Trinity Term
[2019] UKSC 29
On appeal from: [2018] EWCA Civ 230

JUDGMENT

Sveriges Angfartygs Assurans Forening (The Swedish Club) and others (Appellants) *v* Connect Shipping Inc and another (Respondents)

before

Lord Reed, Deputy President
Lord Hodge
Lord Lloyd-Jones
Lord Kitchin
Lord Sumption

JUDGMENT GIVEN ON

12 June 2019

Heard on 10 and 11 April 2019

Appellants	*Respondents*
Michael Ashcroft QC Luke Pearce (Instructed by Thomas Cooper LLP)	Steven Berry QC Neil Hart (Instructed by Hill Dickinson LLP)

LORD SUMPTION: (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agree)

1. On 23 August 2012 the m v "RENOS" was seriously damaged by an engine room fire while on a laden voyage in the Red Sea. On the same day, the owners appointed salvors under Lloyd's Open Form 2011 (No Cure - No Pay). The vessel was towed by the salvors to Adabiya, where her cargo was discharged, and then to Suez, where the salvage services came to an end. A tug was hired to stand by the vessel throughout the time when she was at Suez and to tow her to a place where she could be scrapped or repaired. These proceedings were brought in support of a claim against the hull underwriters for a constructive total loss. Notice of abandonment was served on the insurers on 1 February 2013, while the vessel was at Suez.

2. The "RENOS" was insured at an agreed value of US$12m under a hull and machinery policy subscribed by the appellants (among others) and incorporating the Institute Time Clauses Hulls (1/10/83). The lead hull and machinery insurer was the first appellant, the Swedish Club. In addition, the Swedish Club alone subscribed an Increased Value Policy against the same risks covering certain charges so far as they exceeded those recoverable under the hull and machinery policy, up to a maximum of US$3m. At the trial of the action before Knowles J, it was common ground that there had been a loss by an insured peril. The sole issue was the measure of indemnity. The insurers acknowledged liability for a partial loss but declined the notice of abandonment and denied that the vessel was a constructive total loss.

3. Knowles J held that there was a constructive total loss. The Court of Appeal agreed with both his conclusions and his reasons. The courts below addressed a number of issues, only two of which are before this court. Section 60(2)(ii) of the Marine Insurance Act 1906 provides that in the case of damage to a ship, there is a constructive total loss where "she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired". As a matter of practice, the "cost of repair" has always been treated as including salvage charges, and that is put beyond question by clause 19.2 of the Institute Time Clauses Hulls (1/10/83), which requires account to be taken of the "cost of recovery and/or repair". Both of the issues before this court relate to the expenditure to be taken into account in computing that cost. The first issue is whether it includes expenditure already incurred before the service of notice of abandonment. The insurers say that none of this expenditure is to be taken into account. If they are right about that, the whole of the salvors' remuneration will be excluded, together with the greater part of the cost of the standby tug and some other miscellaneous costs incurred at Suez. On that footing, the judge found that the "cost of repairing the damage" would be

between US$9,079,533.05 and US$11,248,311.20, as against an insured value of US$12m. It is common ground that on these figures the insurers are liable for a partial loss only. The second issue is whether the relevant costs include charges payable to the salvors under the SCOPIC (Special Compensation, Protection and Indemnity) clause of Lloyd's Open Form. The SCOPIC clause is a clause supplementary to the Form which entitles the salvors to additional remuneration for measures taken while performing the salvage services in order to prevent or minimise damage to the environment. The SCOPIC charges, like the rest of the salvors' remuneration, were all incurred before the service of notice of abandonment, and will be disregarded if the insurers are right on the first issue. The judge found that if SCOPIC charges are excluded from the computation but other costs incurred before notice of abandonment are included, the "cost of repairing the vessel" ranged from US$11,820,260.05 to US$13,989,038.20 as against an insured value of US$12m. In that case, she may or may not have been a constructive total loss, depending on where in that range the true figure lay. Both issues were decided in the shipowner's favour in the courts below.

Costs incurred before notice of abandonment

4. The relevant rules are codified by sections 60-63 of the Marine Insurance Act. They are in the following terms:

> "**60. Constructive total loss defined**
>
> (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
>
> (2) In particular, there is a constructive total loss -
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

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

…

61. Effect of constructive total loss

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.

62. Notice of abandonment

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

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

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

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) 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.

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

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63. Effect of abandonment

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

(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."

5. These provisions substantially restate the previous common law. Their effect is that unless notice of abandonment is waived by the insurer or the circumstances are such that there would be "no possibility of benefit to the insurer if notice were given to him", it is a condition precedent to the assured's right to claim for a constructive total loss, that he should have given a valid notice of abandonment: see section 62(1). This is a true election, although it has some features which differentiate it from other cases in which the law requires a person to elect between inconsistent rights or remedies. In particular, it becomes irrevocable only if and when the insurer accepts the abandonment, in which case he is taken to admit both the validity of the notice and his own liability to pay on a total loss: section 62(6). He then becomes entitled to take over the assured's interest in the subject-matter insured and all incidental proprietary rights: section 63. In practice, insurers hardly ever do accept an abandonment except as part of an overall settlement of the claim. But section 62(4) provides that the insurer's refusal to accept the abandonment does not prejudice the assured's rights.

6. The owners' case on pre-notice expenditure is straightforward. They say that the damage to which section 60(2)(ii) of the Act refers is the entire damage flowing from the casualty, and that the cost of recovery and repair is the entire cost, whenever incurred. The insurers dispute this. Their case is more elaborate. They say that the question whether there has been a constructive total loss falls to be decided as at the time when notice of abandonment is given, and by reference to the facts then existing, because the parties' rights are, so to speak, crystallised at that point. This question is, as Mr Ashcroft QC put it, "time-sensitive", in that a ship may be a constructive total loss at one point of time and not at another, as events occur which alter the prospective cost of reinstatement. The assured has to elect between claiming a total loss or a partial loss on the basis of the options open to him at that time. Those options cannot be said to include the incurring of costs which he has already incurred. They are sunk costs, and his real choice is between incurring further costs in future and abandoning the ship to the insurer. Therefore, only the further costs can count. The financial and practical implications of this disagreement are considerable. It is often impossible to know with any confidence what it would cost to restore the vessel to serviceable condition after a casualty, until the damage has been professionally assessed. This is commonly possible only after salvors have brought her to a place of safety. The insurers' argument, if it is correct, will in many cases have the effect of excluding salvage remuneration from the computation of repair costs for the purpose of ascertaining whether there has been a constructive total loss.

7. Although the present question must have arisen in a high proportion of cases where a constructive total loss is alleged, there is very little assistance to be obtained either from the language of the Act or from authority.

8. Dealing first with the language of the Act, I reject the submission that the references in section 60 to expenditure which "would" be incurred point only to future expenditure to be incurred after abandonment. Notice of abandonment is not mentioned in section 60, and if the section refers to future expenditure there is nothing to show from what point it must be "future". More generally, it is clear that the word "would" reflects the hypothetical character of the whole exercise and not the chronology of the expenditure. I also reject the submission that the reference in the additional paragraph of section 60(2)(ii) to "future" salvage operations and general average contributions, points to expenditure following abandonment. Again, there is no indication of the point of time from which these costs must be "future", except that it is implicitly from the time as at which the estimate is made, whenever that is. I am inclined to think, but do not need to decide, that the additional paragraph is concerned only with the treatment of general average contributions. Its effect is that in computing the owner's cost of repairs (i) no account is to be taken of general average contributions receivable by him from other interests such as cargo or freight, whereas (ii) account is to be taken of future general average contributions payable by him to other interests. On that footing "future salvage operations" are being treated as included in the future general average contributions, and would be estimated looking forward from the general average sacrifice. There is much to be said for the view of the current editors of *Arnould's Law of Marine Insurance and Average*, 19th ed (2018), para 29.34 that the result was to overrule the decision of the House of Lords in *Kemp v Halliday* (1866) LR 1 QB 520 that the owner's cost of repairs had to be computed net of any liability of other interests to contribute in general average to salvage charges. But whether that be so or not, it seems to me to be clear that the reference to future liabilities was not intended as an implicit exclusion of past expenditure even for the purpose of general average, let alone more generally for the purpose of determining whether the ship is a constructive total loss. It has been said that the maxim expressio unius, exclusio alterius is "often perilous": *National Grid Co plc v Mayes* [2001] 1 WLR 864, para 55 (Lord Hoffmann). I do not think that it will bear the weight which the appellants seek to place on it in this case.

9. Turning to authority, there appears to have been no case in which the present question was considered before the passing of the Marine Insurance Act 1906, although we were referred to a number of earlier cases in which salvage charges incurred before notice of abandonment were allowed without discussion. They include *Bradlie v Maryland Insurance Co* (1838) 37 US 378, a decision of the United States Supreme Court in which the opinion of the court carried the considerable authority of Justice Story; and the English decisions in *Holdsworth v Wise* (1828) 7 B & C 794 and *Rosetto v Gurney* (1851) 20 LJCP 257. We were also pressed with the observations of Mr Carver QC at an international conference at Buffalo in 1899 in connection with an abortive project to draft common rules for marine insurance, in which he proposed that what happened before the giving of notice of abandonment should be ignored, adding that he was "not sure that that has always been done": *Report of the 18th Conference of the International Law*

Association held at Buffalo, USA (1900), 120. Since the passing of the Act, there have been two English decisions lending some support to the insurers' case. In *Hall v Hayman* (1912) 17 Comm Cas 81, 90, Bray J accepted a concession that pre-notice expenditure was irrelevant. Half a century later, in *Helmville Ltd v Yorkshire Insurance Co Ltd (The "MEDINA PRINCESS")* [1965] 1 Lloyd's Rep 361, 429, Roskill J accepted without discussion a submission in relation to one of a large number of disputed items of expenditure that it was "inadmissible for the purposes of the constructive total loss claim because the work was done before the date of notice of abandonment." The lack of reasoning and apparent lack of argument make it difficult to attach much weight to either decision, and they are certainly not beyond controversy. Every edition of *Arnould's Law of Marine Insurance and Average* from the 15th ed (1961) onward has taken the contrary view. The editors of the 12th ed of *Lowndes & Rudolph, The Law of General Average and the York-Antwerp Rules* (1997), considered that the concession accepted by Bray J was correct in law, but the (different) editors of the 14th ed (2013) appear to resile from that view. In my opinion, the issue is better approached as a matter of principle than by trying to squeeze more juice from these rather dry lemons. The answer depends on some basic principles of insurance law and on an analysis of how those principles are affected by the requirement for a notice of abandonment.

10. The first point to be made is that as a general rule, the loss under a hull and machinery policy occurs at the time of the casualty and not when the measure of indemnity is ascertained. A claim on an insurance policy is a claim for unliquidated damages. The obligation of the insurer is to hold the assured harmless against an insured loss, from which it follows that where the insurance is against physical damage to property the insurer is in breach of that obligation as soon as the damage occurs: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65, 73-74; *Firma C-Trade SA v Newcastle Protection and Indemnity Association ("The FANTI")* [1991] 2 AC 1, para 35 (Lord Goff of Chieveley). As Megaw J pointed out in the former case, at p 74, the result is that "it is not a condition precedent - it is not a fact which must exist and be pleaded - that the plaintiff has quantified the amount of his claim; or even that all the facts exist at the date of the writ which will enable the proper amount of the claim to be determined." These are "matters of evidence, not prerequisites of a cause of action." The rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss developed thereafter, unless it developed as a result of something that can be regarded as a second casualty, breaking the chain of causation between the first one and the loss. For that reason, it has been held that the fact that the policy expires before the loss has fully developed will not affect the assured's right to recover under it in full: *Knight v Faith* (1850) 15 QB 649, 667 (Lord Campbell CJ); *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2010] 1 AC 180, para 39 (Lord Mance). For the same reason, as the editors of *Arnould*, 19th ed (2018) point out at para 29.07, if a casualty occurs within the policy period, and the loss develops after its expiry into one which is constructively total, there is still a constructive total loss under the policy.

11. Constructive total loss is a legal device for determining the measure of indemnity. An insured loss is either total or partial, and any loss other than a total loss is a partial loss: see section 56(1) of the Act. A constructive total loss is not a sui generis kind of loss, conceptually distinct from these. It is a partial loss which is financially equivalent to a total loss, and may be treated as either at the election of the assured. The ordinary measure of indemnity under an insurance against damage to property is the depreciation in the value of the property attributable to the operation of the insured peril. Section 69 of the Marine Insurance Act provides that the measure of loss is the reasonable cost of repairs so far as these have been carried out and the reasonable depreciation arising from the unrepaired damage so far as they have not: see section 69. The reasonable cost of repairs which have been carried out is treated as the measure of the depreciation of the ship's value. Therefore, if the reasonable cost of repairs exceeds the insured value, as the statutory definition of a constructive total loss envisages, the value of the ship is nil, and in financial though not physical terms the loss is total.

12. Although section 60(1) of the Act refers to an actual total loss "appearing to be unavoidable", it is not in doubt that the question whether there has been a constructive total loss depends on the objective facts. So far as they are future or unknown facts, a reasonable assessment of the probabilities must be made. But the test does not depend on the opinion or predictions of the owner, however reasonable. The rule was laid down by Lord Ellenborough in *Bainbridge v Neilson* (1808) 10 East 329, 341:

> "The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment: but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment."

13. It follows from the objective character of the exercise and the fact that the loss is suffered at the time of the casualty notwithstanding its development thereafter, that the damage referred to in section 60(2)(ii) of the Act is in principle the entire damage arising from the casualty from the moment that it happens. The measure of that damage is its effect on the depreciation of the vessel, represented by the entire cost of recovering and repairing it. It cannot make any difference when that cost was incurred. This being the ordinary principle to be applied, the next question is whether it is affected by the legal requirement for a notice of abandonment.

14. It would be surprising if it were. In the first place, a notice of abandonment is not always required, even in the case of a constructive total loss. Section 62 envisages two cases where it is not required: where it is waived by the insurer, and where there is no possibility of benefit to the insurer. Both exceptions reflect the fact that the requirement for notice of abandonment exists wholly for the benefit of the insurer. Its purpose is to enable him to exercise the rights which arise in his favour upon an effective abandonment. Thus where a total loss is constructive as opposed to actual, the insurer is entitled to take over what remains of the hull and to receive the freight in cases where it has been earned notwithstanding the casualty: section 63. Secondly, under section 61 of the Act, there must be a constructive total loss before any question can arise of an election to treat it as a partial or a total loss. For this reason, the House of Lords held in *Robertson v Petros M Nomikos Ltd* [1939] AC 371, that service of a notice of abandonment was a condition precedent not to the existence of a constructive total loss but only of the right to claim against the hull insurers on that basis. It followed that where recovery under the terms of an insurance on freight depended on the ship having become an actual or constructive total loss, the assured was entitled to recover notwithstanding that the shipowner had elected to treat the loss as partial and had not tendered notice of abandonment. Lord Wright, with whom Lord Atkin, Lord Thankerton and Lord Russell of Killowen agreed, went on to point out, at p 387, that the constructive total loss dated back to the time of the casualty. The freight insurers being liable upon the vessel becoming a constructive total loss:

> "That liability accrues at once when the casualty happens, even if the exact position is not ascertained till later. If the assured has rightly given notice of abandonment of the ship, the loss dates back retrospectively to the date of the casualty."

15. The mainstay of the insurers' case is the proposition that the assured may not recover on the basis of a constructive total loss unless the loss is still total at the time of notice of abandonment. The proposition itself is not in doubt. It was established by a series of cases dating back to the decision of Lord Mansfield CJ in *Hamilton v Mendes* (1761) 2 Bur 1198. It is, however, important to appreciate the basis on which these cases were decided. They do not depart from the orthodoxy that a loss, including a constructive total loss, occurs at the time of the casualty and includes any development of the damage thereafter. Nor do they hold that a constructive total loss may cease to be regarded as one by reference to the facts existing at some later stage. They are concerned with the question what happens if the loss is, as it is put in the older cases, "adeemed" because something happens after the casualty to reverse it. The ratio of these cases is that even if the vessel is a constructive total loss, the character of the policy as a contract of indemnity requires the assured to be limited to his actual loss at the time when notice of abandonment is given. Exactly the same reasoning underlies the corresponding rule that he is limited to his actual loss at the time when the action is brought.

16. In *Hamilton v Mendes* itself, the "SELBY" was captured by a French privateer in the Atlantic during the Seven Years War, and then recaptured from her French prize crew a few weeks later by a British man-of-war. News of the capture and recapture reached the assured simultaneously. He purported to give notice of abandonment. Lord Mansfield, sitting at Guildhall, held that the ship was never a constructive total loss, because it was never sufficiently clear that the loss arising from the original capture would be permanent. But on the footing that it was a constructive total loss, he held that the assured could recover only for a partial loss, arising from the prize due to the recaptors. His reason appears at p 1210 of the report:

> "The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification, as it really is at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification, in truth, is an average, or perhaps no loss at all. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been sustained."

Lord Mansfield (p 1214) left open the question what would have happened if news of the recapture had arrived after the notice of abandonment. That question was, however, resolved nearly half a century later in *Bainbridge v Neilson* (1808) 10 East 329, another case of capture and recapture, this time during the Napoleonic wars. In this case news of the recapture arrived between the tender of notice of abandonment and the commencement of the action. I have already referred to it as authority for the objective character of the factual enquiry involved. Lord Ellenborough held (p 344) that the recapture adeemed the loss so that:

> "that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss has been incurred in the salvage; that is the real amount of the damnification which the plaintiff is entitled to receive under this contract of indemnity."

The leading modern case, which holds that the position was not altered by the Marine Insurance Act 1906, is the decision of the Court of Appeal in *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922.

17. In *Roura & Forgas v Townend* [1919] 1 KB 189, the plaintiffs were the voyage charterers of the "IGOTZ MENDI". They insured their anticipated profit on

the voyage against the actual or constructive total loss of the vessel. The vessel was captured by a German cruiser in the Indian Ocean, as a result of which the profit was lost. But before action was brought against the insurer, the ship was stranded and abandoned on the coast of Denmark while in the charge of her German prize crew, and recovered by salvors employed by the shipowner. Roche J held that the plaintiffs were entitled to succeed. This was because the rule was that

> "restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if before action it has already been made good to him." (p 195)

The recovery of the ship by her owners did not therefore mean that the vessel was no longer to be regarded as having suffered a constructive total loss. At p 196, he observed:

> "I have already held that there was a constructive total loss of the *Igotz Mendi* by her capture, and before the ship was restored to the owners such capture resulted in a total loss to the plaintiffs of their rights and profit under the charter. In short, the event agreed upon as necessary to give a right to indemnity had happened, and had irrevocably caused the loss of the subject-matter of the insurance. In these circumstances, as the restoration of the vessel itself to its owners did nothing to extinguish or minimise the plaintiffs' loss, so also it cannot, in my judgment, operate to extinguish or to bar the plaintiffs' claim."

This decision was subsequently approved by the House of Lords in *Robertson v Petros M Nomikos Ltd* [1939] AC 371, 382-383 (Lord Wright), 395 (Lord Porter).

18. If the principle in these cases is that although a constructive total loss has occurred, the assured is limited to his actual loss so far as reduced by subsequent events, it must follow that no expenditure of the owner himself by way of salvage or repair can be regarded as reducing the "cost of repairing the damage". It does not reduce his loss. On the contrary, it is part of the measure of loss against which he is entitled to be indemnified, if not as part of the sum insured then as sue and labour charges. This was what the House of Lords decided in the Scottish appeal of *Sailing Ship "BLAIRMORE" Co Ltd v Macredie* [1898] AC 593. The "BLAIRMORE" was sunk by a storm while moored in San Franscisco Bay and abandoned to the insurers by her owner. The assured pleaded that the cost of raising and repairing the ship was

such as to make her a constructive total loss at the time of the notice of abandonment. After the notice of abandonment the insurers raised her at their own expense and when sued for a total loss contended that by the time action was brought the loss was only partial: she would no longer have cost more to raise and repair than she was worth, because she had already been raised at their expense. This is substantially what the insurers are saying in the present case, when they argue that the position must be determined by reference to the situation of the vessel at the moment of abandonment, without regard to what has already been spent on reinstating her. The case came to the House on an issue as to relevancy. Lord Halsbury appears to have thought that there had been an actual total loss. But the other members of the Appellate Committee proceeded on the footing that there had been a constructive total loss. They held that the loss could not be reduced to a partial loss by the mere expenditure of money by the insurer. This, as Lord Watson explained at p 607, was because the insurers could not

> "avoid their liability as for a total constructive loss by their intervening gratuitously and taking upon themselves part of the expenses which primâ facie fall upon the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss."

In other words, if the assured had incurred the expenditure, it would not have reduced the amount of his loss, and it made no difference that instead of the assured incurring the expenditure and recovering it from the insurer, the insurer incurred it directly.

19. In the present case, the "cost of repairing the damage" for the purpose of determining whether the vessel was a constructive total loss included all the reasonable costs of salving and safeguarding the "RENOS" from the time of the casualty onwards, together with the prospective cost of repairing her. The cost of repairing the damage was in no way "adeemed" because part of it had already been incurred at the time when notice of abandonment was given and action brought on the policy. These costs are therefore to be taken into account for the purposes of section 60(2)(ii) of the Act. On this point, I would affirm the decision of the courts below.

SCOPIC costs

20. As with the earlier issue concerning pre-abandonment expenditure, the financial implications of this question are significant. The SCOPIC charges incurred by the "RENOS" were found by the judge to amount to about half of the total salvage remuneration, and if included in the calculation it might make the difference

between recovery on a partial or total loss basis. In other cases, especially where a casualty involves an oil or chemical tanker, SCOPIC charges may be many times the remuneration attributable to the "classic" salvage services directed at saving the property.

21. Salvage remuneration is payable under maritime law, independently of contract, but in practice has for many years been payable under Lloyd's Open Form (No Cure - No Pay) in its successive iterations, which provides for its assessment by arbitration in London. Historically, remuneration was payable only for services supplied for the salvage of property, ie the ship and her cargo. Salvors were not rewarded for any additional services supplied for any other purpose, such as preventing or minimising environmental damage. Indeed they exposed themselves in some cases to liability for such damage. After the grounding of the "AMOCO CADIZ" on the French Atlantic coast in 1978, special provision was made in the 1980 ed of Lloyd's Open Form for an enhanced rate of remuneration to those supplying salvage services to laden oil tankers. But the general law was not modified until the International Convention on Salvage 1989, which has the force of law in the United Kingdom by virtue of section 224(1) of the Merchant Shipping Act 1995. Article 8(1)(b) of the Convention provided that in performing salvage services as traditionally understood, a salvor had a duty to "exercise due care to prevent or minimise damage to the environment". Article 13(1) provides for the assessment of the salvors' remuneration, and stipulates that it should reflect, inter alia, "the skill and efforts of the salvors in preventing or minimising damage to the environment". Article 14(1) entitles the salvors to "special compensation" from the shipowner equivalent to the expenses incurred in performing the duty under article 8(1)(b). The Convention regime was not initially as successful in its object as had been hoped, mainly because article 14(1) did not provide for a profit element in respect of salvage services provided to safeguard the environment. In 1999, therefore, the SCOPIC clause was added to Lloyd's Open Form, which provided for compensation to be based on commercial rates for the service supplied. In its current form, it is an addendum to the 2011 edition of the form, which is in almost universal use for the provision of salvage services.

22. The 2011 Form provides by clause A for the provision of the classic salvage services, ie services to "salve the property", being the vessel, her cargo, freight, bunkers and stores together with any property thereon (with specified exceptions), and to take the property to an agreed place or in the absence of agreement on the place, to a place of safety. It provides separately by clause B that "while performing the salvage services the Contractors shall also use their best endeavours to prevent or minimise damage to the environment", and by clause C that unless otherwise agreed the SCOPIC clause is to be treated as incorporated. The critical parts of the SCOPIC clause for present purposes are clauses 5 and 6. Clause 5 provides for the assessment of the salvors' remuneration for the totality of the services provided, including those required for the protection of the environment, in accordance with

an elaborate tariff set out in Appendix A. Clause 6 provides that the salvors' basic remuneration shall be assessed in accordance with article 13 of the Convention, but that so far as the remuneration calculated in accordance with clause 5 exceeds the amount payable under article 13, it will be payable in addition by the shipowners alone. In other words, it will not be shared with the other interests salved. This reflects the fact that SCOPIC remuneration is intended to avoid environmental damage which would be a liability of the shipowner, in respect of which he will be insured not under the hull and machinery policy but by the owner's Protection and Indemnity insurer. Accordingly, clause 15 of SCOPIC, which deals with general average, provides:

> "SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel."

The "RENOS" was entered for these among other risks with the American Club, which ultimately paid the SCOPIC charges in this case.

23. The insurers' case is that the test for determining whether some item of expenditure is part of the "cost of repairing the damage" depends on the characterisation of the expenditure. They say that SCOPIC charges fall to be disregarded because they are not part of the "cost of repairing the damage" for the purpose of section 60(2)(ii) even on the footing (which is common ground) that that includes the cost of recovering the vessel. The assured, by comparison, say that the SCOPIC charges are part of the "cost of repairing the damage" because they were an integral part of the salvors' remuneration. They had to be paid if the ship was to be salved, and she had to be salved if she was to be repaired. The assured accept that the shipowners could in theory have contracted with the salvors on terms which excluded the SCOPIC clause. But they say that the test is whether a prudent uninsured owner would have contracted on terms that the salvors' remuneration included SCOPIC costs. There is no basis in the judge's findings for concluding that the prudent uninsured owner would have contracted with the salvors on terms any different from those that these owners agreed. This submission was accepted by Knowles J and the Court of Appeal.

24. I can travel a certain distance down the path favoured by the assured, but not as far as their destination. Although, on the face of it, the words "the cost of repairing the damage" describe a kind of expenditure, it is well established that they include

some costs which are not directly expended on the actual reinstatement of the ship but are preliminary to that reinstatement. Salvage charges are the classic example. They are included in the cost of repairs because the vessel must be salved in order to be repaired. For the same reason, temporary repairs near the site of the casualty and towage to a repair yard are generally allowed if they are reasonable preliminaries to the repairs themselves. As Roskill J put it in *The "MEDINA PRINCESS"* [1965] 1 Lloyd's Rep 361, 520, temporary repairs and towage to a repair yard may be part of "what would have to be expended to put the ship right." This accords with the concept of a constructive total loss. The cost of repairs is the measure of the extent of the damage. The reason why section 60(2)(ii) requires a comparison between the cost of the repairs and the value of the ship when repaired, is to determine whether the ship is financially worth repairing. Expenses for a purpose which is an essential preliminary to repairing her necessarily enter into that comparison. Even if the actual repairs would cost less than the repaired value of the ship, if she cannot be got off the rocks or towed to a place where she can be repaired save at a cost which when added to the cost of the actual repairs will exceed her value, then she is not financially worth saving. For the same reason, the mere fact that the insurer would not, under the policy terms, be liable to indemnify the assured for some item of expenditure on a partial loss basis does not necessarily mean that it cannot be included in the comparison for the purpose of deciding whether there is a constructive total loss. It is still potentially relevant to the question whether the vessel is financially worth saving.

25. The common feature of all the cases where the cost of steps preliminary to repairs have been included in the comparison is that their objective purpose was to enable the ship to be repaired. That will generally be true of salvage charges. The same goes for the cost of temporary repairs, towage, and other steps which are plainly preliminaries to carrying out permanent repairs. The objective purpose of SCOPIC charges was different. It was not to enable the ship to be repaired, but to protect an entirely distinct interest of the shipowner, namely his potential liability for environmental pollution. That purpose has nothing to do with the subject-matter insured, namely the hull. It was no part of the measure of the damage to the ship, and had nothing to do with the possibility of repairing her. The point may be tested by asking what the position would have been if the shipowner, instead of making a single agreement with salvors to salve the ship and prevent or minimise environmental damage, had contracted with one enterprise to salve the ship and another to put floating booms around her with a view to preventing or minimising environmental damage. Mr Berry QC was inclined to accept that in that case the cost of the booms would not have entered into the comparison required by section 60(2)(ii). I think that his instinct was right. The money paid to the boom contractor would in no sense have been preliminary to the repairs. By comparison, the cost of temporary repairs or towage to the repair yard would have been preliminary to the repairs whether these tasks were undertaken by the salvors or by some other contractor. What this suggests is that the only reason why the SCOPIC charges are said to be part of the cost of repair is that the charges for environmental protection

were owed to the same contractor as the charges for salving the property so that she could be repaired. Yet that is an entirely adventitious factor. Whether the same contractor or different contractors were used has nothing to do with the objective purpose of the expenditure or with the comparison required by section 60(2)(ii).

26. I am prepared to assume that a prudent uninsured owner would have done what these owners did and contracted with the salvors for both the salving of the ship and protecting the environment. But I do not think that that makes any difference. The prudent uninsured owner test was first laid down by Lord Abinger CB in *Roux v Salvador* (1836) 3 Bing NC 266, 286 and endorsed by the House of Lords, adopting the advice of the judges of the Exchequer Chamber in *Irving v Manning* (1847) 1 HL Cas 287. It is a test for determining whether the subject-matter insured is a constructive total loss in circumstances where the relevant facts are hypothetical or cannot be known. As applied to a damaged ship, the test is whether the prudent uninsured owner would have repaired her and if so how. Before the passing of the Marine Insurance Act 1906, there was a controversy about how far the prudent uninsured owner was assumed to take account of matters other than the cost of repair and the repaired value of the ship, such as the value of the wreck if sold to breakers. In *Angel v Merchants' Marine Insurance Co* [1903] 1 KB 811, the Court of Appeal held that only the comparison between the repaired value of the ship and the cost of repair (including steps preliminary to repair) was relevant. In *Macbeth & Co Ltd v Maritime Insurance Co Ltd* [1908] AC 144, a case decided after the Act but by reference to the law as it stood before, the House of Lords overruled *Angel*, holding that the question fell to be decided by reference to whatever other considerations would have been taken into account by a prudent uninsured owner. These might include the financial benefits and detriments of not repairing, which in that case included the benefit of being able to sell the wreck. If that view had prevailed, it would have been relevant to ask whether the prudent uninsured owner would have been induced to repair notwithstanding that the cost of salvage and repair would exceed her repaired value, because of the potential liability for environmental pollution associated with abandoning her. But section 60(2)(ii) resolves that question in favour of the view taken in *Angel*, which was the leading authority at the time that the Act was drafted. The effect of that provision is that the prudent uninsured owner is assumed to be interested only in the comparison between the cost of repair and the repaired value, and his hypothetical choices are relevant only to the quantum of the repair costs. The statutory solution has sometimes been criticised as illogical, but the world of marine insurance has accommodated it and moved on. The classic division of risks between hull insurers and P&I insurers assigns environmental liabilities and associated sue and labour charges to P&I insurers, a state of affairs which is reflected in clause 15 of the SCOPIC clause. The old controversy about the value of the wreck has for many years been resolved by what is now clause 19.1 of the Institute Time Clauses Hulls (1/10/83), which excludes it from the constructive total loss comparison.

27. The result is that it is necessary to identify the purpose of the expenditure which it is proposed to take into account, and to apply the prudent uninsured owner test only to expenditure for the purpose of repairing the ship in the larger sense which I indicated above. The fact that a prudent uninsured owner might have contracted with the same contractors for both the protection of the property and the prevention of environmental pollution does not show that both are part of the cost of repairing the damage. Neither does the fact that the charges under both heads are secured on the ship. The two heads of expenditure have quite different purposes, only one of which is related to the reinstatement of the vessel. If they were truly indivisible, this might not matter. But the whole scheme of the SCOPIC clause depends on their being separately identifiable, and the very fact that one is for the hull underwriter's account and the other for the P&I insurers shows that they cannot be indivisible. In my opinion, SCOPIC charges are not part of the "cost of repairing the damage" for the purpose of section 60(2)(ii) of the Act or the "cost of recovery and/or repair" for the purpose of clause 19.2 of the Institute Clauses, because their purpose is unconnected with the damage to the hull or its hypothetical reinstatement. I would therefore allow the appeal on that point.

Disposal

28. I would make a declaration accordingly, set aside the order of Knowles J and remit the matter to him to determine in the light of this court's judgment whether the "RENOS" was a constructive total loss and what financial consequences follow from that.