable interest and the payment of a premium – rather than having relied upon the intentions of the landlord and the tenant as construed from the terms of the lease alone. However, the cases which followed have not heeded these points. This paper does not set out to completely criticise and overthrow the interpretative exercise of the underlying contract but, rather, to argue that there has been a radical reinterpretation of the *Mark Rowlands* principle as the case law has developed.

Leaving the law of subrogation aside, this paper has also observed that satisfying the question of an insurance contract affected for the benefit of a third party is a distinct but primary issue for the third party to claim insurance indemnity and insurance immunity. In summary, a first-party insurance contract affected for a third party's benefit should consider the following factors: 1) the intentions of the parties to the underlying contract as derived from the proper construction of the contract; 2) the terms of the insurance contract that purports to confer a benefit to a third party, if, in the absence of any express terms, it requires a "plausible" explanation or other legal basis such as statutory law; 3) whether the insurance contract is for the third party's benefit to the extent of his interest in the subject-matter of the insurance and 4) the party paying for a premium.

Should a general principle be drawn from *Mark Rowlands*, a full and contextual consideration of the factors discussed above is necessary in order to determine whether the insurance contract would benefit both the parties – the landlord and the tenant – even where the tenant was responsible for the damage and no subrogated claim could then be brought. The interpretative approach that focuses on the terms of the underlying contract alone may well be correct for addressing the issue of subrogation immunity in the modern rules of insurance law. However, as this paper suggests, the approach to addressing insurance for a third party's benefit should not be confused with the question of subrogation immunity, as subrogation immunity is a separate subject and set of rules in law.

[94] [2021] EWCA Civ 1828 [53].
[95] *ibid,* [49].