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# Constructive Total Losses The Inside Story

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## Section 57, Marine Insurance Act 1906:

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

*2) In the case of an actual total loss no notice of abandonment need be given.*



***Fraser Shipping Ltd. v Colton and Others [1997] 1 Lloyd's Rep. 586 (Shakir III)***

Vessel en route, dead ship and under tow from Jebel Ali to Huang Pu, China for scrapping.

During passage vessel stranded on Wu Zhou Island and vessel (nearly?) broken in two.

No survey undertaken but generally accepted that it would not be possible to refloat in one piece even if she were not cleanly broken in half be unlikely to be refloated and towed to China in one piece.



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Was the vessel an ATL?





Held that no, she was not an ATL.

The vessel had not ceased to be a thing of the kind insured. She still had the appearance of a ship, albeit possibly in two parts.

The vessel could be towed (in two parts!!) to China and be scrapped as intended.

Further the assured had not been irretrievably deprived of the vessel, it was salvageable, it would simply have been a very expensive operation. The test for an ATL is whether recovery is a legal or physical impossibility.



**Moore v. Evans [1918] AC 185**, per Lord Atkinson:

*"The doctrine [CTL] had its origin in cases of capture...based upon the principle that the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not, but might upon capture proceed at once and, after notice of abandonment, recover his capital, the value of his ship, from the underwriters, provided he was not aware of her recapture when he commenced his action."*



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Section 60 (1), Marine Insurance Act 1906:

*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.*





Section 60 (2)(i), Marine Insurance Act 1906:

*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...*



Section 60 (2)(ii), Marine Insurance Act 1906:

*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;*



## Constructive Total Loss by deprivation

*“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 **within a reasonable time...**”*



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

*“...and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision. **Such a rule seems to me too favourable to the underwriter.**”*

*I think that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise data upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision.”*



## Section 62, Marine Insurance Act 1906.

*(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.*



## Section 62, Marine Insurance Act 1906 (*continued*).

*(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.*



## Section 62, Marine Insurance Act 1906. *(continued)*

*(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.*



## Section 60(2)(ii), Marine Insurance Act 1906

*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; or*





**KAC v KIC Lloyd's Law Reports, [1996] 1 Lloyd's Rep. 664, Per Rix**  
J

*“it seems to me ... that it is at the time of issue of proceedings that the rights of the parties must be viewed as crystallized. Since therefore recovery after action brought does not affect the total loss indemnity to which an assured is entitled as of that date, that also seems to me to be an appropriate date at which to find that an assured's right (and correlative duty under s. 78(4) of the MIA) comes to an end.”*



## Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (the “B Atlantic”) [2015] 1 Lloyd's Rep 117

*“Furthermore, despite Mr Blackwood QC's [for insurers] strenuous efforts to suggest that everything changed once there was a writ agreement, in that it polarised the parties' positions, I consider that the commercial reality is that, in many cases (including the present one), at the time of the writ agreement, the vessel is still in the grip of the relevant insured peril and it is in the interests of both parties that expense continues to be incurred in mitigating the loss,...*



## Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (the “B Atlantic”) [2015] 1 Lloyd's Rep 117

*...The writ agreement protects the insured from prejudice in the event of change of circumstances and obviates the need to issue proceedings at the time a notice of abandonment is rejected but, in my judgment, it does not have the wider effect for which insurers contend. The position is different once proceedings are actually issued: the dispute is now regulated by the Civil Procedure Rules and in those circumstances, it may well be that Rix J is right that the entitlement to sue and labour ceases on issue of proceedings. However, in my judgment, it does not cease at the earlier stage of a writ agreement.”*



**Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The M/V “Brilliante Virtuoso”)**  
**[2015] EWHC 42 (Comm)**

*“it seems to me that ... [Rix J in KAC v KIC] applied a principle recognised and applied in the earlier cases (albeit in relation to ademption of loss rather than sue and labour) that the issue of the writ or claim form crystallises the rights and obligations of the parties to the contract of insurance. Once the claim form is issued, the relations between the parties are governed by the Civil Procedure Rules rather than the contract of insurance. Hence, the duty of utmost good faith comes to an end once proceedings are issued*



*On behalf of Underwriters subscribing to policy number ### we hereby decline the Notice of Abandonment tendered. Underwriters have been asked to agree to the Assured being placed in the same position as if a Claim Form had been issued on 16th July 2018.*

*Underwriters agree to place the Assured in the same position as if an English Claim form had been issued on 16th July 2018, but please note that Underwriters deny that, by reason of their agreement, they have any greater exposure to claims for interest and costs (if any) as at or from 16th July 2018, than they would have but for this agreement.*



*“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.”*

*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.”*

# “JAMES JOYCE” – Schedule of Costs

US\$		US\$	GA	PA	Salvage/ S&L	P&I	Claim against proceeds	Rank for CTL ??
-	-							
75,000.00	<b><u>CAPE VERDE COAST GUARD.</u></b>  Evacuation of crew by helicopter.....	75,000.00				75,000.00		
5,000,000.00	<b><u>ACME SALVAGE INC.</u></b>  Salvage award (Article 13 plus SCOPIC) for services up to 18 August.....	5,000,000.00			3,500,000.00	1,500,000.00		4,500,000.00
1,589,500.00	<b><u>ACME SALVAGE INC.</u></b>  Services under WRECKHIRE - 18 August/ 15 December as follows:  Standby tug at Cape Verde - 18/31 August.....  Temporary repairs for tow to Las Palmas.....  Towing to Las Palmas - 31 August/ 7 September.....  Discharging damaged/worthless cargo ashore.....  Caretaking of vessel - 5 October/ 30 November @ US\$6,000/day.....  Towing to scrapyard.....	105,000.00	105,000.00					42,000.00
		80,000.00	90,000.00					32,000.00
		87,500.00	87,500.00					35,000.00
		750,000.00				750,000.00		
		342,000.00			246,000.00		96,000.00	246,000.00
		225,000.00					225,000.00	
		1,589,500.00						
-	-							

US\$		US\$	GA	PA	Salvage/ S&L	P&I	Claim against proceeds	Rank for CTL ??
177,000.00	<b><u>AGENT'S DISBURSMENT ACCOUNT AT CAPE VERDE</u></b>							
	Port charges for "Jame Joyces" entry.....	25,000.00	25,000.00					10,000.00
	Berth dues - 18/ 31 August @ US\$500.....	7,000.00	7,000.00					2,800.00
	Hotel charges for evacuated crew.....	5,000.00				5,000.00		
	Anti-pollution booms in port.....	75,000.00	75,000.00					30,000.00
	Oil skimmers and dispersing chemicals used by local authorities at port.....	65,000.00				65,000.00		
		177,000.00						
292,000.00	<b><u>AGENT'S DISBURSEMENT ACCOUNT AT LAS PALMAS.</u></b>							
	Port charges for entry.....	25,000.00	25,000.00					10,000.00
	Beth dues - 7 September/ 1 December @ US\$200/day.....	17,000.00	7,000.00		8,200.00		1,800.00	15,300.00
	Disposal of worthless cargo using trucks.....	250,000.00				25,000.00		
		292,000.00						
10,000,000.00	<b><u>LAS PALMAS SHIPYARD. (quotation)</u></b>							
	Repairs to fire damage (estimate).....	7,000,000.00						7,000,000.00
	Repairs to extinguishing damage (estimate).....	3,000,000.00						3,000,000.00
		10,000,000.00						



