

CASE NOTE

**MASEFIELD AG v AMLIN CORPORATE MEMBER LTD;  
THE BUNGA MELATI DUA\***

**PIRACY, RANSOM AND MARINE INSURANCE**

KATE LEWINS<sup>†</sup> AND ROBERT MERKIN<sup>‡</sup>

*[The issue of piracy rarely comes before the courts, but the recent spike in piratical activity off the coast of Somalia has seen it reappear. This case note discusses one cargo owner's attempt to claim loss by piracy against a marine insurance policy, and considers the circumstances in which such losses may be recoverable. Given that the policy covered piracy as an insured peril — as do most marine policies — the failure of the claim may seem somewhat surprising.]*

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\* [2010] 2 All ER 593, affd [2011] 3 All ER 554.

<sup>†</sup> BJuris, LLB (UWA), LLM (Southampton), PhD (Murdoch); Associate Professor, School of Law, Murdoch University.

<sup>‡</sup> LLB (Wales), LLM (Lond); Professor of Commercial Law, University of Southampton; consultant to Norton Rose. Our thanks go to the two anonymous referees for their helpful comments. This case note had its genesis in separate papers delivered by the authors on the same topic: Rob Merkin at the inaugural Conference of the Hong Kong Centre for Maritime and Transportation Law, City University of Hong Kong in March 2010, and Kate Lewins at the Maritime Law Association of Australia and New Zealand Annual Conference in Melbourne on 14 October 2010.

## I INTRODUCTION

The notion of piracy conjures up images of swashbuckling characters from ages past. Contemporary culture tends to romanticise<sup>1</sup> what is in fact a terrifying threat to life and property that is occurring somewhere in the world each day.

Of course, piracy is hardly a new problem.<sup>2</sup> There are records of piracy in Ancient Greek writings, and it was mentioned in a treaty between the Romans and the Carthaginians in around 509 BC.<sup>3</sup> In the 1500s and 1600s, and right through to the 19<sup>th</sup> century, piracy was rife in various hotspots throughout the world — the Caribbean, South America, the Mediterranean Sea and the Indian Ocean to name a few.<sup>4</sup> Pirates were not far removed from privateers, the only difference being that privateers were given permission by their governments to pillage foreign ships as a way of supplementing the resources of what were meagre national navies at the time.<sup>5</sup> Davidson credits the reduction of the piracy plague during the 19<sup>th</sup> century to the creation of national navies and the technological developments of the age of steam and iron, together with the increased colonial presence in far-flung regions, and says that '[a]t the turn of the twentieth century piracy was an almost negligible problem'.<sup>6</sup>

However, piracy soon flared again. In the latter part of last century, South-East Asia, and particularly the Malacca Strait, bore the dubious honour of being the region with the highest concentration of pirate activity.<sup>7</sup> Piracy continues in other parts of the world,<sup>8</sup> but it is now the Somali pirates that seem to capture public attention because of the exponential increase in attacks in that region since the mid 2000s. There is ample literature about the causes of this spike in piracy and attempts to combat it.<sup>9</sup> The size of the problem is substantial. In 2009 alone,

<sup>1</sup> For an entertaining look at the place of pirates (and maritime law) in fiction and film, see Jonathan M Gutoff, 'The Law of Piracy in Popular Culture' (2000) 31 *Journal of Maritime Law and Commerce* 643.

<sup>2</sup> The history of piracy is outside the focus of this case note other than by way of general background. For a more detailed analysis of the history of piracy consider Peter Earle, *The Pirate Wars* (Methuen, 2003). See also A T Whatley, 'Historical Sketch of the Law of Piracy' (1874) 3 *The Law Magazine and Review* 536; Joel H Samuels, 'How Piracy Has Shaped the Relationship between American Law and International Law' (2010) 59 *American University Law Review* 1231, 1233–4, and particularly the authorities cited in 1233 n 10.

<sup>3</sup> Whatley, above n 2, 537.

<sup>4</sup> See Yonah Alexander, 'Maritime Terrorism: An Overview of Challenges and Responses' in Yonah Alexander and Tyler B Richardson (eds), *Terror on the High Seas: From Piracy to Strategic Challenge* (ABC-CLIO, 2009) 1, 8–14. See also Samuels, above n 2, 1233–4.

<sup>5</sup> For a discussion of privateers, see Alfred P Rubin, *The Law of Piracy* (Transnational Publishing, 2<sup>nd</sup> ed, 1998) ch 2.

<sup>6</sup> Scott Davidson, 'Dangerous Waters: Combating Maritime Piracy in Asia' (2000) 9 *Asian Yearbook of International Law* 3, 4–5.

<sup>7</sup> For example, of the 471 piracy incidents reported to the International Maritime Organization in the year 2000, 112 occurred in the Malacca Strait: International Maritime Organization, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report — 2000*, UN Doc MSC/Circ.991 (31 March 2001) 1 [5]. See also *ibid* 8.

<sup>8</sup> Notably in Asia: see International Maritime Organization, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report — 2010*, UN Doc MSC.4/Circ.169 (1 April 2011) 2 [6]; Davidson, above n 6, 8.

<sup>9</sup> See, eg, Douglas Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?' (2010) 11 *Melbourne Journal of International Law* 141; James Kraska and Brian

some 50 vessels were seized by so-called Somali pirates,<sup>10</sup> almost all eventually being released upon payment of ransom. According to the International Maritime Bureau, as at 1 December 2011 there have been 230 incidents of piracy for the year — which equates to more than one incident every two days.<sup>11</sup> Twenty-six ships have been hijacked and 450 hostages taken.<sup>12</sup> At the time of writing, Somali pirates are holding 10 ships and 172 hostages.<sup>13</sup> The size of ransoms is not always something widely disclosed, but evidence has been presented in an English court that in the 12 months from November 2008, 30 vessels were seized and released upon payment of over US\$60 million.<sup>14</sup> Industry chatter would suggest that the average ransom for an average vessel in 2009–10 was in the region of US\$2–4 million.<sup>15</sup>

It was inevitable that these piratical attacks would eventually lead to contested insurance claims for the losses resulting from piracy. This case note discusses one such case decided by the English courts, *Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua*. The first instance judgment<sup>16</sup> was delivered by Steel J of the English High Court on 18 February 2010, and the judgment of the Court of Appeal<sup>17</sup> was handed down on 26 January 2011.

## II *MASEFIELD AG v AMLIN CORPORATE MEMBER LTD; THE BUNGA MELATI DUA*

### A *The Facts*<sup>18</sup>

Masefield ('the insured') owned a cargo of biofuel that was being carried from Malaysia to Rotterdam on board the *Bunga Melati Dua*, a MISC Bhd ('MISC') vessel. Amlin was the insurer of the cargo under an open cover policy, which used a modified form of the standard London *Institute Cargo Clauses (A)*

Wilson, 'Maritime Diplomacy and Piracy in the Horn of Africa' [2008] (161) *Maritime Studies* 13; Omer Elagab, 'Somali Piracy and International Law: Some Aspects' (2010) 24 *Australian and New Zealand Maritime Law Journal* 59; Milena Sterio, 'The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution' (2010) 59 *American University Law Review* 1449.

<sup>10</sup> Mark McDonald, 'For Somali Pirates, 2009 Is a Record Year', *The New York Times* (New York), 30 December 2009, A9.

<sup>11</sup> International Chamber of Commerce International Maritime Bureau, *Piracy News & Figures* (1 December 2011) <<http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>>.

<sup>12</sup> And the situation is becoming increasingly violent. Four hostages were murdered by pirates in a single incident in February 2011: Adam Nagourney and Jeffrey Gettleman, '4 Americans Killed by Pirates on Yacht after 4-Day Ordeal', *The New York Times* (New York), 23 February 2011, 1. As at 1 December 2011, a total of 15 hostages have been killed by Somali pirates in 2011.

<sup>13</sup> International Chamber of Commerce International Maritime Bureau, above n 11.

<sup>14</sup> *Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua* [2010] 2 All ER 593, 597 [13] (Steel J).

<sup>15</sup> See, eg, Zack Phillips, 'Increase in Pirate Attacks Draws More K&R Capacity' (2010) 44(35) *Business Insurance* 1.

<sup>16</sup> [2010] 2 All ER 593 ('*Masefield EWHC*').

<sup>17</sup> [2011] 3 All ER 554 ('*Masefield EWCA*').

<sup>18</sup> The facts below are taken from the judgment of Steel J at first instance in *Masefield EWHC* [2010] 2 All ER 593.

(‘*ICC(A)*’) wording.<sup>19</sup> This provides that an insured is entitled to recover for loss of cargo from any physical cause other than those specifically excluded.<sup>20</sup> It was not disputed that piracy was an insured peril.<sup>21</sup> On 19 August 2008, the *Bunga Melati Dua* was seized by Somali pirates in the Gulf of Aden. Tragically, one crew member died during the seizure. Within a matter of days there was dialogue between MISC and the pirates about the negotiation of a ransom to be paid for the safe release of the vessel, its crew and cargo. There was cogent evidence as to the almost invariable practice of the Somali pirates of negotiating release for ransom.<sup>22</sup> There was also evidence put before the Court of the active negotiations taking place for the release of the vessel within days of its seizure.<sup>23</sup> The cargo owners did not seem to participate actively in the negotiations with the pirates. This was not unusual. Indeed, the practice is for shipowners (and their insurers) to keep cargo interests out of such negotiations.

On 18 September 2008, the insured served a notice of abandonment on its insurers with respect to the cargo, which was rejected by the insurers. The parties agreed, in accordance with standard London market practice, that proceedings should be deemed to have commenced on that date. That is a significant point, because the date on which the proceedings commence (or are deemed to commence) is the date on which the question of whether or not there was a constructive total loss (‘CTL’) is assessed: the question is not what actually happened but rather how things looked on that date.

Some 10 days later the ransom was paid by MISC,<sup>24</sup> and the vessel, crew and cargo were released shortly afterwards. The vessel steamed for Rotterdam and discharged the cargo on 26 October 2008. The vessel had been detained for about six weeks in total. There was no evidence that the cargo had been physically damaged in that time, but it had missed its market and was devalued as a result.

Despite the fact that the goods had been retrieved, the insured commenced proceedings in the High Court. The insured claimed that at the time of its notice

<sup>19</sup> Institute of London Underwriters, *Institute Cargo Clauses (A)* (CL252, 1 January 1982) <<http://www.iaa.co.uk>>. In 2009, these clauses were updated: Lloyd’s Market Association and International Underwriting Association of London, *Institute Cargo Clauses (A)* (CL382, 1 January 2009) <<http://www.iaa.co.uk>>. The clauses of *ICC(A)* discussed in this case note did not substantively change in the 2009 version.

<sup>20</sup> *ICC(A)*, above n 19, cl 1.

<sup>21</sup> There are also (B) and (C) wordings, which cover only specified risks: Institute of London Underwriters, *Institute Cargo Clauses (B)* (CL253, 1 January 1982) cl 1 <<http://www.iaa.co.uk>> (‘*ICC(B)*’); Institute of London Underwriters, *Institute Cargo Clauses (C)* (CL254, 1 January 1982) cl 1 <<http://www.iaa.co.uk>> (‘*ICC(C)*’). Piracy is not an insured peril under those wordings: *ICC(B)* cl 6.2; *ICC(C)* cl 6.2. Note that, as with *ICC(A)*, *ICC(B)* and *ICC(C)* were updated in 2009: Lloyd’s Market Association and International Underwriting Association of London, *Institute Cargo Clauses (B)* (CL383, 1 January 2009) <<http://www.iaa.co.uk>>; Lloyd’s Market Association and International Underwriting Association of London, *Institute Cargo Clauses (C)* (CL384, 1 January 2009) <<http://www.iaa.co.uk>>. Again, the clauses of *ICC(B)* and *ICC(C)* discussed in this case note did not substantively change in the 2009 versions.

<sup>22</sup> *Masefield EWHC* [2010] 2 All ER 593, 599–600 [19]–[27] (Steel J).

<sup>23</sup> *Ibid* 597–8 [15]–[17].

<sup>24</sup> Those paying ransoms have to distance themselves from the pirates lest they become implicated as accomplices. Many ransoms are delivered by helicopter drop onto beaches: see Jonathan Steer, ‘Piracy and General Average’ (2009) 23(8) *Maritime Risk International* 14, 15. However, it is not known if that is what happened here.

of abandonment it had been irretrievably deprived of the cargo, which was therefore an actual total loss ('ATL') under s 57(1) of the *Marine Insurance Act 1906* ('MI Act').<sup>25</sup> Section 57 reads (emphasis added):

- (1) 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.
- (2) In the case of an actual total loss no notice of abandonment need be given.

The insured relied upon the 1854 case of *Dean v Hornby*<sup>26</sup> as authority for the proposition that an ATL occurs as soon as insured goods are captured by pirates who intend to exercise dominion over them, even if the goods are recovered later.<sup>27</sup>

Alternatively, it claimed the cargo was a CTL pursuant to s 60(1) of the *MI Act*. That section 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.<sup>28</sup>

It was to the CTL claim that the notice of abandonment was relevant. There can be no claim for CTL without a notice of abandonment,<sup>29</sup> although the fact of its rejection (as here) does not affect the validity of the notice itself and thus the right of the insured to argue that there has been a CTL.<sup>30</sup>

It is to be noted that there was no claim for partial loss, which at first sight seems surprising given that what had been lost was in effect half of the value of the cargo. There are probably two reasons for this: there had been no physical loss, which is a prerequisite for a claim under a maritime policy on goods; and even if there was a loss, one proximate cause of it was probably the delay in getting the goods to market, and delay is an excluded peril. We consider this point below.<sup>31</sup>

### B *First Instance Judgment*

Steel J held that it was clear that Somali pirates capture vessels with the intention of releasing them upon payment of ransom.<sup>32</sup> Expert evidence established that this capture had followed the typical profile of a seizure accompanied by a

<sup>25</sup> 6 Edw 7, c 41. If it were an ATL claim only, then the notice of abandonment would have been unnecessary: s 57(2).

<sup>26</sup> (1854) 3 El & Bl 180; 118 ER 1108.

<sup>27</sup> *Masefield EWHC* [2010] 2 All ER 593, 597 [11] (Steel J).

<sup>28</sup> The policy wording stipulated that s 60(2)(i) did not apply to this insurance: *ibid* 596 [8].

<sup>29</sup> *MI Act* s 62(1).

<sup>30</sup> This was agreed between the parties: see *Masefield EWHC* [2010] 2 All ER 593, 595–6 [2] (Steel J).

<sup>31</sup> See below Part III(B).

<sup>32</sup> *Masefield EWHC* [2010] 2 All ER 593, 599 [19].

ransom demand, and that the pirates would not be interested in keeping the cargo when they released the ship.<sup>33</sup> Steel J concluded that as at 18 September 2008, the prospects of recovery of the vessel and cargo were good.<sup>34</sup> This was borne out by the fact that the vessel was in fact released some 10 days after the notice of abandonment.

Steel J reviewed the authorities and concluded that for the purpose of establishing irretrievable deprivation of the goods sufficient to constitute an ATL, the insured had to establish that recovery was impossible.<sup>35</sup> In particular, he rejected the suggestion that early authority — notably *Dean v Hornby*<sup>36</sup> — established that piratical seizure was automatically an ATL. In the absence of any absolute principle to that effect, ATL could not be made out on the facts of the case.

However, the issue of whether or not the seizure constituted a CTL was less straightforward. The notion of CTLs based on notices of abandonment had its origin in capture cases,<sup>37</sup> when ships were captured by pirates with no intention of returning them. The test for a CTL following a seizure is whether the subject matter is likely to be returned within a reasonable time, and for this purpose market practice accepts that the relevant period is 12 months from the date of seizure, assessed at the date when legal proceedings are commenced (ie when the notice of abandonment is rejected).<sup>38</sup> But, his Honour said, the existence of a CTL is heavily dependent on the facts.<sup>39</sup> In a ransom situation, a ‘wait and see’ approach is justified, while capture where the intention of the captors was clearly to permanently remove the goods from the owners would be an ATL situation.<sup>40</sup> Here, although the insured had filed the notice of abandonment, it had not actually abandoned the goods in the relevant sense of *abandoning any hope* of recovery: all parties were still hopeful of recovering their property, and had every intention of doing so.<sup>41</sup>

The insured, anticipating that the Court would reject the arguments that there had been either an irretrievable deprivation of the goods or that the goods were unlikely to be returned, countered this by arguing that the Court ought not take into account the fact that the payment of a ransom would probably secure the release.<sup>42</sup> It was said that the payment of a bribe should not be relevant in considering whether a vessel and cargo were irretrievable, for two reasons:

<sup>33</sup> Ibid 600 [26].

<sup>34</sup> Ibid 597 [14].

<sup>35</sup> Ibid 602 [35].

<sup>36</sup> (1854) 3 E1 & B1 180; 118 ER 1108.

<sup>37</sup> *Masefield EWHC* [2010] 2 All ER 593, 607 [47] (Steel J).

<sup>38</sup> Richard Milestone, Peter Glover and Claire Berwick, *When Does Piracy Constitute a Total Loss?* (7 November 2011) Safety4Sea <<http://www.safety4sea.com/analysis/53/85/when-does-piracy-constitute-a-total-loss>>.

<sup>39</sup> *Masefield EWHC* [2010] 2 All ER 593, 607–8 [49]–[50] (Steel J), quoting *Marstrand Fishing Co Ltd v Beer; The Girl Pat* [1937] 1 All ER 158, 163–4 (Porter J).

<sup>40</sup> *Masefield EWHC* [2010] 2 All ER 593, 608–9 [51] (Steel J), quoting with approval a passage from the award in *Dawson's Field* (Unreported, Arbitration, Michael Kerr QC, 29 March 1972).

<sup>41</sup> *Masefield EWHC* [2010] 2 All ER 593, 610–11 [55]–[56] (Steel J).

<sup>42</sup> Ibid 596 [4].

- 1 because payment of bribes is contrary to public policy;<sup>43</sup> and/or
- 2 because the insured could not be regarded as being under any duty to pay the ransom, even as a sue and labour expense.<sup>44</sup>

Steel J was not prepared to hold that the payment of bribes was contrary to public policy: indeed, he was ‘wholly unpersuaded’.<sup>45</sup> There was no legislation rendering payment of ransom illegal, although there had been in the past, and it was, according to his Honour, not a place for courts to stray.<sup>46</sup> While acknowledging that payment of ransom encourages repetitive acts of piracy, it is often the only way to get the crew and vessel out of harm’s way.<sup>47</sup> His Honour pointed out that his conclusion was supported by the fact that the courts allow ransom payments to be recovered as a sue and labour expense<sup>48</sup> and by the fact that kidnap and ransom insurance was a ‘long-standing’ feature of the insurance market.<sup>49</sup>

On the second ground, that there could be no duty to pay a ransom, Steel J was again not prepared to be drawn. He skirted the moral question and said that ‘[t]he only issue’ was ‘whether the required expenditure ... might lead to recovery.’<sup>50</sup> The payment was reasonable given the value of the goods being retrieved. The fact that the *shipowners* paid the ransom defeated the insured’s argument in any event.

The insured’s final submission was that there had been theft of its property. Again, the judge said that there was not an irretrievable deprivation of property as the pirates intended to return the property upon payment of the ransom.<sup>51</sup>

This sentence perhaps sums up the entire case for the insured: ‘In the result the fact that [the] shipowners paid a ransom [and that the property was returned] inevitably defeats the claimant’s claim.’<sup>52</sup>

Accordingly, his Honour dismissed both of the insured’s claims (for ATL or alternatively CTL). The insured appealed from that judgment and the appeal was heard in October 2010.

<sup>43</sup> Ibid 520 [58].

<sup>44</sup> Ibid 612 [64].

<sup>45</sup> Ibid 611 [60].

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 611–12 [63], quoting *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 as authority.

<sup>49</sup> *Masefield EWHC* [2010] 2 All ER 593, 611 [62].

<sup>50</sup> Ibid 612 [64].

<sup>51</sup> Ibid 612 [65]. On this he was wrong. The *Theft Act 1968* (UK) c 60 provides that although there has to be an intention to permanently deprive the owner of his or her goods for there to be theft (s 1), there is an exception where the goods are held to ransom: see s 6; *R v Raphael* [2008] EWCA Crim 1014 (13 May 2008) [40]–[47] (Judge P). However, that would not have assisted the insured because there was still no ‘loss’: see below Part III(B).

<sup>52</sup> *Masefield EWHC* [2010] 2 All ER 593, 612 [64] (Steel J).

### C Court of Appeal Judgment

The Court of Appeal handed down judgment on 26 January 2011.<sup>53</sup> The leading judgment was delivered by Rix LJ.

By the time of the appeal hearing, the insured had confined its claim to one of ATL, discarding the CTL argument. (This in itself was interesting as Steel J had given the ATL argument short shrift at first instance, concentrating on the CTL claim.) The facts of the case as found by Steel J were not challenged.

Counsel for the insured sought to establish two principles:

- 1 that 'capture by pirates created an immediate ATL, whatever the prospects of recovery might be';<sup>54</sup> and
- 2 that 'the law would not or could not take account of the payment of a ransom'<sup>55</sup> in considering the possibility of recovery; that it could be no part of the insured's duty to preserve the property to pay the ransom and therefore the property must be lost if the only means of recovery was to do something the insured could not reasonably be expected to do.<sup>56</sup>

The insured argued, therefore, that since at the time proceedings were deemed to have commenced (namely the date on which the notice of abandonment had been rejected) the cargo had not been recovered, it was entitled to succeed.<sup>57</sup>

The first proposition to be considered was whether the insured had been 'irretrievably deprived' of the goods as required to constitute an ATL under s 57(1) of the *MI Act*. Rix LJ reviewed the various authorities that established the 'utmost rigour'<sup>58</sup> with which this requirement had been applied.<sup>59</sup> While the insured claimed to accept that requirement generally, it argued that the case law supported a specific proposition relating to piracy, which is that 'piracy, like capture[,] ... operates immediately as an ATL, unless there is recovery (before the date of commencement of proceedings).'<sup>60</sup> In effect, the insured was saying that the cases supported the view that irretrievable deprivation was satisfied immediately upon piratical capture. The insured once again relied upon *Dean v Hornby*.<sup>61</sup>

However, his Honour found, on analysis, that *Dean v Hornby* and those cases decided subsequent to it did not support a finding of the nature relied upon by the insured. Rix LJ carefully dissected the *Dean v Hornby* case and then gave it context by examining cases on losses from piracy, capture and similar perils,

<sup>53</sup> *Masefield EWCA* [2011] 3 All ER 554.

<sup>54</sup> *Ibid* 557 [2] (Rix LJ).

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* 557 [5].

<sup>57</sup> *Ibid* 557 [2].

<sup>58</sup> *Ibid* 560 [16].

<sup>59</sup> *Ibid* 560–1 [19]–[25].

<sup>60</sup> *Ibid* 561 [25].

<sup>61</sup> Although this time with a slightly different twist to at first instance, where it argued both CTL and ATL.



from both before the *MI Act*<sup>62</sup> and after.<sup>63</sup> On proper analysis,<sup>64</sup> his Honour concluded that the judgments in those cases were concerned with various matters, such as proximate cause and whether the facts supported a CTL at the time of capture, and at what later point the loss may ‘mature into’<sup>65</sup> an ATL. His Honour found that there was no rule of law that could be derived from those cases that a loss by capture would immediately constitute an ATL, though on certain facts that may be the result.<sup>66</sup>

Rix LJ said:

In the light of all this material, I conclude that, subject to [the insured’s] second point about the public policy of paying a ransom, piratical seizure in the circumstances of this case ... was not an actual total loss. It was not an irretrievable deprivation of property. It was a typical ‘wait and see’ situation. The facts would not even have supported a claim for a CTL, for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery. ... There is no rule of law that capture or seizure is an ATL. The subject-matter is not amenable to a rule of law at all: it is all ultimately a question of fact.<sup>67</sup>

Here, there was ‘not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum ... would secure recovery’ of both ship and cargo, and therefore it was not an ATL.<sup>68</sup> Rix LJ also disposed of the insured’s alternative argument that the cargo had been the subject of theft, by pointing out that even if there had been a theft the insured could not establish loss by reason of irretrievable deprivation of the cargo.<sup>69</sup>

His Honour then moved to deal with the final submission. This was that the Court could not take into account the fact that the ship and cargo could be released upon payment of a ransom in determining whether the cargo was an ATL, because such a payment would be against public policy. His Honour agreed with the judge at first instance that the payment of ransom was neither illegal,<sup>70</sup> nor, it would seem, against public policy, although he acknowledged that there had been no consensus about such matters to date.<sup>71</sup> Nor could payment of ransom be seen as analogous to payment of a bribe.<sup>72</sup> The industry and govern-

<sup>62</sup> In particular, *Roux v Salvador* (1836) 3 Bing NC 266; 132 ER 413; *Stringer v The English and Scottish Marine Insurance Co Ltd* (1869) LR 4 QB 676, affd (1870) LR 5 QB 599; *Cory v Burr* (1883) 8 App Cas 393; *Andersen v Marten* [1908] AC 334.

<sup>63</sup> *Polurrian Steamship Co Ltd v Young* [1915] 1 KB 922; *Marstrand Fishing Co Ltd v Beer* [1937] 1 All ER 158; *Dawson’s Field* (Unreported, Arbitration, Michael Kerr QC, 29 March 1972); *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd’s Rep 664; *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] 2 All ER (Comm) 190.

<sup>64</sup> Which included having to correct a statement made in one of his own judgments about the effect of the *Dean v Hornby* decision: see *Masefield EWCA* [2011] 3 All ER 554, 570–1 [52], 572 [56] (Rix LJ).

<sup>65</sup> *Ibid* 572 [56].

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* 573 [60]. See above n 51.

<sup>70</sup> *Masefield EWCA* [2011] 3 All ER 554, 574 [63] (Rix LJ).

<sup>71</sup> *Ibid* 575 [66].

<sup>72</sup> *Ibid* 577 [73]–[74].

ment positions on ransom were discussed,<sup>73</sup> and the moral dilemma posed by piratical seizure clearly weighed heavily:

In these morally muddled waters, there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition. There are only elements of conflicting public interests, which push and pull in different directions ...<sup>74</sup>

The insured submitted that it could not reasonably be required to pay a ransom to release the vessel because it was contrary to public policy. Therefore, the insured argued, ‘a piratical seizure which can be brought to an end only by the payment of a ransom must be regarded as though it provided no prospects of recovery at all, thus fulfilling the test of an ATL.’<sup>75</sup> Rix LJ, however, dismissed this as a non sequitur:

The fact that there may be no duty to make a ransom payment does not turn a potential total loss which may be averted by the payment of ransom into an actual total loss ... In any event, all ... questions of reasonableness are pertinent to CTL, but not to the incidence of ATL.<sup>76</sup>

As had occurred at first instance, the fact that the ransom had been paid by the shipowners, and the ship, crew and cargo released, meant the inevitable defeat of the insured’s claim.<sup>77</sup> This was not a case about whether it was reasonable for the insured to be required to pay the ransom or not, because this simply had not occurred. The cargo had been returned unharmed because someone else had paid the ransom.

### III DISCUSSION

There are three aspects that this case note seeks to discuss. First, we make a brief comment on the question of ransom and public policy. Secondly, we look at why (in our view) the insured’s case was always doomed to fail given the cover provided, but how another claim might succeed. Thirdly, we delve into the hypothetical situation of an insured being obliged to pay, or choosing to pay, a ransom contribution — we explore whether, and when, an insured may be able to claim that payment against an insurance policy.

#### *A Ransom and Public Policy*

The *Masefield* judgments, both at first instance and on appeal, are sensible and pragmatic, as well as well-supported in law. In confirming that payment of ransom is not against public policy, it seems that in the United Kingdom (‘UK’)

<sup>73</sup> Ibid 575–7 [67]–[71].

<sup>74</sup> Ibid 576–7 [71].

<sup>75</sup> Ibid 577 [72].

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 578 [77].

at least,<sup>78</sup> it is acceptable to pay for the release of crew, vessels and cargo (as distasteful as this may be to some). As both Courts acknowledged, once the pirates have the vessel and crew under their control, there are few other options available.

There is no escaping the fact that the payment of ransom encourages repeat attacks; it also allows pirates to, in effect, invest in their business by purchasing all manner of technology, from swift vessels to armoury and GPS systems.<sup>79</sup> There is anecdotal evidence that piracy is supporting entire villages in Somalia.<sup>80</sup> However, the most worrying development is undoubtedly the growing fear that ransom payments may well be finding their way into the pockets of terrorists. Elagab notes that while some commentators consider that the ties between Somali pirates and terrorists are strengthening, at this stage the more prevalent view is that there is no systematic connection — although ‘the potential for a link remains.’<sup>81</sup>

This has been a concern, particularly for the United States (‘US’), for quite some time. On 13 April 2010, President Barack Obama signed an Executive Order ‘effectively forbidding US persons or entities from being involved in the payment of ransoms to Somali pirates under certain circumstances.’<sup>82</sup> The Executive Order proscribes payments destined for certain named entities and persons. Clearly, this will have the greatest impact on ransom payments coming from the US or from US citizens. Although as a matter of US law the Order has extraterritorial effect<sup>83</sup> and extends to non-US entities,<sup>84</sup> it is far from obvious

<sup>78</sup> The position in the United States may differ and is discussed below.

<sup>79</sup> Elagab, above n 9, 60.

<sup>80</sup> See, eg, Mohamed Olad Hassan, ‘Rich Somali Pirates Creating Boomtowns’, *The Star World News* (online), 19 November 2008 <<http://www.thestar.com/News/World/article/539942>>; David Blair, ‘Somali Pirate Port Becomes Boom Town’, *The Telegraph* (online), 18 November 2008 <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3479001/Somali-pirate-port-becomes-boom-town.html>>.

<sup>81</sup> Elagab, above n 9, 64.

<sup>82</sup> ‘US Threat to Hostages’ (2010) 24(4) *Maritime Risk International* <<http://www.i-law.com/ilaw/doc/view.htm?id=247121>>; Barack Obama, ‘Executive Order Concerning Somalia’ (Executive Order, 13 April 2010) <<http://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia>>. This should be seen in the context of the series of UN resolutions concerned with Somalia: see, eg, SC Res 1844, UN SCOR, 63<sup>rd</sup> sess, 6019<sup>th</sup> mtg, UN Doc S/RES/1844 (20 November 2008), although this resolution is more concerned with the prevention of supply of materials to the pirates. More detailed discussion of the Resolution and the Executive Order is beyond the scope of this case note but is pursued by Elagab, above n 9, 72–4. A useful discussion of the US position can be found in Lawrence Rutkowski, Bruce G Paulsen and Jonathan D Stoian, ‘Mugged Twice?: Payment of Ransom on the High Seas’ (2010) 59 *American University Law Review* 1425.

<sup>83</sup> 18 USC § 2339B(d) (2006) provides as follows:

Extraterritorial jurisdiction. —

(1) In general. —

There is jurisdiction over an offense under subsection (a) if —

- (A) an offender is a national of the United States ... or an alien lawfully admitted for permanent residence in the United States ... ;
- (B) an offender is a stateless person whose habitual residence is in the United States;
- (C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

that courts in other jurisdictions would recognise or enforce it. The problem may be at its most acute where a US shipowner is insured in, say, London, and the owners of cargo on board the insured vessel assert that the shipowner cannot pay a ransom because doing so would expose it to sanctions under the Executive Order. The reality may be that the shipowner's insurers will ensure that the ransom is paid and that the vessel is released, and in ascertaining whether there is a likelihood of release the court would look to such practicalities of the situation. The Executive Order is, therefore, unlikely to make much difference outside the US. However, it does add to the other indications that a US court may well hold a different view from Steel J as to whether payment of ransom is contrary to public policy. Nonetheless, as Rix LJ was at pains to point out,<sup>85</sup> pirates are not classified as terrorists. If they were terrorists, then the public policy position as to payment of ransom may well be different.<sup>86</sup> That said, terrorism is, at least in the absence of special negotiation, an excluded peril under standard wording London market cargo and hull policies,<sup>87</sup> so the point is unlikely to be significant in the context of insurance.

*B Insuring against Pirate Attacks — When Might an Insured Recover against an Insurer?*

One fundamental problem for the insured was that it sought to claim that its property had been lost when, by the time of trial, it had been recovered. At first blush, particularly to those unfamiliar with the machinations of marine insurance, the cargo owner seemed to be seeking, in effect, some sort of windfall.<sup>88</sup> However, the law adopts a prospective attitude, by gauging how things look at the date of the commencement of proceedings (ie the date of the rejection of the notice of abandonment). It is far from unknown for a court to adjudge that a vessel was a CTL even though, by the time of trial, the vessel had been repaired and was again trading.<sup>89</sup>

- (D) the offense occurs in whole or in part within the United States;
- (E) the offense occurs in or affects interstate or foreign commerce; or
- (F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction.—

There is extraterritorial Federal jurisdiction over an offense under this section.

<sup>84</sup> Ibid § 2339B(d)(1).

<sup>85</sup> *Masefield EWCA* [2011] 3 All ER 554, 575 [66].

<sup>86</sup> Ibid.

<sup>87</sup> *ICC(A)*, above n 19, cl 7.3; International Underwriting Association of London, *International Hull Clauses* (CL601, 1 November 2003) cl 30.1 <<http://www.iaa.co.uk>>.

<sup>88</sup> The insured's total loss was 'about US\$7 million, being the net loss allowing for receipts from the disposal of the cargo after discharge': *Masefield EWHC* [2010] 2 All ER 593, 596 [5] (Steel J).

<sup>89</sup> Indeed, in seizure cases this may apply also to an ATL. See *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] 2 All ER (Comm) 190, where aircraft seized by Iraq on the invasion of Kuwait were held to have been lost on the date of seizure even though by the time of trial some of them had been safely retrieved from custody in Iran.

The insured had suffered a clear disadvantage, because its cargo could no longer be sold for the amount it would have been worth had the vessel arrived at its destination when it ought to have. It had missed the market for biofuels that exists before the northern winter takes hold. That *is* a loss of a kind, and it did result from the piracy. But the goods themselves were not irretrievably ‘lost’ to the insured, so there was no insured ‘loss’. The actual shortfall was not recoverable. In the result, the insured was left to bear the consequences of this event, rather than the insurers.

The insured seems to have harnessed its wagon to a ‘total loss’ scenario (either CTL or ATL) from the outset. The insured’s solicitors did not argue a partial loss as an alternative claim. Could a partial loss claim succeed under the *ICC(A)*? If not, why was this shortfall to the insured not a loss under the policy?

In certain circumstances — albeit not in those of this case — an insured *might* succeed in an argument under cl 6 of the *ICC(A)* claiming a loss as a result of detention by pirates. Clause 6 reads (emphasis added):

In no case shall this insurance cover loss damage or expense caused by

- 6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
- 6.2 capture seizure arrest restraint or detainment (*piracy excepted*), and the consequences thereof or any attempt thereat ...

The insurer in *Masefield* could have argued that the insured’s claim was essentially one for losses caused by delay and therefore fell within the delay exclusion in cl 4.5 (emphasis added):

4 *In no case* shall this insurance cover ...

- 4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above) ...

The intention in cl 6 is to allow ‘loss damage or expense’ caused by seizure by pirates to be an insured peril. It is clear that this provision intends to cover a loss of control over the goods for a period of time — as the words ‘arrest’, ‘restraint’ and ‘detainment’ indicate.<sup>90</sup> It is possible to craft an argument that claims for damage caused to cargo or expenses that arise from detention brought about by piratical activity can be recovered under *ICC(A)* clauses.

The stumbling block for the insured in *this case* was that its ‘loss’ — although very real — was a diminution of market value. The cargo itself was not damaged, and it is a longstanding principle of general cargo insurance that policies do not cover a diminution in value at the discharge port.<sup>91</sup> Section 55(2) of the *MI Act* confirms this because it requires damage to be established by comparing the landed value of the goods as described at their origin with the actual value of

<sup>90</sup> ‘An arrest, restraint or detainment does not necessarily divest the assured of ownership of his property’: R J Lambeth, *Templeman on Marine Insurance: Its Principles and Practice* (Pitman Publishing, 6<sup>th</sup> ed, 1986) 180.

<sup>91</sup> The cases insist upon physical loss: see, eg, *Coven SpA v Hong Kong Chinese Insurance Co* [1999] Lloyd’s Rep IR 565.

the goods in the condition in which they arrived at their destination. Here, there was no difference because the goods themselves were undamaged; hence there was no such loss. This probably explains why the insured did not attempt to argue a partial loss. Had the goods been damaged in some way by the detention (eg if they had been perishable, or had diminished in quality) then the insured would have had an argument that that loss was recoverable under the policy.<sup>92</sup> Since in the *Masefield* case the goods were undamaged, the insured had to prove a total loss or nothing, and here it could not establish a total loss.

While the first instance and Court of Appeal judgments lead to a neat result on the particular facts of this case, they pose some challenges for cases where the release does not occur so promptly. Admittedly, every case will be fact-dependent, but some of the questions that spring to mind are: at what point *would* an insured know that there has been a total loss entitling it to a payout? At what point can it be sure that it will not get its goods back? How long must it 'wait and see'? Must it just sit tight until it is clear that it has been 'irrevocably denied' its goods? When has it (and how could it establish that it has) in fact 'abandoned hope' of ever seeing its consignment?

These problems are discussed in the judgment of Rix LJ in the Court of Appeal.<sup>93</sup> It would seem that the only answer one can give is that everything depends on the facts of the case. Presumably when the situation has 'matured' to such a point that it becomes clear that there is 'no prospect whatever of finding or recovering vessel or cargo'<sup>94</sup> then a total loss can be claimed — again, whether it will be constructive or actual will depend on the facts. As already noted, the current market practice would seem to be that 12 months is the period at which a seizure will be regarded as being a total loss, although the courts may well decide some other period, depending on the facts.

This raises a particular point for cargo claims. If a vessel is taken the ransom demanded is likely to be a fraction of its value, so that payment is to be expected. However, if cargo is taken the ransom will in all likelihood exceed the value of the cargo. That means that the cargo owner's fortunes are in the hands of the hull owner. It might conceivably be argued that, because a cargo owner cannot control the release of the seized subject matter, then from its point of view there should be an ATL or at least a CTL — even though a hull owner could not make the same claim. Through the *Masefield* case, the 'ransom and release' model of Somali piracy is now very familiar. It does pose some questions regarding how the payment of ransom is to be treated under the insurance policy and it is to those questions that this case note will now turn.

<sup>92</sup> Although since January 2009 piracy risks have been mentioned separately and recast to fall under war cover, the new 'war clauses' use the same wording and do not appear to be changing the ambit of cover provided. This means that insurers will underwrite the risk — and receive premiums — on a per voyage basis rather than annually. As noted above, under the *ICC(B)* and *ICC(C)* clauses piracy is not an insured peril and is treated as an excluded war risk: see above n 21.

<sup>93</sup> *Masefield EWCA* [2011] 3 All ER 554, 572 [56].

<sup>94</sup> *Ibid.*

C *Can Cargo Interests Recover Any Contribution to Ransom  
under the Policy of Insurance?*

It seems, to the extent one can determine, that it is unusual for cargo interests to be involved in the negotiations or contribute to the ransom payment. While it is probably practical that negotiations do not involve cargo interests, one can foresee that cargo interests might be asked to contribute towards the ransom amount. It is theoretically possible that cargo insurers may be asked to ‘top up’ the offer, particularly if the cargo is very valuable.

This contribution may be either direct (more likely if there is only one cargo owner) or by the shipowner declaring a general average (‘GA’) event. This in turn raises several questions. First, we will consider whether any such contribution could be claimed under the *ICC(A)* policy as a sue and labour expense or as a GA expense.<sup>95</sup>

1 *Situation 1 — Direct Contribution to Ransom Recoverable as a Sue and Labour Expense?*

What would have happened in the *Masefield* case if the insured had contributed to the ransom? If the insured had itself contributed to the offering made by the shipowner — in effect, adding to the ransom to make it more attractive — would *that* payment be recoverable as a potential sue and labour payment?

Clause 16 of the *ICC(A)* states (emphasis added):

It is the duty of the Assured and their servants and agents *in respect of loss recoverable* hereunder

- 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss,
- 16.2 ... and the Underwriters will, *in addition to any loss* recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Here the *Masefield* judgments give clear guidance because both Courts appeared to accept that ransom payments are recoverable as a sue and labour expense.<sup>96</sup> If the insured had made a payment to ‘avoid’ a loss — the permanent removal of cargo from its dominion — then the act would have borne a direct relationship with the saving of the property and therefore it would seem recoverable. By contributing to the ransom payment, the insured is ensuring the return of the goods. If no ransom was paid at all, then the goods would not be returned and that would constitute a total loss under the policy. Clearly in almost every case,<sup>97</sup> if the cost of the ransom that the insured is being asked to pay exceeds the cost of the cargo, then there is no point in *cargo interests* paying it: it would no longer be ‘reasonable’.

<sup>95</sup> *ICC(B)* and *ICC(C)* do not cover piracy risks: see above n 21.

<sup>96</sup> *Masefield EWHC* [2010] 2 All ER 593, 611–12 [63] (Steel J), quoting *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, 720 (Phillips LJ); *Masefield EWCA* [2011] 3 All ER 554, 574 [64] (Rix LJ).

<sup>97</sup> There would be exceptions — for example cargoes with a value or significance beyond their monetary value, such as nuclear waste.

It therefore seems that in a *Masefield*-type case, although the insured party cannot claim a total loss (because the pirates would return the goods if paid the ransom), any *ransom* paid to get the goods back would be recoverable, so long as the amount is reasonable.

More interestingly, can cargo interests be found to be in *breach* of the duty to sue and labour by not offering to pay or at least contribute to ransom? As a matter of public policy we believe a court would be loathe to *oblige* an insured cargo owner to pay a ransom, especially as the component of the ransom allocated to cargo is likely to be smaller than the hull/crew component. That aside, only reasonable payments are recoverable from the insurers, and it is most unlikely that a cargo owner would act reasonably in paying any sum which even began to approach the value of the cargo. In practice, even if there is an obligation to pay a ransom, failure to do so is unlikely to preclude any claim that the cargo owner might have under the policy: this is because a failure to sue and labour will give the insurers a defence to a claim only where the breach by the insured is the proximate cause of the loss.<sup>98</sup> It is surely the case that the proximate cause of the loss is piracy.<sup>99</sup>

## 2 *Situation 2 — Cargo Interests Contributing to Ransom as a Declared General Average Event?*

This is another interesting point that is consequential to the decision in *Masefield*. It would seem that a cargo insurance policy covering the peril of piracy would likewise respond if the insured is *required* to chip in because the shipowner declares a GA event. GA arises where a loss has been suffered by a number of interested persons, and one of them has borne disproportionate expense for the benefit of the others, as where cargo belonging to one owner is thrown overboard in order to preserve the stability of the vessel for the benefit of the shipowner and other cargo owners.<sup>100</sup> It would seem that the judgment of Steel J regarding the status of any ransom payment as a sue and labour expense has likewise cast away any doubt that payment of ransom could be the subject of GA.<sup>101</sup> The policy covers any GA payment ‘incurred to avoid or in connection with the avoidance of loss from any cause’ apart from those excluded from cover under the policy.<sup>102</sup>

The *Masefield* decision confirms that ransom payments are not illegal at least in the UK (and they probably are not illegal under US law unless the link to

<sup>98</sup> *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] EWHC 181 (Comm) [48] (Burton J).

<sup>99</sup> And what of hull owners: are they obliged to pay the ransom under the suing and labouring clause? The answer is surely yes, so that any reasonable payment is recoverable from insurers. But what of the insolvent hull owner? Such a situation is unlikely to be problematic for two reasons: insurers are likely to fund the ransom if the insured cannot afford to do so, and refusal by the hull owner to pay is unlikely to be a cause of the loss so as to give the insurers a defence under the suing and labouring clause. In short, it is up to the insurers to pay the ransom, because if they fail to do so the insured may have an ATL or CTL by refusing to pay.

<sup>100</sup> This is referred to as ‘general average sacrifice’.

<sup>101</sup> See *Masefield* EWHC [2010] 2 All ER 593, 611–12 [63]–[64] (Steel J).

<sup>102</sup> *ICC(A)*, above n 19, cl 2.



terrorism is established). One of the possible defences cargo interests may have had to a claim by the shipowner for GA has therefore been scuppered, at least for the time being. That is, no illegality defence would appear to be able to be raised by cargo interests against a claim by the shipowner for GA arising out of a ransom payment to pirates.<sup>103</sup> Cargo interests may have other defences to the shipowner's claim, particularly if they consider that the shipowner could have done more to protect the ship from attack.<sup>104</sup>

#### IV CONCLUSION

If the insured in *Masefield* had contributed to the ransom, either through a GA claim or by direct contribution, that specific contribution would appear to have been recoverable either under the sue and labour clause or by way of GA. Steel J's judgment removed any public policy concerns, at least in the UK, and this was reinforced on appeal. (The US position is starkly different.)

It may seem incongruous that cargo interests could recover for contributions to ransom (whether directly or via a GA event) given that in the *Masefield* case, Steel J concluded that the cargo was not 'lost'. In fact, it is entirely consistent. The reason the cargo was not lost was because a ransom payment would see it released. Without payment, the ship, its cargo and crew would not have been released. Clearly then, contribution to ransom would have to sensibly be seen as an expense which ensured return of the goods.

The *Masefield* decision, as already noted, is a pragmatic and defensible one in many respects. However, one of the problems with this decision is that the insured is left in an invidious position; it has no control over the return of its goods, and has actually suffered a loss due to a peril insured against, but apparently is without recourse. For the insured that suffers no physical loss or damage to its cargo but only the loss of market value, the cargo policy wording provides no relief because it is simply intended to cover physical loss. One imagines that there may be a market for a contractual extension to any loss in value caused through the delay of delivery brought about by detainment by pirates. Notably, an insured cannot look to the new war clauses<sup>105</sup> for enhanced coverage, as those clauses offer no greater ambit of cover for insureds.

The insured in *Masefield* may well have been very confident of its position because of the seemingly strong precedent case law concerning losses by pirates, particularly *Dean v Hornby*.<sup>106</sup> The judgment of Rix LJ made it clear that that confidence was misplaced; in fact, *Dean v Hornby* was not such authority after all. The principles are fact-dependent; piracy now is perhaps a different operation to what it was hundreds of years ago. (Of course there are different definitions of

<sup>103</sup> See Steer, above n 24, 15.

<sup>104</sup> *Ibid.* Steer raises the possibility that cargo interests may invoke the 'actionable fault' defence by arguing that the shipowner is not entitled to a contribution because they failed to exercise due diligence to ward off an attack. He states: 'There is evidence that a properly trained, motivated and equipped crew will be significantly more likely to repel an attack.'

<sup>105</sup> See the discussion in above n 92.

<sup>106</sup> (1854) 3 El & Bl 180; 118 ER 1108.

piracy in different legal contexts;<sup>107</sup> the definition in public international law is not particularly helpful in the context of insurance.<sup>108</sup>) In considering various old cases and papers relating to piracy, it is clear that original definitions of piratical behaviour relate more to the wrongful *capture* of the ship and cargo under threat of or actual force: the demand of ransom, and the possibility of return, are not usually mentioned (although sometimes they are set out as an afterthought). Until *Masefield*, the main preoccupation of marine insurance seems to have been the overwhelming likelihood that once seized by pirates, the goods were almost certainly lost forever.<sup>109</sup>

The current reality is that cargo policies are simply not intended to give cover for anything other than physical loss of or damage to the goods. There is no doubt that detainment of goods by pirates also comes at a real cost to cargo interests, who have little opportunity to influence the end result. It would be a fairly straightforward exercise to draft wording which would cover economic loss flowing from detention, but it remains to be seen whether the demands of cargo owners are regarded as sufficiently powerful to influence this change. In the present 'soft' market<sup>110</sup> the lure of additional premiums may well bring about the necessary modifications.

<sup>107</sup> Passman lists no fewer than five different legal definitions and contexts: Michael H Passman, 'Interpreting Sea Piracy Clauses in Marine Insurance Contracts' (2009) 40 *Journal of Maritime Law and Commerce* 59, 61–2.

<sup>108</sup> It is interesting to note, however, that ransom piracy can fit within the *United Nations Convention on the Law of the Sea* ('UNCLOS') definition of piracy, which is 'any illegal acts of violence or *detention*, or any act of depredation, committed for private ends by the crew or the passengers of a private ship': *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 101 (emphasis added). However, the definition goes on to require that this behaviour occur 'on the high seas', which is not always the case for Somali pirates. A detailed comparison of the treatment of piracy in insurance and public international law is outside the ambit of this case note.

<sup>109</sup> Although in some cases, including *Dean v Hornby* itself, the ship was recaptured.

<sup>110</sup> Where the supply of insurance exceeds the demand for it.