The "RENOS" – Retaking notice of the notice of abandonment

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1. Introduction and summary of facts

On 19 February 2018 Hamblen LJ in the Court of Appeal affirmed the first instance decision of Knowles J on an issue which had not been addressed by the English courts for fifty years.[1] This issue dealt with the communication of the assured's choice to treat a loss as a total loss, known as the notice of abandonment[2] ("NOA") within the doctrine of constructive total loss ("CTL"), which is a legal fiction that allows the assured to claim for a total loss, even where an actual total loss has not occurred.[3] In *The Renos*[4] it was held that the costs incurred prior to the service of the NOA can as a matter of law count towards the calculation of the repair costs within the doctrine of the CTL.[5] Furthermore, it was decided that the NOA was tendered in a timely manner in the light of contradicting information regarding the assessment of the ship's repair quotation.[6] These issues, which are scheduled to be heard before the Supreme Court on 10 April 2019, reflect on the significance of the NOA which constitutes the subject of the present paper.

In a summary of what was a quite complex set of facts, the "MV Renos" (the ship) was on a laden voyage in the Red Sea when a fire broke out in the engine room and caused extensive and serious damage. The ship was insured under a hull and machinery policy by the defendants (later appellants, the leader of which was The Swedish Club as to 85 per cent). The insured value of the ship was US$12 million and the increased value insured also by The Swedish Club was US$3 million.[7]

The incident took place on 23 August 2012 and after the necessary salvage operations (under a Lloyd's Open Form 2011 and the Special Compensation Protection and Indemnity Clause invoked), the ship was delivered in the Suez Canal on 31 August. By that time, she had been surveyed by an independent surveyor on behalf of the owners. Then, she was surveyed on behalf of the insurers and by the owner's technical superintendent. The estimates ranged from US$5 million to approximately US$9 million. On 25 September the ship was towed to the port of Adabiya in Egypt, for the purpose of discharging the cargo and after her return to Suez, a new more powerful tug was engaged for standby services.

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[1] The previous authorities on the matter will be addressed later on.

[2] See infra p. 2.

[3] See section 60 MIA 1906.

[4] *Connect Shipping Inc and another v Sveriges Anfgartygs Assurans Forening (The Swedish Club) and others (The Renos)* [2016] EWHC 1580 (Comm); [2018] EWCA Civ. 230.

[5] *The Renos* [2018] EWCA Civ. 230, at [85], per Hamblen LJ affirming the High Court decision.

[6] Ibid, at [68].

[7] This increased value under a hull policy reflects the assured's insurable interest, which exceeds the vessel's market value, and includes additional costs mostly associated with replacement. Traditionally any cover in excess of the market value was prohibited, but shipowners managed to demonstrate that such costs should be taken also into account in relation to the vessel's value.

Then, after additional surveys, the owners drafted their repair specification and forwarded it to several shipyards and to the insurers. The quotations received ranged from around US$2.5 million (based on the insurers' specification) up to US$8 million (based on the owners' specification). On 21 January 2013 the parties had a meeting, while quotations were still being received. On 25 January the owners requested another meeting, which the insurers denied on 30 January. Finally, on 1 February the owners tendered an NOA, which was rejected by the insurers as being served too late.

In the light of the aforementioned facts, the issues that arose in relation to the NOA were (1) whether it was valid or not and (2) whether the expenses incurred prior to the service of the NOA could be counted as costs of repairs for the purposes of the CTL calculation.[8]

At first instance, after a trial lasting eleven days, Knowles J gave judgment for the claimants by holding that the NOA was not served too late and that the expenses incurred prior to the service of it were to be counted within the costs of repair within the CTL calculation.[9] The insurers appealed and in the Court of Appeal, Hamblen LJ delivering his judgment, with which both Simon LJ and Sir Geoffrey Vos, Chancellor of the High Court, agreed, affirmed the first instance decision and dismissed the appeal.

Before exploring the aforementioned issues that arose in this case, for the sake of clarity and completeness the doctrine of the NOA should be briefly addressed at this point.

2. The notice of abandonment in marine insurance

2.1. The purpose of the notice of abandonment

In the event of a CTL, the assured has the option to treat that loss either as a total or a partial loss, and in case he elects to pursue a claim for a - constructive – total loss he must abandon the casualty to the insurer.[10] For this option of the assured to have legal effect, he must normally serve an NOA to his insurer.[11]

However, the claim for a total loss can be pursued in certain circumstances without the service of the NOA. First, the assured need not serve an NOA where the insurer would gain no benefit from it.[12] Accordingly, it has been held that where the occurrence of an actual total loss followed a CTL, the requirement of the NOA is, for this reason, excused.[13] On the facts of the case a fire broke out onboard causing the CTL of the ship and she sunk because of the entry of seawater from unknown causes a few hours after the incident. The court held that the CTL claim was valid, although there was no service of NOA.

[8] The SCOPIC issue that arose is outside the scope of this paper.
[9] *The Renos* [2016] EWHC 1580 (Comm), at [9] and [31] respectively.
[10] Section 61 MIA 1906.
[11] Section 62(1) MIA 1906.
[12] Section 62(7) MIA 1906.
[13] *Kastor Navigation Co Ltd v AGF MAT (The Kastor Too)* [2004] EWCA Civ 277; [2004] 2 Ll. L. R. 119, at [86], per Rix LJ.

The same approach was evidenced where any salvage operations were impracticable because the ship was sunk within a warzone[14], or where at the time the assured receives information which otherwise would require of him to serve an NOA, he is further informed that the ship has been sold.[15]

Secondly, no NOA need to be given as in cases where such requirement has been waived by the insurer.[16] Such a waiver can be either express or implied.[17] The market's reaction is illustrated by the drafting of standard clauses which deal with the issue of waiver and stipulate that the actions of the insurer "with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either part".[18]

Lastly, the NOA is not required when an actual total loss has occurred.[19] However, in practice it is often the case that the assured will serve an NOA even in the event of an actual total loss. This serves the purpose of communicating to the insurer the assured's election to treat the loss as a total loss in case the issue of CTL arises. In the same context, the assured will often provide, further, the grounds upon which he is entitled to a total loss claim, even though he bears no such obligation under the existing law.[20]

2.2. The notice of abandonment as condition precedent to the insurer's liability

It is clear that the NOA constitutes a communication to the insurer that the loss is treated as a total and not a partial loss and is not an indication of the character of the loss itself.[21] In other words, it is "an election as to the nature of the claim, not as to the nature of the loss".[22] Conversely, the occurrence of a CTL is a prerequisite to the NOA.[23]

The quite clear wording of the Marine Insurance Act 1906,[24] which indicates that the NOA constitutes a condition precedent to the insurer's liability for a CTL claim, has been so interpreted by the judiciary.[25]

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[14] *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Ll. L. R. 437, at 478, col. 2, per Hirst J.
[15] *Rankin v Potter* (1873) L.R. 6 H.L. 83, at 102-103, per Brett LJ.
[16] Section 62(7) MIA 1906; for the conditions that must be met see in a non-insurance context *Motor Oil Hellas (Corinth) v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Ll. L. R. 390, at 399, per Lord Goff.
[17] *Rickards v Forestal Land, Timber & Rys Co Ltd (The Minden)* [1942] A.C. 50; the fact that this is a cargo case is irrelevant to the issue in question.
[18] Institute Time Clauses (Hulls) (1/10/83), cl. 13.3; Institute Voyage Clauses (Hulls) (1/10/83), cl. 11.3; Institute Hull Clauses 2003, cl. 9.3.
[19] Section 57(2) MIA 1906.
[20] See Francis Rose, *Marine Insurance: Law and Practice* (2nd edn, Informa 2012) (hereinafter Rose), at para 24.17.
[21] *Roura and Forgas v Townend* [1919] 1 K.B. 189, at 194, per Roche J; affirmed by the House of Lords in *Robertson v Petros M Nomikos Ltd* [1939] 64 Ll. L. R. 45, at 50 per Lord Wright; the latter case was applied in *The Kastor Too* [2003] 1 Ll. L. R. 296, affirmed in the Court of Appeal [2004] 2 Ll. L. R. 119.
[22] *Bank of America National Trust and Savings Association v Chrismas and Others (The Kyriaki)* [1993] 1 Ll. L. R. 137, at 151, per Hirst J citing the relevant part from Arnould.
[23] *Court Line Ltd. v R. (The Lavington Court)* [1945] 78 Ll. L. Rep. 390, at 394, per Scott LJ.
[24] Section 62(1) MIA 1906.
[25] See the reasoning of Lord Brett in *Kaltenbach v Mackenzie* (1878) 3 C.P.D. 467, at 470-471; *Roura and Forgas v Townend* [1919] 1 K.B. 189; *Robertson v Petros M Nomikos Ltd* [1939] 64 Ll. L. R. 45, at 47, per Lord Atkin; *Bank of America National Trust and Savings Association v Chrismas and Others (The Kyriaki)* [1993] 1 Ll. L. R. 137, at 151, per Hirst J.

Thus, the service of the NOA, when necessary as illustrated above, is a condition that must be satisfied in order for the insurer's liability for the total loss claim in question to be established[26] and, in case it is not, the assured may claim only for a partial loss, subject to the wording of the contract.[27] Hence the invalidity or the absence of the NOA would deprive the assured of his right to claim for a total loss.[28]

2.3. The validity of the notice of abandonment

For the NOA to be effective, the offer of the assured must be unconditional, in the sense that such intention of the assured must be clear.[29] Therefore, an NOA by mistake is a nullity.[30] To use the words of Lord Wright in *Norwich Union Fire Insurance Society v Price (WH) Ltd*[31]: "But proof of mistake affirmatively excludes intention".

There is no requirement for the word "abandon"[32] but the offer must be unequivocal.[33]This is needed for the insurer to be entitled to exercise his right to take over the ship.[34] In this respect, it follows that the extent of the assured's interest on the ship is critical, since the insurer can only take over what the assured chooses to abandon according to the maxim *nemo dat quod non habet*.

In addition, the notice must comply with the requirements in relation to its form. Section 62(2) MIA 1906 provides that the NOA can be communicated to the insurer in writing or orally. The author agrees with the expressed view[35] that this section is permissive, since the law provides for all the means of communication known at the time the Act was drafted. Thus, other means of communicating the assured's choice to the insurers - such as emails - should be considered as satisfying the wording of the Act, subject to the wording of the insurance policy.

The law provides that the NOA must be served "with reasonable diligence" after the assured has been reliably informed of the loss and he is entitled to a "reasonable time" to communicate his choice to the insurer in case the event is complex and the information needs further investigation.[36] This wording is not quite clear and the judge will have to determine as a question of fact whether the assured has complied with this requirement.[37] Since there is plenty of case law on this issue, this part of the paper is a mere illustration of the approach of the English courts.

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[26] It is not a condition precedent neither to the contract nor to the attachment of the risk.
[27] Marine insurance policies may provide cover for total loss only, often using the wording "free of particular average".
[28] The assured retains the right, subject to the insurance contract, to claim for a partial loss.
[29] Section 62(2) MIA 1906.
[30] *Russian Bank for Foreign Trade v Essex Insurance Co Ltd* [1919] 1 K.B. 39.
[31] [1934] A.C. 455, at 463.
[32] *Currie (MR) & Co v The Bombay Native Insurance Co* (1869) L.R. 3 P.C. 72, at 79, per Lord Chelmsford.
[33] See *Involnert Management Inc v Aprilgrange Ltd (The Galatea)* [2015] EWHC 2225 Comm, at [161], per Leggatt J.
[34] As explained before according to section 63(1) MIA 1906.
[35] See Rose, para 24.15; notice by cablegram was served in *Russian Bank for Foreign Trade v Essex Insurance Co Ltd* [1918] 2 K.B. 123; affirmed in the Court of Appeal [1919] 1 K.B. 39.
[36] Section 62(3) MIA 1906.
[37] Section 88 MIA 1906 provides: "the question what is reasonable is a question of fact".

In *Kaltenbach v Mackenzie*,[38] Lord Brett explained that the assured is entitled to take time in order to assess the acquired information and decide whether he will choose to abandon his vessel to the insurer or not.[39] The information must indicate to a reasonable man that the danger of losing the ship is very imminent and at that time the NOA must be given.[40]

In *Anderson v Royal Exchange Assurance Company*[41] the court held that the assured continued to work on the vessel on his own account by selling part of the cargo after nearly one month after the loss occurred[42] and he should not be entitled to make the best of the accident for himself.[43]

In *George Cohen Sons & Co v Standard Marine Insurance Co Ltd*[44] Roche J dealing with the NOA being served nearly two months after the loss, he held that the timing requirement was satisfied.[45] In holding so, the judge found that the assureds' notices both in February and in April - the loss had occurred in late December the previous year - were in time, although they "chose to rely on what may be called business instinct, and which may, less flatteringly, be called guess or conjecture".[46] It is submitted that the decision is justified, since it should be taken into account that when the incident took place the means of contemporary technology, which could shed sufficient light into the facts, were not available.[47]

However, the NOA served two months after the loss had occurred was considered to be late in *The Galatea*.[48] On December 2011 the claimant's yacht caught fire at her mooring in the Athens Marina and was damaged beyond economic repair. On 8 May 2012 solicitors for the claimant pointed out that the proposal form presented to the insurers had contained various crew details and that the vessel was "almost certainly" a CTL. This wording was held not to provide an unequivocal choice of the insured to treat the loss as a total loss.[49] On 12 July 2012 the claimant's solicitors served an NOA together with a sworn proof of loss, but this two-month delay along with the non-compliance with the clause imposing on the insured the obligation to provide a sworn proof of loss within 90 days of the occurrence of such loss was held inconsistent with the requirements of "reasonable diligence" according to section 62(2) MIA 1906.[50] Thus, the insured was deprived of his right to claim for a total loss. It is noteworthy that on 7 December 2011, four days after the damage had occurred, an NOA was signed on behalf of the claimant, but was not sent to the insurers.

[38] (1878) 3 C.P.D. 467.
[39] Ibid, at 471-472.
[40] Ibid, at 474.
[41] (1805) 103 E.R. 16.
[42] Ibid, at 17-18, per Lord Ellenborough.
[43] Ibid, at 18, per Le Blanc J.
[44] [1925] 25 Ll. L. R. 30.
[45] Ibid, at 34, col. 2.
[46] Ibid, at 36, col. 1.
[47] The circumstances of this case were quite complex and to make matters worse the master of the ship had passed away at the time of the trial.
[48] [2015] EWHC 2225 Comm.
[49] Ibid, at [262], per Leggatt J.
[50] Ibid, at [261], per Leggatt J.

Now it is time to turn to the issues that arose in *The Renos* in relation to the NOA, namely (1) whether it was valid or not and (2) whether the expenses incurred prior to the service of the NOA could be counted as costs of repairs for the purposes of the CTL calculation.

3. *The Renos*: The timely tender of the notice of abandonment issue

The relevant question to this issue was whether the NOA was too late contrary to section 62(3) of the Marine Insurance Act 1906. As mentioned above,[51] this question which is vital for the validity of the total loss claim, is to be answered by the court as a question of fact and, therefore, will be addressed briefly below.

3.1. The arguments

The owners argued that the complexity of the case required a serious amount of time to assess the situation and, therefore, to decide whether they would pursue a total or a partial loss. In support of this argument, they contended that the reputation of the surveyor appointed by the insurers played a huge role in their reluctance to accept the reports of their own surveyors as the only accurate ones. The essential point is the difference as to the amount of the cost of repairs between these surveys. It was further put forth that the information acquired from the different survey reports was equally reliable, so that the owners needed time to plan their next move.

Additionally, the owners argued that the parties had agreed on a *modus operandi*, namely a process that was agreed to be followed in respect of the assessment of the results of the various reports and quotations from shipyards. When the insurers informed them, they contended, that the process had come to an end, the next day they served an NOA. Thus, according to the owners, the alleged delay as to the service of the NOA was not unjustifiable and a result of the behaviour of the insurers, based on the agreed plan and their continuous involvement with the survey process. Indeed, the insurers required and undertook various inspections on board in order to assess the cost of the damage.

In response to these arguments, the insurers submitted that the fact that reliable information, when seen in isolation, was acquired is not challenged merely because it is disputed. In other words, the fact that there were several survey reports indicating different amount of costs of repair did not change the fact that the first reports provided the owners with reliable, sufficient information as to the extent of the damage. So the insurers argued that at several points in time before the date of the service of the NOA, the owners had reliable information and simply delayed to take appropriate action. Accordingly, they further submitted that the owners were not entitled to wait until they have "certain" information as to the extent of the damage since all the relevant facts are known.[52]

[51] See ft 37.
[52] *George Cohen Sons & Co v Standard Marine Insurance Co Ltd* [1925] 25 Ll. L. R. 30, at 35.

The insurers further contended that the claimants had not made clear that they were considering a claim for CTL and their delay caused costs to incur so that a CTL could occur. This was the "protective NOA" argument which is analysed at a later stage.

3.2. The decisions

At first instance, Knowles J held that it was not realistic to assess any information acquired in isolation[53] and that under these circumstances the owners had acted reasonably as to the time they took to assess the contradicting information received based on the complexity of the facts.[54] In this respect, he accepted the point of the defendants that the assured need not be "certain" before he reaches the decision to pursue a total loss claim.[55]

The judge further accepted that the significance of the vessel's damage and the contradicting nature of the information from the several reliable sources required the repair quotations from shipyards[56] and held that the approach of the insurers to provide competing specification and to emphasize that the choice of a yard that was not agreed would have adverse financial consequences, made it harder for the owners to form a reliable picture of the actual situation.[57]

The judge rejected the point made by the insurers that the owners should have made known that they were considering a CTL claim.[58] He based his ruling on the wording of section 62(2) and (6) of the Marine Insurance Act 1906, which stipulates that the assured must abandon the ship unconditionally and that the abandonment once accepted is irrevocable.

On appeal, Hamblen LJ affirmed the judgment of Knowles J, by holding that at the points of time put forth by the defendants (insurers) the complexity and the conflicting nature of the repair specifications and quotations from the shipyards the owners did not have reliable information to decide whether to pursue a claim for a total loss. His Lordship noted that, under the insurers' case, the owners would have been required to disregard the specification provided on behalf of the insurers, which was one that they insisted to be correct.[59]

3.3. Commentary

The issue of the timely NOA is closely related to the facts of each case and the ability of the parties to prove their points. In relation to the points of law, it is submitted that in the light of the specific facts of the case, both judgments seem justified. However, it is noteworthy that the reasoning which Knowles J

[53] *The Renos* [2016] EWHC 1580 (Comm), at [11].
[54] Ibid, [9] and [10].
[55] Ibid, [25].
[56] Ibid, [17].
[57] Ibid, [23] and [24].
[58] Ibid [34] and [35].
[59] *The Renos* [2018] EWCA Civ. 230, at [52].

applied in relation to the level of knowledge required on behalf of the assured before electing to pursue a total loss claim and to serve the NOA, is unclear.[60]

On this point, it is submitted that the designation of a specific test for these cases seems quite vague, if not unnecessary. The fact that the law vests in the judge the power to decide on the facts of each case whether the timely service of the NOA is satisfied is dependent on the nature of these very facts. The author argues, therefore, that a possible test would have to take into account not only the process of assessing the information provided, but also the sources and the reliability of such information. In any event, the formation of such a test, it is submitted to be superfluous to the existing law, which imposes that these matters should be explored by the judge.

In addition, it is submitted that the establishment of a specific test may have negative consequences on the recoverability for CTL claims. Indeed, the endeavor of formulating an objective test for an issue that is to be decided strictly in a case-by-case sequence may pose obstacles within the already complex legal fiction of the CTL. An analogy could be drawn from the area of fraudulent claims and the test that Sumption LJ formulated and applied in the *Versloot*.[61] From the author's perspective, the way that test is phrased[62] does not provide any guidance as to how it is going to be applied in future cases. By the same logic, the same danger may lurk also within the formation of a test for the issue in question. It is submitted, therefore, that the need for a test should be carefully weighed against its applicability to future cases, especially within a context which is to be decided based on the specific circumstances of each case.

Moreover, in relation to the point of the "protective NOA", the author agrees with the finding of the learned judge at first instance and further submits that it is also incorrect as a matter of principle. The point made by the insurers suggested that the assured should make known his intention to treat the loss as a total loss even before examining the information regarding the damage to the vessel. The obligation of the assured to communicate his choice of whether he will pursue a claim for a total loss is balanced with the fact that he is entitled to a "reasonable time" to make up his mind. The point of the insurers, according to the author, seems to ignore this established right of the assured and seeks to add another obligation on the assured clearly beyond and with no foundation on the existing requirements of the law.

In conclusion, the importance of the NOA emerges clearly as the absence or the invalid service of it, in cases where it is necessary, may deprive the assured of his right to claim for a total loss. Thus, the assured is advised to carefully assess at every stage the acquired information, since even what may seem a minor oversight or omission on his behalf may provide the insurer with a valid defense against the total loss claim.

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[60] Ibid, at [45] per Hamblen LJ; the same point was made by the insurers in the Court of Appeal.
[61] *Versloot Dredging BV and Another v HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45.
[62] Ibid, at [36], per Sumption LJ: "…although a lie uttered in support of a claim need not have any adverse impact on the insurer, I consider that it must at least go to the recoverability of the claim on the true facts".

4. *The Renos*: The pre-notice of abandonment costs issue

This issue relates to the question whether the costs incurred prior to service of the NOA can as a matter of law count towards the calculation of the costs of repair within the CTL. The arguments of the both sides and the decisions on the point are presented below followed by an in depth analysis by the author.

4.1. The arguments

The owners argued that such costs are to be included in the calculation of a CTL based on several arguments. First, they argued that the wording of clause 19.2 of the hull policy[63] is not limited to post-NOA expenses. At this point they further noted that the standard terms were drafted in 1983, so after the old cases about the interpretation of the Act, relied upon by the insurers. The owners contended that, in any event, this clause did otherwise provide, so that the relevant section of the Act did not apply.[64]

Secondly, they argued that the wording of section 60(2)(ii) of the Marine Insurance Act 1906[65] did not preclude the prior-NOA costs to be counted towards the costs of repair within the CTL calculation. They contended that the relevant date as to which "future" is to be contemplated is the date of the casualty. They based this on the view expressed extra-judicially by Donaldson LJ given as Chairman of the Association of Average Adjusters in 1982. His Lordship had stated that in *Hall v Hayman*,[66] the relevant date was considered to be the date of the NOA and that this concession seemed to ignore the distinction between the nature of the CTL and the election of the assured to pursue a claim for a total loss through the NOA.[67] Furthermore, the owners relied on the view expressed in *Arnould*, according to which in principle the assured "should not be penalized by having incurred some expenses before he gives notice".[68] To strengthen further their argument, they pointed out that the senior editor of the edition, in which this view was expressed, was Sir Michael Mustill, as he then was. Additionally, the owners argued that the decision in *The Medina Princess*,[69] which was another decision relied upon by the insurers, was wrong, since it was based on the aforementioned decision and was based upon a concession by the insurers' counsel and the judge did not explain his reasoning.

The insurers argued that pre-NOA costs were not to be counted towards the costs of repair within the CTL calculation. They based their view on matters of authority, principle and interpretation of the wording of the Marine Insurance Act.[70]

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[63] Clause 19.2 Institute Time Clauses - Hulls (1/10/1983) reads: "No claim for constructive total loss based on the cost of recovery and/or repair shall be recoverable unless such cost would exceed the insured value…".
[64] See section 60(1) MIA 1906, "Subject to any express provision in the policy".
[65] The relevant part of section 60(2)(ii) MIA 1906 reads: "…but account is to be taken of the expense of *future* salvage operations and of any *future* general average contributions…" (emphasis added).
[66] (1912) 17 Com Cas 81; a case relied upon by the insurers.
[67] See *The Renos* [2018] EWCA Civ. 230, at [76].
[68] Arnould para 29-23; ibid at [75] where Hamblen LJ cited this specific part.
[69] *Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Ll. L. R. 361.
[70] Section 60(2)(ii) MIA 1906.

Firstly they suggested that the decision in *Hall v Hayman*[71] which supported their case on this point, was not based on a concession but on a clear judgment by Bray J, although without the judge's reasoning being explained. In that case, the judge held that the pre-NOA costs were not to be counted.[72] They further relied on the decision in *The Medina Princess*,[73] where it was held by Roskill J, as he then was, that the cost in question could not be counted towards the costs of repair of the CTL calculation because it was incurred before the service of the NOA.[74] The insurers noted that both legal teams featured leading practitioners who possessed the necessary expertise to analyse this point in depth.

The insurers argued further that the "prudent uninsured shipowner test"[75] would decide whether a vessel is a CTL and the relevant date is when the NOA is served. They contended that otherwise an injustice would occur, namely the costs would be counted twice, once towards the CTL and the same costs would be recoverable under sue and labour.

As far as the wording of the Act is concerned, the insurers argued that the word "future" in section 60(2)(ii) of the Act cannot be superfluous since the relevant part was redrafted by the drafting Committee of the MIA 1906 in order to include it.[76] Thus, according to the insurers, the purpose of the wording is to include only *future* expenses, namely after the service of the NOA.

Finally, they argued that the clause 19.2 of the hull policy[77] had the opposite meaning from that which the owners contended, namely that the absence of any specific reference to the allowance of the pre-NOA costs meant that these costs would be excluded.

4.2. The decisions

At first instance Knowles J held that the expenses incurred prior to the date at which the NOA is served do count towards the calculation of the costs of repair within the CTL.

In holding so, the learned judge expressed the view that both the wording of the Marine Insurance Act 1906[78] and the clauses of the hull policy[79] did not preclude these costs from the calculation of the costs of repair and further noted that this is in unison with the fact that under certain circumstances the service of NOA is not necessary.[80] According to his view, the inclusion of the word "future" did not have the meaning that only the expenses after the date of the NOA were to be counted.[81] He based his reasoning

[71] (1912) 17 Com Cas 81.
[72] Ibid, at 90.
[73] [1965] 1 Ll. L. R. 361.
[74] Ibid, at 469, col. 2.
[75] For instance *Sailing Ship 'Blairmore' Co v Macredie* [1898] A.C. 593, at 603, per Lord Watson.
[76] Sir M D Chalmers and Douglas Owen, *A Digest of the Law Relating to Marine Insurance* (1st edn William Clowes and sons 1901) at 82.
[77] See fn 63.
[78] Section 60(2)(ii) MIA 1906.
[79] Namely clause 19.2 Institute Time Clauses-Hulls (1/10/1983); fn 63.
[80] *The Renos* [2016] EWHC 1580 (Comm), at [31].
[81] Ibid, at [38].

on the fact that section 60(2)(ii) of the Act[82] does not refer to any period commencing other than when the ship is damaged.[83]

The judge further held that this conclusion is the correct one as a matter of principle. In this respect he relied on the view expressed in *Arnould*,[84] namely accepting the point made by the owners and sided with the view of Donaldson LJ that the relevant date should be the date of the casualty.[85]

In relation to the authorities relied upon by the insurers, Knowles J was of the view that the reasoning of Bray J in in *Hall v Hayman*,[86] was not developed, since there was no argument on the point and that may be that the case is known for other parts of the judgment.[87] While discussing *The Medina Princess*[88] though, the judge clearly denied to follow it, since he was "convinced that it was wrong on that point".[89]

In the Court of Appeal, Hamblen LJ upheld the first instance decision on this issue. His Lordship rejected each one of the insurers' points in turn. At first, he agreed with Knowles J in relation to the wording of the Marine Insurance Act 1906, namely that the reference of section 60(2)(ii) to the cost of repairing the damage is not related to a period commencing other than the date of the casualty.[90] Furthermore, Hamblen LJ based his judgment on the grounds that in this section there is no mention to the NOA and no distinction based on the date the cost is incurred.[91]

Moreover, he expressed the view that CTL is a fact to be decided objectively and the relevant date is the one of the casualty based on clear authority.[92] Then, he went on to hold that the view expressed in *Arnould* and by Donaldson LJ extra-judicially was the correct one for the same reasons as Knowles J in the High Court, whilst noting that this result is based on logic and principle.[93] In other words, the judge seemed to accept the view that the relevant date which the word "future" in the Act refers to is the date of the casualty.

Finally, he rejected the arguments of the insurers which were based on the two authorities on the issue of whether the pre-NOA costs could count towards the costs of repair within the CTL. Hamblen LJ expressed the view that both judgments' authoritative weight is slight and that the reasoning is unclear or absent, since it was uncertain whether there was an argument on that point.[94]

4.3. Commentary

[82] Fn 65.
[83] *The Renos* [2016] EWHC 1580 (Comm), at [39].
[84] Ibid, at [42].
[85] Ibid, at [40].
[86] (1912) 17 Com Cas 81.
[87] *The Renos* [2016] EWHC 1580 (Comm), at [41] to [44].
[88] *Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Ll. L. R. 361.
[89] *The Renos* [2016] EWHC 1580 (Comm), at [44].
[90] *The Renos* [2018] EWCA Civ. 230, at [72].
[91] Ibid, at [73].
[92] Ibid, at [74], where the decision in *Robertson v Petros M Nomikos Ltd* [1939] 64 Ll. L. R. 45 was cited.
[93] Ibid, at [75], [76] and [80].
[94] *The Renos* [2018] EWCA Civ. 230, at [77] to [79].

The parties based their case on the views and arguments of distinguished practitioners. The owners argued that the view expressed by Donaldson LJ and Sir Michael Mustill, as he then was, as senior editor of *Arnould* at that time, was correct, whilst the insurers sided with the view of Mr. Brandon, QC, later Lord Brandon, and Mr. Anthony Lloyd, later Lord Lloyd expressed in *The Medina Princess*.[95] The insurers further contended that the expertise of the opposing legal team in this case,[96] increased the authoritative weight of the judgment.

Thus, in this case Knowles J at first instance and the panel of the judges in the Court of Appeal had essentially to choose between the views of these bright legal minds. Both in the High Court and in the Court of Appeal the argument put forward by the owners prevailed. The author argues that the judgments of Knowles J and the Court of Appeal are correct for the following reasons.

First, the view that the costs incurred prior to the service of the NOA do count towards the calculation of the costs of repair within the CTL is supported by the very nature of the NOA. Indeed, it does not constitute "an essential ingredient"[97] of the concept of CTL. It is usually considered a condition precedent to the insurer's liability for a total loss[98] and should be distinguished from the CTL itself, which is a prerequisite as to whether an NOA need be served.[99] From the aforementioned it is deducted that the significance of the NOA appears to be limited to the recoverability of a total loss claim in case a CTL has occurred.

Hence, it is submitted that the NOA does not influence the calculation of the cost of repairs within the CTL regime, being only a means of communication to the insurer that the assured has elected to exercise his right to claim for a total loss.[100] This view is further supported by the wording of section 60(2)(ii) of the Marine Insurance Act 1906.[101] The author suggests that the phrase "future salvage operations" refers to the time of the casualty and not to the time of the service of the NOA. There is no mention to the NOA in this section of the Act and it is submitted that the inclusion of the word "future" intended to eliminate any doubt as to the relevant time, thus it should not be considered superfluous. The Act was drafted during an era when the endeavour of collecting the sources of the law was a demanding and difficult task, so that the need of a clear drafting was of the essence.

Secondly, as a matter of precedent there was not any binding authority on the issue in question at the time of that the judgments, on which the insurers based their argument, were delivered. The decisions on which the insurers based their case were High Court decisions,[102] which do not constitute binding authorities for the High Court. Furthermore, in relation to these cases, as it has been pointed out, the

[95] [1965] 1 Ll. L. R. 361.
[96] Among the opposing legal team were Lord Gardiner, QC, who later served as Lord High Chancellor of Great Britain and Mr. Hobhouse, later Hobhouse LJ.
[97] See fn 21.
[98] See supra p. 2; however, there are cases where the service of the NOA is not necessary.
[99] See fn 23.
[100] Sections 61 and 62 MIA 1906.
[101] See fn 65.
[102] *Hall v Hayman* (1912) 17 Com Cas 81; *Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Ll. L. R. 361.

reasoning in respect to the issue in question is not clear and developed.[103] Indeed, the relevant parts of these decisions are quite brief and are not relevant to the ratio of the judgments. Hence, Knowles J at first instance was right to explore the law on this issue and was correct to hold that the service of the NOA was irrelevant to the calculation of the costs of repair within the CTL.

Furthermore, in relation to the opposing views on the issue in question it should be noted that both Donaldson LJ in his speech in the Association of Average Adjusters and Sir Michael Mustill, as he then was, did not have the benefit of the argument when expressing their view. However, they both gave their reasons. Their view is to be in the light of the correlation between the CTL and the NOA.

On the other hand, the insurers' argument that suggested that the point was argued and analysed in depth in *The Medina Princess*[104] is not persuasive. It is noteworthy that the point in that case was not of vital importance and the decision on it was quite brief. Moreover, it should be taken into account that the way the issue was decided was by the acceptance of the concession made by the insurers' counsel (Mr Henry Brandon QC, as he then was) and not on the basis of a full argument on that particular point.[105] In respect of the decision in *Hall v Hayman*,[106] the author agrees with the view of Knowles J that this decision may be known for other parts of the judgment, since the reasoning of Bray J on this point appears not to be developed.[107] In conclusion, the author argues that the decisions relied upon by the insurers do not constitute clear authorities for the proposition that the costs incurred prior to the service of the NOA do not count towards the calculation of the repair costs within the CTL.

5. Conclusion

The aim of this paper was to explore the importance of the NOA which emerges within the legal fiction of CTL, especially in the light of the decisions in *The Renos*.[108]

This case dealt with an issue that had not been addressed by the courts for a long time. Now it seems that there is a clear answer as to whether the NOA affects in any way the calculation of the costs of repair within the CTL. This question has been answered in the negative both before the High Court and the Court of Appeal. Thus, at least at the moment, it can be stated with certainty that the NOA does not constitute such a critical point in time and does not influence the calculation of these costs of repair.

On 10 April 2019 both the issues discussed are being heard before the Supreme Court,[109] since the leave for appeal has been granted. The author suggests that this is a remarkable opportunity for the Supreme Court to deliver an opinion which will decide this point and eliminate any remaining doubts. It is suggested that this aspect of the concept of the NOA should be decided by the Supreme Court in the same way as the High Court and the Court of Appeal decisions for the reasons mentioned above.

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[103] *The Renos* [2016] EWHC 1580 (Comm); [2018] EWCA Civ. 230, at [78] and [79], per Hamblen LJ.
[104] [1965] 1 Ll. L. R. 361.
[105] *The Renos* [2016] EWHC 1580 (Comm), at [45].
[106] (1912) 17 Com Cas 81.
[107] *The Renos* [2016] EWHC 1580 (Comm), at [44].
[108] [2016] EWHC 1580 (Comm); [2018] EWCA Civ. 230.
[109] <https://www.supremecourt.uk/cases/uksc-2018-0054.html> accessed on 13 February 2019.

Thus, in the light of these decisions the author argues that the insurers should be quite careful when assisting the assured in relation to the investigation and specification of the damage after a loss within the policy has occurred. As these decisions show, the insurers could face negative consequences deriving from their own intense intervention. Hence, it is submitted that a "hands-on-approach" is to be considered with caution, since it could provide the assured with valid reasons, as in this case, to need more time to decide what to do with the casualty.

On the other hand, in case the assured needs more time to make up his mind regarding his approach as to the loss which has occurred, it would be wise to turn to his insurer for additional information. The author suggests that in the light of the decisions in *The Renos*[110] such behaviour of the assured could be considered as satisfying his obligation to act with "reasonable diligence" in accordance with the Marine Insurance Act 1906.[111] This is further supported by the common practice that insurers nowadays have at their disposal the knowledge and the experience to assist and advice on such matters.[112]

In conclusion, the author argues that the NOA is a vital ingredient to the recoverability for a total loss in case a CTL has occurred, subject to the circumstances where the NOA is not necessary by law. However, it should be irrelevant to the calculation of the costs of repair within the CTL, since it is a separate concept and does not constitute a critical point in time in relation to the costs that are included in that calculation. This derives from the fact that it is dependent on the existence of a CTL in the first place, as the decisions of the High Court and the Court of Appeal clearly indicate.

In that respect the author is of the view that, when this issue is brought before the Supreme Court this April, the latter should take advantage of this opportunity to clarify once and for all the correlation between the NOA and the doctrine of CTL – which had been untouched for fifty years, by upholding the judgments of Knowles J and the Court of Appeal respectively for the reasons discussed above.

[110] [2016] EWHC 1580 (Comm); [2018] EWCA Civ. 230.
[111] Section 62(3) MIA 1906.
[112] It is noteworthy that many insurers use this knowledge and experience when providing loss prevention services.