Constructive total loss: a critical and historical analysis

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature: ……..

Abstract

Constructive total loss is a concept that sits midway between partial loss and actual total loss. It entitles the assured to full indemnity where notice of abandonment has been duly served; otherwise he would recover no more than a partial loss, unless in certain circumstances, such a notice could be excused. Constructive total loss originated from the cases of capture, to rescue the plight of the assured where he could not claim for a loss under the policy until the ship was recaptured; and this was soon extended to cases of dispossession in other types and cases of damage. The application of the principle of constructive total loss, a doctrine peculiar to marine insurance, has addressed the intractable problems caused by sea perils, and has also balanced and protected the rights of both the assured and the underwriter. Considering the benefits of constructive total loss to the marine insurance market and the parties to the marine insurance policy, it is important to explore the possibility as to the application of constructive total loss to non-marine areas, especially industries in which large amounts of capital are often locked up, such as in the aviation industry.

The purpose of this thesis is to trace the growth of the principle of constructive total loss, examining its application to hulls, cargo and freight, and then to consider whether the Marine Insurance Act 1906, a milestone in the marine insurance industry, is consistent with the earlier authorities, viz. how the Act echoes or alters the pre-statute cases and, how it works in the modern world. An application of constructive total loss coupled with a notice of abandonment,

as generally set out, would not be properly applied to any indemnity contract other than that of marine insurance. However, regardless of the specific artificial terminology of ‘constructive total loss’, there is a trend for considerations of constructive total loss or a concept of commercial loss to be taken into account in ascertaining a total loss in non-marine cases. Concern that there is a need for its legal application in the non-marine area of insurance and prompted by developments in the insurance market, the issue as to whether constructive total loss has any part to play in the non-marine market is a remarkable and hotly-debated subject and will be comprehensively analysed here for the first time.

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Chapter 1 Introduction

The concept of constructive total loss is regarded as originating from the cases of capture, thereby to rescue the plight of the assured where he could not claim for a loss under the policy until the ship was recaptured.[1] The term 'constructive total loss' had not been prevalent until the 1850s.[2] Before the term came into use, the concept was initially 'shaped and moulded' by Lord Mansfield in judgments he gave in the middle of the eighteenth century.[3] By virtue of this principle, the assured was not bound to wait until the ship was definitely recaptured; instead, as Lord Mansfield commented, the assured could claim for a total loss from the underwriter by the approach of an offer to abandon the subject matter insured, made with due care,[4] and such an offer to abandon was the precedent of the principle of notice of abandonment.

Before the term 'actual total loss' and 'constructive total loss' came into being, two sorts of total loss had been compared and shaped in some early cases. In *Mitchell v Edie,*[5] Buller J illustrated the two types of total loss, one with the whole property perished, and the other with the property existing in specie but the voyage being lost or the expense of pursuing it exceeding the benefit arising from it. In the courts, claims for constructive total loss occur much more frequently than claims for actual loss and, during the long history of carriage of

[1] Jonathan Gilman, Robert Merkin, Claire Blanchard, Julian Cooke, Philippa Hopkins, Mark Templeman, *Arnould Arnould's Law of Marine Insurance* (17th edn, Sweet & Maxwell 2010) para 1168, 954
[2] *Rosetto v Gurney* (1851) 11 CB 276; *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520; *Farnworth v Hyde* (1866) LR 2 CP 204; *Barker v Janson* (1868) LR 3 CP 303
[3] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683; *Hamilton v Mendes* (1761) 1 W Bl 276
[4] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683; *Hamilton v Mendes* (1761) 1 W Bl 276
[5] *Mitchell v Edie* (1787) 1 TR 608

goods by sea, the application of constructive total loss has addressed the formidable problems caused by perils insured against, and has also balanced and protected the rights of both the assured and the underwriter. The thesis systematically and critically traces the growth of the application of constructive total loss in the realm of marine insurance in chronological order as well as analyses whether it could be applied to non-marine area.

Initially appearing in the cases of capture, the doctrine of constructive total loss was soon extended to cases of other types of losses, in situations such as embargoes, blockades, arrests, submersions, and shipwreck, or circumstances where the cost of repairs would exceed the value of the ship when repaired.[6] Chapter Two will show the growth of common law on constructive total loss from its commencement till the passing of MIA 1906[7]. Specifically, for the first time it comprehensively discusses when, where and why the doctrine of constructive total loss commenced, and how it grew and extended.

Being codified from significant pre-statute cases, MIA 1906 was not only a milestone in the UK legislation, but also had an enormous effect on the marine insurance legislation of other nations. Sections 60 – 63 of MIA 1906 deal with issues of constructive total loss[8] and s 60 defines the doctrine of constructive total loss using six criteria - most of which echo the pre-statute cases whereas

[6] Jonathan Gilman, Rob Merkin QC, Claire Blanchard, Mark Templeman, *Arnould's Law of Marine Insurance and Average* (18th Revised edn, Sweet & Maxwell 2013), at para 29-13

[7] Marine Insurance Act 1906 for short.

[8] S 60 provides the definition of constructive total loss; s 61 provides the effect of constructive total loss; s 62 deals with notice of abandonment; s 63 deals with the effect of abandonment.

some of the principles have been altered.[9] The section shows how these principles, such as constructive total loss based upon reasonable abandonment or deprivation of possession, or upon damage, reflect the pre-statute cases; and how some alterations, like the change of the test from uncertainty to unlikelihood, the component of the cost of repairs, the meaning of repaired value, the constitution of the cost of forwarding the goods to their destination and so on, have occurred - all these will be discussed in Chapter Three since it has not yet been systematically reviewed before. Section 60 is exclusive but also leaves some space for the principle of freedom of contract by the wording of 'subject to any express provision in the policy'[10], and the Institute Clauses seem to be such express provisions that refer to a number of matters related to the constitution of a constructive total loss.[11] Today the insurance market often makes use of the modern Institute Clauses, but this does not mean the terms in the Lloyd's SG forms (where ships and goods were insured together under the same policy) have been set aside entirely. The majority of nations all around the world elect to use Institute Clauses issued by the UK insurance market, or use them in conjunction with their locally-issued policy forms. These clauses play an essential role in the modern insurance market. They have modified some principles and made more explicit some less clear points under MIA 1906. In Chapter Three, a comparison of the principle of a constructive total loss between MIA 1906 and the Institute Clauses will also be carried out.

[9] Rob Merkin QC, *Marine Insurance Legislation* (5th edn, London, 2014) p267
[10] MIA 1906, s 60(1)
[11] N Geoffrey Hudson, Tim Madge, *Marine Insurance Clauses* (4th edn, London Singapore LLP 2005) p146

Furthermore, there also exist some specific problems relating to constructive total loss – seizure by pirates and loss of voyage. The attitude toward the deprivation of possession by pirates has changed a lot; in an earlier age, seizure by pirates would be deemed an actual total loss straight away while the consequence of seizure by the pirates today is at significant variance with that of one or two hundreds years ago. As to the consequence of loss of voyage, MIA 1906 makes no reference to it. However, in the very early cases, loss of voyage was to some extent relevant to both the loss of the ship and to the loss of the goods.[12] During its long history such a view has changed and now it has been widely accepted that the loss of ship is the loss of the ship alone, and irrelevant to the loss of voyage; however the loss of goods is on the goods as well as the voyage, and loss of freight is much more relevant to the loss of voyage.[13] Chapter Four explains when, how and why such changes have occurred.

Constructive total loss lies midway between an actual total loss and a partial loss, and the bridge is the notice of abandonment, which having been properly offered, the assured could then get full indemnity; otherwise he would recover no more than a partial loss, unless in certain circumstances, such a notice could be excused. The notice of abandonment is not a component of a constructive total loss, but it just plays an essential role at the stage of showing the option of claiming for the full indemnity in cases of a constructive total

[12] *Arnould*, at para 29-16
[13] FD Rose, *Marine Insurance: Law and Practice* (2nd edn, Informa Law from Routledge 2012) at 21.32

loss.[14]

There would always be a potential risk that, in a case of a constructive total loss, after the casualty has occurred, the assured might wait and see how things develop, and even wait until a total loss really happens when it could in fact have been avoided. The assured might take all the advantage of the situation for himself and throw all the risk onto the underwriter. The principle of the notice of abandonment was justly brought in to avoid such unfairness and, moreover, it gives the insurer an option to take promptly such steps as he may think best to prevent further deterioration of the insured subject, or to improve the value of what remains, in a case of constructive total loss. The combination of the doctrine of constructive total loss and notice of abandonment contributes to the establishment of the fair and reasonable indemnity principle.

Chapter Five starts with a comparison between abandonment and notice of abandonment and then discusses the origin of the necessity to give a notice of abandonment in a case of constructive total loss and in what circumstances, it could be excused. Furthermore, the chapter will discuss how the notice works, and what the effect of an acceptance of such notice will be.

The risk of a total loss of freight is much lower than that of goods or ship, for in the more frequent circumstances the freight might be paid for in advance either in part or as a whole.[15] Constructive total loss of freight appears complicated

[14] Susan Hodges, *Cases and Materials on Marine Insurance Law*, (Routledge-Cavendish 1st edn 25 Mar. 1999), p658
[15] *Marine Insurance: Law and Practice*, at 22.57

and it has varied greatly during its history,[16] and there has even been doubt whether it ever existed. Few cases of total loss on freight have been reported and there is no mention of this issue in the statute law of the various nations up to the present time. This issue still causes heated debate and leaves much room for the law to develop further.

Chapter Six describes in chronological order the development of the constructive total loss of freight and analyses the relationship between the loss of ship/goods and the loss of freight and whether constructive total loss of freight really exists.

As for Chapter Seven, the core issue will be discussed: this is whether the rule of constructive total loss could be applied to non-marine insurance; it is also one of the hottest debates in the insurance market and no final conclusion has ever been reached. The doctrine of constructive total loss is peculiar to marine insurance and no analogy could be properly made between a marine insurance case and a non-marine case. However, many courts are asked to consider whether this sort of loss is within the meaning of the non-marine policy. In addition, considering the benefits of constructive total loss to the marine insurance market and the parties to the marine insurance policy, it is important to explore the possibility of applying the principle of constructive total loss to non-marine areas, especially industries in which much capital is often locked up, such as the aviation industry. Bearing this purpose in mind, the

[16] *Arnould*, 18th edn, at para 29-61, as described, 'most of the more recent cases in which the courts have discussed the concept of total loss, actual or constructive, of freight turned largely on the interpretation of policy clauses.'

arguments for and against the application of the considerations for applying the concept of constructive total loss in the non-marine market will be examined in detail. Research on this issue is of significance since the principle of constructive total loss goes on inspiring innovative legal minds and is always bringing new challenges to the open market.

There has never been a full study of the origins of constructive total loss, its development up to the enactment of the Marine Insurance Act 1906, and how it works in the present age. The purpose of this thesis is to trace the growth of the principle of constructive total loss, examining its application to hulls, cargo and freight, and then to consider whether the Act is consistent with the earlier authorities or how the Act may have altered the pre-statute cases. The thesis also reviews the operation of the Institute Clauses and their impact on the concept of constructive total loss. Moreover the thesis conducts a thorough analysis of whether constructive total loss has any part to play in the non-marine market, as this has never been comprehensively discussed before.

In a nutshell, by case study, literature study, and comparative study, the thesis critically analyses the notion of constructive total loss both in marine and non-marine settings in a historical manner.

Chapter 2 Growth of constructive total loss up to the passing of MIA 1906

Constructive total loss is a sort of total loss which enables the assured to claim for the full indemnity as an actual total loss when due notice of abandonment has been given.[17] Constructive total loss is a doctrine unique to marine insurance[18] and it is regarded as having originated from the cases of capture, thereby to rescue the assured from the sorry predicament where he could not claim for a loss, within the meaning of the policy, until the ship was recaptured.[19] The doctrine of constructive total loss, duly served with notice of abandonment, seemed to be 'shaped and moulded' in a number of decisions by Lord Mansfield in the middle of the eighteenth century,[20] even though at that time, the phrases 'constructive total loss' and 'notice of abandonment' were not used. The term 'notice of abandonment' was initially used by Lord Ellenborough in the cases of *Barker v Blakes*[21] and *Bainbridge v Neilson*[22] and was soon adopted into general usage; and the term 'constructive total loss' and 'actual total loss' started to be prevalent from the 1850s.[23] By virtue of this principle, the assured was not bound to wait to ascertain whether the ship was definitely recaptured or not; instead, as Lord Mansfield commented, he could claim for the total loss from the underwriter by the approach of an offer to

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[17] *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376 at 383, Bigham J ,'A constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment.'

[18] Rubina Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' (1994) Journal of Maritime Law and Commerce, Vol. 25, No. 1

[19] *Arnould*, 17th edn, at para1168, 954

[20] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683, and *Hamilton v Mendes* (1761) 1 W Bl 276

[21] *Barker v Blakes* (1808) 9 East 283 [294] (Lord Ellenborough)

[22] *Bainbridge v Neilson* (1808) 1 Campbell 237; (1808) 10 East 329

[23] *Rosetto v Gurney* (1851) 11 CB 276; *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520; *Farnworth v Hyde* (1866) LR 2 CP 204; *Barker v Janson* (1868) LR 3 CP 303

'abandon' the subject matter insured with due care.[24]

Initially appearing in the cases of capture, the doctrine of constructive total loss was soon extended to cases of loss in other types of situations, such as embargoes, blockades, arrests, submersions, and shipwreck, or circumstances where the cost of repairs would exceed the value of the ship when repaired.[25] Constructive total loss plays an essential role in the realm of marine insurance. The application of constructive total loss has addressed the formidable problems caused by perils covered, has protected the rights of the assured and the underwriter and has promoted the development of the marine insurance market as well. This chapter concentrates on the origins of constructive total loss and the growth of common law on this principle up to the passing of MIA 1906. The issues when, where and why the doctrine of constructive total loss commenced, and how it grew and extended will be comprehensively discussed.

2.1 Growth of constructive total loss on ship to 1906

2.1.1 Deprivation

As early as the eighteenth century, it was taken that, where the assured was deprived of possession of his property, such as being captured, seized, detained, arrested, and situations analogous to these, the eventual outcome of

[24] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683, and *Hamilton v Mendes* (1761) 1 W Bl 276
[25] *Arnould*, at para 29-13

the insured peril would be uncertain,[26] and with an offer to abandon the subject matter insured, the assured could claim for a total loss.[27] In a case of deprivation of possession, an actual total loss exists only when such deprivation is irretrievable.[28] There may be a constructive total loss where the assured loses the 'free use and disposal' of the property insured.[29]

2.1.1.1 The commencement of the doctrine of constructive total loss

As mentioned above, from the decisions by Lord Mansfield in the middle of the eighteenth century, the doctrine of constructive total loss came into being in cases of capture and was then adopted in other circumstances. Early eighteenth century cases such as *Goss v Withers*[30] and *Hamilton v Mendes*[31] can be used to illustrate the extension of this principle,[32] even though the term 'constructive' had not yet been mentioned thereby.

2.1.1.1.1 Where the assured is entitled to abandon

Where a ship was captured and condemned, it was certainly a total loss, and the right to get a full amount of indemnity of the assured would not alter even though the owner recovered or retook the ship after the condemnation.[33] Such total loss would be regarded as an actual total loss under a later definition

[26] *Marine Insurance: Law and Practice*, at 23.29
[27] *Goss v Withers* (1758) 2 Burr 683
[28] MIA 1906 s 57(1)
[29] *Marine Insurance: Law and Practice*, at 23.31
[30] *Goss v Withers* (1758) 2 Burr 683
[31] *Hamilton v Mendes* (1761) 1 W Bl 276
[32] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson)
[33] *Goss v Withers* (1758) 2 Burr 683 [696]-[698] (Lord Mansfield)

which would be attributable to the event of condemnation, instead of the concept of a constructive total loss, as it was called later, by reason of capture.[34] However, even in a case where a ship has never been condemned and never been really driven into the port of the enemy, in general, the ship can also be taken as totally lost by capture and the assured can get compensated by the insurer for the whole amount as total loss, as long as the state of loss remains until the commencement of the action.[35] This rule not only applies to the occasions where the ship is captured, but also to other analogous situations where the ship is deprived of its freedom, such as, restraint, detention, arrest and so on.

There were two vital steps to test for a total loss in a case where the subject matter was captured but not condemned: firstly, whether the assured was entitled to abandon, and secondly whether he abandoned properly.[36] As held by Lord Mansfield, the assured was entitled to offer to abandon the ship or cargo to the insurer as soon as he received the intelligence of the loss on his ship or cargo.[37] Such an offer was properly made as long as no subsequent incident occurred to alter the case.[38] That is, the assured would be entitled to abandon from the moment he got the intelligence that he had lost the control of the ship by capture and the claim for a total loss could be successful if that situation did not alter.[39]

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[34] *Arnould,* at para 29-13
[35] *Hamilton v Mendes* (1761) 1 W Bl 276
[36] *Goss v Withers* (1758) 2 Burr 683
[37] *Goss v Withers* (1758) 2 Burr 683
[38] *Goss v Withers* (1758) 2 Burr 683
[39] *Arnould,* at para 29-13

In *Goss v Withers*,[40] a ship was captured by the French enemy on the 23rd of December 1756 and was being carried to France. The ship was under the control of the French enemy for eight days and was then subsequently recaptured by a British privateer who took her to Milford Haven on 18th of January 1757. The assured informed the insurer immediately 'with an offer to abandon the ship to their care', claiming for a total loss after he had received intelligence of recapture on the 18th of January. Even before being taken by French enemy, the ship had experienced a bad storm, which would have led to her voyage to her destination being interrupted if she had not sailed into port for a refit. As to the cargo, one quarter was thrown overboard in the storm and the rest was spoiled when laid up in Milford Haven.

Lord Mansfield firstly illustrated the circumstances where a total loss could not be claimed: that would be where after the capture, the ship was recaptured and finally restored to the owner in safety,[41] upon reasonable redemption; then the only loss the assured could claim from the insurer would be the cost of the redemption.[42] However with regard to the case at issue, the situation differed. The assured was entitled to abandon, as Lord Mansfield explained, upon the following grounds: the ship had been damaged by a storm prior to her capture; the voyage was at first suspended by the capture and still not able to be pursued after the subsequent recapture, which implied the destruction of the voyage; the market for the cargo was gone, the freight was lost, and the condition relating to the ship was uncertain and the loss to the ship could not

[40] *Goss v Withers* (1758) 2 Burr 683
[41] *Assievedo v Cambridge* (1711) 10 Modern 77; *Pole v Fitzgerald* (1750) Willes 641
[42] *Assievedo v Cambridge* (1711) 10 Modern 77

be estimated. Proof showed that the subsequent recapture just saved a small part; thereby the salvage, which equaled half of the value of the ship, was not likely to be worth much. Since the assured could not recover more than what he had lost, the abandonment would be a proper one. Moreover, it was noticeable that, in those days, the view was, as Lord Mansfield took, that the destruction of the voyage necessarily led to a total loss of the ship and goods. This view changed under modern rules.

In summary, for the reasons mentioned above, the court made the decision that the assured was entitled to claim for a total loss and such type of total loss was taken as the commencement of what was later called a 'constructive total loss'.

2.1.1.1.2 A loss may be deemed a partial loss

However, not all captures necessarily lead to a total loss. In the case of *Hamilton v Mendes*,[43] related to but differing from *Goss v Withers*, the ship 'Selby', laden with cargo was insured from Virginia to London. The ship was firstly taken by the French enemy on the 6th of May 1760, being subsequently carried to France but was then recaptured by an English warship on the 23rd of May. Her voyage was changed from France to Plymouth where she finally arrived on 6th June. As soon as the assured received intelligence of 'Selby', he informed his agent of the decision of abandonment on the 23rd of June. And three days later, the agent acquainted the insurer with an offer to abandon the

[43] *Hamilton v Mendes* (1761) 1 W Bl 276

interest of the ship and claimed for a total loss, while the insurer refused to accept and insisted that he was only bound to pay an average loss[44]. Later on the 19th of August, by order of the owner of the cargo and the recaptors, the ship 'Selby' was brought into the port of London. Till then, there had been no damage to the ship from the capture. The cargo was also delivered at the port of London.

The court held that the loss on the ship captured and recaptured, which could be recovered with a salvage fee, was a partial loss. Lord Mansfield stated that, admittedly, a recapture would not necessarily change a total loss in to a partial one, as where the voyage was destroyed or not worth pursuing or where the salvage was too high to be properly conducted when compared to the value of the ship; as in the case of *Goss v Withers*, the loss would still be total. However, the material difference between the case of *Goss v Withers* and the current case was that, by the time the action was brought, in the former case, the property was literally lost and the hope for the voyage was entirely gone, whereas in the latter case the ship and the whole cargo were kept in safety and the voyage could be recovered. There was not anything worth rescuing in the case of *Goss v Withers* so that the assured was entitled to abandon and recover as a total loss; in contrast to this, in the current case, the voyage was just temporarily obstructed; the ship was in safety and the cargo was finally delivered; and the cost for salvage did not exceed half of the value; all the events brought about only an average loss; and no reasonable person in these circumstances would choose to abandon.

[44] It contained 'the salvage and all other losses and charges that the plaintiff sustained by the capture'.

There also existed an argument that the loss once being total, that state continued and would not be altered by subsequent events, but this argument was rejected by Lord Mansfield. As explained, the indemnity would only be founded upon the damnification at the time the action was brought. If, by any chance, the cause of action disappeared before the action was brought, any attempt to turn an average loss into a total loss under the formerly existing cause, would be in vain. Moreover, Lord Mansfield addressed the fact that the insurer carried no risk of a fall in the market, as he would never have gained from a rise either.

In summary, as discussed in *Goss v Withers,* abandonment should never be the means of approach to turning an average loss into a total loss. Therefore, since the recovery of the ship was not at all hopeless in this case, Lord Mansfield held the view that the abandonment here was not proper and the assured should be allowed to recover as what he actually lost. Thus only partial loss had been constituted in this case.

2.1.1.1.3 Conclusion

It could be inferred from the two cases discussed above that, where the ship is restored in the cases of capture and recapture, it is uncertain whether or not a total loss exists. The recapture per se would not necessarily determine a loss to be a total one or a partial one. Where the voyage of a ship recaptured is destroyed or it is not worth executing a rescue, the assured would be entitled

to abandon the subject matter insured and claim for a total loss.[45] By contrast, the loss would be a partial one where the voyage is just temporarily lost and the property could be retaken with the proper salvage or with ransoms pledged to the recaptor.[46]

The purpose of insurance, on the part of the assured, is to get indemnified, not to benefit from insurance.[47] Thus, where the property was in safety, the insurer was only liable to indemnify the 'charges and expenses the assured should be put to by the capture'. This principle was also identical with some earlier cases, as in *Spencer v Franco*,[48] where a ship was seized and occupied for a long time by the Spanish King in wartime, and the judge held that the loss was definitely not a total one, since the ship returned in safety later. Analogously in *Pole v Fitzgerald*,[49] it was agreed that only a partial loss incurred where the ship was finally restored after four months. But in this case, Lord Wiles took a different view of the relationship between loss of voyage and loss of the ship. He stated that the fact that the voyage was interrupted was immaterial insofar as the matter of the loss of a ship was concerned, since loss of the voyage was irrelevant to the loss of the ship.[50] A similar case was that of *Forster v Christie*,[51] where the ship was just detained for 11 days to 'prevent it from proceeding to a port where British vessels were embargoed.' In that case it was argued that the capture and recapture of the ship were just temporary pauses in the voyage, and both the ship and cargo were in good

[45] *Goss v Withers* (1758) 2 Burr 683
[46] *Hamilton v Mendes* (1761) 1 W Bl 276
[47] *Pole v Fitzgerald* (1750) Willes 641
[48] Before Ld. Hardwicke, at Guildhall, in 1735
[49] *Pole v Fitzgerald* (1754) Ambler 214
[50] This doctrine will be discussed in detail in Chapter Three.
[51] *Forster v Christie* (1809) 11 East 205

condition at the time the notice of abandonment was given, therefore the court declined a claim for a total loss. As to the circumstances where it is common practice to get the property back with due ransom, the claim for a total loss would not usually be successful.[52] The proper cost for salvage or ransom, or any other approach for the purpose of getting a ship back, normally amounted to a partial loss.[53] Under such situations, the right of abandonment was restricted in accordance with the nature of the indemnity principle that the insurer would only be liable to undertake to indemnify the loss that the assured actually sustained. Namely, the assured cannot recover more than what he has suffered, and even in a total loss, as in *Goss v Withers*, the assured must abandon what may be saved and leave the interest in the insured subject left to the insurer.[54] The election of abandonment could never turn a claim for partial loss into one of total loss;[55] and for circumstances where the assured is entitled to abandon, the assured should abandon within a reasonable period. In *Anderson v Royal Exchange Ass Co*,[56] even though there may have been a total loss, the assured did not treat it as a total loss and kept using it on their own account during the time the ship was submersed in the water. The assured did not abandon 'till a considerable part of the cargo was taken out', which was obviously out of time. It was held that here a successful claim for a total loss would be established upon a proper abandonment.[57] As Le Blanc J expressed it, 'the assured must not take the chance of endeavouring to make

[52] *Arnould,* at para 29-13; see also *Masefield AG v Amlin Corporate Member Ltd* [2011] Lloyd's Rep 630
[53] *Hamilton v Mendes* (1761) 1 W Bl 276
[54] *Goss v Withers* (1758) 2 Burr 683
[55] *Cazalet v St Barbe* (1786) 1 TR 187 [191], Buller J, 'there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss.' Also, Lord Ellenborough in the case of *Anderson v Wallis* (1813) 2 M & S 240, 'there is not any case nor principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment.'
[56] *Anderson v Royal Exchange Ass Co* (1805) 7 East 38
[57] *Marine Insurance: Law and Practice,* at 23.28; see also *Anderson v Royal Exchange Ass Co* (1805) 7 East 38

the best of the accident for himself, and when he finds that it does not answer, then to abandon to the underwriters'. In later cases, the right of abandonment was limited, for fear of fraud and the unfairness of a situation where this method is abused to turn a partial loss into a total loss.

Relying upon earlier authorities, Lord Lee CJ took the view that, the result would be changed if the ship could be recovered in safety beyond the period of cover.[58] Thus, where a ship, within the period of cover, could not get back by the end of its voyage, the courts would tend to regard it as a total loss. In *Pond v King*,[59] the vessel insured for a voyage of three months was captured by the French enemy during the three-month voyage and was later recaptured by an Englishman. Although the ship could be restored on account of the salvage, but the assured could not claim for the salvage fee under the policy of 'free of average' and 'without benefit of salvage', thereby for the sake of what gave him the most profit, the assured elected to abandon the ship and claim for a total loss. Admittedly, abandonment itself could not turn a partial loss into a total one, but here Lord Lee CJ held that the insurer was liable for the indemnification because a total loss had occurred within the period of the cover. This was in light of the facts that the voyage was interrupted and the ship was lost and had not come back to the assured by the end of the voyage. Analogously, in *Berkley v Cullen*,[60] it was the view of Lord Lee CJ that, since the ship in question was taken 'for His Majesty's use and turned into a hulk, and the owners never had her again before the end of the voyage', the ship

[58] See *Pond v King* (1747) 1 Wilson KB 191
[59] *Pond v King* (1747) 1 Wilson KB 191
[60] *Mentioned in the case of Charles Pole v George Fitzgerald* (1750) Willes 64

was undoubtedly to be taken as totally lost. However, if the ship had come back safely within the period of the voyage, the result would have been against the assured, and for the insurer.

Therefore, it can be concluded that only when the assured loses control of the ship and is not able to regain control before an action begins, at the same time having given proper notice of abandonment, will this amount to a successful claim for a total loss[61].

2.1.1.2 What is deprivation of possession?

It is agreed that, in the case of capture, arrest, detention, or embargo, regardless of whether it is by a hostile or friendly government, the assured is entitled to abandon, where he is likely to lose the freedom to use and dispose of the ship.[62] The general circumstances of deprivation of possession were illustrated in the American case of *Peele v Merchants' Insurance Co*.[63] The assured was entitled to abandon and claimed for a total loss in the circumstances, firstly, where there was 'a forcible dispossession of the ship', such as a capture or seizure; secondly, where there was 'a restraint or a detention which the assured lost the free use and disposal of his ship, as in the cases of embargoes, blockades, and arrests'.[64]

[61] Here the phrase 'total loss' equates to the phrase 'constructive total loss', but the term had not yet appeared at that time.
[62] *Arnould,* at para 29-17
[63] *Peele v Merchants' Insurance Co* (1822) 3 Mason's Rep 27
[64] *Peele v Merchants' Insurance Co* (1822) 3 Mason's Rep 27

2.1.1.2.1 The period of the deprivation

A purely temporary deprivation of the free use of the vessel would not normally cause a total loss of the vessel.[65] To contribute to a total loss, the period of deprivation should be of an uncertain nature or lasting long enough.[66] For example, in the case of *Forster v Christie*,[67] during the voyage from Hull to St Petersburgh, a British ship was stopped by a King's ship for 11 days, and then proceeded to a port for convoy but waited for 7 days before she continued the voyage. The intelligence came afterwards that a hostile embargo was laid on British ships at the port of destination. The ship was therefore ordered to return to the port for rendezvous. Lord Ellenborough CJ held that no loss occurred during the detention by the King's ship and the temporal arrest or detainment by the King's ship did not cause the loss of the voyage. Even though there was no detainment by the King's ship, she would not have arrived at the destination to deliver her cargo before the embargo.

2.1.1.2.2 The situation of embargo

Where an embargo is not expressly and particularly provided for in a policy, according to common law the risks covered by the policy should be extended to include the situation of embargo.[68] In *Rotch v Edie*,[69] the policies covered against several risks 'at and from L'Orient', among which included 'arrests,

[65] *Marine Insurance: Law and Practice*, at 23.28. See also *Forster v Christie* (1809) 11 East 205
[66] *Marine Insurance: Law and Practice, at* 23.28. See also *Forster v Christie* (1809) 11 East 205
[67] *Forster v Christie* (1809) 11 East 205
[68] See *Goss v Withers* (1758) 2 Burr 683; *Rotch v Edie* (1795) 6 TR 413
[69] *Rotch v Edie* (1795) 6 TR 413

restraints, and detainments, of all Kings, princes, and people, of what nation condition or quality so ever'. The ships were ready for the voyage when an embargo was imposed. The embargo stopped the voyage for a long time and the assured saw no prospect of continuing the destined voyage; he thus planned to abandon the ships to the underwriter and recover a total loss. The underwriter contended that the embargo was not within the perils the policy insured against. However, the court held that what was described in the policy should be extended to the situation of embargo. In the earlier case of *Goss v Withers*,[70] Lord Mansfield stated that 'the assured may abandon and recover as for a total loss in the case of an arrest on an embargo by a prince'. Therefore, it can be inferred that the deprivation of the ship by an embargo may lead to a total loss. Returning to *Rotch v Edie*, as to the construction of the ambit of the words 'arrests, restraints, and detainments', the court thought that they should be extended to include the situation of embargo.[71] Otherwise, if those terms were interpreted in the narrow sense, by means of analogy, where a ship was captured but the underwriters attempted to relieve their liability by arguing that 'capture' was not included within the words 'arrests, restraints, and detainments', it would be ridiculous.[72] Lawrence J also commented that no such decisions had ever been made to exclude the situation of embargo in similar cases and the situation of embargo should be within the meaning of the policy.[73] In the facts of *Rotch v Edie*, the embargo continued to cause the prevention of the voyage and the assured lost the free use of the ships. Thus he could without doubt abandon and recover as for a total loss, for he was just

[70] *Goss v Withers* (1758) 2 Burr 683
[71] *Rotch v Edie* (1795) 6 TR 413 [422]-[424] (Kenyon LJ, Ashhurst J)
[72] *Rotch v Edie* (1795) 6 TR 413 [422] (Kenyon LJ)
[73] *Rotch v Edie* (1795) 6 TR 413 [425] (Lawrence J)

asking for an indemnity of the loss he actually suffered.[74]

2.1.1.2.3 The ambit of restraint of princes

In numerous cases, there arose arguments as to whether there could be a close analogy between a siege of a town and a blockade of a port, and whether they all belonged to a restraint of princes.

In *Rodocanachi v Elliott*,[75] the goods was carried to Paris by railway but the German army took possession of parts of the railway and cut off all communication. The state of siege in Paris continued even after the action was brought. To ascertain whether there existed a constructive total loss here within the terms of the policy, it was essential to be clear whether a siege of a town was the peril insured, viz. under the policy, whether a siege of a town could be explained as a restraint of princes.

First of all, the court held the transit of the goods in Paris by railway definitely fell within the meaning of the policy. As Bovill CJ stated, agreeing with the American Courts, the same principle applied to a vessel being kept in a blockaded port as with goods kept under a siege in town, since they were both situations where the progress of these goods getting to their destination was halted by exterior force. Bovill CJ agreed that siege and blockade would result in the same outcome in respect of a claim for a total loss upon the policy.

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[74] *Rotch v Edie* (1795) 6 TR 413 [422] (Kenyon LJ)
[75] *Rodocanachi v Elliott* (1873) LR 8 CP 649; cited in *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135

The issue of whether a blockade belonged to a restraint of princes was discussed in *Geipel v Smith.*[76] A blockade is usually forcible and takes place in a sovereign state and if the blockade renders the vessels being unlikely to get through, it consequently forms a restraint of princes. However, the fact that the master was deterred from pursuing the voyage just for fear of a blockade would obviously not constitute a restraint of princes.[77] It can be concluded that if the subject matter insured was caught in a blockaded port, such detention would consequently constitute a restraint of princes.[78] Keating J put an analogy between a siege of a town and a blockade of a port and took the view that the circumstances of a siege or a blockaded town or port, or a detainment under an embargo, were all of the same effect.[79]

2.1.1.3 Situations of being restored

It obviously stands that a total loss could be constituted if there is no retaking of the thing insured subsequent to a capture,[80] whereas when there is a restoration, the outcome differs according to the time the restoration occurs. Two essential time slots have been put forward: the time when notice of abandonment is given and the time the action is brought.

As was concluded from the early cases, the rule is set that it is essential to give due notice of abandonment so as to recover as for a constructive total loss.[81]

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[76] *Geipel v Smith* (1872) Law Rep 7 QB 404
[77] *Forster v Christie* (1809) 11 East 205
[78] *Geipel v Smith* (1872) Law Rep 7 QB 404
[79] *Rodocanachi v Elliott* (1873) LR 8 CP 649, 668 (Keating J)
[80] See *Plantamour v Staples* (1781) 3 Doug 1
[81] *Arnould,* at para 29-04

A proper notice of abandonment requires that, firstly, information of the notice should be true and secondly, the state of constructive total loss remains up until the time the notice is given.[82]

For the first factor, allowing a notice of abandonment on the basis of wrong intelligence may give rise to acts of fraudulence and thereby a violation of a key principle of marine insurance. It was thus contended by a judge that no right should be vested in light of false intelligence because it would lead to fraud if the assured recovered beyond the losses in reality sustained.[83] Otherwise, it might happen that an assured gives a notice of abandonment upon a totally imaginary piece of information and claim for a constructive total loss.

As to the other factor, it may occur sometimes that the facts for the notice are true, but the state of such a loss terminates before the notice is given. The court hence held that the notice of abandonment was not properly made since the facts the notice was based upon ceased to exist at the time it was given, even though it was made *bona fide* upon the intelligence.[84]

Again, as far as the second factor is concerned, the facts might alter after the notice is given. As we have seen, not all cases of capture 'or other forcible deprivation' cause a constructive total loss, as for example a ship having been restored. The timing of the restoration of the ship in question is highly material

[82] *Arnould,* at para 29-07
[83] *Bainbridge v Neilson* (1808) 10 East 329 [347]-[348] (Bayley J)
[84] *Bainbridge v Neilson* (1808) 10 East 329 [340]-[344] (Ellenborough LJ)

to determine whether there is a constructive total loss. The different occasions where a ship is regained, with the various differing times of giving the notice of abandonment and bringing an action, are now considered in detail.

2.1.1.3.1 Restoration before notice of abandonment given

Where the ship was restored in safety before notice of abandonment was given, the notice would be inoperative even though the assured has not received the intelligence of the restoration.[85] In *Bainbridge v Neilson*,[86] the ship insured from Jamaica to Liverpool was captured but later restored in safety before notice of abandonment was given. It was thus held that the notice of abandonment given in this case was invalid because, at the time of giving it, a total loss had ceased to exist, and the ship finally arrived at Liverpool with no damage but 'only a trifling expense incurred for the salvage and charges of the recapture'. Besides, it was also unfair for the underwriter to undertake a hypothetical total loss which actually did not exist at the time notice of abandonment was given, for it would 'grievously enlarge the responsibility of underwriters'.[87]

A series of cases reflected this rule. In *Parsons v Scott*,[88] the assured, who had just got the intelligence of capture and knew nothing about the liberation of the ship, gave notice of abandonment of the ship that had been restored

[85] *Arnould,* at para 29-07; see also *Bainbridge v Neison* (1808) 10 East 329*; Parsons v Scott* (1810) 2 Taunt 363*; Falkner v Ritchie* (1814) 2 M & S 290
[86] *Bainbridge v Neilson* (1808) 10 East 329
[87] *Bainbridge v Neilson* (1808) 10 East 329 [340]-[344] (Ellenborough LJ)
[88] *Parsons v Scott* (1810) 2 Taunt 363

before the notice was given. The decision was quite similar in that, although the ship had been detained, at the time when notice of abandonment was given the ship was in safety and the loss was gone, in consequence of which the notice of abandonment was inoperative. Therefore, the assured was not entitled to claim for a total loss. Analogously, in *Falkner v Ritchie*,[89] the ship was seized by the crew and carried to another country far away and was then deserted with her cargo plundered. The ship was afterwards retaken to an English port with part of her cargo by an American prize vessel and finally arrived at London on the 6th of August. The condition for the ship was not seaworthy unless a considerable expense for repair was incurred. The assured gave notice of abandonment on hearing of the seizure and the recapture on the 4th of August, which the insurer rejected. Although a total loss might have existed where there was a seizure initially, by the time the notice of abandonment had been given, the state of a total loss had disappeared due to the recapture. The ship was in safety and the salvage was considerable. The court was thus in favour of the insurer.

It can be concluded that if the subject matter insured is restored in safety before the notice is given, the notice is not valid.[90] An invalid notice of abandonment would certainly fail to obtain recovery of a total loss. Instead, all that the assured could get indemnified from the insurer would simply be the extent of the trifling expenses incurred for the salvage and the costs of recapture. As Grose J expressed, ‘no artificial reasoning shall turn that into a

[89] *Falkner v Ritchie* (1814) 2 M & S 290
[90] *Bainbridge v Neilson* (1808) 10 East 329 [340]-[344] (Ellenborough LJ)

total loss, which in fact is only a partial loss.'[91]

2.1.1.3.2 Restoration between notice of abandonment given and action brought

Where the state of a total loss remains at the time the assured gives notice of abandonment, but later, before the commencement of the action, the ship is restored under the state of being undamaged or just partially damaged, the claim for a total loss may then fail,[92] as in the case of *Hamilton v Mendes*.[93]

The rule has been set in the case of *M'Iver v Henderson*[94] that the criterion of the test as to the validity of the notice of abandonment is upon the state of the ship at the time of action brought. In other words, what really matters is, whether there is a total loss present at the time the action is brought. Undoubtedly, the contract of marine insurance is one of indemnity and is subject to the doctrine of indemnity. Therefore, the amount that the assured could recover was limited to what he had in fact suffered at the time the action was brought. If would be repugnant and unfair to 'grievously enlarge' the burden of the insurer to make them answerable for a supposed total loss which actually ceased to exist before the action was brought.[95]

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[91] *Bainbridge v Neilson* (1808) 10 East 329 [345] (Grose J)
[92] *Arnould,* at para 29-14; see also the cases cited in *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135
[93] *Hamilton v Mendes* (1761) 1 W Bl 276
[94] *M'Iver v Henderson* (1816) 4 M & S 576 [585] (Lord Ellenborough)
[95] *Hamilton v Mendez* (1761) 1 W Bl 276 [280] (Mansfield LJ); *Brotherston v Barber* (1816) 5 M & S 418 [422]-[423] (Ellenborough LJ)

2.1.1.3.2.1 The ship restored to safety at the time of the action

The rule was established in *Brotherston v Barber*[96] that the essential time to ascertain the state of a total loss should be the commencement of the action, viz. at the time of the action brought, the assured is only entitled to make a claim for the loss in effect suffered by him. If the subject matter insured was restored in safety during the period after notice of abandonment was given but before the commencement of action, there could only exist a partial loss on the thing insured. In this case, the assured gave notice of abandonment and claimed for a total loss as soon as he got the intelligence of the capture. However, afterwards, the ship was recaptured and carried to the destination port in safety. The notice of abandonment is just a proposal by the assured. If the insurer accepts, a new agreement arises; otherwise, it would rely on the state of facts at the time action is brought to ascertain whether the loss is a total one or a partial one.[97] The state of capture in the present case was temporary and the injury was just the retardation of the voyage and the average loss for salvage, thus the insurer was not bound to indemnify a total loss but was only answerable for a partial loss.

Where the intelligence the assured gets is true and the state of a total loss continues at the time notice of abandonment is given, in accordance with English law, the decision is then to be ascertained upon the state of facts at the time action was brought, viz. the situation where the subject matter is

[96] *Brotherston v Barber* (1816) 5 M & S 418
[97] *Brotherston v Barber* (1816) 5 M & S 418 [424] (Bayley J)

restored in safety usually defeats the claim for a total loss.[98]

Occasionally the mere return of the hull of a ship between the time of notice given and the action brought would not necessarily defeat a total loss.[99] In the case of *Milles v Fletcher*,[100] a ship was captured during her voyage from Montserrat to London, and was afterwards recaptured and taken to New York. The captain then found the cargo was partly damaged and partly gone; at the same time the ship was also damaged and could not be repaired unless all the cargo was unloaded off her. Since repair was not practical, the captain decided to sell the ship and the cargo in order to benefit his employers. However, the person who signed the contract to purchase the ship ran away. The captain left the ship there and he himself returned to England. The assured offered to abandon and claimed for a total loss immediately after getting the intelligence from the captain.

As to the fact of the master selling the ship, Lord Mansfield held that there was definitely a total loss as long as the captain made his decision fairly for the benefit of the assured under all concerns. With the hulk of the insured ship still in existence, this did not necessarily prevent there being a total loss. In this case, despite the ship having been recaptured, because of the factual matters of the inability to recover the ship, the pointlessness of pursuing the voyage and the impracticability of salvage, there could be a total loss. Given all the circumstances, it may be the best solution by the master to sell her and justify

[98] *Arnould,* at para 29-08
[99] *Milles v Fletcher* (1779) 1 Dougl 232
[100] *Milles v Fletcher* (1779) 1 Dougl 232

the decision of the sale for the ship and cargo by the captain. Lord Mansfield put forward a hypothesis to explain this issue. Suppose that there were no insurance at all, it would obviously be better to sell than continue the voyage. The salvage fee would be higher than the freight. Moreover, the cost of taking her home would be more than the value of her. Since the captain did not know the insurance and had no express order, he would not be biased. Therefore, the underwriter should be responsible for a total loss.[101]

In cases where a total loss exists at the time of the action, the assured may recover such a total loss. The following case of *Brown v Smith* was also a case of capture and recapture of a ship insured. The crew on the ship mutinied and took her to the enemy's port. But later the boatswain went against the orders of the mutinous crew and steered the ship to another port, where the ship was recaptured and the ringleader was executed. For the benefit of all concerned, the government agent decided to sell the ship and contacted the appellants (the assured) immediately. The appellants gave notice of abandonment right away on hearing the news of the ship from the agent's first letter. It was held that the appellants were entitled to abandon the ship and claim for a total loss where the total loss had existed, based on the facts that, at the commencement of the action, the salvage for the ship was impractical and the notice of abandonment was given in time.[102]

From another point of view, the situation for the ship insured in this case had

[101] *Milles v Fletcher* (1779) 1 Dougl 232
[102] *Brown v Smith* (1813) 1 Dow PC 349 [360] (Lord Chancellor)

some similarities to the case of *Milles v Fletcher*.[103] In both cases, the notice of abandonment was given in time, and, at the commencement of the action, the salvage for the ship was impractical. The reason for the salvage being not practical was that, to benefit all concerned, the best solution was hence to sell the ship. The only difference was the attitudes of the judges to the effect of the loss of voyage on the ship, which will be discussed in a later section. In such circumstances as the salvage being impractical, a total loss was held to be present. If notice of abandonment[104] as to such a loss was given, the assured might be able to recover for the total loss.

2.1.1.3.2.2 Uncertainty as to constructive total loss at the time of the action

In some early cases where the hull was restored but it was uncertain whether the restitution cost was more than its value at the time of the action brought, in such circumstances, it was held that a total loss could be claimed.[105] In the case of *M'Iver v Henderson*, a ship insured from Liverpool to Sierra Leone was captured during the voyage by a French frigate and was then carried to Fayal where she was detained during the proceedings in the Admiralty Court, with part of her cargo plundered and the majority of guns, arms, and other instruments taken away. Subsequently the assured got intelligence from the captain of the ship and the assured immediately gave notice of abandonment and claimed for a total loss of the ship but the insurer rejected this. Afterwards

[103] *Milles v Fletcher* (1779) 1 Dougl 232
[104] Before 1808, this was usually called an offer to abandon.
[105] *M'Iver v Henderson* (1816) 4 M & S 576

the remainder of her cargo was sold at Fayal. Finally the ship was carried back to Liverpool.

Lord Ellenborough CJ explained that firstly the abandonment was properly made, namely, at the time the notice of abandonment was given, the factual situation stayed as one of total loss, with the ship captured, her cargo, guns, stores, and other instruments plundered. As to the time the action was brought, the plundered equipment was not back and the voyage was lost; it was also still uncertain whether the ship itself would get fully liberated, even with a large sum of money deposited. The subsequent event obviously did not convert a total loss into an average one under such a circumstance where the assured needed to pay more than the ship's value. Thus Lord Ellenborough CJ commented that, the state of the ship at the time of the commencement of the action was fully sufficient to entitle the assured to recover as for a total loss.

2.1.1.3.2.3 No means of restoration at the time of action

In the case of *Dean v Hornby*,[106] during the voyage from Valparaiso to Liverpool, the ship insured was first seized by pirates and then retaken by an English war steamer which brought her back to Valparaiso during the period covered by the policy. The assured, after getting the intelligence, gave notice of abandonment, but with an inaccurate statement that the ship was condemned at Valparaiso. The insurer rejected the notice. Again, on her way

[106] *Dean v Hornby* (1854) 3 E & B 180

from Valparaiso to Liverpool by the recaptor under the order of a prize master, the ship encountered bad weather and was sold by the prize master.

According to the judgment of Lord Campbell CJ, a total loss had happened because of the existence of seizure and the notice, given in time, and with no restoration or possibility of regaining it. If a total loss once occurred by seizure, it would never be converted into a partial loss unless there was a restoration or some means of regaining the thing insured.[107] According to the case law, the ship once being captured could be deemed a total loss in circumstances where the ship had not been regained at the time of an action.[108]

As to the inaccurate statement of the notice in this case, it was regarded as immaterial, since from the first to the last, the ship was never regained by the assured, which was enough to set up a total loss:[109] that is to say, the ship was out of the control of the assured and the assured was unlikely to take possession of her again at the time the action was brought.[110] By way of contrast, if the assured had obtained any chance of preventing the total loss caused by the sale, the recovery for such a loss could not be upheld.[111]

[107] *Dean v Hornby* (1854) 3 E & B 180 [191] (Campbell LJ)
[108] *M'Iver v Henderson* (1816) 4 M & S 576; *Holdsworth* v *Wise* (1828) 7 B & Cr; *Parry v Aberdein* (1829) 9 B & Cr 411
[109] *Dean v Hornby* (1854) 3 E & B 180 [192] (Coleridge J)
[110] *Dean v Hornby* (1854) 3 E & B 180 [193] (Wightman J)
[111] *Thornely v Hebson* (1819) 2 B & Ald 513

2.1.1.3.2.4 The notice has been accepted by the insurer prior to the restoration

Obviously, the precondition of the rule discussed above is that the notice of abandonment has been rejected by the underwriters, for once it has been accepted, the insurer is liable for a total loss regardless of the actual state of the thing insured. This was illustrated in the case of *M'Carthy v Abel*,[112] where the abandonment of the ship had been accepted; the court found in favour of the assured and the claim for a total loss of the ship was successful, in spite of the fact that the ship was recaptured afterwards. The fact that the ship was subsequently recaptured was immaterial here. As to the result of the rejection on the abandonment of freight and the effect on the freight, in the case where the underwriter accepted the ship, this will be explored infra in the freight section.[113]

Where the assured chooses to abandon the ship insured by giving the notice, once the underwriter acquiesces in the abandonment by accepting the notice, the underwriter cannot avoid his liability by arguing that the total loss had ceased by reason of a recapture having happened. The act of the insurer accepting the notice means that the assured has already admitted the total loss by taking steps to settle the loss. The case of *Smith v Robertson*[114] was again involved in capture and recapture. A ship was captured on the voyage, and, on receiving the intelligence of the capture, the assured offered the notice

[112] *M'Carthy v Abel* (1804) 5 East 388
[113] See Chapter 6, 6.3.3
[114] *Smith v Robertson* (1814) 2 Dow 474

of abandonment to the underwriter immediately. After the underwriter 'acquiesced in or accepted' the abandonment, the news came that the ship was recaptured and restored in safety with her cargo discharged and freight charges received. In these circumstances, the underwriter refused to pay for a constructive total loss.

The present case differed from the case of *Bainbridge v Neilson*[115] and *Falkner v Ritchie*[116] on the grounds that the notice of abandonment here was accepted by the underwriters. The grounds for this rule were stated by Lord Eldon that, for the assured, once a capture had occurred, a right to abandon vested in him. With such a right, the assured could claim for a total loss by electing to give up the property and all interests attached to the underwriters, or to wait for a potential restoration. As for the underwriters, when faced with notice of abandonment, they got two choices as well. They could either accept the notice and pay for a total loss, or reject it, giving an opportunity for the ships to be restored before an action is brought. To put it simply, the notice of abandonment is actually just a proposal by the assured. Hence, once the insurer has accepted it, a new agreement arises; otherwise, it would have to rely on the state of facts at the time the action was brought to ascertain whether the loss was a total one or a partial one.[117]

[115] *Bainbridge v Neilson* (1808) 10 East 329
[116] *Falkner v Ritchie* (1814) 2 M & S 290
[117] *Brotherston v Barber* (1816) 5 M & S 418 [424] (Bayley J)

2.1.1.3.3 Restoration after action brought

2.1.1.3.3.1 The crucial timing - at the time of action brought

The rule was set down in some very early cases that the commencement of the action was the 'governing date' to ascertain the state of the thing insured, whether totally lost or not.[118] As in *Hamilton v Mendes*,[119] the news of the capture and recapture of the ship arrived at the same time and thereupon the assured offered to abandon the ship; it would later be restored in safety before action was brought. Lord Mansfield thereby explained that an action was usually founded upon the state of the damnification at the time it was brought. Therefore, to ascertain whether the assured could recover for a total loss, it was of significance to examine the state of facts at the commencement of the action. Moreover, it can be inferred from the words of Lord Mansfield that the judgment would not be influenced by the state of facts after the time the action was brought. It was widely accepted that the material timing in respect of whether the fact of restoration can defeat a constructive total loss is at the time of action brought, no matter whether the ship is restored before the notice of abandonment is given or between the notice given and the time of action, or after the action;[120] and it is the date of the commencement of the action that really matters.[121]

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[118] *Bainbridge v Neilson* (1808) 10 East 329 [345] (Grose J)
[119] *Hamilton v Mendes* (1761) 1 W Bl 276
[120] *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135
[121] *Brotherston v Barber* (1816) 5 M & S 418

2.1.1.3.3.2 Restoration after action brought cannot defeat a constructive total loss

According to the case law, the rule was given that a restoration after the commencement of the action would not defeat a constructive total loss[122] and the key point of time for the purpose of determining the nature of a loss was at the time the action was brought. As in *Ruys v Royal Exch Assurance Corp*,[123] the ship insured under a valued policy covering war risks was captured by an Italian cruiser when carrying contraband of war for the King of Abyssinia. (These two countries were then at war with each other.) The assured gave notice of abandonment to the insurer on hearing of the capture which the insurer rejected. Then the action commenced. Afterwards, the war came to an end; thereby the Italian Prize Court ordered a restitution of the ship. It was held by the court that the commencement of the action was no doubt the crucial date and the circumstances of recapture after action could not affect the decision in any way.

2.1.1.3.3.3 Restoration between the action and the trial

There is a statement in *Rankin v Potter*[124] that the constructive total loss might be defeated by a change of circumstances before the trial and Blackburn J cited the case of *Dean v Hornby*[125] to support his view. Nevertheless, according to the principle in the *Dean* case, it was stated that all that had

[122] *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135 (QB) 140-141 (Collins J)
[123] *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135
[124] *Rankin v Potter* (1873) LR 6 HL 83
[125] *Dean v Hornby* (1854) 3 E & B 180

happened after the action was brought was immaterial. Thus it may be inferred that the expression mentioned above was at least not very accurate: instead of the words 'before trial', it should be 'before action'. In *Rodocanachi v Elliott*,[126] the assured gave notice of abandonment and the action commenced shortly afterwards. Meanwhile the goods insured were finally restored to the destination after the commencement of the action but before trial. In light of the existence of a constructive total loss before notice of abandonment given, the court held that the assured was definitely entitled to abandon and the insurer thereupon gained the goods as well as all interests on it, such as the price for the sale of the goods. It could be inferred from this judgment that the assured could recover for a total loss since there was no change in the situation before action was brought and as to the restoration after action, no matter if it was before or after a trial, it would not defeat the abandonment made before action, but only that the rights derived from the abandonment should be reallocated.[127] Therefore it can be taken as settled law that the state of facts at the time of the commencement of the action is decisive; and it actually brings benefits and convenience to all parties to make the time of the commencement of the action a decisive date, instead of the expression 'before trial', for the former is a certain date while the latter is an obscure and complicated period.

2.1.1.3.4 Fees for restoration versus the value of the ship

However, it does not necessarily mean that all restoration before action is

[126] *Rodocanachi v Elliott* (1873) LR 8 CP 649; cited in *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135

[127] *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135 (QB) 141-142 (Collins J)

brought amounts to the termination of a total loss.[128] In cases where the ship could be restored under the state which could be regarded as a constructive total loss and the release of her nevertheless seems to be of little value, the assured will then still be entitled to abandon and claim for a constructive total loss.[129] On some occasions, the ship could be regained from countries outside that of the owner.[130] Nonetheless, the salvage is impractical and the owner cannot use the ship with freedom. In this case the possibility of restoration is not sufficient to defeat a claim for the constructive total loss.[131] The above two situations are in effect answering the question as to whether the assured should pay more than the value of the ship[132] to get her back, the test of which has been set out well in the case of *Shepherd v Henderson*.[133]

2.1.1.4 Repurchased

In English law, the loss of the ship would be an actual total one where there had been a lawful condemnation, for the property would be altered thereby. As a result, any repurchase by the master afterwards makes no impact on recovering a total loss.[134] However, cases of repurchase by masters would be more complicated where there has been no lawful, or unlawful condemnation. In the United States, the master repurchasing the ship before notice of abandonment is given, is taken as acting on behalf of the assured, so that

[128] *Milles v Fletcher* (1779) 1 Dougl 232
[129] *Arnould,* at para 29-14
[130] According to *Arnould*, the expression 'out of the country of the owner' in old cases would not be a decisive element in modern cases.
[131] See *Brown v Smith* (1813) 1 Dow PC 349; *M'Iver v Henderson* (1816) 4 M & S 576; *Holdsworth v Wise* (1828) 7 B & Cr 794 [799] (Bayley J)*; Dean v Hornby* (1854) 3 E & B 180; *Lozano v Janson* (1859) 2 E & E 160 [177]-[179] (Lord Campbell); *Shepherd v Henderson* (1881) 7 App Cas 49
[132] As to the scope of the value here, see a later section.
[133] *Shepherd v Henderson* (1881) 7 App Cas 49, 68-70 (Lord Blackburn)
[134] *Wilson v Forster* (1815) 6 Taunt 25 [29] (Gibbs CJ)

recovery as for a total loss would be defeated;[135] while the repurchasing after notice of abandonment given is deemed to be the behaviour of the insurer,[136] affecting nothing concerning the indemnity as for a constructive total loss.

In *M'Masters v Shoolbred*,[137] the ship insured was captured and carried into a neutral port and subsequently sold there by the captor. The master afterwards repurchased the ship on account of the owners in circumstances in which the ship was illegally condemned at a neutral port. The claim for a total loss by the assured failed.[138] As Kenyon LJ explained, here the master would be deemed to be an agent of the assured who had repurchased the ship and got back the ship with expenditure. In such circumstances, the assured could only be indemnified for the loss he really suffered – a partial loss of the sum for repurchasing and repairing the ship. In addition, by virtue of analyzing the facts, the assured in effect did not given notice of abandonment in the first instance. It can thus be concluded that the assured could recover only for a partial loss.[139]

The principle is echoed in English law. In *Wilson v Forster*,[140] a ship was seized and put up for public sale by a neutral state without any lawful condemnation. The master repurchased her at the sale and then after repairing her, navigated her back to London, but the assured refused to repay the money for the repurchase. The point in this case was whether, upon the

[135] *Arnould,* at para 29-15; see also *M'Masters v Shoolbred* (1794) 1 Esp 237; *Wilson v Forster* (1815) 6 Taunt 25
[136] *Arnould,* at para 29-15
[137] *M'Masters v Shoolbred* (1794) 1 Esp 237
[138] *M'Masters v Shoolbred* (1794) 1 Esp 237
[139] *M'Masters v Shoolbred* (1794) 1 Esp 237 [239]-[240] (Kenyon LJ)
[140] *Wilson v Forster* (1815) 6 Taunt 25

ship, the assured was entitled to recover for a total loss, or only a partial loss. It was held that the mere seizure and sale with no lawful condemnation could not constitute forfeiture. The property here had not changed since the master, for the benefit of the assured, got her back with the expense of a repurchase. There existed no total loss on such a ship repurchased. Additionally, since the assured never abandoned the ship, no total loss could be recovered here and what the assured could get indemnified was only the amount of the average costs.

2.1.2 Damage

When a ship insured is destroyed and becomes totally wrecked by perils insured, the assured can recover for a total loss with no notice of abandonment needed – this is a case of an actual total loss.[141] A total loss could also exist where there is no destruction but just damage, and such damage is usually serious but not to the extent of destruction and the shape of her hull remains. The repair is hence necessary but cannot be executed due to some objective reasons: such as a shortage of money or materials;[142] or there is no place for repairing it; or there is no chance of extricating it; or for the reason that even though the repair can be procured, the cost for repair exceeds the value after being repaired.[143] To sum up, in the case where repair is necessary but hopeless or not worth carrying out, there is a constructive total loss.

[141] *Arnould,* at para 29-20
[142] But these two reasons no longer give rise to a constructive total loss, according to *Arnould*.
[143] *Arnould,* at para 29-22

2.1.2.1 Damaged with hopeless for recovery

2.1.2.1.1 Short for funds and facilities

Nowadays there is little likelihood that the master cannot raise enough funds for repairs. Even though it occurs, the loss can hardly be recovered purely by reason of no funds, for the causation of lack of money is usually not included in perils insured.[144] But in the very early beginning, in some old cases, there was some support for such factors, as in the case of *Somes v Sugrue.*[145] In that case Tindal CJ held that where there was no possibility that the assured could find a place for repairs, or, where even though a place for repairs was available, the assured had no access to raise enough money, under such situations, the sale of the vessel could be justifiable and a total loss could be recovered; whereas Richardson J stated a different view in *Read v Bonham*,[146] that shortage of money did not contribute to the necessity of the sale of the ship by the master. Moreover, the assured could not claim for a constructive total loss in circumstances where the repair was urgent but there was a shortage of for facilities for repairs.[147] More recently, it has been widely accepted that neither lack of funds nor lack of facilities could contribute to a constructive total loss.[148]

When the repairs were necessary but there was a lack of money and no other access to raising funds except for the master selling the goods to defray the

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[144] *Arnould,* at para 29-24
[145] *Somes v Sugrue* (1830) 4 C & P 276 [283]
[146] *Read v Bonham* (1821) 3 B & B 147 [156]
[147] *Irvin v Hine* [1950] 1 KB 555, see also *Arnould,* at para 29-24
[148] *Arnould,* at para 29-24, fn 163

cost of repairing the ship, the discussion arose as to what the indemnity for the sold goods was in such circumstances. The rule was well established that the insurer was only liable for a loss caused by the 'proximate cause', not a 'remote cause'.[149] Therefore, where perils of the sea were too remote a cause of the loss of the sold goods to make the underwriter liable, the insurer could be relieved from his liability of indemnity.[150]

In *Powell v Gudgeon*,[151] the ship was badly damaged and in urgent need of repair to proceed with the voyage. Lacking funds to defray the cost of repairing, the master had no other means to raise the money but to sell part of the goods. Lord Ellenborough CJ held that the insurer was not liable for the loss of the goods not directly caused by the perils insured, but by a sort of 'forced loan' due to a lack of funds or having no other means to raise funds for repairing the ship.[152] A loss not proximately caused by sea risks insured against was not recoverable. This opinion was totally affirmed by Bayley J and Abbott J, that since the loss was induced by virtue of raising funds for repairing the ship, which was not included in the perils insured, thereby the underwriter was not liable to the loss.[153]

[149] *Powell v Gudgeon* (1816) 5 M & S 431 [437] (Ellenborough LJ)
[150] *Powell v Gudgeon* (1816) 5 M & S 431 [437] (Ellenborough LJ)
[151] *Powell v Gudgeon* (1816) 5 M & S 431
[152] *Powell v Gudgeon* (1816) 5 M & S 431 [437] (Ellenborough LJ)
[153] *Powell v Gudgeon* (1816) 5 M & S 431 [438]-[439] (Bayley J and Abbott J)

2.1.2.1.2 No hope of extrication

It was regarded that, in numerous old cases, the circumstance where the ship was damaged but with no hope of extrication from the risks insured has been the main ground to constitute a constructive total loss.[154] In the early case of *Somes v Sugrue*,[155] Tindal CJ illustrated several situations that could justify a sale by the master and entitle the assured to claim for a total loss, one of which was where there was no hope at all of extricating the ship and getting her repaired at the place where she suffered the injury. Whereas, by way of contrast, the loss on a ship which can be extricated would not be regarded as a constructive total loss. That was the judgment in the case of *Doyle v Dallas*,[156] in which the ship sunk and it was suggested that it should be sold. By analyzing the possibility extricating the ship, it could be concluded that it was improper to say raising the ship was hopeless since 'the height of the water did vary greatly with the variation of the winds'. It was therefore held that, on the grounds that the recovery for the ship was practical, the sale was thus unjustified and no total loss was admitted here. Questions will be discussed infra to determine which sale and in what situation the sale could be justifiable[157] and whether the assured could claim as for a total loss without notice of abandonment.

In modern times, more cases of constructive total losses appear where the cost of repairing exceeds the estimated repaired value, viz. is not worth

[154] *Arnould,* at para 29-25
[155] *Somes v Sugrue* (1830) 4 C & P 276 [283]
[156] *Doyle v Dallas* (1831) 1 Mood & Rob 48 [54]-[56]
[157] *Somes v Sugrue* (1830) 4 C & P 276 [283]

repairing. In legal argument, sometimes these two tests, 'hopeless' and 'worthless' will be merged together.[158]

2.1.2.2 Cost of repair exceeding repaired value

One aspect in relation to the difference between an actual and a constructive total loss has been expressed by Willes J in the case of *Barker v Janson*.[159] Where a ship ceased to be in existence or could never be used for the purpose of a ship, it was an actual total loss. By contrast, if the ship was badly damaged but had not ceased to be a ship and could be repaired only at an expenditure exceeding the repaired value, it was a constructive total loss and with a due notice of abandonment, the assured could recover for the full sum insured. In *Kaltenbach v Mackenzie*,[160] it was similarly held that the ship could be regarded as a constructive total loss where the expense of the repairs would exceed the repaired value. The law was set in accordance with an abundance of cases: that where the damage to the ship, by perils insured against, was serious and the cost of repairing her would exceed the repaired value, the assured was entitled to abandon the ship and recover as for a constructive total loss.[161] In the courts today, the commonest cases of constructive total loss of ship usually arise from the circumstances where the cost of repairs

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[158] *Arnould,* at para 29-25
[159] *Barker v Janson* (1868) LR 3 CP 303, 306-308
[160] *Kaltenbach v Mackenzie* (1878) 3 CPD 467
[161] *Arnould,* at para 29-27; see also *Benson v Chapman* (1843) 6 M & Gr 792 (Tindal CJ); *Irving v Manning* (1847) 1 HL Cas 287; *Grainger v Martin* (1862) 31 LJQB 186; *Kemp v Halliday* [1866] LR 1 QB 520; *Barker v Janson (1868)* LR 3 CP at 305; *Kaltenbach v Mackenzie* (1878) 3 CPD 467; *Sailing Ship 'Blairmore' Co v Macredie* [1898] AC 593

exceeds the repaired value.[162]

2.1.2.2.1 What is the cost of repairs?

In line with the view of *Arnould*, the cost of repairs was merely the cost to make a ship seaworthy again; it was not compulsory to make the ship carry the same goods in the same state.[163] As Lord Ellenborough CJ stated in the case of *Reid v Darby*,[164] it was not required to make the ship navigable to get home with the same goods, but just being in a seaworthy condition was enough. This principle was adopted in the case of *Doyle v Dallas*[165] that since the ship was repaired later and used as a coasting ship, no constructive total loss could be claimed even though she was no longer fit to finish the contemplated voyage. It was the ship that was insured, not the voyage. Moreover, Tindal CJ in *Benson v Chapman*[166] also mentioned the same test for cost of repairs as repairing the ship for the purpose of it being in a seaworthy condition.

However, in modern times, the test has been developed and Lord Shand in the case of *Sailing Ship 'Blairmore' Co v Macredie*[167] put forward a test for the meaning of cost of repair in ascertaining a constructive total loss, viz:

> If a prudent owner, having regard to all the circumstances, would abandon his vessel and would not attempt to raise and repair her because the cost

[162] *Arnould,* at para 29-27
[163] *Arnould,* at para 29-36; See also *Reid v Darby* (1808) 10 East 143 [156]-[157] (Lord Ellenborough CJ); *Doyle v Dallas* (1831) 1 M & Rob 48; *Benson v Chapman* (1843) 6 M & G 792 [808]-[812] (Tindal CJ)
[164] *Reid v Darby* (1808) 10 East 143 [156]-[157]
[165] *Doyle v Dallas* (1831) 1 M & Rob 48
[166] *Benson v Chapman* (1843) 6 M & G 792 [808]-[812]
[167] *Sailing Ship 'Blairmore' Co v Macredie* [1898] AC 593

of doing so would exceed her value when thus restored to her former condition, a constructive total loss has been incurred.

It can be seen that the meaning of 'her former condition' is still ambiguous. It will thus need further consideration, and will be discussed in detail, below as to what amounts to the cost of repairs.

2.1.2.2.1.1 The contribution of the goods to the expense of the salvage operations

It was once put forward in *Arnould* that where the ship, which had sunk with her goods, was raised together in a joint operation, in estimating the cost of repairing the ship, there was an issue as to whether the salvage for the goods should be deducted or not.[168] In some old cases, as in *Kemp v Halliday*,[169] this point was hotly debated. The ship sunk, with part of her goods, by perils insured against and afterwards the ship was raised, together with what goods there were, by the agent of the ship. The assured claimed a constructive total loss for the ship based upon the argument that the cost of repairing the ship would be in excess of the repaired value. It was of great significance here to ascertain whether the salvage contribution of the goods should be deducted; otherwise the result would be different. Shee J considered that the salvage operation was not a sort of general average; and no intention to benefit from the ship or the goods could be shown from this salvage operation. He thus held that there was no deduction here and his judgment was for the assured.

[168] *Arnould,* at para 29-31
[169] *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520

However, Blackburn J, who was affirmed by the Exchequer Chamber, Martin B and Willes J, shared a different view. Blackburn J made his decision on the ground that both the ship and the goods got benefits from the salvage operation and thus the goods' contribution to salvage expenditure should no doubt be taken into account and be deducted.

Nowadays in accordance with MIA 1906 s 60, it could be inferred that the salvage for the goods should be deducted; but there is also a different view that the cost of repairs in the Act includes all salvage operations. As explained in *Arnould*, it is better to refer to the common law, when there exist some doubt about the meaning of the Act.[170]

2.1.2.2.1.2 The value of wreckage

In modern times, according to the Institute Clauses, it has been made explicit that the value of wreckage will no longer be taken into account in ascertaining whether the ship is a constructive total loss,[171] viz. without the aggregate of the value of the wreck, only the pure cost of repairs will be compared to the repaired value.

Actually this issue has long been debated and no certain rule on this is mentioned in the 1906 Act. The value of wreckage was allowed to be added into the cost of repairs in some cases after 1906,[172] while in many others it

[170] *Arnould,* at para 29-32
[171] *Arnould,* at para 29-28, fn 177
[172] *Arnould,* at para 29-28; see also *Macbeth & Co Ltd v Marit Ins Co Ltd* [1908] AC 144

was held that it ought to be excluded.[173] The situation after 1906 will be discussed in the next chapter; in this chapter it mainly focuses on the pre-Act cases.

A change of attitude can be seen towards the question as to whether the value of wreckage should be included in the cost of repairs. In *Rankin v Potter*,[174] when making comparisons, Mr Martin B said:

> A constructive total loss is grounded upon a calculation. In the present case the calculation would be, present value of the ship £3000, expense of repairs £7500, total £10,500; against value of the ship when repaired £5,264, freight which if repaired the ship would have earned, say £3500, total £8764.

Here the 'present value' was referring to the value of the wreck, which was taken as being included. Similarly, in the case of *Young v Turing*,[175] Lord Abinger expressed the view that the damaged value of the ship lying in the dock, which equals to the value of the wreck, should be added into the cost for repairs. But it was overruled in *Bank of English v Vagliano*[176] and *Angel v Merchants' Marine Insurance Co*[177]. In *Bank of English v Vagliano*,[178] it was held that the words 'cost of repairs' only referred to the natural meaning as to the cost of repairing the damage. Also, in the latter case, it was stated explicitly

[173] See *Hall v Hayman* [1912] 2 KB 5; see also *Carras v Lonon & Scottish Ass Corp* [1936] 1 KB 291
[174] *Rankin v Potter* (1873) LR 6 HL 83
[175] *Young v Turing* (1841) 2 M & G 593 [600]-[605]
[176] *Bank of English v Vagliano* [1891] AC 107
[177] *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811
[178] *Bank of English v Vagliano* [1891] AC 107

that 'the ship owner was not entitled to add the value of the wreck to the cost of repair, in determining whether there was a constructive total loss of the ship.'[179] To support his view, Vaughan Williams LJ gave an illustration. He supposed that the damaged value of a ship was 10,000 pounds and it cost around 1,000 pounds to repair it. Her repaired value was 10,500 pounds. And obviously it would be absurd to take it as a total loss, when it was only damaged to the extent of 10 percent or even less.[180] This could be regarded as a perfect explanation for such an issue. If the value of the wreck should be included then any damaged value should be taken into account as well, which would completely mess up the rules.

2.1.2.2.1.3 The estimated expenditure for repairs

In estimating the exact cost of repairs, the rule was set that all circumstances of the ship, at the time and the place that the casualty occurred, should be completely taken into account.[181] As Bayley J commented in *Morris v Robinson*,[182] to ascertain the necessity of a sale by the master, the subject matter insured in damages should be fully examined and 'the decree of the Vice-Admiralty Court could only be looked upon as the fair opinion of a person residing on the spot', but this could not be made the foundation of the final judgment. In *Young v Turing*,[183] Lord Abinger CB confirmed that all the circumstances attending the ship ought to be included, to ascertain whether an

[179] *Bank of English v Vagliano* [1891] AC 107
[180] *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811
[181] *Arnould,* at para 29-37; see also *Read v Bonham* (1821) 3 Brod & Bing 147; *Cannan v Meaburn* (1823) 1 Bing 243; *Somes v Sugrue* (1830) 4 C & P 276
[182] *Morris v Robinson* (1824) 3 B & Cr 196 [204]-[206]
[183] *Young v Turing* (1841) 2 M & G 593

uninsured prudent owner would repair the vessel in such circumstances. The vessel was not a British ship, and in accordance with the English market, the repaired value in England would be less than the cost of repairs. It was also proved that in Holland it cost far more to repair the ship while the repaired value was much less; what was worse, the trading companies in Holland would not employ a ship once damaged even though she was perfectly repaired. Thereby the court took all these circumstances, affecting the value, into account in considering whether the ship was a partial or a total loss.[184]

It was held that, to make a damaged ship seaworthy again, besides the action taken to repair her, the preparatory salvage was essential as well, like raising a sunken ship, or refloating the stranded ship and so on; and thus all these should be aggregated together to calculate the cost of repairs when ascertaining whether a constructive total loss existed.[185] As in the case of *Doyle v Dallas*,[186] Lord Tenterden CJ, shed light upon the right judgment for whether the loss was a total one, and that it would depend on two points: firstly the probability of being able to raise the ship, and secondly the power to repair her, which implied that these circumstances should be added together.[187]

As to whether the decayed part should be excluded in estimating the cost of repairs, and this question is mentioned in *Arnould*,[188] there was an answer in

[184] *Young v Turing* (1841) 2 M & G 593 [601]-[603] (Lord Abinger CB)
[185] *Arnould,* at para 29-38; see also *Mount v Harrison* (1827) 4 Bingham 388
[186] *Doyle v Dallas* (1831) 1 Mood & Rob 48
[187] *Doyle v Dallas* (1831) 1 Mood & Rob 48 [54]-[56] (Lord Tenterden CJ); see also *Gardner v Salvador* (1831) 1 Mood & Rob 116
[188] *Arnould,* at para 29-39

the case of *Phillips v Nairne*.[189] An old and decayed ship was damaged by perils insured against, and the cost of repairing her would have exceeded her repaired value. Since it was admitted that the ship was seaworthy, and the damage was caused by the casualty insured against, not by reason of the decayed state, the court thus refused to exclude the old and decayed state of the ship when estimating the cost of repairs. Moreover, according to the words of the judge, here only the repair referable to the damaged by the casualty insured was included. Obviously no deduction needed to be made.

To sum up, the cost of repairs should be calculated in detail with all the circumstances considered. It was to be a whole amount, including the preparatory salvage and the specific repair to the damages. The decayed state of the ship, which made no difference to the loss, should be included in the cost of repairs. Once the cost of repairs exceeded the repaired value, there was a total loss, even if a large portion of the amount could be paid for by a third party.

2.1.2.2.1.4 Repaired by the underwriter

There was an important issue discussed in *Sailing Ship 'Blairmore' Co v Maredie*:[190] whether or not the large expenditure by the underwriter in raising up the ship insured should be taken into account in estimating the whole sum for the repairs; or whether to exclude the expenditure by the underwriter, and just calculate an estimated cost of the salvage operation as raising up the ship

[189] *Phillips v Nairne* (1847) 4 CB 343; 16 LJCP 194 [343]-[359]
[190] *Sailing Ship 'Blairmore' Co v Maredie* [1898] AC 593

by the assured on their own when assessing the value of a constructive total loss as claimed.[191]

In this case, during the currency of the contract period, the ship '*Blairmore'* encountered a squall and sunk. The assured gave notice of abandonment to the underwriters, but before the commencement of the action, the underwriter incurred a large expenditure of their own in raising up the ship and it was successful. The assured stated that the cost of raising and repairing the ship would exceed the value of the ship after being repaired and they thereby claimed for a constructive total loss. However, the underwriter averred that the expenditure by the underwriters themselves for raising up the property insured should not be calculated in the cost of repairs, that is to say, by excluding that expenditure, the cost of repairs would be less than the repaired value, and thus the loss was not total but partial.

2.1.2.2.1.4.1 Actual total loss or constructive total loss

In accordance with Lord Halsbury LC,[192] in a case where a ship sunk to the bottom of the water, an actual total loss necessarily occurred. Only in the circumstances of capture, seizure, arrest, detention or the similar situations where there has been deprivation of possession, a total loss would be converted into a partial one by the restitution before action brought. In the present case, since a total loss had existed and there was no such restitution, the contention by the underwriter hence should be refused. Moreover, instead

[191] *Sailing Ship 'Blairmore' Co v Maredie* [1898] AC 593, 601-608 (Lord Watson)
[192] *Sailing Ship 'Blairmore' Co v Maredie* [1898] AC 593, 598-599 (Lord Halsbury LC)

of ‘the prudent uninsured owner test’, Lord Halsbury LC stated that ‘the astute underwriter test’[193] should be taken into account.

Lord Watson objected to such an opinion even though he agreed that the loss in this case was a total but certainly not an actual total loss, but nevertheless it was a constructive total loss, for it was not a total wreck immediately. Obviously the ship was likely to be raised to the surface and repaired but it might not be worth doing. Lord Watson affirmed the test for ascertaining a constructive total loss as in the case of *Irving v Manning*:[194] in estimating a constructive total loss, it could be inferred that an uninsured prudent ship owner, whether he chose to raise and repair the ship or leave her at the bottom of the sea, would have concerns about her repaired value compared to the cost of repairs. The test was the same both in Scottish and English law and the difference was the date when the test ought to be applied, which need not be discussed in this part.

2.1.2.2.1.4.2 No deduction of expenditure by the underwriter

The rule was set in the case of *Sailing Ship ‘Blairmore’* that, if a large amount of expenditure were paid by the underwriter, there should be no deduction for an estimated cost of repairs. Some concerns were expressed, similar to the contention by the underwriter in this case, that, firstly, before the commencement of the action, the ship was raised up and what the assured

[193] Earl of Halsbury LC stated, ‘In this particular case… It would no longer be, what would a prudent uninsured owner do, but, how much would an astute underwriter expend to turn a total into a partial loss…’
[194] *Irving v Manning* (1847) 1 HLC 288

needed to bear was no more than the cost of repairing her. Secondly, the underwriter added that the ship being raised by them could be regarded as being raised by natural causes, such as ‘volcanic action under the bed of the sea’, or ‘by some neutral person acting in furtherance of his own purpose’. However, Lord Watson’s view was that, according to English law, if, at the time after notice of abandonment was given and before action was brought, the ship was really raised by natural causes or neutral persons without any expenditure by the assured themselves, the constructive total loss as claimed would be defeated since the repaired value exceeded the cost for repairs thereby and a prudent uninsured ship owner would choose to repair the ship without hesitation. This was also approved by Lord Shand. But, in the circumstances of this case, it was the underwriter, not a neutral person or natural causes, who raised the ship. As Lord Watson enunciated, it would break the principle of equity to allow a contractual party (the insurer) to avoid his liability for a total loss by intervening with a gratuitous expenditure of their own. Being more specific, if this was allowed, in order to pay for a partial loss, the underwriter might escape from paying a whole amount as for a total loss by making a partial expenditure. Even though the underwriter would promise to pay for the repaired bill as well, Lord Watson insisted no one could go beyond the contract and the underwriter was definitely not allowed to shirk his responsibility for a total loss by paying a partial bill for repairs, especially under the policy where only total loss was covered.

2.1.2.2.1.4.3 Conclusion

In some foreign countries, as Lord Herschell indicated, the rights and obligations were fixed once a due notice of abandonment was given, viz. anything that happened after notice of abandonment was given made no sense. However, in England, the law was stipulated in a different way. In a long course of decisions in the cases of capture and recapture, once a ship was restored in safety before action was brought, a total loss would be defeated, unless, as in the case of *Holdsworth v Wise*,[195] the salvage for the ship was equal to or even exceeded her repaired value, under which circumstance the total loss existed. Thus, the general rule was that the assured could only recover as for a partial loss if by the commencement of action a change of circumstances occurred and defeated the existence of a total loss. However, such change of circumstances never included the intervening by the underwriter with a large expenditure for salvage to put the ship into a condition so that the final cost of repairs was less than the repaired value as in the case of *Sailing Ship 'Blairmore'*. Even though, as in this case, the insurance was against both total loss and partial loss, Lord Herschell held that it should be treated in the same way as where the insurance was only against the total loss. Thus the underwriter could not escape his liability for a constructive total loss 'by doing part of the repairs'.

[195] *Holdsworth v Wise* (1828) 7 B & Cr 794

2.1.2.2.2 What is repaired value?

Besides the concept of 'cost of repairs', another essential concept in ascertaining a constructive total loss would be 'repaired value'.[196] In an unvalued policy, obviously, the repaired value would be taken as the real market value of the ship with no other choice, whereas in a valued policy, it is usually argued as to whether the agreed value in the policy or the real market value should be taken into account. As to the market value, it also had several issues, such as at which date the market value should be regarded, the date of the occurrence of the casualty or the date when the ship was repaired.[197] This issue was put forward late in the 20th century in *CT Bowring Reins Ltd v Baxter*,[198] where Hirst J affirmed the market value should be assessed by reference to the value at the date of occurrence of the casualty or the date of notice of abandonment given, instead of the anticipated value when the repair was accomplished.

Normally it was the market value which was to be compared with the cost of repairs even in a valued policy. The issue of repaired value commenced in *Allen v Sugrue*,[199] which was under a valued policy. In that case, the agreed value in the policy was 2,000 pounds, and the cost of repairs was 1,450 pounds. The assured finally was entitled to recover as for a total loss, for it was the market value that was to be compared with the cost of repairs. It was the

[196] *Arnould,* at para 29-40
[197] *Arnould,* at para 29-40, fn 228
[198] *CT Bowring Reins Ltd v Baxter* [1987] 2 Lloyd's Rep. 416
[199] *Allen v Sugrue* (1828) 8 B &Cr 561

same in the case of *Young v Turing*,[200] where the market value in Holland had to be taken into consideration; and in the case of *Irving v Manning*,[201] it was set as a rule that the market value was to be redeemed.

For the next stage, it is necessary to ascertain what the market value comprises. In *Kemp v Halliday*,[202] Blackburn J indicated that the freight payable should be a component of the market value of the ship. However, obviously there would be no need to take the freight payable into account if a policy specified that the repaired value should be the insured value.

Problems arose where the ship insured was such a special one that no market value could be referred to.[203] This happened in reality in *Grainger v Martin*,[204] where the Court of Exchequer Chamber affirmed that in this circumstance the repaired value was certainly not the normal market value. The value of a ship with exceptional size and class varied greatly depending upon the need for the owner to sell or the buyer to purchase. In the case, Blackburn J explained that 'such a ship could neither have been built nor purchased at that time for so small a sum as the estimated cost of repairs.' A prudent uninsured owner would definitely choose to repair her and hence a total loss could not be claimed. For a peculiar type of ship there always existed a peculiar test in ascertaining whether the loss was total or partial, instead of simply comparing the cost for repairs and the normal market value.

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200 *Young v Turing* (1841) 2 M & G 593
201 *Irving v Manning* (1847) 1 HLC 288
202 *Kemp v Halliday* (1866) 6 B & S 623
203 *Arnould,* at para 29-41
204 *Grainger v Martin* (1862) 2 B & S 456 [467]-[470]; 4 B & S 9

2.1.2.3 Sale by masters

The law is well established that, subsequent to the occurrence of a constructive total loss of the subject matter insured by perils insured against, a valid and lawful sale under decree of a court would convert a constructive total loss into an actual total loss, as in the case of *Cossman v West*.[205] As to a sale by masters, there existed a series of old cases where, in some circumstances of urgent necessity, the masters of the ships sold the ships for the benefit of all concerned. With such a 'justifiable sale',[206] the assured could recover as for a total loss.[207] As to what amounted to a 'justifiable sale', again, the 'uninsured prudent owner' test could be taken into account; thus if a ship suffered damages and became unseaworthy, as an uninsured prudent owner, after taking some thought for the interests of all parties, he would prefer to sell the ship rather than repair her. More specifically, a justifiable sale by the master should satisfy the following conditions: firstly, at the time of the sale there was a constructive total loss on the subject matter insured; secondly, there was an urgent necessity and timely communication between the master and the ship owner or the assured was impracticable; thirdly, the master should make his decision in good faith and for the benefit of all related parties.[208]

In much earlier times, it was held that even though the sale was justifiable, the subject matter insured was still a constructive total loss and the notice of abandonment was necessary, if the assured wanted to be fully indemnified;

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[205] *Cossman v West* (1887) 13 App Cas 160
[206] This term was concluded from *Arnould,* at para 29-25
[207] *Arnould,* at para 29-23
[208] *Marine Insurance: Law and Practice*, at 23.21

otherwise the assured could only recover as for a partial loss.[209] However, later, as in the case of *Farnworth v Hyde*,[210] Montague Smith J delivered his view that with a 'right sale', the state of things was an actual total loss;[211] and this was affirmed by the court in the case of *Rankin v Potter*;[212] ever since, it is plain that, by a justifiable sale, the constructive total loss of the subject matter insured was converted into an actual total loss, which exempted the necessity of a notice of abandonment.[213] The issue on whether a right sale by the master excuses the notice of abandonment will be thoroughly discussed in detail in Chapter Four.

2.1.2.3.1 No total loss could be created by a sale[214]

In the modern age, it seems pointless to carry out a deep analysis of whether a sale by the master is justifiable or not,[215] but cases of this sort did occur frequently in times past. In accordance with such cases, the law concluded that a total loss could not be created merely by sale: prior to a sale, first and foremost the owner should prove a constructive total loss on the ship and then the urgent necessity should be proved as well, so as to recover as for a total loss.

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[209] *Arnould,* at para 29-23, 29-25, fn 159 & 164, see also, *Arnould*, 2nd, p1095.
[210] *Farnworth v Hyde* (1865) 18 CBR (NS) 835 [853]-[858]; (1866) 34 LJCP 207, 210
[211] *Arnould,* at para 28-10; see also *Rankin v Potter* (1873) LR 6 HL 83; *Cossman v West* (1887) 13 App Cas 160, 176
[212] *Rankin v Potter* (1873) LR 6 HL 83
[213] *Arnould,* at para 29-23, 29-25, and fn 164
[214] See *Somes v Sugrue* (1830) 4 C & P 276; *Doyle v Dallas* (1831) 1 Mood & Rob 48; *Gardner v Salvador* (1831) 1 M & R 116; *Knight v Faith* (1850) 15 QB 649; *Kaltenbach v Mackenzie* (1878) 3 CPD 467
[215] *Arnould,* at para 29-23

2.1.2.3.1.1 No constructive total loss existed by the time of sale

In the case of *Doyle v Dallas*,[216] the damaged ship the 'Triton' sunk and it was suggested that it be sold after being surveyed, on the ground that the expense of salvage and repairs would exceed the repaired value; but afterwards the ship was raised up and repaired by the purchaser at huge cost but in fact less than the cost of repairs. The assured claimed for a total loss but the judgment was for the insurer. Lord Tenterden CJ stated that, only when the sale was conducted on the basis that it was for the benefit of all parties, the total loss could be recovered; but the proof that the assured 'acted honestly' in the sale was not strong. Two grounds should be taken into account to determine whether a total loss existed: firstly the possibility of raising the ship and secondly the economics of repairing her. According to Lord Tenterden CJ's analysis, firstly, it was common sense that 'the height of the water did vary greatly with the variation of the winds'. Thus at the time of the sale it was uncertain whether and when she could be raised and the result was that it was raised. As to whether it was worth repairing, the truth was that the cost of repairs was less than the repaired value and the ship could then sail for England with any sort of cargo, which showed it was worth spending the money on her. All these circumstances could not justify the sale. Therefore the assured could not recover as for a total loss.

Similarly, in *Gardner v Salvador*,[217] the ship was damaged and the advice was for it to be sold, and subsequently the sale was conducted. However Bayley B

[216] *Doyle v Dallas* (1831) 1 Mood & Rob 48 [54]-[56]
[217] *Gardner v Salvador* (1831) 1 M & R 116

held that no total loss could be created by the sale. More specifically, if the ship was likely to be restored, into its essential character of a ship, the master could not convert a partial loss into a total loss by sale. Only when a constructive total loss existed by the time of sale, could the assured recover as for a total loss. No total loss existed where the master estimated erroneously and sold the ship. Here the ship was 'ultimately rescued' within the master's reach. The judgment was, without doubt, for the insurer.

In the case of *Knight v Faith*,[218] a ship was damaged before the end of the policy and sold by the master after expiration of the policy by reason of being badly damaged and lacking facilities to repair her. Lord Campbell CJ held that the sale here was not justifiable according to the real condition after the casualty: she was still a ship in specie 'with her crew on board, several weeks after the risk had expired' and she could be repaired, if there were no lack of workmen or materials or if she were sent to other ports for repair. Lord Campbell CJ also indicated that the 'right sale' should be conducted 'honestly, fairly, and properly' under necessity, and so meeting the strict requirements - in urgent and necessary circumstances, and for the benefit of all concerned, as stated in the cases of *Idle* v *The Royal Exchange Assurance Company*,[219] and *Robertson* v *Clarke*.[220] Here Lord Campbell CJ held that there was no sign of any benefit to the insurer by the sale and no loss could be created from a sale.

[218] *Knight v Faith* (1850) 15 QB 649
[219] *Idle v The Royal Exchange Assurance Company* (1819) 8 Taunt 755
[220] *Robertson v Clarke* (1824) 1 Bing 445 (Lord Gifford), 'This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be bonâ fide for the benefit of all concerned, and must be strictly watched.'

2.1.2.3.1.2 No urgent necessity

However, to make a sale justifiable, it was not enough that a constructive total loss existed by the time of the sale. In *Kaltenbach v Mackenzie*,[221] a ship was sold by the master in accordance with the survey and it was suggested that the cost of the repair would exceed the repaired value. Brett LJ held that, before the sale, there was a constructive total loss of the ship and the notice of abandonment was needed if the assured wanted to recover as for a total loss 'unless it be excused'. As to whether the sale here could excuse the notice of abandonment, Brett LJ explained that, even though a constructive total loss was constituted before the sale, there was 'no evidence shown that the vessel was in imminent danger of perishing, or that there was any immediate necessity for the sale'. As Brett LJ stated, in general, the master was not entitled to sell the subject matter insured without the authority from the owner, save that it was under an urgent necessity. Brett LJ then went further to explain the situation of necessity; for example, where the situation drove a prudent and reasonable person authorized by the owner to sell, the sale could be taken as justifiable. Thesiger LJ also implied that where there was evidence shown that 'if the sale of that vessel had been postponed even for two or three or four months, she would have ceased to exist in specie or that the loss from a constructive total loss would have become an actual total loss', there could be a justifiable sale.

In a word, a total loss of the subject matter insured cannot be based upon a

[221] *Kaltenbach v Mackenzie* (1878) 3 CPD 467

sale by the master, unless it is in circumstances of urgent necessity, as Sir Henry S Keating described in the case of *Cobequid Mar Ins Co v Barteux*,[222] where it was also put forward that the exact definition of 'stringent necessity' should be in line with the real but not the reported state of the subject matter insured.[223] Sir Henry S Keating also referred to the expressions in *Arnould* as the rule for this case, that:

> If the master come to the conclusion to sell hastily, either without sufficient examination into the state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, he will not be justified in selling even though the danger at the time appear exceedingly imminent.

2.1.2.3.2 What amounts to a 'right sale'

As was concluded, a 'right sale' relied upon the circumstances that: there was a constructive total loss before sale, it was with urgent necessity, and for the benefit of all concerns, all of which required the exercise of the best discretion by the master. If the master merely behaved *bona fide* but formed a wrong judgment, as Lord Tenterden CJ commented in *Doyle v Dallas*,[224] the underwriters were not bound to pay for the loss as well. Lord Tenterden CJ used the words 'best and soundest judgment' to describe a justifiable decision

[222] *Cobequid Mar Ins Co v Barteux* (1875) LR 6 PC 319, held, 'the master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity.'
[223] *Cobequid Mar Ins Co v Barteux* (1875) LR 6 PC 319, 326-327 (Sir Henry S. Keating), 'that is, not the reported state, but the true state of the vessel, becomes an important element for consideration.'
[224] *Doyle v Dallas* (1831) 1 Mood & Rob 48 [54]-[56]

by the master and held that nothing less than this could entitle the assured to recover as for a total loss where 'the ship continued in existence'. It is widely accepted that it depends upon the state of things at the time of the sale to determine whether a sale is justifiable or not. As to the subsequent course of conduct by the purchaser, it is of little influence. Abbott CJ in *Robertson v Caruthers*[225] had clearly shown that, the subsequent conduct as for recovery and repairs of the ship made little sense in the judgment of a sale even though the master sold the ship but the purchaser made it seaworthy again. What really mattered most was whether the master had exerted the best discretion he could upon the subject matter. Abbott CJ also held that without 'a nice and minute calculation', the sale could not be justified. That is to say, the master could not make decisions at random; instead, in every case, the 'prudent uninsured owner test' should be brought in to ascertain the rightness of the sale.

There are a series of authorities as illustrations of the principle.

In the case of *Robertson v Clarke*,[226] during the voyage, the ship encountered a gale and was damaged; and after being surveyed, she was thus recommended to be sold as it was not worth repairing her. In the end the purchaser did not repair the ship but broke her up. According to Lord Gifford CJ, it was widely accepted that a justifiable sale should be under an urgent necessity and the master should make the decision strictly in the interests of all parties. Here the key point was whether the state of the ship in this case

[225] *Robertson v Caruthers* (1819) 2 Stark 571
[226] *Robertson v Clarke* (1824) 1 Bing 445

was under an urgent necessity or not, or, what in fact was an urgent necessity.

As Lord Gifford CJ explained, the ship was in good condition until encountering the gale. Afterwards, for the benefit of all concerned, the master made a decision in line with the advice of a Lloyds' agent, that it was impractical to repair the ship, for the cost of repair would exceed her own value. The truth was that, the purchaser finally gave up repairing her as well and broke her up right away; it could also be inferred that the situation was somewhat within the test of a necessity for a sale. Lord Gifford CJ held that the circumstances in this case justified the sale upon all these facts, thus the assured should be able to recover as for a total loss. It was analogous to the case of *Robertson v Caruthers*,[227] where the master abandoned and sold the shattered ship with a 'fair and honest discretion' in circumstances where the cost of repairs would exceed the repaired value. Abbott Ld. CJ held that, in deciding whether the assured could recover as for a total loss, the justification of the sale by the master was of vital importance, viz. whether the master has exercised the best discretion regarding the ship. The master should make the decision 'as if the ship was uninsured'.

In *Roux v Salvador*[228] the leak in the ship putrefied the hides and by the process of progressive putrefaction, it was inferred that the hides would have been destroyed if the voyage had continued; the master thus sold them for a fourth of their value. It was held, that the assured could recover as for a total loss, without abandonment. Lord Abinger CB said that, though the subject

[227] *Robertson v Caruthers* (1819) 2 Stark 571
[228] *Roux v Salvador* (1836) 3 Bing NC 266

matter was not yet utterly destroyed, where by perils insured it was so damaged that it could not be carried to the destination port, or before arriving there, the thing insured was no longer in specie and had lost all its original character, therefore the loss was total to the assured. Before the sale, a constructive total loss existed, and with 'a due regard to the interest of all parties', the sale in this case was justified by virtue of necessity. There was a clear clue that the assured received the intelligence of the damage and the sale at the same time. Nothing thus could be done by both the assured and the insurer for they both lost control of the ship. Therefore, since the sale occurred, the loss was not constructive any more, but an actual total loss.

Similarly, in *Farnworth v Hyde*,[229] both the ship and cargo were sold by the master, as suggested after a survey that the cost of repairing the ship and carrying the cargo to the destination port would far exceed the repaired value repaired. News of the sale and the necessity for it reached the assured simultaneously. Consequently the court justified the sale for both the ship and the cargo and held that the insurer of the cargo was responsible for the total loss with no need for the notice of abandonment. As Montague Smith J explained, firstly, the ship was in imminent danger of being destroyed, since the situation was so urgent that, without the sale, some of her value could not be saved. As to the cargo, in the commercial sense, it was impractical to carry any part of the cargo to the destination port where the expenditure of carriage of the cargo would exceed their own value. Montague Smith J also delivered the view that with a simultaneous right sale and casualty, the state of the

[229] *Farnworth v Hyde* (1865) 189 CBR (NS) 835

subject matter insured was an actual total loss.

Even though the cases of *Roux v Salvador*[230] and *Knight v Faith*[231] were both in agreement, it could be inferred that a sale, occasioned by urgent necessity and for the real benefit of all concerned and with utmost good faith, constituted a total loss with no requirement for notice of abandonment; but yet, it would appear to be the case that in accordance with the decisions in these two cases, 'the degree of imminent danger' and the circumstances with 'urgent necessity' which could justify a sale greatly varied. In *Australasian SN Co v Morse*,[232] it was held by the Chief Justice that, to justify a sale, the master must establish a necessity and an inability to communicate with the owner;[233] whereas the judges of the Supreme Court criticised the definition of 'necessity' by the Chief Justice, and explained that 'the urgency of the occasion' that justified the sale by the master could be referred to the analogous cases; and the circumstances for necessity should be determined in accordance with the nature of things with no 'irresistible compelling power'. More specifically, where the duty of care was cast upon the master from the owner, the master, forced by the circumstance 'in a given emergency', took action as a wise and prudent man 'apparently the best for the interest of the persons for whom he acts'. Montague J once put forward that, if the cost of salvage exceeded the value of the thing itself, it would be better to sell than 'to save it by incurring on his

[230] *Roux v Salvador* (1836) 3 Bing NC 266
[231] *Knight v Faith* (1850) 15 QB 649
[232] *Australasian SN Co v Morse* (1872) LR 4 PC 222
[233] The Chief Justice explained: 'But it is only in cases of the most pressing necessity that the Master can thus take upon himself to act for the Owners of the Cargo; and if he does this without such a pressing necessity, he and his Owners will be responsible, even though he may have acted in perfect good faith... this necessity is equivalent, for the purposes of the present inquiry, to a high degree of expediency; in other words, that course which was clearly highly expedient will be considered to have been pressingly necessary… the Master cannot dispose of it in any way unless under such a necessity as that already mentioned, and where he can hold no correspondence with the Owner.'

behalf a wasteful expenditure'. In this way it was under 'a commercial necessity' to justify a sale. As to the possibility of communicating with the owners, Montague J held that it also depended, viz. where before the sale the answer by the owner could be, or could be expected to be, obtained, thus the communication was required and the master should act according to the instruction by the owner.

2.1.2.3.3 Effect of a 'right sale'

In *Farnworth v Hyde*, Montague J stressed that the effect of a right sale changed a constructive total loss into an actual total loss. As he described, before a sale, obviously the state of facts constituted a constructive total loss where 'the cost of carrying the cargo to its destination would far exceed the value on arrival', and here notice of abandonment was needed if the assured wanted to recover as for a total loss. But now, the sale was conducted, and a right sale transferred the property, making the property totally lost to the assured, 'as much as if it was destroyed'.[234] Admittedly, with a notice of abandonment, the insurer might get the remaining value of the subject matter insured while by sale such value was sacrificed to the insurer. But the truth was that a right sale could save the most benefit for salvage in time, otherwise the delay by waiting for a notice of abandonment might lead to its destruction and ruin all the remaining interest. Thereby, Montague Smith J stated that such a justifiable sale converted the constructive total loss into an actual one, thus no notice of abandonment was needed. Byles J also agreed that a right

[234] *Farnworth v Hyde* (1865) 189 CBR (NS) 835

sale changed the property, making a constructive total loss into an actual loss, which waived the notice of abandonment. In the meanwhile, they both stressed that the key point was then 'to guard against fraud and wrong' and strictly examine whether the sale was really justifiable, was with urgent necessity and was conducted for the benefit of all concerned.

The decision on the effect of a right sale was affirmed in the case of *Rankin v Potter.*[235] Blackburn J held that after a sale, both the assured and the insured lost the control of the subject matter insured, and from then on both of them could do nothing on the salvage of the ship or cargo. Thus notice of abandonment had no influence and was therefore certainly unnecessary.

Actually in some very early cases notice of abandonment was necessary even with a right sale, whereas later it was overruled. The rule was set down in the case of *Rankin v Potter*:[236] with a right sale by the master, the assured could be excused from giving notice of abandonment, for nothing was left to be abandoned, thus the notice was unnecessary. Brett LJ affirmed the view in the case of *Kaltenbach v Mackenzie*,[237] that in a case of a constructive total loss, notice of abandonment was necessary, save that it could be excused such as if a right sale occurred. Thesiger LJ shared the same view that if the sale of the subject matter insured by the master could not satisfy the requirement to be justifiable, the assured would certainly not be entitled to try 'excusing himself from giving notice of abandonment' by reason of the sale. In other words,

[235] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 121-122 (Blackburn J)
[236] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 121-122 (Blackburn J)
[237] *Kaltenbach v Mackenzie* (1878) 3 CPD 467

where the sale could be justified, the notice of abandonment would no doubt be exempted.

All these cases prove that now the view that prevails is that the constructive total loss would be converted into an actual total loss with a justifiable sale by the master, in which circumstance, notice of abandonment would be unnecessary and could be exempted.

2.1.2.4 Slightly damaged during the voyage but seriously damaged after arriving

In *Cazalet v St Barbe*,[238] the ship 'Friendship' was damaged during the voyage but it was proved that in the voyage only an average loss occurred by the peril insured. The ship finally arrived at the port of destination and the assured averred she was not worth repairing after arriving and alleged he was entitled to abandon the ship and claim for a total loss. It was held that only when the ship suffered a constructive total loss, would the assured be entitled to abandon; however, as Willes J stated, since the ship just sustained a partial loss during the voyage, it could not be treated as a total loss even though after the voyage she was not worthy to be repaired, especially because she was in fact an old ship. Ashhurst J also explained, the ship now was not worth repairing, but the truth was that, even though she suffered no damage, she still might not be worth repairing either. Therefore, it could be concluded that, for a voyage policy, it is the state of the ship during the voyage that is relevant to

[238] *Cazalet v St Barbe* (1786) 1 TR 187 [191] (Buller J)

ascertain whether a total loss ever occurs, irrespective of what occurs afterwards.

2.1.2.5 Cases of being deserted then restored

In circumstances that, as a result of the damage sustained, the crew might elect to desert the ship when their safety was threatened by the perils of a tempestuous sea, if the assured made no effort to prevent the loss and finally the loss was caused by the desertion, instead of by the perils insured against, thus obviously no liability for total loss would be admitted. By contrast, if there was no negligence or misconduct by the crew and the desertion was necessary and the ship was unlikely to be saved or the cost was far greater than its value, the assured thus could claim for a total loss.

2.1.2.5.1 Cases where no total loss is admitted

2.1.2.5.1.1 The assured made no effort

In *Thornely v Hebson*,[239] the ship, on her voyage from Hull to New York, was damaged by continuous bad weather. After serious effort, the crew were 'so worn out with fatigue' that they decided, unanimously, to leave the ship for the preservation of their lives. The ship was afterwards under the control of eight volunteered fresh crew, who succeeded in carrying her into Newport (not far

[239] *Thornely v Hebson* (1819) 2 B & Ald 513

from New York), regardless of the 'violence of the weather' and the risk to their lives. The assured gave notice of abandonment but the insurer rejected it.

On the facts in this case, no total loss existed until the ship was sold. But the point was that the assured made no effort to prevent the sale whereas he should have done so. As Abbott CJ explained, the expression of Lord Mansfield in the case of *Goss v Withers*[240] that the assured could abandon the duty of paying salvage to the insurer now could only apply when the assured had no means of paying for it; otherwise, the assured was bound to pay the salvage to prevent the loss. But obviously in the present case the assured did nothing. As to the behaviour of desertion, here it did not amount to a total loss, since those who took possession of the ship later behaved for the benefit of all concerned on both sides. Bayley J agreed that the assured did not exert their utmost effort to prevent the loss of the ship and he could, by no means, make the loss a total loss by abandonment.

To sum up, firstly the desertion here had no impact on whether there was a total loss, for the later fresh crew also took the benefit of the owner into account. Secondly the sale of the ship here was not necessary at all if the assured could pay the salvage for the ship; that is to say, it was undoubtedly within the power of the assured to prevent the loss. Therefore the assured was not entitled to recover for a total loss.

[240] *Goss* v *Withers* (1758) 2 Burr 68

2.1.2.5.1.2 Deserted with partial damage

In *Shepherd v Henderson*,[241] a ship insured was driven ashore in danger of foundering by a violent storm, and afterwards a monsoon commenced. Upon intelligence from the master that the ship was unlikely to be saved, the assured gave notice of abandonment and claimed for a total loss, which the underwriter rejected. By the end of the monsoon, Captain Burns, the agent of the underwriter, endeavoured to get the ship floating again and finally she was successfully towed to Bombay and offered to the assured.

Lord Penzance held that the ship, with great prospect, could be got off. Moreover, as a matter of fact, she suffered little damage if at all during her laying ashore; thus a prudent owner would definitely try to get the ship afloat after the monsoon. In accordance with Lord Blackburn, 'constructive total loss' occurred when repairs cost more than the ship was worth, which was not true of the facts in this case.

Another controversy in this case was whether the underwriter accepted the notice of abandonment at all. All that could be concluded here was that the agent of the underwriter took possession of the ship and acted as a salvor to tow her to Bombay. Such acts would be done both by the salvor and those who accepted the notice. In the present case, there were no signs indicating any inference of the acceptance of the notice by the underwriter.

[241] *Shepherd v Henderson* (1881) 7 App Cas 49

2.1.2.5.2 Cases where total loss existed

Similar to the case of *Thornely v Hebson*,[242] in *Holdsworth v Wise*,[243] the ship the 'Westbury' was damaged and it continuously encountered gales of wind, and was found to be so leaky that her crew decided to desert her for the preservation of their lives. The assured gave notice of abandonment to the agent of the underwriter. Actually subsequent to the desertion the ship was saved by another American ship and carried to New York where she got repaired and afterwards brought back to Liverpool. But the difference was that in this case the judgment was for the assured, even though the ship was restored, for the cost of the salvage and the repairs exceeded her value.

There were two key points for this case: firstly, whether there was negligence and whether such misconduct of the crew of the ship waived the responsibility of the underwriter; secondly, whether the restoration of the ship stopped a total loss here. As to the first point, Bayley J discussed a similar case of *Shore* v *Bentall,* where Lord Tenterden CJ held 'that the insurer was responsible for the misconduct or negligence of the captain and crew; but the owner, as a condition precedent, was bound to provide a crew of competent skill'.[244] Nevertheless, here the assumption could not be made that there was misconduct by the crew.

As to the second point, it was agreed that capture or the necessary desertion

[242] *Thornely v Hebson* (1819) 2 B & Ald 513
[243] *Holdsworth v Wise* (1828) 7 B & Cr 794
[244] (1828) 7 B & C 798

of the ship constitutes a total loss if no subsequent restoration occurred, so that in this case at the time notice of abandonment was given, a total loss was constituted, which no doubt justified an abandonment. Regarding her subsequent return, as in *M'Iver v Henderson*,[245] and *Cologan v The London Assurance Company*,[246] it was shown that restorations of a ship would not always convert a total loss into a partial loss. The termination of a total loss occurred where the ship was *in esse* returned to the hands of the assured in the circumstances that a reasonable owner who had no insurance would still prefer to get her back. Here calculating the salvage, the charge fee and the repairs, it was obvious that the assured should pay more than the value of the ship. The loss was therefore definitely total. And the gap between the present case and the case of *Thornely v Hebson*[247] was that for the latter 'there had not been at any period of time a total loss', while for the former the total loss never ceased.

2.2 Growth of constructive total loss of goods to 1906

2.2.1 Deprivation

As earlier discussed, the general principle of the ship and the goods are almost the same in circumstances of deprivation.[248] The assured could claim for a constructive total loss for the goods with a notice of abandonment given where he is deprived of possession of the goods and it is unlikely he will

[245] *M'Iver v Henderson* (1816) 4 M & S 576
[246] *Cologan v The London Assurance Company* (1816) 5 M & S 447
[247] *Thornely v Hebson* (1819) 2 B & Ald 513
[248] *Arnould,* at para 29-43, note 244

recover them or they are not worth recovering[249], but if the total loss were actual, a notice of abandonment would be of no necessity.[250] In *Stringer v English Marine Insurance Company*,[251] the goods were seized and at first the owner elected to treat the seizure as a partial loss but changed his mind and claimed for a total loss by giving a notice of abandonment after the suspending of the restitution of the goods. Blackburn J explained that the election of a partial loss at first could not be converted into a total one merely by a subsequent notice of abandonment under the same seizure. But the truth here was that the situation had subsequently altered and made the loss an actual total loss.

A proper and timely notice of abandonment is an essential component in claiming for a constructive total loss.[252]

To justify the abandonment, the goods should be to the highest degree probable totally lost or the recovery of it was to be of the lowest worthiness.[253] In *Anderson v Wallis*,[254] Lord Ellenborough CJ delivered his view that 'a retardation of the voyage was not a ground of abandonment, the goods still subsisting in specie.' Similarly, in *Thompson v The Royal Exchange*

[249] MIA (1906) s 60(2)(i)
[250] *Mullett v Shedden* (1811) 13 East 304, 390, Lord Ellenborough CJ: '… in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner, but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away'; See also *Mellish v Andrew* (1812) 15 East 13
[251] *Stringer v English Marine Insurance Company* (1869) LR 4 QB 676; 5 QB 599
[252] *Mullett v Shedden* (1811) 13 East 304*; See also Barker v Blakes* (1808) 9 East 283*; Hunt v The Royal Exchange Assurance Company* (1816) 5 M & S 47; *Gernon v. Royal Exchange Assurance Company* (1815) 6 Taunt at 387
[253] *Anderson v Wallis* (1813) 2 M & S 240, 375, Lord Ellenborough CJ '…there is not any case nor principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment.'
[254] *Anderson v Wallis* (1813) 2 M & S 240

Assurance Company, [255] Lord Ellenborough CJ held that a notice of abandonment was no doubt unacceptable where all goods were saved and barely damaged. In the case of *Hunt v The Royal Exchange Assurance Company*,[256] Lord Ellenborough CJ again stressed that the loss of voyage itself was not a loss of the commodity where the goods with a non-perishable nature were in safety, while on the contrary, if the goods were of a perishable nature, the result would not only be a case of retardation, but also a destruction of the thing insured. Bayley J explained further that, if a ship were so badly damaged midway to her destination, and it was impossible to seek a substitute to forward the goods, or the expense of forwarding the goods to the port of destination would exceed its value, in these circumstances, the abandonment would be proper and necessary.

Obviously before giving notice of abandonment, the assured would be entitled to a reasonable time to investigate the true state of the damaged cargo,[257] and the reasonable time in each case always depended on circumstances.[258] As Gibbs CJ held in the case of *Gernon v Royal Exchange Assurance Company,* the proper period was accepted for the assured to look into the situation, but the examination was limited to the state of the goods, and the degree of damage, but never the state of the market.[259] The time for the survey would be allowed but the assured was bound to act within a reasonable time.[260] It could be inferred that the election was treating it as a partial loss where the

[255] *Thompson* v *The Royal Exchange Assurance Company* (1812) 16 East 214
[256] *Hunt v The Royal Exchange Assurance Company* (1816) 5 M & S 47
[257] *Gernon v Royal Exchange Assurance Company* (1815) 6 Taunt 383 [387]
[258] *Hudson v Harrison* (1821) 3 B & C 97 [107] (Dallas CJ)
[259] *Gernon v Royal Exchange Assurance Company* (1815) 6 Taunt 383 [387]
[260] *Hunt v The Royal Exchange Assurance Company* (1816) 5 M & S 47 [54] (Lord Ellenborough CJ)

assured obtained the full extent of damage and did nothing but just waited to see the market. In *Barker v Blakes*,[261] Lord Ellenborough CJ also delivered the view that with 'no excuse for the lateness of the abandonment', five weeks after the publicly notified blockade, the loss would be regarded as a partial loss. More specific principles of notice of abandonment will be thoroughly discussed in Chapter Four.

2.2.1.1 Restoration before notice of abandonment

For circumstances where the subject insured is restored, it is the same for the goods as with the ship, that, where a notice of abandonment was given after the restoration or its partial reconditioning, no constructive total loss could exist.[262]

2.2.1.2 Restoration between notice of abandonment given and action brought

In the meantime, as discussed above for the ship,[263] the decisive date for whether constructive total loss exists rests with the writ or claim form. When notice of abandonment was given where the action had not yet commenced, the goods were restored or greatly expected to be restored, and in such circumstances the constructive total loss could not be supported, save that the goods were restored to the port of destination with no value.[264] In *Patterson v*

[261] *Barker v Blakes* (1808) 9 East 283
[262] *Anderson v Royal Exchange Assurance Co* (1805) 7 East 38; *Thompson v Royal Exchange Assurance Co* (1812) 16 East 214
[263] See 2.1.1.3
[264] *Arnould,* at para 29-44

Ritchie,[265] the assured gave a notice of abandonment after receiving intelligence of the capture of the goods. However, the goods were recaptured before an action was brought. It was held the assured could only recover a partial loss.[266] The principle always applies: that if the goods were captured or seized or suffered from any other sort of deprivation, even with notice of abandonment duly given, it would not amount to a total loss when an effective subsequent restoration occurred, or is likely to occur to the highest degree probable to occur, by action brought; for a mere suspension or retardation could not constitute a total loss.[267]

However, the mere existence of a ship or its goods does not mean there is a restoration.[268] A constructive total loss would be hardly defeated as long as the goods were not effectively restored or unlikely to be restored by reasonable means or within a reasonable time in the circumstances that first it was deprived of possession and was followed by a recapture or decree of restitution after notice of abandonment had been given and before action was brought. The decisive point is at the commencement of action. In the case of *Parry v Aberdein*,[269] several months after notice of abandonment was duly given, the goods were delivered to the agent before action was brought. The result was explained by Lord Tenterden CJ as, 'the perishable goods was so much damaged as not to be worth sending to the place of destination, and this therefore, is not a mere loss of the voyage and the adventure, but in reality a

[265] *Patterson v Ritchie* (1815) 4 M & S 393
[266] *Patterson v Ritchie* (1815) 4 M & S 393 [397] (Bayley J); see also *Naylor v Taylor* (1829) 9 B & Cr 718
[267] *Lozano v Janson* (1859) 2 E & E 160 [177]-[179] (Lord Campbell CJ)
[268] *Holdsworth v Wise* (1828) 7 B & Cr 794 [799]
[269] *Parry v Aberdein* (1829) 9 B & Cr 411

loss of the thing insured.'[270] That is to say, here the goods were not the subject of an effective restoration at all to prevent a total loss. Since the state of unavoidable total loss existed at the moment of action brought, a total loss could be successfully claimed without any doubt.[271] It was analogous to the case of *Cologan v The Governor and Company of the London Assurance,* where since the state of total loss continued by action brought, the assured could be indemnified as for a total loss.[272]

In common law, it came into use that the date which is to be taken, in ascertaining whether or not there has been a total loss of the thing insured, is that of the issue of the writ in an action by the assured against the insurers on the policy. However the Marine Insurance Act 1906 is silent on this point.[273]

2.2.1.3 Restoration after action brought

The basic rule for restoration of the goods and the ship after action brought stays the same: that the commencement of the action is no doubt the crucial date and the circumstances of recapture after action could not affect the decision.[274]

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[270] *Parry v Aberdein* (1829) 9 B & Cr 411 [416] [417]
[271] *Roux v Salvador* (1836) 3 Bing NC 266
[272] *Cologan v The Governor and Company of the London Assurance* (1816) 5 M & S 447, as to the decisive date, Lord Ellenborough CJ described that: '…where there has been a total loss and an abandonment, we must look to the situation of things before action brought, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment.' See also *M'Iver v Henderson* (1816) 4 M & S 576
[273] *Richards v Forested Land Timber & Railways Co* [1941] AC 50 (AC) 69
[274] See *Rodocanachi v Elliott* (1873) LR 8 CP 649

2.2.2 Damage

Besides situations of deprivation and complete loss of voyage, when the goods were damaged and could not stay in specie when being forwarded to their destination, or the cost for repairing and shipping them to the destination would exceed the value on arrival, the assured could claim for a total loss on goods.[275]

2.2.2.1 Not in specie

Once the goods were damaged by perils insured, though not utterly destroyed in specie, and by no means could they be in the same, or substitute vessel in safety, or, with a reshipment they would lose their original character utterly, in such circumstances the goods could be taken reshipped as totally lost[276] and such total loss was a so-called constructive total loss in later usage.

In *Roux v Salvador*,[277] the hides were damaged and were of a perishable nature; they could not be forwarded to their destination in the form of hides due to the process of putrefaction. The loss was no doubt a total one. By contrast, in *Glennie v the London Assurance Company*,[278] the rice was finally delivered to its port of destination in a saleable state, as the rice, even though damaged, still existed. Similarly, in *Navone v Haddon*,[279] the damaged silk could be

[275] *Arnould,* at para 29-49
[276] *Roux v Salvador* (1836) 3 Bing NC 266 [277]-[279] (Lord Abinger CB)
[277] *Roux v Salvador* (1836) 3 Bing NC 266
[278] *Glennie v the London Assurance Company* (1814) 2 M & S 371
[279] *Navone v Haddon* (1850) 9 CB 30 [43]-[45] (Wilde CJ)

reshipped to the destination in specie as silk in a reasonable time and at a reasonable expense. Even though in a deteriorated state, it was still bearing the original saleable character. Therefore, there was no total loss at all.[280]

2.2.2.2 Economic factors

To qualify for a constructive total loss of the goods, as well as requiring the goods to be conveyed to the port of destination in a saleable state in specie, it is also essential to take the economic factors into account, that is whether the goods might have been repaired and forwarded at a reasonable cost. It was held that, even where the goods sustained only a temporary loss of voyage, or suffered little physical damage, the underwriter would be liable for a total loss of the goods when the cost for repairing and shipping them to the destination exceeded the value on arrival due to the perils insured.[281]

It was taken as a general rule that, if the damaged goods could be practically forwarded to the destination in a marketable state, the master would not be entitled to sell and total loss could not be claimed. By contrast, if the cost of reparation and carriage exceeded the value of the goods, making the repairing and forwarding impractical, thus the abandonment would be justifiable and a total loss could be claimed.[282] Therefore, it was essential for the master to ascertain the cost of reparation and reshipment and the value of the restored

[280] (1850) 9 CB 30; See also *Thompson v The Royal Exchange* (1812) 16 East 214
[281] *Arnould,* at para 29-49, 29-51; see *Rosetto v Gurney* (1851) 11 CB 176; *Reimer v Ringrose* (1851) 6 Exch 263
[282] *Rosetto v Gurney* (1851) 11 CB 176 (Jervis CJ); See also *Moss v Smith* (1850) 9 CB 94; *Parry v Aberdein* (1829) 9 B & Cr 411

goods when they arrived at the destination. In *Rosetto v Gurney*, Jervis CJ held that 'if the aggregate exceed the value of the cargo when delivered, the loss was total; while if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only.' [283]

It was widely accepted that where the cargo was damaged at a different place from the destination by perils insured against, to ascertain whether there existed a constructive total loss, it would be necessary to see whether it cost more than it was worth to carry on.[284] However, another essential issue necessarily arose in the application of the principle of the 'commercial factor' in the courts, as to what expenses should be taken into account, such as whether the 'cost of sending on' the goods was included in ascertaining whether there was a constructive total loss.[285]

It seems clear from the case law that there was a change of this point. In *Reimer v Ringrose*,[286] the view held by Alderson B, that 'the expense of drying the wheat and of sending it on might be taken into account', was rejected in *Rosetto v Gurney*[287] and *Farnworth v Hyde*.[288]

Jervis CJ gave a detailed explanation of this issue in *Rosetto v Gurney*[289] that there might be two occasions. Firstly, if the damaged goods were carried in the same ship, no additional freight would be incurred since it was all under the

[283] *Rosetto v Gurney* (1851) 11 CB 176
[284] *Farnworth v Hyde* (1866) LR 2 CP 204, 223-225 (Channell B)
[285] *Arnould,* at para 29-52
[286] *Reimer v Ringrose* (1851) 6 Exch 263
[287] *Rosetto v Gurney* (1851) 11 CB 176
[288] *Farnworth v Hyde* (1866) LR 2 CP 204
[289] *Rosetto v Gurney* (1851) 11 CB 176

original contract. Secondly, if the original ship was badly damaged and unseaworthy, the master might transship the goods but still under the original contract. The truth is the freight for transshipment would usually be higher than the original ship, and in such circumstances, the cost of the difference of transit should be added to the outlay in ascertaining the practicability of delivering the whole, or part, of the goods to the destination in a marketable state.

Jervis CJ further described the components of expenses to be accumulated in ascertaining whether or not it was practicable to send the whole or any part of the cargo to its port of destination in a marketable state, viz. the salvage fee in proportion to the value of the cargo saved; the cost of unshipping the cargo; the cost of drying and warehousing it; the cost of transferring it into a new ship; and the cost of the difference of transit.

The rule was affirmed in *Farnworth v Hyde*, where Channell B delivered the view that all the extra expenses incurred as a consequence of perils insured should be taken into account, like drying, landing, warehousing, and reshipping. It was noteworthy that it was not the whole cost of transit from the place of distress to the place of destination that was to be accounted for, but only the excess difference of the freight.[290]

Therefore, it could be illustrated as follows: suppose, the value of the goods is 1000 pounds and the freight is 500 pounds, whereas due to the sea perils the

[290] *Farnworth v Hyde* (1866) LR 2 CP 204

goods are being carried to a intermediate port and the freight from the third port to the original destination is 600 pounds and the cost of landing and reloading is 400 pounds. The proper comparison is between the cost of landing and reloading (400 pounds), adding the difference of freight (100 pounds) and the gross value of the goods (1000 pounds).

However, some controversialists denied this rule and put forward that in ascertaining whether it was worth sending the goods on, it was the net value (deducting the freight) on arrival that needed to be compared, for the merchant or owner would not care any more that it was the proceeds minus the ordinary freight, instead of the gross proceeds. They insisted that the original freight should be accounted for on both sides or both excluded, as it would be unfair to be brought in on one side only.[291]

Actually such argument was erroneous. Obviously the original freight and the value of the goods are separate things. The original freight is not among the sea perils while the additional amount of the freight is caused by the sea perils insured. It seems a fallacy to take the value of goods as a net value with the freight of it deducted, for no one could guarantee the value of the goods themselves would definitely exceed the amount of freight in the beginning. It does occur when it is necessary that the assured spends a large amount of freight in carrying the goods with little value but essential.[292] It could be

[291] *Arnould,* at para 29-55
[292] *Arnould,* at para 29-57, Gow observed: 'the underwriter never guarantees that cargo will be worth its freight whether it arrives damaged or sound.'

concluded that the decisions in *Rosetto v Gurney*[293] and *Farnworth v Hyde*[294] were reasonable to become a piece of settled law on this issue.

In addition, all such economic concerns should come as proved, instead of being mere suspicion. The inspection or survey should be executed to ascertain whether the goods were in fact damaged.[295] As to the cost of the survey or inspection, it was thereby taken as sufficient to rank to make a constructive total loss.

2.2.3 A justified sale

A constructive total loss would be converted into an actual total loss with a justifiable sale by the master, in which circumstance, notice of abandonment would be unnecessary and could be exempted.[296] A right sale changed a constructive total loss into an actual total loss but no total loss could be created merely by a sale where there is no urgent necessity.

As for imperishable goods, the mere loss of the voyage for the season would never entitle the master to sell.[297] In *Reimer v Ringrose*,[298] the corn was sold in a considerably damaged state and actually could be practically reshipped and arrive in a marketable state, thus such sale was definitely unjustified. In

[293] *Rosetto v Gurney* (1851) 11 CB 176
[294] *Farnworth v Hyde* (1866) LR 2 CP 204
[295] *Arnould,* at para 29-60
[296] *Farnworth v Hyde* (1865) 18 CB (NS) 835; LR 2 CP 204, cf *Roux v Salvador* (1836) 3 Bing NC 266; *Rankin v Potter* (1872) LR 6 HL 83
[297] *Arnould,* at para 29-49
[298] *Reimer v Ringrose* (1851) 6 Exch 263

Meyer v Ralli,[299] a portion of the cargo was damaged, but the residue was surveyed and it was said that the grain might be perfectly reshipped and conveyed without any danger to its destination. However the residue was not reshipped and later the state of the weather was unfavourable to its preservation. Archibald J explained that if the captain had done his duty in hiring another vessel to forward the cargo to its destination, the loss would be only partial. Here the sale of this portion of the cargo was not really due to any of the perils insured against, but the great lapse of time, with no effort on the part of the captain to perform his duty, bears on the case. So here the assured could not claim for a constructive total loss at all.

However, suppose the goods with a perishable nature was dragged onto a third port and would have definitely decayed before arriving at the original port of destination; in such circumstances, the master would be entitled to sell and a total loss could be claimed with no notice of abandonment needed since nothing would be left to be abandoned.[300]

2.3 Conclusion

When tracing back the history of constructive total loss, it is deemed to originate from the cases of capture and being 'shaped and moulded' in the decision by Lord Mansfield dating back to the middle of the eighteenth century,[301] but the certain term of 'constructive total loss' did not start to be

[299] *Meyer v Ralli* (1876) 1 CPD 358
[300] *Arnould,* at para 29-49; See also *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger)
[301] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson)

prevalent until the 1850s and at about the same time, the term actual 'total loss' started to be seen.[302] Before the terms were set, it had already been illustrated by some early authorities that there existed one sort of total loss with the whole property perished and another type of total loss with the property existing in specie but the voyage being lost or the expense of pursuing it exceeding the benefit arising from it.[303]

It was once held that there would be a straightforward total loss when the ship was captured. However, the purpose of insurance, on the part of the assured, was to get indemnified, not to benefit from insurance.[304] The assured should not get full indemnity with a subsequent restoration of the property insured. Therefore, the rule was set down in the case law that where the property was restored in safety before action brought, the claim for a total loss would fail, but a restoration after the commencement of the action would not defeat a total loss.[305] The key time slot in ascertaining the nature of a loss was at the time of the commencement of action. It could be concluded from the early cases that the assured would be entitled to abandon the vessel from the moment he got the intelligence that he had lost the control of it by capture and a claim for a total loss could be successful if the situation did not alter before the commencement of the action.[306]

The rule of constructive total loss was then extended very quickly to the cases

[302] *Rosetto v Gurney* (1851) 11 CB 276; *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520; *Farnworth v Hyde* (1866) LR 2 CP 204; *Barker v Janson* (1868) LR 3 CP 303
[303] *Mitchell v Edie* (1787) 1 TR 608 [616] (Buller J)
[304] *Pole v Fitzgerald* (1750) Willes 641
[305] *Ruys v Royal Exch Assurance Corp* [1897] 2 QB 135 (QB) 141 (Collins J)
[306] *Goss v Withers* (1758) 2 Burr 683

of losses in other types, such as the situations of embargoes, blockades, arrests, submersions, and shipwreck, or of damage where the cost of repairs would exceed the value of the property when repaired, and this could be classified as deprivation of possession and damage. For the former situation, the assured should lose free use and disposal of the property and would not be able, or it would not be worth it, to get it back before action was brought; and for the latter, a constructive total loss could be constituted where the repair is necessary but hopeless or not economically worth it carrying out. A hopeless recovery could be occasioned by shortage of funds or of facility or there is no way for extrication; and it makes it not worth doing when cost of repairs exceeds the repaired value.

The rule was set in the early authorities that the cost of repairs was merely the cost to make a ship seaworthy again, it was not compulsory to make the ship carry the same goods in the same state.[307] Later the 'prudent uninsured owner' test was adopted to cover the point but to some extent it might also bring ambiguity. To be more specific, in estimating the cost of repairing the ship, in accordance with the general view of the early authorities, firstly, where the ship sunk with her goods and was raised together in a joint operation, the contribution of the goods towards the expense of salvage operations should be deducted.[308] Secondly, as to whether the value of the wreck should be included in the cost of repairs, there has been a change of attitude. Some earlier authorities[309] took the view that the value of the wreck should be added

[307] *Reid v Darby* (1808) 10 East 143 [156]-[157] (Lord Ellenborough CJ); *Doyle v Dallas* (1831) 1 M & Rob 48; *Benson v Chapman* (1843) 6 M & G 792 [808]-[812] (Tindal CJ)
[308] *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520
[309] *Young v Turing* (1841) 2 M & G 593 [600]-[605]; *Rankin v Potter* (1873) LR 6 HL 83

into the cost for repairs, and this was overruled in some later cases;[310] and thirdly, the cost of repairs should be calculated in detail with all circumstances taken into account. It was to cover the whole amount including the preparatory salvage and the specific repair to the damage. The decayed state of the ship, which is of no concern to the issue of loss, should be included in the cost of repairs. Once the cost of repairs exceeded the repaired value, there was a total loss, even if a large portion of the amount could be paid by a third party. Additionally, if a large amount of expenditure were paid by the underwriter, no deduction should be made when estimating the cost of repairs.[311] Moreover, it was set as a rule in the pre-statute cases that the market value was to be deemed to be repaired value.[312]

There existed a series of old cases saying that the assured was entitled to recover for a total loss with a justified sale by the master; and a justifiable sale relied upon the circumstances of there being a constructive total loss before sale, with urgent necessity, and for the benefits of all concerned, all of which required the exercise of the utmost discretion by the master.[313] In much earlier times, it was held that a justified sale could not convert a constructive total loss into an actual total loss, which meant the notice of abandonment was necessary if the assured wanted to be fully indemnified. However, the rule altered and it prevailed later that with a 'right sale', the state of things was an actual total loss, which exempted the necessity for a notice of

[310] *Bank of English v Vagliano* [1891] AC 107; *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811
[311] *Sailing Ship 'Blairmore' Co v Maredie* [1898] AC 593
[312] *Allen v Sugrue* (1828) 8 B &Cr 561; *Young v Turing* (1841) 2 M & G 593; *Irving v Manning* (1847) 1 HLC 288
[313] *Marine Insurance: Law and Practice*, at 23.21

abandonment.[314]

The crew might elect to desert the vessel on account of their safety when the ship encountered tempestuous sea perils. If the assured made no effort to prevent the loss and finally the loss was caused by the desertion instead of by the perils insured against, thus obviously no total loss would be allowed.[315] On the contrary, if no negligence or misconduct by the crew and the desertion was necessary and the ship was unlikely to be saved or the cost was far greater than its value, the assured could claim for a total loss.[316]

A constructive total loss of the goods shares great similarities with that of the ship in many ways but the difference appears in the circumstances of the damage. When accounting for a constructive total loss of the goods, besides whether the goods could be conveyed to the destination port in a saleable state in specie, it is also essential to take the economic factor into account, that is whether the goods might have been repaired and forwarded at a reasonable cost. It was essential for the master to ascertain the cost for reparation and reshipment and the value of the restored goods when they arrived at the destination. There was a change of view on the cost for reparation and reshipment. It was finally agreed and widely accepted that all the extra expenses, arising as a consequence of perils insured, should be taken into account, such as drying, landing, warehousing, and reshipping. But it was noteworthy that it was not the whole cost of transit from the place of distress to

[314] *Farnworth v Hyde* (1865) 18 CBR (NS) 835 [853]-[858]; (1866) 34 LJCP 207, 210; *Rankin v Potter* (1873) LR 6 HL 83; *Cossman v West* (1887) 13 App Cas 160, 176
[315] *Thornely v Hebson* (1819) 2 B & Ald 513; *Shepherd v Henderson* (1881) 7 App Cas 49
[316] *Holdsworth v Wise* (1828) 7 B & Cr 794

the place of destination that had to be accounted for, but only the excess of difference of the freight.[317]

This is the development in the concept of constructive total loss before the enactment of MIA 1906. As to how the Act reflects the pre-statute authorities, it this will be discussed in the next chapter.

[317] *Farnworth v Hyde* (1866) LR 2 CP 204

Chapter 3 Constructive total loss in the MIA 1906 - how the MIA 1906 reflects pre-statute cases and how the MIA 1906 compares with the modern Institute Clauses

During the long history of carriage of goods by sea, important issues were put forward and the related principles of marine insurance were settled by the courts. The Marine Insurance Act 1906 (hereinafter referred to as the Act or MIA 1906) is a codification of the majority of such principles, which is not only a milestone in the UK legislation, but it also has an enormous effect on the marine insurance legislation of other nations. Section 60 – 63 of MIA 1906 deal with issues on constructive total loss[318] and s 60 defines the doctrine of constructive total loss in great detail. This chapter shows how the principles upon the Act reflect the pre-statute cases and how some alterations have occurred.

The Institute Clauses, which have modified some principles and made more explicit some less clear points under MIA 1906, also play an essential role in the modern insurance market. Today the majority of nations all around the world adopts the Institute Clauses issued by the UK insurance market, or use them in conjunction with their locally-issued policy forms. In this chapter, a comparison of the principle of a constructive total loss between MIA 1906 and the Institute Clauses will also be carried out.

[318] Section 60 provides the definition of constructive total loss; s 61 provides the effect of constructive total loss; s 62 deals with notice of abandonment; s 63 deals with the effect of abandonment.

3.1 Scheme of s 60

Section 60 of the Act defines the doctrine of constructive total loss thoroughly and exclusively. It illustrates six criteria of constructive total loss – two general principles in sub-section one and four specific circumstances in sub-section two. The two sub-sections are related but also independent of each other.[319]

3.1.1 General definition in s 60(1)

S 60(1) provides a general introduction to constructive total loss in terms of the three sorts of subject matter insured - ship, cargo, and freight.[320] To understand it thoroughly, this provision is divided into three parts. First of all, the expression 'subject to any express provision in the policy'[321] shows that the contract parties are still entitled to make agreements in the policy and maintain the principle of freedom of contract. As in *Fowler v English and Scottish Marine Insurance Co Ltd*,[322] there existed an unambiguous special stipulation in the policy that 'the insurers should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation.' Therefore there was a vested right for the assured to recover for a total loss of the ship since thirty days had elapsed on hearing the intelligence of the capture or embargo, notwithstanding that the captain was

[319] Rob Merkin QC, *Marine Insurance Legislation*, 5th edn, London, 2010
[320] *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, 657 (Earl Loreburn)
[321] MIA 1906, s 60(1); See E R Hardy Ivamy, *Chalmers' Marine Insurance Act 1906*, (10th edn, Tottel, 2007), at p90-98
[322] *Fowler v English and Scottish Marine Insurance Co Ltd* (1865) 18 CBNS 818

never actually deprived of the possession of the ship. Similarly in *Rowland and Marwood's SS Co Ltd v Maritime Insurance Co*,[323] the contract between the assured and the underwriter stipulated that if the ship insured had been stranded and remained in such position for a period of six months, and during such period it had been found impracticable to save her, the assured could abandon the ship and claim for a constructive total loss. In this case the ship was stranded for more than 6 months and could not be saved during that period, even though admittedly the ship could eventually be rescued at a future time. The court held the ship was a constructive total loss for it could not be saved within the stipulated period in line with the contract. Furthermore, today the marine insurance policies usually incorporate the Institute Clauses, and the modern Institute Clauses have updated some principles in MIA 1906 in the domain of constructive total loss, making up some deficiencies of MIA 1906. For cases combined with the Institute Clauses, the modification under the Clauses would be taken as a priority.

Secondly, it provides that when the subject matter insured is reasonably abandoned in circumstances where an actual total loss is appearing to be unavoidable, there would constitute a constructive total loss. In this circumstance, a constructive total loss is formed on the basis of a reasonable abandonment of the subject matter insured,[324] and later there will be some analysis as to what would amount to the circumstances of an unavoidable

[323] *Rowland and Marwood's SS Co Ltd v Maritime Insurance Co* (1901) 6 Com Cas 160

[324] *Chalmers' Marine Insurance Act 1906*, at p91*; See Robertson v Petros M Nomikos* [1939] AC 371, 381-383 (Lord Wright); As to a reasonable abandonment, see discussion below (2.2.1); See also *Court Line Ltd v R, The Lavington Court* [1945] 2 ALL ER 357; *Lind v Mitchell* (1928) 34 Com Cas 81

actual total loss.[325]

Thirdly, even though the subject matter insured is likely to be physically recovered from being an actual total loss, the expenditure would exceed its own value. With a reasonable abandonment based upon the economic factor as stated above, the assured could claim for a constructive total loss of the subject matter insured as well.[326] The essential ingredient - a reasonable abandonment to establish a constructive total loss - under s 60 (1) means a physical act of abandonment, an objective fact. It is totally different from the concept of notice of abandonment or the 'abandonment' in some very old cases that equates to the meaning of notice of abandonment where the term 'notice of abandonment' had not yet been adopted, both of which would be necessary for a successful claim for a constructive total loss even after the physical act of abandonment of the subject-matter insured.[327]

3.1.2 Specific definition in s 60(2)

The description of s 60(1) is general while s 60(2) sets out more specific circumstances in terms of a constructive total loss of ship and goods, freight excluded.[328] S 60(2) starts with the words 'in particular', which shows that, compared to s 60(1), s 60(2) is cumulative, not merely illustrative.[329] S 60 never restricts the constructive total loss to cases where the subject matter

[325] See 2.2.1.1
[326] See 2.2.1.2
[327] *Robertson v Petros M Nomikos* [1939] AC 371, 381-383 (Lord Wright)
[328] Rob Merkin QC, *Marine Insurance Legislation*, (5th edn, London, 2010) p 268
[329] *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50 (AC) 84-85 (Lord Wright)

insured has been abandoned. Although sub-section 1 constitutes a constructive total loss based upon the reasonable abandonment, sub-section 2 provides the forms of constructive total loss with no actual physical act of abandonment needed.[330] Two main causes for a constructive total loss could be concluded from s 60(2): deprivation of possession, and damage.

S 60(2)(i) is still a general concept and deals with the cause of 'deprivation of possession' which is applicable both to the ship and the goods. Two forms of constructive total loss are illustrated when the assured is deprived of the possession of his ship or goods by perils insured against: firstly, the ship or the goods are unlikely to be restored;[331] or secondly, the cost of recovering the ship or goods would be in excess of their value when recovered.[332]

S 60(2)(ii) refers specifically to damage to the ships by perils insured against. It provides that there would be a constructive total loss if the cost of repairing such damage exceeds the repaired value.[333] It also further provides what would amount to the cost of repairs.[334] As to what shall be taken as repaired value, the law has changed over time. In common law, in some cases the

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[330] *Robertson v Petros M Nomikos* [1939] AC 371 (AC) 381-383 (Lord Wright)

[331] See *Polurrian SS Co v Young* [1915]1 KB 922,20 Com Cas 152,163; *Marstrand Fishing Co Ltd v Beer* [1937] 1 ALL ER 158 KB; *C Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd* [1941] 3 ALL ER 256, KB; *Court Line Ltd v R, Lavington Court* [1945] 2 ALL ER 357, CA

[332] See *Roux v Salvador* (1836) 3 Bing NC 266 [286]; *Rodocanachi v Elliott* (1874) LR9CP 518, Ex Ch; *Sailing ship Blairemore v Macredie* [1898] AC 593; *Rickards v Forestal Land, Timber and Railways Co* [1941] 3 ALL ER 62, HL

[333] See *Moss v Smith* (1850) 19 LJCP 225; *Lohre v Aitchison* (1878) 3 QBD 558, 562-563; *Rankin v Potter* (1873) LR6HL 83 (HL) 116; *Irving v Manning* (1847) 1HL Cas 287; *North Atlantic SS Co v Burr* (1904) 9 Com Cas 164; *Hall v Heyman* [1912] 2 KB 5; *Helmville Ltd v Yorkshire Insurance Co Ltd, The Medina Princess* [1965] 1 Lloyd's Rep 361, QB; *Bank of America National Trust and Savings Association v Christmas, The Kyriaki* [1993] 1 Lloyd's Rep 137, QB;

[334] MIA 1906, s 60(2) stipulates that no exclusion is to be made in respect of general average contributions to those repairs payable by other related third parties. And the expense of future salvage and future general average to which the ship would be liable if repaired should also be taken into account.

repaired value is the real value while the Institute Clauses alters the law.

S 60(2)(iii) specifically stipulates, in terms of damage to the goods by perils insured, that there is a constructive total loss if the cost of repairs and the cost of forwarding the goods to the destination would be in excess of the value of the goods on arrival.[335]

3.1.3 Independence of s 60(1) and s 60(2)

At first glance, s 60(1) looks like a brief description of s 60(2) and s 60(2) seems as if it is just illustrating the content of sub-section 1 in detail. However, this is not the truth. The two sub-sections are related but also independent of each other. They provide separate forms of constructive total loss, applicable to different circumstances. There exist some circumstances with regard to sub-section 1 that might not be contained in sub-section 2 and vice versa.[336] For example, sub-section 1 lays down two forms of constructive total loss on requirement of 'reasonable abandonment', which is certainly not the ingredient for the forms of losses under sub-section 2. According to the circumstances in s 60(1), there may exist no constructive total loss without a proper abandonment. However, the subject matter being reasonably abandoned is by no means the general component to constitute a constructive total loss under s 60(2). Sub-section 2 provides the additional circumstances where a lack of the proper abandonment does not influence the existence of constructive total loss. Therefore, sub-section 2 adds the criteria for the definition instead of just

[335] See *Farnworth v Hyde* (1866) LR 2 CP 204
[336] *Robertson v Petros M Nomikos* [1939] AC 371 (AC) 381-383 (Lord Wright)

precisely describing it.[337] As Lord Wright stated in the case of *Rickards* v *Forestal Land, Timber and Railway Co., Ltd*,[338] the assured can claim for a constructive total loss just in light of one form listed in s 60(2), regardless of any words in s 60(1).

3.1.4 Whether s 60 is complete and exhaustive or not

Except for some particular conditions expressed in the policy, s 60 has completely defined the concept of constructive total loss of the ship and cargo.[339] That is to say, situations outside s 60 would fail to constitute a constructive total loss. As is proved in the case of *Irvin v Hine*,[340] only the events listed under s 60 could constitute a constructive total loss. In this case, a ship was stranded on the rock, badly damaged, while the repair could not be executed because the assured had not obtained a licence. Here the claim for a constructive total loss was definitely not tenable within the criteria illustrated under s 60. It was contended by the assured that the situation in this case was justified under the common law and in accordance with s 91(2) the common law could be applied, but this was rejected by the court. Devlin J explained that the authority of the application of common law under s 91(2) relies on the basis that it is consistent with the provisions of MIA 1906. Devlin J affirmed that if the circumstances outside s 60 could constitute a constructive total loss, it would be against the definition in s 56 in reference to Lord Porter's opinion in the

[337] *The Bamburi* [1982] 1 Lloyd's Rep. 312; *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727; [2012] 1 Lloyd's Rep. 571
[338] *Rickards v Forestal Land, Timber and Railway Co Ltd* [1942] AC 50
[339] *Marine Insurance Legislation*, at p86; See also *Robertson v Petros M Nomikos* [1939] AC 371; *Rickards v. Forestal Land, Timber and Railway Co Ltd* [1942] AC 50; *Irvin v Hine* [1950] 1 KB 555
[340] *Irvin v Hine* [1950] 1 KB 555

case of *Robertson v Petros M Nomikos Ltd*,[341] that s 56 defines a partial loss as any loss other than a total loss.[342] This implies that any loss outside the circumstances stated under s 57 and s 60 shall be a partial loss, which further implies that s 57 (definition of actual total loss) and s 60 (definition of constructive total loss) provide completely all the instances of total loss.

It was also contended that, in *Pollurian Steamship Co Ltd v Young*,[343] Pickford J added a complementary expression of 'within a reasonable time' to the provision about recovery of the ship or goods under s 60(2), which could be taken as a hint that s 60 is incomplete. But such a complementary expression was just the judge's construction of the provision, not an added instance to build upon the meaning of a constructive total loss.

3.1.5 Types of constructive total loss in s 60

The comprehensive definition by s 60 can be identified as the following six criteria: (1) the subject matter insured is reasonably abandoned for its unavoidable actual total loss;[344] (2) the subject matter insured is reasonably abandoned due to the expenditure to avoid actual total loss being greater than the salvaged value;[345] (3) the assured is deprived of the possession of his ship or the goods by a peril insured against, and the ship or the goods insured is unlikely to be recovered;[346] (4) the assured is deprived of the possession of his ship or the goods by a peril insured against, and the cost of recovery will

[341] *Robertson v Petros M Nomikos Ltd* [1939] AC 371
[342] In MIA 1906, s 57 defines an actual total loss and s 60 defines a constructive total loss.
[343] *Pollurian Steamship Co Ltd v Young* [1915] 1 KB 922
[344] MIA 1906, s 60(1)
[345] MIA 1906, s 60(1)
[346] MIA 1906, s 60(2)

exceed the recovered value;[347] (5) in the case of damage to a ship, the cost of repair would exceed the repaired value;[348] (6) in the case of damage to the goods, the cost of repair and forwarding the goods to the destination would exceed the value on arrival.[349] By and large, the interpretation of these criteria has been mainly left to the courts.

3.2 Reasonably abandoned

3.2.1 The meaning of 'abandoned' in s 60(1) – echoing the pre-statute cases

Being 'reasonably abandoned' is an essential component in establishing a constructive total loss under s 60(1).[350] This should be distinguished from the concept of 'abandon' in s 61, 62 and 63 of the Act. The former is a physical abandonment to its fate while the latter is the abandonment to the insurer.[351]

In *Court Line v R*, *The Lavington Court*,[352] Scott LJ gave a thorough and comprehensive interpretation of the words 'reasonably abandoned' in s 60(1) in reference to the case of *Bradley v Newsom, Sons and Co*.[353] He was of the opinion that the abandonment made within two sets of circumstances under s 60 (1) contained two meanings.[354] Firstly, within the circumstance where an actual total loss appears to be unavoidable (such forecast was often made by

[347] MIA 1906, s 60(2)
[348] MIA 1906, s 60(2)
[349] MIA 1906, s 60(2)
[350] Howard Bennett, *The Law of Marine Insurance* (2nd edn, Oxford University Press 2006) at 21.54
[351] *Arnould*, at para 30-02; see also *Court Line v R, The Lavington Court* (1945) 78 Ll LR 390; *Masefield AG v Amlin Corporrate Member Ltd* [2010] 1 Lloyd's Rep 509
[352] *Court Line v R*, *The Lavington Court* (1945) 78 Ll LR 390
[353] *Bradley v Newsom, Sons and Co* [1939] AC 16
[354] *Cases and Materials on Marine Insurance Law*, at p630

the master), here the abandonment could be taken as that the subject matter insured, such as a ship, was abandoned by the master and crew with the intention of making it 'derelict' and with no intention or hope of recovering it.[355] The pure action of the master in leaving the ship, which might be a provisional departure for the sake of safety, never constitutes the abandonment under s 60(1). It should be a physical act of vacating the property and never planning to get it back.[356] Secondly, when the abandonment was on account of the expenditure needed for recovering the subject matter insured exceeding its own value, as Scott LJ remarked, it was a decision based upon economic factors by the owner, and usually expressed in the form of a letter. However, Du Parcq LJ denied that there were two separate meanings of the word 'abandonment' in s 60 (1) and held that the same word used for once in one place could by no means provide two meanings. In accordance with his explanation, the abandonment in s 60(1) should be made by the owner or an authorized agent and with the act of abandonment, 'the owners are renouncing all their rights in the subject matter insured except the right to recover the insurance.'[357] Scott LJ and Du Parcq LJ held varied views on this point; nevertheless the application in practice was not in dispute. They reached an agreement on the interpretation of the word 'abandonment' in s 61, which means no more than a choice by the assured to transfer the property to the underwriter to treat the constructive total loss as an actual total loss, instead of a partial one.

It could be concluded that, abandonment in s 60(1) means that the assured

[355] *Court Line v R, The Lavington Court* (1945) 78 Ll LR 390, 394 (Scott LJ)
[356] *Cases and Materials on Marine Insurance Law*, at p630
[357] *Court Line v R, The Lavington Court* (1945) 78 Ll LR 390, 399 (Du Parcq LJ)

opts to give up recovering the subject matter insured by means of his physical act or expression or implied authority when the recovery seems to be hopeless or not worth recovering in economic terms. According to s 60(1), constructive total loss will not exist without being 'reasonably abandoned'. However, 'abandonment' in s 61 illustrates more about the choice of the assured to treat a constructive total loss as an actual total loss rather than a partial loss by sending a notice of abandonment to the insurer.[358] Abandonment in s 61 will not influence the constitution of a constructive total loss and where it makes sense is in the settlement of the claim. Therefore, as Scott LJ stated, abandonment in s 60 certainly takes precedence over abandonment in s 61. In some instances, the occurrence of 'reasonably abandoned' is a condition precedent to the notice of abandonment and the transfer of property to the insurer.[359]

The rule of 'reasonably abandoned' just echoes the pre-statute cases, as discussed in Chapter Two, where the ship was deserted by the crew. In the circumstances where a damaged ship was deserted by the crew for reasons of their safety, which was threatened by the tempestuous sea peril, if the loss was caused by the desertion instead of by perils insured against, thus obviously no total loss would be admitted since the ship was definitely improperly abandoned; on the contrary, if there was no negligence or misconduct by the crew and the desertion was necessary and the ship was

[358] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280
[359] *Court Line v R, The Lavington Court* (1945) 78 Ll LR 390, 394 (Scott LJ)

unlikely to be saved or the cost was far greater than its value, the assured thus could claim for a total loss upon the reasonable abandonment.[360]

3.2.2 Scope of being reasonable

Only when the subject matter insured is abandoned properly and the loss is caused by the peril insured rather than by the choice of abandonment, can the assured really get their loss recovered.[361] In the case of *Lind v Mitchell*,[362] a ship was on her voyage to Newfoundland in quite bad weather. When it knocked against the heavy ice, the ship was holed and began to leak. The master speculated that the ship would sink since a severe gale was coming. The master made up his mind to abandon the ship by setting her on a fire in order to influence other ships. In this case, the ship was absolutely abandoned unreasonably by the master. As Scrutton LJ described, the ship was just 15 miles from her own port and she floated high in the water 7 or 8 hours after she was abandoned.[363] According to the evidence, the lifeboat was able to sail and row in with a north-east wind, so that it could be inferred that the ship could equally have sailed with the north-east wind as well. Normally a premature abandonment like this would not qualify as a constructive total loss. But in this case the ship was also covered by Clause 8 of the Institute Time Clauses that the underwriter was liable for the damage caused by the negligence of the master. In this way the defendant would be liable to recover the loss.

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[360] See *M'Iver* v *Henderson* (1816) 4 M & S 576; *Cologan* v *The London Assurance Company* (1816) 5 M & S 447; *Thornely v Hebson* (1819) 2 B & Ald 513; *Holdsworth v Wise*(1828) 7 B & Cr; *Shepherd v Henderson* (1881) 7 App Cas 49; More detailed discuss, see Chapter Two, 2.1.2.5

[361] *Marine Insurance Legislation*, at p86

[362] *Lind v Mitchell* [1928] All ER Rep 447

[363] *Chalmers*, at p95

Similarly, as the pre-statute cases revealed, abandonment of a ship by a premature sale was also not reasonable and could not constitute a total loss. In the case of *Gardner v Salvador*,[364] the ship hit the rock and the master was driven by the erroneous but *bona fide* assumption that the ship could not be recovered, so the master abandoned the ship by selling her at the price of 18 pounds. Later the buyer spent 750 pounds repairing her and as a result, she was worth 1200 pounds in the end. This absolutely could not be regarded as total loss.[365] The ship was prematurely sold as a wreck when she was finally rescued, which proved that the recovery was within the master's reach and the abandonment here was totally unreasonable. The underwriter was not liable for the loss caused by a premature sale. This principle has already been discussed.[366]

Finally it should be emphasized that once the assured decides to abandon a ship insured, it means he opts to cease to recover the ship. The abandonment would not be made where the crew and the master just leave the ship for safety purposes due to the current dangerous state of the ship, as in the case of *Court Line Ltd v R, the Lavington Court*.[367] A reasonable abandonment of the ship meant that the assured was not only subjectively without any intention but also objectively without any hope of recovering her. In other words, whether the abandonment is reasonable or not usually depends on the situation as to whether an actual total loss is unavoidable or whether the expenditure of recovering exceeds its own value.

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[364] *Gardner v Salvador* (1831) 1 Moo & R 116; 42 R R 767
[365] *Chalmers,* at p90-98
[366] See 2.1.2.3.2
[367] *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390

3.2.3 Actual total loss appearing to be unavoidable – reflection of old cases

The 'unavoidable actual total loss' usually means the recovery is hopeless. 'Appearing to be unavoidable' is not 'absolute'. Instead, it shows that the possibility of being an actual total loss is much bigger than it not being so.[368] In *Court Line Ltd v R, the Lavington Court*, [369] Stable J explained his understanding of this circumstance, especially the word 'unavoidable'. The word 'unavoidable' is even stronger than the word 'inevitable': the latter usually refers to a future event which will naturally happen, while the former connotes the high probability that something will take place, and one can take no action whatsoever to avoid it, even with the utmost effort. Where a result is described as unavoidable, then it would seem that it is unlikely that anything could happen, by accident or chance, to prevent that result; and any attempt, designed to prevent the outcome, is also unlikely to be successful: such a situation can be regarded as 'unavoidable'.[370]

This principle echoes a series of old cases. As for damaged goods in a perishable nature, an actual total loss would be unavoidable due to putrefaction as in *Roux v Salvador*.[371] And in *Read v Bonham*,[372] the ship suffered serious damage from severe weather and had to return to the port of departure, where after a survey, the master sold the ship for the benefit of all concerned. In this case, whether the ship was a total loss depended on

[368] *Marstrand Fishing Co Ltd* v *Beer*, *The Girl Pat* (1937) 56 Ll LR 163
[369] *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390
[370] *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390, 400 (Stable J)
[371] *Roux v Salvador* (1836) 3 Bing NC 266
[372] *Read v Bonham* (1821) 3 Brod &B 147

whether her total loss was unavoidable. The master abandoned the ship and only when an actual total loss was unavoidable, could the abandonment be taken as reasonable. Park J affirmed that in this case the act of abandonment by the master (the sale of the ship) was a necessity, although during this period a case of stronger necessity to justify the sale of a ship has seldom been made out. In this case the master had endeavoured to avert the rot of the ship: he contacted the agent of the underwriter (whom he thought was authorized to act in the business) to give notice of abandonment; he called the surveyor; he tried to procure the money for repairs; but failed. The ship was sold in the end, which was regarded as the best result for the benefit of all concerned in accordance with the survey. Otherwise the delay in repairing would cause the ship being left to rot, and at the same time her actual total loss would appear to be unavoidable. It could be inferred that this principle under s 60(1) shows consistency with the old cases. By way of contrast, in *Irvin v Hine*,[373] the ship lay on the beach in a fairly sheltered position and was not likely to quickly deteriorate; certainly the delay in repairing would not ruin the ship. Therefore the contention that the ship was abandoned on the ground of her actual total loss appearing unavoidable was denied.

Similarly, in quite a recent case, *Masefield AG v Amlin Corporate Member Ltd*,[374] the ship and goods were seized by pirates. Driven by the assumption that the actual total loss seemed to be unavoidable, the assured opted to abandon the ship and claimed for a constructive total loss. The claim was rejected since David Steel J held the view that the seizure of cargo by pirates did not constitute a constructive total loss. There existed proof that it was

[373] *Irvin v Hine* [1950] 1 KB 555
[374] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280

possible for the assured to pay for a ransom for the release of the vessel and cargo and such events often occurred. All this evidence would have guaranteed the possibility of its recovery. Therefore, in these circumstances, the assured could wait and see and negotiate for the release. A total loss here was not actually unavoidable.

3.2.4 Expenditure exceeding its value – comparison of cases pre-statute and post-statute

There are three types of constructive total loss based upon economic expediency regarding s 60: firstly, under s 60 (1) that the subject matter insured is abandoned on account of the expenditure to preserve it from actual total loss exceeding its value; secondly, under s 60 (2) that when the ship or goods is deprived of possession, the cost of recovery exceeds its value; and thirdly, under s 60 (2) when there is damage to the ship or goods, cost for repairs (for goods, with the cost of forwarding it to its destination added) exceeds its value. Sometimes, some circumstances could be applied to more than one type. For example, if the goods are captured and the cost for ransom would be higher than its own value, this could be applied to the first two types; and if a ship is damaged and the cost for repair exceeds its own value, this could be applied to the first and the third types.[375] Here the commercial factor of what expenses may be included in ascertaining a constructive total loss will be discussed.

[375] *Cases and Materials on Marine Insurance Law*, at p633

Prior to the Act, Brett J concluded in *Kaltenbach v Mackenzie*[376] that a ship could be a constructive total loss when she was in imminent danger of becoming a total loss. The unavoidable total loss could be due to the process of putrefaction or as a consequence of the cost of the repairs exceeding the repaired value.[377] The general principle is consistent.

Focusing on the economic factor specifically, as in the case of *Farnworth v Hyde*,[378] which was discussed in detail in Chapter Two, here is just the concluding principle from it. The insured cargo was sold due to the severe weather. In order to justify the sale and recover a constructive total loss, it had to be proved that the cost for recovery exceeded the recovered value of the goods. The essential question to the court was what was to be taken into account in calculating the cost of recovery. Channel B concluded that the expenditure included the cost of landing, drying, warehousing and reshipping the goods, but the freight of the original ship or a substituted ship by the original ship owner was excluded since they needed to pay the freight upon the original contract anyway. Channel B delivered his view by referring to the case of *Rosetto v Gurney*[379] that 'the whole cost of transit from the place of distress to the place of destination should not be taken into account, but only the excess of that cost above that which would have been incurred if no peril had intervened'.[380]

It is not clear whether the introduction of the Act alters the principle in

[376] *Kaltenbach v Mackenzie* (1878) 3 CPD
[377] See also *Shepherd v Henderson* (1881) 7 App Cas 49
[378] *Farnworth v Hyde* (1866) LR 2 CP 204
[379] *Rosetto v Gurney* (1851) 11 CB 176
[380] *Farnworth v Hyde* (1866) LR 2 CP 204 [227]

Farnworth v Hyde. There has been no indication as to whether the post-statute cases are at variance with the pre-statute cases or not. In *Vacuum Oil Co v Union Insurance Society of Canton*,[381] Atkin LJ affirmed a constructive total loss of the goods by explaining that the cost for reconditioning and forwarding exceeded the value on arrival.

3.2.5 Compared to Institute Cargo Clauses

The Institute Cargo Clauses 1/1/82 (ICC 1982) contains A Clause, B Clause, and C Clause, which respectively could be adopted to cover various sorts of risks.[382] The stipulation on constructive total loss - Clause 13 under A, B, and C Clauses are all the same and have still not been changed in the new 2009 version.[383]

Clause 13 highly resembles s 60(1) of MIA 1906, and stipulates that a constructive total loss could be claimed when the subject matter insured is reasonably abandoned on the two accounts as stated: firstly, when an actual total loss appears to be unavoidable; secondly, when the 'cost of recovering, reconditioning and forwarding the subject matter insured to the destination port would exceed its value on arrival'. The wording of the second circumstance as stated above is more specific and restrictive than in s 60(1) where it describes this cost as 'an expenditure which would exceed its value when the

[381] *Vacuum Oil Co v Union Insurance Society of Canton* [1926] 25 LiL Rep 546
[382] ICC (A) 1982 for all risks minus exceptions, B Clause and C Clause for named risks insured against.
[383] ICC (A) 2009, clause 13 provides: '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 or 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.'

expenditure had been incurred'. In MIA 1906, no further explanation on what such 'expenditure' includes has ever been made, while in cl 13, it is specified what costs should be counted when comparing these with the value on arrival in ascertaining a constructive total loss.[384]

In addition, it could be easily concluded from cl 13 that, for a valued policy, the insured value is not a component in ascertaining a constructive total loss. The comparison subject should be that 'of recovering, reconditioning and forwarding the subject matter insured to the destination port' and the real value on arrival, not the insured value. The insured value would come centre stage only when the process goes to indemnity, so that, after a constructive total loss is constituted, the assured could recover for the whole insured value stated in the policy.[385]

However, cl 13 is not as comprehensive as s 60; it does not contain all the situations that constitute a constructive total loss listed in s 60. For example, it lacks the circumstances of deprivation of possession and the damage of the subject matter insured.

[384] See *Rosetto v. Gumey* [1851] 11 CB 176; See also *The Law of Marine Insurance*, at 21.75
[385] See *Irving v Manning* (1847) 1 HLC 288

3.3 Deprivation of possession of ship or goods

3.3.1 Definition and scope of deprivation of possession pre-statute and post-statute

The doctrine of constructive total loss originated from cases of capture,[386] and later appeared gradually in cases of seizure, detention, blockade, confiscation, embargoes and so on. In MIA 1906, these events have been included as being in the scope of the term 'deprived of possession', and this has been the cause of much debate. In line with the pre-statute cases, the common view seemed that 'deprived of possession' contained only the circumstances of capture or similar perils, but the Act has no such restriction.[387] In Chapter Two, the definition and scope of deprivation of possession regarding the pre-statute cases were discussed thoroughly. Later in the post-statute case of *Polurrian Steamship Co v Young*,[388] where the claim for a constructive total loss was accepted on the basis that the master and the crew suffered from the loss of the free use of the ship while still remaining on board. On the other hand, as to the situation in which the owner has paid a big sum for a ransom and then is allowed to stay on board and use the vessel, it obviously cannot constitute a constructive total loss.[389] Furthermore, it was also held that the deprivation of possession, like arrest or restraint, does not necessarily come with force.[390]

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386 *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson)
387 *Arnould,* at 29-02, note 14; See also *Kemp v Halliday* (1865) 34 LJQB 233
388 *Polurrian Steamship Co v Young* (1915) 19 Com Cas 143
389 *Marine Insurance Legislation*, at p87
390 *British and Foreign Marine Insurance Co v Sanday* (1916) 21 Com Cas 154

However it was uncertain until the case of *The Bamburi*[391] came out, from which the 'loss of free use and disposal' test was widely accepted.[392]

The Bamburi has been regarded as a leading case to identify the concept of deprivation of possession.[393] In this case, 70 vessels had been detained by Iraqi authorities at the outbreak of the Iran-Iraq war. The skeleton crews remained on board and the permission for the vessels to leave had not been granted by the harbour master until the date of the arbitration decision.[394] The essential issue, as to whether the owners had been deprived of possession of the vessels under MIA 1906, was discussed at length by Staughton J. He took the term 'deprived of the possession' in the first sentence of s 60 (2) as a broad meaning - loss of the free use and disposal, viz. when the master lost the right to use the vessel even though he still remained in physical possession of the vessel, it could nevertheless be judged that he was deprived of possession of the vessel. This view was soon accepted in practice by the market.[395]

[391] *The Bamburi* [1982] 1 Lloyd's Rep 312
[392] The test nowadays is often applied by incorporation with the Detainment Clause, which will be discussed below.
[393] *The Law of Marine Insurance*, at 21.60
[394] *The Bamburi* [1982] 1 Lloyd's Rep 312
[395] *Arnould,* at 29-17

3.3.2 Unlikely to be recovered

3.3.2.1 Concept of unlikely under MIA 1906

3.3.2.1.1 Term of 'unlikely' – alters the pre-statute cases

The word 'unlikely' did, however, involve a change from the old law.[396] It was considered in the case of *Polurrian Steamship Co Ltd v Young*[397] that the test of 'uncertainty of recovery' prior to the Act was replaced by the test of 'unlikely to be recovered' after the Act was codified. The test in pre-statute cases has been discussed in Chapter Two;[398] here, in this part, the emphasis will be on how the test applied in cases after the Act was codified.

In the *Polurrian*[399] case, the ship insured was captured and detained by a warship a short distance before reaching her destination, and the court held that the recovery of the ship was uncertain but not unlikely. MIA 1906 altered the express of 'uncertain to be recovered' in common law by a substitution of 'unlikely to be recovered'.[400] Therefore the test of 'uncertainty' was not proper here and the issue for the court was whether the unlikelihood of the recovery, to entitle a constructive total loss, was proved. Although the Act says nothing

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[396] *Chalmers*, at p92; See also *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50 (AC) 87-88 (Lord Wright)

[397] *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922; See also *Roura & Forgas v Townend* [1919] 1 KB 189; *Marstrand Fishing Co Ltd* v *Beer*, *The Girl Pat* (1937) 56 Ll LR 163; *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50; *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390

[398] See *Goss v Withers* (1758) 2 Burr 683; *Peele v Merchants' Insurance Co* (1822) 3 Mason's Rep 27; *M'Iver v Henderson* (1816) 4 M & S 576*; Gardner v Salvador* (1831) 1 M & R 116; *Roux v Salvador* (1836) 3 Bing NC 266

[399] *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922

[400] *Arnould,* at 29-18; See also *The Law of Marine Insurance*, at 21.62

about the degree of unlikelihood, the understanding has been left to the court. It is not difficult to see that the meaning of 'unlikely' has been explained in the case law.[401] The word 'unlikely' differs from the word 'uncertain'. 'Unlikely' contains the inference and the forecast of the results, while 'uncertain' just means not for sure – the former contains some balance against the event while in the latter the balance is even.[402] There would not be a constructive total loss if the assured were just uncertain whether his ship could be recovered. However, the change of the test is taken as being to the detriment of the assured.[403] In referring to the *Polurrian* case, Stable J explained and affirmed in *Court Line Ltd v R, the Lavington Court*,[404] that 'unlikely' lay in the middle of the word 'uncertain' and the word 'inevitable', and was definitely stronger and more severe than 'uncertain'.

As to the application of the test of 'unlikely', in *Polurrian Steamship Co v Young,* Warrington J shared the opinion that, to constitute a constructive total loss of this type, first of all, at the date of the issue of the writ, the plaintiffs should make sure that they were deprived of the possession of the ship. And secondly, the essential factor was that the uncertainty of the ship's fate within a reasonable time would definitely not be enough. As for the probability, she should be apparently more likely to be lost than recovered;[405] this was also cited by Porter J in *Marstrand Fishing Co Ltd v Beer*,[406] as he addressed the

[401] See *Polurrian Steamship Co v Young* [1915] 1 KB 922;See also *Marstrand Fishing Co Ltd v Beer*, *The Girl Pat* (1937) 56 Ll LR 163; *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50; *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390
[402] *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50 (AC) 87-88 (Lord Wright)
[403] *Polurrian Steamship Co v Young* [1915] 1 KB 922 (KB) 937-938 (Warrington J)
[404] *Court Line* v *R*, *The Lavington Court* (1945) 78 Ll LR 390
[405] *Polurrian Steamship Co v Young* [1915] 1 KB 922;See also *Marstrand Fishing Co Ltd* v *Beer*, *The Girl Pat* (1937) 56 Ll LR 163; *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50
[406] *Marstrand Fishing Co Ltd* v *Beer*, *The Girl Pat* (1937) 56 Ll LR 163

issue of whether the test of unlikelihood should be objective and since he had got no answer to the question whether the ship was more likely to be lost than recovered, no constructive total loss could be ascertained. It can be simply inferred that, upon the judgment of a reasonable man, a state of 'unlikely to be recovered' means the balance of probability is against the ship being recovered.[407]

There would be also exceptions where the policy has got a special stipulation. In *Panamanian Oriental Steamship Corporation v Wright*,[408] the ship was seized by Vietnamese Customs and the recovery of the ship was unlikely, but the policy contained a special stipulation that it excluded 'loss … arising from … arrest, restraint or detainment … by reason of infringement of any customs regulations.' Therefore, the assured could not be indemnified due to the special stipulation.

In a very recent case, *Clothing Management Technology Ltd v Beazley Solutions Ltd*,[409] the assured is a clothing manufacturer who makes sample garments and then sends the garments and the raw materials to a Moroccan factory for mass production. After the assured made the first payment of 51,000 pounds, the manager of the factory was away, leaving all the workers unpaid. The workers threatened that they would neither resume work nor release finished garments unless they got their wages on the 25th of September 2008. The assured paid the workers their overdue wages the next

[407] See *Marstrand Fishing Co Ltd* v *Beer*, *The Girl Pat* (1937) 56 Ll LR 163; *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664
[408] *Panamanian Oriental Steamship Corporation v Wright* [1971] 1 Lloyd's 487, CA
[409] *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727; [2012] 1 Lloyd's Rep. 571

day and got the garments. Since the business seemed to be working satisfactorily, the assured sent another large portion of fabric to the factory. The same thing happened again on the 5th of November – the workers asked for an immediate payment of 80,000 pounds but the assured refused this time. One question put forward to the court was that whether a seizure existed. The underwriter contended that the goods remaining in the factory were detained by a lawful political or executive power, because only the local governor has the power to decide who could enter the factory or not. The underwriter contended that the final behaviour of the workers caused a seizure by lawful authority. However, Mackie QC J enunciated that there was proof that the governor said he had no jurisdiction and the security guard at the factory was employed by the landlord, instead of by the authorities. According to the policy, the insurance extended to include the subject matter insured whilst in store at named locations. Mackie QC J held that a constructive total loss arose when the workers refused to give the garments after the assured refused to pay the 80,000 pounds. At that moment, the assured lost the possession, control, free use and disposal of the subject matter insured. And the garments remaining in the factory were taken as unlikely to be restored within a reasonable time since the profits on the goods depended on the season and the commercial life of the garments would be short. The underwriter contended that the recoverability of the garments in November was the same as in September. But as illustrated by Mackie QC J, productivity and morale deteriorated from September onwards. It was established, with a careful survey and study of the situation, that there was no guarantee at all that the assured could get the amount of goods equal to a payment of 80,000 pounds salary. The impossible

recoverability of the goods was not based upon physical factors, but commercial factors. It is at variance with the case of *Bayview v Mitsui Marine*,[410] where the goods were in the hands of those who would not return them to the assured, and this was a physical impossibility.

3.3.2.1.2 Reasonable time to recover

It is widely recognized that s 60(2)(i) implies a test of 'reasonable time' when it comes to the likelihood of recovery, that is to say, there would be a reasonable period, beyond which the recovery would be deemed unlikely.[411] Subject to any express provision in the policy, (such as the Detainment Clause,[412] which will be discussed in the next section) in general, the reasonable period is not fixed and should be based upon the facts of the varied cases.[413] And again it left a margin to the court. In accordance with the decisions of some cases, the market practice shared a convention that a constructive total loss occurred where the assured was likely to be deprived of possession for beyond a period of 12 months,[414] and this was later summarized in the Detainment Clause.

But this does not mean 12 months is the general guidance. On some occasions the policies may specify a shorter period, for example, in the case of *Rowland & Marwood SS Co Ltd v. Maritime Insurance Co Ltd*,[415] six months was set as a reasonable length of time. If the ship insured was stranded or

[410] *Bayview v Mitsui Marine* [2001] 1 Lloyd's Rep 652; [2003] 1 Lloyd's Rep 131
[411] *Arnould,* at 29-18
[412] Institute War and Strike Clauses, clause 3, which provides 12 months to be the period of deprivation of possession in ascertaining a constructive total loss.
[413] *The Law of Marine Insurance*, at 21.64
[414] See *Polurrian Steamship Co v Young* [1915] 1 KB 922; *The Bamburi* [1982] 1 Lloyd's Rep 312
[415] *Rowland & Marwood SS Co Ltd* v *Maritime Insurance Co Ltd* (1901) 6 Com Cas 160

retained and it was impracticable that it would be saved within 6 months but likely to be saved eventually, a constructive total loss still could be constituted, just as in the case of *Wong Wing Fai Co SA v. Netherlands Insurance Co*,[416] where the policy provided that nine months was a reasonable time.[417] In the recent case mentioned above, *Clothing Management Technology Ltd v Beazley Solutions Ltd*,[418] Mackie QC J stressed that the subject matter insured, that of fashion garments, have a short commercial life, so a reasonable time here would be a relatively short period.

Once the period has been fixed, another essential point would be to ascertain the date of commencement of that period, which also varies in different cases. In *Polurrian Steamship Co Ltd v Young*,[419] Warrington J suggested that the reasonable time started from the date of the writ to enforce his notice of abandonment; and in the case of The *Bamburi*,[420] Staughton J gave a similar suggestion as Warrington J in the *Polurrian* case that the reasonable time was counted from no earlier date than the notice of abandonment given or the date when the writ was issued. Staughton J said that the notice should be valid and given with 'reasonable diligence' to claim for a constructive total loss and it would be logical to start counting the time for determination of the unlikelihood of recovery from when the assured got intelligence and when the notice was given. Staughton J further explained that it caused no conflict between the date of the notice of abandonment given and the date of the writ issued since if the abandonment was rejected it would be the common practice to take the

[416] *Wong Wing Fai Co SA* v *Netherlands Insurance Co (1945)* [1980–81] 1 SLR 242
[417] *Marine Insurance Legislation*, at p87
[418] *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727; [2012] 1 Lloyd's Rep. 571
[419] *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922
[420] The *Bamburi* [1982] 1 Lloyd's Rep at 321

occasion as the commencement of the action or the issue of the writ.

There also appeared another voice, as in *Irvin v Hine*,[421] where Devlin J suggested a reasonable length of time would be better commencing from the time of the casualty. However this would cause some inconvenience, for the assured would not necessarily get the intelligence of the casualty once it occurred. If the date of the casualty was being regarded as the commencement of the reasonable time period, it might happen that the ship or goods had not yet been restored before a reasonable period had elapsed, but before the assured got news; and before notice of abandonment was given, the subject matter insured is recovered. From the point of view that the ship or goods are 'being restored beyond a reasonable period', a constructive total loss could be constituted; while from the point of view of 'restored before notice of abandonment given', a constructive total loss could not exist; these two views would definitely be in conflict. From this perspective, the date of the notice of abandonment seems to be a better choice as the start date for counting the reasonable time. However, in modern times, technology brings convenience in communication between the two parties. Therefore even if the date of casualty is set as the commencement date, such supposed conflicts will hardly ever occur.

3.3.2.2 The Detainment Clause under the War and Strikes Clauses

Codified by a series of cases of deprivation of possession from the eighteenth

[421] *Irvin v Hine* [1950] 1 KB 555

and nineteenth century, s 60(2) has stipulated one sort of constructive total loss: where the assured is deprived of the possession of his ship or goods by perils insured and it is unlikely he can recover it. In the courts, the complicated point is that, it seems discretionary for the court to decide how circumstances of unlikelihood of recovery come about. The arising of the Detainment Clause under the War and Strikes Clauses provides a precise solution and helps to solve such a complicated issue in ascertaining a constructive total loss of this sort, that by perils insured of a capture, seizure, arrest, restraint or detainment, etc., a circumstance of unlikelihood of recovery of a ship could be deemed when the assured loses the free use and disposal of the ship for a continuous period of twelve months.[422] The predecessor of the Detainment Clause was the Institute Detainment Clause, until 1983 when the Detainment Clause came into being and occupied the stage. In recent times most cases of loss by perils of capture, seizure, arrest, detainment, restraint, etc., under war risks policies were governed by the Detainment Clause.[423]

3.3.2.2.1 Comparison of the case of *the Bamburi* and the Detainment Clause

The Detainment Clause shares some similarities in some tests with the case of *The Bamburi*[424] but also varies a lot from it. In ascertaining the likelihood of

[422] Institute War and Strikes Clauses Hulls, Clause 3 Detainment: 'In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.'

[423] *Arnould,* at 29-19, note 141

[424] *The Bamburi* [1982] 1 Lloyd's Rep 312

recovery of the ship, the 'free use and disposal' test has been set as a rule in the case of *The Bamburi*[425] and has also been adopted and summarized in the Detainment Clause. However, the Detainment Clause is not a conclusion of *The Bamburi* and actually the draft of the Detainment Clause 1983 had been accomplished prior to the decision of this case being made by Staughton J.[426]

There also exists a 'reasonable time test' relating to the likelihood of recovery, beyond which the recovery would be deemed unlikely. Although the reasonable period is not fixed, some cases conventionally take twelve months as a time limit,[427] which was accepted in the Detainment Clause as well. The difference and dispute arose on the issue of the commencement of the reasonable period. In *The Bamburi*,[428] the reasonable period was held as starting from the notice of abandonment given, and any period prior to the notice should be excluded. But in the Detainment Clause, the 12- month period initiated from the date the ship was captured or seized or detained, etc.

3.3.2.2.2 Application of the Detainment Clause

In the very beginning, there was also some uncertainty on the interpretation of the Detainment Clause, but later the accurate illustration has been accepted that: firstly, the reasonable period to ascertain the likelihood of recovery should be counted from the date the casualty takes place. In the case of *Bank of America National Trust v Christmas (The Kyriaki)*,[429] as Hirst J explained, the

[425] *The Bamburi* [1982] 1 Lloyd's Rep 312; See also *Arnould,* at 29-19
[426] *Arnould,* at 29-19, note 145
[427] See *Polurrian Steamship Co v Young* [1915] 1 KB 922; *The Bamburi* [1982] 1 Lloyd's Rep 312
[428] *The Bamburi* [1982] 1 Lloyd's Rep 312
[429] *Bank of America National Trust v Christmas (The Kyriaki)* [1993] 1Lloyd's Rep 137

cause of action commenced at the date of the casualty and notice of abandonment was never an ingredient of the cause of action; but secondly, this does not mean a notice of abandonment could be waived to claim for a constructive total loss. Apart from some waiver conditions existing, a notice of abandonment would be compulsory in the process of claiming for a constructive total loss, without which the assured could only recover a partial loss even if the situation could satisfy the criterion of a constructive total loss; and thirdly, it also does not imply that any notice of abandonment before the 12 months elapses would be deemed to be prematurely given.[430] The assured would be entitled to give notice of abandonment immediately on hearing the reliable intelligence of the casualty and had no need to wait and see the full accurate information.[431] Based upon the Detainment Clause, the process could be imagined: a ship being captured and the assured gives notice of abandonment immediately. An action is brought once the underwriter declines the notice. The claim for a constructive total loss would be successful if the assured has lost the 'free use and disposal' of the ship for a continuous 12 months or accurate proofs of evidence could be offered that the assured could not recover his ship within 12 months from when the capture occurs.[432]

3.3.2.2.3 Analysis of exclusions of constructive total loss arising from detainment

Sometimes there would be debates on the exclusion clause under the policy. In *Sunport Shipping Ltd v Tryg-Baktica Intl (UK) Ltd (The Kleovoulos of*

[430] *Marine Insurance Clauses*, at p336; See also *Arnould,* at 29-19
[431] *Arnould,* at 29-06
[432] *Marine Insurance Clauses*, at p336

Rhodes),[433] there was a special Detainment Clause where the reasonable period was 6 months and the policy was also governed by an Exclusion Clause which stipulates that 'the insurance excludes the loss arising from arrest …detainment …by reason of infringement of any customs or trading regulations.' In this case, the ship was detained by a Greek officer after a large quantity of cocaine was exposed during the underwater inspection; this was taken as a breach of the Greek criminal law and the detainment lasted for more than 6 months. The significant issue was whether the infringement of the criminal law could be counted as being an infringement of customs or trading regulations listed in the Exclusions Clause. Clarke LJ affirmed that the interpretation of the term 'infringement of customs and trading regulations' should be construed in the context of the insurance contract. As he illustrated, the Institute Clauses were drafted for use in policies all around the world. And according to the Naples Convention, the expression 'customs regulations' would be wide enough to embrace both regulations imposing duties and regulations prohibiting imports absolutely. Therefore, a constructive total loss here was excluded from arising from detainment occasioned by the infringement of a regulation banning imports absolutely.

Analogically, in *Atlasnavios-Navegacao LDA v Navigators Insurance Co Ltd*,[434] the drugs were attached to the vessel by an unknown smuggler, leading to the detainment of the vessel. Here the essential issue was whether a 'malicious act' by an unknown person was included in the 'infringement of customs

[433] *Sunport Shipping Ltd v Tryg-Baktica Intl (UK) Ltd (The Kleovoulos of Rhodes)* [2003] 1 Lloyd's Rep 138

[434] *Atlasnavios-Navegacao LDA v Navigators Insurance Co Ltd* [2016] EWCA Civ 808, [2018] 2 WLR 1671

regulations'. In the Appeal Court, Christopher Clarke LJ held there existed no reason to exclude the case of malicious acts from the infringement of customs regulations. The result of the Appeal Court was reasonable; otherwise, the assured might take 'malicious acts' as an excuse even when the smuggler was one of the crew members. Therefore, the vessel lost by reason of detainment occasioned by infringement of customs regulations, which was excluded by the Exclusions Clause.

In *Handelsbanken ASA v Dandridge (The Aliza Glacial)*,[435] Potter LJ held that in order to claim for a constructive total loss of the ship pursuant to the Detainment Clause, the assured should prove that the cause of the loss, the detention, continued for 12 months by perils insured. In this case, the continuous detention over 12 months was concurrent with the owner's refusal to provide the security for releasing the ship. Potter LJ accepted that the refusal to pay the security demanded was reasonable after making a comparison between the amount of the security and the market value of the ship. This case also contained the Exclusion Clause that the insurance excludes 'loss, damage…arising from the operation of ordinary judicial process failure to provide security or to pay any fine or penalty or any financial cause.' But obviously here the loss was occasioned by the detention, instead of the financial reason. The failure to provide the security was just a concurrent cause for the continuous detention, which was deemed to be reasonable, not the proximate cause of the loss. Therefore a constructive total loss could be recovered here.

[435] *Handelsbanken ASA v Dandridge (The Aliza Glacial)* [2002] CLC 1227

The analysis could be expanded to include the exclusions in the Strikes Clauses. In some related cases, the underwriter may refuse to indemnify a constructive total loss by arguing for the application of the Strikes Exclusion Clause[436] in the Institute Cargo Clauses or the General Exclusions Clause[437] in the Institute Strikes Clauses Cargo. The case of *Clothing Management Technology Ltd v Beazley Solutions Ltd*,[438] which was considered in detail earlier, is relevant here. In that case the assured was a clothing manufacturer and paid 51,000 pounds to the factory but the manager of the factory took the money away. The workers released the garments after the assured paid the workers their overdue wages. The assured sent another large portion of fabric to the factory. The same thing happened again – the workers refused to provide the garments unless an immediate wage of 80,000 pounds was paid to them but the assured refused this time. The policy incorporated the Institute Cargo Clauses (ICC) and the Institute Strikes Clauses Cargo (ISC). In the ICC, there is a Strikes Exclusion Clause (cl. 7) which excludes from the insurance loss damage or expense '(1) caused by strikes, locked out workmen, or persons taking part in labour disturbances, riot or civil commotions; (2) resulting from strikes, lock-outs, labour disturbances, riots or civil commotions.' In the ISC, the General Exclusions Clause also excludes loss damage or expense 'arising from the absence shortage or withholding of labour of any description whatsoever resulting from any strike, lockout, labour disturbance, riot or civil commotion' (cl 3.7). The insurer contended that the loss of orders was due to the absence of labour; but in this case, the assured claimed for the

[436] ICC (A) 1982, clause 7
[437] Institute Strikes Clauses Cargo, clause 3
[438] *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727; [2012] 1 Lloyd's Rep. 571

loss by deprivation of possession, instead of damage by strikers. Moreover, what cl 3.7 in the ISC excluded was the consequential loss. It has been interpreted that, in accordance with the General Exclusions Clause, the insurer agrees to indemnify the direct physical loss by strikers, such as losses due to the setting on fire of property by strikers, but if the strikers withhold the labour and the cargo decays due to their lack of care for it, such consequential loss would not be covered.

3.3.3 Cost of recovery exceeding recovered value

For this type of constructive total loss, the economic consideration is based upon the fact that the ship or goods are in the hands of a third party.[439] When the assured is deprived of the possession of his ship or goods and there exists the possibility of recovering them, but the cost of the recovery will be in excess of the recovered value, in this situation, the assured could claim for a constructive total loss.[440] The principle under s 60(2) just reflects and summarizes the old pre-statute cases.

Being distinct from the cost of repairs, the cost of recovery usually refers to the direct cost to get back the subject matter insured from the third party who has taken possession of it. In the case of *Stringer v English and Scottish Marine insurance Co*,[441] the goods were captured by a foreign army and regarded as a war trophy and was about to be sold by the Prize Court. The cost of recovering the goods would be 1.5 -1.8 times the original price. The court held that the assured was not at fault in not preventing the sale of the goods, by the

[439] *Cases and Materials on Marine Insurance Law*, at p644
[440] MIA 1906, s 60(2)
[441] *Stringer v English and Scottish Marine Insurance Co,* (1870) LR 5 QB 599

adoption of the 'prudent uninsured owner test'. Blackburn J explained that, although normally it would be more reasonable for the assured to pay the security rather than allow the goods to be sold, here the situation was peculiar that the loss would grow 1.5 -1.8 times bigger if the assured ransomed them compared to letting the whole goods be totally lost to them. Therefore in this case, it was obviously not proper to recover the goods. Moreover, supposing the vessel was captured and the assured paid a sum for recovery to the captors, the loss was the sum paid and the vessel itself could not be regarded as totally lost,[442] for there lacked not only the physical act of abandonment, but also the notice of abandonment to the underwriter.

Being at variance with the *Stringer*[443] case, attention should be paid to the circumstances where the total loss was caused by the acts of the salvors and the sale by orders of the Court of Admiralty, as in the case of *De Mattos v Saunders*.[444] Willes J said that such acts and proceedings were not the natural and necessary consequences of a peril insured against. The seizure and sale under the decree of the Admiralty Court was definitely a different thing when comparing it to the hostile seizure or capture and condemnation by a Prize Court.[445] Similarly, in *Meyer v Ralli*,[446] a sale of the goods by order of a foreign tribunal was occasioned by the negligence of the master, instead of by perils insured against, since it could be easily proved that if the master had done his duty on due diligence, the portion of the goods sold by order of the foreign tribunal would have been forwarded to the destination port in safety. In

[442] *Marine Insurance Legislation*, at p87
[443] *Stringer v English and Scottish Marine Insurance Co,* (1870) LR 5 QB 599
[444] *De Mattos v Saunders* (1872) LR 7 CP 570
[445] *Marine Insurance Legislation*, at p87
[446] *Meyer* v *Ralli* (1876) 1 CPD 358

these circumstances, a constructive total loss would definitely not be constituted.

3.4 Damage to ship

Section 60(2)(ii) stipulates that there is a constructive total loss when the ship is so damaged and the cost for repairs would exceed the repaired value.[447] This is also a type of constructive total loss based upon economic considerations. Under this principle, there is an implied condition that the ship is usually repairable. Maule J referred to such a principle in making a decision in the early case of *Moss v Smith*[448] that, even though the ship was physically repairable, but at enormous and unreasonable cost that exceeded the repaired value, there could be a total loss.[449] In the olden days, owing to the limited tools of communication, decisions were often made by the master or the agent, whereas in these days, usually the owner himself would make the choice.[450] In Chapter Two, the history of constructive total loss of the ship caused by damage before the Act has been thoroughly discussed.[451] The principle under s 60(2)(ii) is an apparent summarization and a lucid reflection of the pre-statute cases.

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[447] See *Moss v Smith* (1850) 9 CB 94; *Lohre v Aitchison* (1878) 3 QBD 558, 562-563; *Rankin v Potter* (1873) LR 6 HL 83 (HL) 116; *Irving v Manning* (1847) 1HL Cas 287; *North Atlantic SS Co v Burr* (1904) 9 Com Cas 164; *Hall v Heyman* [1912] 2 KB 5; *Helmville Ltd v Yorkshire Insurance Co Ltd, The Medina Princess* [1965] 1 Lloyd's Rep 361 (QB); *Bank of America National Trust and Savings Association v Christmas, The Kyriaki* [1993] 1 Lloyd's Rep 137 (QB); *Venetico Marine SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm); [2014] 1 Lloyd's Rep 349; *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep. 651

[448] *Moss v Smith* (1850) 9 CB 94

[449] In early cases, a constructive total loss is usually expressed as a total loss.

[450] *Cases and Materials on Marine Insurance Law*, at p644

[451] For more illustrations of the old cases before 1906, refer to 2.2.2

For constructive total loss of this sort, two significant components should be worked out – the repaired value and the cost for repairs, and especially, for the concept of these two salient factors, whether the Act explicitly echoes the pre-statute cases and whether there exist any changes in the post-statute cases.

3.4.1 Repaired value

3.4.1.1 Under MIA 1906 and the pre-statute cases

What amounts to a repaired value usually relies upon the policy, subject to any express provision in the policy; normally in the very old cases, whether valued or unvalued, the market value is set as a relevant value to be compared with the cost of repairs in ascertaining a constructive total loss on economic grounds. As briefly illustrated in Chapter Two, the issue of repaired value was put forward in *Allen v Sugrue*,[452] which concerned a valued policy. The assured finally was entitled to recover as for a total loss because the cost of repairs exceeded the market value. And later in the case of *Irving v Manning*,[453] it was set as a rule that the market value was to be redeemed on the basis of the repaired value. Patteson J explained that in ascertaining a constructive total loss, the market value should be taken into account; as to the compensation stage, in a valued policy, once a total loss has been justified,

[452] *Allen v Sugrue* (1828) 8 B &Cr 561
[453] *Irving v Manning* (1847) 1 HLC 288

the assured would be entitled to receive the full amount of the fixed insured value.[454]

Section 60 of the Act has not explicitly stipulated that it is the market value which is to be compared to the cost of repairs; whereas it could be inferred that this principle was not altered by the expression in s 27(4) that the insured value is not decisive for ascertaining whether a constructive total loss exists 'unless the policy otherwise provides'.[455] The word 'otherwise' appears both in the Institute Time Clauses Hulls[456] and the Institute Voyage Clauses Hulls,[457] which will be discussed in detail later.

Although s 27(4) provides the concession words of 'unless the policy otherwise provides', the policy should specify the provision clearly. In the case of *Sailing Ship Holt Hill Company v United Kingdom Marine Association*,[458] there was a special clause under the policy which stated that:

> No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80% of the value in the ordinary hull 'all risks' policy - say 12,500 pounds.

The fact was that the estimated cost of repairs exceeded 80% of 12,500

[454] *Irving v Manning* (1847) 1 HLC 288
[455] *The Law of Marine Insurance*, at 21.78
[456] See cl 19.1
[457] See cl 17.1
[458] *Sailing Ship Holt Hill Company v United Kingdom Marine Association* [1919] 2 KB 789

pounds – that is 10,000 pounds, but was very much less than the true value of the ship, which was about 25,000 pounds. Rowlatt J interpreted that here the 10,000 pounds was not the repaired value or not even a substituted repaired value. To ascertain a constructive total loss, it should be the repaired value to be compared to the cost of repairs; and the words under the policy that the ship could not be a constructive total loss unless the cost of repairs exceeds 10,000 pounds shall not be interpreted as once the cost of repairs exceeded 10,000 pounds there would definitely be a constructive total loss, but if it were less than the certain amount (10,000 pounds), a total loss could not be claimed even it exceeded the repair value. Therefore in this case the ship was held not to be a constructive total loss. Furthermore, suppose the cost of the repairs here was 8,000 pounds, and the true repaired value was 6,000 pounds, but due to the specified words under the policy, the cost of repairs exceeded the repaired value but by no more than 80% of the value in the ordinary hull 'all risks' policy, the ship could not be deemed to be a constructive total loss.

Furthermore, things might be different when the ship was a special one as in the case of *Grainger v Salvador*,[459] where the special ship was valued at 17,000 pounds, the cost of repairs was 10,500 pounds and the value after repair was 7,500 pounds. Since the ship was of a special size and used for a particular trade, the cost for rebuilding it would be far more than 10,500 pounds. The court held the assured could only claim for a partial loss, because here it was not the repaired value to be compared with the cost of repair, and a special ship with a particular usage could not be treated under normal

[459] *Grainger v Salvador* (1863) 4 B & S 9, Ex Ch

principles.

3.4.1.2 The Institute Clauses

The definition of constructive total loss under MIA 1906 leaves some space for the principle of freedom of contract by the wording of 'subject to any express provision in the policy',[460] and the Institute Clauses seem to be such express provisions which contain several different aspects with regard to what constitutes a constructive total loss.[461] Today the insurance market often takes the modern Institute Clauses, but this does not mean the terms in the Lloyd's SG forms are set aside entirely. The SG Policy, which commenced in 1779 and became the standard marine policy for ship and goods since 1795, prevailed for nearly two hundred years and played a critical role in the development of marine insurance law. On the United Nations Conference on Trade and Development in 1975, SG policy was criticized as out of date since new sea perils continually sprang up. Now the majority of nations around the world elect to use Institute Clauses issued by the UK insurance market, or use this in conjunction with their locally issued policy forms. The Institute Clauses play an essential role in the modern insurance market, and have modified some of the principles and clarified some of the vaguer points under MIA 1906. As to the concept of 'repaired value', they have altered the stipulation of s 27(4) of the Act.

[460] MIA 1906, s 60(1)
[461] *Marine Insurance Clauses,* at p146

3.4.1.2.1 'Repaired value' under the Institute Time Clauses Hulls

To begin with, the background needs to be discussed. In the early days of marine insurance, policies were more often made for a round trip, while in the present day the majority of cases of marine insurance are covered on a time basis.[462] The Institute Time Clauses Hulls 1983 (hereinafter referred to as ITCH (83)) was 'the first of the modern comprehensive forms issued by the UK insurance market for the insurance of ships.'[463] Although it is not the mainstream in the current marine insurance market, the modern Institute Voyage Clauses Hulls (hereinafter referred to as IVCH)[464] was also modified in 1983. Several clauses vary between ITCH and IVCH, but as to the point of constructive total loss, it makes no difference thereto. The content of constructive total loss under ITCH (83) is stable and as time has passed, nothing on this point has changed under the 1995 version.[465]

In accordance with s 27(4), the repaired value tends to be the real value while cl 19 ITCH alters the Act and the common law rule.[466] Since the clause is an express provision under the policy, it occupies a priority between the assured and insurer. In market practice, the insured value of a ship is usually higher than its real value. It would be unfair for the insurer when the test is to compare the real value and the cost of repairs in ascertaining a constructive total loss

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462 *Marine Insurance Clauses,* at p180
463 *Marine Insurance Clauses,* at p81
464 Institute Voyage Clauses Hulls
465 In ITCH, clause 19 is on constructive total loss and in ICVH, Clause 17 is on constructive total loss. Clause 19 of ITC provides: '19.1 In ascertaining whether the Vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account. 19.2 No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value. In marking this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account.'
466 For the common law rule, see *Allen v Sugrue* (1828) 8 B &Cr 561; *Irving v Manning* (1847) 1 HLC 288

and then the assured gets the higher indemnity of the whole insured value. For example, if a ship was badly damaged and the cost of repairs would be 10 million pounds, her insured value was 12 million pounds, her market value before damage was 10 million pounds and the real value after repair would be 8 million pounds. It could be explicitly inferred that, with the test that the repaired value should be the insured value, there is no constructive total loss here at all; with the test that the repaired value is the real value, a constructive total loss could be constituted and the assured would be indemnified for 12 million, which means the assured has made a profit from the insurance, leading to a break in the basic principle of insurance. Therefore it would be more reasonable to compare the insured value and the expenditure for repairing the ship in ascertaining a constructive total loss. The clause apparently makes the criterion for claiming a constructive total loss more strict, which is obviously a better protection for the insurer and would balance the fairness between the insurer and the assured within the context that the insurance law always inclines to protect the assured. Therefore, in *Suez Fortune Investments Ltd v Talbot Underwriting Ltd*,[467] the policy incorporated ITCH (83), and Flaux J commented accordingly that, to establish a constructive total loss of the vessel successfully, the cost for repairing the vessel should exceed the insured value of 55 million dollars even though the real market value after repair was only 10 million dollars.

However, it should be noticed that cl 19 is concerned with a constructive total loss of the ship based upon an accident that leads to repairs or salvage, and

[467] *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42; [2015] 1 Lloyd's Rep. 651

not applicable to loss caused by deprivation of possession. In *Handelsbanken ASA v Dandridge (The Aliza Glacial)*,[468] a ship was detained by the Australia Navy due to illegal fishing and the Australia Fisheries Management Authority agreed to release it with a demand for security of 10 million US dollars. The real value of the ship was 4.5 million US dollars and the insured value 13.5 million US dollars. A constructive total loss was claimed by reason of the detainment of more than twelve months. The underwriter contended that the policy was under the Institute War Clauses that incorporated the Institute Time Clauses, and in accordance with cl 19 of ITC, the word 'recovery' in cl 19.2 could be applied to the situation under s 60(2)(i)(b) – deprivation of possession. Therefore he insisted that, to ascertain whether the security is reasonable, the security (10 million) should be compared to the insured value (13.5 million), instead of the real value (4.5 million). Such contention was denied by Porter LJ and as he explained, firstly, cl 19 deals with the losses caused by accidents that lead to repairs or salvage; secondly, in this case a constructive total loss was claimed under the Detainment Clause and the essential point was to prove the deprivation of possession for a continuous period of twelve months, that is to say, the constructive total loss was occasioned by detainment, instead of cost of recovery. Therefore, the insured value made no sense here.

3.4.1.2.2 International Hull Clauses 2003

Clause 21 of the International Hull Clauses (IHC 2003) sets out the situation that constitutes a constructive total loss and the only difference between cl 21

[468] *Handelsbanken ASA v Dandridge (The Aliza Glacial)* [2002] CLC 1227

of IHC 2003 and cl 19 of ITC is, under the former clause, the repaired value is 80% of the insured value.[469] Clause 21 has broadened the criterion in ascertaining whether a ship is a constructive total loss, for a reasonable concession has been made for the assured. In insurance market practice, the insured value is usually higher than the market value and sometimes it would be far higher than it is really worth, especially for some old ships. To avoid the difficulties in claims for a constructive total loss of an aged ship, such a concession comes out.[470] It is a small bonus for the assured from the insurer, and in return the insurer will ask for stricter proof of the cost of repairs.[471]

3.4.2 Cost of repairs – a change in the rule

3.4.2.1 The extent of the repair

As discussed above[472], in accordance with the old cases, the cost of repairs was merely the cost to make the ship seaworthy, it was not compulsory to make the ship fit to carry the same goods for the same voyage in the same state.[473] However, the principle alters in modern cases and the test has been updated so that after the repairs the ship should function to the same extent as

[469] IHC 2003, clause 21 provides that: '21.1 In ascertaining whether the vessel is a constructive total loss, 80% of the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. 21.2 No claim for constructive total loss of the vessel based upon the cost of recovery and/or repair of the vessel shall be recoverable hereunder unless such cost would exceed 80% of the insured value of the vessel. In making this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account.'

[470] Liangyi Yang, Pengnan Wang, *UK Marine Insurance Institute Clauses* (5th Edition, Dalian Maritime University Press Co., Ltd) p307

[471] *Marine Insurance Clauses*, at p146

[472] See 2.1.2.2.1

[473] See *Reid v Darby* (1808) 10 East 143 [156]-[157], (Lord Ellenborough CJ); *Doyle v Dallas* (1831) 1 M & Rob 48; *Benson v Chapman* (1843) 6 M & G 792 [808]-[812] (Tindal CJ)

her former state.[474] Although the repair is not the reconstruction, being repaired to a seaworthy state is not enough. In modern times, the cost of repairs should be the cost to put the ship back to the same state as when it had been valued.[475]

3.4.2.2 Value of the wreck

3.4.2.2.1 Upon MIA 1906 and pre-statute Cases

Even in the pre-statute cases, a change of attitudes by the courts could be seen towards the question as to whether the value of the wreck should be included in the cost of repairs. In the earlier pre-statute cases, the attitude tended to be included,[476] whereas in some later pre-statute cases, the principle was overruled[477] and it was held that the words 'cost of repairs' only referred to the natural meaning as the cost of repairing the damage, with the value of the wreck being excluded, but it was not the settled law for the more recent pre-statute cases. In *Macbeth & Co Ltd v Marit Ins Co Ltd*,[478] although the case was brought to the court after MIA 1906 became law, the casualty occurred before this time and in the end the House of Lords decided that the value of the wreck should be added into the cost of repairs.

However, in most post-statute cases, the court ruled that the value of the

[474] *Sailing Ship 'Blairmore' Co v Macredie* [1898] AC 593 (AC) 614-15 (Lord Shand)
[475] *North Atlantic Steamship Co Ltd v Burr* (1904) 9 Com Cas 164
[476] See *Young v Turing* (1841) 2 M & G 593 [600]-[605] (Lord Abinger); *Rankin v Potter* (1873) LR 6 HL 83 (HL) 142 (Baron Martin)
[477] See *Bank of English v Vagliano* [1891] AC 107; *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811; *Macbeth & Co Ltd v Marit Ins Co Ltd* [1908] AC 144; *Hall v Hayman* [1912] 2 KB 5
[478] *Macbeth & Co Ltd v Marit Ins Co Ltd* [1908] AC 144

wreck was not the expenditure to repair the ship, and this was taken as a more logical and proper approach in ascertaining what amounts to cost of repairs.[479] At the same time it would be in favour of the insurer to some extent and would bring a better balance for both sides - the assured and the insurer - for most stipulations intend to protect the assured. In *Hall v Hayman*,[480] Bray J said that the word 'expenditure' in s 60(1) denoted a plain meaning, representing an amount of money used for recovering the subject matter insured. He took the view that the principle of the value of the wreck being a component of the cost of repairs under previous cases was inconsistent with the express provision of s 60 and could no longer be treated as the law. Therefore, it can be concluded that, for this point, the Act superseded the previous case law.

3.4.2.2.2 Upon Institute Clauses

There have been two cardinal controversial concepts on constructive total loss during its history: the first one is the concept of repaired value as stated above, and the second one is whether the value of the wreck should be counted into the cost of repairs in ascertaining a constructive total loss. However, cl 19.1 of the Institute Time Clauses gives the explicit answers to these two issues: the repaired value should be the insured value and in counting the cost of repairs to the damaged vessel or to its break-up value shall be excluded.[481] Since Clause 19 has ended a long drawn-out debate in common law on this issue, it

[479] *Cases and Materials on Marine Insurance Law*, at p649
[480] *Hall v Hayman* [1912] 2 KB 5
[481] In addition, Clause 19.2 firstly interprets a condition that would constitute a constructive total loss – when the cost for repairing the ship exceeds the insured value of the ship, and then illustrates that the cost for repairing the ship should be only related to a single accident or successive losses caused by one single accident.

would be a waste of time to discuss it in a case containing such clauses.[482]

3.4.2.3 Cost of recovery or repair before notice of abandonment

There also arose an essential point as to whether the cost of recovery or repairs for the ship before notice of abandonment given should be counted or excluded in the calculation of cost of repairs in ascertaining a constructive total loss. In a recent case, *Connect Shipping Inc v Sveriges Anfgartygs Assurans Forening (The Swedish Club)*,[483] Knowles J held that according to the Act there was no wording restricting the cost for repairs to the realm of the expenditure after notice of abandonment was given, when comparing it with the repaired value. As Lord Wright previously described, 'notice of abandonment is not an essential ingredient of a constructive total loss.'[484] Cost for repairs before notice or after notice is of the same nature and makes no difference. Knowles J enunciated, firstly, that it could be that the wording under s 60(2)(ii) is the cost of repairing the damage, not a part of the cost or a certain period of the cost; secondly, with regards to s 60(2)(ii), in the calculation the only exclusion concerns the future salvage operations or future general average contributions to which the ship would be liable, which implies two points: (1) for the salvage operations and general average contributions to which the ship would be liable if not repaired in the future, no deduction should be made for the calculation of cost of repairs, and (2) it is only related to the salvage operations and general average contributions to which the ship would

[482] In ITCH (95), clause 19 and IVCH (95), clause 19, it is stated that, '… nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.'
[483] *Connect Shipping Inc v Sveriges Anfgartygs Assurans Forening (The Swedish Club)* [2016] Bus LR 1184
[484] *Robertson v Petros M Nomikos* [1939] AC 371, 381-383 (Lord Wright)

be liable, and is nothing to do with the cost of recovery or repairing the damage of the ship. As to the calculation of temporary repairs, in *Venetico Marine SA v International General Insurance Co Ltd*,[485] it was held that it should be upon what the residual strength of the hull was and the extent of the damage to the double-bottom structure, for the vessel would have to be strengthened before being towed for permanent repairs.

Knowles J overruled the decision of the case of *Helmville Ltd v Yorkshire Insurance Company Ltd (The Medina Princess)*[486] on this point, where Roskill J held that the cost of 420 pounds to recover a steering engine was inadmissible in claiming for a constructive total loss for it occurred before the date of notice of abandonment had been given. Knowles J declined to follow this decision and took the view that the cost of recovery or repairs occurring between the date of casualty and the date of the notice of abandonment should be a component of the calculation of the cost of repairs.

3.4.2.4 The estimated expenditure for repairs - whether the Act overrules the pre-statute cases

It is essential to determine the place of repair. In *Carras v London & Scottish Assurance*,[487] Porter J put forward the view that the port for repair varied according to the certain circumstances of each case, including the time, the expenses or the facilities. This was supported in the case of *Suez Fortune*

[485] *Venetico Marine SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm); [2014] 1 Lloyd's Rep 349
[486] *Helmville Ltd v Yorkshire Insurance Company Ltd (The Medina Princess)* [1965] 1 Lloyd's Rep 361
[487] *Carras v London & Scottish Assurance* (1935) 52 LIL Rep 34

Investments Ltd v Talbot Underwriting Ltd,[488] where Flaux J affirmed that the port of necessity would not necessarily amount to the nearest port to the casualty or the port with the cheapest price. As in this case, repairing the vessel in China was cheap and faraway while repairing it in Dubai was expensive and near. Flaux J was in favour of the latter, for first of all, repairing it in China called for a lengthy tow taking two months to get there; and secondly repairing it in China would involve a risk of project overrun; all these delays would inevitably have some financial consequences or would even cause some more damage; and last but not the least, the quality of the workmanship in Chinese shipyards was poorer than that in Dubai. All these various factors led to the final choice.

In relation to the calculation of the cost, it has been stated in s 60(2)(ii) that 'general average contributions[489] to those repairs payable by other interests' should be included in estimating the expenditure for repairs, but the 'future salvage operations' and 'any future general average contributions to which the ship would be liable if repaired' should be excluded. However there remain some doubts about the wording of the Act. Regarding whether the Act overrules the pre-statute cases, two interpretations have emerged.

In a pre-statute case, *Kemp v Halliday*,[490] the ship with part of her goods sunk as a result of perils insured against and was afterwards raised together by the agent of the ship. The question to the court was whether the general salvage

[488] *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep. 651
[489] As to the meaning of general average contribution, see s 66 MIA 1906
[490] *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520

contributions payable by the goods' interests should be deducted or not in estimating the cost of repairing the ship. The Exchequer Chamber held it not to be so in every situation; the general salvage contributions payable by other interests should be deducted, but here in this case the situation was special, so that by the operation, both the goods and the ship benefitted, viz. the goods were also liable for the general average contributions. Therefore, the general salvage contributions payable by the goods' interests should be deducted and the ship was not taken to be a constructive total loss.

However, it could not be inferred that the Act overrules the law by this case. According to the Exchequer Chamber, this case was an exception, and for most forms of general average contributions payable by other interests, no deduction needed to be made. From this point of view, it seems consistent with the Act. However, it has also been argued that s 60 (2)(ii) contains no exception, and the wording is clear enough to embrace all sorts of general average contributions payable by other interests. The exception of the case *Kemp v Halliday* would be inconsistent with the Act. But combined with the 'prudent uninsured ship owner' test,[491] the final decision of this case is correct. The common view is that the wording of s 60(2)(ii) is vague and too broad.[492]

S 60(2)(ii) stipulates that 'future salvage operations' and 'any future general average contributions to which the ship would be liable if repaired' should be excluded in counting the cost of repairs. Two questions have been brought.

[491] This test was applied by Blackburn J that: 'an uninsured shipowner would take into account every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay.'
[492] *Arnould,* at 29-31

Firstly, there is the question as to which day should the future be counted from; and secondly, as to whether such expenditure that has already occurred is excluded as well. Both questions are unanswered by the Act. In line with Arnould, the future starts from the time that the casualty occurs[493] and has been affirmed by Donaldson LJ. As he explained, the owner needed to evaluate the cost in the first stage and then to elect to claim for a constructive total loss with notice of abandonment given or just to treat it as a partial loss. Notice of abandonment would not be given before the election was made. Therefore it would be proper to take the point of future as the date of casualty.[494]

For the second issue, logically it is supported that if the salvage operations and 'general average contributions to which the ship would be liable if repaired' have already occurred, no deduction is to be made, since it is the expenses that the ship is liable for.[495]

3.4.2.5 'Large margin' in cost of repairs

However, in some cases, the cost of repairs cannot be examined with complete accuracy, and in such circumstances, the 'prudent uninsured owner' test could be applied. The nature of this test was formed by Patteson J in *Irving*

[493] *Cases and Materials on Marine Insurance Law*, at p657
[494] Donaldson LJ gave this illustration in the 113th General Meeting of the Association of Average Adjusters in 1982, cited by Knowles J, in the case of *Connect Shipping Inc v Sveriges Anfgartygs Assurans Forening (The Swedish Club)* [2016] Bus LR 1184
[495] *Cases and Materials on Marine Insurance Law*, at p657; See also *Connect Shipping Inc v Sveriges Anfgartygs Assurans Forening (The Swedish Club)* [2016] Bus LR 1184

v Manning[496] and was also adopted in two very recent cases, *Venetico Marine SA v International General Insurance Co Ltd*,[497] where Andrew Smith J held the reasonable cost of repairs would be what a prudent uninsured owner costs; and in *Suez Fortune Investments Ltd v Talbot Underwriting Ltd*,[498] where Flaux J also commented that,

> In assessing the cost of repairs, the approach the court should take is to ask what a prudent uninsured ship owner in the position of the claimants would have done in deciding whether or not to repair the vessel and where and how the repair should be carried out.

This was especially so where there existed practical difficulties to checking with complete accuracy the actual amount of damage to the vessel.

In *Suez Fortune Investments Ltd v Talbot Underwriting Ltd*,[499] the vessel was attacked by pirates; the result was the main engine was broken and an explosive device in the engine room detonated. The policy incorporated the Institute Time Clauses, which said that the repaired value should be the insured value, viz. to claim a constructive total loss, the cost of repairs should exceed the insured value. After inspecting the vessel, the surveyors and

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[496] *Irving v Manning* (1847) 1 HL Cas 287, where it is described, 'The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against.'

[497] *Venetico Marine SA v International General Insurance Co Ltd* [2013] EWHC 3644 (Comm); [2014] 1 Lloyd's Rep 349

[498] *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep. 651

[499] *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep. 651

consultants reported that the power was off on board and there was oily sludge in the engine room, all of which made it impossible to formulate a detailed and accurate repair specification. For circumstances like this, Flaux J adopted the view of Vaughan Williams LJ in the case of *Angel v Merchants Marine Insurance Co*,[500] that when precise estimates were impossible, a large margin should be added into the calculation of cost of repairs. At the same time, the prudent uninsured owner test could be applied to ascertain the 'margin'. In this case, with the additional costs of salvage and standby tugs, the cost of repairs had already exceeded the insured value of 55 million dollars. Flaux J further put forward that even if the estimated cost of repairs up to now was lower than 55 million dollars and between 50-55 million, a constructive total loss could also be established upon the 'large margin test'.

After a constructive total loss is constituted, there existed an additional issue, which was whether the owner lost his right to claim for a constructive total loss by sale of the scrap and the answer was no. Flaux J held that the underwriters were aware of all that had happened throughout this time and had made no objection to the sale. At the same time the assured intended to credit the insured with the outcome of the sale if a constructive total loss was paid. Since the assured made the choice for the benefits to both sides, his right would not be denied.

[500] *Angel v Merchants Marine Insurance Co* [1903] 1 KB 811

3.5 Damage to goods - whether the Act alters the law of the pre-statute cases

Section 60(2)(iii) provides that 'in a case of damage to goods, there is a constructive total loss, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.' The key point for this provision is to sort out the meaning of the word 'forwarding'. With the pre-statute cases,[501] where the cost of recovery exceeded the recovered value of the goods, only the excess of the freight would be included in the calculation.[502] The principle illustrated above could be applied here perfectly, that, in calculating the cost for repairing the damage and the cost of forwarding the goods, if the goods were forwarded by the original ship, the freight would not be included in such cost, for even with no casualty, the assured ought to pay the freight after delivery; whereas if the goods were carried by the original ship owner in a substituted ship or the original ship owner refused to forward the goods, only the excess of the cost of the original freight would be counted.[503]

There is much heated debate about whether the Act alters the law of the pre-statute cases. On the one side, it is put forward that the wording of 'the cost of forwarding the goods to their destination', *prima facie*, is inclined to mean the entire freight to forward the goods from the port of casualty to the destination port, instead of the mere excess of the original freight. From the

[501] *Rosetto v Gurney* (1851) 11 CB 176; *Farnworth v Hyde* (1866) LR 2 CP 204
[502] See 1.3.2.2
[503] *Farnworth v Hyde* (1866) LR 2 CP 204

other side, it was never explicitly expressed in the Act whether the 'cost of forwarding' is entire or whether it is just the excess, so it is impossible to infer the result from the wording itself, viz. there is no obvious words to show the Act alters the pre-statute cases. In the meanwhile, the Institute Clauses shares a quite similar expression with the Act. There tends to be a consistency of case law and statute law on this point.

3.6 Conclusion

The MIA 1906 is a codification of the common law that mostly reflects the pre-statute cases while some principles from the early cases are also altered. Section 60 defines the doctrine of constructive total loss in great detail, illustrating six criteria of constructive total loss, which is taken as complete and exhaustive.[504]

Section 60(1) illustrates two sorts of constructive total loss - the subject matter insured is reasonably abandoned: (a) for its unavoidable actual total loss; (b) due to the expenditure to avoid actual total loss being greater than salvaged value. These two criteria are consistent with the early authorities, as well as with the Institute Cargo Clauses.

Under s 60(1), being 'reasonably abandoned' is an essential component for establishing a constructive total loss and the abandonment here refers to a

[504] *Irvin v Hine* [1950] 1 KB 555 (KB) 567 (Devlin J); *Robertson v Petros M Nomikos Ltd* [1939] AC 371, 391-393 (Lord Porter); *Pollurian Steamship Co Ltd v Young* [1915] 1 KB 922, 936 (Warrington J)

physical act or expression or implied authority of giving up recovering the subject matter insured. The rule of 'reasonably abandoned' just echoes the pre-statute cases, where the ship was deserted by the crew, as discussed in Chapter Two; and that if the loss was caused by the desertion instead of by perils insured against, thus obviously no total loss would be admitted since the abandonment was definitely unreasonable; on the contrary, if the ship was unlikely to be saved or the cost was far greater than its value, the assured thus could claim for a total loss upon the reasonable desertion.[505]

There are two types of constructive total loss under the circumstance of deprivation of possession under s 60(2)(i), that the assured is deprived of the possession of the thing insured by a peril insured against, and it is unlikely to be recovered; or the cost of recovery exceeded the recovered value.

The MIA 1906 altered the test of 'uncertain to be recovered' in common law by a substitution of 'unlikely to be recovered'. Such alteration seems, on the face of it, to be to the detriment of the assured; nonetheless the criteria of 'uncertainty' made the test literally too broad, and this would throw too much burden on the shoulders of the underwriters. Thus this change in effect built a balance between the assured and the insurer since the doctrine of constructive total loss itself is always taken as a protection for the assured.

However, MIA 1906 leaves a margin to the court as to what would be a

[505] See *M'Iver* v *Henderson* (1816) 4 M & S 576; *Cologan* v *The London Assurance Company* (1816) 5 M & S 447; *Thornely v Hebson* (1819) 2 B & Ald 513; *Holdsworth v Wise*(1828) 7 B & Cr; *Shepherd v Henderson* (1881) 7 App Cas 49; More detailed discuss, see Chapter Two, 2.1.2.5

reasonable period, beyond which the recovery would be deemed unlikely. In accordance with the decisions of some cases, the market practice shared a convention that a constructive total loss occurred where the assured was likely to be deprived of possession for beyond a period of 12 months.[506] This was later summarized in the Detainment Clause. The Detainment Clause shares some similarities in the time limit for what is a reasonable time within the common law but it also varies a lot. As in the case of *The Bamburi*,[507] the reasonable period was held to start from the notice of abandonment given, and any period prior to the notice should be excluded. But in the Detainment Clause, the 12-month period initiated from the date the ship was captured or seized or detained, etc. Moreover, the test of reasonable period would never be fixed at 12 months and on some occasions the policies may specify a shorter period, subject to any express provision in the policy or the exclusion clause under the policy.

Section 60(2)(ii) concerns the constructive total loss occasioned by damage; there will be a constructive total loss where the ship is damaged and the cost of repair exceeds the repaired value; and in the case of damage to the goods, a constructive total loss occurs where the cost of repair and forwarding the goods to the destination exceeds the value at arrival.

As discussed in Chapter One, early authorities took the market value as the repaired value. The MIA 1906 just echoes the pre-statute cases but it differs from what is provided for in the Institute Clauses. Actually s 60 of the Act has

[506] See *Polurrian Steamship Co v Young* [1915] 1 KB 922; *The Bamburi* [1982] 1 Lloyd's Rep 312
[507] *The Bamburi* [1982] 1 Lloyd's Rep 312

not explicitly stipulated that it is the market value which is to be compared to the cost of repairs, but it could be inferred that this principle was consistent with the early cases by its expression in s 27(4) so that the insured value is not decisive for ascertaining whether a constructive total loss exists 'unless the policy otherwise provides'. The Institute Time Clauses Hulls[508] and Institute Voyage Clauses Hulls[509] might be such 'otherwise'; these clauses provide that in ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value. It seems more proper to set the insured value as the comparison object since the insured value of a ship is usually much higher than its real value in market practice. It would be unfair for the insurer when the test is to compare the real value and the cost of repairs in ascertaining a constructive total loss, and then the assured gets the higher indemnity of the whole insured value. To build a better balance, the International Hull Clauses updated the test as the repaired value is 80% of the insured value.

In modern cases, the principle has been updated so that the cost of repairs should be the cost to make the ship improved to the extent of her former state, which is not the requirement found in the early authorities. It was also held that the principle of the value of the wreck being a component of the cost of repairs under previous cases was inconsistent with the express provision of s. 60 and could no longer be treated as the law. The Institute Clauses also excludes the value of the wreck in counting the cost of repairs.

[508] See cl 19.1
[509] See cl 17.1

As to the cost of repairing the vessel, the provision of s 60(2)(ii) was interpreted in a recent case. For the salvage operations and general average contributions to which the ship would be liable if not repaired in the future, no deduction should be made for the calculation of cost of repairs; it is only related to the salvage operations and general average contributions to which the ship would be liable, and is nothing to do with the cost of recovery or repairing the damage to the ship.[510] For the point on general average contributions, the case of *Kemp v Halliday* seemed inconsistent with the Act. But the Exchequer Chamber admitted that it was not in all circumstances that the general salvage contributions payable by other interests should be deducted, but here in this case the situation was special.[511] The common view is that the wording of s 60(2)(ii) is vague and too broad[512] and when the cost of repairs cannot be examined with complete accuracy, in these circumstances, the 'prudent uninsured owner' test could be applied. With regard to the principle of damage to the goods, there is no evident wording to show the Act alters the pre-statute cases. In the meantime, the Institute Clauses shares a similar expression with the Act. It tends to be a consistency of the case law and the statute law on this point.

[510] *Connect Shipping Inc v Sveriges Anfgartygs Assurans Forening (The Swedish Club)* [2016] Bus LR 1184, 1191 (Knowles J)
[511] *Kemp v Halliday* (1865) 34 LJQB 233; LR 1 QB 520
[512] *Arnould,* at 29-31

Chapter 4 Specific problems

There exist some specific problems relating to constructive total loss changed a lot during the history – seizure by pirates and loss of voyage. Seizure by pirates in the very early age would be deemed an actual total loss straight away while the outcome today is at significant variance. As to the consequence of loss of voyage on ship, goods and freight, MIA 1906 makes no reference to it. It has now been widely accepted that the loss of ship is irrelevant to the loss of voyage while it was not the case in early authorities. This chapter explains when, how and why such changes have occurred.

4.1 Piracy

4.1.1 Deprivation of possession by pirates in former times

In the very early ages, for carriage of goods by sea, the precedent on for deprivation of possession by pirates was to treat it as an actual total loss straightaway. In *Goss v Withers*, Lord Mansfield commented that in the case of a capture by pirate, 'there could be no condemnation to entitle the pirate'.[513] In *Dean v Hornby*,[514] a ship was captured by pirates on her homeward voyage from Valparaiso to Liverpool and a month later she was recaptured by an English war steamer which brought her back to Valparaiso during the period the policy covered. The assured, after getting the intelligence, gave notice of

[513] *Goss v Withers* (1758) 2 Burrow 683 [694]-[695]
[514] *Dean v Hornby* (1854) 3 E & B 180

abandonment; however, it was with an inaccurate statement that the ship was condemned at Valparaiso. The insured rejected the notice. Again, on her way from Valparaiso to Liverpool by the recaptor under the order of a prize master, the ship encountered bad weather and was sold by the prize master. An action to claim for a total loss was brought by the assured. Campbell LJ stated that when the ship insured was captured by pirates, a total loss occurred. And he took it as a principle that:

> Once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration.

In this case after the piratical capture, the restoration never really happened; nor was there ever an opportunity of regaining possession of the ship. Analogously, in *Cory v Burr*,[515] Lord Blackburn addressed this by saying that, when the subject matter insured was taken out of the control of the owners by perils of men-of-war, enemies, pirates, rovers, or barratry of the master and mariners, there was a total loss, unless 'by subsequent events the assured either do get, or but for their own fault might get, their property back'.

The case of *Dean v Hornby* was regarded as a leading case to set the rule that once a ship or goods was taken by pirates, a total loss could be claimed. In

[515] *Cory v Burr* (1883) 8 App Cas 303

reference to that case, Rix J affirmed in *Kuwait Airways v Kuwait Insurance*[516] that since the intent of a capture was to take dominion over the subject matter insured, in the circumstances of a capture or seizure, no matter hostile or piratical, there was an actual total loss straightaway even though there might later be a recovery.[517]

4.1.2 Deprivation of possession by pirates in modern times

The consequence of seizure by the pirates today is at significant variance with that of one or two hundreds years ago. In the courts, that rule for loss occasioned by piratical seizure was but is no more. The change occurred by virtue of distinguishing pirates of old and modern ones. For example, when, in former days, the subject matter insured was captured by pirates of the Caribbean, it would be unlikely for the ship or goods to be released.[518] Therefore, a piratical seizure would be equal to an irretrievable total loss for the owner in the past. But nowadays, it has become the convention that the recovery could be secured with the payment of a ransom for releasing the subject matter insured.[519]

Somalia is an extremely impoverished country with no effective government or law enforcement, making fertile ground for the fishermen to carry out piracy

[516] *Kuwait Airways v Kuwait Insurance* [1996] 1 Lloyd's Rep 664, 686 (Rix J)
[517] [1996] 1 Lloyd's Rep 664, (Rix J); See also *Anderson v Marten* [1908] AC 334
[518] Liangyi Yang, *Marine Cargo Insurance* (Law Press China) p367
[519] Rob Merkin QC, *Marine Insurance Legislation*, 5th edn, London, 2014; See also Paul Lansing, Michael Petersen, 'Ship-Owners and the Twenty-First Century Somali Pirate: The Business Ethics of Ransom Payment' (2011) Journal of Business Ethics, 102: 507–516 <DOI 10.1007/s10551-011-0832-y> accessed 20 October 2016

attacks.[520] These attacks began in 2007 and have been happening ever since.[521] The lack of any government power makes diplomatic and military intervention impossible. At the moment the best approach for a release of the subject matter insured would be upon payment of a ransom after negotiations.[522] Gradually a convention has emerged that after capturing the ship or goods, the pirates would inform the owner the amount of the ransom and then negotiations between the pirates and the owner would take place, which usually take one to two months.[523] The ship or goods would be released if the representatives of each party reached an agreement and the owner paid the ransom. It was once reported that, from November 2007 onward, within a period of 12 months, around 30 vessels were captured and all released with total ransom payments of over 60 million dollars.[524] Normally Somali pirates have got no intention of permanently taking possession of the ship or goods. They always prefer to get ransom money rather than keep the vessel or cargo. In case after case, it has been proved that the safest and most efficient way to secure the release of the crew and the thing insured would be to negotiate and pay a ransom;[525] and according to the press reports, the average period of seizure by Somali pirates was 37 days and the then known range was from 21 to 68 days.[526]

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[520] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, 323-325 (David Steel J)
[521] It has been reported that up until September 2009, seizure by Somali pirates occurred more than 300 times. See also Jatin Dua, Ken Menkhaus, 'The Context of Contemporary Piracy: The Case of Somalia' (2012) Journal of International Criminal Justice, Vol. 10, Issue 4, 749, <https://doi.org/10.1093/jicj/mqs050>, accessed 27 October 2016
[522] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, 323-325 (David Steel J)
[523] *Mitsui v Beteiligungsgesellschaft LPG Tankerflotte MBH* [2017] UKSC 68
[524] Carney S, 'An Economic Analysis of the Somali Pirate Business Model' (2009) Wired <http://www.wired.com/politics/security/magazine/17-07/ff_somali_pirates>, accessed 12 March 2017
[525] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, 323-325 (David Steel J)
[526] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, 323-325 (David Steel J)

In *Masefield AG v Amlin Corporate Membthater Ltd*,[527] a vessel was seized by Somali pirates with her crew and the cargo on board, and soon negotiations between the pirates and the owner were conducted. The assured (the owner of the cargo) gave notice of abandonment to the underwriter during the period of negotiations but this was rejected. Ten days later the owner of the vessel paid the ransom and the vessel was released with the cargo and the crew thereafter. Taking into account the background of Somali pirates and the facts of the case, David Steel J firstly explained that the seizure of the cargo was not an actual total loss, for the pirates just took possession not dominion of the cargo and the cargo in effect was not irretrievably deprived of. Secondly, he commented that the seizure of the cargo by pirates did not constitute a constructive total loss either, since there existed proof that it was possible, and quite common, for the assured to pay a ransom for the release of the vessel and cargo. All this evidence would have guaranteed the possibility of the recovery of the cargo. Therefore, in this circumstance, the assured could wait and see and negotiate for the release. A total loss was not actually unavoidable.

4.1.2.1 Not an actual total loss

In *Masefield AG v Amlin Corporate Membthater Ltd*,[528] David Steel J overruled the principle put forward in *Dean v Hornby*[529] and *Kuwait Airways v*

[527] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280
[528] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280
[529] *Dean v Hornby* (1854) 3 E & B 180

Kuwait Insurance[530] that in the circumstances of a capture or seizure, no matter whether it is hostile or piratical, there was an actual total loss straightaway, even though there would be a recovery later. According to s 57 MIA 1906, an actual total loss could be claimed upon two bases: where the subject matter insured is destroyed or seriously damaged as to no longer being in specie; or where the assured is irretrievably deprived of the subject matter insured. For normal cases of seizure by Somali pirates, the condition of the vessel and cargo will not have deteriorated unless the cargo is perishable and the refrigerating system is stopped, because the pirates capture the vessels and cargo for money, thus they will not treat them violently.

The pirates merely took possession of the vessel but not the dominion of it, and the property of the vessel had not been transferred after the seizure by pirates, which was at variance with the case of a capture of a vessel followed by a lawful condemnation of a sale by a Prize Court. In the latter case, a constructive total loss developed into an actual total loss and the previous owner of the vessel was irretrievably deprived of the possession of the vessel, for he lost the property and ceased to be the owner of the vessel. However, by payment of a ransom to the pirates, it was the possession that had been given back to the assured, not the property, which was never lost. Capture followed by condemnation constituted an actual total loss while capture alone would not necessarily amount to an actual total loss.[531] Concerning the background of Somali piracy, vessels seized have all been released by payments of ransom within an accordingly short period according to the reports. In this regard, it

[530] *Kuwait Airways v Kuwait Insurance* [1996] 1 Lloyd's Rep 664, 686 (Rix J)
[531] *Marstrand Fishing Co v Beer* [1937] 1 All ER 158, 173-4 (Porter J)

could be taken as a sign that possession would not be irretrievably deprived of by the actions of pirates.

4.1.2.2 Not a constructive total loss

There might be an alternative claim for a constructive total loss for seizure by pirates. Section 60 of MIA 1906 completely and exhaustively defines a constructive total loss, thereby the circumstances should be within the scope of the criteria under s 60 to claim for a constructive total loss. Contention for a constructive total loss could be made under two headings: reasonably abandoned on account of an unavoidable actual total loss; and unlikelihood of recovery when deprived of possession. Taking the case of *Masefield AG v Amlin Corporate Membthater Ltd*[532] as an example, the owner had no intention to abandon the vessel and the cargo. As mentioned in Chapter Two, abandonment under s 60(1) means giving up with no intention of, and no hope for, recovery. In this case the ship owner together with the owner of cargo had every intent to get back their property and very hopefully the recovery would be successful. As to the likelihood of recovery, as above stated, negotiations between the pirates and the owner could be easily made and usually the ransom could be reasonably paid.

4.1.2.3 Whether a ransom is contrary to public policy

Another contention that has been brought is that the approach of a recovery by

[532] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280

payment of ransom should be excluded, for the ransom was contrary to public policy and contravened public order and good morals.[533]

Admittedly, the payment of a ransom encourages a repetition,[534] but concerned with the harm of such approach, first of all, the payment of ransom is not illegal in English law. Secondly, the safest and most efficient way to take back the vessel with her crew and cargo onboard is to pay the ransom. Furthermore, it could be proved that payment of a ransom is widely acceptable in the insurance market, not only because there exists an essential long-standing cover - the kidnap and ransom cover - but also payments of a ransom are recoverable as a 'sue and labour' expense.[535] In *Royal Boskalis Westminster NV v Mountain*,[536] the court held that a 'sue and labour' expense clause should be wide enough to embrace the payment of a ransom for a release of the vessel being captured and the payment of a ransom would no doubt be recoverable in general.

4.2 Loss of voyage

4.2.1 Effects of loss of voyage on a ship

The MIA 1906 makes no reference to loss of voyage. Loss of voyage, under early authorities, seemed relevant to both loss of ship and loss of goods since Lloyd's SG form was common in early authorities, upon which ships and goods

[533] *Fender v St John Mildmay* [1938] AC 1 (AC) 9-12 (Lord Atkin)
[534] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, 323 (David Steel J)
[535] *Royal Boskalis Westminster NV v Mountain* [1999] QB 674
[536] *Royal Boskalis Westminster NV v Mountain* [1999] QB 674

were insured together under the same policy.[537] However, the principle altered by and by, and now it has been widely accepted that loss of ship is on the ship alone, irrespective of the loss of voyage, but loss of goods is on the goods as well as the voyage, and loss of freight is much more relevant to the loss of voyage.[538] As was concluded by Viscount Maugham, where a policy was on the ship, the insurer was bound to indemnify the loss of the ship only, while under the policy on goods, the assured could claim either for loss of goods or for loss of voyage.[539] The change of effect of loss of voyage on ship from former times up to the present day is set out below.

4.2.1.1 Loss of voyage affecting loss of ship

It was held that loss of voyage was highly relevant to the wager policy.[540] In the case of *Depaba v Ludlow*,[541] which was under a wager policy, the ship was captured by pirates for nine days and afterwards was retaken. The judgment was for the plaintiff and it was held that, even though the ship was retaken, the loss still existed, incurred by the interruption of the voyage, which proved that the loss of voyage did affect the loss of ship in earlier times. Likewise, in the case of *Pond v King*,[542] Lord Lee CJ made it explicit that in this case, loss of ship was attributable to the loss of the voyage.

Later Lord Mansfield also shed light on the view that the destruction of the

[537] *Arnould*, at 29-16
[538] *Marine Insurance: Law and Practice,* at 21.32; See also *The Law of Marine Insurance*, at 21.97
[539] See *Richards v Forested Land Timber & Railways Co* [1941] AC 50 (AC) 69 (Viscount Maugham J)
[540] See *Assievedo v Cambridge* (1712) 10 Mod 77; *Depaba v Ludlow* (1721) Comyn R 360; *Dean v Dicker* (1746) 2 Str 1250; *Pond v King* (1747) 1 Wils 191; *Whitehead v Bance* (1749) 1 Park Ins 165
[541] *Depaba v Ludlow* (1721) Comyn R 360
[542] *Pond v King* (1747) 1 Wilson KB 191

voyage contributed to a total loss for the ship.[543] In *Goss v Withers*, the ship insured was captured and then recaptured and, in line with Lord Mansfield's view, it was held that the total loss occurred at the time the ship was captured and the state of total loss persisted since the voyage had been broken.[544] Therefore, the assured was entitled to abandon and recovered as for a total loss in these circumstances, where the voyage was destroyed and salvage seemed to be of no worth. Also, in *Hamilton v Mendes*,[545] the claim for a total loss failed, for the ship was restored in safety with a decent expenditure for salvage and the voyage was just temporarily paused. As Lord Mansfield explained, in ascertaining a constructive total loss of the ship, the following factors could be taken into account: if the voyage was interrupted or not worth pursuing, or if the salvage was high, or if the ship was not worth repairing and the insurer would not undertake to indemnify the damage.[546] The rule was confirmed in some more cases as follows.[547] In *Manning v Newnham*,[548] the ship was found and declared unfit for the voyage and seemed unlikely to get repaired in the West Indies. Lord Mansfield made it clear that, if the voyage was broken by the perils insured, there was a total loss on the ship.[549]

The judgment by Lord Mansfield was referred to in a series of cases

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[543] See *Goss v Withers* (1758) 2 Burr 683; *Hamilton v Mendes* (1761) 1 W Bl 276; *Milles v Fletcher* (1779) 1 Dougl 232; *Manning v. Newnham* (1782) 3 Douglas 130

[544] *Goss v Withers* (1758) 2 Burr 683 [697], Lord Mansfield: 'The loss was total, at the time it happened. It continued total, as to the destruction of the voyage.'

[545] (1761) 1 W Bl 276

[546] *Hamilton v Mendes* (1761) 2 Burr 1198 [1209], Lord Mansfield: 'If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expence is necessary; if the insurer will not engage, in all events, to bear that expence, though it should exceed the value or fail of success: under these and many other like circumstances, the insured may disintangle himself and abandon, notwithstanding there has been a re-capture.'

[547] *Milles v Fletcher* (1779) 1 Douglas 232; *Manning v Newnham* (1782) 3 Douglas 130

[548] *Manning v Newnham* (1782) 3 Douglas 130

[549] *Manning v Newnham* (1782) 3 Douglas 130 [131] Lord Mansfield: 'The general principle is, that if the voyage, in consequence of a peril within the policy, is lost, or is not worth pursuing, that is a total loss.'

happening shortly after. In *Cazalet v St Barbe*,[550] Buller J took the same view that loss of voyage and loss of ship were closely related. In this case, the ship insured completed her voyage and was found to be not worth repairing, but the fact was that during the voyage she just sustained a partial loss. Buller J took the case of *Hamilton v Mendez*[551] as a decisive case and explained that the words 'that the insurance must be taken to be on the ship as well as on the voyage' should be understood to mean that the insurance was on the ship for the voyage, that is to say, where there was a loss on the ship or on the voyage, there would be a total loss. In the case at issue neither the ship itself nor the voyage was lost, so no total loss could be claimed.[552] Similarly, referring to the case of *Goss v Withers*[553] and approving the view of Lord Mansfield, Lawrence J stressed in the case of *Rotch v Edie*[554] that, when the voyage was destroyed, it could also be regarded as if there was a loss on the ship.[555]

These early cases showed the attitude that, in the very earliest times, loss of voyage was also incidental to the loss of the ship, which worked to the detriment of the underwriters and was inconsistent with the indemnity principle in insurance law.

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[550] *Cazalet v St Barbe* (1786) 1 TR 187
[551] *Hamilton v Mendez* (1761) 1 W Bl 276
[552] *Cazalet v St Barbe* (1786) 1 TR 187 [191], Buller J: 'It has been said, that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this, it is an insurance on the ship for the voyage. If either the ship or the voyage be lost, that is a total loss; but here neither is lost.'
[553] *Goss v Withers* (1758) 2 Burr 683
[554] *Rotch v Edie* (1795) 6 TR 413
[555] *Rotch v Edie* (1795) 6 TR 413 [425] (Lawrence J), 'If the voyage be defeated, it is the same thing for this purpose as if the ship be lost.'

4.2.1.2 Loss of voyage having no effect on loss of ship

It would in substance be double insurance if both the ship and the voyage were being insured and it would also be unfair to pay for a loss of voyage where the insurer had just indemnified against the loss of ship. The view whether the loss of voyage affected the loss of ship has altered and now the prevailing view is that the loss of the ship is on the ship alone, and has nothing to do with loss of voyage. Actually even in some cases as early as in the middle of the eighteenth century, the decision was that loss of voyage would not affect loss on the ship.

In *Pole v Fitzgerald*,[556] the judgment was made plainly that insurance on the ship was about the ship alone, not the voyage. In this case, a ship named 'Goodfellow' was under the policy of 'free of average' when going on a cruise for four months; the crew mutinied and seized the ship against the will of the master to take her back to the departure port a fortnight before the end of the four months, whereby the further cruise was prevented but the ship was in safety. The court chiefly put forward that the insurance was on the ship, not on the voyage[557] - the sort of which never existed - and even in terms of privateers, it was still the insurance on the ship. The perils insured would just happen to the ship and the sum of the insured value was about the ship, not the voyage. Moreover, the assured had an interest just in the ship, rather than in the voyage. According to Lord Wiles, it would be double insurance if both the

[556] *Pole v Fitzgerald* (1750) Willes 641

[557] See also the cases of *Green v Young* (1702) 2 Lord Raymond 840, *Trantor v Watson* (1703) 6 Mod 11, and an Anonymous case in Salk, *Green v Young* (1702) 2 salk 444, mentioned in the case of *Charles Pole v George Fitzgerald* (1750) Willes 641

ship and the voyage were being insured. Given that insurance on a voyage would cause absurdities and inconveniences, it followed that the subject matter was the ship itself; and even though the insurance was on the voyage, the assured could not get recovery, for he had no interest in the voyage. Since this was incidental to what is being discussed, it is not necessary to go further into this subject. By and large, the insurance was on the ship and the ship was in safety, so no total loss occurred on the ship.

Later the case was brought up to the House of Lords, where the judgment of the Exchequer Chamber was affirmed - eight of the judges were with this judgment.[558] Lord Hardwicke expressed his view that the insurer was not liable since this was not a total loss. He considered that the subject matter was the ship and not the cruise. Moreover, only a fortnight of the cruise (in the end) was interrupted; it made no sense whether the interruption occurred at the beginning or in the middle or at the end. The interruption only caused an average loss. The assured could not recover since the ship was in safety by the end of the voyage.

Early in the nineteenth century, the rule was settled in the case of *Parsons v Scott*,[559] that the loss of the voyage would not entitle the assured to recover as for a total loss where the policy was on the ship alone. In this case the ship could be returned back to the hands of the owner in safety and only the voyage was lost. The plaintiff put forward that, 'wherever there is a loss of the ship for that voyage, it is a total loss for the purpose of the insurance'. This was

[558] *Pole v Fitzgerald* (1754) Ambler 214
[559] *Parsons v Scott* (1810) 2 Taunt 363, the issue of a ship being restored in safety before notice of abandonment given has been discussed, and here is just mentioned the issue of the relationship between loss of voyage and loss of the ship.

rejected by the court. As Lawrence J mentioned, what Lord Mansfield explained in the case of *Goss v Withers*[560] could not apply to the present case where the ship could be restored to the hands of the owner in safety. Lawrence J indicated that, suppose a ship was blockaded in a port in winter and restored in safety the next spring, thus the voyage was lost but no loss at all happened to the ship itself. Therefore, Lawrence J concluded that, loss of the voyage and loss of the ship were totally different and destruction of the voyage could not build a total loss where the ship itself was in safety; and this was adopted by Bayley J in *Falkner v Ritchie*.[561] Lord Ellenborough CJ said explicitly that loss of the voyage itself had nothing to do with loss of the ship, by referring to the judgment of Willes CJ in *Pole v Fitzgerald*.[562] Similarly, in *Brown v Smith*,[563] the Lord Chancellor again stressed that the loss of the voyage was not the loss of the ship. In this case the assured could recover for a total loss as a result of the fact that the ship was not restored in safety, that the salvage for her was impractical, and this was irrespective of the loss of the voyage.

In *Doyle v Dallas*,[564] where the sale by the owner was not justified and the ship was in specie, the claim for a total loss failed. Lord Tenterden CJ also held that the loss of voyage would not lead to a constructive total loss on the ship for the insurance was on the ship, affecting nothing on the voyage. The ship remained in essence and the interruption of the voyage would definitely not amount to a total loss for the ship. It was unfair to pay for a loss of voyage since the insurer had just indemnified against the loss of ship.

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560 *Goss v Withers* (1758) 2 Burr 683
561 *Falkner v Ritchie* (1814) 2 M & S 290
562 *Pole v Fitzgerald* (1750) Willes 641
563 *Brown v Smith* (1813) 1 Dow PC 349
564 *Doyle v Dallas* (1831) 1 Mood & Rob 48 [54]-[56]

4.2.2 Effects of loss of voyage on goods

In earlier times, loss of voyage was usually occasioned by war risks but in modern times the Institute War Clauses excluded circumstances of frustration of voyage.[565] The MIA 1906 says no words on constructive total loss occasioned by loss of voyage, but this pre-statute concept did appear from long ago and has generally kept consistent from then till now. Agreement had been reached that loss of goods is on the goods as well as the voyage. A marine insurance policy on goods should guarantee the indemnity for all sorts of losses the assured might sustain by perils insured against that would prevent the goods from arriving in safety at their port of destination.[566] In *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co*,[567] the rule was settled that a constructive total loss could be claimed upon the basis of loss of voyage or adventure by perils insured against even though the insured goods were in safety and undamaged, for not only the goods were insured, but also their safe transport and arrival.[568] Actually it would be useless for the owner if the cargo could hardly arrive at the designated port even though it was in a perfect state. In reference to this case, MacKinnon LJ[569] commented explicitly that the underwriter insured the damage or loss of goods but additionally insured the loss of voyage as well, if the goods were not

[565] Institute War Causes 2009, CL 3.7; Institute Strikes Clauses 2009, cl 3.8; See also Rob Merkin QC, *Marine Insurance Legislation*, 5th edn, London, 2014; *Atlantic Maritime Co Inc* v *Gibbon* [1953] 2 Lloyd's Rep 294

[566] *Arnould*, at 29-45. See also *Cologan v London Assurance Co* (1816) 5 M & S 447 [455]-[456] (Bayley J); *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger); *Hudson v. Harrison* (1821) 3 B & C 97; *Miller* v *Law Accident Insurance Co* [1903] 1 KB 712; *Mansell & Co* v *Hoade* (1903) 20 TLR 150, which was upheld by the House of Lords in *British and Foreign Marine Insurance Co* v *Samuel Sanday & Co* [1916] 1 AC 650; *Becker, Gray & Co* v *London Assurance Corporation* [1918] AC 101 and *Rickards* v *Forestal Land, Timber and Railway Co* [1942] AC 50 to have survived the Act.

[567] *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650

[568] *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, 652 (Bailhache J)

[569] [1941] 1 KB 250

so damaged. In *Rickards v Forestal Land, Timber and Railways Co*,[570] the policy contained a frustration clause which stipulated that it was 'warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests restraints or detainments of kings princes peoples usurpers or persons attempting to usurp power.' And in the Appeal Court, Viscount Maugham affirmed that even though the loss of voyage in this case should be excluded by the frustration clause, the claim for a constructive total loss of the goods would not be barred by this clause, because the insurance here was two-fold, the goods as well as the adventure. When loss of voyage was excluded by the clause, the assured could claim upon loss of goods; however, admittedly, under a circumstance where the goods were in safety and only the adventure was destroyed, with a policy under the frustration clause, the assured could not claim for a total loss then.

Since a policy of insurance for goods covers both the loss of the goods itself and its safe arrival,[571] the mere existence of goods in specie is never conclusive to determine a total loss or partial loss. Loss of voyage, where it is completely pointless to take the goods to the port of destination in safety, will constitute a total loss in goods.[572] In *Mansell v Hoade*,[573] Walton J put forward the view that if there was difficulty in completing the voyage, even though it was not definitely destroyed, a constructive total loss might be constituted nevertheless. However, it is essential to distinguish the definition of

[570] *Rickards v Forestal Land, Timber and Railways Co* [1942] AC 50
[571] *Marine Insurance: Law and Practice*, at 21.30; See also *Cologan v The Governor and Company of the London Assurance* (1816) 5 M & S 447 [455]-[456] (Bayley J); *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger CB)
[572] *Arnould,* at 29-45, note 261
[573] *Mansell v Hoade* (1903) 20 TLR 150

loss of voyage from a merely temporary retardation.[574]

4.2.2.1 Loss of voyage

If the cargo were carried by a particular vessel, the loss of the vessel would no doubt amount to the loss of the adventure and thus the underwriter would be liable for a total loss of the cargo.[575] It could in effect be extended so that, where the goods could not, by any means, be reshipped to the port of destination, or it is out of the control of the assured to get them to arrive at the destination port within a reasonable period, a total loss for the goods would be constituted. Besides, the loss would be total even with a temporary retardation when the goods are of a perishable nature and before arriving at the destination port the ship in specie would disappear or lose its original character and change its nature utterly.[576]

In *Barker v Blakes*,[577] a neutral ship with oil on board was detained and brought into a British port during her voyage from New York to Havre. Since the Court of Admiralty declared that Havre was in a state of blockade, the voyage was therefore stopped and the oil was unable to be carried to the port of destination. Lord Ellenborough CJ delivered his view that the only loss in the case in question that could be contended for was loss of voyage, for the goods itself was very much likely to be restored; therefore, to entitle a total loss of goods, it would be necessary to prove that the loss of the voyage occurred by

[574] *Arnould,* at 29-45, note 261
[575] *Arnould,* at 29-58
[576] *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger); See also *Hudson v Harrison* (1821) 3 B & C 97 [111] (Richardson J)
[577] *Barker v Blakes* (1808) 9 East 283

perils insured against and this situation would have continued and rendered the carriage of the goods to their destination no longer practicable. As Lord Ellenborough CJ affirmed, the detention of the ship and goods was prolonged and the voyage to the port of destination was prohibited. The unlikelihood of continuing the adventure could be taken as a loss of voyage. In accordance with the recent principle of insurance law, a total loss of the goods insured could be claimed on the basis of such loss of adventure. But in this case such a claim failed, owing to the fact that no prompt and immediate notice of abandonment was ever made.

In *Cologan v The Governor and Company of the London Assurance*,[578] where notice of abandonment was duly given on hearing of the loss of voyage, the assured was entitled to recover as for a total loss on the whole of the goods insured. In this case, a ship with wheat, fish, and staves on board was captured and recaptured and taken to a third port, where part of the damaged goods was thrown into the sea, and due to the embargo there, the voyage for the rest of the goods to the destination port was prevented. Bayley J delivered his view that the object of a policy should be 'to insure the risk against failure by reason of any of the perils mentioned in the policy'. The policy on goods covered the voyage from Quebec to Tenerife and the purpose was to take the goods to the port of destination. Since the purpose could be no longer realized, the voyage was lost and therefore there was a case for a claim then for a total loss of goods.

[578] *Cologan v The Governor and Company of the London Assurance* (1816) 5 M & S 447 [455]-[456]

4.2.2.2 Temporary retardation

The perishable and imperishable nature of the goods did not matter a great deal in some of the earlier cases,[579] whereas in modern times it makes good sense to know whether the commodities are perishable or not. The loss would be total, even with a temporary retardation, when the goods are of a perishable nature and before arriving the species would disappear or lose their original character and change their nature utterly. However, for the imperishable goods, or those that are perishable, but not so damaged as to be in danger of being destroyed before arriving at the destination port, and probably being under the control of the assured again or being worthy of, and likely to be sent to the destination just with a temporary retardation, the mere loss of the voyage for the season will never entitle the assured to recover as for a total loss.[580] In such circumstances, at most a partial loss could be claimed even though the assured chose to sell at the port the casualty occurred, instead of making measures to transship them to their original destination port for their own sake.[581]

In *Anderson v Wallis*,[582] Lord Ellenborough CJ explained the difference between loss of voyage and temporary retardation, as well as the effect of temporary retardation of the voyage on goods. In this case, during the voyage from London to Quebec, a ship with goods on board encountered heavy gales and was badly damaged, so that the repairs were accordingly executed and

[579] See *Manning v Newnham* (1782) 3 Douglas 130; *Milles v Fletcher* (1779) 1 Douglas 232
[580] *Arnould*, at 29-49; see also *Anderson v Wallis* (1813) 2 M & S 240; *Hunt v Royal Exch Assurance Co* (1816) 5 M & S 47
[581] *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger)
[582] *Anderson v Wallis* (1813) 2 M & S 240

there was no hope of it being done by March. There was no substitute ship to pursue the voyage for the sake of the goods. The goods could not arrive at the destination that season due to the weather: the St Lawrence River would be frozen in November, and Quebec would be inaccessible by ships by the 28th of November. This was apparently only a temporary retardation, for the ship could be repaired in a few months; this differed from a permanent loss of voyage as in *Manning v Newnham*,[583] where there was a total loss on the ship and only two substituted ones could be procured, both of which were not suitable to take the cargo on board, viz. the goods could be conveyed by no ship and the voyage was lost. In the current case, the cargo could be conveyed only with a few months' delay in the very same ship.

Lord Ellenborough CJ stated his view that a temporary retardation of the voyage was not a ground for abandonment and he rejected the 'disappointment of arrival' test as a new head for abandonment in insurance law. It was unfair to throw too much burden on the shoulders of underwriters and it was definitely improper to convert a partial loss into a total one by a merely temporary retardation. As was explained, 'if the retardation of the voyage be a cause of abandonment, the happening of any marine peril to the ship by which a delay is caused in her arrival at the earliest market, would be also a cause of abandonment.' A total loss of goods could be constituted by any risk insured against, which renders the cargo permanently lost to the assured, or permanently where there was no means the assured could acquire a ship to perform the voyage; here there would be a destruction of the contemplated adventure. The circumstance of an interruption of the voyage

[583] *Manning v Newnham* (1782) 3 Douglas 130

would not warrant the assured getting totally indemnified. A justified abandonment would not occur when the loss, whatever the voyage or the goods, has not yet been total, or not to the highest degree possibility.[584]

4.3 Conclusion

The consequence of seizure by the pirates today is at significant variance with that of one or two hundreds years ago. The early authorities treated the seizure by pirates as an actual total loss straightaway. By virtue of the convention of modern piratical seizure, such as with the Somali pirates, that the recovery could be secured with the payment of a ransom, seizure by pirates normally no longer constitutes a total loss, no matter whether it is actual or constructive. Some contention has been brought that the ransom was contrary to public policy and contravened public order and good morals, but since it is lawful in English law and the safest and most efficient way to take back the vessel with her crew and cargo onboard, the payment of a ransom is accepted in the insurance market.

It is noteworthy that MIA 1906 does not refer to loss of voyage, but it plays an essential part in the case law. In some very early cases the rule was set that loss of voyage affected loss of vessel, viz. destruction of the voyage contributed to a total loss for the ship even though the ship was retaken with safety. But in effect it would be a double insurance if both the ship and the voyage were being insured and it would also be unfair to pay for a loss of

[584] See *Hunt v The Royal Exch Assurance Co* (1816) 5 M & S 47

voyage since the insurer would have just indemnified against the loss of ship. Therefore, in later cases, the prevailing view became that the loss of the ship would be on the ship alone, and would be irrelevant to the loss of voyage. With respect to the effects of loss of voyage on the goods, there has generally been a consistency from the olden days till now, that the loss of goods is on the goods as well as the voyage. The rule was settled that a constructive total loss could be claimed upon the basis of loss of voyage or adventure by perils insured against, even though the insured goods were in safety and undamaged, for not only were the goods insured, but also their safe transport and arrival;[585] but in these circumstances, the significant step would be to compare a loss of voyage with a temporary retardation, for the latter served no contribution to a total loss of the goods.

[585] *British and Foreign Marine Insurance Co., Ltd. v Samuel Sanday & Co* [1916] 1 AC 650 (Bailhache J)

Chapter 5 The consequence of constructive total loss - abandonment

The word 'abandonment', as mentioned in Chapter Two, has several meanings. Abandonment under s 60 of MIA 1906 varies with that under s 61, s 62 and s 63. However, the concept of abandonment discussed in the current chapter mainly refers to abandonment to the underwriter, which means the assured would transfer the subject matter insured to the insurer to get a full indemnity.[586] A more specific definition of abandonment in this sense was described in the case of *Rankin v Potter*,[587] that

> … a cession or transfer of the ship to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be.

Also, in *Simpson v Thomson*,[588] Lord Blackburn explained, if the assured had claimed for a constructive total loss successfully and was paid the full indemnity, the property of what remained and all rights along with the subject matter insured should be transferred to the underwriters and such abandonment was deemed to occur at the time of the settlement of the claim.

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[586] *Cases and Materials on Marine Insurance Law*, at p659
[587] *Rankin v Potter* [1873] LR 6 HL 83 (HL) 144
[588] *Simpson v Thomson* [1877] 3 App Cas 279 at 292

The rule of abandonment reflects the principle of indemnity and avoids such an inequity that the assured gets the full indemnity as well as the remaining value of the thing insured at hand.[589] Abandonment in this sense varies greatly from notice of abandonment, where the latter is based upon the claim for a constructive total loss. In accordance with MIA 1906, where there is a constructive total loss, the assured should give notice of abandonment to the insurer if he wants to get full indemnity as a total loss; or he can just get indemnified as a partial loss, apart from some occasions mentioned in ss 62(7)(8)(9) of the 1906 MIA. Notice of abandonment in essence is an offer to cede, that upon payment, the insurer would be entitled to what remains of the subject matter insured and a complete interest in it.[590]

This chapter starts with a comparison between abandonment and notice of abandonment and then discusses the origin of the necessity to give a notice of abandonment in a case of constructive total loss and the circumstances where it could be excused. Additionally, the chapter will discuss how the notice works, and what the effect of an acceptance of such notice will be.

5.1 Difference between abandonment and notice of abandonment

5.1.1 The ambit of application

Abandonment and notice of abandonment are different concepts. First of all,

[589] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 101 (Brett J)
[590] *The Kastor Too* [2004] 2 CLC 68

the ambit of application is different:[591] the rule of abandonment is applicable to every kind of indemnity insurance - both marine and non-marine, whereas the concept of notice of abandonment is peculiar to marine insurance.[592] Even within the realm of marine insurance, abandonment can be applied to both an actual and constructive total loss. In contrast, notice of abandonment is unique to a constructive total loss and not required by an actual total loss.[593]

5.1.1.1 The scope of application of abandonment

In the leading case of *Kaltenbach v Mackenzie*,[594] Brett LJ compared the distinction of abandonment and notice of abandonment in detail. The doctrine of abandonment could be applied under all contracts of indemnity: an insurer having fully indemnified an assured was entitled to the rights regarding the remains of the insured subject wholly indemnified.[595] For example, as Brett LJ illustrated, in some particular circumstances of a constructive total loss, as where there was a right sale of the subject matter insured, the notice of abandonment could be excused because the assured lost the whole property and there was nothing of the subject matter insured left; while the abandonment still existed since there would obviously be the proceeds of the sale that could be abandoned to the underwriter when the insurance was settled.[596]

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591 *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119
592 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 470-1; *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
593 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471; 1906 MIA, s 57(2)
594 *Kaltenbach v Mackenzie* (1878) 3 CPD 467
595 *Randal v Cockran* (1748) 1 VS 98 (Ch) 98
596 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471

In the context of non-marine insurance, such as under a fire policy, where the insurer had compensated the assured's loss caused by demolition of the insured house by rioters, he was entitled to recover in an action against the hundred in the name of the assured. It was thus not uncommon to find abandonment in indemnity insurance.[597] The rule of law as to abandonment was also once approved of in a life case, although it was not applicable to life insurance, which differed from indemnity insurance. The decision in the case of *Dalby v The India and London Life Assurance Company*[598] overruled the judgment of *Godsall v Boldero*[599] in which the court had adopted the above principle to the life policy. Up to now the rule of abandonment is just applicable to indemnity insurance.

In the realm of marine insurance, abandonment is applicable to both an actual and constructive total loss. Where the assured claimed for a total loss, abandonment should take place if there exists anything to abandon. As Brett LJ explained in detail, supposing a ship was destroyed into 'congeries of planks' and ceased to be a thing of the kind insured, there still should be an abandonment of the wreck;[600] or, as in the case of *Roux v Salvador*,[601] the cargo was totally lost, but some proceeds came out from the loss, and abandonment here could also take place, for the value still existed, despite not the cargo itself. It could thus be concluded that, where there is a claim for an absolute indemnity, there could be abandonment by the assured of all his rights remaining in the subject matter insured to the insured.

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[597] *Mason v Sainsbury* (1782) 3 Doug 61 [64]
[598] *Dalby v The India and London Life Assurance Company* (1854) 15 CBR 365
[599] *Godsall v Boldero* (1807) 9 East 72
[600] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471 (Brett LJ)
[601] *Roux v Salvador* (1836) 3 Bing NC 266

5.1.1.2 The scope of application of notice of abandonment

However, notice of abandonment is not a necessity outside contracts of marine insurance, but is peculiar to marine insurance.[602] Being provided for in MIA 1906 which has been codified from previous cases, it stipulates that in a case of an actual total loss, no notice of abandonment need be given.[603] Such a notice is a condition precedent to a claim for a constructive total loss unless it has been excused.[604]

Although the situation for the necessity of notice of abandonment is where there is a constructive total loss, it seems more equitable to give a notice to the insurer for an actual total loss, for example, where there is such a loss that the subject matter has lost its character but still retains some value in it. However, in principle, the statement of MIA 1906 s 57(2) excludes the necessity of notice of abandonment in actual total loss, except in some cases, where the notice is required by contract.[605]

5.1.2 Different objects

The principle of abandonment helps to build an equal relationship between the assured and the insurer. When the assured obtains the full indemnity, he is bound to abandon all rights of the thing insured to the insurer. By tracing the history of the law, in the very beginning the insurance was something like a

602 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471 (Brett LJ)
603 MIA 1906, s 57(2)
604 MIA 1906, ss 62(7)-(9)
605 *Marine Insurance: Law and Practice*, at 24.8

wager, and later insurance developed into a contract of indemnity, which required some rules for the conduct of the assured and insurer,[606] and 'the obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity.'[607] Such equity had to be established to avoid the assured making money from an insurance policy.

However, the object of notice of abandonment, being at variance with abandonment, is that once the assured gets reasonable intelligence of the damage, he needs to tell the insurer immediately what his election is, instead of keeping it a secret to wait and see what would happen in the end. To some extent notice of abandonment protects the insurers by means of offering more time for them to make their own decision and to try their best to save most of the value remaining in the thing insured.[608]

5.1.3 The different times for abandonment taking place

Abandonment is the cession of the subject matter insured and it could be generally described as the abandonment taking place at the time of the settlement of the claim.[609] However there is a debate as to the exact time when such cession occurs. From one perspective, it is held that cession occurs after the acceptance of notice of abandonment while some argue that the cession would only take place upon payment.[610] Such discussion makes

606 *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger)
607 *Roux v Salvador* (1836) 3 Bing NC 266 [278] (Lord Abinger)
608 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471 (Brett LJ)
609 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471 (Brett LJ)
610 *The Kastor Too* [2004] 2 CLC 68, 98 (Rix LJ)

little sense since the payment shall normally be made by the underwriter once the notice has been accepted.

As to the notice of abandonment, it occurs before the claim for the loss. A valid notice should be given immediately after the assured gets the intelligence upon which any reasonable man would believe that there exists the imminent danger of a total loss of the subject matter insured. As to the issue of the time to give the proper notice of abandonment, this will be discussed in detail later.

5.1.4 Different effects

The abandonment has an effect that an assured indemnified should cede everything in the insured subject matter to the insurers who are indemnifying. In other words, after an assured has been compensated, the effect of the abandonment should subsequently be triggered.[611] As a result, the subsequent profits or risk relevant to the remains of the insured subject only concern an insurer who has indemnified. The rule of abandonment cannot convert a partial loss into a total loss but can transfer benefit or risk of the remains of the thing insured from an original owner indemnified to his insurer indemnifying.[612] Also, it is notable that, since the MIA 1906 uses the wording as 'the insurer is entitled to take over', this apparently leaves it open to the underwriter not to 'take over' the interest of the assured as well.[613] Therefore, where the insurer has paid for either a constructive total loss, or an actual total

[611] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119
[612] *Cologan v London Assurance* (1816) 5 M &S 447 [456]
[613] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, 687 (Scrutton LJ); MIA 1906, s 63(1)

loss, he will be in a position where he can elect whether to take over the remains of the subject matter insured.[614] However, this does not mean the assured has got the same choice for abandonment or not as when he wants to get full indemnity as a total loss. Suppose in a case where the subject matter insured is being sold, after deducting the salvage or some other necessary charges, the net profit of the sale should be under the control of the underwriter upon the payment of a total loss. If the assured chooses to keep the profit of the sale for himself, he might be precluded from getting indemnified as for a total loss.[615]

By contrast, a notice of abandonment plays the role of letting the insurer know that the assured intends to recover a total loss rather than a partial loss. After the notice, it is conclusive that recovery of a total loss is required by an assured. Normally the notice of abandonment is compulsory if the assured wants to get full indemnity in a case of constructive total loss, otherwise he could only recover for a partial loss. However, the property or any rights on the thing insured would not be transferred to the underwriter directly merely by giving a notice of abandonment, whereas a valid abandonment would entitle the underwriter to take over whatever may remain in the subject matter insured and all rights incidental thereto.[616] Moreover, the notice would not necessarily lead to the result of abandonment. The notice has the nature of an offer to transfer interest in the subject matter insured of the assured to the insurer. Where the notice has been accepted, it will be irrevocable and on the payment

[614] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889 (Admlty) (Tomlinson J); [2009] 2 Lloyd's Rep 420
[615] *Roux v Salvador* (1836) 3 Bing NC 266; *Mitchell v Edie* (1787) 1 TR 608
[616] MIA 1906, s 63(1)

by the insurer, the assured is liable for abandonment. Where the offer is rejected or the insurer just keeps silence, the result will subsequently be confirmed by the court.[617]

In an old case, *Tunno v Edwards*,[618] the assured recovered 50% of the value from the underwriter and half the proceeds from the Dutch Government, making the assured more than fully indemnified. The underwriter claimed for a return of his payment but failed. Lord Ellenborough CJ explained that, the ground for the underwriter's claim could only be that the underwriter would be entitled to the remains of the thing insured and all rights incidental thereto upon the settlement of a total loss. However, in the circumstance that the subject matter insured remained in specie, the absence of the offer to abandon precluded a claim for a total loss; and since there was only a partial loss in this case, the underwriter got no ground for his claim.

5.2 Relationship between notice of abandonment and constructive total loss

The notice of abandonment is not a component of a constructive total loss, but it just plays an essential role at the stage of showing the option of claiming for the full indemnity in cases of a constructive total loss.[619] Notice of abandonment is certainly not the criteria to distinguish an actual total loss and a constructive total loss: it is provided that the former does not require the

[617] *The Kastor Too* [2004] 2 CLC 68, 98 (Rix LJ)
[618] *Tunno v Edwards* (1810) 12 East 488
[619] *Cases and Materials on Marine Insurance Law*, at p658

notice, and the notice is the condition precedent to give the assured the right to claim for a constructive total loss as if it were an actual total loss; however, even in the cases of constructive total loss, notice of abandonment might be excused as well, in certain circumstances.[620]

5.2.1 The origin of the necessity of giving notice of abandonment in constructive total loss

In the very beginning, Lord Mansfield commented in the case of *Goss v Withers*[621] that the assured was not bound to wait to ascertain whether the ship was definitely recaptured or not; he could claim for the total loss from the underwriter under an offer to abandon the subject matter insured with due care; namely, when such an offer to abandon was being made, no following change occurred to alter the circumstances.[622] Similarly in the case of *Hamilton v Mendes*,[623] the same phrase of 'offer to abandon' was used when the assured wanted to abandon the ship to the insurer and claim for a total loss. And such an offer, as Lord Mansfield mentioned, should be the precedent for the principle of notice of abandonment. In *Mitchell v Edie*, [624] Ashhurst J acknowledged that to claim for a total loss where the thing insured was not yet totally destroyed, the assured should give reasonable notice to the underwriter of his intention to abandon. Later in the case of *Anderson v Royal Exchange*

[620] MIA 1906, ss 62(7)-(9)
[621] *Goss v Withers* (1758) 2 Burr 683
[622] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683, and *Hamilton v. Mendes* (1761) 1 W Bl 276
[623] *Hamilton v Mendes* (1761) 2 Burr 1198
[624] *Mitchell v Edie* (1787) 1 TR 608

Ass Co,[625] Lord Ellenborough CJ said the following 'the offer to abandon was made before the 18th, and refused by the underwriters, after which a more formal notice was given on the 18th'. This time the word 'notice' appeared but still the term 'notice of abandonment' had not yet been adopted. In this case, the claim for a total loss failed since the abandonment was out of time. The assured did not treat it as a total loss and kept using it for his own account during the time the ship was submersed in the water. The assured did not abandon 'till a considerable part of the cargo was taken out'. Le Blanc J enunciated that it would be an injustice for the assured to take every advantage for himself to make the best of the accident and did not abandon until he found it not worth rescuing; this also implied a necessity to give a notice.

The term 'notice of abandonment' initially appeared in the case of *Barker v Blakes*[626] and was soon adopted into general usage. In this case, Lord Ellenborough CJ delivered the view that, to recover a successful total loss, two factors should be taken into account, firstly, that the loss by perils insured continued and was not just temporary; secondly, a timely notice of abandonment should be given.

It was once put forward by some judges that the principle of notice of abandonment originated for equity reasons to give the insurer an option to take prompt steps as he may think best to prevent further deterioration of the insured subject, or to improve the value of what remains in a case of constructive total loss. Without such a notice, it would be unjust to the insurers

[625] *Anderson v Royal Exchange Ass Co* (1805) 7 East 38
[626] *Barker v Blakes* (1808) 9 East 283 [294] (Lord Ellenborough)

who have indemnified a total loss.[627] This is admittedly one of the reasons why notice of abandonment is needed in a constructive total loss, but as to the origin, it was doubted by Brett LJ in the leading case on notice of abandonment, *Kaltenbach v Mackenzie.*[628]

In this case, Brett LJ discussed the origin of the necessity of giving notice of abandonment and regarded it as being introduced into contracts of marine insurance by the consent of the ship owner and the insurer as with many other stipulations; and then such notice became part of the contract and an essential component in the process of claiming for a constructive total loss.

As to the reasons why notice of abandonment was introduced by the ship owner and the underwriter, as Brett LJ indicated, that, due to the peculiarity of marine losses, in the very early days, the casualty could occur in any part of the world, and it was usually inconvenient for all the parties concerned to obtain immediate intelligence in relation to it. The assured could receive the intelligence of the casualty from the master, while the underwriter usually knew nothing until the assured told him; and even so he had no access to ascertain the real situation of the loss. In such circumstances, there might be a potential risk that the assured might wait and see how things developed, and even wait until a total loss really occurred where it could in fact have been avoided. The assured might take full advantage to himself and throw every risk onto the underwriter; for example, the assured might incline to profiting by electing to adhere to the adventure as his own where the market is favourable, but throw

[627] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119; *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
[628] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473

a loss on an insurer where the price has been falling as Brett LJ illustrated.[629] All these reasons drove the principle of notice of abandonment into being a part of the contract, and a condition precedent in the claim for a constructive total loss, unless it could be excused under some special circumstance.

Besides, in modern cases, it is held that a notice of abandonment can play a role as evidence. After giving the notice, it proves that the assured intends to claim for a total loss, rather than a partial loss.[630]

5.2.2 The timing of giving a notice of abandonment

5.2.2.1 The immediate giving of notice of abandonment

In accordance with one of the reasons why a notice of abandonment is provided for in a constructive total loss claim in the realm of marine insurance – to avoid the assured making a profit by waiting and seeing how things are going after hearing of the casualty from the master - it could be inferred from a series of very early cases that, an assured must immediately give the notice of abandonment, once he has received reliable information of an imminent danger of the subject matter insured being totally lost.[631] As to the criterion of 'immediately', in *Mellish v Andrew*,[632] Lord Ellenborough CJ took the notice given on the 17th January as too late when the assured received the

[629] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 120; *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 472
[630] MIA 1906, s 61; *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24 (AC) [15]
[631] See *Pole v Fitzgerald* (1750) Willes 641; *Anderson v Royal Exchange Ass Co* (1805) 7 East 38; *Mellish v Andrew* (1812) 15 East 13; *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ); *Fleming v Smith* (1848) 1 HL Cas 513
[632] (1812) 15 East 13

intelligence on the 8th January. Brett LJ stated in *Kaltenbach v Mackenzie* that, when the assured received the intelligence of a capture of the subject matter insured in wartime, or if he heard that the ship was stranded with a hole in the stern, or some other similar situations that would make a reasonable owner believe that a total loss seemed to be imminent, in such circumstances, the notice should be given immediately with no hesitation.

Also, in the very old case of *Mitchell v Edie*,[633] a vessel with cargo on board was captured and then taken to a third port, where the cargo was sold by a person. The assured accepted the acts of such a person and decided to recover the proceeds. However, this person became insolvent and was not able to hand over the money. It was beyond all question that in such circumstance it would be too late for the assured to give notice to the underwriter of his intention to claim for the full indemnity. As Buller J explained, when intelligence of the casualty reached the assured, he must make an election to abandon and give a notice to signify his election to the underwriter immediately to claim for a total loss, or the assured could just claim for a partial loss. If the assured failed to provide an immediate notice and abandon the thing insured in time, he would not be permitted at any subsequent period to change the partial loss into a total loss.[634]

Similarly, in *Kaltenbach v Mackenzie*,[635] on February 7th, the assured received the information as to the condition of the ship, and on February 23rd,

[633] *Mitchell v Edie* (1787) 1 TR 608
[634] *Mitchell v Edie* (1787) 1 TR 608 [616] (Buller J)
[635] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473

the ship was sold by the master. In this case the underwriter denied the loss as a constructive total loss, arguing that he received no notice of abandonment; whereas it was alleged by the assured that the notice was sent to the underwriter on March 10th. However, Brett LJ explained that, even if the underwriter received the notice on March 10th, it was too late. The assured was held to be bound to act upon the information he acquired on 7th February, viz. he should give notice of abandonment immediately after February 7th, or by the next post, or the next telegraph, if he wanted to treat it as a total loss, and get full indemnity; and March 10th was absolutely not a proper time to give notice in this case.

5.2.2.2 Exceptions when the information has a doubtful character

However, it does not necessarily mean that the assured should at once give the notice of abandonment at the moment of the first hearing of the loss in every situation. Instead, the assured would be entitled to a reasonable time to investigate the accurate nature and extent of the damage, when the state of the subject matter insured is not clear and sufficient enough.[636] In *Hudson v Harrison,*[637] Dallas CJ stated that in accordance with the common law, even though it was laid down that the assured could not take full advantage for himself of waiting and seeing the circumstances of the market, he should give notice of abandonment in a reasonable time, but it did not mean he should immediately give the notice. It could be seen that the time spent on making further investigation into the unclear situation of the thing insured was one

[636] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
[637] *Hudson v Harrison* (1821) 3 B & C 97

example of what is a reasonable time. It was important to make it clear whether the delay in giving notice of abandonment by the assured was reasonable, and this was taken as a matter of law for the decision of the court and undoubtedly such decisions always varied according to the facts in each case.[638]

5.2.2.3 Conclusion

From the above it can therefore be concluded that notice must be given immediately unless there are exceptions as follows: where the information is not reliable, which could entitle him to make further enquiry as to the nature and extent of the damage; or where there are provisions in the contract to the contrary, such as no possibility of abandonment[639] or waiver of an insurer.[640] M D Chalmers has thus codified in the 1906 MIA that,[641] an assured is required to give notice of abandonment with reasonable diligence, as he receives reliable information of a loss of the insured subject; and the period of offering the notice can be extended if such information is doubtful.

5.2.3 Circumstances where notice of abandonment could be excused under a constructive total loss

In the case of *Knight v Faith*,[642] there was set a technical rule that notice of

[638] *Hudson v Harrison* (1821) 3 B & C 97 [106]
[639] 1906 MIA, s 62(7)
[640] 1906 MIA, s 62(8)
[641] 1906 MIA, s 62(3)
[642] *Knight v Faith* (1850) 15 QB 649

abandonment would be compulsory in claiming for a total loss as long as the thing insured existed in specie, even though the underwriter could do nothing with such a notice under the state of things insured; and this was criticized by Blackburn J. in *Rankin v Potter*.[643] Notice of abandonment is compulsory in claiming for a full indemnity under a constructive total loss, except for some occasions where it can be excused. As s 62(7) of MIA 1906 stipulates, being codified from the pre-statute cases, the notice of abandonment is unnecessary if there would be no chance for the underwriter to gain benefits or interests from the subject matter remaining at the time the assured receives the full information of the loss.[644] Examples of this would be where there exists a right sale of the subject matter insured by the master,[645] or the subject matter would not be in specie[646] at the time the assured has got the intelligence of the casualty. Apart from these exceptions, notice of abandonment would not be excused simply because the insurer has no ability to do anything that the assured could. Where there is anything useful that could be done to the thing insured, notice must be given.[647]

5.2.3.1 Sale of the ship or goods by master

In many old cases, when the loss occurred, there might be some emergency circumstances, where the master needed to make a decision at once, and usually they elected to sell the ship or goods for the benefit of all concerned.

[643] *Rankin v Potter* (1873) LR 6 HL 83 (HL)129
[644] *Mullet v Shedden* (1811) 13 East 304
[645] *Rankin v Potter* (1873) LR 6 HL 83; *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
[646] *The Kastor Too* [2004] 2 CLC 68
[647] *Chalmers*, at p100; See also *Vacuum Oil v Union Insurance Society of Canton Ltd* (1926) 25 Ll L Rep 546 at 554

According to the case law, the 'uninsured prudent owner test' could be the criterion to ascertain whether the sale was with necessity, viz. such necessity arose if an uninsured owner would sell as well. In *Kaltenbach v Mackenzie,*[648] Brett LJ commented that on some occasions, if a reasonable person obtaining the authority from the owner would sell, then the master was entitled to sell, even though the master had no such authority.

However, the question is, whether notice of abandonment could be excused for a constructive total loss of the subject matter insured with a subsequent justified sale, since after the sale, the property has transferred and there seems to be nothing of the subject matter insured left to be abandoned; therefore the notice seems useless.

5.2.3.1.1 Intelligence of damage and the sale come at the same time

In *Rankin v Potter,*[649] the law was settled that, if the assured received the intelligence of an imminent total loss of the subject matter insured, and at the same time there came the news of the sale of it by the master, in such circumstances, notice of abandonment could be excused. Brett LJ went further on that point with the explanation that, after the 'right sale', the property was transferred to the vendee and it had gone out of his power; therefore, the assured has nothing of the subject matter at hand to abandon, whereby the notice would then be a mere idle ceremony and unnecessary.

[648] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473
[649] *Rankin v Potter* (1873) LR 6 HL 83

5.2.3.1.2 Intelligence of the sale comes later than the damage

Moreover, Brett LJ went further still and made it explicit later, in the case of *Kaltenbach v Mackenzie*[650] with regard to the situation where the information in relation to the sale comes later than that related to the damage. If the assured firstly heard of the intelligence of the damage and a total loss seemed imminent, and some time later came the intelligence of the sale by the master, supposing the sale was justified, the assured would still be compelled to give notice of abandonment to the underwriter to claim for the full indemnity.

5.2.3.1.2.1 The issue to be dealt with

In *Kaltenbach v Mackenzie,*[651] at first instance, it was accepted that the ship sustained a constructive total loss; and on the 7th of February, the assured received the intelligence of the damage to the ship, and such information regarding the ship could clearly prove that the ship was in imminent danger of being a total loss. In accordance with the settled law that 'the moment the assured received information which would lead any reasonable man to come to the conclusion, he would be bound to give notice of abandonment unless he was excused'.[652] This means that the assured was bound to make an election on the 7th of February whether giving the notice to claim for a total loss or not, unless such notice could be excused. Therefore, the essential point was to prove whether the notice of abandonment could be excused.

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650 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473
651 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
652 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)

5.2.3.1.2.2 A comparison between the cases of *Kaltenbach v Mackenzie* and *Rankin v Potter*

The facts in the *Kaltenbach* case were that the assured received the intelligence of a constructive total loss of the ship on the 7th of February, and on the 23rd of February the ship was sold. There could be a comparison between *Kaltenbach v Mackenzie* and *Rankin v Potter* where the ship was also sold by the master and notice was considered to be unnecessary.[653] However the rule enunciated in the case of *Rankin v Potter*[654] could not be applied in *Kaltenbach v Mackenzie*. In the former case, the assured received the information about the casualty and the sale at the same time; while in the latter case, at the time the assured received the news of damage to the ship, the ship was not sold at all. The object of such notice of the assured is to inform the underwriter of his election at the earliest possible moment.[655] At the moment the assured received the exact information of an imminent total loss of the subject matter insured, if there was nothing left in the thing insured to be handed over to the underwriter, the notice of abandonment could be excused; while if there still remained any advantage the underwriter could take, the notice would absolutely be required, for the assured to claim for a total loss. Therefore, in the *Kaltenbach* case, it was held that when the assured got the exact information on the 7th of February, the ship had not yet been sold; therefore, the notice could not be excused and should have been given immediately, even though there was a justified sale later.

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653 *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119
654 *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119
655 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Cotton LJ)

5.2.3.1.2.3 Reasons for no excuse

Actually in *Kaltenbach v Mackenzie*, Thesiger LJ denied the necessity for the sale, and held that there was no evidence that she would cease to exist in specie, even though the sale was postponed for several months. Thesiger LJ further explained the potential danger if the notice was allowed to be excused here, as the assured might absolve himself from the necessity of giving notice of abandonment by selling the ship even though a prudent uninsured owner would not sell, which would 'lead to the greatest danger of frauds upon the underwriters, and at all events to very considerable inconvenience in reference to policies of marine insurance.' [656]

5.2.3.1.2.4 The subsequent sale cannot justify the assured not giving notice of abandonment

In *Kaltenbach v Mackenzie*, a further consideration appeared that before the underwriter sent any reply to the notice of abandonment, a reasonable man might have sold the ship; this was denied by Brett LJ with the explanation that no proof here could justify the inference that the ship would perish and no longer exist in specie before any reply would be arriving. There was no sign or evidence here that the assured was unlikely to communicate with the underwriter in time 'to enable the underwriter to take any advantage of the communication' after the 7th of February. Instead, there existed proof that the communication was not blocked, for the assured sent a letter to his co-owner. The assured could never just use the words 'if I had given notice the

[656] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Thesiger LJ)

underwriter would have got no benefit from it' as an excuse for not sending the notice of abandonment. It was not the jury to say whether the notice of abandonment would be useful for the underwriter or not; it should be decided upon the facts and in this case no fact proved that the later sale was from necessity. Had the ship not been sold here, the underwriter might have taken his own steps on receiving the notice of abandonment from the assured. The assured might have intended to act *bona fide*, but he did not do what he should have done; that is, he should have given notice of abandonment to the underwriter immediately after the 7th of February since the ship at that time was still in his power and under his control, instead of sending forward a communication to the co-owner, not telling him to abandon but just leaving it to him to consider whether to abandon or not.

5.2.3.1.2.5 Conclusion

In accordance with the wording of Brett LJ, it could be concluded that, suppose that when the intelligence of the casualty came to the assured, and before notice of abandonment could be received by the underwriter or any response of the underwriter could be returned, the subject matter insured would absolutely perish and nothing of the value would have remained, it would necessarily excuse the assured's obligation to give notice of abandonment. But if the situation fell short of that, such notice would absolutely not be able to be excused.[657]

[657] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)

5.2.3.2 The subject matter insured not in specie

Brett LJ expanded further saying that at the time when the assured needed to make an election, even though there was no sale of the subject matter insured, notice of abandonment could still be excused if the assured was able to prove that, had he given such notice, it would turn out to be of no use.[658] The case of *The Kastor Too*[659] is just such an example.

5.2.3.2.1 The main issues of *the Kastor Too* case

In *the Kastor Too* case, the ship sustained a constructive total loss and a subsequent actual total loss; the constructive total loss was caused by the peril insured against while the actual total loss was not covered by the policy. Before the trial, the assured changed the claim from an actual total loss to a previous constructive total loss.

The essential issues of this case were: (1) whether the vessel became a constructive total loss before being doomed to become an actual total loss by sinking by reason of entry of seawater; and if so, (2) whether the claim for a constructive total loss would be defeated by the fact that the vessel sank afterwards; and (3) in claiming for a constructive total loss, whether notice of abandonment here could be excused.

[658] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
[659] *The Kastor Too* [2004] 2 CLC 68

5.2.3.2.2 A constructive total loss exists

For the first issue, the loss at issue was a constructive total loss, because it had been surveyed that, before sinking, the cost for repairs would exceed 3 million dollars, the value repaired, and this would fulfill a criterion to be considered as a constructive total loss in accordance with the MIA 1906 s 60.

5.2.3.2.3 A constructive total loss can be followed by a subsequent actual total loss

As to the second issue, the insured contended that the claim for a constructive total loss was considered only at the moment of sinking and would be merged by a subsequent actual total loss occasioned by uninsured perils. However Rix LJ denied such contention and held that there was no merger here; the doctrine of merger of unrepaired partial loss with a subsequent total loss would absolutely not apply to the current case where a prior constructive total loss was followed by an actual total loss. Moreover, as illustrated, the timely recovery of a vessel may remove a claim for a constructive total loss while a subsequent actual total loss would certainly not restrict a claim for the former constructive total loss. These two events are not comparative.

The insurer then asserted that the initial claim for an actual total loss was an irrevocable election, and as a matter of estoppel, thus, the subsequent attempt for a constructive total loss should be blocked. But Rix LJ took this contention as no reference, and according to both the case law as well as the MIA

1906,[660] only an accepted notice would be irrevocable. If the notice of abandonment was rejected, the assured could recover a partial loss. In this case, the assured claimed for an actual total loss in the beginning with no notice of abandonment, therefore there existed no offer for the insurer to accept to make things irrevocable.

5.2.3.2.4 Notice of abandonment could be excused where a subsequent actual total loss has occurred

In this case, notice of abandonment could be excused for there existed no opportunity for the assured to give such a notice before an actual total loss occurred and since the actual total loss occurred closely after the constructive total loss, there left nothing in specie of the thing insured for the assured to abandon, and there would be no benefit to underwriters from a notice of abandonment. Also as in the case of *Black King Shipping Co v Massie, The Litsion Pride,* Hirst J explained that the notice of abandonment would be useless, where '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.'[661]

Regarding the origin of necessity of notice of abandonment as mentioned above, in cases like these, there would be no need or opportunity for the assured to play the market by prevaricating between treating his loss as partial

[660] See MIA 1906, s 62(6)
[661] *Black King Shipping Co v Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437, 478

or total, nor any chance for him to wait and see how things developed, and no possibility for the insurer to avoid a total loss since a real total loss had already occurred. Here there is no chance that the assured could take full advantage to himself and throw every risk onto the underwriter, and thus a notice of abandonment here would then be of no use. As Rix LJ demonstrated, the choice would be obviously meaningless if the thing insured had been lost and there remained nothing for the assured to choose; and no disadvantages would occur to the underwriters by the absence of an offer of abandonment. Also, it should be noted that, although the assured gave no notice of abandonment, he had never treated the constructive total loss as a partial loss, for in the beginning he even claimed for an actual total loss.

5.2.3.2.5 Where notice of abandonment could be excused, the way to prove the claim being for a total loss

Another issue may arise, as to how the assured could demonstrate he has chosen to claim for a total loss instead of a partial loss in circumstances of a constructive total loss where notice of abandonment could be excused. In this case, it can be analyzed from two aspects. First of all, as Rix LJ explained, a reasonable owner seemed to be unlikely to treat the loss by fire in the circumstances of this case as a partial loss. Here the vessel sunk to the bottom of the sea with no hope of salvage. How was it that a reasonable owner elected to treat this as a partial loss instead of total loss? Secondly, before claiming for a constructive total loss, the assured claimed for an actual total loss of the vessel. In fact, by claiming for a total loss, albeit initially an actual

loss, the owner had already demonstrated that he was willing to abandon the vessel to the underwriters. Abandonment, as distinct from notice of abandonment, is effective both in the actual total loss and the constructive total loss. With a claim for an actual total loss initially, it showed that the assured elected to transfer the subject matter insured along with all interests or profits that might arise from it to the insurer in return for a full indemnity. Upon the facts in this case, when the assured changed his claim to a constructive total loss, since notice of abandonment could be excused, such a notice was thus not compulsory for the assured to demonstrate his willingness to abandon the vessel to the insurers. According to the decision of the court, an election to abandon could be made simply by claiming for a total loss where the notice of abandonment was neither required nor given.[662]

In a nutshell, the owners had never treated or represented themselves as treating the damage caused by the fire as amounting only to a partial loss and actually no reasonable person would do so. By claiming for an actual total loss, the assured had already demonstrated his willingness to abandon, which implied his election for a total loss instead of partial loss when subsequently claiming for a constructive total loss.

5.2.3.2.6 Conclusion

Although in some cases in relation to a constructive total loss, the notice of abandonment could be excused, it does not necessarily mean the election could be excused as well. To claim for full indemnity for a constructive total

[662] *Arnould*, at 30-05

loss, the only difference between cases where notice of abandonment could be excused or not would be the timing.[663] The notice must be given in time in a case where notice is required for a full indemnity; otherwise the assured could only recover for a partial loss, whereas where the notice could be excused, the election would not be required immediately.

5.3 Effect of notice of abandonment

5.3.1 How to give notice of abandonment

5.3.1.1 No strict form or terms is required

There is no uniform approach for giving a notice of abandonment. Whether it is given orally or in writing or half orally half in writing, or on any terms showing the assured's election to abandon his insured interest in the thing insured to the insurer unconditionally, a notice of abandonment should be regarded as having sufficiently been given.[664]

In an old case on insufficiency of notice of abandonment, *Parmeter v Todhunter*, [665] Lord Ellenborough commented that, an implied oral abandonment seemed to be obscure and could not be supported. An effectual abandonment should be expressed directly with the word 'abandon'. However, Lord Chelmsford rejected this view in the case of *M R Currie & Co v The*

[663] *Arnould*, at 30-05
[664] MIA 1906, s 62(2); See also *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727, 581 (Mackie J QC); [2012] 1 Lloyd's Rep. 571
[665] *Parmeter v Todhunter* 1 Camp 541

Bombay Native Insurance Co.[666] As he stated, regardless of how strict it would be to give notice of abandonment in the case of a constructive total loss, it could never be necessary to use the technical word 'abandon'. As long as the assured expressed his intention to transfer the property and all interests therefrom to the underwriter with any equivalent expressions based upon the background of its having been totally lost, the notice would be sufficient.

5.3.1.2 Unconditional abandonment

Moreover, a sufficient notice of abandonment should also be unconditional, viz. a compromise would not constitute a valid notice. In *Russian Bank for Foreign Trade v Excess Insurance Co*[667], the assured telegraphed to the insurer: 'Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk and insured value.' Such a notice with the condition was held by the court as a mere offer of a compromise, and could not be taken as a notice of abandonment at all. Therefore, the assured could not recover since no timely notice of abandonment had been given here.

5.3.2 How to accept the notice of abandonment

As we have seen, the assured cannot lie by to wait and see how things develop if he wants to claim for a constructive total loss. However, things might happen that after a due notice of abandonment by the assured, the underwriter

[666] *M R Currie & Co v The Bombay Native Insurance Co* (1869) LR 3 PC 72, 78
[667] *Russian Bank for Foreign Trade v Excess Insurance Co* [1919] 1 KB 39

just lies by and does nothing. The case of *Hudson v Harrison*[668] discussed the issue of the silence of the underwriter after notice of abandonment had been given. As was held by the court, the behaviour of the underwriter in keeping silent and doing nothing could be taken as his acquiescence to the abandonment. However, such authority has been altered in MIA 1906. It provides that the acceptance of abandonment is not strict, but whether by direct expression, or by implied conduct, the underwriter could not be deemed to have accepted abandonment merely by way of keeping silence after his receiving of the notice.[669]

5.3.2.1 The constructive acceptance

The pure silence of the underwriter would definitely not be construed to be a constructive acceptance. After the notice of abandonment having been duly given, mere silence by the underwriter, with no words and with no action taken, usually implies that the underwriter has no intention to accept. However, if the underwriter or his agent says nothing but he repairs and takes possession of the subject matter insured with no rejection of the notice, then it could be inferred that there is a constructive acceptance of the notice of abandonment by the underwriter. A constructive acceptance of the notice of abandonment has the same effect as an expressed acceptance by words.[670] In *The Provincial Insurance Company of Canada v Joel Leduc,*[671] after notice of abandonment had been given by the assured, the agent for the underwriter

[668] *Hudson v Harrison* (1821) 3 B & B 97
[669] MIA 1906, s 62(5)
[670] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224
[671] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224

took possession of the vessel so as to take care of the interests of the underwriter. In these circumstances, the underwriter was not utterly silent; instead, upon the behaviour of his agent, the vessel was preserved, and kept under the control of the underwriter from the moment she was raised. There was no proof that the assured received the rejection letter of the notice or any letter from the insurer to contend their liability for the loss under the ground of a breach of warranty; in the meanwhile, there existed no sign that the agent was just acting as a salvor and actually the action by the agent was as instructed by the insurance company. As to this point, Sir Barnes Peacock cited the authority of an US case, *The Cincinnati Insurance Company v Bakewell,*[672] which provided that if the underwriter took possession of a vessel after notice of abandonment had been given, and proceeded to repair without giving notice of their repudiation of the abandonment, it would be an acceptance. Sir Barnes Peacock held that the remarks on this point in *The Cincinnati Insurance Company v Bakewell* could be applied to the present case. Sir Barnes Peacock also mentioned the decision of another US case, *Peele v The Merchants' Insurance Company,* [673] where the Supreme Court of *Massachusetts* held that the underwriter kept the ship for an unreasonable time with the intention of surrendering to the assured; therefore it could be taken as a constructive acceptance of the notice of abandonment by the underwriter even though they did have a right to keep possession of a ship for a reasonable time to repair it. All these led to the conclusion that in the current case the underwriter constructively accepted the notice of abandonment; and, as commented by Sir Barnes Peacock, the issue of the constructive

[672] *The Cincinnati Insurance Company v Bakewell* (1855) 4 B Monroe's Reports (Kentucky), 541
[673] *Peele v The Merchants' Insurance Company* (1822) 3 Mason's Reports 27

acceptance of the notice of abandonment is a mixed question of law and fact.

By way of contrast, in *Captain J A Cates Tug And Wharfage Co Ltd v Franklin Insurance Co*,[674] the underwriter refused to accept the notice of abandonment at that stage in writing; but later after the surveys and examinations had been conducted, the salvor made an offer to the underwriter for the wreck without the knowledge of the assured. The underwriter requested them to put it into writing and they did, but after an interval of some three weeks this offer was withdrawn. In the beginning, the trial judge held that in spite of a formal refusal of the notice of abandonment, it could still be inferred there existed a binding acceptance here, based upon the negotiations between the underwriters and the salvor, which seemed to have been tendered by the assured in the beginning. But the Appeal Court reversed this. As Viscount Sumner explained, such tentative negotiations between the underwriter and the salvor would not imply that the underwriters intended to control or be the owners of the tug. The behaviour of the underwriter was no more than a precaution, and nothing to do with a constructive acceptance at all.

5.3.2.2 The underwriter acting as a salvor

However, as mentioned above, the underwriter obviously obtains a right to keep possession of a ship for a reasonable time to repair it, viz. it could not be taken as an acceptance of the notice of abandonment by the underwriter when he merely acts as a salvor. The key point is how to tell whether the underwriter acts as a mere salvor or that he intends to accept the notice and there exists a

[674] *Captain J A Cates Tug And Wharfage Co Ltd v Franklin Insurance Co* [1927] AC 698

constructive acceptance.

5.3.2.2.1 Whether the acceptance of notice of abandonment was acquiesced in

In *Shepherd v Henderson,*[675] the assured sent the notice of abandonment to the underwriter on hearing from the master that it was impossible to save the ship while the underwriter repudiated to accept. The assured put forward the argument that acceptance of notice of abandonment could be acquiesced in upon the behaviour of the underwriter, taking possession of the vessel and floating and carrying her to Bombay and having her repaired after being docked. However the underwriter contended that they just took the vessel for salvage and no certain repairs had ever been executed except for the sake of safety. They actually acted no more than a salvor and informed the assured of everything they had done.

Lord Penzance held that the decision should be made both upon the facts and the law. In some cases, the law stated that the acceptance of notice of abandonment could be expressed by words or implied by the conduct of the underwriter.[676] But the law could not be applied directly to a case without going into the facts of the case to ascertain what the circumstances of the case were.

[675] *Shepherd v Henderson* (1881) 7 App Cas 49
[676] See *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224; See also MIA, s 62(5)

5.3.2.2.2 Facts can determine whether behaviour is that of a salvor or acceptance of abandonment

In the current case, there existed no sign of an acceptance of the notice by the underwriter. As the evidence showed, the Captain took possession of the vessel and floated her and carried her to Bombay and there had her docked and repaired. Actually such behaviour could be taken as done by a salvor as well as by an underwriter who had accepted the notice of abandonment. Therefore, the final decision could not be made just upon the face of such a statement.

Lord Penzance then compared the behaviour of a salvor and a constructive acceptance by citing the case of *The Provincial Insurance Company of Canada v Joel Leduc*[677] and *Peele v The Merchants' Insurance Company*,[678] both of which have been discussed above. In *The Provincial Insurance Company of Canada v Joel Leduc,* after notice of abandonment had been given by the assured, the agent of the underwriter took possession of the vessel and the vessel was kept and was under the control of the underwriter from the moment she was raised. The underwriter did not reject the notice directly and nor did he do anything to make the assured think they were acting as salvors. It was held that, it could be taken as proof of an acceptance of the abandonment upon the acts of the underwriter as being without repudiation of the notice or expressing directly the character in which they were acting. In *Peele v The Merchants' Insurance Company,* the underwriter kept the ship for

[677] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224
[678] *Peele v The Merchants' Insurance Company* (1822) 3 Mason's Reports 27

an unreasonable time with the intention of surrendering to the assured. In these two cases, the underwriter said nothing but all acts done by them could only be referable to the assumption that he had accepted the abandonment. Comparatively, looking back to the current case, the acts of the underwriter could definitely be explained as being both the behaviour of a salvor and as an acceptance of the abandonment. However, the inference of rejection of the notice of abandonment became apparent, since the underwriter expressly repudiated the idea of the abandonment instead of keeping silent and did acts consistent with the behaviour of a salvor. It can be said that as a matter of fact the underwriters did not accept the abandonment.

5.3.2.2.3 The assured's right may not be affected by the rejection of acceptance

Moreover, Lord Blackburn commented that it did not mean that the result would necessarily be changed where the underwriter denied an acceptance, and actually the effect might be the same in law as if they had accepted. It was widely accepted that the right of the assured would not be restrained by rejection of the notice by the underwriter.[679]

5.3.3 The effect of acceptance of the notice

Prior to the MIA 1906, there appeared some debate that, with no need for the acceptance, a mere valid notice of abandonment of the subject matter insured

[679] MIA 1906, s 62(4)

had the same effect as if it was accepted.[680] However, no support for this view existed at all after the Act. It was admitted that the abandonment would be put into effect after the notice has been accepted or judgment given by the court.[681] Also, Atkinson J held the view that, 'by a notice of abandonment the assured merely makes an offer, which remains executory unless and until it is accepted.'[682] Two points could be inferred from his words: firstly, before acceptance of the notice of abandonment is made by the underwriter, the assured could withdraw the notice, just like a normal offer in contract law; secondly, the acceptance would be irrevocable.

5.3.3.1 Acceptance is irrevocable

Now the law has been set that, in a case where the assured claims for a constructive total loss, once the notice of abandonment is accepted, the loss immediately becomes tantamount to an actual total loss for the underwriter to settle. The underwriter would not be allowed to preclude his liability for the indemnity upon a subsequent recovery of the subject matter insured or upon an excuse of breach of warranty. It could be inferred that the underwriter has already made an irrevocable decision to take over the property if he has accepted the notice of abandonment given by the assured.[683]

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[680] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889 (Admlty) (Tomlinson J); [2009] 2 Lloyd's Rep 420

[681] *Arnould*, at 30-06

[682] *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* (1946) 79 LI L Rep 417 (KB) 433 (Atkinson J)

[683] *Chalmers*, at p102; See *Smith v Robertson* (1814) 2 Dow 474; *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224; *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455

5.3.3.1.1 Meaning of irrevocable

In *Smith v Robertson,*[684] the ship insured was captured and the notice of abandonment was thus given and was constructively accepted by the underwriter by taking steps to settle the loss. However, later the intelligence came that the ship was recaptured and therefore the underwriter refused to settle except for a partial loss. Lord Eldon held that since the notice of abandonment was acquiesced in by the underwriter, the principle of estoppel should be applied, viz. the underwriter was not allowed to refuse to settle the loss after the acceptance of the notice. As illustrated, once the notice was accepted, the abandonment took effect.

Analogously, in *Provincial Insurance Company of Canada v Joel Leduc,*[685] the Superior Court gave the decisive opinion that, in a case of a constructive total loss, if the underwriter, with full knowledge of the intelligence, had already expressly accepted or constructively acquiesced in the notice of abandonment given by the assured, he would be estopped from declining the settlement of the loss upon an excuse of a breach of warranty. As Sir Barnes Peacock explained, the acceptance of the notice of abandonment closed the whole matter as for when agreement had been reached in a contract. After the notice had been accepted, the abandonment would be put into effect, which was tantamount to the processes that the underwriter would take if he had settled the loss, and the subject matter insured, along with all rights and interests pertaining to it, would be transferred to the underwriter.

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[684] *Smith v Robertson* (1814) 2 Dow 474
[685] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224

Being codified from the old cases, in MIA 1906, it provides that 'Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.' [686] In a post-statute case, *Dornoch Ltd & Ors v Westminster International BV & Ors*, [687] Tomlinson J analyzed in details the word 'irrevocable' in s 62(6) of the Act. As he commented, the word 'irrevocable' differed from the words 'complete' or 'perfected'. It showed the consistency with the second sentence of Tomlinson's comments as he unfolded the meaning of the word 'irrevocable': that, after acceptance of the notice of abandonment, the underwriter admitted his responsibility to pay for the full indemnity for the thing insured and at the same time admitted the validity of the offer by the assured on the cession.[688]

5.3.3.1.2 Acceptance made upon a mistake of fact

The principle that acceptance is irrevocable is based upon the ground that estoppels are reciprocal. If the mouth of one party is closed, so also is that of the other. By the notice of abandonment and the acceptance of the notice, the matter was closed. Then an issue arose, whether there would be an exception when there existed a mutual mistake of fact; and assuming that the acceptance was made on a mistake of fact, whether the underwriter was debarred from recovering the money he paid, when according to the Act that

[686] MIA 1906, s 62(6)
[687] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889; [2009] 2 Lloyd's Rep 420
[688] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889 (Admlty) (Tomlinson J); [2009] 2 Lloyd's Rep 420

acceptance was irrevocable.[689]

In *Norwich Union Fire Insurance Society Ltd v William H Price Ltd*,[690] on hearing the intelligence that the lemons had been damaged by a peril insured against and sold in consequence, the underwriter settled the payment. But it was proved later that, the lemons were not damaged by perils insured, but were sold due to their condition of having ripened and were ready to be marketed. Therefore the underwriter claimed for return of the payment when realizing the truth, that they had made the payment under a mistake of fact.

At the beginning, the trial judge held that, in one respect, in accordance with common law, the underwriter would be entitled to get back the money he paid upon a mistake of fact; but, from another perspective, with regard to the statute law,[691] the acceptance of notice of abandonment made the abandonment irretrievable, and the underwriter was seemingly not entitled to claim for the return of the payment. However, in the Appeal Court, Lord Wright analyzed these two points one by one. First of all, it can be concluded from several old cases that, the intention to make the payment would be essential. The payment should be recoverable; if it was made under a mistake of fact, as in the current case the underwriter would definitely not intend to settle the payment, if he had known the true fact as the loss was not occasioned by perils insured against. Any agreement made upon a mistake of fact would be null and void in law. Therefore, the payment based on such mistakes should

[689] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455
[690] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455
[691] The Australian Marine Insurance Act 1909, which is equal to MIA 1906

be necessarily revocable.[692]

As to the issue whether the acceptance of the notice here was irrevocable, their Lordship held that, what the underwriter initially received was in effect that, the lemons were badly damaged by perils insured against and then sold, which should be taken as an actual total loss and no notice of abandonment was needed. Later this fact was found to be a mistake. Lord Wright cited the case of *Bainbridge v Neilson,*[693] in which Lord Ellenborough CJ stated that, if notice of abandonment were given upon mistaken facts, the notice would be improper. Lord Wright took the view that, even though the MIA 1906 s 62(6) provided that the abandonment was irrevocable where notice of abandonment had been accepted, it was notable that the condition precedent of this rule was that the notice of acceptance was not in vain.[694] Otherwise, the abandonment was revocable. The notice given under a mistake would be rendered invalid. Undoubtedly, where the notice was invalid, the acceptance would also be void. As a consequence, the payment based on the void acceptance was recoverable.[695]

In a nutshell, the principle that the acceptance of notice would be irrevocable stands on the ground that the facts were not mistaken. Whether by fraud or in good faith, notice of abandonment given upon a mistake of fact would be void. Had the insurer accepted such a notice, the indemnification by the insurer could be recovered.

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[692] See *Kelly v Solari* (1841) 9 M & W 54 [59] (Parke B); *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670, 696 (Lord Sumner); *Cooper v Phibbs* (1867) LR 2 HL 149 (HL) 170 (Lord Westbury); *Bell v Lever Bros Ltd* [1932] AC 161

[693] *Bainbridge v Neilson* (1808) 10 East 329 [341] (Lord Ellenborough CJ)

[694] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455 (AC) 466

[695] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455 (AC) 467

5.3.3.2 The transfer of the property

5.3.3.2.1 The timing of cession

There also exists a debate regarding the issue as to when the property of the subject matter issued, and the remaining interests vested in it, could be transferred to the underwriter. In some pre-statute cases, it was held that the cession occurred upon the acceptance of notice of abandonment; while after the Act, the mainstream view is that the cession takes place upon the settlement of claim, viz. after the underwriter accepts the offer, the transfer has no effect unless the claim has been paid.[696]

It was held by Rix LJ in *the Kastor Too* that the cession of the interests remaining in the thing insured would definitely not occur upon acceptance of the notice of abandonment. Instead, it would only occur upon the payment, and only if the underwriter would be willing to accept the cession. [697] As he explained, before the payment had been made for settling the claim for a constructive total loss by the insurer, if the assured did anything 'inconsistent with a continued preparedness to abandon the subject-matter to the insurer', then the assured would be deprived of the right to get full indemnity as a total loss; and as a replacement he would only be entitled to a claim for a partial loss. This can be shown in the following example; after the acceptance of notice of abandonment by the underwriter and before the payment had been made, if the assured sold the subject matter insured to a third party for his own

[696] *Arnould*, at 30-06
[697] *The Kastor Too* [2004] 2 CLC 68, 98 (Rix LJ)

benefits and kept the profits to himself with no reference or negotiation with the underwriter, the assured would thereafter lose their right to get indemnity for a constructive total loss, unless the underwriter expressly or impliedly waived their rights.[698]

Tomlinson J agreed with Rix LJ on this point in the case of *Dornoch Ltd & Ors v Westminster International BV & Ors.*[699] Firstly, he stated that, in accordance with the wording of the MIA 1906 s 62(6) and s 63(1),[700] it never showed that, the cession of all interests remaining in the thing insured would occur upon the acceptance of notice of abandonment. Actually a logical inference could be made that, the acceptance of notice of abandonment only meant its valid giving, and the insurer's recognition for his liability for a constructive total loss; however, it had no effect on whether the insurer could take over interests of the assured in whatever remained of the subject matter insured, which was provided for by the 1906 MIA s 63(1). In conclusion, acceptance of notice of abandonment could not affect the cession of the thing insured; the cession would only occur upon payment.

5.3.3.2.2 Equitable lien

An equitable lien differs from a legal cession, and it would not be inconsistent where an equitable lien could be imposed on the underwriter upon acceptance

[698] *The Kastor Too* [2004] 2 CLC 68, 98 (Rix LJ)
[699] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889; [2009] 2 Lloyd's Rep 420
[700] In s 63(1), it provides that the insurer is entitled to take over the interests remaining of the thing insured where there is a valid abandonment.

of notice of abandonment. The reasons were as follows: upon acceptance of notice of abandonment, the underwriter made an irrevocable promise to pay for a constructive total loss; standing in the position of the underwriter, after an irrevocable acceptance of the notice and before the payment, the law would be seriously deficient, if it provided no such security, such as the lien to insurers upon their irrevocable promise to pay for a constructive total loss.[701]

To summarise, since the acceptance of notice of abandonment is irrevocable, for the concerns of the assured, it would be fair that only after the payment, the cession of the interests remaining in the subject matter insured could occur; and on the part of the underwriter, it would be quite proper to impose an equitable lien to secure his promise to pay for a full amount of the loss. These two points are consistent with each other and can protect both the assured and insurer. The combination of the doctrine of constructive total loss and abandonment contributes to the establishment of the fair and reasonable indemnity principal.

5.3.3.2.3 The argument as to no necessity to study acceptance of notice of abandonment

However, a view was expressed saying that the significance of the analysis of acceptance of notice of abandonment would be slight in the modern marine market, for in the cases on constructive total loss nowadays, rarely would notice of abandonment be accepted directly by the underwriter. In the

[701] *Dornoch Ltd & Ors v Westminster International BV & Ors* [2009] EWHC 889 (Admlty) (Tomlinson J); [2009] 2 Lloyd's Rep 420

meantime, seldom would the underwriter elect to take over the thing insured, unless there existed a beneficial financial advantage. By way of example, sometimes it would be more troublesome to remove the wreck or conduct a salvage effort than for the potential profits that might exist.[702] As in the case of *White Star SS Co v North British and Mercantile Insurance Co Ltd,*[703] in order to avoid liability for the cost of wreck removal, the insurer rejected the abandonment by the assured, and disclaimed any interest in the wreck of the vessel. Therefore, it did not mean that, after payment, the underwriter must take over everything remaining in the thing insured. In addition, despite this, the insurer who had settled a claim for a total loss should make it clear whether he was disclaiming an interest in the property or wished to take the benefit of any salvage, so as to avoid any risk of it being inferred that he had made his election, in either direction; but in principle it would appear that he could keep his options open indefinitely.[704]

5.4 Conclusion

Abandonment and notice of abandonment are different concepts. Abandonment is applicable to both the marine and non-marine realms, whereas the notice of abandonment is unique to constructive total loss in marine insurance. The object of abandonment was to avoid the assured making money from an insurance policy; therefore the assured is bound to abandon all rights to the thing insured to the insurer when he obtains full

[702] *Arnould*, at 30-06; see also *White Star SS Co v North British and Mercantile Insurance Co Ltd* [1943] AMC 399
[703] *White Star SS Co v North British and Mercantile Insurance Co Ltd* [1943] AMC 399
[704] *Arnould*, at 30-06

indemnity. Notice of abandonment originated to let the insurer get informed immediately of what the assured had elected, on hearing the intelligence of the damage, instead of keeping it a secret to wait and see what would happen in the end. Therefore, the abandonment takes place at the time of the settlement of the claim and notice of abandonment occurs before the claim for the loss.

The term 'notice of abandonment' initially appeared in the case of *Barker v Blakes*[705] and was soon adopted into general usage.[706] Before it came into being, it was usually described as 'an offer to abandon'.[707] Notice of abandonment is taken as a bridge for constructive total loss, lying between partial loss and actual total loss, without which the assured would recover no more than a partial loss, unless the notice could be excused.

A proper notice should be given immediately unless the information is not reliable so that the assured need make further enquiry as to the nature and extent of the damage, or there exist provisions of a contract to the contrary, such as no possibility of abandonment[708] or waiver of an insurer.[709]

There also exist some occasions that the notice of abandonment could be excused in claiming for a constructive total loss. The law was settled that, in a case of constructive total loss followed by a sale of the ship or goods, when intelligence of damage and the sale came at the same time, the notice of

[705] *Barker v Blakes* (1808) 9 East 283 [294] (Lord Ellenborough)
[706] Concluded by Rob Merkin QC in a book to be published.
[707] *Goss v Withers* (1758) 2 Burr 683
[708] 1906 MIA, s 62(7)
[709] 1906 MIA, s 62(8)

abandonment could be excused.[710] On the other hand, if the news of damage arrived earlier than the sale, notice of abandonment would be compulsory in claiming for the full indemnity.[711] Notice of abandonment could be excused if the assured was able to prove that had he given such notice, it would turn out to be of no use, for example, when the subject matter insured would absolutely perish and was not in specie with nothing of the value remaining before notice of abandonment could be made.[712]

There is no uniform approach for giving a notice of abandonment, viz. it could be given orally or in writing or half orally half in writing, or in any terms showing the assured's election to abandon his insured interest in the thing insured to the insurer unconditionally; but a conditional notice as a compromise would not constitute a valid notice.[713]

Some early authorities took the silence of the underwriter, after his receiving of the notice of abandonment, as acquiescence, but it has been altered in MIA 1906 that provides that, as the acceptance of abandonment could be made by direct expression or implied conduct, a mere silence could not be deemed to be the offer.[714] However, a constructive acceptance might occur when the underwriter or his agent says nothing, but he repairs and takes possession of the subject matter insured with no rejection of the notice, and a constructive acceptance has the same effect as an explicitly expressed acceptance;[715] but

[710] *Rankin v Potter* (1873) LR 6 HL 83
[711] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
[712] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
[713] *Russian Bank for Foreign Trade v Excess Insurance Co* [1919] 1 KB 39
[714] MIA 1906, s 62(5)
[715] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224

obviously, the behaviour as a mere salvor by the underwriter is definitely not a constructive acceptance.[716] Before the notice of abandonment is accepted, the assured could withdraw the notice, but the acceptance makes things irrevocable unless the acceptance is made upon a mistake of fact.[717]

In some pre-statute cases, it was held that the cession occurred upon the acceptance of notice of abandonment, whereas after the Act, it is generally accepted that the cession takes place upon the settlement of claim, viz. after the underwriter accepts the offer, the transfer has no effect unless the claim has been paid.[718] Imposing an equitable lien on the underwriter after the acceptance of notice of abandonment does not break this principle, for an equitable lien differs from the legal cession in its essence. From the perspective of the assured, it would be fair that cession occurs only after the payment is made, whereas from the underwriter's position, it would be quite proper to impose an equitable lien to secure his promise to pay for a full amount of the loss. These two points stand together protecting both the assured and insurer. In addition, it never means that the underwriter must take over everything remaining in the thing insured after payment.

[716] *Shepherd v Henderson* (1881) 7 App Cas 49
[717] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455
[718] *Arnould*, at 30-06

Chapter 6 Constructive total loss on freight

The risk of a total loss of freight is much lower than that of goods or ship, for the most common situation is that the freight is paid in advance, either in part or as a whole.[719] Policies on freight were complicated; they could be either a particular charter-party freight or a general freight, a sort of freight earned during the whole voyage insured or just a part of it. Constructive total loss of freight appears complicated and has changed greatly during its history,[720] and it has even been doubted whether it exists. Few cases of total loss on freight have been reported and there is no mention of this issue in the statute law in the different countries up to now. This issue still causes fierce debate and leaves a great deal of room for future legal practice to fill. This chapter describes in chronological order the development of the constructive total loss of freight and analyses the relationship between the loss of ship/goods and the loss of freight and whether constructive total loss of freight really exists.

6.1 Constructive total loss of freight in earlier times

6.1.1 What amounts to a total loss of freight

In the old days, the policy on freight was placed in a strict sense. The assured could be indemnified for the loss of the freight by perils insured that he should

[719] *Marine Insurance: Law and Practice*, at 22.57
[720] *Arnould*, at 29-61, as described, 'most of the more recent cases in which the courts have discussed the concept of total loss, actual or constructive, of freight turned largely on the interpretation of policy clauses.'

have earned.[721] In enormous cases, to determine whether the assured was entitled to recover, it was essential to examine when the right to freight commenced. When ascertaining a total loss for freight, there are two areas of concern. The first stage is to check whether the right has commenced, and the second is to see whether the loss is caused by perils insured against.

6.1.1.1 When the right to the freight of the assured should commence

In general, the rule was settled that the commencement of the right to freight of the assured would be according to the words of the charter-party. The policy might stipulate the inception, as in some cases the right to freight of the assured commenced when the ship began its voyage,[722] while in some other cases the right to freight started after the goods were taken on board.[723] In the latter situations, if the loss occurred before the goods were already on board, the assured could claim for nothing on freight since his right to it had not yet begun.[724] In *Montgomery v Egginton*,[725] when the ship got lost, only part of the goods were on board, all the rest were waiting on the shore. The court held that the right to freight of the assured had begun since part of the goods were on board, and the whole freight under the charter-party upon a valued policy got lost by perils insured against, so that the assured was entitled to recover a total loss. However, it was at variance with the open policy as in *Forbes* v

[721] See *Montgomery* v *Egginton* (1789) 3 TR 362; *Thompson* v *Taylor* (1795) 6 TR 478; *Horncastle v Suart* (1806) 7 East 400; *Mackenzie v Shedden* (1810) 2 Camp NPC 431; *Forbes* v. *Aspinall* (1811) 13 East 325; *Davidson v Willasey* (1813) 1 M & S 313; *Idle v Royal Exch Ins Co* (1819) 8 Taunt 755
[722] *Thompson* v *Taylor* (1795) 6 TR 478; see also *Montgomery v Egginton* (1789) 3 TR 362; *Davidson v Willasey* (1813) 1 M & S 313; *Everth v Smith* (1814) 2 M & S 278
[723] *Tonge v Watts* (1745) 2 Str 1251
[724] *Tonge v Watts* (1745) 2 Str 1251
[725] *Montgomery* v *Egginton* (1789) 3 TR 362

Aspinall,[726] where the ship also got lost by perils insured against with part of the outward goods on board. But in this case it was held the assured was only entitled to recover for the freight in conformity with the proportion of the outward goods, for it was uncertain whether any additional homeward goods could ever be obtained. Therefore in this case no extra loss had ever occurred apart from the loss of freight based upon part of the goods only.

In *Thompson* v *Taylor*,[727] a ship was chartered from London to Tenerife to take on board the goods and then proceed to the destination port, but she was taken as a prize on the way as ballast proceeding upon the said voyage towards Tenerife. The contract under the charter-party was the entire voyage, from London to the final destination port; thus even though the goods were not yet loaded on board, the right to freight had commenced, and the assured was held to be entitled to recover.[728] Based upon this principle, in *Mackenzie v Shedden*,[729] it was cogent to infer that, from the moment the outward voyage commenced, till the ship returned home, the insurer was liable to indemnify the assured whenever perils insured against occurred and prevented the ship from earning her freight, for the policy covered the whole voyage.

It was explained that the ship owner earned the freight as profit by carrying goods to the destination port and the insurance upon freight was just to protect

[726] *Forbes* v *Aspinall* (1811) 13 East 325
[727] *Thompson v Taylor* (1795) 6 TR 478; see also *Horncastle v Suart* (1806) 7 East 400, which was governed by *Thompson v Taylor* (1795) 6 TR 478; see also *Mackenzie v Shedden* (1810) 2 Camp NPC 431; see also *Davidson v Willasey* (1813) 1 M & S 313
[728] *Thompson v Taylor* (1795) 6 TR 478 [482] (Lord Kenyon CJ)
[729] *Mackenzie v Shedden* (1810) 2 Camp NPC 431

such profit from being lost by perils insured against.[730] Once the voyage for earning the freight was stopped by any of those perils, the assured will be entitled to recover the loss.[731] Only when the right to freight had commenced, did the assured get a right to recover on the policy. It was immaterial whether the ship was seized or captured or detained or badly damaged, before or after the goods was taken on board, and the requisite point was to check when the right to freight had commenced.

6.1.1.2 Loss should be occasioned by the perils insured

The underwriter was only liable for the loss of freight caused by the perils insured. He was not answerable for loss due to the assured's own fault or the circumstances in which it had been earned and then deprived of by reasons irrelevant to the contract.[732] For example, in *Benson v Chapman,*[733] the ship owner borrowed some money to repair the damaged ship, when in the end he was unable to pay off the bondholder so that the freight was paid over after it had been earned. The loss happened after it had been earned, and it was not occasioned by any peril insured against so that it was not recoverable.[734]

Blackburn J had explained what was meant by perils insured and what was the

[730] *Forbes v Aspinall* (1811) 13 East 325 [327] (Lord Ellenborough CJ)
[731] *Davidson v Willasey* (1813) 1 M & S 313 [317] (Le Blanc J)
[732] See *Scottish Marine Insurance Co v Turner* (1853) 15 D HL 33, Lord Truro, 'the loss of freight, has two meanings and the distinction between them is material. (1) Freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight. (2) Freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstance unconnected with the contract between the assured and the underwriters on freight. For a loss of freight in the first sense the underwriter on freight is liable. But for any loss of freight in the second sense, I conceive the underwriter is not answerable.'
[733] *Benson v Chapman* (1849) 2 HL Cas 696
[734] *Arnould*, at 29-77

assured's own fault in *Rankin v Potter*.[735] Where in the circumstances the assured was able to reasonably repair the ship or to find a substituted one but he declined to do so, it would be a loss by the assured's own default. In such circumstance, the underwriter was not answerable even though the assured had given notice of abandonment; and notice of abandonment, as analysed, never creates a total loss when it is not a total loss in nature.[736] On the other hand, where there was no possibility the greatly damaged ship could be properly repaired and no substitute was available, the loss of freight was occasioned by perils insured against. For example, suppose in a case, the ship and goods were sold by the ship owner, the first step should be ascertaining whether it was a right sale.[737] Where there was a right sale of the ship and goods, there was a total loss on the freight,[738] whereas in the opposite case, the responsibility of the freight would not be transferred to the underwriter by an unjustifiable sale.[739]

In summary, no law protects an assured without due diligence while at the same time no law would push the assured to use unreasonable exertions to preserve the subject matter insured as well. The principle of loss of freight also resembled the 'prudent uninsured owner test' as discussed in Chapter One.

[735] *Rankin v Potter* (1873) LR 6 HL 83; See also *Stringer v English Marine Insurance Company* (1869) LR 4 QB 676; 5 QB 599
[736] *Chapman v Benson* (1847) 5 CB at 363
[737] As to what is a right sale, it has been discussed in 1.2.2.3.2.
[738] *Idle v Royal Exch Assurance Co* (1819) 8 Taunt 755
[739] *Arnould*, at 29-81; See also *Mordy v Jones* (1825) 4 B & Cr 394; *Brockelbank v Sugrue* (1831) 1 Mood & Rob 102

6.1.1.3 Effect of the state of the ship and goods on loss of freight

The loss of freight has a close relationship to the state of the ship or the goods whereas it is not equally true to say a total loss on freight is established on the facts of a total loss on the ship or the goods. A mere partial loss of the ship or the goods, however great, would not constitute any loss on freight.[740] As to what would amount to a partial loss on freight and what made a total loss on freight, Brett J enunciated various circumstances on this issue in *Rankin v Potter.*[741] Under a general policy on freight, there probably would cause a partial loss of freight: where by perils insured against bringing about a general average contribution; or where there was a total loss of part of the goods on some occasions; or where there was a total loss on the ship and the goods were sent by a substituted ship; or where there was a total loss on the goods and the master earned some freight by carrying some other goods during the voyage insured; and so on.[742] For a total loss of the freight, Brett J stated that, under a general policy on freight, an actual total loss of freight would be occasioned where there was an actual total loss of ship and no means for the goods to be sent in a substituted ship to earn freight; or there was an actual total loss of the whole goods and no chance for the ship to earn freight by carrying other goods during the voyage insured.[743] Furthermore, if according to the contract, the freight would be earned by a specific ship or by carriage of the particular goods, the loss of such ship or goods would inevitably lead to a

[740] See also *Moss v Smith* (1850) 9 CB 94 [109]-[110] (Wilde CJ)
[741] *Rankin v Potter* (1873) LR 6 HL 83
[742] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J)
[743] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J); See also *The Law of Marine Insurance*, at 21.93

loss of freight.[744]

Results would be extremely complicated in the circumstances of a constructive total loss of the ship. Summarising the opinions of Brett J, there would be two branches: the ship not being insured or the converse. For the former situation, the test of a 'prudent uninsured owner' could be applied so that a prudent owner would not repair and then the ship was likely to be sold as a wreck, viz. the freight on the voyage by the ship was definitely lost. However, what if the owner repaired the ship unreasonably and obtained the freight? Obviously then no loss on freight occurred at all.

And for the latter, if the ship was insured, there would also be two branches: due notice of abandonment may or may not be given. It was worth a critical discussion that, with no notice of abandonment given, should the result on the freight be taken as the same as where the loss of the ship was partial (as mentioned above, a partial loss of ship or goods constituted no loss on freight), or, should it be regarded as if the ship had not been insured with the test of a 'prudent uninsured owner' applied, and the freight was totally lost? In legal practice, the second view was supported.[745]

Even when due notice of abandonment of the ship was given, the results on freight still varied. Theoretically speaking, for most cases, the ship would be sold as wreck by the underwriter and freight on this voyage would be totally lost if there were no substituted ship. It would be exceptional that the

[744] *Arnould*, at 29-64; See also *Rankin v Potter* (1873) LR 6 HL 83
[745] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J)

underwriter repaired the ship and earned the freight, and then it was agreed that no loss on freight could be claimed. In such circumstances, it could be logically inferred that the abandonment of the ship was not correct since the underwriter repaired it with success. In legal practice it was the duty of the assured to carry out the repairs to the ship to a seaworthy state when it was possible, otherwise the loss of freight to the assured was caused by the voluntary act of their own, instead of in consequence of sea perils insured against.[746]

By and large, it was impossible to come to any certain principles for total loss of freight. What could be concluded from this was that the results always relied upon the facts. It was not really very material whether the ship was insured or not and whether due notice of abandonment of ship was given or not. Even more complicated issues were, in those stated circumstances, whether the total loss of the freight was a constructive total loss or an actual total loss, and whether notice of abandonment on freight was required, both of which would be discussed in a later section.

6.1.2 Freight earned in the end

The total loss would be denied if the freight had been in fact earned in the end even though the notice of abandonment was given beforehand. As in *M'Carthy v Abel*,[747] Lord Ellenborough CJ rejected the claim for a total loss, for the

[746] See *M'Carthy v Abel* (1804) 5 East 388; See also *Scottish Marine Insurance Company v Turner* (1853) 15 D HL 33
[747] *M'Carthy v Abel* (1804) 5 East 388

freight had been in fact earned by the underwriter by reason of the abandonment of the ship, which implied that the loss of freight of the assured occurred due to the assured's own fault, instead of by perils insured against. Even though the loss existed in some other sense, but not by the perils insured against, such as loss of freight due to the improper abandonment of the ship by the assured themselves, or occasionally that the freight was deprived of after it had been earned,[748] the assured could not get indemnified; whereas the result would be different where the ship or cargo were in the greatest peril, and the assured was entitled to abandon, and the freight was not ever earned by anyone, as in the case of *Idle v Royal Exch Ins Co*.[749]

In reference to the early case of *M'Carthy v Abel*, Lord Ellenborough CJ further explained this issue in detail in *Everth v Smith*[750] where a ship was covenanted to sail from London with the outward goods for unloading in some ports and then to proceed to Riga to upload the homeward goods on board and then return to London. The ship was restrained in Riga for five weeks and the cargo was not allowed to be loaded. After the restraint ceased, the frost set in, leading to the detention of the ship for a whole winter, so that no previous homeward goods were ever loaded. Finally, the master earned some freight by carrying cargo for some other persons the next spring. The assured claimed to have abandoned the freight and got paid for the expenses incurred by the ship's detention during the winter, which actually exceeded the freight earned. The claim was rejected and the court took the view that the policy covered a

[748] *Stringer v English Marine Insurance Company* (1869) LR 4 QB 676; 5 QB 599; *Chapman v Benson* (1847) 5 CB at 363
[749] *Idle v Royal Exch Ins Co* (1819) 8 Taunt 755
[750] *Everth v Smith* (1814) 2 M & S 278

general freight, not a specific one. In the case at issue, no loss on freight happened since the freight was finally earned and it made no difference whether the goods were the previous ones. This was at variance with the situation in *Rankin v Potter*,[751] where the subject matter insured was a particular chartered freight and irreplaceable, not a general freight which could be earned during the voyage by carrying any goods. Whether the freight was earned by the contracted particular freight or a substituted following freight in the current case made no difference and since the freight had been fully earned there could be no loss properly demandable of the underwriters. In addition, the court further explained that the protraction of the adventure was not a cause of abandonment in insurance law and the mere retardation of the adventure was not the basis of a total loss.

This principle resembles that of the ship or goods restored before action brought. Normally if the ship or goods were restored before action brought, the assured was not entitled to claim for a total loss. In addition, if restoration of goods or ship occurs after action brought, the right to the assured to recover a total loss would not be affected either. Therefore, after action commenced, the fact that some freight was subsequently earned by the cargo underwriters who had purchased the vessel and had her towed to port did not prevent the assured on freight from claiming for a constructive total loss.[752]

[751] *Rankin v Potter* (1873) LR 6 HL 83
[752] See *Guthrie v North China Ins Co* (1900) 6 Com Cas 25; (1902) 7 Com Cas 130 CA

6.2 Total loss of freight in modern ages

6.2.1 The reason why constructive total loss of freight was absent in MIA 1906

The definition of constructive total loss of freight was absent in the Marine Insurance Act 1906. There may be two main causes. Firstly, Scott LJ gave the reason for this absence in *Kulukundis v Norwich Union Fire Insurance Society*,[753] as follows: 'the distinguished lawyers who settled the drafting of the Bill were unable to agree upon the law as to insurance of freight, and that is why the Act says so little about it.' Also as Chalmers explained, 'The bill originally contained a sub-section dealing with freight, which was agreed to by the Lord Chancellor's Committee, but it was contended that it was too broadly expressed, and it was afterwards cut out.'[754] Till now, constructive total loss on freight could only be governed by a too broadly general provision contained in sub-section one of section 60 of the Act; and in legal practice, several principles of insurance on freight are left open, so that the result always varies and seems to rely on the policy and in the manner thereby agreed.

Secondly, there are few cases on a total loss of freight, and this makes the law of constructive total loss on freight obscure and impedes the development of this issue in statute law. Although there are many cases discussing similar issues, few of them could reach the sufficient certainty or unanimity for the precise point by judicial reasoning. It is not easy to give a decision fully in

[753] *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1
[754] *Chalmers*, at p91

accordance with the decided cases for situations of a constructive total loss on freight, and it is widely accepted that most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy. The Act does not provide the specific aids to interpretation in the case of freight as it does in the case of ship and cargo. Instead of the Act, the standard form clauses could help to explain the underlying law better.[755]

6.2.2 Constructive total loss of freight in the Institute Clauses

For many recent cases, in determining the type of loss on freight, much reliance has been placed on the interpretation of the policy clauses.

For policies under the Institute Time Clauses – Freight (ITC Freight), there is much use of the words 'loss of hire' or 'loss of earning' and under the Institute Voyage Clauses – Freight (IVC Freight) it uses the words 'loss of freight', and they almost refer to the same thing.[756] Hobhouse J also elaborated the distinction between these two forms of policy in *Compania Naviera SA v Palmer (The Wondrous)*.[757] Earnings under a valued time policy referred to a fixed sum to be earned for a period of time; freight under a voyage policy was concerned with the freight to be earned under a stipulated voyage, much like a symbol of the value of a vessel or voyage or adventure under a particular contract. Today most freight insurance takes the form of valued time policies, usually described as insurance on loss of hire or loss of earnings. If a ship is

[755] *Marine Insurance: Law and Practice*, at 23.54
[756] *Ikerigi Cia Nav SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400; see also *Cepheus Shipping Corp v Guardian Royal Exchange Assurance Plc (The Capricorn)* [1995] 1 Lloyd's Rep 632
[757] *Ikerigi Cia Nav SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400 at 417

prevented from earning the freight by an insured peril, the fixed value of the earnings during the provided period would be payable, without reference to any particular engagement she may have obtained during that period.[758]

6.2.2.1 How Institute Clauses defines constructive total loss of freight

There exist two main related clauses: Clause 14 (Loss of Time Clause) in ITC Freight, which is the same as Clause 12 in IVC Freight; and Clause 15 (Total Loss Clause on freight) in ITC Freight, which equates to Clause 13 in IVC Freight.

Clause 14 is about loss of time, which stipulates that: 'This insurance does not cover any claim consequent on loss of time whether arising from a peril of the sea or otherwise.'[759] This is similar to the Frustration Clause in the Institute War and Strikes Clauses on freight, providing that loss proximately caused by delay is not recoverable; but in accordance with some leading cases, the principle was not applicable where there was a constructive total loss on ship. As discussed in Chapter Three, there is also a Detainment Clause in the War and Strikes Clauses on freight, which provides for the sum insured to be paid 'in full' in the event that a claim for constructive total loss of the vessel is paid under the Detainment Clause in the hull war risks policy.[760] The Loss of Time Clause excludes a claim under the Total Loss Clause on freight as the

[758] *Arnould*, at 12-37; See also *Cepheus Shipping Corp v Guardian Royal Exchange Assurance Plc (The Capricorn)* [1995] 1 Lloyd's Rep 622 [641]-[642] (Mance J)
[759] See *Bensaude v Thames and Mersey Marine Insurance Company Ltd* (1897) 46 WR 78; *Atlantic Maritime v Gibbon* [1953] 1 Lloyd's Rep 278; 2 Lloyd's Rep 294; *The Wondrous* [1991] 1 Lloyd's Rep 400; [1992] 2 Lloyd's Rep 566
[760] For example, as a result of the loss of the free use and disposal of the vessel for a continuous period of 12 months due to capture, seizure, etc. See also *The Bamburi* [1982] 1 Lloyd's Rep 312

Frustration Clause excludes a claim under the Detainment Clause in the Freight policy as well.

Clause 15 is the Total Loss Clause on freight, which is based on the principle that the ship should be a freight-earning tool in the market.[761] In line with subsection one of cl 15, the freight policy and the hull policy are highly relevant when there is a total loss on the hull.[762] The assured could recover the freight by providing the proof that an actual or a constructive total loss has occurred to the ship and there is no need to prove the amount of freight at risk. Subsection two illustrated the criterion to build a constructive total loss of the ship.[763] This clause is only relevant for the purpose of fixing the insured value of the hull, without taking account of the value of wreck, as the point of reference for determining whether the vessel is a constructive total loss, where the assured's claim for loss of freight is based upon the vessel's being a total loss. It is open to the assured to claim for a loss of freight independently of cl 15, where he is able to do so without needing to establish a total loss of the vessel.[764] Subsection three is a limitation to the assured. This principle was settled after the case of *Petros M Nomikos Ltd v Robertson*[765] and overruled the decision of the case, where there was a constructive total loss on the ship; but the assured elected not to give notice of abandonment on the ship and repaired her and at the same time claimed for a total loss on freight. The underwriter rejected this and argued that there was no notice of abandonment

[761] *Cepheus Shipping Corp v Guardian Royal Exchange Assurance Plc (The Capricorn)* [1995] 1 Lloyd's Rep 622
[762] *The Law of Marine Insurance*, at 21.95
[763] ITC Freight, clause 15.2 of is the same as ITC Hull, clause 19.1.
[764] See *Carras v London & Scottish Assurance Corp* [1936] 1 KB 291; *Kulukundis v Norwich Union Fire Ins Society Ltd* (1935) 41 Com Cas 239; *Robertson v Petros M Nomikos* [1938] 2 KB 603; [1939] AC 371
[765] *Petros M Nomikos Ltd v Robertson* (1939) 59 Ll L Rep 182; 61 Ll L Rep 105

of the ship so that only a partial loss was constituted. But the House of Lords held that the election of the assured and notice of abandonment made no sense in ascertaining the loss type.

6.2.2.2 Effect of loss of ship or goods on the freight

Not all total losses of freight rely on a total loss of ship or goods, notwithstanding the fact that according to cl 15 of Institute Freight Clauses, to claim for a total loss of freight, the assured just needs to prove there existed a constructive total loss on the ship. The assured might be able to recover a total loss for freight although no total loss on ship or goods occurs, as long as the freight could not be earned by perils insured against.[766]

In *Carras v London & Scottish Assurance Corp*,[767] the cost of repairing the damaged ship exceeded the actual repaired value but was less than the insured value. In this case the policy contained the IVC Freight. Porter J held that in effect the earning of the freight was cut off, but on the basis of the then current Institute Freight Clauses (cl 4 and cl 5, which equals to cl 15.1 and 15.2 in 1983 Clauses), there was no constructive total loss of the ship so the assured could not recover a total loss on freight. This was overruled by the Court of Appeal. According to Lord Wright, a total loss of ship or goods was definitely not a requisite ingredient to create a total loss for freight. The essential point was to ascertain whether the loss of freight was occasioned by perils insured against; more specifically speaking, it was to ascertain whether

[766] *Moss v Smith* (1850) 9 CB 94; *Assicurazioni Generali v SS Bessie Morris* [1892] 2 QB 652
[767] *Carras v London & Scottish Assurance Corp* [1936] 1 KB 291

the ship was really not repairable in a commercial sense to enable herself to earn the freight. Clauses 15.1 and 15.2 (cl.4 and cl. 5 before 1983) solve one type of total loss of freight, but not every type.

Sharing the same principle, though with varied facts, in *Robertson v Petros M Nomikos Ltd*,[768] the cost of repairs exceeded the insured value, but less than the actual value after repair and the freight policy contained ITC Freight. Normally in light of the clauses, to test for a constructive total loss for the ship, the cost of repairs should be compared to the insured value; but in the case in question, the assured elected not to abandon and recovered a partial loss for the ship. However, after being repaired, the ship still failed to complete the voyage and freight was not earned. It was contended that, according to the Loss of Time Clause, loss occasioned by loss of time was irrecoverable and the Total Loss Clause of freight was on the basis of a constructive total loss of the ship; thereby, this clause could not be applied either since the ship here was recovered as a partial loss so the underwriter was not liable for loss of freight.

However the House of Lords held that there could be a constructive total loss without notice of abandonment and, at the same time, agreed with the view that not every case of total loss on freight should necessarily be caused by a constructive total loss of the ship. Even though a constructive total loss of ship was highly likely to cause a total loss of freight, it should be kept in mind that the freight policy and the hull policy were two separate policies and irrelevant

[768] *Robertson v Petros M Nomikos Ltd* [1939] AC 371

to each other except on one occasion where the Total Loss Clause of Freight should be applied. In this case, first and foremost the facts should be concentrated upon the basis of the freight policy. Moreover, notice of abandonment only influenced the outcome of the indemnity, and effected nothing of the nature of the loss. By a combination of the application of s 60 of MIA 1906, the ship could be taken as a constructive total loss. Therefore, the result of this case was against the defendant.

The 1983 Institute Freight Clauses made an amendment for this principle: that the underwriter would not be liable for the loss of freight on the basis of a constructive total loss of ship where the ship was finally recovered as a partial loss. Obviously it would not be applicable for loss of freight based outside the claims under Total Loss Clause of Freight;[769] for all claims under Total Loss Clause of Freight, the proximate cause should be the constructive total loss of the ship.[770]

Similarly, in *Kulukundis v Norwich Union Fire Ins Society Ltd*,[771] in the Court of Appeal, two main issues were in dispute: firstly, whether the fact that the assured was prevented in a business sense by perils of the sea from performing the freight contract was enough to constitute a total loss of freight; and secondly, as to what the repaired value should be compared, the cost of the temporary repairs to complete the voyage in safety or the cost of the permanent repairs. The principle of the first issue was established in the case

[769] Clause 15 of Institute Time Clauses of Freight
[770] *Continental Grain Co Ltd v Twichell* (1945) 61 TLR 192
[771] *Kulukundis v Norwich Union Fire Ins Society Ltd* [1937] 1 KB 1

of *The Carras's* and was adopted here. As to the second issue, the majority of the court held that by perils insured against, the loss of freight could be taken as total when in a commercial sense the temporary repairs would be impractical.[772] Also, supposing the cost for a temporary repair was less than the repaired value and the assured refused to conduct a temporary repair to enable the ship to accomplish the voyage for fear of the following repairs added; in these circumstances, the loss of freight would be taken as not caused by perils insured and would be irrecoverable. The court did not think it necessary to determine whether in estimating the arrived value of the vessel, after its temporary repairs, the freight so earned should be included. There was an objection that Scott LJ put forward, that after a temporary repair, the ship recovered just its basic structure as would enable her to complete the voyage and there still existed a commercial loss for the ship. Such contention was reasonable and just comparing it to a temporary repair was not enough at all. However this point was not essential for the decision in this case. Normally when temporary repairs exceeded the repaired value, the permanent repairs would no doubt exceed both.

Although being a most probable cause, a total loss, actual or constructive, of ship does not necessarily lead to a loss of freight, while indeed on occasions a total loss of freight is consequential on the loss of ship and arises therefrom; for example, where an actual total loss of the ship occurs and the contract of the carriage could not be performed; or where a ship is captured and unlikely

[772] See also *Vrondissis v Stevens* [1940] 2 KB 90

to be restored;[773] or where a ship is damaged and physically impossible to be repaired and an actual loss appears to be unavoidable; or where the ship was damaged and although the repair could be physically executed but the cost for repair would exceed the repaired value; or the other situations which constitute a constructive total loss of the ship and the ship has been abandoned and so the freight has not been earned.[774]

6.3 Whether constructive total loss of freight really exists

It can be easily seen that in the cases down the ages, expressions are always as 'total loss of freight', instead of 'constructive total loss of freight'. As a subject matter insured, freight is quite different from the ship or the goods by its peculiar intangible nature, especially when what is insured is the right to earn future freight as in *Rankin v Potter*.[775] This causes disputes about whether constructive total loss exists in reality.[776] There is also a similar question as to whether notice of abandonment is needed at all when claiming for a total loss of freight, since it plays a very prominent role in constructive total loss.

There is no need to discuss the situation when both ship and goods become actual total loss, for, as mentioned above, in that case the freight is an actual total loss as well and notice of abandonment is definitely not necessary. The

[773] *Roura and Forgas v Townend* [1919] 1 KB 189
[774] *Vrondissis v Stevens* [1940] 2 KB 90; *Carras v London & Scottish Assurance Corp* [1936] 1 KB 291; *Kulukundis v Norwich Union Fire Ins Society Ltd* (1935) 41 Com Cas 239
[775] *Rankin v Potter* (1873) LR 6 HL 83
[776] *Arnould*, at 29-61

controversial point comes into focus when only the ship/goods is an actual total loss, or the ship/goods is a constructive total loss. Two views have been propounded for the necessity of notice of abandonment on freight. On the one hand, notice of abandonment could be waived where there is nothing and no value that could be passed to the underwriter; admittedly, where there exists any chance or hope to get the freight, notice of abandonment would be requisite to claim for a total loss. On the other hand, it has been contended that the underwriter might obtain the better position to fulfill the interests of the subject matter insured, though it seems impossible for the assured, so that even for an intangible thing as freight, notice of abandonment is needed.[777]

6.3.1 Situations where no notice of abandonment is needed

When the subject matter meets the requirements of being a constructive total loss, the underwriter is necessarily to be informed that they can take full advantage of the remains (even though of no value to the assured). In times past, the prevailing principle was that notice of abandonment of the freight was needed in claiming for a total loss of freight in the circumstances where the ship and cargo were sold abroad.[778] It was even set as a technical rule in *Knight v Faith*[779] that notice of abandonment could not be waived where the subject matter insured existed in specie even if the underwriter could do nothing with it.[780] However, this was denied and altered after the case of

[777] *The Law of Marine Insurance*, at 21.96
[778] *Parmeter v Todhunter* (1808) 1 Camp 541
[779] *Knight v Faith* (1850) 15 QB 649
[780] The principle deferred in *Cambridge v Anderton* (1824) 2 B & C 691; *Roux v. Salvador* (1836) 3 Bing (NC) 266; *Farnworth v Hyde* (1866) LR 2 CP 204

Rankin v Potter,[781] where it was held that notice of abandonment of freight was unnecessary in cases where the insurers could not derive any advantage by receiving such notice.[782] Then the prevalent rule was that notice of abandonment on freight would be unnecessary where there existed a right sale; and if the sale were unjustified, the loss of freight could be taken as not caused by perils insured and becomes irrecoverable.[783] In *Idle v Royal Exch Ins Co*,[784] it was held that the captain was justified in making such a sale, and that notice of abandonment on the freight was not necessary since no actual benefit could be derived from abandonment in terms. In reference to this case, it was widely accepted that for any ship or goods still in specie, it was visible and tangible and had corporeal existence to be abandoned, which was wholly inapplicable to freight and there seemed nothing to abandon for insurance on freight.[785] But it was still quite obscure whether the prevalent view showed the freight was an actual total loss or still a constructive total loss, but notice of abandonment could be excused.[786]

In *Rankin v Potter*[787] this issue was discussed thoroughly. Normally the notice was required to maximize the benefits for both sides but it was useless to enable an assured to recover as for a total loss when there was nothing to abandon, since nothing can pass to or be of value to the underwriter.[788] Brett J further illustrated the circumstances where notice of abandonment could be

[781] *Rankin v Potter* (1873) LR 6 HL 83
[782] This is also adopted by MIA 1906 s 62(7)
[783] *Arnould*, at 29-80
[784] *Idle v Royal Exch Ins Co* (1819) 8 Taunt 755
[785] *Green v Royal Exchange Assurance Company* (1815) 6 Taunton 68; *Mount v Harrison* (1827) 4 Bingham 388
[786] *Arnould*, at 29-69; See also *Rankin v Potter* (1873) LR 6 HL 83
[787] *Rankin v Potter* (1873) LR 6 HL 83
[788] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J), and Brett J thought it a wrong decision in *Knight v Faith* (1850) 15 QB 649; See also *Farnworth v Hyde* (1866) LR 2 CP 204

excused: where the ship was damaged to such an extent or in such circumstances as would authorize an abandonment of the ship on a policy on the ship, and at the same time where there was no cargo on board the ship, or, if on board, where none was saved with the chance of an opportunity of its being forwarded in a substituted ship. Brett J took the circumstances mentioned above as an actual total loss of the freight, where notice of abandonment would naturally be unnecessary, instead of regarding them as cases of constructive total loss but where notice of abandonment could be waived.[789]

6.3.2 Situations where notice of abandonment is needed

Brett J did not accept the view that there existed no constructive total loss at all in the realm of freight.[790] He illustrated several situations that could constitute a constructive total loss of freight, for example, where there was a total loss of the ship, but the goods were in safety and there might not, or might not for sure, be a substituted ship to carry the goods to the destination; or where there was a total loss of the goods but the ship was saved and it was not certain whether the ship could earn the freight by carrying some other goods during the voyage. In such circumstances, the notice of abandonment was requisite to claim for a constructive total loss of the freight, for there still existed some chance for the underwriter to earn some freight by his own methods.[791]

[789] *Arnould*, at 29-69 See; also *Rankin v Potter* (1873) LR 6 HL 83
[790] *Rankin v Potter* (1873) LR 6 HL 83
[791] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J)

It could be concluded that when the ship or goods becomes an actual total loss and physically or commercially impossible for the assured to arrange a reshipment or to procure the substitute goods to earn the freight, there would be an actual total loss of freight and notice of abandonment could be excused; whereas when the ship or goods becomes a total loss and it was doubtful whether there existed substituted ship or goods, notice of abandonment was then required to be given to the underwriter to enable them to take full advantage of the subject matter insured and in this circumstance the freight may properly be taken as a constructive total loss. For a more complicated situation when there is a constructive total loss of the ship/goods, the assured was regarded as obtaining a right to abandon the freight.[792] Indeed, while, as will be shown, cases of a constructive total loss of freight are theoretically possible, and have perhaps occurred in practice, there appears to be no decision in the reports that a particular loss of freight was constructive and not actual.[793] The current prevailing view accepts that, though at the very least, there need be a notice of abandonment occasionally when the loss fell within the definition of constructive total loss of freight, but more usually if the loss be total at all it would be an actual total loss.[794] It may be said, therefore, that when the circumstances are such as to make the ultimate earning of freight highly doubtful, without, however, destroying all hope of eventually earning it, then notice of abandonment will be necessary to entitle the assured on freight to recover as for a total loss on that interest.[795] However it is true there has always been a perspective that, even if the freight is a constructive total loss,

[792] *Benson v Chapman* (1849) 6 M & G 792 [965]-[966] (Tindal CJ)
[793] *Arnould*, at 29-61
[794] *Arnould*, at 29-66
[795] *Arnould*, at 29-64

the notice of abandonment of it could be waived by reason of the peculiar nature of freight, intangible and artificial.[796]

6.3.3 Effect of abandonment of freight

Suppose there is a constructive total loss both of the ship and the freight, and the assured gives notice of abandonment of ship and freight to the respective underwriters and both of them accept. Then who could possibly be entitled to take the benefit of the freight if it is being earned in the end? Obviously if, after notice of abandonment has been given and accepted, the freight was earned by a substituted ship, the freight would definitely be irrelevant to the underwriter of the ship. What if freight is earned by the abandoned ship?[797] In accordance with s 63 of MIA 1906,[798] the underwriter of the ship could take over the freight in the course of being earned or earned by the ship after a casualty has occurred. The case of *Case v Davidson*[799] just reflected this principle.

In *Case v Davidson*,[800] Bayley J held a different view from the rest of the judges, that an acceptance of the notice of abandonment of the ship could vest in the underwriter the right to ask for the hull and tackle but no right to expect

[796] *Arnould*, at 29-62, note 320; See also *Jackson v Union Mar Ins Co* (1874) LR 10 CP 125
[797] *Thompson v Rowcroft* (1803) 4 East 34; *Leathem v Terry* (1803) 3 B & P 479; *M'Carthy v Abel* (1804) 5 East 388; *Sharp v Gladstone* (1805) 7 East 24; *Kerr v Osborne* (1808) 9 East 378; *Case v Davidson* (1816) 5 M & S 79; *Davidson v Case* (1820) 2 Brod & Bing 379
[798] In MIA 1906 s 63, it provides as: '(1) Where this is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary right incidental thereto; (2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.'
[799] *Case v Davidson* (1816) 5 M & S 79
[800] *Case v Davidson* (1816) 5 M & S 79; *Davidson v Case* (1820) 2 Brod & Bing 379

more than he has insured. He also stated that, supposing at the time of abandonment the voyage was nearly finished, it was unfair for the underwriter to get the freight of the whole voyage. Therefore he insisted that an abandonment of the ship should not carry with it the freight; this was against the opinion of the majority judges. The court finally held that, with a valid notice of abandonment, the hull, the use of the ship and the interest remaining on the ship would all be transferred to the underwriter of the ship and would not be affected by other contracts the assured had engaged in with a third party. In fact, after a valid abandonment, the underwriter became the new owner of the ship and would be entitled to all future benefit in place of the owner, so definitely the freight in the course of earning, and earned subsequent to the casualty occurring, should belong to the new owner. And accordingly, by a valid abandonment of ship, the underwriters on freight would inevitably be deprived of some rights which they should not have lost otherwise.[801] In addition, Abbott J quoted the abandonment as a sale of a ship, so that after a sale, the then earning of the freight belonged to the purchaser, and after abandonment, the then earning of freight belonged to the abandonee.

All these pre-statute cases perfectly reflected the doctrine in MIA 1906. However, the principle was altered in the ITCH (83); as cl 20 stipulates, in the event of a total loss (actual or constructive) of the ship, the underwriter of the ship shall make no claim for the freight whether notice of abandonment of the ship is given or not. Therefore, under a policy containing this Freight Waiver

[801] *Case v Davidson* (1816) 5 M & S 79 [83]-[84] (Lord Ellenborough CJ); See also *Sharpe v Gladstones* (1805) 7 East 24; *Morrison v Parsons* (1810) 2 Taunt 407; *Stewart v Greenock Marine Insurance Co* (1848) 2 HLC 159

Clause, the underwriters on ship give up their right to the freight in the course of earning or earned subsequent to the casualty occurs where there is a constructive total loss of the ship, so that such freight still belongs to the ship owner.[802] Furthermore the clause also protects the assured from a contention by the underwriter of the freight that there is no need for them to recover a total loss on freight for the assured, since the underwriter of the ship has already got the earnings.

A new question is evoked that, regardless of the Freight Waiver Clause, to whom the freight, earned before notice of abandonment on ship was given, might belong. It has long been settled that if the whole or a portion of the freight was already earned before the casualty occurred, such freight has no relationship with the underwriter of the ship.[803]

Up to now, there is no settled law to stipulate the obscure principles mentioned above, such as, whether constructive total loss of freight exists, and in a case notice of abandonment of freight could be excused, whether the freight was an actual total loss or still a constructive total loss. Actually both sides have supporters and it is regarded as the least important thing to have certain answers to those questions. In any event the doctrines of constructive total loss and abandonment on ship, goods and freight are the same, but apparently the application of such doctrines for intangible objects like freight would be with difficulty. Theoretically with the notice of abandonment of freight, the

[802] Institute Time Clauses 1983 clause 20: ' In the event of total or constructive total loss no claim to be made by the underwriters for freight whether notice of abandonment has been given or not.' See also *Coker v Bolton* [1912] 3 KB 315

[803] *The Red Sea* [1896] P 20; See also *Luke v Lyde* (1759) 2 Burr 882; *Thompson v Rowcroft* (1803) 4 East 34 [44] (Le Blanc J)

underwriter would be entitled to the chance to gain the freight but the vexed part is to determine when abandonment could be excused and when it would be necessary; or to say, how to distinguish a constructive total loss and an actual total loss on freight. Actually the doctrine of constructive total loss of freight exists theoretically, and may also exist in practice.[804] For freight there is no obvious gap between an actual total loss and a constructive total loss and the truth is that till now no case of an action for a total loss of freight has ever been reported as being defeated for lack of a notice of abandonment.[805]

6.4 Conclusion

The policy on freight was shaped in the strictest sense in olden times and there are two basic points to be concerned with in order to ascertain a total loss for freight; in the first stage, it is to check whether the right has commenced, which would usually be according to the words of the charter-party, and secondly, it is to see whether the loss is caused by perils insured against. The underwriter was not answerable for loss due to the assured's own fault or the circumstances in which it has been earned and then deprived of, by reason of it being irrelevant to the contract.[806]

The loss of freight has a close relationship to the state of the ship or the goods while it is not equally true to say a total loss on freight is established on the facts of a total loss on the ship or the goods. It was impossible to reach a

[804] *Arnould*, at 29-62
[805] *Arnould*, at 29-63; See also *Popham v St Petersburg Ins Co* (1904) 10 Com Cas 31, 33
[806] See *Scottish Marine Insurance Co v Turner* (1853) 15 D HL 33 (HL) 35 (Lord Truro)

conclusion about a certain principle for total loss of freight and the results always relied upon different facts. The MIA 1906 speaks little on insurance of freight. This is mainly due to the fact that an agreement on this issue could not be reached during the drafting of the Bill. Moreover, few cases on a total loss of freight could be drawn upon to settle the law of constructive total loss on freight, and this has impeded the development of this issue in statute law.

Most modern cases adopt the Institute Clauses to ascertain a total loss on freight, which provides that the assured could recover the freight by providing the proof that an actual or a constructive total loss has occurred to the ship and there is no need to prove the amount of freight at risk.[807] Under the Institute Clauses, if there is a constructive total loss on the ship but the assured has elected not to give notice of abandonment and repaired her, a claim for a total loss of freight would failed; this overruled the early authorities.[808]

Since loss of freight is an intangible loss, it always causes disputes as to whether constructive total loss on freight exists in reality or whether notice of abandonment is needed when claiming for a total loss of freight. Brett J declined to accept the view that there existed no constructive total loss in the realm of the freight and held that when the circumstances made the ultimate earning of freight highly doubtful, but without destroying all hope of eventually earning it, then the notice of abandonment was requisite to claim for a constructive total loss of the freight: for example, where there was a total loss of the ship and it was not certain whether the goods could be carried by a

[807] ITC Freight, clause 15; IVC Freight, clause 13
[808] *Petros M Nomikos Ltd. V Robertson* (1939) 59 Ll L Rep 182; 61 Ll L Rep 105

substituted ship; or where there was a total loss of the goods and it was not certain whether the ship could earn the freight by carrying some other goods during the voyage.[809]

Controversy was evoked when there were constructive total losses both on ship and freight and notice of abandonment given to both underwriters respectively and accepted by them; who on earth would be entitled to take the benefit of the freight if it had been earned by the same ship in the end? Under the case law, the principle on this issue was set that the underwriters of the ship would be entitled to all future benefit as the new owner after a valid abandonment; but there was nothing relating to the freight earned before the casualty, and accordingly the underwriters on freight would inevitably be deprived of some rights which they should not have lost otherwise.[810] However, the principle was altered in the Institute Time Clauses 1983; cl.20 provides, in the event of a total loss (actual or constructive) of the ship, the underwriter of the ship shall make no claim for the freight whether notice of abandonment of the ship has been given or not.

[809] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J)
[810] *Case v Davidson* (1816) 5 M & S 79 [83]-[84] (Lord Ellenborough CJ); See also *Sharpe v Gladstones* (1805) 7 East 24; *Morrison v Parsons* (1810) 2 Taunt 407; *Stewart v Greenock Marine Insurance Co* (1848) 2 HLC 159

Chapter 7 Whether the rule of constructive total loss is applicable to non-marine insurance

Considering the benefits of constructive total loss to the marine insurance market, it is of significance to explore the possibility of applying such principle to non-marine realm. This chapter analyses the doctrine of constructive total loss in non-marine setting: the arguments for and against the application of the considerations for applying the concept of constructive total loss in the non-marine market. As far as the non-marine insurance is concerned, there are three types of total loss: physical impossibility, losing identity and the irretrievable deprivation of the possession of the subject matter insured. The subject matter of this chapter, whether considerations of constructive total loss or a commercial loss could amount to a total loss in non-marine insurance, shall be examined in detail. As Bankes LJ explained in *Moore v Evans*

> The word 'loss' in such a policy as this may have a very different meaning when applied to perishable goods, or to goods warehoused at a heavy rent, from what should be attributed to it when applied to such goods as pearls and jewellery when detained under the circumstances of the present case.[811]

In order to make it clear whether the rule of 'commercial loss' is applicable to the realm of non-marine insurance, on the first hand the three types of non-marine loss should respectively be studied. The term 'commercial loss' in

[811] *Moore v Evans* [1917] 1 KB 458 (KB) 471

non-marine insurance might be treated as the counterpart of 'constructive total loss' in the marine area. To be specific, drawing from the experience of the definition of constructive total loss in MIA 1906, there is a commercial loss of the subject matter of non-marine insurance, where the assured is deprived of possession of the subject matter insured, and (a) it is uncertain, rather than unlikely, that, he can recover the insured property, as the case may be, or (b) the cost of recovering the insured subject, as the case may be, would exceed their value when recovered; or in the case of damage to, or warehousing, the insured subject matter, the cost of repairing or warehousing it would exceed its value when repaired, or that before the assured could dispose of it.[812]

7.1 The trend to make the doctrine of constructive total loss apply in non-marine insurance

The rule of constructive total loss and notice of abandonment are peculiar concepts to the realm of marine insurance and not applicable to non-marine insurance.[813] Thus, Brett LJ said that he had seen no application of constructive total loss coupled with notice of abandonment in any indemnity contract other than that of marine insurance.[814] Also, Rix LJ agreed with the above view, and stated that, 'the doctrine of constructive total loss is a special feature of marine insurance law and is not found outside marine insurance'.[815]

[812] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31-32; *Moore v Evans* [1917] 1 KB 458 (KB) 469; *Holmes v Payne* [1930] 2 KB 301 (KB) 310; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531-32; 1906 MIA, s 60

[813] *Assicurazioni Generali v Bessie Morris Co* [1892] 2 QB 652; *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277, [2004] 2 CLC 68 (Rix LJ); *Moore v Evans* [1918] 1 AC 185; *Arnould*, at 28-01, fn 3

[814] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471

[815] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]

In light of His Lordship's opinion in *The Kastor Too case*,[816] in non-marine insurance, there were only two kinds of concepts as to loss: actual and partial loss, differing from marine insurance in which there was also an intermediate concept - constructive total loss.[817] In other words, unless otherwise provided in the non-marine policy, a total loss merely referred to an actual total loss.

However, about a century ago, it was suggested that the doctrine of constructive total loss, or at least its considerations, should also be applied to non-marine insurance.[818] Indeed, there are authorities which have made an analogy between marine constructive total loss with commercial loss in non-marine insurance, seemingly holding that, in determining whether there is a non-marine loss, considerations of decisions when dealing with constructive total loss may be helpful.[819] It is thus not necessarily right that the assured under a non-marine policy can recover a total loss only where it has suffered an actual total loss, i.e. destruction, loss of identity and permanent seizure. As is said in *Arnould*, although constructive total loss is a peculiar concept in marine insurance, it does not necessarily mean that a total loss within the meaning of the non-marine policy is restricted to physical destruction or absolute irrecoverability.[820] Other factors might also affect the recovery of non-marine property insured: where the cost of recovering or repairing is not commensurate with the value recovered or repaired, the assured may still be entitled to recover a total loss. In addition, in cases of deprivation of

[816] *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277, [2004] 2 CLC 68 [8] (Rix LJ)
[817] *Roux v Salvador* (1836) 3 Bing N C 266 [286]
[818] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[819] *Mitsui v Mumford* [1915] 2 KB 27; *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357; *Moore v Evans* [1918] 1 AC 185
[820] *Arnould*, at 29-01, fn 6; *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31

possession of the subject matter of non-marine insurance, it seems that there would be a total loss within the meaning of the policy, if the assured can prove the uncertainty, rather than the unlikelihood, of the recovery of the insured chattel.[821] In short, in non-marine insurance, in the case of deprivation of possession of the insured subject matter, it appears that, the assured can be entitled to claim for a total loss, whereas in similar situations in marine insurance he may claim for a constructive total loss with due notice of abandonment given.[822]

7.2 Grounds for the extension of application relating to considerations of constructive total loss to non-marine insurance

7.2.1 Considerations of constructive total loss seem to be able to assist in deciding a commercial loss in non-marine insurance

7.2.1.1 No loss either actual or commercial

In the case of *Mitsui v Mumford,*[823] the court needed to address whether the assured could be entitled to recover a total or constructive total loss under a non-marine policy. The policy was agreed to cover the period of three months from August 4th to November 3rd 1914. The war risks were insured against. On October 9th Germany took and occupied Antwerp, where the assured

[821] *Holmes v Payne* [1930] 2 KB 301 (KB) 310; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531-32
[822] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]; *Arnould*, at 28-01, fn 3
[823] *Mitsui v Mumford* [1915] 2 KB 27

warehoused his insured goods as timber. The assured after giving notice of abandonment on October 14th claimed for a loss under the policy, relying on the fact that, because of the occupation of his warehouse by Germans, it was not clear when they could trade them.

The court held that, the plaintiff assured could not recover for a total or commercial loss, because the insured timber was still in the hands of the assured's agent, and there was thus no seizure by Germany during the life of the cover. Owing to having no absolute irrecoverability of the timber, there was no actual total loss. In the case of deprivation of possession of the subject matter under a non-marine policy, the assured could not claim for a commercial loss until he could prove either the uncertainty of recovering the insured property, or the incommensurate cost of its recovering or warehousing. Thus, in order to claim for a commercial loss, the assured needed to prove two aspects: his dispossession of the insured property and the uncertainty as to its recovery, or the incommensurate cost. Since there was no deprivation of possession by the Germans, the condition precedent of claiming a commercial loss was absent; the assured thus did not need to give proof of the uncertainty or the incommensurate cost; he accordingly suffered no commercial loss. In other words, even though a commercial loss, which could play a similar role of constructive total loss in order to put a loss within the meaning of the non-marine policy at issue, it might be within the meaning of total loss or actual total loss covered by the policy, but owing to the lack of dispossession, there was no commercial loss in this case.

7.2.1.2 Different terms of 'constructive total loss' and 'commercial loss'

It appeared that Bailhache J thought that in form it was wrong to use the term 'constructive total loss' coupled with notice of abandonment in non-marine insurance. However, it did not necessarily mean that a 'commercial loss', which was in form not a 'constructive total loss', but substantially similar to it, could not be applicable to non-marine insurance.[824] Bankes LJ was in favour of the view of Bailhache J, and then gave the opinion that the law as to 'constructive total loss' was not applicable to non-marine insurance, but there were common considerations as to the loss under contracts of marine insurance and non-marine insurance.[825] Thus, it was no surprise to see that Bailhache J would have treated the non-marine case as total loss, if, having given notice of abandonment, the assured in the same circumstances had been entitled to claim for a constructive total loss in marine insurance cases. The reason why the term 'constructive total loss', as well as that of notice of abandonment, could not apply to non-marine insurance was because the terms were peculiar to marine insurance.[826] However, in the opinion of Bailhache J, a non-marine policy, purporting to cover a loss, or an actual total loss, caused by perils insured against, should cover a 'commercial loss' of the subject matter of the non-marine insurance at issue.[827]

On the face of it, a total loss in non-marine insurance thus should not be narrowly understood as an actual total loss. Even though an assured under a

[824] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31-32
[825] *Moore v Evans* [1917] 1 KB 458 (KB) 469
[826] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[827] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31

non-marine policy could not derive assistance from the principle of constructive total loss, he could recover for a commercial loss arising from perils insured against under the policy. Thus, an assured under such a policy should be entitled, after abandonment, to recover a commercial loss as an actual total loss, where the assured had been deprived of the possession of the insured subject matter, and it was uncertain that he could recover the insured property, or the cost of storing would exceed the value of the insured subject matter before the assured could sell it.[828]

Furthermore, Bailhache J gave the opinion based on the judgement of Blackburn J that, a person under every kind of insurance, not confined to marine insurance, having been compensated by insurers should abandon his rights to the insured property to the latter.[829] However, as discussed in Chapter Four, it is noteworthy that abandonment was different from notice of abandonment, and the latter was not a precedent condition for the assured recovering a commercial loss. This was because notice of abandonment was limited to constructive total loss, and not known outside marine insurance.[830]

7.2.1.3 Elements of constructive total loss should be considered when testing for the existence of a commercial loss in non-marine insurance

In conclusion, it seems that *Mitsui v Mumford* approves of the application of the rule similar to 'constructive total loss', that is, a commercial loss in

[828] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[829] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[830] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31

non-marine insurance, and it supports the view that, in non-marine insurance, a total loss is not only confined to an actual one. Specifically, considerations taken into account for constructive total loss in marine insurance should also be taken into account for a commercial loss covered by a policy in non-marine insurance.[831] For example, where the assured has been dispossessed of the subject matter of non-marine insurance, and it would be dispossessed of it for so long a time that the cost of warehousing would exceed its value before he could dispose of it, there should be a loss within the meaning of the policy. As can be seen, the comparison between the cost of warehousing and the value of the insured thing has been considered. In addition, in the case of deprivation, when to determine whether the assured has suffered a loss within the meaning of the non-marine policy, the uncertainty of recovering the subject matter insured may be considered, as with the previous test to a constructive total loss before the enactment of the 1906 MIA.[832] Thus, it seems s 60 of the 1906 MIA defining constructive total loss can assist to determine whether an assured has suffered a commercial loss of the subject matter insured in non-marine insurance. However, this does not mean that the law as to constructive total loss can be directly applicable to a non-marine insurance case. Thus, the approach adopted in the case of *Campbell & Phillips Ltd v Denman*,[833] that the judge directly applied the principle of constructive total loss when dealing with a policy on non-marine goods, may be incorrect. On the other hand, in non-marine insurance, where the assured has been deprived of the possession of his goods, and the cost of recovering or warehousing will exceed the value of the subject matter insured, it may be a commercial loss

[831] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[832] *Holmes v Payne* [1930] 2 KB 301 (KB) 310
[833] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357

purported to be covered by the policy in question.[834] Therefore, for the above situation of a commercial loss, in marine insurance, the doctrine of constructive total loss, despite not having a direct application, can assist an assured to recover an actual total loss. By contrast, in non-marine insurance, the commercial loss can also be deemed to be covered by the policy intended to be against the loss of the subject matter insured.

7.2.2 Considerations of a constructive total loss adopted in aviation insurance

7.2.2.1 No direct application of the rule as to a constructive total loss in aviation insurance

In the case of *Scott v Copenhagen Reinsurance Co (UK) Ltd* (the facts of which was the same as *Kuwait Airways Corpn v Kuwait Insurance Co SAK*, which will be discussed later) concerning seizure of the British Airways (BA) jet by the invading Iraqi forces, the aircraft was caught at Kuwait airport at the time of the Iraqi invasion and subsequently damaged by coalition fire.[835] Based on the judgement of *Moore v Evans*,[836] Langley J held that the doctrine of constructive total loss was not accepted outside marine insurance. Also, since aviation insurance was not marine insurance,[837] and the case was aviation insurance, it was thus held that the claim for constructive total loss failed. On appeal, Rix LJ, also relying on *Moore v Evans*, held that the rule of

[834] *Mitsui v Mumford* [1915] 2 KB 27; *Moore v Evans* [1917] 1 KB 458 (KB) 469
[835] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696
[836] *Moore v Evans* [1918] AC 185
[837] *Kuwait Airways Corporation and Kuwait Insurance Company* [1999] 1 Lloyd's Rep 803, 809

constructive total loss was only confined to marine insurance, and therefore could not be applied to the case at issue as an aviation insurance.[838] In ascertaining whether BA had suffered a total loss, Rix LJ held that the BA airplane was not totally lost due to dispossession of the aircraft insured, but the issue as to whether a total loss had occurred was a 'wait and see' situation.[839] In other words, the BA airplane was not totally lost at the time of invasion, but, due to the later change as its destruction by the allied bombing, it had suffered a total loss at the time of destruction.

It could be concluded that, although both Langley J and Rix LJ gave the judgement that the rule of constructive total loss had no application to non-marine insurance, they gave no further explanation for the reason why there was no such application. Additionally, in light of the judgement of Rix LJ, for seizure at the time of invasion not physical destruction, the test of irretrievable deprivation to an actual total loss was not applicable to the case at issue, viz. the court did not use the definition of an actual total loss under s 57(1) of the MIA 1906 to decide whether the loss in this case was total.[840] The test of 'wait and see' was adopted instead, which meant that the ingredients of a constructive total loss had been taken into account.[841] In other words, the court needed to look at: where in this case the airplane had been seized, and whether it was uncertain that the assured could recover the subject matter insured within a reasonable time. Of course, just as in this case, where the fate of the insured airplane turned out to be physical destruction, it was indeed an

[838] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [38]
[839] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]-[77]
[840] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]
[841] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]-[77]

actual total loss under s 57(1) of the MIA 1906.

7.2.2.2 Considerations of the rule as to a constructive total loss can contribute to determine a total loss in non-marine insurance

7.2.2.2.1 Facts

In *Kuwait Airways Corpn v Kuwait Insurance Co SAK (KAC v KIC)*,[842] a case concerning seizure of planes by Iraqi forces, Iraq invaded Kuwait in the early morning of August 2nd 1990. One of the main purposes of the invasion was to control Kuwait airport. By mid-morning, the Iraqis were in control of the airport, including 15 airplanes and spares belonging to KAC, and 14 of the 15 airplanes had left Kuwait by August 8th. In this case, Rix J needed to deal with the issue as to whether the aircrafts had already been lost on August 2nd; otherwise the assured could only suffer a loss when the aircrafts had flown away.

7.2.2.2.2 No application but considerations matter

Rix J held that the assured, KAC, had suffered a loss of the aircrafts on August 2nd, upon the basis that, KAC had been deprived of its possession and control of their airplanes and it was uncertain that KAC could recover the airplanes on that day. Rix J noticed that the tests to a total loss in the realm of non-marine and marine insurance were different: that the former was the uncertainty of

[842] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664

recovery while the latter was the unlikelihood of recovery.[843] It could be concluded that the learned judge had rejected the direct application of the rule of constructive total loss to this non-marine aviation insurance. Nonetheless, the considerations of the concept of constructive total loss were taken into account by Rix J: in the event of dispossession, as the seizure of the airplanes in this case, it was an actual total loss where the recovery of the airplanes was uncertain. It was also a proof that in non-marine insurance the ambit of an actual total loss was larger than that of an actual total loss in marine insurance where an actual total loss had to be rigorously applied because there also existed detailed criteria for the assured to claim for a constructive total loss.[844]

7.2.2.3 Seizure - one sort of deprivation of possession

7.2.2.3.1 Whether there is a deprivation of possession should be ascertained first

When encountering a prima facie case of dispossession, whether there is a dispossession should be first analysed; that is what could distinguish the case of *KAC v KIC*[845] from the cases of *Mitsui and Moore*. In the latter two cases, in spite of the outbreak of war, during the life of the policies, due to the subject matter insured being in the hands of the agent or persons entrusted by the assured, there was no loss by seizure because there was no deprivation of possession of the subject matter insured.

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[843] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 686
[844] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]
[845] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664

7.2.2.3.2 Whether there is a total loss must depend upon the facts in a case of seizure

When there does exist a dispossession, such as cases of seizure and ransom, the judgement as to whether the assured needed to wait and see whether the recovery of the subject matter is uncertain must depend on the facts of each case. In other words, whether there is a total loss in non-marine insurance must depend upon the facts and the ingredients of the rule of law. For example, the facts of *Scott* are the same as that of *KAC v KIC*. The facts that airplanes belonged to different countries, leading to different outcomes as to whether ingredients of the rule of law were satisfied, gave rise to different results as to the assured's claim in each case for a total loss. In the *KAC v KIC* case, owing to one of the Iraqi military targets being Kuwait airport, as a result of invasion, there was a total loss. This was because on its facts there was a dispossession and it was uncertain that possession would be recovered within a reasonable time. It was clear that the facts of *KAC v KIC* had satisfied the considerations of a constructive total loss. By contrast, in the case of *Scott,* the evidence had established that the BA aircraft was not one target of the Iraqi invasion, meaning that it was a wait and see situation.[846] Because at the time of dispossession of the BA aircraft, a person did not know whether or not it was uncertain that the assured could make recovery; he must wait and see the future process of change and development. The facts of *Scott* did not satisfy the considerations of a constructive total loss.

[846] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696, 697

7.2.2.3.3 No rule of law that seizure is an actual total loss[847]

A circumstance of seizure does not necessarily lead to an actual total loss, but it cannot be denied that it may actually be a matter of fact. The determinative factor as to the definition of an actual total loss is that of a physical or legal impossibility,[848] and for the case of dispossession discussed here, it is the deprivation of possession of the property insured being irretrievable.[849] Thus, in the event of seizure, it is not an actual total loss, where by paying a ransom, either being a comparatively small sum, relative to the value of the subject matter insured,[850] or a very high expenditure,[851] the assured can recover the subject matter insured. It is an actual total loss where the subject matter insured has been seized and there is no prospect of recovering the subject matter insured. For instance, a person who has seized it escapes with the intent to take dominion over the property insured and it is impossible for the assured to find or recover it.[852] That is to say, the assured will be irretrievably dispossessed of the subject matter insured.

7.2.2.3.4 No rule of law that seizure is a commercial loss[853]

Additionally, the situation of seizure will not necessarily result in a commercial

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[847] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[848] *Cohen (George), Sons & Co v Standard Marine Insurance Co* (1925) 21 Ll L Rep 30, 33
[849] 1906 MIA, s 57(1)
[850] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[851] *Cohen (George), Sons & Co v Standard Marine Insurance Co* (1925) 21 Ll L Rep 30, 33
[852] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[853] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

loss. In non-marine insurance, the assured must wait and see the uncertainty of recovery. It is not right to state that where there is a case of deprivation of possession such as seizure, by which a ransom has been required for the release of the subject matter insured, there will be a total loss at the time of seizure, or a commercial loss as the counterpart of a constructive total loss. In other words, mere deprivation of possession itself cannot determine the existence of a commercial loss. In this situation, in the context of non-marine insurance, to wait and see whether it is uncertain that the assured can recover the subject matter insured is the determinative ingredient as to the occurrence of a commercial loss, one type of a total loss. In addition, the loss can even be an actual one, where the definition of actual total loss has been satisfied as the ultimate fate of the subject matter insured terminating in destruction.[854]

On the occurrence of seizure in the general sense, no immediate total loss occurs. Instead, the assured needs to wait and see whether there is a total loss or at what stage a total loss has occurred.[855] However, although a seizure is a typical 'wait and see' situation, and it does not necessarily give rise to a commercial loss, it can be noted that in order to decide whether a total loss has occurred the considerations of a constructive total loss could be taken into account. It can thus be concluded that the concept of a commercial loss can be introduced into the realm of non-marine insurance, so that the rule of law as to a total loss in non-marine insurance can be clear and certain, and that the confusion can be cleared away that the rule of a constructive total loss does

[854] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688
[855] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

not apply to non-marine insurance but considerations of which can be taken into account for the purpose of the existing of a non-marine total loss.

In addition, even though a seizure in general is a typical 'wait and see' situation, the exception is hostile seizure, such as in the case of *KAC v KIC*, where there was a hostile seizure; in other words, with intent to take dominion over the possession or right to the subject matter insured from the outset, there would be an immediate total loss; for it was uncertain that the assured could recover the subject matter insured within a reasonable time, even though the subject matter insured might subsequently be recovered.[856]

7.2.2.3.5 Whether the loss by seizure could be analysed from the perspective of irretrievable deprivation based upon s 57 of MIA 1906

Under the circumstance of seizure, it can be observed that the assured has been deprived of possession of the subject matter insured. To claim for a total loss, in light of the fact that there is only one recognised form of total loss as an actual one, the assured may in accordance with the definition of s 57(1) of the 1906 MIA submit that he has suffered an actual total loss because he has been irretrievably deprived of the subject matter insured. Whether the deprivation is irretrievable is a matter of fact. Taking the examples of the case of *Scott*, it was held that there was no irretrievable deprivation of the subject matter insured at the time of Iraqi invasion, because a loss by capture in marine insurance, or the general seizure in non-marine insurance could not be

[856] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 686

deemed to be irretrievable.[857] However, owing to the concept of an actual total loss in non-marine insurance being wider than that in marine insurance, the assured is also entitled to treat it as an actual total loss that he has been dispossessed of the subject matter insured and its recovery is uncertain. For the purpose of this chapter, it could be referred to as a commercial loss, rather than an actual total loss caused by permanent seizure. That was the judgement of the case of *KAC v KIC*. Again, in this case, despite a hostile seizure situation, the test of irretrievable deprivation was not adopted, because on the facts of this case there was a possibility of subsequent recovery.[858]

Upon the analysis above, in the situation of seizure where a question whether there is a total loss needs to be dealt with, there are two ways to achieve this goal: firstly, the test of irretrievable deprivation arising out of the definition of an actual total loss under 57(1) of the 1906 MIA can be adopted; secondly, in light of the fact that in non-marine insurance an actual total loss can embrace a commercial loss, viz. the considerations of a constructive total loss could be taken into account to scrutinise whether the facts of the case at issue have satisfied them. In other words, where there is a dispossession situation, either test of irretrievable deprivation, or uncertainty of recovery within a reasonable time or incommensurate cost of recovery could help to ascertain whether a total loss has ever occurred; and it would depend upon the facts as to the decision of which test to adopt.

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[857] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]; *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]; *Arnould*, at 28-03, fn 10

[858] *Arnould*, at 28-03, fn 10

7.2.2.4 Scrutinising the considerations of constructive total loss under s 60(2)(i)(a) of the 1906 MIA

In light of the fact that, although the rule of constructive total loss is not applicable to non-marine insurance, in the event of dispossession, ingredients of constructive total loss could be considered in ascertaining whether there is a non-marine total loss. Therefore, there is a need to scrutinise the considerations of constructive total loss.

7.2.2.4.1 The widely construed meaning of 'possession'

Under s 60(2)(i)(a) of the 1906 MIA, as to the meaning of 'the deprivation of possession', this terminology of 'possession' should be widely construed, and not narrowly interpreted merely as the actual physical possession. Thus, the loss of possession is not limited to the loss of actual physical possession of the subject matter insured. To be specific, it may refer to 'control' or 'free use and disposal' of the subject matter insured for the construction of possession. As a result, an assured who has physically possessed the insured property, but lost the control of it, could be taken as having been deprived of possession,[859] and suffered a loss of the insured property.[860] It could thus be seen that 'control' is one interpretation of possession prior to the enactment of the MIA 1906. Also, where the assured owners had been wholly deprived of the free use and

[859] *Polurrian Steamship Co v Young* [1915] 1 KB 922; *Panamanian Oriental Steamship Corporation v Wright* [1970] 2 Lloyd's Rep 365
[860] *Cory v Burr* (1883) App Cas 393, 398; *Peele v The Merchants' Insurance Co* (1822) 3 Mason's Rep 27, 64

disposal of their vessel insured,[861] the court said that the loss of the free use and disposal could constitute the loss of possession.[862] In addition, where the assured has only sustained minor interference with his rights as an owner, it could not be regarded as him having suffered a loss of 'free' use and disposal.[863] To make it clearer, in order to satisfy the loss of 'free' use and disposal, minor interference is not sufficient to constitute a loss of possession; by contrast, the assured must be wholly deprived of 'free' use and disposal of the subject matter insured so as to constitute a loss of possession.[864] Again, it should be noted that the wording of 'possession' should be widely construed: even though it can be understood from the perspective of 'control' or 'free use and disposal', it does not necessarily mean that the concept of possession is confined to the above two meanings.[865]

7.2.2.4.2 'Within a reasonable time' or 'wait and see'

Under s 60(2)(i)(a) of the 1906 MIA, the test for a constructive total loss is the unlikelihood of recovery as to the subject matter insured. To be specific, it implicitly means that it is unlikely 'within a reasonable time' that he can recover the ship or goods.[866] Additionally, in the setting of non-marine insurance, it is submitted that, in the case of dispossession and making a claim for a total loss, one must 'wait and see' whether the recovery of the subject matter is uncertain.

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[861] *The Bamburi* [1982] 1 Lloyd's Rep 312, 317
[862] *The Bamburi* [1982] 1 Lloyd's Rep 312, 321
[863] *Royal Boskalis Westminster NV* v *Mountain* [1997] LRLR 523, 534
[864] *The Bamburi* [1982] 1 Lloyd's Rep 312, 317; *Royal Boskalis Westminster NV* v *Mountain* [1997] LRLR 523, 534; *Arnould*, at 29–17
[865] *Royal Boskalis Westminster NV* v *Mountain* [1997] LRLR 523, 534
[866] *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922 (KB) 937; *Roura & Fourgas v Townend* [1919] 1 KB 189 (KB) 194; *Robertson v Petros M Nomikos* [1939] AC 371 (AC) 383; *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523, 534; *Scott v Copenhagen Reins Co (UK) Ltd* [2003] Lloyd's Rep IR 696, 707

The term 'wait and see' has two senses: emergence of evidence about the initial dispossession and a situation in which it is subject to the process of development and change. In the context of s 60(2)(i)(a) of the 1906 MIA, it clearly refers to the latter.[867] Exceptions to the 'wait and see' principle are specifically illustrated casualties, for example, capture and pirates, or the intention to take dominion over the subject matter from the first,[868] such as cases of hostile seizure and theft.[869] Therefore, in the event of ransom, where the three planes were hijacked and then blown up, it was held that the planes were lost not at the time of hijacking, but at the time of explosions, because in the situation of dispossession, ransom in this case, to 'wait and see' whether it was uncertain to recover was necessary for the claim for a total loss.[870] Whether a person intends to take dominion over the subject matter at the outset is a matter of fact. For instance, it was such an intention where one of the main targets of the military was to plunder Kuwait's wealth, and the airport subsequently had been under the control of the military on August 2nd.[871]

It has been submitted that there are two meanings in relation to 'wait and see'. Firstly, in the words of Rix LJ, 'In its real sense, it refers to a situation which is subject to a process of development and change.'[872] This is the real sense which the judges have adopted to test whether the facts of the cases at issue has satisfied the considerations of a constructive total loss. Where there is a ransom, the court needs to wait and see whether the ransom has been paid

[867] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696, 716
[868] *Dawson's Field Award*
[869] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664
[870] *Dawson's Field Award*
[871] *Dawson's Field Award; Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 687
[872] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]

and whether or not the subject matter insured can be released. Where there is seizure in a general sense, the court needs to wait and see whether it becomes uncertain for the assured to recover his subject matter insured. Secondly, in the language of Rix LJ, 'In another sense, it might be used to refer to the emergence of evidence about the initial deprivation.'[873] The initial deprivation of a car may be by a joyrider or a thief. If the evidence proves that it has been taken by a joyrider, then it cannot be a total loss because it is possible that the car will soon be found and recovered. If taken by a thief, there will be a total loss at the time of theft. Therefore, it could be concluded that the process of change and development should be looked at to test whether the process has satisfied the considerations of a constructive total loss in ascertaining whether there is a total loss and it is a wait and see situation, viz. whether it is uncertain for the assured to cover the property insured.

7.2.2.4.3 Relationship between the two factors

In light of s 60(2)(i)(a) of the 1906 MIA, there are two factors for what could amount to a constructive total loss: deprivation of possession and non-recovery within a reasonable time. Generally speaking, the former in most cases cannot by itself decide whether a loss occurs; however, there are two exceptions, capture and specific intention, which have been set out above. By contrast, the latter is the decisive factor for a total loss.[874] It is submitted that even in the MIA 1906 deprivation of possession is only a *prima facie* basis for

[873] *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 [76]
[874] *Dawson's Field Award; Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

a case of a total loss and it is qualified by the unlikelihood of recovery[875] while in a non-marine insurance, it should be the uncertainty of recovery within a reasonable time to constitute a total loss. Therefore, Roche J in *Holmes v Payne* held that in non-marine policies on the question of an actual total loss the main consideration was the uncertainty of recovery of the subject matter insured.[876]

7.2.2.4.4 Reasons for the adoption of the unlikelihood test in marine insurance but uncertainty in non-marine insurance

In effect, a change of the test concerning constructive total loss in marine insurance has occurred: prior to the enactment of the 1906 MIA, the test was the uncertainty of recovery. It was submitted that the test of the unlikelihood of recovery referred to a balance of probabilities which tended then not to happen whereas on the test of uncertainty the scales would be level.[877] One of the reasons why the test of unlikelihood of recovery has been adopted may be due to its being external and objective. It has been concluded that to determine whether the assured is likely to recover a constructive total loss would be based on, not the judgement of the assured himself, but that of an uninsured reasonable owner. That is to say, the balance of probabilities should be made upon all facts at the relevant time, not merely on what is known to the assured.[878] Moreover, the state of the thing insured would be easy to be uncertain during carriage by sea, and the change from uncertainty to

[875] *Dawson's Field Award; Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688
[876] *Holmes v Payne* [1930] 2 KB 301
[877] *Rickards v Forrestal Land Co Ltd* [1942] AC 50 (AC) 87
[878] *Marstrand Fishing Co Ltd v Beer* (1937) 56 Ll L Rep 163, 173-4

unlikelihood lessens the burden of the underwriter, which would build a fairer principle for the marine insurance market since the principle of constructive total loss tends to better protect the assured. As is known to all, owing to the special nature of marine trade, the state of uncertainty of the thing insured occurs more frequently in a marine case than a non-marine case, which means the test of uncertainty for the latter would be good enough.

7.2.2.4.5 Four factors to determine a total loss in a case of deprivation of possession in non-marine insurance

7.2.2.4.5.1 Four factors

With regard to the issue as to how to ascertain whether and at what stage a total loss has occurred, the submission is as follows. In the situation of deprivation of possession in non-marine insurance, in ascertaining whether a total loss, or at what stage a loss, has occurred, the considerations of the facts relating to deprivation of possession and uncertainty of recovery should be taken into account. In addition, the other two factors, viz. the whereabouts of the subject matter insured and the intention of the person or persons involved should also be considered.[879]

[879] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531-2; *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

7.2.2.4.5.2 Dispossession and uncertainty

There is no space for the application of constructive total loss to non-marine insurance. Nonetheless, as can be seen below, the considerations of constructive total loss have been taken into account in non-marine authorities.[880] The facts of each case are definitely the fundamental basis for the decision as to whether a total loss has occurred, and whether an owner is deprived of possession of the subject matter insured needs firstly to be scrutinised. In some cases, there is not even a dispossession, let alone a loss.[881] Also, in the case of dispossession, the considerations of constructive total loss may also be the core ingredients of a total loss in non-marine insurance, especially the factor relating to uncertainty of recovery, despite the test being unlikelihood in the marine area.[882] Comparatively speaking, the whereabouts of the subject matter plays a less crucial role in deciding a total loss in a non-marine case. In some cases, where the whereabouts of the subject matter are unknown, despite being traced subsequently, such as in a case of theft, there indeed exist total losses;[883] whereas in some cases even where the whereabouts of the subject matter are known, depending on the facts of the case, it could still be a total loss.[884]

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[880] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531-2

[881] *Mitsui v Mumford* [1915] 2 KB 27; *Moore v Evans* [1918] AC 185

[882] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

[883] *Dawson's Field Award; cited in Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 688

[884] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 532

7.2.2.4.5.3 Uncertainty is significant

Amongst the four factors to determine when and at what stage a loss occurs, the key point is to wait and see whether the recovery is uncertain. The factor of the intention of the person having seized the property insured just assists to decide whether the recovery of the subject matter insured is uncertain. Thus, normally an intention of exercising dominion over the property insured itself could not decide whether the seizure is a total loss. Therefore, in the event of dispossession, such as seizure, a clear intent at the time of deprivation to permanently deprive the owner of title or possession of the subject matter insured itself cannot constitute an actual total loss in non-marine insurance; the decisive factor is the uncertainty of recovery.[885]

Whether an actual total loss has occurred by the seizure of the subject matter insured is not amenable to a rule of law; instead it depends on the facts of each case. In the case of seizure of planes, it would not be an actual total loss where by paying ransom the subject matter insured could be recovered. On the other hand, it could amount to such a total loss in the circumstances where the property insured had been irretrievably deprived of as in total destruction. However, even in such circumstances it might be not an actual total loss where, even though the loss was irretrievable, on the facts of the case there might be a chance of recovery.[886] By contrast, also in the case of seizure of planes, it would not be an actual total loss where by paying a ransom it was not

[885] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[886] *Dawson's Field Award; Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]

uncertain that the subject matter insured could be recovered; however, it would be an actual total loss if the result turned out to be uncertainty of recovery, even though there was a chance of recovery; this was different from the situation as an actual total loss by permanent seizure.[887]

7.2.2.4.5.4 Actual total loss from the perspective of permanent seizure

Generally speaking, it could not amount to an actual total loss where the loss of the property insured has been irretrievable but there may be still a chance of recovery.[888] Relying on the facts of the case at issue, it is an actual total loss, where not only is there clear intent at the time of dispossession to permanently deprive the owner of possession or ownership, but noticeably the owner has indeed subsequently lost the title of the insured subject matter. [889] Nonetheless, it could not be deemed an actual total loss, where there is intent to take dominion over the property at the beginning, but there is a chance to recover it. For instance, the subject matter insured has been seized and the person who has seized them intends from the outset to deprive the owner of the title to the aircrafts, but there is still a chance of recovery, viz. if the title has not been lost, it consequently is not an actual total loss.[890] However, as in the authority of *KAC v KIC,* it has been held that it is an actual total loss where, with hostile seizure, it is uncertain that the assured can recover the subject matter insured even though there is a chance of recovery.

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[887] *Dawson's Field Award; Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[888] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]
[889] *Arnould*, at 24-17
[890] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [56]

7.2.3 Test of uncertainty from pre-statute cases has been considered in determining a non-marine loss in the case of the dispossession of household goods

7.2.3.1 The test for constructive total loss should be considered in the cases of non-marine loss

In the judgement of Roche J in *Holmes v Payne*,[891] it was held that, in a non-marine insurance policy, at any rate, one of personal effects, there was a loss within the meaning of the policy if the assured could show that it was uncertain that he could recover the subject matter insured. In this case, one of the issues before the court was whether the property insured had been lost. The assured had insured her loss derived from the loss of, or damage to, her necklace under the non-marine policy. She then noticed it was missing and made a diligent search in her house for it, but could not find it. An agreement for the replacement of the necklace was afterwards contracted between the assured and the insurer. Since the assured afterwards found the necklace in her house, the insurer thus alleged that he should be entitled to the relief of his burden of indemnification because the assured had suffered no loss.

On the face of it, Roche J in effect held that the test for constructive total loss, or at least a commercial loss, was applicable to non-marine insurance, at least on personal effects such as a necklace, although the judge did not directly hold that the rule of constructive total loss could be applied in non-marine cases.

[891] *Holmes v Payne* [1930] 2 KB 301

The judge directly adopted the considerations of a constructive total loss to decide whether the property insured had been lost. 'Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters the main consideration on the question of loss.'[892] That was to say, in the case of deprivation of possession of a necklace insured, where the assured could prove that the recovery of the necklace was uncertain, he could be entitled to claim for its loss because he had suffered a loss within the meaning of the policy. Although there was a change of the test to a constructive total loss from the 'unlikelihood' to the 'uncertainty', of the recovery of the insured subject matter,[893] it could not be denied that the considerations of a constructive total loss or a commercial loss, rather than the rule of constructive total loss had been used to determine the existence of a non-marine loss.

It should be noted that an actual total loss arising from a commercial loss is different from that under the definition of the MIA 1906 s 57(1): for the former, it is still an actual total loss although there is a chance that the property insured can be discovered or recovered, while under the MIA 1906 s 57(1) it is not where there is a chance of recovery. Roche J in his judgement expressed the opinion that an analogy could be made between the loss in the current case and being occasioned by capture. In the case of capture of ships or her goods, where it was uncertain the assured would recover his property, it could be said that he had suffered a constructive total loss; that is, he, having duly given a notice of abandonment, could on capture claim immediately for such a loss,

[892] *Holmes v Payne* [1930] 2 KB 301 (KB) 310
[893] *Polurrian Steamship Co v Young* [1915] 1 KB 922 (KB) 937; *Roura & Forgas v Townend* [1919] 1 KB 189

and was not obliged to await for the result of recapture,[894] 'though she be never condemned at all, nor carried into any port or fleet of the enemy';[895] likewise, the assured had suffered a loss within the policy, if he could show that it was uncertain for him to recover his insured things, viz. the insured property had been mislaid and was missing, and 'a reasonable time elapsed before they settled and … diligent search was made and was fruitless',[896] regardless of whether the thing insured was afterwards found, provided there was no mistake nor misrepresentation.

7.2.3.2 A constructive total loss in effect seems to be one kind of a non-marine total loss

It can be noted that, in light of the judgement of Roche J, a total loss in non-marine insurance seems not to be merely confined to an actual total loss. In the event of dispossession of the subject matter insured in a non-marine case, a total loss is not only referring to the physical impracticability, but also, it is such a loss if it is uncertain that an assured can recover his personal effects, for example, the insured property has been mislaid and is missing, and a reasonable time has elapsed and diligent search is fruitless. Namely, the considerations of constructive total loss have been taken into account: in the event of dispossession in a non-marine case, it is a total loss if it is uncertain that the assured can recover the property insured. Thus, even though there is no concept of constructive total loss in non-marine insurance, the steps the

[894] William Shee, *Marshall on the Law of Marine Insurance, Bottomry, and Respondentia* (4th edn, Shaw and Sons 1861) 403
[895] *Goss v Withers* (1758) 2 Burr 683
[896] *Holmes v Payne* [1930] 2 KB 301 (KB) 310

assured has taken, and the result of the claim, are just the same, as if he had taken them in a marine insurance in similar circumstances. It can thus be concluded that the rule of constructive total loss is not applicable to non-marine insurance, while the considerations of it, or the concept of commercial loss for the purpose of this chapter, could be applied in non-marine insurance. In addition, the extension of loss in non-marine insurance seemed to be in the judgement of Roche J, which signified that the rule of common law was established that a non-marine total loss could contain a commercial or physically impossible loss.

7.2.4 The law of constructive total loss has been directly applied to non-marine insurance

7.2.4.1 No actual and/or constructive total loss

Another case supporting the extension of constructive total loss to non-marine insurance is *Campbell & Phillips Ltd v Denman.*[897] In this case, the court applied Bailhache J's judgment in *Mitsui v Mumford.* In *Campbell & Phillips Ltd v Denman,* the court seemed to be of the view that, the rule of constructive total loss was applicable in non-marine insurance. In this case, the assured was covered by a non-marine Lloyd's policy, and a war then broke out between Germany and Great Britain. The German government requisitioned the assured's goods in December 1914, but the policy had expired on 26th October. The court held that the assured suffered no total and/or constructive

[897] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357

total loss for the following two reasons. There was no actual total loss on the basis that, before 26th October when the policy had expired, the assured did not necessarily permanently lose the goods or his possession of them, because the goods still remained during the currency of the policy in the warehouse in which the assured had stored them. This judgement directly applied the definition of actual total loss in marine insurance, provided for by s 57(1) of the 1906 MIA[898] to the non-marine insurance case. In addition, the argument of constructive total loss was not supported by the court, because the assured could not prove that, in this case there was no possibility of recovering the goods before the expiration of the policy. This opinion was also based on the law of marine insurance, which was the definition of a constructive total loss in s 60(2)(i)(a) of the 1906 MIA:[899] in such a situation, for the purpose of entitling the assured to claim for a constructive total loss, coupled with notice of abandonment, he had to prove that it was unlikely for him to recover the subject matter of the marine insurance.

7.2.4.2 The principle of constructive total loss seems to be applicable to non-marine insurance

Therefore, it can be deduced from this case that, in the event of deprivation of the possession of the subject matter in a non-marine case, if the assured was able to prove that it was unlikely for him to recover it, after giving notice of abandonment, he could claim for a constructive total loss, irrespective of the peculiarity of the concept to marine insurance; and that is, in fact, the means of

[898] MIA 1906, s 57
[899] MIA 1906, s 60(2)(i)(a)

testing the existence of constructive total loss in marine insurance.[900] It is noteworthy that, even though the court rejected the existence of constructive total loss on the facts of this case, it did not directly ignore its application to non-marine insurance. Instead, it took into considerations what should be taken into account where, in the same situation in marine insurance, an assured would claim for a constructive total loss. It could be concluded from the *Campbell* case that in ascertaining whether the assured under a non-marine policy has suffered a total loss, one can look at whether in the same situation he can claim for a constructive total loss in marine insurance, coupled with notice of abandonment; that is, s 60 of the 1906 MIA which provides for the concept of constructive total loss can be referred to.

On the face of it, the court thus extended the application of constructive total loss to the area of non-marine insurance and notice of abandonment was also referred to in the case of *Campbell*; but actually there is no concept of notice of abandonment in non-marine insurance. Notice of abandonment is a condition precedent to the assured's right to recover for a constructive total loss, without which the assured can only treat the constructive total loss as a partial loss.[901] The doctrine of notice of abandonment is regarded as unique to marine insurance, and it provides a special right to the assured so as to treat a constructive total loss as the loss, as if it were an actual total loss. Without the abandonment of the subject matter insured to the insurer, the assured cannot recover for a constructive total loss;[902] and subject to the provisions of s 62(1)

[900] MIA 1906, s 60
[901] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[902] 1906 MIA, s 61

of the 1906 MIA, in order to abandon the subject-matter insured to the insurer, he must give notice of abandonment.[903] In conclusion, the concept of notice of abandonment is not known outside marine insurance. The reason why it has been discussed in the non-marine case of *Campbell* is because it seems that the judge has held that the law as to constructive total loss is applicable to non-marine insurance.[904] Thus, the rule of notice of abandonment can also play the role of giving special rights to the assured under the non-marine insurance, just as its does in marine insurance. Additionally, according to the judgement of *Campbell,* in order to entitle the assured to claim for the full sum arising from a constructive total loss in non-marine insurance, the assured also must satisfy the condition precedent as giving a notice of abandonment.

By contrast, in *Moore v Evans,* Bankes LJ thought that the judgement of *Campbell* went too far; instead, he set out that it was not right to apply the rule of constructive total loss to non-marine insurance, on the basis that there existed two classes of loss in marine insurance, and, on the appearance of constructive total loss, the assured could elect to claim for a partial loss or get fully indemnified.[905] On appeal, Lord Atkinson disputed such an extension as well. His Lordship set out that the application of constructive total loss to marine insurance is based upon the nature of marine insurance, and the public policy of encouraging the development of marine trade and commerce,[906] which should not be applied to the non-marine area.

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[903] 1906 MIA, s 62(1)
[904] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[905] *Moore v Evans* [1917] 1 KB 458 (KB) 468
[906] *Moore v Evans* [1918] 1 AC 185

7.2.4.3 To constitute a commercial loss occasioned by dispossession under a non-marine policy: test of uncertainty or unlikelihood?

7.2.4.3.1 Test of unlikelihood rather than uncertainty in marine insurance

It should be noted that, as set out by s 60(2)(i)(a) of the 1906 MIA,[907] the test as to whether the deprivation of possession of the insured subject matter can constitute a constructive total loss is the unlikelihood of, rather than the uncertainty, of recovery of the insured property.[908] The test of uncertainty was a common law rule prior to the enactment of the 1906 MIA, which was later substituted by the test of unlikelihood.[909] Thus, in *Campbell & Phillips Ltd v Denman,* due to the direct adoption of the test of unlikelihood in ascertaining a constructive total loss in marine insurance by Bray J, it was held that the assured could not claim for a constructive total loss, even though it was uncertain whether the assured could recover the goods insured.

7.2.4.3.2 The test of uncertainty is sufficient to a non-marine loss

By contrast, in spite of the acknowledgement of the change of the test to a constructive total loss in marine insurance, where in the non-marine area, the assured had been deprived of the possession of the insured personal effects, in order to ascertain the existence of a total loss and whether the assured

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[907] MIA 1906, s 60(2)(i)(a)

[908] *Polurrian Steamship Co v Young* [1915] 1 KB 922 (KB) 937; *Roura & Forgas v Townend* [1919] 1 KB 189

[909] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [15]

could subsequently recover the insured property, it must be examined whether the recovery was 'uncertain', rather than 'unlikely' as in marine insurance. Thus, in the opinion of Roche J, the test for a constructive total loss in marine insurance should be the unlikelihood of recovery, whereas for a commercial loss in non-marine insurance it is the uncertainty as to recovery. Based upon the test of uncertainty, the learned judge held that, the assured suffered a loss of a necklace within the meaning of the policy, because the recovery of the necklace was uncertain: on the facts that, in the event of deprivation, a reasonable time as to a diligent search, and its recovery had elapsed; a diligent search had been made, and was fruitless.[910] Although the test for a constructive total loss in *Campbell & Phillips Ltd v Denman* and commercial loss in *Holmes v Payne* were different, yet notably it was common ground in these two cases that the considerations of a constructive total loss, regardless of the exact name, could be applied in non-marine cases.

In the case of an airplane hijacked for ransom and then blown up, the arbitrator (as he then was, later Kerr LJ) substituted the test of uncertainty of recovery for that of unlikelihood.[911] Again, where the aircrafts had been seized by the invading forces, the judge used the test of uncertainty of recovery to decide whether a total loss had occurred: there was a total loss of airplanes on August 2nd when the assured had been deprived of the possession of the airplanes insured and it was uncertain that the assured could recover them.[912]

[910] *Holmes v Payne* [1930] 2 KB 301 (KB) 310
[911] *Dawson's Field Award*
[912] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 686

It is essential to make explicit the meaning of 'uncertainty of recovery'. It has no relation with the length of time, i.e. whether the time of recovery is exact, but the fact whether the assured can ultimately recover the subject matter insured is what really matters. Where the subject matter can be ultimately recovered, but when that can be done is indefinite, there is no loss. Thus, assuming that the assured had put his belongings inside a cellar, which had been reduced to ruins by enemies, but not itself harmed, the military for the purpose of defence the realm had taken possession of the cellar. Although the time when the assured could recover the subject matter was indefinite, there was no loss, since the assured could ultimately recover the subject matter and the uncertainty of time was irrelevant.[913] Also, based on the above analysis, Rix J in *Moore v Evans* held that there was no loss of the subject matter as jewels, because there was no dispossession; and during the life of the policy the subject matter was in the hands of the consumers and the bank in whose hand they were to return them, i.e. the jewels could be recoverable, although when that could be done was uncertain.[914]

7.2.4.3.3 Subsequent discovery or recovery would generally not affect the existence of a loss in non-marine insurance – differing from marine insurance

In the judgement of Roche J, it was a loss within the meaning of the policy, as long as it was uncertain as to whether the assured could recover the subject matter of non-marine insurance, regardless of whether there was subsequent

[913] *Moore v Evans* [1917] 1 KB 458 (KB) 472
[914] *Moore v Evans* [1917] 1 KB 458 (KB) 472

discovery or recovery of the insured thing occurring.[915] Therefore, on the facts of *Holmes v Payne*, as, before the settlement of insurance, the assured had been dispossessed of the insured necklace, a reasonable time to allow a diligent search and recovery had elapsed, and such a search had been done but was unsuccessful; although the assured afterwards found her necklace in her house, it was still a total loss of the insured property.

Roche J held that, the rule of capture in marine insurance could be applied to the above circumstance. In the cases of capture, the assured could claim for a constructive total loss if the subject matter insured was captured, even though with no condemnation or confiscation, viz. the assured was not required to wait for the final fate of the insured property; but the consequence of restoration differs between marine and non-marine cases. As mentioned in Chapter One, a restoration before action brought might defeat the claim for a total loss and in a marine insurance case, the subsequent restoration could probably result, in that the assured could not claim for a constructive total loss in the following two circumstances. Firstly, it was well laid down that, by not giving a due notice of abandonment, the assured could not claim for a constructive total loss. In the circumstance of the absence of notice of abandonment, the assured was not entitled to recover the full sum insured.[916] Secondly, the contract of insurance on property, which was the contract of indemnity, was subject to the fundamental principle of the doctrine of indemnity. Therefore, the amount that the assured could recover was limited to what he had in fact suffered at the time the action brought. A subsequent restoration before action brought could

[915] *Holmes v Payne* [1930] 2 KB 301 (KB) 310-11
[916] *Roura & Forgas v Townend* [1919] 1 KB 189 (KB) 195-96

defeat the claim for a constructive total loss. Otherwise, it would be definitely repugnant and unfair to increase the burden of the insurer to make them answerable for a total loss which actually ceased to exist before the action was brought.[917]

7.2.4.3.4 Uncertainty of recovery in the event of dispossession

In the non-marine case of *Webster v General Accident Fire & Life Assurance Corp Ltd*,[918] an action was brought before Parker J in relation to whether there was a loss of a motorcar falling within the meaning of the policy. In this case, the assured lost his possession of the car insured, which was caused by T.'s fraudulent representation that there was a private bid for the sale of the car. T. afterward sold the car and misappropriated the proceeds out of the sale. As a result of being told by the police that, he could not recover his car, the assured thus took no further steps as to the recovery of his car.

It has been conceded that it is not easy to define what can amount to a loss in non-marine insurance, because there are many kinds of losses, and thus different tests may be applicable to every type of loss.[919] For the purpose of determining, in the case of deprivation of possession, whether the assured suffered a loss within the meaning of the policy, in his judgement, Parker J however approved of the test of uncertainty as to the recovery of the insured property, which was defined by the arbitrator (the future Chapman J), who had

[917] *Hamilton v Mendez* (1761) 1 W Bl 276 (Mansfield LJ); *Brotherston v Barber* (1816) 5 M & S 418 (Ellenborough LJ)
[918] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520
[919] *Holmes v Payne* [1930] 2 KB 301 (KB) 310; *Moore v Evans* [1917] 1 KB 458 (KB) 471

dealt with this case, before it was brought to the court. The judge justified his approval, based on the judgement of Roche J in the *Holme* case, the policy of which had similarities with that of the current case.[920] In the opinion of the arbitrator, in the event of deprivation, the loss could be defined as 'an effective deprivation in circumstances making recovery uncertain'.[921] Therefore, in non-marine insurance, where the assured was deprived of the possession of the subject matter insured by the perils insured against, and it was uncertain that he could recover the subject insured, there would be a loss within the meaning of the policy, as a commercial loss. The uncertainty could not of course be determined, unless the assured had taken all reasonable measures to recover the insured property.

7.2.4.3.5 The assured does not need to prove the irrecoverability of the subject matter insured

Also, as to the steps taken by the assured, he was not entitled to sit by and do nothing. However, there was no burden of proof on him, as to whether the chattel was irrecoverable. In other words, even though it was unlikely that the assured could recover the subject matter insured, it was no doubt a loss falling within the meaning of the policy. In this circumstance, it was not necessary for him to prove that the recovery of the subject matter was impossible.[922] Instead, after Parker J pointed out that the tests to a constructive total loss and a

[920] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 527
[921] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 528
[922] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531

non-marine loss were different, the judge then said that, 'the test whether there was a loss was whether recovery of the chattel was still uncertain after all reasonable steps to recover it had been taken by the assured.'[923] Also, it seems that Bankes LJ in the case of *Moore v Evans* held that, in the event of dispossession, what the assured needed to prove was whether the recovery of the insured property was uncertain, rather than unlikely or irrecoverable.[924]

7.2.4.3.6 Conversion of the chattel as a result of fraudulent misrepresentation

A dispute arose in the case of *Webster* as to whether it could be held that there was a loss under the policy, where the assured had voluntarily handed over the subject matter insured to the agent; this was in effect occasioned by the agent's fraudulent misrepresentation, just as there would be a loss, where the assured was deprived of the insured matter by a criminal wrong, which was actually against the will of the assured.[925] The answer seemed to be a positive one. It was established at common law that there was a loss within the meaning of the policy, where another person had committed a conversion of the subject matter insured, which meant that, the assured had been deprived of the possession of the insured chattel by the act of the another person, whether by a criminal wrong or a civil tort, and that the assured could not recover his chattel from such a person.[926] Although Goddard LJ in *London*

[923] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520
[924] *Moore v Evans* [1917] 1 KB 458 (KB) 471
[925] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520, 529
[926] *London and Provincial Leather Processes Ld v Hudson* [1939] 2 KB 724; 55 TLR 1047; [1939] 3 All ER 857; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520, 530-31

and Provincial Leather Processes Ltd v Hudson mainly discussed the above issue, it seemed that the judge was of the opinion that the rule of constructive total loss, leaving alone the exact term, was applicable to non-marine insurance. That was based on the finding that, in the judgment, the judge adopted the test of unlikelihood of recovery of the subject matter insured to determine the existence of the non-marine loss under consideration. Goddard LJ thus said that, 'Here we have the fact that the plaintiffs have been at any rate deprived of their goods. They have suffered a loss in the sense that they cannot get their goods.'[927] This supported the conclusion that there would be a loss within the meaning of the policy, where the assured had been dispossessed of the subject matter insured, and it seemed that its recovery was impossible, irrespective of whether the deprivation was occasioned by a civil tort or criminal offence, such as theft.

7.2.4.3.7 How to differentiate a loss of chattels and proceeds of sale

In order to better understand the above test, the term 'effective deprivation' also needs to be carefully examined. It may be reasonable to hold the view that, an 'effective deprivation' refers to the assured's deprivation of possession, as not only to whether or not the subject matter insured physically exists, but also the title to it.[928] Thus, there is a necessity of distinguishing the loss of the 'chattel' and 'proceeds' out of the sale of the chattel, or the commercial adventure. In certain circumstances, the courts need to decide whether there

[927] *London and Provincial Leather Processes Ld v Hudson* [1939] 2 KB 724; 55 TLR 1047; [1939] 3 All ER 857 (KB) 731-32
[928] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 528

is a loss of the insured subject matter within the meaning of the policy, where there is uncertainty relating to when the assured can recover it. Then, the dispute may arise as to what is the right subject matter that the assured has intended to insure. In the event where the assured has been rendered no access to the subject matter insured of goods, and the recovering of it may take a very considerable time, it is not right to say that there is a loss of goods under the policy. In effect, it is the loss of the commercial adventure that has been sustained by the assured. Because the subject matter insured is the goods, rather than the commercial adventure, there is no loss of goods within the meaning of the policy.[929] In order to recover, the assured needs to insure the right subject matter.

In *Webster*,[930] the assured has been induced to part with possession of the car to T on T's fraudulent representation that he had a buyer for it. In fact, T never had a buyer but sold the car by auction in his own name, and misappropriated the proceeds. It was held that it was a loss of the car insured, rather than of the proceeds of sale of the car. By contrast, In *Eisinger v General Accident Fire & Life Assurance Corp Ltd*,[931] the assured was held to have lost the proceeds of the sale of the car insured, rather than of the car itself, where he had agreed to sell the car, and subsequently parted with the car, and received the cheque as payment for it, which was dishonoured.

For the purpose of differentiating the loss of the insured thing, and profits

[929] *Moore v Evans* [1917] 1 KB 458 (KB) 473
[930] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520
[931] *Eisinger v General Accident Fire & Life Assurance Corp Ltd* [1955] 2 All ER 897

arising from it, the fundamental principle of insurable interest may assist the judges to make a decision, through which the courts can determine what kind of interest the assured has, and then decide the right subject matter for which the assured effectively intends to obtain cover. In the case of *Mitsui v Mumford,*[932] because there had been no contract of sale as to the goods of timber, and they were instead only waiting an opportunity of sale, the judge thus held that the assured had suffered no loss of the commercial adventure, or the profits derived from the sale of the goods, because he had no insurable interest in the profits. That was because in such a case there must be a contract of sale to support the existence of the close economic relations between the assured and the profits, and there was a difference between an interest in a property, and the profits derived out of it.[933] In this case, even if the commercial adventure had been frustrated, because he was not interested in it, he would not have suffered a loss of goods within the meaning of the policy.

In conclusion, for the purpose of determining whether the assured has suffered a loss of the property or proceeds of sale within the meaning of the policy, there are two aspects needing to be examined. In the first place, with the assistance of the doctrine of insurable interest, the courts can then decide whether the assured is interested in the goods or the profits from them. If he is merely interested in goods, rather than profits, even though a loss of profits has occurred and been covered by the policy, the court cannot hold that he has suffered a loss of profits. Secondly, it is helpful by way of finding out the

[932] *Mitsui v Mumford* [1915] 2 KB 27
[933] *Wilson v Jones* (1867) LR 2 Ex 139

very subject matter covered by the policy, whether goods or profits. Even though the assured is both interested in goods and profits, where the policy expressly stipulates that the subject matter insured is goods, although he has sustained a loss of profits, due to absence of cover for profits, the assured has suffered no loss of goods within the meaning of the policy.[934]

7.2.4.3.8 Conclusion

It has been well established that the principle of constructive total loss is peculiar to marine insurance, and not applicable to a non-marine loss. Parker J thus said in the case of *Webster* that, at the time of dealing with a loss under a non-marine policy, it was crucial to remember that, constructive total loss or such principles of marine insurance could not be applied to such a policy. Bankes LJ in the *Moore* case also expressed the view that, where a case was brought before a court to determine whether the assured had suffered a loss within the meaning of the policy under consideration, it was the general principles concerning the law of contract, and the meaning of the parities by looking at the terms of the contract, rather than the principle of constructive total loss that, should be taken into account.

However, although the terminology of constructive total loss has been argued not to be applicable to non-marine insurance, it seems that, the test of uncertainty for constructive total loss, which was under the pre-statute cases and substituted by that of unlikelihood after the enactment of MIA 1906, has

[934] *Eisinger v General Accident Fire & Life Assurance Corp Ltd* [1955] 2 All ER 897

been adopted in non-marine cases to decide whether a total loss exists. Regardless of the specific name of constructive total loss, at any rate, it may not be illogical to say that, in deciding the existence of non-marine losses, considerations for a constructive total loss should also be taken into account. In short, in deciding whether there is a non-marine loss within the meaning of the policy, assistance can be derived from considerations of constructive total loss, despite the test of uncertainty of recovery,[935] because there are certain common considerations crucial both to a constructive total loss and a loss within the meaning of the non-marine policy.[936]

Moreover, in deciding whether there is a loss within the meaning of the policy of non-marine insurance, normally the result would not be affected by the subsequent restoration, discovery, or recovery of the insured subject matter, save for two exceptions; nor would it be affected by the intention of the assured, regardless of the fact that the taking of it from him was with his consent but by another's fraudulent misrepresentation, or was against his own will. On the other hand, it indeed can be influenced by the matter the assured is interested in, the goods or the profits out of them; also, the subject matter stipulated in the policy can have a crucial effect on whether there is a non-marine loss under the policy.

[935] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31-32
[936] *Moore v Evans* [1917] 1 KB 458 (KB) 469

7.2.5 The result may be the same

7.2.5.1 A commercial loss may be treated as a total loss

It may be argued that there is no need to incorporate the rule of constructive total loss into non-marine insurance through legislation, since the result of claiming for a commercial loss could be the same even if there is no principle of constructive total loss in non-marine insurance. In *Mitsui v Mumford,* which was a non-marine insurance case, Bailhache J set out that:

> If, for instance, the plaintiffs were unable, owing to a peril insured against, to deal with this timber and were liable to be prevented for so long a time that the cost of warehousing would in all probability exceed the value of the timber before the plaintiffs could dispose of it, I should be prepared to hold that there was a loss of the timber within the meaning of the policy.[937]

Such a loss has been recognised as a commercial loss within the meaning of the policy.[938] According to s 60(2)(i) of the 1906 MIA, the assured suffers a constructive total loss, where he will be deprived of the possession of his goods, and it is unlikely that he can recover the subject matter insured; or in order to recover the goods, he pays money greater than the value recovered. In marine insurance, the principle of constructive total loss is therefore designed to deal with the similar situation of commercial loss. By analysing

[937] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[938] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31

both situations of non-marine insurance and marine insurance, it can be concluded that, a commercial loss and a constructive total loss by a peril insured against can be deemed to be within the meaning of the policy in question, and the assured, if appropriate, is entitled to recover such a loss. That is, despite the use of different terms relating to loss, the result would not necessarily be different: an assured under a non-marine insurance policy could be entitled to recover for a commercial loss, in spite of there being no application of constructive total loss. In other words, he would be entitled to claim for the insured sum as much as, in the same circumstance, he could recover by claiming for a constructive total loss under a marine policy.[939]

7.2.5.2 Argument of providing for one regime as to incommensurate expenditure in indemnity insurance

It may also be argued that, the law as to constructive total loss should be applicable to non-marine insurance, in light of the fact that the consequence of a commercial loss in non-marine insurance may be the same as that of a constructive total loss supported by notice of abandonment, entitling the assured to claim the full payment of the sum insured. Upon this analysis, in fact, there may be two regimes relating to incommensurate expenditure in indemnity insurance, namely, the cost of recovery or repair will largely exceed the value recovered or repaired. Where the loss falls within the definition in s 60(2) of the 1906 MIA, it may be a constructive total loss; by contrast, in non-marine insurance in the same circumstances, it may be a commercial loss.

[939] *Arnould*, at 28-01, fn 3

This may be an argument supporting the following opinion that, the rule for constructive total loss should be legally made to be applicable to non-marine insurance, leaving one regime for treating the case of incommensurate expenditure as a total loss to all indemnity insurance. In this situation, despite using different terms, consequences of incommensurate expenditure in the above two kinds of insurance are in effect identical. Therefore, there is no need to have two regimes and recognising the application of constructive total loss in non-marine insurance may be beneficial; otherwise, it may bring about dispute or injustice in relation to whether there is a constructive total loss or a commercial loss in non-marine insurance, as that would be a constructive total loss in similar circumstances in marine insurance.

However, this may not be accurate. The language of Bankes LJ can assist to make this situation clearer: albeit some considerations are material both to a constructive total loss and a commercial loss, it does not necessarily mean that the law as to constructive total loss can be directly applicable to commercial loss.[940] Thus, even though the result of a constructive total loss and a commercial loss may be the same, it may be incorrect to try to provide for the above two kinds of incommensurate expenditure into one regime; because, for example, the former originated from the peculiarity of marine insurance, and constructive total loss has a set of rules, such as notice of abandonment.

[940] *Moore v Evans* [1917] 1 KB 458 (KB) 469

7.2.5.3 Conclusion

As discussed above, it is not right to directly apply the principle of constructive total loss to non-marine insurance, even though the considerations of it can be taken into account in the case of a commercial loss in non-marine insurance. In addition, the tests for constructive total loss and for commercial loss are different. Also, the method may not be a satisfying situation, in that the non-marine total loss only includes a commercial loss as the way in practice, in effect adopting the definition of constructive total loss, rather than just providing that a total loss in non-marine insurance includes an actual total loss and a commercial loss, and then the law as to non-marine insurance should provide for a rule for commercial loss.

7.2.6 An assured under a non-marine policy also needs to avert capital from being locked up unprofitably

The principle of constructive total loss originated from the case of capture by Lord Mansfield in the middle of the eighteenth century, and this was soon adopted to apply to other marine losses.[941] As has been discussed in Chapter One, with the assistance of the rule of constructive total loss, the assured can conquer the hardship faced by him being prevented from recovering a loss from his insurers until a long period has elapsed, i.e. the time waiting for the recapturing of ships and goods. Furthermore, the assured can claim immediately after the capture, and the capital of the assured invested in the

[941] *Goss v Withers* (1758) 2 Burr 683; *Hamilton v Mendes* 1 W Bl 276; *Moore v Evans* [1918] 1 AC 185 (HL) 194; *Arnould*, at 29-01

marine adventure can be set free to gain profit again as soon as possible; whereas under the previous common law it was uncertain whether the assured could recover the subject matter insured, or under the 1906 MIA whether or not the deprivation of possession is in fact unlikely.

In light of the legal effect of constructive total loss, and certain considerations of it also material to a commercial loss, it can be argued that, a commercial loss, the counterpart of constructive total loss, should be directly provided for in non-marine cases. It does not make sense that, venture capitalists, such as airline carriers and aircraft operators, cannot legally apply the rule of commercial loss. By contrast, with such an application, where the subject matter insured by them, which is expensive and used for moneymaking purposes, is lost, there is no need to waste a long time waiting for the final valuation of the insured property. On the other hand, upon the occurrence of a commercial loss, the assured should be entitled to claim for a total loss, for the purpose of preventing capital in the expensive chattels, such as aircraft, from being locked up unprofitably. Thus, in *KAC v KIC,* it was held that it was a total loss where the airplanes insured had been dispossessed of, and it was uncertain whether the assured could recover them.[942]

[942] *Kuwait Airways Corporation and Kuwait Insurance Company* [1999] 1 Lloyd's Rep 803

7.2.7 The practice of non-marine insurance market having virtually adopted the considerations of constructive total loss

7.2.7.1 The practice of motor car insurance

In motorcar insurance, where the cost of repairs is greater than the value repaired, it is a common practice to treat such a loss as a total one, by the writing-off of the motorcar.[943] Since the practice of the market-place has deemed it a total loss that the cost of repairs exceed the value repaired, no reason can be seen why a statutory basis should not be provided for this situation. Otherwise, there will be a conflict between practice and law, which is undesirable. By so providing, the loss can be better regulated in non-marine insurance, and the right of the assured to claim for a loss under his policy and the duty of the insurer to compensate can be clarified. Otherwise, the issue may be disputed, whether the law as to constructive total loss, either in name or not in name but in effect using an alias of constructive total loss, is applicable to a loss under a non-marine policy, due to an absence of law to regulate the development of the practice of non-marine insurance market.

7.2.7.2 The purpose of business requires the concept of non-marine commercial loss.

In addition, from the commercial perspective, where a commercial loss could

[943] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]; *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277, [2004] 2 CLC 68 [8] (Rix LJ)

be anticipated, an assured under a non-marine policy should be entitled to claim for a total loss. In marine insurance, when discussing the principle of constructive total loss, Sir MD Chalmers set out that 'A merchant trades for profit, not for pleasure, and the law will not compel him to carry on business at a loss.'[944] Therefore, in order to avert incommensurate cost under a marine policy, s 60 of the 1906 MIA provides for constructive total loss. Similarly, as regards non-marine insurance, businessmen participating in trade also aim to pursue profits. It does not make commercial sense either that the cost of repairing or retrieving exceeds the value repaired or recovered while the insured merchant is compelled to repair or recover.[945] It is also unfair to an assured under a non-marine policy if a loss cannot be regarded as a total loss within the policy in question, where the assured has been dispossessed of the subject matter insured, and it is uncertain that he can recover the property insured.

7.2.7.3 Common law has seemingly in effect applied the considerations of constructive total loss in non-marine insurance

Nowadays, it seems that there is a fixed common law in relation to treating a commercial loss as one kind of a total loss, despite not recognising the application of constructive total loss in non-marine insurance. That is to say, there seemingly is a legal basis for the business practice to treat a commercial loss as a total loss, entitling an assured who has suffered such a loss to

[944] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]; *Chalmers*, at p92
[945] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31

recover a total loss. Consequently, the practice of the market has effectively matched the approach of the common law as to whether there is a loss within the meaning of the non-marine policy. For example, in the case of dispossession of, not damage to, a motorcar, the previous test for constructive total loss as uncertainty of recovery has been adopted, in deciding whether there is a loss within the meaning of a non-marine policy. Although it has been held that the test for constructive total loss under s 60 of the 1906 MIA is not applicable to a non-marine loss, Parker J gave the judgment that there is a loss of a chattel under a non-marine policy, where it is uncertain that the assured can recover the chattel; and this is a previous test at common law to constructive total loss before the enactment of s 60 of the 1906 MIA.[946] Furthermore, in the view of Bailhache J, if the policy at issue was a business policy, despite being a non-marine one, even though the loss suffered was a loss in a commercial sense, rather than that of irretrievable deprivation of the insured subject matter, the assured should be able to claim for a total loss.[947] It thus seems that a commercial loss is one class of a non-marine total loss. Also, so far as the policy on personal effects or household goods is concerned, it seems that not only the practice of the market, but also the common law, has treated as a total loss the uncertainty of the recovery of the thing insured.[948] Where the necklace insured has been mislaid and has disappeared, a reasonable time for allowing for a diligent search and recovery has elapsed before the settlement, and such search has been made but is without result; the insurer thus recognises this case as a loss within the meaning of the policy,

[946] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 531-32
[947] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[948] *Holmes v Payne* [1930] 2 KB 301

indemnifying the assured by replacement of the necklace. The judgement has seemingly treated such a circumstance as a loss as well, irrespective of whether there is subsequent recovery or not. Furthermore, in aviation insurance, it has been held that it is a total loss where the assured has been deprived of possession of the airplanes insured, and it is uncertain that he can recover them. However, in order to make it clear and certain as to the boundary of total loss in non-marine insurance, legislative measures are needed to be taken.

7.2.7.4 Conclusion

In short, the law in relation to constructive total loss cannot be applied outside marine insurance. However, it has been set out that the considerations of constructive total loss, despite uncertainty rather than unlikelihood of recovery, can also be essential in deciding whether there is a loss of a non-marine subject matter insured.[949] This may imply that, rather than the rule of the law, these considerations of constructive total loss have been in fact extended to the ambit of non-marine insurance, even though it has been argued that such an extension does not make sense.[950] Since the practice of the insurance market has treated as a total loss the commercial loss of a motorcar, and the opinions expressed by the judges that the considerations of constructive total loss may be common and material to a loss under a non-marine insurance policy, it seems that a reform of the definition of a non-marine total loss is needed, and that a concept of commercial loss may be stipulated for, to entitle

[949] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31; *Moore v Evans* [1917] 1 KB 458 (KB) 469
[950] *Moore v Evans* [1918] 1 AC 185 (HL) 196

an assured under a non-marine insurance policy to claim for the full payment of the sum insured, as the amount that he can claim for a constructive total loss supported by notice of abandonment.

7.3 Reasons for no application of constructive total loss in non-marine insurance cases

7.3.1 The principle of constructive total loss cannot be applied to non-marine insurance

7.3.1.1 No analogy of loss between cases of marine and non-marine insurance

In *Moore v Evans*, Lord Atkinson thought that, the above-mentioned reasons could not prove that, the principle of constructive total loss in marine insurance could be applied to non-marine insurance. In this case, the assured, as a London firm of jewellers, was covered by a non-marine policy. Then it consigned jewellery covered by the policy to dealers in Frankfurt and Brussels on sale or return. Because of the war between the UK and Germany, it could not recover possession of the pearls. However, it could not be proved that the pearls had been permanently seized or specifically interfered with by Germany. The court was required to deal with the issue whether the assured suffered a loss within the provisions of the policy. The Court of Appeal,[951] reversing the

[951] *Moore v Evans* [1917] 1 KB 458

decision of Rowlatt J,[952] held that the assured suffered no such loss, because there was no evidence proving that the recovery of the subject matter insured was a mere chance, and it was not unlikely that he could recover it. The House of Lords affirmed this decision.[953] Lord Atkinson criticized the application of constructive total loss in a non-marine case, for in order to claim for such a loss as if it were an actual total loss, the notice of abandonment had to be duly served; it was not served in the present case.[954] In addition, His Lordship held that, the rule of constructive total loss was peculiar to marine insurance, and it was thus not applicable to non-marine insurance. The reasons are as follows.

7.3.1.2 The rule of constructive total loss based on the peculiarity of marine insurance and the practices of maritime merchants

7.3.1.2.1 Two options under a constructive total loss

On appeal, in deciding whether the law of marine insurance was applicable to the non-marine policy on jewellery, Bankes LJ in the *Moore v Evans*[955] gave two reasons to explain why there should be no application. One of them was that the reasoning underlying the recognition of constructive total loss justified the position that it was not applicable to a non-marine policy.[956] In other words, it may be argued that the principle of constructive total loss is not applicable to non-marine insurance on the ground that, on the occurrence of constructive

[952] *Moore v Evans* [1916] 1 KB 479
[953] *Moore v Evans* [1918] 1 AC 185
[954] *Moore v Evans* [1918] 1 AC 185 (HL) 193
[955] *Moore v Evans* [1917] 1 KB 458 (KB) 469
[956] The other was that there were two kinds of loss in marine insurance, which will be discussed later.

total loss, it does not necessarily mean that, the assured can be entitled to claim a loss as if it were a total loss.[957] In effect, he can treat it either as a partial loss, or as a total loss, on the condition that he has chosen to abandon the subject matter insured to the insurer, with due notice of abandonment given, unless such a notice could be excused.[958] This is the law of marine insurance.

By contrast, in non-marine insurance, there is no need to give a notice of abandonment, because, as an integral part of constructive total loss, it is not known outside marine insurance,[959] although the giving of it is still a diligent and businesslike step to take.[960] Namely, in deciding whether there is a loss under a non-marine policy, the assured could have claimed for a constructive total loss, if he was covered by a marine cover, coupled with notice of abandonment; then, the loss at issue was able to be deemed a commercial loss, as one class of total loss. Therefore, in such circumstances, there would only be one kind of loss, rather than two options enjoyed by the assured in the event of constructive total loss under marine insurance.[961]

In other words, it may be argued that, the rule of constructive total loss is not applicable to non-marine insurance, on the basis that there is a whole set of legal rules as to constructive total loss, such as the requirement of notice of abandonment; on the other hand, in order to apply the rule of constructive total loss in a non-marine insurance case, the law relating to non-marine insurance

[957] *Moore v Evans* [1917] 1 KB 458 (KB) 469; 1906 MIA, s 61
[958] MIA 1906, ss 61-62
[959] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
[960] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31
[961] MIA 1906, s 61

has to provide for the above whole set of legal rules as to constructive total loss. However, at present, there is no equivalent set of rules in non-marine insurance law; and it seems that, as set out in the above paragraph, on the occurrence of a commercial loss, there is no need to give notice of abandonment to support the assured's claim for a total loss. The proper approach seems to be that, what should be provided for in non-marine insurance law is not the whole set of rules as to constructive total loss; instead, the concept of, or considerations of it, which can also be common and material to commercial loss, should be stipulated in the law.

Even though Bankes LJ did not refer in detail to the reasons for its recognition, assistance could be derived from the language of Lord Atkinson, when the case was brought before the House of Lords, which will be discussed in later section.

7.3.1.2.2 The peculiarity of marine insurance

It is suggested that the rule of constructive total loss is peculiar to marine insurance, and not applicable to non-marine insurance, because the rule is based on the specialised characteristic of marine insurance. Thus, it is not necessarily applicable to non-marine insurance. Lord Atkinson in *Moore v Evans*[962] therefore disputed the analogy of constructive total loss between non-marine insurance and marine insurance. In the first place, the rule of constructive total loss was not known except in marine insurance law, which

[962] *Moore v Evans* [1918] 1 AC 185

law was provided for to protect maritime commerce and trade.[963] Also, marine insurance law governing marine insurance was specifically involved in marine adventures of ships or goods they carried, for the purpose of profiting.[964]

7.3.1.2.3 The practices of maritime merchants

It was submitted that the rule of constructive total loss was dependent on the practice of marine dealers, who aimed to make convenient their trade and commerce with other businessmen at home or abroad.[965] They were for a long time the interpreters of the principles of their commercial custom, in accordance with which they were involved in the marine adventure. Thus, it might be argued that a loss may not fall within the meaning of constructive total loss sustained by a merchant covered by a non-marine policy.

Nonetheless, without obvious contradiction, no reasons can be seen as to why the experience, which can provide convenience for both the assureds and insurers, drawn from marine practice, cannot be applied in non-marine cases. In addition, at least in motorcar insurance, by similar way of marine merchants establishing constructive total loss, the practice of non-marine insurance also has long deemed a commercial loss to be when the cost of repairs would be higher than the value repaired, as a total loss.[966] As can be seen, both the

[963] William Shee, *Marshall on the Law of Marine Insurance, Bottomry, and Respondentia* (4th edn, Shaw & Sons 1861) at p2; Luis Lobo-Guerrero, *Insuring War: Sovereignty, Security and Risk* (Routledge 2012) at p27
[964] *Marshall on the Law of Marine Insurance, Bottomry, and Respondentia*, at p2
[965] *Moore v Evans* [1918] 1 AC 185 (HL) 193
[966] Professor Robert M Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) at 11-001; *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]

practices of marine and non-marine insurers have recognised as a total loss an insured property which is not worth repairing, and the recovery of which is uncertain or unlikely.

7.3.1.2.4 The rule of constructive total loss is devised to promote marine adventure

The practice of marine insurance and the relevant law, particularly the rule of constructive total loss, was intended to attract more merchants to participate in marine commerce and trade, and thus to contribute to the development of marine carriage and trade.[967] For this purpose, the rule was established as follows: in the event of the loss of dispossession of the insured property, a merchant under a marine policy, having knowledge of capture, should be entitled to at once liberate, by claiming for a constructive total loss coupled with notice of abandonment, their locked up capitals deriving from the capture of ships or goods; and not needing to await their recapture or the final certainty of the fate of the insured property, as long as he had not known recapture, when he raised the action.[968] The rule of constructive total loss was thus designed to contribute to the advance, and the increasing of, marine insurance and the maritime commerce and trade.

It may be argued that the rule is not applicable to non-marine insurance, because the extending of the application of constructive total loss to non-marine insurance is not within the legislative intent of Parliament.

[967] 43 Eliz. c. 12
[968] *Moore v Evans* [1918] 1 AC 185 (HL) 193-194

However, it cannot be denied that, the definition of constructive total loss, at least a commercial loss, can better promote the development, and make convenient, the business of non-marine insurance, by entitling the assured to claim for such a loss, so that his capital in an expensive chattel can be prevented from being locked up unprofitably for too long. Otherwise, in motorcar insurance, at least in the practice of the market, the underwriters would not have for so long treated it as an actual total loss, where the cost of repairing exceeds the value repaired, by writing off the car.[969] The judges would not have stated that a non-marine assured should be able to claim for a total loss, where in similar situation supported by notice of abandonment, he could claim for a constructive total loss in marine insurance.[970] In light of this positive effect of constructive total loss and the practice of the non-marine market, it may be acceptable that the definition of constructive total loss, or that of a commercial loss, should be applied in non-marine cases.

7.3.1.3 Whether Bailhache J's dicta is sufficient to justify the application of a commercial loss to non-marine insurance

Bailhache J in the case of *Mitsui v Mumford* gave the view that, '…it is right in considering whether there has been a loss under this policy to take into account considerations similar to those which one would take into account in determining a question of constructive total loss under a marine policy.'[971] On the face of it, this case approved of the application of the considerations for

[969] *Colinvaux*, at 11-001; *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]
[970] *Mitsui v Mumford* [1915] 2 KB 27; *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[971] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32

constructive total loss to non-marine insurance. Due to the lack of a clear judgement, there is thus a dispute relating to the ambit of the application of the rule of constructive total loss.

7.3.1.3.1 Approval of Bailhache J's language

On the one hand, Bray J treated the language of Bailhache J as meaning that, the rule of constructive total loss could be applied to non-marine insurance.[972] On the other hand, in the words of Bankes LJ, Bailhache J's statement was right, as far as the facts of the case under consideration was concerned.[973] However, it was noteworthy that, despite Bailhache J's statement, it did not mean that the principle of constructive total loss could be directly applicable to non-marine insurance. Instead, what it really meant was that, there were some considerations, which were material and common both to constructive total loss and commercial loss. In consequence, considerations of constructive total loss could be used in deciding whether there is a commercial loss. Therefore, on the face of it, this may support the conclusion that, the rule of constructive total loss cannot be applied in non-marine insurance while the considerations of constructive total loss in the form of commercial loss may be applied to a non-marine insurance policy. In addition, Bankes LJ was not satisfied with the headnote of *Mitsui v Mumford*, which stated that Bailhache J's statement could be applied to every policy on 'commercial goods on land'. This argument might be right, because there were no clear words to indicate the extension of application to the subject matter identified in the headnote.

[972] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[973] *Moore v Evans* [1917] 1 KB 458 (KB) 469-70

7.3.1.3.2 Disagreement with Bailhache J's opinion: mere obiter dicta

Lord Atkinson then further explained the reasons why constructive total loss was not applicable in non-marine cases. Firstly, despite Bailhache J's expression of opinion that a commercial loss was applicable to non-marine insurance,[974] those were just *obiter dicta,* rather than *ratio decidendi*.[975] Bailhache J held that neither actual nor commercial loss was suffered by the assured plaintiff, on the ground that the insured timber was still possessed by his agent, and there was no seizure or confiscation of the timber by the Germans.[976] It was thus clear that, Bailhache J, in the above *ratio decidendi,* did not refer to the application of constructive total loss to non-marine insurance. Nevertheless, this might not be the case. In spite of being *obiter dicta,* it did not mean that the *dicta* were of less importance, because Bailhache J's analysis was based on it: 'It is from this standpoint that I approach the facts of this case, and the plaintiffs' contentions based upon those facts.'[977] In other words, the ground of the judgment was also founded upon the *dicta*. Lord Atkinson also said that the *dicta* should be entitled to be given great weight,[978] especially in light of the fact that, there were no existing rules at common law in relation to the application of constructive total loss to non-marine insurance.[979]

Then, from the opposite side of the judgement, it could be implied that,

[974] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 31-32
[975] *Moore v Evans* [1918] 1 AC 185 (HL) 195
[976] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 34
[977] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[978] *Moore v Evans* [1918] 1 AC 185 (HL) 194
[979] Emily Finch, Stefan Fafinski, *Legal Skills* (2nd edn, Oxford University Press 2009) at p156

considerations of constructive total loss, or a commercial loss, might be applicable to a non-marine insurance. Bailhache J clearly concluded that:

> It is right in considering whether there has been a loss under this policy to take into account considerations similar to those which one would take into account in determining a question of constructive total loss under a marine policy.[980]

If the timber in question had been seized or confiscated by the Germans, and the goods were unlikely to be recovered, or the cost of recovering it from them had hugely exceeded its market value, it would not be surprising to say that Bailhache J would hold that the assured suffered a commercial loss due to the uncertainty of recovery or the uneconomic cost, although he would not use the specific expression of constructive total loss.

7.3.1.4 Blackburn J's judgement seemingly cannot support Bailhache J's dicta.

7.3.1.4.1 Mere discussion of abandonment does not necessarily refer to constructive total loss

Secondly, Lord Atkinson disagreed with Bailhache J's justification for the application, which was based on Blackburn J's judgment, that Blackburn J did

[980] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32

not in effect refer to the application of the rule of constructive total loss.[981] The view of Lord Atkinson seemed more reasonable. In *Rankin v Potter*,[982] indeed, as was argued by Lord Atkinson, Blackburn J was concerned with dealing with the effect of abandonment,[983] and whether a person indemnified was bound by his choice. Blackburn J stated that in every kind of indemnity insurance, not limited to marine insurance, the assured, who had been indemnified by the insurer, must cede all his rights to the insured subject matter to the latter, which was a requirement of the general principle of equity.[984] Also, an assured, under such a contract, who was entitled to claim either a partial or total loss, or either a constructive total loss or nothing, and had taken an action, must be bound by his election;[985] otherwise it would be unfair to an insurer. It could be expected that an assured tended to adhere to his own adventure, where the price of the insured subject could rise, whereas he chose to abandon it to his insurer, where the prospect of benefit failed.[986] Those were concerned with the effect of 'abandonment', which was not peculiar to marine insurance. It was thus not right to say that, because, in both marine and non-marine insurance, the assured, after having been indemnified, should cede all his interest in the remains of the insured property to the insurer who has settled the claim, a commercial loss can thus be applied to non-marine insurance. In addition, because constructive total loss was a concept limited to marine insurance, while abandonment was not, Blackburn J's statement was not aimed at constructive total loss. Therefore, there was no basis for the discussion on the

[981] *Moore v Evans* [1918] 1 AC 185 (HL) 196
[982] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 118-9
[983] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
[984] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 118
[985] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 119
[986] *Rankin v Potter* (1872) LR 6 H L 83 (HL) 120

ambit of its application.

7.3.1.4.2 Discussion of notice of abandonment does refer to constructive total loss

By comparison, this was unlike the discussion as to notice of abandonment by Brett LJ in *Kaltenbach v Mackenzie*,[987] in which it was in effect talking about the ambit of application of 'constructive total loss' when discussing that of 'notice of abandonment'. That was because, even though there was no direct reference to the realm of application of 'constructive total loss', it could be inferred that 'constructive total loss' was confined to marine insurance; because 'notice of abandonment' was peculiar to, and an integral part of 'constructive total loss', and 'notice of abandonment' was not known except in marine insurance.

7.3.1.4.3 Notice of abandonment is not a test to distinguish an actual from a constructive total loss

However, it is incorrect to hold the view that, due to the 'notice of abandonment' being of a specialised character of 'constructive total loss', 'notice of abandonment' can hence be treated as a test of the distinction between a constructive total loss and an actual total loss.[988] According to s 62(7) of the 1906 MIA,[989] the assured is not required to give notice of abandonment where

[987] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
[988] *Arnould*, at 28-01
[989] MIA 1906, s 62(7)

it would be impossible for the insurer to obtain any benefit as to the remains of the insured subject matter even though it was given. Therefore, the case may arise that, the assured could be entitled to claim as for a total loss, even though he has indeed suffered a constructive total loss and notice of abandonment is not given, for the reason provided for by s 62(7). In other words, it is not necessarily right that, owing to lack of notice of abandonment, a total loss has to be treated as an actual one. For example, the assured is entitled to claim for a constructive total loss, where the assured has suffered a constructive total loss, but he is not yet aware of it; and then successively sustained an actual total loss, meaning there are no remains of any interest of the assured in the insured property; this has the effect that there would be no benefit to the insurer if the notice of abandonment was given.[990]

7.3.1.5 Whether the 1906 MIA is able to govern non-marine insurance

7.3.1.5.1 The extension of the 1906 MIA to non-marine insurance by the court

Bray J in the *Campbell* case directly adopted the concept of constructive total loss to decide whether the assured had suffered such a loss under a policy on non-marine property. That judgment was based on the definitions of an actual and a constructive total loss in the 1906 MIA.[991] This possibly implied that, the judge thought that the rule of law as to a constructive total loss, at least a

[990] *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277, [2004] 2 CLC 68
[991] MIA 1906, ss 57(1) and 60(2)(i)

commercial loss, could be applied to insurance on non-marine goods.[992] Otherwise, he would not have relied on the definition of a constructive total loss to decide, whether there was a total loss under the non-marine policy.

7.3.1.5.2 The 1906 MIA may be applied to non-marine insurance

Lord Atkinson however was not satisfied with Bray J's intentions in that case, and the outcome of the application of the rule of constructive total loss to a non-marine policy. His Lordship's view was based on the ground that, the 1906 MIA was confined only to marine insurance, and accordingly the provisions of actual and constructive total loss under the 1906 MIA should not be applied in non-marine cases. However, this may be incorrect, because it is submitted that, where appropriate, most of its principles are applicable to non-marine insurance.[993] For example, 1906 MIA s 57(1) defines an actual total loss as follows: actual destruction, the ceasing to be a thing of the type insured, or permanent seizure. There is no reason why this definition should not be applied to non-marine insurance.[994]

7.3.1.5.3 No application of constructive total loss to non-marine insurance

On the other hand, in the *Campbell* case, Bray J held that, the rule of

[992] *Mitsui v Mumford* [1915] 2 KB 27; *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[993] *Locker & Woolf Ltd v W Australian Insurance Co Ltd* [1936] 1 KB 408 (AC) 415
[994] *Colinvaux*, at 11-001

constructive total loss was applicable to non-marine insurance,[995] coupled with the fact that, the rules of the 1906 MIA could govern insurance outside marine insurance.[996] It was well-established that the principle of constructive total loss could not be found except in marine insurance.[997] As far as the terminology was concerned, it seemed to be inaccurate to use the term of constructive total loss in a claim under a non-marine policy. Bailhache J in his dicta was aware of this issue, and the judge then held that it was not proper to use the term constructive total loss; although it was in effect applicable to non-marine insurance, i.e. when to assess the loss under a non-marine policy, the considerations should be taken into account, which, in a similar situation, would be considered by an assured entitled to claim for a constructive total loss under a marine policy.[998]

7.3.1.5.4 Conclusion

The conclusion can be drawn that, even though the rule of constructive total loss is not applicable in non-marine insurance cases, many rules of the 1906 MIA can be applied to non-marine insurance. Furthermore, as the above discussion has shown, the rejection of the application of a commercial loss on some occasions does not mean the considerations of a constructive total loss should not be taken into account. By contrast, they have been considered, and the failure of a claim for a loss under a non-marine policy is occasioned by absence of elements of a constructive total loss. Where the considerations of

995 *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
996 *Locker & Woolf Ltd v W Australian Insurance Co Ltd* [1936] 1 KB 408 (AC) 415
997 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471
998 *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32

constructive total loss have been satisfied, it can be said that there is a loss within the meaning of the non-marine policy. It thus can be deduced that, the considerations of constructive total loss, despite uncertainty rather than unlikelihood of recovery, has been effectively applied to non-marine insurance. In light of the application of the judgment of *Mitsui v Mumford* and *Campbell & Phillips Ltd v Denman,* and the seeming approval of a commercial loss applying to a non-marine policy, it may be safe to argue that, considerations of constructive total loss can also be common and material to a commercial loss.

7.3.2 What amounts to destruction

7.3.2.1 That whether a loss is subjective is subject to the policy terms

It is suggested that, the rule of constructive total loss cannot be applied to non-marine insurance, because such a commercial loss, in the non-marine insurance context, is by its nature a 'subjective' assessment by an assured. It is thus contended that, the fact that the cost of repairs has been greater than the value repaired, cannot determine whether there is destruction of the subject matter insured, because the assured can by himself determine the measure of loss. As a result, the consideration of the incommensurate cost of the repair cannot be applied to a loss of non-marine insurance.

In addition, it is laid down that, 'the prudent uninsured owner' test is

objective,[999] which is another meaning of constructive total loss.[1000] If the loss were subjectively assessed, then, there would be no constructive total loss. Thus, the standard of assessing loss, either subjectively or objectively, needs to be examined. Actually, losses sustained by an assured are relied upon in the terms of a policy in question: under some situations, it could depend on an assured's intention, rather than on the inapt expression of 'subjective' assessment; whereas they are in effect objectively assessed.

7.3.2.1.1 Where there is no distinction between destruction and damage under a non-marine policy

It is admitted that an insurance contract aims to indemnify an assured's loss,[1001] and this is certainly affected by his 'intentions' for the insured subject matter. But it is not apt to say that, the loss could be 'subjectively' assessed by an assured. For example, an insured building with all its features was covered by a policy. In *Reynolds v Phoenix Assurance Co Ltd*,[1002] an historic malting house of massive brick construction was covered by a policy against fire. It provided that the insurer was bound to pay for destruction or damage to, the whole building or part of it, on the occurrence of fire. Since the assured in effect intended to reconstruct it, and to use it in its previous state, the assured was entitled to the cost of repairs, although it would much exceed the cost of rebuilding a functionally equivalent new malt factory. By contrast, the amount of indemnification would be the cost of rebuilding a functionally equivalent new

[999] *Chalmer*, at p91; Angel v Merchants' Marine Insurance Co [1903] 1 KB (AC) 819
[1000] *Grainger v Martin* (1862) 2 B & S 456 [468]
[1001] *Falcon Investments Corp (NZ) Ltd v State Insurance General Manager* [1975] 1 NZLR 520, 523
[1002] *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440

building, if the assured just needed its commercial use, without considerations of all its features. Thus, the court in *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd*[1003] held that, it was the loss of rebuilding an equivalent new building, rather than that of the original Victorian structure, which the assured suffered. Subject to the assured's intention, if the assured intended to sell the insured subject matter, then, the measure of the loss should be its market value.[1004] Also, where, before being damaged by fire, the building at issue was genuinely intended to be redevelopped by the assured for rent in one year, the loss was held by the court in *Falcon Investments Corp (NZ) Ltd v State Insurance General Manager*,[1005] to include that of the damage to the building, and loss of the rent.

As discussed above, the intentions of the assured could affect the loss, and the measure of the loss. This does not apply to every case of non-marine insurance. In fact, such a result is based on the terms of the non-marine policy. Taking the example of *Reynolds v Phoenix,* though Forbes J set out that, as to destruction, the measure of indemnity was the value of the subject matter insured and by contrast, as to damage, it would be the amount of the damage, because the policy had not distinguished destruction from damage, viz. under this policy, the former could refer to part, and the latter could relate to the whole property, the measure of loss thus could be assessed by relying upon

[1003] *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* [1983] 1 Lloyd's Rep 674
[1004] *Leppard v Excess Insurance Co Ltd* [1979] 2 All ER 668
[1005] *Falcon Investments Corp (NZ) Ltd v State Insurance General Manager* [1975] 1 NZLR 520

the assured's intentions for the property.[1006]

7.3.2.1.2 Where the policy distinguishes between destruction and damage

Although it has been conceded above that, the intention of the assured has an effect on the amount that he can recover, it is incorrect to contend that, a loss is thus subjectively affected by the assured's intention for the subject matter insured. Where the policy at issue has distinguished between destruction and damage, for example, it has stipulated that, there is no destruction, unless the subject matter insured has been so damaged that the loss is equivalent, or greater than the cost of rebuilding, which is the measure of indemnity, in such a situation, the measure of indemnity is objective, and must rely on the facts of every case. In *Marriott v Vero Insurance New Zealand Ltd*,[1007] the New Zealand Court of Appeal stated that, the measure of loss was based on an objective assessment, and the assured's intention alone could not render it to be one of destruction. Under the policy in this case, the measure of indemnity on destruction was the cost of rebuilding. Thus, in order to be one of destruction, the cost must be sufficient to the standard of that of rebuilding the entire insured property; this must be dependent on the facts of the case in question, meaning that the assessment of loss was objective, and that it could not be affected merely by the assured's intention. The standard must be measured based on facts in every case at issue, which was an objective test.

[1006] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [103]-[104]
[1007] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [104]

7.3.2.1.3 Conclusion

Thus, the submission is not the case that, because an assured can 'subjectively' decide the amount and type of loss under his policy, there should not be considerations of a commercial loss, in ascertaining whether there is loss of destruction of the insured property within the meaning of the policy. This is because in effect that, whether the intentions for the insured property could have an effect on the measure of loss, is subject to the terms of the policy in question; and the measure of indemnity, reliant on the provisions of the policies, is hence objective. However, it does not necessarily mean that, the concept of constructive total loss is applicable to non-marine insurance. It may just signify that, the commercial loss may be one of those relating to the test of destruction, but it is not the decisive one.[1008]

7.3.2.2 The measure of loss: whether a prudent owner test is applicable to non-marine insurance

It has been argued that the doctrine of constructive total loss could be applicable to non-marine insurance, because a prudent uninsured owner would not effect repairs, where it is uneconomical.[1009] It may be referred to as 'the single owner' test,[1010] or 'the prudent uninsured owner' test.[1011] Blackburn J in *Grainger v Martin*[1012] said that, this test, despite being 'not so

[1008] *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (1986) 4 ANZ Insurance Cases 60–777; *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 [23]
[1009] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [94]
[1010] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [107]
[1011] *Chalmer*, at p91
[1012] *Grainger v Martin* (1862) 2 B & S 456 [468]

strictly accurate', was in effect another expression of 'the cost of repairs being greater that the value repaired': one kind of constructive total loss. Thus, there is a necessity to study whether such a test is applicable to non-marine and marine insurance. Should it be so, the considerations as to the doctrine of constructive total loss may be applicable to non-marine insurance.

7.3.2.2.1 No application in non-marine insurance

Even though the measure of loss could be affected by an assured's intention for the insured property, it was held that, in a non-marine insurance setting, a loss should not be assessed from the perspective of a person, who, uninsured, would spend his own money.[1013] Thus, the single owner rule would not be applicable here.[1014] It was thus incorrect to contend that, an insured building was deemed to be destroyed, because a sensible commercial person, using his own money, would not effect repairs, where its cost was greater than that of rebuilding an equivalent modern building.[1015] That was because the insured owner, having suffered a loss, did not inevitably go to the market to replace the subject matter of insurance, being damaged, or purchased compulsorily. The measure of compensation relating to compulsory purchase was on the basis of a statute,[1016] whereas that as to repairing or rebuilding under a policy was provided by a policy contracted. Despite this, the English law had equated

[1013] *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440, 453; *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [107]
[1014] *Bamford v Turnley* (1862) 3 B & S 66 [84]-[85]
[1015] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [107]
[1016] Land Compensation Act 1961, s 5(5), which provides that, in the case of 'reinstatement', compensation as to any compulsory acquisition shall be assessed on the basis of the reasonable cost of equivalent reinstatement.

them, both of which were subject to the fundamental indemnity doctrine.[1017] Thus, the measure of loss of the two kinds of indemnification may impact one on the other.

However, the measures of loss related to insured property to be, or not to be, dispossessed of, are different. The loss of market value of the insured subject matter may be the measure of loss of compulsory acquisition, whilst not necessarily being applicable to the loss of an assured, not going to the market to replace the subject damaged. The commercial concern test was mentioned and supported in *Festiniog Railway Society v Central Electricity Generating Board*.[1018] It was a case of compulsory purchase, where the owner was dispossessed of part of the railway. Under this situation, what a prudent person in the position of the owner would do is conclusive, because he had to go into the market to replace what he had lost. When explaining the basis of the commercial concern test, and the ambit of its application, Forbes J was of the same opinion as that in the *Reynolds* case:

> But the second reason is that the whole basis of compensation for compulsory purchase is that the owner is in fact to be dispossessed. If he wishes to replace what is lost he must necessarily go into the market to replace it. It is right therefore that the severely commercial logic of the market should operate to determine what a commercial concern would properly do. But where the owner is not inevitably to be dispossessed the

[1017] *Murphy v Wexford County Council* (1921) 2 IR 230, 240; *Horn v Sunderland Corporation* [1941] 2 KB 26 (KB) 42; *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440, 451
[1018] *Festiniog Railway Society v Central Electricity Generating Board* (1962) 13 P & CR 248, 261

market is not an ineluctable solution, and the commercial logic of the market is not the necessary criterion.[1019]

Conversely, in the context of an owner not being deprived of possession, the learned judge held that the commercial concern test would not be applicable. Instead, as discussed above, in such a situation, the measure of loss should be reliant on the intention of an assured to recover, either the loss of general use of the insured subject matter, or that of the subject with all its character. In deciding whether or not an owner was to be dispossessed, the assured's intention should not be deemed to be unreasonable or eccentric.

7.3.2.2.2 Application in marine insurance

As to the position in marine insurance, it is one kind of constructive total loss, where the cost of repair or recovery may be greater than the value repaired or recovered. However, the question is, whether the measure of loss, or the estimated cost of repairs, is taken from the angle of a sensible commercial person, or a prudent uninsured owner, using his own money. As discussed in previous chapters, it seems that the 'prudent uninsured owner' test does apply to marine insurance. It has indeed been stated as true that it is a prudent uninsured assured who should consider, whether a vessel at issue is worth repairing.[1020] Thus, where a common ship, or one with exceptional features, has been captured or damaged, it is necessary to view it from the perspective of a common commercial person, in deciding whether it is worth recovering or

[1019] *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440, 453
[1020] *Grainger v Martin* (1862) 2 B & S 456 [467]; *Roux v Salvador* (1836) 3 Bing NC 266 [286]

repairing. The nature of the claim can then be determined: as either a partial loss or, after notified abandonment, a total loss.

Despite the application of the prudent uninsured owner test in marine insurance, it is noteworthy that the test is less and less important, as follows.[1021] In the first place, the test is not easy to apply: because it requires the average prudence of uninsured owners, rather than that of a specific one. Because of this problem, then, the case law has been trying to lay down rules, instead of continuing to apply the prudent uninsured owner test, for the situation where the test is applicable.

7.3.2.3 Economic consideration cannot conclusively determine 'destruction' in non-marine insurance

7.3.2.3.1 Necessity to look at 'destruction'

It has been argued that, in non-marine insurance, where cost of repairs is greater than the repaired valued, the subject matter could be deemed to be 'destroyed', other than 'damaged'.[1022] Thus, in order to make clear the ambit of application of the rule, the definition of 'destruction' needs to be explored, or whether the economic consideration can of itself decide whether 'destruction' occurs. If the physical condition of the insured subject matter is conclusive of what amounts to 'destruction', there is a total loss where the subject is so

[1021] *Chalmer*, at p91
[1022] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 [9]

damaged that repairs are not physically practical. It is a partial loss where loss is not sufficient to such an extent. Thus, there will only be two concepts of loss in non-marine insurance: total and partial loss. This seems to be the present position as to the law of loss in non-marine insurance.[1023] By contrast, if economic factors were not able to constitute a loss as destruction, consequently, in line with the rule in marine insurance, there would also be three kinds of loss in non-marine insurance: total and constructive total loss, and partial loss. However, it seems that, even though other factors may be considered when to test the existence of 'destruction',[1024] such as an uneconomical element,[1025] the conclusive one appears to be the physical state of the insured subject matter, that is, whether it is able to be repaired or not.[1026]

7.3.2.3.2 Distinction between 'destruction' and 'damage'

Terms of 'destruction' and 'damage' do not always have a different meaning in every case. The meaning should be dependent on the facts in the specific situations of every case. In general, 'destruction' relates to loss of the whole subject matter insured, whilst 'damage' is referred to, where part of it is lost.[1027] In a general sense, damage refers to repairable damage, while it is destruction where the subject matter is so damaged that it cannot be repaired. It is noteworthy that the meanings of those terms are subject to the terms of the

[1023] *Colinvaux*, at 11-001
[1024] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [107]-[108]
[1025] *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (1986) 4 ANZ Insurance Cases 60–777
[1026] *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (1986) 4 ANZ Insurance Cases 60–777; *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 [30]
[1027] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [103]

policy. Therefore, in *Reynolds v Phoenix Assurance Co Ltd,* although Forbes J at first sight tried to draw a distinction between 'destruction' of, and 'damage' to, the insured property, owing to the fact of this case, the two terms have the same meaning.[1028] Subject to the particular policy, 'destruction' can also mean the loss of the entire property, or just part of it. The whole property or part of it can be 'damaged' as well.[1029] In this case, both terms can be used to identify losses of, either the whole property, or just any part of it. Thus, there is no need to distinguish between 'destruction' and 'damage'. Hence, the above meaning is certainly not fixed.

7.3.2.3.3 Constructive total loss not being applicable to non-marine insurance and the physical condition of the subject matter insured matters

In *Marriott v Vero Insurance New Zealand Ltd*,[1030] the High Court of New Zealand considered whether the rule of constructive total loss could apply to a policy on buildings. In this case, policies, covering two years, were effected on two buildings. They were afterwards affected by three Christchurch earthquakes during the currency of the policies. A dispute arose in relation to whether they had been 'destroyed' by the second earthquake or not. The insurer argued that, they were not liable for incommensurate repairs: that is, where the cost of repairs would exceed the value repaired, they only assumed liability for destruction of the buildings, on a basis of constructive total loss,

[1028] *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440, 446
[1029] *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440
[1030] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120

rather than the full amount as to repair costs. By contrast, the assured owner submitted that, there was no 'destruction' until the building was not physically able to be repaired. Dobson J favoured the assured's argument, and held that, there was 'destruction' only where the physical of the buildings was physically impossible to be reinstated by way of repairs to their pre-loss conditions.[1031]

Thus, Dobson J held that, the principle of constructive total loss, an economic consideration, did not apply to a non-marine insurance, and it was not a total loss of destruction where the cost of repair would exceed the value repaired. Instead, the physical condition of the building, being impractically repairable, was the only element to amount to 'destruction'. Other damage not to such an extent could be merely deemed a partial loss. Therefore, the learned judge only accepted two kinds of loss in non-marine insurance: an actual total loss and a partial loss.[1032]

7.3.2.3.4 Other factors should be taken into account

In general, where an issue arises in relation to deciding the extent of losses an assured suffered, or whether the insured subject is destroyed, relevant elements, such as an assured's intention, features of the insured subject matter, and sometimes economic considerations, need to be considered. Without taking all the above elements into account, it is hard in the abstract to answer the question as to whether 'destruction' of the insured property has been sustained by an assured. Terms of the policy in question need to be

[1031] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 [30]
[1032] *Colinvaux*, at 11-001

looked at, when it requires determining which element or elements need be taken into account. It was thus held that, in relation to the question whether the insured subject matter at issue has been destroyed under a policy, it is an abstract one. It cannot be dealt with, without the combined consideration of the facts in question in every case.[1033]

Thus, in the appeal of *Marriott v Vero Insurance New Zealand Ltd*, the New Zealand Court of Appeal did not decide the issue as to whether the rule of constructive total loss could apply to a non-marine policy, although it disagreed with the submission that the buildings at issue had suffered a constructive total loss.[1034] It rejected Dobson J's decision that physical practicality of repairs was the sole factor to test the existence of 'destruction'.[1035] Other factors could also have an effect on the test such as: '…any special character or features of the building, the insurer's promise to pay the costs of reinstating (subject to policy limits) that particular building, and the insured's preferences so far as they are not eccentric or unreasonable.'[1036] If physical feasibility was the only test, where the insured building was destroyed, the assured's right of rebuilding elsewhere would have been limited.[1037]

[1033] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120 [29]; *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [96], [108]
[1034] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [91]
[1035] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [108]
[1036] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [107]
[1037] *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447 [105]

7.3.2.3.5 Economic consideration is one relevant, but not conclusive, factor

In ascertaining whether the subject matter of insurance damaged is destroyed, where the economic element has been considered, it does not necessarily mean that the economic element can conclusively amount to 'destruction', and then that constructive total loss is applicable to non-marine insurance. This is because the economic element may be just a relevant factor, while the conclusive factor is that repairs cannot physically be practical. In *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd*,[1038] a policy on computer equipment against loss or damage was made. A casualty of smoke and water damage to the equipment arose. Because of its complexity, the equipment could not be fixed in Australia. An overseas firm could effect repairs, but it refused to promise the effectiveness of repairs. The New South Wales Supreme Court held that the goods were destroyed because they were not practically capable of repairs.

In this case, Clarke J recognised that, the economic consideration was one of the reasons, why it was not practical for the equipment to be repaired. However, the reasoning of the judgment was conclusively based on the impracticability of repairs, which focused on the physical condition of the insured property, rather than on the cost of repairs being greater than the repaired value, which was an economic consideration. In the context of marine insurance, there is a constructive total loss where the insured subject matter is

[1038] *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (1986) 4 ANZ Insurance Cases 60–777

damaged and repair costs are uneconomical. Although, in the *Morlea* case*,* the equipment damaged is deemed to be destroyed, the *ratio decidendi* was on the basis of the peculiar fact of this case, i.e. not being reparable. The *Morlea* case has not approved the intermediate concept of constructive total loss in non-marine insurance either.

7.3.2.4 Conclusion

According to the case of *Marriott v Vero,* it seemed that, the court held that, the rule of constructive total loss was not applicable to non-marine insurance. Furthermore, the application of the consideration that, the cost of repairs would exceed the value repaired, to non-marine insurance, had been rejected as well, although it had been accepted as an element which might to some extent affect a loss within the meaning of the non-marine policy. This was different from the language of the judges dealing with English cases, seemingly holding that, even though the rule of constructive total loss was not applicable to non-marine insurance, there were some considerations, which were common and material both to constructive total loss, and a loss within the meaning of a non-marine policy. That the cost of repairs would be greater than the value repaired was one of these considerations. In light of the function of a commercial loss, the necessity of the non-marine market, and the common law rule, it seemed that the approach by the English courts would be more reasonable.

7.3.3 Whether loss of use is a loss or damage for insurance purposes

Loss of free use of the subject matter insured is one circumstance of deprivation of possession of the subject matter insured in marine insurance.[1039] If loss of use can be loss or damage to the subject matter insured within the meaning of the non-marine policy, it may have been argued that the rule of constructive total loss could have been applicable in non-marine insurance.

7.3.3.1 Loss of use in an undamaged state not being as damage

In *Re Mining Technologies Australia Pty Ltd*,[1040] the issue of the meaning of 'damage' needed to be dealt with. In this case, the subject matter was the mining machinery and equipment, part of which had been trapped in the mine, while part of which had been retrieved in an undamaged condition. The loss of the part of equipment abandoned in the mine had been indemnified by the insurer, while the claim for the cost of the part recovered due to temporary entrapment had been rejected. Thus, the issue whether loss of use arising from temporary entrapment could amount to 'damage' needed to be addressed. At first instance, White J citing the authority of *Ranicar*[1041] was of the opinion that it could not amount to 'damage', since the meaning of 'damage' required physical change having a deleterious effect on the property said to have been damaged, but there was no such a change in this case. The Court

[1039] See the discussion in 6.2.2.4.1
[1040] *Re Mining Technologies Australia Pty Ltd* [1999] 1 Qd R 60 (QCA), affirming *Re Mining Technologies Australia Pty Ltd* QSC 7829/1996, 28 November 1996
[1041] *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113 (TASSC)

of Appeal, on the same basis as above, upheld the judgement of White J. It could thus be seen that there was no 'damage', where there was loss of use as to the subject matter insured but it had not been physically changed, provided that the policy had clearly covered loss of use of the subject matter insured.

7.3.3.2 Loss of use with no physical change not being damage or loss

Also, in *O'Loughlin v Tower Insurance Ltd*,[1042] a New Zealand case following the earthquakes, the Cabinet papers had, as part of the Government's response to the earthquakes, released the authority from the Cabinet of the creation of four zones in the Christchurch area, the red zone of which was for the worst affected areas. As a result of the earthquakes it was neither practical nor reasonable for the communities to stay in the red zone land,[1043] meaning that the assured had lost use of the house insured. The issue that needed to be addressed was whether the placing of the house insured in the red zone, created after the earthquakes, could amount to 'accidental physical loss or damage', which the policy had covered. Asher J held that the mere event that the house insured had been designated in the red zone while there was no physical change arising from the creation of the red zone did not amount to damage to the house at issue.

[1042] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [43]; followed in *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262
[1043] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [28]

7.3.3.2.1 The red zone itself not being damaged

7.3.3.2.1.1 Physical damage as the disturbance of the physical integrity

In *O'Loughlin,* the meaning of each word relating to 'physical damage' was considered by the court: for that of 'physical', it referred to 'of or concerning the body',[1044] which in this case specifically meant loss of or damage to the materials and structures that constituted the body of the house. For that of 'damage', the authority of *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*[1045] had been cited, which held that it could constitute damage to the property insured where the 'physical integrity' of it had been disturbed. However, in the *O'Loughlin* case, since there was no physical effect upon, or disturbance of the 'physical integrity' of, the house insured arising from the designation of the red zone, as a result, the creation of the red zone itself could not amount to physical damage to the house insured.

Also, Asher J summarised that the red zone itself could not give rise to damage to the house insured because it did not lead to physical alteration or repair to the house insured.[1046] On the authority of *Ranicar*, the requirement of physical alteration was significant for the purpose of 'damage' to the subject matter insured. Consequently, the house insured was not damaged where it had been lost to use by the earthquakes but not physically changed by the creation of the red zone.

[1044] Tony Deverson and Graeme Kennedy (eds), *The New Zealand Oxford Dictionary* (Oxford University Press, Auckland 2008) at p852

[1045] *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307 (HCA) 309

[1046] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [4]

On the judgement of *Ranicar*, damage meant physical change or alteration rendering impairment of use or reduction of value of the subject matter insured.[1047] Since in *O'Loughlin* the value of the house insured had not been reduced because of the Cabinet decision to offer to buy the homes of residents, neither could it be said that the house insured had been physically damaged.

7.3.3.2.1.2 Physical damage as physical change having a deleterious effect

Loss of use of the insured subject matter at issue without physical change or alteration in general could not be regarded as loss or damage to it. The key factor the issue of whether loss or damage to the subject matter insured occurs should depend on whether physical change or alteration having a deleterious effect on the property at issue has occurred. Thus, in *Ranicar v Frigmobile Pty Ltd*,[1048] for the meaning of 'damage to', in the context of goods, Green CJ held that it referred to a physical alteration or change having impaired the value or usefulness of the subject matter in question. Similarly, in *The Nukila,* the definition of 'damage' was deemed to be a 'changed physical state' which had a harmful effect on the subject matter insured in the commercial context.[1049] In *Moore v Evans,* Lord Atkinson required the element

[1047] *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113 (TASSC), applied in *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Insurance Cases 61-026 (NSWSC) (insecticide contaminated by herbicide); *Switzerland Insurance Australia Ltd v Dundean Distributors Pty Ltd* [1988] 4 VR 692 (VCA); *Orica Australia Pty Ltd v Limit (No 2) Ltd* [2011] VSC 65, (2011) 16 ANZ Insurance Cases 61-877

[1048] *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113 (TASSC), applied in *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Insurance Cases 61-026 (NSWSC) (insecticide contaminated by herbicide); *Switzerland Insurance Australia Ltd v Dundean Distributors Pty Ltd* [1988] 4 VR 692 (VCA); *Orica Australia Pty Ltd v Limit (No 2) Ltd* [2011] VSC 65, (2011) 16 ANZ Insurance Cases 61-877

[1049] *Promet Engineering (Singapore) Pte Ltd v Sturge (The 'Nukila')* [1997] 2 Lloyd's Rep 146 (CA) 151; cited in *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23, [2005] 1 All ER 283, and *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [46]

of 'physical injury' in defining 'damage to property'.[1050] Thus, generally speaking the subject matter insured which has been lost to use but not physically changed could not be said to have been lost or damaged for the purpose of insurance.

However, in the following two circumstances, the loss of use may amount to loss or damage to the subject matter insured. Firstly, where there are clear terms under the policy which has covered the assured against the loss of use as to property insured, during the life of the policy, the assured is entitled to recover for the loss arising from the loss of use. Secondly, a loss of use of the property insured can be said to have been lost or damaged, where it has been physically changed and consequently its usefulness has been impaired or its value has been reduced.

7.3.3.2.1.3 Temporary physical change is sufficient

It should be noted that it does not necessarily mean that the physical alteration or change has to be permanent or irreparable; this means that temporary impairment of the value or usefulness could constitute damage to the property in question. Thus, in *Jan de Nul (UK) Ltd v AXA Royale Belge SA*[1051] it was held that the temporary deposit of quantities of silt in the waterway which had physically affected its previous use as a waterway could constitute damage to the property as a waterway.

[1050] *Moore v Evans* [1918] AC 185 (HL) 191; cited in *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [43]

[1051] *Jan de Nul (UK) Ltd v AXA Royale Belge SA* [2002] EWCA Civ 209, [2002] Lloyd's Rep IR 589 [32]-[33]

7.3.3.2.1.4 An economic loss generally excluded

In order to precisely identify a physical damage, there is a need to differentiate a physical damage from an economic loss. Where losses of profits or other business interruption occurs, it would be easy to recognise them as economic losses. Nonetheless, some cases may be in dispute. Where defective glass panels were installed in a building and a potential risk of causing personal injury was present, it was held that it was not damage to the building insured, and any loss arising out of such a potential risk was only a potential economic loss rather than a physical loss of or damage to the insured subject matter.[1052] Again, paper loss due to being not a physical loss was not a loss covered by the policy which provided insurance for 'shortage in weight' of the goods insured; this arose from a misstatement by the vendor as to the quality or quantity of goods supplied.[1053]

In addition, the loss of part of the official meat subsidy, arising from rejection of meat by the Egyptian authorities, was an economic loss and not covered by the policy covering the loss of, damage to or deterioration of the meat due to an insured peril. The assured needed to prove not only that the meat insured had been rejected by the Egyptian authorities, but that the rejection of the insured property had been caused by loss or damage to the meat insured by perils insured against. Thus, the loss of subsidy was mere economic loss, and without clear terms of the policy covering such a loss, it could not be said such

[1052] *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ 23, [2005] 1 All ER 283
[1053] *Coven SpA v Hong Kong Chinese Insurance Co* [1999] Lloyd's Rep IR 565; *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 Lloyd's Rep 656

a loss had been covered by the policy. In other words, a physical loss was required to constitute a loss under a policy, and in order to be indemnified, the assured had to prove that the loss or damage to the subject matter insured had occurred and was occasioned by the perils insured against under the policy.

7.3.3.2.1.5 Mere economic loss by physical change recoverable

Of course, where there is no physical damage to the subject matter insured, but only an economic loss occasioned by physical change is present, such economic loss can be regarded as damage to the subject matter insured, and can be recovered under the policy which insured the assured against damage to the subject matter insured. In *Ranicar v Frigmobile Pty Ltd*,[1054] it was held that where no physical damage to the subject matter insured occurred but there was mere economic loss by physical change as the rise in temperature, under the policy insuring against damage to scallops, it was damage to the insured property. The following three points need to be noted. Firstly, as mentioned above, the definition of 'damage' was suggested in this case as meaning physical change, either permanently or temporarily, which had rendered the usefulness of the subject matter impaired or the value reduced. Secondly, two kinds of elements were required to constitute damage to the property insured. Thus, mere physical change could not necessarily amount to damage. For example, in this case, two types of physical damage had occurred; these were enzymic activity and a rise in temperature. However, the

[1054] *Ranicar v Frigmobile Pty Ltd* [1983] Tas R 113 (TASSC), applied in *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Insurance Cases 61-026 (NSWSC) (insecticide contaminated by herbicide); *Switzerland Insurance Australia Ltd v Dundean Distributors Pty Ltd* [1988] 4 VR 692 (VCA); *Orica Australia Pty Ltd v Limit (No 2) Ltd* [2011] VSC 65, (2011) 16 ANZ Insurance Cases 61-877

former could not amount to damage because there was no physical change to the scallops, and only the latter could amount to damage because the physical change, as the temperature rose, had reduced the value of the scallops, namely by having an deleterious effect on the export of the scallops. Thirdly, damage meant not only physical damage but mere economic loss by physical change with no physical damage. In this case, even though the scallops suffered no physical damage, since economic loss had occurred arising from the physical change, as the rise in temperature rendered the scallops less valuable; the scallops could not be exported due to their not being in accordance with export regulations and it was held that the assured was entitled to recover such economic loss.

7.3.3.2.2 The red zone not being loss

7.3.3.2.2.1 Policy on property generally covers physical loss

In the context of a building cover, when looking at whether loss of use can amount to a loss under an insurance policy on property, since a loss can include an economic one and physical one, therefore, the first thing to be discussed is in which sense the loss is defined. In light of the meaning of the word 'loss', although it is a broad word, it is often construed as meaning physical loss.[1055] Again, according to the authorities, under an insurance policy on property, a policy covered merely physical loss of the insured

[1055] *Technology Holdings Ltd v IAG NZ Ltd* (2009) 15 ANZ Insurance Cases 61-786 (HC); *Holmes v Payne* [1930] 2 KB 301 (KB); cited in *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [52]

property, unless the policy had been extended to cover losses of profits or other business interruption.[1056]

7.3.3.2.2.2 A 'physical loss' requires the disturbance of physical integrity

In the context of a policy on a house, the sense of a loss as 'physical loss' needed to be scrutinized. Consequently, the issue that needed to be addressed was whether the creation of the red zone could constitute a 'physical loss'. In *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd*, it was held that, subject to the facts of a case at issue and the stipulation of the policy in the case, a significant ingredient of a 'physical loss' (as well as 'damage to property') was the disturbing of the physical integrity of the insured subject matter.[1057] Thus, since the house mentioned above was not physically affected by the designation of the red zone, the mere creation of the red zone could not amount to physical loss of the house insured.[1058] Even though the house had lost its use by the earthquakes, such a loss of use was not occasioned by the red zone.

Again, in the case of *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd*,[1059] a number of significant errors having been made in the spacing and location of columns and walls had been found before the completion of the

[1056] *Harris Paper Pty Ltd v FAI General Insurance Co Ltd* (1995) 8 ANZ Insurance Cases 61-276 (VSC); *McConnell Dowell Middle East LLC v Royal & Sun Alliance Insurance plc* [2008] VSC 501, (2008) 15 ANZ Insurance Cases 61-789

[1057] *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-772 (QSC); *Guardian Assurance Co Ltd v Underwood Constructions Pty Ltd* (1974) 48 ALJR 307 (HCA) 309; and *Bayer Australia Ltd v Kemcon Pty Ltd* (1991) 6 ANZ Insurance Cases 61-026 (NSWSC)

[1058] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [43]

[1059] *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-772 (QSC)

assured's engagement in erecting the building. The issue was whether this event could amount to physical loss or damage to the building against which the policy had covered. The court held that physical loss implied possession of the subject matter insured and then consequent loss of possession,[1060] and it meant total destruction, which was a physical injury and distinct from damage to the building. Namely, the element of 'physical' was required to constitute a loss in the context of a building cover. In the *O'Loughlin* case, since the house had not been physically affected by the designation of the red zone, the claim for physical loss thus failed.[1061]

7.3.3.3 Conclusion

As is shown by the above analysis, considerations of constructive total loss have not been taken into account by the courts to decide whether these considerations can affect the existing of loss or damage to the estate insured. For both loss of, and damage to, the estate insured under a non-marine policy, the disturbance of physical integrity is required. It thus seems that the rule or considerations of constructive total loss is not applicable to a policy covering equipment or buildings. The word 'loss' is often construed as meaning physical loss.[1062] Therefore, in order to amount to a total loss in non-marine insurance, as in a building insurance policy, a physical injury to the subject matter insured

[1060] *Technology Holdings Ltd v IAG NZ Ltd* (2009) 15 ANZ Insurance Cases 61-786 (HC); *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [52]
[1061] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [53]
[1062] *Technology Holdings Ltd v IAG NZ Ltd* (2009) 15 ANZ Insurance Cases 61-786 (HC); *Holmes v Payne* [1930] 2 KB 301 (KB); cited in *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [52]

to the extent of total destruction must occur.[1063] In other words, from the perspective of non-marine total loss as a physical impossibility, it cannot be a loss in non-marine insurance, where the subject matter is not totally destroyed but it is merely a situation that the assured has been dispossessed of the property insured and it is uncertain that the assured can recover it, or the cost of recovery or repair will incommensurately exceed the value recovered or repaired; namely, the rule of constructive total loss is not applicable to non-marine insurance.

7.3.4 Definition of total loss in non-marine insurance may include constructive total loss' counterpart: commercial loss

7.3.4.1 The argument that there is merely a total loss in non-marine insurance

In the case of the *Moore v Evans*,[1064] Bankes LJ held that, the position of the law of marine insurance, in which there were two types of total loss, justified the conclusion that, the law of marine insurance was not applicable to non-marine insurance: that is because in non-marine insurance only the actual total loss has been recognised, and there was no such intermediate concept as constructive total loss.[1065] The objection to the application as to the considerations of constructive total loss seems to be incorrect at any rate. In spite of the above facts, there is the counterpart of constructive total loss which

[1063] *Graham Evans & Co (Qld) Pty Ltd v Vanguard Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-772 (QSC)
[1064] *Moore v Evans* [1917] 1 KB 458 (KB) 469
[1065] *Colinvaux*, at 11-001

is the concept of commercial loss. Indeed, at least in the practice of non-marine insurance market and at common law, a total loss has been regarded to be able to include a commercial loss of the subject matter insured.

It has been submitted that in effect considerations, that are material to a constructive total loss, may also be as important as those, which can be adopted to determine whether there is a commercial loss in non-marine insurance. Although Bankes LJ argues that the law of marine insurance is not applicable to a non-marine policy, as set out above, at least the considerations of constructive total loss can assist a court to determine whether there is a loss within the meaning of a non-marine insurance policy.

7.3.4.2 The definition of actual total loss in non-marine insurance may be more flexible

Although it is submitted that the position is unclear as to whether the ambit in relation to the definition of actual total loss in marine insurance and non-marine insurance is the same, it seems that the concept of actual total loss in non-marine insurance is broader than that of marine insurance,[1066] at least as far as the practice of the market is concerned.[1067] The case of *Masefield AG v Amlin Corporate Member Ltd* established that, an actual total loss in marine insurance law would be narrower than that in non-marine insurance.[1068]

[1066] *Holmes v Payne* [1930] 2 KB 301; *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]
[1067] *Venetico Maritime SA v International General Insurance Co Ltd* [2013] EWHC 3644; [2014] 1 Lloyd's Rep 349
[1068] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]

Furthermore, in the *KAC v KIC* case, it was held that, in light of the fact that there was only one recognised type of total loss, namely an actual total loss, it was a total loss where there was hostile seizure in spite of the possibility of recovery.[1069] The following proposition also reflects the conclusion that the concept of an actual total loss may be more flexible than that in marine insurance: Bankes LJ in the *Moore* case, citing the words of Blackburn J in *Wilson V Jones*,[1070] opined that in a case of deprivation of possession of the subject matter insured it was a total loss in non-marine insurance where there was a chance of recovery, but the recovery would be only a mere chance.[1071] The conclusion also explained why in *Holmes v Payne* it was still an actual total loss in circumstances where the subject matter insured had ultimately been recovered.[1072] That was because there was a dispossession and it was uncertain that the assured could recover the property insured. The considerations needed to be taken into account in this case is not the definition of an actual total loss under 57(1) of the 1906 MIA, but what a person would take into account when claiming for a constructive total loss, viz. the considerations of a commercial loss for the purpose of this chapter. It could thus be deduced that, an actual total loss in non-marine insurance might include a commercial loss, because the loss, derivable out of the uncertainty as to recovery of the insured property, has been treated as an actual total loss under the non-marine policy in question.[1073]

As for actual total loss in marine insurance, there is an actual total loss, where

[1069] *Kuwait Airways Corporation and Kuwait Insurance Company* [1999] 1 Lloyd's Rep 803
[1070] *Wilson v Jones* (1867) LR 2 Ex 139
[1071] *Moore v Evans* [1917] 1 KB 458 (KB) 472-73
[1072] *Holmes v Payne* [1930] 2 KB 301
[1073] *Holmes v Payne* [1930] 2 KB 301 (KB) 310

the insured property loses its identity subsequent to casualties, or is destroyed, or seized without the possibility of return, or the assured has received no news of a missing ship during the marine adventure within a reasonable time.[1074] In addition, the 1906 MIA s 60 provides that, there is a constructive total loss, where the subject matter insured, after reasonable abandonment, will unavoidably be totally lost, or will suffer a commercial loss because the repairing or retrieving fees will exceed its repaired value.[1075] Therefore, the principle of actual total loss has to be strictly applied in marine insurance, because different situations of loss fall within different types of definition of total loss. By and large, where the subject matter insured is physically or legally impractical, it is an actual total loss, whereas when it is just 'business impossible', the loss is a constructive total loss,[1076] viz. where the damage of the subject matter of marine insurance is physically and legally possible to be repaired, but the cost of recovering or repairing exceeds the value recovered or repaired.

7.3.4.3 Types of total loss in non-marine insurance

Specifically, in non-marine insurance, there are at least four kinds of losses which could be deemed to be a total loss: just as provided for by the 1906 MIA s 57(1), it is an actual total loss, where the subject matter of a non-marine insurance is destroyed, loses identity or is permanently seized. [1077] Additionally, an assured can recover a loss of the insured property within the

[1074] MIA 1906, ss 57-58
[1075] MIA 1906, s 60
[1076] *Chalmer*, at p92
[1077] MIA 1906 s 57(1); *Colinvaux*, at 11-001

meaning of a non-marine policy, based on a commercial loss, for example where the cost of repairs exceeds the value repaired, even though this may only be regarded as the practice of the market.[1078] However, although the above observation that, actual total loss in non-marine insurance may include commercial loss, it should be noted that, under English law, definitions of actual total loss as to marine and non-marine insurance seem to be similar. That is, it may only be the business practice that treats actual total loss in non-marine insurance wider than that under a marine policy.

Nevertheless, to some extent, the common law seems to hold that, a commercial loss is a loss within the meaning of the policy in question. In *Mitsui v Mumford*,[1079] Bailhache J stated that, it was a total loss within the meaning of the non-marine policy and if the assured had suffered a commercial loss, meaning that a non-marine total loss was not confined to an actual total loss, it could be deduced from the judge's opinion that, in non-marine insurance, a commercial loss is part of a total loss. Also, in motorcar insurance, upon the facts that the cost of repair exceeds the value when repaired, the loss in question is deemed a total loss.[1080]

[1078] *Masefield AG v Amlin Corporate Member Ltd* [2011] Bus LR 1082; [2011] Lloyd's Rep IR 338; [2011] EWCA Civ 24; *Venetico Maritime SA v International General Insurance Co Ltd* [2013] EWHC 3644; [2014] 1 Lloyd's Rep 349

[1079] *Mitsui v Mumford* [1915] 2 KB 27

[1080] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]

7.3.4.4 The argument that, since an actual total loss can include a commercial loss, it is thus not necessary to provide for constructive total loss in non-marine insurance

Even though there is no principle of constructive total loss in non-marine insurance, on the occurrence of a commercial loss, an assured may be entitled to recover it, by way of extending the concept of total loss to include a commercial loss, or of treating a commercial loss falling as within a non-marine policy. In other words, the non-marine insurance may not need the rule of constructive total loss, because the total loss covered by a non-marine policy may be so wide that it can play the role of constructive total loss. As a result, despite the lack of constructive total loss as a principle being applied to a non-marine policy, under the circumstances of a commercial loss, the assured, not necessarily giving notice of abandonment, may be entitled to recover a total loss, or the insurer may be entitled to pay for the value of the subject matter insured, rather than the larger amount as to the cost of repair.[1081]

7.3.4.5 Necessity for the clear provision of a commercial loss in non-marine insurance

However, in order to make the rule of commercial loss clearer to the non-marine insurance law and market, it would be better to provide for the rule as to a commercial loss of the non-marine subject matter insured, rather than deriving assistance from treating a commercial loss as an actual total loss.

[1081] *Mitsui v Mumford* [1915] 2 KB 27; *QBE Insurance (International) Ltd v Wild South Holdings Ltd [2014] NZCA 447*

Otherwise, it could bring about confusion and debate relating to whether the rule of constructive total loss could be applied to non-marine insurance, although it has been recognized that, in determining whether there is a loss within the meaning of a non-marine policy, considerations of decisions, dealing with marine insurance case involving the rule of constructive total loss, should be taken into account.

7.3.4.6 Conclusion

Thus, a total loss in non-marine insurance has in effect encompassed a commercial loss, which is the counterpart of a constructive total loss. Even though there is no concept of constructive total loss, and there is only total loss and partial loss in non-marine insurance, owing to the fact that total loss includes commercial loss, a commercial loss has substantially been recognised as a form of total loss in non-marine insurance. The concept of total loss in non-marine insurance is thus wider than that in marine insurance. Then, in the context of non-marine insurance, since the concept of total loss can include a commercial loss, playing the role of constructive total loss, it may be disputable whether there is any need to expressly provide for constructive total loss in non-marine indemnity insurance.

7.3.5 The express provision of non-marine policy may entitle the assured to recover a constructive total loss

7.3.5.1 Terms of non-marine policies can render a constructive total loss as a loss within the meaning of the policies

Where the non-marine policy provides covers for a constructive total loss and the cost of repairs will exceed the repaired value, the assured under such a cover is entitled to claim for such a loss.[1082] It could thus be argued that, there would be no need to provide for a constructive total loss in non-marine insurance law, because a policy on a non-marine subject matter could directly stipulate a constructive total loss, so that such a loss could be recovered, if the cost of repairs would exceed the value repaired, or the assured had been deprived of the subject matter insured, and it were uncertain that he could recover it. In other words, even though there is no rule of law as to constructive total loss applicable to non-marine insurance, by way of inserting a terms in a non-marine policy, an assured can still recover a total loss, where the cost of repairs will far exceed the value repaired, but there is no destruction of the insured subject matter, no change of the nature of the kind insured, or no irretrievable deprivation, viz. it can be physically reparable. Through such a stipulation in a policy, the loss covered by the policy will be made clear and certain, and no dispute will arise as to whether the rule of constructive total loss can be applied to non-marine insurance, because the voluntary nature of parties to policies' assumption of obligation is the foundation of contract

[1082] *Arnould*, at 28-01, fn 3

law.[1083]

7.3.5.2 The particular percentage in the practice

For example, parties to a non-marine policy are entitled to contract that, it will be a total loss that cost of repairs will exceed an agreed percentage of the value of the insured subject matter.[1084] In *Islington Park Ltd v Ace Insurance Ltd*,[1085] the New Zealand High Court accepted such a policy, and then held how to calculate the percentage in this case. With regard to the exact rate for the percentage, in *Rout v Southern Response Earthquake Services Ltd*,[1086] it was held that, the industry of insurance had widely accepted the figure of 80 percent of cost of repairs.

7.3.5.3 Conclusion

However, the approach adopted by parties to a contract of non-marine insurance, that is by way of terms of the contract to apply the rule of constructive total loss to such insurance, is not satisfactory. The law is used to govern situations that have not been contracted for by the parties in an insurance policy. There is no doubt that a policy can cover a constructive total loss where such a loss has been covered by the policy insured. However, where there is no such provision for a constructive total loss, the present debate still remains unsettled concerning whether the rule of constructive total

[1083] Mindy Chen-Wishart, *Contract Law* (5th edn, Oxford University Press 2015) at p44
[1084] *Colinvaux*, at 11-004
[1085] *Islington Park Ltd v Ace Insurance Ltd* [2013] NZHC 2983
[1086] *Rout v Southern Response Earthquake Services Ltd* [2013] NZHC 3262

loss is applicable in non-marine insurance cases. Hence, the favourable means may be to establish a rule of law, that a commercial loss is applicable to non-marine insurance. The assured under a non-marine policy should be entitled to claim as for a total loss, where the loss has been within the considerations of a commercial loss, some of which are also common and material to a constructive total loss.

7.3.6 The non-marine insurance law not recognising a commercial loss as actual total loss

7.3.6.1 At English law, a non-marine actual total loss does not include a commercial loss

It has been argued that the considerations of constructive total loss, or the rule of commercial loss, are not applicable to non-marine insurance, because, as a matter of law as to cases of non-marine insurance, an actual total loss does not include a commercial loss.[1087] It has been held that considerations of constructive total loss are instructive in deciding whether there is a commercial loss. The following will thus examine, under the law in relation to marine insurance, the concept of an actual total loss, and the relationship between an actual and constructive total loss.[1088] When explaining constructive total loss, Chalmers has made it clear that, actual total loss is different from constructive total loss: the former is based on being physically impractical, while the latter is

[1087] MIA 1906, s 56; *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277, [2004] 2 CLC 68 [8] (Rix LJ)
[1088] *Moore v Evans* [1917] 1 KB 458 (KB) 470

based on commercial concerns.[1089] Thus, Rix LJ set out, at least in the case of irretrievable deprivation, one type of actual total loss;

> The doctrine of constructive total loss in marine insurance law has meant that the test for an actual total loss has been applied with the utmost rigour: for an insured has always had the option of claiming for a CTL (constructive total loss).[1090]

To be specific, where the insured ship has been physically repaired, or repaired as much as legally practical, even though the cost of repairs will much greater than the value repaired, it is not an actual total loss.[1091] That is, it is the considerations relating to the physical or legal condition of the insured property, rather than the incommensurate cost of repairs, that should be taken into account for the purpose of actual total loss. Also, in the cases where the assured has been deprived of possession of the insured vessel, when to decide whether he has suffered an actual total loss, what should be considered is whether or not the deprivation is permanent or irretrievable, irrespective of whether the cost of recovery will exceed the recovered value.[1092] Similarly, in the event that the insured subject matter is so damaged that it cannot retain its identity as an operating ship, or a merchantable thing, it is an actual total loss. By contrast, if the ship can be restored to an operating

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[1089] *Chalmer*, at p92

[1090] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]

[1091] *Venetico Maritime SA v International General Insurance Co Ltd* [2013] EWHC 3644 [400]; [2014] 1 Lloyd's Rep 349

[1092] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ, [2011] Bus LR 1082 [16]; *Venetico Maritime SA v International General Insurance Co Ltd* [2013] EWHC 3644 [400]; [2014] 1 Lloyd's Rep 349; *Geo Cohen & Sons & Co v Standard Marine Ins Co Ltd* (1925) 21 Ll L Rep 30

condition, despite at incommensurate expense, it is not an actual total loss.[1093]

As can be seen, under the law of marine insurance, there is a clear dividing line between an actual and a constructive total loss. Drawing on the cases of actual total loss under the law as to marine insurance, in non-marine insurance, the concept of actual total loss should be strictly applied, and there is no recognition of a commercial loss as one class of an actual total loss.[1094] Also, the language of judges suggest that, an actual total loss under a non-marine policy should not take into account considerations of constructive total loss, which may be common and material to a commercial loss.[1095] In short, in non-marine insurance, as far as the law, rather than the practice of the market is concerned, when to consider the existence of an actual total loss, the elements of constructive total loss does not seemingly need to be considered, when deciding whether the assured has suffered a loss within the meaning of the non-marine policy.

7.3.6.2 No justification of absence of settled law

Nonetheless, the view may be incorrect that the concept of commercial loss does not apply to non-marine insurance, for there are no relevant non-marine law allowing such application. The reasons are as follows.

[1093] *Barker v Janson* (1868) 3 CP 303, 305; *Asfar v Blundell* [1896] QB 123 (QB) 128
[1094] *Colinvaux*, at 11-001
[1095] *Moore v Evans* [1918] 1 AC 185 (AC) 196

7.3.6.2.1 Absence of law as to commercial loss is not a reasonable ground

Firstly, it is probably improper to say that, since no law has provided for the application of commercial loss in non-marine insurance, a commercial loss must not be one kind of a total loss, and there is no justification as to its application. Lack of relevant legislative provisions or common law rules may just imply that, the current law cannot meet the development of the non-marine insurance market, and that the rule of commercial loss needs to be incorporated into the law governing non-marine insurance. Additionally, as will be discussed below, the common law has in effect recognised a commercial loss as a total loss within the meaning of the policy.[1096]

7.3.6.2.2 The provision for commercial loss can match the needs of the market

Secondly, the approach adopted in the non-marine practice of market, treating a commercial loss as a total loss, may justify the necessity as to the application of considerations common and material both to constructive total loss and commercial loss to non-marine insurance. One requirement for the introduction of a commercial loss into a non-marine policy is the consent of the assured as owners of the insured property and the insurer.[1097] Now that the introduction is the necessity of good commerce, and can possibly contribute to the development of the non-marine insurance industry, there is no reason not

[1096] See 6.3.6.2.4, below.
[1097] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 471-72

to lay down the rule that, an assured under a non-marine policy can claim for a commercial loss as well.

7.3.6.2.3 Providing for commercial loss can better protect benefits of parties to a non-marine insurance policy

Thirdly, the rule of constructive total loss has established convenience for the development of maritime trade and commerce, encouraging more merchants to take part in marine adventures, and prevented their capital from being locked up unprofitably.[1098] In addition, from the perspective of protecting the interests of both the assured and the insurer, by introducing the principle of commercial loss into the non-marine insurance law, it can be expected that, non-marine insurance can also enjoy the benefits of the principle of constructive total loss, in light of the fact that they have some common considerations, in deciding whether there is a loss.

In marine insurance, as for the assured, the invention of the doctrine of constructive total loss can better protect the goal of the person taking part in a marine adventure, that is, carrying on business for profits; and it can avoid forcing the assured merchant to continue his adventure at a loss.[1099] On the part of the insurer, the doctrine of constructive total loss can also assist to protect his own benefit. After a valid abandonment, the insurer is entitled to the interest of the assured in whatever may remain of the insured subject

[1098] *Moore v Evans* [1918] 1 AC 185 (HL) 193-94
[1099] *Chalmers*, at p92

matter.[1100] He is then at liberty to realise or increase its value.[1101] The possbility of a claim for constructive total loss may avoid the further loss of, or damage to, the insured subject matter. Thus, the more portions of the insured subject matter remain, the better the insurer's benefit can be protected. As set out by Lord Abinger in the leading case of *Roux v Salvador*:[1102]

> The very principle of the indemnity requires that he (an assured) should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value.

In non-marine insurance, by recognising an impossible loss in the commercial sense as a total loss, the assured may not be compelled to continue his adventure, which can diminish the value of the insured subject matter. Then more rights deriving from the remains of the insured subject, owing to the assured quitting his adventure, can be ceded to the insurer, which contributes to the protection of his own benefit. If the rule of commercial loss, as a counterpart of constructive total loss, could be applied to non-marine insurance, just like the function of the rule in marine insurance, the benefit of not only the assured but the insurer may be better protected.

[1100] MIA 1906, s 63
[1101] *Roux v Salvador* (1836) 3 Bing N C 266 [286]
[1102] *Roux v Salvador* (1836) 3 Bing N C 266 [286]

7.3.6.2.4 Common law has seemingly recognised the application of commercial loss

Last but not least, on the face of it, the common law may have established that a non-marine assured may be entitled to claim for a commercial loss, if under a marine policy he, in similar circumstances, could claim for a constructive total loss supported by notice of abandonment.[1103] For example, Bray J in the *Campbell* case gave the judgment that the rule of constructive total loss could be directly applied in non-marine cases, and the judge thus adopted the definition of constructive total loss from s 60 of the 1906 MIA to determine whether the assured had suffered such a loss under a non-marine policy.[1104] However, it cannot be ignored that the direct application of marine insurance law to non-marine insurance has been criticised.[1105] Despite this, just as discussed below, it seems that, the considerations of constructive total loss have in effect been applied to non-marine insurance, because they are also common and material to a commercial loss under a non-marine policy.[1106] Also, in *Holmes v Payne*,[1107] it seemed that an economic loss, irrespective of the specific expression as a 'constructive total loss' or 'commercial loss', was applicable to a non-marine insurance. This was because, Roche J in this case clearly stated that, when to decide whether there was a loss within the meaning of a non-marine policy, the test of 'uncertainty' as to recovery of the subject matter insured should be taken into account, which before the passage

[1103] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[1104] *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357; *Moore v Evans* [1918] 1 AC 185 (HL) 197
[1105] *Moore v Evans* [1917] 1 KB 458 (KB) 469; [1918] 1 AC 185 (HL) 196
[1106] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32; *Moore v Evans* [1917] 1 KB 458 (KB) 469
[1107] *Holmes v Payne* [1930] 2 KB 301 (KB) 310

of the 1906 MIA was a previous common law test to a constructive total loss. This test was also approved of by Parker J in the *Webster*[1108] case. Roche J furthermore held that, there was an analogy between the cases of a non-marine loss and those of a loss of capture, from which the rule of constructive total loss had its origin.[1109] Last but not least, in the aviation insurance case of *KAC v KIC*,[1110] the considerations of constructive total loss had also been taken into account to decide the existence of the total loss.

7.4 Conclusion

The doctrine of constructive total loss is regarded as unique to marine insurance. Lord Atkinson criticized a verdict that applied the principle of constructive total loss to the non-marine insurance industry.[1111] However, although the terminology of constructive total loss has been argued not to be applicable to non-marine insurance, there exists a trend that considerations of constructive total loss might be able to assist in deciding for a commercial loss in non-marine insurance. But the principle of notice of abandonment is definitely not applicable to it, which means that an assured under a non-marine insurance policy is not required to give a notice of abandonment to recover a commercial loss.

The test of uncertainty to constructive total loss under pre-statute cases in

[1108] *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520 (QB) 532
[1109] *Moore v Evans* [1918] 1 AC 185 (HL) 194
[1110] *Kuwait Airways Corpn v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664
[1111] *Moore v Evans* [1918] AC 185

marine insurance, which was substituted by that of unlikelihood after the enactment of MIA 1906, has been adopted in non-marine cases to decide whether a total loss exists in the cases of dispossession. It could be seen that in deciding whether there is a total loss in non-marine cases, assistance can be derived from considerations of constructive total loss; that first of all, the assured has to prove that he has been dispossessed of the subject matter insured and secondly, it should be uncertain whether the thing insured could be recovered. Moreover, in deciding whether there is a total loss in non-marine insurance, normally the result would not be affected by the subsequent restoration, which differs from that of marine insurance.

This may imply that, the considerations, rather than the rule of the law, of constructive total loss has been in fact extended to the ambit of non-marine insurance, even though it has been argued that, such an extension does not make sense.[1112] Since the practice of insurance market has treated a commercial loss of motorcars as a total loss, and it was held that the considerations of constructive total loss may be common and material to a loss under a non-marine insurance policy, there seemed a need for a reform of the definition of a non-marine total loss. A concept of commercial loss may be stipulated for, to entitle an assured under a non-marine insurance policy to claim for the full payment of the sum insured.

In New Zealand, the law seems that the rule of constructive total loss was not applicable to non-marine insurance and the application of the consideration

[1112] *Moore v Evans* [1918] 1 AC 185 (HL) 196

that the cost of repairs would exceed the value repaired to non-marine insurance has been rejected as well, although it had been accepted as an element which might to some extent affect a loss within the meaning of the non-marine policy.[1113] However, in the English courts, the rule of constructive total loss was not applicable to non-marine insurance either, but that the cost of repairs would be greater than the value repaired was one of these considerations applicable to a loss within the meaning of a non-marine policy. It seemed that the approach by the English courts would be more reasonable in light of the function of a commercial loss and the necessity of the non-marine market.

For the subject matter of buildings and estates, considerations of constructive total loss have not been taken into account by the courts in cases of loss of or damage to it, since the disturbance of physical integrity is usually required for both loss of and damage to the estate insured under a non-marine policy. The word 'loss' here often means the physical loss.[1114] Therefore, from the perspective of non-marine total loss as a physical impossibility, it cannot be constituted where the building is not totally destroyed but merely the cost of recover or repair will incommensurately exceed the repaired value.

Under the common law, it seems the concept of total loss in non-marine insurance is wider than that in marine insurance, since a total loss in non-marine insurance encompasses a commercial loss, which is the

[1113] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120
[1114] *Technology Holdings Ltd v IAG NZ Ltd* (2009) 15 ANZ Insurance Cases 61-786 (HC); *Holmes v Payne* [1930] 2 KB 301 (KB); cited in *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275 [52]

counterpart of constructive total loss; and since a commercial loss in non-marine insurance plays the role of constructive total loss, there seems no need to expressly provide for constructive total loss in non-marine indemnity insurance. Concerns for the need of legality in practice in the non-marine area and provoked by the developments in the insurance market, it would be favourable to make it as settled law that a commercial loss could be applicable to non-marine insurance. The assured under a non-marine policy should be entitled to claim as for a total loss, where the loss has been within the considerations of commercial loss, some of which are also common and material to constructive total loss.

Chapter 8 Conclusion

Initially commenced from the cases of capture to rescue the plight of the assured where he could not claim for a loss under the policy until the ship was recaptured, the concept of constructive total loss was taken as 'shaped and moulded' in the decision by Lord Mansfield dating back to the middle of the eighteenth century,[1115] but the particular term of 'constructive total loss' did not start to be prevalent until the 1850s.

The rule of constructive total loss was soon extended from the cases of dispossession to cases of damage. For the former situation, the assured should lose free use and disposal of the property and should not be able to get it back, or it would not be worth getting it back, before action brought; and for the latter, a constructive total loss occurs where the thing insured stays in specie but the repair is hopeless or not worth carrying out.

Being codified under common law, the MIA 1906 mostly reflects the pre-statute cases while some principles from the early cases are also altered. The Act altered the test of 'uncertain to be recovered' in common law by a substitution of 'unlikely to be recovered'. Such an alteration seems to be to the detriment of the assured on the face of it; nonetheless the criteria of 'uncertainty' made the test literally too broad, which would throw too much of a burden on the shoulders of the underwriters; thus this change in effect has built a balance between the assured and the insurer since the doctrine of

[1115] *Moore v Evans* [1918] AC 185 (HL) 194-195 (Lord Atkinson); see also *Goss v Withers* (1758) 2 Burr 683, and *Hamilton v Mendes* (1761) 1 W Bl 276

constructive total loss itself is always taken as a protection for the assured. However, MIA 1906 leaves a margin to the court as to what would be a reasonable period, beyond which the recovery would be deemed unlikely. The market practice shared a convention that a constructive total loss occurred where the assured was likely to be deprived of possession for beyond a period of 12 months;[1116] this was later summarized in the Detainment Clause. The difference between the Detainment Clause and the common law was the time of commencement of the period. As in the case of the *Bamburi*,[1117] the reasonable period started from the notice of abandonment given, whereas in the Detainment Clause, the 12-month time period initiated from the date the ship was captured or seized or detained, etc.

Just echoing the pre-statute cases, MIA 1906 takes the market value as the repaired value. This differs from what is provided for in the Institute Clauses: that in ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value. It seems more appropriate to set the insured value as the comparison object, since the insured value of a ship is usually much higher than its real value in market practice. It would be unfair for the insurer, when the test is to compare the real value and the cost of repairs, in ascertaining a constructive total loss and then the assured gets the higher indemnity of the whole insured value. To build in a better balance, the International Hull Clauses updated the test so that the repaired value is 80% of the insured value.

[1116] See *Polurrian Steamship Co v Young* [1915] 1 KB 922; *The Bamburi* [1982] 1 Lloyd's Rep 312
[1117] *The Bamburi* [1982] 1 Lloyd's Rep 312

In modern cases, the principle has been updated so that cost of repairs should be the cost to make the ship to the same standard as her former state; this was not the requirement under the early authorities. It was also held that the principle of the value of the wreck being a component of the cost of repairs under previous cases was inconsistent with the express provision of s 60 and could no longer be treated as the law. The Institute Clauses also exclude the value of the wreck in counting the cost of repairs.

There exist some specific questions on constructive total loss – seizure of pirates and loss of voyage. The early cases treated the seizure by pirates as an actual total loss straightaway, while modern piratical seizure normally no longer constitutes a total loss, no matter actual or constructive. As to loss of voyage, it is notable that MIA 1906 makes no reference to it. But it plays an essential part in the case law. In some very early cases the rule was set that loss of voyage affected loss of vessel; this was overruled by later cases, and the prevailing view became that the loss of the ship would be on the ship alone, irrelevant to the loss of voyage. With respect to the effects of loss of voyage on the goods, the law has generally kept consistent from the olden days till now, that loss of goods is on the goods as well as the voyage.

Constructive total loss lies mid-way between an actual total loss and a partial loss, and the bridge is the notice of abandonment; where this has been properly offered, the assured could get full indemnity, otherwise he would recover no more than a partial loss, unless under some certain circumstances, such a notice could be excused. The term ‘notice of abandonment’ initially

appeared in the case of *Barker v Blakes*[1118] and was soon adopted into general usage.[1119] Before it came into being, it was usually described as 'an offer to abandon'.[1120] It originated to let the insurer be informed immediately what the assured had elected, on receiving the intelligence of the damage, instead of keeping it a secret to wait and see what would happen in the end. A proper notice should be given immediately, unless the information is not required to enable the assured to have some more time to make further enquiry. There is no uniform approach for giving a notice of abandonment, but a conditional notice as a compromise would not constitute a valid notice.[1121] Some early authorities took the silence of the underwriter after he had received the notice of abandonment as one of acquiescence, but it has been altered in MIA 1906 to provide that the acceptance of abandonment could be made by direct expression or implied conduct; a mere silence could not be deemed an acceptance of the offer.[1122] However, a constructive acceptance might occur when the underwriter or his agent says nothing, but then carries out repairs and takes possession of the subject matter insured with no rejection of the notice, and a constructive acceptance has the same effect as an explicitly expressed acceptance.[1123] Obviously, the behaviour as a mere salvor by the underwriter is definitely not a constructive acceptance.[1124] Before the notice of abandonment is accepted, the assured could withdraw the notice, but the acceptance makes things irrevocable unless the acceptance is made upon a

[1118] *Barker v Blakes* (1808) 9 East 283 [294] (Lord Ellenborough)
[1119] Concluded by Rob Merkin QC in a book to be published.
[1120] *Goss v Withers* (1758) 2 Burr 683
[1121] *Russian Bank for Foreign Trade v Excess Insurance Co* [1919] 1 KB 39
[1122] MIA 1906, s 62(5)
[1123] *The Provincial Insurance Company of Canada v Joel Leduc* (1874) LR 6 PC 224
[1124] *Shepherd v Henderson* (1881) 7 App Cas 49

mistake of fact.[1125] The law was settled that, notice of abandonment could be excused if the assured was able to prove that, had he given such notice, it would turn out to be of no use.[1126] As in the case where there is a justified sale by the master. In much earlier times, it was held that a justified sale could not convert a constructive total loss into an actual total loss, and therefore the notice of abandonment was necessary if the assured wanted to be fully indemnified. However, the rule altered and it became the law later that with a 'right sale', the state of things was an actual total loss, which exempted the necessity of notice of abandonment.[1127]

In some pre-statute cases, it was held that the cession occurred upon the acceptance of notice of abandonment; while after the Act, the mainstream view has accepted that the cession takes place upon the settlement of claim, viz. after the underwriter accepts the offer, the transfer has no effect unless the claim has been paid.[1128]

The loss of freight has a close relationship to the state of the ship or the goods whereas it is not equally true to say a total loss on freight is established on the facts of a total loss on the ship or the goods. It was impossible to conclude a certain principle for total loss of freight and the results always relied upon different facts. The MIA 1906 says little on the insurance of freight. This is mainly due to the fact that agreement on this issue could not be reached when the Bill was being drafted. Moreover, few cases on a total loss of freight could

[1125] *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455
[1126] *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (AC) 473 (Brett LJ)
[1127] *Farnworth v Hyde* (1865) 18 CBR (NS) 835 [853]-[858]; (1866) 34 LJCP 207, 210; *Rankin v Potter* (1873) LR 6 HL 83; *Cossman v West* (1887) 13 App Cas 160, 176
[1128] *Arnould*, at 30-06

be drawn upon, to settle the law of constructive total loss on freight, and this has impeded the development of this issue in statute law.

Most modern cases adopt the Institute Clauses to ascertain a total loss on freight. These provide that the assured could recover the freight by providing proof that an actual or a constructive total loss has occurred to the ship and there is no need to prove the amount of freight at risk.[1129] Under the Institute Clauses, if there is a constructive total loss on the ship but the assured elects not to give notice of abandonment and repairs her, a total loss of freight claim would be failed. This overruled the early authorities.[1130]

Since loss of freight is an intangible loss, it always causes disputes about whether constructive total loss on freight exists in reality or whether notice of abandonment is needed when claiming for a total loss of freight. Brett J did not accept the view that there existed no constructive total loss in the realm of freight and held that when the circumstances made the ultimate earning of freight highly doubtful, but without destroying all hope of eventually earning it, then the notice of abandonment was requisite to claim for a constructive total loss of the freight.[1131]

It has been well laid down at common law that the rule of constructive total loss, peculiar to marine insurance, is not applicable to non-marine insurance, save the definition of constructive total loss. As set out by Bailhache J, it is indeed

[1129] ITC Freight, clause 15; IVC Freight, clause 13
[1130] *Petros M. Nomikos Ltd. V Robertson* (1939) 59 Ll L Rep 182; 61 Ll L Rep 105
[1131] *Rankin v Potter* (1873) LR 6 HL 83 (HL) 99 (Brett J)

not proper to use the expression 'constructive total loss' in non-marine insurance.[1132] However, regardless of the specific artificial terminology of 'constructive total loss', it may be argued that the considerations taken into account where an assured claims for a constructive total loss, has effectively been considered, when an assured under a non-marine policy claims for a loss to be within the policy which has been contracted by him and an insurer, for the purpose of covering the loss occasioned by the perils insured against.[1133] Furthermore, it has been recognized that there are common considerations which are material both to a constructive total loss under a contract of marine insurance, and a commercial loss covered by a non-marine policy.[1134] This means that considerations helpful in determining a constructive total loss may also be able to assist in establishing the existence of a commercial loss. Even though the law as to constructive total loss is not applicable to non-marine insurance, in this way, the considerations of constructive total loss can in effect be applied to non-marine insurance. However, it should be noted that the principle of notice of abandonment is not applicable to it, which means that an assured under a non-marine insurance policy is not required to give a notice of abandonment to recover a commercial loss; without this requirement he will not be confined merely to claiming for a partial loss.

In addition to the above considerations common both to a total loss in marine and non-marine insurance, there is also evidence at common law to suggest that the test for constructive total loss may be applicable to non-marine insurance, even though it has been argued that the uncertainty of recovery of

[1132] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[1133] *Mitsui v Mumford* [1915] 2 KB 27 (KB) 32
[1134] *Moore v Evans* [1917] 1 KB 458 (KB) 469

the subject matter insured is sufficient to constitute a loss, whereas the test for a constructive total loss has changed from uncertainty to unlikelihood as to the subject matter insured. Also, owing to the different tests, the outcome as to whether a loss in dispute can be regarded as one falling within the loss of the policy may be distinct. The cases of *Mitsui* and *Campbell* have held that there is no constructive total loss or commercial loss of the subject matter insured, unless the assured in the event of dispossession can prove the unlikelihood of his recovery of the goods;[1135] by contrast, under the judgment of *Holmes* and *Webster*[1136] it could be a loss falling within the meaning of the policy, where it is uncertain that the assured could recover the insured property. It is submitted that it is difficult to give a test as to a loss which can be applicable in all non-marine cases. Obviously, the test applied to the above four non-marine insurance cases is one that is suitable for the deprivation of the possession of the subject matter insurer, irrespective of its physical existence.

In addition, the better step to be taken may be that the rule should be established that where a loss falls within the concept of constructive total loss, it should be a commercial loss. Without such a rule, just like the present approach, both the courts and the stakeholders in the non-marine insurance market may feel uncertain as to whether, on the occurrence of a non-marine insurance loss, the assured has a right to claim for a total loss under a non-marine policy. On the other hand, in order to make rules as to commercial loss in the law of non-marine insurance to be more specific and applicable, the law may better provide for the test as to commercial loss, specifically, to the

[1135] *Mitsui v Mumford* [1915] 2 KB 27; *Campbell & Phillips Ltd v Denman* (1915) 21 Com Cas 357
[1136] *Holmes v Payne* [1930] 2 KB 301; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520

three kinds of commercial loss; that is, there is a commercial loss in non-marine insurance, where the assured is dispossessed of the subject matter insured by a peril insured against, and (a) it is 'uncertain' that he can recover the insured thing, as the case may be, or (b) the cost of recovering the insured thing, as the case may be, would exceed their value when recovered; or (c) where the insured thing is so damaged that the cost of repairing the damage would exceed their value when repaired.

It is suggested that considerations of judgment relating to marine insurance can assist the courts dealing with a non-marine loss.[1137] In order to constitute a constructive total loss, the assured must prove the dispossession of the subject matter insured and the unlikelihood of recovering it.[1138] By the same line of reasoning, in the case of deprivation of possession of the subject matter insured under a non-marine policy, in order to constitute a commercial loss, two necessary conditions need to be satisfied. Firstly, the assured has to prove that he has been dispossessed of the subject matter insured. Otherwise, there is no loss, just as in the facts of *Moore v Evans*.[1139] In that case the assured could not prove that the jewellery insured had been seized by the German authorities, while, at the date of the action, they were partially still in the hands of consignees of the assured, and partially in a bank in the name of the consignees; the court held that there was no loss of the subject matter insured within the meaning of the policy. Secondly, there must be evidence that it is uncertain rather than unlikely that the assured can recover the subject matter insured. It has been held that there will be a commercial loss if the assured can

[1137] *Moore v Evans* [1917] 1 KB 458 (KB) 468-69
[1138] *Polurrian Steamship Co v Young* [1915] 1 KB 922 (KB) 937; 1906 MIA, s 60(2)(i)(a)
[1139] *Moore v Evans* [1917] 1 KB 458 (KB) 472

prove the uncertainty as to the recovery of the insured thing.[1140]

The rule of constructive total loss has been playing a significant role in the ambit of marine insurance. In light of its effect and the similar situations where it can play in marine insurance arising out in the non-marine insurance, it can be expected that the counterpart of constructive total loss can help to resolve whether an assured who has been covered by the non-marine insurance policy can be entitled to claim for a total loss. Also, on the findings of this thesis, the concept of the commercial loss can help to promote the development of the non-marine insurance market, and better balance the benefits of the insurer and the assured. Hopefully, this thesis can contribute to the law on the loss in non-marine insurance.

[1140] *Holmes v Payne* [1930] 2 KB 301 (KB) 310; *Webster v General Accident Fire & Life Assurance Corp Ltd* [1953] 2 WLR 491, [1953] 1 QB 520

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