

NEWSSTAND

Piracy does not Pay: High Court Rules on the Interpretation of Actual and Constructive Total Loss

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Mr Justice David Steel handed down his judgment in the case of *Masefield AG v Amlin Corporate Member* [2010] EWHC 280 (Comm) on 18 February 2010. The judgment contains a consideration of the concepts of actual and constructive total loss under the Marine Insurance Act 1906 (the Act). A capture of a vessel by pirates does not automatically result in an actual total loss; the facts of each individual case will need to be considered.

Masefield AG (Masefield) was the owner of two parcels of bio-diesel which were shipped onboard the Bunga Melati Dua (the Vessel) owned by MISC, a state owned Malaysian company. Amlin Corporate Member (Amlin) had insured Masefield's cargo under an open cover contract. On 19 August 2008 the Vessel, a chemical/palm oil tanker, was seized by Somali pirates in the Gulf of Aden and taken to Somali waters at a position off the coast at Eyl.

Negotiations started between the owners of the Vessel and the pirates on 20 August 2008 and continued for about a month, resulting in the shipowners paying a ransom and the pirates releasing the Vessel together with cargo and crew. The recovered Vessel arrived at its original destination, Rotterdam, on 26 October 2008. On 18 September 2008, during the negotiations between the owner and the pirates, Masefield had served a Notice of Abandonment on Amlin, which was declined.

Masefield's case was that on the capture of the Vessel by the pirates the cargo was an actual total loss under s57 of the Act. In the alternative, Masefield claimed that there had been a constructive total loss under s60(1) of the Act as the Vessel and cargo had been reasonably abandoned on account of its total actual loss appearing to be unavoidable.

Steel J found that there had been no actual total loss under s57 of the Act. The Act required the owner to be "*irretrievably deprived*" of their property. This was an objective test based on the true facts as of the date proceedings began, in this instance 18 September 2008, the date the Notice of Abandonment was served. Although the fact of recovery was not material, the court was entitled to consider the surrounding facts, as this could assist it in ascertaining the probability that Masefield would be irretrievably deprived of its property as of that date.

In order to ascertain this probability, Steel J considered a number of factors, including the broad history of piracy in Somalia, expert evidence from a security consultant providing advice to the international shipping community, and reports of other captured vessels. He commented that the

nature of Somali piracy was such that the only realistic and effective manner of obtaining the release of a vessel was the negotiation and payment of a ransom. This was because the lack of any national administration meant that any attempt to intervene by diplomatic means was very difficult and military intervention involved a great many legal and technical difficulties. The modus operandi of the pirates was well known, they would take vessels in order to ransom them and negotiate payments with the owner or any other interested party for the release of the vessel, cargo and crew. The ransom payments normally represented an economic proportion of the value of the property at stake.

The expert's evidence was that "*it was more likely than not that the m/v Bunga Melati Dua would be released*" and that this was likely to happen after the payment of a ransom by the owners. Reports of other vessels taken by Somali pirates also suggested that it was highly likely that the Vessel and her cargo would be released within a relatively short period of time.

After considering what degree of probability was sufficient, the judge held that "*an assured is not irretrievably deprived of its 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).*" It was clearly not the case on these facts that recovery of the Vessel was impossible as it was common practice for Somali pirates to release vessels upon payment of a ransom.

Mr Justice David Steel therefore rejected Masefield's submission that there was an immediate actual total loss on capture of a vessel by stating that the impact and effect of a capture is fact sensitive and that a straightforward seizure has no effect on the proprietary rights of the assured.

It was for the same reasons that Masefield's claim of constructive total loss under s60 of the Act was also rejected by the High Court. The criteria for this section are that the subject matter must be abandoned (in the sense that the owners do not hope to recover it) because an actual total loss appears unavoidable. In these circumstances the Vessel did not appear to be unavoidably lost. Both the shipowners and Masefield had every intention of recovering their property and were fully hopeful of doing so.

This judgment includes a comprehensive consideration of previous case law on actual and constructive total loss. However, the court's conclusions were drawn on the basis of the factual background and specific circumstances surrounding - this particular capture of a vessel. The case confirms that authorities on actual and constructive total loss should not be applied without taking into account the fact that the rules they provide are fact sensitive. However, the judgment does suggest that it will be difficult for an insured to recover for actual or constructive total loss where the vessel in question has been hijacked by Somali pirates, and where negotiations for the vessel's release are undertaken by the owners.