

Court of Appeal clarifies issues relating to Marine Insurance, Piracy, and the treatment of Ransom Payments as a matter of English Law and Public Policy

Author: Mark F. Connoley, Partner, London

Author: Alexandra E. Allen, Associate, London

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Masefield AG v Amlin Corporate Member Ltd [2011] EWCA 24

The Facts

The vessel "BUNGA MELATI DUA" was captured in the Gulf of Aden by Somali pirates, while carrying cargo belonging to the Claimant. Negotiations for the payment of a ransom, to which the Claimant was not a party, were commenced by the vessel's owners and the ship, crew and cargo subsequently released. Prior to the release, the Claimant made a claim under its cargo policy on the grounds that seizure by pirates amounted to an actual total loss.

The Court of Appeal's Decision

Does seizure by pirates amount to an actual total loss under a marine insurance policy?

The Claimant had argued that the cargo became an immediate actual total loss when the vessel was seized by pirates, whatever the prospects of recovery. The Defendant submitted that section 57(1) of the Marine Insurance Act 1906, which requires the insured to be "irretrievably deprived", would only be satisfied if there was a physical or legal impossibility of recovery and, in this case, the cargoes were not irretrievably lost as there was a good chance of the ransom negotiations being successful.

The Court rejected the proposition that there was a rule of law that the seizure of a vessel by pirates amounted to an "actual total loss". It held that it is ultimately a question of fact as to whether the insured has been irretrievably deprived of possession and in this case, the seizure did not amount to an actual total loss.

There could be no actual total loss where there was not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure the recovery of both. The Claimant had not been irretrievably deprived of its property.

Ransom Payments and Public Policy

The Claimant submitted that it was not permissible to take into account the payment of a ransom as a relevant, legitimate reason in calculating the possibilities of recovery. The payment of ransom was so undesirable from the point of view of the public interest that it could not be part of an insured's duty to pay a ransom demand. The property in question must be irretrievably lost where the only means of recovery was by an act which an insured could not reasonably be expected or required to do. The Defendant argued that the payment of a ransom was neither illegal nor contrary to public policy and so the prospects of recovery by payment of a ransom could be taken into account when applying the test of irretrievable deprivation.

The Court referred to the issues surrounding the payment of ransoms to pirates as "morally muddied waters", but held that the payment of a ransom is not against public policy. There is no "universally recognised principle of morality", "clearly identified public policy" or "incontestable public interest" which would lead it to hold otherwise.

Comment

The Court's decision as to whether seizure by pirates amounted to an actual total loss was based on a factual analysis of the likelihood that the vessel and her cargo would be recovered. The Court observed that the motive of pirates in seizing vessels is generally to obtain the ransom payment, upon receipt of which a vessel, its crew and cargo are released. In light of this, in similar circumstances, it appears unlikely that seizure by pirates could ever amount to an actual total loss. However, the position may differ if the ransom demand is a much greater proportion of the value of the ship and cargo, or if there is any other reason to believe that a ransom will not be paid or, if paid, would not secure the release of the vessel.

It is also interesting to note that an analogy was drawn by the Claimant between the payment of a ransom and the payment of a bribe, in the context of its argument that the payment of a ransom is an "illegitimate and unreasonable means of recovery". Although the Court did not consider this to be a sound analogy, the potential comparison could give rise to a question of

whether, once the Bribery Act 2010 (the "Act") comes into force, ransom payments are illegal under this Act.

The Court was not directly concerned with the application of the Act (because it is not yet in force). However, the Court observed that there is no legislation expressly precluding the payment of a ransom and to do so is, therefore, not illegal, although "bribery or constructive bribery may well be". It commented that the payment of a ransom in these circumstances is prima facie not a bribe, "done for the purpose of obtaining an improper advantage". This draws a direct comparison with the Act, which defines as an offence a situation where financial advantage is offered or given to induce or reward the improper performance of a function or activity, or where the acceptance of the advantage itself constitutes improper performance.

In light of the Court's comments it is unlikely that a ransom payment, in these circumstances, would contravene the provisions of the Act.

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