MASEFIELD AG V AMLIN CORPORATE MEMBER LTD [2010] 1 LLOYD'S LAW REPORTS 509

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The UK High Court (Commercial Court) held that seizure by Somali pirates would not constitute actual total loss or constructive total loss pursuant to the *Marine Insurance Act 1906* (Imp) ('*MIA*'). As the relevant provisions are replicated in the *Marine Insurance Act 1909* (Cth) and the *Marine Insurance Act 1908* (NZ), the decision of the court is equally relevant to both Australia and New Zealand.

Crucially, the court also declared that ransom payments were congruent with public policy.

Facts

The claimant was the owner of two parcels of biodiesel on board the *Bunga Melati Dua* and had insured its cargo under an open cover policy all risks with the defendants on ICC(A) terms.[1] The policy covered loss due to piracy. Clause 6 read:

> 6. In no case shall this insurance cover loss, damage or expense caused by ...
> 6.2 capture, seizure, arrest, restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat.

Further, clause 13 provided:

> 13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival.[2]

This clause generally replicates the provisions in s 60(1) of the *MIA*[3] but it importantly excludes the operation of s 60(2)(i)(a)[4] which provides for constructive total loss ('CTL') where the assured is deprived of its property and it is unlikely that it can recover that property.[5]

Pirates seized the vessel on 19 August 2008 in the Gulf of Aden while it was on its way from Malaysia to Rotterdam and brought it to Somali waters off the town of Eyl.[6] During the course of the capture, one of the crew members was sadly killed and this prevented military and diplomatic efforts to secure the release of the vessel.[7] The shipowners, therefore, entered into negotiations with the pirates soon after seizure following a ransom demand in excess of US$2 million for the release of the vessel, its crew and cargo.[8]

While negotiations were underway, on 18 September 2008, the claimant served a notice of abandonment on the defendant insurers. The defendant declined the notice of abandonment but the parties agreed that proceedings should be deemed to have commenced on the date of issue. Within six weeks of the seizure, and about 10 days after the date of the notice of abandonment, a ransom was paid and the vessel, its crew and cargo were released.[9] The claimant had seemingly taken no part in the negotiations or payment.

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[1] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [1].
[2] Ibid [6].
[3] See also *Marine Insurance Act 1909* (Cth) s 66(1); *Marine Insurance Act 1908* (NZ) s 60(1).
[4] See also *Marine Insurance Act 1909* (Cth) s 66(2)(a)(i); *Marine Insurance Act 1908* (NZ) s 60(2)(i)(a).
[5] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [8].
[6] Ibid [1] and [14].
[7] Ibid [9].
[8] Ibid [2] and [14].
[9] Ibid [2].

The Claim

The claimant claimed that it was 'irretrievably deprived' of its property when the *Bunga Melati Dua* was seized by pirates. Pursuant to section 57(1) of the *MIA*,[10] this rendered its cargo an actual total loss ('ATL'). Alternatively, it claimed that its cargo was 'reasonably abandoned on account of its actual loss appearing to be unavoidable', and thus its property was a CTL under section 60(1) of the *MIA*.[11]

The claimant further contended that despite the cargo being subsequently retrieved upon the payment of ransom, such payment was against public policy and hence the existence of the possibility of recovery on ransom payment should be ignored for the purposes of ss 57 and 60.[12]

The Decision

The presiding judge, Steel J, found for the insurers. He rejected the claimant's arguments that seizure by pirates rendered the cargo either an ATL or CTL. He also held that payment of ransom was not contrary to public policy.[13]

Actual Total Loss

The issue here was whether the claimant was deprived of its property from the date of the notice, despite the fact that the cargo was subsequently recovered upon payment of ransom by the shipowners.

ATL occurs when the assured is irretrievably deprived of its insured property.[14] The test for determining whether the property is an ATL is an objective one, assessed in this case on the date of issue of the notice of abandonment.[15] The finding is hinged on the probability of retrieval. The actual fact of recovery is not material in this determination, although it can be considered as an indication of the probability of retrieving the property.[16]

Steel J described the high level of probability required for irretrievable deprivation in the following words: 'an assured is not irretrievably deprived of property if it is legally and physically possible to recover it (and even if such recovery can only be achieved by disproportionate effort and expense).'[17]

Steel J found that the 'actual prospects of recovery of the cargo as at 18 September were good.'[18] This was supported by a detailed analysis of the context of Somali piracy, communications between the ship and cargo interests, various reports and press statements.[19] Steel J also examined the modus operandi of the Somali pirates[20] to conclude that even without the communications:

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[10] See also *Marine Insurance Act 1909* (Cth) s 63(1); *Marine Insurance Act 1908* (NZ) s 57(1).
[11] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [3].
[12] Ibid [4].
[13] There was a further claim regarding late declaration of freight but as a result of the finding on total loss, there was no need to address it.
[14] *Marine Insurance Act 1906* (Imp) ('*MIA*') s 57(1); See also *Marine Insurance Act 1909* (Cth) s 63(1) and the *Marine Insurance Act 1908* (NZ) s 57(1). ATL can also arise out of destruction of the insured subject matter or by damage to the extent that the subject matter ceases to be a thing of the kind insured, but this was irrelevant in this case.
[15] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [29]. Note that pursuant to *MIA* s 57(2), a notice of abandonment is not required for ATL but the parties had agreed upon this date as the date of commencement of proceedings.
[16] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 454 (Lord Sumner).
[17] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [31].
[18] Ibid [14].
[19] Ibid [12]-[18].
[20] Ibid [19]-[23].

> [i]t is clear that [the pirates] take vessels in order to ransom them and invariably negotiate with the shipowner or other interested party for the release of the vessel, cargo and crew, in exchange for a payment which represents an economic proportion of the value of the property at stake.[21]

The court accepted further expert evidence that the seizure of the *Bunga Melati Dua* matched the profile of recent Somali pirate attacks in the area and that as a result 'it was not unlikely that the cargoes would be recovered within a reasonable time upon the payment of a ransom.'[22]

This high standard of probability was not satisfied in this case and since it was not impossible to recover the cargo, there was no ATL.

The claimant did not dispute the likelihood of recovery[23] but relied on the decision in *Dean v Hornby*[24] to contend that seizure by pirates rendered the cargo an ATL immediately upon capture. In this case, a vessel had been seized by pirates but later recaptured by an English warship and put under the command of a prize master. Subsequently, the prize master sold the vessel after its condition deteriorated because of bad weather. The court held that the vessel was a total loss as a result of the capture by pirates. The assured also highlighted Rix J's comment in *Kuwait Airways Coroporation v Kuwait Insurance Co SAK*[25] as support of its proposition that '[i]n case of capture, because the intent is from the first to take dominion over a ship, there is an actual total loss straightaway'.[26]

Steel J reiterated the fact-sensitive nature of such cases and distinguished *Dean v Hornby* by pointing to the fact that seizure by pirates was only a transfer of possession while capture as a prize of war was effectively transfer of property. There was no transfer of title here, nor was there an intention to take dominion over the ship.[27] The absence of intention to take dominion of the ship was determined through Steel J's analysis of the nature and trends associated with recent Somali pirate attacks.[28]

Constructive Total Loss

If an assured claims for ATL and it is subsequently determined that there was no ATL, the assured may still claim for CTL since its rights are not prejudiced by the negative finding in relation to ATL.[29] For a CTL to occur, the property has to be 'reasonably abandoned on account of its actual total loss appearing to be unavoidable'.[30]

Other provisions of the *MIA* and its Australian and New Zealand equivalents require a notice of abandonment to be served for CTL to be effective. Steel J reiterated that it is not so much the notice of abandonment but the 'abandonment of any hope of recovery' in line with the judgment in *Court Line v R*[31] that enlivens a claim for CTL.[32]

In this case, as was determined with ATL, the ship and cargo owners 'were fully hopeful of' recovering their property.[33] As a result, there was no CTL.

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[21] Ibid [19].
[22] Ibid.
[23] Ibid [4].
[24] (1854) 3 El & Bl 179.
[25] [1996] 1 Ll Rep 664.
[26] Ibid 687 (Rix J).
[27] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [39].
[28] Ibid [12] –[23].
[29] *Kastor Navigation Co Ltd v AGF MAT* [2003] 1 Ll Rep 296, 308 (Tomlinson J).
[30] *MIA* s 60(1); *Marine Insurance Act 1906* (Cth) s 66(1); *Marine Insurance Act 1908* (NZ) s 60(1).
[31] (1944) 78 Ll L Rep 390, 395-6 (Scott LJ).
[32] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [55].
[33] Ibid [56].

Legality of Ransom Payments

The claimant argued that the possibility of recovering the vessel, its crew and cargo upon payment of the ransom demanded by the pirates should be disregarded because ransom payments were contrary to public policy, though not illegal.[34]

Steel J rejected the argument. He endorsed the cautious approach espoused by Lord Atkin in *Fenton v St John Mildmay*,[35] quoting the latter's words:

> [issues of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds.[36]

On that basis, Steel J outlined three specific reasons for finding that ransom payments were not contrary to public policy.[37] Firstly, paying ransoms was not illegal under English, Somali, Malaysian and Swiss law. The claimant had accepted as much. Secondly, he pointed to legislative initiatives to outlaw ransom payments such as the *Ransom Act 1782*, which has since been repealed, and cautioned against courts undertaking to do the same. Although not mentioned by Steel J, the *Ransom Act 1782* was a war statute designed to stop English merchants from paying ransoms to prize courts for the release of their vessels[38] and it might not have actually prohibited payments to pirates for the release of vessels and crew. Thirdly, he said that there would be no other viable option to remove crew from the clutches of pirates if military or diplomatic efforts were ineffective or unavailable. Hence, on these grounds he found that this was not a case in which harm to the public was incontestable.[39]

Steel J also put forward two broader justifications for determining that ransom payments are in line with public policy. Firstly, the presence of a long-standing market for kidnap and ransom insurance (K&R cover) reflects that ransom payments are well-accepted by the market and indicates that they should not be rendered unenforceable.[40] Secondly, he relied on *Royal Boskalis Westminster NV v Mountain*[41] as authority for the finding that ransom payments are recoverable as a sue and labour expense under *MIA* s 78(4)[42] and that therefore, should not be against public policy.[43]

The harm caused to the public should be 'substantially incontestable'[44] if ransoms were to be contrary to public policy and it was held in this case that this is not so.[45] Hence, the claimant's contention that the possibility of recovery through payment of ransom should be ignored was rejected.[46]

Comment

In relation to ATL, the judgment provides clarity on the effect of *Dean v Hornby*. The authors of *Arnould's Law of Marine Insurance and Average* regard as 'doubtful' whether seizure by piracy renders the property an immediate ATL.[47] This case now clearly distinguishes *Dean v Hornby* and other capture cases along the lines of the nature of possession. Piratical seizures, especially by Somali pirates in the Gulf of Aden, should be characterised by an intent to temporarily possess until a ransom is paid, after which the vessel, its crew

[34] Ibid [58].
[35] [1983] AC 1.
[36] Ibid 12 (Lord Atkin). Quoted in *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [59].
[37] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [60].
[38] See generally William Senior, 'Ransom Bills' (1918) 34 *Law Quarterly Review* 49, 49-55; *Havelock v Rockwood* (1799) 8 TR 268, 273.
[39] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [61].
[40] Ibid [62].
[41] [1999] QB 674.
[42] See also *Marine Insurance Act 1909* (Cth) s 84(4); *Marine Insurance Act 1908* (NZ) s 78(4).
[43] *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280, [63].
[44] Ibid [59].
[45] Ibid [61].
[46] Ibid [64].
[47] Jonathan Gilman et al, *Arnould's Law of Marine Insurance and Average* (Sweet & Maxwell, 17th ed, 2008) [28-03].

and cargo will almost always be released. In such cases, where damage to the vessel is not an issue, there is no ATL unless it can be proven that it was legally or physically impossible to recover the property.

However, in light of recent international and domestic initiatives on anti-terrorism, the situation is not entirely straightforward. While the two are distinct, there exists a porous divide between definitions of terrorism and piracy.[48] It might be argued that where a court determines a particular seizure as one of terrorists rather than pirates, the intent would more likely be to exercise dominion over the ship rather than to possess it until a ransom is paid or some other demand is met. In this situation, unless otherwise addressed by the contract of insurance, a finding of ATL may be more probable.

Perhaps more importantly, Steel J dismisses the argument that payment of ransom is against public policy. The arguments for the proposition that ransom payments should be outlawed or at least held to be in conflict with public policy have taken hold in places such as the US.[49] There is clearly merit to such arguments.

However, in a *purely* commercial context, it may be argued that if held to be against public policy, such a situation would have wide-ranging implications imposing a heavy burden on those transacting in the marine insurance market. Also, as Steel J warned, such a situation would render K&R cover, a long standing and well-accepted part of the insurance market, void. Certainly, he did not intend to suggest that since such an insurance market product existed, it had to be legitimate. However, its essential role in facilitating the recovery of property, and more importantly, crew members, coupled with its entrenched position in the market make it extremely difficult to taint it as illegitimate.

In the UK, it is now clear that ransom payments to recover crew, vessel and cargo are well within the ambits of public policy. However, given the tenuous but growing link between piracy and terrorism,[50] questions may be raised about the wisdom of effectively legitimising a payment of a bribe to bandits who may be terrorists. Surely the potential for harm to the public in the event of a terrorist attack is 'substantially incontestable' and grounds to invoke the public policy argument to prevent such payments where legislation has not already done so? Should the courts then treat two separate seizures of vessels that are subsequently released upon payment of a ransom differently simply because one was seized by pirates and the other by terrorists?

Perhaps one way of dealing with such difficulty is to adopt a restrictive approach in following the ruling in this case. It may not be ideal to use a broad brush to classify all ransom payments to pirates as in the public's interest. Instead, a careful, considered analysis in light of existing legislation and evidence in relation to the pirates' general behaviour and intent and the effect on the community as well as the market will be required. Clearly, this is easier said than done.

Conclusion

The court heard another piracy-related matter with regards to a time charterparty in June 2010.[51] In that case, Gross J commented that piracy is topical.[52] The effect of piracy in a commercial context is increasingly attracting judicial attention because of the rising incidences of piracy percolating through disputes between parties. Steel J's decision in this case makes clear that, in a marine insurance matter, especially in relation to Somali pirate attacks in the Gulf of Aden, a seizure by pirates does not constitute total loss. One expects that the position in Australia and New Zealand would be likewise. Perhaps more importantly, this decision maintains a separation from legal developments in the US by clarifying the

[48] See, eg, Monica Pathak, 'Maritime Violence: Piracy at sea and marine terrorism today' (2005) 20 *Windsor Review of Legal and Social Issues* 65.
[49] See, eg, 'US threat to hostages' *Maritime Risk International* (19 May 2010). See also *Blocking Property of Certain Persons Contributing to the Conflict in Somalia*, President of the United States of America, Executive Order 13536 of 12 April 2010, 75 FR 19869. Available at <http://federalregister.gov/a/2010-8878>.
[50] Above n 48.
[51] *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340.
[52] Ibid [1].

position of the UK courts that ransom payments to pirates are not contrary to English public policy. This raises interesting questions particularly in light of the relationship between piracy and terrorism.