THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

(EXERCISING ITS ADMIRALTY JURISDICTION)

Case No: 54/08

In the matter between: Reportable

LORCOM THIRTEEN (PTY) TD **PLAINTIFF**

And

ZURICH INSURANCE COMPANY SOUTH AFRICA LTD **DEFENDANT**

Coram: ROGERS J

Heard: **8 & 9 APRIL 2013**

Delivered: **29 APRIL 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The plaintiff ('Lorcom') sues the defendant insurer ('Zurich') for R 3 million in terms of an insurance policy issued by the latter (then called South African Eagle Insurance Company Ltd) in respect of a fishing vessel called *Buccaneer* ('the vessel'). The vessel was lost at sea on 8 January 2008.

[2] Although certain other defences were raised, the only two that survived at the trial were [a] whether Lorcom had an insurable interest in the vessel; [b] whether its loss fell within the ambit of the cover. These two points are related, as will appear.

[3] The only evidence led at the trial was that of Mr DJ Theart ('Theart'), Lorcom's controller. A bundle of documents was handed in. There were no factual disputes.

The facts

[4] Theart has been a fisherman for many years. He is a qualified skipper. In early 2007, at a time when Theart did not have his own fishing vessel, he negotiated with a friend of his, Mr JI Crous ('Crous'), to buy a vessel, *Buccaneer*. The vessel was owned by Gansbaai Fishing Wholesalers (Pty) Ltd ('GFW'). Lorcom held all the shares in GFW. Crous, through his 100% members interest in a close corporation called Millivent Thirty Four (Pty) Ltd ('Millivent'), and Crous' wife together owned 62,5% of the shares in Lorcom. The other 37,5% of Lorcom was owned by the Buccaneer Crew Trust.

[5] Crous and Theart agreed that the way in which Theart would acquire the vessel was by buying the members interest in Millivent from Crous, with the latter to arrange that Millivent became possessed of Mrs Crous' shares in Lorcom, thus giving Millivent a 62,5% shareholding in Lorcom. A purchase agreement was signed on 20 February 2007. This agreement would give Theart an indirect 62,5%

shareholding in Lorcom and thus in GFW and the vessel. It seems that *de facto* Theart viewed himself as obtaining the entire interest in Lorcom, GFW and the vessel. There was no evidence as to the rights of the Buccaneer Crew Trust.

[6] In terms of clauses 3 and 4 of the purchase agreement Theart was to pay R3,8 million for the members interest in Millivent. A deposit of R500 000 was payable on signature, the balance to be paid in instalments of R85 000 per month starting on to April 2007 (ie over about 39 months). Crous confirmed in clause 6 of the agreement that by the date the last instalment was paid (defined as the 'effective date') Millivent would be the owner of 62,5% of Lorcom and Lorcom would own the fishing permit and the vessel. At the time the agreement was executed Lorcom was already the holder of the permit (a permit issued in terms of s 13 of the Marine Living Resources Act 18 of 1998 for the catching of a specified quota of hake and sole) but the vessel, as noted, was at that stage still owned by GFW, Lorcom's subsidiary. The fishing permit authorised the catching of fish by use of *Buccaneer.* The permit could not be exploited on any other vessel without an amendment to the permit.

[7] The agreement provided in clause 7 that control of the 'assets' as defined (including the vessel, the permit and the shares in Lorcom) would be given to Theart upon signature and payment of the deposit. Although the members interest in Millivent would continue to vest in Crous until the effective date, the risk, profit and loss in the members interest and the assets would pass to Theart upon signature and payment of the deposit.

[8] Clause 7.3 stated that Theart had to insure the assets for a sum of R2 million and cede the policy to Crous. It was recorded that the loss of the vessel would not affect Theart's obligation to make payment of the purchase price of the members interest. (There was no evidence that the policy in clause 7.3 was concluded. It is not the policy at issue in this case.)

[9] Theart paid the deposit. Control of the shares in Lorcom and the vessel then passed to him together with the risk in the fishing operation. Although the vessel was owned by GFW, Lorcom (which Theart now *de facto* controlled) held the permit and was the party lawfully entitled to catch and sell the fish contemplated by the

permit. GFW made the vessel available to Lorcom for this purpose. There was no evidence about the contractual arrangements if any in that regard between Lorcom and GFW.

[10] Lorcom obtained an updated fishing permit in October 2007 which allowed it to catch its 2007 quota until 15 January 2008. It was while the vessel was fishing for this quota that it was lost at sea on 8 January 2008.

The policy

[11] The policy was issued by Zurich on 23 February 2007, ie shortly after Theart signed the purchase agreement. The policy was issued pursuant to a proposal form signed by Theart on 9 February 2007. The proposal was evidently made by Theart in anticipation of the conclusion of the purchase agreement. The proposed insured party was Lorcom. The proposal form gave the insured values as being R2 million for the hull, R1 million for engines and machinery and R250 000 for other electronic equipment and fishing gear. The requested cover was 'Cover in full as per Institute Clauses', this being a reference to the Institute Fishing Vessel Clauses issued by the Institute of London Underwriters ('the Institute Clauses'). Theart signed the form as 'Eienaar/Skipper'.

[12] The proposal form did not state that Lorcom was the owner of the vessel nor did the form contain questions directed at ascertaining the identity of the owner or the nature of Lorcom's interest in the vessel. Various certificates were furnished to Zurich as part of the proposal indicating or at least suggesting that GFW was the owner. Mr Howie, who appeared for Zurich, argued the case on the footing that Zurich was provided with information disclosing that GFW rather than Lorcom was the owner of the vessel.

[13] The policy describes itself as a marine policy. In terms thereof Zurich agrees, in consideration for payment of the premium, 'to insure against loss, damage, liability or expense in the manner hereinafter provided'. The insured party was Lorcom. The period of the insurance was 19 February 2007 to 18 February 2008.

The amounts insured and the conditions of insurance were stated to be as per an attached schedule.

[14] The attached schedule stated that the 'subject matter' of the insurance was the 'hull, machinery and equipment, excluding fishing gear and dinghies of' the *Buccaneer*. The sums insured were R3 million for 'HME' (hull, machinery and equipment); R3 million for 'War'; and R3 million for 'Liability'. The policy conditions were stated to be *inter alia* as follows:

'Subject to the Institute Fishing Vessel Clauses (20/07/87) (cancelling returns only – Clause 23) excluding machinery breakdown howsoever caused including collision liability as per Clause 18 and as per Clause 19 in so far as it applies including protection and indemnity as per Clause 20.'

[15] Clauses 6 to 17 of the Institute Clauses relate to the HME insurance while clauses 18 to 20 relate to liability insurance. In regard to the former, clauses 6.1 and 6.2 state that the insurance 'covers loss of or damage to the subject-matter insured caused by' various listed perils, including 'perils of the seas' (clause 6.1.1). From clauses 16 and 17 it seems that the measure of indemnity for damage to HME would in general be the cost of repairs or depreciation in market value. In regard to total loss, Lorcom alleged in paragraph 6 of its particulars of claim that the value of the vessel as provided for in the policy was R3 million, and this was admitted by Zurich in its amended plea. The parties appear to have assumed that in the event of a total loss (as here) the claim would be for the insured sum of R3 million less the deductible amount specified in the policy, and they have agreed the quantum on this basis (R2,85 million, after subtracting the 5% deductible). This understanding, if correct, would suggest that the policy was a 'valued policy', namely a policy where the parties agreed the value of the insured property to avoid future dispute over actual value (see *LAWSA* First Reissue Vol 12 'Insurance' para 13[1]). So understood, the figure of R3 million for HME was not an upper limit on Zurich's liability but the agreed recoverable sum (subject to the specified deductible) on total loss. Although this does not appear as explicitly from the policy's wording as I would

[1] The chapter on insurance in *LAWSA* is by the same authors as Reinecke *et al General Principles of Insurance Law* 2002 (LexisNexis) and has substantially the same text so I shall not refer further to the latter work in this judgment.

have expected, I do not need to discuss this aspect further in the light of the agreement between the parties.

[16] In regard to liability, clauses 18 to 20 indicate that the liability covered by the policy is liability incurred by the insured person to third parties arising from the operation or ownership of the insured vessel (eg arising from collision).

[17] The Institute Clauses contemplate that the insured party might not be the owner of the vessel. In clause 6.2 there is an exclusion of cover where the loss or damage results from want of due diligence 'by the Assured, Owners or Managers'. The same phrase appears in other clauses as well.

Lorcom's alleged insurable interest

[18] Mr RS Van Riet SC, who appeared for Lorcom together with Mr AA Cuyler, submitted that Lorcom had an insurable interest in the vessel by virtue of one or more of the following circumstances: [a] that it was the sole shareholder of the owner, GFW; [b] that in terms of the purchase agreement Lorcom was to be vested with the ownership of the vessel by the effective date; [c] that Lorcom had the right of use of the vessel; [d] that Lorcom held the fishing permit.

[19] These grounds for Lorcom's alleged insurable interest were not pleaded in the particulars of claim but no exception or objection was taken by Zurich on that account (cf *Oelrich v General Accident Fire & Life Assurance Corporation Ltd* 1928 OPD 105 at 107-108). Lorcom's case for its alleged insurable interest was sufficiently identified in trial particulars.

The law to be applied

[20] Since this court is exercising its admiralty jurisdiction the law to be applied is determined by s 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983. In the present case the parties in the policy expressly agreed that the policy was subject to South African law. In terms of s 6(5) of the Act this choice prevails. In any event our common law (ie Roman-Dutch law) would have applied by virtue of s 6(1)(b) of the

Act, since marine insurance was not subject to admiralty jurisdiction in South Africa immediately prior to the coming into force of the Act in 1983.[2]

Insurable interest in general

[21] It is commonly said that in order for a contract of insurance to be valid the insured party must have an insurable interest in the subject of the insurance (for example, the insured property or the insured life). The foundation of this requirement in our law is not free of controversy. In 1879 the English law of insurance was made applicable by statute to the Cape Colony.[3] In 1902 the insurance law of the Cape was in turn by statute made applicable to the Orange Free State.[4] The Transvaal and Natal applied Roman-Dutch law though the influence of English law was evident in some decisions. In 1977 the applicability of English law in the Cape and Orange Free State was abolished by the Pre-Union Statute Law Revision Act 43 of 1977, thus making Roman-Dutch law applicable, being our general law of contract together with any applicable principles developed by the writers specifically with reference to insurance contracts (see *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A)).

[22] An insurable interest was not originally a requirement of the English common law. Nor were gambling transactions unenforceable.[5] The requirement of an insurable interest was introduced by statute, first in the field of marine insurance by way of the Marine Insurance Act of 1745. That Act stated (I summarise) that no insurance should be made on British ships or on goods on board British ships if there was no interest other than the interest created by the policy itself or if the contract was 'by way of gaming or wagering or without benefit of salvage to the insurer'. The same rule was extended to life policies by the Life Assurance Act of 1774. Section 18 of the Gaming Act of 1845, while not expressly referring to insurance, had the effect of making void all contracts of insurance which were

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[2] See Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd Ed at 29 and footnote 126. Marine insurance can now form the subject of a maritime claim by virtue of para (u) of the definition of 'maritime claim' in s 1 of the Act.
[3] General Law Amendment Act 8 of 1879 (Cape).
[4] General Law Amendment Ordinance 5 of 1902 (OFS).
[5] See, in general, on the historical evolution of insurable interest in England *Colinvaux's Law of Insurance* 8th Ed paras 4-01 to 4-03; *MacGillivray on Insurance Law* 11th Ed paras 1-021 to 1-044.

wagers. Section 4 of the Marine Insurance Act of 1906 stated that every contract of marine insurance by way of gaming or wagering was void; and that a contract of marine insurance would be deemed to be a gaming or wagering contract where the insured had not an insurable interest as defined in the Act. The Act stated that a person had an 'insurable interest' if he was 'interested in a marine adventure' and he would be treated as so interested 'where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof'.

[23] The leading English cases on insurable interest have concerned the interpretation of one or other of these English statutes. For many years until 1977 this was in turn the law to be applied in the Cape and Orange Free State.[6] But that ceased to be the position in 1977. There is no South African statute which lays down the need for a so-called insurable interest. In England the statutory requirement of insurable interest was introduced in order to outlaw wagers in the form of insurance contracts and to remove the incentive which such contracts might provide for people to destroy the subject-matter of the policy. We have our own law (both common and statutory) to regulate gambling. In terms of s 16 of the National Gambling Act 7 of 2004 a debt incurred in the course of a gambling activity licensed under that Act or under provincial law is enforceable. In respect of other gambling debts, the common law is that gambling contracts are not illegal but are stigmatised to the extent that they will not be enforced (*Dodd v Hadley* 1905 TS 439 at 442; *Estate Wege v Strauss* 1932 AD 76 at 81; Christie *The Law of Contract in South Africa* 6th Ed at 393). If an insurance contract does not constitute a gambling transaction for purposes of our law, why should it not be enforced? There certainly appears to be little justification for importing requirements from English law which only ever applied in the Cape and the Orange Free State and which ceased to apply there in 1977.[7]

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[6] Though the extent to which the English statutes applied has been questioned : see Reinecke *Versekering sonder Versekerbare Belang?* (1971) *CILSA* 193 at 198-202.

[7] Cf Midgley *Spouses and Shareholders – Insurably Interested?* (1985) 102 *SALJ* 466 at 469. English commentators themselves seem currently to regard English rules of insurable interest as unduly rigid and restrictive: see *MacGillivray supra* para 1-049.

[24] However, the question would remain how, in our law, we are to distinguish an enforceable insurance contract from one which is an unenforceable betting transaction. Voet (*Commentarius ad Pandectas* 11.5.2) refers to the Roman law regarding games where chance predominates, such as games of hazard and other similar games (this is from Sir Percival's Gane's translation – the Latin word rendered as 'games of hazard' is '*alea*', meaning dice). He says that in modern times (ie in Roman-Dutch law) no demands are enforceable in respect of such games (11.5.6). In 11.5.8 he contrasts such transactions with conditional contracts which are undoubtedly valid. In other words, an uncertain event may be the subject of a condition attached to a contract; by contrast, a wager on the occurrence or non-occurrence of the same uncertain event is not enforceable because it then takes on the nature of forbidden gambling ('*aleae prohibitae*'). Grotius (*Introduction to Roman-Dutch Law*) deals with gambling transactions in the context of conditional contracts. After stating that a contract may validly be made the subject of a suspensive condition (3.3.37) he poses the question (in 3.3.38) whether wagers, namely promises made upon a condition, when there is no evidence of an intention to give, and no other contract is involved in the transaction, are binding. He states that in the public interest such wagers are devoid of effect unless there are reciprocal obligations 'and the parties have some interest in the event, which is the case in contracts of assurance' (Lee's translation[8]). In *R v Theodosiou* 1935 TPD 72 it was said, following *R v Bernstein* 1927 TPD 487, that the ordinary meaning of a betting or wagering contract is

'a contract by which two persons agree that, dependent upon a future uncertain event, one shall win from the other, and the other shall pay a sum of money or other stake, neither party having any other interest in the contract than the stake he will win or lose, and there being no other real consideration for the contract' (at 74-75).

[25] Grotius speaks of some interest in the event while the above case refers to an interest in the contract. I doubt whether these are different concepts. The existence of some such interest is the thing which takes the contract outside the realm of betting. When one says that a person has no interest in the event or contract but for the stake he will win or lose one is saying that but for the existence

[8] The quoted words in the translation are, in Grotius' original Dutch, the following: '*ende den handelaers aen het indien waer ghelegen, 't welck gebeurt in verseeckeringen*'.

of the wagering contract it would be a matter of indifference to him whether the event happens or not. What distinguishes an insurance contract from a wager is that there is a reason (apart from the contract) why the happening of the event matters to the insured party. Indeed, his interest is that the event should not happen, so that unlike the person who places a bet he does not conclude the contract with the wish that the event will occur so that he can receive a payment from the insurer.

[26] There seems no good reason why an enquiry into whether a person who has concluded a purported insurance contract has an interest in the event or contract apart from the insurance contract itself should be an unduly technical matter. In the context of insurance contracts it may do no harm to call this distinguishing interest an 'insurable interest' provided one guards against equating this criterion with the English law of insurable interest. That is not to say that English and other Commonwealth cases on insurable interest may not usefully be consulted but it would be erroneous, in my view, to assume that we have inherited a body of common law derived from English law. That would be to ignore the statutory foundation of the English law of insurable interest and the legislative basis for its application in the Cape and the Orange Free State until 1977. I am thus inclined to agree with the view expressed by De Villiers J in *Phillips v General Accident Insurance Co (Pty) Ltd* 1983 (4) 652 (W) that a contract of insurance should be enforceable if it is not a gambling contract at common law (at 659F-660E and 661B; and see also *Steyn v AA Onderlinge Assuransie Assosiasie Bpk* 1985 (4) SA 7 (T) at 10E-12I; *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 (ZHC) at 324B-E). The presence or absence of what is customarily regarded as an insurable interest is a relevant aspect of that enquiry but it is not a self-standing requirement. This is the view expressed by the learned authors of *Gibson South African Mercantile Law & Company Law* 8th Ed at 491. I am not sure that the opinion of the learned author of *Gordon & Getz The South African Law of Insurance* 4th Ed at 92-94 is actually different, since the author does not suggest that the requirement for an insurable interest in our law derives from anything other than the need to overcome the unenforceability at common law of gambling transactions. In *Lynco Plant Hire & Sales BK v Univem Versekeringsmakelaars BK* 2002 (5) SA 85 (T) Claassen AJ held that whatever the juridical basis might be it was clear from the cases that insurable interest was part of our law (para 12). If the learned judge

meant something other than the interest necessary to avoid the conclusion that the contract is an unenforceable gambling transaction, his view appears to me, with respect, to pay insufficient regard to the historical evolution of our insurance law.

[27] I have not conducted an extensive enquiry into the Roman-Dutch law of insurance. A requirement of something akin to insurable interest is not to be found in the overview of the contract of insurance in Grotius (*Inleiding* 3.24) or Van Leeuwen (*Commentaries on Roman-Dutch Law* 4.9.3 – 4.9.10). These discussions relate to the insurance of ships and other property – the insuring of human life was not permitted in Roman-Dutch law. However, the lectures of Van der Keessel on Grotius 3.24 (*Praelectiones* and *Theses Selectae* 711-769) and the notes of CW Decker on Van Leeuwen 4.9.4 contain statements which would support the view that the insured must have an interest in the insured property. And in Van der Linden *Institutes of Holland* 4.6.10 the writer states that if the sum insured exceeds the value of the interest in the ship, the sum may be reduced to the actual value of the interest. The commentaries are framed largely on the supposition that the insured will be the owner (see Van der Keessel's suggested definition of the insurance contract in Th 712[9]) though both commentators say that anything can be insured in which the insured party has an interest (see Van der Keessel Th 716). There are also statements in Van der Keessel suggesting that the nature of insurance law dictates that the insured may not recover more than the damage he himself has suffered in consequence of the loss of or damage to the insured goods.[10] It is interesting to note than in his commentary on Grotius 3.3.48, where Grotius deals with gambling, Van der Keessel questions Grotius' statement that gaming transactions of all kinds are unenforceable and challenges the view of other writers that a general prohibition of this kind can be derived from the laws governing insurance, since the latter laws apply only to ships, commodities and certain other things (see Th 514). In Wessels *Law of Contract in South Africa* (1937) the question of insurance is discussed in passing in the context of the attitude of our law to betting (paras 556-572). The learned author opines that the early Dutch writers, like the English lawyers, regarded insurance contracts as a species of wager but that

[9] 'Dit is dus 'n benoemde, konsensuele, bona fidei kontrak waarkragtens daar teen 'n vaste prys onderneem word om in te staan vir die skade wat die saak van 'n ander moontlikerwys uit hoofde van 'n onsekere gevaar kan ly' (Tr HL Gonin in the edition by Van Warmelo *et al*)
[10] See Th 717 Note 8; Th 738.

gradually in the interests of trade marine insurance came to be recognised as a legitimate contract 'though hedged in with numerous statutory restrictions' (para 571).

[28] It may well be that at the time of Van der Keessel and the earlier writers the same underlying policy that led to gambling transactions being treated as unenforceable resulted in fairly strict rules about what could be recovered under insurance contracts. However, a reading of these writers shows that there were many restrictions in the Roman-Dutch law of insurance, often derived from ordinances and local statutes, which are not part of our modern law.[11] I thus do not consider that we are bound to find that an insurance contract which promises to pay a sum which may differ from (and exceed) the insured party's patrimonial loss is unenforceable. Such a view is not supported by case law (see below).

[29] It is sometimes said, at least in regard to so-called indemnity insurance, that the insured must have an interest in the subject matter of the policy because the purpose of indemnity insurance is to indemnify the insured party against actual loss and there can be no loss without an interest. In my view, however, this does not mean that we need a separate requirement of insurable interest. One must interpret the policy to determine what it means. If the contract properly construed requires the insured party to prove that he has suffered a particular kind of loss in order to claim then that is what he must prove. As will appear, though, it is by no means our law that in every short-term insurance contract the insured party is limited to claiming his own proven patrimonial loss. (In *Colinvaux supra* the learned author states that the 'indemnity principle' takes effect as an implied term of the contract and can be waived [para 4-05], which correctly locates this aspect in the sphere of contractual interpretation.)

[11] For example, the Roman-Dutch law, apart from prohibiting life insurance, imposed manifold restrictions in respect of property insurance: carriers and wagoners could not take out insurance; in general one-tenth of the value of the insured goods had to remain uninsured at the owner's risk (and there were complicated rules as to how the one-tenth was to be calculated); in respect of insured goods carried by ship, the merchant had to arrange for the goods on arrival to be offloaded within 15 days; a ship which failed to return within a stated period could be presumed lost; premiums which did not exceed 7% of the insured value had to be paid in cash, and so forth.

[30] The courts here and abroad have sometimes stretched the notion of insurable interest quite far in order to find that a policy is enforceable. This is unsurprising. The following statement by Brett MR in *Stock v Ingles* [1884] 12 QBD 564 at 571 has often been quoted:

'In my opinion it is the duty of a court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the insured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest.'[12]

[31] However, this process of liberalisation may just mask the fact that the courts are not really applying a self-standing requirement of insurable interest with any clear content provided by law but are rather seeking to determine whether the insured person's interest in taking out the policy is an acceptable one which removes the contract from the ambit of gambling. In that sense, insurable interest in our law would, like wrongfulness in the field of delict, be a policy-laden assessment serving to separate enforceable contracts from those which should in accordance with the legal convictions of the community be branded as unenforceable wagers. One sees this particularly in life insurance, where our own case law on insurable interest is particularly sparse. I do not think that anyone in this country doubts that a parent may insure the life of a child or that spouses may insure each other's lives. In some cases such insurance may have an economic justification but that is not necessary for the policy to be valid; the insured party can claim on the death of the insured life without proof that the death has occasioned him or her financial loss. All one can really say is that the law finds it acceptable for persons in such relationships to insure each other's lives, that the relationship provides an acceptable reason (or 'interest' in the event - the insured life's death) quite apart from the reason created

[12] See also *Feasey v Sun Life Assurance* Company of Canada [2003] EWCA Civ 885 para 7. And in South Africa see *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 at 381 (where Wessels J incorrectly attributed the statement to Lord Esher); cf *Unitrans Freight Pty Ltd v Santam Ltd* 2004 (6) 21 (SCA) para 17.

by the contract of insurance itself. That is a policy-laden conclusion, one on which views could be expected to change over the years.[13]

[32] In cases where an insurable interest in the conventional sense appears to be lacking, some adherents of conventional learning argue that the policies are indeed unenforceable but that the insurer in the ordinary course will nevertheless pay out – so called 'honour policies'.[14] Into this category have sometimes been placed cover under extension clauses (where, for example, the owner of a car obtains cover in respect of liability which may be incurred by persons driving the car with his permission – I shall return to such policies later) and certain types of life insurance. This is to sacrifice common sense to dogmatism. If a particular type of insurance contract is unenforceable it can only be because, as with gambling, it is stigmatised as offending public policy. How then can it be a matter of 'honour' for the insurer to pay out anyway? And why do courts almost always view with a sceptical eye the insurer's reliance on insurable interest, as if the disreputable feature were not the insurance contract but the insurer's refusal to pay? And why, most of all, should insurers be permitted to write such contracts and make profits from them when the contracts are supposedly frowned upon and when the insurers fail to tell their clients upfront that they are buying an unenforceable policy? The common sense answer is that such contracts are not in truth frowned upon. They are regarded as fulfilling a useful social function. There is some or other element which, at the level of policy, we find an acceptable reason to justify the conclusion of the contract and to remove it from the realm of gambling. It is these more liberal modern views to which the notion of insurable interest, if it is to remain a useful tool, must adapt.

Insurable interest in our case law

[33] Zurich in the present case did not allege or argue that the policy taken out by Lorcom was an unenforceable gambling transaction. Zurich did, however, allege the absence of an insurable interest. Lorcom for its part did not argue the case on the basis that insurable interest was not a requirement of our law. I thus propose to

[13] Cf *LAWSA op cit* para 90.
[14] See, for example, *Vandepitte v Preferred Accident Insurance Corporation of New York* [1932] All ER Rep 527 (PC) at 534B-C; *Old Mutual Fire & General Insurance Company of Rhodesia (Pvt) Ltd v Springer* 1963 (2) SA 324 (SR) at 331D-H.

examine the concept of insurable interest in our case law, where it has largely been dealt with along conventional lines as an independent requirement for an enforceable insurance contract. If Lorcom had an insurable interest in the conventional sense, that would obviously be a sufficient interest to avoid characterising the policy in this case as an unenforceable wager. Conceivably, though, some lesser interest would suffice if the sole enquiry were whether the contract is or is not an unenforceable wager.

[34] In the case of indemnity insurance, it is generally said that the purpose of the policy is to indemnify the insured party against loss. It is this feature that is generally thought to distinguish such a contract from a wager. If I take out a policy in terms whereof I will receive an agreed figure upon the destruction of an asset owned by a stranger, I and the insurer are merely betting on the likelihood of the event occurring. It is thus not surprising that in indemnity insurance the concept of insurable interest is conventionally concerned with identifying those interests which will cause the insured party to suffer financial harm if the insured risk eventuates. Financial loss in this context naturally includes loss as recognised in our law of damages in the fields of delict and contract (ie some diminution in the patrimony of the insured party) but, as will be seen, it extends beyond patrimonial loss so as to include financial prejudice of a kind the party would not be entitled to recover in delict or for breach of contract (see *LAWSA op cit* para 56).

[35] The function of insurable interest in the law of indemnity insurance and its association with financial loss show that one cannot divorce the question of insurable interest from the type and extent of recovery permitted by the policy. An owner of an asset naturally has an insurable interest in the asset, and the insurable interest will usually be an interest in the full market value of the asset, since the destruction of the asset will diminish the owner's patrimony by that amount. However, if the asset is known to be worth R200 000 but the parties deliberately conclude a contract that upon destruction the insured will be paid R1 million, the owner would lack an insurable interest in the asset to the extent of the additional R800 000. Stated differently, the contract would appear to be a wager or speculation to the extent of R800 000. (This is not to be confused with a valued policy, where

the parties *bona fide* settle upon a sum to be taken as the market value for purposes of the policy.)

[36] It is well established that a person other than an owner may have an insurable interest in relation to an asset. However, in the case of a non-owner the insurable interest (ie the extent to which he will suffer financial harm from damage to or destruction of the asset) will often be less than the market value of the asset. For example, a person with a contractual right to use an asset free of charge for one year will have an insurable interest in the asset because upon destruction of the asset he will be deprived of its use for one year. The loss he stands to suffer by virtue of this circumstance would be less than the market value of the asset and would be given, rather, by the market rent of hiring an equivalent asset (*LAWSA loc cit* para 305). Depending on the circumstances, though, the lessee's insurable interest might also include loss in the form of a liability to the owner (cf *Van Acherberg v Walters* 1950 (3) SA 734 (T) at 740G-H) or a loss of other benefits associated with the use of the asset (cf *Manderson t/a Hillcrest Electrical v Standard General Insurance Co Ltd* 1996 (3) SA 434 (D) at 442E-443D) .

[37] It follows that one cannot say, merely because the insured party has an insurable interest in an asset, that he has an insurable interest sufficient to sustain cover of the kind for which the particular policy provides in respect of the asset. Where, for example, a contract of insurance promises to pay the market value of an asset upon its destruction, the question will be whether the insurable interest the insured has in the asset is an insurable interest which will sustain insurance against the loss of the market value of the asset.

[38] This can be illustrated with reference to the *Manderson* case *supra*. The plaintiff had insured a vehicle against theft. The vehicle having been stolen, he claimed an amount equal to the value of the vehicle. The vehicle in fact belonged to a Mr Sieg, who was employed by the plaintiff (an electrician) as a sub-contractor. At 44F-G McCall J quoted a passage from *MacGillivray and Parkington on Insurance* 8th Ed and then said (at 44G-H):

'This passage demonstrates the fallacy of the suggestion by counsel for the plaintiff that, once an insurable interest is established, the insured is entitled to recover under the policy

the full value of the items insured, irrespective of the extent of his loss or the value of his interest.'

[39] With reference to the facts of the particular case, McCall J said the following (440E-I):

'Applying these principles to the facts of the present case, I am of the view that the plaintiff has not suffered any loss capable of being valued as a result of the theft of the car and tools belonging to Mr Sieg. He certainly has not suffered a loss represented by the market value of the vehicle and the tools which were stolen. That is the loss which has been suffered by Mr Sieg. As appears from the evidence of the plaintiff and Mr Sieg which was not disputed, what the plaintiff had in mind was that if Mr Sieg's vehicle was stolen or damaged and could not be replaced the plaintiff would suffer a loss representing the loss of profit or loss of goodwill suffered by his business as a result of his being unable to supply his customers with the service performed by Mr Sieg. That may well have been an insurable loss and a loss giving him an insurable interest in Mr Sieg's motor vehicle, but that was not a loss insured under the policy. What was insured against was the loss of or damage to the vehicles described in the schedule, including that owned by Mr Sieg, not the loss caused to the plaintiff as a result of the unavailability of that vehicle or the tools which were contained in it when it was stolen. If one applies, therefore, the test of proof of loss or damage, in order to ascertain whether the plaintiff had an insurable interest in the motor vehicle and tools at the time of the theft of them, I am of the opinion that the plaintiff did not have an insurable interest to the extent of the value of the vehicle and tools.'

[40] The learned judge recognised that various people could have different insurable interest in the same asset. He referred to several examples but said (443D-E):

'Here, the plaintiff's interest in the vehicle was, as I have said, an interest in ensuring that his business did not suffer as a result of the loss of or damage to the vehicle but what he is seeking to recover in this case is not his interest, but the value of Mr Sieg's proprietary interest in the motor vehicle. That, in my view, is not permitted.'

[41] *Armstrong v Bhamjee* 1991 (3) SA 195 (A) is another case where a plaintiff (this time a lessor who was not the owner of the leased premises) was held in effect not to have an insurable interest in insurance cover relating to the market value of leased trading premises, though the court's conclusion was not expressed with reference to insurable interest but was based on a view that the insured had not

proved the extent of his actual loss occasioned by the destruction of the premises (at 202C-203D). (Whether the policy in that case was framed in such a way that that the plaintiff could have recovered an amount based on the insurable interest he had in the rentals payable by the tenants does not appear from the judgment.)

[42] Nevertheless, the cases show that the courts in this country and in other jurisdictions (though to differing extents) have often approached the question of insurable interest quite liberally so as to enable the insured party to recover what the policy promised. In this country the liberal approach can be seen, for example, in regard to insurance taken out by a person on the assets of his or her spouse. In *Littlejohn*[15] the husband was found to have an insurable interest in the goods of his wife to whom he was married out of community of property in circumstances where the goods constituted trading assets of the business which the husband *de facto* controlled and managed. Wessels J found that the husband had an insurable interest, observing as follows (380-381):

'The principle to be deduced from these cases appears to be this: If the insured[16] can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a *jus in re* nor a *jus ad rem* to the thing insured his interest will be an insurable one.

…

Applying these principles, I ask myself the question whether the husband was in a worse position after his wife's property insured by him had been burnt, and whether he has suffered loss thereby. He was the manager of the property, it was almost entirely under his control, and from the profits he and his wife carried on the joint household. It is to his interest that the property should be replaced exactly as it was before the fire. In the words of Chambre J,[17] he is interested in the preservation of the property because he has a benefit from its existence and prejudice from its destruction. It is to his interest that the business should be conducted in the future as it has been in the past, and therefore I think he must be held to have had an insurable interest in the goods insured by him.'

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[15] Footnote 12 above.
[16] The report uses the word 'insurer'' but this is clearly a typographical error.
[17] This is a reference to Chambre J who gave one of the opinions in the leading English case of *Lucena v Crauford* (1806) 127 ER 630. However, Wessels J errs, with respect, in attributing the words in question to Chambre J – they come from the opinion of Lawrence J at 643.

[43] It appears that in *Littlejohn* the husband was held to be entitled to claim the market value of the destroyed goods (up to the limit of the policy). He was not required to quantify and value his separate interest in controlling the business and earning profits for the benefit of the joint household. In other words, although in law his patrimony was not shown to have been reduced by the amount payable to him in terms of the policy, Wessels J evidently considered that the nature of his insurable interest entitled him to enforce a policy which provided cover measured with reference to the market value of the insured assets.

[44] In *Phillips v General Accident Insurance supra* De Villiers J held that a husband had an insurable interest in an engagement ring belonging to his wife because he had bought it for her and because, although he was under no legal obligation to replace it if it was stolen, he nevertheless felt under a moral obligation to do so (660G-H). As noted earlier, there are statements in the judgment indicating that De Villiers J favoured an approach in which a contract of insurance would be enforceable provided it was not a betting transaction, thus bypassing the requirement of insurable interest *eo nomine* (660A-E). Nevertheless, his decision was based primarily on a recognition of the husband's interest as being an insurable interest, no doubt influenced by his sense that if one was not permitted to test the matter solely with reference to whether the contract was a betting transaction one should 'extend' the meaning of the term 'insurable interest' to ensure that justice is done between the parties (660A-B). As in *Littlejohn*, the husband's interest was held to be sufficient to entitle him to claim a sum based on the market value of the stolen ring.

[45] In *Refrigerated Trucking Pty Ltd v Zive NO (Aegis Insurance Co Ltd, Third Party)* 1996 (2) 361 (T) the question was whether the owner of a vehicle had an insurable interest to sustain insurance in respect of third party liability incurred by persons driving the vehicle with his consent. As is typical in clauses of this kind (known as extension clauses), the provision of this cover was not a *stipulatio alteri* for the benefit of the driver but constituted cover which only the insured owner could enforce. Hartzenberg J referred to various cases including *Littlejohn* and *Phillips* and then offered the following definition of 'insurable interest' for purposes of indemnity insurance (372F-H):

'It seems then that in our law of indemnity insurance an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer an economic loss or, in respect of any event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the events does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens.'

[46] Hartzenberg J then applied this view of insurable interest to find that the owner of the vehicle had an insurable interest to obtain cover in respect of third party liability incurred by drivers of his vehicle. It was, he said, of great economic (though not legal) interest to the owner, for example, that members of his family should be insured against third party liability (372I), presumably meaning that a decrease in the patrimony of a member of the household (by virtue of having incurred third party liability) could put economic strain on the household as a unit. He said, further, that the owner has an obvious interest in cases where the driver is one for whom he is vicariously liable but that the owner also has an economic interest in avoiding contentious litigation over the question whether the driver is indeed one for whom he is vicariously liable (372J-373D). In terms of this decision the owner could enforce the policy and recover from the insurer the amount of the liability incurred by the driver to the third party without proving that in the particular circumstances of the case he is in fact vicariously liable or that the driver's liability will put such stress on the household unit that the owner will need to contribute an additional sum to the household's maintenance equal to the amount of the liability incurred by the driver. Once it is found that the owner has an insurable interest in obtaining insurance measured with reference to third party liability incurred by drivers of his vehicle, he can claim an amount equal to the liability without proving that he has suffered a loss in an equivalent amount.

[47] An extension clause was also the subject of *Unitrans Freight.*[18] The insured party was JG Olieverspreiders ('JGO'), the insurer was Santam. The extension

[18] See footnote 12 *supra*.

clause provided cover, enforceable by JGO, in respect of any liability incurred by a person driving JGO's vehicle on its order or with its permission. The vehicle was involved in an accident at a time when it was being driven by one Shai, an employee of an entity called De Kroon, which was using the vehicle with JGO's permission. As a result of the accident Shai, and De Kroon as Shai's employer, incurred liability towards Unitrans. One of the questions was whether the insured party, JGO, had an enforceable claim against Santam. Nugent JA rejected an argument that De Kroon had acquired any rights under the policy (ie the extension clause was held not to be a *stipulatio alteri*). Nugent JA nevertheless held that the clause was enforceable by JGO. Although the supposed absence of an insurable interest on JGO's part was not a point raised by the exception which the court was called upon to decide, Nugent JA said the following in that regard (para 17, footnotes omitted):

'It has been suggested that an indemnity given in that form might be void for lack of an insurable interest on the part of the insured – and that has been held to be the case in other jurisdictions – but that is not a ground upon which the particulars of claim were attacked and it has not been argued before us. Indeed, it would be surprising if an insurer who has given an earnest undertaking to indemnify a person in what is clearly a policy of insurance and not a gambling contract (as pointed out by *Chaskalson (loc cit)*, the requirement of insurable interest is designed to ensure that insurance policies are not used as a basis of gambling) were to repudiate its obligations on those grounds.'

[48] In extension clauses of this kind, the insured party (JGO in the above case) cannot be said to have suffered a patrimonial loss but, as was held in *Refrigerated Trucking*, the insured party may nevertheless have an insurable interest in enforcing the insurer's promise to pay to the insured an amount equal to the liability incurred by the driver. What the insured party has to prove in such a case is not that he has incurred a liability or suffered a loss but that the driver has incurred a liability. Although the insured party may need to have some interest in obtaining cover of that kind, the interest does not need to be of a kind which, upon the happening of the event insured against, will result in the insured party suffering a loss.[19]

[19] In *McClain v H Mohamed & Associates* [2003] 3 All SA 707 (C) Blignault J accepted the *stipulatio alteri* construction of extension clauses, relegating to a mere procedural matter the provision which stated that only the insured party could claim under the policy. On this view, the relevant insurable interest is that of the driver (as an additional insured party when he accepts the benefit of the extension), not that of the primary insured party (paras 35-37). I doubt whether that view of the matter can survive *Unitrans.* Moreover, the notion that the insured party can, by a procedural arrangement,

Insurable interest in the present case

[49] Reverting to the present case and dealing first with interpretation of the policy, I do not read it as saying that Lorcom must prove that it has suffered patrimonial loss. Zurich agreed in the policy to 'insure against loss, damage, liability or expense in the manner hereinafter provided'. The 'loss' and 'damage' referred to in this phrase do not mean patrimonial loss suffered by Lorcom. The words 'loss" and 'damage' in the sense of patrimonial loss would be tautologous. In the context of the schedule and Institute Clauses, 'loss' means the physical loss of the vessel and 'damage' means physical damage to the vessel. The schedule describes the 'subject-matter' of the policy as being the hull, machinery and equipment of the *Buccaneer*. Clause 6 of the incorporated Institute Clauses states that the insurance covers 'loss of or damage to the subject-matter insured' arising from various causes, ie the loss of or damage to the vessel. Throughout the Institute Clauses the word 'loss' is used with reference to the physical loss of the vessel. The word 'loss' also does not mean 'lost by the insured party', as I think Mr Howie for Zurich argued. The 'loss' of a vessel in the context of the policy means the event of the vessel's loss due to sinking or destruction. The parties apparently understood their contract as meaning that Zurich promised to pay Lorcom R3 million if the vessel was lost (the insured value of R3 million seems to have been a *bona fide* assessment of the vessel's value). In the case of damage to the vessel (which is not at issue in this case), the Institute Clauses appear to contemplate payment of a sum calculated with reference to cost of repairs or depreciated market value.

[50] I thus find that the policy does not require Lorcom to prove that the loss of the vessel caused it to suffer a patrimonial loss, whether in the amount of R3 million or any other sum, or to prove that Lorcom lost the vessel (in the sense of ceasing to own it). On the assumption that an insurable interest is an independent requirement of our law, the enquiry as I conceive it is whether Lorcom had an interest sufficient

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be given the right to sue on a claim vesting in the driver appears to be inconsistent with other cases which hold that an agent cannot by agreement sue on a claim vesting in his principal (*Sentrakoop Handelaars Bpk v Lourens & Another* 1991 (3) SA 540 (W); *Myburgh v Walters NO* 2001 (2) SA 127 (C) at 130C-E). This view of the extension clause would also imply that the insured party, as an agent for the driver in whom the claim vests, is subject to directions from the driver (who would be his principal), which seems unlikely to be the insured party's intention.

to render enforceable a policy providing cover measured with reference to the value of the vessel.

[51] The insurable interests, other than ownership, which would commonly be accepted as sustaining insurance of that kind would include a purchaser to whom risk in the subject-matter has passed, a mortgagee (to the extent of his secured claim) and a lessee on whom the risk of destruction or damage is imposed by the lease. In these cases the insurable interest is generally such as to cause the insured party, upon destruction of or damage to the insured asset, to suffer a patrimonial loss equivalent to the loss of or reduction in the market value of the asset. However, in the field of property insurance *Littlejohn* and *Phillips* show that an insurable interest need not be such as in law to cause the insured party to suffer a patrimonial loss equal to the market value of the insured asset; and in liability insurance *Refrigerated Trucking* and *Unitrans* are by analogy to similar effect.

[52] I have already summarised the four aspects of Lorcom's alleged insurable interest. As to Lorcom's right to use the vessel and to exploit the fishing permit by so doing, there was no evidence as to the terms of Lorcom's right of use. I do not know whether rent was payable and whether a period of use was stipulated. Since GFW was Lorcom's wholly-owned subsidiary and since Lorcom's affairs were *de facto* under the control of Theart, it appears likely that Lorcom was intended to have the use of the vessel until on the effective date Lorcom became the owner. However, it was not definitely proved that Lorcom had a contractual right to this effect though I have little doubt that this was the factual expectation.

[53] On the conventional view of insurable interest, Lorcom's temporary right of use of the vessel and its right to earn profits from the vessel's exploitation would not be sufficient to sustain cover measured with reference to the market value of the vessel (cf *Manderson supra*). The temporary right of use would sustain cover related to the cost of hiring a comparable vessel and for loss of profits, neither of which the policy in the present case purported to provide. It was also not proved that there was an agreement between Lorcom and GFW that in the event of the loss of or damage to the vessel Lorcom would be liable to GFW to compensate the latter for the value of the vessel or the depreciation in its value. Lorcom did not allege in its trial

particulars that it was under any such liability and did not argue that its insurable interest lay in the existence of such a liability.

[54] However, Lorcom's right of use did not stand alone. The purchase agreement required Crous to procure that Lorcom was by the effective date the owner of the vessel. And, of course, Lorcom had an interest in the vessel via its 100% shareholding in GFW.

[55] As to the first of these additional factors, Lorcom was not a purchaser, let alone a purchaser at risk. Lorcom was not a party to the purchase agreement, the immediate subject-matter of which was the members interest in Millivent. The purchase agreement does not spell out how Crous was to procure that Lorcom by the effective date became the owner of the vessel nor was this explained in evidence. It is nevertheless clear to me that it would not have been consistent with the purchase agreement for this to have been done in a way which imposed on Lorcom any external financial liability, since then Theart would effectively (through his indirect shareholding in Lorcom) have been required to pay yet again for the vessel. (Whether the transfer of the vessel to Lorcom could permissibly have been accompanied by the creation of a liability to GFW I do not know though this would have been of less moment to Theart and Lorcom: GFW was a wholly-owned subsidiary of Lorcom, and any asset which GFW had in the form of a loan claim against Lorcom was indirectly an asset of Lorcom itself.) I thus consider that Lorcom had a factual expectation of becoming the owner of the vessel in a way which would not impose any obligation on it to an external party. This factual expectation would be thwarted if the vessel was destroyed or damaged prior to the effective date, since in terms of the purchase agreement Crous did not carry the risk of destruction or damage; if the vessel was lost or damaged prior to the effective date, Crous did not have to procure that the vessel was repaired or that an equivalent vessel or its value was provided to Lorcom.

[56] I consider that the combination of Lorcom's right of use, its well-founded expectation that such use would continue until it became the owner of the vessel, and its well-founded expectation that Crous by virtue of his contract with Theart would procure that Lorcom became the owner of the vessel by the effective date

(subject, however, to the loss of or damage to the vessel, the risks of which Crous did not bear) gave Lorcom and insurable interest in cover measured with reference to the market value of the vessel. Such cover would enable Lorcom, if the vessel was lost or damaged prior to the effective date, to be placed in the same position as if Lorcom's right of use had continued as expected and as if the contract between Crous and Theart had followed its expected course.

[57] The matter is, however, placed beyond question in my view by the added consideration that Lorcom was the 100% shareholder of GFW. The 100% shareholder of a company is obviously not the owner of the company's assets. In *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd & Another* 1962 (1) 458 (A), not an insurance case, the court was called upon to decide whether a shareholder nevertheless had a 'financial interest in' the business of the company for purposes of s 166(v) of the Liquor Act 30 of 1928. The majority answered this question affirmatively (at 473H per Van Blerk JA; 485F-486B per Wessels AJA). At least in the case of a 100% shareholder, there would appear to be a direct correlation between the company's financial welfare and the shareholder's financial welfare.

[58] In examining whether shareholding gives the shareholder an insurable interest in an asset of the company, several questions must be distinguished. The first is a threshold question: whether the shareholding provides an insurable interest at all in relation to a policy which provides cover measured with reference to the market value of an asset of the company. The second is whether, if such an interest is recognised, the insured shareholder's claim is limited to the negative effect which the loss of or damage to the asset has on the value of his shares or whether he can claim the loss of or diminution in the market value of the asset. The answer to the second question may depend not only on the law's approach to insurable interest but also on the interpretation of the particular policy.

[59] In England the conventional view is that a shareholder, even a 100% shareholder, does not have an insurable interest in the assets of the company. This appears from the judgment of the House of Lords in *Macaura v Northern Assurance*

Co Ltd & Others [1925] AC 619 (HL). Lord Buckmaster said the following (at 626-627):

'Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset – a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity. … In the present case, though it might be regarded as a moral certainty that the appellant would suffer loss if the timber which constituted the sole asset of the company were destroyed by fire, this moral certainty becomes dissipated and lost if the asset be regarded as only one in an innumerable number of items in a company's assets and the shareholding interest be spread over a large number of individual shareholders.'

Lord Sumner also found that the appellant had no insurable interest (at 630):

'It is clear that the appellant had no insurable interest in the timber described… He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no 'legal or equitable relation to' the timber at all. He had no 'concern in' the subject insured. His relation was to the company, not its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire.'

Lord Wrenbury put the matter more pithily (at 633):

'My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.'

The reference to standing in a 'legal or equitable relation' to the property or having 'property legal or equitable' in the assets harks back to the definition of insurable interest in the English Marine Insurance Act of 1906.

[60] Even in England, it has been questioned whether the outcome in *Macaura* was correct. In *Inland Revenue Commissioners v Cleary* [1966] 2 All ER 19 (CA) Salmon LJ said the decision in *Macaura* was 'a strange result, especially as the rule that an insurance policy cannot be enforced by the assured unless he has an insurable interest in the thing insured was evolved only to prevent gambling and wagering transactions from being enforced in our courts' (at 24F-G).

[61] More recently, though, Mr AD Coleman QC, sitting as a Deputy Judge of the High Court, found in *Sharp & Another v Sphere Drake Insurance plc & Others, The Moonacre* [1992] 2 Lloyd's Rep 501 (QB) that in the particular circumstances of that case the shareholder (Mr Sharp) had an insurable interest in the yacht owned by the company (Roarer). In addition to having 100% of the shares in Roarer, there were two powers of attorney executed by the company in favour of Sharp (one for two years, the other for five years) which, in the judge's view, conferred on him authority to enjoy the use of the yacht for his own purposes and to exercise such control of it as he saw fit (512). The effect of the powers was that the company vested in Sharp very wide powers of management and control and the right of disposal of possession of and title to the yacht (509). The conferral of these rights was very beneficial to Sharp 'in as much as they were entirely consistent with the purpose for which he had caused Roarer to acquire the vessel, namely so that he personally could enjoy its use and occupation' (509). In the course of finding that Sharp had an insurable interest in the yacht, the judge reviewed the relevant insurance legislation and said the following (at 510):

'Accordingly the essential question to be investigated in those cases which since 1745 have been concerned to test the existence of an insurable interest has been whether the relationship between the insured and the subject matter of the insurance was sufficiently close to justify his being paid in the event of its loss or damage, having regard to the fact that, if there were no or no sufficiently close relationship, the contract would be a wagering contract…

There is thus in a wagering contract the essential feature that neither party has any interest in the outcome of the future uncertain event save for that amount which will be won or lost under the contract. Conversely, if the outcome of the future uncertain event upon the happening of which one party is entitled to be paid by the other would or might but for the contract cause loss or damage to the payee, then one essential characteristic of a wagering contract has gone and there is nothing in the Gaming Act, 1845 or in subsequent betting and gaming legislation which renders that contract void and unenforceable. Neither the words of any statute since 1845 nor any judicial pronouncement suggest that there should be a category of contracts of insurance which were not wagering contracts but which on account of the absence of an "insurable interest" should not be enforceable. Accordingly, in approaching the construction and application of s 5 of the Marine Insurance Act it is, in my judgment, right to proceed on the assumption that, provided the insured has sufficient interest in the subject matter of the insurance to prevent his contract being a wagering contract, he is entitled to enforce that contract.'

[62] It should be noted that in *The Moonacre* the powers vested in Sharp, while beneficial to him, were to be exercised on behalf of and in the name of the company (509). He was not given the power, for example, to sell the yacht and keep the proceeds for himself. Nevertheless, his 100% shareholding coupled with the rights he enjoyed under the powers of attorney were held to give him an insurable interest. Furthermore, this insurable interest was evidently regarded as sufficient to entitle him to claim the insured value of the yacht. He was not required to prove a diminution in the value of his shares or the amount of the loss he had suffered due to the thwarting of his rights of use and control. Although Sharp's claim against the insurer failed on other grounds, his claim against the insurance broker for negligence succeeded. The damages recoverable from the broker were held to be equal to the insured value of the yacht on the basis that this was the sum Sharp could have recovered from the insurer but for the broker's negligence (at 527). Whether or not the judgment in *Moonacre* correctly represents the law of England cannot be confidently stated but I see no reason why our more liberal law on the question of insurable interest should repudiate the outcome reached in the case.

[63] The strongest rejection of *Macaura* in Commonwealth case law is the judgment of the Supreme Court of Canada in *Constitution Insurance Company of Canada & Others v Kosmopoulos & Another* [1987] 1 SCR 2. There one

Kosmopoulos was the sole shareholder of a company which conducted the business of manufacturing and selling leather goods. A policy was taken out in Kosmopoulos' name ensuring the company's assets against fire. The company's assets having been damaged by fire, the insurers repudiated liability on the basis that Kosmopoulos had no insurable interest. The Supreme Court held that a finding that Kosmopoulos had an insurable interest could not on the facts of the case be based on piercing the corporate veil (10-12) nor on the basis of treating Kosmopoulos as a bailee (12-13). If there was an insurable interest it could only be by virtue of Kosmopoulos' shareholding in the company, which meant deciding whether to follow *Macaura*.

[64] Wilson J, who delivered the main judgment, began by contrasting the differing formulations of insurable interest in the famous English case of *Lucena v Crauford* (1806) 127 ER 630. Lawrence J (one of the judges who had given his opinion on various questions posed prior to the hearing in the House of Lords) formulated a test which has become known as the 'factual expectancy test'. In terms of his formulation there need not be a legal right in the asset; it is enough that the insured is so circumstanced with respect to the asset that there is a 'moral certainty' of an advantage or benefit to him from the asset (at 643). Lord Eldon in the House of Lords, however, was not prepared to accept anything short of a right in the property or a right derivable out of some contract about the property. A 'moral certainty', apart from being in his view difficult to define, would enable many people to insure the same thing (at 650-652).[20]

[65] Wilson J considered that Lawrence J's view of an insurable interest was to be preferred. She expressed the opinion that the greater certainty which Lord Eldon thought was provided by his more restrictive test was illusory (15-16). She considered that the danger of multiple insurance was also illusory, since the insured would have to disclose all circumstances relevant to the risk. The curb on excessive insurance is in the hands of the insurers themselves – they can decline the risk or insert protective clauses. A broadening of the concept of insurable interest would

[20] The precise nature of the procedure followed in *Lucena* is difficult to grasp from the report. In the event, and despite their differing formulations, both Lawrence J and Lord Eldon found that the Commissioners did not have an insurable interest in their own right.

allow for the creation of more socially beneficial insurance policies with no increase in risk to insurers (16-17).

[66] Wilson J pointed out that in England *Macaura* represented a triumph of Lord Eldon's view in *Lucena* over that of Lawrence J (18) but she preferred Lawrence J's more flexible approach, noting that the factual expectancy test had prevailed in other fields of insurance such as life and health insurance (21). In assessing whether the more restrictive test of insurable interest should continue to be applied in Canada, Wilson J had regard to the policies underlying the requirement of an insurable interest:

[a] As to the public policy against wagering, she thought that in the modern world it was easy to overestimate the danger of insurance contracts being used to create wagering transactions. There were many more convenient devices for the serious gambler (22). Insurable interest was not an ideal mechanism for combating gambling, since only the insurer could invoke it; it was not available to any public watchdog (23). All that should be required to combat wagering is some form of valuable relationship to the occurrence. The policy against wagering is satisfied by any valuable relationship which equals the pecuniary value of the insurance (23-24).

[b] The public policy of restricting the insured to full indemnity for his loss is inconsistent with a restrictive test of insurability, since people who suffer genuine loss may be excluded (24-25).

[c] The moral hazard that the insured might be tempted to destroy the subject-matter of the insurance is not increased by accepting Lawrence J's broader test. Indeed, the moral hazard in such cases may be less since in the type of case excluded by Lord Eldon's more restrictive test the insured party is usually not in possession or control of the subject matter (25). Insurance concepts cannot on their own prevent deliberate causing of harm; the primary burden in that regard lies with the criminal justice system (26).

[67] Wilson J observed that if shareholders try to bypass the company's creditors by arranging for insurance in their own names, there are various devices of

corporate law which could be deployed to ensure that the company and other interested parties are not unfairly treated (27-28). She also noted that the restrictive approach adopted in *Macaura* had been abandoned in the United States (28-29).

[68] Wilson J concluded that by virtue of his 100% shareholding Kosmopoulos had a sufficient interest in the company's assets to support the insurance policy and was entitled to recover under it (30). Although there are passages in the judgment which might suggest that the shareholder's pecuniary interest in such cases is confined to the effect on his shares, Wilson J also envisaged that a shareholder could insure to the full extent of the value of the underlying assets and receive the balance for the benefit of the company. In the event, there was no enquiry in *Kosmopoulos* into the effect which the damage to the goods had had on the value of Kosmopoulos' shareholding. In the trial court Holland J had awarded Kosmopoulos the full amount of the damage to the goods on the basis that Kosmopoulos was in truth the owner of the goods (8). Although Holland J's approach of lifting the corporate veil was not followed in the Court of Appeal of Ontario[21] or in the Supreme Court, Holland J's award was nevertheless upheld in both appellate courts on the basis of the insurable interest in the form of Kosmopoulos' 100% shareholding (8-9 and 30).

[69] It is not necessary to accept every aspect of the reasoning in *Kosmopoulos*. However, the flexible approach adopted in that case gives me confidence, having regard also to our own cases to which I have referred, to hold that Lorcom's 100% shareholding in GFW, taken together with its right of use and its expectancy of becoming owner on the effective date, is a sufficient interest to render enforceable an insurance contract providing for payment of a loss of the market value of the vessel. I cannot say that the value of Lorcom's shareholding in GFW was reduced by an amount equal to the market value of the vessel (ie the agreed figure of R3 million). That would depend on GFW's financial position overall, of which there was no admissible evidence. GFW's net asset value may, depending on its other assets and liabilities, have been less than R3 million, it might may even have been nil or negative. But I do not think this matters. A 100% shareholding in a company gives

[21] Reported at (1983) 149 DLR (3d) 77.

the shareholder an interest in the company's assets sufficient to rationally sustain insurance cover expressed with reference to the underlying value of the assets. The enforceability of the policy should not depend on whether, by virtue of the fluctuating fortunes of the company's affairs as a whole, the loss of the insured asset will affect the shares' value in a corresponding amount.[22]

[70] Indeed, recognition of shareholding as conferring an insurable interest in the corporeal assets of a company would probably be of little utility if the insured were confined to claiming the negative effect on the value of his shares rather than the value of the property. I say so, because in the usual policy insuring physical assets the contract as a matter of interpretation only promises to pay an amount determined with reference to the value of the insured asset. The policy does not provide cover in respect of the insured party's shares but in respect of the underlying asset. If the shareholder claims a certain sum on the basis that his shares have diminished in value by that amount, the insurer would, on the wording of most standard property insurance policies (including the one between Lorcom and Zurich), be entitled to reject the claim on the basis that policy does not promise to pay an amount so computed. The fact that the amount claimed happens to be the same or less than the value of the destroyed or damaged asset would not mean that the claim is one for the loss or diminution in value of the insured asset. And it is quite conceivable that the negative effect on shareholding may exceed the value of the destroyed or damaged asset, because shares are not invariably valued on the company's net asset value but may be valued on the company's profitability. The market value of a stand-alone asset belonging to a company may be less than the negative effect which the destruction of that asset would, in the context of the company's business as a whole, have on the value of the shares. Shareholding, as a basis for an insurable interest in the company's assets, thus differs essentially

[22] I have said that there was no admissible evidence concerning the value of Lorcom's shares in GFW. There is included in the trial bundle a copy of GFW's audited financial statements for the year ended 31 March 2008, with comparative figures for 31 March 2007. Based on the depreciated cost price of assets, the balance sheet reflects an excess of assets over liabilities of R566 65 in the 2007 year and R568 996 in the 2008 year. It appears that the vessel (if it is included in the balance sheet at all) must have had a substantially higher market value than the depreciated cost figure reflected for fixed assets in the balance sheet. If one were to substitute the depreciated figure with the insured value of R3 million, it would appear that on an NAV valuation of Lorcom's shares in GFW the loss of the vessel would have caused the value of the shares to reduce by the value of the vessel. However, the financial statements were not referred to in evidence and there was no agreement that documents in the bundle were proof of the truth of their contents.

from the insurable interest held by a purchaser at risk, a mortgagee or lessee who carries the risk of the property's destruction. In the latter class of case the loss or diminution in the value of the insured asset is, by virtue of the nature of the interest, the measure of the insured party's loss. It follows that if, as I consider, shareholding is to be recognised as a sufficient interest to sustain standard property insurance in respect of the company's assets, the shareholder must be entitled to claim what the contract promises upon the destruction of or damage to the asset, namely the loss or diminution in the value of the insured asset.

[71] The view I have expressed above appears to accord with that of JR Midgley in his article *Spouses and Shareholders – Insurably Interested* (1985) 102 *SALJ* 466. The learned author supports the more flexible approach of the American and Canadian courts to the right of a shareholder to take out cover on the company's assets. He submits (482-483) that the nature of the property is a relevant consideration. He argues that '[i]nsuring a major asset upon which the economic livelihood of the company depends amounts surely to the safeguarding of an interest and not a wager'. He would treat 'minor assets' like furniture and stationery on a different footing, contending that the value of shares will usually be unaffected by their destruction so that such insurance would amount to a wager. For present purposes it is unnecessary to comment on the validity of this distinction since there is no doubting that GFW's vessel was a 'major asset'. What is of particular interest is what the author says on 'how the shareholder's interest is to be calculated', ie what he can recover from the insurer upon destruction of the asset (483). He alludes to the difficulty in valuing shares and the various methods by which such value can be measured, including the shareholder's proportionate share in the excess of assets over liabilities. He makes the point that a shareholder has an interest in the preservation of a company's assets even where its liabilities exceed its assets. He continues (484):

'In my view the value of the shareholder's interest in the preservation of a particular asset of the company is not dependent upon the size or nature of the company's debts, for, irrespective of the debts, the interest remains. Creditors' interests in the insured assets are therefore immaterial. The shareholder's interest in the event is proportionate to his interest in the company. The extent of his recovery is accordingly determined by dividing the value

of the asset at the time of its destruction by his proportionate shareholding in the capital of the company. The advantage of adopting this formula is its simplicity.'

I do not need to comment on the case where the shareholder does not hold 100%. But the learned author's view means that where the shareholder, as here, has a 100% shareholding, he is entitled to recover the amount stipulated in the policy with reference to the asset's value. As I have already said, this appears to be what happened in *Kosmopoulos* and *The Moonacre*. It also seems to have been the approach in a number of American cases.[23]

[72] This result seems not very different in principle from the insurable interest which, in the case of extension clauses, the owner is regarded as having in the contingent liability of persons driving the vehicle with his consent. He may or may not in the particular circumstances of the case be financially prejudiced by the incurring of liability by the driver but this does not affect his right to recover the driver's full liability from the insurer. Just as the expectation in such cases may be that the insured owner will use the proceeds of the policy to settle the driver's liability (though he cannot be compelled by the driver to do so in the absence of a separate contract to that effect), so the shareholder may be expected to use the proceeds in a case such as the present one to recapitalise the company in an amount equal to the value lost by the company. The insurance certainly puts the shareholder in a position to do so.

[73] It is perhaps useful to remind oneself that a broadening of the concept of insurable interest, and a recognition of the right of a 100% shareholder to enforce a

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[23] In *Providence Washington Insurance Company v Stanley* (1969) 403 F.2d 844 the United States Court of Appeals 5th Circuit said that '[t]he overwhelming majority of jurisdictions, including Alabama, recognize that a stockholder in a corporation has a legal insurable interest in the corporation's property in proportion to the amount of his stockholding'. The amount recovered from the insurer in that case appears to have been the amount of damage to the underlying property. In the early case of *Seaman v Enterprise Fire & Marine Insurance Co* (1883) 18 Fed Rep 250 the insured was a 3/16th shareholder in a company which owned a boat. In a jury trial Brewer J found that the insured was entitled to insure his proportionate interest in the boat and charged the jury to award the insured 3/16th of the value of the boat if they found for him on other disputed factual questions. (In in a later decision on an application for a retrial the same judge did allow the possibility that in particular circumstances – though not those of the case before him – the market value of the company's asset might not be a proper measure of the recoverable amount.) In *American Indemnity Co v Southern Missionary College (*1953) 195 Tenn 513, which concerned a theft policy, the majority (Neil CJ with three other judges concurring) awarded the insured (the sole shareholder) the amount of cash stolen from the company. Tomlinson J dissented, holding that the insured had not suffered a 'direct loss' as contemplated in the policy, its loss being the loss of the net profit, if any, which might have been earned had the company's money not been stolen.

policy providing cover measured with reference to the market value of an asset of the company without proof that the shareholding has been diminished in value by the same amount, will not prejudice insurers. An insurer takes on the risk of paying out the diminution in market value of the insured property on the basis of an actuarially assessed premium related to the likelihood of the risk eventuating. To the extent that the nature of the insured's interest is relevant to the risk and to the premium, the insurer can call for the information it regards as relevant and can disavow liability if there has been misrepresentation or non-disclosure. The fact that each of several different insurers may, for a properly calculated premium, have to pay out the full value of the property to several different people cannot be regarded as inequitable to the insurers. Each of them took on the risk for an acceptable premium. Unless misrepresentation or non-disclosure is available as a defence, why should they not pay? If there is a legitimate reason not to recognise such insurance claims, it is not concerned with protecting insurers but has to do with the policy considerations relating to speculation and gambling.

[74] If one asks the simple question whether Lorcom's contract with Zurich was a gambling transaction, ie a contract where Lorcom had no interest in the possible loss of the vessel other than the interest created by the insurance contract itself, the answer would in my view clearly be no. By virtue of Lorcom's 100% shareholding in GFW, its right of use of the vessel and its expectation of becoming the owner thereof pursuant to Theart's contract with Crous, Lorcom had an obvious interest in the loss of or damage to the vessel. Lorcom's best interests would have been served by the preservation of the vessel. It concluded the insurance contract in case, against its desire, the vessel was lost or damaged, and not because it wanted the vessel to sink so that it could claim under the policy. For reasons I explained earlier in this judgment, I believe that this is the simple answer which our law should recognise. However, I have in any event concluded that Lorcom's claim can be upheld even if one assumes that there is a separate requirement of insurable interest.

Conclusion and order

[75] The parties have agreed that the sum to be awarded on the total loss of the vessel, if Lorcom is otherwise entitled to succeed, is R2,85 million. As to *mora* interest, Zürich repudiated the claim on 16 April 2008 which I think can fairly be taken as the date from which interest should run. Lorcom engaged two counsel which I believe was justified by the amount at issue, the complexity of the legal issues raised and the importance of the matter to Lorcom.

[76] I thus make the following order:

(a) The defendant is directed to pay the plaintiff the sum of R2,85 million together with interest thereon at the prescribed rate of 15,5% from 16 April 2008 to date of payment.

(b) The defendant is further directed to pay the plaintiff's costs, including the costs of two counsel.

ROGERS J

APPEARANCES

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