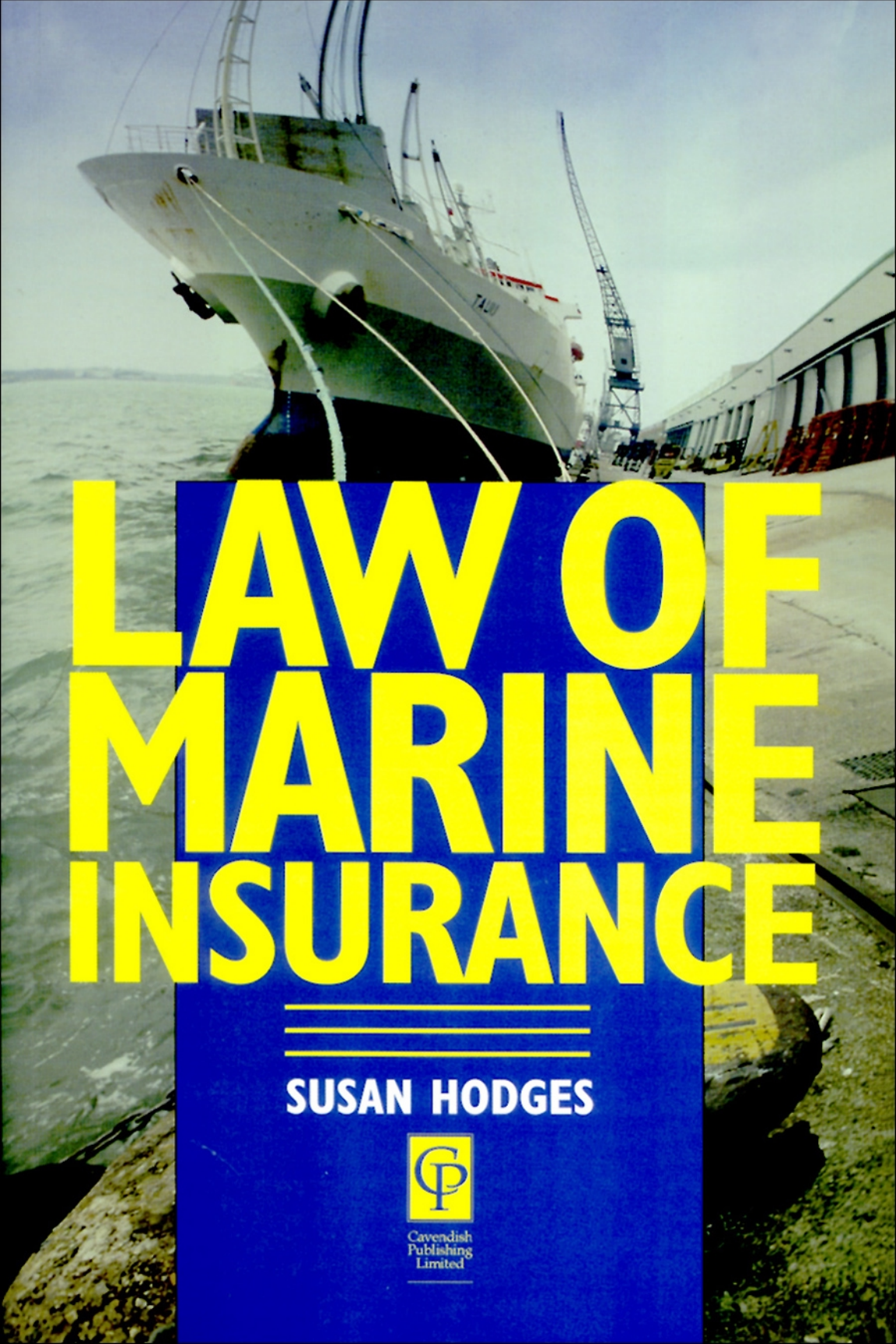

LAW OF MARINE INSURANCE

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CHAPTER 15

TOTAL LOSS

INTRODUCTION

Like the common law, the Marine Insurance Act 1906 recognises only two main types of loss: a total loss and a partial loss. A total loss may be either an actual total loss or a constructive total loss (s 56(2)). This chapter will first discuss the various types of actual total loss, and then the nature of a constructive total loss together with matters relating to the giving of a notice of abandonment and ademption of loss. Partial losses will then be discussed in the next two chapters, the first of which will study the different types of particular average loss: particular average loss of ship and goods, and the measure of indemnity therefor. This will be followed by a chapter on extraordinary expenses such as salvage, salvage charges, general average and sue and labour charges (particular charges) where each of these special claims will be dealt with separately.

As a preface to this and the next two chapters on claims for losses, it is necessary to highlight the new clause in the ITCH(95) relating to the giving of notice of claims and tenders. The new addition to cl 13.1 of the ITCH(95) is applicable to all claims whether the loss be total or partial.

Notice of claim and tenders

Whenever any accident occurs whereby loss or damage *may* result in a claim, whether for a total or a partial loss, under the insurance the assured is required to give notice to the underwriters. By cl 13 of the ITCH(95),[1] he is required to give notice to the underwriters promptly after the date on which the assured, owners or managers become or should have become aware of the loss or damage and prior to survey so that a surveyor may be appointed if the underwriters so desire. Under cl 8 of the IVCH(83)[2] the assured is only required to give notice to the underwriters prior to survey, and to the nearest Lloyd's Agent (if the vessel is abroad) so that a surveyor may be appointed if underwriters so wish.

Prompt notice

What constitutes prompt notice under the new cl 13.1 is in on each case a question of fact; in any event notice must be given as soon as it is reasonably possible after the date on which the assured, owners or managers become or *should have become* aware of the loss or damage and, definitely, before survey. Besides the owners, a mortgagee could, of course, be an 'assured' under a policy of insurance.[3] And should he have knowledge of the fact that the insured ship

1 Previously cl 10 of the ITCH(83).

2 And cl 10 of the ITCH(83).

3 A mortgagee could take out his own policy as an original assured of a policy. See Chapter 2.

had met with an accident, he himself would have to report to the underwriters in accordance with the terms of cl 13.1.

Whether a mere failure to report promptly in itself constitutes a breach of contract is questionable. But, of course, if the assured fails to report within the 12-month limit, then his claim becomes time-barred, in which case the underwriter is automatically discharged from liability.

Automatic discharge from liability

Clause 13.1 of the ITCH(95) requires that the assured makes a report to the underwriters within 12 months of the date when the assured (owners or managers) become aware or should have become aware of the loss or damage. The consequence for failing to report within the 12-month period is that the underwriters are *automatically* discharged from liability for any claim under the insurance in respect of any resulting claim.

The expression 'automatically discharged'[4] is borrowed from *The Good Luck*,[5] where the law on the effects of a breach of a promissory warranty was debated and settled by the House of Lords. As the concept of automatic discharge applies to a breach of a warranty, one could be misled into thinking that this clause, in stipulating the same effect for its breach, must be a promissory warranty. It is significant to note that the underwriters are discharged from liability, but only for any claim 'in respect of or arising out of *such* accident or loss or damage'.[6] In other words, the underwriters are automatically discharged from liability, but only as regards any claim arising from the particular accident of which the assured had failed to notify to the underwriters within the prescribed period.

Unlike a breach of a promissory warranty, the underwriter is not discharged from further liability as from the date of the breach. Only the claim(s) arising from the particular accident which he had failed to report is time-barred and, therefore, not recoverable. Unlike a breach of a promissory warranty, the future liability of the underwriter is clearly not brought to an end by the breach; neither is the contract of insurance itself brought to an end. The underwriters may, of course, waive the breach if they so desire, but this has, according to cl 13.1, to be confirmed in writing.

A – ACTUAL TOTAL LOSS

An actual total loss is defined by s 57 as thus:

> 'Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.'

4 It is to be noted that only 'discharge' is used in cl 4, the new classification clause, and 'terminate automatically' in the new cl 5.1 of the ITCH(95).

5 [1991] 2 Lloyd's Rep 191, HL. The legal effects of a breach of a promissory warranty are discussed in depth in Chapter 7.

6 The crucial word here is 'such'.

It is necessary at the outset to mention that s 57 is applicable to any subject-matter insured, whether ship, cargo or freight. There are three parts to this definition, each of which will be analysed, and where appropriate with illustrations of loss of ship and/or of goods.

The first and the last parts of s 57 are derived from an observation made by Lord Abinger in *Roux v Salvador*,[7] where the whole basis of marine insurance was referred to in the following terms:

> 'The underwriter engages, that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the peril against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured.'

It is to be noted that under s 57(2) no notice of abandonment need be given in the case of an actual total loss.[8]

WHERE THE SUBJECT-MATTER IS TOTALLY DESTROYED

A total wreck

The first part of s 57 is obviously taken from the above comments of Lord Abinger, the words 'totally destroyed or annihilated'. To what extent must a ship be damaged before she could be described as having been 'destroyed'? The first case to provide an answer to this question was *Bell v Nixon*,[9] where it was said, in reference to a wooden ship, that 'her planks and apparels had to be scattered in the sea'. In *Cambridge v Anderton*,[10] the well-known 'a congeries of planks' expression was coined by Chief Justice Abbott: 'If the subject-matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck …'. Finally, in the Scottish case *Sailing Ship Blairmore Co Ltd v Macredie*,[11] Lord Watson, using strong and picturesque language, embellished upon the subject. He decided that *The Blairmore* was not a total loss because she:

> '... did not become, in the strict sense of the term, *a total wreck*, seeing that she was not reduced to the condition of a mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship, and that she had sunk in a depth of water which admitted of her being raised to the surface and repaired.'

The very concept of an actual total loss conjures a picture in one's mind of a ship foundering in a squall; sinking in deep waters after a collision; being consumed by fire or destroyed by the enemy – leading to a physical total loss or annihilation of the subject-matter insured. This has perhaps led Lord Halsbury

7 (1836) 3 Bing NC 266 at p286.

8 *Cf* s 62 on constructive total loss.

9 (1816) Holt NP 423 at p 425.

10 (1824) 2 B & C 691.

11 [1898] AC 593 at p 598, hereinafter cited as *The Blairmore*.

in *The Blairmore* to say that:[12] '… a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again …'. The matter, however, is not quite as simple as was envisaged by Lord Halsbury. Fortunately, his somewhat sweeping remark was clarified in *Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co*,[13] where the Privy Council warned that:

> 'Lord Halsbury's remark must not be taken as meaning that any ship is an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present to salvors a problem of some difficulty.'

Thus, the mere fact that a ship has sunk even in very deep sea does not automatically mean that her owners can claim for an actual total loss. A shipowner would have to satisfy the court that in the circumstances of the case, it is either physically or commercially (in a business sense) impossible to raise the sunken vessel.[14] Proof of the former would establish an actual total loss, and of the latter, a constructive total loss.

It appears from the above authorities that to qualify as an actual total loss, the vessel has to be so severely damaged as to become a total wreck. There is, however, another approach adopted by Mr Justice Willes in *Barker v Janson*,[15] decided before the Act. He held the view that:

> 'If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purpose of a ship …'

This seems to be a more liberal and an easier requirement to fulfil. Whether the test of navigability and of the impossibility to carry out repairs should be read conjunctively is unclear. The last part of his remark, however, seems to imply that both criteria have to be fulfilled: simply being unnavigable is not enough to render the vessel an actual total loss; the vessel must also be placed in a position where it is impossible, for whatever reason, to carry out any necessary repairs. The whole statement is ambiguous to say the least. Such a situation falls more easily in line with the second limb of s 57.

Presumption of an actual total loss: missing ship

An actual total loss may be presumed where 'the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received'. What is or is not a lapse of a reasonable time is a question of fact.[16]

12 *Ibid*.

13 [1927] AC 698 at p 705; *per* Viscount Sumner.

14 A host of factors, eg, the place where she lies, her size, the nature of her injuries, and the available facilities for salvage work, would have to be taken into consideration.

15 (1868) LR 3 CP 303 at p 305.

16 See s 88.

As discussed earlier,[17] the common law by the case of *Green v Brown*[18] is prepared in the case of a missing ship to presume a loss by perils of the seas. This presumption, together with the presumption of a total loss allowed by s 58, should ease the plaintiff's burden of proof considerably. However, in *Houstman v Thornton*,[19] a vessel which was not heard of for nine months was presumed by the court to be a total loss, but with the caveat that should she be discovered afterwards, it will be for the benefit of the insurers.

In relation to goods, to qualify as an actual total loss under this heading, nothing short of utter and complete destruction of the goods in specie, either actual or inevitable, will suffice. In *Dyson v Rowcroft*,[20] a cargo of fruit, which was so damaged by sea-water and stunk so badly that the government prohibited its landing, was thrown overboard. The court held that there was in this case an actual total loss. However, the court noted that as there was always so much temptation in such circumstances to throw the cargo overboard, each case must be looked at with some suspicion. Thus, one should not lose sight of the fact that the necessity of having to jettison the cargo has to arise from a peril insured against.

Neither deterioration in quality nor depreciation in value will give an assured the right to terminate the adventure and recover for a total loss. For example, in *Anderson v The Royal Exchange Assurance*,[21] a vessel carrying a cargo of wheat was, to prevent her from sinking, ran on ashore. The vessel was under water for four weeks, during which time the assured rigorously made attempts to save the cargo. A greater part of the cargo was recovered, kiln-dried, and could have been sold as wheat. The assured, however, gave notice of abandonment and claimed for a total loss. The court held that, as some of the cargo had been salved, there was not, in fact, a total loss.[22]

CEASE TO BE A THING OF THE KIND INSURED

A ship which is so destroyed as to become a total wreck would not only fall within the first, but also the second part of s 57: reduced to 'pieces of iron' she would certainly 'cease to be a thing of the kind insured'. However, this category of loss is more relevant to cargo than to ship or freight. The nature of cargo is such that it lends itself more easily to the application of this principle. The authority for this rule has to be *Asfar v Blundell*,[23] where a cargo of dates, having

17 See Chapter 9.

18 (1743) 2 Str 1199. In *Koster v Reed* (1826) 6 B & C 19, it was said to be only a *prima facie* presumption.

19 (1816) Holt NP 242.

20 (1802) 3 B & T 474.

21 (1805) 7 East 38.

22 *Ibid*, at p 43, Lord Ellenborough pointed out that the assured '... did not however treat it as a total loss at the time [when it was submersed in water] but continued labouring on the vessel and cargo on their own account ... and succeeded in preserving part of it ... and when they did abandon it was no longer in fact a total loss'. They could not recover for a partial loss because of the free from particular (except general) average warranty.

23 [1896] 1 QB 123, CA.

been so impregnated with sewage, was held by the Court of Appeal to be a total loss for which freight was not payable on delivery. In a state of fermentation and putrefaction, they had lost 'any merchantable character as dates'. This case has highlighted the fact that to constitute an actual total loss, 'total destruction is not necessary'; a destruction of the merchantable character of the goods would suffice.[24] In each case, the test is whether 'as a matter of business, the nature of the thing has been altered'.[25]

Similarly, in *Roux v Salvador*,[26] Lord Abinger had to determine whether a cargo of hides which was so far damaged by a peril of the sea that it never could have arrived in the form of hides was a total loss. Their condition was described as follows: 'By the process of fermentation and putrefaction, which had commenced, a total destruction of them before their arrival at the port of destination, became as inevitable as if they had been cast into the sea or consumed by fire.'[27] As the hides had actually changed their form, they were sold as glue, manure, or ashes. This change in specie was sufficient to render the loss an absolute total loss.[28]

The above pair of cases have established the principle that cargo which has sustained a total destruction 'in specie', either actual or inevitable, would qualify as a total loss under this part of s 57. The expression 'in specie' in effect has the same meaning as 'so damaged as to cease to be a thing of the kind insured'.

For the purpose of contrast, the case of *Francis v Boulton*[29] may be cited. A cargo of rice which had become saturated with water was held to be only a partial loss. That the rice was capable of being conditioned, and when kiln-dried was sold as rice fetching about a third of its sound value were factors which influenced the court's decision.[30] As the rice remained as rice in specie, there was no total loss.

24 [1895] 2 QB 196 at p 201, *per* Mathew J, in the court of first instance. On appeal [1896] 1 QB 123, CA.

25 See also *Duthie v Hilton* (1868), LR 4 CP 138 where it was held that freight was not payable in respect of cement which had become wet and had lost its properties as cement; it had been changed into a hard substance, though all the cement was there.

26 (1836) 3 Bing NC 266 at p 281.

27 See also *Montoya & Others v The London Assurance Co* (1851) 6 Ex 451, where damage sustained by a cargo of tobacco caused by the putrefaction of hides, rendered putrid by sea water, was held recoverable as a total loss by perils of the sea.

28 In *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442, QB, steel injection moulds which had rusted so badly that they were incapable of use as moulds, with no more value than scrap metal, was held an actual total loss.

29 [1895] 1 Com Cas 217.

30 See *Glennie v The London Assurance Co* (1814) 2 M & S 371, where the court stated: 'Assuming it [cargo of rice] to have produced nine-tenths less than its value, that will not make it a total loss'; and *Boon & Cheah Steel Pipes Sdb Bhd v Asia Insurance Co Ltd* [1975] 1 Lloyd's Rep 452, Malaysia High Court, where the court expressed the view that it would only be prepared to apply the *de minimis* rule if only a single pipe or two out of the whole consignment was lost.

Obliteration of marks

An owner of cargo may sustain a loss because his cargo has, due to an obliteration of marks, become unidentifiable. Section 56(5) states:

> 'Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial and not total.'

In *Spence and Another v The Union Marine Insurance*,[31] cotton belonging to various owners were shipped on board the same vessel as the plaintiff's cargo of 43 bales of cotton. During the course of the voyage, some of the bales were lost, some were damaged, and on some the identification marks were so badly obliterated that they could not be identified as belonging to which of the owners. Only two of the 43 were identified and delivered to the plaintiffs. The bales have become unidentifiable not by reason of a change in specie or character, but by a loss of their identification marks. The confusion only arose because similar cargo belonging to several parties were shipped together; as there was no loss in specie, the matter was treated as a partial loss. The court dealt with the confusion in the following manner: '… when goods of different owners become by accident so mixed together as to be indistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportion in which they have severally contributed to it'.

'IRRETRIEVABLY DEPRIVED THEREOF'

This part of s 57 takes care of the situation where the subject-matter insured is not destroyed, remains in specie, but is in the hands of a third party, whether a captor, an enemy, a purchaser or a barratrous crew. Whether the assured has or has not been 'irretrievably deprived' of the subject-matter insured is, of course, a question of fact.

In *George Cohen, Sons & Co v Standard Marine Insurance Co Ltd*,[32] an obsolete battleship which went ashore on the Dutch coast was detained by the Dutch authorities which feared that she might damage the sea defences of the area. The owners pleaded that they had suffered an actual total loss claiming that they have irretrievably lost their insured property. This plea was rejected by the court on two grounds. First, the fact that the battleship could be got off physically, even though the whole operation may be an engineering feat requiring considerable preparation and high expenditure, indicated that she was not irretrievably lost. Secondly, the order of the authorities, however influential, was not conclusive; as the possibility of appeal against the order was always available, it meant that the directive of the authorities could well be set aside by a higher body.

In *Marstrand Fishing Co Ltd v Beer, The Girl Pat*,[33] the master and crew ran off with the ship in order to use her for trading. As Mr Justice Porter could not find

31 (1868) LR 3 CP 427.

32 (1925) 21 Ll L Rep 30.

33 [1937] 1 All ER 158.

any evidence to suggest that the vessel was irretrievably lost to her owners, the loss to her owners was not an actual total loss.

A ship which has been captured by enemies, condemned in the Prize Court, and ultimately sold would be an actual total loss. This was the decision of *Stringer and Others v The English and Scottish Marine Insurance Co Ltd*.[34] The same decision would have been delivered in *Andersen v Marten*,[35] if it were not for the 'warranted free from capture' clause in the policy.

In relation to goods, Earl Loreburn in *The Sanday Case*[36] was prepared to hold that an assured whose goods, though they remain in specie and were effectively in the possession of the assured, has been irretrievably deprived of them because all prospect of their safe arrival on the voyage was hopelessly frustrated by the outbreak of war. Here, it has to be borne in mind that the subject-matter insured which was held to have been lost was not the goods, but the adventure. The assured was not irretrievably deprived of the goods themselves, but of the performance of the voyage.

RECOVERY FOR A PARTIAL LOSS

Section 56(4) states that, 'Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.' A policy containing a free from particular average warranty is one which 'otherwise provides'.

In *Boon and Cheah v Asia Insurance Co Ltd*,[37] counsel for the assured had, because of the free from particular average warranty, to present a case of a total loss. It was argued that applying the maxim *de minimis no cura lex*, a loss of 98.3% of the cargo of steel pipes was sufficiently high to constitute a total loss. This contention was rejected by the Malaysian High Court which held that there was not a total loss. By reason of the warranty, the partial loss was held not recoverable under the policy.

34 (1869) LR 4 QB 676; (1870) LR 5 QB 599, CA.

35 [1908] AC 334, where a neutral ship was captured and afterwards condemned in the Prize Court. It was held that there was in fact a total loss by capture, but because of the 'free from capture' warranty, the owners could not recover on the policy.

36 [1916] 1 AC 650, HL. All the other Law Lords preferred to rest their decision on the ground that the voyage was 'reasonably abandoned' on account of its actual total loss (not of the goods but of the voyage) appearing to be unavoidable: s 60(1).

37 [1975] 1 Lloyd's Rep 452.

ACTUAL TOTAL LOSS OF FREIGHT

Payment of freight and delivery of goods

The payment of freight and delivery of goods are concurrent conditions.[38] Thus, if cargo is for whatever reason not delivered at its proper destination, freight is not payable.

A total (actual or constructive) loss of goods caused by an insured peril would naturally result in a total loss of freight. In *Denoon v The Home and Colonial Assurance Co*,[39] for example, the ship in which the cargo of rice was carried was wrecked resulting in a total loss of the rice which in turn caused a total loss of the freight of the rice. Similarly, in *Iredale and Another v China Traders Insurance Co*,[40] chartered freight was held a total loss by the peril of fire[41] when a cargo of coal which became so heated that it had, for the safety of all concerned, to be landed at a port of refuge. The abandonment of the chartered voyage resulted in an actual total loss of chartered freight.

When cargo arrives at its proper destination, even in a damaged state, or is short delivered, the agreed freight is nevertheless payable in full.[42] The charterer or consignee is, of course, entitled to claim for damages for the damaged goods or short delivery by means of a cross-action, but not as a set-off.

The common law is always prepared to presume that freight is payable only on delivery of the goods at the port of discharge. If cargo is not delivered at its agreed destination, freight is, as a general rule, not payable; and if the non-delivery of the cargo is caused by a peril insured against, the assured of freight would be able to claim for a total loss of freight.[43] This was made clear in *Rankin v Potter* by Mr Justice Brett of the House of Lords, who observed that:[44] 'There may be an actual total loss of freight under a general policy if there be … an actual total loss of the whole cargo …'. The word 'general' (qualifying 'policy') warns that if the policy insures freight generally (as opposed to specifically in relation to a particular cargo) earned by the ship, it may be possible for the ship to carry *other* cargo on the voyage insured and thereby earn an equal amount of, or some freight. In such a case, the assured of freight cannot by reason of the

38 Freight is the remuneration payable to the carrier for the conveyance of goods from the port of shipment to the destination agreed under the contract of affreightment, be it a voyage charterparty or a bill of landing.

39 (1872) LR 7 CP 341.

40 [1900] 2 QB 519, CA.

41 See *The Knight of St Michael* [1898] P 30. Fire is an insured peril under the Institute Freight Clauses.

42 Unless the freight has already been paid in advance.

43 In *Price & Another v Maritime Insurance Co Ltd* [1900] 5 Com Cas 332; [1901] 2 KB 412, CA, there would have been a total loss of freight, if it were not for the application of Italian law which allow recovery for distance freight for part of the cargo which was salved when the ship failed to arrive at its proper destination by reason of constructive total loss. The assured were, however, unable to claim for the partial loss because of the free from particular average warranty.

44 (1873) LR 6 HL 83 at 99, HL.

principle of indemnity claim for a total loss of freight, if he has earned some freight from the carriage of other cargo.

Constructive total loss of goods

As mentioned earlier, freight is payable even if the cargo is delivered in a damaged condition at its proper destination. This rule, however, does not apply where the cargo delivered is so severely damaged as to be in an unmerchantable condition. To illustrate this point, reference has to be made again to the classic case of *Asfar v Blundell*,[45] where freight was held not payable for dates which were delivered impregnated with oil and sewage and unfit for human consumption. Having lost their identity as dates, they were a constructive total loss. A constructive total loss of goods could thus engender an actual total loss of freight.

B – CONSTRUCTIVE TOTAL LOSS

INTRODUCTION

The doctrine of constructive total loss is peculiar to marine insurance.[46] The concept is defined in s 60, but before embarking upon an analysis of the terms and requirements of each of the different types of constructive total losses, it is necessary at this juncture to offer some observations as to the relationship between the subsections, and the overall scheme of the section.

Scheme of section 60

Section 60(1) introduces with a broad and general definition of a 'constructive total loss' in the following terms: 'Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned …'.

Section 60(2) begins with the words: 'In particular, there is a constructive total loss …' and then proceeds to set out a list of events which would cause a constructive total loss of ship and goods.

Without at this stage of going into detail as to the characteristics of a constructive total loss, it is necessary to point out certain salient features about s 60. First, it is observed that by s 60(1), a constructive total loss is dependent upon the subject-matter being 'reasonably abandoned'. No such qualification, however, appears in s 60(2). Secondly, s 60(2) offers two specific cases of a constructive total loss; the first (s 60(2)(i)) is on deprivation of possession, and the second (s 60(2)(ii) and (iii)), the cost of repairs. Are these mere examples of

45 [1896] 1 QB 123. See also *Duthie v Hilton* (1868) LR 4 CP 138, where freight was held not payable for the delivery of solidified cement salvaged from a vessel which had been scuttled.

46 See *Court Line Ltd v R, The Lavington Court* [1945] 2 All ER 357 at p 365, *per* Stable J; *Manchester Ship Canal Co v Horlock* [1914] 2 Ch 199 at p 208, CA, *per* Swifen Eady LJ: 'The expression "constructive total lost" has no meaning as applied to a ship, except in connection with marine insurance …'.

the preceding subsection, or are they separate heads of claim? The phrase 'in particular' gives the impression that they are illustrations of sub-s (1). Thirdly, only ship and goods are mentioned in s 60(2), nothing is said about freight.

Section 60 is renowned for raising 'great difficulties of construction'; the fitting together of the two subsections of s 60 is by no means easy.[47] Fortunately, the matter has been resolved by the House of Lords in *Robertson v Petros M Nomikos Ltd*,[48] where Lord Wright expressed the view that: 'The two sub-ss contain two separate definitions, applicable to different conditions of circumstances'. Two years later, again in the House of Lords in *The Rickards Case*,[49] he was given yet a further opportunity to drive the point home. He confirmed that:

> '… the view which this House arrived at was that the two subsections contained two separate definitions, which may be applied to different conditions of fact. Thus, an assured can base his claim on the terms of subsection (2), which give an objective criterion in each case, ship, goods or freight,[50] not only more precise than, but substantially different from that in subsection (1). Subsection (2), as compared with subsection (1), is thus additional, and not merely illustrative.'

Lord Porter, however, in *The Robertson Case*,[51] took a slightly different route to arrive at the same conclusion. He said:

> But it does not follow that the first subsection lays down the general rule, whereas the second gives certain particular instances already covered by the general rule. Indeed, whatever may be the case with regard to s 60(2)(i), ss 60(2)(ii) and (iii) do not appear to be covered in terms by the definition in s 60(1). But in any case, unless there is some reason to the contrary, a definition must be held to include the whole of its wording, and if particular instances are given which include matters which are outside the more general definition, that is no reason for supposing that their application is limited by the more general words. They do not merely illustrate: they add to the terms of the definition. Section 60 does not confine constructive total loss to cases where the subject-matter of insurance has been abandoned, though in some instances there may be no constructive total loss unless abandonment has taken place.

A complete definition

The above discussion has clarified the point that the two subsections are separate, but does not answer the question as to whether s 60 contains an exhaustive definition of a constructive total loss. The matter was touched upon (by way of *obiter*) by Lord Porter in *The Robertson Case*, but came up squarely before the court in *Irvin v Hine*,[52] where counsel for the assured attempted to

47 Lord Wright for one in *Rickards v Forestal Land, Timber and Railways Co Ltd* [1941] 3 All ER 62 at p 79, HL, would be sympathetic to such a belief: 'That is perhaps inevitable, and is certainly excusable when it is sought in a brief section, supplemented though it is by ss 61 to 63, to embody the complicated problems of law and fact which experience has shown to arise in the case of a constructive total loss'.

48 [1939] AC 371, HL, hereinafter cited as *The Robertson Case*.

49 [1941] 3 All ER 62 at p 79, HL.

50 But s 60(2) does not mention freight.

51 [1939] AC 371 at p 392, HL.

52 [1950] 1 KB 555.

introduce a 'new' head of constructive total loss which is covered by neither s 60(1) nor 60(2).

In *Irvin v Hine*, the vessel in question grounded in a severe and prolonged storm; owing to wartime conditions, and to the licensing system then in force, it was unlikely that she would be repaired within a reasonable period of time. On this basis, the assured claimed against the insurers for a constructive total loss, alternatively, a partial loss. It was argued that the vessel was a constructive total loss because it was unlikely that the assured would be able to obtain a licence to repair her.[53] But for the evidence that her repairs would probably be deferred for an indefinite period, there was no evidence to suggest that her condition was such that an actual total loss appears to be unavoidable.[54]

Mr Justice Devlin, relying on a remark made by Lord Porter in *The Robertson Case*,[55] held that on its true construction, s 60 was a complete definition. He emphasised that the word 'defined' in the marginal note '… shows conclusively that s 60 is intended to define a constructive total loss, which is the same as saying that s 60 circumscribes completely the concept of constructive total loss'.[56]

Lord Porter, however, in *The Robertson Case*, depended on s 56 to arrive at the same result: 'That s 60 is intended to be a complete and not a partial definition appears to follow from the wording of s 56 when it says: "Any loss other than a total loss, *as hereinafter defined*, is a partial loss"'.[57]

As the assured could not bring his case within any of the heads in s 60, the vessel was held not to be a constructive total loss. Mr Justice Devlin was not at all concerned with whether or not the loss would have been a constructive total loss under common law. The fact that it was not a constructive total loss under s 60 was in itself sufficient to dispose of the plaintiff's claim for a total loss.

There is clearly no room under the Act for the introduction of any *new* form or theory of constructive total loss: in this sense, s 60 is complete and exhaustive. However, it has to be mentioned that there is another specie of constructive total loss, created by the common law, that of the loss of voyage applicable only to goods, which is not expressly acknowledged by the Act. Though not given a place in the statute book, this common law form of constructive total loss of goods was given the highest seal of approval possible by the House of Lords in *The Sanday Case*,[58] decided after the passing of the Act. '*The Sanday* principle' now stands in its own right as a type of constructive total loss peculiar only to goods.

53 It is to be noted that the test of 'unlikely' in s 60(2)(i) relates to the unlikelihood of recovery of possession of the subject-matter insured, and not the unlikelihood that he would be able to repair her within a reasonable time.

54 See s 60(1).

55 [1939] AC 371, HL.

56 [1950] 1 KB 555 at p 568. The marginal note to s 60 states: 'Constructive total loss defined'.

57 [1939] AC 371 at p 392, HL.

58 [1916] 1 AC 650. *The Sanday Case* has already been discussed elsewhere, see Chapter 3.

Types of constructive total loss

As each of the subsections to s 60 is held not to be a mere elaboration of the preceding subsection, but an independent head of claim, they will have to be discussed separately. Section 60, though it has only two subsections, may for the purpose of discussion be broadly divided into four main parts:

- the first part (s 60(1)) which is of general application relates to any insured subject-matter (whether ship, goods or freight) that has been 'reasonably abandoned';
- the second (s 60(2)(i)), applicable only to ship or goods, is on deprivation of the subject-matter insured;
- the third (s 60(2)(ii)) is concerned with damage to ship; and
- the fourth (s 60(2)(iii)) is on damage to goods.

REASONABLE ABANDONMENT OF SUBJECT-MATTER INSURED

There are two parts to s 60(1). To recover for a loss under this section, the assured has to show that the subject-matter insured was 'reasonably abandoned' either:

- 'on account of its actual total loss appearing to be unavoidable'; or
- 'because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.'

The word 'abandon' (and 'abandonment') appearing in ss 60–63 has, depending on the context in which it is used, different meanings in the law of marine insurance.[59] The term was subjected to thorough examination in *Court Line Ltd v R, The Lavington Court*,[60] where the Court of Appeal had to decide, though the action was not in relation to a marine policy, on a hypothetical basis, whether the vessel was 'abandoned' within the meaning of s 60(1).[61]

One would have thought that, as the requirement of reasonable abandonment is common to both parts of s 60(1), the same meaning ought to have been given to the word 'abandon' in both parts. Lord Justice Scott

59 Chalmers, p 98, observes that the term 'abandonment' is used in three different senses. First, an assured may where there is a constructive total loss 'abandon' the subject-matter insured to the insurer, the purpose of which is to transfer whatever rights the assured may have of the remains of the subject-matter insured to the insurer. Secondly, it is sometimes loosely used to refer to a notice of abandonment. Thirdly, it could refer to abandonment by operation of law of whatever remains of the subject-matter insured when the insurer pays for a total loss. There is, however, a fourth category, where the master and crew abandon or leave, giving up for lost, the subject-matter insured.

60 [1945] 2 All ER 357, CA.

61 The dispute was in relation to a charterparty under which there was a clause providing that: 'Should the vessel become a constructive loss such loss shall be deemed to have occurred and the hire under this contract shall cease …'. The court had, therefore, first to determine whether the vessel was a constructive total loss as understood in the law of marine insurance.

observed that even in s 60(1) itself, the term is used in two different senses. In the light of this, it is necessary, in order to avoid confusion, that the concept of abandonment be discussed in its proper context.

Actual total loss appearing unavoidable

Reasonable abandonment of ship

Leaving the ship

According to *The Lavington Court*, an abandonment under s 60(1) takes places when the master and crew leave the ship with the intention of never returning. Such an act, said Lord Justice Scott, 'may and very often must be by the master in exercise of his authority express or implied, but usually pursuant to his general powers of agency for his owner'. An abandonment under this part of s 60(1) constitutes a physical act of leaving the ship. In similar vein, Lord Justice Scott said:[62]

> '... whereas the forecast of the probability of actual total loss would, at any rate a century ago, nearly always have to be made by the master on the spot; and even in these days of easy and quick wireless communication, the decision would very often devolve on the master.'

Lord Justice Stable, however, preferred to focus his attention on the nature of the act itself. The term must be:

> '… directed to the act, that is to say, the actual abandonment of the ship by the responsible person in whose charge she is. In my judgment, abandonment in the present context was complete when the master finally and irrevocably left the ship …'

'Give up for lost'

Even though Lord Justice Du Parq did not agree with the other two Law Lords that the word 'abandoned' was capable of having two different meanings in one subsection, his understanding of the term is in effect not altogether that different. To him, the word 'abandon' refers to:[63]

> '… something done by the shipowner or his agent with his authority, and I would add that the master may often be an agent of necessity. I understand "abandon" to mean "give up for lost", and when I say give up for lost I mean that the owners are renouncing all their rights in the ship except the right to recover insurance.'

To constitute abandonment under this part of s 60(1), the physical act of leaving the ship must also be accompanied with the intention of never returning. Leaving the ship temporarily would not suffice. The court held that as the master had no intention of abandoning the ship in this sense, there was no constructive total loss.[64]

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62 [1945] 2 All ER 357 at p 363, CA.

63 *Ibid*, at p 365. 'The word "abandoned" in s 60 cannot ... be given one sense in relation to the first, and another in relation to the second limb of subsection (1)'.

64 The vessel was not 'given up for lost', as the master was mainly concerned with saving the lives of the crew and property.

Meaning of 'unavoidable'

An act of abandonment *per se*, even if made with the intention of renouncing all the owner's rights in the ship, would not satisfy s 60(1). The ship has to be abandoned by reason of 'an actual total loss appearing to be unavoidable'.[65] To illustrate this requirement of a constructive total loss, reference has to be made to the case of *Lind v Mitchell*,[66] which is directly on point. The master abandoned the vessel after she was damaged by ice and was leaking rather badly. Expecting a gale in which he thought she would be lost, he decided to abandon her; he set fire to her to prevent her from being a danger to navigation. He and the crew then abandoned her. One of the issues which concerned the Court of Appeal was whether the abandonment was 'unreasonable'. To answer this question the court had to consider whether it was made 'on account of its actual total loss appearing to be unavoidable'.

Taking into account the fact that the schooner was within only 15 miles of her home port, the direction of the wind with which the vessel could have sailed, and that she was still floating high in the water seven or eight hours after she was abandoned, the abandonment was held to be premature and, therefore, 'unreasonable'. In the light of this, her abandonment could not be justified as having been made 'on account of its actual total loss appearing to be unavoidable'.

Thus, whether the adverb 'reasonably' adds anything to the substance of the section is doubtful. The abandonment has to be made for one or the other of the reasons stated in the section.

No definition of the word 'unavoidable' is given in *Lind v Mitchell*. Mr Justice Stable, however, in *The Lavington Court*,[67] has provided us with an insight of his understanding of the term. Even though he had arrived at a different conclusion on the facts from the other two Law Lords, his interpretation of the law as regards the word 'abandon' is, nonetheless, worthy of consideration. Though he felt that 'to attempt to give a definition of the word applicable in all circumstance is likely to do more harm than good', he was clear that 'it cannot be assigned such an absolute meaning as "inevitable" in the sense of something which must in the course of nature happen'. He made it clear that the word 'unavoidable':[68]

> '... connotes a very high degree of probability, with the additional element that there is no course of action, project or plan, present at the time or place in the mind of the person concerned which offers any reasonable possibility of averting the anticipated event.'

The question of whether the test to be applied is objective or subjective was raised by the judge. However, as the facts of the case did not require an answer

65 In *Irvin v Hine* [1950] 1 KB 555 at p 569, Devlin J expressed the opinion that: 'If the delay in repairing was such that the most likely fate for the ship was that she would be left to rot so that her actual total loss would appear to be unavoidable, a claim might be maintain under s 60(1) …'. See Park J in *Read v Bonham* (1821) 3 Brod & B 147 at p 155.

66 (1928) 45 TLR 54, CA.

67 [1945] 2 All ER 357, CA.

68 *Ibid*, at p 368.

to be given to the question, the matter was left open. The above remarks seem to suggest that a subjective, rather than an objective test is to be employed.[69]

Reasonable abandonment of goods

As mentioned earlier, this subsection on abandonment of the subject-matter insured on account, *inter alia*, of its actual total loss appearing to be unavoidable is of general application. Clause 13, the 'constructive total loss clause' of the ICC, reiterates that: 'No claim for constructive total loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable …'. It does nothing more than to echo the first principle of s 60(1).

Irreparable damage

Goods may suffer physical damage which, depending on the nature and extent of the damage, may or may not be repairable. If the damage is repairable, but the cost of repairing (and forwarding the goods) is economically impracticable, the assured would plead s 60(2)(iii) to claim for a constructive total loss.[70]

However, if the damage sustained is not repairable (but leaves the goods still in specie)[71] and an actual total loss of the goods appears to be unavoidable in time to come, the assured would invoke s 60(1) to support a claim of a constructive total loss. He is not obliged to wait for an actual destruction of the goods to take place before tendering his notice of abandonment. If the damage suffered by the subject-matter insured is such that it would satisfy the criterion of 'reasonable abandonment' on account of its actual total loss appearing to be unavoidable, the assured does not have to wait for the event of an actual total loss to occur before taking action. As in the case of deprivation of possession under s 60(2)(a), this is the principle upon which the doctrine of constructive total loss is based.[72]

Loss of or frustration of the voyage or adventure

A long line of authority, culminating in the House of Lords decision in *The Sanday Case* – the leading authority on the subject – had established the principle of 'loss of voyage' applicable only in relation to insurance on goods.[73] Goods may, by a peril insured against, be prevented from arriving in safety at their port of destination. An assured, though he or his agent may be in possession of the goods, could, for whatever reason,[74] find it physically or practically impossible to forward them to their proper destination. A forced

69 Cf s 60(2)(i) where the test is objective. In *Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd* [1941] 3 All ER 256 at p 262, the court said: 'As far as the definition in subsection (1) is concerned, I should again adopt the view ... that it is the true facts which have to be considered in deciding whether the subject-matter was reasonably abandoned …'.

70 For a discussion of s 60(2)(iii), see below.

71 If the goods are so destroyed or so damaged as to 'cease to be a thing of the kind insured', the assured would plead an actual total loss: see s 57(1) discussed above.

72 See in particular, the remarks of Lord Atkinson in *Moore v Evans* [1918] AC 185, HL.

73 For example, *Barker v Blakes* (1808) 9 East 283; *Cologan v London Assurance Co* (1816) 5 M & S 447; and *Lozano v Janson* (1859) 2 E & E 160.

premature destruction, termination or frustration of the *voyage* can cause the goods to suffer a 'loss of voyage'.

Practical impossibility of forwarding the goods

Unlike insurance on ship,[75] insurance on goods for a particular voyage covers not only physical damage or loss, but also the loss of the voyage or adventure. The ancestry of this rule has been traced to the 'test' cases on war risks.[76] As the principle is well established, only two cases need be discussed, one decided before the Act and the other after the Act, to ascertain whether the law before the Act is still good law after the passing of the Act.

In *Rodocanachi v Elliot*,[77] silks were shipped at Shanghai for London, but had to be sent by rail from Marseilles, through Paris, and thence to London – a customary route for silks. When the goods arrived at Marseilles, France and Germany were at war, and though the silks had arrived at Paris, it was practically impossible to convey them to London, because Paris was then under siege. The silks existed *in specie*, were uninjured, and were effectively in the possession and control of her owners. The only problem was that they were prevented from leaving Paris, and the whole adventure was broken up, and so continued at the time when the notice of abandonment was given and up to the commencement of the action.

The court had no doubt that the loss was caused by 'restraint of princes' which was an insured peril in this case.[78] It held that the assured were entitled to abandon the goods and to recover against the insurers as for a total loss. The following is an extract of an oft-cited speech delivered by Bramwell B, which was approved in *The Sanday Case* by the House of Lords:[79]

> 'It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, "to a destruction of the contemplated adventure".'

It has to be said that the judge was keen to point out that a 'mere temporary retardation of the voyage', even if caused by an insured peril, will not give the assured a claim against the insurer.[80] Only such delay as to lead to a frustration or 'a breaking up of the whole adventure' would found a claim for loss of voyage.

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74 Eg, goods may be detained in a blockaded port, where they are 'shut up and cannot be got out': *Rodocanachi v Elliot* (1874) LR 9 CP 518; or goods may be prevented on sanitary grounds from entering a port, as in *Miller v Law Accident Insurance Co* [1903] 1 KB 712, CA. War, capture, seizure, embargo, blockade, the operation of foreign laws, etc can all cause a loss of voyage for goods.

75 See *Doyle v Dallas* (1831), 1 M & Rob 48.

76 See O'May, p 433. This observation is correct, as all cases on the subject relate either to capture by enemies, detention, restraint or seizure by a foreign authority or state.

77 (1874) LR 9 CP 518.

78 *Ibid*, at p 522, *per* Bramwell B: 'The silks were ... as effectually prevented from coming out as if they were actually seized by the German army'.

79 *Ibid*, cited with approval by Lord Atkinson in *The Sanday Case* [1916] 1 AC 650 at p 661, HL.

80 See also s 55(2)(b) and cl 4.5 of the ICC on loss caused by delay.

The Sanday principle

The legal standing of the above principle was, in *The Sanday Case*, examined in the context of the Act. Here, a cargo of linseed oil was sent to Germany to be sold. By reason of illegality, the goods were prevented from being carried to their proper destination. The adventure of carrying the cargo to its destination became not only impracticable, but in law a serious offence. Again, as in the first case, the goods themselves were unharmed and in the actual possession of the assured.

Affirming the decisions of the trial judge and of the Court of Appeal, the House held that there was a constructive total loss of the goods: there was 'a destruction of the contemplated adventure'. Lord Atkinson said:[81]

> 'And what the assured insures against is not merely the loss sustained by injury to or destruction of the goods, but in addition the loss resulting from a failure to transport the goods to their destination, that failure being established by detention of them through one of the perils insured against, so prolonged as to amount to a destruction of the contemplated adventure.'

As regards the status of the principle in the light of the Act, the matter was succinctly explained by The Earl of Loreburn as thus:[82]

> 'In 1906 it was well settled that when goods are insured ... at and from the port of loading to the port of destination there is a loss if the adventure is frustrated by a peril insured against. It is not merely an insurance of the actual merchandise from injury, but also an insurance of its safe arrival ... I do not think the Act altered the law in the particular now under consideration.'

Reasonably abandoned

It has to be borne in mind that, as was seen, s 60 on constructive total loss is a 'complete definition'. Thus, it is now pertinent to consider which limb of the section applies to a loss of voyage. All the Law Lords were of the opinion that the first part of s 60(1) was applicable to such a loss: The Earl of Loreburn, for one, was of the view that the assured may reasonably abandon the 'subject-matter' insured because its actual total loss appeared to be unavoidable.[83] The same was expressed by Lord Atkinson as: 'the consequent loss of the market appear to be unavoidable …'.[84] Lord Parmoor, in much more positive terms declared that: 'If the *subject-matter* in the present case includes the contemplated adventure, it was no doubt reasonably abandoned on account of its actual loss appearing to be unavoidable, and a case of constructive total loss arises'.[85]

Subject-matter insured

As far as a claim under the Act is concerned, the whole issue revolves around the words 'subject-matter' appearing in s 60(1), for which the Act has not

81 [1916] 1 AC 650 at p 662, HL; also discussed in Chapter 3.

82 *Ibid*, at p 656, HL.

83 He also prepared to categorise such a loss under s 57 as an actual total loss.

84 [1916] 1 AC 650 at p 663, HL.

85 *Ibid*, at p 668, HL. Emphasis added.

provided a definition. It is thus necessary to determine what the 'subject-matter' insured is in policies on goods. That it refers to the goods themselves is not in dispute, but whether it includes a loss of voyage is unclear. The problem, however, was resolved by Lord Parmoor as follows:[86]

> 'When the Act was passed the common form Lloyd policy of marine insurance on goods in transit from one port to another designated by usage that the contemplated adventure was part of the subject-matter, so that if the contemplated adventure was frustrated by a peril insured against, the insurers became liable to pay the insured the amount due under the policy. This position is not altered but preserved by subsection 4 [of s 26].'

Thus, s 60(1) could be read as follows: There is a constructive total loss where *the voyage* (to be undertaken by goods) is reasonably abandoned on account of its actual total loss appearing to be unavoidable.

The frustration clause

The frustration clause was introduced to override *The Sanday* principle. After going through several changes in wording, which need not concern us here, the current version of the clause is much simplified. Clause 3.7 and cl 3.8 of the Institute War Clauses (Cargo) and of the Institute Strikes Clauses (Cargo), respectively, read as follows:[87]

> 'In no case shall this insurance cover ... any claim based upon loss of or frustration of the voyage or adventure.'

That it refers to the *insured* voyage or adventure is implied. This clause, however, has to be read in its proper context: its scope is limited to a loss of voyage caused by war and strikes risks covered by the Institute War Clauses, and the Institute Strike Clauses, respectively.

It is noted that there is no frustration clause in any of the ICC. A loss of or frustration of the voyage or adventure caused by a marine peril, (eg, fire or peril of the seas) is not expressly excluded. To illustrate this point, reference could be made to an example raised by Arnould to the effect that the ship on which the goods are carried may be so severely damaged (by an insured marine risk) that it becomes impossible to continue with the voyage; and if the circumstance is such that it is practically impossible to procure another ship at the port of casualty or any neighbouring port to carry the goods to their proper destination, then there is a loss of voyage for which a claim for a constructive total loss could be made for the goods.[88] There is nothing in the Act, nor the Clauses, preventing recovery for a loss of voyage arising from such a form of practical impossibility caused not by war or strike, but by an insured marine peril.

86 *Ibid*. And as there is nothing about this common law interpretation of 'subject-matter' which is inconsistent with an express provisions of the Act, it will have the force of law: see s 91(2).

87 An earlier version was worded as: 'Warranted free of any claim based upon loss of, or frustration of, the *insured* voyage or adventure, caused by arrests, restraints or detainments of kings, princes, or peoples'. See *Atlantic Maritime Co Inc v Gibbon* [1953] 2 Lloyd's Rep 294, CA.

88 Arnould, para 1220. No case is cited for this proposition.

Expenditure which would exceed its value

The 'economic' test

Lord Justice Scott in *The Lavington Court*[89] referred to the second criterion of s 60(1) as the 'economic test'. Here, the decision, which involves the making of financial estimates, is normally made by the owner, not the master. The distinction as regards the question of abandonment was graphically drawn by Lord Justice Scott as follows:[90]

> 'The making of the financial estimate is, of course, merely an exercise of business judgment and discretion. The abandonment which follows after it may be expressed in a letter and not in boats as in the first alternative ...'

Compared to the abandonment described earlier, which is physically demonstrated 'on the spot' or 'on the boat'[91] by the master and crew in leaving the ship for good, an abandonment under this limb of s 60(1) is 'later in time and different in quality'.[92] Such an abandonment is made by the assured to the insurer. In as much as such a loss is grounded upon mathematical calculations, it is similar to a constructive total loss under s 60(2)(ii) and 60(2)(iii) in relation to ship and goods, respectively. As can be seen shortly, this part of s 60(1) is of particular relevance as regards the loss of voyage or adventure in relation to insurance on goods.

The 'economic test', it is noted, can also be found in cl 13 (the second part) of the ICC, which states that: 'No claim for constructive total loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned ... because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival.'

Should insured goods suffer physical damage to the extent that, '... the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival', an assured would obviously invoke s 60(2)(iii) to claim for a constructive total loss. Should he be deprived of the possession of his goods, he would rely on either (a) or (b) of s 60(2)(i), depending on the circumstances of the case, to base his claim.

Commercial impossibility of forwarding the goods

This part of s 60(1), however, is only applicable when the goods themselves suffer little or no physical damage, and the assured (or his agent) is still in possession of them.[93] Though he may be in possession of the goods, and there is no physical difficulty in sending on the goods to their destination, an assured may, for economic reasons, find it impossible to forward them to their proper

89 [1945] 2 All ER 357 at p 362, CA.

90 *Ibid*, at pp 362–363, CA.

91 *Ibid*.

92 *Ibid*, at p 367.

93 Eg, goods may be seized and later returned to the assured in a country other than its proper destination: such is a loss of voyage.

destination. If the cost of forwarding is so great as to be commercially prohibitive, an assured would invoke this provision to claim for a constructive total loss. This form of loss of goods, relating to a loss of voyage, is akin to that proposed by *The Sanday Case*; except that here the loss of the voyage is due to a commercial impossibility, whereas under *The Sanday* principle, it is due to a physical or practical impossibility. Further, if one were to apply the prudent uninsured shipowner criterion, a court is unlikely to expect such an expenditure to be incurred. An abandonment of a voyage, whether by reason of a physical or commercial impossibility, can hardly be described as unreasonable. It is to be recalled that to legalise the claim, the assured has to tender to the insurer a notice of abandonment. Such a safeguard has to be observed – in case the insurer may have his own special means of transporting the goods to their proper destination, and so desire to take advantage of the abandonment.

It is necessary to mention that in *The Sanday Case*,[94] Lord Wrenbury was prepared to employ the words '... and forwarding the goods to their destination …' of s 60(2)(iii) to allow for such a loss. He has obviously read the word 'and' disjunctively to mean 'or'. In view of the opening words of the subsection, it is questionable whether such a construction is tenable.

There is no such concept as loss of voyage or adventure in a policy on ship.[95] Thus, it is difficult to see how this limb could be applied to insurance on ship. In the case of damage to ship, the assured would plead s 60(2)(ii); for deprivation of possession, he would plead either s 60(2)(i)(a) or (b).

DEPRIVATION OF POSSESSION OF SHIP OR GOODS

Section 60(2)(i), which applies to ship or goods but not freight, is divided into two parts. To invoke this section, the assured must first establish that he has been 'deprived of the possession of his ship or goods by a peril insured against' and, secondly, either that:

- it is unlikely that he can recover the ship or goods as the case may be, or
- the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered.

As will be seen shortly, the cases dealing with this type of constructive total loss are generally concerned with the capture of the ship and/or goods by enemies or a belligerent state. This has led an eminent 19th century author to state in his comparative study of the laws that:[96]

> 'In England, the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because, in the opinion of

94 [1916] 1 AC 650 at p 673, HL.

95 See *Doyle v Dallas* (1831) 1 M & Rob 48 at p 55; where Lord Tenterden CJ said: 'The loss of the voyage will not, in my opinion make a constructive total loss of the ship ... and as they [the insurer] indemnify only against the loss of the ship, the loss of the voyage would not injure them.'

96 Marshall, *Law of Marine Insurance* (1861, 4th edn), cited in *Polurrian SS Co Ltd v Young* [1915] 1 KB 922 at p 936, CA.

> the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to a total deprivation; it is therefore unreasonable to oblige the insured to wait the event of a capture, detention or embargo.'

If judicial authority be required to confirm this proposition, it can be found in the judgment of Lord Atkinson of the House of Lords in *Moore v Evans*,[97] where the origin of the doctrine of constructive loss was traced:

> '... the law of constructive total loss based upon notice of abandonment was shaped and moulded by decisions of Lord Mansfield about the middle of the eighteenth century. The doctrine had its origin in cases of capture … *Goss v Withers* and *Hamilton v Mendes* were both cases of capture and recapture, and were apparently based upon the principle that the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not, but might upon capture proceed at once and, after notice of abandonment, recover his capital, the value of his ship, from the underwriters, provided he was not aware of her recapture when he commenced his action.'

Though the court in *Polurrian SS Co Ltd v Young*[98] was prepared to admit that s 60(1) and (2)(i)(a) relate to a constructive total loss by capture, it was not able to comment on whether the requirement embodied in the phrase 'unlikely that he can recover' originated from the cases of capture.[99]

Meaning of 'deprived of possession'

The fundamental difference between s 60(2)(i) and s 60(1) lies in the fact that in the case of the former, the assured has to be deprived of the possession of the subject-matter insured, whereas in the latter, possession has obviously to remain with the assured, his servants or agents; otherwise, no physical abandonment can take place.

An assured of ship or goods can be deprived of the possession of his insured property either by capture by enemies, a belligerent state, a barratrous crew or any third party running away with the ship. Most of the cases in this area of law, however, are in relation to deprivation as a result of capture by enemies. The capture may be by hostile or friendly means, but the assured must be deprived of the free use and disposal of his vessel.[100] To claim for a constructive total loss, it is not enough for the assured merely to show that there is actual and complete deprivation of possession of the insured property, he must also prove that its recovery is 'unlikely'.

97 [1918] AC 185 at p194, HL.

98 [1915] 1 KB 922; 20 Com Cas 152, CA; hereinafter referred to as *The Polurrian Case*.

99 *Ibid*, at p 937; the court said: 'Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know'.

100 In *The Bamburi* [1982] 1 Lloyd's Rep 312 at p 316, Staughton J held that the assured was wholly deprived of the free use and disposal of their vessel even though there were four crew members on board; there was no Iraqi presence; and neither the Iraqi nor the Iranian government had asserted any right to, interest in or claim over the vessel. Later, at p 321, after a thorough examination of case law, he concluded that 'the loss of "free use and disposal" in this case amounted to loss of possession within the meaning of the policy ...'.

Meaning of 'unlikely'

In *The Polurrian Case*,[101] the word 'unlikely' was compared to 'uncertain' which was the concept used before the passing of the Act. In substituting the test of 'unlikelihood of recovery' with 'uncertainty of recovery', the Act had modified the pre-existing law to the disadvantage of the assured. The criterion is 'not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so'.[102] As the recovery of the vessel in question was only uncertain and not unlikely, there was no constructive total loss. The court also acknowledged the fact that the test would be 'very difficult to apply with any sense of satisfaction, because it necessarily involved conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies'.

Justice Stable in *The Lavington Court*[103] would place the degree of probability, 'somewhere between mere uncertainty on the one hand and inevitability on the other'. In comparison with the criterion of 'unavoidable' under s 60(1), the measure of 'unlikely' is the 'less severe' of the two.[104] That the test of 'unlikely' is more stringent than 'uncertain', but less severe than 'unavoidable' is clear.

In *Marstrand Fishing Co Ltd v Beer*,[105] the master and crew ran away with *The Girl Pat* with the intention of trading with her, and ultimately selling her. She had been seen at several places but managed to elude capture. Mr Justice Porter asked himself the question: 'Is she more likely to be lost than to be recovered?' As there was always the chance that 'her good fortune in eluding capture so far might not be repeated', his reply to the question was: 'I do not know'. Being left in complete darkness as to whether *The Girl Pat* was likely or unlikely to be recovered, he felt that he had no choice but to hold that the vessel was not a constructive total loss.[106]

In summing up, reference should be made to the illuminating words of Lord Wright of the House of Lords in *The Rickards Case*:[107]

> 'There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former, the balance is even. No one can say one way or the other. In the latter, there is some balance against the event. It is true that there is nothing in the Act to show what degree of unlikelihood is required. If, on the test of uncertainty, the scales are level, any degree of unlikelihood would seem to shift the balance, however slightly. It is not required that the scale should spring up and kick the beam.'

101 (1915) 1 KB 922, CA.

102 *Ibid*, at p 937

103 [1945] 2 All ER 357 at p 369.

104 See *Polurrian SS Co Ltd v Young* (1915) 1 KB 922, at p 937, CA.

105 [1937] 1 All ER 158

106 In contrast, in *George Cohen, Sons & Co v Standard Marine Insurance Co Ltd* (1925) 21 Ll L Rep 30 at p 34, the facts of which have been referred to earlier, the vessel was held a constructive total loss because there was a 'distinct unlikelihood ... that under any circumstances, or on any terms which the shipowners as commercial men were likely to be able to offer, the courts would ever have allowed the operation to have been attempted'.

107 [1941] 3 All ER 62 at p 81, HL.

Clause 13 of the ICC (A), (B) and (C) is silent as regards deprivation of possession of goods. Thus the above general legal principles relating to s 60(2)(i) apply. On the subject of deprivation of possession of goods, reference should be made to *Stringer v English and Scottish Marine Insurance Co Ltd*,[108] decided before the Act, where the ship and cargo were seized, condemned, and ultimately (about 18 months after capture) sold by the Prize Court. The assured initially elected to treat the loss as a partial loss and concerted efforts were made to recover the cargo. More than a year later, when it became clear to the assured, by reason of a change of circumstances, that they were unlikely to recover their cargo because of the impending sale by the Prize Court, they immediately gave notice of abandonment. When the sale took place and the proceeds paid into court, they again tendered a fresh notice of abandonment.

The Court of Appeal held that there was a total loss. As the cargo all the time existed *in specie*, the total loss can today be described as a constructive total loss, though the word 'constructive' was not used in the case. The assured were deprived of the possession of the goods, and the sale had rendered it not just 'unlikely', but impossible of recovery.

Whether a recovery is or is not unlikely raises several questions which have to be considered:

- Is the judgment to be based on an objective or subjective assessment of the facts of the case?
- When must the judgment be exercised?
- For what length of time must the period of recovery be unlikely? and
- From when is the period of unlikelihood of recovery to be measured?

The first question was in *Marstrand Fishing Co Ltd v Beer*[109] framed as thus: 'Was the recovery unlikely on the true facts as then existing and not upon the facts as known to the assured?' Citing *The Polurrian Case*[110] as authority, Mr Justice Porter held that 'the person to whom it must appear that the vessel is unlikely to be recovered is not the individual concerned, but is the reasonable man'.[111] Of course, in giving notice of abandonment, he may act on a reasonable guess. The test has to be objective, for to hold otherwise would be to hold that, 'the insurance had been effected, not against loss, but against bad news'.

On the second question, s 60(2)(i) has not specified a time limit which the assured is allowed to take to arrive at a decision as to whether recovery is or is not unlikely. In the absence of an express provision, he is given a reasonable period of time to make an assessment of the situation. This is said to be implicit in the subsection.[112] What is or is not a reasonable period of time is, of course, a

108 (1869) LR 4 QB 677; (1870) LR 5 QB 599, CA.

109 [1937] 1 All ER 158; see also *Czanrnikow Ltd v Java Sea and Fire Insurance Co Ltd* [1941] 3 All ER 256, where the principles laid down in *The Polurrian* and *The Marstrand* Cases were applied.

110 [1915] 1 KB 1922.

111 The same test, he said, is to be given to s 60(1).

112 See *The Polurrian Case* [1915] 1 KB 922 at p 937, *Irvin v Hine* [1950] 1 KB 555 at p 569; and *The Bamburi* [1982] 1 Lloyd's Rep 312 at p 314.

question of fact.[113] In any event, the assured is given a period of grace to make inquiries by s 62(3) which states that:

> '... notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.'

The third and fourth questions may be conveniently discussed together. It was argued in *Irvin v Hine*,[114] that, as the subsection is silent on the matter, it was open to construction as to whether the deprivation of possession has to be perpetual or not. Mr Justice Devlin expressed the view that provided that there was no inconsistency with any express provision, this lacuna could be filled by the common law. Referring to the case of deprivation of possession, for example, by capture, he was of the opinion that '... the prospect of indefinite delay negatives the likelihood of return within a reasonable time'. But, an assured is not obliged to wait indefinitely with the hope of recovering his ship. If he can demonstrate that it is unlikely that he would recover possession of his ship within a reasonable period of time, he is entitled to give notice of abandonment and claim for a constructive total loss. It is noted that the Court of Appeal in *The Polurrian Case*[115] had also, without hesitation applied the 'reasonable time' test.

The test of 'reasonable time', however, may be applied only if there is no express provision in the policy stating otherwise, such as the Detainment Clause of the Institute War and Strikes Clauses (Time).

The detainment clause

By the Detainment Clause, cl 3 of the Institute War and Strikes Clauses, Hulls, (Time), and for (Voyage), an assured who has lost 'the free use and disposal of the vessel for a continuous period of 12 months' shall be deemed, for the purpose of ascertaining whether the Vessel is a constructive total loss, to have been 'deprived of the possession of the Vessel without any likelihood of recovery'. [116] As in the case of the Act, the clause has failed to specify the date when the 12-month period (or in the case of the common law, the 'reasonable time') is to commence. It could be 12 months from the date of the 'capture seizure arrest restraint detainment confiscation or expropriation' or 12 months from the date of the giving of the notice of abandonment. In *The Bamburi*,[117] it was construed as follows: '... a reasonable time to be 12 months from the notice of abandonment, without taking into account any period of detainment before the notice.' The reason being that the vessel must be a constructive total loss on that date for the notice to be valid.

The rule stated in *The Bamburi*[118] was in relation to the Institute Detainment Clause. Under common law, however, the possibilities for the date for the

113 See s 88.

114 [1950] 1 KB 555 at p 567.

115 See also *Marstrand Fishing Co Ltd v Beer* [1937] 1 All ER 158 at p 164.

116 See *The Bamburi* [1982] 1 Lloyd's Rep 312.

117 [1982] 1 Lloyd's Rep 312 at p 321.

118 *Ibid*.

commencement of the 'reasonable time' period are: the date of the casualty, the date of the notice of abandonment, or the date of the issue of the writ. The law, however, is unclear on the subject: *The Polurrian Case* seems to suggest that the crucial date is the date of the issue of the writ, or the notional issue of the writ, that is to say, the date which the underwriter has agreed to treat the matter as if the writ had been issued. On the other hand, Mr Justice Devlin, in *Irvin v Hine*, was of the opinion that the reasonable time is to be judged prospectively from the time of the casualty, it is then that recovery must be unlikely within a reasonable time.

Cost of recovery

It is to be observed that s 60(2)(i)(b) refers to the cost of 'recovering' the ship or goods; whilst s 60(2)(ii) and (iii), to the cost of 'repairing' the damage to ship and goods respectively. Clause 13 of the ICC amplifies s 60(2)(i)(b) by specifying that not only 'the cost of recovering', but also of 'reconditioning and forwarding the subject-matter to the destination' may be considered. If the total cost for recovering, reconditioning and forwarding exceeds its value on arrival, the assured may claim for a constructive total loss of the goods. The law in this regard is the same before and after the Act.

In *Farnworth v Hyde*,[119] decided before the Act, the court held that the cost of drying, landing, warehousing and reshipping the goods may be taken into account for the purpose of deciding whether there was a constructive total loss of the goods. The court also made it clear that the assured may not take into account 'the freight originally contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not.'[120]

In *Vacuum Oil Co v Union Insurance Soc of Canton*,[121] the decision of the trial judge was overturned when the Court of Appeal, in taking into account the expense of obtaining new tins for the petroleum and of shipping them, arrived at a different finding of fact: as the oil would not have been worth the expense of reconditioning and sending on, the assured were held to have established a case of a constructive total loss.

119 (1866) LR 2 CP 204, applying the rule laid down in *Rosetto v Gurney* (1851) 11 CP 176, that if the cost of transhipping could only be effected at a higher than the original rate of freight, only the cost of the difference of transit could be taken into account.

120 In *Stringer v English and Scottish Marine Insurance Co* (1869), LR 4 QB 677 at p 691; (1870) LR 5 QB 599, CA; the assured could have recovered possession of their goods if they were prepared to pay the Prize Court about 150-180% more than the value of the goods. Though the rule as framed by s 60(2)(i)(b) was not then available, the court applied the 'prudent uninsured owner' criterion to support their decision that the assured were not in default in not preventing the sale of the cargo. The seizure, which ultimately led to the enforced sale, was held to have occasioned the total loss of the vessel and cargo.

121 (1926) 25 Ll L Rep 546, CA.

DAMAGE TO SHIP

Unlike a loss under s 60(2)(i), a constructive total loss under this heading entails the assured having possession and control over his property. For the section to apply, the damage sustained by the ship has to be repairable. The issue here is primarily concerned with a comparison of figures between the cost of repairs and the value of the ship when repaired. Section 60(2)(ii) states:

> 'In particular, there is a constructive total loss –
>
> (ii) In the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired.'

The above principle was recognised as early as 1836 by Chief Justice Tindal in *Roux v Salvador*.[122] In 1850, however, in *Moss v Smith*,[123] Mr Justice Maule was able to describe with clarity the nature of this form of a constructive total loss, even though the concept was then still somewhat undeveloped. Though the expression 'constructive total loss' was not used, nonetheless, the concept he had then envisaged is the same as current law:

> '... it may be physically possible to repair the ship, but at an enormous cost; and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost ... So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her – seeing that the expense of repairs would be such that no man of common sense would incur the outlay – the ship is said to be totally lost.'

As will be seen shortly, this is by far the most complex of all statutory provisions on constructive total loss. It has generated a host of problems, some of which a solution has yet to be found.

The foundation of the rule is essentially premised on commercial or economic considerations, whereas an actual total loss is effectively a case of physical impossibility, a constructive total loss is a business impossibility.

The basis of the section is dependent upon a comparison between the cost of repairs and the value of the ship when repaired: these are basically the two main features of the section which require examination. As the law in relation to the latter is no longer in dispute it would be more convenient to dispose of it first, before proceeding to discuss the other part of the section which is more contrived and troublesome.

The value of the ship when repaired

The first question which immediately springs to mind is: which of the following values is the section referring to – the real market value of the ship when repaired or her insured value?

In an unvalued policy, it was never been doubted that the real value of the ship when repaired is the value to be taken for comparison: a prudent owner,

122 (1836) 3 Bing NC 266.

123 (1850) 9 CB 94 at p 103.

uninsured, would have taken the market value of the ship as the figure for determining whether he ought to carry out the repairs on his ship.[124]

In relation to a valued policy, the matter is governed by s 27(4) which states that: 'Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.'

Before the passing of the Act, the courts were at one stage uncertain as to the value which was to be taken into account.[125] In 1847, the matter was finally settled by the House of Lords in *Irving v Manning*,[126] which held that the real market value of the ship when repaired was the figure to be used for the purpose of comparison. The House said that the inquiry was in each case '... what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against'. The matter was considered as if there was no policy at all. Lord Campbell felt greatly relieved that this question which had 'agitated Westminster Hall for the last 30 years is at last solemnly decided'. Unless the policy otherwise provides, this would still be the general rule.

In practice, however, the Institute Hulls Clauses have taken advantage of the words 'unless the policy otherwise provides' to set aside the rule embodied in s 27(4). Clause 19.1 of the ITCH(95) and cl 17.1 of the IVCH(95) state that: 'In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value …'.[127]

An assured could also, if he so desires, specify in the policy that where the cost of repairs exceeds a certain percentage of the insured value, the vessel may be deemed to be a constructive total loss. This was the case in *Sailing Ship Holt Hill Co v United Kingdom Marine Association*,[128] where a special clause provided that: 'No vessel insured ... shall be deemed to be a constructive total loss unless the cost of repairing the damage ... shall amount to 80% of the value in the ordinary hull ... policy for £12,500.'

Mr Justice Rowlatt held that the parties had not provided that in *all* cases where the cost of repairs amounted to 80% of £12,500 there was a constructive total loss. He said that if they had intended to substitute the agreed figure for the repaired value, it would have used 'the direct and plain language of the well-known Institute Clause' which was 'ready to hand as a precedent'. The

124 In *Irving v Manning* (1847) 1 HL Cas 287 at p 304, HL, though the problem at hand was in relation to a valued policy, nevertheless, Patteson J pointed out that: 'If this had not been the case of a valued policy ... the course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired'.

125 See *Allen v Sugrue* (1828) 8 B & C 561, the matter was left to the jury to decide. In *Young v Turing* (1841), 2 Man & Gr 593, the judge directed the jury that they ought not to have taken into account the value in the policy, but to apply the prudent uninsured owner test to arrive at its decision.

126 (1847) 1 HL Cas 287.

127 See *North Atlantic SS Co Ltd v Burr* (1904) 9 Com Cas 164; 20 TLR 260, a case decided before the Act, where the policy contained a clause that the 'insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss'.

128 [1919] 2 KB 789 at p 793.

purpose of the clause was to eliminate claims for a constructive total loss unless the estimated cost of repairs was equal to 80% of the declared value. This could be described as a hurdle (perhaps, the first of two) which the assured has to satisfy before he could claim for a constructive total loss. Allowing for the goodwill of underwriters, Mr Justice Rowlatt's parting words are as follows:

> 'I do not know whether underwriters usually pay when the condition provided for in the clause is satisfied without agitating the question of the actual repaired value, but I cannot read the clause as compelling them to do so.'

Freight earning capacity of the ship

If the market value of the vessel is to be used for the purpose of determining whether a ship is or is not a constructive total loss, a 'prudent uninsured owner' would be expected to include any pending freight in his calculation.[129]

Clause 19.1 of the ITCH(95) has simplified matters inasmuch as it has specified a single figure, namely, the insured value of the ship which is to be taken for comparison. On a strict interpretation, however, it means that, unless the freight-earning capacity of the ship has already been incorporated in the insured value of the ship, it cannot later be added to the insured value for the purpose of ascertaining whether the ship is or is not a constructive total loss. Arnould holds the view that, as any pending freight will in normal cases already have been allowed for, this should not pose much of a problem in practice. Provided that the sum is not counted twice, there seems to be a willingness to apply the principle of the 'prudent uninsured owner'.[130]

The cost of repairing the damage

What may or may not be included in 'the cost of repairing the damage' is of critical importance to the question as to whether there is a constructive total loss of a ship. Section 60(2)(ii) itself goes some way to answering this question, but is silent on a number of other issues which have since been raised and considered by the courts.

Value of the wreck

The question as to whether an assured may add the value of the wreck, and thereby inflate the cost of repairs, was examined in cases before and after the passing of the Act. In view of the somewhat erratic practice which existed before the passing of the Act, it would be sensible in this study to follow the course which Mr Justice Bray had taken in *Hall v Hayman*[131] by going straight to the words of the section in order to ascertain its real and natural meaning.[132]

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129 See *Macbeth & Co v Maritime Insurance Co* Ltd [1908] AC 144, HL.

130 Arnould, para 1214.

131 [1912] 2 KB 5; 17 Com Cas 81.

132 Bray J took heed of the advice given by Lord Herschell in *Bank of England v Vagliano Brothers* [1891] AC 107 at pp 144 and 145, that one should be 'uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood …'.

Relying on both subsections (1) and (2)(ii) of s 60, he placed emphasis on the word 'expenditure' and the phrase 'the cost of repairing the damage' appearing in the respective sub-ss. The value of the wreck can neither be described as an 'expenditure' of money to be incurred by her owner, nor 'the cost of repairing the damage'. Boldly, he swept aside all previous inconsistent rulings, including that emanating from the House of Lords in *Macbeth & Co v Maritime Insurance Co*,[133] which had declared that the assured was entitled to add the break-up value of the ship to the estimated costs of repairs.[134] In summing up, he said:[135]

> 'The rule therefore of the common law, that the value of the wreck ought to be added to the estimated cost of repairs in determining whether the ship can be treated as a constructive total loss, is, in my opinion, inconsistent with the express provision of s 60 and can no longer be treated as the law.'

However, as a first instance judgment, *Hall v Hyman* does not stand on the firmest of foundation. In the light of the somewhat changeable course which the law has so far taken, the Institute Hulls Clauses have done well to have set the problem at rest by inserting cl 19.1 of the ITCH(95) which states that '... nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account'. This is endorsement of the rule laid down in *Hall v Hyman*.

A shipowner who wishes to include the value of the wreck in the account may, of course, do so by inserting a stipulation to that effect in the policy. Such a course is allowed by the opening words 'unless the policy otherwise provides' of s 60.

Cost of repairs

Nature of repair

The standard to which the ship may be repaired is a matter which Arnould[136] has described as now clearly settled by *Reid v Darby*.[137] Here, the vessel was found to be navigable, but she was not capable of being navigated home with her then cargo on board. Is such a vessel a constructive total loss? It was held that there could not be a constructive total loss because a policy on ship is only against the loss of the ship, not of the voyage. That she may be made good physically – as she was before the casualty or at the time when the valuation was agreed – appears to be accepted as the general rule, which was applied in *Doyle v Dallas*.[138]

The basis of the rule is probably sound for, unlike insurance of cargo, there is no equivalent to the principle of law laid down in *The Sanday Case*,[139] which

133 [1908] AC 144. It is to be noted that this case, though it was decided after the Act came into force, was not based on the Act, because the loss had occurred before the passing of the Act. See also *The Wild Rose SS Co v Jupe & Others* (1903) 19 TLR 289.

134 *Macbeth & Co v Maritime Insurance Co* [1908] AC 144, HL, overruled the decision of the Court of Appeal in *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811.

135 [1912] 2 KB 5 at p 14.

136 Arnould, para 1206.

137 (1808) 10 East 143.

138 (1831) 1 Mood & Ro 48.

139 [1916] 1 AC 650, HL, see Chapter 3.

is only applicable to cargo, in insurance on ship. As such, only repairs for damage which affects the physical condition of the ship (sailing either in ballast or with any kind of cargo), not loss of the adventure, may be taken into consideration. But having said that, it has to be pointed out that these cases were decided almost two centuries ago, and there is no recent direct authority on the subject.

Should temporary repairs be necessary to enable the vessel to proceed to sea from the place of the casualty or from the port of refuge, the assured is entitled to claim for both the estimated costs of the temporary and complete repairs from the insurers. As regards deduction of new for old, cl 14 of the ITCH(95) and cl 12 of the IVCH(95) provide that claims are payable 'without deduction new for old'.

Estimating the cost of repairs

In estimating the cost of repairs, s 60(2)(ii) has, as mentioned earlier, offered some guidance as to the items which may and may not be taken into account for the purpose of determining whether a ship is a constructive total loss. It states that:

> 'In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.'

It is to be noted that three elements are covered by the above provision:

(1) general average contributions payable by other interests;

(2) expense of future salvage operations to which the ship would be liable if repaired; and

(3) future general average contributions to which the ship would be liable if repaired.

As both (2) and (3) above relate to the liability of the ship, they can be conveniently discussed together. There is, however, another category of payment which is not covered by the subsection, namely, expense of future salvage operations *payable by other interests*. Whether such an expense, which could well be a component of the 'general average contribution ... payable by the other interests', is to be deducted from the cost of repairs is a controversial matter which will dominate a substantial part of this discussion.

General average contributions payable by other interests

First, the very notion of general average connotes that other interests are involved. A general average situation can only occur when the whole adventure, ship and goods, is exposed to a common danger. Thus, there can be no question of general average contribution when a ship sails in ballast; when only one interest is at stake or at risk, general average contribution cannot possibly arise. Interests which have benefited from a general average act (expenditure or sacrifice) would naturally have to make a contribution towards the general average loss incurred. This is referred to in the subsection as 'general average contributions ... payable by other interests'. This sum would

include all expenses which would necessarily have to be incurred to extricate the whole adventure from a position of danger.

The subsection has conferred an advantage upon the assured, inasmuch as he is permitted to add the general average contributions payable by other interests to the cost of repairs. He is able, thereby, to increase the total figure which is to be used for the purpose of comparison with the value of the vessel when repaired. Such additions would obviously enlarge the aggregate cost of repairs, making it easier for the assured to claim for a constructive total loss.

One would have thought that, as the sum is payable by third parties, it ought to be deducted from the cost of repairs. Arnould endeavours to provide an explanation for the rule by rationalising along the following lines:[140]

> 'The final incidents of such expenses should no more be taken into consideration in the case suggested than in a case where they are recoverable from a wrongdoer. But it could not be contended that a vessel which has been damaged by a collision is any the less a constructive total loss, because the cost of repairing her is recoverable by way of damages from the owners of another ship, by the negligent navigation of which the collision was occasioned.'

Against this, one is tempted to argue that an uninsured prudent owner, when considering the real cost (to him) to have the ship raised (if necessary) and repaired, would probably take into the account the amount which he will recover from the other interests.

Though it may probably be too late in the day to query the rationale for the rule, it is not too late to examine the wording of the provision which, on first reading, seems to suggest that an assured may add the whole of the general average contributions payable by other interests to the cost of repairs. But when read in the light of the ruling in *Kemp v Halliday*,[141] the only direct authority on the subject, albeit a pre-statute case, the position is far from clear.

Before taking any further step to examine the scope of the provision, it may be prudent here to take heed of the advice handed down by the Law Lords in *Bank of England v Vagliano Brothers*,[142] to the effect that the words of a codifying statute must in the first instance be construed according to their ordinary and natural meaning, without regard to the state of the law previously established by cases. Thus *Kemp v Halliday* is left for discussion at a later stage.

Expense of future salvage operations payable by other interests

In the first place, it is noted that the subsection, using general terms, declares that 'no deduction is to be made in respect of general average contributions to those repairs payable by other interests'. This raises the question whether the expense of future salvage operations payable by other interests may be added to the cost of repairs. The provision is capable of admitting to two interpretations.

A literal construction of the subsection should allow the whole sum of the general average contributions 'payable by other interests' to be added to the

140 Arnould, para 1200.

141 (1866) LR 1 QB 520; 6 B & S 723.

142 [1891] AC 107.

cost of repairs. The words 'cost of repairs' are wide and neutral enough to include all expenses which would necessarily have to be incurred to raise the ship and her cargo in order to place the whole adventure in a position of safety. Arnould has observed that: '... on one view of the construction of the subsection the words "cost of repairs" are intended to cover all those expenses, including salvage operations, which would have to be incurred before the ship was restored to a navigable condition'.[143]

Furthermore, it has to be said that as no exception is made in the subsection as regards such an expense, it would not be unreasonable to assume that the whole sum of the general average contribution payable by the other interests, including *expense of salvage operations*, is to be added to the cost of repairs.

If the raising of the ship is necessary for the safety of both ship and goods, the expense therefor would be regarded as for general average. As an integral part of the process of lifting the whole adventure from a position of danger, the cargo interests which have benefited from the operation are expected to make a contribution towards it.[144] Such an interpretation would not only be in line with the wording of the subsection, but would also promote consistency in the law. It would, however, oppose the rule laid down in *Kemp v Halliday*, decided before the passing of the Act.

On the other hand, it could also with equal force be argued that, as the expense of future salvage payable by other interests is not expressly stipulated in the subsection as an item which may be added to the cost of repairs, it should be deducted. Arnould, attracted to this line of reasoning, states that[145] ' ... although s 60 of the Act expressly states that no deduction need be made in respect of general average contributions to the cost of repairs, it makes no such concession with regard to the expense of salvage operations. The implication is that general average contributions to expenses of the latter class must be deducted'.[146]

Support for this interpretation can also be derived from the next part of the subsection, which is concerned with items that may be added to the cost of repairs: It specifies that account is to be taken of the 'expense of future salvage operation and of future general average contributions to which the *ship* would be liable if repaired'. Again, by implication, it is possible to contend that, as the expense of future salvage operations payable by other interests is not expressly included in this list as an element which the shipowner may add to the cost of repairs, it has to be excluded from the cost of repairs. Such a construction would be in line with the ruling in *Kemp v Halliday*, which will now be considered.

The rule in Kemp v Halliday

The facts of the case are as follows. The vessel laden with cargo suffered severe damage in a storm and had to put into a port of refuge for repair. Whilst she

143 See Arnould, para 1202. Thus, the 'cost of repairs' is taken in the wider sense to include the cost of raising or salving the vessel in order that she may be repaired.

144 The position would, of course, be different if the expense of salvage operations is incurred to raise only the ship.

145 Arnould, para 1201.

146 But is the expense of salvage not an integral element of a general average contribution?

was undergoing repairs, she sank at her moorings in a violent squall with some cargo still on board. Surveyors had formed the judgment that the ship, submerged in deep water with heavy cargo on board, was in imminent danger of destruction, and that the most convenient mode of saving the ship or cargo, or both, was by raising the ship together with the cargo. It was estimated that it would cost more to raise and repair than she would be worth when repaired. Relying on this advice, the plaintiffs accordingly gave notice of abandonment and claimed that the vessel was a constructive total loss. Three days later, a surveyor, acting solely on his own initiative, commenced salvage operations, and eventually succeeded in raising the ship with all the cargo on board.

The question for the court was whether the amount of general average (in the nature of expense for salvage operations) which would be contributed by the cargo must be taken into account in determining whether or not the ship was a constructive total loss. The outcome of the case was critically dependent upon whether this item was to be taken into account in estimating the cost of repairs. If the expense for salvage was not allowed in the calculation, it would reduce the total cost of repair, and accordingly the loss would not qualify as a constructive total loss.

In the Court of Queen's Bench, Mr Justice Blackburn held that there was neither an actual nor a constructive total loss. As regards the latter, he was of the opinion that the contribution of the cargo to the general average must be taken into account, thus reducing the cost of raising the ship. Mr Justice Shee was of the contrary opinion, but withdrew his judgment. Judgment was thus awarded in favour of the defendant.

In delivering the judgment of the court in the special case, Chief Justice Erle said:[147]

> 'But we hold that the plaintiff, in considering whether the submersion of his ship, containing cargo ... was a constructive total loss, was bound to take into his estimate the fact that cargo would be saved by the operation which raised the ship, and would contribute to the expense thereof ...'

The decision of the court was based on two main grounds. First, if need be, it was prepared to invoke the good old common law – the prudent uninsured owner test – to arrive at its decision. Secondly, the more important of the two, it was greatly influenced, and rightly so, by the fact that the shipowner would have a lien on the cargo to secure the payment of that general average.[148] The court said:[149]

> '... the plaintiff, in calculating the cost of raising, was bound to take into his estimate the contribution which would become due to him from the cargo secured to him by a lien thereon; and if so, the special case provides that the defendant should succeed.'

147 (1866) LR 1 QB 520 at p 527.

148 Under current practice, a shipowner would, for the release of the cargo (the lien), exact an average bond from its owner.

149 *Ibid*.

But the same can be said for all the components of a general average contribution.[150] If this is the basis for the rule, one can then ask why has the Act expressly allowed 'general average contributions ... payable by other interests' to be added to the cost of repairs? Should the expense of salvage operations be treated differently?

Kemp v Halliday was decided in 1866. Thus parliament cannot claim that it was unaware of this 40 year old principle of law when it passed the Marine Insurance Act in 1906. Whether parliament had intended to overrule *Kemp v Halliday* when it enacted s 60(2)(ii) (or more accurately its first limb) is unclear. The question which has now to be examined is whether it is permissible to use *Kemp v Halliday* to interpret the statutory law on the subject. Such a recourse would not, of course, be allowed if the wording of the section is in itself unambiguous. Section 91(2) declares: 'The rules of the Common Law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance'. Indeed, this is all very well, but unless the meaning of the express provision of the Act is known, it is not possible to say whether a section is or is not inconsistent with the rules of the common law.

As was seen, the wording of the subsection itself is capable of admitting to two conflicting meanings. On the one hand, based on a strict interpretation of its wording, it would appear that the whole of the general average contribution (including expenses for salvage operation) payable should be added to the repair costs. On the other, based primarily on the rule in *Kemp v Halliday* and a strained construction of the subsection, expenses for salvage payable by other interests ought to be deducted from the cost of repairs. Neither approach appears to be satisfactory – the reason being that in the case of the former, it is hard to see the rationale for the rule; in the latter it opposes the tenor of the section.

It is difficult to see the sense for giving a different treatment to a general average contribution towards salvage expenses. As the subsection has not expressly stated that it should be deducted from the repair bill, the general rule (of inclusion) should apply. Viewed in this light, one could say that s 60(2)(ii) has overruled *Kemp v Halliday*. Surely, we should safely be able to assume that parliament must have had the rule of *Kemp v Halliday* in mind when it drafted the Act. If it had wanted to preserve the *Kemp v Halliday* principle, it could have easily created an exception to the rule.

The language used in this part of the subsection is intolerably imprecise. That the underlying principle of the matter was not fully considered is obvious. Summing up, the scales are, as Arnould has found, '... so nicely balanced that it scarcely seems possible to prefer one view or the other'. In reality, it is not the rule in *Kemp v Halliday* which is difficult to accept, but the general rule laid

150 Expenditure incurred by a shipowner for the common safety of the adventure may, *inter alia*, include any of the following items: expenses for lightening a ship; expenses at port of refuge; wages and maintenance of crew and other expenses bearing up for and in a port of refuge; cost for temporary repairs; and salvage whether incurred under contract or otherwise. See the York-Antwerp Rules, 1994 (see Appendix 24), for a complete list of items allowable as general average.

down in s 60(2)(ii). To have to rely on innuendoes in order to ascertain the meaning of a provision is clearly not the best approach to adopt in order to ascertain the meaning of a section.

This whole area of law on a rather important issue is in need of clarification: a clear ruling on the subject is urgently required. In order to arrive at any meaningful understanding, the underlying basis of the matter has to be fully and carefully examined.

'Expense of future salvage operations and of future general average contributions to which the ship would be liable if repaired'

This is another provision which could be phrased in clearer terms. The word 'but' is misleading and can cause confusion.[151] It does not really add anything to the rest of the sentence which could well stand on its own. The phrase 'account is to be taken' means that the two items listed, namely, the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired, may be added to the cost of repairs. As such expenses have necessarily to be incurred because of a peril insured against, the assured should be allowed to include them in the repair costs.

Meaning of 'future'

The adjective 'future' is used for both the expense of salvage operations and of general average contributions. As it is not defined, it is also capable of generating problems. However, it connotes a prospective event, or an event of time to come; it has to be 'counted' or 'measured' from a particular event or date. The section does not specify with reference to what time or event the salvage operations are 'future'. The time of the 'future' could commence from the date of the casualty or the date of the giving of the notice of abandonment. Arnould has correctly stated the law as:[152]

> 'If notice of abandonment is rightly given the loss dates back to the casualty, and the test for ascertaining whether or not there is a constructive total loss ought presumably to be applied, actually or notionally, at the same date.'

'Salvage operations'

First, it is observed that the term used is not 'salvage charges' but 'salvage operations'. This alone should be adequate to discount pure maritime salvage from the scope of the subsection. Support for this contention can also be found in the word 'expense': pure maritime salvage is never referred as an 'expense' but as an 'award'. According to Arnould, a pure salvage award, whether derived from maritime law or under LOF does not cause any serious difficulty.[153] The reason being that: 'Since liability attaches to each party only for that part of the total cost that is referable to his own interest, and can therefore be no question of contribution.'[154]

151 On first reading, it could give the impression that 'no deduction is to be made in respect of general average contribution …', but deduction is to be made to future salvage operations.

152 See Arnould, para 1203.

153 See Appendix 25.

154 Arnould, at para 1201

General average contributions

This part of the section has to be read with s 66(4) which allows an assured the right to recover from the insurer the proportion of the general average loss (expenditure and sacrifice) which falls upon him.[155]

DAMAGE TO GOODS

Sections 60(1) and 60(2)(i)

To recapitulate, there are essentially four types of constructive total losses of goods, three of which have already been discussed, and the last is to be examined here. As was seen, a claim for a constructive total loss of goods may be made when:

- the goods are 'reasonably abandoned' on account of their actual total loss appearing to be 'unavoidable': s 60(1) and cl 13 of the ICC;
- the goods are 'reasonably abandoned' because 'it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred': s 60(1) and cl 13 of the ICC; and
- the assured has been deprived of the possession of his goods, and (a) it is unlikely that he can recover them, or (b) the cost of recovering them would exceed their value when recovered: s 60(2)(i)(a) or (b) and cl 13 of the ICC.

The first and second involve a loss of voyage or adventure by reason of a practical and commercial impossibility, respectively. And in the third case, whether the goods are or are not damaged is inconsequential.

Section 60(2)(iii) is in fact an exemplification of the general concept of a constructive total loss defined in the second limb of s 60(1).[156] It has to be noted that, as the opening words suggest, this subsection to s 60 is applicable only if the goods are physically damaged, and the damage is repairable. Under this head of claim, unlike a case falling within s 60(2)(i), the assured does not have to be deprived of the possession of his goods.

Cost of repairing the damage

As far as s 60(2)(i) is concerned, whether the goods, of which the assured has been deprived of possession, are or are not themselves physically damaged is really quite irrelevant. By this section, the assured is not claiming that the cost of repairing the damage (if any), but of 'recovering' the goods, is uneconomical.[157]

155 For a fuller discussion of general average loss, see Chapter 17.

156 Lord Wright in *The Rickards Case* [1941] 3 All ER 62 at p 79, HL, said that 'Subsection (2), as compared with subsection (1), is thus additional, and not merely illustrative'. The choice of the words 'not merely' could be interpreted to mean that s 60(2) does more than just simply illustrate the general terms of s 60(1).

157 The word 'recovery' here is used in the sense of a recovery from a third party who is in possession of the goods: *Stringer v English and Scottish Marine Insurance Co* (1869), LR 4 QB 677; (1870) LR 5 QB 599, CA.

But should the goods be also damaged, he would also be able to invoke s 60(2)(iii) (and cl 13 of the ICC) in support of his claim for a constructive total loss.

Section 60(2)(iii) allows the assured in the case of damage to goods to take into account not only the cost of repairing the damage, but also the cost of forwarding the goods to their destination for the purpose of determining whether they are a constructive total loss. As s 60(2)(iii) does not envisage a loss of possession of the goods, it should not come as a surprise that the cost of 'recovery' is not included.

Clause 13 of the ICC, as was seen earlier, declares a most comprehensive rule on a constructive total loss for goods. The second part of the clause has brought the concepts of the second part of s 60(1), s 60(2)(i)(b), and s 60(2)(iii)[158] all under one umbrella. In this format, it would appear that should the cost of either recovering, reconditioning, or forwarding the goods, (to its insured destination) exceed their value on arrival, there is a constructive total loss. It is to be noted that, unlike the Institute Hulls Clauses,[159] it is the value of the goods on arrival, not their insured value, which is to be taken for the purpose of comparison.

The cost of 'forwarding' the goods

The main controversy as regards this section relates to the word 'forwarding', which also appears in cl 13 of the ICC. Whether the assured may add the whole or only the additional cost of forwarding the goods to their proper destination was considered in a pre-statute case, *Farnworth v Hyde*.[160] The law before the Act was that only the additional freight (if any) payable may be included in the calculation. Whether s 60(2)(iii) has altered the legal position is unclear. It could be argued that if parliament, which we can only assume was well aware of the existence of this rule when it drafted the section, had intended to depart from the common law rule of *Farnworth v Hyde*, it would have made a point of using clearer terms.[161]

Any loss of the original bill of lading freight sustained by the assured (which if paid in advance) would be recoverable under his freight policy. As such, it could be argued that a prudent uninsured owner would probably not take this into account in his calculation. The extra freight payable, which he has not insured under his freight policy, ought therefore to be added to the cost. Clause 13 does not in any way help to resolve this problem.

158 If 'reconditioning' appearing in cl 13 is taken to have the same meaning as 'repairing' in s 60(2)(iii). As opposed to 'repairing', the word 'reconditioning' is also capable of a lesser meaning of just rendering the goods in a state (like temporary repairs made to a ship) in order for that they may safely undertake the journey to their proper destination.

159 See cl 19.1 of the ITCH(95) and cl 17.1 of the IVCH(95).

160 (1866) LR 2 CP 204, which applied the rule in *Rosetto v Gurney* (1851) 11 CP 176. For a detailed analysis of the pros and cons of the rule in *Farnworth v Hyde*; see Arnould at paras. 1224–1230.

161 Parliament has yet again left another matter in doubt: the problem here is identical to that encountered in s 60(2)(ii) which, when read with *Kemp v Halliday* (1866) LR 1 QB 520; 6 B & S 723, has left the law with much uncertainty.

EFFECT OF CONSTRUCTIVE TOTAL LOSS

Abandonment of the subject-matter insured

Sections 61, 62 and 63 spell out what may be described as the procedural aspects of the law relating to constructive total loss. They lay down the steps which an assured has to take to 'validate' his claim for a constructive total loss. Section 61 should be read with s 62(1): the former relates to abandonment of the subject-matter insured, whilst the latter to the notice of abandonment which the assured has to give to the insurer when he elects to treat the loss as if it were 'an actual total loss'. Section 62(1) provides that:

> 'Subject to the provisions of this section, where the assured elects to abandon the subject-matter to the insurer he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.'

The opening words of s 61 are significant: only 'Where there is a constructive total loss' may the assured 'abandon' the subject-matter insured to the insurer. But once he has decided to 'abandon' the subject-matter insured, he has to manifest his intention by giving the insurer a notice of abandonment.

Meaning of 'abandon'

The word 'abandon' is used here in a sense quite different from that in s 57 discussed earlier.[162] As expressly stated in s 61, the abandonment is to be made by the assured 'to the insurer'. The meaning of the word 'abandon', the purpose of a notice of abandonment, and various other aspects of the doctrine of abandonment were all given a thorough examination by the House of Lords in *Rankin v Potter*.[163] Later, a few more words on the subject were added by the Court of Appeal in *Kaltenbach v Mackenzie*.[164]

Mr Baron Martin in *Rankin v Potter*[165] expressed the opinion that '... there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon"'. He was conscious of the fact that the words 'abandonment' and 'notice of abandonment', though frequently confounded together in expression, are distinct and separate concepts.[166] As regards the former, he said:[167]

> '... in reference to a constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and

162 See above for a discussion of the meaning of 'abandon' appearing in s 60(1).

163 (1873) LR 6 HL 83.

164 (1878) 3 CPD 467; 4 Asp MLA 39, CA. Reference will be made only to the first citation as it contains a fuller report of the case, hereinafter referred to as *The Kaltenbach Case*.

165 (1873) LR 6 HL 83. A panel of judges – Mr Baron Martin, Mr Baron Bramwell, Blackburn J, Mellor J, Keating J and Brett J – was summoned to advise the House, presided by Lord Chelmsford, Lord Colonsay and Lord Hatherley.

166 In similar vein, Blackburn J, *ibid*, at p 118, remarked: 'This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word, "abandonment", often leads to confounding the two'.

167 *Ibid* at p 144.

> interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it …'

When an assured 'abandons' the subject-matter insured, he is effectively relinquishing all his rights in the property to the insurer.

The basis for this requirement of abandonment is explained by Mr Justice Brett in *Rankin v Potter* in the following terms:[168]

> 'The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to that end to prevent the assured from having at the same time payment in full of the sum insured, and the thing insured, a thing of value, in his hands.'

Notice of abandonment

Once an assured has decided to claim for a constructive total loss – giving up his interest in the subject-matter insured or the remains of it – he has to notify the insurer of his intention to denounce his rights in the property. The requirement to give a notice of abandonment is peculiar to marine insurance; Lord Justice Brett said that he was not aware of its existence in any contract of indemnity, except in the case of contracts of marine insurance.[169] But having said that, there is really nothing mysterious about abandonment or the giving of a notice of abandonment, the purpose of which was described by Lord Porter in *Rankin v Potter*[170] as follows:

> 'In cases of marine insurance, the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity, is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive … the consequence of which is that everything is ceded to ... the underwriters.'

In *The Kaltenbach Case*,[171] Lord Justice Cotton offered two reasons for the requirement of a notice of abandonment. The first is that an assured, on giving the notice, 'cannot go back from his decision'; and the second, the insurers on receipt of the notice may then 'do the best they can and make the most they can'[172] as regards the claim and, in particular, the subject-matter insured or what remains of it.

A further explanation can be found in the following passage of the judgment of Lord Justice Brett who, relying on practical grounds, remarked:[173]

> 'Now, a loss may occur in any part of the world, and losses frequently occur in places where the underwriter has no power to get notice of the loss except from the assured, and there must be great danger that the owner of the ship or goods might take his own time to consider what to do, and to wait and find out

168 *Ibid*, at p 101.

169 (1878) 3 CPD 467 at p 471, CA; 4 Asp MLC 39, CA.

170 (1873) LR 6 HL 83 at p 119.

171 (1878) 3 CPD 467 at 471, CA.

172 4 Asp MLC 39, at p 42, CA.

173 (1878) 3 CPD 467 at p 472, CA.

> whether the markets were likely to rise or fall before he arrived at any decision, and this is the reason why in all cases it is made a part of the contract that, when there is a claim for constructive total loss, notice of abandonment must be given.'

He thought that the notice of abandonment was 'introduced by the unanimous consent of shipowners and underwriters, and has therefore become part of their contract'. It has become a condition precedent to the validity of a claim for a constructive total loss.[174]

A condition precedent

In the course of the development of the law of the doctrine of abandonment, there was at one stage a degree of confusion as regards the function of a notice of abandonment. Not surprisingly, this was partly brought about by the use of the words 'condition precedent'. The point of debate was framed in *Roura & Forgas v Townend*[175] as, 'whether the giving of such notice is an integral element of a constructive total loss or is rather a condition precedent to a claim by the owner of ship and goods based upon such a loss'. As will be seen, the operative word here is 'claim'.

In *The Robertson Case*, Lord Wright took time in the House of Lords to clarify the confusion in the following way:[176]

> '... notice of abandonment is not an essential ingredient of a constructive total loss. The Appellant's argument confuses two different concepts, because it confuses constructive total loss with the *right to claim* for a constructive total loss. The right to claim ... depends on due notice of abandonment under s 62 of the Act. The distinction is explicitly stated in s 61 ... The section makes it clear that the right to abandon only arises when there is a constructive total loss *in fact*. That is the necessary precondition to a right to abandon.'

As Lord Porter's summary of this legal issue is concise and illuminating it may be useful, for a deeper understanding of the point, to quote a passage from his judgment:[177]

> '... abandonment may be a condition or consequence of recovery and not a condition precedent to the existence of a total loss whether actual or constructive. A constructive total loss may exist, but if the assured wishes to take advantage of it he must give notice of abandonment, at any rate in a case where there would be any possibility of benefit to the insurer.'

A notice of abandonment is not an essential ingredient of a constructive total loss, but is an essential prerequisite to claim for a constructive total loss. It has to be said that a notice of abandonment cannot convert what is otherwise not a constructive total loss into a constructive total loss. It must be borne in mind that the subject-matter insured must first be a constructive total loss to justify the giving of a notice of abandonment. In other words, a constructive total loss must exist before a notice of abandonment can be given.

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174 See also *Vacuum Oil Co v Union Insurance Society of Canton* (1926) 25 Ll L Rep 546 at p 553, CA, for further discussion of the objectives of a notice of abandonment; see below.

175 [1919] 1 KB 189.

176 [1939] AC 371 at p 381, HL. Emphasis added.

177 *Ibid*, at p 393, HL.

An 'idle ceremony'

There are exceptions to the general rule requiring the giving of a notice of abandonment. Should it constitute an 'idle ceremony' or a pointless exercise, both statute and case law are prepared to dispense with the requirement. There are essentially three circumstances where the giving of a notice of abandonment would be an 'idle ceremony'. The first, expressed in general terms in s 62(7) occurs when 'no possibility of benefit to the insurer' could arise even if notice were given to him. The second, specifically declared by common law, is in relation to freight: this is now probably subsumed under s 62(7); and the third, governed by s 62(9) relates to re-insurance.

No possibility of benefit to the insurer

Section 62(7) which is of general application states that:

> 'Notice of abandonment is unnecessary where at the time when the assured receives information of the loss there would be no possibility of benefit to the insurer if notice were given to him.'

The origin of this exception to the general rule can be traced to the much celebrated case of *Rankin v Potter*,[178] where the term 'idle ceremony' was used by most of the judges. Leaving the niceties of the other issues in the case for discussion elsewhere, it is suffice here to say that the House, adopting the opinions of the majority of the judges, held that in so far as freight was concerned, no notice of abandonment need be given. Some of the judges were of the view that, as there was an actual total loss of freight, the assured was not required to give notice of abandonment. Others, without giving a direct answer to the question as regards constructive total loss of freight, took the safe route by supporting their decision with the explanation that the giving of a notice of abandonment was in any event, in the circumstances of the case, excused because there was in reality nothing to abandon. Thus, there was no necessity for the assured to give notice of abandonment of the chartered freight to the underwriters.[179]

In contrast, *The Kaltenbach Case* was able, by reason of the facts of the case, to provide a more direct account of the law relating to the requirement of a notice of abandonment. As the subject-matter was in relation to a constructive total loss of a ship (and not freight) it lent itself more easily for the court to provide a more 'honest' statement of the law in this regard. The facts of the case have to be reiterated, as they are particularly relevant for the purpose of illustrating the principle of law established therein. Briefly, the plaintiff's vessel was insured for a voyage with the defendants. On 22 January, she struck upon a bank and was damaged. She was surveyed on 24 and was recommended that she should be sold. On 7 February, the owners made up their minds to sell her and wrote to the captain to that effect. On 11 she was condemned, and on 23 she was sold. On 11 March, the plaintiffs claimed for a total loss against the insurers.

178 (1873) LR 6 HL 83. Though the case is primarily concerned with the question as to whether a notice of abandonment is required as regards a total loss of freight, it is also well known as the authority which is concerned with the sensitive issue of whether there is such a concept as a constructive total loss of freight.

179 *Ibid*, at p 157.

The question as to whether the sale was or was not justifiable need not concern us here, for the court was prepared to accept the fact that the ship was (before the sale) in such a condition that the assured was entitled to abandon her and claim for a constructive total loss. On this basis, the court was then able to proceed to determine whether the assured was excused from giving notice of abandonment. The plaintiffs argued that, as it was impossible for them to communicate to the insurers in time to enable them to take any advantage of the situation, or to give any orders in reference to the vessel, it was not necessary for them to give a notice of abandonment; and even if the defendants were to receive a notice of abandonment, they could not have obtained any benefit from it.

Lord Justice Brett, after having closely examined the sequence of events, concluded that the plaintiffs ought either on 7 February, by the next post, or next telegraph to have sent forward the notice to the insurers. None of the judges was able to find an excuse to absolve the assured from the necessity of having to give notice of abandonment; notifying the insurer of the circumstances was in the circumstances of the case not an idle ceremony. The rationale for the decision can be found in a remark made by Lord Justice Theisger:[180]

> 'One can see that if at any moment an assured, who is entitled to treat a loss as a constructive total loss, may at the same time absolve himself from the necessity of giving notice of abandonment by selling the vessel, which although a prudent course, is not a necessary course, it would lead to the greatest danger of fraud upon the underwriters, and at all event to very considerable inconvenience in reference to policies of marine insurance.'

For a post-statute authority on the subject, reference should be made to *Vacuum Oil Co v Union Insurance Soc of Canton*,[181] where Lord Justice Bankes in the Court of Appeal gave an insight into his conception of the statutory term 'no possibility of benefit.' He said:

> 'What it means ... is that when the circumstances are such that the underwriter, if the goods had been abandoned and he had had the absolute control over them, could have exercised that control and done what he thought best under the circumstances.'

In simple terms, the criterion is: were the insurers in a position to make something out of the property?[182] More recently in *The Litsen Pride*,[183] salvage of a vessel sunk in a war zone was impracticable, and so abandonment could not have benefited the insurers. Mr Justice Hirst said:[184]

> 'I hold that there was no possibility of benefit to the underwriters if notice had been given, since any notion of salvage was completely impracticable by reason of the place where, and the war-time circumstances in which, this vessel was sunk.'

180 (1878) 3 CPD 467 at p 486, CA.

181 (1926) 25 Ll L Rep 546 at p 549, CA.

182 *Per* Sargant LJ, *ibid*.

183 [1985] 1 Lloyd's Rep 437 QBD.

184 *Ibid*, at p 478.

Sale of the subject-matter insured

A master of a ship may be, by reason of necessity in an emergency, entitled to sell either the ship and/or the goods. Though he may not have express authority from the owners to sell, nonetheless, his act, if it arises from necessity, would bind the owners. Thus, a constructive loss could be accompanied by the sale of the subject matter-insured.

With the advancement in communication, the problems relating to a sale by the master are unlikely to arise. Thus, it is unnecessary to analyse the extensive comments made on this aspect of the law in *Farnworth v Hyde*,[185] *Rankin v Potter*[186] and *The Kaltenbach Case*.[187] Perhaps, all that is required to be mentioned here is the principle of law delivered by Lord Justice Brett, in *The Kaltenbach Case*, which reads as follows:[188]

> 'A sale cannot make a total loss; notice of abandonment cannot enable the assured to recover for a total loss unless the sale was justifiable by the circumstances, and the circumstances were such as to justify a person in claiming for a total loss. The constructive total loss, in other words, must exist before either the sale or the notice of abandonment; the circumstances must be such as to justify it.'

Briefly, this means that the ship or goods must be in a condition 'to justify what was done afterwards, otherwise the fact of sale or the fact of giving notice of abandonment had no effect whatever.'[189]

Reasonable time

Section 62(3) provides:

> 'Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.'

An assured is not expected, on receipt of information of the loss of his ship, to react immediately to give notice of abandonment. He is allowed by law a reasonable period of time to determine the exact nature of the loss, and to decide on the course of action which he should take.

Lord Justice Brett in *The Kaltenbach Case*,[190] who had devoted some time to consider this issue, said: '... the assured must have a reasonable time to ascertain the nature of the loss with which he is made acquainted ... he must have certain and accurate information as to the nature of the damage.' Such is a question of fact.[191] Lord Wright in *Rickards v Forestal Land Co*[192] has, however, placed a limit on the time allowed for reflection. An assured would not be allowed '... to await events to see how things turn out or to decide what may best suit his interests'.

185 (1866) LR 2 CP 204; 18 CB (NS) 835; 34 LL (CP) 207.

186 (1873) LR 6 HL 83, HL.

187 (1878) 3 CPD 467, CA.

188 *Ibid*, at p 476.

189 *Ibid*, at p 475.

190 *Ibid*, at p 472, CA.

191 See s 88.

192 [1942] AC 50 at p 79, HL.

Form of notice of abandonment

Section 62(2) states that a notice of abandonment:

> '… may be given in writing or by word of mouth or partly in writing and partly by word of mouth and may be given in any terms which indicate the intention of the assured to abandon his interest in the subject matter insured unconditionally to the insurer.'

In *Parmeter v Todhunter*,[193] it was held that 'an implied parol abandonment is too uncertain, and cannot be supported'. In this case, the insurers were simply given directions as to how the ship and cargo were to be disposed of. As this alone did not manifest an intention to abandon the subject-matter insured, it was held not to constitute a proper notice of abandonment.

Acceptance of notice of abandonment

There is no duty imposed on the insurer either to accept or reject a notice of abandonment, though in practice they are very rarely accepted. He may choose to remain silent the effect of which does not constitute acceptance of the notice. This is clarified by s 62(5). The acceptance of an abandonment may be either express or implied. If the behaviour of the insurer is such that it can only be construed as being consistent with their having accepted the abandonment, then they will be held to have impliedly accepted the abandonment by their conduct.[194] But, of course, any measure taken by the assured or the underwriters with the object of saving, protecting or recovering the subject-matter insured shall not, by cl 11.3 of the ITCH(95) and cl 9.3 of the IVCH(95), be considered as a waiver or acceptance of the abandonment or otherwise prejudice the rights of either party.

The assured may at any time withdraw his notice of abandonment, but the underwriters, once they have accepted the notice, cannot withdraw their acceptance: they are bound by their acceptance[195] unless it was accepted under a mistake of fact.[196] A notice of abandonment acts merely as 'an offer' which remains executory unless and until it is accepted. As pointed out by Mr Justice Atkinson in *Pesquerias y Secaderos de Espana SA v Beer*,[197] 'until it is accepted the assured has the right to look for intervening events which may restore in whole or in part his former situation, and may limit his claim accordingly if it suits him better to claim as for a partial loss ...'. This right of withdrawal preserves the right of the assured to treat a constructive total loss as a partial loss.[198]

193 (1808) 1 Camp 540.

194 *Hudson v Harrison* (1821) 3 Brod & Bing 9. *Cf Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224; and *Captain J A Cates Tug & Wharfage Co Ltd v Franklin Insurance Co* (1927) 137 LT 709, PC. Merely requesting that the assured should do the best they can with the damaged property was held in *Thellusson v Flethce*r (1793) 1 Esp NP 72, not to amount to an acceptance.

195 See *Smith v Robertson* (1814) 2 Dow 474.

196 *Norwich Union Fire Insurance Soc v Price* [1934] AC 455 at p 467.

197 (1946) 79 Ll L Rep 417, at p 433, KB, reversed on the facts on appeal, (1947) 80 Ll L Rep 318, CA.

198 Section 61.

Ademption of loss

Whenever there is a constructive total loss, the sequence of events following from the casualty would generally begin with the assured electing to abandon the subject-matter insured to the insurer; this would be followed by the giving of a notice of abandonment, then the issuing of a writ, the trial, and, finally, the delivery of the court's verdict. During this period of time, there is every likelihood that events (beyond the control of the parties) may change: property may be restored – a captured ship could be released – and a constructive total loss may by reason of a change in circumstances become only a partial loss. This raises a question of considerable importance: what point in time is to be taken for determining when there is a constructive total loss?

For certainty in the law, a cut-off point has to be set from which any event occurring thereafter would be considered as inconsequential and of no avail to either of the parties to the contract. An event or time has to be determined from which moment the rights of the parties are regarded as fixed and unaffected by anything which may happen between that date and the verdict of the trial.

In *Ruys v Royal Exchange Assurance Corpn*,[199] Mr Justice Collin who, after having conducted a most careful and meticulous research on the subject, arrived at the following conclusion:

> 'But the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained, and the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years ...'

The assured in this case, upon the capture of the vessel, immediately gave notice of abandonment and, shortly afterwards commenced an action on the policy. By the time of the trial, the war being at an end, the ship was returned to her owners. Applying the above rule, Mr Justice Collins held that the return of the ship after the commencement of the action did not disentitle the owners of the right to recover as for a constructive total loss.

In the House of Lords in *The Blairmore*,[200] the facts of which could be more relevantly discussed elsewhere to illustrate another related issue, Lord Herschell framed the English principle of law as follows:

> 'I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss.'

In summing up, reference should be made to the succinct and informative remarks made in the Court of Appeal in *The Polurrian Case*:[201]

199 [1897] 2 QB 135 at p 142.

200 [1898] AC 593 at p 610, HL.

201 (1915) 1 KB 922 at p 929 CA.

> 'Now it is indisputable that, according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel.'

For a more recent confirmation of this rule by a higher authority, reference should be made to *The Rickards Case*[202] where Lord Wright of the House of Lords expressed his approval of the historical account given of the law by Mr Justice Collins in *Ruys v Royal Exchange Assurance Corpn*.[203]

The above principle is sometimes, in the law of marine insurance, referred to as the theory of 'ademption of loss'. Basically, restoration of the subject-matter insured before (but not after) the commencement of an action could preclude a claim. The Act is silent on this point, but the authorities decided after the passing of the Act have, without qualification, confirmed the validity of the rule.

In practice, there is in effect no problem, as the date of the giving of the notice of abandonment is almost invariably taken as the date of the issue of the writ. The current position is vividly described by the trial judge, Mr Justice Pickford, in *The Polurrian Case*[204] as follows:

> '... the underwriters are asked in case they refuse to accept the abandonment to put the assured in the same position as if a writ had been issued. In nine cases out of ten, and probably a much larger proportion, the underwriters agree to do so, and, if they did not, the consequence is that the assured issues his writ immediately, and therefore the two dates in ordinary English insurance practice correspond.'

More recently, in *The Bamburi*,[205] the usual practice of agreeing to place the assured in the same position as if a writ had been issue was again confirmed.

The waiver clause

The above discussion on a change of circumstances relates to events beyond the control of the parties. But should either party interfere with the subject-matter insured after the loss, cl 11.3 of the ITCH(95) and cl 9.3 of the IVCH(95) would apply. It provides that:

> 'Measures taken by the assured or the underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.'

202 [1941] 3 All ER 62 at p 80, *per* Lord Wright: 'By the English common law, the date of giving notice of abandonment was not treated as the decisive date, which was taken up to be the date of issuing the writ in the action.'

203 (1897) 2 QB 135.

204 (1913) 19 Com Cas 143 at p 153; on appeal (1915) 1 KB 922.

205 [1982] 1 Lloyd's Rep 312. See also *Panamanian Oriental SS Corpn v Wright* [1970] 2 Lloyd's Rep 365, QB, where the insurer had agreed to place the assured in the same position as if a writ had been issued.

Just as an assured would not be allowed to take advantage of any benefit which he had derived from interfering with the subject-matter insured, likewise, an insurer would not be allowed to convert what was in effect a total (actual or constructive) loss into a partial loss, by raising the ship,[206] without the consent of the shipowner.

206 See *The Blairmore Case* [1898] AC 593, HL.