The "RENOS" – Constructive Total Loss revisited

Antonis Vakondios*

1. Introduction

The unanimous decision of the Supreme Court in *The Renos*,[1] which was delivered by Sumption JSC on 12 June 2019, provided clarity in relation to two issues which lie at the heart of marine insurance law.

The first issue was that the costs incurred before the insured tenders a notice of abandonment (NOA) to its hull and machinery insurer do count as a matter of law towards the calculation of the constructive total loss (CTL).[2] The second was that the Special Compensation Protection and Indemnity Clause (SCOPIC) costs do not form part of the costs of repairs for the CTL purposes and, therefore, do not count towards the CTL calculation.[3]

The scope of this article is mainly concerned with the above issues as a matter of law.[4] In this respect, it is noteworthy, that the case has been remitted back to the first instance judge, Knowles J, in order for him to decide whether The MV RENOS was indeed a CTL, in light of the Supreme Court decision.[5]

Each of the aforementioned issues decided by the Supreme Court will be analysed separately. In that respect, the law and Sumption JSC's approach, with which the other Justices of the Supreme Court agreed, will be explained and critically assessed.

2. The pre-NOA costs issue

Before exploring the decision of the Supreme Court on this point, the concept of the CTL and the NOA are briefly addressed.[6]

The legal fiction of the CTL allows an insured after the occurrence of the loss to abandon the subject-matter insured as is to his hull insurer and to claim for a total loss, even in cases where no actual total loss has, in fact, occurred.

Therefore, according to the Marine Insurance Act 1906 (Act), there is a constructive total loss where (a) it is unlikely that the insured can recover the ship or the goods insured,[7] or (b) the costs of recovering the ship or the goods would exceed their value when recovered,[8] or (c) where the ship is damaged, the costs of repairing her would exceed her value after the repairs.[9]

One precondition of recovery for a CTL is the service of an NOA, by which the assured[10] communicates to his insurer that he elects to treat the loss as a total loss.[11] In this respect, the law grants the right to the assured to take a step back, evaluate the financial situation that the casualty has created (i.e. the expenses

---

* LLM in Maritime Law (University of Southampton).

[1] *Sveriges Angfartygs Assurans Forening (The Swedish Club) and others v Connect Shipping Inc and another (The Renos)* [2019] UKSC 29.

[2] For a brief explanation of the CTL and the NOA see further below.

[3] For the analysis of the SCOPIC clause see infra p. 4.

[4] Therefore, the facts of the case are not presented.

[5] *The Renos* [2019] UKSC 29, at [28].

[6] For a detailed analysis of the NOA see A. Vakondios, 'The RENOS – Retaking notice of the Notice of Abandonment' [2019] British Insurance Law Association Journal, Issue 132, p. 17-34, at 19-23.

[7] Section 60(2)(i)(a) MIA 1906.

[8] Section 60(2)(i)(b) MIA 1906.

[9] Section 60(2)(ii) MIA 1906.

[10] The terms 'insured' and 'assured' are used interchangeably.

[11] Section 61 MIA 1906.

that he will have to incur as a result of the loss), and then, to choose whether he will exercise his right to pursue a claim for a total loss by abandoning whatever remained of the subject-matter insured to his insurer or to claim for a partial loss only and retain the subject-matter insured.

However, service of an NOA is not necessary where at the timing the insured obtains information about the loss, the service of an NOA would provide no benefit to the insurer[12] or in cases where the insurer has waived the NOA[13] or where an insurer has re-insured his risk.[14]

2.1. The Supreme Court decision

Sumption JSC, before explaining the reasons for his opinion, mentioned that neither the language of the Act nor any decided case can provide a straightforward answer to the question on the timing point.[15]

His Lordship rejected the insurers' argument that the words "would"[16] and "future"[17] in section 60 of the Act suggest that only future expenditure after the notice of abandonment is served are to be included in the CTL calculation. Sumption JSC agreed with the courts below that the fact that the notice of abandonment is not mentioned in section 60 of the Act does not help insurers' proposition.[18] He further expressed the view that the reference to "future" liabilities does not automatically exclude the past expenditure.[19]

Sumption JSC based his opinion on the principles of insurance law and the correlation between these principles with the requirement for the service of an NOA. He preferred to approach the issue of whether pre-NOA costs do count as a matter of law towards the CTL calculation, without referring to old US case law and the speech of Carver QC, at an international conference at Buffalo in 1899. He further expressed the view that the decisions in *Hull v Hayman*[20] and *The Medina Princess*,[21] both of which were relied on by the insurers, "are certainly not beyond controversy" due to lack of reasoning and argument.[22] Instead, in his own words: "…the issue is better approached as a matter of principle that by trying to squeeze more juice from these rather dry lemons".[23]

By this rather vivid expression, Sumption JSC clarified that one should take into account the objective character of the CTL exercise and that the loss occurs at the time of the casualty.[24] He referred also to the classic case of *Robertson v Petros M Nomikos Ltd*,[25] where the House of Lords (since 2009, The Supreme Court) held that the NOA was a condition precedent to the assured's claim for a CTL and not to the CTL itself.

---

[12] Section 62(7) MIA 1906.
[13] Section 62(8) MIA 1906.
[14] Section 62(9) MIA 1906.
[15] *The Renos* [2019] UKSC 29, at [7], per Sumption JSC.
[16] See section 60 MIA 1906, where there are a few references to the word "would".
[17] Section 60(2)(ii) MIA 1906 reads: "In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of ***future*** salvage operations and of any ***future*** general average contributions to which the ship would be liable if repaired;" (emphasis added).
[18] *The Renos* [2019] UKSC 29, at [8], per Sumption JSC.
[19] Ibid.
[20] (1912) 17 Comm Cas 81.
[21] [1965] 1 Lloyd's Rep 361.
[22] *The Renos* [2019] UKSC 29, at [9].
[23] Ibid, at [9].
[24] Ibid, at [10] and [13].
[25] [1939] AC 371.

In the following paragraphs of his judgment dedicated to the pre-NOA costs issue, Sumption JSC went on to analyse the doctrine of "ademption of loss" and its influence on the CTL claim.[26] When discussing the old cases of capture and recapture before the Act entered into force, his Lordship clarified that it is a basic principle of insurance law that after the occurrence of a CTL, an assured is limited to his actual loss as this may be reduced by subsequent events. The position is the same under the Act, as the decision of the Court of Appeal in *Polurrian v Young*[27] indicates.

It is noteworthy that the fact that the vessel is recaptured does not itself negate the existence of a CTL. In *Roura & Forgas v Townend*,[28] the charterers of the vessel had insured their anticipated profit on the voyage against actual or constructive total loss of the vessel and the vessel was captured. It was held that the profit was lost notwithstanding that the vessel was later recaptured, and this did not mean that the insured had not suffered a total loss. Roche J noted that the event, against the occurrence of which the right to indemnity was agreed, had happened and had "irrevocably caused the loss of the subject-matter of the insurance".[29]

By the same reasoning, the fact that the insurer incurred expenses directly, which, ordinarily, would fall onto the assured (who would claim them in turn from his insurer), could not have the result of reducing the assured's repair costs. This was decided in *The Blairmore*,[30] by the House of Lords.

According to Sumption JSC, since the assured is entitled to recover only for his actual loss so far as it may be reduced by subsequent events, it follows that any expense incurred by the owner in the form of salvage or repairs cannot be regarded as reducing the repair costs.[31] Therefore, since the fact that part of the repair costs were incurred prior to the service of the NOA did not cause the repair costs to be "adeemed" in any way, pre-NOA costs were to be taken into account for the CTL calculation.[32]

2.1. Commentary

It is submitted that in light of the absence of definitive authority on the point, the approach followed by Sumption JSC is the most appropriate. Instead of trying to draw conclusions and arguments from decided cases which did not deal expressly with the issue at hand, Sumption JSC opted for solving this issue from the perspective of general principles of marine insurance law. In this respect, Sumption JSC analysed the application of the legal fiction of CTL in 'capture/re-capture' cases and went on to hold that the service and the purpose of the NOA does not affect the nature of the loss suffered by the assured in any event. Therefore, for Sumption JSC the NOA is a pre-condition of the insurer's liability for a total loss (when the service of an NOA is necessary) and does not interact with the nature or the calculation of the CTL.

It is now settled law that the NOA is an essential part of the procedure of the CTL claim, but not a part of the nature of the CTL itself. As the author had previously argued in light of the Court of Appeal decision,[33] the NOA is an entirely separate concept from the CTL, which could affect the right of the assured to claim for a CTL only in respect of whether the assured has acted with "reasonable diligence" in serving the NOA after having received "reliable information" about the casualty. In this regard, the assured will be entitled to a "reasonable time" to make up his mind and to inform his insurer of his election to pursue either a CTL or a partial loss claim.

---

[26] *The Renos* [2019] UKSC 29, at [15]-[18], per Sumption JSC and the authorities discussed thereof; The doctrine of "ademption of loss" suggests that an assured can claim for an indemnity which actually reflects his loss after the influence of subsequent events, which may reduce his loss – e.g. the recapture of a vessel which was initially captured may give rise only to a partial loss.
[27] [1915] 1 KB 922.
[28] [1919] 1 KB 189.
[29] Ibid, at 196.
[30] *Sailing Ship "BLAIRMORE" Co Ltd v Marcedie* [1898] AC 593.
[31] *The Renos* [2019] UKSC 29, at [18], per Sumption JSC.
[32] Ibid, at [19], per Sumption JSC.
[33] A. Vakondios, 'The RENOS – Retaking notice of the Notice of Abandonment' [2019] British Insurance Law Association Journal, Issue 132, p. 17-34, at 33.

Therefore, the valid service of the NOA is of great importance only in respect of the recoverability for a total loss. Although this issue was not appealed to the Supreme Court, the Court of Appeal decision on the same point seems to suggest that insurers should act with caution when exercising their contractual rights, such as the right to choose the port of repairs and the right to require further tenders for the repair of the vessel to be taken.[34] It is submitted that the insurers should have in mind that, subject to the facts of each specific case, it may be the case that a proactive approach could result in lengthening the time during which the assured must, according to the Act, communicate his election to pursue a CTL to his insurer. Therefore, the overall strategy is of the essence when insurers are about to interact with a casualty and the assured's reaction and response to the same.

In the facts of *The Renos*, the NOA was served on 1 February 2013, whilst the loss had occurred on 23 August 2012. In light of the 'hands-on' approach followed by the insurers combined with the complexity and the contradicting information about the casualty, the Court of Appeal held that the service of the NOA on 1 February 2013 was valid.

In this respect, it is submitted that had the insurers elected to follow a less proactive approach in handling the casualty, subject to the assured's reaction, the lower courts could have held that the NOA was served too late. This would have a twofold result: (a) the insurers would not have been liable for a total loss, and (b) *The Renos* would have been another case on the timing of the service of the NOA. Indeed, had the insurers won this point, the issue of whether the pre-NOA costs and the SCOPIC costs could count towards the calculation of the CTL would have never been addressed by the Court of Appeal and the Supreme Court.

3. The SCOPIC costs issue

Before presenting the ruling of the Supreme Court in relation to the above issue, it is worth providing an overview of the SCOPIC within the law of salvage.[35]

3.1. The law of salvage and the SCOPIC

English courts have been dealing with the law of salvage for over two centuries. In that regard, English courts have refrained from laying down a strict definition of salvage services. Instead their approach has been to proceed with extreme caution so as not to limit the ambit of salvage operations.[36]

Salvage is based on the existence of several elements such as the render of assistance to a vessel in danger,[37] the voluntary character of the services provided,[38] and the no cure – no pay principle.[39] The

[34] See Institute Time Clauses (Hulls) (1/10/83), Clause 10.2 and Clause 10.3 respectively.
[35] In this respect, the reader is referred to the leading practitioner books on this subject: Brice, *Maritime Law of Salvage* (5th edition, Sweet & Maxwell, 2011) (hereinafter Brice) and Kennedy & Rose, *Law of Salvage* (9th edition, Sweet & Maxwell, 2017) (hereinafter Kennedy & Rose).
[36] See *The Governor Raffles* (1815) 2 Dods. 14, where Lord Stowell said at 17: "It has been said that no exact definition of salvage is given in any of the books. I do not know that it has, and I should be sorry to limit it by any definition now".
[37] For the meaning of "danger", see *Brice*, at 1-144ff.
[38] This means without a pre-existing legal obligation, i.e. a private or public duty; see Kennedy & Rose, at chapter 8; regarding the public duty, Article 10(1) of the Salvage Convention provides: "Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.".
[39] Among the preconditions of the salvage remuneration being payable is the ***success*** of the salvage operations. For an in-depth analysis on the matter see Brice, at 1-356; Kennedy & Rose, at chapter 9.

salvor could claim remuneration, subject to the no cure – no pay principle, for salvage services rendered in respect of the ship and cargo.[40]

In practice however, salvage remuneration has been payable under the Lloyd's Open Form (No Cure – No Pay) (LOF), which is essentially a salvage contract. After the grounding of the oil tanker "AMOCO CADIZ" on the French Coast in 1978,[41] the 1980 edition of the LOF was amended to include a special provision for an enhanced rate of remuneration to those rendering salvage services to laden oil tankers. It is noted that the usual way of introducing rules and regulations in the shipping industry is, unfortunately, as a response to major environmental disasters.[42]

Under The Salvage Convention,[43] which has the force of law in the United Kingdom,[44] the salvor has a further duty to "exercise due care to prevent or minimise damage to the environment".[45] Regarding the salvage remuneration, the assessment of the salvor's efforts should reflect, inter alia, "the skill and efforts of the salvors in preventing or minimizing damage to the environment".[46] Additionally, Article 14 provides for the salvor's special compensation for preventing or minimising environmental damage, which is payable only for the period in which the threat of environmental damage is present (the Article 14 Award).[47] This Award would include the "out of pocket" expenses of the salvor as well as expenses for a "fair rate for equipment and personnel" used in the salvage operation.[48]

The House of Lords dealt with the wording of Article 14 in *The Nagasaki Spirit*,[49] where it held that the Article 14 award does not include an element of profit for the salvage services provided and that the word "rate" effectively "denotes an amount attributable to the equipment and personnel used, just as the expenses include an amount attributable to out-of-pockets".[50] This ruling will apply to the salvage services rendered under the regime of The Salvage Convention.

The market's reaction to the application of Article 14 and its unsatisfactory results led to the introduction of the SCOPIC in 1999.[51] Once incorporated in the LOF contract – the SCOPIC is not part of the LOF contract, the SCOPIC will exclude the application of Article 14 of The Salvage Convention, whether invoked or not.[52] Under the SCOPIC, the remuneration payable to the salvor for preventing or minimising environmental damage is assessed based on agreed daily tariff rates for equipment and personnel. In addition, the salvor will be entitled to an uplift of 25% on those rates.[53]

As it is the case with the Article 14 Award, the SCOPIC remuneration will be payable only if it exceeds the traditional Article 13 Award. However, since the SCOPIC remuneration is not dependent on the

---

[40] On whether freight (which would normally be taken into account when assessing the value of the cargo) can be considered as a separate subject of salvage see Brice p. 229-234 and Kennedy & Rose p. 108-114.
[41] Approximately 220,000 metric tonnes of light crude oil were spilled into the sea.
[42] Another example is of course the adoption and establishment of the Supplementary Fund in 2003 in the context of the International Convention on Civil Liability for Oil Pollution Damage, after the sinking of the oil tanker ERIKA off the coast of France in 1999.
[43] IMO, International Convention on Salvage (24 August 1989) 1953 UNTS 165, entered into force 14 July 1996 (hereinafter The Salvage Convention).
[44] See section 224(1) of the Merchant Shipping Act 1995.
[45] See Artcile 8(1) of The Salvage Convention.
[46] Ibid, see Article 13(1) for the criteria to be taken into consideration when assessing the salvor's Article 13 Award.
[47] See Article 14 of The Salvage Convention.
[48] See Article 14(3) of The Salvage Convention.
[49] [1997] 1 Ll. Rep. 323.
[50] Ibid, at 334 per Lord Mustill.
[51] For a brief but quite comprehensive analysis of the SCOPIC see Archie Bishop (former legal adviser to the Salvage Union): 'The mystery of the SCOPIC unravelled' <http://www.marine-salvage.com/media-information/articles/archive/the-mystery-of-scopic-unravelled/> accessed 16 March 2020.
[52] See SCOPIC, Clause 1.
[53] Ibid, Clause 5(iv).

salvor's succeeding in preventing damage to the environment, there is a mechanism in place to prevent salvors from invoking the SCOPIC in every case: If the Article 13 Award is higher than the SCOPIC remuneration, then not only the latter is not payable, but also the Article 13 Award is reduced by 25% of the difference between it and the SCOPIC remuneration.[54] Among the features of the SCOPIC is also the right of the shipowner to withdraw from SCOPIC giving five days' notice and provided that the local authorities allow it[55] and the obligation on the shipowner or his insurer to provide security in the amount of $3million within two working days from the time SCOPIC is invoked.[56]

Following this brief introduction, it is now time to turn to the Supreme Court decision on this point.

3.2. The Supreme Court decision

Sumption JSC based his holding (with which the rest Justices of the Supreme Court agreed) that the SCOPIC costs do not count towards the CTL calculation on the purpose of the SCOPIC charges. Sumption JSC drew a distinction between expenses which are linked directly with the reinstatement of the ship by being preliminary to that reinstatement – i.e. temporary repairs, towage or salvage services in a general sense.[57] However, he held that the SCOPIC charges served a different purpose, which is to "protect an entirely distinct interest of the shipowner, namely his potential liability for environmental pollution".[58]

In relation to the "prudent uninsured test",[59] Sumption JSC held that, in the present case, its application would not make any difference (i.e. the assured's behaviour was in line with what a prudent uninsured shipowner would have done).[60] He further stressed that the division of risks between the hull and machinery insurers and liability insurers regarding environmental liabilities supports his holding. Additionally, he noted that the same is in line with the effect of Clause 15 of the SCOPIC.[61]

Sumption JSC concluded that the SCOPIC costs do not form part of neither the repair costs under section 60(2)(ii) of the Act,[62] nor for the purpose of Institute Hull Clauses[63] because "their purpose is unconnected with the damage to the hull or its hypothetical reinstatement".[64]

3.3. Commentary

The Supreme Court's decision that the SCOPIC costs do not count towards the CTL calculation is based on the view that the SCOPIC costs are incurred in order for the shipowner to minimise his liability for

---

[54] SCOPIC, Clause 7.
[55] Ibid, Clause 4.
[56] Ibid, Clause 3(i).
[57] *The Renos* [2019] UKSC 29, at [24], per Sumption JSC.
[58] Ibid, at [25].
[59] This test was first applied in *Roux v Salvador* (1836) 3 Bing NC 266, at 286, per Lord Abinger CB, and affirmed by the House of Lords in *Irving v Manning* (1847) 1 HL Cas 287; In the words of Lord Abinger in *Roux v Salvador*: "…In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured…".
[60] *The Renos* [2019] UKSC 29, at [26].
[61] Clause 15 of the SCOPIC provides: "SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel.".
[62] See fn 17.
[63] Institute Time Clauses (Hulls) (1/10/83), which were incorporated in the policy.
[64] *The Renos* [2019] UKSC 29, at [27], per Sumption JSC.

environmental pollution. This reasoning seems to draw support from the traditional allocation of costs between the hull and machinery insurers and the liability insurers. The author argues that, although this solution provides clarity and is in line with the shipping practice, the reasoning behind it is, with respect, not entirely convincing for a number of reasons.

First, it should be noted that the SCOPIC was introduced as an alternative to the unsatisfactory solution provided by the application of the Article 14 of The Salvage Convention. Therefore, the SCOPIC offered the financial incentive to salvors to try and salve the vessel and her cargo by providing a "guaranteed remuneration".[65]

Secondly, the SCOPIC is not an anti-pollution clause. Under the LOF, into which the SCOPIC may be incorporated, the salvors are under an obligation to "use their best endeavours to salve the property".[66] Along the same lines, the SCOPIC provides that the duties of the salvors are the same as provided under the LOF.[67] In that respect, it has been expressed that usually it will be a nearly impossible task to separate between the costs incurred for salving the vessel and the costs incurred in order to minimise pollution and that Clause 14 of the SCOPIC seems to be contradicting with the argument accepted by the Supreme Court – i.e. that the scheme of the SCOPIC is based on the basis that costs for reinstating the vessel and the costs of preventing pollution not being indivisible.[68]

The author agrees with the above view in light of the fact that in practice there may be cases where the services rendered under a salvage contract could not strictly be allocated to the salving of the vessel or to the avoidance of environmental pollution. For instance, the involvement of the authorities or the actual process of bringing the vessel to safety would probably call for the removal of oil (as bunkers or cargo) from the vessel before the actual commencement of the salvage operations. Therefore, the author suggests that the purpose of the costs incurred under a salvage contract is not always quite clear and easy to identify.

Thirdly, the allocation of costs between hull and machinery insurers and liability insurers does not have an impact on the nature or the purpose of the SCOPIC costs themselves, as explained above. This allocation of costs was the outcome of the CMI Montreal Conference in 1981, where it was agreed that the compensation payable to salvors in respect of services rendered in order to minimise or prevent pollution should be allocated between the cargo owners (and their insurers) and the owners of the vessel (and their insurers).[69] The so called "Montreal compromise" was later on reflected in Article 13 and Article 14 of The Salvage Convention. Under Article 13.1, between the criteria for fixing the reward payable to the salvors by the vessel owners, there was the addition of "the skill and efforts of the salvors in preventing or minimizing damages to the environment". In addition, it was agreed that the Article 14 Award will be payable only by the owners of the vessel – therefore, in practice, by their insurers.

Although the aforementioned commercial allocation of expenses provides certainty and it has been endorsed by the industry, it is submitted that it does not provide for a solid legal basis for supporting the holding that the SCOPIC costs (which, in practice, substitute the Article 14 Award) should not count as a matter of law towards the calculation of a CTL. In the absence of a clear wording in the hull policy to that effect, the author argues that it makes no difference that the SCOPIC costs are effectively paid out

---

[65] G. Brice, 'Salvage and the role of the insurer', [2000] L.M.C.L.Q. 26, at 31, where Brice explains that the SCOPIC was to be considered as entirely distinct from Article 14 of The Salvage Convention and had "nothing to do with a threat of damage to the environment".

[66] See Clause A of the LOF contract; it is noted that the latest edition, LOF 2020 launched on 1 January 2020, has not introduced any major changes to the LOF.

[67] Clause 10 of the SCOPIC provides: "The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment.".

[68] M. Hall and D. Handley: 'RENOS: A problem solved or created?' <https://www.clydeco.com/insight/article/renos-a-problem-solved-or-created> accessed 16 March 2020; Clause 14 of the SCOPIC provides: "The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.".

[69] See The Travaux Preparatoires of The 1989 Salvage Convention, p. 295-296.

of the liability insurer's pocket. These costs will be incurred by the owner of the vessel because of the salvage operations.

Fourthly, Sumption JSC's reasoning could possibly lead to the paradox of two identical situations in terms of the nature of services rendered to be addressed differently: Imagine two identical situations of salvage services rendered where in the first the SCOPIC is invoked and in the second it is not. Based on the reasoning of the decision in *The Renos* the costs incurred in the former scenario – i.e. the SCOPIC costs, would not form part of the CTL calculation, whilst, in the latter scenario, the costs incurred under the LOF contract would probably count towards the CTL calculation.

In light of the above, the author suggests that, prior to the decision, should the parties wish to agree that the SCOPIC costs should not count towards the CTL calculation, the hull policy should have contained a clause to that effect. However, following the Supreme Court decision, any need for such clause is now redundant.

It is also interesting to address the insurers' argument that Clause 15 of the SCOPIC[70] precluded the owners of the vessel to include the SCOPIC costs in the calculation of their CTL claim.[71] During the Supreme Court hearing (and also before the lower courts) insurers contended that the wording of Clause 15 of the SCOPIC was so wide so as to mean that the SCOPIC costs should not be taken into account when calculating the CTL.

The Supreme Court (in line with the lower courts on that point) rejected the insurers' argument on the basis that the meaning of the clause is simply to introduce a bar to any possible attempt of the shipowner to recover such (SCOPIC) costs from his hull and machinery insurer. As Sumption JSC noted during the hearing, by including the SCOPIC costs in the calculation of the CTL, the insured does not seek to recover the SCOPIC costs, but to claim for an indemnity on a (constructive) total loss basis.

It is submitted that this is correct: Clause 15 of the SCOPIC effectively depicts the allocation of expenses between the hull and machinery insurers and the liability insurers, as a result of a commercial compromise, and expressly disallows any claim for recovery of the SCOPIC costs from the shipowner against the former. In any event, the insured was not claiming from the hull insurer the SCOPIC costs themselves.

Additionally, it is noted that the general position is that exclusion clauses need to be expressed clearly and without ambiguity, otherwise there is a risk of such clauses being held ineffective.[72] In the case of Clause 15 of the SCOPIC, according to the author, the wording is not clear enough to support the insurers' aforementioned argument.

4. Conclusion

The decision in *The Renos* dealt with points of law which have not been in the spotlight for half a century (the pre-NOA costs issue) and had never been addressed before (the SCOPIC costs issue) by the English courts. The Supreme Court decision is now a clear authority for the proposition that the costs incurred before the service of the NOA do count towards the calculation of a CTL and that the SCOPIC costs do not form part of the same calculation.

In respect of the issues relating to the NOA, the decisions in *The Renos* suggest that the overall view of each case should be of importance in terms of claims strategy. In light of the findings of the decisions, it is submitted that the insurers' interference could, subject to the circumstances of each case, result in allowing the assured more time to elect whether or not to pursue a CTL claim.

In relation to the SCOPIC costs issue, despite the above thoughts and considerations, in the author's view, the Supreme Court decision resolves a complex issue in favour of the practical need of certainty.

---

[70] See fn 61.

[71] Sumption JSC ultimately decided the SCOPIC issue in favour of the insurers, however it is worth dealing with the argument briefly.

[72] See Chitty on Contracts, 33rd Edition, at para 15-007 ff.

In this respect, Sumption JSC's opinion would have been easier to digest, if, after having stated that the determining factor in deciding whether a certain category of costs would count towards the CTL calculation is the purpose of such costs, the judge had not taken the view that in all circumstances the SCOPIC costs are incurred with a view of minimising the shipowner's environmental liability. In this respect, the author argues that this issue may be better approached on a case-by-case basis for the reasons outlined above.

Obviously, the Supreme Court decision is welcomed by hull and machinery insurers, since it may effectively make it more difficult for the assured, in certain circumstances, to claim for a CTL. For the same reason, it may be the case that the assured will seek to negotiate with his insurer that the insurance policy contains a specific clause allowing the SCOPIC costs to be taken into account when calculating the CTL. In this respect, commercial considerations, which will influence the insurer's approach, would also come into the picture.

In any event, it remains to be seen how the English courts will apply this decision in the cases to come. In particular, it will be interesting to see how the courts will seek to identify the purpose of the costs incurred in relation to salvage operations and whether this will be a fruitful task.

Finally, in terms of *The Renos*, it will be Knowles J (to whom the case has been remitted to) in the High Court, who will have to decide, in light of the facts and the Supreme Court decision, whether the MV RENOS was indeed a CTL.