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SCUTTLING, FORTUITY, AND MARINE PERILS — FROM THE MORTGAGEE'S AND THE CARGO OWNER'S POINTS OF VIEW

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Scuttling, fortuity, and marine perils – from the mortgagee's and the cargo owner's points of view

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This paper examines marine insurance issues arising from the scuttling or deliberate casting away of a ship with the connivance of the insured shipowner. Currently, where the loss is attributable to the wilful misconduct of the shipowner, not only the shipowner, but also the mortgagee of the vessel, and the cargo owner whose cargo sank together with the ship, will be barred from recovery. The paper examines the purpose of s 55(2)(a) of the Marine Insurance Act 1906 (UK) and the controversial decision of the majority in *Samuel v Dumas*. The author argues that this decision should be revisited in order to produce a more just ruling for the co-assured innocent mortgagee.

Keywords: Marine insurance, misconduct, fraud, shipowner, innocent mortgagee and cargo owner, composite policy, mortgagees' interest insurance, public policy

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1 Introduction

Where a loss is attributable to the assured's wilful misconduct, the insurer will not be liable for that loss.[1] Scuttling or deliberate casting away of a ship with the connivance of the insured shipowner will be assessed under this exception. If the loss was caused deliberately but without the insured shipowner's involvement, it could either be a barratry (if the crew cast away the ship) or a 'malicious act' of a third party aiming to harm the shipowner. 'Barratry' and 'malicious acts of third parties' are commonly included amongst the risks insured against under the shipowner's hull and war risks insurance policy.[2] Barratry or malicious acts of third parties cannot apply where the insured shipowner is privy to the relevant act which caused the loss. Both occur when there is an act done *against* the owners of the vessel.[3]

However, where the loss is attributable to the wilful misconduct of the shipowner, not only the shipowner, but also the mortgagee of the vessel, and the cargo owner whose cargo sank together with the ship, will be barred from recovery. This brings into question the purpose of s 55(2)(a) of the Marine Insurance Act 1906 (UK) (the MIA 1906), which provides:

> The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

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1 Marine Insurance Act 1906 (UK), s 55(2)(a).

2 Institute Time Clauses (Hulls) 1/10/83, cl 6.2.5; Institute War and Strikes Clauses Hulls – Time (1/10/83), cl 1.2

3 *Shell International Petroleum Co Ltd v Gibbs* [1983] 2 AC 375; *Atlasnavios Navegacao Lda v Navigators Insurance Co Ltd* [2018] Lloyd's Rep IR 448.

Namely, does this section aim to prevent any recovery for any loss in which the shipowner's wilful misconduct is involved, or to impose a personal bar to recovery for the shipowner only?

As the courts' view has been firm on disallowing recovery for an innocent co-assured mortgagee under the shipowner's hull insurance where s 55(2)(a) of the MIA 1906 applies, the market has developed a mortgagees' interest insurance (MII) as a way of further securing recovery for the loss of the vessel. An MII aims to protect mortgagees against the possibility of their security, the mortgaged ship, proving insufficient in the circumstances that are likely to be listed in the policy.[4] Furthermore, in order to protect the cargo owner's interest, cargo insurance policies include a clause allowing the assured to recover where the shipowner's wilful misconduct is involved in the occurrence of the loss. The MII, and similarly cargo insurance policies, usually insert a clause which allows recovery for 'any deliberate or fraudulent casting away of or damage to the Mortgaged Vessel'.[5]

Recovery under an MII will be closely linked with the insured shipowner's entitlement to indemnity under the hull policy. The shipowner's claim against the hull insurers may be rejected for a number of reasons other than deliberate casting away of the vessel. Recent authorities have raised doubts as to whether an express inclusion of deliberate casting away will suffice to protect the mortgagee's interest, as desired, at the outset of the contract. This paper proposes that attempting to find a solution through contractual wordings is unlikely to mitigate the unjust outcomes that were created by *Samuel v Dumas*.[6] Construing a marine

4 *Schiffshypothekenbank Zu Luebeck AG v Norman Philip Compton (The Alexion Hope)* [1988] 1 Lloyd's Rep 311, 313.

5 Institute Mortgagees Interest Clauses – Hulls 1997, cl 2.1.4. *Shell International Petroleum Co Ltd v Gibbs* (n 3).

6 *Samuel v Dumas* [1924] AC 431.

insurance policy is subject to a number of different principles and rules, both statutory and judicial, that can impede recovery for the mortgagee, despite an express clause as such. A more effective solution for an innocent mortgagee could be found by revisiting *Samuel v Dumas*,[7] and allowing the co-assured to recover where it is not privy to the shipowner's wilful misconduct.

2 'Included and excluded losses'

The title of s 55 of the MIA 1906 is 'included and excluded losses'. Under s 55(1), the insurer is liable for any loss proximately caused by a peril insured against and is not liable for losses that are not caused by perils insured against. Section 55(2) states that the insurer is not liable for any loss attributable to the wilful misconduct of the assured. Where, however, a loss is proximately caused by a peril insured against, the insurer is liable, even though the loss would not have happened but for the misconduct of the master or crew.[8] The language the subsection adopted for 'delay' is different as 'the insurer on ship or goods is not liable for any loss proximately *caused by* delay'.[9] Similarly, s 55(2)(c) excludes losses caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils. Some other exclusions, however, are named as types of loss under s 55(3): 'the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured'. In all the cases listed above, the parties are free to agree otherwise.

7 Ibid.
8 MIA 1906, s 55(2)(a).
9 Emphasis added.

Analysing s 55 as a whole is outside of the scope of this paper. Understanding the proximate cause of the loss is essential to any evaluation of insured or excluded risks, and highlighting the above list is necessary to point out the variations of the wording of several different exclusions under this section. Fundamentals of the proximate cause will be mentioned below before moving on to the proof of wilful misconduct of the assured.

3 Proximate cause of the loss

Section 55 of the MIA 1906 does not define the phrase 'proximate cause'. Numerous cases[10] discussed its meaning, until it was settled that it refers to the 'efficient' cause of the loss.[11] The word proximate can also be used interchangeably with determining,[12] predominant,[13] or real causes;[14] as opposed to remote,[15] indirect,[16] or distant[17] causes.

The question of 'what caused the loss' is essential to any insurance claim, given that the insurer will not be liable for any loss regardless of what brought it about. Whilst the proximate cause criterion sets the legal standard for the relevant burden of proof, it is ultimately a matter of judgment of the facts and evidence to determine what was the efficient cause of

[10] *Thompson v Hopper* (1858) El Bl & El 1038; *Lawrence v Aberdein* (1821) 5 B & Ald 107; *Dudgeon v Pembroke* (1877) 2 App Cas 284; *Pink v Fleming* (1890) 25 QBD 396.

[11] *Reischer v Borwick* [1894] 2 QB 548, 550; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

[12] *Larrinaga Steamship Co Ltd v The King* [1945] AC 246, 253 (Viscount Simon LC).

[13] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691, 702 (Lord Macmillan).

[14] *ENE Kos 1 Ltd v Petroleo Brasileiro SA Petrobras (No 2) (The Kos)* [2012] 2 AC 164 [37], [48] (Lord Mance).

[15] *Thompson v Hopper* (n 10).

[16] *Lawrence v Aberdein* (n 10) 110.

[17] *Ionides v The Universal Marine Insurance Co* (1863) 14 CB NS 259, 289 (Willes J).

the loss. Hence, in the words of Lord Roskill, questions of causation can give rise to problems both of law and of fact, and opinions on them may, and often do, differ.[18]

The proximate cause of loss is determined by first formulating the problem, then identifying the applicable legal principle(s) and point of construction, and finally determining the cause as a matter of fact.[19] As noted by Erle CJ in *Ionides v The Universal Marine Insurance Co*:[20]

> the relation of cause and effect is a matter which cannot always be actually ascertained: but, if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established.

For the insurer to argue the assured's wilful misconduct under s 55(2)(a), the insurer does not have to prove that the relevant act of the assured was the proximate cause of the loss. This is due to the choice of language in the subsection: instead of 'caused by', the words 'attributable to' precede the exclusion. Whilst terminology is not always conclusive,[21] it has authoritatively been held that the words 'attributable to' refer to a different level from 'proximate cause'.

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18 *Shell International Petroleum Co Ltd v Gibbs* (n 3) 392.

19 *The Ann Stathatos* (1949-50) 83 Ll L Rep 228, 236.

20 *Ionides v The Universal Marine Insurance Co* (n 17) 285.

21 The UK Supreme Court, in the context of the meaning of 'as a result of', 'arising from', and 'in consequence of', expressed the view that 'it is rare for the test of causation to turn on such nuances': *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] Lloyd's Rep IR 63 [162]. Previously, however, in *Handelsbanken ASA v Dandridge (The Aliza Glacial)* [2002] 2 Lloyd's Rep 421 [60], [62], it was held that the words 'arising from' and 'as a result of' do no more than import the usual test of causation as between peril and exception, namely that of proximate cause. The words 'thereby', 'proceed from' and 'owing to' were treated similarly: *Thompson v Hopper* (n 10) 1043.

4 'Attributable to'

These words also appear in s 10(2) of the Insurance Act 2015 (UK) (the IA 2015), the effect of which is that breach of warranty by an insured suspends the insurer's liability under the insurance contract from the time of the breach, until such time as the breach is remedied. This assumes that the breach is remediable, and that it has been remedied by the assured. The result of this will be restoration of the insurance coverage by lifting the suspension. The section adds that if a loss occurs after the breach was remedied, the insurer will not be liable for it if the loss is attributable to something which happened when the cover was suspended. In other words, the insurer will have no liability for anything which occurs, or which is attributable to anything occurring, during the period of suspension.

The Explanatory Notes to the IA 2015 state that:[22]

> A direct causal link between the breach and the ultimate loss is not required. That is, the relevant test is not whether the non-compliance actually caused or contributed to the loss which has been suffered.

The Notes add that the 'attributable to something happening' wording is intended to cater for the situation in which loss arises as a result of an event which occurred during the period of suspension, but is not actually suffered until after the breach has been remedied.[23] The

[22] Explanatory Notes [96]: < https://www.legislation.gov.uk/ukpga/2015/4/notes>.
[23] Explanatory Notes [89].

Law Commission most probably did not mean 'caused by' when they used the phrase 'as a result of' in this explanation.

In *Thompson v Hopper*,[24] Cockborn CJ's reference to the words 'attributable to' supports the above conclusion. In response to the allegation that the assured's loss was attributable to unseaworthiness of the ship, Cockborn CJ said:

> it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shewn to have been so connected with the loss as that it must necessarily have led to it.

The words 'must have led to it' express the view that it must be identified clearly as having occurred prior to the loss, that it must have some connections with the loss, but that the connection does not have to be the proximate cause.

A remote cause will not be the proximate cause of loss, but it could be the event to which the loss is attributable. Hence, the concept of 'attributable to' is broader than 'caused by', which includes the proximate cause only.

The conduct which caused the loss, and the mental state of the person who committed that act, are treated separately for the purpose of assessing the insurer's liability. The relevant mental state could be 'negligent', 'reckless', or 'deliberate', and each of these elements is

[24] *Thompson v Hopper* (n 10) 1054.

subject to different evaluations, whether they are the master's, the crew's, or the assured shipowner's mental states.

5 Negligence and fortuity

A loss may be attributable to an error or defect in judgement, namely an act of carelessness or negligence in the ordinary navigation of the vessel. For instance, a vessel may have caught fire through the negligence of the master or crew or may have been stranded in a river because the cargo was loaded carelessly. Such error or defect does not itself suffice to excuse the insurer from liability.[25] In *Dudgeon v Pembroke*[26] Lord Penzance said that 'the assured has hitherto always been held protected from loss through the perils insured against, though that loss was brought about through the negligence of his captain or crew'.

This is because negligence is not a cause for this purpose,[27] but is a quality of the way the insured peril has occurred. It was held that where it is clear that the loss is immediately occasioned by perils of the sea, the cause of the loss is still perils of the sea, despite being brought about by negligent navigation.[28] In *The Xantho*,[29] Lord Herschell said: 'I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea'. In the context of grounding, it was held that where there was neither any suggestion nor any evidence that the grounding was deliberate, and the

[25] *Sadler v Dixon* (1841) 8 M & W 895, 899.
[26] *Dudgeon v Pembroke* (n 10) 297.
[27] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* (n 13) 711 (Lord Wright); *Venetico Marine SA v International General Insurance Co Ltd* [2014] Lloyd's Rep IR 243 [285].
[28] *Trinder Anderson* & *Co v Thames & Mersey Marine Insurance Co* [1898] 2 QB 114, 123 (AL Smith LJ); *Sheean v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340.
[29] *Thomas Wilson, Sons & Co v Owners of Cargo per the Xantho* (1887) 12 App Cas 503, 511.

grounding was not the natural and inevitable result of the action of the wind and waves, it must have been fortuitous even if it was brought about by negligence.[30]

The key issue is the definition of fortuity under r 7 of Sch 1 to the MIA 1906 which states: 'The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.'

The short definition of fortuity is 'accidental loss',[31] and whether a loss was accidental or deliberate is 'a straightforward factual issue'.[32] What caused the loss is determined on the evidence in each case. The well-known definition of fortuity was provided by Lord Herschell in the *Xantho*: it is 'an accident which might happen, not an event which must happen'. It therefore implies something unexpected 'which could not be foreseen as one of the necessary incidents of the adventure'.[33] Where cargo was damaged because seawater entered into the ship, it would be investigated what led the water into the vessel. At a time when ships were made of wood, seawater entry led by a hole opened by rats was accidental, as it was 'sea damage occurring at sea and nobody's fault'.[34] Where a cargo of rice was damaged because of sweat and moisture when the crew had to close ventilators to prevent sea water entry, the cause of the loss was held to be accidental.[35]

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30 *McKeever v Northernreef Insurance Co SA* [2019] 2 Lloyd's Rep 161 [46].

31 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1)* [1995] 1 Lloyd's Rep 455, 459.

32 Ibid.

33 *NE Neter & Co Ltd v Licenses & General Insurance Co Ltd* (1944) 77 Ll L Rep 202; *The Catharine Chalmers* (1875) 32 LT (NS) 847.

34 *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, approving Lopes LJ at first instance: (1885) 16 QBD 629, 635.

35 *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* (1940) 67 Ll L Rep 549.

Whilst negligence, whether that of the crew members or the shipowner assured, does not prevent the event from being accidental, wilful misconduct on the part of the assured, according to the authorities,[36] takes the relevant event outside the scope of this definition. Section 55 of the MIA 1906 also refers to misconduct with regard to the master or crew but omits the word 'wilful' in this case. Subsection 2(a) states that the insurer will be liable for 'any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew'. The words 'but for' here serve a purpose similar to the words 'attributable to', so that a link (as described by Cockborn CJ in *Thompson v Hopper*)[37] between the misconduct of the master or crew and the loss suffices to satisfy the 'but for' test. In other words, the misconduct of the master or crew does not have to be the 'direct cause' of the loss. If a collision occurs, and if the master's or crew's misconduct contributed to the occurrence of the collision, the insurer will still be liable for the loss if collision is an insured peril. Misconduct of the master and crew, if committed against the shipowner, would be a barratry and, as mentioned above, barratry is generally insured under marine insurance contracts.

The MIA 1906 therefore looks at whether the loss was fortuitous from the assured's point of view, and neither the assured shipowner's nor the master and crew's negligence prevents the loss from being fortuitous.[38] Misconduct of the master and crew will have a similar effect. However, wilful misconduct of the shipowner is treated differently.

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[36] *Samuel v Dumas* (n 6); *Suez Fortune Investments Ltd, Piraeus Bank AE v Talbot Underwriting Ltd, The Brillante Virtuoso* [2020] Lloyd's Rep IR 1.

[37] *Thompson v Hopper* (n 10) 1038.

[38] Although the shipowner's or their manager's failure to exercise due diligence may bar recovery under some standard clauses. Institute Time Clauses (Hulls) 1/10/83, cl 6.

6 The meaning of 'wilful'

Both deliberate and reckless acts can be wilful but not all 'wilful' acts are deliberate. While the natural meaning of wilful includes deliberate, wilful is capable of having a wider meaning, depending on the context.[39] A reckless act could be wilful, but a 'deliberate' act does not include recklessness.[40] The word 'deliberate' connotes 'consciously performing an act intending its consequences'.[41] It involves a different state of mind from recklessness.[42] In *Ronson International Ltd v Patrick*,[43] Tuckey LJ held that in an insurance policy which excludes cover for 'claims and liabilities arising from any wilful, malicious or criminal acts', the adjectives characterise the excluded acts and look to the quality of the act and the state of mind of the actor.[44] For a wilful act it is not necessary to show that the relevant person intended to cause damage of the kind in question.[45] Recklessness as to the consequences of their act is also sufficient in this context.[46] If the assured is aware that what they are about to do risks damage of the kind which gives rise to the claim, or does not care whether there is such a risk, they will act recklessly if they go ahead and do it.[47] This approach focuses on the state of the assured's mind when they do the act, rather than on its intended consequences.[48] In other words, it is not necessary to prove the assured intended to cause damage of the kind in question. For instance, if the assured was unaware of the risk that their fire might burn

39 [2021] UKSC 12 [53].
40 Ibid [64].
41 Ibid [52].
42 Ibid.
43 [2007] Lloyd's Rep IR 85.
44 Ibid [13].
45 Ibid [15].
46 Ibid [14].
47 Ibid.
48 Ibid.

down the ship, and there is nothing to show that they did not care whether it might have done so or not, they are not reckless.[49]

The UK Supreme Court agreed with the above proposition in *Burnett v International Insurance Co of Hanover Ltd*.[50] Whilst he was in a bar in Aberdeen, under the influence of alcohol and cocaine, G was taken out of the bar by three door stewards. An altercation between G and the stewards caused one of the stewards, M, to apply a neck hold for three minutes on G with the help of the other stewards. The pressure applied by M, however, resulted in G's death due to mechanical asphyxia. M was convicted of assaulting G. The trial Judge accepted that M's actions were badly executed, but not badly motivated. M's employer was insured under a public liability insurance policy, s 14 of which excluded liability arising out of 'deliberate acts wilful default or neglect' by the insured's employee.

The Supreme Court held that the use of the word 'deliberate' in the exclusion indicated that the employee's act should be intended to cause the type of harm suffered by the victim. The word 'accidental' was to be considered from the perspective of the assured – ie the employer – rather than that of the doorman.[51] It was inherent in a public liability policy such as this that the assured would be covered for damages which it had to pay owing to its vicarious liability for its employees' torts. It was not the act which gave rise to the injury, but the act of causing the injury, which must be deliberate.

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49 *Ronson v Patrick* [2007] Lloyd's Rep IR 85 [17].

50 *Burnett v International Insurance Co of Hanover Ltd* [2021] UKSC 12.

51 *Hawley v Luminar Leisure Ltd* [2006] Lloyd's Rep IR 307.

It followed that the deliberate act meant carrying out an act intending to cause injury. In *Burnett* the insurers failed to establish that M had intended to injure G.

Whether deliberate or reckless, the assured shipowner's wilful misconduct has been discussed most commonly in the case of the scuttling or deliberate casting away of ships. The difficulties brought about by the scarcity of evidence of the assured's wilful misconduct, on the facts, were nevertheless overcome in some cases by the insurers who persuaded the courts that the loss was caused deliberately with the connivance of the owner.

7 Scuttling – standard of proof

For the shipowner to succeed, the evidence must establish that the event leading to the loss of the vessel was fortuitous. If the shipowner fails to discharge this burden, their claim will have to fail,[52] even if the insurers have alleged but failed to prove that the loss was deliberate.

The burden of proof of the assured's wilful misconduct rests unequivocally on the insurer.[53] The insurer must satisfy the court that what resulted in the loss was deliberately done with a view to causing it, and that this was done with the connivance of the shipowner. The burden of proof which rests upon the insurer is derived from the civil rather than the criminal standard, although some authorities have formulated the test as follows:[54]

[52] *The Popi M* [1985] 2 Lloyd's Rep 1; *The Ikarian Reefer* (n 31) 459.
[53] *The Alexion Hope* (n 4) 317.
[54] *Anghelatos v Northern Assurance Co Ltd, The Olympia* (1924) 19 Ll L Rep 255, 257.

> Do circumstances exist, individually, perhaps, not of decisive consequence, but in their cumulative effect establishing beyond reasonable doubt that the vessel was dishonestly stranded?

The standard of proof is on a balance of probabilities,[55] but is 'commensurate with the gravity of the allegation made'. [56] The degree or standard of proof required appears to be heavier than that which rests upon the shipowner.[57] The mere existence of the possibility that, for instance, the fire or grounding was accidental does not mean that the insurer has not satisfied the burden of proof.[58]

Although Aikens J said in *The Milasan*[59] that 'effectively the standard of proof will fall not far short of the criminal standard', in *The Ikarian Reefer*[60] the Court found it unnecessary to pursue the question whether the burden of proof so described by reference to the balance of probabilities is different in practice from the criminal standard of 'beyond reasonable doubt'. In *The Grecia Express*,[61] Colman J concluded that it must be 'highly improbable' that the vessel was lost accidentally, and that there must be derived from the whole of the evidence 'a high level of confidence that the allegation is true'. The facts proven against the owner must be 'sufficiently unambiguous' to establish that the owner was complicit in the casting away of their vessel. [62] For the court a distinction must be drawn between remote or fanciful possibilities, unsupported by any evidence, and the kind of substantial, or substantiated,

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55 *The Atlantic Confidence* [2016] 2 Lloyd's Rep 525 [139].
56 *The Ikarian Reefer* (n 31) 459.
57 Ibid.
58 Ibid 483, 484.
59 *The Milasan* [2000] 2 Lloyd's Rep 458 [28].
60 *The Ikarian Reefer* (n 31).
61 *The Grecia Express* [2002] 2 Lloyd's Rep 88.
62 *The Milasan* (n 59) [28].

possibility.[63] The burden of proof is not discharged if the evidence fails to exclude a substantial, as opposed to a fanciful or remote, possibility that the loss was accidental.[64]

The proof of a motive is not conclusive, but it can be relevant.[65] Equally, the absence of motive will assist the shipowner to rebut an accusation of this nature.[66] The courts will not disregard the character and antecedents of the shipowner.[67] The overall financial position of the owner is also taken into account. [68]

8 Witness statements

The courts acknowledge that if evidence is given through an interpreter, it is not easy to tell whether a witness is telling the truth. This is mostly because a fact-finding judge can gain little from the demeanour of a witness when the witness is foreign, comes from a different culture, and does not give evidence in their first language.[69] In cases where scuttling is alleged, the assessment of the reliability of a witness depends on a consideration of the extent to which their evidence is consistent with: (1) what is not in dispute; (2) what the witness has said on other occasions; and (3) the probabilities. If no real or substantial explanation can be put forward to explain an accidental loss of the vessel, that will, or may, have a bearing upon

63 *The Ikarian Reefer* (n 31) 459.
64 *The Popi M* (n 52); *The Ikarian Reefer* (n 31) 459; *The Atlantic Confidence* (n 55).
65 *The Ikarian Reefer* (n 31) 483, 498.
66 Ibid.
67 *The Olympia* (n 54) 257; *The Ikarian Reefer* (n 31) 498; *The Atlantic Confidence* (n 55); *The Brillante Virtuoso* (n 36).
68 *The Ikarian Reefer* (n 31) 498.
69 *The Atlantic Confidence* (n 55).

whether factual evidence that the loss was accidental is true. Their evidence must be tested in the light of the probabilities and the evidence as a whole.[70]

The credibility of the evidence will become doubtful where the shipowner's explanation requires a series of steps to happen in sequence, each of which is improbable or highly improbable. This is also the case especially if some or all the steps have to take place within a tight timescale and involve one or more remarkable coincidences.[71] Whilst the improbable can happen, it is difficult to accept that a number of improbable events may have occurred in rapid succession to each other. As Greer J pointed out in *The Ioanna*:[72]

> One improbability would not be sufficient to justify one coming to the conclusion that the event did not happen. But when there are two improbabilities the likelihood of it happening is still more remote, and when there are three it is more remote still.

In *The Atlantic Confidence*,[73] the vessel sank in deep water. The wreck had not been inspected with a view to determining the cause of the fire or the cause of the sinking. The available evidence was limited to surveys of the vessel prior to the final voyage, the crew's statements, and photographs of the vessel taken after the vessel had been abandoned and before it sank. What was argued as accidental was described by the Judge as 'cumulative suspicions', as the Judge was not persuaded that fire, then flooding of the engine room caused by the fire, and

[70] *The Ikarian Reefer* (n 31) 483, 484.
[71] Ibid.
[72] *The Ioanna* (1922) 12 Ll L Rep 54.
[73] *The Atlantic Confidence* (n 55).

then flooding of two double bottom tanks on the portside caused by the fire, were all accidental.[74]

9 Scuttling – insurance claims

In *Thompson v Hopper*,[75] the majority of the Court of Queen's Bench held that it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek indemnity for a loss produced by their own wrongful act. Lord Ellenborough CJ in *Cullen v Butler*[76] approved a quote that 'I cannot effectually (valablement) contract with any one that he shall charge himself with the faults which I shall commit'.

Section 55(2)(a) of the MIA 1906 is a reflection of these authorities. However, as the post-MIA 1906 cases have demonstrated, it is not only shipowners themselves whose claims are invalidated by the shipowner assured's wilful misconduct. The innocent cargo owner whose cargo sank together with the ship, and the innocent mortgagee who lost their security for the loan granted to the shipowner, will also be disadvantaged by the way that the loss occurred. The insurance market has been trying to find a market-based solution to this problem through contractual wording, as mentioned in the introduction above. However, the possibility for a mortgagee making a successful claim under an MII, in the relevant circumstances, still appears to be very slim.

[74] Ibid [296]-[300].

[75] *Thompson v Hopper* (1856) 6 El & Bl 172, 191-192; approved by the Exchequer Chamber: *Thompson v Hopper* (n 10) 1038.

[76] *Cullen v Butler* (1816) 5 M & S 461.

10 Innocent co-assured

An innocent co-assured is not permitted to recover from the hull insurer, even though their interest is not joint with the shipowner, and they were not privy to the scuttling of the ship. Where a mortgagee claims against the hull underwriter as a co-assured, in principle, their position is different from those who claim as a loss payee or assignee of the insurance recovery.

The mortgagee may participate in the shipowner's own policy as a loss payee, as an assignee, or as a co-assured. The mortgagee does not have to select one of these options: some or all of them may be available to them to protect their interest as a mortgagee.[77]

The mortgagee, if described as a loss payee in the shipowner's policy, will be entitled to enforce the insurer's promise to pay to them directly.[78] Alternatively, the shipowner's entitlement to claim under the insurance policy may be assigned to the mortgagee under s 50 of the MIA 1906, or under s 136(1) of the Law of Property Act 1925 (UK), or in equity. In all four cases, however, the assignee's title is derivative, so the insurer will be allowed to argue the defences that would be available if the claim was made by the shipowner. It follows that where the shipowner assured scuttled the insured vessel, the insurer's position is the same towards the shipowner, loss payee, or assignee under the insurance contract.

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[77] Peter Macdonald-Eggers QC, 'Mortgagees' Interest Insurance' in Baris Soyer, Andrew Tettenborn (eds), *Ship Building, Sale and Finance* (Informa Law from Routledge 2015), Ch 11, 172.

[78] The (Contracts Rights of Third Parties) Act 1999 (UK), s 1, permits the mortgagee to do so.

The mortgagee of a vessel being purchased or under construction may participate in the insuring of the vessel to protect their interest in it. This is confirmed by ss 14(1) and 14(2) of the MIA 1906, which provide respectively that '[w]here the subject-matter insured is mortgaged, … the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage'; and '[a] mortgagee may insure on behalf and for the benefit of other persons interested as well as for his own benefit'. Further, under s 10 of the MIA 1906, '[t]he lender of money on bottomry or respondentia has an insurable interest in respect of the loan'.

Where the mortgagee is a co-assured, together with the shipowner, the interest of each party is composite,[79] ie separate, and if one party's claim is invalidated, for instance because of a breach of contract, the other party's entitlement remains intact. This is different to joint insurance, where co-assureds' interests are inseparably connected, so that a loss or gain necessarily affects them both, and the misconduct of one co-assured is sufficient to contaminate the whole insurance.

Despite such a clear distinction being drawn between the interests of the shipowner and the mortgagee, and the latter's innocence in the way that the loss has occurred, the courts have strictly rejected the proposition that the co-assured mortgagee can successfully claim against the insurer for the loss of the vessel, being the security for the loan which they granted to the shipowner.

[79] Jonathan Gilman and others (eds), *Arnould's Law of Marine Insurance and Average* (20th edn, Sweet & Maxwell Ltd 2021) para 8-13.

It is not clear whether it is a matter of principle of general marine insurance law, or a matter of policy wording, that the co-assured mortgagee's claim is not allowed judicially even though the mortgagee is not privy to the shipowner's conduct. Viscount Finlay said in *Samuel v Dumas*:[80]

> The possibility of scuttling is not a peril of the sea; it is a peril of the wickedness of man, and would have to be mentioned expressly in the policy, like barratry or pirates, in order that the assured should recover from the underwriter in respect of it.

Where the insured vessel is damaged by the deliberate wicked action of another, that does not prevent recovery from the insurer. The loss in such cases may have been caused by barratry or malicious act of a third party towards the assured shipowner. Where the claimant is the innocent co-assured mortgagee under the hull insurance policy, the position is similar, in that the shipowner's wicked act is not imputed to the innocent co-assured. Bramwell B stated in *Thompson v Hopper*:[81]

> There is nothing wrongful in sending an unseaworthy ship to sea; though she is insured, there is nothing wrongful in burning her. The wrong is in making a claim founded on such an act. … The act does not become wrongful where a claim is founded on it and its consequences; but the claim is. … 'Dolus circuitu non purgatur' means, You cannot fraudulently do that indirectly which you cannot do directly: and I agree that if a man sent his ship to sea with a false compass, in order that she might be lost, and she was lost in consequence, he could not recover.

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80 *Samuel v Dumas* (n 6) 459.

81 *Thompson v Hopper* (n 10) 1038, 1045-1046.

Whilst this describes the shipowner's situation, it is arguable that in a composite policy the position of the mortgagee who is not privy to the owner's wilful misconduct should be separated from that of the owner.

11 A double-edged sword

The critical issues in the evaluation of the innocent co-assured's claim against the vessel's hull (or war risks) insurers are: first, the co-insurance policy is composite, meaning that, in principle, one co-assured's loss of the claim by their own failure to meet the contractual requirements does not prevent the other co-assured from claiming from the insurer. Secondly, the shipowner's wilful misconduct is not imputed to the mortgagee co-assured who is not privy to the shipowner's misconduct. Thirdly, the innocent co-assured, in principle, should be allowed to claim against the insurer if the loss falls under the insurance cover. Whether the loss is covered by the policy is determined if the cause of the loss is one of the insured perils. Fourthly, and crucially, marine insurance contracts insure against fortuity, meaning accidental losses only. On the other hand, the wilful misconduct of the assured, according to the common law,[82] takes away the possibility of the loss having occurred as a result of an accident. In other words, the ability of the co-assured to claim against the insurer evaporates upon proof that the loss was not caused by a peril insured against. The possibility of scuttling or deliberate casting away inevitably excludes a finding of perils of the seas. The insurer's position is strengthened by the wording of s 55(2)(a) of the MIA 1906, which requires proof of loss being attributable to the wilful misconduct of the assured: ie, a looser causal link than

[82] *Samuel v Dumas* (n 6).

the proximate cause suffices for the insurer to argue the exception. An analogy can be drawn with the ruling in *The Cendor Mopu*,[83] where the definition of inherent vice excluded perils of the seas and vice versa. In other words, once inherent vice is found to have caused a loss, there is no possibility of finding perils of the sea for the loss in question.

In *Samuel v Dumas*,[84] the ship *Grigorios* foundered in calm weather off the coast of Spain and became a total loss. Bailhache J found that the vessel was scuttled with the connivance of the owner. [85] The Judge was satisfied that this was done by deliberately letting water into the ship and into the bilge connections, and afterwards causing a sham explosion, which induced the innocent members of the crew to leave the ship together with those who were guilty, and to refrain from using the pumps. The assured's recovery depended on whether their loss was due to a risk covered by the policy. The policy did not include scuttling amongst the perils insured against. Bailhache J held that although the incursion of seawater into the ship would undoubtedly be a peril of the sea, the co-assured mortgagee could nonetheless not recover, owing to the fact that scuttling was a risk not covered by the policy. In the House of Lords, Viscount Cave said:[86]

> There appears to me to be something absurd in saying that, when a ship is scuttled by her crew, her loss is not caused by the act of scuttling, but by the incursion of water which results from it.

[83] *The Cendor Mopu* [2011] 1 Lloyd's Rep 560.
[84] *Samuel v Dumas* (n 6).
[85] *Samuel v Dumas* (1922) 12 Ll L Rep 73.
[86] *Samuel v Dumas* (n 6) 446-447.

Whilst the scuttling, the subsequent entry of the sea water, the slow filling up of the hold and bilges, the failure of the pumps, and the break-up of the vessel are as much parts of the effect as is the final disappearance of the ship below the waves, the efficient cause was the scuttling.[87] Viscount Cave said that the maxim *dolus circuitu non purgatur* applied only as against persons who were parties to the *dolus*. However, the Judge found it hardly necessary to have recourse to the maxim. The answer lay in the fact that the loss was not fortuitous; the words 'perils of the sea,' could not extend to a wilful and deliberate throwing away of a ship by those in charge of it.

In *Small v United Kingdom Marine Mutual Insurance Association*[88] the insured ship was wilfully cast away by the captain. The captain owned some shares in the ship. He purchased the shares with a loan from Small, whose interest was insured, as well as the owners. The Court decided that Small could recover from the insurers, who had rejected his claim on the basis that the loss was not caused by perils of the sea. The captain's wilful casting away of the ship, in the absence of Small's connivance, amounted to a barratry. Moreover, Small was not involved in the appointment of the captain; the captain was a stranger to Small; and a stranger's wrongdoing to the ship as a result of which the ship sank was a peril of the sea. The majority of the House of Lords in *Samuel v Dumas* partially overruled the *Small* case, which now stands on the ground of the barratry alone.[89]

[87] *Samuel v Dumas* (n 6) 448, referring to *Reischer v Borwick* [1894] 2 QB 548, 550; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

[88] *Small v United Kingdom Marine Mutual Insurance Association* [1897] 2 QB 311.

[89] *Samuel v Dumas* (n 6) 449.

The words 'and of all other perils, etc.' may be added to the insured risks to broaden the coverage beyond perils of the seas. In *Samuel v Dumas*, the policy included such wording. However, this was still not sufficient to allow the mortgagee's insurance claim, as these words were to be construed as applying to perils of the same kind as those which have been previously specified.[90]

Viscount Finlay also rejected the possibility of a separation between the entrance of the sea water and the act which caused it.[91] The Judge argued that the view that the proximate cause of the loss when the vessel has been scuttled was the inrush of the sea water, and that this was a peril of the sea, was inconsistent with the well-established rule that it was always open to the underwriter on a time policy to show that the loss arose, not from perils of the seas, but from the unseaworthy condition in which the vessel sailed. With respect, s 39(5) of the MIA 1906 requires proof that the ship was sent to sea in an unseaworthy state, and that the loss is attributable to such unseaworthiness. The test is not the proximate cause test, and it is open to the insurer to prove what s 39(5) looks for if the insurer denies liability under the time policy. It is therefore not easy to see how a separation between the entrance of the sea water and the act which caused it results in the consequence about which Viscount Finlay was concerned.

Importantly, the members of the House of Lords in *Samuel v Dumas* referred to *Trinder, Anderson & Co v Thames & Mersey Marine Insurance Co*[92] where Collins LJ said:

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[90] *Thames & Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co, The Xantho* (1887) 12 App Cas 484.

[91] *Samuel v Dumas* (n 6) 453-454.

[92] *Trinder, Anderson & Co v Thames & Mersey Marine Insurance Co* [1898] 2 QB 114, 127–8.

> The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds ... first, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence ... secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea.

Viscount Finlay acknowledged that the first ground would be applicable to the mortgagee only if the policy was joint, namely, the shipowner's and mortgagee's interests were inseparable. However, the Judge found it unnecessary to decide whether the mortgagee in *Samuel v Dumas* could be so identified. For Viscount Finlay, the overwhelming consideration was that there were no perils of the sea on the facts.

Lord Sumner dissented. His Lordship read Bailhache J's judgment as being consistent with the proposition that 'the guilty owner fails to recover on the policy because he is guilty and not because the loss is not otherwise a loss by perils insured against'. Lord Sumner expressed the view that:

> Contracts of indemnity are intended to make good losses where they happen in certain events, and except where, as with barratry, culpability is a quality of the cause of loss itself, they are not concerned with the guilt or innocence of the action. Loss attributable to the wilful misconduct of the assured is not excluded by any actual term of the contract. There is a restriction placed by law on the right to recover upon it, in order that a contract of indemnity may not serve as an instrument of fraud.

This accords with what was held by Bramwell B in *Thompson v Hopper*,[93] as discussed above. A fortuitous casualty is a matter of chance. Lord Sumner said that when a ship had been holed below the waterline, if nothing was done to close it, the ship would probably eventually sink. The ship's ultimate fate was a matter of the intervention of something to stop the inflow before the point of sinking was reached. Whether the hole was made by negligence or by crime, by the impact of heavy cargo slipping from the slings, or contact with floating submerged wreckage, would not make any difference. Consequently, his Lordship stated: 'I do not see how it can be affirmed that the ship did not go to the bottom by getting too full of water, whether the owner let the water in at the beginning or not.'

A further matter on which Lord Sumner relied was the personal disability of the shipowner for recovery under insurance due to their wilful misconduct. The assured not being allowed to take advantage of their own wrong is a different matter from what caused the loss. Importantly, Lord Sumner described that the former maxim refers to something which would, in itself, be a matter of right under the contract being denied to a party, because the law is more moral than the contract. For his Lordship, the exclusion of the assured from recovering on the policy for a loss attributable to their wilful misconduct was a separate matter from the fortuitous character of perils of the sea. The Judge stated that if proximate cause did not apply, it must be because the policy was subjected to an exceptional rule of law to prevent the assured from profiting from their own misconduct, but no further.

[93] *Thompson v Hopper* (n 10) 1038, 1045-1046.

If wilful misconduct removes the accidental nature of the case, in principle, the third party's wilful misconduct should also fall outside of the definition of perils of the sea. In *Gordon v Rimmington*,[94] the ship *Reliance* was set on fire by its captain and crew whilst on a voyage from Africa to the West Indian islands. The fire was set in order to prevent the ship being captured by French privateers who were chasing it. The crew left the ship in a long boat. Lord Ellenborough held that if the ship was destroyed by fire, it was of no consequence whether this was occasioned by a common accident, or by lightning, or by an act done in duty to the State. Nor could it make any difference whether the ship was thus destroyed by third persons, subjects of the King, or by the captain and crew acting with loyalty and good faith. Fire was still the proximate cause, and the loss was covered by the policy. Moreover, in *The Midland Insurance Co v Smith and Wife*,[95] loss by perils insured against, although brought about by the felonious act of a third party, were held to be a loss within a fire policy.

Nevertheless, the courts subsequently confirmed the majority opinion in *Samuel v Dumas*, even though it is a double-edged sword for the innocent co-assured, as illustrated in *The Brillante Virtuoso.*[96] In this case, the claim was made by the insurers of the MII against the vessel's war risk underwriter. The latter argued that the shipowner, with the assistance of the master and chief engineer, arranged for a fake attack by pirates, and for a fire to be deliberately started on board the vessel. The local salvor who attended the vessel was, allegedly, a party to the conspiracy. The Judge found for the war risk underwriter. There were several improbabilities which, when viewed collectively, cogently suggested that the

[94] *Gordon v Rimmington* (1807) 1 Camp 123.
[95] *The Midland Insurance Co v Smith and Wife* (1881) 6 QBD 561
[96] *The Brillante Virtuoso* (n 36).

supposed attack by pirates was a fake attack.[97] Having recognised that the mortgagee was a co-assured under the war risks insurance, the Judge stated that the bank could claim against the insurers, despite the shipowner's misconduct. However, this would be possible only if the mortgagee proved that the loss was caused by a peril insured against. The impossibility of satisfying such a burden of proof has been analysed above. Not surprisingly, on the facts, it was not possible for the mortgagee to prove that the loss was caused by a peril insured against. Given that the Judge found that the pirate attack was fake, and that the shipowner was privy to it, it followed that neither a malicious act against the owner, nor a pirate attack (given that the owner was not a pirate) had caused the loss.

The Court of Appeal's evaluation of the mortgagee's claim in *The Alexion Hope*[98] is worth noting, although the Court's reasoning seemingly relies on the separation between perils of the sea and fire. The mortgagee purchased an MII if the vessel were to become a total or partial loss, and the mortgagee were to find themselves unable to recover from the hull underwriter. The MII did not spell out the circumstances in which the mortgagee might not be able to recover from the hull underwriter. Lloyd LJ assumed that they included cases where the hull underwriter declined liability on the ground of misrepresentation or non-disclosure, or because the vessel had been wilfully cast away with the connivance of the owners.[99]

The *Alexion Hope* was insured by the shipowner, and the benefit of the policy was assigned to the mortgagee. On 23 October 1982, a serious fire occurred in the engine room which led to the loss of the vessel. Unable to recover from the hull insurer, the mortgagee made a claim

97 Ibid [414].
98 *The Alexion Hope* (n 4).
99 Ibid 313.

under the MII, but the claim was rejected on the ground that if there was a fire at all, the fire was not fortuitous, as it was caused by the wilful misconduct of the shipowner.

The Court of Appeal held that 'fire' in a marine policy is not confined to an accidental or fortuitous fire.[100] It includes a fire started deliberately by a stranger to the contract of insurance. If it included any deliberate fire, the consequence would be that if, in the case of an ordinary householder's policy, the assured set their house on fire through carelessness, they would recover; but if their neighbour set their house on fire through ill-will, the assured would not recover. Lloyd LJ differentiated perils of the sea and fire, since perils of the sea are defined by r 7 of Sch 1 to the MIA 1906 as referring only 'to fortuitous accidents or casualties of the seas', whereas there is no such limitation in the case of fire.[101] Nourse LJ said:[102]

> the suggestion that a fire deliberately caused by, or with the connivance of, the owners and in respect of which hull underwriters have disclaimed liability is not covered by an insurance whose avowed purpose is to protect a mortgagee against the loss of his security is to my mind preposterous.

Significantly, according to Purchas LJ, it would produce an absurd result if the MII were to be interpreted narrowly. His Lordship said:

[100] Ibid 316.
[101] Ibid.
[102] Ibid 319.

> as between the mortgagee and the mortgagee's interest insurer, it matters not whether the fire was started by an independent agent, or whether by or with the connivance of the shipowner, the master or the crew, or indeed whether it occurred fortuitously.

However, in *The Brillante Virtuoso*,[103] the Judge adopted a much narrower view, and a similarly restricted approach can be observed in *Piraeus Bank AE v Antares Underwriting Ltd*,[104] where the vessel's war risks insurer rejected liability, as the ship was detained for a criminal investigation which was excluded from the cover. Calver J held that the purpose of the MII was to protect the mortgagee against the risk of non-payment under the shipowner's policy.[105] The coverages in cl 1 of the MII were typical of the types of cover that a mortgagee seeks under the MII in protecting themselves against the shipowner's insurer denying liability by reason of the shipowner's misconduct regarding the loss: non-disclosure of material facts; breach of the duty of utmost good faith; breach of warranty; and failure to prove that the loss was caused by an insured peril. Calver J held that the MII policy does not cover losses which would not have given rise to a loss covered by the shipowner's policies, because, for example, there was no constructive total loss under the shipowner's policies, or the loss was excluded thereunder. Accordingly, there was no prima facie cover for the loss under the war risks policy for the purposes of the MII policy, as the detention of the vessel would not have been covered. Calver J held that the purpose of the MII was to provide a secondary insurance, and if the MII was held to cover losses that did not fall under the shipowner's policy, the MII would be providing primary insurance in respect of loss of or damage to the vessel.

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[103] *The Brillante Virtuoso* (n 36).
[104] *Piraeus Bank AE v Antares Underwriting Ltd* [2022] EWHC 1169 (Comm).
[105] Ibid [251].

Furthermore, Calver J rejected the view that *The Alexion Hope* laid down a general principle which applies to all MII cover regardless of its wording, to the effect that it would defeat the purpose of MII cover if the rights of recovery under a MII policy were subject to the exclusions in an underlying hull policy. In respect of the MII, the shipowner's act or omission must be the cause of the non-payment for a loss that was covered by the shipowner's insurance policy.[106]

12 Cargo owners

The ship, when scuttled, might be loaded with cargo. The cargo owner's claim against their insurer will be met by the same issue: the cause of the loss was not accidental. In *Shell International Petroleum Co Ltd v Gibbs*,[107] Shell lost about 200,000 tons of crude oil as a result of a gigantic fraud perpetrated for the express purpose of sending the crude oil to South Africa in defiance of the ban on the export of oil from the Gulf to that country. The perpetrators of this fraud chartered a ship to load the cargo from Kuwait, ostensibly to be carried to Italy. They instead took the cargo to South Africa, discharged most of it at Durban, and then scuttled the ship with the remainder of the cargo on board. Shell's claim for the loss of the cargo at Durban was rejected as the occurrence of the loss did not match with any of the risks insured against. However, Shell was successful in the claim of the loss of the cargo scuttled with the vessel. Clause 8 of the cargo insurance policy provided:

[106] Ibid [265].
[107] *Shell International Petroleum Co Ltd v Gibbs* (n 3).

> In the event of loss the assured's right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributable to the wrongful act or misconduct of the shipowners or their servants, committed without the privity of the assured.

It was common ground that this second sentence was added for the benefit of innocent mortgagees of ships and cargo owners to surmount the decision of the majority of the House of Lords in *Samuel v Dumas*.

The Court had no doubt that cl 8 allowed Shell recovery of the cargo scuttled with the ship. The Court held – and the insurer conceded – that cl 8 rendered this risk a peril of the sea.

It is arguable, as referred to above, that a party whose interest is not the same as the shipowner should be regarded as distinct from the shipowner in their claims against the insurers for the loss caused by the sinking of the ship. In the words of Viscount Cave in *Graham Joint Stock Shipping Co Ltd v Merchants Marine Insurance Co Ltd (The Ioanna) (No 1)*,[108] the mortgagee is independently insured. The same is arguably true for the innocent cargo owner. In *Shell*, cl 8 recognised separation of the interests involved, but it should still be possible to draw such a distinction in the absence of a clause such as cl 8. Similarly, in *The Atlantic Confidence*, [109] the ship was loaded with cargo when it grounded. The cargo insurer compensated for the loss which the cargo owner suffered, and then claimed against the shipowner.

[108] [1924] AC 294
[109] *The Atlantic Confidence* (n 55).

It would be interesting to see what decision a court would reach in a case similar to *Piraeus Bank AE v Antares Underwriting Ltd*[110] if the insurer persuaded the court that the vessel was scuttled with the connivance of the owner. The MII expressly insures instances where the hull insurer rejects liability for scuttling of the ship. Assume that the wording of the MII policy requires prima facie liability. Where the vessel is scuttled, the loss under the hull insurance would fall outside the insurance cover: it will not be possible to argue fortuity. If there is no fortuity, there will be no prima facie cover, or any cover at all. However, the MII expressly includes scuttling of the vessel. Following the approach adopted in Calver J's judgment, the MII would be treated as covering primary rather than secondary insurance, whereas Calver J's view in *Piraeus Bank AE v Antares Underwriting Ltd* appears to suggest that MII policies, by their nature, should provide a secondary cover.

The Court of Appeal's interpretation of the MII in *The Alexion Hope* appears to be preferable in order to give effect to the aim of the MII, as desired by the parties at the outset of the contract.

13 Subrogation

As we saw in *The Atlantic Confidence*, the cargo owner's insurer indemnified the cargo owner whose interest sank together with the ship and brought a subrogated claim against the shipowner by arguing that the loss was caused by their wilful misconduct. Where the innocent mortgagee is indemnified by the loss of their security (the vessel), the insurer should

[110] *Piraeus Bank AE v Antares Underwriting Ltd* (n 104).

subrogate into the mortgagee's right and claim the amount paid from the shipowner. If the loss had not occurred, in theory, the shipowner would have repaid the loan to the mortgagee. Alternatively, if the shipowner was entitled to an indemnity under the insurance contract, the mortgagee would recover from the amount paid out by the insurers. The mortgagee would be making a claim for loss of their security which was caused by the shipowner's wilful misconduct. The mortgagee's interest is clearly separated from that of the shipowner's, as the insurance policy is composite. The wrongdoing of the shipowner will be the basis for the insurer's subrogation claim. It is true that the shipowner is also insured under the insurance contract, and the assured cannot sue themselves. So, for example, when two sister ships collide, a subrogation action against the guilty ship's owner is not permitted as they are also the innocent ship's owner.[111] However, in the case of co-insurance where both the mortgagee and the shipowner are insured, the insurer's subrogation against the shipowner for their wilful misconduct would not be regarded as the assured suing themselves. The insurer is not stepping into the shipowner's shoes and trying to claim against the shipowner.

Whether the insurer's subrogation action is prevented where the person indemnified by the insurer, and the defendant of the insurer's subrogation action, are both co-assureds has been discussed by the courts to a great extent.[112] It is outside the scope of this paper to discuss the authorities on this issue.[113] It suffices here to say that the innocent mortgagee's position under a composite policy is not different from the cargo owner's position in respect of the

[111] *Simpson v Thomson* (1877) 3 App Cas 279.

[112] *Petrofina* (*UK*) *Ltd v Magnaload Ltd* [1983] 2 Lloyd's Rep 91; *Tyco Fire & Integrated Solutions* (*UK*) *Ltd* (*formerly Wormald Ansul* (*UK*) *Ltd*) *v Rolls Royce Motor Cars Ltd* (*formerly Hireus Ltd*) [2008] Lloyd's Rep IR 617; *Gard Marine & Energy Ltd v China National Chartering Co Ltd* [2017] Lloyd's Rep IR 291; *Rugby Football Union v Clark Smith Partnership Ltd* [2022] EWHC 956 (TCC).

[113] The matter was discussed in E Blackburn and A Dinsmore, 'Joint Insurance Issues in *The Ocean Victory*: The Roads not Taken' [2018] LMCLQ 50-72; O Gurses, 'Subrogation against a Contractual Beneficiary: A New Limitation to Insurers' Subrogation?' [2017] JBL 557-575.

shipowner. So far as the shipowner is concerned, neither the mortgagee nor the cargo owner connived in the shipowner's wilful misconduct. Each suffers loss because of the shipowner's wrongdoing. Each is insured for the loss of the ship and the cargo respectively. Given that the cargo owner's subrogation action against the shipowner is heard by the courts, it should equally be available so far as the mortgagee's claim is concerned.

14 Conclusion

Whilst rejecting firmly the notion that a co-assured innocent mortgagee must not be allowed to recover under the shipowner's policy where the loss is attributable to the shipowner's wilful misconduct, the courts have not satisfactorily clarified how their rulings can be reconciled with the principle that, in a composite insurance, one policyholder's wrongdoing is not imputed to the other policyholder. It is submitted that the shipowner's wilful misconduct is a personal bar for them to recover under the policy. If scuttling or deliberate casting away of the vessel without the privy of the innocent co-assured excludes any possibility that the perils of the seas might be present on the facts, it is fallacious to argue that it is open to the co-assured mortgagee to prove that the loss was caused by a peril insured against, so that it can make a claim under the policy. In the words of Bailhache J[114] and Viscount Finlay[115] in *Samuel v Dumas*, for the co-assured mortgagee to recover for this loss, scuttling could, and should, be included expressly in the shipowner's policy amongst the perils insured against. 'Including the shipowner's fraud in the policy as an insured risk' goes beyond the question of availability of such an insurance in the market and brings into the picture

[114] *Samuel v Dumas* (n 85).
[115] *Samuel v Dumas* (n 6) 459.

public policy concerns as to whether the law would, or should, permit insurance of the shipowner's interest against their own 'fraud'. Moreover, even it is assumed hypothetically that an insurer would agree to insure against scuttling, that would allow the shipowner to recover under the insurance contract, and there would thus be no need to discuss if the co-assured mortgagee could recover. Moreover, where the co-assured received a policy indemnity from the shipowner's insurer, the insurer would then subrogate into the mortgagee's rights against the shipowner. As a result, the unjust outcome of the majority decision in *Samuel v Dumas* could, and should, be authoritatively revisited. The principles of marine insurance law are open to an interpretation which would produce a more just ruling for the co-assured innocent mortgagee.