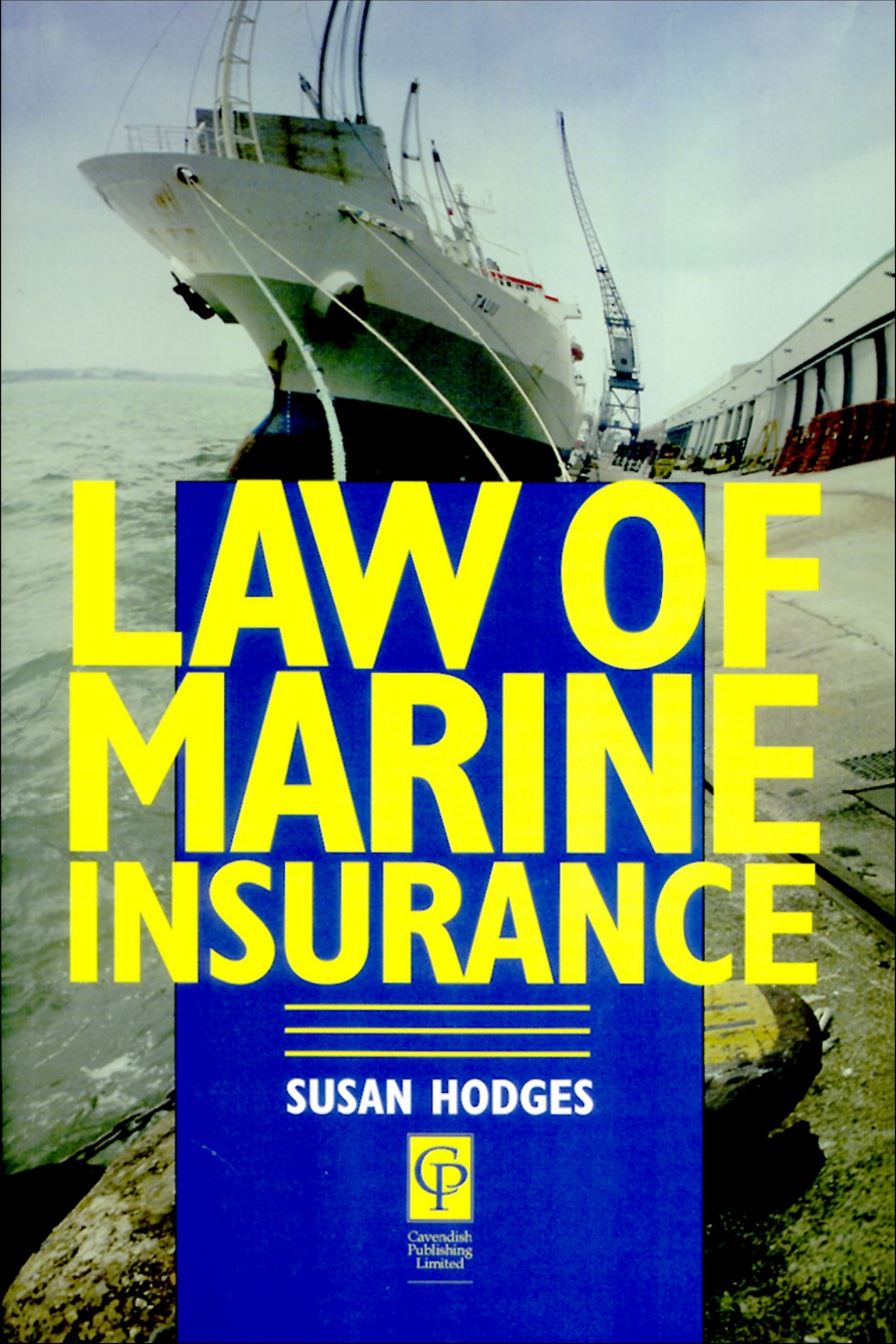

LAW OF MARINE INSURANCE

SUSAN HODGES

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PREFACE

This book is designed primarily for postgraduate students following a taught course of study in the law of marine insurance. It will prove useful not only to postgraduate students in law and maritime studies, but also to persons involved in the field of marine insurance such as arbitrators, adjusters of claims, brokers, in-house lawyers, legal practitioners, marine claims officers and P&I Clubs.

The approach of the works of *Arnould*, *Ivamy*, *Templeman* and *O'May* are professionally orientated and, therefore, are not ideally suited to student use. Moreover, they are all outside the range of the average student pocket. With the exception of the recent work by *O'May*, none of these discuss the cases of the last decade, some of which have introduced significant changes to the law. The need for such a book has become obvious over the years, and this work is designed to fill this gap by offering a reasonably priced, medium sized reference work aimed at the postgraduate and profession alike.

The aim of this book is to state the law as clearly as possible and to show the relationships between the Marine Insurance Act 1906, case law, and the standard terms of the Institute Clauses. As it is not possible to refer to all the Institute Clauses, this work will focus mainly on the Clauses for hulls and cargo. Emphasis is give to areas of the law which have been found by students to be particularly problematic. Special attention is awarded to recent leading judicial rulings. The intention has been to state the law as it stands at October 1995. Although the introduction of the new Institute Time Clauses, Hulls, on 1 November 1995 delayed the completion of this work, it has nevertheless enabled the changes made to the 1983 version of the Clauses to be discussed. As it is anticipated that the 1983 Institute Clauses will eventually be replaced by the new Clauses, the 1995 Clauses are used as the basis of the text.

It is a great pleasure to record my indebtedness to my friends who have helped me in the preparation of this book. I wish to express my thanks to Ms J Reddy, Ms K Nicol and the staff of Cavendish Publishing Ltd for their assistance, patience and understanding throughout the production of this work, Mr P Clinch, Mr D Montgomery and the staff of the law library for their help in locating materials, and Professor J King for his support and encouragement. I am also greatly indebted to Mr J Moloney, Secretary of Lloyd's Underwriters' Association, for his invaluable assistance and the many interesting and stimulating discussions which have helped to clarify my thoughts on some of the issues involved. Finally, I owe a particular debt of gratitude to P Wylie, and my colleague, Professor E D Brown for without their assistance and intervention the writing of this book would not have been possible.

Dr Susan Hodges

March 1996

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CHAPTER 1

CONTRACT OF INDEMNITY

A CONTRACT OF INDEMNITY

The basis of a contract of marine insurance is contained in the opening section of the Marine Insurance Act 1906,[1] which reads as follows:

> 'A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.'

The operative word here is 'indemnify'. A contract of marine insurance is essentially a contract of indemnity. This is the cardinal principle upon which the whole contract is founded, and from which the rules relating to the right of claim under a policy emanate. The rights and liabilities of the parties are dictated by this basic concept, and the amount recoverable by the assured, which is measured by the extent of his pecuniary loss, is also governed by it. This should not come as a surprise, for the very purpose of effecting a policy of insurance, marine or non-marine, is for indemnity for loss.

The most incisive comment on the subject of indemnity can be found in Lord Wright's judgment of the House of Lords in *Rickards v Forestal Land, Timber and Railways Co*,[2] where he said:

> 'The object both of the legislature and of the courts have been to give effect to the idea of indemnity, which is the basic principle of insurance, and to apply in the diverse complications of fact and law in respect of which it has to operate. In this way, the law merchant has solved, or sought to solve, the manifold problems which have been presented by insurances of maritime adventures.'

In *Castellain v Preston*,[3] Mr Justice Brett remarked:

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

As will be seen, the incidents and legal consequences of the contract all stem from this 'great principle'.[4] Many of the main legal principles, for example, the rules relating to insurable interest; gaming and wagering policies; excessive over-valuation; double insurance, contribution, and return of premium; abandonment and right of subrogation; and the merger of losses, all spring from this concept.

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1 Hereinafter referred to simply as 'the Act'. See Appendix 1.

2 [1941] 3 All ER 62 at p 76, HL.

3 (1883) 11 QBD 380 at p 386.

4 *Per* Lord Ellenborough in *Brotherston v Barber* (1816), 5 M & S 418 at p 425, 'The great principle of the law of insurance is that it is a contract for indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the subject-matter insured; it is not supposed to be in his contemplation: he is to indemnify only'.

Not a perfect contract of indemnity

Lord Justice Bowen in *Castellain v Preston*[5] was confident that the principle of indemnity will solve all problems. His words were:

> 'In all these difficult problems, I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will be found … But can it be any exception to the infallible rule that a man can only be indemnified to the extent of his loss?'

Admittedly, most of the problems can be resolved by applying the principle. But this, as will be seen, is a somewhat optimistic point of view. A contract of marine insurance, though a contract of indemnity, is by no means a perfect contract of indemnity. As in all walks of life, there is always a margin of error: in some instances, the theory may more than indemnify the assured for his loss, and in others, he may be under-indemnified. That the principle is not infallible was noted by Lord Sumner in *British and Foreign Insurance Co Ltd v Wilson Shipping Co Ltd*[6] where he said: 'In practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract'. In similar terms, Mr Justice Patteson in *Irving v Manning*,[7] who, also resigned to the fact that perfection may be difficult, if not impossible, to achieve, openly declared that: 'A policy of assurance is not a perfect contract of indemnity.' He acknowledged the fact that it has to be taken with qualifications, one of which is the effects of a valued policy, the problem he was asked to resolve.[8]

Ideally, an assured should be compensated only to the extent of his loss. In practice, however, this is not always easy to attain. But having said that, the principle is always at hand and may be invoked whenever judges feel that justice may be better served by its application rather than by a strict and literal adherence to rules. It is fair to say that judges have in the past employed the principle of indemnity as a fall-back whenever the main ground of their decisions needed further support or reinforcement.

GAMING AND WAGERING CONTRACTS

There are essentially two broad types of gaming or wagering contracts identified by the Act. The first relates to contracts where the assured has no insurable interest or expectation of acquiring such an interest, and the second to policies which declare that the policy itself is proof of interest, commonly referred to as 'honour' or 'ppi' policies.

5 (1883) 11 QBD 380 at p 401, CA.

6 [1921] 1 AC 188 at p 214, HL.

7 (1847) 1 HLC 287 at p 307.

8 In a valued policy, the agreed total value is conclusive; the parties have conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in event of a loss: see s 27(3).

No insurable interest or expectation of acquiring such an interest

As was seen, the very essence of a contract of marine insurance is that of indemnity. This necessarily means that an assured who has no insurable interest in the subject-matter insured, in the sense as defined in s 5(2), would not be able to show that he has suffered a loss. In the words of s 5(2), he is not 'prejudiced by its loss or by damage thereto, or by the detention thereof'. Such a contract, where the assured has not an insurable interest as defined by the Act, is deemed to be a gaming or wagering contract and, therefore, void by s 4(1). Where the policy is void, the general rule is that the assured is, by s 84(3)(a), entitled to a return of premium. But as such a contract is forbidden by the Marine Insurance (Gambling Policies) Act 1909, the premium is not refundable by reason of illegality – a defence specifically laid down in the said section.

There are two parts to s 4(2)(a): the first refers to the case discussed above, where the assured has not an insurable interest, and the second to 'where the contract is entered into with no expectation of acquiring such an interest'. The corollary of the latter is that if the assured has a genuine expectation of acquiring an interest, then the policy is not a wager policy. Naturally, this has to be read with s 6(1) where it is laid down that the crucial moment when the assured must have an insurable interest in the subject-matter insured is at the time of the loss; 'he need not be interested when the insurance is effected'.

'Honour' or ppi policy

Section 4(2)(b) states:

> 'A contract of marine insurance is deemed to be a gaming or wagering contract:
>
> Where the policy is made "interest or no interest" or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer", or subject to any other like term:
>
> Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.'

It is to be noted that such a policy does not automatically rule out the possibility of the assured having, in fact, an insurable interest. The fact that the wording of the policy dispenses with proof of interest does not necessarily mean that the assured does not or cannot have an interest in the subject-matter insured.

Cheshire & Co v Vaughan Bros & Co[9] has ruled that such a policy is still void even though the assured may, in fact, have an interest. In an action brought by the assured against their brokers, the defendants, for negligence in failing to make full disclosure to the insurers, the defendants pleaded that the suit was not maintainable because the policy was void. This contention was upheld by both the trial judge and the Court of Appeal. The wording of s 4 clearly covers not only contracts of insurance where there is no insurable interest, but also

9 (1919) 25 Com Cas 242; [1920] 3 KB 240, CA.

those which use words that might well suggest that no insurable interest exists.[10]

But whether an action arising from such a contract may be adjudicated upon by a court of law is questionable. It is submitted that a court should not lend its hand to the parties by trying a case where the contract is void in law, and all the more so if the contract is illegal by reason of the assured not having in fact an insurable interest.[11]

The fact that the ppi clause may have been detached by the assured at the time of claim makes no difference to the validity of the contract. In *Re London County Commercial Reinsurance Office Ltd*,[12] it was held that the crucial moment for consideration is at the time when the policy was issued.

Though void in law, such policies are not illegal.[13] Thus, the assured is entitled to a return of premium, if he is able to prove that he has in fact an insurable interest in the subject-matter insured.[14]

Lord Robson, in *Thames and Mersey Marine Insurance Co Ltd v 'Gunford' Ship Co*,[15] observed that, 'The sums insured under such policies are, under ordinary circumstances, paid with the same regularity as if they were legally due'. By reason of this fact, ppi policies have earned the 'much-abused' name of 'honour' policies.

'Without benefit of salvage'

A policy 'without benefit of salvage' is a gaming or wagering policy and, therefore, void. But if the nature of the subject-mater insured is such that there is no possibility of salvage (eg, commission, unsecured loan or anticipated profit to be earned from the sale of cargo on its arrival at the port of destination), the policy, though 'without benefit of salvage', is valid.

10 It was argued that, as the plaintiffs had an insurable interest the section did not apply. Bankes LJ (at p 248) said: '… the language of the section does not permit that construction … it makes void a contract where the instrument contains one of those objectionable clauses.'

11 In *Buchanan v Faber* (1899) 4 Com Cas 223; 15 TLR 383, the court acceded to the request made by the parties to try the case as though the contract did not contain the provision that the policy was to be deemed sufficient proof of interest. *Cf Gedge & Others v Royal Exchange Assurance Corpn* [1900] QB 214; 5 Com Cas 239; 16 TLR 344, where the court held that, though not pleaded by the insurers, the action could not be heard because of the ppi clause.

12 [1922] 2 Ch 67, Ch D.

13 Ppi policies were illegal under the Marine Insurance Act 1745, but with the repeal of this Act they are now no longer illegal, but merely void under the 1906 Act.

14 See s 84(3)(a) and s 1(1)(a) of the Marine Insurance (Gambling Policies) Act (1909) where it is only an offence if an assured effects a contract of insurance 'without having any *bona fide* interest …'.

15 [1911] AC 529 at p 550, HL, hereinafter referred to as *The Gunford Case.*

DOUBLE INSURANCE, CONTRIBUTION AND RETURN OF PREMIUM

The legal rules on double insurance and the return of premium therefor, and contribution all emanate from the principle of indemnity that the assured is entitled only to indemnity and not profit. Just as the assured is not allowed to profit from a marine policy, the same applies to the insurer, who is not allowed to retain the premium for a policy where he runs no risk or where the subject-matter insured is not exposed to maritime perils.

Double insurance

Over-insurance by double insurance occurs when 'two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by … [the] Act'. The same assured is insuring the same subject-matter, for the same adventure, for the same interest, and for the same perils. There is no double insurance where one or more of these subjects are different, or where one of the policies is, for whatever reason, unenforceable.

The common law definition provided by Lord Justice Mellish in *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co*,[16] albeit a fire policy, clearly explains the basis of the rule. He said:

> 'The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights.'

As two or more policies with different insurers are in operation, the assured is permitted by s 32(2)(a) to 'claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by … [the] Act'. Should he receive more than full indemnity under either policy, valued or unvalued, he must give credit for the sum in excess of the indemnity and is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.[17]

Double insurance on a ship is said to be extremely rare, but occasionally arises, inadvertently rather than intentionally, in practice in respect of insurance of cargo. In this regard, it has to be said that 'Increased Value Policies', common in cargo insurance, do not give rise to double insurance. This is because the subject-matter under such a policy is not on the goods themselves but the increased value thereof.

Over-insurance by ppi policies

An assured may over-insure by taking up a ppi policy in addition to the standard hull, cargo or freight policy. This occurred in *The Gunford Case*, where, in addition to the hull and freight policies, additional valued policies on

16 (1877) 5 Ch D 569 at p 583.

17 See s 32(2)(b)–(d).

disbursements, and on hull and disbursements, were also taken out by the assured.[18] The House of Lords held that even though the insurances on disbursements were ppi polices, nonetheless there was a double insurance, as much that was covered in the hull and freight polices were also covered by the polices on disbursements. To quote from the judgment of Lord Shaw of Dunfermline:[19]

> '… the disbursements were the very things which had been already accounted for in the freight, and when the ship became a wreck the payment on these policies was not to be a payment of indemnity, but a present to the assured of this sum of money …'

There was clearly an over-insurance by double insurance. Though the disbursements policies may be void in law, nevertheless the assured could still be indemnified under them should the insurer chooses to honour them. He could not, however, 'legally avail [himself] of it to enforce recovery of any sum in excess of the indemnity allowed by law'. The House held that the hull and freight insurers were entitled to avoid their policy on the ground of non-disclosure of a material fact: the existence and the amounts of the wager policies were circumstances material to be disclosed.[20]

Contribution

In the event of over-insurance by double insurance, fairness has also to be observed amongst the insurers. Each insurer should not have to contribute more than his proportion of the loss. Section 80 spells out the rules as to how the matter is to be resolved amongst the insurers *inter se*. The fundamental rule is that he should not incur more than 'the amount which he is liable under his contract'.

Return of premium

An insurer is not liable for more than his share of the risk. The corollary of this is that an assured who has over-insured by double insurance would be able to recover a proportionate part of the several premiums which he has paid to the various insurers. The right to demand a return of premium in such a case is, however, subject to the proviso in s 84(3)(f) that a premium is not returnable if:

> '(a) the polices are effected at different times, and an earlier policy has at any time borne the entire risk; or
>
> (b) a claim has been paid on one policy in respect of the full sum insured thereby, or

18 The only source from which these disbursements could be repaid was the freight earned by the ship, which freight was itself insured Lord Robson observed (at p 549): 'So far as these payments consisted of current working expenses necessary to earn freight they were covered by the insurance on the gross freight, and so far as they consisted of repairs, outfit, and insurance premium on hull they would ordinarily be included in the policy on ship and materials.'

19 [1911] AC 529 at p 542, HL.

20 The over-insurance was a matter which 'might well make a prudent underwriter hesitate both as to undertaking the risk and consider the premium which he should require before doing so': *per* Lord Alverstone CJ, *ibid*, at p 538 in *The Gunford Case*.

(c) the double insurance is effected knowingly by the assured.'[21]

SUBROGATION

There is no doubt that the right of subrogation is a 'necessary incident of a contract of indemnity'.[22] In the words of Lord Justice Brett in *Castellian v Preston*, subrogation is '… a corollary of the great principle law of indemnity', and it is from this principle that an assured is not permitted to recover more than his actual loss. In the Act, the law relating to subrogation is contained in s 79 which is divided into two subsections. Subsection 79(1) refers to subrogation in the event of a total loss and sub-s 79(2), a partial loss.

Definition of 'subrogation'

According to Lord Blackburn in *Burnand v Rodocanachi*,[23] the doctrine of subrogation is a rule of law and of equity:

> 'The general rule of law (and it is obvious justice) is that where there is a contract of indemnity … and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifer is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.'

In the earlier case of *Simpson v Thomson*,[24] Lord Cairns described the principle in the following terms:

> 'I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.'

On settlement of a loss, the indemnifier, the insurer, is, by the rule of subrogation, entitled to step into the shoes of the assured.[25] Having paid the assured for the loss, he is 'subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss'. The objective of this process is to prevent the assured from taking with both hands: once indemnified, he would not be allowed to be compensated twice over for the same loss.

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21 An assured who deliberately over-insures by double insurance may well be found guilty of a breach of the duty of utmost good faith (s 17) and of disclosure (s 18).

22 *Chalmers' Marine Insurance Act* (1906, 10th edn), p 131; hereinafter referred to simply as 'Chalmers'.

23 (1882) 7 App Cas 333 at p 339.

24 (1877) 3 App Cas 279 at p 284, HL.

25 By way of subrogation, the insurer has to sue in the name of the assured, whereas in the case of an assignment, he may sue in his own name.

It is to be noted that there is no right of subrogation in respect of a ppi policy. Void in law, the policy is not only unenforceable, but no rights can be derived from it.[26]

Settlement of total loss

In the event of a settlement of a total loss, the insurer is, by s 79(1):

- 'entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for'; and
- 'subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss'.

There are two separate aspects to this rule: the right to take over the interest in the remains of the subject-matter insured (involving abandonment and proprietary rights) and the right to subrogation. Though distinct, both rights are kindred to the principle of indemnity. In *Attorney-General v Glen Line Ltd and Liverpool & London War Risks Association Ltd*,[27] Lord Atkin, drawing the distinction between the rights of abandonment and the rights of subrogation, said that 'in respect of abandonment the rights exist on a valid abandonment, whereas in respect of subrogation they only arise on payment …'. Later, Mr Justice Diplock in *Yorkshire Insurance Co v Nisbet Shipping Co Ltd*[28] warned that:

> 'It is to be noted that the subsection [referring to s 79(1)] which comes into operation only upon payment for the total loss by the insurer, deals with two distinct matters: (1) the interest of the assured in the subject-matter insured, and (2) the rights and remedies of the assured in and in respect of that subject-matter.'

A failure to recognise that they are distinct has caused some confusion in the law.

Abandonment and proprietary rights

The word 'entitled' appearing in s 79(1) clarifies that the insurer is not compelled to take over whatever may remain of the subject-matter insured. The effect of this rule has raised interesting questions relating to proprietary rights over the abandoned property. This provision has to be read with s 63 (on the effects of abandonment) stating that:

> 'Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.'

The connection between a constructive total loss and the notice of abandonment was highlighted by Lord Justice Brett in *Castellain v Preston*[29] as follows:

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26 See *Edwards & Co Ltd v Motor Union Insurance Co Ltd* [1922] 2 KB 249; 11 Ll L Rep 170; 27 Com Cas 367 where McCardie J remarked: 'Legal proceedings to enforce subrogative rights cannot be based on a document which is stricken with sterility by an Act of Parliament.'

27 (1930) 37 Ll L Rep 55 at p 61; (1930) 36 Com Cas 1 at p 13.

28 [1961] 1 Lloyd's Rep 479.

29 (1883) 11 QBD 380 at p 387, CA.

> 'The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term.'

Section 63(1), using the same expression – 'entitled to take over', emphasises the fact that the insurer has on abandonment the option to take over 'all proprietary rights incidental thereto'.

Acceptance of abandonment

In practice, insurers rarely accept the abandonment, for this carries with it not only rights but also liabilities in respect of the abandoned property.[30] However, should they agree, whether expressly or impliedly, to assume ownership over the remains of the subject-matter insured, they would be able to retain any profit made on its sale. This rule was first established in *Attorney General v Glen Line Ltd*,[31] where the insurer was allowed to retain the whole of the proceeds of the sale even though he profited as a result. Justice Diplock in *Yorkshire Insurance Co v Nisbet Shipping Co Ltd*[32] observed that in the case of abandonment, 'the insurer is entitled although not bound to take over; if he does, the whole interest of the assured in the subject-matter insured is transferred to him'.

In this regard, some may say that the principle of indemnity has failed to realise its full potential, that the contract is not one of perfect indemnity. In accepting the abandonment, the insurer takes over not only rights but also liabilities in relation to the remains of the subject-matter insured. Thus, it could be validly argued that as he had assumed all responsibility in respect of the subject-matter insured, he should be allowed to keep any reward arising therefrom, which may be regarded as the consideration (or 'price') for accepting the good with the bad with the transfer of ownership.[33]

The insurer is also, by reason of s 63(2), entitled to any freight earned after his acceptance of the abandonment.[34] According to Lord Blackburn in *Simpson v Thomson*,[35] 'the right to receive payment of freight accruing due but not earned at the time of the disaster is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property …'.[36]

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30 Obvious liabilities are expenses incurred for the removal of the wreck and damage caused by oil pollution See *River Wear Comrs v Adamson* (1877) 2 App Cas 743; *The Mostyn* [1928] AC 57; and *Arrow Shipping Co v Tyne Improvement Comrs* [1894] AC 508.

31 [1930] 36 Com Cas 1; [1930] 37 Ll L Rep 55.

32 [1961] 1 Lloyd's Rep 479.

33 The same rule applies to the case of a missing ship: the insurer, on paying out, is entitled to keep the vessel should she later reappear: see s 58 and *Houstman v Thornton* (1816) Holt N P 242.

34 See *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159. To negate the operation of s 63(2), the 'Freight Waiver' clause (cl 20 ITCH(95) and cl 18 IVCH(95)) states: 'In the event of total or constructive total loss no claim to be made by the Underwriters for freight whether notice of abandonment has been given or not.'

35 (1877) 3 App Cas 279 at p 292, HL.

36 How the ship has become the property of the underwriter is another separate question altogether which will be discussed later. Suffice it is here to say that Lord Blackburn was of the view that it automatically passes over to the insurer on settlement of the loss.

No acceptance of abandonment

Problematic issues, however, arise where the insurer does not exercise the right to 'take over the interest of the assured in whatever may remain of the subject-matter insured so paid for …'. It is now necessary to consider the particular circumstance where the insurer who has paid the assured for the loss has declined to accept, expressly or impliedly, the abandoned property. The pertinent question is: Who is the owner of the abandoned property?

There are three possibilities as regards the subject of ownership on abandonment pursuant to a total loss: ownership could be automatically transferred to the insurer on settlement of the loss; the abandoned property could be *res nullius* – belongs to no one; or all proprietary rights remain with the shipowner.

Automatic transfer of ownership to insurer

In *Simpson v Thomson*, decided before the Act, Lord Blackburn of the House of Lords advocated the notion of automatic transfer. He had no doubt at all that:

> '… where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster …'

He argued that the validity of the rule as regards the insurer's right to freight (now contained in s 63(2)) can only be supported if this was the case.[37] His comments on this subject have already been cited. It is to be noted that Chief Justice Cockburn in *North of England Steamship Insurance Association v Armstrong* also supported this rule.'[38]

Res nullius

Mr Justice Bailhache in *Mayor & Corpn of Boston v France, Fenwick & Co Ltd*[39] expressed the view that the wreck must be *res nullius*, meaning, in lay terms, that it belongs to nobody, but to the world at large. His remarks were: 'I will only say that there is a good deal to be said … in favour of the wreck in such circumstances becoming a *res nullius*'. There does not appear to be overwhelming support for this view.

Both the above rule of automatic transfer of ownership and of *res nullius* are regarded by many as difficult to support, not only on the ground of the wording of both ss 63 and 79 but also of s 61 where an assured may, in the event of a constructive total loss, treat the loss as a partial loss. If the assured was held

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37 The wording of s 63(2) does not say anything about transfer of ownership. It is capable of two interpretations, namely, that the insurer is entitled to the said freight only if he accepts the abandonment, or, regardless of whether or not he accepts the abandonment. Unless the insurer has exercised the right to take over the interest or the notion of automatic transfer of ownership applies, it is difficult to see how he could be entitled to the freight earned subsequent to the casualty causing the loss. Lord Blackburn obviously prefers the latter construction.

38 (1870) LR 5 QB 244 at p 248. He said: 'Now, I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy …'.

39 (1923) 15 Ll L Rep 85; 28 Com Cas 367 at p 373.

to have been divested of ownership of the remains, it would be impossible for him to treat the loss as a partial loss.

Ownership remains with the assured

The third view, held by Lord Justice Greer in *Oceanic Steam Navigation Co v Evans*,[40] is that if the abandonment is not accepted by the insurer, the owner (assured) is not divested of ownership of the wreck. In other words, there is no automatic transfer of ownership and the property is not *res nullius*, but remains in the ownership of the assured until such time as the insurer exercises his right to take over control or ownership over the abandoned property. This appears to be the preponderant view.[41]

Rights of subrogation

The second part of s 79(1) confers upon the insurer 'all the rights and remedies of the assured in and in respect of that subject-matter'. In this regard, the extent of the subrogative rights has to be considered in relation to recovery of damages from a wrong-doer; gifts and voluntary payments received by the assured; and the right to salvage in the case of under-insurance.

Recovery of damages from a wrong-doer

In the event of a collision for which a third party is liable, an assured may well receive by way of damages an amount in excess of what he is entitled to claim under the policy. It is also possible that the insurer himself may, after having indemnified the assured for his loss, by exercising his right of subrogation recover from the wrong-doer a sum in excess of what he has paid to the assured. The crux of the matter is: Which party, the assured or insurer, is entitled to keep the excess? It should not make any difference to the question of entitlement to the sum already paid by the insurer to the assured, and to the excess, whether the assured or the insurer has recovered the damages from the third party.

Recovery of the amount paid by the insurer

In the early case of *North of England Steamship Insurance Association v Armstrong*,[42] the insurer paid the assured the sum of £6,000 (the full sum insured) as for a total loss, when the insured vessel was run down and sunk by another ship. Subsequently, a sum of £5,000 was recovered against the owners of the other vessel. The real value of the insured vessel was £9,000. The insurers asserted that they were entitled to the whole of £5,000. Chief Justice Cockburn awarded judgment in favour of the insurers on two grounds: first, by reason of the conclusive nature of a valued policy,[43] and, secondly, on the point of law

40 (1934) 50 Ll L Rep 1 at p 3, CA.

41 See also *Blane Steamship Ltd v Minister of Transport* [1951] 2 KB 965 at p 990 where Cohen LJ agreed with Greer LJ's opinion; *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* (1946) 79 Ll L Rep 417 at p 433; *Dee Conservancy Board v McConnell* [1928] 2 KB 159 at p 163; and *Allegemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1930] 1 KB 672 at p 688.

42 (1870) LR 5 QB 244; 39 LJ QB 81.

43 This issue which need not concern us here will be examined later.

relating to the right to salvage pursuant to payment for a total loss.[44] Using the right to salvage as analogy, Chief Justice Cockburn has implied that the insurer would be entitled to the whole sum (including the excess) in the event of a settlement with the assured. He was only able to arrive at this decision on the ground of automatic transfer of ownership.[45] It has to be said, and with due respect, that he has failed to appreciate the distinction between the right of the insurer to take over the interest of the assured in whatever may remain of the subject-matter insured with all proprietary rights incidental thereto, and the right of subrogation. In so far as the sum recovered from the wrong-doer did not exceed the amount which the insurer had paid to the assured, the decision of the court is correct. But real problems, however, would arise if the recovery was to exceed the amount paid out by the insurer.[46]

In *Thames and Mersey Marine Insurance Co v British and Chilian Steamship Co*,[47] the Court of Appeal, on similar facts, also held that the insurer was entitled to the whole sum recovered by the assured from the wrong-doer. But again, as the amount so recovered was not in excess of the sum paid out by the insurer, the decision cannot be faulted. However, in so far as the amount of damages recovered was calculated on the basis of a figure (the real value of the ship) higher than the agreed value stated in the policy, the decision is open to criticism.

Recovery of the excess

As was seen, there was no excess in either of the above two cases. Thus, they cannot be cited as authority for having laid down the rule that an insurer is entitled to any excess which may be recovered from a wrong-doer. The case which is directly on point as regards such a claim is *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd*,[48] where the insurer had, in accordance with the terms of the policy, paid the assured £72,000 for a total loss. Subsequently, the assured, because of a devaluation of the pound, received from the third party liable for the collision a sum in excess of what they had received from the insurer. The

44 He said at p 248: 'It is admitted that if this ship had been recovered from the bottom of the sea … the body of the vessel would have passed to the underwriters. If moreover, the value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel so recovered. And I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for the loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to what which is the representative of the ship in the shape of damage to be paid by the owners of the vessel which caused the collision.'

45 In *Goole & Hull Steam Towing Co Ltd v Ocean Marine Insurance Co Ltd* [1928] 1 KB 589 at p 598, Mackinnon J (as he then was) suggests that Cockburn CJ's reasoning can only be supported if it is based on 'cession of property to the underwriter upon payment for a total loss'.

46 Mellor J's views on the question of indemnity appears be more acceptable. Using the agreed valuation as the ceiling, he said, at p 250, that: '… as a matter of course … all those rights, which spring out of the payment by an underwriter for a total loss, must be governed by the agreed value.'

47 [1916] 1 KB 30, CA.

48 [1961] 1 Lloyd's Rep 479.

insurers then proceeded against the assured claiming not only what they paid out, but the whole sum which the assured had received from the third party. There was no doubt whatsoever that the insurer was entitled to recover the sum which he had paid out to the assured under the policy. By the doctrine of subrogation, they were clearly entitled to at least £72,000. But whether this right to subrogation extends to recovery of the excess was the main ground of contention. The court held that the insurers were entitled to be paid only the amount which they had paid under the policy. The excess windfall belonged to the assured. According to Mr Justice Diplock, the law has never 'suggested that the insurer can recover from the assured the amount of the excess'. More pointedly, his interpretation of the second part of s 79(1) was that it was 'limited to recovering any sum which he has overpaid; he cannot recover more than he has in fact paid'.[49]

The rule that the insurer is entitled only to what he has in fact paid out under the policy is derived from the principle of indemnity as spelt out in s 1 of the Act; in this context, the words 'in the manner and to the extent thereby agreed' are particularly relevant. For the same reason, if the assured were allowed to retain both sums, he would be paid twice over for the same loss: He would be more than indemnified for the loss. Summing up, '[t]he simple principle … is that the insurer cannot recover under the doctrine of subrogation now embodied in s 79 of the Marine Insurance Act 1906, anything more than he has paid'.[50] In the words of Lord Atkin, subrogation only arises on payment, and 'will only give the insurer rights up to 20s in the £ on what he has paid …'.[51]

Gifts and voluntary payments

Whether an insurer who has paid the assured and has thereby been subrogated to the rights of the assured is entitled to claim any benefit which has been conferred on the assured by third parties is a question which has to be considered. The real issue here is: How far does the principle of subrogation extend? An assured may receive gifts and voluntary payments made by third parties for the purpose of compensating him for his loss. This precise point arose in *Burnand v Rodocanachi*,[52] where a compensation was paid to the assured in respect of the difference between the real value of the cargo and the sum which the assured received from their insurers. The insurers claimed from the assured, as salvage, this sum which the assured had received from the compensation fund. The House of Lords held that the insurers were not entitled to this sum because it was a gift made not for the purpose of reducing the loss against which the insurers had to indemnify the assured, but to compensate the assured personally for the loss actually sustained by him. In each case, the purpose of the gift or voluntary payment has to be ascertained. An insurer

49 The principle was applied in *Goole & Hull Steam Towing Co Ltd v Ocean Marine Ins Co Ltd* [1928] 1 KB 589 in relation to a partial loss.

50 [1961] 1 Lloyds Rep 479 at p 487, *per* Diplock J.

51 *Attorney General v Glen Line Ltd* [1930] 36 Com Cas 1 at p 13.

52 (1882) 7 App Cas 333.

cannot claim a gift or payment the purpose of which is to indemnify the assured for that portion of the loss which the insurance had not covered.

Under-insurance

An assured may insure 'for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation'. In such an event, he is under-insured and is deemed by s 81 to be his own insurer in respect of the uninsured balance. An assured who is under-insured may find himself out of pocket even though he may have been fully indemnified by the insurer under the policy. As he is his own insurer for a proportion of the loss, he is entitled consequent to abandonment to a proportionate share of the salvage. The doctrine of subrogation, which originates from the principle of indemnity, will not permit an insurer from recovering more than he has paid out for his share of the risk. This principle was applied in *The Commonwealth*,[53] where the Court of Appeal held that '… the underwriters are to take all that is recovered, provided it does not exceed the amount they have paid …'.

Settlement of partial loss

As there is no question of abandonment of the insured property in the case of an indemnity for a partial loss, the insurer has no proprietary right to the subject-matter (or the remains of it) insured. By s 79(2), he is subrogated only to the rights and remedies of the assured, but only in so far as the assured has been indemnified. On the other side of the coin, the assured would not be allowed to retain any recovery from a third party when he has already been indemnified by his insurers.

53 [1907] P 216, CA; affirming *The Welsh Girl* (1906) 22 TLR 475, the assured who were their own insurers for a 350/1,350th share were entitled to recover from their insurers that proportion of the sum which the insurer had obtained from the ship at fault.