Abstract

Insurance is intended to compensate (indemnify) the insured in the event of loss, but not to be enriched by or used as a commercial venture. To avoid such misuse by the insured and to protect the indemnity principle, English insurance law codified indemnity principle and its constituents (e.g., subrogation, double and under insurance) in the English Marine Insurance Act 1906 (MIA 1906). Thus, the insured should not recover surplus nor any additional gains exceeding indemnity. For these reasons, insurance law also adopted the ‘unjust enrichment’ principle from equity and the ‘injurious behaviour’ rule from contract law, to further protect the indemnity principle. However, despite that protection, including the granting of limitations, modifications and exceptions to indemnity and subrogation, recovery of a surplus or excess indemnity (hereinafter ‘windfall’) by a fully compensated insured is persistent in common law courts. This raises related issues. Firstly, judicial failure to define windfall and its resort to use of alternative insurance concepts such as ‘profit’, ‘excess’ and ‘surplus’. Secondly, continued judicial permission of windfall retention by the insured unjustly enriches the insured, thereby contravening and undermining indemnity, the very essence of indemnity in insurance. This has not only created inconsistency of approach to judicial apportionment of windfall but also a contradiction with protection of indemnity. Although this contradiction is common to most insurance categories, it is paramount in marine and export credit guarantee insurance policies-hence the choice of title to this article. This English insurance law and practice was spread to Anglo-American and other common law jurisdictions.

This article re-examines this inconsistency and contradiction. It argues that: (a) failing to define windfall and instead using substitute terms for it is inappropriate and confusing; (b) permitting the insured’s retention of windfall contravenes the indemnity principle and subrogation doctrine, thereby undermining the very bedrock of insurance; and (c) the practice also erodes the continued justifications for the indemnity principle and subrogation doctrine respectively. In the process of its analysis, this article:
(a) traces the relation between windfall, subrogation and indemnity; (b) defines and distinguishes windfall from other terms; (c) contextualises the continued illogicality of the insured's entitlement thereto; and (d) analyses the interface between the various insurance doctrines, principles and rules intended to solve the persistent problem of windfall retention by a fully indemnified insured. Although windfall is common to all insurance categories, this article focuses on marine and export credit guarantee insurance case law, as they best demonstrate the nature and extent of the problem. While most of the decisions cited are from English law, reference is made to cases and examples from other leading common law jurisdictions. Against this background, this article questions the rationale for the continued justification of subrogation, and its apparent application to combat the persistent contradiction in windfall cases.

Keywords: Marine insurance, indemnity, subrogation, double (over) insurance, underinsurance, excess, surplus, profit, windfall, export credit guarantee insurance, marine cargo insurance, English common law, Anglo-American law and Common law jurisdictions.

1. INTRODUCTION

Common law1 has grappled with competing claims in subrogation between the insured and insurer for entitlement to payments from third parties regardless of whether or not it exceeds the insured's indemnity. There are ways of resolving such situations. The first allows a partially indemnified insured to recover partly from the insurer and then directly from the wrongdoer to make up his full loss. The second enables the insured to recover fully from the insurer but denying the insurer the right to proceed against the wrongdoer or third party. The third allows the insured to recover from the insurer but also allows the insurer to recover subrogation from the wrongdoer or third party in the insured's name (Hasson, 1985, 417). The first option is where, for reasons beyond the scope of this article, the insured is not fully indemnified by the insurer. In this instance, windfall does not arise until the insured has claimed from the wrongdoer or third party a sum exceeding indemnity. The second is where a fully indemnified insured also receives gifts or presents from third parties. However, this too does not constitute windfall and therefore outside the scope of this article. The third option, the subject matter of this article, is where the insured who has recovered fully from the insurer recovers more from the wrongdoer or third party due to, for example, currency devaluation between loss and recovery from wrongdoers or other third party in export sales policies.2

This article deals with the apportioning of 'surplus' or 'excess' – an additional recovery by an insured from the wrongdoer or other third party exceeding the insurer's full compensation – between the insurer and insured. In the course of doing so, this article addresses two associated concerns. Firstly, under strict indemnity principle, an insured is not permitted to retain such excess gains; the insured should not profit from insurance. However, courts in English and other common law jurisdictions have intermittently sanctioned such retention without any rationale, thereby undermining indemnity; a cardinal principle which underpins insurance. Secondly, the favoured terms by the judiciary and jurists for windfall are 'profit', 'surplus' and 'excess'. However, despite the widespread use of these terms, both the English language and English common law do not contain either their description or definition. These terms also have different meanings within the English language, English law and the wider common law. That notwithstanding, the contexts in which they use the above three terms is inappropriate and confuses it with both the plain English language definition as well as the insurance law definitions of the terms. For those and other reasons, this article prefers the use of 'windfall' rather than any of the three terms as being the most appropriate term. Accordingly, 'windfall',3 as used throughout this article, describes

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1 Common law, as used in the article, is the legal system originating from English law (Laws of England and Wales) as introduced into the former-British colonies. Common Law Jurisdictions are therefore the English jurisdiction and those countries that adopted its legal system. Although it should be logical inclusion, reference to Anglo-America actually excludes Canadian jurisdiction. The emphasis on Anglo-American jurisdiction is due to the dominance of the two (English and USA) in the common law jurisdictions. In addition to English law decisions, the article uses cases and examples from the leading common law jurisdictions of Australia, Canada, Ireland, New Zealand, Singapore, South Africa and the USA. Some common law countries also practise a mixture of common law and civil law and common law and religious law; for a list of these countries see: Ademuni-Odeke, 2007, 1-37; for minor divergence in especially marine insurance practice in common law jurisdictions, see, Clark, M., Marine insurance system in common law countries, status and problems, https://www.bmla.org.uk/annual_report/rep_marine_clark.htm

2 Also, erroneously referred to as 'surplus', 'profit' or 'excess'.

3 For effect of gifts on subrogation see the South African case of Stearns v Village Main Reef Gold Mining Co. (1905) 10 Com Cas 89; cf the earlier American case of Burnand v Rodocanachi (1882) 7 App Cas 333, where the House of Lords allowed the fully
a scenario where a fully indemnified insured receives payment from a wrongdoer or third party, excluding gifts or presents, exceeding the full indemnity.

In support of indemnity, subrogation was devised\(^4\) to provide against possibilities of windfall recoveries in order to avoid unjust enrichment and other indemnified insured to retain the gift from the US Government for losses incurred in the Civil War.

\(^4\) The creators of subrogation and emergence of windfall had no idea what their later problems would be. Although its exact advent into English law is unknown, windfall results from a function of subrogation [DL]. Buckley thinks that even 'subrogation' itself only entered the vocabulary of English courts in a Privy Council appeal from Canada on a point of French insurance law, but that the principle had been applied in an unnamed form for some time previously (Buckley, 2000, 22 and Quebec Fire Insurance Co v Augustine St Louis and John Molson (1815) 7 Moo P.C. 286). This may well be true. The right of the insurer to pursue an action of the insured to diminish its liability was stated as long ago as 1782 by Lord Mansfield in Mason v Sainsbury (1782) 3 Doug K.B.61, who said “Every day the insurer is put in the shoes of the insured”. Nevertheless, the first recorded time subrogation is mentioned under English law is by Holdsworth in 1639 (Holdsworth, 1966, 204). This mention relates to "levitians", and in a company law decision intended to pierce the corporate veil in 1671 in Solomon v The Hambrough Co (1671) Ch. Cas. 206 and 207. Holdsworth notes that "by sort of subrogation, the creditors could use the powers of the company against the individuals comprising it, and force those individuals to pay" (Holdsworth, 1966, 204). For an exhaustive modern history of the doctrine see Marasinghe (Marasinghe, 1975, 45).

Subrogation found its way into common law jurisdictions via received English law. It remains unclear as to why it entered into Canada via French law. Subrogation may have been adopted by French law and then subsequently transferred to Canada by Quebec French settlers. There is no evidence, however, of subrogation having entered the general body of American law from nearby Louisiana. The natural migration would have been its transfer via the Lombard merchants to the City of London and then to the English colonies, as was the case with most other insurance and commercial law principles. It is neither unique to, nor restricted to, insurance as is generally assumed. Subrogation has also become a general principle of contracts and commercial law, which refers to a situation where one party is allowed 'to step into the shoes of another' and enforce claims originally vested in that other. For instance, in contracts where a lender of a void loan to an infant or minor which is used to pay off debts for necessities binding on the infant may be subrogated to the rights of the supplier of necessaries against the infant. In American jurisdiction, Black notes that “subrogation appears commonly in construction contracts, insurance contracts, surety ship, and negotiable instrument law” (Black, 1990, 1427) and includes guarantees and bonding company contracts. However, it is most commonly used in insurance law to aid the fundamental rule of indemnity, ensuring that the insured does not defraud or make a business or profit out of insurance; the unjust enrichment function. The corollary is indemnity, which exists to limit the insured's entitlement to the amount of his/her actual loss. To put the doctrine of subrogation into context in insurance, a brief account of the rules relating to indemnity from which the inappropriate advantages by a fully indemnified insured. The doctrine allows the insurer to 'step into the insured's shoes'\(^5\) to recoup ensuing contractual, tort, and other rights and remedies which an insured may have against a third party, so as to discharge or diminish the loss for which he has been indemnified (O'Regan-Cazabon, 1999, 20).\(^6\) To aid their efficacy, limitations, exceptions, modifications and other mechanisms were introduced to indemnity and subrogation. However, these mechanisms (exceptions, modifications and limitations) do not seem to apply to windfall, especially in the marine, export credit guarantee and other insurance policies covered within this article.

The three theses of this article are that: first, the term 'windfall' in insurance has been used inappropriately in publications, commentaries and judicial decisions; second, common law courts have been inconsistent in the way they permit and/or deny windfall retention by either party, and; third, the inconsistency has created contradictions between the apportioning of windfall on the one hand and the protection of indemnity through the administration of subrogation.

Accordingly, the article: clarifies windfall, through description and definition, from the above three terms; inquires why windfall retention by the insured is sometimes permitted in contravention of indemnity; asserts that the use of the three alternative terms to windfall in judicial decisions and publications is misleading; argues that the importation of equitable remedies of unjust enrichment, set-offs and contract law considerations of injurious behaviour are insufficient if not inappropriate solutions to windfall problems; and questions why windfall is omitted from the list of exceptions, modifications and limitations to subrogation and indemnity. From sample decisions and juridical opinions in Anglo-American\(^7\) and other doctrine of subrogation is necessary; see also Halsbury’s Laws of England, 2011, at paras. 216-228.

\(^5\) Hence, 'subrogazione', Latin for jumping into another's shoes. See Stolt v Allianz, 2010 AMC 1711 (SDNY) where an American court dwell on the concept of the insurer jumping into the insured's shoes upon indemnifying. However, it was not clear whether they take over rights of compensation or action.

\(^6\) O’Regan-Cazabon puts forward an interesting scenario in which subrogation can kick in: Suppose X owns a house subsequently burnt to the ground by Y. X, under a policy, recovers from an insurer the loss in respect of the arson to the house. The insurer in this instance can step into the shoes of the insured and sue Y in the insured's name, to recover the sum paid to X. This right of the insurer arises from the doctrine of subrogation, but it also derives from X’s actual right to sue Y for malicious damage to the insured property.

\(^7\) Anglo-American refers to Anglo-US, thus excluding Canada which is considered separately. Note that the US does
selected common law jurisdictions (Bybee, 1979), this article examines the paradox of windfall apportionment in the context of subrogation and indemnity. It questions the apparent contradiction between insured’s windfall retention and the continued justification of subrogation and indemnity, particularly in marine insurance and export credit insurance policies. Although Anglo-Irish (for Irish law, see: O'Regan-Cazabon, 1999, 20) and Anglo-American (Bybee, 1979) authorities are chosen for their clarity as representative practices in these jurisdictions, reference is made to selected decisions from other common law jurisdictions. Coverage in this article is limited to the relationship between windfall, indemnity and subrogation rather than the wider contexts of indemnity and subrogation or the detailed aspects of the wider common law. Finally, despite the emphasis on marine and export credit insurance contracts, examples are also drawn from non-marine and other insurance branches.

Among the article’s conclusions are that: first, under common law first, the term ‘windfall’ needs to be redefined and distinguished from other insurance terms such as ‘profit’, ‘excess’ and ‘surplus’ with which it is currently confused; secondly, judges should provide reasons and rationale for their windfall decisions and thereby account for the inconsistent approaches in such judgments; third, courts should acknowledge that their decisions on windfall are sometimes based on equitable or policy considerations rather than purely legal grounds; fourth, co-insurance principles and windfall sharing should be considered as possible solutions to windfall apportionment problem; and finally, failing that, legislative reforms may be necessary to eliminate the unsatisfactory contradictions and ambiguities in windfall practices are depicted in this article.

This article is divided into two parts. Part I lays down the doctrinal and definitional background, outlines windfall problems in insurance generally and examines windfall decisions in marine and export credit insurance. Part I contains three sections: Section 1 (Introduction); Section 2 (Description and definition of windfall); and Section 3 (Windfall decisions in marine and export credit insurance).

Part II focuses on doctrinal windfall issues and the relation between windfall on the one part and indemnity and subrogation on the other. Part II examines further judicial decisions on windfall, offers some recommendations for reform and includes the Overall Conclusion. It contains five further sections that concerns practical issues: Section 4 (Relationship between windfall, indemnity and subrogation); Section 5 (Re-evaluation and suggested solutions); Section 6 (Concluding remarks); Summary and References.

2. DESCRIPTION AND DEFINITION OF WINDFALL

2.1. Introduction

It is necessary to develop thoughts in this Section 2 of the article first with a description and definition of ‘windfall’ in the context of indemnity and subrogation, provide contrasts with profit, excess and surplus in order to reflect on the overall nature of the problem. Second, the section will demonstrate judicial practice regarding apportionment of windfall especially in marine and export credit insurance.

2.2. Definition of Windfall

Common law courts⁸ and jurists (Bybee, 1979; Horn, 1964, 13-14; Procaccia, 1973, 573; King, 1951; Kimball, Davis, 1962, 841; Derham, 1986; Birds, 1979, 124; Hasson, 1985; Mitchell, 1996, 343; Mitchell, 1994; Mitchell, Watterson, 2007; Sheldon, 2000; Walmsley, 2007; Marasinghe, 1975, 43) have interchangeably used ‘surplus’, ‘excess’ and ‘profit’ as general alternative terms to windfall. Even then, only Birds has half a page on surplus (Birds, 2010, 338-339). It is argued that the use of these substitutes can sometimes be inaccurate, if not confusing, for the reader and insurance non-professionals, as those terms also convey different meanings in insurance and other disciplines. To avoid such inaccuracies and confusions, this article considers the term ‘windfall’ to be the most appropriate and accurate definition of excessive recovery from wrongdoers and other third parties by a fully indemnified insured. It is also the only one of the three terms (profit, excess and surplus) without multiple meanings and which, therefore, avoids any misconceptions.

Windfall as used in this article is the financial gain, from the wrongdoer or other third party, by

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⁸ Authorities from Australian, Canadian, New Zealand, Hong Kong, Singaporean and South African jurisdictions are also used.

⁹ Judges in almost all cited authorities use ‘profit’, ‘excess’ and ‘surplus’; few, if any, use ‘windfall’.
a fully indemnified insured that exceeds his full compensation. To qualify as a windfall the gain must be additional to, and only after, the insured’s receipt of full compensation from the insurer. It must arise from a particular policy and relate only to the subject matter of that policy. Its rise should be independent of the insured’s actions or intentions on the policy, i.e. unintended consequence of and from factors external to and beyond the insured’s powers. The best example of circumstances, independent of and beyond the insured’s powers, giving rise to windfall is in the UK state funded policies issued through the Export Credit Guarantee Department (ECGD). This may occur for instance from a subsequent change in the exchange rate between the time when the insured is compensated by the ECGD for a foreign buyer’s default and when the foreign buyer remits the sales proceeds. The insured risks in this case being delays or failures in remittance of sales proceeds for instance following imposition of exchange controls by the buyer’s country.

Due to lack of appropriate definition, windfall has also been equated to profit and described as ‘excess’ and ‘surplus’. It is definitely not a profit and although a type of or resembles ‘excess’ and ‘surplus’, it is technically none of those two either in the plain English language or common law or insurance contexts. Unlike those three (profit, excess and surplus), windfall conveys only one interpretation whereas the others contain multiple other meanings. The following sub-paragraphs of this section will highlight differences, further reasons and justifications for the preference of, ‘windfall’ to, ‘profit’, ‘excess’ and, ‘surplus’, in that order.

2.3. Distinguishing Windfall from Profit

Firstly, the use of ‘profit’ is inappropriate as it implies that the insured is primarily trading in insurance business rather than using it only as a service for protecting his principle occupation. Second, profit in its natural meaning refers to the situation where a merchant makes a gain from his normal business. In this case, it would be correct to refer to profit in relation to the insurer rather than the insured. For example, in ECGD insurance policies, unlike profit, windfall results from factors beyond the insured’s control and intention. Allowing insureds to speculate in insurance would involve wagering and gambling, in contravention of the MIA 1906 and the Insurance (Gambling Policies) Act 1909. Rather, the insured takes out insurance to cover himself against risks of loss in his business, not to trade in insurance. That notwithstanding, neither English common law generally nor English insurance law in particular adequately define profit. A more precise meaning is US law, which correctly defines profit as “the excess of revenue over expenditures in a business transaction” (Black, 2001, 560). No common law jurisdiction has insurance law definition of profit. Thus, even the above US legal definition has no bearing upon, and instead mystifies it. This seems to support Bennett’s more suitable definition of profit in the insurance contexts of profit (Bennett, 1992, 267), which bears no relation to windfall. For those reasons, the use of the term ‘profit’ in this context does not convey windfall and can confuse the reader, as in insurance law it carries different meanings. Such misuse has probably partly contributed to creating the current problems.

2.4. Comparison of Windfall with ‘Excess’

Secondly, ‘excess’ is another term unfittingly used instead of windfall. Although excess is, logically, a type of windfall when the insured receives more than their indemnity, that, however, is the only resemblance between windfall and excess. In the plain English language, excess means “that which surpasses or goes beyond what is due,应有的.” It is definitely not a profit and although a type of or resembles ‘excess’ and ‘surplus’, it is technically none of those two either in the plain English language or common law or insurance contexts. Unlike those three (profit, excess and surplus), windfall conveys only one interpretation whereas the others contain multiple other meanings. The following sub-paragraphs of this section will highlight differences, further reasons and justifications for the preference of, ‘windfall’ to, ‘profit’, ‘excess’ and, ‘surplus’, in that order.

11 E.g., section 4(1), which nullifies and voids such policies; similar provisions are found in s.1 of the Life Assurance Act 1774.

12 Section 1(1) which criminalises the practice. The legislation has been enacted, albeit with modifications, in most common law jurisdictions.

13 (a) ‘profit insurance’, referring to a policy taken out to cover loss of profits, also known as business interruption insurance; and

(b) ‘profit commission’, referring to a commission based on a predefined formula, the principal examples of which are:

(i) the commission received by an underwriting agent (not the insured) from the name at Lloyds as a reward for the profit made by them through the agent’s activities on their behalf;

(ii) the commission received by a ceding office from a reinsurer as a reward for the ceding of profitable business.

Thus, although a gain on the insured’s part, windfall is technically not a profit.
beyond expectations” i.e., “going beyond what is usual or proper”, or “that which exceeds [expectations]”; or “the degree or amount by which one thing exceeds another” - all of which have some element of windfall (Macdonal, 1979, 454; William, L., et al, 1985a, 696; William, L., et al., 1985b, 2552). The Uniform Customs and Practice for documentary Credits describes excess simply a franchise or deductible clause. The author's limited research has not revealed any legal definition of excess under common law. Yet, without any guidance, as in ‘profit’ above, ‘excess’ could be wrongly mistaken for other more proper technical insurance law uses of the term. For instance, when the term ‘excess’ is contained in an excess clause, Lord Slesser in Beacon Insurance Co Ltd v Langdale equated it to a function of memorandum in a marine policy as in the US case of Marsh Ins. Instead, he construed ‘excess’ not according to an ‘excess clause’ but as a ‘franchise clause’, yielding outcomes very different from windfall. On the contrary, Bennett’s definition demonstrates that in insurance, ‘excess’ has multiple meanings none of bears any relation to excess as a substitution for windfall (Bennett, 1992, 121-122). Other excess-related insurance practices or terms include ‘excess point’, where the insurer fixes a point up to which level he will retain losses for his own account in ‘excess of loss reinsurance’, and an ‘excessive (exaggerated) claim’ made by the insured for an amount which exceeds the loss he has incurred and his entitlement to recovery from the insured. Consequently, although of the three (profits, excess and surplus) substitute terms ‘excess’ has the closest technical meaning to windfall, none of its related uses above resemble or convey the meaning of windfall (surplus).

2.5. Differences Between ‘Windfall’ and ‘Surplus’

Thirdly, ‘windfall’ has also been improperly denoted to ‘surplus’. Like ‘excess’ and ‘profit’ above, ‘surplus’ might also at first appear to resemble windfall. Nevertheless, this application is also imprecise. For instance, in ordinary English ‘surplus’ refers to “anything above expected or due sum, that is which is left over, remainder, excess over what is required or taken or used” (William, L. et al., 1985b, 2552). On the other hand, in economics, accounting and taxation, surplus means “excess of revenue over expenditure” (Macdonal, 1979, 1359) - a type of profit. Thus, at best, ‘surplus’ is primarily an accounting expression describing the excess of income over expenditure of mutual companies. However, reasonable investigation has not revealed any common law definitions of ‘surplus’, the nearest being ‘surplusage’ referring to “irrelevant, unnecessary excessive material in formal pleadings”. (Macdonal, 1979, 1359) - a meaning far removed from surplus, let alone windfall, in insurance law.

2.5.1. Surplus-related definitions

Fourth, and finally, the use of surplus for windfall could be further mistaken for the correct insurance -

(g) ‘excess of loss cover or insurance’ - insurance prevalent in aircraft insurance, to cover risks beyond which the insurer reinsures with a reinsurer;
(h) ‘excess of loss ratio reinsurance’ - also known as ‘stop loss reinsurance’, like the ‘excess of loss treaty’, it is non-proportional and is based on claims results; and
(i) ‘excess of loss reinsurance’ - a reinsurance pertaining to excess of loss cover above.

Thus, although they have no bearing on the meaning of windfall, if misused in a context any of the above could be mistaken for it.

15 Bennett  meanings namely:
(a) ‘excess or deductible’ - specific sum which the insured must bear before the insurers pay their liability;
(b) ‘excess floating policy’ - a collective guarantee insurance to provide additional cover on a floating basis to supplement the specified sums insured in respect of the individual employees;
(c) excess insurance - an insurance in respect of the difference between the amount acceptable to the insurers and the amount required to be covered;
(d) ‘excess liability or excess value or increased value insurance’ - which occurs where a vessel is undervalued;
(e) ‘excess of average loss insurance or reinsurance’ - a form of excess of loss insurance (see below);
(f) ‘excess of line insurance or reinsurance’ - a situation where an insurer has more risks than he can handle;
uses of ‘surplus’ (Bennett, 1992, 317–318) - related expressions and terms. Accordingly, windfall in subrogation has no bearing either on any of the above uses, or on related uses such as ‘surplus treaty insurance’ and ‘surplus treaty reinsurance’ - both referring to proportional reinsurance working on the basis of lines rather than surplus in subrogation.

2.6. Preference of Use of Windfall

The logical conclusion from the foregoing analysis, therefore, leaves ‘windfall’ as the precise description and preferred definition of the insured’s gain for the purposes of this article. Once more, to the best of the author’s knowledge, English common law does not define ‘windfall’ either, the nearest again being the US law definition: “An unanticipated benefit, usually in the form of a profit and not caused by the recipient” (Black, 2002, 1427). The phrase “not caused by the recipient” in this sentence is probably the most accurate explanation of the term (windfall) yet and also the closest in meaning of ‘windfall’ as used in this article. Thus, other than US jurisdiction, insurance laws of the remaining common law jurisdictions do not define ‘windfall’ either in their case laws or statutes. This is because the term is not a creature of legislative or case law. It was instead coined by the courts and jurists to deal with situations unforeseen in the MIA 1906 and later ignored by the legislature. This dilemma of a lacunae left by legislature and only filled by judicially made law extends to windfall in general insurance contract law. Therein lies the problem of the absence of proper definition and subsequent inconsistency and contradiction in judicial approach to windfall. That notwithstanding, what links windfall to indemnity? Section 3 (below) seeks to establish this link.

3. WINDFALL DECISIONS WITH SPECIFIC REFERENCES TO MARINE AND ECGD POLICIES

3.1. Introduction

In some ECGD cases, a windfall may remain after the insurer has recouped for himself the amount they have paid out under the policy. On the contrary there may be cases where the insured is left short after insurer’s exercise of subrogation. This arises in situations where the insured’s rights against a third party prove to be greater in value than the loss that has suffered. In which instances other insurance principles such as under and double insurance come into play, thereby further complicating determination of windfall. That is beyond the remit. That notwithstanding, three issues need pointing out here. First, although marine policies tend to be valued policies, in which windfall is inbuilt, this does not mean that windfall is a subrogation; (ceding office) for its net account, which varies according to the quality of the risk (e.g. fire account might have a minimum line of £120,000. It might retain the minimum for a plastic works and the maximum for an office block). None of these two insurance surpluses bear any resemblance to windfall.

3.2. Origin of Windfall in Modern Marine Insurance Policies in Common Law Jurisdictions

Windfall decisions in ECGD policies have taken their cue from marine insurance. Starting with the leading authority of Yorkshire Insurance Co v Nisbet

29 (a) ‘surplus treaty insurance’ - the amount ceded by way of reinsurance after the direct office has decided upon its retention; and
(b) ‘surplus in life insurance’ - the difference between assets and liabilities as revealed at the annual valuation, out of which bonuses are paid with profits to policyholders.

21 A ‘line’ in this case being the amount retained by an insurer (ceding office) for its net account, which varies according to the quality of the risk (e.g. fire account might have a minimum line of £120,000. It might retain the minimum for a plastic works and the maximum for an office block). None of these two insurance surpluses bear any resemblance to windfall.

22 However, the term’s literal and appropriate meaning of “...any unexpected money or other advantages or a casual or unexpected acquisition or advantage” bears no relation to windfall in subrogation. Neither is there any English common law definitions of windfall, the nearest being windfalls used in the decision below referring to trees and their fruit being blown down by the wind. Pursuant to Re Harrisons Trusts, such ‘windfalls’ “belong, in general, to the owner of the inheritance although the dotards may be taken by the tenant”. Thus, in plural (windfalls), as in this case, the term conveys a totally different meaning from windfall in subrogation.

23 Black here makes a distinction between legal and equitable subrogation; Gerken v Davidson Grocery Co, 57 Idaho 670, 69 P.2d 122, 126; Olin Corp. (Plastics Division) v Workmen’s Compensation Appeal Bd., 14 Pa Cmwlth. 603, 324 A.2d 813, 816; Jenks Hatchery, Inc. Elliot, 252 Or. 25,448 P.2d 370, 373.

24 Re Miller Gibb & Co Ltd [1957] 2 All ER 266, [1957] 1 WLR 703 (discussed below).

Windfall in marine and export credit insurance policies in Anglo-American and other common law jurisdictions...

Shipping Co, marine insurance case law has held that insurer's rights are only extended to the amount paid out by the insurer and this acts as a limitation on their subrogation rights. This case centred on a marine insurance contract in which a ship insured for £72,000 was damaged by a Canadian cruiser towards the end of WWII in 1945. The result was an actual total loss with no salvage value. The insurers indemnified the ship owners and gave them permission to bring an action against the Canadian government who was held responsible for the loss. The insured were awarded a sum in Canadian dollars equal to the agreed value of the ship. However, by the time the Canadian dollars were exchanged into pound sterling in 1949 this sum had nearly doubled to £126,971, 11s 1d (including interest), as the pound sterling had correspondingly devalued.

The insurer claimed the whole sum (indemnity plus the windfall) from the insured as subrogation. The insured did not dispute the insurer’s entitlement to the amount (£72,000) they had paid out under the policy as subrogation, but they disputed their entitlement to the difference - the windfall of £55,000. Diplock J, in construing s.79(1) of MIA 1906 and despite following Brett L. J's ruling upholding the principle of subrogation in Castellain v Preston, nevertheless concluded that in this case the insurers were only entitled to the actual amount paid out on the policy on the basis that, the insurers could not recover under the doctrine of subrogation anything more than they had paid. Justice Diplock separated the cause of windfall (currency devaluation) from subrogation and the contract between the parties, thereby reinforcing this article's argument: the windfall's independence and separation from either party's action. Probably as an obiter dictum, Justice Diplock added that "There is no case in the book in which the insurer has made a profit on insurance". So if the insurer cannot make a profit despite being out of pocket, why should the insured who is already fully compensated?

This review of marine insurance case law has held an insurer profit despite being out of pocket, why should the insured who is already fully compensated? Is windfall based on general legal principles, contractual law or insurance law? The insurer would have retained the windfall if he had claimed directly from the wrongdoer, which was his right. The decision was made easier by the occurrence of actual total loss of the subject matter in this case. This decision has been both welcomed and criticised in equal measure. Perhaps the court could have decided otherwise. There is sympathy with Birds’ views that although unstable, this decision was rather unfair to the insurers. They fully compensated the insured who were 13 years out of pocket (Birds, 2007, 314). Strict adherence to indemnity disentitles the insured and this ruling that the insured should not make a profit not only leaves entitlement in a limbo, but is also inconsistent with subrogation indemnity and the original aim of insurance. They would have been better off suing the Canadian government (Birds, 2007, 314), thereby retaining the indemnity, windfall and interest. The case was also the first marked modern departure from pro-insurer cases and was celebrated in the American and other common law jurisdictions below.

Although not cited in Yorkshire Insurance, almost identical circumstances (loss from collision) occurred in a preceding US case. In the case, Burnand v Rodocanachi, an undervalued cargo (i.e., cargo worth more than the valuation) under a valued policy was destroyed by a Confederate cruiser during the American Civil War. The cargo owner received full compensation from the US government under an Act which expressly refused to recognise claims made by or on behalf of the insurers. Despite paying full indemnity for a total loss, the insurer's claim to the compensation or windfall was denied by the court. However, unlike Yorkshire Insurance, it appears that in this case exclusion of subrogation by a legislation and under-insurance, but not the windfall, was the distinguishing somewhat unfair. He argues that the insured had the benefit of prompt payment in 1945 while the insurer was out of pocket for 13 years. Birds concludes that if the insurers had actually exercised their right to sue the Canadian government in the insured's name they would be better off, because they could have claimed interest on the money for their own benefit. For a commentary on the case, see Hodgin, 1975, 114.

This decision overruled North of England Insurance Assn Co v Armstrong (1870) LR 5; QB 244 that if the insurer who indemnifies the insured might recover from a third party more than he had paid; see also Thames and Mersey Ins. Co v British and Chilean SS Co [1916] 1KB 30CA.

See also Cousins v DeC Carriers (1971) 2QB 230, where the insurers in suing also received interest in the process.

See Livingstone and St. John’s cases below.

(1882) 7App. Cas. 333.
factor. It is also unclear whether the decision was made under subrogation and indemnity or the legislation. That uncertainty in this case, necessitated explanation, restating indemnity, in the subsequent Castellain v Preston[34] and Sterns v Village Main Reef Co.[35] decisions. Another US case, Livingstone,[36] probably following the Yorkshire Insurance precedent, decided that subrogation can never entitle the insurer to recover more that he has paid the insured. This decision was supported by yet another US authority, that of St. John,[37] which claimed that: “The insurer’s right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the insured”. These decisions for indemnity (e.g., Castellain v Preston and Sterns v Village Main Reef) and those ignoring indemnity (Yorkshire Insurance v Nisbet Shipping, etc) perpetuate the inconsistencies and contradictions in judicial approach to windfall.

3.3. Inconsistencies and Contradictions in Windfall

Therefore, as a corollary to the rationale that subrogation exists to prevent the insured becoming unjustly enriched at the expense of the insurer, so too subrogation can also be limited to ensure the opposite: that the insurer does not become unjustly enriched (albeit not at the expense of the insured). This limitation on the insured’s subrogation rights is, however, open to much criticism. It not only justifies the assertions, by this article, of judicial inconsistencies but also contradiction between the protection of indemnity and balancing both parties’ interests. These inconsistencies and contradictions in judicial application of windfall are discussed further in details under ECGD cases law below. Regardless of whether subrogation has its roots in implied or express clauses in common law, it appears from ECGD decisions (below), following Yorkshire Insurance, that the doctrine can be modified by an express clause in any given contract, although those mechanisms were not employed in the case.

That notwithstanding, an insurer’s subrogation rights can be legal (applying automatically to the contract), expressly contractual, arising out of tort and equitable. Contractual subrogation refers to the effect of express clauses on an insurer’s subrogation rights. It appears, furthermore, that where a policy does refer to express subrogation, the correct approach is to construe the relevant provisions for a determination of the relevant parties’ rights, then refer only to general subrogation principles if the clauses are unambiguous.[38] This modification of the express doctrine by clauses in a policy does not affect the insured’s retention of, or participation in, any resulting windfall. This was the approach taken in the first ECGD case of Lucas v ECGD,[39] where subrogation rights were expressly provided for. The rest of this section is devoted to the determination of windfall entitlement and apportionment in ECGD cases.

3.4. Windfall in Export Credit Insurance Policies

An exporter of goods to a foreign country is peculiarly vulnerable as regards receiving payment for his goods. From time to time new devices, such as state coverage under the ECGD, have to be created in order to facilitate and stimulate international trade[40] through issuance of government funded policies. Paramount in such policies is the protection against export-import risks of loss.[41] These policies are contracts of indemnity.[42] If payment has been made under a policy by the ECGD in respect of a loss due to restrictions on the export of currency, and the currency is ultimately released and the purchase price paid, the ECGD, by subrogation, is entitled to receive the purchase price to the extent of its payment. This is true even against the liquidator of the exporters where the exporters are in liquidation.[43] In England, Morris J put the rationale for such a practice in Lucas, so as to assist exporters in circumstances where ordinary insurances would not be available. Most medium and major trading nations

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34 Castellain v Preston (1883) 11 QB at 404 per Brown LJ.
35 Sterns v Village Main Reef Co (1904) 10 Com. Cas. 89, C.A.
38 Ibid.
40 An example in the field of banking may be found in commercial letters of credit; see Halsbury’s Laws of England, 2008, para. 923 et seq.
41 One such device takes the form of an insurance against the loss an exporter incurs when: (a) the buyer fails to pay for goods he has received; or (b) without any breach of condition or warranty on the part of the exporter, the buyer declines to accept goods; or (c) without the buyer being in default, governmental difficulties arise in connection with the transfer of currency representing the purchase price. The Export Credits Guarantee Department (ECGD) issues to exporters policies covering them up to specified percentages against non-commercial risk; see Export and Investment Guarantees Act 1991 s2; Halsbury’s Laws of England, 2010, para. 918 et seq.
42 Re Miller Gibb & Co Ltd [1957] 2 All ER 266, [1957] 1 WLR 703; see also Lucas Ltd v Export Credits Guarantee Department [1974] 2 All ER 889, [1974] 1 WLR 909, HL.
43 Ibid.
now have equivalent systems in place. Among its member states, the European Union makes provision in a Council Directive, for the harmonisation of the basic provisions in respect of export credit guarantees for short-term transactions (political risks) with public buyers or with private buyers. However, the Directive does not cover windfall.

In Lucas, just as in Re Miller Gibb, Clause 17, on subrogation rights, in the old Standard ECGD Policy provided first that the ECGD would indemnify the insured 90% of the loss caused by the delay in payment for the goods sold to Egypt (then part of the United Arab Republic [UAR] with Syria) which was not the fault of either party. This would be calculated in sterling on the exchange market at the date of export. Secondly, that “all sums recovered by the merchant in respect of the loss to which the guarantee applies shall after the date of loss be divided between the parties at a ratio of 9:1 and in the event of the merchant recovering such monies they held it on trust for the guarantor”. The risk insured against occurred and the insured indemnified 90% (£372,071 6s 10d) of the insured value (US$1,155,181) (£413,411 12s 0d). The Egyptian government removed the barriers and the buyers paid for the goods, but when the US$ were exchanged into pound sterling they amounted to £443,032 8s 1d, a windfall of £29,620. The insurers claimed 90% of the greater sum (£443,032, 8s, 1d). The Appeal Court limited the insured’s liability to 90% of the lesser (i.e., £372,071 6s 10d) rather than the greater sum on true construction of Clause 17. Thus, parties can, through express clauses in the contract, limit the application of subrogation and share the windfall.

3.5. Effect of Express Clauses in ECGD Policies

Their Lordships (Appeal Court Law Lords) closely examined the sentence in Clause 17 “…the loss to which this guarantee applies” and held that loss in this context refers to the sum of money the insured did not receive from the buyer at the time he should have received it (i.e., the lesser sum). However, Lord Morris in the House of Lords reversed the Court of Appeal’s decision. He held that, as it followed that Clause 17 ceased to apply once the sum was received in respect of the loss covered by the guarantee, any further sum received was not received in respect of the loss. The insured should retain the windfall. There are a number of criticisms of this decision. Firstly, is that undue emphasis was placed on the interpretation of the phrase “loss covered by the guarantee” rather than, and at the expense of, the wider subrogation doctrine and indemnity principle. Secondly, the court limited itself to the interpretation of s.79 (1) of MIA 1906 and Clause 17 of the contract and was not prepared to consider the effect of unusual circumstances, such as currency devaluation, giving rise to the windfall as argued by the defendant’s counsel. Secondly, the court treated the sterling value several years later as the same without reference to effect devaluation and its purchasing power. The supposed justification that ‘a pound was a pound’ was illogical if not perplexing. Probably acknowledgement of the application of policy rather than purely legal reasons for the decision would be understandable, but none were given either in this or other instances. Finally, in treating the recovery as ‘not received in respect of this contract’, the court considered independent of and separate from the contract, subrogation and indemnity.

Although not cited in Lucas, another UK decision of Brooks v MacDonnell was an earlier case combining the facts and circumstances of Yorkshire Insurance, Re Miller Gibb and Lucas, in which a vessel carrying the insured contract goods was considered to be a blockade-runner by a Brazilian cruiser and thus captured. The insurer rejected the insured’s offer of abandonment, instead compromising by paying 35% of the claim. Several years later, the Brazilian government, under a Treaty with the UK, paid full compensation resulting in a windfall. Once again, the court rejected the insurer’s claim to the windfall as subrogation and the insured retained all the windfall. The insurer probably rued their earlier decision to reject the insured’s offer of abandonment. A comparison can also be made with Yorkshire Insurance above, where the insurer would have better off claiming directly from the wrongdoer (as was their right) rather leaving it to the insurer

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44 For the list of export credit agencies offering insurance facilities within the OECD, see http://www.oecd.org/tad/xcred/eca.htm
46 The 90% being the upper limit the ECGD was permitted to cover the insured; keen to leave participation by private commercial insurers, the 10% was left for that purpose of insured’s self-insurance.
48 Re Miller Gibb [1957] 1 Lloyds Rep 258 CA.
49 Lords Reed and Viscount Dilhorne concurring. Also concurring, Lord Simon added that “There is nothing either in the public scheme out of which it arises or in the terms of the agreement itself which suggests in any way a profit sharing scheme”, at 889.
50 Brooks v MacDonnell (1835) 41 RR 336.
3.6. Effect of Set-off in ECGD Windfall

It has been suggested that an equivalent clause to Clause 17, but instead on set-off, between claims arising under a policy, and amounts due in respect of subrogation on reimbursement, might provide a fairer solution to subrogation generally and ECGD policies in particular. Although the principle is alien to subrogation, the issue nevertheless arose in ECGD v Davenport (Shoes) Ltd. The court, however, was not prepared to enter into the realm of set-off and instead ruled that the principle did not extend to windfall. So, we will never know what the outcome would have been if the courts had agreed to entertain the principle of set-off.

The problem of windfall as a possible exception to, limitation to or modification of, subrogation in the context of ECGD cases has been addressed in other common law jurisdictions. For instance, the Irish Insurance Act 1936 empowers the Irish government to provide insurance to their exporters and importers under the auspices of the Insurance Corporation of Ireland (ICI) on the terms equivalent to that of the British ECGD. Although the leading Irish decision on the subject, International Commercial Bank v ICI, is a collateral contract to guarantee a party’s contractual compliance (contract of provide security); and the second a contract to guarantee full compensation for a party’s loss (indemnify).

However, the case neither touched on the windfall nor elaborated on the issue of the extent to which the ICI was subrogated to the place of the insured.

3.7. Doctrinal and Contractual Bases of ECGD Windfall Decisions

In the UK, export credit insurance policies have been offered by the ECGD since 1919. In the earliest reported case, Re Miller Gibb, the issue arose for discussion in circumstances very similar to that in Yorkshire Insurance. By a policy dated in 1951, the ECGD agreed (through the equivalent of Clause 17 of the latter policies) to indemnify the exporters, Gibb and Co., 90% of any such loss as the company may sustain by operation of law which (in circumstances outside the control of the company or of the buyer) restricted the transfer of payments from the buyer’s country to the UK. This was in respect of goods sold and shipped from the UK to a buyer in, among other countries, Brazil. Owing to Brazilian exchange control, the buyers were unable to pay the £2,880 4s 9d for the goods. In 1953, the company claimed 90% from the ECGD. Under the terms of the claim, the company assigned to the ECGD its rights in the debt and interest in the goods forming the subject of the claim, and to pay over to the ECGD a third party with registered offices in the Channel Islands. The third party failed in their claim at both instances, and while the case centred largely on jurisdictional issues, the Irish courts confirmed that such a contract fell under indemnity principles; see also Re Casey (a Bankrupt) (Unreported HC Ireland, March 1, 1992), another Irish case which followed Re Miller Gibb.

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51 A set-off is alien to insurance. Rather, it is a claim in liquidated amount by the defendant who wishes to set it against the money claimed against him by the plaintiff. The amount may be included in the defence whether or not it is added as a counterclaim; Richards v James (1884) 2 Exch 471; Boghal v Punjab National Bank [1988] 1 FTL 1; Stewart Gill Ltd v Meyer [1992] 2 All ER 257.

52 ECGD v Davenport (Shoes) Ltd, unreported February 3, 1983, CA.

53 See part VI of the Act entitled The Re-Insurance Company of Ireland Ltd.

54 International Commercial Bank v The Insurance Corporation of Ireland (ICI) [1989] I.R. 453. In this case, the plaintiffs lent a large sum of money (1.5 million Swiss francs) to Axama A.G. and, at the same time, entered into a “credit guarantee agreement” with the defendant, the ICI, whereby the ICI agreed to insure the risk of default by Axama A.G. in repaying the loan. The defendants then entered into a contract of reinsurance in respect of its potential liability to the bank with Meadow Indemnity Company Ltd, (the third party), incorporated in the Channel Islands. When Axama A.G. defaulted on the repayments of the loan, the defendants refused to indemnify the plaintiffs against the risks they had contracted to bear, on the grounds of alleged misrepresentation and non-disclosure on the part of the plaintiff. The defendants (ICI) having lost on these grounds proceeded to claim a full indemnity from the third party. ICI was subsequently given liberty by the Irish High Court to issue a third-party notice and serve it outside the jurisdiction in the Channel Islands against the third-party reinsurance company. The third party counterclaimed these motions largely on the grounds that the court had no jurisdiction to order such actions to enforce a contract of indemnity against
forthwith any payments which the company or its agents might receive in respect of the debt.

Following on from the company’s undertakings under the claim form, they informed the exporter’s bankers by written instruction to hand the proceeds of the bill of exchange over to the ECGD once they were realised. In 1954, the company was wound up and a liquidator appointed. In 1956, Martin’s Bank (seller’s and later the insured company’s liquidator’s bank) received the contract price of the goods plus interest on behalf of the sellers/liquidator. The liquidator rejected a claim by the then Board of Trade on behalf of the ECGD to 90% of the sum of £3,111 11s 1d received by the bank. The insured had received a windfall and interest totalling £231 6s 4d and the insurer claimed entitlement to both amounts paid out under the indemnification agreement and also the windfall received by the insured. *Yorkshire Insurance*’s ruling that, in subrogation, the insurer is only entitled to reimbursement of monies equal to the amount paid out under the policy, was not followed. In this instance, the ECGD succeeded in their claim and the Board of Trade were entitled to receive from Martins Bank not only 90% of the contract price as they were contractually entitled to, but also 90% of the windfall (plus the interest). The distinguishing factor in this case and in *Lucas* and *Yorkshire Insurance* was the fact that the insured had expressly assigned his interest in the subject matter to the insurers. Applying the *dictas* of Brett J’s in *Randal v Cockran* and Lord Hobhouse in *King v Victoria Insurance Co.*, Lord Wynn Parry confirmed that the guarantee in the policy was one of indemnity to which subrogation applied as a matter of law. However, the insured still retained 10% of the windfall- a type of co-sharing perhaps or participation, in contrast to *Lucas* and *Yorkshire Insurance*. Lord Parry’s comments in separating windfall from subrogation and the contract is rather baffling. First, either it is a contract of indemnity, to which subrogation applies, or it is not. Secondly, if subrogation did not apply as a matter of law, how else did it. Finally, was he referring to the assignment or the underlying insurance contract?

### 3.8. Effect of Assignment on Windfall in ECGD Policies

Furthermore, the undertakings referred to above under the claim agreement constituted an equitable assignment, while the letter to the bank constituted an effective absolute legal assignment of the proceeds of the bill of exchange to the ECGD. Thus, the company received the money as trustees in equity and the ECGD was entitled to only 90% of the claim and the interest. This case confirms the proposition that different considerations apply where the insured has assigned their interest in the subject matter to the insurer. In such a situation, the insurer can claim an entitlement to any windfall for their own benefit. Subrogation cases exist where there has been no assignment but the insured has retained the windfall. It is argued that these ECGD windfall cases evidence both clear limitations to subrogation and consequently the undermining of indemnity- the very essence of indemnity, particularly in relation to the unjust enrichment argument. Indeed, this apparent total overthrow of the usual incidents relating to subrogation does not only contradict the bases of subrogation and indemnity, but has not been met by any compelling court justifications as to why the insured is entitled to keep this windfall after he is fully indemnified.

### 3.9. Whether Insurer’s Negligence Advice Affects Windfall

That notwithstanding, Justice Parry’s confirmation of the application of subrogation and indemnity in these cases was followed by *Lucas Ltd v ECGD* and *Lonrho Exports Ltd v ECGD*. However, in both cases, the supplier’s credit policies included express clause entitling the ECGD to be subrogated to the seller’s rights against a defaulting buyer. Furthermore, although subrogation and windfall were not direct issues in the case, Neil J decided in *Culford Metal Industries v ECGD* that the ECGD insurance policy was a contract of indemnity. Although not directly related to windfall, Neil J also decided that the ECGD were liable to the insured where they gave him negligent advice concerning the insurance affected. A decision

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57 Re Miller, Gabb and Co Ltd (1957) 2 ALL ER 266; followed in Re Casey (a Bankrupt) CA NI, unreported (unreported HC Ireland, 1 March 1992).
58 *Randal v Cockran* (1748) 1 Ves. Sen.
59 *King v Victoria Insurance Co* [1896] AC 255.
60 Ibid., at 267; favourably referred to by Lord Templemann in *Napier and Ettrick (Lord) v RF Kershaw (No.1)* [1991] AC 713 at p.734 and followed by *Re Casey (a Bankrupt)*, unreported March 1, 1992 HC Ireland.
61 As Birds notes, in the great majority of cases there will be no express assignment and therefore it logically follows that in the great majority of cases it will be the insured who gets to keep the benefit of any surplus. This situation can be clearly criticised as a controversial limitation on the doctrine, which will be addressed below (Birds, 2010, 312).
63 *Culford Metal Industries v ECGD* (unreported).
followed in *Lyonnaise v ECGD* and subsequent ECGD decisions. Although windfall was not an issue in the case, would an insurer who has given negligent advice lose his rights to the windfall? The answer is probably not in law but may be in equity.

### 3.10. Changes to Express Clauses on Windfall in ECGD

As a result of *Re Miller Gibb*, where the ECGD reclaimed only 90% of the original sum rather than that of the new inflated sum, the wording of Clause 17 was altered to make it clear that the ECGD was now entitled to the benefit of any currency exchange rate fluctuations by providing that the amounts recovered are to be shared on the same basis as the amount of loss: “...whether or not such division [resulted] in the retention by the insurer of a greater or lesser sum than the amount paid by the insurer under this guarantee”.

The new provision removes the 90%:10% windfall sharing formula but statutorily endorsed assignment as the alternative to subrogation (rather than extinguishing the insured’s rights in the remainder). The revision of Clause 17 does not eliminate the insured’s windfall; it only reduces it to 10% thereof. That notwithstanding, the new Standard Policy does not contain the 90%:10% share and instead contains a provision enabling the insurer, through assignment (Article 8.2(c)) to claim directly from the wrongdoer. So, the insured is still entitled to 10% of the windfall. From *Lonrho* onwards, most current policies now follow this later version. Furthermore, the seller’s claim is now also restricted to the appropriate percentage of the applicable credit limit. This appears to be a common approach in common law jurisdictions. For instance, the New Zealand decision in *Hill and Liechtenstein Ltd v Export Guarantee General Manager*, based on the equivalent policy terms, confirmed this point: that no claim can be made in regard to amount due from the buyer in excess of this limit. These policies permit assignments, but in *Paul and Frank Ltd v Discount Bank (Overseas) Ltd*, however, Pennycuik J held, contrary to *Re Miller Gibb*, that it constituted an assignment by way of charge and not an absolute assignment of a bill of sale. The former method constitutes a temporary or conditional transfer of the policy and its proceeds while the latter is a complete and unconditional transfer.

It is unclear whether there is a difference between assignment by way of charge of a bill of sale (as in *Paul and Frank Ltd*) and an absolute assignment of indemnity (as in *Re Miller Gibb*). In contracts of the normal Guarantees for Buyer Credit Financing (as opposed to Seller Supplier Credit), *ECGD v Universal Oil Products Co* suggests that the ECGD’s rights of subrogation against a supplier under the Premium Agreement of the former may be wider than those against the seller supplier. There have been further changes since *Re Miller Gibb*. These include the decision...
in *Formica v ECGD* that the supplier policy now also constitutes an insurance policy to which subrogation and consequently windfall would apply.

To sum up, although it was a marine insurance case of *Yorkshire Insurance* and a fire insurance decision of *Castellain v Preston, inter alia*, that originated windfall, it is the ECGD authorities that definitely raised the windfall jurisprudence to a new and higher level. Although they do not acknowledge it, on permitting insured's retention of windfall in ECGD cases, courts seem persuaded by circumstances such as where no harm has been done to the insurer. They also seem to introduce equitable considerations in the decisions. Such analyses lead to a wider area of equitable and probable policy considerations in windfall decisions in Part II of this article.

### 4. CONCLUSION

This Part I of the article has demonstrated that, particularly with regard to ECGD policies, judicial application has not defined or justified the insured's retention of windfall, correlations between the indemnity principle and subrogation, and other doctrines such as unjust enrichment. To reiterate, the courts have adopted the indemnity rule that the insured shall be entitled only to the full indemnity for the loss sustained, thereby preventing the insured from receiving more than a full indemnity. The rules and principles relating to subrogation have arisen from this rule. However, following on from this understanding of the rationale of subrogation, the ECGD windfall cases have left us with an anomaly. At no time in their judgments in the cases discussed so far have the courts, in their application of this rule, given any coherent reason why some insured are permitted to retain the windfall in instances where they had clearly been adequately and fully compensated by insurers following their losses under the contracts.

Rather, they seem to have used a rule of thumb, equity and policy considerations. Thus, while common law courts have correctly held that the insured ought to be fully compensated for their loss before the insurer can be subrogated to his rights, it is probably harder to justify the extension of this rule to encompass a situation where, following the full compensation of the insured, the insurer is denied any rights against the insured to a windfall obtained by the insured from the wrongdoer or other third parties. A possible explanation is that in all the ECGD decisions discussed, the windfall arose out of a function of international factors independent of, and external to, the insured's actions such changes in exchange rates between the loss and recovery. Hence taking the matter out of subrogation and indemnity once full compensation is paid. Another is based on the equitable issue that, where the insurer has not lost anything, it would be inequitable that the insurer (rather than the insured) is allowed to pocket the windfall.

### REFERENCES


Birds, J. (1979). *Contractual subrogation in insurance law*, JBL.


END OF PART I