Piracy

January 2011

PIRACY UPDATE

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

London

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Rouen

Brussels

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Piraeus

Dubai

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In February 2010 we provided a short client briefing on the ramifications of the judgment of the High Court in *Masefield AG v Amlin Corporate Member Ltd [2010] EWHC 280 (Comm)*. Following an appeal by Masefield AG, the Court of Appeal published its judgment in the matter on 26 January 2011.

The questions on appeal by the appellants were:

- Was the cargo an actual total loss ("ATL")?
- Does the hijacking of the vessel constitute theft?
- Is payment of ransom in the public interest or is it contrary to *"universal principles of morality"*?

The appellants did not appeal the High Court's decision that the vessel was not a constructive total loss ("CTL") or any issues of fact.

The Court of Appeal began with a lengthy analysis of the law of ATL and concluded, in accordance with the finding of the Judge at first instance, by deciding that the cargo was not an ATL because there was no irretrievable deprivation of property. The hijacking was a typical *"wait and see"* situation given that *"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 recovery of both..."*. Although not an issue on appeal, the Court of Appeal also noted that *"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"*.

The Court of Appeal went on to consider whether the taking of the vessel and cargo, even with an intention of returning them on payment of a ransom, constitutes theft under English law. This point was dealt with quickly and the Court concluded that there was no intention to permanently deprive (deemed or otherwise) and therefore the argument fails.

As with the decision at first instance, the remainder of the judgment considered the question of public policy. The Court of Appeal held that *"there is no legislation against the payment of ransoms, which is therefore not illegal."* They went on to identify that *"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."*

Helpfully the Court went on to note, as an aside, that the pirates are not classified as terrorists and reiterated that the payment of ransom is a sue and labour expense under a marine insurance policy. These are both useful comments by the Court which confirm the current understanding.

One matter was left over by the Court. The Court noted that payment of a ransom in response to threats to life or liberty is not prima facie a bribe. However, it did not consider whether the Bribery Act 2010 would change this position when it comes into force later this year. We have previously considered this issue and it is our view that the payment of a ransom to pirates in the manner undertaken in cases where we have been involved would not contravene the Bribery Act 2010.

On the whole the judgment is a confirmation of the law as previously stated by the High Court in early 2010 and should provide some further peace of mind to those who are involved in the release of hijacked vessels and seafarers.

For further information, please contact James Gosling, Partner, on +44 (0)20 7264 8382 or james.gosling@hfw.com, or Richard Neylon, Associate, on +44 (0)20 7264 8100 or richard.neylon@hfw.com, or Alex Kemp, Associate, on +44 (0)20 7264 8432 or alex.kemp@hfw.com, or your usual contact at HFW.

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Lawyers for international commerce hfw.com

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888