PROOF OF LOSS IN MARINE INSURANCE CONTRACT

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&

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1.0 INTRODUCTION.

A Contract of Marine Insurance is a contract whereby the insurer takes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure.[1] This contract of insurance is entered to by way of Insurance Policy. Insurance Policy can be defined as a legally binding contract between Insurance Company and the person who buys the insurance policy commonly called the *Policy holder*, who also is often the person assured in exchange for payment of a specified sum of money called the premium, the Insurance company agrees to pay for certain types of losses or damage as specified by the contract when a loss occurs which meet all of the requirements described by the terms of insurance policy, the loss is said to be covered by that policy.[2]

The marine insurance contract is strictly contract of indemnity. It involves the valued agreed upon in advance, unlike Fire insurance, where it is limited to the actual loss, which is sustained, which value may be greater or less than the value of actual risk.[3] The contract involves an

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1 See Section 3, Marine Insurance Act, Cap. M2 Laws of Federation of Nigeria, 2004. See Section1, Marine Insurance Act, 1906(U.K). See also Re London County Comm. Re-insurance Office Ltd (1922)

2 http:law.Freeadvise.com/insurance_lawm, accessed on 22/3/09.

3 See Yerokun, O. " Insurance Law in Nigeria",(Chapter 9 Rev. Projects Pub; Lagos 1992) P. 443

underwriter and the assured, where the underwriter agrees to indemnify the assured against loss or damage caused by certain specified perils (otherwise called the Loss) termed "Maritime Perils" in consideration of the payment of a certain sum called the premium.[4] Marine peril is defined to mean peril consequent on or incidental to, the navigation of the sea, that is to say; captures, seizures, restraints, and detainment of princes and people, jettisons, barratry, and any other perils, either of the like kind, which may be designated by the policy.[5]

> *When loss occurs, the duty is on the Claimant[6] to prove the loss or rebuking the evidence before the court, it is the duty of the parties to present quality evidence to substantiate the fact(s) laid before the court, hence, it is incumbent on the parties to supply the evidence to proof any fact relevant to his own case,[7] either on balance of probability or proprandrance of evidence, as in Civil cases;[8] or beyond reasonable doubt, as in criminal cases.[9]*

On the above, this paper will examine Proof of Loss vis-à-vis Burden of proof of loss, Standard of loss, defences available to the Insurer, conclusion and recommendation(s).

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4 See Ibid.

5 Section 5 (3), Marine Insurance (n. 1)

6 The Claimant could be a Ship owner, mortgagee, Cargo owner or any other interested party.

7 See Sections 135-139, Evidence Act, Cap. E14,, Laws Of The Federation of Nigeria, 2004. See also Ayeni v Adesina (2007) All FWLR (Pt.370)1451. See also Ogunyade v Oshunkeye (2007) All FWL (389)1179. See also Ojo v Gharoro (2006) All FWLR (Pt.316) 197 S.C. See also Lawal v Governor of Kwara State (2006) All FWLR (Pt.321)1294. See also Dada v Dosunmu (2006) All FWLR (Pt.343) 1605. See also University of Ilorin Teaching Hospital Management Board v Ajide (2006) All FWLR (Pt.326) 282.

8 See Ikarian Reefer`s case (1995) 1 Lloyd`s Rep.455, C.A. See also MECL Ltd v Agility and Brothers Enterprises Nig. Ltd. (2006) All FWLR (Pt.298) 1289. See also Ibiyeye v Fojule (2006) All FWR (Pt.302) 156 S.C. See also Buildwell plants Equipment Nig. Ltd v Rolis Hotels Ltd (2006) All FWLR (Pt.314) 238.C.A. See Mallo v Mallam (2006) All FWLR (Pt.306) 972, C.A. See also Nduka v Izundu (2006) All FWLR (Pt.343) 1740, C.A. See also, Nig. Bottling Co. Plc. v Abubakar (2006) All FWLR (Pt.335)122 C.A. See also, Charlic v Gudi (2007) All FWLR (Pt.362) 1992 C.A. See also Dughum v Andzenga (2007) All FWLR (Pt.385) 499 C.A

9 See Udozen v State (2007) All FWLR (pt.356) 669 S.C. See also Orji v Oluwabumv a (2007) All FWLR 1533, C.A. See also Akpa v State (2007) All FWLR (Pt.351) 1560, C. A. See also Asake v Nigerian Army Council (2007) All FWLR (Pt.396) 737, C. A.

2.0 Proof of Loss.

When loss occurred as a result of any of the marine peril,[10] the claimant is entitled to enforce the Policy[11] and the insurers become liable to pay the amount of the loss in accordance with its terms. No claim imposed on the assured by law or by stipulations of the policy. The due performance of these duties may be made a condition precedent to the liability of the insurers'.[12] Therefore; the duties of the assured as regards the making of a claim are to give notice of the loss, to furnish particulars of the loss, to furnish proof of loss and to make no fraudulent claim.[13]

It merits mentioning that if the assured makes claim upon fulfilment of the above duties but the insurer is denying liability and refused to indemnify[14] the assured, it then behoves on the assured to institute an action in court and substantiate his claim that the Proximate cause[15] of that loss or damage was an insured risk or peril(s)[16]

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10. The loss may be caused by Peril of the seas, Fire, or Barratry.

11 This is a formal evidence of the contract of marine insurance. See J. O. Orojo," A guide to insurance claim in Nigeria"(Nigeria practice note no 8)(Sweet and Maxwell,1990 at 28. See also Section 24. Marine Insurance Act, (n. 1).See also N.I.C.N v P.I.E.C. Ltd (1986) 1 NWLR (Pt.14) 1. For the content of Marine Insurance Policy. See also N.I.C.N. v P.I.E.C (2006)2 NPMLR at 21.

12 See, E.R Ivamy: "General Principles of insurance law"(6th edition, Butterworth, London,1993).P.421.

13 Ibid.

14 Indemnity is defined as replacing of the assured after a loss as nearly as may be in the same financial position as that which he would have occupied had no loss occurred. See V .Dover, "A Hand book to Marine Insurance"(H. F.& G. Witherby Ltd., London,) at P.331. Note that a contract of Marine Insurance is a contract of Indemnity. See Castellain v Preston (1883) 11 QB.d 380. See also Brotherston v Barber (1816) 5 M&S at P.425. See also British and Foreign Insurance Ltd v Wilson Shipping Co. Ltd (1921)1 A.C.188 @ 224.

15 Note that the Fundamental principle underlining Insurance contract is that the loss must be shown to have proximately caused by the peril insured against as explained in maxim, Proxima Causa non remota spectator, meaning Proximate and not the remote cause must be looked into. See Section 55(1), Marine Insuran Act, 1906. See also Leyland Shipping Co. Ltd v Norwich Union Fire Ins. Society Ltd. (1918) A.C 350. See also Reischer v Borwick(1894) 2 Q.B 548 C.A. Proximate cause may be one proximate cause of loss. See Ballantyre v Mackinnon(1896) 2 Q.B 445 C.A; Two or proximate cause of loss.See Haskell v Continental Express and Anor (1950) 1 All E.R 1033.See also H.N.Bennett, The Law of Marine Insurance;(oxford press, New York:1996), at pp115-118

16 Insured peril may be (I) peril of the Seas; (ii) peril of Fire; and (iii) peril of Barratry. Each of this peril has its own characteristics. See S. Hodge, "Cases and Materials on marine Insurance Law" (Cavendish Publishing Ltd. 1999), atPp. 449-450.

2.1 Methods of proving Loss

The insurers are usually empowered, by a stipulation in the Policy, to call on the assured to prove that the loss is covered by the Policy[17], to call on the assured to prove that the loss is covered by the policy.[18]

In requiring proofs, however, or in deciding whether the proofs given are sufficient, the insurers can not act capriciously, unreasonably, or unjustly, by requiring evidence which is not necessary to satisfy them on any reasonable view of the case. It is sufficient if the assured lays before them evidence with which reasonable man would be satisfied,[19] and it is unnecessary to show that t insurers have been, in fact, satisfied.[20]

The stipulation may usually provide that the assured may further, be required to make a statutory declaration.[21] In *Watts .v. Simmons*[222] where the policy provided that

> *A Statutory declaration by the assured with regard to any claim hereunder that he believes it to be a loss within the meaning of the insurance, and further that he has no reason to suspect a believe that such loss has caused by an excepted risk or is in any respect a loss from which the underwriters are by the terms of this policy declared free from liability shall be sufficient prima-facie evidence that the loss is not of the character excluded by this policy*[23]

The insurers may by their conduct, waive their right to demand proofs in accordance with the condition stated in the policy or waive

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17 . See Harvey v Ocean Accident and Guarantee Corp.(1905) 21 RI ,26.
18 See Johnson v Dominion of Canada Guarantee and Accident Insurance Co. (1908) 17 QLR 462.
19 See Braunstem .v Accidential Death Insurance Co.(1861)1 B&S 782 at 794
20 See Moore v Woolsey (1854) 4 E&B 243
21 . Note that the form of statutory declaration can not be directed by the insurers in the absence of a term in the stipulation to that effect. The assured is entitled to frame he declaration as he chooses. See Beeck v Yorkshire (1909)11WALR.88.
22 (1924)18 LL. Rep 87.
23 Ibid, at 177

objection to insufficiency of proof. However, failure to object does not amount to waiver. [24]

The policy may fix the time for delivery of proofs, but where no time is fixed, proofs may be delivered at any time before the case is statute barred.[25]

2.2 Required Elements to Prove and Burden of Proof

2.2.1 Peril of the Seas

Peril of the Seas is defined to mean an action of the elements at sea of such force as to overcome the strength of a well founded ship and the normal precautions of good marine practice.[26]

IIn *Norumal and Sons Nig. Ltd v Niger Benue Transport Ltd*,[27] the court stated that peril of the seas is not confined to heavy storm blowing across the sea. The peril starts from the shore or as soon as the vessel moves. The constant lashing of water against the Hulls of the vessel constitutes perils to which the vessel is subject. Other examples are: storms and waves; rocks, shoals and rapids; change of climate; confinement necessary at sea; animal peculiar to the sea; other obstacles, though of human origin; and all other dangers peculiar to the sea.

Where a claim is brought for loss under the peril of the seas, the burden is on the assured[28] to proof the following:

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24 Masson v Andes Insurance Co.(1899)29 SCR 537.

25 Harvey v Ocean Accident and Guarantee Corp. (supra). In Welch v Royal Exchange Assurance (1939) 1 K.B. 294, it was held that if the Assured fails to produce proofs at the time when he commences proceedings, and a reasonable time for compliance has already elapsed, he can not fulfil the condition by producing the proofs thereafter.

26 B.A. Garner (ed.), Black Law Dictionary,(West Publishing Co. U.S.A. 2004) p 11 74. See also Black Law Dictionary, 6th edition, p'1138. See also See also Rule 7, Marine Insurance Act,(n.1).

27 . (2006) 2 NPMLR 82,

28 See Compania naviera vascongada v British and Foreign Marine Insurance Co. Ltd.(1934)54LIL Rep35, where Branson J stated as follows: ... the law is, in my opinion clear, the onus of proof that the loss was fortuitous lies upon the plaintiffs, but that does not mean that they will fail if the evidence does not exclude all reasonable possibility that the ship was scuttled. Before that possibility is considered, some evidence in support of it must be forthcoming. ...With regard to unseaworthiness,on the otherhand, the onus is upon the defendants to show that the vessel was unseaworthy when she left ..."See also Narumal & Sons .v. Niger Benue Transport (supra).

(I) That the vessel is seaworthy when it is sent to the sea. In *Narumal & Sons .v. Niger Benue Transport,*[29] Seaworthy is defined in Shipping Law to mean the condition in which a vessel insured under a voyage policy is bound to be on leaving port. On seaworthiness of a ship, the rule is that a vessel must be reasonably seaworthy, taking into account the type and nature of the voyage river or ocean, the season of the year, the kind of cargo etc. Seaworthiness is thus a relative term and may vary with the ship insured. Also, the standard of seaworthiness varies with the nature of the voyage insured. Thus, a vessel may be seaworthy for one voyage but not for another, for a voyage for one season of the year, but not for another season; she may be seaworthy when laden with one kind of goods or cargo and not so when laden with another kind.[30]

For a ship to be seaworthy, a ship must be fit in design, standard, condition, and equipment to encounter the ordinary perils of the voyage. Note further that the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as can not breakdown except under extra ordinary peril, the ship must have that degree of fitness which an ordinary careful and prudent owner would required to have at the commencement of her voyage, having regard to all the probable circumstances of it.[31]

(ii) The Loss was proximate caused by one of the peril insured against.[32] In *Compania Navieria santi S.A v Indemnity marine Insurance Co.Ltd.*[33] The steamship Tropaioforos sank over a period of five hours in the bay of Bengal in calm weather conditions. The plaintiff owners of the vessel claimed that the loss was due to perils of the seas, in that Tropaioforos Struck an unknown submerged object which caused sufficient damage to allow her to be sunk by the resulting in rush of sea water. The underwriter refused to pay and alleged that Tropaioforos had been scuttled with the connivance of theowners. The court held that the plaintiffs' owner of Tropaioforos has failed to prove that there had been an accidental loss due to peril of the seas.

It merits mentioning that claimant may be unable to present direct evidence showing the precise nature of the cause of a loss, such as in the

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29 (supra) p. 83
30 Ibid, Per. Oputa, JSC at p. 83. See also Cotter .v. Huddart Parker Ltd.(1942)P.S. W.S.R.33
31 Ibid, Per Kawu, JSC at p.82.
32 See Ballantyre .v. Makinnon (supra).
33 (1960)2Lloyd's Rep469

case of a missing ship or where the loss is inexplicable, he may seek the assistance of the court with the request that presumption of a loss by an unascertainable perils of the seas be drawn in his favour. The plea if granted will allow the claimant to present his evidence by way of inference to prove the cause or reason for the loss. But before the presumption of loss by an unascertainable peril of the seas is allowed, the following conditions must be proved:

i. That the ship was seaworthy when she sail; and
ii. That uninsured peril did not occur which results into cause of loss.[34]

In *Skandia Insurance co. Ltd v. Skoljarev*,[35] there was a loss of a fishing vessel which sank in calm seas after there was a sudden in rush of water unto the engine room. The inference sought was that, whether the cause of the sudden ingress of water; it should be taken as a fortuitous accident or casualty of the seas. The High Court of Australia held that the loss was due to a peril of the seas.

There is a presumption of loss by perils of the sea when a ship is known to have sailed and ship never heard of, it is presumed to founder at sea.[36]

In *Green v. Brown*,[37] the ship, charming Peggy was insured in 1739, from North Carolina to London, with a warranty against captures and seizures. On the evidence given charming Peggy sailed out of port on the intended voyage, and was never heard of again. It was put to the court by the plaintiff that she foundered at sea, but the underwriters insisted that, as captures and seizures were expected, it lays upon the assured to prove that the loss happened in the particular manner declaration.

The jury found for the plaintiff, in that it must be presumed that charming Peggy foundered at sea from this was born the phrase "a ship never heard of is presumed to be foundered at sea".

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34 The purpose of the aforestated conditions are to prove that the cause of loss is unascertained and to eliminate doubt as to the seaworthiness or otherwise of the Vessel.
35 (1979) 142 CLR .375
36 This presumption operates when a Ship is missing and never heard of. See Green v Brown (1743) 2 str 1199
37 Supra.

In *Koster v Innes*,[38] the plaintiff, a cargo owner produced so little evidence to show that the ship had sailed that it could not be presumed that the loss was attributable to the vessel foundering. Also in the case of *Compania Martiaru v Royal Exchange Assurance Corporation Arnus*.[39] Where a vessel foundered in clam weather on a voyage from Spain to Rotterdam. Scrutton J. Asserted:

> *The presumption may well be when nothing is known except that the ship has disappeared at sea, that her loss was by perils of the sea:* ***Green v. Brown.*** *But when, though it is known that she had sunk, there is evidence on each side as to the cause of the admission of seawater, which leaves the court in doubt whether the effective cause is within or without the policy, the plaintiff the assured, fails, for he has not proved a loss by perils insured against*[40]

In the light of statutory provision, Marine Insurance Act[41] provides:

> *Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.*[42]

From the above, it is remarkable to state that the plaintiff, ship owner, the assured, is required to prove the following when claiming indemnity for a missing ship:

(I) That the vessel is seaworthy when put on sail;
(ii) That the lost of the vessel is caused by one of the perils of the seas;
(iii) That the vessel foundered at sea
(iv) That no news of the vessel has been received, and
(v) That the loss was not caused as a result of uninsured peril.[43]

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38 (1825)RY7Modd334
39 (1923)1LB650C.A
40 Ibid at p. 657
41 Marine Insurance Act.(n. 1)
42 Ibid, S.59.
43 See *Green v Brown* ,supra. See also *Koster v.Innes*. supra

2.2.2 Proof of Loss by Fire

In the case of Fire insurance, direct evidence as to the cause of the fire is not always available, and accordingly the success or failure of the claim depends on whether the onus of proof, upon the material before the court, has been discharges. Where the property is actually burned, the loss is, in fact, caused by fire and the policy, therefore, cover it, unless the insurers succeed in establishing that the fire was originated by an excepted cause. Where the result of the evidence is to leave the cause of the fire in doubt, the insurers have not discharged the onus of proof and the assured, therefore will succeed.[44]

However, if the property is not actually burnt, but the facts proved are sufficient on a balance of probabilities to enable an inference to be drawn as to the cause of loss, the onus of proof is discharged and the assured will succeed or fail according as the inference is drawn that the cause of loss falls within the policy or not.[45]

If, on the other hand, the facts proved are insufficient to enable any inference to be drawn at all, the assured must fail, since he has not proved that the loss was caused by fire.[46]

Thus, unlike perils of the seas, fortuity is not an essential element when making a claim for a loss occasioned by fire. What the claimant needs to proof is that the loss was caused by fire, whether started accidentally or deliberately, to establish prima facie case and throw the burden of proof upon the insurer to prove that there was connivance on the part of the assured, by which the defence of wilful misconduct by the assured could be driven home. In *Continental Illinois National Bank and Trust co of Chicago and Xenofon Maritime S.A v Alliance Co. Ltd, Captain Panagaos Dp,*[47] the vessel grounded and suffered a major fire in the red sea, which was held to have been a deliberate act brought about with the connivance of the owner. At the court of the first instance, Evans J. stated:

> *Fire, unlike perils of the seas, does not itself connote a fortuity; unlike "barratry" there is not statutory definition which gives grounds for arguing that the possibility of*

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44 See *Gorman v Hand-in-Hand insurance Co.* (1877) 1 RLL CL 224
45 See E.R. Ivamy, (n.10) at p443
46 Ibid.
47 *(1962)1 ALL Er525*

> *connivance must be disproved. I therefore conclude that the plaintiffs would have proved a loss by fire, if their claim had not been defeated by the defence of owner's connivance*[48]

From the above authority, it shows that there is no requirement for the plaintiff to show that there was element of fortuity in a claim for a loss caused by fire. The claimant only needs to establish prima facie case of loss by fire in order to shift the burden of proving complicity by the assured on the insurers.

In *Slattery v Mance,*[49] where the plaintiff owner of the vessel Treworval light brought an action against the defendant insurers. claiming, under a policy of marine insurance, a total E4,500 for the loss of the vessel by fire. The underwriter rejected the claim on the basis that the plaintiff wilfully caused or connived with the destruction of vessel. The court ruled, on the principle of the common law that he who asserts must prove, that it fell upon the defendant underwrites to prove, on the balance of probabilities, that the plaintiff deliberately destroyed Treworval light.

It is remarkable at this juncture to state the legal principles relating to burden of proof in a case of perils of the seas or fire as summarized with clarity by Cress Well J. in the case of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, Ikarian Reefer,*[50] the court of Appeal ruled that there had been wilful misconduct by the assured when a vessel had been lost due to a combination of grounding and fire. But at the court of first instance, Cress Well J, with admirable clarity, summarized the legal principles applicable to the burden of proof when claiming for a loss by perils of the seas or fire as follow:

In loss by perils of sea, the burden of proving, on the balance of probability remained on the assured throughout;[51]
In the case of fire, where the owners have proved a loss by fire, the burden of proving deliberate fire and connivance lies on the insurers. If the evidence leaves the court in doubt, then the assured must succeed.

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48 Ibid at p.511
49 (1962) 1 All. ER 525. See also National Justice Compania Naviera S.A v Prudential Assurance Co. Ltd, Ikarian Reefer (1995) 1Lioyd's Rep455, C.A.
50 See Ikarian Reefer's case, supra
51 Lord Brandon in Popi M (1985) 2 LIod's Rep 1 at p. 2.
52 Captain panagos DP (1986) 2 Lloyd's Rep 470, pp. 510-511

2.3 Peril of Barratry

Rules of construction[53] define barratry to include i.e. every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be the chatterer.

In *P. Samuel & Co. v Dumas*,[54] the court defined barratry to mean an act of fraud not directed against the owner of the goods which are lost, but a fraud against the owner of the ship; and however innocent may be the owner of goods, who seeks to recover against the underwriter, yet, if the owner of the ship concurs in the act which caused the loss, it takes from it the character of barratry; for the very definition of barratry is, a fraud by the master and mariners against the owner of the ship. Also in *Sogres v Thorton*,[55] it was held that theft by a person within the vessel or fraud by the master and mariners against the owner of the ship is termed peril of barratry.

A cargo-owner would not be able to claim for a loss caused by a barratrous act, unless barratry is specifically insured against. However, under the Institute Cargo Clauses (A), barratry is a peril insured against by reason that the Institute Cargo Clauses (A) is an "all risks" policy with no specific provisions excluding barratry within its general exclusions clause. Both the Institute Cargo Clause (B) and (C) are silent with regard to barratry and it must, therefore not be an insured peril under these clauses.[56]

The wrongful act committed by the master or crew has to be committed against the interests of the ship owner or the chatterer, regardless of whether or not either of them is the assured of the policy under consideration[57]

When a ship-owner pleads a loss caused by barratry, it is crucial on the part of insurers to prove that there was complicity on the part of ship-owner, and that the assured equally have the burden to prove that there was no complicity on his part. It goes further that by the common law rule of "*He who assert must prove*" placed legal burden on the insurer to prove the wilful misconduct. On the other hand, there is equally fundamental

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53 See Rule 11, Marine Insurance Act (n. 1), which is in peri-material with Marine Insurance Act, 1906. Rule 11.Note that Barratry may be committed by member(s) of the crew or by master who is a part owner. The Barratrous act must be prejudicial to the owner or co-owners.
54 (1924)A.C.431-464.
55 (1917)7 Taunt 627,639-640
56 Marine Insurance (n. 49).
57 A cargo-owner and a mortgage (whether suing as an assignee or as an original assured, for example would have to prove that the act was prejudicial to the ship owner or the chatterer as the case may be.

rule of evidence that "the plaintiff must prove the essential ingredients of his claim. It therefore befalls upon the claimant (Assured) to establish, at the outset, a prima facie case that the loss was so caused and, in order to do so, non-complicity must be established.

In *Deermay Shipping Co SA and Brandt's v Chester, 'Michael'*[58] KERR J. stated thus:

> *...what must the owners establish to succeed in barratry? Apart from authority the answer seems obvious in principle. The owners must establish a loss by the insured of barratry, which involves establishing both a deliberate sinking and the absence of owner's consent. If, at the end of the day, the court is left in doubt whether the owners consented or not, then it seems to me that the claim must fail. This is also appears to have been the view of the court of session in Demetriades and co. V. Northern Assurance Co., Spathari (1923) 17 LIL Rep 327, in particular, the judgement of Clerk LJ, p.334...*[59]

2.3.1 Burden of Proving Complicity in a Loss by Barratry

There is a controversy on the issue of whom the burden of proving complicity in loss by barratry lies. This controversy has been generated on the conflicting court decisions in the cases of *Issaias* and *Martiartu-Micheal*.

In *Elefie Issaias v Marine Insurance Co. Ltd.*[60] The wooden steamer Elias issaias was on voyage from Baltimore to pricaeus when the engines suffered a serious malfunction, and she was found shifting in mid-Atlantic by an English vessel, which took her in tow. During the course of the tow, Elias issaias slowly settled in the water, was abandoned and later sank. The plaintiff shipowner claimed for a total loss by perils of the seas, the underwriters resisted the claim on the grounds that ship had been wilfully scuttled on the owner's, orders. Evidence was put forward that the owner's finances were stretched.

58(1979)1Lloyd's Rep55.(1979)2Lloyd's rep.1, C.A
59 Ibid at p.72.
60(1923)15LIL Rep.186,C.A.

The Court of Appeal upheld the decision of the trial judge in ruling that the ship had been scuttled by the master and engineer with the connivance of the owner. All the three judges were of the opinion that the burden of proof, when alleging complicity and wilful misconduct on the part of the ship-owner lay upon the accuser-the underwriter.

On the other hand, in *Compania Martiartu v Royal Exchange Assurance Corporation, 'Arnus'*[61] where the whole issue of onus of proof of the defence of wilful misconduct was again raised. Almost in passing, Scrutton L.J. put forward an alternative view to that expounded in the Issaias case.

Scrutton L.J. stated:

> *...if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship- see Leyland shipping Co. v. Norwich Union Fire insurance society- and the court doubtful what is the real cause of the loss, the assured has failed to prove his case...but when, though it is known that she has sunk, there is evidence on each side as to the cause of the admission of seawater, which leaves the court in doubt whether the effective cause is within or without the policy, the plaintiff, the assured, fails, for he has not proved a loss by perils insured, against. Not every loss by seawater is a peril of the sea, as is shown by definition in Marine insurance Act; when there is evidence on each side as to the cause of admission of seawater, which leaves the court in doubt whether the effective cause is within or without the policy, the plaintiff, the assured, fails, for he has not proved a loss by perils insured against.. Not every loss by sea water is a peril of the sea, as is shown by definition in Marine Insurance Act; when there is evidence on*

61 (1923) 1 K. B. 650, C.A

> *each side suggesting the real cause, the court must determine on the balance of probabilities, as in every case of circumstantial evidence, and not be deterred from finding in favour of stronger probabilities by the fact that some remote possibility exists the other way*[62]

Also in *Diermanay Shipping Co. S.A and Brandt's v Chester, Michael*[63] Where the same approach was adopted with respect to the onus of proof as that put forward by scrutton L.J in the Martiatus case.

In that case, a ship was insured with the defendants under a policy of marine insurance which included, inter alias, loss by barratry. In January, 1973. on a voyage with a cargo of soda ash from Baton Rouge to Venezuela, ship encountered heavy weather and suffered a series of engine breakdowns. After all attempts to repair the engine failed, the master sent out an SOS and the tug rescue came to her assistance and succeeded in attaching a tow rope. Some hours later, Ship's engine room started to flood and, without orders the tow rope was released. The crew abandoned ship and was lost. The owners claimed for a loss by barratry, as it was common knowledge that an engineer had scuttled the ship, but the underwriters denied liability, contending that the owner had consented to the loss.

The court of appeal upheld the decision of the trial judge and rules that the loss had been due to barratry, whereby Ship had been sunk deliberately without the consent or foreknowledge of the owner. At the court of first instance, the subject of complicity was raised, and Kerry LJ, stated thus:

> *... the owners must establish a loss by the insured peril of barratry, which involves establishing both a deliberate sinking and absence of the owner's consent*[64]

Also in *Continental Illinois National Bank & Trust Co. of Chicago and Xenofon Maritimes SA v Alliance Assurance Co. Ltd., Captain Panagos DP*[64] where a vessel was deliberately run aground in the Red Sea and set on fire with the connivance of the owners. Neill LJ deliberated on the

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62 Ibid at p.657.
63 Supra at p.66
64 Ibid at p.66

issue of barratry and the proving complicity and states thus:

> *.... Accordingly, in the primary contention of the owner of a vessel is that the loss was a loss of barratry, I can see great force in the argument that it is for the owner to prove that the wrongful act was committed without his consent or connivance*[66]

Also in *Compania Naviera Santi SA v Indemnity Marine Assurance Co. Ltd.*[67] where a vessel sank in calm weather in the bay of Bengel, and the court ruled that she had been scuttled with the connivance of the owners. Pearson J. suggested another why the burden of proof should fall upon the plaintiff thus:

> *... no doubt one reason for placing the burden of proof on the shipowners in such a case as this is that they are likely to have all, or almost all, the relevant informant, and the insurers are likely to have virtually no information initially. The insurers, for their proof of scuttling, or their suggestion that there is strong ground for thinking that there may have been scuttling, have to rely on such information as they can obtain from discovery of documents, and from cross-examination of ship's witnesses called by the plaintiffs*[68]

2.3.2 Standard of Proof of Complicity

Whilst there has been controversy on whom the burden of proof lies in establishing complicity or wilful misconduct, equally, the standard of proof followed the line of controversy as is not clear whether it is proof beyond reasonable doubt or proof on the balance of probabilities.

(a.) Proof beyond reasonable doubt

In *Issaias case*,[69] it was admitted that the vessel had been sunk deliberately and the sole question before the court was the issue of privity, the Court of Appeal considered the level of proof required of the

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65 (1989) 2 Lloyd's Rep 33, CA
66 Ibid at 40.
67 (1960) 2 Lloyd's Rep. 649 at 673
68 Ibid at p.673.

accusers (insurers) to be of a criminal standard. Warrington LJ stated thus:

> *... the learned judge has said, and I agree with him in this that when the defendants charge the plaintiff with the very serious misconduct of conniving at the casting away of his ship, in other words, of being a party to that act, it is incumbent on them to bring his guilt home without reasonable doubt*[70]

(b) Proof on the balance of probability

In "*Ikarian Reefer*" case,[71] it was painted out that the standard of proof is the civil test of the balance of probabilities.

Stuart smith LJ, stated thus:

> *.....On the issue (the alleged deliberate grounding of the vessel, the burden of proof rests unequivocally on the insurers, and the degree or standard of proof which the law requires makes the burden heavier than that which rest upon the ship owners. Although the same 'balance of probilities' test applies, the standard of proof required is commensurate with the gravity of the allegation made; and no more serious allegation can be made against the master of a ship...*
>
> *... But we bear in mind that, on the authorities, the burden which rests upon the insurers is denied from the civil, not the criminal standard, and that is nature is as described above*

3.0 Defences

When the burden of proof is discharged in accordance with the provision

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69 supra
70 Ibid at p. 189.
71 (1995) 1 Lloyd's Rep 455, CA
72 Ibid at p.459

of the law, the burden will now shift to the defendant, the Insurer to raise his defence(s) in order to rebuke the evidence of the assured.

The Insurers may plead the following defences as provided by the Marine Insurance Act[73]

(a) Loss that falls within an excluded or exceptional peril.[74] The Act excludes losses caused by:

(i) Any loss which is not proximate cause by peril insured against unless the policy provides otherwise;

(ii) Wilful Misconduct of the assured. The following are elements of wilful misconduct (a) that the assured intended to achieve a loss or damage; (b) that the assured was recklessly indifferently whether such loss or damage was caused; and(c) that the assured immediate purpose was to claim on his insurers or that he subsequently advanced such claim;[75]

(iii) Delay;[76]
(iv) Leakages and breakages;[77]
(v) Inherent Vice;[78] and
(Vi) Rat or Vermine.[79]

It merits mentioning that where the ship has stranded, the insurer is liable for the excepted losses, even though the loss occasioned is not attributable to the stranding provided that when the stranding takes place the risk has attached and, if the policy be on goods that the damaged

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73 Section 56, Marine Insurance Act (note 1).
74 Ibid.
75 Ibid. See The Popi(n. 51) . See also Jackson v Marshau, Sons & Co.(1906)A.C411. See also Palamisto General Enterprises S.A v Ocean Marine Insurance Ltd. (1972) 2 LIoyd's Rep 60.See also Trinder Anderson &C o. v Thames and Mersey Insurance Co.(1898)2Q.B114C.A. See also Papademitriou v Henderson (1939)64 Lioyd.Rep.345, 348. See also Jones v Nicholson (1854) 10 Exch.28 at 38. See also Graham Joint Stock Company Ltd. vMerchant marine Insurance Co Ltd (1923) 17LIL. Rep.44 and 241 H.L. See generally on Wilful Misconduct, See Leyland Shipping Co.v Norwich fire Insurance Society (1918) A.C350. See also Pink vFleming (1890)25 Q.bd.396. see also Reische v Borwick (1894)2 Q.bd.548.
76 Ibid, (note 5). See also Section 55 Marine Insurance Act, 1906. See also Institute Time Clauses Freight, Clauses 12 and 15. See also Institute Cargo Clauses (all Risks), Clause 5. See also Voyage Clause Freight. Clause11. See also Turnbull,Martin & Co. .v. Hull underwriters Association (1900) 2 Q.B 402. See also Jackson v Union Marine Insurance Co. Ltd. (1874) L.R 10 C.P. 125. See also Atlantic Marine Co. Inc .v Gibbon (1953) 2 Lloyd's Rep.294.
77 See F.W. Berk & Co. Ltd. v Style (1955) 2 Lloyd's Rep.382. QBD.
78 See Wilson, Holgate & Co.Ltd. v Lancashire and Chesire Insurance Corp. Ltd.(1922) 13 LIL. Rep.486, K .B.d. See also Bird Cigarrette Manufacturing Co. Ltd v Rouse (1924)19LIL Rep.301
79See Section 56(2)(c), Marine Insurance Act,(n. 1). See also Halmiton, Fraser& Co.v Pandort& Co(1884)12 App.Cas518 at 524.

goods are on board.[80]

(b) Unseaworthiness of the Vessel,[81]

(c) ilful misconduct for loss as a result of peril of the seas, fire and barratry,[82] and

(d) Loss of something uninsured[83]

4.0 Conclusion and Recommendations.

There is no doubt that the purpose of entering into agreement between two parties is whenever there is conflict between the parties, it is this agreement policy that will serve as yardstick to measure the extent of indemnity that is payable.

However, before the assured will be entitled to indemnity, he is required to proof any loss suffered whether as a result of perils of the seas, peril of fire, or peril of barratry, as the case may be.

In perils of the seas, evidential burden is placed on the assured to prove that the vessel or cargo is seaworthy when it was sent to the sea and that the loss was caused as a result of the one the perils of the seas, otherwise, no court would presume guilt of the insurers from the explanation of the assured. Thus, the assured is required to prove on a balance of probability.

It should be mentioned that where a ship is missing, it is the duly of the assured to prove that the ship foundered at sea and no new of it has been received, that the ship is sea worthy when put on sail and the loss was caused as a result of uninsured peril on the side of the defendant, insurers, it is incumbent upon it to raise defence of wilful misconduct on the part of the assured or that the loss occasioned as a result of uninsured peril.

With regard to the peril of fire as a cause of loss to the assured, it is the duly of the assured to prove that the loss was caused by fire and that the peril is covered by the policy. Therefore, the burden of proving loss by fire is placed upon the assured. On the other hand, it is the duty of the

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80 See Rule 14 Marine Insurance Act,(n. 1).

81 See Narumal & Sons .v. Niger Benue Transport (supra), at p. 83. See also Anderson .v. Morice (1874) 10 CP 58, (1876) I APP Case 713.

82 See Pateras and others v. Royal Exchange Assurance, Sappho; (1986) 2 Lloyd's rep. 470 ;and Compania Martiartu v Royal Exchange Assurance Corporation, Arnus (1923) 1 KB 650 CA.

83 .See Field steamship Co. Ltd.vBurr (1899)1QB579.

insurers to disprove the fact stated by the assured by way of proving that the loss was caused as a result of the connivance of the assured by which defence of wilful misconduct by the assured could be sustained.

With regard to the loss as a result of barratry which requires prove of no-complicity on the part of the assured. There is divergent of opinion as to on that the burden of proving complicity lies. Thus, some juror were of the opinion that the burden of proving complicity lies on the insurer, provided the assured is able to prove that the loss of vessel was caused as a result of barratry and that the standard of prove required is that under criminal allegation, that is, prove beyond reasonable doubt, since the act of connivance (complicity) is criminal in nature. While others were of the opinion that the evidential and legal burden of proving non complicity is placed on the assured and that the standard of prove required s that in civil case, that is, on balance of probability.

It should be borne in mind that the burden of proof remains constantly with the plaintiff to prove, on the balance of probabilities that the loss was proximately caused by an insured peril.

In the light of the above, the following are hereby recommended. On prove of Complicity and/or Non complicity, it is recommended that common law principle of " *He who assert must prove the assertion"* be made to apply, since it is the insurer who will raise the defence of complicity against the assured. Connivance is synonymous with conspiracy which is criminal in nature; it is therefore desirable that the act of connivance or complicity should totally be made criminal offence which requires criminal standard of proof.