Case No: 2009 FOLIO 260

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2010

Before :

MR JUSTICE DAVID STEEL

- -

Between :

MASEFIELD AG	**Claimant**
- and -	
AMLIN CORPORATE MEMBER LTD	**Defendant**

- -
- -

Sir Sydney Kentridge Q.C. & Andrew Henshaw (instructed by **Arbis LLP**) for the **Claimant**
Peter MacDonald Eggers & Sarah Cowey (instructed by **Waltons & Morse LLP**) for the **Defendant**

Hearing dates: 14 - 16 December 2009

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Judgment

Mr Justice David Steel :

Introduction

1. On 19 August 2008, the vessel *Bunga Melati Dua* ("the vessel") a chemical/palm oil tanker was seized by Somali pirates in the Gulf of Aden during a voyage from Malaysia to Rotterdam. The vessel together with her crew and cargo were taken to Somali waters. The Claimant was the owner of two parcels of bio-diesel which had been shipped onboard the vessel.

2. The Defendant was the insurer of the cargo under an open cover contract. This policy covered loss by both piracy and theft. Soon after the seizure, negotiations between the pirates and the owners of the vessel ("MISC") a state owned Malaysian company were commenced with a view to obtaining the release of the vessel, cargo and crew. During the course of those negotiations (about a month after the vessel had been seized) the Claimant served a Notice of Abandonment on the Defendant. This was declined but the parties entered into an agreement that proceedings should be deemed to have commenced on 18 September 2008. About 10 days later MISC paid a ransom to the pirates and the vessel was shortly thereafter released together with her crew. The vessel arrived at Rotterdam on 26 October where the cargo was discharged.

3. It is the Claimant's primary case that on the capture of the vessel by the pirates and its removal into Somali waters the cargo became an actual total loss in terms of *s57(1)* of the *Marine Insurance Act 1906* ("the *Act*") in that the assured had been "irretrievably deprived" of the cargo. In the alternative the Claimant asserted that there had been a constructive total loss under *s60(1)* of the *Act* in that the vessel and cargo had been reasonably abandoned on account of its actual total loss appearing to be unavoidable.

4. The Claimant does not dispute that there always existed a possibility, perhaps even a likelihood, that MISC would successfully ransom the ship but submits that the possibility of an effective ransom payment should be ignored for the purposes of both *s57(1)* and *s60(1).*

5. The marine open cover was in place for all of the Claimant's shipments commenced during the policy period. It was obligatory from both the perspective of the assured and the insurer. Declarations totalling US$13,326,481.75 were made in respect of the two parcels of cargo[1]. The claim in respect of the total loss is put forward in the sum of about US$7 million being the net loss allowing for receipts from the disposal of the cargo after discharge at Rotterdam.

6. The policy was an all risks policy albeit with a war exclusion clause which read as follows:-

> "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".

[1] There is a dispute about the effectiveness of part of these declarations.

7. Importantly there was a Constructive Total Loss clause to the following effect:

> "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."

8. It was accordingly common ground that both theft of cargo and the capture or seizure of the cargo by pirates were insured risks under the policy. It was also common ground that the effect of clause 13 of the policy was to exclude the additional category of constructive total loss provided for in *s60(2)(i)* of the *Act* relating to deprivation of the assureds possession in circumstances where it is "unlikely he can recover the ship or the goods as the case may be…".

9. Sadly during the course of the capture, one member of the crew of the vessel was killed. Thereafter no attempt was made to recover the vessel or cargo by military intervention. Nor were there any diplomatic or other such attempts to obtain their release.

10. The primary issue is whether, when notice of abandonment was served on 18 September 2008, the Claimant had been irretrievably deprived of the cargo (and likewise the shipowner of their vessel) and thus it had been actually totally lost albeit restored at a later date following payment of a ransom by or on behalf of the shipowners.

11. At the forefront of this analysis was the Claimant's reliance on the decision in ***Dean v Hornby (1854) 3 El & Bl. 180*** that was said to support the proposition that, in the case of capture by pirates who intend to exercise dominion over a ship or cargo, there is straightaway an actual total loss even though the property is later recovered.

Piracy in Somalia

12. The existence and nature of piratical attacks off Somalia is a matter of great notoriety and has claimed increasing column inches of headlines over the last 2 or 3 years. The background is simple enough. Somalia is a failed state with no effective government or law enforcement. It is also one of the poorest countries in the world. This provides a fertile breeding ground for piracy conducted by fishermen living along the lengthy seaboard of Somalia.

13. The absence of any national administration means that any attempt to intervene by diplomatic means is fraught with difficulty. Equally any concept of military intervention involves legal and technical difficulties, leaving aside the risk to captured crews. In short the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom. The scale of the problem is startling. In the 12 month period to November 2008 some 30 vessels were seized and then released on payment of ransoms in excess of $60million.

14. *Bunga Melati Dua* was the sixth ship to be hijacked in 2008. The seizure was in August.[2] It was taken to a position off the coast at Eyl. The initial ransom demand was well in excess of $2 million. But this was all of a piece with the process of Somali hijacking. Fortunately the process of negotiating such a demand and making an agreed payment had invariably led to the release of all vessels involved. Against that background, I did not understand it to be controversial that the actual prospects of recovery of the cargo as at 18 September were good. In any event, the evidence is overwhelmingly in support of that conclusion.

15. Following the seizure, there were contacts and communications between the Claimant, the Defendant, the other cargo-owners, and the shipowner, MISC, discussing the situation. In addition from the moment the vessel was seized, its taking and subsequent developments were reported in the press and these were circulated amongst the interested parties. Many of these reports clearly emanated from MISC, the shipowner, and the Malaysian Government, who own a stake in MISC.

16. The following represents a selection of such exchanges and reports.

    i) On 20th August 2008, only a day after the seizure, one of the shippers of the cargoes, Carotech Berhad - a Malaysian company - sent an email stating that "MISC is in the progress the negotiation with the pirates".

    ii) On 24th August 2008, the Claimant circulated an email internally with the un-confirmed information that the pirates had contacted the owners and had demanded a ransom of $2million and that the Malaysian government had asked the US government for help.

    iii) On 26th August 2008, the Claimant received a message from MISC stating that "Negotiations are ongoing to secure the safe release of the crew members".

    iv) On 26th August 2008, Lloyd's List reported that "The Malaysian government is holding talks with the pirates behind the attack to secure the release of the 39 crew members, the country's deputy prime minister added …".

    v) On 28th August 2008, Clarksons, MISC's brokers, informed the Claimant that "Owners are doing their utmost to secure the release of the crew …".

    vi) On 31st August 2008, MISC briefed the families of the 65 Malaysian crew members of *Bunga Melati Dua* and *Bunga Melati 5* (a sister vessel which had been seized on 29th August 2008), at which the shipowner said that "the ordeal will be over in 30-40 days" (as reported by the Malaysian National News Agency on 4th September 2008).

    vii) On 2nd September 2008, MISC issued a press release confirming that "… Negotiations are ongoing for the safe release of the crew of *MT Bunga Melati Dua* … At least 30 ships have been hijacked in the Gulf of Aden this year … In all known cases, the crew are known to be unharmed by the pirates …".

[2] Her sister vessel BUNGA MELATI 5 was seized 10 days later.

viii) On 2nd September 2008, the director of the International Maritime Bureau (IMB), Captain Pottengal Mukundan, was reported in thestar.com as saying that "the negotiations could take between two to three months before the crewmen could be released. "It is not a quick fix. The pirates are not interested in the cargo but money," he said".

ix) On 2nd September 2008, an MISC representative confirmed that "it has a team in constant contact with the pirates". In the same report, it was also stated that "The pirates are reported to have demanded over RM3mil for the release of each vessel …" and that "two Malaysian navy vessels with navy commandos and rations are heading to the Gulf of Aden to help free the crewmen and tankers *mt Bunga Melati Dua* and *mt Bunga Melati Lima*".

x) On 15th September 2008, Lloyd's List reported the Malaysian National Security Council secretary as saying that "negotiations with the pirates who hijacked the tankers *Bunga Melati 2* and *Bunga Melati 5* were going well … We hope the negotiations will bring positive results …".

xi) On 22nd September 2008, Clarksons wrote to the Claimant's chartering consultant (Mendocino) stating that: "Negotiations with the hijackers of both vessels are progressing well. Communication with *MT Bunga Melati Dua* is carried out on a daily basis and based on the latest communication, all crew members onboard are safe and are in relatively good condition … Owners are committed to ensure the safety of crew remain as the first and immediate priority of the company, apart from speedy release of crew, vessel and cargoes. To protect and safeguard the safety of crew and their families, we are not able to provide any detailed information on the negotiation at this point of time".

17. Within a week of the last-mentioned message, the vessel, cargo and crew were released. The Defendant submitted, and I accept the submission, that it is evident from the above exchanges that:

i) The shipowner, MISC, was in contact with the pirates very soon after the vessel was seized.

ii) The pirates had demanded a ransom and the shipowner was negotiating the ransom with a view to securing the safety of the crew as well as the vessel and cargo.

iii) Given the values of the vessels (and the cargoes), it was obvious that the shipowner would pay the ransom of US$4 million - or indeed the initially demanded sum of US$4.7 million - in exchange for the safety of the crew members' lives and property worth well in excess of US$80 million.

iv) By 31st August 2008, the Malaysian government was indicating to the crew members' families that the "ordeal" would be over in 30-40 days.

v) By 2nd September 2008, the Malaysian navy had sent two naval vessels to the area, the obvious implication being that the vessels carried the ransom payments and would be used to escort back the two MISC vessels.

vi) By 15th September 2008, Lloyd's List was reporting that the negotiations were going well.

18. Based on these communications alone, it was apparent that the vessel, cargo and crew were likely to be released in short order, as proved to be the case.

The pirates' *modus operandi*

19. Even without the above exchanges and press reports, much was known about the *modus operandi* of Somali pirates. It is clear that they 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.

20. On 20th August 2008, the day after the vessel's seizure, Mr Noel Choong, the head of the International Maritime Bureau's (IMB) piracy reporting centre in Kuala Lumpur, is reported as referring to the taking of *Bunga Melati Dua* and saying that "Once the ship enters Somali waters, Choong said pirates were likely to demand ransom for the release of the vessel and the crew … Negotiations were ongoing in all cases [of other piracies] after pirates demanded for the release of the crew …".

21. Also, on 20th August 2008, the Claimant circulated internally a Reuters report which stated that "In most cases Somali pirates have treated their hostages with care in the hope of receiving a substantial ransom payment …".

22. On 19th September 2008, the Claimant's insurance broker, Swinglehurst, received a circular from Dolphin Maritime, which was forwarded to the Claimant on 23rd September 2008. Dolphin Maritime at that time stated that "We write in general terms because these cases tend to follow a pattern and also because our comments may be of assistance so far as possible future cases are concerned … The ship crew and cargo are taken to Somali waters and detained there. The hijackers then demand a ransom … Typically based on our knowledge the pirates ask for $3-4m and settle for a ransom of about $1-1.5m. The shipowners usually control the negotiations via their professional negotiators, and pay the ransom in the first instance … The negotiations usually take some time, between 6 & 8 weeks being the norm before the ship and cargo and crew are released. On the positive side, we are not aware of a case in the past with Somali hijackings where the ship and crew and cargo have not been released. The hijackers seems more interested in the ransom money than trying to sell the cargo or ship …".

23. It was therefore evident that Somali pirates would demand a ransom and would release the vessel, cargo and crew upon payment. It was also likely that the ransom would be paid and that the vessel, cargo and crew would be released.

The expert evidence

24. The Defendant called Mr James Wilkes, a consultant providing security advice to the international shipping community, to give expert evidence on the manifestation of Somali piracy, the method of hijacking merchant vessels and the prospects and manner of obtaining the release of such vessels all with particular relevance to the *Bunga Melata Dua*. Although he was called to give oral evidence and was briefly

cross-examined on behalf of the Claimant, there was no material challenge to his written report.

25. Mr Wilkes's evidence corroborated the contemporaneous material. In his report dated 8th October 2009, Mr Wilkes concluded that "it was more likely than not that the m/v BUNGA MELATI DUA would be released", that there was "a high expectation that the ship, its crew and its cargo would be recovered by MISC Bhd following the eventual payment of a ransom" and that it was not unlikely that the cargoes would be recovered within a reasonable time.

26. Mr Wilkes's conclusion reflects the following considerations:

i) There have been a relatively large number of seizures by Somali pirates between 2007 and 2009. Mr Wilkes records that "there has yet to be a case where a merchant ship that has been hijacked by Somali pirates, where the ship, its crew and cargo (where laden) has not subsequently been released".

ii) Prior to 18th September 2008, 9 vessels had been taken and released by Somali pirates between 2007 and 18th September 2008 (and a further two - excluding *Bunga Melati Lima* - were released prior to the release of *Bunga Melati Dua* on 29th September 2008). Of those 9 vessels, the ransom details are known in respect of 5 ships.

iii) Mr Wilkes's evidence was that there is a typical profile for a Somali pirate seizure and that the "safest, most timely and effective means to secure the release of a ship's crew in such circumstances has proven to be, in case after case, to negotiate and subsequently pay a ransom". Mr Wilkes also states that the seizure of Bunga Melati Dua was consistent with the typical profile.

iv) Consistent with the typical profile, Mr Wilkes believes that the pirates made a ransom demand by 22nd-23rd August 2008 and that ransom negotiations had started by 24th August 2008. The fact that a ransom demand was made and a negotiation would follow would mean, according to the typical profile, that the vessel and crew (and cargo) would be released on payment of the agreed ransom.

v) The Somali pirates would not be interested in keeping the cargo and there was no risk of the cargoes being discharged. As a result, there would be a "*high expectation*" that upon the vessel being released, the cargoes would also be released.

vi) The presence of the Royal Malaysian Naval vessels in the area in early September 2008 would indicate that the ransom negotiations were drawing to a conclusion, for the purposes of delivering the ransom and escorting the released vessels.

vii) The vessel's detention for 41 days was close to the then average period of detention of 37 days and within the then known range of 21-68 days.

Other vessels

27. For the purposes of his report, Mr Wilkes had tabulated details of every vessel taken by Somali pirates during the period between 2007 and 2009, recording when the vessel was taken and released, and insofar as they are known, the details of the ransom demand and payment. Considering the statistics revealed by this table, it was plain that the vessel and her cargo would be released within a relatively short period of time.

The actual recovery of the cargoes

28. A striking feature of this case is that the cargoes were in fact safely recovered following MISC's payment of a ransom to the pirates for the release of the crew, vessel and cargo. The release occurred less than 6 weeks after the vessel was seized. The sister vessel was detained for only 31 days. Moreover, the release occurred only 11 days after the Claimant saw fit to tender a notice of abandonment.

Actual total loss ("ATL")

29. The issue is whether on 18 September 2008 the Claimant was "irretrievably deprived" of the cargo. The test is objective and is to be assessed on the true facts as at that date whether or not known or apparent to the assured: ***Marstrand Fishing Co Ltd v Beer (1936) 56 Ll. L. Rep. 163***. Although the actual fact of recovery within a short period is not directly material let alone decisive the court is entitled to consider what in fact happened after the relevant date as this "may assist in showing what the probabilities really were, if they had been reasonably forecasted": see ***Bank Line, Limited. v Arthur Capel and Company [1919] A.C. 435*** per Lord Sumner at p 454.

30. The material set out above demonstrates:

    i) Both the contemporaneous correspondence and the information in the public domain showed that all interested persons (including the Claimant) were fully aware that the cargoes were likely to be recovered.

    ii) This is entirely consistent with the unchallenged expert evidence.

    iii) Other vessels seized by Somali pirates had been promptly released following negotiations over a relatively short period.

    iv) Indeed the vessel and cargo were safely recovered only 11 days later upon payment of a ransom representing a tiny proportion of the value of the ship and cargo.

31. What degree of probability is sufficient for these purposes? The short answer, in my judgment, is that 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).

32. In ***George Cohen, Sons & Co v Standard Marine Insurance Co (1925) 21 Ll. L. Rep. 30*** an obsolete warship grounded off the Dutch coast was held not to be an actual total loss because it "physically could be got off". Such it was found would have been "a matter of great elaboration and difficulty":

> "It would be an engineering feat requiring considerable preparation and … very high expenditure, but it could be done so far as the physical feat was concerned… In these circumstances, there has been no irretrievable deprivation which a Court can find by reason of physical impossibility."

33. Likewise in ***Panamanian Oriental Steamship Corporation v Wright [1970] 2 Lloyd's Rep. 365***, a vessel had been detained by Vietnamese Customs Officials and subsequently confiscated by a "special court". In due course the owners received legal advice that release could only be achieved by payment of bribes to various officials. In the result, given a finding of a CTL, the claim for an ATL became academic but Mocatta J commented as follows:

> "It may be true that the order of confiscation divested the plaintiffs of the legal ownership of the vessel as is the case after condemnation of a ship by a Prize Court. But the test of irretrievable deprivation is clearly far more severe than the test of unlikelihood of recovery of possession and, despite the gloomy prospects for the future as at Aug. 29, 1967, I feel unable to find that the plaintiffs were at that date irretrievably deprived of their vessel."[3]

34. In ***Fraser Shipping Ltd v Colton [1997] 1 Lloyd's Rep. 586***, the plaintiffs' vessel was insured against ATL only. Whilst under tow it stranded on a Chinese island. It was clear that the costs of salvage would be prohibitive. Potter LJ sitting in the Commercial Court addressed the claim for an ATL as follows:

> "As to the definition of actual total loss, whether the plaintiffs were "irretrievably deprived" of the vessel prima facie depends upon whether, by reason of the vessel's situation, it was wholly out of the power of the plaintiffs or the underwriters to procure its arrival. It seems to me that this, in turn, depends upon whether the vessel could have been physically salved or not. The undisputed evidence in this respect was to the effect that it was feasible to salvage the vessel subject to accessibility and cost."

35. It follows from these decisions, which are not challenged, that for the purposes of establishing irretrievable deprivation the assured must establish that the recovery is impossible. Yet despite the fact that the Claimant accepts that there was a reasonable hope if not likelihood of recovery it is contended that an ATL occurred as and when the vessel was seized by pirates.

36. As indicated the starting point here is said to be ***Dean v Hornby supra***. The facts as summarised in the margin headnote were as follows

> " A ship was insured on a time policy, for a year ending 21st April 1852. In December 1851, being on her homeward voyage

[3] The Court of Appeal reversed the decision on the grounds that the finding that the Special Court was not an independent judicial body was not established on the evidence and thus cover was excluded.

from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan: in January 1852 she was recaptured by an English war steamer; and a prize master took the command, and brought her to Valparaiso. Intelligence of all these facts reached the owners, at one time, about the end of April 1852; and they, on 30th April 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to Her Majesty's steamer." The underwriters refused to accept.

The vessel was sent home by the recaptors from Valparaiso, under the command of a prize master, with instructions to proceed to Liverpool, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into Fayal on 19th August 1852, where she was sold by the prize master, being then in a state not justifying the sale."

37. The judgments are short and need be cited at some length:

i) Lord Campbell C.J.

"I am of opinion that, according to English law, the plaintiffs, in conformity with decided cases, are entitled to judgment. The underwriters undertake for the safety of the ship from April 1851 to April 1852. In December 1851 she is taken by pirates. Then, in fact, a total loss has occurred. After that, she never is restored to the owners; nor have they had an opportunity of regaining possession. They have lost the possession by events over which they have no controul, and therefore are entitled to the indemnity for which they have paid. The cases referred to establish this principle: that, if once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. The right to obtain it is nothing: if that were enough to prevent a total loss, there never would in this case have been a total loss at all; for pirates are the enemies of mankind, and have no right to the possession. The question therefore is, Had the owners ever, after the capture, the possession or the means of obtaining possession? That principle is to be found in *Holdsworth* v. *Wise* (7 B. & C. 794), *Parry* v. *Aberdein* (9 B. & C. 411) and *M'Iver* v. *Henderson* (4 M. & S. 576). In *Bainbridge* v. *Neilson* (10 East, 329), which is a case relied upon by Mr. Cowling, the property was actually restored before the action was brought. In *Thornely* v. *Hebson* (2 B. & Ald. 513) the owners, before they brought the action, had the means of obtaining possession. In both cases the principle is acknowledged. At what time, in the present case, did there cease to be a total loss? When had the assured either the possession or the means of obtaining it? Whether the detainer

was rightful or wrongful is immaterial: for the possession was taken away by the plaintiffs and never restored to them."

ii) Coleridge J

"I am of the same opinion. There was a capture by pirates; and, if that were all, there would unquestionably be a total loss. The question, therefore, is as to what has occurred since. The vessel is recaptured by an English man of war; a prize master is put on board: and she is brought back to England, not on her original voyage, but with a view to proceedings in the Court of Admiralty. She receives damage, and is ordered to be sold. These are all the facts that are material; for we have nothing to do with what occurred in the Admiralty Court: nor is the question of the right to the possession material: that right was never out of the plaintiffs. But the material question is, Whether the possession was ever restored to the plaintiffs; and it never was, from the first to the last. As to the notice of abandonment, I agree with my Lord that it is enough if this is given in reasonable time, and that the time here was reasonable."

iii) Wightman J

"The question here is, Whether that which was at one time a total loss has been converted into a partial one. To make that so, the circumstances ought to be such as either to restore the possession to the assured, or to afford them the means of obtaining possession. Here there never was a restoration in fact, nor the means of regaining possession: what was done after the capture by the pirates was the act of the recaptor: the vessel remained out of the controul of the assured; the recaptor brought her to another port, where she was sold; and she was then brought to England. The assured, therefore, never had an opportunity of taking possession; and there never ceased to be a total loss. The case is not unlike *Cologan* v. *London Assurance Company* (5 M. & S. 447)."

38. This decision is said to support the proposition that capture by pirates constitutes an ATL without more since it follows that the insured has neither the possession of the vessel nor the means of obtaining it. This analysis is supported, it is claimed, by dicta of Rix J in ***Kuwait Airways v Kuwait Insurance [1996] 1 Lloyd's Rep. 664***:

"In case of capture, because the intent is from the first to take 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)".

39. In my judgment there are a number of insuperable difficulties with this submission. By way of introduction two points are important:

i) The impact and effect of a capture is very fact sensitive. Where a vessel is seized as a prize and condemned in a prize court, property is transferred and on any view the former owner is irretrievably deprived of the vessel. Mere seizure by pirates without more has no impact on the proprietary interests in a vessel. The suggestion in regard to the present case that in demanding a ransom the pirates were requiring the owners to repurchase the vessel and cargo is a felicitous but inaccurate summary of the situation. What has been transferred is possession and not title and the question thus arises, in my judgment, as to whether recovery of possession is legally or physically impossible.

ii) Of course, where possession is lost, recovery will often be unlikely (or in its former guise uncertain) whereby the threshold requirement for a CTL claim may be established though in these circumstances the assured must elect to treat it as such by service of a notice of abandonment, a step not applicable in cases of ATL.

40. Viewed in isolation, ***Dean v Hornby*** might be read as determining that a capture by pirates as such would constitute a total loss. Thus the Court's emphasis on the contingent total loss created by the capture: possession was never restored to the owners as a result of the extraordinary concatenation of subsequent events. But by the same token the emphasis on the timeliness of the notice of abandonment following arrival at Valparaiso demonstrates that the claim was in fact advanced as a constructive total loss and not as an ATL.

41. The need to draw a distinction between a claim for an ATL where property is beyond recovery and a claim for a CTL with an associated requirement for notice of abandonment where recovery is uncertain was well established in the early 19th century. A good example is to be found in ***Roux v Salvador (1836) 3 Bing. NC 266***:

> "But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages, that the object **[286]** of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases —there may be a capture, which, though

> primâ facie a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value."

42. In support of its principal submission, the Claimant also relied on ***Stringer v English and Scottish Marine Insurance Company (1868-69) L.R. 4 Q.B. 676***. This was another capture case. The vessel had been captured by the U.S. army during the American Civil war. An application for condemnation as prize failed. Initially the owners elected to treat the loss as partial. But when an appeal was issued, the plaintiffs gave notice of abandonment to their underwriters which was held to be invalid as circumstances had not changed. In due course the US Court threatened to sell the ship and cargo, a course of action which could have been prevented by the posting of bail. Neither the owners nor the underwriters posted the bail because the currency exchange rate was highly unfavourable and subject to violent fluctuation. Ship and cargo were duly sold. The claim for total loss succeeded despite the ability to post bail to prevent it.

43. The underlying analysis is to be found in the judgment of Baron Martin in the Exchequer Chamber ***(1869-70) LR 5 QB 599***. The claim was initially advanced as a CTL following the capture. But matters changed following the order for sale:

> "But the matter proceeds further than that. The goods are taken into New Orleans, and proceedings are immediately instituted in the prize court there for the purpose of their condemnation; this suit proceeded for upwards of eighteen months, and in the meantime, as we might expect, the goods became very much deteriorated. In the result the prize court determined that the capture was not a lawful capture, and decreed restitution accordingly; but the captors did what they had a right to do, they appealed to the Supreme Court at Washington, and, while

> the appeal was pending in that court, an order was made by that court, which I apprehend was a perfectly lawful order, that the cargo should be sold and the proceeds of sale deposited as the law directed. That order being made, the propel officer proceeded with the sale; and, in my opinion, when that sale took place, the property in those goods was taken out of the owner, so that it became impossible for him to take those goods, under his original ownership, to the port of discharge; and, upon that taking place, the goods—I will not say were totally lost, because I have complained of that being an ambiguous expression—but were taken entirely from the owner's dominion and control, and were absolutely taken away from him; and in my judgment, after that event took place, the word "abandonment," in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was, that there was, in my judgment, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy; but the underwriter was entitled to the proceeds of the goods."

44. How then is this decision consistent with the requirement for an ATL that it be legally and physically impossible to recover the goods when bail could be posted? It was not just the fact that, with the deterioration of the value of the "greenback", the sum to be posted as bail was such as "no sane man would give". Nor was it merely the fact that the goods at this stage (a year after the capture) had deteriorated almost to the level of total destruction (this being the catalyst for the sale). The crucial ingredient was that the condemnation had removed the goods from the owners' dominion and control

45. In contrast to those "very unusual circumstances" it is of note in the present case that the condition of the ship and cargo off Somalia had not deteriorated significantly in the period up to the abandonment to underwriters, the ransom sought whilst large was on a par with sums paid by other owners and represented only a tiny proportion of the overall value but most important of all the cargo-owners had lost only possession and not dominion over (or property in) their goods.

46. The contrast between a constructive total loss where an owner acting as a prudent uninsured would not incur the risk and expenses of recovering a vessel and an actual total loss following formal sale of property by a competent court was also at the heart of ***Cossman v West (1888) 13 App. Cases 160*** where Sir Barnes Peacock giving the judgment of the Privy Council said this:

> "There seems to be no doubt that, after the abandonment of the barque by the master and crew, and when the owner first received notice thereof, the vessel was in such a hopeless condition that the risk and expenses of endeavouring to save her were such that no prudent uninsured owner would have incurred them. There was, consequently, a constructive total loss, and the plaintiff might, when he first received notice of the loss, or within a reasonable time afterwards, have given

> notice of abandonment to the underwriters, in which case he could have recovered for a total loss. It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: Mullett v. Sheddon."

47. It is indeed clear that the law of constructive total loss based on notice of abandonment had its origin in cases of capture. The principle was that "the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not.": per Lord Atkinson in ***Moore v Evans [1918] 1 AC 185***. There is no suggestion in the authorities that a capture not associated with a transfer of property (which could only be achieved by an order of a competent court) would constitute an ATL for which no notice of abandonment was required.

48. I have not forgotten the proposition that there is confirmation that the decision in ***Dean v Hornby*** is authority for the proposition that capture by pirates constitutes an actual loss to be found in ***Kuwait Airways v Kuwait Insurance [1996] 1 Lloyd's Rep. 664*** at p. 683:

> "In case of capture, because the intent is from the first to take dominion over a ship, there is an actual total loss straightaway, even though there later be a recovery: see Dean v. Hornby…"

49. But the Claimant places undue reliance on this passage:

    i) The premise is fact sensitive. The intention of pirates can be various. As the cited passage from ***Cory v Burr (18812-83) L.R. 8 App. Cas. 393*** set out immediately thereafter shows acts of pirates "do not in themselves necessarily occasion any loss". At one extreme are pirates who "steal" the vessel and use her for trading (or indeed further piratical acts). At the other extreme are pirates who simply retain possession of the vessel and her crew to extort a ransom which they know from past experience will be (albeit reluctantly) paid.

ii) As stated in a later passage at p.685 in the context of citing the award of Mr Michael Kerr in ***Dawson's Field*** "the planes were not lost when hijacked but when destroyed since "wait and see" is an essential ingredient in a ransom situation".

iii) The passage relied upon is but a side observation in a non-marine case. The suggestion of capture leading to ATL straightaway is rightly described as a "doubtful" by the editors of *Arnould Law of Marine Insurance and Average 17th Ed.* para 28-03 note 9.

50. In this regard I regard the judgment of Porter J in ***Marstrand Fishing Co v Beer [1937] 1 All ER 158*** as particularly instructive:

> "First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone I do not think was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think it is certain, even then, that that result would follow. Normally, I think capture is a constructive total loss, and the confusion which has arisen, with regard to whether it is an actual or a constructive total loss, arose merely because, in the earlier cases, the distinction between those two classes of loss was not kept clear. In the same way, damage may amount to a constructive total loss, but I think will not amount to an actual total loss, though it may amount to an actual total loss if it has been followed by sale so as to make the position one in which the vessel was lost to her owners by the proper sale after sufficient damage to justify it. The class of case I am referring to is *Dean v Hornby* and *Stringer v English & Scottish Marine Insurance Co*. However that may be, whether under the old law capture was or was not an actual or constructive total loss, the case is now governed by the Marine Insurance Act 1906, ss 56 to 60. That Act provides in s 57, amongst its definitions of "actual total loss," "if the vessel be irretrievably lost". In my view, no one could say here that the vessel was irretrievably lost to her owners. Under the Marine Insurance Act, loss by barratry is

> [not] necessarily an actual total loss, and this case I find there was no actual total loss."[4]

51. The discussion in non-marine cases is also instructive. In the well known ***Dawson's Field*** incident the hijackers had made a demand for the release of "political" prisoners. In the event when those demands were not met, they blew up the seized planes. In the reasons for his award dated 29 March 1972 Michael Kerr QC, having cited ***Dean v Hornby*** and other authorities, went on as follows:

> "The substance of the Respondents' submission is well summarised in two passages from the authorities on which they relied by way of illustration. In Cory v Burr (1883) A.C. 303 at p 398 Lord Blackburn was dealing with "the ordinary enumeration of perils against the loss from which the Underwriters undertake to indemnify the assured". He said:
>
>> "Many of these, as for instance men-of-war, enemies, pirates, rovers, and I may add barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get, their property back."
>
> Lord Blackburn then referred to Dean v Hornby (1854) 3 E& B 180 at p 190 where Lord Campbell said in a case of dispossession by pirates:
>
>> The cases referred to establish this principle: that, if once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration.
>
> Having reconsidered all the relevant authorities I am convinced that passages such as these cannot be applied literally to facts such as those in the present case, for the following reasons. First, they all occur in the context of a loss resulting from a specifically defined peril such as "capture" or "pirates", and in situations in which the persons who deprived the owners of possession clearly intended there and then to deprive him of possession and ownership forever, if they could. "Deprivation of possession" as such was not an insured peril, let alone a term of art to describe a case of total loss. This expression only took on the semblance of having this effect when it was used as part of the definition of a constructive total loss in section 60 of the Marine Insurance Act 1906. It is therefore dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery. Secondly, even in

[4] There is a clear typographical error: the last sentence should read "loss by barratry is **not** necessarily an actual total loss".

> the Act of 1906 this concept is only a prima facie basis for a case of total loss. It is qualified by unlikelihood of recovery (for which I substitute uncertainly of recovery in the present context) and, as shown by Polurrian v. Young, this in itself is qualified by the notion of non-recovery within a reasonable time. "Wait and see" is therefore to some extent always an essential ingredient of a claim for total loss in circumstances involving deprivation of possession, unless (perhaps) there is a deprivation within the terms of specifically enumerated perils such as "capture" or one can infer from the circumstances that there was a clear intention at the time of the dispossession permanently to deprive the owner of possession and ownership. This is quite different from a "ransom" situation such as in the present case. It also distinguishes the present case from the case dealt with by Mr Roskill, which was a case of theft, with the aircraft being flown away to an unknown destination, only being traced subsequently, and where he held that the proximate cause of the loss was the theft. In my view, as was said by Parker J. (as he then was) in Webster v. General Accident (1953) 1 Q.B. 520 at pp.531/2, every case in which there has been a dispossession must depend on its own facts as to whether and at what stage a total loss has occurred. One must consider the facts concerning the dispossession, the apparent intention of the person or persons concerned, whether or not or to what extent the whereabouts of the subject matters are known, and allow for the lapse of a period of time to form a view about the prospects of recovery; i.e. whether the loss is total or only partial. In the circumstances of the present case I do not believe that any Court could properly have held that the owners of the hijacked aircraft at Dawson's Field were entitled to recover for a total loss if such an action had been brought to trial between 6th and 12th September 1970. I therefore reject the contention that these aircraft were total losses before they were blown up."

52. The concept of "wait and see" was picked up again in ***Scott v Copenhagen Reinsurance Co. UK Ltd [2003] 2 All ER (Comm) 190***. This concerned the BA aircraft marooned at Kuwait airport after the Iraqi invasions. The aircraft was later destroyed in the bombing. Rix LJ commented at para 76:

> "Care must no doubt be taken with that expression, because it is capable of being used in two senses. In its real sense, it refers to a situation which is subject to a process of development and change. Will a ransom be paid and honoured and the property recovered?"

53. Before turning to various specific points relating to the significance that the pirates having seized the vessel were seeking to extort a ransom I must deal with the alternative claim for a CTL.

54. For this purpose, the Claimant must satisfy the criteria contained in *Sect 60 of the Marine Insurance Act 1906*:

    i) The subject matter must be abandoned

ii) Because an ATL appears unavoidable.

55. In my judgment these criteria are not met. In the first place the vessel and its cargo were not abandoned in the relevant sense. What is required is not a notice of abandonment in the sense of *Sections 61, 62 and 63* of the *Marine Insurance Act* but the abandonment of any hope of recovery. The distinction is spelt out in ***Court Line v R (1945) 78 Ll. L. Rep 390*** in the judgment of Lord Justice Scott at pp395/396:

> “When the ship is spoken of as "abandoned on account of its actual total loss appearing to be unavoidable," the word is used in nearly the same sense as when according to the law of salvage the ship is left by master and crew in such a way as to make it a "derelict," which condition confers on salvors a certain but not complete exclusiveness of possession, and a higher measure of compensation for salvage services. But to constitute the ship a "derelict," it must have been left (a) with that intention (*animo derelinquendi*) (The John and Jane, 4 C. Rob. 216); (b) with no intention of returning to her; and (c) with no hope of recovering her. Obviously that sense of the word is frequently inappropriate to the second case to which the first sub-section applies, namely, because it could not be preserved from total loss (that is, an economic test) "without an expenditure which would exceed its value when the expenditure had been incurred.”
>
> Another distinction between those two alternative grounds in sub-s. (1) for claiming a constructive total loss is that in the latter case the financial estimate is one which normally would be made by the owner; whereas the forecast of the probability of actual total loss would, at any rate a century ago, nearly always have to be made by the master on the spot; and even in these days of easy and quick wireless communication, the decision would very often devolve on the master. The making of the financial estimate is, of course, merely an exercise of business judgment and discretion. The abandonment which follows after it may be expressed in a letter and not in boats as in the first alternative; or be a mere mental decision by the owner that he will exercise the option which Sect. 61 allows him. There is a somewhat similar contrast between the two alternatives of sub-s. (2) (i) (a) and (b) . In Sect. 61 the word "abandonment" seems to import an act on the part of the assured, but in truth it amounts usually to nothing more than his making up his mind to give notice of abandonment to the insurer under Sect. 62 (1) , at the peril of losing his right of election under Sect. 61. The legal consequences of a notice of abandonment if accepted by, or established as valid against, the insurer is to pass the property to the underwriter as an abandonment to him under Sect. 61. A valid "abandonment" in Sect. 63 necessarily means an abandonment by the assured to the insurer and passes the property to him. It cannot be the

> same act as is contemplated by Sect. 60 (1), where the act is done in consequence of an actual total loss appearing unavoidable. That abandonment, for example, by the master and crew leaving the ship with the intention of never returning, etc., may lead up to and justify a subsequent abandonment to the insurer, but the two are wholly different acts, and distinct in kind."

56. No such abandonment has occurred. To the contrary the shipowners and the cargo owners had every intention of recovering their property and were fully hopeful of doing so.

57. In any event, for all the reasons set out earlier in this judgment there was no reasonable basis for regarding an ATL as unavoidable.

58. This leads to the question whether the fact that the pirates were holding the ship to ransom to which the owners succumbed alters this analysis. The Claimant in this regard says this: although the payment of a ransom was not illegal it was contrary to public policy. Thus the facility for recovering property by payment of a bribe should not be treated as relevant or appropriate when considering whether a vessel and her cargo were in practice irretrievable.

59. Issues of public policy must be approached with great caution: ***Fender v St John Mildmay [1938] AC 1***. The often cited passage from the speech of Lord Atkin is sufficient for present purposes:

> "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."

60. I am wholly unpersuaded that it would be right to categorise the payment as contrary to public policy:

    i) As already noted the payment of ransom is not illegal as a matter of English law (nor I can assume as a matter of Somali, Swiss or Malaysian law).

    ii) Circumstances have arisen where legislative action has intervened to make such payments illegal: see e.g. the *Ransom Act 1782*. The courts should refrain from entering into the same field.

    iii) So far as harm is concerned it is true that payments of ransom encourage a repetition, the more so if there is insurance cover: the history of Somali piracy is an eloquent demonstration of that. But if the crews of the vessels are to be taken out of harm's way, the only option is to pay the ransom. Diplomatic or military intervention cannot usually be relied upon and failure to pay may put in jeopardy other crews.

61. In short the "balance of convenience" is far from clear cut. In these circumstances with no clear and urgent reason for categorising the activity as contrary to public

policy the court should resist any temptation to enter the field in the manner suggested by the Claimant.

62. This conclusion is fortified by the wider implications of any contrary conclusion. Kidnap and ransom cover (whether for personnel or property) is a long standing and important feature of the insurance market. Are such policies (acceptable to the industry) to be rendered unenforceable?

63. It is also to be noted that payments of a ransom are recoverable as a sue and labour expense: see ***Royal Boskalis Westminster NV v Mountain [1999] QB 674***. Albeit the point was not pursued in argument and left Pill LJ concerned as to whether recovery was repugnant to English notions of legality, the majority's view is a strong indication that the Claimant's position is misconceived:

> "The terms in which the duty under section 78(4) is expressed are wide enough on their natural meaning to embrace expenditure necessary to procure the release of a vessel that has been seized and I see no reason of policy or practice why they should not do so. If that is right, then it would be strange indeed if such expenditure did not fall within the sue and labour clause. In my judgment the assumption of the editors of *Arnould* that payment of a ransom, if not itself illegal, is recoverable as an expense of suing and labouring is well founded."

64. The reference to *Section 78(4)* leads to a further point raised by the Claimant that it could not be regarded as under any duty to pay the ransom and for that reason such payment was to be disregarded for the purposes of assessing whether the property was retrievable (or the loss unavoidable). I disagree. The existence or otherwise of a duty is irrelevant. The only issue is whether the required expenditure would or might lead to recovery. Further and in any event the payment was in fact reasonable given the contrast between the sum required and the value of the property. In the result the fact that shipowners paid a ransom inevitably defeats the Claimant's claim.

65. Lastly theft. As a matter of English criminal law a demand for ransom against return of property may well constitute a theft. Whether that be so or not is irrelevant. The issue here is whether there has been an irretrievable deprivation (or a total loss appearing to be unavoidable) regardless of the intentions of the pirates. Further the pirates' clear intention was to return the property on payment of the ransom.

66. I conclude that the claimant has not made out its claim for a total loss whether actual or constructive. This renders it unnecessary to consider an alternative issue raised by the defendant as regards late declaration of freight under the policy.