

## Marine insurance — subrogation

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CENTRAL INSURANCE CO LTD v SEACALF SHIPPING  
CORPORATION — THE AIOLOS

English Court of Appeal, 1, 2 February 1983<sup>1</sup>

The case concerned a plaintiff who paid an assured for cargo which was found to be short shipped from Brazil to Taiwan in the vessel *Aiolos*.

Having paid out the assured, the plaintiff became subrogated to the buyers' rights, and in addition to relying upon the ordinary insurer's rights of subrogation, the insurer (the plaintiff) obtained from each buyer (of the short shipped goods) a formal document headed — "Loss Subrogation Receipt".

The important aspect about this "Loss Subrogation Receipt" was that although it was issued and received, it was not in fact a document of assignment of the buyers' right of action between an equitable assignee and an assignor, and therein was a major problem for the plaintiff (the insurance company) when it attempted to recover damages (in its own name) from the shipowner.

In the judgment it was stated that<sup>2</sup>—

Subrogation is concerned solely with the mutual rights of the parties to a contract of insurance and it confers no right and imposes no liability on any third party.

And that<sup>3</sup>—

... an insurer has no right, in English Law at any rate, to sue under his right of subrogation in his own name, but must bring his action in the name of the insured.

While the "Loss Subrogation Receipt" could be treated as a notice of abandonment, thereby vesting in the insurers title to the goods,

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<sup>1</sup> [1983] 2 Lloyd's Law Reports 25.

<sup>2</sup> Ibid 33. See analysis of Diplock J (as he then was) in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1961] 1 Lloyd's Rep 479; [1962] 2 QB 330.

<sup>3</sup> Supra n1, 28.

"abandon" does not mean "assign" or "transfer", and the receipt does not constitute an assignment of the right to sue for their non delivery.<sup>4</sup>

Abandonment must be carefully distinguished from subrogation,<sup>5</sup> and as settlement of the loss by insurers is a condition precedent to subrogation,<sup>6</sup> section 62 of the Marine Insurance Act 1909 becomes relevant.

If the loss is not total loss it will be partial loss, in which case no title in the subject matter will pass to the insurer. If a total loss, the insurer can require the assured to proceed against third parties in the name of the assured, and at the insurer's expense under Common Law. The Marine Insurance Act however, does not specifically require the assured to do so.

Letters of subrogation drawn up by the insurer may require the assured to lend the assured's name to proceedings which the insurer may take against third parties. If the assured has no proprietary rights, these cannot be subrogated.<sup>7</sup>

There are a number of interesting points in the *Aiolos* case —

- 1 There was no actual transfer of title of the goods for the simple reason that there were no goods — they had been "*short shipped*".
- 2 As settlement of the loss (short shipment) by insurers is a *condition precedent* to subrogation, it was incumbent upon the insurer (the plaintiff) to have some firm arrangement with the assured (a group of Taiwanese buyers) *before* attempting to engage in subrogation.
- 3 With the passage of time, the assured (the Taiwanese buyers) had been paid out, had nothing to assign, and were not interested in allowing the plaintiff (the insurer) to use their names in a court action against some (possibly unknown) third party (in this case the Seacalf Shipping Corporation).

Lord Justice Oliver summed up the rather complex situation when he held<sup>8</sup>—

an equitable assignee *can* only assert his cause of action in a suit to which his assignor is a party.

<sup>4</sup> Ibid 31. Although Oliver LJ was clear that was the position in English law, he conceded that it was arguable in Taiwanese law that the receipt was an effective assignment.

<sup>5</sup> *Dover A Handbook to Marine Insurance* (Witherby and Co, London, 1975) p 429.

<sup>6</sup> Ibid 455.

<sup>7</sup> Ibid 456.

<sup>8</sup> Supra n1, 33.