

SIR STEPHEN TOMLINSON

“Underwriters decline notice of abandonment” – some new questions raised by an old phrase.

An address to the Association of Average Adjusters, 13 May 2010

May I begin by thanking you for the great honour you have done me in making me your Chairman. That is an honour in itself, the greater an honour because it adds my name to a long list of very distinguished men which includes some of the most towering figures from the world of marine insurance, market professionals and lawyers alike.

I have however found it a useful antidote to hubris to tell my friends of the honour you have bestowed upon me. Blank incomprehension is the norm. Some, knowing my passion for cricket, assume that this must be an association of cricket scorers. But I suppose that those of you present who are adjusters are used to all that.

A little over thirty years ago I found myself on an idyllic private island in the Seychelles. The island was owned by a French lawyer who had I think prospered in the woodpulp industry. His passion was for deep sea fishing and his island lay just off some renowned fishing grounds. Perhaps to ensure some company he built a few luxurious thatched bungalows along the white sand which fringed the clear waters of the Indian Ocean. He brought in two French chefs and set up a rudimentary farm and a market garden. Other supplies were flown in daily by light aircraft, the pilot sometimes having to circle whilst a giant tortoise was enticed off the grass landing strip. For a consideration you could stay on this paradise, as I did on my honeymoon. On the third morning at breakfast, as we watched the exotic birds jostling for crumbs from the table, the owner of the island, Pierre, advanced in his shorts and flip-flop

sandals to wish us good morning. He had a buff folder tucked under his arm and, after the usual pleasantries and with a slightly nervous glance in the direction of my wife of only five or six days he asked me engagingly, “I wonder if you might spare a moment on the beach this morning to look at my file.” “Of course Pierre”, I said, “but what is it?” He knew by now that I was a young shipping lawyer from London. With the unmistakable air of a man with a grievance warming to his theme he replied “it is my claim against the Lloyd’s for the constructive total loss of my fishing boat.” And so it was.

Well I am glad to report that we are still married, and that Pierre’s claim was settled after we had argued the case for four days before another of your Honorary Fellows, Mr Justice Anthony Lloyd, as he then was. Tempted though I am to discuss with you the difficulties of compliance on a small tropical island with a warranty that a vessel shall not be left unattended off an exposed beach or foreshore, I thought that I would spend some time today on some other aspects of claims for a CTL, which claims have from that time on proved to be a significant part of my work both at the bar and now on the bench.

Lord Diplock famously reminded us in the *Amin Rashid* case that the contract of marine insurance is highly idiosyncratic, involving juristic concepts that are peculiar to itself such as sue and labour, subrogation, abandonment and constructive total loss; to give but a few examples.

The particular idiosyncratic concepts upon which I wish to focus this morning are constructive total loss and, necessarily, abandonment. I say necessarily because, as you will recall, where there is a CTL the assured may either treat the loss as a partial loss or he may treat it as if it were an actual total loss – see section 61 of the Marine Insurance Act 1906. Just a word about the Act. It was intended to reflect and

codify the common law as it had been declared and established by the courts in decisions given over the centuries before. The Marine Insurance Act thus reflects the common law of England as at 1906. Although there are no doubt some of you whose familiarity with the provisions of the Act is such that you need no reminder, I thought that my remarks would be more intelligible to those who, like me, lack total recall, if we all had before us a copy of the sections of the Act upon which I propose to focus. Hence the handout.

So reverting to section 61, where there is a CTL the assured may either treat the loss as a partial loss or he may treat it as if it were an actual total loss. In the case of an actual total loss no notice of abandonment need be given – if the ship is sunk and irretrievably lost, there is no need to give notice of abandonment – section 57 of the Act tells us that. However where the assured wants to treat a CTL as if it were an actual total loss, and thus recover the full insured value, he must abandon the wreck or whatever is left to the insurer. That I derive again from section 61 of the Act, which tells us that in order to treat a constructive total loss as if it were an actual total loss, the assured must, in the words of the Act, “abandon the subject matter insured to the insurer”. And as we will see, if the assured wants to be paid for a CTL, he must remain ready and willing to abandon the subject matter insured to the insurer right up until the moment of payment for the CTL.

Then section 62(1) tells us that where the assured elects to abandon the subject matter insured to the insurer, he must give notice of abandonment. If he fails to do so, the loss can only be treated as a partial loss.

There are of course different types of CTL, but I shall focus on that kind where a ship is so damaged by a peril insured against that the cost of repairing the

damage would exceed the value of the ship when repaired – that value being conventionally taken as the insured value stated in the policy.

It is always dangerous for a lawyer to tell an audience of market professionals that this is the type of CTL most commonly encountered, but certainly that is so in my experience. The classic case is of collision, grounding or fire damage the cost of repair of which will exceed the insured value. The owner in such a case wishing to recover for a CTL – in other words to recover the full insured value, must first give notice of abandonment. And he must remain ready, able and willing to abandon the wreck or what remains of the ship to the underwriters at all times up until the loss is paid. So an owner who gave notice of abandonment which was not accepted and then sold the vessel without reference to underwriters before being paid for a CTL would lose the right to recover for a CTL – abandonment is a condition of being entitled to treat a CTL as if it were an actual total loss.

So what is abandonment? Curiously, the Act does not tell us. The classic definition of what is meant by abandonment is to be found in the advice of Baron Martin to the House of Lords in *Rankin v Potter* in 1873:

“A cession (and that is cession with a “c”) or transfer of the ship to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be.”

Under the old common law before the passage of the Marine Insurance Act it was thought that a cession or transfer of interest of this sort occurred automatically upon payment by insurers for a total loss. There was even a school of thought to the effect that a valid notice of abandonment of itself, and without the need even for acceptance by underwriters of the notice, had the same effect. This is of course the last thing that underwriters want, for the wreck may well be, in the classic expression, a “damnosa hereditas”, exposing the underwriters to liability for wreck removal, pollution and goodness knows what else.

Unsurprisingly therefore before the Act was passed the question was also discussed whether insurers who had paid for a total loss and in whom the vessel was thought thereby to have vested could disclaim all interest in her, thereby escaping the liabilities associated with ownership, as apparently could be done in France. Not even Sir Mackenzie Chalmers, the draftsman of the Act, seems to have been entirely sure how this issue was resolved. The Act deals with the point both at the stage of notice of abandonment and at the stage of payment for the loss, reflecting the two earlier schools of thought. The treatment is in each case the same, at section 63 subsection (1) and at section 79 subsection (1) respectively.

Section 63(1) says that “where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.”

Section 79(1), which is confusingly headed “right of subrogation”, tells us again that where the insurer pays for a total loss, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for.

Chalmers tells us in a footnote to his own first edition of his Commentary on the Act that this wording was in part introduced at the committee stage in Parliament. The Bill had the language “is entitled to” the interest of the assured in the subject-matter insured, but in Committee this was altered to “is entitled to take over” thereby strengthening the view, according to Chalmers, that the insurer is not compelled to accept an onerous property, – he is not by payment for the CTL saddled with the “*damnosa hereditas*” but rather has a choice whether to take it over or not.

We might think today that it is pretty obvious that this language of entitlement does not bring about an automatic transfer of interest on either acceptance of notice of abandonment, if that ever in fact happens, or on payment for a CTL, which of course is an everyday occurrence. It is I think now settled law that in the classic case where notice of abandonment has been declined but thereafter payment is made for a CTL, underwriters then have a choice. It is the choice given them by section 79(1) of the Act. They are entitled, but not bound, to take over the interest of the assured in whatever may remain of the insured subject matter. Note here the contrast which section 79(1) draws between the assumption of the rights of ownership, which is optional, and the very different process of subrogation to all the rights and remedies of the assured in and in respect of the subject-matter as from the casualty causing the loss, which is automatic. One can see the practical good sense of this distinction. Subrogated rights bring with them no burdens unless and until the insurer chooses to exercise the rights, in which case he must pay the costs of exercising them. Assumption of a proprietary interest in the subject-matter insured on the other hand of necessity involves the immediate assumption of the burdens of ownership – the cost of wreck removal and of meeting pollution claims being those which spring immediately to mind. So far as that last point is concerned, it should also be noted

that although the language is not entirely clear, section 79(1) seems to provide that both the assumption of proprietary interest, if that is what insurers elect to do, and subrogation, which is automatic, take effect “as from the time of the casualty causing the loss”. That was the view of Lord Justice Rix in his judgment in the “*Kastor Too*”.

This is more significant than is perhaps always appreciated. Everyone is aware that an insured must do nothing after the occurrence of an insured loss which might prejudice his insurer’s rights of subrogation – because those rights as and when the insurer acquires them date back to the time of the loss. But if by the same token “taking over the interest of the assured in the wreck” takes effect as from the time of the casualty causing the loss, it may mean that it is the hull underwriters and not the insured who potentially bear the responsibility for failing to contain an oil leakage which is continuing after the immediate effects of the casualty itself are spent. All good reasons underpinning the analysis, which as I have said is now I think accepted, that on payment for a CTL insurers retain the right of choice whether to assume a proprietary interest in the wreck or not. Again you will find that view supported by Lord Justice Rix in the *Kastor Too* and in *Arnould*.

Now why does this analysis matter, apart from the satisfaction of understanding how the scheme of the Marine Insurance Act works? It matters of course for the reasons I have just been discussing. But a recent and unusual case which I had to decide shows that the analysis matters for other reasons too. I am referring, as many of you will know, to the case of *The WD Fairway*. The *WD Fairway* is a mega-sized trailing-suction hopper dredger which at the relevant time had an insured value for hull and machinery of €73.5 million. As a result of a collision off China she became a CTL. The insured owners gave notice of abandonment. It was declined, but in the time honoured manner underwriters agreed

to place the assured in the same position as if a writ or claim form had been issued. So there was no question of underwriters at that stage taking over the interest of the assured in the wreck. They did not even accept notice of abandonment – indeed they declined it. The wreck was towed to a shipyard in Thailand. Such mega hopper dredgers are rare and their earning potential is enormous. At all relevant times demand for their services was buoyant. On any view the wreck had substantial value, although there was disagreement between insured and insurers as to what that value was. Insurers said it could be of the order of €75 million. The insured said it was of the order of €25 million. The parties were agreed that once underwriters had paid owners for the CTL, underwriters were entitled to the residual value of the vessel, although I will have to come back to discuss on what basis that agreement rested. However when paying for the CTL, which in due course they did, the insurers did not at that stage exercise their election to take over the interest of the owners in the vessel. Nor did they say that they had decided not to take over the interest of the assured in the vessel. There was then an acute disagreement between the owners and the underwriters as to how the residual value of the CTL should be determined. The owners offered to pay the €25 million which they said represented the fair market value of the vessel, but the underwriters declined that offer, thinking it too low. The owners offered to submit the matter to independent third party valuation, but the underwriters found that unattractive, thinking that a market valuation would be based on insufficient true market comparables and that it would in any event fail properly to reflect the premium which they thought the owners would be prepared to pay in order to ensure that the vessel did not fall into the hands of their competitors. The underwriters said that the vessel ought to be put out for global tender and sold as the best method of ascertaining her true market value. That course was unattractive to the

owners, for at least two reasons. Firstly they did not want the vessel to fall into the hands of their competitors. This is a small niche market with only a few operators in it and the lead time for newbuildings is of course considerable. A competitor acquiring the vessel and repairing her would boost his capacity and at the same time limit the owner's capacity to tender for future work. Secondly the owners did not want to engage in a global tender process in which they would be forced to bid against themselves, always an unattractive prospect. So the owners held out against a global tender and declined to permit potential bidders access to the vessel for inspection. They pointed out, quite correctly, that ownership of the vessel remained vested in them as did of course all rights of access. An impasse was reached.

It was at this point that the underwriters decided that the time had come when they would formally exercise their rights under section 79(1) of the Act to take over the interest of the assured in the wreck. But of course the insurance coverage as you would expect was written in layers – there was a primary layer and an excess layer. And in the usual way each layer was subscribed by a number of underwriters. I am not sure whether any of those underwriters or their claims managers will ever before have been invited to consider exercising their rights of assumption of ownership under section 79(1) of the Act. Not surprisingly therefore they did not at first all agree to do so. 77.5% of the primary layer underwriters and 85% of the excess layer underwriters expressly elected to take over the interest of the assured in the vessel.

The owners took the view that this purported election by the underwriters was invalid or at any rate ineffective to vest control of the vessel in underwriters. They contended that it would only be if all primary and all excess layer underwriters agreed unconditionally to take over the vessel that the takeover would be effective. If only some of the underwriters tried to do so, they said, that does not work.

We could spend a long time on that interesting question. There is actually a further twist to all this which was that the vessel was, as I mentioned earlier, during all this time lying in a shipyard in Thailand. Of course the insurance policies were governed by English law, and so the relationship between the insured and the insurers was governed by English law. That however does not mean that the question whether underwriters' election to take over the interest of the assured in the vessel was actually effective is also governed by English law. Since the vessel was at the relevant time in Thai waters, as a matter of English private international law or conflict of laws principles, the question whether proprietary interests in the vessel were transferred to the underwriters by virtue of their election must be determined in accordance with the law of Thailand, the so called "*lex situs*" of the moveable property which is what a ship is. We can gloss over that for present purposes, although it is an important point which should give food for thought as it will arise in virtually every case – usually when insureds and insurers are in negotiation over payment for a CTL the wrecked vessel will of course be somewhere other than in English waters.

The point which owners took was that as a matter of English law all of the underwriters had to elect to take over their interest in the vessel in order for the election to be effective. On this point I think they were wrong. Their argument overlooks the basic point that where two or more underwriters subscribe to an insurance, there are as many individual contracts of insurance as there are insurers. It is irrelevant to the rights of one insurer what another insurer decides to do. Quite apart from legal theory, it would be utterly absurd if the ability of the majority of underwriters to take over the interest of the assured in the vessel could be compromised or frustrated by, for example, the insolvency of an insurer representing

a small percentage of the cover. So it is I think clear that each individual underwriter may exercise his entitlement under section 79(1) quite separately from and independently of what other underwriters are doing. But although the theory is clear, that each underwriter can exercise his rights individually, there are actually some quite difficult problems raised in the event that, for whatever reason, less than one hundred per cent of the subscribing underwriters do so elect. And the problems are exactly the same in the event that all of the subscribing underwriters do elect, but the insurance extends, as sometimes happens, to only a proportion of the value of the vessel.

The problem which here arises is that of co-ownership. Let us take the case where the vessel is fully insured, and where the CTL is lying in English waters, but only 90% of the subscribing underwriters agree to exercise their election to take over the interest of the assured in the wreck – either because the last 10% does not wish to do so, or can't make up its mind, or is insolvent. In these circumstances the electing underwriters become co-owners of the vessel with the assured, all in their respective proportions. However the only way in which the law, and here I mean English law because this is a CTL lying in English waters, the only way in which English law can initially give effect to the co-ownership so created is by imposing a trust upon the registered owners of the vessel. If again we take the case of a British vessel, where legal ownership is permitted only in 64th shares, the electing underwriters become entitled to have the appropriate number of whole one-64th shares transferred to them to be registered in their name. That leads us straight into another difficulty – how can the insurers compel the transfer to them of the relevant proportion of the legal title, as represented by the shares. This is not straightforward, and involves some difficult questions in the law of trusts. I do not propose to address that problem here beyond

noting that it provides yet further food for thought as to how, when push comes to shove, underwriters can exercise their rights in an effective manner. And bear in mind that my example was of a CTL lying in English waters, hardly the typical case. The trust concept is peculiar to English law. The CTL may well be lying and probably will be lying in waters whose legal system recognises no comparable method of giving effect to underwriters' rights.

Which brings me back to the story of what happened in relation to the dredger. The CTL was paid. The underwriters, or at any rate most of them, had exercised their rights under section 79(1) to take over the vessel. The owners said that this was ineffective because not unanimous. The underwriters issued proceedings in the English court. They gave notice that they intended to apply for an injunction restraining the owners from selling, transferring or disposing of the vessel. The owners responded swiftly. They decided to take matters out of insurers' hands. Before the injunction was applied for they sold the vessel. They sold the vessel to a related Nigerian company for €1,000.00, maintaining that they were entitled to do so because the underwriters had not yet effectively taken over ownership of the vessel themselves. They did so solely in order to prevent the underwriters from carrying out their stated intention to put the vessel out to global tender and then to sell her. They did so in order to prevent the underwriters from realising the open market value of the vessel in that manner.

Which brings us to the heart of the problem. Had the owners succeeded in frustrating the desire of the underwriters to realise the market value of the vessel by selling her on the open market? Or did the underwriters have subsisting rights in or over the vessel which would survive a sale to anyone other than a bona fide purchaser for value without notice? Which brings us back to where we were a few minutes ago.

Underwriters who have paid for a CTL have their contractual entitlement under section 79(1) to take over the interest of the assured in what remains of the vessel. But as we all know a contractual right against a one ship company is of little value once the sole asset is gone. So do the underwriters by paying for a CTL acquire any sort of security interest in or over the vessel which will survive against all but a bona fide purchaser for value without notice of it?

As we have already seen, this question is likely to be complicated by the fact that the vessel is unlikely after the occurrence of a CTL to be in English waters. Any effective security interest will be a proprietary right in the vessel and if at the time of its purported creation, which by definition will be after the casualty, the vessel is not within the English jurisdiction, the question whether underwriters have acquired a valid proprietary interest will be governed by the law of the place where the vessel lies, the *lex situs*. But let us start by examining what the position would be if the vessel was by chance in English waters. What is underwriters' position as a matter of English law?

In the *WD Fairway* case the underwriters argued that by reason of paying for the CTL they acquired an equitable lien over the vessel, which would potentially be effective to secure their position whilst they considered whether to exercise their right to assume ownership. I hope you will forgive me for beginning with an explanation of what precisely an equitable lien is. It is a very valuable right. It is a security interest. It is quite unlike a possessory lien with which we are all rather more familiar. It operates independently of possession. It is also quite unlike a legal lien, which is effectively a negative right of retention. An equitable lien generally arises as between parties who are already in a contractual or a quasi contractual relationship. It confers a charge on property and arises by operation of equity from the relationship

between the parties. It confers positive rights, not just negative rights, which are enforceable by means of an order for sale by the court. It will not avail against a bona fide purchaser for value without notice, but it can be enforced by injunction to prevent disposal of the property subject to it without satisfaction of the obligation the performance of which it secures. So it could have been very relevant in the dredger case if the underwriters had actually made their application for an injunction to restrain sale before the sale of the vessel was carried out by her owners. In such circumstances the question would have arisen whether the underwriters had an interest in the vessel which entitled them to stop the owners from selling her without reference to that interest. The interest they would have asserted would have been an equitable lien. So do underwriters who pay for a CTL enjoy this valuable right?

In order to answer this question we need to go back to our discussion of sections 63 and 79 of the Act and in particular the question what exactly is abandonment and what is the effect of acceptance of notice of abandonment? The first opportunity which underwriters have to take over the interest of the assured in whatever may remain of the subject matter insured is “where there is a valid abandonment” – section 63(1) of the Act. So the nature of the rights available to underwriters at this early stage, even if underwriters habitually do not take advantage of them, may tell us something about the rights likely to be available at the later stage when payment is made for a CTL. So the starting point is what is meant by abandonment, and what is the effect of acceptance of notice of abandonment, albeit we all know notice of abandonment is never in practice accepted.

At first sight it might be thought that section 62(6) of the Act gives the answer to the question. It provides:

“Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.”

What is I think significant about this sub-section is that although it says that on acceptance of notice of abandonment “the abandonment is irrevocable” it does not say that the process of abandonment is “complete” or “perfected” – in other words it is not suggested that the process of abandonment is all over on acceptance of notice of abandonment. In my view it is not. The scheme of the Act is here highly logical. The second sentence of section 62(6) tells us what is the effect of acceptance of notice of abandonment. It conclusively admits liability to pay for a CTL, and it conclusively admits that the offer by the insured to transfer his interest in the vessel to underwriters is validly made. From this it follows I think that acceptance of notice of abandonment does not of itself achieve a transfer of interest from insured to insurer. If it did, why would it be necessary to provide expressly that acceptance of notice of abandonment admits the sufficiency of the notice? The sufficiency of the notice would no longer be a relevant enquiry if by acceptance of notice of abandonment, abandonment itself was complete, and interest in the subject matter insured transferred from insured to insurer. Moreover as I have just mentioned we should never overlook the logical sequence in which the Act is constructed. It is actually the next section, section 63(1), which provides that where there is a valid abandonment, the insurer is entitled, but not obliged, to take over the interest of the insured in the vessel. In view of that language of entitlement in section 63, we cannot conclude that the process described in the preceding section 62(6) brings about automatically that over which the insurer is then given a choice.

So acceptance of notice of abandonment does not amount also to the exercise of the election which is available under section 63(1). In *The Kastor Too* Lord Justice Rix said that whilst the underwriter's decision whether to take over the interest of the assured will effectively occur when he accepts, if he does, notice of abandonment, even then the abandonment itself only takes effect on payment for a CTL. What I think Lord Justice Rix meant by that is that acceptance of notice of abandonment is properly to be understood as an irrevocable election by underwriters to assume responsibility for the wreck, which will take effect on payment for the CTL but then be retrospective to the time of the casualty. If that is right, I think it is probably as a matter of strict analysis an irrevocable election to exercise the right which on the promised payment for a CTL will become available to the insurer not by reason of section 63(1) but by reason of section 79(1). The question which I am afraid I can't answer is why therefore the entitlement to take over the interest of the assured is apparently conferred by section 63(1) as well as by section 79(1). Fortunately, as insurers never accept notice of abandonment, it doesn't really matter.

But the implications of the analysis which was I think adopted by Lord Justice Rix do matter. They are relevant to the question whether the underwriters can prevent the owners from unilaterally selling a vessel which has suffered a CTL but still has substantial residual value. In the theoretical case of an accepted notice of abandonment, this is of particular importance, because by acceptance of notice of abandonment the underwriters have committed themselves to pay for a CTL, a liability conclusively admitted which would remain binding on underwriters even if the owners thereafter sold the vessel before they had received payment for the CTL. In my view underwriters who have accepted notice of abandonment could obtain an injunction to restrain the insured from selling the vessel.

In order to understand why, let me first look again at the unusual case where underwriters, when paying for a CTL, expressly elect to take over the interest of the assured in the vessel. That will be effective to transfer to the underwriters a full proprietary interest in the vessel, either the legal title or at the very least the equitable title which will in turn enable the insurers to require transfer to them of the legal title. So in such circumstances the insured could not after payment for a CTL sell the vessel without reference to underwriters, for they would retain no proprietary interest to transfer to their purchasers, and most legal systems recognise the principle *nemo dat quod non habet* – you cannot give what you have not got.

It follows I think that in a case where the insured accepts notice of abandonment, thereby irrevocably promising to pay for a CTL and irrevocably electing to take over the interest of the assured in the wreck, equity will impose an equitable lien over the vessel in favour of underwriters, in anticipation of the inevitable crystallisation of their full proprietary rights on payment for a CTL. That equitable lien will secure the insurers' position in the interval between the making of those two irrevocable promises, to pay for the CTL and to take over the wreck, and the eventual transfer of title on actual payment for the CTL.

So far however I have been talking about situations which hardly ever arise – that is to say acceptance of notice of abandonment or payment for a CTL coupled with an express election to take over interest. What of the typical case, where notice of abandonment is declined, and where, on subsequent payment for a CTL, nothing is said by underwriters which amounts either to express acceptance or to express disclaimer of a proprietary interest in the subject matter insured?

First of all, declining notice of abandonment cannot I think without more deprive underwriters of their prospective rights under section 79(1), which arise if and

when they pay for a CTL, but not before. What I cannot tell you I am afraid is whether by declining notice of abandonment underwriters lose their equivalent right under section 63(1), but again fortunately it does not really matter. The right to recover for a CTL after notice of abandonment has been declined is itself dependent upon the assured's continued willingness to transfer his interest in the subject matter to the insurer. So for as long as the insured continues to press for payment for a CTL after underwriters have declined notice of abandonment, the insured impliedly repeats his offer to transfer to underwriters his interest in the insured property, and it is open to underwriters at any time to accept that offer, by acceptance of notice of abandonment. Unlike acceptance of notice of abandonment, declining notice of abandonment is not irrevocable. If underwriters did accept that offer, they would of course acquire an equitable lien as I have already described, which will in most cases protect them against an unauthorised disposal of the vessel or at least enable them to seek injunctive relief to prevent any such disposal.

So what of the case when, after declining notice of abandonment, underwriters pay for the CTL but say nothing about the right of election to take over the interest of the assured, in other words the standard case. In my view underwriters in such circumstances leave themselves unprotected from the risk that the insured will deal with the vessel without reference to them. It is not in my view a situation in which equity will intervene to impose an equitable lien or other security interest. It is unnecessary so to do and it would ordinarily be inequitable to intervene. It is unnecessary to impose an equitable lien, because the insurers can secure their position themselves by agreeing to take over the wreck, as contemplated by the Act. It would be inequitable to impose an equitable lien, because an equitable lien once created subsists without limit of time until performance of the obligation which it secures.

Imposition of a lien in favour of underwriters by reason only of their having paid for a CTL without also expressly taking over the wreck would prevent the insured from taking steps to protect his own position by selling the wreck and thereby divesting himself of the ongoing liabilities associated with ownership, whilst at the same time imposing none of the burdens of ownership upon underwriters. In circumstances where the underwriters have given no commitment to assume those obligations, why should the law confer upon them a security interest which indefinitely prevents the insured owner from protecting his own interests? I think it likely that if it had been intended that underwriters should in these circumstances enjoy some protection, it would have been provided in the Act that an insured who is paid for a CTL must not dispose of his interest in the subject matter insured without underwriters' consent.

So the discussion comes full circle. An underwriter who in the ordinary way declines notice of abandonment and thereafter simply pays for the CTL without more acquires no protection against unauthorised dealing with the wreck. An underwriter can in theory secure his position by accepting notice of abandonment, but whether that will in fact be effective to give to him a proprietary interest in the vessel will actually be dependent upon the law applicable in the jurisdiction where the vessel lies. The same is true even of the underwriter who combines payment for a CTL with an express assumption of the rights of ownership. Whether such rights are effectively transferred, as they would be if English law governed, will depend not upon English law but on the law of the place where the vessel lies.

In *The WD Fairway* case the underwriters, when agreeing to pay for a CTL, endorsed the brokers' claim settlement with these words:

“Agree settle CTL claim... net open market residual value of vessel to be accounted to insurers”.

At the trial everyone agreed that the underwriters were in fact entitled to the net open market residual value, whatever that was, but there was no agreement why that should be so. I found this at first sight surprising. I suspect that we all think that underwriters who have paid for a CTL must be entitled to the residual value of the wreck. It seems right and proper. Yet at the trial there was great uncertainty as to the source of this entitlement, and the Act does not say that the underwriters are entitled to the residual value of a CTL for which they have paid.

One argument which I had to consider was whether underwriters' entitlement to the residual value derives from their rights of subrogation, acquired automatically on payment for a CTL – the second limb of section 79(1) of the Act. I do not consider that this can be the source of the entitlement. Subrogation simply does not work. Subrogation is as to rights against third parties. If an insured keeps and repairs a CTL, to what right can the insurers be subrogated which entitles them to the residual value of the CTL? The same is true if the insured sells the wreck after he has been paid for a CTL. Subrogation is as to rights subsisting at the time of the casualty. The underwriters have no subrogated interest in the proceeds of such a sale.

In my view the reason why underwriters who pay for a CTL are ordinarily entitled to the residual value of the vessel is because ordinarily they retain the right to take over the interest of the assured in the vessel, and, if in fact they did take over that interest, they would be able then to realise the residual value for themselves by selling the wreck which they have acquired.

Usually of course this is dealt with by agreement between insurers and insured. Usually there is co-operation – usually the insured assists by facilitating the sale of the vessel to a third party, often for scrap, or, if the insured wishes to retain the vessel, he agrees to account to underwriters for the residual value. This latter process

is as I understand it often referred to in the market as involving the assured “offering to buy back the vessel from underwriters”. This description of the process is obviously technically incorrect in the usual situation where underwriters have not in fact elected to take over the assured’s interest in the vessel when paying for the CTL. The insured does not need to “buy back” what is still his property. What this common usage reflects however is the assumption that underwriters are entitled on payment for a CTL to take over the assured’s interest in the vessel and to dispose of it as they see fit, but also a recognition that where there is the usual co-operation in arrangements for disposal underwriters will be relieved of the need actually to exercise that entitlement. Thus when assured and insurers in these circumstances talk of the assured “buying back the vessel from underwriters”, what they are actually doing is omitting a stage in the process which all understand it is open to underwriters to bring about by taking over the vessel but which by co-operation will ordinarily be rendered unnecessary.

It follows in my view that if when paying for a CTL underwriters say to their assured without more “we elect not to exercise our right to take over your interest in the vessel” they will thereby deprive themselves of any entitlement to the residual value of the vessel. Whether the assured thereafter repairs the vessel and retains it in his own service or sells it to a third party, the underwriters have renounced any interest in the residual value of the vessel, however measured. They have no further entitlement.

By the same token, underwriters who expressly stipulate on payment for a CTL that owners are to account to them for the residual value of the vessel act at their peril if they also at this stage expressly elect not to take over the interest of the assured in the vessel. As the *WD Fairway* case shows, underwriters who do that

would lose the ability to control the means whereby the value remaining in the vessel is realised, because the only way in which the insurers can control that process is by actually taking over the interest of the assured in the vessel and selling it themselves.

The *WD Fairway* was of course an unusual case. But it is the unusual case which tests our usual assumptions. It has certainly caused me to think long and hard about what is actually happening when insured and insurers go through the ritual steps of the dance which invariably follows the occurrence of a CTL. However well we may think we understand the English law of marine insurance and the effect of the Marine Insurance Act, all our assumptions and conclusions may well be proved wrong or irrelevant if the law of the place where the CTL lies after the casualty requires some particular formality in order to effect a transfer of a proprietary interest in moveable goods. In many systems of law, although not in English law, a transfer of a proprietary interest in moveable goods is ineffective unless formalised by a physical delivery of the goods from transferor to transferee or by registration of the interest transferred. In such a case, underwriters may have acquired contractual rights enforceable against their insured, but lack any security for their performance good against either the insured or the rest of the world. The *WD Fairway* was just such a case. There the underwriters in fact had a remedy because they were able to procure the setting aside of the sale by invoking section 423 of the Insolvency Act 1986. I do not propose to go into that procedure now. Suffice it to say that that remedy will be unavailable or ineffective where the third party purchaser is not amenable to the jurisdiction of the English court, or where enforcement against it will simply be impossible. It is in any event a discretionary remedy, and it is no substitute for a proprietary interest vested in underwriters upon which they can rely in order to prevent a sale from taking place contrary to their interests.

So I hope that I understand a little better than I did the ramifications of the process which an owner who has suffered a CTL sets in train when he tenders notice of abandonment. If nothing else, we can agree with Lord Diplock that the contract of marine insurance is highly idiosyncratic. Our working lives would be far less interesting if it were any different.

Thank you very much.