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SAMPLE ARTICLE

## Seizure, ransom payments and public policy

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Despite piracy's long history and recent resurgence, prior to the judgment last February in *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm), the last piracy case heard in the English courts was in 1590. The *Masefield* case is the first to have considered piracy in the context of the 1906 Marine Insurance Act.

In August 2008, a vessel carrying consignments of bio-diesel owned by *Masefield* was seized in the Gulf of Aden by Somali pirates, who diverted it to Somali waters and demanded a ransom for release from its owners. While hull interests and the pirates were negotiating, *Masefield* tendered Notice of Abandonment to its insurers, *Amlin*. This was rejected on the grounds that *Masefield* was not, at that time, "irretrievably deprived" of its goods under s.57(1) of the Marine Insurance Act, which reads

*"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."*

The policy had been written under the Institute Cargo (A) Clauses. It was never argued that *Masefield* was not entitled to cover in the circumstances.

Substantial and widely reported evidence was adduced that negotiations between the Owners, assisted by their government, and the pirates began almost immediately upon seizure. This bargaining bore a strong inference that the vessel, crew and cargo were more than likely to be released, plus *Masefield* was aware of it at the date it tendered Notice of Abandonment. Accordingly, at that time, the criteria set out in s.57(1) of the Marine Insurance Act had not been met.

In order to assess whether the s.57(1) criteria are satisfied, it has long been established that the Court will consider the actual circumstances at the date the assured tenders Notice of Abandonment, whether or not the assured was aware of them at that time. [*Marstrand Fishing v Beer* (1936) LLR 163] The Court may also look at what occurred subsequent to tendering the Notice since this "may assist in showing what the probabilities reasonably were" [*Bank Line v Arthur Capel and Company* (1919) AC 435]. Although the vessel was held for six weeks in total, it was released eleven days after the Notice was tendered, a fact which was taken into account by the Court.

*Masefield* also claimed that even if there had been hope of recovery at the time the Notice was tendered, an actual total loss had occurred at the moment of seizure. *Masefield's* counsel referenced the well-known *Kuwait Airways v Kuwait Insurance* litigation of 1996, quoting *Rix J*

*"In case of capture, because the intent is from the first to take away dominion over a ship, there is an actual total loss straightaway, even though there later be a recovery: see Dean v Hornby (1854) 3 El.& Bl 179 (a case of piratical seizure)"*

This argument was not accepted by the Court in *Masefield*. It was held that since the pirates had contacted the vessel's owners immediately after seizure, as indeed is the usual practice, there had been no intention "from the first to take away dominion". *Steel J* also added that the leading marine insurance textbook, *Arnould Law of Marine Insurance and Average*, rightly described the scenario of capture equating to an immediate actual total loss as "doubtful". The Judge differentiated between a loss of possession, which could be temporary, and loss of title, which is permanent.

Another strand of Masefield's case was that they had, in the alternative, suffered a constructive total loss under s60(1) of the Marine Insurance Act, which reads

*“Subject to any express provision in the policy, there is a constructive total loss 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.”*

Unfortunately for Masefield, the policy expressly excluded s 60(2) of the Marine Insurance Act, which deals with constructive total loss where an assured is deprived of possession by a covered peril with little prospect of recovery. Masefield therefore had to convince the Court that they tendered Notice of Abandonment since an actual total loss appeared unavoidable.

This alternative argument also failed, since in line with his previous reasoning, Steel J held that there had been no total loss, actual or constructive. Further, he noted that “abandonment” under s60(1) did not mean Notice of Abandonment, but bore the literal meaning of the loss of all hope of recovery. As before, the negotiations between pirates and Owners, begun immediately upon seizure and in keeping with piratical activity in the area, indicated that recovery was likely, and therefore the goods were not abandoned.

An argument raised by Masefield in both the actual and constructive total loss contexts was that the likelihood of release, if engendered by a ransom payment, should be disregarded as contrary to English public policy. It was accepted by all parties that since The Ransom Act of 1782 was repealed in 1981, payment of a ransom has not been illegal. Steel J's findings were that while ransom payments were indeed likely to encourage piratical activity, there was often little option but to make them, given that military or diplomatic assistance may not always be available, and bearing in mind the safety of crew. The Judge also noted the well established and

widespread market in kidnap and ransom policies, which indicated that payment of ransom monies could not be seen as contrary to public policy, a view reinforced by the case of *Westminster N V v Mountain* [1999] QB 674, in which a ransom payment was deemed recoverable as a sue and labour expense.

Ironically, the case was started after the insured goods were safely recovered. The dispute arose since the delay in delivery occasioned by the seizure reduced the price Masefield could obtain for them by some USD 7 million. In bringing the action, Masefield hoped to prove that it had, when it tendered Notice of Abandonment, been “irretrievably deprived” of the goods at that date, when they could have been sold at a greater value.

In the meantime, Masefield has established that seizure of non-perishable goods by pirates is unlikely to mean that an insured is “irretrievably deprived” of them under the Marine Insurance Act while negotiations for their release are ongoing, particularly now that payment of a ransom conclusively raises no public policy issues. Masefield is appealing the judgment and it remains to be seen if the decision will stand. The public policy decision is in marked contrast to the US Government's attempts to crack down on ransom payments, something that may well be raised in the appeal.