The Doctrine of Subrogation in Insurance Law: An Appraisal of the Nigerian and English Perspectives

By:

Omotolani Victoria Somoye

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Introduction

The doctrine of subrogation, a corollary of indemnity is a distinctive principle that has shaped the history of insurance contracts in common and civil legal systems. In light of the circumstances, this piece reviews two fundamental aspects and theories of subrogation which have been a subject of controversy over the years. It discusses seminal English case law that laid to rest the juridical basis of subrogation and identifies some lessons that the Nigerian regime can emulate in handling subrogation actions.

Subrogation Under Nigerian Law

In Nigeria, subrogation is governed by the common law for general insurance and the Marine Insurance Act 1961 for marine insurance. Except for motor insurance, the duties, rights, obligations of parties and insurance business, were not regulated by law in Nigeria before 1961; neither was the subrogation doctrine. As a result of this *laissez-faire policy*, customary and communal practices governed insurance activities. However, with the enactment of the Marine Insurance Act in 1961 (MIA), which was drafted alongside the broad lines, of the English Marine Insurance Act, 1906, the English common law was codified and a legislative framework for the insurer's subrogation rights against a negligent party was introduced through Sec 80 (1) & (2) of the MIA, 1961.

Nature and Justification of Subrogation

The antique origins of insurance subrogation are said to have emanated from the Roman law and were introduced to England as one of the fundamental principles in insurance law in the 18th Century. Thereafter, modern insurance activities, principles and doctrines governing marine and property insurance contracts were introduced to Nigeria from Britain, in the late 19th Century. The etymology of the term 'subrogation' is derived from two Latin words, '*sub*' meaning 'under' and '*rogare*' meaning 'to ask.' In literal terms, subrogation is 'to substitute'. In insurance law and practice, subrogation is expressed as the right of the insurer having performed his obligation of settling the claims of the insured, to take over the advantage of every right of the insured against third parties, which may reduce or extinguish the insurer's loss. The justification of subrogation is to prevent the unjust enrichment of the insured, such that the insured does not receive with both hands.

An extract of the English leading judgment in *Castellain v Preston* recognised and applied in the Nigerian case of *United Nigeria Insurance Co. v. Kajopaiye* [1] is most enlightening on the insured's width and limit in a contract of indemnity on the rule preventing unjust enrichment. Brett L.J in *Castellain v Preston* clearly postulated that:

> '*…the contract of insurance contained in a marine or fire policy is a contract of indemnity, and indemnity only and that this contract means that the assured, in case of a loss against which the policy has been made, shall never be more than fully indemnified'.*

Thus subrogation could be seen as a two edged sword that first, prevents the insured from making profit and thereafter the insurer upon payment of full indemnity is entitled to 'step into the shoes' of the insured, to pursue recovery claims against a wrongdoer. Past controversies as to when the insurer's right of subrogation is triggered to define the concept of full indemnity has been resolved by the English courts. The case of *Napier v Hunter,* has put judicial certainty on the point that full indemnity under the policy means that insurer has discharged his obligation.

Subrogation theories defined

Although the historical and legal developments of the doctrine of subrogation seem undisputed, the juridical basis has been a subject of controversy. The question of whether subrogation is an equitable doctrine or a common law principle based on an implied term in the contract of insurance has been laid to rest by the English Court of Appeal in *Napier and Ettrick (Lord) v Kershaw* and has resolved the dispute in the favour of equity. From the facts, whether the insurers had an equitable proprietary claim to part of the fund held by the solicitors and whether any of the settlement monies were impressed with a trust in favour of the stop loss insurers were the issues considered.

The Court held that once the insured had been paid under the policy, the stop loss insurers had an equitable proprietary right in the form of a lien over the settlement money by the doctrine of subrogation. As a result, could get injunctions restraining the firm of solicitors from paying and each assured from receiving any part of the settlement money until the stop loss insurers had been paid all the amount due.

One key principle in *Napier* is that the insurer can also assert an equitable lien or charge over recoveries, as security for the insurer's personal claim to recoupment, which arises because of those recoveries based on the sound principles of equity according to which equitable interest might arise from specifically enforceable obligations to transfer or hold the property for another. Their Lordships stressed that although the insurer's right of subrogation later came to be expressed based on the contractual relationship between the assured and the insurer through some implied obligation on the assured, these contractual promises did not prevent the creation of equitable interests.

Equitable Theory of Subrogation: Lessons for Nigerian Courts

It has now been clearly and authoritatively determined that equity is the legal basis of subrogation rights has a huge positive impact on Nigerian insurance legal history especially with the recent English court's decision in *Napier*. The insurer's right of subrogation is thus strengthened in the following area: (i) To help clarify the status of the monies received by assured in a way which might seem difficult in reliance on quasi-contract alone; (ii) In the event that the insured goes insolvent, the insurers rank in priority to other creditors (iii) imposing an equitable lien in favour of the insurer on moneys received by the assured to reduce his loss after he has been fully indemnified by the insurer; (iv) equity would compel an uncooperative assured to consent to proceedings being taken in his name for the benefit of the insurer; and (v) Where the exercise of subrogation rights is inequitable or unfair, the court has the discretion to deny the insurer's subrogation rights. By these, there is a balance of rights and obligation on both the insured and the insurer.

Conclusion

This piece has appraised subrogation in insurance commercial operations as a tool to dissuade using insurance as a wagering or gaming contract. It also presents the two important aspect of subrogation that justifies its nature in insurance contracts. It is submitted that recoveries made by insurers is of huge economic importance to the Nigerian economy such that, insurance companies would not always run at a loss and would contribute more to the Gross Domestic Product.

Thus it is economically and politically expedient that insurers should take advantage of exercising their equitable subrogation rights to increase profit from large sums accumulated which can be invested in the local economy for development purposes.

Omotolani is a Part-time Business Law Lecturer and a doctoral candidate at Bangor University Law School, Bangor, United Kingdom. Her research focuses on Marine and Property Insurance Law. The issues raised are currently part of her doctoral thesis at Bangor School of Law, Bangor University. She can be contacted via email: o.somoye@bangor.ac.uk.

[1] *United Nigeria Insurance Co. v. Kajopaiye* [1981] 4.O.Y.S.H.C. 609; *Adelowore v Adisa* [1979] N.C.L.R. 404 at 406.