THE CESSATION OF SUE AND LABOUR

An assured under a marine insurance contract has a duty to take reasonable measures to avert or minimise a loss, whether under s 78(4) of the Marine Insurance Act (Cap 387, 1994 Rev Ed) or under the inevitable suing and labouring clause in the policy. He also has a corresponding right to recover suing and labouring expenses properly incurred. Authorities are scant on the duration of such right or duty. This paper discusses when the right or duty should end.

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I. Introduction

1 Man, the assured says, marks the earth with ruin; his control stops with the shore. Upon the watery plain, wrecks are the deed of the sea. That may be so, says the underwriter, but you must still sue and labour. Time writes no wrinkles on the ocean's brow, pleads the assured, but shall I be thus yoked till the stages of my age and youth are passed?

2 The sue and labour provision in the old Lloyd's SG (ship and goods) Form had been likened to poetry.[1] Perhaps because it would take a doctoral thesis to unravel its meaning:

> And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance: to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.

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1 Donald O'May & Julian Hill, *Marine Insurance: Law and Policy* (Sweet & Maxwell,1993) at p 324.

3 Clearly, the clause is prolix, not Byronic. But what about the assured's plea: When does sue and labour end? The travel continues in prose.

4 The SG Form version is couched in permissive language, referring to a right.[2] The modern version, found in, for example, the International Hull Clauses 1/11/03 ("IHC") speaks of the "duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimizing a loss which would be recoverable under this insurance". It also requires the underwriters to contribute to "charges properly and reasonably incurred" for such measures.[3] The right and the duty are correlative, and it is the premise of this paper that, as the right ends, so shall the duty.

5 Section 78 of the Marine Insurance Act[4] ("the Act") refers to both right and duty:

> **78.**—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.
>
> (2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.
>
> (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.
>
> (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

2 Though ancient, the SG Form is not obsolete. It survives as an option in the Schedule to the Marine Insurance Act, *infra* n 4, and is still used by some underwriters in Singapore.

3 Clause 9; cl 11 in Institute Time Clauses – Hull ("ITCH") 1/11/95 and cl 13 in ITCH 1/10/83; cl 9 in Institute Voyage Clauses – Hulls, 1/11/95; cl 16 of Institute Cargo Clauses (A), (B) and (C), 1/1/82.

4 (Cap 387, 1994 Rev Ed). It is the same Act as the Marine Insurance Act 1906 (c 41) (UK) which was made applicable in Singapore by the Application of English Law Act (Cap 7A, 1994 Rev Ed) as at 12 November 1993.

6 The essence of sue and labour is neatly summarised by Lord Hobhouse of Woodborough in the House of Lords decision of *Kuwait Airways Corporation v Kuwait Insurance Co SAK*:[5]

> It is not in contention that the ordinary purpose and understanding of a sue and labour clause is to authorize the assured to take reasonable steps to recover the insured property or reduce the extent of the insured damage or loss. Indeed it is ordinarily to be inferred that the assured has a duty to take these steps. …
>
> Just as the authority and obligation to sue and labour are supplementary to the contract of indemnity so also is the underwriters' liability to reimburse sue and labour expenses reasonably incurred. Provided those expenses have been reasonably incurred, it does not matter whether they were in the end successful or not. They may not succeed in averting a total loss of the subject matter of the insurance. But, having properly sued and laboured in accordance with authority given by the clause, the assured is entitled to look to the underwriter to reimburse him the expenses so incurred. The fact that the underwriter is also having to pay for a total loss does not alter this position.

7 The suing and labouring duty is triggered on the happening of any insured peril, *ie*, loss or misfortune covered by the policy. The duty operates when the peril has arisen or is imminent – when the subject matter (*eg*, the vessel) is "in the grip of a peril".[6] Rix J (as he then was) explained in *State of the Netherlands v Youell*:[7]

> In my judgment the duty to sue and labour does not arise until a peril is at any rate imminent: it is a duty which arises in response to a casualty, actual or imminent. Thus the right to recover sue and labour expenses, where a sue and labour clause exists, and the statutory duty to take reasonable measures for the purpose of averting or minimizing a loss, are in this respect correlative.

5 [1999] 1 Lloyd's Rep 803 (HL) at 816.

6 *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA (The Nore Challenger)* [2005] 2 Lloyd's Rep 534, *per* Cooke J at [82].

7 [1997] 2 Lloyd's Rep 440 at 458. As Mocatta J had done in *Astrovlanis Compania Naviera SA v Linard (The Gold Sky)* [1972] 2 Lloyd's Rep 187, Rix J grappled with the question of when a loss is caused by a peril insured against, and when a loss is caused by failure to comply with the s 78(4) duty. Rix J put it down to a question of which is the proximate cause – whether it was the failure properly to respond to the operation of the insured peril rather than the peril itself which caused the loss in question. In Singapore, Belinda Ang Saw Ean J took a similar approach in *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd* [2006] 1 SLR 69 at [61]:

> [T]he breach of duty to sue and labour must be so significant that the loss was caused, not by the insured peril but by a breach of the duty to sue and labour.

The line between the two can be rather fine in some scenarios, and the connection between ss 55(2)(*a*) and 78(4) also troubled Lord Mustill in his paper, "Fault and marine losses" [1988] LMCLQ 310 at 355–357.

8 When the right and duty end does not enjoy such clear judicial pronouncements. We know that they continue as long as the peril is in place,[8] but beyond this, there are few cases that have explored their duration. This question can become particularly important when there is a total loss. For brevity, the examples in this paper refer mainly to an insured vessel. But sue and labour principles apply equally to other subject matter, for example, goods insured under the Institute clauses.[9] These principles do not generally apply outside the marine insurance context, and it is rare to find a sue and labour clause in a non-marine policy.[10]

9 In *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd*,[11] the assured's tug was hijacked by armed men while she lay at anchor at Batam, Indonesia. The decision turned mainly on whether this amounted to "piracy" within the meaning of cl 6.1.5 of the ITCH 1/10/83. Belinda Ang Saw Ean J held that it did. A corollary issue arose regarding sue and labour because the insurer counterclaimed for breach of the sue and labour duty in cl 13.1 of ITCH and s 78(4) of the Act. The insurer alleged that the assured failed, amongst other things, to offer rewards or actively pursue or locate the tug through their own contacts and the relevant authorities (before the action was commenced). This counterclaim was dismissed because the judge found that, on the facts, the assured had not failed to do what a reasonable prudent uninsured would do.

8 *Integrated Container Service Inc v British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154 (CA) at 160.

9 See, for example, *Nishina Trading Company, Ltd v Chiyoda Fire and Marine Insurance Company, Ltd* [1969] 1 Lloyd's Rep 293 (CA); *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd* [2002] 1 Lloyd's Rep 652 (CA); *Integrated Container Service Inc v British Traders Insurance Co Ltd*, *supra* n 8. It is said that, where cargo is insured for a voyage, the subject matter of insurance is not just the cargo but also the adventure, namely the safe arrival of the cargo at destination. Therefore, sometimes there can be total loss where the adventure itself is considered lost, even though the cargo may not be. For example, in *Roura & Forgas v Townend* [1919] 1 KB 189, the subject matter insured was profit on a charterparty. The ship in question was captured but recovered before an action was commenced. Although the vessel ceased to be a total loss when it was restored, there was a total loss of the venture itself, namely the subject matter of the insurance. See also *British and Foreign Marine Insurance Company, Limited v Samuel Sanday & Co* [1916] 1 AC 650.

10 One instance of this was in the aviation policy in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 (Rix J), [1997] 2 Lloyd's Rep 687 (CA), [1999] 1 Lloyd's Rep 803 (HL) ("the *Kuwait Airways* case"). The sue and labour clause is also sometimes found in fire policies.

11 [2006] 1 SLR 69 ("*Bayswater*").

10 The assured had lodged reports with various authorities in Singapore, Indonesia and Malaysia. They had arranged for searches by helicopter and speedboats. The assured gave notice of abandonment which was rejected by the insurer. Notwithstanding this, the insurer intervened and assumed responsibility for the search of the tug. The assured was not fully updated on the progress. Up to the time that the assured commenced action, the tug had not been found. It was only in the defence that the insurer alleged breach of the sue and labour obligation. The judge held that the assured did not breach its duty, and the alleged failures were in any event not the proximate cause of the loss.

11 An interesting question that was not decided in the *Bayswater* case is, when does the duty (and corresponding right) of sue and labour end? Obviously, as long as the insured peril is operating and the subject matter is not totally lost, the duty and right ought to continue. Conversely, the clause ceases to apply once the subject is free of the peril. But what about a situation like *Bayswater*'s, where a vessel is hijacked or the assured is otherwise deprived of possession of the vessel or goods in circumstances that make recoverability unlikely?[12] Do the duty and right of sue and labour continue?

12 There is no easy answer. The following possibilities have to be considered:

(a) where there is a constructive total loss or actual total loss;

(b) where the assured commences action against the underwriter, on the policy;

(c) where the underwriter accepts abandonment;

(d) where the underwriter pays on the policy without accepting abandonment; and

(e) where there is a partial loss.

12 "Unlikelihood of recovery" is a test for constructive total loss under s 60(2)(*a*)(i) of the Act; see *Polurrian Steamship Company, Limited v Young* [1915] 1 KB 922 (CA) ("*Polurrian Steamship*"). *Dean v Hornby* (1854) 3 El & BL 179; 118 ER 1108 was a case of total loss by piratical seizure before the UK Act was enacted. Sue and labour was not in issue there.

13 There is hardly any judicial explication. The following are propositions extrapolated from concepts of total loss, abandonment and ademption:

(a) Whether the loss is a constructive total loss or actual total loss should not make any difference to the duration of sue and labour.

(b) Sue and labour should stop at the door of the writ, provided that at that stage it could also be said there was a constructive or actual total loss.[13]

(c) If the underwriter accepts abandonment (and therefore takes over the property), the sue and labour provision should be exhausted.

(d) Sue and labour might end upon payment, or admission of duty to pay, though there are arguments either way on whether it should.

(e) Partial loss might well require a different approach as there is no question of an immutable loss being crystallised at the time of the writ. Events after the writ can affect the loss payable under the policy. Sue and labour does not end on the occurrence of a partial loss. In addition, there is a residual right on the assured to convert its claim from a total loss to a partial loss even after commencement of action, and it may arguably claim sue and labour expenses incurred to avert total loss.

14 As sue and labour is inextricably connected to concepts like total loss, abandonment and ademption, we shall start with a review of these concepts.

13 There is a practice among insurers to treat a writ as having been issued on receipt of a notice of abandonment. As explained in para 59 below, this agreement has the same effect as commencement of action, for the purpose of terminating sue and labour. See the account of this practice given by Rix J in *Royal Boskalis Westminster NV v Mountain* [1997] 1 LRLR 523 at 534.

A. Constructive total loss

15 A total loss can be actual or constructive.[14] It is useful to bear in mind that constructive total loss is peculiar to marine insurance. Non-marine insurance recognises only actual total loss. Lord Atkinson gave a good account of the origin and rationale of constructive total loss in marine insurance in *Moore v Evans*.[15]

16 Section 60(1) defines constructive total loss generally to be "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred".

17 Section 60(2)(*a*) gives a specific instance of constructive total loss:

> ... where the assured is deprived of the possession of his ship or goods by a peril insured against, and —
>
> > (i) it is unlikely that he can recover the ship or goods, as the case may be; or
> >
> > (ii) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered[.]

18 The "reasonable abandonment" test in sub-s 60(1) seems at odds with the deprivation of possession test in sub-s 60(2), but case law has reconciled the two.

19 In *Robertson v Petros M Nomikos, Limited*, Lord Wright explained:[16]

> The two sub-sections contain two separate definitions, applicable to different conditions of circumstances. But I do not find any inconsistency between s. 60, sub-s.1 and s. 61. Sect. 60, sub-s.1, deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual abandonment of the subject-matter insured.

14 Section 56(2) of the Act.
15 [1918] AC 185 at 193–194.
16 [1939] AC 371 at 382.

20 His Lordship continued in *Rickards v Forestal Land, Timber and Railways Company, Limited*[17] that:[18]

> [A]n assured can base his claim on the terms of sub-s. 2, which give an objective criterion in each case, ship, goods or freight, not only more precise but substantially different from that in sub-s. 1. Sub-sect. 2, as compared with sub-s. 1 is thus cumulative, not merely illustrative.

When deprivation of possession amounts to a constructive total loss, or an actual total loss, is not an easy question and is explored in more detail shortly below.

B. Actual total loss

21 Section 57 of the Act says this about actual total loss:

> (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.
>
> (2) In the case of an actual loss, no notice of abandonment need be given.

22 It is not always easy to tell right away whether damage to a ship is such as to make it an actual total loss within the meaning of s 57.[19] In the case of a wreck, if she had been "reduced to the condition of a mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship",[20] that would be an actual total loss. Otherwise, the mere fact of sinking that could theoretically admit of her being raised to the surface and repaired, would not make her an actual total loss.

23 In deciding whether there is actual total loss, the test is one of feasibility of recovery, not whether the costs of salving the vessel would exceed its insured value. This was pointed out by Potter LJ in *Fraser*

17 [1942] AC 50 (HL) ("*Rickards v Forestal Land*").

18 *Ibid*, at 84.

19 In the case of *The Gatto* (1982) AMC 2532, the US Court of Appeals applied English law as the governing law of the policy in determining that a mobile drilling platform which was broken up into "a dispersed mass of scrap, a wreck" was "so damaged as to cease to be a thing of the kind insured". It was an actual total loss even though present technological capacity could reinstate the platform (at tremendous cost). The Court considered that the extent of refurbishment that would have to be done to restore the platform in this case went beyond the definition of repair.

20 *Sailing Ship "Blairmore" Company, Limited v Macredie* [1898] AC 593 (HL) at 603, *per* Lord Watson.

Shipping Ltd v Colton,[21] where he rejected counsel's argument that the stranded vessel was an actual total loss because the costs of salving her would have exceeded its insured value. Potter LJ said that this submission was "in the language of constructive, and not actual total loss".[22] A vessel might be a constructive, if not actual, total loss if a prudent shipowner "would not have gone to the expense of raising and repairing" her.[23]

C. Deprivation of possession

24 If it is a case of the assured being deprived of his property, *eg*, where there is capture by hostile forces or piracy, there is often uncertainty about when constructive total loss turns into actual total loss. Sometimes, it is even open to question whether the vessel has become a constructive total loss. There is no mathematical formula to work out the period of time when deprivation of possession gives rise to a constructive total loss, or an actual total loss.

25 For constructive total loss by deprivation of possession where recovery is unlikely, Rix J (as he then was) in *Royal Boskalis Westminster NV v Mountain*[24] observed that "unlikely" meant unlikely for a reasonable time. In that case, he observed that the parties had accepted six months as representative of the prospective deprivation period that could amount to a constructive total loss.[25]

26 Under s 57, actual total loss requires that the assured is "irretrievably deprived", not merely an unlikelihood in recovery, which is the more lenient test for a constructive total loss.

27 In *Rickards v Forestal Land*,[26] the House of Lords held that the three vessels in question were constructive total losses when the German masters of the ships acted on the instructions of the German government in wartime in putting the vessels into a neutral port with a view to

21 [1997] 1 Lloyd's Rep 586.
22 *Ibid*, at 592.
23 *Sailing Ship "Blairmore" Company, Limited v Macredie*, *supra* n 20, at 603, *per* Lord Watson. The Earl of Halsbury LC's comment in that case, at 598, that "a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again" was disapproved by Viscount Sumner in *Captain J A Cates Tug and Wharfage Company, Limited v Franklin Insurance Company* [1927] AC 698 (PC).
24 *Supra* n 13.
25 *Ibid*, at 534.
26 *Supra* n 17.

bringing the ships to Germany. They became actual total losses only when two of the ships were scuttled and the other reached Germany. In *Bayswater*,[27] discussed in paras 9 to 11 above, the judge found that the vessel was an actual total loss by the time the writ was issued because the assured was "irretrievably deprived thereof" under s 57 of the Act.[28] Prior to this, there had been attempts, on the part of both assured and the insurer, to locate the vessel. Presumably, until she became an actual total loss, the vessel could be considered a constructive total loss – this point was neither discussed nor necessary for the decision.

28 There is a presumption of actual total loss under s 58 of the Act if no news has been received of a missing vessel after the lapse of a reasonable time. The presumption may be rebutted by evidence of what actually happened to the ship.[29] Section 58 does not give the assured any fixed timeline either, because all that s 88 offers by way of explanation is that reasonable time is "a question of fact".[30] In *Bayswater*, the insurer argued that 13 to 18 months would be the requisite period under s 58. This was rejected by the judge as arbitrary.[31]

29 It is no comfort to the assured that the problem of deprivation is amplified in non-marine policies, where there is no doctrine of constructive total loss. In the leading non-marine case of *Moore v Evans*,[32] the assured consigned some jewellery to German merchants, to be paid for or returned within a certain time. War broke out and the German merchants were prevented by law from dealing in any way with the jewellery. The assured claimed "loss" of the goods under a non-marine policy. Both the Court of Appeal and the House of Lords held that there was no "loss", because there was no evidence that the goods were not in the custody of the persons to whom they were entrusted by the plaintiffs. All that could be said was that, for the currency of the war, the plaintiffs could not get access to them. In an oft-cited judgment, Bankes LJ of the Court of Appeal held that "loss" by deprivation was neither a mere temporary deprivation, nor did it require complete certainty of non-recovery. The difficult cases lay in between these two extremes. Bankes LJ

27 *Supra* n 11.
28 *Ibid*, at [54].
29 *La Compañia Martiartu v The Corporation of the Royal Exchange Assurance* [1923] 1 KB 650 (evidence of scuttling).
30 There is no case law yet that applies s 58 to a hijacked ship. It was originally meant for a ship that went missing without explanation, giving rise to a presumption that it had foundered at sea.
31 *Supra* n 11, at [48].
32 [1917] 1 KB 458 (CA), [1918] AC 815 (HL).

ventured that if the facts existing at the time of the action were such that there was only a "mere chance" of recovering the jewellery, then the assured might be entitled to recover under the policy.[33] This may be contrasted with constructive total loss, which is established by unlikeliness of recovery within a reasonable time, on a balance of probabilities.

D. Abandonment

30 Abandonment is an incident of both actual and constructive total loss.[34] Brett LJ in *Kaltenbach v Mackenzie* explained:[35]

> Whenever there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity.

31 Although a notice of abandonment is required for constructive total loss, with a few exceptions,[36] the notice is not required for actual total loss.

32 Section 63 of the Act provides that:

> (1) 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.
>
> (2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

33 The language of the Act is permissive, in that this is an entitlement of the insurer when there has been abandonment. Likewise, s 79(1) of the Act states that an insurer who pays for a total loss "becomes

33 [1917] 1 KB 458 at 473.
34 Michael J Mustill & Jonathan C B Gilman, *Arnould's Law of Marine Insurance and Average*, vol II (Stevens & Sons, 16th Ed, 1981) ("*Arnould*") at para 1259.
35 (1873) 3 CPD 467 at 471.
36 See s 62, sub-ss (7), (8) and (9). For example, where a notice would be an "idle ceremony", as in *Rankin v Potter* (1873) LR 6 HL 83, and in *Kastor Navigation Co Ltd v AGF MAT* [2004] 2 Lloyd's Rep 119, where a constructive total loss by fire was quickly followed by an actual total loss when the ship sank.

entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for".

34 The underwriter does not have to take over the interest. Abandonment, if accepted, vests in the insurer the privileges as well as the liabilities of ownership.[37]

35 By its permissive language, s 63(1) seems to contemplate that it is possible for there to be a valid abandonment under which the insurer does not take over the subject matter. There might be a situation, for instance, where the assured purports to abandon the vessel in circumstances which factually justify an actual or constructive total loss, and the insurer either admits this or pays on the claim, without purporting to take over the subject matter. In principle then, it is possible for an insurer expressly to accept that the assured has a right to abandon the vessel and treat it as a total loss, without the insurer taking over the vessel.

36 The possible dichotomy between a "valid abandonment" under s 63(1) and abandonment to the insurer has not been authoritatively addressed. Moreover, most textbooks and cases speak of accepting abandonment (or a notice of abandonment) as equivalent to taking over the subject matter.[38] For consistency, acceptance of abandonment will be used in the same sense in this paper. If underwriters merely wish to acknowledge that there is a total loss or admit liability, without taking over the subject matter, it is prudent to avoid using the phrase "accept the abandonment".

37 Arnould and other writers do question whether there can be a unilateral abandonment to the world (as opposed to an abandonment to the insurer), so as to avoid liabilities for the thing abandoned.[39] Authorities available are old and inconclusive.

37 *Arnould*, *supra* n 34, at paras 1288, 1290.
38 *Id*, at para 1288.
39 *Id*, at para 1290; fn 66; *The Modern Law of Marine Insurance* (D Rhidian Thomas ed) (LLP, 1996), at 207–208.

38 Arnould prefers the view that the owner cannot unilaterally abandon a vessel to the world at large: "As a general rule, a person cannot divest himself of his property merely by saying he does not want it."[40]

39 On this view, s 63(1) should not be read as endorsing a valid abandonment *in vacuo* to render the vessel *res nullius*, even where the insurer does not take over. Section 63, or the Act for that matter, is not intended to deal with the assured's rights or liabilities to the world at large. They are intended to address the relationship between assured and underwriter. One may therefore take "valid abandonment" in that section as a short form reference to a situation where there are circumstances justifying a right to abandon, *ie* where there is a constructive total loss in fact.[41] Where such circumstances exist, the assured may opt to treat the subject matter as an actual total loss and recover for the same, whether or not the underwriter accepts the abandonment (in the sense of taking over the subject matter).[42]

E. Ademption

40 Notwithstanding a notice of abandonment having been given after a constructive total loss, the assured cannot recover for a total loss if the subject matter insured is recovered or restored before the action is brought. This is the effect of ademption. Under this doctrine, the right of the assured to be indemnified for a total loss depends on the state of affairs as it exists at the time of commencement of the action.

40 *Arnould*, *supra* n 34, at para 1290; quoting Plowman J in *Vandervell v Inland Revenue Commissioners* [1966] Ch 261 at 275, a non-maritime case. For maritime cases, the learned editors cited *Oceanic Steam Navigation Company, Limited v Evans* (1934) 40 Com Cas 108 at 111, *per* Greer LJ, whose view was preferred by Cohen LJ in *Blane Steamships Ld v Minister of Transport* [1951] 2 KB 965 at 990–991 over that of Bailhache J in *Mayor of Boston v France Fenwick & Co, Limited* (1923) 28 Com Cas 367 at 373; *cf The Arrow Shipping Company, Limited v The Tyne Improvement Commissioners (The Crystal)* [1894] AC 508, where the House of Lords decided that the assured shipowner had validly abandoned its wreck regardless whether the insurer had accepted it, so that the shipowner was not liable to the harbour authority for expenses incurred in raising and disposing of the wreck.

41 As explained by Lord Wright in *Robertson v Petros M Nomikos, Limited*, *supra* n 16, at 382:

> [Section 61] makes it clear that the right to abandon only arises when there is a constructive total loss in fact. That is the necessary pre-condition to a right to abandon.

42 Section 61 refers to the right of the assured to abandon to the underwriter, but the underwriter may just pay on the claim without taking over the subject matter. See the above-quoted language of s 79(1).

41 The editors of *Halsbury's Laws of England* questioned whether the doctrine of ademption has survived the UK Marine Insurance Act 1906,[43] which does not address it.[44] But case law since 1906 has overwhelmingly proceeded on the basis that the doctrine is alive and well, at least for constructive total loss. For example, in *Roura & Forgas v Townend*,[45] Roche J considered the consequences of a captured ship being restored to her owners:[46]

> The true view, in my judgment, is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if before action it has already been made good to him.

42 On the other hand, there is recent debate on whether the doctrine of ademption applies to actual total loss. Sir Michael Mustill and Jonathan Gilman QC, the learned editors of *Arnould's Law of Marine Insurance and Average*, vol II,[47] pointed out that Arnould adopted the view that restoration of the subject matter before action prevents the assured from recovering for a total loss. In that volume, they disagreed with Arnould. They preferred the views of the editors of the 12th edition that if, at the time of a confiscation, the goods could properly be regarded as irretrievably lost, there was an actual loss and the subsequent restoration of the goods could not deprive the assured of his claim for actual total loss.[48] It was up to the underwriter to claim the benefit of the property salvaged. But Jonathan Gilman QC, the editor of vol III,[49] decided "on reflection" that the better view was that ademption was possible even for actual total loss (before issue of writ).[50] Gilman noted that, outside marine insurance, where the only loss recognised was actual total loss, it was the date of the writ which was the relevant time for deciding when a

43 See *supra* n 4.
44 *Halsbury's Laws of England*, vol 25 (LexisNexis UK, 4th ed 2003 Reissue) at para 489.
45 [1919] 1 KB 189: see summary of case in *supra* n 9 above.
46 *Ibid*, at 195–196. See also *Polurrian Steamship*, *supra* n 12; *Rickards v Forestal Land*, *supra* n 17, at 85, *per* Lord Wright.
47 *Supra* n 34.
48 *Id*, at para 1137.
49 Sweet & Maxwell, 16th Ed, 1997.
50 *Ibid*, at para 1137.

loss had occurred.[51] This approach reconciles actual total loss in marine and non-marine contexts.[52]

43 The doctrine of ademption ceases to apply when a writ is issued. Thus, in *Ruys v Royal Exchange Assurance Corporation*,[53] the insured ship was captured by a belligerent state in time of war. When notice of abandonment was rejected by the insurer, the assured commenced action on the policy. Subsequently, the ship was released by the captor when the war ended. Collins J held that there was a total loss at the time of the writ, and matters arising after the action would not defeat the claim for total loss:[54]

> But, the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained, and the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years …

II. Sue and labour in a constructive total loss situation

44 The foregoing discussions have an impact on the duration of sue and labour. It might be instinctive to argue that sue and labour ceases to operate when the subject matter is totally lost. But when does one determine if something is totally lost? We shall examine this in the contexts of, first, constructive total loss, followed by actual total loss.

51 The learned editor had in mind the first instance judgment of Rix J in the *Kuwait Airways* case, *supra* n 10, which had been discussed above. Ironically, Rix LJ in *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 at [40] cited the 1981 view of the learned editors of *Arnould* in commenting that it had never been authoritatively determined that the date of writ was relevant to the existence of an actual total loss in the marine insurance context. Although he pointed to the 1997 edition of *Arnould*, he did not note the revised opinion in the 1997 edition. Rix LJ's observation was only *obiter* as he was considering a non-marine policy.

52 In *Bayswater*, *supra* n 11, Ang J used the time of the writ as the reference point in finding that the vessel was an actual total loss: at [54].

53 [1897] 2 QB 135 ("*Ruys*").

54 *Ibid*, at 142. See also *Polurrian Steamship*, *supra* n 12, at 928. Section 79(1) of the Act provides that an insurer who pays for a total loss is entitled to take over the interest of the assured in the subject matter insured. So it seems that the insurer's remedy, where the ship is recovered after commencement of the action and he still has to pay for a total loss that existed at the time of the writ, is to take over the assured's interest in the ship. This was not addressed in either *Ruys* or *Polurrian Steamship*. In *Ruys*, the underwriter and the assured came to an arrangement to use the recovered vessel for both parties' benefit.

45 It is established that the date for determining whether there was a constructive total loss is the date of commencement of the action. The judgment of Kennedy LJ in *Polurrian Steamship Company, Limited v Young*,[55] finished by the leading judge just before his death and read posthumously by Warrington J, is often cited:[56]

> Now it is indisputable that, according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel.

46 There is less authority on when the sue and labour principle ceases to operate. The most direct pronouncement on this is from Rix J (as he then was) in the first instance decision in *Kuwait Airways Corporation v Kuwait Insurance Co SAK*.[57]

47 Kuwait Airways claimed under an aviation policy for loss of 15 aircraft and spares, which were plundered by Iraq after it invaded Kuwait on 2 August 1990. The policy contained a "maximum ground limit" of US$300m. The loss of the aircraft was valued at US$692m and the spares at US$300m. The policy also contained a sue and labour clause. The main issue was whether the ground limit applied to loss of the 15 aircraft as well as the spares. In September 1990, the insurer agreed to and paid out US$300m on a "without prejudice" basis. Between May 1991 and August 1992, Kuwait Airways recovered eight of its aircraft and some spares, incurring certain expenditure in doing so. A portion of this was incurred after the assured commenced action against the insurer on 30 July 1991. The assured claimed the balance of its losses plus sue and labour expenses incurred.

48 Rix J held that the ground limit of US$300m applied to both aircraft and spares,[58] but sue and labour expenses were outside this limit.

55 *Supra* n 12.
56 *Id*, at 927–928; *Rickards v Forestal Land*, *supra* n 17, at 84–85, *per* Lord Wright.
57 [1996] 1 Lloyd's Rep 664.
58 Rix J and the Court of Appeal, albeit not all for the same reasons, held that the loss of the spares was excluded from cover. The House of Lords disagreed and held that the primary losses for both the aircraft and the spares were covered by the policy: *supra* n 10.

He held further that the right to sue and labour persisted until the date of the writ:[59]

> I do not see why the making of a total loss claim should bring the right to sue and labour to an end. It does not in the marine context. The date of payment ushers in the right of subrogation. It might be said that at that date, if the right to sue and labour were still extant, it made way for the insurer's right of subrogation: but that point has not been pressed. The date of issue of a writ for a constructive total loss, however, is a familiar date in the case of marine insurance. Up to that date any recovery by an assured goes to reduce his claim, even though notice of abandonment has already been given; after that date any recovery does not reduce the claim: *Polurrian Steamship Co. Ltd. V. Young*, [1915] 1 K.B. 922 at pp. 927–928, *Rickards v. Forestal Land, Timber and Railways Co. Ltd.,* [1942] A.C. 50 at pp. 84–85. That suggests that the date of issue of writ is a watershed in respect to not only the effect of recovery but also the right to sue and labour.

49 Elsewhere, Rix J added that his reasoning regarding the right to sue and labour applied equally to the duty.[60]

50 Neither the Court of Appeal nor the House of Lords hearing the case on appeal expressed an opinion on the point. Staughton LJ, however, added an interesting dimension to the sue and labour duration, which is addressed in para 80 below.[61] The Court of Appeal and House of Lords held that the US$300m ground limit applied only to the aircraft and there was a separate limit of US$150m for the spares. The Court of Appeal agreed with Rix J that sue and labour expenses were outside these limits. The House of Lords held, on a reading of that particular policy, that the sue and labour expenses were subsumed within the limits for the primary losses. As the limits had been exhausted, the duration of sue and labour was irrelevant.[62]

51 Although all the authorities refer to the date of the writ, the effect ought to be the same where arbitration is commenced. Arbitration is an equally unequivocal form of dispute resolution. There is no uncertainty as to when arbitration commences. In most cases, this would be when the notice or request for arbitration is received by either the respondent,[63] or

59 *Supra* n 57, at 696–697.
60 *Id*, at 697.
61 [1997] 2 Lloyd's Rep 687 at 696.
62 [1999] 1 Lloyd's Rep 803 at 816, *per* Lord Hobhouse.
63 For example, in Art 21 of the UNCITRAL Model Law on International Commercial Arbitration; s 9 of the Arbitration Act (Cap 10, 2002 Rev Ed).

by the administrator in the case of an institutional arbitration.[64] Once arbitration has commenced, the parties are as much in dispute and their interests are as much opposed, as they are in litigation. The following observation of Lord Hobhouse of Woodborough can just as well describe an arbitration:[65]

> When a writ is issued the rights of the parties are crystallised. The function of the litigation is to ascertain what those rights are and grant the appropriate remedy.

III. Sue and labour in an actual total loss situation

52 There is much to be said for the proposition that the duration of sue and labour should the same for both constructive and actual total loss. In both instances, the possibility of ademption dissipates on issue of a writ. It would be introducing one too many fine distinctions to differentiate between an actual and a constructive total loss. On the other hand, actual loss means that the subject matter is destroyed or irretrievably lost (save for some unexpected turn of events). In these circumstances, is it right to impose a continuing duty on the assured to continue trying to recover the subject matter? The answer is that, duty aside, there is in reality not much that a prudent assured can do in the case of an actual total loss. As we have seen, the tests for actual total loss are such that no reasonable efforts by a prudent assured can recover the subject matter.[66]

53 This is probably one reason the issue has not come up directly for judicial review. Whether or not there is a duty of sue and labour in principle, there should not in fact be much room for the assured to avert or minimise the loss, as in a case where the vessel has been reduced to "mere congeries of wooden planks".[67] If there is something that he can reasonably do to reverse the damage, the chances are that the total loss is constructive, rather than actual – in which case, the duty of sue and

64 For example, the Registrar of the Singapore International Arbitration Centre ("SIAC") in r 3.3 of the Arbitration Rules of the SIAC; the Secretariat of the International Chamber of Commerce ("ICC") in Art 4(2) of the ICC Rules of Arbitration.

65 *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2003] 1 AC 469 at [75].

66 Section 57 of the Act uses the tests of "destroyed, or so damaged as to cease to be a thing of the kind insured" or "the assured is irretrievably deprived thereof".

67 *Supra* n 20.

labour continues until commencement of action, or acceptance of abandonment.

54 That does not dispose of all difficulties. Whether a vessel is irretrievably destroyed can be technically verified. As we have seen in paras 24 to 29 above, it is harder to assess when a vessel is constructively or actually lost by deprivation of possession. Where does this leave the assured regarding sue and labour?

55 Whether a hijacked vessel is a total loss (constructive or actual) is assessed on the date of the writ. The assured is theoretically under a continuing burden of search and rescue until he decides to commence action. If he commences action too early, there is a risk that there is no constructive total loss yet. At that time it may be too early to say that it is unlikely he could recover the ship. Likewise, he may not yet be irretrievably deprived of possession so as to render the ship an actual total loss. If that is so, he cannot avoid his duty of sue and labour by commencing a writ prematurely, when hope of recovery has not yet faded.

56 The *Bayswater* case discussed earlier highlighted the predicament of the owner of a hijacked vessel.[68] The vessel was hijacked by pirates in January 2003. In February 2003, the assured gave notice of abandonment, which was rejected by the insurer. After that, there were various steps taken by both sides in an attempt to trace the vessel. The attempts were unsuccessful. The registry of the ship was closed in August 2003 and the certificate of registration returned for cancellation. The assured had a lawyer's demand letter sent out in November 2003. The insurer said investigations and searches were still under way. The assured finally commenced action on 15 December 2003. In its defence, the insurer argued that there was a failure by the assured to sue and labour. As mentioned in para 27, its witnesses testified that a missing vessel would be presumed lost under s 58 of the Act only after a lapse of 13 to 18 months from the casualty. The learned judge rejected this period as arbitrary. She held that s 58 did not avail the insurer in this case. On the facts, she was satisfied that by the time of the writ, about 11 months after the hijack, it could be said that the assured was "irretrievably deprived" of the vessel, which was a total loss under s 57(1) of the Act. [69]

68 *Supra* n 11, and see paras 9 to 10 above.
69 *Ibid*, at [54].

57 It may be that at some point before commencement of the action, circumstances were clearly such as to constitute the vessel a constructive or actual total loss. However, given that there is no mathematical formula, there will always be uncertainty as to when exactly the vessel became a total loss.

58 The assured may think that there is no chance of recovering a hijacked ship. This may be so. Nonetheless, there is a theoretical possibility of ademption before the writ is issued if the insurer has not accepted abandonment. It is prudent to treat the duty of sue and labour as subsisting until action is commenced or the insurer has accepted the abandonment. When in doubt, the safer way out for the assured would be to perform his sue and labour obligation to the standard of a reasonable man. If the assured, by reasonable efforts, establishes that there is nothing more that can be done, the assured would not be in breach of his duty to sue and labour, even if the duty subsisted.[70] If the assured did not do enough to establish that the subject matter indeed could not be saved, he would have trouble persuading the court either that total loss had occurred to render the duty extinct or that the duty had been fulfilled.

59 In practice, the broker representing the assured often gives a notice of abandonment once a casualty occurs. It has been noted that insurers in England treat the giving of a notice of abandonment as equivalent to the issue of legal proceedings, so that there is no effective time lapse between notice and writ.[71] In Singapore, this is also apparently the practice.[72] Insurers will normally not accept a notice of abandonment, but will inform the assured that they take it that a writ has been issued for the purpose of preserving time. If there had been indeed a total loss at this time, the consequences of deeming that a writ is issued are that (a) there is no further ademption; and (b) there will also not be any further duty or right of sue and labour.[73]

60 In *Bayswater*, the assured gave notice of abandonment a month after the vessel was hijacked, which notice was rejected by the insurer. It is not known from the facts cited in the judgment whether the insurer, in

70 As happened in *Bayswater*, *supra* n 11.

71 *Arnould*, *supra* n 34, at para 914, fn 94; F D Rose, *Marine Insurance: Law and Practice* (LLP, 2004) at para 21.35, fn 78; *Royal Boskalis Westminster NV v Mountain*, *supra* n 13, at 534, *per* Rix J.

72 From the writer's enquiry with marine insurers and brokers. But not all insurers spoken to have encountered the practice.

73 If there was in fact no total loss, the principle of sue and labour continues to operate.

rejecting the notice, agreed to treat the date of notice as the date of the writ. This is unlikely from the stance taken by the insurer in its defence.

IV. Good faith

61 Although good faith is not the subject of this paper, the duration of this doctrine makes an interesting comparison to the duration of the duty of sue and labour. An additional attraction of using the writ as a "line of convenience" for sue and labour as well as ademption is that it also terminates the obligation of good faith, both under s 17 of the Act and common law.[74] In *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)*,[75] the House of Lords rejected the underwriter's defence that the assured's failure to disclose material documents in the course of litigation amounted to breach of the good faith duty under s 17, thereby avoiding the policy *ab initio*. Their Lordships decided that the rationale for the duty of good faith no longer applied once the parties were in litigation. One reason for this was that once litigation had commenced, the parties no longer had a "community of interest" but were in dispute and their interests were opposed. The rules of procedure regulated their relationship and rights.[76] One may say that the rationale for replacing the good faith disclosure with procedural disclosure is not applicable to sue and labour or ademption. But it is noteworthy that Lord Hobhouse referred to the doctrine of ademption in coming to his decision on when the rights of the parties had crystallised.[77] His Lordship's decision did not rest entirely on the replacement of one set of remedies for another.

62 In *Agapitos v Agnew*,[78] Mance LJ described *The Star Sea* as containing "most powerful dicta to the effect that the duty of good faith under s.17 is superseded or exhausted by the rules of litigation, once litigation is begun".[79] He went on to say that the same policy considerations that led Lord Hobhouse to restrict the s 17 duty to the

74 There is also much discussion on the difference between pre-contract and post-contract good faith, which is irrelevant for our purpose.
75 *Supra* n 65.
76 *Ibid*, at [4], *per* Lord Clyde; at [75], *per* Lord Hobhouse; at [110], *per* Lord Scott of Foscote.
77 *Id*, at 504.
78 [2002] 2 Lloyd's Rep 42.
79 *Ibid*, at [51].

pre-litigation period "militate strongly in favour of a similar restriction of the duration of the common law duty".[80]

63 While principles of ademption and good faith provide compelling material for sue and labour, it must be acknowledged that all analogies break down at some point. First, an admission of and payment for total loss may have different effects on each doctrine. As will be seen in the discussions under Pt VI below, whether payment terminates sue and labour is not an easy question. The considerations under Pt VI are largely irrelevant to good faith. Likewise, the rationale that good faith ends because parties' interests diverge on commencement of litigation does not apply to a situation where parties have amicably agreed to a settlement. This issue cannot be fully explored here, but there is room to argue that the duty of good faith does not end with payment under the policy. The insurer himself is under a duty to exercise his rights of subrogation in good faith.[81] On his part, an assured is bound to account to the insurer any reduction in its loss after receipt of payment from the insurer. [82] This may be a manifestation of the continuing duty of good faith.

64 Second, sue and labour might not end if there was no total loss, constructive or actual, on commencement of action. Good faith ends regardless of the loss on issue of the writ. Rix J was addressing his mind to a situation where there was a constructive total loss on commencement of action, which cannot be adeemed by events occurring thereafter. Partial losses are not irrevocably fixed on commencement of action – actions taken subsequent to the writ, *eg*, repairs, can affect the policy liability. This is expanded under Pt VII below. As we have seen, it is also open to an assured to waive its claim for total loss and seek recovery for partial loss instead.

65 Third, logic dictates that if the insurer has taken over the subject matter *before* commencement of action, the assured should not continue to sue and labour in relation to it.

80 *Id*, at [52].

81 *Napier v R F Kershaw Ltd* [1993] 1 Lloyd's Rep 197 (HL) at 204, *per* Lord Templeman.

82 *Yorkshire Insurance Company, Ltd v Nisbet Shipping Company, Ltd* [1961] 1 Lloyd's Rep 479 at 483, *per* Diplock J.

V. Acceptance of abandonment

66 In the *Kuwait Airways* case, Rix J alluded to the doctrine of ademption in deciding when sue and labour ends. There is force in his *dicta* linking sue and labour to ademption. Until the writ is issued, the assured retains sufficient interest in minimising or averting any loss to the subject matter, if this can be done. There is a possibility of ademption so that the total loss is reversed. To use Rix J's words again:[83]

> [I]t is at the time of issue of proceedings that the rights of the parties must be viewed as crystallized. Since therefore recovery after action brought does not affect the total loss indemnity to which an assured is entitled as of that date, that also seems to me to be an appropriate date at which to find that an assured's right (and correlative duty under s.78(4) of the [Act]) comes to an end.

67 If the insurer has accepted the abandonment, ademption is no longer possible.[84] A notice of abandonment becomes irrevocable under s 62(6) of the Act when it is accepted. In *Smith v Robertson*,[85] during wartime, the underwriters accepted a notice of abandonment of loss due the ship's capture. On the same evening as abandonment, advice was received of the ship's recapture and she was brought into port where her cargo was discharged and freight was earned. The underwriters were not allowed to rescind the acceptance.

68 Acceptance of abandonment vests all rights and liabilities in the subject matter to the insurer. Anything affecting the subject matter after that is a matter for the insurer. It does not alter the assured's right to indemnity under the policy. Even if the subject matter is recovered or restored, that is subrogated to the insurer. In these circumstances, the rights and obligations of the parties are as crystallised as when a writ is issued. The assured does not have any interest in monitoring the abandoned property, nor should it have a right to continue incurring costs in relation to it. That is a matter for the insurer. It ought to follow that the duty and right to sue and labour ends with the insurer taking over the interest of the assured in the subject matter.

83 *Supra* n 57, at 697.
84 *Smith v Robertson* (1814) 2 Dow 474; 3 ER 936; See also *Arnould*, *supra* n 34, at para 1177, fn 53; Rose, *supra* n 71, at para 21.39.
85 *Supra* n 84.

69 As Arnould says, if the assured does incur any expenses after abandonment is accepted by the insurer, it will not be recoverable on the sue and labour basis.[86] It must be recoverable as expenditure incurred with the authority, and for the benefit, of the underwriter, under general restitutionary principles.[87]

70 The passage in *Arnould*, however, merits a closer look to see if it accords with what Rix J said about sue and labour. Arnould puts the position as follows:[88]

> If the assured gives a notice of abandonment which is justified by the existing state of facts, any such expenditure which he incurs thereafter will in general be recoverable from underwriters, not by virtue of the suing and labouring clause, but by virtue of the abandonment to underwriters. The expenditure will probably not, however, be recoverable if the underwriters both decline to authorise the expenditure and to take over the abandoned property on its proceeds or if, although they take the abandoned property, they can show that the expenditure was unauthorised and has been of no benefit.

71 Read carefully in context, Arnould's first proposition must be premised on the insurer having accepted the abandonment *and authorised* the expenditure. If so, this is not controversial as it is also proposed in this paper that neither ademption nor sue and labour operates after the insurer has accepted the abandonment. The expenditure authorised by the insurer is recoverable on a different basis from sue and labour – it is based on an agreed expenditure incurred for the account of the insurer.[89]

86 *Arnould*, *supra* n 34, at para 914.

87 *Arnould* cited *Suart v The Merchants' Marine Insurance Company, Limited* (1898) 3 Com Cas 312 ("*Suart*"). The underwriters there had not accepted a notice of abandonment after the vessel sank. But the underwriters and the assured agreed, on a without prejudice basis, to appoint salvors. Due to the negligent watch of a tug appointed by the salvors, another ship collided with the wreck. Bigham J proceeded on the basis that only the underwriters had an interest in the wreck, and the salvors as well as the negligent tug were acting for the underwriters. The underwriters therefore were liable for losses that arose from the collision between the second ship and the wreck. There was no finding that the underwriters had accepted abandonment by their conduct. *Stuart* probably cannot stand for any wide proposition on sue and labour, or abandonment. One should also note the waiver clause in the SG form that provides that "no acts of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver, or acceptance of abandonment". Similar provisions are found in the Institute clauses.

88 *Arnould*, *supra* n 34, at para 914.

89 Which may explain the decision in *Suart, supra* n 87.

72 Arnould's second proposition is not an absolute rule. If the underwriters reject the abandonment, they ought to still be liable for sue and labour expenses properly incurred before commencement of the action. In the note to the text cited, Arnould said this about sue and labour:[90]

> The usual practice is for underwriters to agree to treat the assured as having issued his writ when he gave the notice of abandonment. If this is not done, and the property is restored before action brought, the expenses incurred by the assured in recovering the property would in proper cases be recoverable under the suing and labouring clause, even though at the time when they were incurred, the vessel was a constructive total loss; this follows from the rule that the assured cannot claim for a constructive total loss which is adeemed before action is brought ...

73 Arnould therefore accepts that one can claim from the insurers sue and labour expenses incurred in restoring the property after notice of abandonment and before the writ is issued. Though this is not mentioned in the note, sue and labour expenses properly incurred can be claimed even if the property was not successfully restored.[91] Lord Hobhouse emphasised this principle in the *Kuwait Airways* case[92] in words quoted at para 6 above. A popular illustration is an abortive tug service where nothing is saved but expenditure is nonetheless incurred.[93]

74 There is nothing in *Arnould*, therefore, which is really at variance with Rix J's view on the duration of the sue and labour obligation.

VI. Payment without acceptance of abandonment

75 Section 78(1) of the Act says that, where there is a suing and labouring clause, "the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss".

90 *Arnould, supra* n 34, at para 914, fn 94.

91 Subject to contractual limitations such as those limiting the sum recoverable to the insured value of the vessel, *eg* in cl 9 IHC, 01/11/03 (cl 11 in ITCH 1/11/95). See Rose, *supra* n 71, at para 20.65.

92 [1999] 1 Lloyd's Rep 803 (HL) at 816.

93 O'May & Hill, *supra* n 1, at pp 340–341; N Geoffrey Hudson, *Marine Insurance Clauses* (LLP, 4th Ed, 2005) at p 122. Both texts were discussing what is now cl 9.4 of ICH 01/11/03 (cl 11.5 in ITCH 1/11/95, cl 13.5 in ITCH 1/10/83).

76 Section 78(1) codifies the principle that compensation for sue and labour is supplemental to compensation for the loss of the insured property itself.[94] It may not have any temporal prescription – it does not say that the expenses may be incurred after payment for a total loss. Its main thrust is to place sue and labour, generally, as an additional item for compensation over and above the primary loss. For example, recovery must be limited to circumstances where the sue and labour expenses are incurred before the insurer accepts abandonment and before any action is commenced. As we have seen, the acceptance of abandonment or the commencement of the action extinguishes the right of ademption as well as the right to sue and labour. Would payment also extinguish this right? It is open to the insurer to pay for a total loss without accepting abandonment. Does sue and labour survive payment?

A. Arguments in favour of a continuing right or duty

77 Rix J in the *Kuwait Airways* case[95] did not think that payment under the policy would by itself extinguish the right to sue and labour. Payment for a total loss might give the insurer a right of subrogation, but that is a different thing.[96] It has been emphasised in a number of cases that the rights of subrogation are different from those arising from abandonment. In subrogation, the insurer may be compensated for any reduction in the insured loss or any recovery from third parties, up to the amount paid by the insurer. But the insurer cannot recover more than what he has paid out.[97]

78 In abandonment, on the other hand, the insurer is entitled to the property in the ship (including liabilities arising as owner), "and if it is used after he has acquired the property he is entitled to the profits of such use": *per* Lord Atkin in *Attorney-General v Glen Line, Ltd*.[98] In that case, a vessel detained by German authorities was considered a constructive total loss on 4 August 1914 when war was declared and the underwriters accepted a subsequent notice of abandonment, on the basis of a total loss on 4 August 1914. After the war, the owners received compensation for loss of earnings under the Versailles Peace Treaty. The underwriters

94 See also a similar point made by Lord Hobhouse in the *Kuwait Airways* case, *supra* n 92.
95 *Supra* n 57, at 696–697.
96 See also *Yorkshire Insurance Company, Ltd v Nisbet Shipping Company, Ltd*, *supra* n 82, *per* Diplock J.
97 *Id*, at 483, *per* Diplock J.
98 (1930) 37 Ll L Rep 55 (HL) at 61, *per* Lord Atkin.

claimed part of this compensation. The House of Lords rejected the underwriters' claim on the basis that the compensation was premised on an owner's right that had not passed with the abandonment to the underwriters. It would have been different if compensation was for a wrongful deprivation of property after it had passed to the underwriters, as Lord Atkin explained:[99]

> If the claim had in fact been adjudicated upon as a claim not for an original wrongful seizure but for a continued detention of the *Glenearn* after Aug. 4 until release, the insurers would have had something to say for themselves, for on that footing it cannot be denied that the ship that was detained belonged to the insurers.

79 Taken further, Rix J's remarks might drive an important wedge between two payment scenarios. One, where the insurer acquires the property or salvage rights over it, and two, where the insurer acquires a mere right of subrogation. Ademption, and sue and labour, would end with the former. Ademption, and sue and labour, might not end with the latter. Until the underwriters take over the property, there is a possibility of ademption, and the assured continues to be interested in, and responsible for the property.[100] On the other hand, there are compelling reasons why neither party should not be saddled with sue and labour obligations after the claim is paid.

B. Arguments against continuation of a right or duty

80 At the Court of Appeal stage in the *Kuwait Airways* case,[101] Staughton LJ noted Rix J's position that sue and labour expired with the writ. Staughton LJ said he expressed no view on that conclusion, but went on to find that the right to sue and labour had expired with admission or payment on the policy, before the writ was issued. He held that:[102]

> It follows that in the absence of express agreement no recovery efforts made after the admission of the claim could properly be made at the expense of the insurers.

81 His rationale was as follows. The US$300m limit under the policy was admitted in September 1990 and paid shortly afterwards. The insurers were therefore not interested in any attempt to recover the excess

99 *Id*, at 62.
100 Leaving aside the "abandonment to the world" argument, which does not seem to be a firmly established right of any property owner.
101 *Supra* n 61.
102 *Id*, at 696.

loss over US$300m. The assured airline's attempts to recover such excess would purely be for its own benefit, and the airline could not recover sue and labour expenses for these attempts. If the airline succeeded in recovering the excess loss, it had no further interest in recovering any part of the loss below US$300m. "The remaining U.S.$300 m. worth of property would have passed by subrogation to the insurers."[103] The airline had no right to incur expenses to recover such loss on behalf of the insurers, without the insurers' consent.

82 Staughton LJ cited no authority for his proposition on the duration of sue and labour. *Holmes v Payne* here provides both entertainment and precedent value. Mrs Payne thought she had lost her insured pearl necklace after an unsuccessful search for it in her house. The insurer accepted the loss and compensated her with some substitute jewellery. It turned out that the necklace was resting in a cosy recess of her evening cloak and made a dramatic reappearance when the cloak was being tried on by Mrs Payne's sister. The insurer demanded return of the substitute jewellery, but Mrs Payne refused and offered the necklace as salvage instead. Roche J held in favour of Mrs Payne. He made two important points. First, he held that a mislaid thing was not necessarily lost. But if it was mislaid and remained missing despite a diligent search for a reasonable time, it might properly be said to be lost. He in fact compared it to a case of capture in marine insurance. Second, the settlement could not be reopened after payment.[104] Although "ademption" was not mentioned, the decision effectively means, in modern parlance, that there was no longer any right of ademption.

83 Staughton LJ in the *Kuwait Airways* case seemed to treat admission as the cut-off point for sue and labour.[105] In that case, as in most cases, it may not be important to decide whether it was in fact admission, or payment, that would seal the loss. Payment normally follows close on the heels of admission. It is worth noting, however, that Roche J in *Holmes v Payne* categorically distinguished between an adjustment, which he likened to an admission, and payment. He accepted that an adjustment was subject to the same correction as any other

103 *Ibid*.
104 [1930] 2 KB 301 at 309–310.
105 *Supra* n 102.

admission, but payment (though only partially effected) gave the matter finality.[106]

84 It was not clear from the settlement agreement in *Holmes v Payne* that the insurer had agreed to take over the subject matter. Roche J did not discuss whether the insurer had taken over title in the necklace, or merely acquired a right of subrogation, although the assured did offer the necklace to the insurer "as salvage". In the *Kuwait Airways* case, the insurer claimed a right of subrogation rather than salvage. Staughton LJ was not troubled by any consideration of a possible distinction between taking over abandoned property and acquiring mere rights of subrogation over it.

85 On balance, Staughton LJ's approach is more attractive for ensuring that the duty does not continue indefinitely. If sue and labour survives payment on the policy, neither the assured nor the underwriter will have closure. The assured will not be able to walk away from the loss after the insurer has paid on the policy. The insurer himself will understandably be worried that he could be hit with a large claim for sue and labour expenses that are incurred after he has paid out on a policy. The insurer might well wish to close the book on a particular loss. These are real and reasonable concerns.

86 Pragmatism can often be a shield from difficult theoretical questions, such as those posed above. If there is some prospect of recovery which comes to the assured's attention, one would expect a prudent assured to consult or notify the insurer before taking sue and labour steps. If the insurer objects to the expenditure, the insurer waives performance of the duty even if it exists. If the insurer does not object, he may be deemed to have authorised expenditure to be incurred on his behalf. There will still be some safeguard to the insurer as only "expenses properly incurred" are recoverable under the sue and labour provision. Moreover, if the insurer pays for a total loss, he can make it clear to the assured that he is no longer interested in any attempt to recover the property and the assured should not incur further sue and labour expenses.

106 *Supra* n 104, at 309.

VII. Partial loss

87 Examples of a partial loss are a damaged ship,[107] damaged goods[108] or even property that is a constructive total loss but which is treated by the assured as a partial loss.[109] In *Integrated Container Service Inc v British Traders Insurance Co Ltd*,[110] the English Court of Appeal treated goods that were detained by warehousekeepers who claimed liens on them as a partial loss, as they had not yet become either an actual or constructive total loss.[111] In partial loss, no question of abandonment or ademption arises.

88 This is possibly where the distinction between a total loss and a partial loss lies, where duration of sue and labour is concerned. In a total loss situation (constructive and, arguably, actual), recovery of the subject matter after action is brought does not affect the total loss claim. The assured's claim against the insurer is not reduced.[112]

89 In a partial loss situation, commencement of action does not freeze the loss payable under the policy. In *Chandris v Argo Insurance Company, Ltd*,[113] several shipowners faced a time bar on their claims against the underwriters if the causes of action were deemed to have arisen when the casualties occurred. They argued that their causes of action arose only after relevant average adjustments were made. In relation to one shipowner, for instance, the vessel sustained damage more than six years before the action was brought. A series of repairs were effected, the last being less than six years before commencement of the action. Megaw J held that as an action on a policy is a claim for unliquidated damages, it is not a condition that the assured has quantified his claim on the date of action "or even that all the facts exist at the date of the writ which will enable the proper amount of the claim

107 Section 69 of the Act. Examples of the sue and labour obligation in relation to a damaged vessel are found in *The Nore Challenger*, *supra* n 6 and *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146.

108 Section 71(*c*) of the Act.

109 Section 61 of the Act.

110 [1984] 1 Lloyd's Rep 154 (CA) ("the *Integrated Container Service* case").

111 *Ibid*, at 160, *per* Eveleigh LJ; at 162–163, *per* Dillon LJ.

112 See cases cited above in relation to ademption, *eg*, *Polurrian Steamship*, *supra* n 12; *Rickards v Forestal Land*, *supra* n 17; the *Kuwait Airways* case, *supra* n 57, at 697, *per* Rix J.

113 [1963] 2 Lloyd's Rep 65.

to be determined".[114] He rejected the assured's argument that s 69 of the Act, on partial loss of a damaged ship, set out different times when the cause of action would arise depending on whether the shipowner opted for an immediate full repair, a partial repair or no repair. Section 69 only affected the measure of the indemnity, and not the accrual of the cause of action. On this rationale, repairs after the action is brought will affect the measure of indemnity payable under the policy. The loss is not necessarily determined at the point of suit. The argument in favour of extinguishing sue and labour on the commencement of the action for a total loss claim carries less force in relation to partial loss.

90 For partial loss, cessation of sue and labour can be governed by a more basic principle. Sue and labour subsists only when there is a continuing insured peril. It ceases when the peril is gone. This principle applies equally to total loss (leaving aside the writ and abandonment). In the *Integrated Container Service* case,[115] the containers were detained during the policy year. The assured took steps to recover the containers and expenses were incurred even after the policy year. The Court of Appeal held that it did not matter if the expenses were incurred after the policy year, as the sue and labour clause continued to apply until the containers were safely restored to the custody and control of the assured. In the words of Eveleigh LJ:[116]

> Moreover, it did not matter if further loss might occur after the expiration of the policy, for the containers had already been the victims of an insured peril within the policy period. They had received a potential death blow. There was consequently a duty upon the assured to avert such a further deterioration in the situation. They were entitled to act under the sue and labour clause and to recover their expenses.

91 The other scenario where sue and labour might terminate for a partial loss is if the insurer has made payment under the policy. This will be in line with the arguments above in favour of termination of the duty upon payment for a total loss.

92 As a final point, an assured may convert its claim from one of a total loss to one of a partial loss. In an *obiter dictum* in *Royal Boskalis Westminster NV v Mountain*, Rix J said that an assured who had claimed

114 *Chandris v Argo Insurance Company, Ltd*, *ibid*, at 74; approved by the Privy Council in *Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd* [1983] 2 Lloyd's Rep 376; followed in *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep 541.

115 *Supra* n 110.

116 *Ibid*, at 160.

but not received compensation for a constructive total loss had the right to waive its claim for total loss and claim for a partial loss instead, even after the issue of a writ.[117] It seems to follow from his reasoning that, in such circumstances, the assured would have a right to claim for sue and labour expenses incurred, as long as the notice of abandonment had not been accepted.

93 The facts of *Royal Boskalis Westminster NV v Mountain* illustrate the point. The Dutch assured owned and operated a dredging fleet in Iraq pursuant to a dredging contract with the Iraqi government, which was governed by Iraqi law and subject to Paris arbitration under ICC rules. After sanctions were imposed on Iraq due to its invasion of Kuwait, Iraq promulgated Law No 57 in September 1990 to seize all assets of companies of those countries that had imposed sanctions against Iraq. In the same month, the assured tendered notices of abandonment to the insurer under a war risks policy. The insurer did not accept the notices but agreed that a writ was deemed to be issued on the date of the notices. Meanwhile, the assured negotiated with the Iraqi government and a finalisation agreement was signed in December 1990. Under this finalisation agreement, the assured waived all claims under the dredging contract and its fleet and personnel were allowed to leave Iraq. In 1991, the assured claimed the value of the waived claims against the insurer as sue and labour expenses, saying that the insurer had been saved a total loss. In 1993, the assured finally sued for constructive total loss as well as sue and labour expenses. Rix J held that there was no constructive total loss as at the date of the deemed writ in September 1990 because it was not unlikely that the fleet could leave Iraq, even though that could only be achieved by a waiver of claims. There was a financial loss of reward, but not physical loss of use or control of the fleet.[118] He went on to hold that the assured were entitled to part of their claim for sue and labour expenses, even though these were in reality a "sacrifice" rather than an expenditure. He also opined that, in any event and even after issue of the writ, the assured was entitled to and did waive its claim for total loss when it demanded compensation for sue and labour on the ground that total loss had been averted.[119]

94 One might say that the option given to the assured is odd, in that the assured has a unilateral right to decide whether to incur sue and

117 *Supra* n 13, at 534; citing Atkinson J in *Pesquerias y Secaderos de Bacalao de Espana, SA v Beer* (1946) 79 Ll L Rep 417, at 433–434.
118 *Supra* n 13, at 551, 554.
119 *Id,* at 558.

labour expenses (without a corresponding obligation) even after notice of abandonment and issue of writ. On the other hand, if the insurer has refused to accept the notice of abandonment, it is not all that unfair for the assured to have the option of revoking it. If the assured decides to try to recover the lost object, the insurer cannot complain since the insurer has not accepted total loss. If there was in fact no total loss at the time of the notice of abandonment and (deemed) issue of writ, the assured who fails to sue and labour could be in breach of its obligation.

95 To complete the story, the insurer appealed on the sue and labour issue. Although the Court of Appeal agreed with Rix J that a sacrifice could in principle be recovered as sue and labour expenses, the claim failed because the waiver of claims under the finalisation agreement would not have been upheld under English law by reason of duress. The position was assumed to the same under French law and the assured could still have enforced its claims in the Paris arbitration. As the waiver was legally without effect, there was no loss for which the assured could claim as sue and labour expenses.[120]

VIII. Conclusion

96 That the duration of sue and labour ends with the writ, if there was a constructive or actual total loss at that time, is not controversial. Commencement of arbitration should have the same effect.

97 Sue and labour should also end with acceptance of abandonment. This proposition is compatible with the doctrine of ademption, which also ends once the insurer takes over the property.

98 If the insurer decides to make payment, whether for a total or partial loss, there is some basis for arguing that the operation of sue and labour terminates on admission by the insurer, or payment.

99 Partial loss gives rise to different considerations, as the doctrines of abandonment and ademption do not apply. The writ does not cast a shroud of finality on it. For partial loss, the lifespan of sue and labour should be coterminous with the duration of the peril.

100 It also appears that, if an assured elects to waive its claim for total loss where its notice of abandonment has not been accepted, it has a right

120 *Id*, at 617, *per* Stuart-Smith LJ.

to incur sue and labour expenses in saving the subject insured from a total loss. This is so even if the expenses were incurred after commencement of action for total loss.

101 Not all propositions made in this paper have been subjected to judicial scrutiny. They appear to follow from established doctrines, but the caution of Aquinas comes to mind. If, from a known principle, one were straightaway to perceive all its consequent conclusions, one would have the condition of angels. There are some who doubt that lawyers have the condition of angels.