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Case No: A3/2010/0565

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE DAVID STEEL
2009 FOLIO 260

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2011

Before :

LORD JUSTICE RIX
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE PATTEN

- -

Between :

Masefield AG	**Appellant**
- and -	
Amlin Corporate Member Ltd	**Respondent**

The Bunga Melati Dua

- -
- -

Sir Sydney Kentridge QC and Mr Andrew Henshaw (instructed by **Arbis LLP**) for the **Appellant**
Mr Peter MacDonald Eggers and Ms Sarah Cowey (instructed by **Waltons & Morse LLP**) for the **Respondent**

Hearing dates : Wednesday 13th and 14th October 2010

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Approved Judgment

Lord Justice Rix :

1. The *Bunga Melati Dua* was carrying the appellant's cargoes of biodiesel on a voyage between Malaysia and Rotterdam when she was captured on 19 August 2008 in the Gulf of Aden by Somali pirates and taken with her crew into Somali coastal waters. Sadly, one of her crew members died during the capture. Negotiations for the payment of a ransom for the release of the vessel, her crew and cargoes were almost immediately commenced by the vessel's owners, MISC, a Malaysian state-owned shipping company. The appellant was not party to those negotiations. The appellant was still out of possession of its cargoes on 18 September 2008 when it served a notice of abandonment on its insurers, the respondent. The notice was rejected, but proceedings were by agreement deemed to have been commenced on that day. The vessel, her crew and cargoes were released some 11 days later on payment of a ransom of US $2 million by MISC. The voyage to Rotterdam was completed on 26 October 2008. However, it is common ground that if the appellant had a good claim for a total loss as at 18 September 2008, the fact of the cargoes' later recovery would not affect the position.

2. Did the appellant have a good claim for a total loss? Before the judge the appellant, Masefield AG (the "insured"), claimant below, put its case in total loss both as an actual total loss ("ATL") and as a constructive total loss ("CTL"). However, in this court, but only at the hearing itself, Sir Sydney Kentridge QC on behalf of the appellant notified us that the insured ceased to rely on the doctrine of CTL and confined its claim to one of ATL. Sir Sydney relied by way of submission on what he said were two principles: one, that capture by pirates created an immediate ATL, whatever the prospects of recovery might be; the other, that in any event the law would not or could not take account of the payment of a ransom as a relevant, legitimate, reason for calculating the possibilities of recovery. Therefore, since the cargo had not been recovered by the time proceedings were deemed to have been commenced, the insured was entitled to succeed.

3. The respondent, Amlin Corporate Member Ltd (the "insurer"), defendant below, submitted, on the other hand, that the statutory test for an ATL was "irretrievably deprived" (section 57(1) of the Marine Insurance Act 1906, the "Act") and that on the authorities that connoted a physical or legal impossibility of recovery. The cargoes were not irretrievably lost when there was a good chance of negotiations for payment of ransom bearing fruit. Moreover, payment of a ransom was neither illegal nor against public policy, and therefore there was nothing to prevent the prospects of recovery by payment of a ransom from being a relevant and legitimate factor to take into account for the purposes of applying the test of irretrievable deprivation.

4. The judge, David Steel J, agreed with the insurer's submissions and dismissed the claim.

5. On appeal, Sir Sydney has put his case frankly, but cogently, on a more limited basis than he ran before the judge. He accepts that there is no illegality under English law in the payment of ransoms. Somali law and Malaysian law are assumed to be to the same effect. It is believed that there is no illegality in the payment of ransoms under international law. Moreover, at any rate by the end of the hearing, he also accepted that there was no formal public policy which would prevent an insured from recovering from his insurer a ransom payment. Nevertheless, he submitted that the payment of ransom, which amounted to submission to extortion, was so undesirable from the point of view of the public interest and universal principles of morality, that it could be no part of an insured's duty to preserve his property from loss by succumbing to a ransom demand: and that being the case, the property concerned must be considered to have been irretrievably lost, physically and/or legally, where the only means of recovering it was to do something which an insured could not reasonably be expected or required to do. If payment of a ransom could not be required, an underwriter could not say that an insured had not suffered an ATL. In this connection he placed strong reliance on section 78(4) of the Act which provides that it is the duty of an insured to take such measures as may be reasonable for averting or minimising loss.

The facts

6. The appeal does not seek to disturb the judge's findings of fact. He was assisted by an expert in Somali piracy, Mr James Wilkes, who was called by the insurer and whose evidence was not materially disputed by the insured. The judge records that the existence and nature of piracy off Somalia has become a matter of great notoriety, and describes Somalia as a failed state with no effective government or law enforcement. The absence of any national administration means that any attempt to intervene is fraught with difficulty. Military intervention involves legal and technical difficulties, and raises a risk to captured crews. He finds that "the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom".

7. In the twelve months to November 2008, 30 vessels had been seized and then released on payment of ransoms in excess of $60 million. When *Bunga Melati Dua* was seized, she was taken to a position off the coast at Eyl. On 20 August 2008, only a day after the seizure, one of the Malaysian shippers of the insured's cargoes sent an email saying that MISC was already in negotiation with the pirates. On 26 August the insured received a message directly from MISC confirming such negotiations. On 31 August MISC briefed the families of the Malaysian crew to the effect that "the ordeal will be over in 30-40 days". On 2 September MISC issued a press release to confirm negotiations were ongoing. On 15 September Lloyd's List reported the secretary of the Malaysian Security Council as saying that negotiations with the pirates were going well. The judge found that it was apparent that, based on these communications alone, the vessel with its crew and cargoes were likely to be released in short order.

8. The judge found that this conclusion was supported by everything that was known about the *modus operandi* of the pirates. He said:

> "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.

The judge also referred to a circular received by the insured's insurance broker on 19 September which spoke of a "pattern" whereby shipowners usually control negotiations via professional negotiators towards payment of the ransom demanded. The process normally lasted between 6 to 8 weeks. No case was known where ship, crew and cargo had not been released. The pirates were more interested in a ransom than in trying to market the ship or cargo.

9. The judge also stated that the expert Mr Wilkes confirmed this information, for instance it was his evidence 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 tabulated details of every vessel seized by Somali pirates between 2007 and 2009. His statistics revealed that "it was plain that the vessel and her cargo would be released within a relatively short period of time".

10. The judge therefore concluded:

> "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."

11. That conclusion is accepted by the insured on this appeal. Prima facie, it might be thought, the insured had not been "irretrievably deprived" of its cargo on 19 September when proceedings were deemed to have been commenced. As it turned out, the vessel, crew and cargo were in fact released, as expected, on 29 September, less than six weeks after her capture, on payment of a ransom of $2 million (in fact a sister vessel, *Bunga Melati Lima*, was seized about a week after *Bunga Melati Dua*, and MISC negotiated a payment of $4 million for the two). The value of the vessel and her cargo amounted to $80 million.

The claim

12. As stated above, *Bunga Melati Dua* reached Rotterdam on 26 October 2008. The cargo had not deteriorated during the delay, but it had missed its market in the meantime. The market for biofuel is seasonal, and effectively closes after the end of September. The insured's two parcels therefore had to be stored until the following year, when it was sold at a price substantially less than its insured value. The insured gave credit for the recovery made on re-sale, less expenses, and claimed the balance in the sum of $7,608,845.30. The insured value had been $13,326,481.75 (including freight).

13. The insurer observes that the cargo had been recovered, as it was always likely to have been, and that in effect the claim was not for physical loss, but for financial loss, caused by delay and loss of market, an excluded matter (see section 55(2) of the Act).

The Marine Insurance Act 1906

14. It is sufficient to set out the following provisions of the Act::

> "57.–(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…
>
> 78.–(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss…
>
> (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."

15. Since a case of CTL is no longer contended for, it is unnecessary to set out the Act's provisions relating to CTL (see especially section 60). Nevertheless, it is relevant to point out that the doctrine of CTL is a special feature of marine insurance law and is not found outside marine insurance. The essential learning of CTL is that an insured does not have to prove an ATL if he is able to show that the cost of recovering ship or cargo, or of repairing a damaged ship, would exceed its value when recovered or repaired, or, where he is deprived of possession of ship or cargo, if he can show that recovery is "unlikely". Although the Act is in general a codification of prior common

law, the common law test in the case of CTL dispossession had been where recovery was "uncertain", not "unlikely". So in this respect, the Act changed the law. Unlike the case of ATL, a claim for CTL cannot (generally speaking) be made without a notice of abandonment given by the insured to the insurer, which evidences the insured's election to treat his loss as a (constructive) total loss rather than a partial loss.

16. As will appear below, the doctrine of CTL in marine insurance law has meant that the test for an ATL has been applied with the utmost rigour: for an insured has always had the option of claiming for a CTL. Outside marine insurance, the doctrine of actual total loss may be found to be more flexible. Thus a motor-car may be treated as a total loss when it is not worth repairing.

17. Sir Mackenzie Chalmers, the draftsman of the Act, said this in his introduction to it, by reference to section 60:

> "In the majority of cases the distinction between actual total loss and constructive total loss corresponds with the distinction which has been drawn between physical impossibility and mercantile impossibility. A merchant trades for profit, not for pleasure, and the law will not compel him to carry on business at a loss. A commercial operation is regarded as impracticable, from the mercantile point of view, when the cost of performing it is prohibitive."

The cargo policy

18. The policy was an all risks policy with a war exclusion clause which excluded "capture, seizure, arrest, restraint or detainment (piracy excepted)". So piracy was a peril insured against. There was a special CTL clause the effect of which was agreed to exclude that form of CTL which depended on the deprivation of possession where its recovery is unlikely (in the absence of agreement there might have been debate about this). Thus deprivation of possession was only covered in the case of an ATL, ie in the case of irretrievable deprivation.

"Irretrievably deprived"

19. A number of cases illustrate the rigour with which this test of ATL has been interpreted.

20. *George Cohen, Sons & Co v. Standard Marine Insurance Co* (1925) 20 Ll L Rep 30 (Roche J) concerned an obsolete warship purchased for scrapping which grounded off the coast of Holland while being towed from England to Germany. She was held to be a CTL, but *not* an ATL. This was because her recovery was neither a physical nor a legal impossibility. As for the former, the judge found that the vessel could be physically got off, although "[I]t would be an engineering feat requiring considerable preparation and…very high expenditure, but it could be done…". As for the latter, the judge was satisfied that although the Dyke Board would have vetoed her being moved, when the matter was reconsidered at any rate in the Dutch courts, the veto would be overcome, provided the owners would have been "willing to spend the necessary money to guarantee the safety, or to satisfy the Court that they would ensure the safety, of the sea defences".

21. In *Panamanian Oriental Steamship Corporation v. Wright* [1970] 2 Lloyd's Rep 365 (Mocatta J) a vessel had been detained by Vietnamese customs officials and subsequently confiscated by an extraordinary military tribunal outside the ordinary judicial system of Vietnam. Thus the confiscation was ultimately a political or executive act, not a judicial one. Here again, there was held to be a CTL, but not an ATL. In the circumstances, Mocatta J dealt with the question of ATL in a single paragraph. The facts are somewhat obscure. The position appears to have been that it might have been possible to bribe various officials; or to have bought back the vessel from the Government or at auction for a low price. It seems that in the end the vessel could have been released from arrest by payment of fines and a sum of some £13,000. As to ATL, Mocatta J simply said this (at 383):

> "In view of this decision the alternative claim for an actual total loss on the basis that the plaintiffs were irretrievably deprived of the *Anita* is somewhat academic. The question has to be answered as at the date of the writ. It may be true that the order of confiscation divested the plaintiffs of the legal ownership as is the case 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 of Aug 29, 1967, I feel unable to find that the plaintiffs were at that date irretrievably deprived of their vessel."

22. That is not helpful to Sir Sydney as far as it goes, but it may be that it does not go very far, especially as the facts were obscure and the matter was treated lightly. I will have cause to revert to *Panamanian Oriental* below when I discuss Sir Sydney's focus on the payment of ransom as an illegitimate and unreasonable means of recovery. Sir Sydney draws an analogy between the payment of a ransom and the payment of a bribe, as was possibly the case being contemplated by Mocatta J. Sir Sydney therefore has to say that Mocatta J was wrong to contemplate such bribery as an acceptable means of preventing an irretrievable loss.

23. *Fraser Shipping Ltd v. Colton* [1997] 1 Lloyd's Rep 586 (Potter LJ in the commercial court) concerned a vessel insured against ATL only. Whilst under tow she stranded on a Chinese island. Potter LJ said (at 592):

> "On the evidence I have heard, I am satisfied on the balance of probabilities that the costs of salving the vessel would on any realistic basis have exceeded its insured value. However, that is not enough for the plaintiffs to succeed on this issue. The submission of Mr Milligan as I have summarized it appears to me to be in the language of constructive, and not actual total loss."

24. David Steel J therefore concluded that an assured is not irretrievably deprived of property unless it is physically and legally impossible to recover it, even if such recovery can only be achieved by disproportionate effort and expense (at para 31). I suspect that the judge really intended that "and" to be disjunctive, ie "or", and I so understand it.

25. Sir Sydney in general accepts that test, but submits that piracy, like capture, (or, as will appear below theft, another insured peril), operates immediately as an ATL, unless there is recovery (before the date of commencement of proceedings).

Piracy and capture

26. As it happens, there is no case involving a ransom establishing Sir Sydney's submission, but he relies on a case of piratical capture, *Dean v. Hornby* (1854) 3 El & Bl 180, as in point. Since this authority is a linchpin of Sir Sydney's case, it is necessary to deal with it in detail.

27. The facts are complex but the judgments are short. The vessel was seized by pirates in the Straits of Magellan (in December 1851) but within the month recaptured by an English warship (in January 1852). A prize master took command and sailed her to Valparaiso. On learning of these facts in April 1852, her owners gave notice of abandonment to the underwriters, apparently under the impression that the vessel had been condemned as a prize at Valparaiso, but that was not in fact the case. The giving of such a notice might suggest a claim for a CTL rather than an ATL, but it would not be inconsistent with a claim in the alternative for an ATL. From Valparaiso the ship was sent home, still under the command of a prize master, to Liverpool. Meeting with bad weather, she put into Fayal and was there sold by the prize master in August 1852 on a surveyor's erroneous advice that she was unfit for repair, but the sale was unjustifiable. Her new owners repaired her for a trifling sum and later took her to England, where her old owner, the assured, and his underwriter, by agreement took

proceedings (in early 1853) to regain possession of her, without prejudice to their rights inter se. The admiralty court awarded possession to her old owner, she was sold, and her price deposited to await the outcome of the issue between those parties, which appears to have been whether the owner assured was entitled to be paid for a total loss (quaere whether actual or constructive) or only for a partial loss (see at 185), as at the date of abandonment in April 1852.

28. Counsel for the owner submitted that it was a "case of loss by pirates…here the owner did not recover possession at all up to the time of the commencement of the action…What has taken place since the commencement of the action is immaterial". He submitted that the loss was therefore total and not partial. Counsel for the underwriter submitted that "There was no total loss at the time of the abandonment: and the notice of abandonment was given under a mistake either of facts or law. Before that notice, the vessel had been taken possession of by the "Virago" [the warship]; after that, there was no loss…Had the notice been given while the vessel was in the hands of the pirates, there would have been at that time a total loss, for which the plaintiffs might have recovered, subject to such events as might occur before the action brought. But upon recapture, the property was in the owners: the possession was indeed in the Queen, but not a beneficial possession".

29. The judgments are as follows. Lord Campbell CJ said:

> "I am of opinion that, according to English law, the plaintiffs, in conformity with decided cases, are entitled to judgment…In December 1851 she is taken by pirates. Then, in fact, a total loss has occurred. After that, she never is restored to her 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?...At what time, in the present case, did there cease to be a total loss? When had the assured the possession or the means of obtaining it?...The notice of abandonment was abundantly early, having been given in quite reasonable time after the receipt of the intelligence of the loss…Under these circumstances, I am of the opinion that the plaintiffs were entitled to abandon."

30. Coleridge J said:

> "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 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 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 a reasonable time, and that the time here was reasonable."

31. Finally, Wightman J said this:

> "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 possession to the assured, or to afford them 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…"

32. My understanding of these judgments, subject to a consideration of other authorities on capture decided both before and after this authority, is as follows. There is no positive sign that the court was being asked to consider ATL as distinct from CTL. The emphasis on the giving of notice of abandonment in the judgments of Lord Campbell and Coleridge J makes sense only on the basis that a CTL was in mind. In any event, the focus of the argument was plainly not between an ATL and a CTL, but between a total loss and a partial loss. The relevant requirement for a CTL, other than a notice of abandonment, is deprivation of possession plus uncertainty of recovery. There was clearly that at all relevant times down to the commencement of the proceedings.

33. However, even if an ATL was in mind, where a vessel is captured by pirates for their own use and profit, as there, without any suggestion of a ransom, one might infer an irretrievable dispossession (and Lord Campbell's reference to "a permanent total loss" gives some support to that supposition). If so, then had the position changed thereafter? The recapture by the Crown was for the purposes of the Crown, not the owner. As the judgments state, the owner never thereafter regained possession or the means of possession. If therefore an irretrievable loss was once to be inferred at some time before recapture, there would have been an ATL at that time: and only recovery of the vessel (possession or the means of possession) would undo that loss. In

particular in a case where there was no issue as between ATL and CTL, and no prospect of recovery from the pirates by means of a ransom (the recapture was merely serendipitous), this hardly seems to be the firm authority in the insured's favour that Sir Sydney would seek to make of it.

34. The question now is whether that analysis of the case, or Sir Sydney's broad and all-encompassing submission, is the correct one. For that purpose, the parties have taken the court to a number of authorities concerning capture.

35. *Roux v. Salvador* (1836) 3 Bing NC 266 preceded *Dean v. Hornby* by almost twenty years. The claim was for the loss of hides carried from Rio de Janeiro to Bordeaux. A leak in the vessel caused them to putrefy. They were sold en route for a fraction of their value because they would have been destroyed before the end of the voyage. There was an issue as to whether the case was one of ATL or only CTL, for no notice of abandonment was given. There was also an issue as to whether the loss was total or partial only, for the insurance was "free of particular average", ie excluded a claim for partial loss. It was held that there was an ATL. As such, this is a leading common law authority on the nature of ATL and CTL respectively: see at 279 and 286 for the test of the former, and at 286/7 for the test of the latter. What for present purposes is to the point is that Lord Abinger CB groups capture as a peril which tends to give rise to "intermediate cases", ie cases which are not necessarily ones of immediate ATL, but may be treated as a CTL, or may finally be shown to be an ATL. Thus he says (at 286):

> "The underwriter engages, that the object of the insurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or, if it is 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 prima facie a 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 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. In all these cases, not only the thing assured or part of it is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must abide the risk of the arrival of the thing assured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the assured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before."

36. *Dean v. Hornby* was then decided in 1854. *Stringer v. The English and Scottish Marine Insurance Company, Limited* (1869) LR 4 QB 676, (1870) LR 5 QB 599 concerned cargo on a vessel bound from Liverpool to Matamoras when she was seized by a warship of the USA and taken to New Orleans. At that point the cargo owner elected to treat the loss as a partial loss only. At New Orleans suit was commenced against the vessel and cargo to have her made a prize. However, the prize court gave judgment against the captors and decreed restitution of vessel and cargo to their owners. The captors appealed to the US Supreme Court. On hearing of the appeal, the cargo owner served notice of abandonment, but this was refused by the underwriters, as they were entitled to do since the owner had already elected to treat the loss as only partial and not total. Pending the appeal, the Prize Commissioner applied to the prize court to sell the vessel and her cargo. Sale could have been prevented by the deposit of bail, but this would have involved a huge speculation on the value of the local currency, such as the English court subsequently held would have been unreasonable for the plaintiff to undertake. Consequently, vessel and cargo were sold, and thus became for the first time an ATL, for legal title was lost. It was not in dispute that this amounted to a total loss, but the defendant underwriter disputed causation, submitting that the loss had been caused by the plaintiff's own decision to decline giving bail.

37. In the court of the Queen's Bench, its judgment was given by Blackburn J. He explained that the original capture only gave the plaintiff a right to elect to treat his cargo as a CTL (at 687):

> "It is clear at this time the cargo was, by one of the perils insured against, taken entirely out of the control of the assured, under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances, the assured has a right to elect whether he will retain the property in himself and treat the loss as a partial one, or abandon it to the underwriters and claim for a total loss…and the regular mode according to mercantile usage of notifying such an election, is by giving notice of abandonment."

He next explained that, by electing instead to treat the loss as a partial loss only, the plaintiff had put it out of his power to treat it as a CTL by giving notice of abandonment (at 688/9). The appeal to the Supreme Court was not such a change of circumstance as would entitle the owner to make a fresh election (at 690). Therefore there was no right to claim a CTL. But "the sale by the Prize Court stands on a very different footing", for thereby the property in the cargo was wholly lost "and therefore the necessity of an abandonment was altogether done away" (*ibid*). *Roux v. Salvador* at 287 was cited.

38. The only remaining issue was one of causation raised by the possibility of preventing sale by deposit of bail, and that was described by Blackburn J as "one of fact" (at 691). He considered the evidence and concluded that bail would have been an unreasonable speculation and might have resulted in the plaintiff being required to deposit nearly twice the value of the goods. He continued (at 692):

> "We come, therefore, to the conclusion of fact, that the assured could not by any means, which they could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss…"

39. On appeal to the Exchequer Chamber the judgments were to the same effect. Kelly CB was prepared to say that it made no difference whether the total loss was constructive or actual (at 604), but Martin B put in his own words the logic of Blackburn J's judgment (at 606).

40. Sir Sydney relies on *Stringer* for the proposition that an ATL can be made good if the condition subject to which recovery is feasible is one which an assured has no duty to perform: as in the present case, he submits that there can be no duty on the insured to pay a ransom. However, what created the ATL in *Stringer* was the sale itself, which forever dispossessed the plaintiff in that case of his cargo. The issue there was not whether there was a total loss or not, but what had caused it: the capture, or the owner's own breach of duty in looking after his cargo. In the present case, payment of a ransom always rendered the recovery of the cargo possible. The ransom was paid, and the cargo was recovered. If in *Stringer* the bail had been given, however unreasonable the price of it was, there would have been no sale and (subject to the decision of the Supreme Court on the prize issue) no total loss.

41. In *Cory & Sons v. Burr* (1883) 8 App Cas 393 the issue was whether the expenses incurred in obtaining the release of the insured vessel were caused by the barratry of the master in seeking to smuggle goods into Spain, in which case the peril of barratry was covered, or by the seizure of the vessel by the Spanish customs authorities, in

which case a "warranted free of capture" exception applied. It was held that the cause was the capture and thus the insurer was not liable. Since the vessel was released, the claim was not for a total loss. In the course of his speech, however, Lord Blackburn said (at 398):

> "Many of these [perils], 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 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: *Dean v. Hornby*."

Both parties rely on this observation. Mr MacDonald Eggers relies on the first part of it, and Sir Sydney relies on the second part. However, it was not necessary to the decision, and there was no need for Lord Blackburn to state whether he was referring to an ATL or a CTL.

42. I interject at this stage a reference to *Andersen v. Marten* [1908] AC 334, to which reference was not made by either party at the hearing, although the authority was included in our bundles, and Lord Blackburn's dictum in *Cory v. Burr*, and *Dean v. Hornby*, were there cited to, although not by, the court. The case was still decided under the common law, for the events occurred before the Act came into effect. The insured vessel had been "warranted free from capture" and had been captured by a belligerent to the Russo-Japanese war. However, on her way towards the prize court, she was wrecked and lost. She was later condemned in the prize court, but that also occurred before the issue of the writ (see the court of appeal judgment at [1908] 1 KB 601 at 610). Was this a loss by capture, in which case there could be no recovery, or by peril of the seas, in which case there would be? The House of Lords said that it was a loss by capture *because* the vessel had already been lost at the time of capture. Lord Loreburn LC said (at 338): "There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released." And the Earl of Halsbury said "The ship was a total loss from the moment she passed into the possession of the Japanese forces" (at 341). That appears to be the language of actual total loss; and it is not easy to see this as an example of a CTL, for there is no mention of any notice of abandonment. Moreover, Lord Loreburn expressly rejected the argument of Mr J A Hamilton KC, the future Lord Sumner, (an argument "which loses nothing of its merit by being unsuccessful"), who submitted that capture raised only "the possibility of total loss if ultimately she should be condemned" (at 337). Even so, Lord Loreburn accepted that as of the day of capture "The owner still had a chance of recovering the ship and still remained so at risk that he might in law have insured her" (at 338), suggesting that the test of actual total loss had not been met as yet.

43. In these circumstances, an explanation might, however, be that where the ship had on the one hand been both captured and (ultimately) condemned and on the other hand

lost at sea, the issue was not whether there had been an actual total loss, for plainly in one way or another there had been, but, simply as a matter of causation, whether the loss was due to capture or perils of the sea. After all, the captured vessel was in the grip of the peril of capture from the time of her taking; and the voyage during which the vessel was lost at sea was not her insured voyage but a fresh voyage under the control of the capturing belligerent. If a prize court condemns a captured vessel only after the end of the policy period, an insurer could not say that the vessel was not an actual loss within the policy (see Lord Loreburn at 338/9). Or, as Lord Halsbury put it "the rightfulness of the seizure and consequently the change of property related to the time of capture" (at 341).

44. The court of appeal in *Andersen* [1908] 1 KB 601 plainly put the matter simply as one of causation, on similar reasoning, even if it also said that the question of relation back was immaterial, and, at one point (*per* Fletcher Moulton LJ at 609) that the question was "whether the loss occurred really at the moment of and by reason of" the capture. I would respectfully prefer to say that the *peril* occurred at the moment of the capture and that the *loss* occurred by reason of the capture, but that (whether in terms of relation back or not) the actual total loss was established only by condemnation.

45. *Polurrian Steamship Company, Limited v. Young* [1915] 1 KB 922 (CA) concerned a claim for a CTL under the then new Act. The insured vessel was captured by the Greek navy and notice of abandonment was given and its date was the deemed date of the commencement by the assured of its action on the policy. As at that date, the question of the vessel's release from capture was "a matter of uncertainty" (at 934). Before the Act, that would have been sufficient to found a CTL. However, the test under section 60 of the Act was no longer that of uncertainty of recovery, but whether "it is unlikely that he can recover the ship": and this court could not say that recovery was unlikely, and therefore the claim failed (at 937/8). It may be observed that there was no claim for an ATL, which Sir Sydney's submission based on *Dean v. Hornby* would have suggested might be founded on that authority. On the contrary, not even the claim for a CTL was made good; and *Dean v. Hornby* was treated in the submission of Mr Roche KC as an example of a CTL. Mr Hill KC submitted that "there is no case which lays down that capture is of itself an actual total loss" (at 925).

46. *Moore v. Evans* [1918] AC 185 was not a case of marine insurance, but concerned the loss of jewellery. A loss was not proved. It is of relevance because at 194 Lord Atkinson referred to the marine insurance concept of a CTL and said that "The doctrine had its origin in cases of capture". He continued: "

> "*Goss v. Withers* [2 Burr 683] and *Hamilton v. Mendes* [1 W Bl 276] were both cases of capture and recapture, and were apparently based upon the principle that the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not, but might upon capture proceed at once and, after notice of abandonment, recover his capital, the value of his ship, from the underwriters, provided he was not aware of her recapture when he commenced his action."

47. *Marstrand Fishing Co, Ltd v. Beer* [1937] 1 All ER 158 (Porter J) was a case of piratical theft by the crew of the insured vessel itself, ie the peril of barratry. A claim was made in the alternative for an ATL or a CTL. As for ATL, Porter J said this (at 163/4):

> "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 an actual total loss, but that was because the vessel had 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 a 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 sect. 57, amongst its definitions of "actual total loss," "if the vessel be irretrievably lost." In my view, no one could here say that the vessel was irretrievably lost to her owners."

Porter J went on to discuss the claim for a CTL, but held that although a total loss might have been uncertain, it was not likely (at 164/166). He therefore rejected the alternative claim as well, and the action failed.

48. It may be observed that both parties' leading counsel, Mr Carpmael KC and Mr Willink KC, appear to have regarded mere capture as being at best a matter going to CTL only: see at 159. Sir Sydney submits nevertheless that *piratical capture* was always treated as an ATL, even if capture in general is fact-sensitive. However, it is hard to find anything to support his submission in *Marstrand* and the preceding cases.

49. *Dawson's Field* (1972) was an arbitration award decided by Mr Michael Kerr QC as sole arbitrator while he was still at the Bar, before he became a judge and then went on to this court. It concerned the hijacking of four aircraft in 1970 by members of the Popular Front for the Liberation of Palestine (PFLP). One was destroyed at Cairo and three at Dawson's Field in Jordan. The issue was whether the loss of all four aircraft arose out of "one event". The jet at Cairo was blown up first, the other three in Jordan some time later, but within five minutes of one another. Mr Kerr held that the planes were not lost when hijacked, but when destroyed, since "wait and see" is an essential ingredient in a ransom situation. The award entered the public domain with the consent of the parties to it in the course of the hearing in the commercial court in *Kuwait Airways Corporation v. Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 (*KAC v. KIC*).

50. Mr MacDonald Eggers relies on Mr Kerr's analysis, which was considered but distinguished by me in *KAC v. KIC* (at 685/689), and again considered and applied by me in *Scott v. Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688, [2003] 2 All ER (Comm) 190 (at [76]).

51. Mr Kerr said (in a passage cited in *KAC v. KIC* at 688):

> "Having reconsidered all the relevant authorities I am convinced that passages such as these [Lord Blackburn in *Cory v. Burr*] 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 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 uncertainty of recovery in the present [non-marine] 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 a 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-matter are known, and allow for a lapse of a period of time to form a view about the prospects of recovery; i.e. whether the loss is total or partial. In the circumstances of the present case I do not believe that any Court would probably have held that the owners of the hijacked aircraft at Dawson's Field were entitled to recover for a total loss if such action had been brought to trial between 6th [when the aircraft were seized] and 12th [when the three were blown up at Dawson's Field] September. I therefore reject the contention that these aircraft were total losses before they were blown up."

52. In the light of *Dawson's Field* I ventured to make the following among other observations in *KAC v. KIC*. At 687 I said:

> "In *Rodoconachi v. Elliott*, (1873) L.R. 9 C.P. 649 at p. 670 Mr Justice Brett described capture as "the hostile seizure of goods with intent to deprive the owner of them". 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), and *Andersen v. Marten*, [1908] A.C. 334."

I also referred to Lord Blackburn in *Cory v. Burr*. That might, in the light of the submissions made in this appeal, be too broad a statement, but in its context I had in mind a form of capture in which there was an intention from the first to take dominion over an insured property, such as the Kuwaiti aircraft in that case. *KAC v. KIC* was, of course, a non-marine case, and Mr MacDonald Eggers rightly observes that the analogy of marine capture which I was there deploying might not transfer easily to non-marine cases, because of the opportunity in the marine context, but not in non-marine cases, of utilising the doctrine of CTL.

53. Thus in *Arnould's Law of Marine Insurance and Average*, 17th ed, 2008, at para 28-03's footnote 9, the learned editors write:

> "In a non-marine context, where the only recognised form of total loss is an actual total loss, hostile seizure of the property can clearly be treated as giving rise to an immediate total loss notwithstanding the possibility of subsequent recovery; *Kuwait Airways Corp v Kuwait Insurance Co* [1996] 1 Lloyd's Rep. 664 (aviation insurance). The marine cases on capture were relied upon by Rix J., as supporting the view that there is an actual total loss straightaway in a case of marine capture (*ibid.* at 687). This appears to the Editors to be doubtful, although

> it may be justified on the facts of particular cases; see e.g. *Marstrand Fishing Co Ltd v Beer* (1936) 56 Ll. L. Rep. 163, per Porter J, at 172. As a general rule, the loss cannot immediately be said to be irretrievable in a case of capture or similar perils; the better view appears to be that capture results immediately in a constructive rather than an actual total loss."

54. In *Scott v. Copenhagen*, which arose out of the same facts as *KAC v. KIC*, this court distinguished the case of the BA jet caught at Kuwait airport at the time of the Iraqi invasion from the fate of the Kuwaiti aircraft, and held that there was an actual total loss of the former only at the time when it was destroyed by allied bombing where it had been parked. I reverted to Mr Kerr's "wait and see" analysis, and said (at [76]):

> "Nevertheless, as in *Moore v Evans*, it is impossible on Langley J's findings to say that BA was irretrievably deprived of its aircraft from the first, whatever the content of that test may be. It was a 'wait and see' situation. 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 be recovered? Will the property be released? That is the sense in which it was used by Mr Kerr in *Dawson's Field Award*…"

55. Finally, on this topic, I refer again to *Arnould*. At para 28-03 it emphasises the concept of ATL in these terms:

> "The great principle, therefore, on which all the cases of actual total loss depend appears to be this – the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of actual total loss, independently of the election of the assured to treat it as such. Notice of abandonment would in such case be a mere formality because nothing remains to be abandoned…"

Moreover, under the heading of "capture and seizure" at para 24-17, the following is found:

> "Capture is prima facie a case of total loss which gives the assured an immediate right to give notice of abandonment. The loss cannot, as a rule, be said to be irretrievable at the moment of capture, so as to entitle the assured to treat it as an actual (as distinct from a constructive) total loss for there is no immediate loss of title. It has long been the established rule that the property does not pass, after

> capture, to a vendee or recaptor, so as to bar the original owner, until there has been a regular sentence of condemnation…"

And at paras 28-05 and 29-14, in its only relevant appearances in the treatise, *Dean v. Hornby* is treated as an example of a case where capture creates a CTL, entitling a notice of abandonment to be given, with the ultimate fate of such a claim depending on possibilities such as that either the CTL matures into an ATL before action brought, or recovery only post-dates the time of action.

56. In the light of all this material, I conclude that, subject to Sir Sydney's second point about the public policy of paying a ransom, piratical seizure in the circumstances of this case, 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 recovery of both, 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. That is itself recognised by the insured's dropping of its CTL claim. 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. The typical case of capture, by a nation's warship, subject to condemnation as a prize, is not an ATL, although it may mature into one. Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance of recapture remains even such a seizure will not give rise to an immediate ATL, and in any event that is very far from this case. In the circumstances, *Dean v. Hornby*, is best explained as a case concerning CTL, which in any event reference there to the assured's notice of abandonment strongly suggests. Similarly, *Andersen v. Martin*, where there was on any view an ATL, is probably best explained as suggested above, ie as a case on proximate cause (and possibly where the ATL of condemnation relates back to the time of capture). Although Mr Kerr appears to have left the point open in *Dawson's Field*, I think I was therefore wrong to suggest, in *KAC v. KIC*, that those cases showed that the mere intention to exercise dominion over seized property constitutes an ATL.

The loss as theft

57. Theft is a peril within the all risks policy, and Sir Sydney submitted that the taking of the vessel and cargo, even with an intention of returning them on payment of a ransom, constitutes theft under English law.

58. I leave on one side the question whether piratical seizure, saved from exclusion of all "capture seizure arrest restraint or detainment" by the addition of the words "(piracy excepted)", could be saved as an ATL merely by being re-categorised as theft.

59. Sir Sydney's submission proceeds by reference to the Theft Act 1968. It is of course well known that the basic definition of theft to be found there is the dishonest appropriation of another person's property "with the intention of permanently depriving the other of it" (section 1(1)). Thus the taking of a car for a joyride, without an intention permanently to deprive, is not theft and has to be prosecuted separately as a taking without authority. Is therefore the taking of property with an intention to hold it to ransom, theft? Yes, for it falls within section 6(1) which provides:

> "A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights…"

R v. Raphael [2008] EWCA Crim 1014, [2008] Crim LR 995 holds that a person who intends to sell appropriated property back to its owner, or otherwise to make its return subject to a condition inconsistent with the owner's right to possession of his own property, falls within this subsection (at [40]ff). That subsection is "properly described as a deeming provision" (at [45]); but I am prepared to assume that it reflects principles of the common law which preceded the Theft Act. I am not therefore impressed by Mr MacDonald Egger's submission that the Theft Act does not apply outside England and Wales (see section 2 of the Criminal Justice Act 1993). "Theft" in an insurance policy for the international transport of cargo over the high seas cannot depend on the jurisdictional provisions governing the prosecution of theft in England and Wales. For a review of the (inconsistent) authorities as to whether "theft" in a marine policy is to be interpreted in a business sense or in the sense of the criminal law, see *Arnould* at para 23-30 and in particular footnote 184: the learned editors describe the former test as reflecting the better view.

60. However, Sir Sydney's submission suffers from more serious difficulties. Above all is the fact that the incidence of a peril is one thing, but for that peril to cause an ATL is another: for that to occur, the test of irretrievable deprivation must be met. Therefore it matters not whether the pirates had an intention permanently to deprive (which they did not), nor whether they had a deemed intention permanently to deprive (which the Theft Act states they had), but whether, whatever their intention, the insured was irretrievably deprived of its cargo. That question, subject to Sir Sydney's point about public policy, has already been answered.

The public policy of paying ransom

61. The limited nature of Sir Sydney's submission under this heading has been described above. The reasons for those limitations arise out of the following circumstances.

62. In *Fender v. St John-Mildmay* [1938] AC 1 at 12 Lord Atkin laid down fundamental guidance as to the circumstances in which public policy could be invoked by a court: see at 10/12. Thus among other citations he referred to Parke B's dictum in *Egerton v. Brownlow* (1853) 4 HLC 1 at 123 that

> "It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is best for the public good, and to provide for it by proper enactments";

in order to conclude that –

> "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."

Moreover, Lord Wright's distinction between rules of common law or equity which are based on considerations of public interest or policy and "public policy in the narrower sense" which is "disabling" and requires the courts "to depart from their primary function of enforcing contracts", is illuminating (at 38).

63. Then, it is to be observed that there is no legislation against the payment of ransoms, which is therefore not illegal. The repeal of limited legislation in the past (the Ransom Act 1782, which only outlawed the payment of ransom in respect of British ships taken by the King's enemies or persons committing hostilities against the King's subjects, and which was repealed by section 1 of the Naval Prize Acts Repeal Act 1864) only serves to emphasise this fact.

64. Moreover, there is the authority of this court, as a necessary part of its reasoning, although it may be nevertheless that the point was strictly obiter, that the payment of a ransom can be recovered as sue and labour expenses. It would seem to follow that it cannot be against public policy, in the strict sense referred to by Lord Wright, to pay a ransom. In *Royal Boskalis Westminster NV v. Mountain* [1999] QB 674 at 684/55 and 719/720 respectively, Stuart-Smith and Phillips LJJ cited with approval, as part of their comprehensive review of relevant authority, the summary of the law as stated by *Arnould* (then at para 913A of the 1981 16th edition, now at para 25-21 of the 2008 17th edition) that –

> "There appears to be little doubt that where a payment which is not illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hijackers must, it is submitted, in general be recoverable."

In *Royal Boskalis* the payments in question were the waiver of claims under a dredging contract, extracted from the assured by means of the detention by President Saddam of Iraq of the assured's dredging fleet and its personnel. The argument addressed was not precisely that the recovery of a ransom was against public policy, but rather that a payment by way of ransom is not properly to be counted as suing and labouring.

65. The third member of that court, Pill LJ, however, sought to leave the point open. He said (at 699):

> "Ransom had been marked by formal and recognised procedures remote from modern conditions and I do not consider the old cases of much assistance…but the underlying problem of reconciling ransom payments with public policy remains and is not in my view concluded by the repeal of the Ransom Acts enacted to deal with very different circumstances…
>
> I should like to leave open for further consideration the question not taken in the present case: whether a sue and labour clause covers payments made under threats of total loss, from whatever source, which are totally repugnant to English notions of legality. Is the payment of a type the law should recognise as entitling the payer to claim as sue and labour, given a public interest in the issue of extortion of money from shipowners in circumstances of duress and illegality? Payment in face of such a threat may be reasonable within the meaning of that word in section 78(4) of the Act of 1906 but knowledge that such payment is recoverable from insurers may have the effect of encouraging such threats…"

66. However, there is plainly no consensus about such matters, quite apart from the division of opinion in that case itself. *Royal Boskalis* concerned another point of public policy, whether a settlement agreement arrived at by duress (the threats to use the dredging fleet's personnel as human shields) could be enforced, whatever the proper law of a contract might say. It could not, for such threats were against the universal morality of mankind and such as "any civilised tribunal would refuse to give effect to" (at 689 and 729, citing *Kaufman v. Gerson* [1904] 1 KB 591, where at 598 reference was made to the violation of a moral principle "which, if it is not, ought to be universally recognised"). Thus a pirate could not enforce an agreement to pay a ransom, even were such an agreement valid within some local law. Pirates have been spoken of as the enemies of mankind. On the other hand, there is no universal morality against the payment of ransom, the act not of the aggressor but of the victim

of piratical threats, performed in order to save property and the liberty or life of hostages. There is no evidence before the court of such payments being illegal anywhere in the world. This is despite the realisation that the payment of ransom, whatever it might achieve in terms of the rescue of hostages and property, itself encourages the incidence of piracy for the purposes of exacting more ransoms. (Perhaps it should be said that the pirates are not classified as terrorists. It may be that the position with regard to terrorists is different).

67. These conflicting moral and public interest imperatives are reflected in the deliberations of a recent Report of the House of Lords European Committee in respect of Somali piracy, published on 14 April 2010, and thus subsequent to the judgment of David Steel J (HL Paper 103, the "Report"). The Report is entitled "Combating Somali Piracy: the EU's Naval Operation Atalanta". The Report was prepared following an inquiry by the Foreign Affairs, Defence and Development Sub-Committee with the benefit of both oral and written evidence given over the previous year by witnesses representing the government, the military and industry, in particular the shipping and insurance industries.

68. In its Report, the Committee examined the mandate and effectiveness of the EU Operation Atalanta, which has been in operation since December 2008. One of the issues considered was specifically that of the payment of ransom to pirates (at paras 53/58). The decision of David Steel J in this case was referred to in evidence before the Committee, by Mr Gavin Simmonds, head of international policy at the UK Chamber of Shipping (see Q235 in the Minutes of Evidence annexed to the Report). There, Mr Simmonds explained his view that a "fragile status quo" had been achieved which was "delivering our people and ships back", whose safe return was the priority. He therefore did not support any initiative to make the payment of ransom illegal. His evidence was supported by that of Mr Jan Kopernicki, vice president shipping of Shell International Trading and Shipping Company, chairman of the oil companies marine international forum, vice-president of the UK Chamber of Shipping, and co-chair of the UK Shipping Defence Advisory Committee. He said (at Q238/9):

> "At first sight, paying ransoms is an anathema…and we are very familiar with the argument that it might fuel further activity but, as Gavin has mentioned, the priority is around the safety of seafarers…There is, as Gavin mentioned, a conversation emanating from Washington about suggestions to make payment of ransoms in some way illegal…there is a very good international discussion perhaps not to support the American move…We do have a concern that if a view were taken that paying ransoms was illegal, the process would go underground, and that would be far, far worse. None of this is good but this is an extremely difficult situation and at the moment, thankfully, we have had very little loss of life…"

69. At Q79, Lord Malloch-Brown, minister of state at the FCO, said this:

> "It is a curious, you might argue, anomaly of international law, that paying a ransom is not illegal. Ship owners say that the ability to pay ransom is absolutely critical to saving the lives of their crews and are universally in favour of it, despite the fact that it, of course, amounts to both an incentive for further hostage taking and a huge tax on their operations. We are very clear that while we recognise this practice goes on, we will not be a party to it. We do not endorse or condone it, we do not participate in it, but it is a reality of this situation."

70. In its Report conclusions, the Committee said this under the heading of "Hostage taking and ransoms":

> "82. We support the status quo whereby the payment of ransom to pirates is not a criminal offence under United Kingdom law. We recommend that the Government continue to monitor the potential risks of monies reaching terrorists (paragraph 57).
>
> 83. We understand that skilled ransom negotiators can help to keep risk to life and vessels, as well as ransom payments, to a minimum. Where ship owners intend to pay a ransom to recover their vessel and crew, we recommend that they use experienced and effective ransom operators. Where insurance policies do not already insist on experienced negotiators, they should do so (paragraph 58)."

71. There is thus something of an unexpressed complicity: between the pirates, who threaten the liberty but by and large not the lives of crews and maintain their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment of ransom but stands aloof, participates in protective naval operations but on the whole is unwilling positively to combat the pirates with force. Mr Williams described it as a "fragile status quo". In these morally muddied 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, and have yet to be resolved in any legal enactments or international consensus as to a solution, save that of wary watchfulness, the deployment of naval resources as a form of law enforcement or policing operation, and a regard for "a comprehensive approach, seeking to address political, economic and security aspects of the crisis in a holistic way" (para 84).

72. This is not a promising context for Sir Sydney's submission, but it explains the limited approach he takes to the problem. In essence, he comes to rest upon section

78(4) of the Act, which played only a relatively small part in the argument before the judge (see his brief rejection of the point at para 64 of his judgment). The kernel of the submission is that because there cannot or should not be said to be a duty under that subsection to make a ransom payment, therefore 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. However, in my judgment, this is 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: any more than the fact that there is no duty to spend an extravagant sum seeking to save a vessel driven onto the rocks means that there is an ATL (as distinct from a potential CTL) if, quite sensibly, the money and effort are not expended on such a forlorn and in every way undesirable venture. In any event, all such questions of reasonableness are pertinent to CTL, but not to the incidence of ATL.

73. Sir Sydney also sought to draw an analogy between payment of a ransom and the release of prisoners in response to a hostage situation, or even to the payment of a bribe. In this connection Sir Sydney referred to the argument of Mr Robert Goff QC, as he then was, in *Panamanian Oriental* at 367, where the latter submitted that the payment of "fines" amounted to bribery and

> "The Court, in considering the likelihood or unlikelihood of the ship's release, should not take bribery as one of the factors. Bribery was not relevant in this context as it was not one of the steps which a "prudent shipowner" could be expected to take to secure release."

Sir Sydney relied on that argument, and had to submit that Mocatta J had been wrong to reject or overlook it, at any rate so far as the ATL question was concerned (see at paras 21/22 above; a CTL was established).

74. However, I do not think that the analogies are sound. Prisoners can only be released by a state, and only within the limits of the law. The payment of a ransom in response to threats to life or liberty is not prima facie a bribe, done for the purpose of obtaining an improper advantage: but we have not been concerned with the new Bribery Act 2010, which is not yet in force. It is common ground here that payment of a ransom is not illegal, whereas bribery or constructive bribery may well be.

75. In any event, the fact that there may be no duty to make a ransom payment, does not mean that there is any obligation not to make such a payment. Moreover, in *Royal Boskalis*, Phillips LJ recognised the recoverability of ransom payments as sue and labour expenses: see at 720 where he said:

> "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."

In my judgment, such straws in the wind as Mr Goff's argument constitutes, however eminent his reputation and, as a judge, his authority, are overtaken by the considered observations of the majority of this court in *Royal Boskalis*.

76. Moreover, the function of section 78(4) has been said to be limited to a question of causation, in a rare case where negligence or misconduct can be said to break the chain of causation between peril and loss: see *State of the Netherlands v. Youell* [1998] 1 Lloyd's Rep 236 (CA) at 244/245. There has apparently been no example of section 78(4) providing underwriters with a defence to a claim since 1906 (*ibid* at 244).

77. In this appeal, however, we are not concerned with the consequences of a failure to pay a ransom. Not only that, but the payment of the ransom in this case was made, and negotiated, by the owner of the vessel, MISC, and not by the insured. In such circumstances, it seems to me to be simply impossible for Sir Sydney's submission to succeed. As the judge remarked (at [66]), the fact that shipowners paid a ransom inevitably defeats the insured's claim.

Conclusion

78. For these reasons, in agreement with the judge, I consider that this appeal must be dismissed. I am grateful to counsel for the interest and excellence of their submissions.

Lord Justice Moore-Bick :

79. I agree.

Lord Justice Patten :

80. I also agree.