



**NATIONAL UNIVERSITY  
OF LESOTHO**

NOTING OF THE OTHER PARTY'S INTEREST IN THE INSURANCE POLICY  
[NEDBANK LESOTHO LTD v MANYELI T/A COPY SHOP VIS A VIS MARINE AND  
TRADE INSURANCE CO. v GERBER FINANCE]

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DECLARATION

I, .....do hereby declare that, unless specifically indicated to the contrary in this text, this dissertation is my original work and has not been submitted for any fulfilment of the academic requirements of any other degree or other qualification by any other person, other than me now.

Signed at National University of Lesotho on this .... Day of ....., .....

Signature: -----

## ACKNOWLEDGEMENTS

This is dedicated to God, whose grace has always been with me. I am grateful to Dr Ramokanate for supervising this mini-dissertation to the end.

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## ABSTRACT

In this day and age, a number of people may hold different interest rights on one object. One of these people may decide to insure such property against damage for the protection of his own interest in it. The results of this person contracting with the insurance company to protect his interest, the law of contract provides that only he can benefit from the contract, to the exclusion of the interested third parties. It is also admissible for all the parties who have an interest in the subject to insure it under one policy and become composite insured thereof. From this policy each one of the parties will be indemnified in accordance of their insured interest and as such the interests are distinct.

There has been a practice in the recent years in insurance business, especially between the bankers and the insurers that one who holds an interest in an object may insure it and then subsequently note the others' interests in the policy. This practice resulted in insurance companies indemnifying the interested third parties because of such notation. The problem however, is that the noted interested third parties are not part and parcel of the contract of insurance, so the question arises of whether they have legal rights and obligations under the policy. The aim of this research therefore is for investigate whether noting a third party's interest in an insurance policy creates a composite policy from which the insurer is liable to the noted third parties.

The mentioned issue will be discussed with relevance to the Lesotho case of *Nedbank Lesotho Ltd v Manyeli* and the South African case of *Marine & Trade Insurance Co. v Gerber Finance Ltd*, for the purpose of finding out how the courts deal with such issues.

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## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 GENERAL INTRODUCTION

The case of *Lake v Reinsurance Corporation Ltd*<sup>1</sup> gives the definition of “insurance” to mean “a contract” between an insurer and an insured in terms of which the insurer undertakes to indemnify the insured upon the occurrence of a specified uncertain future event in which insured has an interest. The insurers undertaking is done in return for the payment of premiums by the insured. There are traditionally two (2) parties to a contract of insurance, these being; the insurer and the insured. The insurer is the party who assumes or accepts the risk of loss and undertakes, for a consideration, to indemnify the insured or to pay him a certain sum of money on the happening of a specified contingency.<sup>2</sup> The insured, on the other hand is the person in whose favour, the contract is operative and who is indemnified, or is to receive a certain sum upon the happening of a specified contingency.<sup>3</sup> He is the person whose loss is occasioned for the payment of the insurance proceeds by the insurer.

There may be multiple parties to a contract of insurance. This may be the case in multi-party insurance under two (2) circumstances; a) joint policy and, b) composite policy. In which there is more than one insured party as each and every person who has an insurable interest in the subject-matter of insurance can have his or her interest insured in one policy document. The difference between these policies is clearly defined in the case of *Accident, Fire and Life Assurance Corp. v Midland Bank*<sup>4</sup> wherein a company occupying the premises under a lease, the freeholders of the premises and the bank which had a mortgage over the premises were named as the insured parties under a single policy covering those premises. The court had to look at the type of interest each insured had in the said premises and concluded that it was common for joint owners of a property to insure it under a single policy; a joint policy defined by the fact that the insured have a joint interest in the property that is covered. It was noted further that people having different interests

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<sup>1</sup> 1967(3) SA 124(W)

<sup>2</sup> Parties to the contract of insurance [www.batasnatch.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance](http://www.batasnatch.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance) Last accessed: 30/10/2019

<sup>3</sup> *Ibid.*

<sup>4</sup> 1940(2) KB 388

in the subject matter of insurance can also insure it under a single policy known as composite policy. In both these situations it is vividly transparent that that the parties to either a joint policy or a composite policy have legal rights whatsoever to the insurance contract in question. This offers an advantage to third parties because their interests are guarded and if anything happens, they would be indemnified for their losses.

Under Lesotho law, the insurance business was governed by *Insurance Act No. 18 of 1976* which got repealed in by *The Insurance Act No. 12 of 2014*. The common law stemming from the Roman also applies a great deal in insurance law. The study may accordingly aid and contribute to the understanding and development of insurance law in Lesotho since there is not much of growth in Lesotho law under this area.

## 1.2 PROBLEM STATEMENT

The difficulty arises where these parties (third parties to an insurance policy contract) are merely noted or designated or having their interests in the subject matter noted in the policy, the question arises of whether they should benefit from the policy.

It is often not clear what the notation of third party interests in an insurance policy means, could it mean that the third parties are considered 'joint or composite' insureds then? It is common knowledge that under the law of contract, the doctrine of privity, being a controversial rule of the law of contract, prevents a person who is not a party to the contract from having any legal rights to enforce it, or to have contractual liabilities imposed as a result of the contract.<sup>5</sup> Seeing that contractual remedies are for contracting parties only, do the parties whose interests are noted suffer prejudice as a result of this important rule in the law of contract or do they by the virtue of the notation become parties to the insurance contracts of which they primarily were not.

Many lenders believe that having their interests noted in the insurance contract between the insurer and the borrower gives them security interest in such policy, as was seen here in the Lesotho, in the case of *Nedbank Lesotho Limited V Manyeli t/a Copy shop*<sup>6</sup> wherein the parties entered into an instalment sale agreement of a motor vehicle. The respondent then insured the said vehicle against

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<sup>5</sup> O'Sullivan 2010 *Privity of Contract: The potential impact of the law reform commission recommendation on Irish contract law* Judicial Studies Institute Journal 2

<sup>6</sup> (CCT/42/2010) [2012] LSHC 53 (05 MARCH 2012)



third party claims, all loss and damage, and had the seller's interest *noted* on the insurance policy as per clause 5.1 of the contract of sale, which clearly read;

5.1 The buyer shall keep the goods registered, licenced and insured against third party claims and against all loss and damage for the full period of this agreement with a registered insurer for such value as may be determined by the seller from time to time. The buyer shall have the seller's interest noted on the insurance policy and shall pay all insurance premiums punctually and comply with all the conditions of the insurance policy.

The vehicle then got damaged beyond repairs as evaluated by the insurance company, and the bank sought payment of the balance owing by the defendant under the provisions of the sale agreement. But the defendant claimed not to have been indebted to the bank as the bank had to have proceeded against the insurer because such policy was part of the agreement between the bank and the defendant. The court in this regard made reference to the *Gerber Finance* case and it was held in that regard that “...an agreement to protect the financier's interest had been made between Gerber and Marine & Trade. This was an agreement separate and apart from the insurance contract between the lessee and Marine & Trade.” In essence the judge was of the view that there had existed two separate contracts of insurance, one, between the insurance company and the lessee of the machine and, the other between the insurance company and the owner of the machine. Hence the court in accordance with the *Gerber Finance* case rejected the view that the bank has an interest in the policy between the defendant and the insurance company and therefore cannot claim under such policy.

However, in the case of *Marine & Trade Insurance Co. v Geber Finance*<sup>7</sup> the respondent, an owner of a mechanical loader that had been leased to a construction company, had its interest *noted* in the policy taken out by the company on the mechanical loader. The machine that was insured then got damaged beyond repair and the insurer paid out the compensation to the lessee, the construction company that was liquidated and had no dividends to pay the respondent and the respondent took an action against the insurer alleging that the insurer was liable to indemnify it under the insurance

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<sup>7</sup> 1981(4) SA 958 (A)

policy. The court upheld the claim in that regard, because, by agreeing to *note* the respondent's interest on the policy, it had agreed to insure that interest, consequently to indemnify the respondent upon destruction of the machine.

It has been common practice that the third party who has an insurable interest in the object of insurance may have his or her insurance noted, and upon agreement to note the interest, would be entitled to recover in the proceeds of the insurance contract in question for a composite policy would have been created thereon. Nevertheless, the Manyeli case rejected the view and concluded that the bank could not benefit from the policy between the insurance company and Manyeli, the issue that arises therefore is whether these two cases were correct on their conclusions of the law, and what necessarily happens when a third party interest is noted in an insurance contract, is the insurer obliged to honour and compensate such third party. Henceforth the purpose of this study is to determine whether where the interests of the third parties (diverse from those of the original insured) are noted in an insurance policy and such interests are prejudiced, the third parties have a legal recourse against the insurer and if by such notation the interested third parties automatically become parties to the insurance contracts.

#### 1.2.1 Research question(s)

- Whether an agreement to note the other party's interest in the contract of insurance creates a composite policy thereon, and
- Whether the 'noted' is eligible to recover from such policy?

### 1.3 RESEARCH METHODOLOGY

The study seeks to critically discuss the decision in the case of *Nedbank Lesotho Limited v Manyeli t/a Copy shop* in comparison with *Marine & Trade Insurance Co. v Gerber* and as well as establish whether noting of the other party's interest in the insurance policy on its own creates a composite policy. And consequently whether the noted party has an interest in the policy between the borrower and the insurer thereof, and can then recover the proceeds of such policy. The research will use the following methodologies:

### 1.3.1 LITERATURE REVIEW

This research is primarily based on a literature review of appropriate textbooks, law journals, international conventions, and legislation and internet sources dealing with noting of the other party's interest in the insurance contract and composite policies, case law will also be used throughout the discussion.

### 1.3.2 COMPARETIVE LEGAL STUDY

This paper is a critical analysis of the South African judgment on noting of the other party's interest in the contract of insurance, *Marine & Trade Insurance Co. v Gerber Finance* and the Lesotho case, *Nedbank Lesotho Ltd v Manyeli t/a Copy Shop*, The study will be comparative in nature, with reference to both Lesotho and South African law for clarifications and illustrations.

### 1.4 RESEARCH OUTLINE

This study will be categorised into 4 chapters;

CHAPTER 2: This chapter will restate the law of composite policies, give out how it is defined, the parties to a composite policy and the obligations each of those parties hold unto the others. The chapter will investigate in what terms a composite policy arises and the requirements thereof. It will construe the differences between composite policies and joint policies in comparison, for they are different sides of the same coin in that they are relatively similar. The chapter will further find out the legal effects of composite policies to the parties involved and how it affects them in every aspect. At the end there will be a brief summary of the findings discussed in the main content of the chapter.

CHAPTER 3: Part one of this chapter will deal with noting the third party's interest in an insurance policy, the concept of which the objective of the paper lies upon. This concept will be discussed in detail how the notation may take place, and in what instances it may be invoked, and not forgetting the rationale behind this concept or practice as it may be called. Furthermore, the chapter will outline the general effects that the notation of the third party on the parties themselves and the obligations that may arise as a result of the insurance policy. Not forgetting the challenges of noting such interests. Another important aspect that will be discussed about this concept is its state of being a common/market practice that raises expectations for interested third parties to have their

interests indemnified after they had been noted on insurance policies. Construed further will be the benefits that this common practice of noting bring with it, especially to third parties.

The second part of the chapter will be comparative in nature, taking the Lesotho case of Manyeli and the South African case of Gerber Finance Ltd from which noting the third party's interest is seen to have practiced and yet the courts had arrived at different conclusions of whether the noted interested third parties had to benefit from the insurance contracts. The facts of the cases will be discussed in depth as well as the principles which emerged from them in relation of notation of third party interests in insurance contracts in relation with composite policies. This part will also find out how and why the courts had to differ in deciding the cases in issue, as the cases are comparatively analysed. Lastly a summary of the chapter will be seen at the end, which will briefly state what the chapter elaborated in full, picking out the important matter about it.

CHAPTER 4: This being the last chapter of this study, will cover a brief summary of the findings, accompanied by final recommendations on how the interested third parties should ensure that their interests are guarded by the insurers in relation to policies opened by the primary insureds.

## CHAPTER 2

### 2. THE LAW OF COMPOSITE POLICIES

#### 2.1 INTRODUCTION

The intention in this chapter is to restate the law of co-insurance particularly focused on composite policies. In going about that task, the first part of the chapter will explain what the term “composite policy” means, clearly indicating the factors to be considered by the courts to decide whether a policy is composite or not. The second part of the chapter will deal with the parties to a composite policy, showing that normally there are two parties into the contract of insurance; being the insurer and the insured. Whereas, in composite policies there are two or more insured in that respect, clearly indicating that it involves more than just two parties into the contract. The third part of the discussion in this chapter will be mainly based on the composite policies in distinction with joint policies, wherein the key differences between the two will be evaluated, in correspondence with case law. The sole intention in drawing the distinction between joint and composite policies is that courts almost always scrutinize their similarities and differences in order to decide on the type of policy in issue at the time. The other important factor in this regard is that, composite policies and joint policies are more or less the same so much that where one is involved, the other is automatically thought of and a consideration of the facts in question then precede, this is due to the following; a) there are multiple insured parties in both composite and joint policies, and b) all the insured parties have an interest in one subject matter of insurance.

The last but not least part of the chapter will deal with the legal effect of composite policies to the parties thereon, in so doing, the discussion will analyse the entitlements of each insured as from the insurance policy and further discuss the rights and obligations of both the insurer and the insured parties owed to one another as accrued from the composite policy. Lastly, a conclusion will be drawn as to what the law of composite insurance entails, in reference to the main discussion.

#### 2.2 COMPOSITE POLICIES CONSTRUED

##### 2.2.1 What is a composite policy?

There is a type of multi-party insurance arrangement under which several different persons having varied interests in the insured property are designated (either by name or by a descriptive term adequate for their identification) as persons whose interests are insured; each having an entitlement

to receive part of the insurance proceeds if his interest is damaged by a casualty insured against and their different interests in the property are insured under one policy.<sup>8</sup> This type of multi-party insurance arrangement is generally understood as a composite policy. The term composite policy derives from the judgment of Sir Wilfred Greene MR in *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd*<sup>9</sup> wherein three parties were named as the insured under a single fire policy; a company occupying the insured premises, the freeholders of the premises and the bank who had a floating charge over the property of the occupiers. The question that arose in this case concerned the nature of the interest of each insured in the subject matter of insurance, and to answer this question the Court had to look at the type of interest because it was common for the joint owners of property to insure it under a single policy, a joint policy, defined by the fact that the insured have a joint interest in the property. However, in this scenario it was not the case, each insured party had a distinct interest in the said premises. Therefore, Sir Wilfred Greene held in that regard that,

“...there can be no objection to combining in one insurance a number of persons having different interests in the subject-matter of insurance, but I found myself unable to see how an insurance of that character can be called joint insurance.”

It was noted further that people having different interests in the subject matter of insurance can also insure it under a single policy, the policy being known as a composite policy. It is crystal that in such a case the interest of each 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 and it was decided that the policy involved therein would be regarded a composite policy because it comprised in one piece of paper the interests of number of persons whose connection with the subject matter makes it natural and reasonable that the matter should be dealt with on one policy.<sup>10</sup>

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<sup>8</sup> Robert E. Keeton, Basic text on Insurance Law, 1971 West Publishing Co. at pages 178-179

<sup>9</sup> *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd* [1940]2 KB 388 (CA); <[swarb.co.uk/general-accident-fire-and-life-assurance-corporation-v-midland-bank-ca-1940/](http://swarb.co.uk/general-accident-fire-and-life-assurance-corporation-v-midland-bank-ca-1940/)>.

<sup>10</sup> *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* [2015] NZSC 59 [13 May 2015]

Clearly, a composite insurance policy is one in which each insured party's interests and rights are separate, and crucially, not dependant on the compliance by other insureds with their obligations under the policy.<sup>11</sup> This in essence means that, the primary insured and the interested third party are both insured parties but the difference is that each is insured in his own different interest from that of the other making the policy composite. However specific forms of wording (often known as "multiple insured" and "non-vitiation" clauses) are required to be sure that an effective composite insurance contract is in force,<sup>12</sup> this as evidenced in the case of *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporation* wherein insurance for eight port companies, each having separate insurable interests in its own property, was contained in a single policy document, NZPC policy, under which each port company was insured for its individual losses. The names of the eight port companies appeared under the heading "the insured", it was also specified that each insured included a subsidiary of a named insured that was majority owned or controlled by the insured. Immediately after the list of the eight port companies (and the wording including their respective subsidiaries) was set out, the following clause appeared;

"This policy is to be interpreted as if the policy were issued separately to each of the insured for their respective rights and interests."

There were differing indemnity periods for each insured, some additional clauses applied to individually named port companies only and although the policy was expressed to be a single policy, a special protection was included in relation to fraud, misrepresentation and the clause making performance by the insured of its obligations under the policy a condition precedent to the liability of the insurer. In essence, the fraud provision provided that any benefit obtained under the policy by fraud would be forfeited, but each insured would be treated as having been issued with separate policy. This made it clear beyond argument that fraud by Port Company did not affect any other insured port company.

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<sup>11</sup> Eversheds Sutherland, Property Banking E-Briefing, (03-04-2012) < [www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial-Institutions/FIG\\_Property\\_banking\\_briefing](http://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial-Institutions/FIG_Property_banking_briefing) > Last Accessed 20/11/19; MacFarlanes , Composite insurance (sometimes referred to as co-insurance), March 2016 LMA Publishes Insurance Broker Letter

<sup>12</sup> Eversheds Sutherland *Ibid*.

The issue to be determined was whether *inter alia* the NZPC policy was a single, composite policy or a series of separate policies. The High Court and the Court of Appeal in this regard decided that because there was a joint obligation to pay premium and the policy could not be cancelled except by all eight port companies acting together, the policy was a single, composite policy and not eight separate policies. However the Supreme Court overturned that decision and held that each port company's interest in its insured property is entirely distinct from that of the other port companies, hence there are no reasons of obvious convenience to treat the arrangement as a single contract. The NZPC policy was therefore in that instance regarded as a contract of fire insurance of the eight port companies, not one composite policy.

*MacGillivray and Parkington*<sup>13</sup> state that where, therefore the interests of different people in the same insured property are diverse interests, a policy purporting to insure all the persons interested must be construed as a composite policy insuring each one severally in respect of his own interest. This clearly indicates that the insurable interest of the insured parties should be on one subject-matter of insurance, that is, where a number of insureds have totally different properties insured by them, listed in one policy, that kind of a policy cannot be construed to be composite. Thus as decided by the case of *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* where there was no business that was collectively owned by the port companies and the insured was a reference to an individual company, the Court held in that regard that,

“Each port company's interest in its insured property is entirely distinct from that of the other port companies. There are no reasons of obvious convenience to treat the arrangement as a single contract... the NZPC policy should be regarded as a contract of fire insurance of the eight port companies, not one composite policy.”<sup>14</sup>

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<sup>13</sup> MacGillivray and Parkington, *Insurance Law - relating to all risks other than marine*, 7th Edition (Sweet and Maxwell 1981) 79.

<sup>14</sup> *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* (n 10).



This is an emphasis that a composite policy cannot be said to exist where the individual insureds have no corporate association with one another and no interest, insurable or otherwise in each other's property.

Another important feature of a composite policy is premium, in that the composite insureds must be jointly responsible for the payment of premium as Gaudron J when contrasting an insurance contract involving separate obligations owed to and by different persons, in *Federation Insurance Ltd*<sup>15</sup> held that the joint obligation as to the payment of the premium constituted the policy as a single contract although it effected separated insurances and in that sense constituted a composite policy or composite contracts. To that effect and in support thereof, the Court of Appeal of England and Wales found out that a policy insuring CellStar, a corporation based in Texas and its subsidiaries was a composite policy in the case of *American Motorists Insurance Co. v CellStar Corp (AMICO)*.<sup>16</sup> A significant factor in that decision was that CellStar and its subsidiaries were jointly responsible for the premium payable under the policy.

It is then adamant to say that the joint responsibility of the insured parties to pay premium in a policy makes it a composite one in nature, as well as the fact that the policy cannot be cancelled by one insured except by all the other insureds acting together as was stressed out in the *New Zealand Fire Service Commission* to have been the deciding factors in both the High Court and the Court of Appeal.

The composite policies are not only inclined to business related transactions but in as much as not common, they are available to persons with close relations, this is observed in the *Maulder family case*<sup>17</sup> wherein Mr and Mrs Maulder were insured under policies covering a house and its contents, some of which were owned separately. The husband set the house on fire, it and its contents were destroyed. Due to that Mrs Maulder claimed under the policy but the insurer declined to pay out the insurance proceeds on the basis that the damage was caused by one of the insureds and therefore impliedly the other insured cannot benefit from such contract. Eichelbaum CJ found that each policy was a composite policy because Mr and Mrs Maulder severally insured their interests in the insured property, it is common cause that there were no multiple contracts but the spouses

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<sup>15</sup> *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303.

<sup>16</sup> [2003] EWCA Civ 206, Lloyd's Rep IR 295.

<sup>17</sup> *Maulder v National Insurance Co. of New Zealand Ltd* [1993] 2 NZLR 351 (HC).

were separately insured under the policies, because of this Mrs Maulder was not precluded to indemnify because of the acts of her husband.

So in a composite policy, there is a contract of insurance for each of the insured embodied in one document, just as the case of *Arab Bank plc* suggests, for it was made stressed out that in a typical case of composite policy, where there are several assureds with separate interests, the single policy is indeed a bundle of separate contracts.<sup>18</sup> Because granting of a composite insured status provides the composite insured with a separate contract with the insurer, it is therefore logical to conclude that that is the reason that one insured may avoid the risk of the cover being invalidated by the actions of the other insured parties under the same policy.<sup>19</sup>

## 2.3 THE PARTIES TO A COMPOSITE POLICY

As a general rule, the law does not allow a third party to make a claim under the insurance policy,<sup>20</sup> there are however various exceptions to this principle, that arise in cases of co-insurance<sup>21</sup>. Hence a composite policy has more than two parties to the contract of insurance, because in a composite insured there is the insurer and two or more insured parties as the parties to a contract of insurance.

### 2.3.1 THE INSURER

The insurer in a composite insurance policy is the party who assumes the risk of loss and undertakes to indemnify the insureds or to pay to them a certain sum of money on the occurrence of a specified contingency, thus for a considerable amount. The insurer in this situation has an obligation to guard all the insured parties' interests and notify any of them if there are changes to the policy.

### 2.3.2 THE COMPOSITE INSURED

The term 'Composite Insured' applies where there are two or more insured parties with distinct insurable interests within one insurance contract. It is argued that the addition of a party as a composite insured is the appropriate route to take where the interests of the respective parties in

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<sup>18</sup> *Arab Bank plc v Zurich Insurance Co* [1998] CLC 1351 (QB); *New Zealand Fire Service Commission V Insurance Brokers Association of New Zealand Incorporated* (n 10).

<sup>19</sup> Willis Newsletter, ABI withdraws from notification of banks' interest agreement, Willis Property Investors Division (September 2011).

<sup>20</sup> Ozlem Gurses (Dr) 'Recent developments in insurance contract law' (December 2015) < [www.cii.co.uk/fact-files/law-and-regulation/recent-development-in-insurance-contract-law/](http://www.cii.co.uk/fact-files/law-and-regulation/recent-development-in-insurance-contract-law/) > Last updated 06 November 2018, Last Accessed

<sup>21</sup> *Ibid.* " ...of Co-insurance, the express conferring of third party benefits and assignment."

the property are not identical.<sup>22</sup> Each insured party has a right to claim against the insurer directly and to receive payment under the insurance contract, even in cases where the co-insured has breached the terms of the policy.<sup>23</sup>

#### 2.4 COMPOSITE VS JOINT POLICIES

Co-insurance is a generic term for any policy which has two or more insured parties, it covers joint insurance and composite insurance,<sup>24</sup> and sometimes a series of separate policies. As the case of *Federation Insurance Ltd v Wasson*<sup>25</sup> wherein Gaudron J had to contrast a contract involving separate obligations owed to and by different persons, which she said involved several different contracts, and such a contract where some promises are joint and other promises in the same contract are several, in respect of which she said “there is but one contract.” The contract as properly construed must reveal the intention to cover the third party’s interest and the insurance will have to be of the full value of the property rather than merely of the insured as a limited owner.<sup>26</sup> This seems to be fairly likely where the relationship between the insured and the third party is that their interests are similar or there is most likely to be a noting of both interests in the contract of insurance.<sup>27</sup> However it was also submitted in *Wasson* that there are three categories of insurance contracts being joint policies, composite policies and separate policies, nevertheless, the main focus herein is on joint and composite policies.

In *New Zealand Fire Service Commission*, the court contrasted a policy under which joint owners of property obtain insurance cover for that property, with a policy under which a number of persons with different interests in the insured property obtain insurance for their separate interests in the property and saw fit that the former is a joint insurance while the latter is described as follows,

“Such policy may be described as a composite policy because it comprises in one piece of paper the interests of number of persons whose connection with the subject matter of the insurance makes it

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<sup>22</sup> Willis Newsletter (n 19).

<sup>23</sup> Bristows LPP ‘Property Insurance: A look at the different insurable interests of lenders and borrowers’ 2018 < [www.lexology.com/library/detail.aspx?g=d9b8124974d](http://www.lexology.com/library/detail.aspx?g=d9b8124974d) > Last Accessed 23/11/19; See *Maulder v National Insurance Co. of New Zealand Ltd*

<sup>24</sup> Ozlem Gurses (Dr) ‘Recent developments in insurance contract law’ (n 20).

<sup>25</sup> *Federation Insurance Ltd V Wasson* (n 15)

<sup>26</sup> John Birds, *Modern Insurance Law*, 1988 2<sup>nd</sup> Edition (London- Sweet & Maxwell) 52

<sup>27</sup> *Ibid.*

natural and reasonable that the whole matter should be dealt within one policy.”

The similar was decided in the case of *Arab Bank plc v Zurich Insurance Co.*<sup>28</sup> where the defendant insurers provided professional indemnity insurance to a company that carried out estate agency and valuation of business. The claimants obtained judgment for breach of professional duty against that company but the insurers repudiated liability to indemnify the firm because of non-disclosure and breach of warranty based on the assumed fraud by the company’s managing director. Under the policy, a number of persons including the company itself, and its directors were included within the definition of the insured. The company had to rule out that the policy involved therein was a composite policy because company directors do not have a common interest, and are jointly and severally liable for each other’s defaults so the policy covered the company and its directors individually.<sup>29</sup>

It is always therefore important to determine whether a policy is joint or composite when there are two or more persons under a single insurance policy.<sup>30</sup> It is always important to determine whether a policy is joint or composite based on their given similar nature. The test as laid out in the case of *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd* is whether the insureds have a common interest in the insured subject matter, if the parties have different interests, the policy is composite and the misconduct of one will not affect another insured’s entitlement to insurance.<sup>31</sup>

#### 2.4.1 Composite and joint policies in contrast;

- Composite insurances arise where the parties have different interests in the insured subject matter whereas Joint insurance arises where the parties have identical interests,<sup>32</sup> hence in a composite policy the insurer recognises the individual rights and interests of each ‘named insured’ and does not treat those rights and interests as joint or co-insured rights.<sup>33</sup> And to

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<sup>28</sup> See; *Arab Bank plc V Zurich Insurance Co.*

<sup>29</sup> Smithy NFFC, P05 Insurance Law Cases, < [quizlet.com/110251681/p05-insurance-law-cases-flash-cards/](http://quizlet.com/110251681/p05-insurance-law-cases-flash-cards/) >

<sup>30</sup> Richards Butler and Reed Smith, Differentiating between joint and composite policies, 05/01/10

<sup>31</sup> *Ibid.*

<sup>32</sup> Ozlem Gurses (Dr) ‘Recent developments in insurance contract law’ (n 20).

<sup>33</sup> GoldSeal ‘Insurance Clauses – Named Insured vs Interested Party’ Tipsheet (September 2010)

this effect is the case of *Central Bank of India v Guardian Assurance Co.*<sup>34</sup> where one Seth Rustomji had borrowed from the Central Bank and secured the loan by a mortgage of the stock at his mill, of which stock was insured against fire by the respondent company. The difficulty in this case was that the counsel who had appeared for both Rustomji and the bank had taken the view that the insurance was a joint insurance and that the fraud on the part of either the plaintiffs would equally affect the claim of the other plaintiff even though the insurable interests were different.

Their Lordships in the matter made a remark that, “joint insurance is a phrase which seems to be applied accurately only in a case where an insurance is effected as regards property jointly owned by the assured.” Hence it is safe to say that, once parties have different interests in the property, a joint policy would not be created, but a composite policy thereof. As a matter of fact, joint insurance is only properly found where insurance is effected as regards property jointly owned by the insureds, insurance under one policy of composite interests, which is, the different interests of the different insureds, is not joint insurance.<sup>35</sup>

- A joint policy is usually appropriate where the legal liability of the parties will be joint and several<sup>36</sup>, it is therefore treated as a single indivisible contract so that if the insurers have a defence against one co-insured the other is automatically precluded from recovering. By contrast, a composite policy is a collection of separate contracts between the insurers and each insured, so that if one insured is precluded from recovering by reason of his conduct the right of others are not affected.<sup>37</sup>
- Under a joint policy fraud or non-disclosure by one insured will entitle the insurer to avoid the policy as against all insureds, And it is therefore important to stress that the main disadvantage of joint policies is that default by one party invalidates the whole policy<sup>38</sup>

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<sup>34</sup> (1936) 54 L.L. L.R. 247

<sup>35</sup> John Birds, *Modern Insurance Law*, 1988 2<sup>nd</sup> Edition, London - Sweet & Maxwell at page 42

<sup>36</sup> Goldseal (n 25) at page 3

<sup>37</sup> Ozlem Gurses (Dr) 'Recent developments in insurance contract law' (n 20).

<sup>38</sup> Eversheds Sutherland, *Property Banking E-Briefing*, (n 3) but states that the effect of this can be mitigated by the inclusion of the so called “mortgagee protection” clauses (sometimes referred to as “non-invalidation” clauses which

while the practical effect of a composite policy is that one insured is able to recover the proceeds under the policy even if the other insured is in breach of the insurance contract.<sup>3940</sup> Thus as seen in the judgment of Potter J in *New Hampshire Insurance Co. v MGN Ltd*<sup>41</sup> where the insured parties had a community of interest because they were all either members of the Maxwell group of companies or entities associated with it, in which Potter J said “the right to avoid for non-disclosure relates to the contract of insurance made with the individual assured...”

## 2.5 THE LEGAL EFFECT OF COMPOSITE POLICIES

### 2.5.1 TO THE INSURER

The insurer in every essence is the party who assumes or accepts the risk of loss and undertakes for a consideration to indemnify the insured on the happening of a specified contingency.<sup>42</sup> Where there are composite insureds, the insurer can pay out twice from the same event<sup>43</sup> this is as seen in the case of *Marine and Trade Insurance Co. Ltd v Gerber Finance*<sup>44</sup> wherein a composite policy had been created and in the event of loss, the insurance company had paid out proceeds to one insured, the lessee of the subject-matter of insurance, in exclusion of the other (the financier) and the court held in that regard that the insurer was under an obligation to indemnify Gerber Finance under its separate interest to that of the lessee because each insured party was insured independently of the other, this is of course the case provided that the two insured parties involved each make an independent claim under the policy. Also, an insurer of a composite insurance policy

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may state that a lender’s right to recover under a policy will not be affected by certain defaults of the borrower insured, or any alteration to the subject matter of the insurance which increases risk of destruction, damage or liability.; MacFarlane’s Insurance Broker Letter, Composite Insurance (sometimes referred to as co-insurance), March 2016 LMA Publishers

<sup>39</sup> MacFarlane’s Insurance Broker Letter, *Ibid*.

<sup>40</sup> Raoul Colinvaux, *The Law of Insurance*, 1979 (Sweet & Maxwell Limited) 163 para 9-33

<sup>41</sup> *New Hampshire Insurance Co. V MGN* [1996] CLC (CA) at 1728. *New Hampshire Insurance Co. V MGN* [1996] CLC 1692 (QB) [MGN(QB)]

<sup>42</sup> [batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html](http://batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html) ‘Parties to the contract of Insurance’ Last Accessed 02/11/19

<sup>43</sup> Allianz Property and Casualty Newsletter, Lender’s Finance Arrangements – Noting of Interest (July 2015) < [www.allianzbroker.co.uk](http://www.allianzbroker.co.uk) >

<sup>44</sup> 1981(4) SA 958(A)

is likely to charge an increased premium in return for being exposed to an increased risk of having to provide an indemnity under the policy.<sup>45</sup>

### 2.5.2 TO THE INSURED(S)

Generally the insured is the party in whose favour the insurance contract is operative, who is indemnified against, or is to receive a certain sum upon the happening of a specified future event. Thus is a person whose loss is the occasion for the payment of the insurance proceeds.<sup>46</sup> Under a composite policy each insured has their own claim limit which is applied independently from that of the other.

Where, in such a policy, payment in case of loss is expressed to be payable to the insured, any payment, in favour of all the insured jointly must be regarded as in essence a payment in discharge of the loss or losses in respect of which the indemnity has been operative, and those of the insured who are entitled to be indemnified are entitled to insist on payment of that money over to them from the other or others who having suffered no loss in respect of his or their interest, are not entitled to receive if otherwise than as mere payees on behalf of those who have suffered. And if such a joint payment was made in respect of the loss suffered by only one of the three persons insured by a composite policy, each in respect of his own several interest in the property covered by the policy and after such payment it was discovered that the claim made by the person in respect of whose interest and alleged loss the payment was made was a fraudulent claim,<sup>47</sup> the innocent co-insured are not required to refund the proceeds of a such a fraudulent claim paid to a co insured, as discussed in the case of *General Accident Fire and Life Assurance Corp Ltd v Midland Bank Ltd*<sup>48</sup> where it was clearly indicated that, “the innocent co-insured are not required to refund the proceeds of a fraudulent claim paid to an insolvent co-insured.”

If one of the insured’s interest in policy is invalidated, then there is no impact on the other’s insurance because as mentioned above each insured has his own claim limit independently from the other.<sup>49</sup>

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<sup>45</sup> Eversheds Sutherland (n 11).

<sup>46</sup> See; [batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html](http://batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html) ‘Parties to the contract of Insurance’.

<sup>47</sup> MacGillivray and Parkington ‘Insurance Law- relating to all risks other than marine’ (n 6) at page 79 para 181.

<sup>48</sup> *General Accident Fire and Life Assurance Corp Ltd V Midland Bank Ltd* (n 9)

<sup>49</sup> MacFarlanes (n 39)

## 2.6 CONCLUSION

This chapter entails of the law of co-insurance but particularly focused on composite policies thereof. For the perfect discussion the chapter was divided into four part from which the first part dealt with what a composite policy is, the nature of composite policies and factors to which considered important in deciding whether a policy is composite or not. From this part it is clear that a composite policy is a series of separate policies contained in one document which covers the various interests of different insured parties in one subject matter of insurance. Other than the issue of various interests, it was observed that the court dealing with such a case will look into the subject matter of insurance, that is, there should only be one subject matter of insurance from which the insured parties have various interests, and besides that they should be jointly responsible to pay the premium. Furthermore, it was found that composite policies are not only inclined to business-related purposes but may, even if not so much common, be for parties with close relations.

The second part of this chapter dealt with parties to a composite policy showing that in this kind of policy there are more than two parties involved, being the insurer and the multiple insureds. Part three in essence dealt with composite policies in comparison to joint policies because, as seen from the discussion, in most instances the courts try to figure out whether a policy is joint or composite where there is more than one insured party involved in the insurance contract by looking at the insurable interest each insured party has to the insured property. In contract, this part of the chapter clearly stated out that a composite policy maintains each insured distinct rights to the subject-matter of insurance, under separate contracts while in joint policies the insured parties have similar interests in the subject-matter of insurance. In composite policies, breach of the insurance contract by one co-insured that may invalidate the contract does not affect the innocent co-insured of which is not the case in joint policies. Hence it is concluded that composite insurance contracts protect the interests of third parties better in an insurance policy where multiple parties have various interests in one subject-matter. In a composite policy, the third party whose interest is insured should be aware that he has his own obligations to disclose all the material facts about the property to the insurer to avoid his interest from being invalidated.<sup>50</sup>

Finally, the other part of this chapter looked into the legal effects of composite policies to the parties thereto, observing that the insurer has an obligation to indemnify the insureds in times of

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<sup>50</sup> *Ibid.*



loss, and may do to each composite insured separately provided that the insured make independent claims. And for this reason the insurer is susceptible to charge an increased premium for the risk of having to pay twice for the same event. Looking into the effects to the insured parties, the chapter was able to identify that innocent insured parties are not to be penalized for the dishonesty and ill performance of their co-insureds because in essence each party is insured for their own interest hence entitled to be indemnified in that regard thereof.

Composite insurance is therefore the greatest way an interested third party may protect themselves and their interests against any losses or damage to the subject-matter of insurance on which their interest is situate.

## CHAPTER 3

### 3. NOTING OF THE THIRD PARTY'S INTEREST IN AN INSURANCE POLICY

#### 3.1 INTRODUCTION

This chapter discusses noting of a third party's interest in a contract of insurance in detail. Therein included will be an explanation of noting generally, how it may be effected, the number of interested parties that may be noted and in what instances these parties may be noted. The chapter will also consider the relationship of the principal insured with the noted parties, whether anyone who has an interest in the in the outcome of the insurance policy can be noted or there should be some kind of nexus between the insured and the noted, and maybe the subject-matter of insurance. In the midst of the discussion a rationale for noting the interested parties on to a contract of insurance will be laid down for further understanding.

Flowing therefrom the chapter will look into the general effects of noting the third party's interest in the insurance policy; whether that in essence will automatically put this other party in the same position as the principal insured, and the rights that accrue for the parties involved in this instance as well as the protection that is afforded to the noted third parties just by the virtue of being noted. Furthermore, a brief statement of the challenges that may be faced by either concerned party will be stated so as to bring to light to the insurers, the insureds and the interested third parties of the difficulties just noting an interest may bring to any of them hence rectify the situation even before contracting in that manner. There is also a brighter side to noting of the third party's interest in an insurance policy and thus will be outlined in this chapter as the benefits of the common practice of noting, this will be soon after a thorough discussion of noting as the common practice in insurance business is done.

The last part of the chapter will be comparative in nature, dealing with both Lesotho and South African jurisprudence on the notion of noting a third party's interest in an insurance policy, particularly the cases of *Marine & Trade Insurance company v Gerber Finance Ltd* and that of *Nedbank Lesotho v Manyeli t/a Copyshop*. The main purpose of this comparison is to find out whether noting such interest in essence creates an obligation on the insurer to indemnify the interested noted third party in terms of their loss on such interest. And whether a composite policy is created thereupon by the virtue of such notation, thus will be done by the kind of agreement that

has to exist between the insurer, the interested third party and the primary insured respectively. At the end of the chapter a summary of the main discussion will be given as per the conclusions drawn therefrom.

### 3.2 NOTING OF THE THIRD PARTY'S INTEREST

Many commercial contracts require the benefits of the contractor's insurance to be extended to the principal, this is done by requiring the contractor to, inter alia, note the interests of the principal on the insurance policy<sup>51</sup> sometimes this being expressed as noting their "respective rights and interests."

This is where the third party's interest in the property (subject-matter of insurance) is noted, may happen either by adding the name of the third party (designation) or by inclusion of a note of any of his interests on the policy document.<sup>52</sup> The primary way of designating a third party as an insured is to place his name in a blank on the policy form following the words "does insure" or some phrase of similar import.<sup>53</sup> A policy may designate more than one person or legal entity in this way, sometimes the phrase "as their interests may appear" is added, generally signifying that they are entitled to share in the insurance proceeds in proportion to the damage to their respective interests in the insured property, this as seen in the case of *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated*<sup>54</sup> wherein the names of eight port companies appeared under the heading "the insured", it was specified therein that "each insured" included a subsidiary of a named insured that was majority owned or controlled by the insured. It often happens that other persons commonly referred to as additional insureds are named or described elsewhere in the policy as persons whose interests are insured, also, the designation of additional insureds may occur by endorsement. It may also happen that the relationship of the insureds to the property is indicated; for example, one insured may be described as "owner" and another as "mortgagee".<sup>55</sup>

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<sup>51</sup> Gold Seal 'Insurance Clauses – Named Insured VS Interested party' Tipsheet 7, Updated: September 2010 page 1

<sup>52</sup> MacFarlanes, Composite insurance (sometimes referred to as co-insurance), March 2016 LMA Publishes Insurance Broker Letter

<sup>53</sup> Robert E. Keeton, Basic text on Insurance Law, 1971 West Publishing Co. at page 177

<sup>54</sup> [2015] NZSC 59 (13 May 2015)

<sup>55</sup> Robert E. Keeton (n 53)

Noting an interest is often used where a contract requires property to be insured against loss or damage and the principal has an insurable interest in the property.<sup>56</sup> Noting an interest simply puts the insurer on notice that someone else has an insurable interest, this may assist the owners of the property to have the claim proceeds paid to them but it does not always provide cover for their own losses.<sup>57</sup>

3.2.1 Rationale: The theory behind the noting of an interest was that without suitable insurance cover, a third party's property in the hands or possession of the insured would be considered a risk to a lender<sup>58</sup> or rather the owner of the insured property or any other person who obviously has an insurable interest in the said property.

### 3.2.2 GENERAL EFFECT OF NOTING

Noting the third party's interest is the least invasive and simplest to achieve, however, it achieves little for the noted party as it has no specific legal effect.<sup>59</sup> Having someone's interest noted on a policy does not make them a party to the insurance contract, nor does it entitle them to make a claim under the policy.<sup>60</sup> This is confirmed by the case of *Allied Irish Bank plc v Connors and Another*<sup>61</sup> as stated that the noting of a bank's interest on a household insurance policy does not result in legal entitlements under the policy being granted to the bank.<sup>62</sup> There is very limited protection with 'noted interests' – they are only protected for damage to the insured property when they will suffer a pecuniary or financial loss if the property is damaged<sup>63</sup>, in fact a party whose interest is noted, is entitled to no more than notification by the insurer of cancellation or non-renewal of the policy or of any amendment to the terms of the cover.<sup>64</sup>

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<sup>56</sup> Gold Seal (n 51) page 2

<sup>57</sup> Charmaine Holmes 'Named Insured VS Interested' 2012 page 3; Gold Seal above (n 51) page 2

<sup>58</sup> Robert Gerard 'Noting an interest on an insurance policy: Is it necessary?' September 14, 2018 Accessed: 05/12/19 < [www.robertgerard.com/2018/09/moting-an-interest-on-an-insurance-policy-is-it-necessary/](http://www.robertgerard.com/2018/09/moting-an-interest-on-an-insurance-policy-is-it-necessary/)

<sup>59</sup> Allianz Property and Casualty Newsletter, Lender's Finance Arrangements – Noting of Interest (July 2015) < [www.allianzbroker.co.uk](http://www.allianzbroker.co.uk) >

<sup>60</sup> Charmaine Holmes above (n 57); Gold Seal above (n 51) page 2

<sup>61</sup> [2018] IEHC 382

<sup>62</sup> Dillon Eustace, Bank's legal entitlements when interest noted on an insurance policy – *Allied Irish Bank PLC V Connors* [2018] IEHC 382, February 2019 < [www.dilloneustace.com](http://www.dilloneustace.com) >

<sup>63</sup> Gold Seal above (n 51) page 2

<sup>64</sup> Eversheds Sutherland, Property Banking E-briefing, (03/04/2012)

Nevertheless, the only entitlement is that the proceeds of any claim in relation to damage to the property should be paid into the joint names of an insured and the bank<sup>65</sup>, thus as it happened in the *Connors case* wherein the Allied Irish Bank (AIB) brought an application for summary judgment against Mr James Connors and his father, Mr Luke Connors (the Connors) in the sum of €239, 192.66 when they fell into the arrears on a loan facility. Mr James' property had been destroyed by fire and FBD Insurance plc (FBD), the insurers of such property and Mr James settled, AIB were not involved in that dispute. A sum of €85, 000.00 was available to reinstate the house after reduction of costs. AIB's interest as a mortgagee was noted in the policy and following the resolution of the case between Mr James and FBD, a cheque was issued in the joint names of AIB and Mr James. The Connors pleaded that AIB acted unreasonably in not joining with them to require FBD to indemnify them in full in respect of all losses sustained by them and in failing to agree to the request of Mr James to encash the settlement cheque on the terms required by him. The court in this regard had to decide whether a bank has any legal entitlements where its interest is noted on an insurance policy. It was in that instance held that the simple fact of the matter is that AIB had no privity of contract with FBD and would have no standing to make a claim under the policy and the decision was that AIB had not acted unreasonably in not agreeing to the request of Mr James Connors to encash the cheque issued by FBD in the joint names of the parties on the terms requested by him, the Connors were already in arrears and AIB was entitled to have the cheque applied in reduction of those arrears.

In as much as noting does not trigger so much of a legal protection to arise, it is however carried out as a market practice where the third party is not an insured party. Although not required to do so by law, due to noting being a market practice, insurers tend to notify the interested third parties of any policy event, also do not exercise rights of subrogation against such parties.<sup>66</sup> The relevant case in that regard is that of *Mark Rowlands v Berni Inns Ltd*<sup>67</sup> wherein the plaintiff owned a freehold and had let the basement to the defendant. The plaintiff insured the building and the defendant covenanted to pay to the plaintiff an insurance rent equal to the proportionate cost of insuring the part of the building occupied by him. The building was destroyed by fire caused by the negligence of the defendant, after the insurer had paid the plaintiff the sum due under the

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<sup>65</sup> Dillon Eustace (n 62)

<sup>66</sup> MacFarlanes (n 2)

<sup>67</sup> [1986]1 QB 211; < [swarb.co.uk/mark-rowlands-v-berni-inns-ltd-ca-1985/](http://swarb.co.uk/mark-rowlands-v-berni-inns-ltd-ca-1985/)

policy, it brought an action in the name of the defendant, who was not named as a co-insured in the relevant insurance policy. The court held in that regard that,

“This Ancient statute, section 2 of the 1774 Act (which makes it unlawful not to name, as tenant was not, the person interested in a policy which the Act applies) had an application to insurances which provide for the payment of a specified sum upon the happening of a specified event.”

As such, although receipt of the insurance moneys by an innocent party is of course normally no defence to a wrongdoer, considerations of justice, reasonableness and public policy may require exceptions to the general rule of subrogation<sup>68</sup>, hence the landlord’s insurer’s right of subrogation could not be enforced. Furthermore by virtue of recognising third party interests and having agreed to note them in the insurance policies, insurers waive their subrogation rights against such third parties, hence why a third party alert to the risk of subrogation may seek protection by insisting upon such an endorsement of his interest.<sup>69</sup> This is generally due to the principle that an insurer cannot have subrogation against his own insured.

### 3.2.3 CHALLENGES OF NOTING AN INTEREST

It is important to clarify precisely what is to be noted; is it the rights and interests or the rights and liabilities? Is it the insurable interest? Is it a contract?<sup>70</sup>

It is often not clear what the objective of noting an interest is as between the contracting parties, therefore posing a difficulty at the later stage when claiming against the insurer. Thus, the insurer cannot comply with the claims of the noted party if they are vague and uncertain, it is therefore in everyone’s interest to clarify the terms and requirements of the contract beforehand.<sup>71</sup>

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<sup>68</sup> Mark Rowlands *Ibid.*

<sup>69</sup> Robert E. Keeton (n 53) at page 209 clarifies that in the 1950s it became possible to obtain an endorsement on an insured’s policy by which the insurer waives the right of recovery against the endorsed for loss of insured property.

<sup>70</sup> Gold Seal (n 51) see page 4

<sup>71</sup> *Ibid.*

It should be transparent as between the third party and the insured what the noting means, consequently to the insurer, if it so means that the latter is informed of the third party's insurable interest as to allow him to claim on the policy.

#### 3.2.4 NOTING AS A MARKET/COMMON PRACTICE

It is common to note an interest where a contract requires property to be insured against loss or damage and the other person has a beneficial or insurable interest in the property,<sup>72</sup> as such is the case, it has been a norm that the owners of the insured property would request for their interests to be noted in the insurance policies in which they are not the insured parties and thus has been recognised as a trade usage in insurance businesses.

In the notorious case of *Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance v Napier NO*<sup>73</sup> the appellant finance house (the seller) sold the mechanical excavator on instalments, with the reservation of ownership until final payment has been made. It was an express term of the agreement that the buyer would insure the equipment and have the interest of the seller noted on the relevant policy. The buyer effected the insurance but failed to procure the noting of the seller's interest on the policy. The insurance contract was concluded between the buyer and certain underwriters at Lloyds. Before final payment by the insured under the sale equipment was irreparably damaged in circumstances obliging Lloyds to agree to pay out the insurance proceeds. Prior to payment, Lloyds was informed of the seller's interest, the insured then owed to the seller R839 925.00 but the proceeds of the policy were paid to the insured. The seller then sued Lloyds for contractual damages in the sum of the insurance proceeds which it asserted should have been paid out to it, basing the claim on an alleged contract between the seller and Lloyds, alternatively on an alleged trade usage, in breach of either of which Lloyds paid the proceeds to the insured rather than to the seller. The court then had to decide on the issue whether a request by the seller of the insured property to the insurer to note its interest, imposed on the insurer, an obligation on the pain of damages to pay the seller the amount owing to it by the insured before paying any balance to the latter, and it was stated thus far,

“It was long standing practice in the industry, when an owner of the insured property asked the insurer to note its interest, to pay the owner out of the proceeds of the policy any

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<sup>72</sup> Charmaine Holmes above (n 57)

<sup>73</sup> [2006] SCA 48 (RSA)

outstanding amount due to it by the insured in respect of the property prior to paying the insured. The practice was universally observed and well-known.”

This practice is long established and has been in existence for as long as anyone can remember, it is therefore trite to say that it is followed and universally observed by all short term insurance, for example, financial institutions and banks and particularly to institutions that extend credit for the financing of assets, hence why it is notorious both within the industry and without.<sup>74</sup> Trade practice or usage as has been held in the *Barloworld Capital case* was said to provide an effective arrangement, (whether one calls it a convention or practice is immaterial) as long as there is in effect tripartite consensus, express or implied, the insurer, even though not contractually bound to the seller, will pay the latter first.<sup>75</sup>

#### 3.2.4.1 Benefits of the Common Practice of Noting

In the SSRN discussion of the *Barloworld case*<sup>76</sup>, the advantages of having the third party's interest noted on the contract policy are clearly embodied as follows;

- The practice of noting is reasonable for it allows a credit grantor to ensure that it is paid the outstanding balance on the insured property where the property is irreparably damaged, whereas credit receiver's indebtedness to the credit grantor is extinguished or diminished and he is not prejudiced.
- The practice is said to be certain. This is due to the fact that the bank or any financial institution which has financed the purchase or lease of an asset would know that it could merely request the *insurer* to note its interest in the insured property and that effect would be given to its request – there is a certainty thereby that a request would be accepted and be given effect to.
- The practice of having the third party's interest noted may amount to a third party contract, for instance, a lessee may have the interest of the lessor noted or endorsed on a contract that the lessor has taken out in respect of the vehicle leased to him and thereby create a

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<sup>74</sup> < <http://ssrn.com/abstract=2365687> > Noting the Interest of a third party on an insurance policy, trade usage and privity of contract – *Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance V Napier NO* [2004]2 All SA 517 (W), 2005 (68) THRHR p160-166

<sup>75</sup> See; *Barloworld Capital (Pty) Ltd v Napier NO*

<sup>76</sup> < <http://ssrn.com/abstract=2365687> > (n 74)



composite policy, a this practice evidences on the contract between two parties, the interest of the third party.<sup>77</sup>

- Ordinarily, no additional premium is charged for an endorsement or noting of the third party's interest in a policy.<sup>78</sup>

For this practice to be effective so that the insurer pays out the third party's claim on his interest, noting of the latter's interest should be before the insurer agrees to pay the original insured.<sup>79</sup> This should preferably be at the commencement of the insurance contract between the insurer and the insured party. Just as stated in the *Barloworld case* the practice does not deal with the situation where the third party insists on payment being made to him in terms of the policy where the interest had not been noted on the policy at the time of the claim and after the policy had been cancelled.

Obviously, all the parties (the insurer, the insured and the third party who has an interest in the subject-matter of insurance) need to agree to a tripartite arrangement to note the third party's interest in the insurance policy so as to create a contractual nexus between the third party and the insurer thereby creating a composite policy to enable the interested third party to benefit from the proceeds of insurance.

### 3.3 DISCUSSION OF THE CASES

The landmark South African case on noting, *Marine & Trade Insurance Co. V Gerber Finance*<sup>80</sup>, is to be discussed alongside the Lesotho case of *Nedbank Lesotho Ltd V Manyeli t/a Copyshop*<sup>81</sup> from which noting of another party's interest than the principal insured is observed to have been practised but the Courts have come to different conclusions on the matter. The discussion will draw an inference from the reasoning of the judgements, in comparison with the stated law of composite police to answer the issue whether noting of third party interests creates composite policies, as will be seen in the next chapter.

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<sup>77</sup> Ibid. at page 163

<sup>78</sup> Robert E. Keeton (n 53) at page 209

<sup>79</sup> *Ibid.*; *Barloworld Capital (Pty) Ltd V Napier NO* Goldblatt J held that such practice does not deal with the situation where the insurer has already agreed to pay the insured before it learns of the third party's interest...

<sup>80</sup> 1981(4) SA 958 (A)

<sup>81</sup> (CCT/42/2010) [2012] LSHC 53 (05 March 2012)

### 3.3.1 MARINE AND TRADE INSURANCE CO. V GERBER FINANCE

The respondent, a finance company, partly leases vehicles and equipment and provides finance by means of discounting transactions. The respondent acquired ownership of a heavy vehicle known as a 966 C Cat Loader (the loader). The loader was leased by the respondent to A F Marais Construction (Pty) Ltd (the lessee). One of the conditions of the lease agreement in clause 6(a) (ii) was that the lessee was obliged, in its own name and its own expense, to insure the loader for the specified value as defined in the agreement and to subsequently endorse or note the interest of the lessor in that policy; the respondent would then be entitled in terms of the lease, to effect the contemplated insurance and to look to the lessee for reimbursement of the premiums paid by it to the insurer.

Prior to the signing of the lease agreement and apparently in anticipation thereof, the respondent wrote to the lessee, drawing to its attention clause 6(a) (ii) of its standard lease agreement. The aim of the respondent in its correspondence with the lessee and the insurance brokers was to ensure that the loader was included in the schedule to such policy and that the respondent's interest in the loader was noted in the policy. After some time the respondent was informed that the lessee's policy had been cancelled by the appellant due to non-payment of the premiums by the lessee. The respondent thereupon urgently requested insurance brokers to arrange for insurance, vehicles hired by the lessee from or through the respondent. On the cover note appeared the following description under the heading "surname":

"A. F Marais Construction/Gerber Finance (Pty) Ltd for their respective interests".

At the instance of the respondent a policy (exh "R") was thereafter issued by the appellant for a one year period covering specified vehicles which include the loader in question. Shortly after the issue of exh "R" the respondent was informed that the lessee had taken out a new comprehensive insurance with the appellant to cover some vehicles which it held under the lease, including the loader owned by the respondent. This rendered exh "R" redundant. Correspondence ensued between the respondent and the insurance brokers which resulted in adjustments relative to the premium charged to respondent's account in respect of exh "R" and a decision by the respondent to cancel such policy. The respondent office manager saw the need to have noted on the new policy by the lessee the respondent's interest in the vehicles and telephoned the appellant's office and

urged the officer to endorse or note the respondent's interest in the vehicles on the policy taken out by the lessee, and the communication regarding the notation occurred on a number of basis.

During the currency of the policy, the loader fell into the river, and suffered extensive damage that it was considered to be totally beyond repair. The respondent discovered that notwithstanding its interest in the loader which had been noted on the policy, the appellant had without reference to it paid to the lessee what was due in terms of the policy. The lessee was subsequently placed under liquidation by an order of court and it appeared from the liquidator's report that no payment will be made to the concurrent creditors.

The respondent's cause of action was that its request to the appellant to note its interest in the loader, as the owner thereof, on the policy and the appellant's undertaking to do so and its actual noting of such interest constituted a binding agreement between the parties imposing an obligation on the appellant, in the event of the insured vehicle suffering irreparable damage during the subsistence of the policy of insurance taken out by the lessee, to make payment to the respondent of an amount calculated in accordance with the provisions of the policy. It was the respondent's contention that the notation gave rise to a contract and imposed liability on the appellant to pay put to the respondent. This was in dispute and the court had to determine whether the appellant incurred a certain contractual obligation towards the respondent. It appeared from the evidence gathered by the court that it was common practice in the conduct of the appellant's business to note on a policy an interest of a hire-purchaser or lessor and by virtue of such notation to make payment to such lessor or seller of the amount due to him, upon receipt of claim in terms of the policy by the lessee of an insured vehicle which had suffered damage: the lessee's claim in terms of such practice would not be paid to him until the insurer was satisfied that the owner whose interest had been noted on the policy had no further interest in the vehicle concerned. Therefore the court held in this regard that there was full consensus between the parties and that the respondent had established the agreement averred in the particulars of claim.

This case establishes that the policy covered two separate interests being the owner's interest and that one of the lessee thereby creating a composite insurance policy, hence why the insurer was under the obligation to indemnify Gerber Finance in the event of loss.

### 3.3.2 NEDBANK LESOTHO LTD V MANYELI T/A COPY SHOP

In this case the bank being the plaintiff sought payment of M243, 876.55 as balance owing by the defendant (Manyeli) under the provisions of an instalment sale agreement that had been entered into by the parties. The terms of the agreement included among others that the buyer will keep the goods insured against all loss and damage for the full period of the instalment agreement and have the seller's interest noted on the insurance policy as the noting requirement secures' the bank's interest, as per clause 5.1 of the agreement that reads as thus,

“5.1 The buyer shall keep the goods registered, licenced and insured against third party claims and against and against all loss and damage for the full period of this agreement with a registered insurer for such value as may be determined by the seller from time to time. The buyer shall have the seller's interest noted on the insurance policy and shall pay all insurance premiums punctually and comply with all the conditions of the insurance policy.”

The buyer indeed insured the said property and had the bank's interest noted in the insurance policy. However, the subject-matter of insurance overturned and was declared and certified that the vehicle was damaged beyond repairs by the insurer.

This case was decided in comparison with *Marine & Trade* wherein it was held that, Gerber and *Marine & Trade* entered into several conversations which confirmed that Gerber had an interest in the subject-matter of the insurance, and the conversations were held to have constituted an agreement that, in the event of a loss of the loader, *Marine & Trade* would protect the interest of Gerber. The South African Court of Appeal held that, “An agreement to protect the financier's agreement had been made between Gerber (the financier) and *Marine & Trade*. This was an agreement separate and apart from the insurance contract between the lessee and *Marine & Trade*.”

The High Court in this decision was of the view that a mere request by the interested third party for the original insured to note its interest in the contract of insurance does not ipso facto create an obligation to the insurer to compensate such third party in case of a loss, and that Manyeli could not be decided in alignment with *Marine and Trade* because in the latter there had actually been two separate contracts of insurance; a) between the insurance company and the lessee of the loader;

b) between the insurance company and the owner of the loader, of which was not the case in this case because the bank's interest was not covered hence the bank did not have contractual rights against the insurance company.

### 3.3.3 COMPARATIVE ANALYSIS OF MARINE & TRADE AND MANYELI

In contracts of sale, the party who either has property in the goods or bears the risk of their loss has an insurable interest.<sup>82</sup> So far as hire purchase agreements are concerned, the owner of the goods will retain an insurable interest so long as the property or the right to repossess the goods remain vested in him.<sup>83</sup> In both Marine and Trade and Manyeli the third parties ( Nedbank Lesotho and Gerber Finance) had an interest in the subjects-matter of insurance, Nedbank in Manyeli as the hire-purchaser,<sup>84</sup> as stated by Gordon and Getz<sup>85</sup> that,

“Under a contract of sale, the seller of the property has an insurable interest if he may suffer loss by its loss or destruction. He does not cease to have an insurable interest until all the risk of loss has passed to the purchaser so that no damage result to the seller upon the loss or the destruction of the property. And if the ownership remains with him, he has an insurable interest also by virtue of this fact.

And Gerber Finance in Marine and Trade had an interest as the lessor, hence they were correct to request the insureds to note their interests in the property insured for it is established that they had insurable interests.<sup>86</sup> This is because they would/could incur financial loss in case of damage to the property that was insured. But the main question is whether having those interests noted placed the insurer at an obligation to indemnify them because a composite policy had been created or not? This considering the fact that in the South African case, notation of the third party's interest happened pre the accident while in the Lesotho case it happened post the accident, as the main differences herein and that the financier in Gerber did not really rely on the insurance policy but on the agreement that was purported to have occurred between it and the insurer, while Nedbank in the Manyeli case relies solely on the fact that its interest was noted in the insurance policy.

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<sup>82</sup> John Birds, *Modern Insurance Law*, 1988 2<sup>nd</sup> Edition, London - Sweet & Maxwell at page 42

<sup>83</sup> *Ibid.*

<sup>84</sup> Gordon and Getz, *The South African Law of Insurance*, 2003 4<sup>th</sup> Edition, Juta & Co. Ltd

<sup>85</sup> *Ibid.* at page 102

<sup>86</sup> *Ibid.* at page 100 say that a person has an insurable interest in property he owns.

Since questions concerning rights of various persons under insurance policies are primarily questions of contract law, it follows that even if the parties used a phraseology that is commonly associated with the common practice of noting, clear indications in the terms of their agreement that they intended should be given effect.<sup>87</sup> Hence the court in *Manyeli* was correct in following the *Marine and Trade* judgment, when it held that in its instance there had not been a composite policy formed as between the bank and the insurer because there was no tripartite agreement that was seen to have prevailed in the case of *Marine and Trade*. Furthermore the noting in the former happened after the event that was insured against had occurred, clearly there was no contractual obligations for the insurer to indemnify the bank. Whereas in the latter case, negotiations to note the interest of the financier were importantly between the financier and the insurer in as much as the lease agreement provided for noting in its clauses, the interested third party made sure that its interest was noted and that in case of loss, the insurer would be obliged to pay out the insurance proceeds to the financier third party.

### 3.4 CONCLUSION

This chapter is mainly on noting of the third party's interest on the insurance policy wherein, the primary insured notes such third party's interests and rights, either by adding the name of the third party (designation) or by inclusion of a note of any of his interests on the policy document. The rationale behind this notation is to cover the risk of loss of the interest a party has on the subject-matter of insurance. Consequently, the noted party does enjoy some benefits for purposes of having the interest noted, that including the benefit of being updated if there are any developments with the policy in issue, without being a party to that policy. However, in as much as it may be beneficial to the noted interested third party, there are challenges that come with it, including the fact that it is often not clear what the objective of noting an interest is as between the contracting parties, therefore posing a difficulty at the later stage when claiming against the insurer. Thus, the insurer cannot comply with the claims of the noted party if they are vague and uncertain. Also, it is disadvantageous because noting does not trigger any legal entitlements to the noted party and due to the principle of privity of contracts, the noted party does not have any recourse against the insurer in as much as his or interest is noted.

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<sup>87</sup> Robert E. Keeton (n 53) at page 180

Noting a third party's interest in the insurance policy is said to be common/trade practice in insurance business, for that, the question that arose from the discussion was whether by the virtue of noting such third party's interest, a composite policy is created thereupon. It comes to conclusion from the above discussion of the common practice of noting, as well as the two cases, Marine and trade as well as Manyeli that the mere fact of noting the third party's interest in the insured's insurance policy does not automatically create a composite policy, looking at the fact that there should be a tripartite agreement as between, the insurer, the primary insured and the interested third party to note the interest and indemnify the third party incase of any losses thereafter.

## CHAPTER 4

### 4. CONCLUSIONS AND RECOMMENDATIONS

#### 4.1 INTRODUCTION

The aim of this research was to establish whether the mere fact of noting the third parties' interests in insurance contracts creates a composite policy from which the noted parties attach legal rights and obligations, thus comparatively looking into South Africa and Lesotho respectively. The first chapter dealt with the problem statement, the research question, and objectives of the study, as well as the theoretical framework of the work.

Chapter two of the paper made an introduction of composite policies in insurance contracts. The discussion of that chapter included the legal definition of composite policies, which established that these are the kind of policies in insurance contracts which cover the interests of two or more insured parties, insuring each one severally in his/her own interest. And they, in essence, reveal the intention of such parties, the insurer inclusive, to indemnify all the parties whose interests are named or noted. The most important feature of composite policies discovered is that the insured parties' interest must be in relation to one subject-matter of insurance, and the insured parties must be jointly responsible for the payment of premium of such object. This generally means that in as much as each insured party's interest is solely distinct from others' interests on one object, they are however all responsible to pay the required premium. Hence, the chapter then made distinction of composite policies and joint policies to clarify their difference as far as interests are concerned, this is because joint policies cover similar interests of different insured parties on one subject-matter of insurance. The sole purpose of drawing out this distinction was that many seem to confuse the two in that they cannot differentiate them and normally the courts often look into both when making a decision about one.

The third chapter mainly dealt with noting of the third party's interest in insurance contracts, found out what it means for the noted parties, the insurers and the primary insured. The first part of the chapter dealt with noting generally, from which it was established that the third party's interest in the property may be noted, either by adding the name of the third party (designation) or by inclusion of a note of any of his interests on the policy document, and a policy may designate or note more than one person whose interest is on the subject-matter of insurance thus with or without



their interests stated. The rationale behind this noting of the third party's interest in an insurance policy is that without suitable insurance cover, a third party's property in the hands or possession of the insured would be considered a risk to the owner of the insured property or any other person who obviously has an insurable interest in the said property. However, as from the findings, the mere noting of a third party's interest does not attract any legal obligations for the parties involved, however the noted party may be notified of the alterations made in the policy or of any information that the insurer may deem fit. It is in this instance that the wording of the designation is really important for it determines the kind of policy at issue, hence the intention visible from the wording will guide the parties to the contract on what route to follow in indemnifying the deserving parties. In as much as noting does not trigger any legal obligations on the parties to the policy in respect of the noted, it is however practised in the insurance business as a market/common practice.

Dealing with noting as a market or common practice has surfaced the fact that it has been a norm that the owners of the insured property would request for their interests to be noted in the insurance policies in which they are not the insured parties and thus has been recognised universally as a trade usage in insurance businesses for over the years. It is for this practice that, a credit grantor can ensure that it is paid the outstanding balance on the insured property if and where the property is irreparably damaged, this is basically protecting the rights the owner has on their property and this noting of the other party's interest may amount to third party contracts, from which this destruction of such interests may be compensated.

The second part of the third chapter was comparative in nature in which the Lesotho case of *Nedbank Lesotho Ltd v Manyeli t/a Copyshop* and the South African case of *Marine & Trade Insurance Co. v Gerber Finance (Pty) Ltd* were discussed in comparison based on the fact that they solely dealt with noting as a trade usage and the noted third parties felt that the insurer was obligated to indemnify them on their losses. The courts in these cases gave out different judgments regarding the matter hence the basis of the study from which it is questioned whether noting of an interest of a third party in an insurance policy creates a composite policy, thereby making it eligible to the third party to benefit from the policy.

In the South African case, the interested third party (Gerber Finance Ltd) had negotiated with the insurer to have its interest noted in the policy prior conclusion of the insurance contract, thus regardless of the fact that the former had an agreement with the lessee to note such interest. Hence,

Gerber Finance alleged that Marine & Trade was contractually liable to it in respect of the agreement that the parties had. The court held in this regard that there was full consensus between the parties, they had created a tripartite agreement to indemnify the third party in case of loss in respect of his interest in the loader. In the Lesotho case, the third party (Nedbank Lesotho) had an agreement with the insured (Manyeli) to note its interest in the insurance policy, however there was no agreement whatsoever with the insurance company. Manyeli noted the bank's interest in the insurance policy and because of that notation, he alleges that he should be absolved from liability therefrom, and that the bank should have sued the insurer instead. Unfortunately, Manyeli's counsel advanced an argument that the Marine & Trade Insurance case applies in support of this proposition that the bank should have sued the insurer and not Manyeli. The court held in this regard that the argument advanced misunderstands the legal position and Marine & Trade's case, failing to provide Manyeli with a defence.

It was concluded from the discussions that in the South African case there was a tripartite agreement as between the insurer, the primary insured and the interested third party that the latter's interest will be noted and such notation be given effect to, especially because it was common practice in the insurer's business to note third party interests and indemnify them on their losses in relation to those interests. This was held to create a composite policy as from the analysis made in the case of Manyeli, and in that case, this was not the case, the agreement was only between the bank, being the interested third party, and the primary insured, exclusive of the insurer hence the bank was seen to have taken the correct step in suing Manyeli instead of the insurer.

#### 4.2 FINAL ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The general rule has always been that, only a party to a contract can sue under it.<sup>88</sup> From the discussions it is clear that noting a third party's interest in a policy does not give such third party any direct contractual rights to claim against the insurance policy nor any say as to the distribution of the proceeds of any claim made. This is because the noted party does not in any way become party to the insurance policy.<sup>89</sup>

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<sup>88</sup> Raoul Colinvaux, *The Law of Insurance*, 1979 (Sweet & Maxwell Limited) 49 para 3-28

<sup>89</sup> [www.memerycrystal.com/articles/composite-insurance-separate-interest/](http://www.memerycrystal.com/articles/composite-insurance-separate-interest/), Composite insurance: The importance of a separate interest, 30/11/2017

The court in Barloworld case found nothing that warrants the conclusion that as a matter of trade usage an insurer, by mere acquisition of knowledge of the seller's interest, becomes bound, as if by contract, to pay the latter ahead of the insured.<sup>90</sup> That being said, it is evident that a composite policy is not created by noting a third party's interest in the insurance contract, rather it only allows the third party certain benefits. As seen this is because noting does not constitute a tripartite agreement as between the parties to indemnify such third party in case of loss. For the third party to benefit from such policy, the insured and third party contracts should ensure that the third party's interest is sufficiently protected by requiring the insured to refer to the former as 'co-insured in respect of its separate rights and interests' on the insurance policy making it clear that the cover is composite (i.e. the policy contains two contracts of insurance between the insurers and the ultimate insured on one hand and between the insurer and the third party on the other hand).<sup>91</sup>

A third party such as the seller can always take self-evident steps to ensure that the buyer or the lessee complies with its obligation to have the former's interest noted on the policy.<sup>92</sup> This is what happened in the Marine & Trade case, despite of the agreement that was between Gerber Finance and the lessee, the former took evident steps to ensure that its interest was noted but most importantly protected by the insurer, this created a composite policy. All this became possible because a person with a limited interest may insure, either for himself and to cover his own interest only, or he may insure as to cover the interest of all others who are interested in the property.<sup>93</sup> However, because an interested third party, in the Marine case the bank, will not be a party to the insurance policy and may not be able to enforce it despite the requirement of noting being all too the norm, there is little or no protection for the bank. Hence why it should avoid asking for its interest to be simply noted,<sup>94</sup> the intention to protect such interest should be observed prior contracting and on the insurance policy itself. If such intention is not stipulated in the insurance contract, because as John Birds states, "It is a question primarily of what the parties

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<sup>90</sup> Barloworld Capital (Pty) Ltd V Napier NO [2006] SCA 48 (RSA)

<sup>91</sup> [www.cms-lawnow.com/ealerts/2009/06/banks-property-insurance-requirements-coinsured-and-composite-is-preferable?cc-lang=en](http://www.cms-lawnow.com/ealerts/2009/06/banks-property-insurance-requirements-coinsured-and-composite-is-preferable?cc-lang=en), Bank's property insurance requirements – "Co-insured" and "Composite" is preferable, 16/06/2009 United Kingdom

<sup>92</sup> *Ibid.*

<sup>93</sup> Raoul Colinvaux, *The Law of Insurance*, 1979 (Sweet & Maxwell Limited) 49 para 3-30

<sup>94</sup> *Ibid.*

intend as derived from the construction of the contract rather than from the extrinsic evidence of actual intention.”<sup>95</sup>

Marine & Trade Insurance Co. case serves to illustrate the practice of noting an interest. It was common practice in the insurer’s office to note on a contract the interest of a hire-purchase seller or lessor and, by virtue of such notation, to make payment to such seller or lessor of an amount calculated in accordance with the provisions of the contract.<sup>96</sup> The effect of the trade practice in short term insurance industry is that in the event of *inter alia* an owner of the insured property requesting the insurer to note its interest in such property, and the property suffering irreparable damage during the currency of the insurance policy, the insurer will, subject to the maximum amount of the cover provided by the insurance policy, effect payment to the owner of any outstanding amount due to it by the insured in respect of the property, prior to making payment of any proved claim to the insured.<sup>97</sup> Manyeli was not correct to follow the judgment of this case because the law and the facts surrounding it are not similar, for instance the bank did not negotiate with the insurer to insure and protect its interest, hence no contractual obligations between the two. Also, the insurer in that case was not of the practice to protect interests of noted parties, that is why the bank had pursue Manyeli, in as much as the insurer could not have a problem of indemnifying it if Manyeli approved.

The Napier decision<sup>98</sup> is a clear warning to credit grantors, sellers and lessors (credit-grantors) that the onus is on them to ensure that the insurable interest is a) insured at all times, b) that a tripartite agreement is reached between them, the insurer and the insured, in terms of which not only their interests are noted, but the insurer undertakes to pay them first in discharge of the insured’s indebtedness to the insured. However, even if such agreement is reached, interested third parties will have to make sure that they negotiate for themselves a cause of action against the insurer and they are not to be regarded as mere *solutionis causa adjectu*.<sup>99</sup> First, there must clearly be a binding

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<sup>95</sup> John Birds, *Modern Insurance Law*, 1988 2<sup>nd</sup> Edition, London - Sweet & Maxwell

<sup>96</sup> < <http://ssrn.com/abstract=2365687> > Noting the Interest of a third party on an insurance policy, trade usage and privity of contract – *Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance V Napier* NO [2004]2 All SA 517 (W), 2005 (68) THRHR p160-166

<sup>97</sup> *Ibid.*

<sup>98</sup> See; *Barloworld Capital (Pty) Ltd V Napier*

<sup>99</sup> < <http://ssrn.com/abstract=2365687> > (n 96)

contract, and the insurer must be legally bound to compensate the other party (Legal Entitlement) because a right to be considered for a benefit which is truly only a discretionary is not enough.<sup>100</sup>

The best protection for interested third parties is offered by composite insurance, this is because mere noting of the third party's interest in an insurance policy, in as much as it is widely practised, cannot guarantee that the third party will benefit from the policy in case their interest is injured.<sup>101</sup>

The addition of a party as a composite insured is the appropriate route to take if the interests of the respective parties in the property are not identical because the granting of composite insured status provides the composite insured with a separate contract with the insurer thereby avoiding the risk of cover being invalidated by the actions of the original insured.<sup>102</sup>

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<sup>100</sup> John Birds, *Modern Insurance Law*, (1988) 2<sup>nd</sup> Edition published by London- Sweet & Maxwell at page 9

<sup>101</sup> MacFarlanes , *Composite insurance (sometimes referred to as co-insurance)*, March 2016 LMA Publishes Insurance Broker Letter

<sup>102</sup> Willis Newsletter, *ABI Withdraws from notification of banks' interest agreement*, (September 2011) Willis Property Investors Division

## BIBLIOGRAPHY

- < [batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html](http://batasnatin.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance.html) > ‘Parties to the contract of Insurance’
- < <http://ssrn.com/abstract=2365687> > Noting the Interest of a third party on an insurance policy, trade usage and privity of contract – Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance V Napier NO [2004]2 All SA 517 (W), 2005 (68) THRHR p160-166
- < [swarb.co.uk/general-accident-fire-and-life-assurance-corporation-v-midland-bank-ca-1940/](http://swarb.co.uk/general-accident-fire-and-life-assurance-corporation-v-midland-bank-ca-1940/) >.
- < [www.cms-lawnow.com/ealerts/2009/06/banks-property-insurance-requirements-coiinsured-and-composite-is-preferable?cc-lang=en](http://www.cms-lawnow.com/ealerts/2009/06/banks-property-insurance-requirements-coiinsured-and-composite-is-preferable?cc-lang=en) > Bank’s property insurance requirements – “Co-insured” and “Composite” is preferable, 16/06/2009 United Kingdom. Last accessed 30/10/2019
- < [www.memerycrystal.com/articles/composite-insurance-separate-interest/](http://www.memerycrystal.com/articles/composite-insurance-separate-interest/) > ‘Composite Insurance: The importance of a separate interest 30/11/2017
- Allianz Property and Casualty Newsletter, Lender’s Finance Arrangements – Noting of Interest (July 2015) < [www.allianzbroker.co.uk](http://www.allianzbroker.co.uk) >
- Bristows LPP ‘Property Insurance: A look at the different insurable interests of lenders and borrowers’ 2018 < [www.lexology.com/library/detail.aspx?g=d9b8124974d](http://www.lexology.com/library/detail.aspx?g=d9b8124974d) >
- Dillon Eustace, Bank’s legal entitlements when interest noted on an insurance policy – Allied Irish Bank PLC V Connors [2018] IEHC 382, February 2019 < [www.dilloneustace.com](http://www.dilloneustace.com) >
- Eversheds Sutherland, Property Banking E-Briefing, 03-04-2012 < [www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial-Institutions/FIG\\_Property\\_banking\\_briefing](http://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Financial-Institutions/FIG_Property_banking_briefing) >
- Gerard ‘Noting an interest on an insurance policy: Is it necessary?’ September 14, 2018 Accessed: 05/12/19
- GoldSeal ‘Insurance Clauses – Named Insured vs Interested Party’ Tipsheet September 2010
- Gordon and Getz, The South African Law of Insurance, 2003 4<sup>th</sup> Edition, Juta & Co. Ltd
- Holmes ‘Named Insured VS Interested’ 2012
- irds, Modern Insurance Law, 1988 2<sup>nd</sup> Edition, London - Sweet & Maxwell

MacFarlanes, Composite insurance (sometimes referred to as co-insurance), March 2016 LMA Publishes Insurance Broker Letter

O'Sullivan 2010 Privity of Contract: The potential impact of the law reform commission recommendation on Irish contract law Judicial Studies Institute Journal 2

Ozlem Gurses (Dr) 'Recent developments in insurance contract law' (December 2015) < [www.cii.co.uk/fact-files/law-and-regulation/recent-development-in-insurance-contract-law/](http://www.cii.co.uk/fact-files/law-and-regulation/recent-development-in-insurance-contract-law/) >

Last updated 06 November 2018

Parties to the contract of insurance <[www.batasnatch.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance](http://www.batasnatch.com/law-library/mercantile-law/insurance/1592-parties-to-the-contract-of-insurance)> Last accessed: 30/10/2019

Richards Butler and Reed Smith, Differentiating between joint and composite policies, 05/01/10 < [www.interationallawoffice.com](http://www.interationallawoffice.com) >

Seal 'Insurance Clauses – Named Insured VS Interested party' Tipsheet 7, Updated: September 2010

Smithy NFFC, P05 Insurance Law Cases, < [quizlet.com/110251681/p05-insurance-law-cases-flash-cards/](http://quizlet.com/110251681/p05-insurance-law-cases-flash-cards/) >

Willis Newsletter, ABI Withdraws from notification of banks' interest agreement, (September 2011) Willis Property Investors Division

## **LIST OF CASES**

Accident, Fire and Life Assurance Corp v Midland Bank 1940(2) KB 388

Allied Irish Bank plc. v Connors and Another [2018] IEHC 382

American Motorists Insurance Co. v CellStar Corp (AMICO) [2003] EWCA Civ 206, Lloyd's Rep IR 295.

Arab Bank plc. v Zurich Insurance Co. [1998] CLC 1351 (QB)

Barloworld Capital (Pty) Ltd v Napier NO [2006] SCA 48 (RSA)

Central Bank of India v Guardian Assurance Co. (1936) 54 L1. L.R. 247

Federation Insurance Ltd v Wasson (1987) 163 CLR 303

Lake v Reinsurance Corporation Ltd 1967(3) SA 124(W)

Marine & Trade Insurance Co. v Gerber Finance 1981(4) SA 958 (A)

Mark Rowlands v Berni Inns Ltd [1986]1 QB 211

Maulder v National Insurance Co. of New Zealand Ltd [1993] 2 NZLR 351 (HC)

Nedbank Lesotho Ltd v Manyeli t/a Copyshop (CCT/42/2010) [2012] LSHC 53 (05 March 2012)

New Hampshire Insurance Co. v MGN [1996] CLC (CA) at 1728. New Hampshire Insurance Co. V MGN [1996] CLC 1692 (QB) [MGN (QB)]

New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated [2015] NZSC 59 [13 May 2015]