

Marine insurance — constructive total loss

D A Smith*

I. INTRODUCTION

Part V¹ of the Marine Insurance Act 1909 (C'wlth) effectively deals with the rules of “constructive total loss”.

Loss, as such may be divided into

- total loss;²
- partial loss.³

Total loss can then be divided into

- actual total loss;⁴
- constructive total loss.⁵

Partial loss can comprise three general areas

- salvage, general average and particular charges;⁶
- cargo — where the marks or identification are obliterated;⁷ and
- instances where repairs can be made, provided that repairs do not exceed the sum insured⁸.

II. ACTUAL AND CONSTRUCTIVE TOTAL LOSS

Actual total loss is a material and physical loss whereas a constructive total loss may be considered as a commercial loss.⁹

In the case of *Berger and Light Diffusers Pty Ltd v Pollock*¹⁰ an actual total loss was held for cargo which had no value in the damaged state.

* RFD, RLD, JP, BApSc, FAIN, MCIT, MNI, Master Mariner, Deputy Chairman, Tasmania Branch MLAANZ.

¹ Part V is entitled “Loss and Abandonment”.

² Section 62(1).

³ Ibid.

⁴ Section 62(2).

⁵ Ibid.

⁶ Section 71.

⁷ Section 62(5).

⁸ Section 75.

⁹ H Turner *The Principles of Marine Insurance* (Stone and Cox Ltd, London, 1964) p 61.

¹⁰ [1973] 2 L.loyd's Rep 442.

Again¹¹ —

Constructive total loss has been compared with actual total loss as "commercial total loss is to physical total loss". In most cases constructive total loss is a conventional total loss based on arithmetical computation.

This was also held in the case of *Moss v Smith*¹² where the term "loss" was taken to include damage or detriment.¹³

The effect of a constructive total loss is contained in section 67 of the Marine Insurance Act —

67. Where there is a constructive total loss, the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

This certainly gives an option of possible business importance to an assured as to what type of loss may be claimed for. However, where notice of abandonment is given under material mistake as to the facts, it is a nullity. This was well illustrated in *Norwich Union Fire Insurance Society v Wm H Price Ltd*¹⁴ where the assured gave what purported to be, notice of abandonment.¹⁵

III. ABANDONMENT AND LOSS

In marine insurance an assured may "abandon" the subject matter to the insurers and claim a constructive total loss. If the insurer accepts the abandonment, they pay a total loss to the assured and dispose of the subject matter as best they can for their own benefit. If the insurer refuses the abandonment, the assured may dispose of the subject matter and claim a loss equivalent to the insured value less the salvaged value.¹⁶

Where the assured claims for a constructive total loss, it is a condition precedent that he must abandon the subject matter so that the insurer may take the necessary steps to protect the insurer's interests.¹⁷

A vessel is said to be a constructive total loss when it is estimated that the cost of repairing it would exceed its value when repaired. This entitles the assured to claim the whole of the insurance indemnity on abandoning the vessel (contents and cargo) to the underwriters.¹⁸ It still, however, has to be proved that the vessel is a constructive total loss.

¹¹ ER Ivamy *Chalmers' Marine Insurance Act 1906* (Butterworths, London, 1976) p 83.

¹² (1850) 19 LJCP 225,228.

¹³ V Dover *A Handbook to Marine Insurance* (Witherby and Co, London, 1975) pp 416-7.

¹⁴ [1934] AC 455; C Turner *Australian Mercantile Law* (Law Book Co, Sydney, 1981) p 479.

¹⁵ P Latimer *Cases and Text on Insurance Law* (Butterworths, Sydney, 1977) p 145.

¹⁶ W Tetley *Marine Cargo Claims* (2 ed, Butterworths, Toronto, 1978) p 123.

¹⁷ *Supra* n 9, 62.

¹⁸ WC Aubrey-Rees *Shipmasters Business Companion and Business Guide* (5 ed, Brown Son and Ferguson Ltd, Glasgow, 1955) p 53.

IV. CARGO AND HULL CLAUSES

The constructive total loss clause in the "new A, B and C" Institute Cargo Clauses is —

13. 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.

Under the Institute Time Clauses, Hulls¹⁹ and the Institute Voyage Clauses, Hulls²⁰ a different approach is made in that —

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.

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 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.

So that although the constructive total loss clauses in both the Cargo and Hull policies have the same titles, they differ in that²¹ the cargo policy requires the subject matter to be *reasonably abandoned*, whereas in *ascertaining* whether the vessel is a constructive total loss under the Hull policy, a claim based upon the cost of recovery and repair of the vessel must exceed the vessel's value after repair.

The rules for constructive total loss can be shown by the loss flow chart which inter-relates the various clauses of the Marine Insurance Act dealing with loss.

V. CONCLUSION

Marine insurance is concerned principally with the two important factors of *risk and loss*.

A total or partial loss is self explanatory, however, when a total loss situation is further divided into actual or constructive, the loss situation becomes more complex, with such issues as abandonment and subrogation making the issues even more interesting.

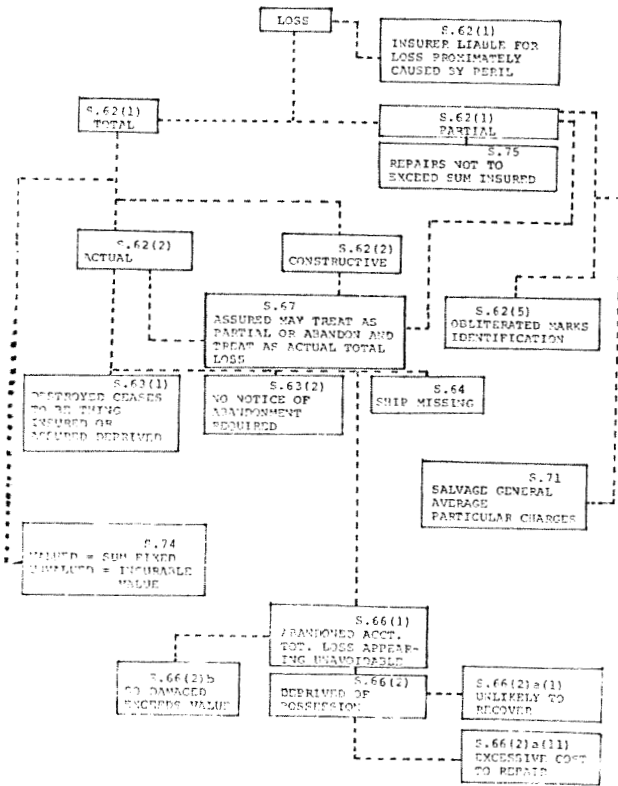
The flow chart provides a framework which illustrates some of these interesting and inter-related components of the Marine Insurance Act.

¹⁹ Clause 19.

²⁰ Clause 17.

²¹ Institute of London Underwriters, *Companies Marine Policy*, (Witherby and Co, London, 1986).

LOSS FLOW CHART



MARINE INSURANCE ACT 1909