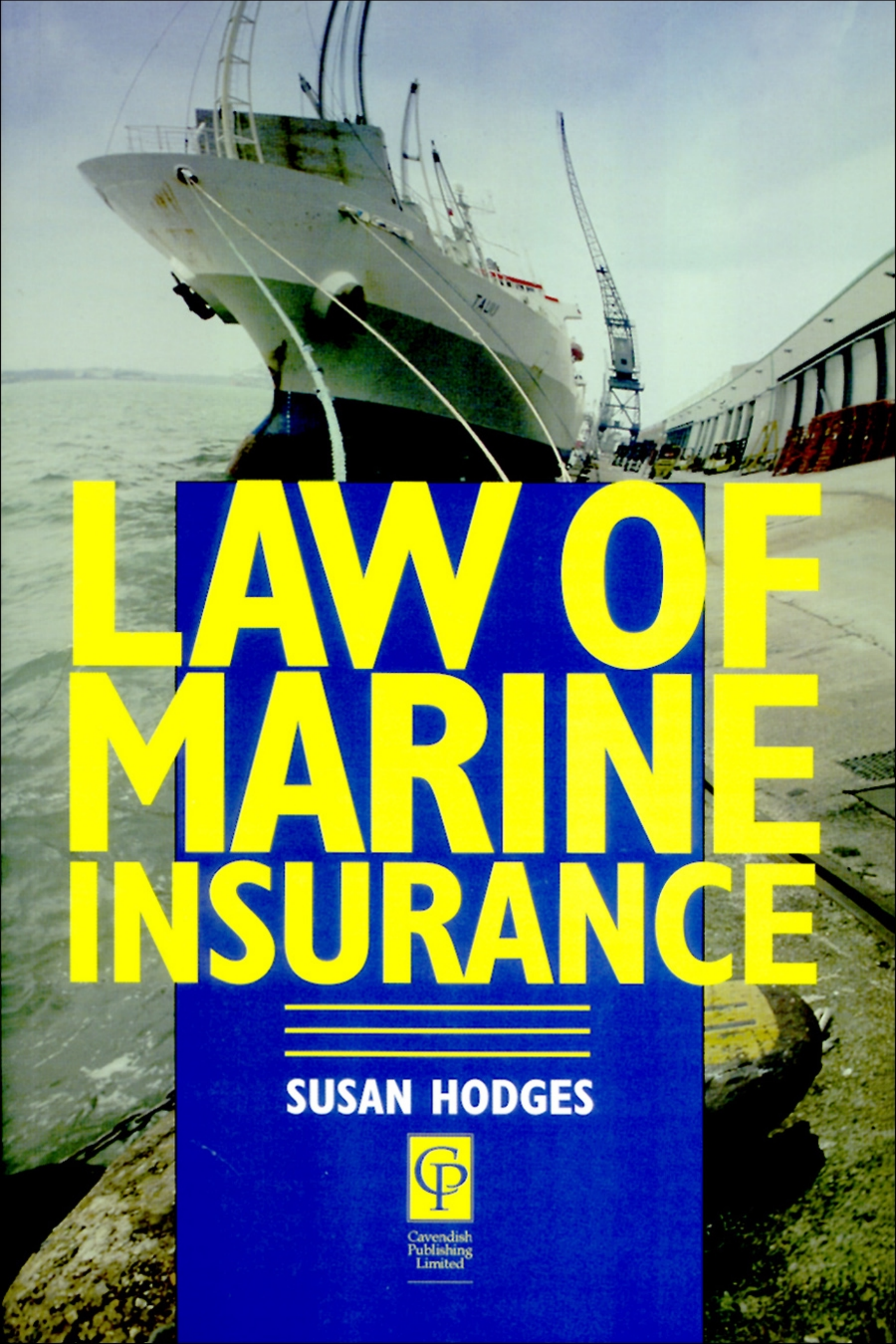

# LAW OF MARINE INSURANCE

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# CHAPTER 3

# SUBJECT-MATTER INSURED

## INTRODUCTION

All the provisions in the Act as to what may be made the subject-matter of a marine policy of insurance are derived from s 3 of the Act. It commences with the general statement that 'every lawful marine adventure may be the subject of a contract of marine insurance', and then lists three broad categories of matters which may be subjected to a marine adventure. The most obvious, namely, 'ship, goods and other moveables' are set out in s 3(2)(a); intangible property in s 3(2)(b); and liability to a third party in s 3(2)(c).

It is to be noted that by s 26(1), 'The subject-matter insured must be designated in a marine policy with reasonable certainty'. In some policies, the subject-matter is briefly described simply as 'ship', 'goods' or 'freight'; if the nature of the goods is such that, if it was not properly designated, it could mislead the insurer, then, the assured is bound to disclose the precise character of the subject-matter insured.[1] But this does not mean that the nature or extent of the assured's interest has to be specified in the policy. Thus, a re-insurer does not have to state that he is effecting a re-insurance.[2]

## SHIP

Rule 15 of the Rules for Construction of Policy[3] states:

> 'The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.'

As can be seen, a policy on 'ship' is comprehensive covering more than just the hull. Thus, if a shipowner does not wish to insure the stores and provisions for the officers and crew, he would have to be more specific in his description of the subject-matter insured; a policy simply on 'hull and machinery' would not include these items.[4] Stores and provisions intended for passengers are not covered in a policy of insurance on 'ship', and should therefore be specifically insured. What constitutes the 'ordinary fittings requisite for the trade' is, of course, a question of fact.[5]

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1 Failing which the assured could also be in breach of non-disclosure of a material circumstance, s 18; see Chapter 6.

2 See *Mackenzie v Whitworth* (1875) 1 Ex D 36.

3 The 'Rules for Construction of Policy' is part of the Marine Insurance Act 1906: see First Schedule. Hereinafter referred to simply as 'the Rules for Construction'.

4 See *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 2 QB 380, CA

5 In *Hogarth v Walker* [1900] 2 QB 283, dunnage mats and separating cloths on board a vessel engaged in a grain trade, though not actually in use at the time of loss, was held covered.

## The policy (MAR 91 Form) and the Clauses

At present, there are four standard sets of Clauses for hulls in use, namely, the Institute Time Clauses Hulls, 1/10/83 (the ITCH(83));[6] the Institute Time Clauses Hulls, 1/11/95 (the ITCH(95);[7] and the Institute Voyage Clauses Hulls, 1/10/83 (the IVCH(83)) and the Institute Voyage Clauses Hulls 1/11/95 (the IVCH(95)).[8] As will be seen, compared to the ITCH(83), the ITCH(95) are less favourable to the assured. All the Clauses are subject to English law and practice, and may be used only with the current Lloyd's Marine Policy, (MAR 91)[9] and the Institute of London Underwriters Companies Marine Policy Form (MAR 91),[10] both of which are expressly declared to be subject to the 'exclusive jurisdiction of the English Courts, except as may be expressly provided herein to the contrary'. As can be seen, attached to each of the MAR 91 Form is a schedule in which the details relating to the insurance are to be inserted.

The Institute Time Clauses – Hulls – Restricted Perils, 1/11/95 [11] were also introduced, and, as the name suggests, they restrict the cover for loss of or damage arising as a result of some of the perils insured under cl 6 of the ITCH(95). They provide a less comprehensive cover than the standard ITCH(95) and the IVCH(95).

# GOODS

The first part of the statutory definition for 'goods' in r 17 states:

> 'The term "goods" means goods in the nature of merchandise and does not include the personal effects or provision and stores for use on board.'

'Goods' refer to goods which are merchantable, that is, merchandise put on board for the purpose of trade or commerce. Hence, it cannot include personal effects or the ship's provisions.[12]

## Deck cargo and living animals

The second part of r 17 states that:

> 'In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.'

6 See Appendix 6.

7 See Appendix 7. At the moment both sets of the 1983 and 1995 Clauses are in use, but it is envisaged that the ITCH(95) to be used only with the current MAR 91 Policy Form, will eventually replace the ITCH(83).

8 See Appendix 9.

9 See Appendix 4.

10 See Appendix 5.

11 See Appendix 8.

12 *Duff v Mackenzie* (1857) 3 CBNS 16 is the authority for the principle that the personal effects of the master are not covered under the general denomination of 'goods'; they have to be specifically insured.

The nature of deck cargo and living animals is such that they are exposed to greater risks than goods carried in the normal way. Living animals, whether carried on or under deck, are vulnerable and susceptible to the stresses and strains of any form of transportation, not to mention a turbulent sea voyage. The general rule that they must be specifically insured also stems from the principle of disclosure. By insuring them specifically, and not just as 'goods', the insurer cannot later complain that he was unaware of the nature of the subject-matter insured or the extent of the risk which he has agreed to underwrite.

## 'Usage to the contrary'

The next question which arises is the meaning of the word 'usage'. Does it refer to the usage to carry the cargo on deck and/or the usage of the insurance market to insure it under the general denomination of 'goods'? The matter was resolved by the House of Lords in *British and Foreign Marine Insurance Co v Gaunt*[13] where wool, which was not specifically insured, was in accordance with the local usage of the wool trade carried on deck. This fact was, however, unknown in the insurance market. The House held the insurer liable for the damage caused by sea water. The word 'usage' was construed to mean a usage in the wool trade, and not of the business of insurance. Cargo insurers, according to this interpretation of the phrase, would have to familiarise themselves with the custom and usages of trade relating to the cargo which they have agreed to insure. Ignorance of the usage of a particular trade is clearly not a defence available to him.

It is of particular importance in cargo insurance that the goods be described with reasonable clarity.[14] This principle ties up neatly with the duty of disclosure of material facts.[15] If an insurer is required to underwrite any risk which is in excess of the ordinary, he ought to be informed of it. And one way of fulfilling this is to require that the assured specify the particular or special nature of the cargo which he has been asked to insure. Second-hand machinery, for example, has to be specifically insured.

## Containers and packing materials

The statutory definition of 'goods' has failed to indicate whether containers and packing materials are covered by a policy on goods. No hard and fast rule can be extracted from the cases which have dealt with this problem.

One test is to ask the question: who provided the container? In other words, is the container owned or hired by the carrier or, is it owned by the persons interested in the cargo? It is possible, in the case of the latter, that it could be covered by the policy on the goods. The general rule appears to be that, if the container is virtually part and parcel of the goods, it is probably covered.

13 [1921] 2 AC 41, HL; hereinafter referred to as *The Gaunt Case*.

14 See s 26(1).

15 See Chapter 6.

## Loss of voyage or of the adventure

When an assured effects a marine policy on goods at and from the port of loading to the port of destination, he probably has in mind that the only risk he is insured for is the risk against physical losses. But, in fact, his policy is much wider, for it extends to an indemnity to be paid in case the goods do not reach their destination. This additional coverage is commonly referred to as 'an insurance of the venture, or an insurance of the voyage, or an insurance of the market, as distinguished from an insurance of the goods simply and solely'.[16] However described, it stems from the doctrine of the loss of voyage.

The doctrine of loss of the voyage was in existence for a great many years before the Act; but doubts as to its validity and applicability crept in soon after the passing of the Act. The fact that the Act had omitted to cast the rule in statutory form has led some to believe that it no longer has a place in law after the promulgation of the Act.

The inveterate doctrine, which is by far one of the most important of rules in the law of marine insurance relating to a policy on goods, was firmly re-established in the case *British and Foreign Marine Insurance Co Ltd v Samuel Sanday and Co*[17] decided not long after the passing of the Act. As the facts of the case will vividly illustrate the principle, it would be helpful to state them: a cargo of linseed belonging to British merchants was shipped on a voyage from the Argentine to Hamburg for sale in Germany. The cargo owners had them insured for the voyage, and the perils insured against included restraint of princes. When war broke out, further prosecution of the voyage became illegal, and the vessel on which the goods were carried was ordered to proceed to British ports, which she did. The goods were then returned to the owners who had them warehoused. They then issued notice of abandonment claiming for a constructive total loss.

The issue in the case was framed with admirable clarity and precision by Earl Loreburn as thus:[18]

> 'The first question is whether the old rule still prevails, that upon an insurance on goods … the frustration of the adventure by an insured peril is a loss recoverable against underwriters, though the goods themselves are safe and sound.'

The House held that as there was nothing to be found in the Act which was inconsistent with the law as was settled by authorities,[19] it must be still good

16 *Per* Lord Wrenbury in *British & Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650 at p 672, HL.

17 [1915] 2 KB 781; [1916] 1 AC 650, HL. For convenience, this case shall henceforth be referred to as *The Sanday Case* and the principle of law propounded therein as 'The *Sanday* Principle' discussed further in Chapter 15.

18 [1916] 1 AC 650, at p 656, HL.

19 The authorities, which had laid down the doctrine of loss of the voyage, before the passing of the Act are: *Anderson v Wallis* (1813) 2 M & S 240; *Barker v Blakes* (1808) 9 East 283, 293-294; and the well-known case, *Rodoconachi v Elliot* (1874) LR 9 CP 518 where the insured goods were detained in Paris by the German army when it became impossible to send them on to their proper destination. The assured was entitled to abandon the goods to the insurers and recover for a constructive total loss.

law. In support of this stand, the law lords relied on ss 26(4) and 91(2) of the Act. Lord Parmoor, who gave a most comprehensive summary of the law, said:[20]

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

The House held that the cargo owners were entitled to recover for a constructive total loss of the goods by a peril insured against, even though the goods did not suffer any bodily damage. It is thus important to bear in mind that an insurance on goods is 'not merely an insurance of the actual merchandise from injury, but also an insurance of its safe arrival'.[21]

The doctrine of loss of voyage applies to goods, freight and profits, but has no application to a ship.[22]

## The Frustration Clause

Following the decision of *The Sanday Case*, which allowed recovery for a claim which was in effect based upon loss of, or frustration of, the insured adventure resulting from 'restraint of princes', the frustration clause (clause 3.7) was introduced in the Institute War Clauses (Cargo) [IWC(C)] which declares that, 'any claim based upon loss of or frustration of the adventure' is not covered.[23]

## The Institute Cargo Clauses (A), (B) and (C)

Cargo may be insured under either the Institute Cargo Clauses (A), (B) or (C), 1/1/82, (the ICC).[24] The ICC (A) is for all risks policy, whereas (B) and (C) are for enumerated risks; as in the case of the clauses for Hulls, they may be used only with the 'MAR Form'. Naturally, the ICC(A) is the most comprehensive cover available, and also has the advantage of the matter relating to the burden of proof.[25]

# MOVEABLES

Section 90 defines 'moveables' to mean 'any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents'.

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20 [1916] 1 AC 650 at p 668, HL.

21 *Per* Earl Loreburn, [1916] 1 AC 650 at p 656, HL.

22 A long list of authorities supporting this statement can be found in a footnote (no 2) in Arnould, *Law of Marine Insurance and Average* (1981, 16th edn) para 1186. Hereinafter referred to simply as 'Arnould'.

23 This clause will be discussed more fully under insurance for war and strikes risks; see Chapter 14.

24 See Appendices 10, 11 and 12.

25 See Chapter 11.

Section 3(2)(a) states that if they are exposed to maritime perils, they may be made the subject-matter of a contract of marine insurance.

# FREIGHT

The subject of freight can be daunting to the timid and the uninitiated; this is because it is abstract and intangible in nature and cannot, as in the case of ship or goods, itself suffer physical damage or loss. It is incapable of being exposed directly to maritime peril. Steeped in history and bounded by the rules of the common law, it is a difficult subject to grasp because there are so many different types of freight. Moreover, it is essentially a concept borrowed from the law of carriage of goods by sea, and when applied to marine insurance, the matter is aggravated by the fact that, 'The references to freight insurance in the Marine Insurance Act 1906 are particularly sparse'.[26]

## Definition of 'freight'

Section 90 (and r 16 of the Rules for Construction) defines 'freight' as follows:

> '"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.'[27]

'Freight' is profit earned from the employment of the ship. The 'earning or acquisition of freight' and 'profit' are both specifically mentioned in s 3(2)(b). Provided that the 'insurable property' from which the freight is to be earned is endangered by exposure to 'maritime perils', they may be made the subject of a contract of marine insurance.[28]

## Freight payable by a third party

This part of the definition is intentionally worded in general terms in order to embrace all the various types of freight known in the law of carriage of goods by sea. Also, the use of the word 'includes' implies that the definition is not exhaustive. Though incomplete, it is, nevertheless, comprehensive, covering any 'benefit derived by the shipowner from the employment of his ship'.[29] According to this judicial definition, freight may be divided into two broad categories: It covers freight earned from the carriage of goods and freight earned from the hire of the ship. There are basically two types of freight falling under this part of the statutory definition, namely:

26 See Ivamy, *Marine Insurance* (1985, 4th edn), p 10; hereinafter referred to simply as 'Ivamy'. Apart from ss 16(2), 70 and 90, and r 3(c), there does not appear to be any other provision in the Act dealing directly with freight.

27 'Goods' is defined in r 17 and 'moveables' in s 90. As regards passage money, see *Denoon v The Home and Colonial Assurance Co* (1872) LR 7 CP 341, where the passage money to be earned for the conveyance of coolies was held not recoverable under a policy on freight. Passage money has to be specifically insured: see s 3(2)(b).

28 Both 'insurable property' and 'maritime perils' are defined in s 3.

29 *Per* Lord Tenterden in *Flint v Flemyng* (1830) 1 B & Ad 45 at p 48.

- ordinary freight, also known as bill of lading freight; and
- chartered freight, sometimes referred to as charterparty freight.

It is to be noted that no distinction is made in the Act of the different types of freight; they are all referred to generally as 'freight'. Past cases have revealed that freight may be insured simply as 'freight' or comprehensively as 'freight and/or chartered freight and/or anticipated freight'.[30] The wide spectrum was not found unacceptable. The courts have not found the wide interpretation as infringing the rule contained in s 26(1) that the subject-matter insured must be designated with reasonable certainty. It has also to be said that there are two sets of Institute Clauses, namely, the Institute Time Clauses, Freight 1/11/95, (ITCF) and the Institute Voyage Clauses, Freight 1/11/95 (IVCF) (whose main clauses are identical) applicable to the insurance of freight covering marine perils.[31]

## *Ordinary freight*

Mr Justice Hamilton in *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd*,[32] when comparing chartered freight with ordinary freight, observed that:

> '... bill of lading freight is prima facie the shipowner's own contracted remuneration for the carriage of goods in his own ship by his own servants.'

It is evident from this comment that he obviously had in mind the circumstance where a shipowner, employing his ship as a general ship, himself enters into contracts with various third parties for the carriage of their goods to agreed destinations. A charterer may, of course, charter a ship in order that he himself can use her as a general ship to earn ordinary freight. But from the shipowner's standpoint, 'it is the same thing ... whether he receives the benefit of the use of his ship by a money payment from one person who charters the whole ship; or from various persons who put specific quantities of goods on board'.[33] However, any profit to be made by the charterer has to be insured as 'profit'.[34]

It is contended that the term 'bill of lading' freight is a better and more vivid description than ordinary freight. It is the reward paid to a 'carrier' for the service of the carriage of goods from one port to another. The word 'carrier' is specially chosen here to denote both shipowner and charterer. In summary, ordinary freight is, in effect, the remuneration earned by a carrier (whether

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30 As in *Carras v London and Scottish Assurance Co Ltd* [1936] 1 KB 291, CA. In *Rankin v Potter* (1873) LR 6 HL 83, freight was insured as 'homeward chartered freight'; *Inman Steamship Co v Bischoff* (1882) 7 App Cas 670, HL, as 'on freight outstanding'; *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, CA simply as on 'cargo and freight'; and *Robertson v Petros Nomikos Ltd* [1939] AC 371, HL as 'freight, chartered or otherwise ...' .

31 See Appendices 13 and 14. For war and strikes, see the Institute War and Strikes Clauses, Freight, Time, and the Institute War and Strikes Clauses, Freight, Voyage.

32 [1912] 3 KB 51 at p 65.

33 *Per* Lord Tenterden in *Flint v Flemyn* (1830) 1 B & Ad 45 at p 48.

34 Which presumably would be the difference between the ordinary freight payable to him by shippers and the chartered freight payable by him to the shipowner.

shipowner or charterer) who employs the ship as a 'general ship' carrying cargo for all and sundry. As such a contract of carriage is evidenced by a bill of lading, the freight so earned has come to be known as 'bill of lading' freight. The prefix, 'bill of lading', distinguishes it from chartered freight earned pursuant to a time or voyage charterparty. It also serves as a notification to the insurer the existence of a charterparty.

The acquisition of such freight is clearly dependent on the delivery of the goods at the agreed destination. The payment of ordinary freight and the delivery of the goods are thus concurrent conditions. Under the law of contract of carriage, freight is payable even if the cargo is delivered in a damaged condition at the agreed port of destination. An observation which is by far the most lucid on the subject can be found in an old case, *Weir & Co v Girvin & Co*[35] It states:

> '… freight is a payment to be made to the ship for the carriage and delivery, and until there has been carriage and delivery, the shipowner is not under ordinary circumstances entitled to demand freight at all.'

Freight, however, is not payable if the goods are so damaged as to lose its identity and can no longer be described as the same goods as that shipped.[36]

It has to be stressed that an assured of freight, which is to be derived from the carriage of cargo, would not be allowed to recover for a loss of freight unless the ship was, at the time of the loss, ready to receive the cargo, and the cargo ready to be shipped. This principle was established in *Forbes v Aspinall* where Lord Ellenborough declared that:[37]

> 'In every action upon such a policy, evidence is given either that the goods were put on board from the carriage of which the freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight.'

The same principle applies to chartered freight. An imaginary cargo or contract of affreightment would not suffice.

## *Chartered freight*

The term 'chartered freight', though it appears in r 3(c) of the Rules for Construction in relation to commencement of risk, has not been defined by the Act. Its name, however, suggests the existence of a charterparty from which the 'chartered' freight is to be earned. A chartered freight policy is not unusual, but is not so common as a policy on freight in general terms. For the purpose of this discussion, chartered freight will be divided into voyage chartered freight and time charter hire.

### ***Voyage chartered freight***

A shipowner could, instead of employing his ship as a general ship, charter her to one person, the charterer, for the carriage of cargo to be provided by the charterer for a specified voyage. To insure the ability of the ship to earn the

35 [1899] 1 QB 193 at p 196.

36 The leading authority on the subject is *Asfar v Blundell* [1896] 1 QB 123, CA.

37 (1811) 13 East 323 at p 325. See also *Williamson v Innes* (1831), cited in 8 Bing 81; and *Barber v Fleming* (1869) LR 5 QB 59.

freight contemplated by the charterparty upon the cargo to be loaded for carriage between the agreed ports, the shipowner would take out a policy on 'chartered freight'.

As in the case of ordinary freight, the freight at risk is on goods which had been shipped. If the goods are not delivered at the proper destination, freight is not payable. This necessarily means that should the ship be unable to commence,[38] or continue with,[39] the chartered voyage with the cargo on board, a loss of voyage chartered freight would accrue. The whole matter is intertwined with the performance of the charterparty. Thus, should the voyage charterparty be cancelled or the chartered voyage discontinued, a loss of chartered freight would befall on the shipowner, for which he would wish to be indemnified under the policy on chartered freight. In each case, the loss of the freight, which has resulted from the non-performance of charterparty, is only recoverable if it was caused by a peril insured against.

It would appear from the following statement made by Arnould that there could be another species of voyage chartered freight.[40] He states:

> '... a fixed sum stipulated to be paid to the shipowner by the terms of a charterparty for the use of his ship, or part of it, on an entire voyage therein described. Under such a contract the ship may earn freight though no goods may ever be put on board, and the question whether, at the time of loss, she had taken any goods on board for the voyage insured, or whether any were contracted to be shipped, does not arise.'

According to this explanation, it is possible for a shipowner to earn chartered freight independently of the carriage and delivery of goods. As soon as the ship commences her chartered voyage, chartered freight is at risk regardless of whether or not she has cargo on board at the time of loss. There is no principle in law saying that the payment of freight has to be made dependent upon the carriage and delivery of cargo. A shipowner could enter into any agreement with a charterer as regards the terms of payment of freight.[41] The expression 'chartered freight' is wide enough to accommodate any freight payable under a charterparty including a time charter.

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38 See, eg, *Rankin v Potter* (1873) LR 6 HL 83, where cargo was not loaded because the ship, which was damaged from perils of the seas, was a constructive total loss; and *Jackson v The Union Marine Insurance Co Ltd* (1874) LR 10 CP 125. In *Re An Arbitration between Jamieson and The New Castle Steamship Freight Insurance Association* [1895] 2 QB 90 and *Carras v London and Scottish Assurance Co Ltd* [1936] 1 KB 291, CA, freight was lost when as a result of a peril of the seas, the ship was delayed, and the charter was cancelled.

39 See, eg, *Guthrie v North China Insurance Co Ltd* (1902) 7 Com Cas 130, CA, where chartered freight was not earned because of the ship on which the cargo was carried went ashore and was lost, and the chartered voyage was not completed; *Robertson v Petros Nomikos Ltd* [1939] AC 371, HL, where during the course of the chartered voyage, an explosion followed by fire caused the (constructive) total loss of the chartered vessel; and *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, CA where shortly after the commencement of the chartered voyage, the ship went ashore and was abandoned to salvors when it was found that the cost of temporary repairs would exceed the repaired value of the vessel.

40 Arnould, para 356.

41 See, eg, *Griffiths v Bramley-Moore and Others* (1878) 4 QBD 70, where the charterparty provided for payment for freight at a specified rate. The shipowners, however, effected an insurance for only part (one third) of the chartered freight with the insurers. The clause in question read as: 'To cover only the one-third loss of freight in consequence of sea-damage as per charterparty.'

### *Time charter hire or time freight*

There is no provision in the Act referring specifically to the payment of 'hire', sometimes referred to as 'time freight'[42] which is the name given to the reward payable by a time charterer to a shipowner for the hire of his ship for a specified period of time. But as it is a 'benefit derived by the shipowner from the employment of his ship' it falls within the common law definition of freight. It is, however, necessary to mention that hire is payable for the right to use the vessel irrespective of the extent to which it is employed by the charterer for the carriage of goods. Unlike ordinary freight, it does not depend on the delivery of the goods for its reward. It is, however, reliant on the physical well-being of the ship,[43] for should the ship be not made available to the charterer for their use, a loss of hire would ensue. In this regard, it is significant to note the effect of the off-hire clause invariably found in standard time charters and, in particular, the 'loss of time' clause, cll 15 and 11 of the ITCF and IVCF respectively.[44] It is also to be recalled that the shipowner would only be able to claim under his freight policy if the loss is caused by a peril insured against.[45]

Mr Justice Hamilton in *Scottish Shire Line Ltd v London and Provincial Marine and General Insurance Co Ltd* intimated that he had:[46]

> '... no difficulty in understanding what is meant by chartered freight ... Chartered freight is remuneration paid to the shipowner by another who hires his ship or part of it, generally with an added contract that the shipowner's captain shall sign bills of lading for the charterer's benefit.'

Arnould has no doubt whatsoever that time charter hire, though not freight strictly so called, is included within the definition of 'chartered freight':[47]

> '... in policies of insurance it also denotes that which is less properly called freight, *viz* the price agreed to be paid by the charterer to the shipowner for the hire of his ship, or a part of it, under a charterparty or other contract of affreightment.'

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42 Note Lord Denning's warning in *The Nanfri* [1978] 2 Lloyd's Rep 132 at p 139 on the use of this term: 'So different are the two concepts that I do not think the law as to "freight" can be applied indiscriminately to "hire"'.

43 See cll 16.1 and 12.1 of the ITCF and IVCF: 'In the event of the total loss (actual or constructive) of the Vessel named herein the amount insured shall be paid in full, whether the Vessel be fully or party loaded or in ballast, chartered or unchartered.'

44 Clauses 15 and 11 state: 'This insurance does not cover any claim consequent on loss of time whether arising from a peril of the sea or otherwise.' *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125; *Inman Steamship Co Ltd v Bischoff* (1882) 7 App Cas 670; *The Alps* [1893] P 109; and *The Bedouin* [1894] P 1, CA, state the legal position before the introduction of the 'Loss of Time' Clause. See *Bensaude v Thames & Mersey Marine Insurance Co Ltd* [1897] AC 609, HL; *Turnbull, Martin & Co v Hull Underwriters' Association* [1900] 2 QB 402; *Russian Bank for Foreign Trade v Excess Insurance Co Ltd* [1918] 2 KB 123; and *The Playa de Las Nieves* (1978) AC 857, HL where the said clause was applied.

45 See *Court Line Ltd v R*, The Lavington Court [1945] 2 All ER 357, CA.

46 [1912] 3 KB 51 at p 65.

47 Arnould, para 311.

### *Advance freight*

Ordinary freight and chartered (voyage and time) freight may be payable in advance, either before the delivery of the cargo or the commencement of the charterparty. Provided that it is 'not repayable in case of loss', it qualifies as advance freight. It is not the shipowner but the party who has paid the freight in advance who would insure the advance freight.[48]

The problem which is likely to arise here is with regard to payments made by the charterer to the shipowner: whether a payment is a mere loan (an advance) or advance freight is a question of fact. A mere unsecured loan which is repayable in any event and is not dependent on any property at risk is therefore not insurable.[49]

## Owner's trading freight

Owner's trading freight, though not referred to specifically as such, is covered by the first part of the statutory definition of 'freight'. It refers to the circumstance where the shipowner carries his own goods in his own ship. In practical terms, he would not, of course, be paying himself for the carriage of his own cargo. It would perhaps be easier to grasp this principle if we were to pretend that the cargo (owned by the shipowner) belonged to a third party, for which freight would be payable by that third party to the shipowner on its arrival at the agreed destination. For all intents and purposes, the shipowner's cargo (carried in his own ship) is to be treated as if it belonged to someone else. In the words of Mr Justice Bayley in *Flint v Flemyng*:[50]

> 'Whether the shipowner carry his own goods or the goods of another person, is immaterial to him ... he may insure that profit under the name of freight, whether it accrue from the price paid for the carriage of the goods of others, or from the additional value conferred on his own goods by their carriage.'

Needless to say, as in the case of ordinary freight, there must actually be a cargo to be shipped, and the ship must be ready to carry that cargo.

# PROFIT

That profit to be earned from a maritime adventure may be made the subject-matter of a marine policy of insurance was established as early as 1802 in *Barclays v Cousins*,[51] where the policy was on profits to be derived from a cargo which was liable to be affected by the perils insured against. Mr Justice Lawrence said:

48 See s 12 and *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209 at p 235.

49 As this problem has not arisen in recent years and the question is one of fact, it would serve no useful purpose to spend time on it. The differences between the two forms of payment were discussed in *Manfield v Maitland* (1821) 4 B & Ad 582 at p 585; *Winter v Haldimand* (1831) 2 B & Ad 649; and *Hicks v Shield* (1857) 26 LJ QB 205. A secured loan whether upon ship, goods or moveables is insurable: see s 3(2)(b).

50 (1830) 1 B & Ad 45 at p 49.

51 (1802) 2 East 545 at p 546.

'As insurance is a contract of indemnity it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages, which but for the perils insured against the assured would not suffer: and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port.'

Like freight and the other pecuniary benefits listed in s 3(2)(b), profit, even though it does not have a physical existence, may be made the subject-matter of a marine contract of insurance. The only *caveat* is that the ship, goods or moveables, from which the profit is to be derived, has to be endangered by exposure to maritime perils. If the insurable property does not arrive, 'his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to …'.[52]

## Profit on goods

First, it has to be mentioned that an insurance simply on 'goods' does not cover profits, which have to be specifically insured.[53] An assured of an insurance on profits upon goods has to show that the goods were at one time or another actually exposed to 'maritime perils' as defined by s 3. The policy attaches only to the goods which are actually on board.[54]

## Profit on charter

The benefits which a charterer expects to earn from the use of the chartered vessel may also be insured. To make a profit, a charterer can either sub-charter the ship or enter into contracts with various shippers for the carriage of their goods. The expected profit to be earned from the sub-charter is generally insured either as 'profit on charter', 'difference of freight', or 'anticipated earnings'.[55]

Unless he has entered into a binding contract for freight, it is generally recognised that a 'carrier'[56] cannot insure his expected earnings under the denomination of 'freight'. Following from this, the question which then arises is whether it could be insured generally as 'profit'. There is no direct authority on the subject. However, in *Manchester Lines v British Foreign Marine Insurance Co*,[57]

52 (1830) 1 B & Ad 45 at p 49.

53 See *Anderson v Morice* (1875) LR 10 CP at p 621.

54 See *M'Swiney v Royal Exchange Assurance Corpn* (1849) 14 QB 634 at p 646.

55 See *Asfar v Blundell* [1896] 1 QB 123, CA; *US Shipping Co v Empress Assurance Corpn* [1908] 1 KB 259; *Scottish Shire Line Ltd v London & Prov Mar & General Insurance Co* [1912] 3 KB 51 at p 65; *Papadimitriou v Henderson* [1939] 3 All ER 908; and *Continental Grain Co v Twitchell* (1945) 61 TLR 291, CA.

56 Who could be a shipowner or charterer.

57 [1901] 7 Com Cas 26 at p 33. He said: 'It seems to me clear that a shipowner has an interest in the use of his ship, and that he may insure himself against the loss which he may undoubtedly suffer from being deprived of its use by perils of the sea or other causes.'

Mr Justice Walton seemed to be receptive to the suggestion that a shipowner could insure his interest in the use of his ship, entirely independently of any particular contract for the payment of freight or hire. He did not, however, as it was unnecessary for him so to do, indicate how the subject-matter insured is to be described. Thus, his comments, made by way of *obiter*, must still been given further thought.

## COMMISSION

The earning of any commission is specifically named in s 3(2)(b) as a subject-matter which may be insured. In any sale or trade, a commission is likely to be made by an agent or any third party who is involved in the transaction. If the merchandise sold is prevented from arriving at its proper destination by a maritime peril, the person expecting the commission would suffer a loss. Though the commission may be dependent upon the goods, it is not covered by a policy on goods and has, therefore, to be specifically insured.

## DISBURSEMENTS

There is no provision in the Act defining the word 'disbursements'. In lay terms, it refers to any expenditure of money, but in relation to marine insurance, it has to represent money spent on insurable property, 'the benefit of which will be lost or the object of which will be frustrated by marine perils …'.[58]

For the purpose of earning freight, a shipowner may incur expenses before and during the course of a voyage in equipping, refitting, and supplying the ship. Expenditure on coal, engine-room stores, provisions, port charges;[59] dry dock and painting expenses;[60] and necessaries[61] have all been held insurable under the denomination of 'disbursements'.

In *Buchanan and Co v Faber*,[62] Mr Justice Bingham thought that 'disbursements' was well understood at Lloyd's to be a compendious term used to describe any interest which was outside the ordinary and well-known interests of 'hull,' 'machinery,' 'cargo,' and 'freight'. Later, Mr Justice Walton in *Moran, Galloway & Co v Uzielli and Others* remarked that:[63] 'disbursements represent expenditure by the shipowner either on his ship or for the purpose of earning his freight, and such policies are in the nature of insurance of the shipowner …'. However defined, it has to be expended either upon his ship or upon his freight, because the money spent cannot itself be at risk.

58 See Arnould, para 325.

59 *Roddick v Indemnity Mutual Marine Insurance Co* [1895] 1 QB 836; 2 QB 380.

60 *Lawther v Black* (1900) 6 Com Cas 5.

61 See *Moran v Uzielli* [1905] 2 KB 555.

62 (1899) 4 Com Cas 223 at pp 226–227.

63 [1905] 2 KB 555 at p 558.

## Double insurance

The major difficulty in this area of law lies with the principle against double insurance. Any outlay incurred by a shipowner before the commencement of the risk, whether for repairs of permanent fixtures or fittings, or for the purchase of stores and provisions, or for port charges, is either represented by some part of the value of the ship or is defrayed out of freight. Thus, the same item may be insured twice over, first, in the policy on ship, and then on disbursements or freight and disbursements, as the case may be. This problem of duplicity arose in *The Gunford Case*[64] where the owners, in addition to a policy on ship, effected a valued honour policy on disbursements. The House of Lords held that, as some of the payments consisting of current working expenses were also covered by the insurance on gross freight, and some of the expenses consisting of repair costs, outfit, and insurance premium on hull were also covered by their policy on ship and materials, there was over-insurance by double insurance. In the circumstances, the owners were not allowed recovery for any sum in excess of the indemnity allowed by law.

In determining whether there is duplicity of coverage, it is suggested that s 16 (on insurable value) should be borne in mind. In an unvalued policy, the insurable value of the subject-matter insured is taken as that at the commencement of the risk. Outlay incurred before the commencement of the risk would probably offend the principle of double insurance, for any expense incurred in enhancing the value of the ship would have been included in the insurable value of the subject-matter insured. It is difficult to say the same of outlay expended after the commencement of the risk.

## Disbursements Warranty Clause

The decision of *The Gunford Case* has led to the introduction of the 'Disbursements Warranty' clause under which an assured is allowed to take out, *inter alia*, additional insurance on disbursements. The amount of such ancillary insurances is limited to the percentages specified in the clause.[65]

## Institute Time Clauses – Hulls Disbursements and Increased Value Clauses (total loss only, including excess liabilities)

The above Institute Clauses are the facility for effecting an insurance on disbursements (or increased value). It is to be noted that this insurance is ancillary to the hull insurance, and recovery under it is dependent on a total loss of the ship.

Whether the words 'Total loss only' refer to a total loss of the ship or the subject-matter insured is unclear. Historically, however, policies on disbursements were almost invariably expressed to be 'free from average'

64 [1911] AC 529, HL.

65 See cl 22 of the ITCH(95) and cl 20 of IVCH(95) which also limit the amount that may be insured on freight.

which means that it is against total loss only. Further, indemnity under disbursements policies has always been in the past made payable only in the event of the vessel being settled under the hull policy as for a total (actual or constructive) loss of the ship.

## SEAMEN'S WAGES

Historically, the law of most maritime countries had debarred seamen from insuring their wages. It was thought that if they were allowed such a privilege, they might be tempted not to exert themselves to the utmost for the preservation of the voyage. The old adage 'freight is the mother of wages' was obviously framed to promote this principle. If no freight was earned, there would not be a fund from which wages could be paid out.

With the abandonment of this harsh rule in 1854, upon which freight ceased to be the mother of wages, seamen became entitled to claim wages even in the event of the loss of ship. The employer became statutorily bound to pay wages up until the time of the loss. But even then, a seaman could still suffer a pecuniary loss, for he would have earned wages for the remainder of the voyage, or the period of time for which he was engaged, had the ship not been lost.

Seamen's wages fall within the category of 'pecuniary benefit' of s 3(2)(b). The earning of their wages is dependent on the well-being of 'insurable property', that is, the ship, which is endangered by the exposure to maritime perils. Further, s 11 expressly acknowledges that, 'the master or any member of the crew of a ship has an insurable interest in respect of his wages'.

## SHAREHOLDER

Whether a shareholder of, for example, a shipping company may take out a marine policy to insure his interest in a particular adventure undertaken by a ship or ships of the company in which he holds shares, upon which profit is to be earned, and on which the value of his share is dependent, is a question which needs to be explored.

Though this may not be a matter of daily or frequent occurrence, it is nonetheless a legal issue not just of academic interest, as it could well arise in the case of a single-ship company or in the particular instance when the value of the shares in a company is critically dependent on the success or failure of an important enterprise or adventure involving great risks and uncertainty. If the stakes are high, a prudent shareholder would surely wish to protect his interest by taking out a policy of insurance. The crucial question is whether, legally, it is possible to do so by a marine policy of insurance.

First, it has to be emphasised that a non-marine case, *Macaura v Northern Assurance Co Ltd*,[66] has firmly established that a shareholder does not own or possess any propriety rights in the assets belonging to the company in which he holds shares. Thus, as a shareholder of a shipping company does not have an

66 [1925] AC 619.

insurable interest in the ship(s) owned by the company, he cannot take out a policy upon them. This authority, however, does not answer the above question. Some light on the subject is shed in a pair of old cases both arising out of the laying of the Atlantic telegraph cable in 1857–58. Though conflicting, they provide some insight as to how the matter may be argued, if not resolved.

In *Wilson v Jones*,[67] it was held that such an interest as described above is insurable, provided that the subject-matter insured is described with clarity. In a methodical fashion, the first question raised by Mr Justice Willes was, 'what was the subject-matter insured?' He observed that, as drafted, the policy was not an insurance on the cable, 'but on the interest which the plaintiff had in the success of the adventure'. As shareholder, he had an interest in the profits to be made by the company, for the value of his share was dependent upon the amount of profit the company was to make.

Mr Justice Blackburn, on the other hand, applying the well-known test framed by Mr Justice Lawrence in *Barclays v Cousins*,[68] which was later amplified in *Lucena v Craufurd*,[69] came to the conclusion that:[70]

> 'He was interested in a company which was about to lay down a cable across the Atlantic. If that event happened, there can be no doubt the owner of shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse off. It follows, then, equally without a doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good.'

Such a policy, according to Mr Justice Blackburn, resembles an insurance on profit, which is always insurable, with the proviso that it has to be 'endangered by the exposure of insurable property to maritime perils'. One of the arguments raised, but which was rejected, was that in the case of insurance on profits upon goods, the goods from which the profits were to be earned must actually be on board, and subject to the risks insured against. The profits here, it was said, must arise from the shares, which, not being on board, cannot be physically at risk. The line of this argument, it is submitted, could be taken one step further: the value of the shares is in turn dependent on the safety of the adventure. Is this one step too remote?

If the subject-matter insured is considered as 'profit', it falls squarely within the wording of s 3(2)(b) under 'profit' and 'pecuniary benefit'. The next query which then arises is: Is the profit 'endangered by the exposure of insurable property to maritime perils'? By s 3(2)(a) 'insurable property' refers to any ship, goods or other moveables which are exposed to maritime perils. A cable would fall within the term 'moveable' which is defined as any 'moveable tangible property …'. In relation to the specific question raised, the insurable property which is at risk to maritime perils would be the ship.

67 (1867) LR 2 Exch 139.

68 (1802) 2 East 544.

69 (1806) 2 B & PNR 269 at p 301, HL.

70 (1867) LR 2 Exch 139 at p 151.

It could be said that what the shareholder is insuring in such a case is not the ship, goods or moveables belonging to the company, but the success of the adventure. In this sense, it is no different from an insurance on freight the earning of which is likewise dependent on (the delivery of) goods and/or the well-being of the ship. In terms of the fact that it is the safety of the adventure which is insured, it is analogous to the concept propounded by *The Sanday Case* discussed earlier.[71]

It is submitted that there is no principle in law preventing the subscription of such an insurance. Provided that the policy is clearly drafted, there is no reason why a shareholder should not be allowed to protect his interest by taking out such a policy. The only authority which could be used against this argument is the case of *Paterson v Harris*,[72] which has to be distinguished on the ground that the policy in question was not drafted with such clarity and precision as in the case of *Wilson v Jones*. In *Paterson v Harris*, the court held that:[73] '... on a true construction of this policy, the underwriters contract to indemnify the owner of that share against any loss arising to his interest in the cable …'. The policy was, in effect, an insurance on 'moveables', property belonging to a third party, the Atlantic Telegraph Co. Thus, it would neither be fair nor proper to cite *Paterson v Harris* as the authority for laying down the rule that a shareholder can never insure his interest in the shares of a company, the value of which is reliant on the success of a particular marine adventure undertaken by that company.

## LIABILITY TO A THIRD PARTY

A shipowner may incur liability to a third party arising from his interest in or responsibility for insurable property. He could be made liable to pay large sums of money to a third party in consequence of loss of life, injury to persons, or damage to property caused by the improper use of the vessel. If he wishes to be indemnified for third party liabilities, he must effect insurance specifically covering such risks. The validity of such a form of insurance is recognised not only by s 3(2)(c) of the Act but also by s 506 Merchant Shipping Act 1894.

The most glaring example of a third party liability that springs to mind is that arising from a collision. This is specifically covered by the Institute Hulls Clauses in a clause known as the '3/4ths collision liability', sometimes referred to as the 'running down clause'.[74]

If further illustration be required reference should be made to the case of *Oceanic Steam Navigation Co v Evans*,[75] where the owner of a wrecked vessel and a salvage company had jointly effected a policy to protect them from claims that the Harbour Commissioners might chose to levy against them. The salvors did not complete the work of removing the wreck to the satisfaction of the commissioners, who then charged the owners with the cost of buoying and lighting the wreck, and

71 See above.

72 (1861) 1 B & S 336; 30 LJQB 354.

73 *Ibid*, at p 355.

74 See Chapter 13.

75 (1934) 50 Ll L Rep 1, CA.

of certain removal costs. The owners succeeded in recovering the charges which they had to pay to the commissioners.

Third party liability which is outside the scope of the standard hulls Clauses is usually covered by mutual P & I Associations.