Neutral Citation Number: [2014] EWHC 4133 (Comm)

Case No: 2011 FOLIO 537

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/12/2014

Before:

THE HONOURABLE MR JUSTICE FLAUX

- -

Between:

ATLASNAVIOS - NAVEGAÇÃO, LDA (formerly BNAVIOS - NAVEGAÇÃO, LDA)	**Claimant**
- and -	
(1) NAVIGATORS INSURANCE COMPANY LIMITED **(2) NAVIGATORS SYNDICATE 1221 AT LLOYD'S (formerly MILLENIUM SYNDICATE 1221 AT LLOYD'S)** **(3) TRAVELERS SYNDICATE 5000 AT LLOYD'S** **(4) AEGIS SYNDICATE 1225 AT LLOYD'S** **(5) ARGENTA SYNDICATE 2121 AT LLOYD'S** **(6) WATKINS SYNDICATE 457 AT LLOYD'S** **(7) INTERNATIONAL INSURANCE COMPANY OF HANOVER LIMITED** **(8) ALLIANZ GLOBAL CORPORATE & SPECIALTY (FRANCE) SA** **(9) AXA CORPORATE SOLUTIONS ASSURANCE SA** **(10) CAISSE CENTRALE DE REASSURANCE SA** **(11) GENERALI IARD SA** **(12) GROUPAMA TRANSPORT SA** **(13) MAPFRE GLOBAL RISKS, COMPANIA INTERNATIONAL DE SEGUROS Y REASEGUROS SA** **(14) MITSUI SUMITOMO INSURANCE COMPANY LIMITED**	**Defendants**

- -
- -

Mr Alistair Schaff QC, Mr Alexander MacDonald and Mr Alexander Wright (instructed by **W Legal Ltd**) for the **Claimant**

Mr Simon Rainey QC and Mr Guy Blackwood QC (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 7-9, 13-16, 20-23, and 28-30 October 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FLAUX

The Honourable Mr Justice Flaux:

Introduction

1. On 13 August 2007, upon completion of loading of a cargo of coal in Lake Maracaibo, Venezuela for discharge in Italy, the vessel B ATLANTIC, owned by the claimant owners ("the owners") was subject to an underwater inspection by divers who discovered three bags of cocaine weighing 132kg strapped to the vessel's hull in the vicinity of the rudder, 10 metres below the waterline. This constituted an offence contrary to Article 31 of the Venezuelan 2005 Anti-Drug Law, but it should be noted at the outset that it has never been suggested by the insurers that the owners themselves were implicated in the commission of the offence in any way. The drugs were affixed by persons unknown, presumably members of a drug cartel or their confederates, intent upon smuggling drugs out of South America into Europe.

2. The vessel was immediately detained on 16 August 2007 and the crew were arrested. The prosecutors in Venezuela charged the Master and the Second Officer with complicity in the drug smuggling and on 31 October 2007, the control court judge, Judge Villalobos, sent them for trial and ordered the continued preventive detention of the vessel pursuant to Articles 63 and 66 of the Anti-Drug Law and Article 108 of the Venezuelan Criminal Procedural Code ("COPP"). The vessel remained in detention until, following a jury trial, the two officers were convicted in August 2010 and the court ordered the final confiscation of the vessel. The owners had in fact abandoned the vessel to the Venezuelan court in September 2009.

3. In these proceedings, the owners claim against the defendant war risks insurers (to whom I will refer as "the insurers") for the constructive total loss of the vessel by reason of her detention for longer than the six months provided for in clause 3 of the Institute War and Strikes Clauses Hull 1/10/83 (referred to hereafter as "the Institute War and Strikes Clauses") as amended. Subject to the issue of the application of excluded perils, the insurers admit that the vessel was a constructive total loss. The insurers rely upon two exclusions in clause 4 of the Institute War and Strikes Clauses, for loss arising from detainment by reason of infringement of customs regulations and for loss arising from failure to provide security.

4. As the owners' case was developed at trial, their primary answer to the insurers' case that there was an infringement of customs regulations was that the proximate cause of the detention of the vessel was the malicious act of the drug smugglers who affixed the cocaine to the hull, with reckless disregard as to whether the vessel would be detained as a consequence and that, either upon the true construction of the policy of insurance, that did not amount to an "infringement of the customs regulations" within the meaning of the exclusion or that, as a matter of causation, it was the malicious act and not any "infringement" which was the proximate cause of the continued detention and hence of the constructive total loss of the vessel.

5. The owners' other answer to the insurers' case that the customs regulations exclusion applies is that the proximate cause of the detention of the vessel after 31 October 2007 was the decision of Judge Villalobos to detain the vessel, which the owners contend was a wrong and perverse decision or one which was procured by unwarranted political interference by the Venezuelan executive. This is an area of the case which will require to be examined in considerable detail, both on the facts and as a matter of

Venezuelan law, but in summary the owners contend that, under Article 63 of the 2005 Anti-Drug Law, if the owners' "lack of intent" was demonstrated, an issue which had to be determined at the preliminary hearing which took place before Judge Villalobos and upon which the burden of proof was on the prosecution, the vessel had to be released under that Article. The owners made an application under that Article for the release of the vessel, contending that they had not been charged and that there was no evidence that they were implicated in the drug crime, so that the vessel should be released. The judge ordered the continued preventive detention of the vessel. The owners contend that in doing so, she failed to decide the issue of lack of intent at all, so that her decision was perverse and wrong, alternatively, if she did resolve the issue sub silentio, she did so against the owners inexplicably in circumstances where the unchallenged material before the court clearly demonstrated the owners' lack of intent, so that her decision was perverse and wrong.

6. As the owners' case was presented by the end of the trial, those alternative cases as to why the decision of Judge Villalobos was perverse and wrong, were independent of any suggested political interference. As a further alternative case, the owners submitted that the reason why either she did not decide the issue at all or decided it inexplicably against the owners was that she felt unable to reach an independent decision under Article 63, in other words a decision to release the vessel, without clear political support, so that the decision she made is to be explained by direct or indirect, positive or negative, political interference. Whatever the explanation for the decision, the owners contend that the exclusion does not operate.

7. So far as the insurers' reliance on the exclusion for loss arising from failure to provide security is concerned, the owners contend that they could only be required to provide reasonable security. They contend that they made efforts to provide security, but through no fault of their own, either it was not possible to do so or such security as might have been acceptable to the Venezuelan authorities was simply not reasonable.

8. In the circumstances, the owners contend that neither exclusion is applicable and they are entitled to recover the insured value of the vessel and her equipment, U.S. $14,135,000. In addition the owners claim U.S. $5,872,392 as sue and labour expenses incurred. I will deal with the issues raised by the sue and labour claim, in relation to which the insurers raise a number of points of principle, separately later in the judgment.

The relevant provisions of the policy of insurance

9. The policy was in force for the period 1 July 2007 to 30 June 2008. It was a standard war risks insurance on the Institute War and Strikes Clauses 1/10/83 with additional perils. The Conditions for hull and machinery cover (Section A) provided: *"Including Strikes, riots and Civil Commotions, Malicious damage and Vandalism, Piracy and/or Sabotage and/or Terrorism and/or Malicious Mischief and/or Malicious Damage. Including confiscation and expropriation."*

10. So far as relevant to the present dispute the Institute War and Strikes Clauses, as amended, provided as follows:

> "**1 PERILS**
>
> Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the Vessel caused by

…

1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

…

1.5 any terrorist or any person acting maliciously or from a political motive

1.6 confiscation or expropriation.

2 INCORPORATION

The Institute Time Clauses-Hulls 1/10/83 (including 4/4ths Collision Clause) except Clauses 1.2, 2, 3, 4, 6, 12, 21.1.8, 22, 23, 24, 25 and 26 are deemed to be incorporated in this insurance in so far as they do not conflict with the provisions of these clauses.

…

3 DETAINMENT

In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of [6] months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.

4 EXCLUSIONS

This insurance excludes

4.1 loss damage liability or expense arising from

…

4.1.5 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations

4.1.6 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause …"

11. By virtue of clause 2 of the Institute War and Strike Clauses, one of the clauses in the Institute Time Clauses-Hulls 1/10/83 incorporated in the policy was clause 13, which provides as follows:

"**13. DUTY OF ASSURED (SUE AND LABOUR)**

> 13.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.
>
> 13.2 Subject to the provisions below and to Clause 12 the Underwriters will contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures ...
>
> …
>
> 13.6 The sum recoverable under this Clause 13 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the vessel."

The trial of preliminary issues

12. In March 2012, Hamblen J heard the trial of various preliminary issues in this case, as ordered by HH Judge Chambers QC. The preliminary issues were:

> (1) Whether, in order for Underwriters to be able to rely on the exclusion in clause 4.1.5, they must show that there was privity or complicity on the part of the insured in any infringement of customs regulations.
>
> (2) If not, whether Underwriters must show that there was privity or complicity on the part of the servants or agents of the insured in any infringement of customs regulations.
>
> (3) Whether the exclusion in clause 4.1.5 is only capable of applying to exclude claims for loss or damage to a vessel which would otherwise fall within insuring clause 1.2 or 1.6, and not the other perils insured against under clause 1 and/or Section A of the Conditions.
>
> (4) Whether the exclusion in clause 4.1.5 is capable of applying if an infringement of customs regulations is found not to be, or not reasonably arguably to be, a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel in question as a matter of the relevant local law.

13. In his judgment dated 29 March 2012 ([2012] EWHC 802 (Comm); [2012] 1 Lloyd's Rep 629), the learned judge only answered the first three questions, all in the negative. It was common ground that the fourth issue was fact sensitive and did not need to be decided at that stage. For present purposes it is only necessary to note three aspects of the judgment. First, the learned judge's conclusions at [20] to [26] as to the general principles to be derived from the authorities on clause 4.1.5 in construing the exclusion, principles which I shall also apply:

> "20. Only a handful of cases have considered the exclusion contained in clause 4.1.5 of the present clauses and their similarly-worded predecessors – all at Court of Appeal level. They are *The "Anita"* [[1971] 1 WLR 882] (generally cited as

> the leading case), *The "Wondrous"* [1992] 2 Lloyd's Rep. 566, *The "Kleovoulos of Rhodes"* [2003] 1 Lloyd's Rep. 138 and *The "Aliza Glacial"* [2002] 2 Lloyd's Rep. 421. The last of these is concerned with an alleged infringement of trading regulations (though in fact the regulations in question were held not to be so characterised, with the result that the exclusion did not apply). The remainder involved an alleged infringement of customs regulations, as does the present case.
>
> 21. As was largely common ground, a number of general principles can be derived from those cases.
>
> 22. First, the exclusions contained in clause 4.1.5 must be given a "businesslike interpretation in the context in which they appear": see *The "Aliza Glacial*" at para. 24, referring to the judgments in *The "Anita"*, and *"The Kleovoulos of Rhodes*" at para. 39.
>
> 23. This means, secondly, that questions of construction need to be answered in the light of the fact that the Clauses are to be used worldwide. So they must be given a wide meaning to the extent that they are intended to cover laws in force anywhere in the world. They cannot turn on niceties of local law: *The "Kleovoulos of Rhodes"* at paras. 12 and 38.
>
> 24. Thirdly, the draughtsmen are to be taken to have had in mind decisions of the courts on earlier editions of the clause which have given the wording a settled meaning: *The "Kleovoulos of Rhodes"* at para. 28.
>
> 25. Fourthly, the burden is on Underwriters to bring themselves within the exclusion: see *The "Aliza Glacial"* at para. 24 and *The "Anita"* at page 492.
>
> 26. A fifth principle was a matter of some dispute between the parties, namely whether the exclusions fall to be construed against Underwriters by reason of the *contra proferentem* canon of construction. *The "Aliza Glacial"* at para. 27 suggests that they may not because "if the task of the Court is to ascertain the extent of the risk in the light of the defined perils read together with the relevant exclusion, there is no room for the operation of that rule". On the other hand, in *The Silva* [2011] 2 Lloyd's Rep. 141 at para. 46 the rule was applied when considering the construction of the "any financial cause" exclusion. It is not necessary to resolve that issue in the present case, although there is force in the Claimant's point that if, as is accepted, the burden is on Underwriters to bring themselves within the exclusion as a matter of fact one would logically expect the burden to be on them to do likewise as a matter of construction."

14. Second, although the learned judge did not decide the fourth issue, he recorded the parties' submissions on the issue of arguability and stated at [63] and [64]:

> "63. It was therefore effectively common ground that the exclusion in clause 4.1.5 does not apply if an infringement of customs regulations is not reasonably arguably a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel in question as a matter of the relevant local law.
>
> 64. That common ground finds support in the judgments of the Court of Appeal in *"The Anita"* and the analysis of that decision in *Arnould* at para. 24-35."

15. Third, it is not suggested by the insurers that the owners' primary argument before me that there is cover under the war risks insurance by virtue of the operation of the peril in clause 1.5 of the Institute War and Strikes Clauses: "any person acting maliciously" had been decided against the owners by Hamblen J or that the argument was not open to the owners by virtue of the decision of the learned judge. The learned judge simply recorded the argument at [44] without deciding the point.

The witness evidence

16. Before considering the detailed chronological history of the dispute, I will set out my findings about the various witnesses who gave evidence. Before dealing with the individual witnesses, there is a general point which is of some significance, which is that all the factual witnesses called by the owners were giving evidence about events which took place between four and seven years ago, with the benefit of hindsight, specifically that, at the end of the day, the two officers had been convicted and the vessel confiscated. Inevitably, that hindsight coloured the evidence they gave and in addition, the length of time since the events in question meant that to an extent they were reconstructing events from the contemporaneous documents, the email correspondence and the court files. Save for specific instances which I identify in my detailed analysis, I found that what individual witnesses were saying at the time was a better guide to what was going on and their state of mind than their reconstruction in evidence with the benefit of hindsight.

17. The owners' principal witness was Mr Aurelio Fernandez-Concheso, a Venezuelan lawyer who was the Practice Manager of the Clyde & Co LLP office in Caracas. Clydes were the principal lawyers for the owners in the proceedings in Venezuela in which the owners sought the release of the vessel. As might be expected, he had considerable maritime law experience, but limited experience of criminal law. He was an engaging witness but there was a fundamental problem with his evidence. This was that he had a very strong personal belief that the two officers were innocent and that the detention of the vessel was politically motivated, which to a very large extent coloured his recollection of events. It also emerged that on occasion the evidence he purported to give was multiple hearsay, garnered from what others had told him and from the gossip amongst the legal community in Venezuela, which was simply exaggerated and unreliable. A striking example of that was the colourful evidence he gave in his witness statement about the meeting of the drug prosecutors in a resort hotel at Puerto La Cruz, where the case was discussed with the senior drug prosecutor Mr Leoncio Guerra over dinner and he ordered the prosecution of the two officers, to set a standard for future cases. In cross-examination it emerged that this may have been what he was told by others but the truth was less colourful and not in any sense sinister: the meeting was at the twenty third drug prosecutors' offices and involved the senior prosecutor overruling the reluctance of his juniors to prosecute, something

which could and no doubt does happen with the Crown Prosecution Service in our own country. In the end, Mr Fernandez-Concheso was not in a position to criticise Mr Guerra's decision or to suggest that it was an improper one.

18. I was left with the overwhelming impression that, although Mr Fernandez-Concheso genuinely believed that this whole incident was politically motivated and was part of a conspiracy by the Venezuelan executive to steal the vessel and cargo, his evidence and the trenchant opinions he expressed to that effect really lacked all objectivity. As the insurers pointed out, neither the owners nor Mr Fernandez-Concheso on their behalf could put forward any sensible explanation as to why the Venezuelan authorities would want to steal a twenty four year old bulk carrier, let alone a perfectly standard and unexceptionable cargo of coal. In the circumstances, I have approached the evidence of Mr Fernandez-Concheso with considerable caution and have preferred the picture which emerges from the contemporaneous correspondence. Even then, I consider that some of the contemporaneous opinions he expressed that unfolding events had a political motivation have to be regarded with a degree of scepticism.

19. Mr Idemaro Gonzalez is a criminal lawyer practising in Maracaibo who acted for the crew in the criminal proceedings in Venezuela. He gave his evidence in Spanish through an interpreter, which presented some difficulties, particularly on the first afternoon of his evidence when the interpreter used was simply not equal to the task and either mistranslated or failed to translate much of what he was trying to convey in his evidence. However, making every allowance for those difficulties, he was still an unsatisfactory witness, in the sense that he had a tendency to argue the owners' case and make speeches to that effect, rather than answer the questions he was asked in cross-examination. Overall, as with Mr Fernandez-Concheso, although for slightly different reasons, I had considerable doubts as Mr Gonzalez's objectivity.

20. The other aspect of his evidence which I should record is that, just before he started giving evidence, he indicated a reluctance to do so unless his evidence was heard in private or otherwise subject to some form of anonymity order, because of concerns as to political reprisals against him and his family in Venezuela for having spoken out about the political interference in this case. I made an order that although the proceedings should continue in public, there should be no reporting of the evidence of Mr Gonzalez (or of a subsequent witness Mr Urdaneta who had similar concerns) without a further order of the court. That order was made on the express understanding that if, at the end of the trial, I was not satisfied about the owners' case on political interference, their evidence would become public and could be reported. For reasons elaborated below, I do not consider that the owners have made out their case on political interference. It follows that I also consider that the evidence of Mr Gonzalez and Mr Urdaneta can be made public but since I have not heard any further submissions from the parties I will defer any revocation of my earlier order until the parties have had an opportunity to make further submissions if they wish on the hand down of the judgment.

21. Dr Parra Saluzzo was another Venezuelan lawyer, who acted for the owners at the time that assurances were being sought from the Venezuelan authorities that Judge Villalobos would be free to decide the case in relation to the vessel on the merits at the preliminary hearing. He gave evidence by videolink which had limitations, not least because he did not have the trial bundles. Like Mr Fernandez-Concheso and Mr Gonzalez, he had a tendency to argue the owners' case and I did not consider him an

objective witness. For example in his witness statement he said that Colonel Reverol, the head of the ONA, the Venezuelan National Anti-Drug Agency, was part of a conspiracy to steal the vessel, a conclusion he apparently reached because Colonel Reverol had refused to meet him face to face. However, as Mr Simon Rainey QC for the insurers pointed out to him in cross-examination, this completely ignored that the Colonel had met with Mr Fernandez-Concheso and another lawyer, Mr Hector Flores and the meeting went well.

22. Dr Vergara Pena was one of the other lawyers instructed by the owners at the appellate stage in the Venezuelan proceedings. He also gave evidence by video link from Venezuela with the same limitations as with Dr Parra. I considered him to be an unsatisfactory witness, who was prepared to say whatever he thought would assist the owners' case, both in relation to his dealings with Judge Finol and in his suggestion that the change in the constitution of the Court of Appeal was politically motivated whereas contemporaneously he was telling Mr Fernandez-Concheso that it was simply a matter of vacation arrangements.

23. The owners called two of the judges who were involved in the case. Alvaro Finol Parra was the judge who was responsible for ordering the release of the vessel in March 2008. However, the circumstances in which he did so were clearly irregular and in disregard of the principles of due process, for the reasons elaborated below. Although he began his evidence with a statement on his behalf by the owners' counsel saying that he had come to tell the truth, not to assist the owners' case, I am afraid that I was left with the abiding impression that both at the time in 2008 and in his evidence before the court, Mr Finol wanted to do what he could to assist the owners, perhaps because he genuinely believed that they had been wronged by the Venezuelan legal system. However, as a consequence, I found much of his evidence unreliable, including the suggestion that he had opposed the release of the vessel against a bond and the political persecution he alleged he had sustained since reaching the decision to release the vessel.

24. Andres Urdaneta Casanova was the judge who conducted the eventual criminal trial at which the two officers, the Master and the Second Officer, were convicted. On any view he was a problematic witness, given that on his own version of events he had perverted his judicial oath. He had produced a witness statement dated 24 January 2013 in which he alleged that when the case was first assigned to him, he was ordered by Dr Arteaga, the head of the Zulia Judicial Circuit, to act quickly and be harsh and to ensure that the vessel passed to the Venezuelan state. At the outset of his oral evidence he withdrew that statement and produced an amended statement dated 14 October 2014, just before he gave evidence, in which he recanted any suggestion that when he was first assigned the case he was told to seize the vessel. In the amended statement, he now alleged that towards the end of the trial, he received a call from Colonel Aponte the Supreme Court Justice who was Dr Arteaga's predecessor as the head of the Zulia Judicial Circuit (and who has now fallen out of favour with the government and fled abroad), telling him to guarantee that the vessel passed to the state.

25. His explanation for this change of evidence was that the person who took down his evidence (in other words presumably a junior solicitor or a transcriber) had made a mistake. That explanation was wholly implausible and it is inconceivable that if the person taking down his evidence had made such an important mistake as to when any instructions were given to confiscate the vessel and by whom, that would not have

been picked up by Mr Urdaneta, who must surely have read through his statement carefully before signing it. In my judgment, what happened was that, when it came to giving oral evidence before this Court, Mr Urdaneta simply could not bring himself to make an untrue allegation about what was ordered by Dr Arteaga, so he simply ascribed the relevant blame to Dr Aponte at a later stage, in circumstances where Dr Aponte was out of favour and had fled the country, so that repercussions were unlikely to be visited on Mr Urdaneta for blaming him.

26. There were other changes between his original statement and this amended statement. In the original statement he had said; "I exerted significant pressure on the jurors to convict the officers". In the amended statement that was deleted and he said he felt under pressure to convict because of a general fear that if he did not he would lose his job, which he explained. He then said that the decision by the jurors to convict might have been influenced by him given the magnitude of the case because it was a drugs case, which is a very different thing from saying he put pressure on them to convict. Overall, I consider that Mr Urdaneta's evidence is inherently unreliable. Furthermore, I was not convinced that the fear of persecution which he claimed if his evidence became public in Venezuela was genuine. It seemed to me highly unlikely that anyone in authority in Venezuela would have a concern about his evidence, particularly since, before me, he maintained that the order to confiscate the vessel had come from Colonel Aponte who is now out of favour. However, I will hear any submissions the parties wish to make before revoking the order I made during the trial.

27. The owners called two witnesses from the managers of the vessel, BCM. Mr Stefano Magnelli was an engaging witness with strong views about people and a sharp wit, much given to colourful Italian metaphors. As with other witnesses, he had a continuing outrage about what had happened in Venezuela. Whilst this was understandable in the circumstances, it meant that both at the time and in his oral evidence, he tended towards the conspiracy theory that the Venezuelan authorities were intent on stealing the vessel and the cargo. However, apart from his brief visit to Venezuela in late October 2007, what he could say about events on the ground was very much dependent on information obtained from the owners' lawyers and P&I correspondents in Venezuela, who were scarcely objective. His evidence was thus often multiple hearsay, which is inherently unreliable, particularly so in this case.

28. One aspect of his evidence which was not impressive was his tendency to downplay his contemporaneous concerns about the risk of spontaneous combustion of the coal cargo, with potentially disastrous consequences for the vessel, the cargo and the environment. He sought to claim those concerns were not real, but part of a tactic to persuade the Venezuelan authorities to release the vessel and the cargo, going so far as to say that his only concern was about damage to the coatings of the holds. However, I am satisfied that, although the contemporaneous concern had a tactical element, there was a genuine concern on the part of Mr Magnelli and the owners at the time about the risk of spontaneous combustion and the disastrous effect that could have on the vessel, the cargo and the environment.

29. Miss Alessia Sebastianelli was an assistant manager with BCM. She gave evidence about matters concerning the owners' sue and labour claim. She was an engaging witness who gave her evidence in a straightforward manner. I have no doubt that she was an entirely honest witness and I accept her evidence about the reasonableness of the expenses incurred by the owners.

30. Mr Matteo Stasio was an Italian maritime lawyer who was head of claims at the P&I brokers. He gave some unconvincing evidence about the attempts to put up security. He insisted in evidence that he and the owners had always been advised that putting up a bond to release the vessel would not be possible, but it is clear that before the preliminary hearing, Mr Fernandez-Concheso was saying this was a possibility. Mr Stasio claimed at one point that there had been an application to put up security at the preliminary hearing, but I am satisfied there was no such application, because Gard did not want to put up security.

31. So far as the experts on Venezuelan law are concerned, the owners called Dr Cabrera Romero, an eminent retired Supreme Court Justice with many years of experience of dealing with and trying criminal cases. The insurers called Professor Luiz Ortiz Alvarez, a distinguished academic who had no experience in his law practice of presenting or arguing criminal cases, but who was able to provide the court with the benefit of his academic study and analysis of the relevant law. However, despite their eminence, I did not regard either of them as entirely satisfactory witnesses, in the sense that they both had a tendency to argue the case of the respective party by whom they had been called. This was more true of Professor Ortiz than of Dr Cabrera. With Professor Ortiz, I had the impression on occasion that his evidence was not so much about what Venezuelan law on any particular point is as what he wanted it to be. However at the end of the day, the impression I formed of the two experts was of marginal significance in determining the issues of Venezuelan law because by the end of the trial, the issues in dispute were limited and it was essentially possible to determine those issues from my own analysis of the Venezuelan statutes and case law.

The approach to the issue of political interference

32. Before considering the detailed chronology of the incident, I should say something about the approach to the issue of political interference which was advocated by the owners. In his opening submissions Mr Alistair Schaff QC for the owners emphasised what he described as the "context" of what happened in this case, the real world of Venezuela under President Chavez, in which he submitted there was systemic political interference with the judiciary. He referred to analyses conducted by various respected international organisations, specifically a report from Human Rights Watch in September 2008: "A decade under Chavez" which referred to the neutralisation and political takeover of the Supreme Court in these terms:

> "The government under President Chavez has effectively neutralised the judiciary as an independent branch of government. Chapter 3 documents how the President and his supporters carried out a political takeover of the Supreme Court in 2004 and how the court has since largely abdicated its role as a check on arbitrary state action and a guarantor of fundamental human rights."

33. Mr Schaff QC also referred to the OAS Report "Democracy and Human Rights" which documents a number of instances of judges who had dared to decide cases against the government of President Chavez being persecuted and hounded out of office. He submits that this was the fate of Judge Finol in the present case. He urged the court to approach the chronological history of the case with this context well in mind. Later in his submissions, he criticised what he described as Mr Rainey QC's "stitch in time" approach, by which he meant an approach of analysing each event in turn separately and minutely. I did not consider this a fair criticism. It seems to me

that Mr Rainey QC's approach of a careful analysis of events to see whether one can discern any evidence of political interference is the correct one, as opposed to simply assuming uncritically on the basis of international articles that the judges must all have been leant on by the politicians because it is Venezuela.

34. It is also important to have in mind that the relevance of the issue of political interference in this case is in considering whether it can be said that the exclusion in clause 4.1.5 of the Institute War and Strikes Clauses does not apply because the proximate cause of the detention of the vessel and hence of her constructive total loss is not the infringement of customs regulations but a decision of the local courts which is completely unjustified because it has been procured by political interference, what Lord Denning MR in *The Anita* [1971] 1 WLR 882 at 888G described as "political intervention unconnected with the breach [of customs regulations]" or as Mr Schaff QC categorises it "unwarranted political interference".

35. It will be necessary to look at the judgments in *The Anita* (which, as Hamblen J said, is the leading case in this area) in more detail below, but for the present it is important to note the distinction which Lord Denning draws between what might be described as justified or "connected" political interference on the one hand and unjustified or unconnected interference on the other at 888E-F:

> "Yet again, if there were evidence of political interference with the course of justice — so that the court acted on the instructions of the politicians and not on its own judgment — it might be different. I can conceive of some instructions which would not render the confiscation invalid. For instance, if the government were to say to the court: "Smuggling is very prevalent and serious. The penalties should be more severe": there would be nothing sinister in it. But, if there was direct intervention by politicians commanding the court to confiscate the vessel, without any foundation for it, then, of course, the loss would not be covered: because the confiscation would not be by reason of customs regulations, but by reason of the political interference."

36. The relevance of that distinction in the present case is that there is a world of difference between a direction from the executive to prosecutors and judges to apply the Anti-Drugs Law strictly and harshly, because Venezuela wants to be seen to be cracking down on drug smuggling (which as Lord Denning says would not be sinister and would be justified) and a direction to be tough on drugs crime irrespective of the Law and to confiscate the property of third parties which was used to commit the crime (here the vessel), even though the Law does not even arguably justify it. Despite the strenuous arguments on behalf of the owners that this case falls into the latter category, in my judgment for reasons elaborated below, if there was "political interference" at all, it was to impress upon prosecutors and judges alike the need to apply the 2005 Anti-Drugs Law strictly.

37. Furthermore, so far as the decision of Judge Villalobos at the preliminary hearing is concerned, which had to be and was the owners' primary target, for reasons developed in more detail in the next section of the judgment, I am quite satisfied that prior to that hearing, the judge received a call from her judicial superior, Colonel Aponte (and possibly a call from the Minister of the Interior as well) confirming that she was free to decide the case on the merits, without any political constraints.

Despite the ingenious attempt of Mr Schaff QC to categorise this as "negative political interference" because the message given was insufficiently strong to overcome her concerns generated by the involvement of the ONA and Corpozulia, (the development corporation of the local Zulia region and an arm of the Ministry of Planning and Development), it seems to me the comfort given by the call or calls was the complete opposite of political interference or, if it was such interference at all, was not in any sense the sort of unconnected political interference that would be required to break the chain of causation between the infringement of the customs regulations and the detention of the vessel.

The detailed factual chronology

Events leading up to the preventive detention of the vessel on 16 August 2007

38. The vessel was one of a number of bulk carriers managed by Bulker Chartering and Management SA (BCM) in Lugano, Switzerland. At the time of the incident she was chartered to Bulk Trading SA (which seems to have been an associated company based at the same offices in Lugano) by a charter on the NYPE form dated 12 July 2007, for a time charter trip from Venezuela to Italy carrying coal with an estimated charter period of 30 days. She proceeded to Palmarejo on Lake Maracaibo where she loaded a cargo of coal. The cargo was apparently loaded at a fixed transfer station to which it was brought by barges. A bill of lading dated 12 August 2007 was signed on behalf of the Master Captain Volodymyr Ustymenko acknowledging the shipment of 33,733.38 metric tons of Colombian steam coal (although in submissions to Judge Finol later, Bulk Trading said the cargo was 25,733.38 metric tons of Colombian coal and about 8,000 metric tons of Venezuelan coal). The cargo was consigned to the order of Bulk Trading for onward sale to Tirreno Power in Rome.

39. On 12 August 2007, there was an underwater inspection of the hull of the vessel by divers instructed by the Venezuelan authorities. The divers noted that an underwater grille on the hull was loose and inside the space behind the grille were various objects not belonging to the vessel variously described as a grappling hook, a saw, a rope and other tools. The port authorities evidently thought these were placed there preparatory to drug smuggling and the Master was told by the port authority to have the grille rewelded because of the risk of drug smuggling. He declined to do so because the vessel was due to sail that night. However the vessel did not sail, apparently because there had been a miscalculation of the vessel's draft and consequent short loading of cargo, so that further cargo had to be loaded.

40. On 13 August 2007, a further underwater inspection of the hull with divers took place, possibly prompted by the fact that the vessel had not sailed on the night of 12 August 2007, notwithstanding that imminent sailing was the Master's reason for declining to have the grille welded. That inspection found the drugs strapped to the hull of the vessel, in a location near the vessel's rudder, some 50 metres from the location of the grille. The vessel was detained by the port authorities and the entire crew were arrested.

41. On the evening of 15 August 2007, a hearing was held at the Port National Guard offices. In attendance was the control judge, Judge Villalobos, a clerk and two local public prosecutors Isabella Veccionache and Diana Vega Corea. The prosecutors sought the detention of the vessel pursuant to Articles 63 and 66 of the 2005 Anti-Drug Law. Those Articles provide, in translation, as follows:

> "Article 63. Preventive seizure.
>
> When the offences covered by Articles 31, 32 and 33 of this Law are committed on ships, aircraft, railways, other overland motor vehicles or on livestock, such items will be seized as a precautionary measure until their confiscation in a final judgment. The owner shall be exonerated from such measure when there are circumstances that demonstrate its lack of intent. That question will be decided at the preliminary hearing.
>
> Article 66. Secured, seized and confiscated property
>
> The movable or immovable property, capital, ships, aircrafts, overland motor vehicles, livestock, equipment, instruments and any other objects employed in the criminal offences investigated as well as property in respect of which there is reasonable suspicion that it originates from the offences envisaged in this Law or related offences such as property and capital whose lawful origin cannot be proven, bank deposits or even a lifestyle that do not correspond with the income of the individual or any other lawful contribution, false imports or exports, excess or double invoicing, the transfer of cash violating customs' regulations, bank or financial transactions from or to other countries, without any proof of lawful investment or placement, unusual transactions, obsolete, non-conventional, structured transactions or transactions recorded as suspicious by the carriers and the possession or ownership of companies or false companies or corporations or any other element of conviction unless the law expressively prohibits that it be admitted, shall be in all cases seized as a preventive measure and when there is a final, definitive judgment their confiscation will be ordered and the property will be awarded to the pertinent decentralized entity, so that it can distribute the resources to carry out its programmes and the public programmes that focus on the suppression, prevention, control and oversight of the offences categorised in this Law as well as for those agencies dedicated to programmes of prevention, treatment, rehabilitation and social re-adaptation of users of narcotic drugs and psychotropic substances. Similarly, resources will be allocated for the creation and strengthening of national and international networks provided for in this Law."

42. The hearing before Judge Villalobos resumed at the court in Maracaibo on 16 August 2007. The crew were represented by Mr Gonzalez. The Second Officer, who was the officer responsible for security on board the vessel was deposed and stated that there was no security plan in relation to the bottom of the vessel. The Master was also deposed and it was noted that, in the first diver's inspection on 12 August 2007, the grille was broken and a saw was found. In her ruling at the end of that hearing Judge Villalobos ordered the continued detention of the crew pending the continued investigation of the commission of criminal offences and preventive detention of the vessel under Article 108 of the COPP whilst that investigation was taking place. Article 108 sets out the functions of the prosecutors in Venezuela which include

asking the control court for any relevant precautionary measures and securing property used in the commission of an offence. It is not suggested by the owners that Judge Villalobos acted other than lawfully and perfectly properly at the hearing on 16 August 2007.

43. Mr Fernandez-Concheso was at that hearing on behalf of the owners and sent an email to Mr Magnelli of BCM from the hearing, in which he explained that unlike in other jurisdictions where such matters were investigated and the vessel and crew could leave in three or four days, in Venezuela there was a very harsh approach and a criminalisation of the crew and the owners. He explained that the average time for release of vessel and crew in 99% of cases was 25 to 35 days because, even though the prosecutors know the crew and owners were not involved, they took time to dismiss the charges to allow the publicity to die down and to cover their backs. Mr Fernandez-Concheso went on that there was an "additional element" in the present case which was that "*unfortunately, at least up to now, the prosecutors are under the impression that there is some crew involvement*". In his evidence, after some initial reluctance, Mr Fernandez-Concheso confirmed that, in the present case it was a real problem that the public prosecutors did believe that the crew were complicit in the drug smuggling, which led them to adopt a more aggressive approach than in other cases of vessels which had been found with drugs strapped to their hulls. In my judgment, that was a problem for the owners which never really went away.

44. At this stage the reasons for suspecting the crew were essentially twofold, first the fact that the Master had refused to repair the grille, in circumstances where it had apparently been tampered with by persons preparing to smuggle drugs and yet the vessel had not sailed until the following day, and second the fact that public prosecutors simply had no experience of the maritime industry and did not know how vessels operate. This was the first case involving a vessel that one of the national prosecutors Ms Isabella Veccionache had been involved in.

45. Judge Villalobos was a mercantile lawyer who was now a criminal control judge. Although she was a temporary or provisional judge without security of tenure, she had six years of experience of criminal cases as such a judge, which will almost certainly have included drugs cases. Furthermore, although there was a suggestion in some of the owners' evidence that she was timid, that is certainly not how Mr Magnelli saw her. He memorably described in his evidence her painted nails and high heels and her resemblance to the pop star Gloria Gaynor. Clearly this was no shrinking violet or wallflower. Furthermore, although Mr Fernandez-Concheso sought to make much in his evidence of the fact that she had no maritime experience, both he and Mr de Leo in due course thought her an intelligent person who understood the legal issues. In contrast with Mr Fernandez-Concheso's view, Mr Magnelli thought that she did have experience of maritime cases. However, if she did lack maritime experience, that will almost certainly have meant that what struck the prosecutors as suspicious would have struck her in the same way. The rough conditions and absence of suitable attire meant that unfortunately she was not able to visit the vessel, a matter which concerned Mr Fernandez-Concheso as he regarded such a visit as important.

46. There were other related matters which did not help the owners from the outset and which led to a harsh approach by the public prosecutors. This was either the fifth or the sixth case in Lake Maracaibo of a ship owned by foreign owners having been found with drugs strapped to the hull. It is clear that the prosecutors and, in particular the senior drugs prosecutor, Mr Guerra, were intent on making an example of this

vessel from the outset, by imposing the Anti-Drugs Law as harshly as possible, to set the benchmark for other cases, in effect *pour encourager les autres*. There had been international criticism of Venezuela for the inaction of the authorities over drug crime and, as Mr Gonzalez put it in cross-examination: "*they really wanted to carry out an investigation to show these foreign governments how really they were carrying this out and in fact that was the reason for the naming by the national [prosecutors] of the [accused officers]…They were going to investigate anybody who they thought was guilty*". Furthermore, as Mr Fernandez-Concheso agreed, the prosecutors had to be seen to be taking as hard a line with international ship operators and owners as they did with Venezuelan nationals whose cars or trucks were seized or confiscated.

47. Also from the outset, there was a great deal of media attention paid to this case which put the owners and the prosecutors in the spotlight. Whilst the attitude of the managers on behalf of the owners was to maximise publicity from an early stage with a view to turning it to their advantage, that was not a tactic which recommended itself to the lawyers. Both Mr Fernandez-Concheso and Mr Charles de Leo, the lawyer instructed on behalf of Gard, the owner's P&I Club on 1 October 2007 thought that publicity could make matters worse, backing the prosecutors into a corner and making it difficult for them just to drop the case quietly.

From the preventive detention to the filing of the accusacion

48. Later in August 2007, there were further developments which made matters worse. On 21 August 2007, Mr Fernandez-Concheso reported that four members of the crew had gone ashore illegally with the assistance of the stevedores, Orivenca, without the vessel's ISPS log being completed. This caused additional suspicion on the part of the prosecutors. The court issued a warrant for the search of Orivenca's offices. Mr Fernandez-Concheso confirmed in evidence that the prosecutors raided the home of the manager of the stevedores, whose father was subsequently convicted of drug smuggling. He had a meeting with the National Guard Intelligence officers who were convinced that Orivenca were involved in the drug smuggling and had intercepted certain emails. He agreed in cross-examination that, by the end of August 2007, the prosecution and National Guard had started to suspect the stevedores significantly.

49. On 24 August 2007 Judge Villalobos wrote to Colonel Reverol, the director of the ONA, informing him of the judgment of 16 August 2007 ordering the provisional detention of the vessel at the port of Maracaibo. The judge's letter stated that, in accordance with Article 66 of the Anti-Drug Law, the vessel would be left under the custody and administration of the ONA. Mr Fernandez-Concheso accepted this was done legally, but said the actual physical detention of the vessel was a matter for the National Guard since the ONA did not have the necessary resources.

50. From the outset of the vessel's detention, one matter which concerned both the owners and the ONA was the physical condition of the cargo. There is not much doubt that the owners and managers sought to "play the card" of the risk of overheating and spontaneous combustion of the cargo of coal as a ground for procuring the release of the vessel and the crew, but despite Mr Magnelli's attempt in his evidence to downplay the extent to which those concerns were genuine, I have no doubt that there were genuine concerns from the outset. August and September are two of the hottest months in Lake Maracaibo and, in due course, the managers appointed cargo surveyors who reported to the prosecutors and the judge concerning the need to monitor cargo temperatures and ensure that overheating did not occur. I refer in more detail to that survey report below.

51. Upon receipt of the letter from the judge, on 24 August 2007, Colonel Reverol wrote a report to Mr Pedro Carreno, the Minister of the Interior (said to have been the second most important man in the country at the time after President Chavez) referring to the court judgment and the letter from the judge. Colonel Reverol's conclusion and recommendation was that: *"considering the recent weather conditions in the country and before the risk of loss or deterioration of the detained coal on board the vessel…the assignment of the use, conservation and custody of the vessel including the coal to Carbozulia [is recommended]."* Against this recommendation, which Mr Carreno underlined and approved, he has written "process urgently". Carbozulia is a specialist state coal company in Zulia State.

52. In his evidence, Mr Fernandez-Concheso suggested that Colonel Reverol, Mr Carreno and General Martinez, the president of Corpozulia were all "buddies" in the military and that this was the beginning of the conspiracy on the part of the Venezuelan executive and Zulia State to steal the vessel and cargo and to use the coal and trade the vessel. In my judgment, that is absurd. The reference to assignment of the "use, conservation and custody" of the vessel and cargo ("uso, guarda y custodia" in the Spanish) simply reflects Article 67 of the Anti-Drug Law which provides that the relevant government agency (here clearly the ONA) is permitted to decide on the necessary measures for the use, conservation and custody of detained property. Furthermore, I agree with Mr Rainey QC's submission that "process urgently" is not the Minister saying "get me the cargo as soon as possible" but rather "sort out this problem urgently using a specialist coal company which will know how to deal with any problems with the cargo". I also accept the insurers' submission that the application to assign the cargo to Carbozulia, subsequently varied to Corpozulia as the State Regional Authority, is not sinister, but entirely understandable. The ONA is the anti-drugs agency and had no resources to deal with the vessel or cargo if something went wrong.

53. One of the peculiarities of the Venezuelan judicial system at the time of this incident (the law has now changed) was that it was quite normal and common for defence lawyers to have private meetings with the control judge to put their case and in effect to lobby the judge on behalf of their client, in the absence of the prosecution. Lawyers for the owners and the crew had four or five such meetings with Judge Villalobos in the present case. Although there is no direct evidence of Judge Villalobos having corresponding meetings with the prosecution in this case, in the absence of the lawyers for the owners or the crew, it would be equally normal and common for her to have done so and, in my judgment, the court is entitled to infer that such meetings did take place from time to time at which the prosecution discussed the case and their investigations with the judge.

54. Such a meeting between the judge and a defence lawyer took place when Mr Gonzalez met Judge Villalobos on 29 August 2007. His evidence was that he asked for the release of the vessel and she said that to do so she would require political support. I have considerable doubts as to whether whatever discussion took place was really to that effect, since it would be highly unusual, given that (i) Article 63 of the Anti-Drug Law provided for the issue of lack of intent to be determined at the preliminary hearing which would take place when any accusation had been laid against potential accused and the judge was deciding whether to send the case for trial and (ii) the judge had made an order for preventive detention less than two weeks previously. As Mr Gonzalez accepted in cross-examination, judges had to act very carefully in drugs cases because the state wanted to crack down on drugs smuggling

and there was a concern about judges being corrupted by the drugs cartels. This makes it all the more unlikely that the discussion took the form suggested by Mr Gonzalez, but even if it did, in my judgment, release of the vessel at this stage could only have occurred with the consent of the prosecutors, which would never have been forthcoming, nor is there any reliable evidence (as opposed to assertion by Mr Gonzalez) that the owners sought such consent.

55. By early September 2007 only a few days later, matters were not going favourably for the owners. As Mr Fernandez-Concheso reported in an email of 4 September, depositions were being taken that day from Orivenca staff and the prosecution had strong suspicions that Orivenca were involved. In his evidence, Mr Fernandez-Concheso compared the ebb and flow with the prosecutors to a patient in intensive care, improving one moment and worsening the next, like an ICU graph. He accepted that this time when the prosecutors still had strong suspicions about stevedore involvement was a worse moment for the owners.

56. Following the recommendation of Colonel Reverol which Mr Carreno had accepted, on 5 September 2007, the Director General of Legal Consulting in the Ministry of the Interior wrote a letter to the judge referring to her letter of 24 August 2007 and enclosing the report from Colonel Reverol and the Minister's instructions. The letter then requested the judge to authorise the state to use the coal given the risk of loss and deterioration due to the hostile meteorological conditions the cargo had been under. Mr Schaff QC relied upon this as an example of political interference, which must have been seen by the judge as in effect an instruction from the state which affected her thinking. In my judgment, it is nothing of the sort. Judge Villalobos' own letter of 24 August 2007 had allocated the vessel and cargo to the custody of the ONA, a perfectly legal order, and Colonel Reverol of the ONA had then requested that the vessel and cargo be assigned to Carbozulia, because of potential problems with the cargo that the ONA as the anti-drug agency were not in a position to deal with. Far from the letter of 5 September 2007 putting undue political pressure on the judge, it did no more than ask her to agree to the recommendation as contemplated by Article 67. Furthermore, the evidence as to the order eventually made by the judge on 27 September 2007, which was tough on the ONA and Corpozulia and emphasised that they were not to exceed their administrative functions, gives the lie to any suggestion that her thinking was affected at this stage by political pressure.

57. In fact, at around this time the owners and cargo interests were seeking permission to put cargo surveyors on board the vessel to inspect the cargo. On 31 August 2007, Mr Magnelli passed on to the P&I correspondents in Caracas an email from Bulk Trading referring to concerns of the ultimate receivers, Tirreno Power that the cargo would have suffered self-combustion and requesting urgent permission to put a surveyor on board. Permission was granted by the judge on about 6 September 2007 for a surveyor to inspect the cargo. On that day, Mr Fernandez-Concheso met the judge and asked whether the vessel could be released with a replacement crew being put on board. The judge asked why the owners could not tranship the cargo, which he explained would involve immense cost and inconvenience. In an email that day Mr Fernandez-Concheso stated: *"Very importantly today the Vice Minister of Energy called the judge to tell her the Government was concerned with the coal's permanence on the Lake and that could help speed up the process."* That suggests that the concerns expressed by the ONA endorsed by the Minister of the Interior about the possibility of damage to the cargo were genuine. It also shows that the owners and their lawyers

were only too happy for political "pressure" to be brought, provided it was favourable to them.

58. On 8 September 2007, Captain Urrego of Incolab Services Venezuela CA conducted a survey of the cargo on board the vessel in Lake Maracaibo. A Final Report was prepared by him, which was sent to Judge Villalobos as well as to Bulk Trading and the owners' representatives. Temperature readings were taken at 16 points on the surface of the cargo in each of the five holds, and in holds 1 and 5 maximum readings of 47°C were recorded. He conducted a visual inspection of the cargo and said there were no visual signs of self-combustion. He stated that though there was no evidence of self-heating, it was important to note the temperatures on the surface were approaching the critical maximum under the IMO regulations. The crew of the vessel should keep monitoring the temperatures as they had been doing and, if temperatures over 50°C were detected, the cargo should immediately be unloaded.

59. That survey report was forwarded to the public prosecutor Ms Diana Vega Corea under cover of a summary report dated 11 September 2007. Having stated the properties and characteristics of coal as set out in the IMO Solid Bulk Cargoes Code, the surveyor said that by gradually increasing the temperature of the cargo there was a high risk of self-combustion which would have negative consequences for Lake Maracaibo, the magnitude of which would depend upon the ability to control any fire in the cargo and on the vessel.

60. After the survey report, Judge Villalobos was clearly so concerned about the environmental risk that she was prepared to order the release of the vessel, disembarking the crew ashore, as they were all still under investigation and allowing a replacement crew on board. However, the owners did not agree to this, it being claimed on their behalf that no replacement crew was available. The owners' tactic was to use the environmental risk to obtain the release of the current crew as well as the vessel. This emerges from an email on the evening of 11 September 2007 from Mr Fernandez-Concheso to the brokers in which he states: *"the judge is extremely concerned. Last night she wanted to release the vessel disembarking the crew but we of course aborted her attempt on grounds that there is no replacement crew (but of course as a strategy play as well). The thing is that while she can release the vessel without the prosecutor's consent the same does not apply to the crew and the prosecutors seem to want to request the 15 day extension*". The reference to the 15 day extension is to a potential request to extend the time to file charges beyond the initial 30 day period permitted under Article 250 of the COPP.

61. It seems to me that the fact that the judge was prepared to order the release of the vessel if a replacement crew could be put on board is scarcely consistent with political pressure being put upon the judge to maintain the detention of the vessel and cargo or hand them over to be used by Carbozulia or Corpozulia or, if such pressure was being placed upon her, that she was prepared to bow to it. There was no suggestion by Mr Fernandez-Concheso that the judge's concerns were not genuine or that she was not prepared to release the vessel on that basis, which is no doubt why he was anxious to dissuade her, because the tactic being employed on behalf of the owners was to keep the vessel and crew together. In my judgment, what the judge was contemplating on 11 September 2007 was the release of the vessel in order to protect the environment.

62. On 12 September 2007, a contract was entered into between the ONA on the one hand and Corpozulia on the other, whereby pursuant to sections 66 and 67 of the 2005 Anti-Drug Law, the vessel was entrusted to Corpozulia for her *"safekeeping, custody,*

use, conservation and maintenance". Corpozulia was obliged to return the vessel to the ONA *"immediately upon request".* The owners submit that this was all part of the conspiracy between the various emanations of the Venezuelan executive to take over the vessel and cargo for themselves, emphasising the reference to the word "use". However, I agree with the insurers that, as with the recommendation of Colonel Reverol in his report of 24 August 2007, the words used in this contract are reflecting the wording of Article 67 of the Anti-Drug Law and are referring to temporary use during preventive detention, not part of some Machiavellian plot to take over the vessel and cargo.

63. On 13 September 2007, Mr Fernandez-Concheso was reporting by email to the owners that the prosecutors had been very difficult over the last few days and were not only insisting on the extension but proposed to the judge again transhipment of the cargo, which he had to explain again was ludicrous. He recorded that the judge was being more reasonable and had called a hearing the following day to hear the parties on the extension. The fact that the prosecutors were proposing transhipment of the cargo is again hardly consistent with some plot by the executive to steal the cargo: quite the reverse. Of course transhipment would have thwarted the owners' tactic of keeping vessel and cargo together to exert as much environmental pressure as possible.

64. On 22 or 23 September 2007, a meeting of the drug prosecutors took place in Puerto La Cruz at which the senior drugs prosecutor Mr Guerra appears to have overruled Ms Veccionache and Ms Vega Corea and required that the Master and Second Officer be charged and prosecuted. Since none of the witnesses attended that meeting, the evidence about it is inevitably third hand hearsay at best. I have already indicated when discussing my impression of Mr Fernandez-Concheso as a witness that I reject his colourful evidence of what Mr Rainey QC described as a louche dinner at a seaside hotel. In my judgment the meeting was an official one which almost certainly took place at the twenty third drug prosecutors' offices in Puerto La Cruz, as Mr Gonzalez said.

65. In my judgment, there is no basis for the assertion by Mr Gonzalez that Mr Guerra had not looked at the file before he made his decision. In all probability, he will have reviewed the file. There is nothing wrong or sinister in the senior drugs prosecutor intervening in what was a high profile drugs case, being the fifth or sixth such case involving drugs strapped to a vessel's hull in the recent past, or in his insisting on prosecution to set a standard for future cases. Furthermore, even if the owners are right that the local prosecutors did not want to prosecute, there is nothing improper in Mr Guerra overruling them and insisting on prosecution. As Mr Rainey QC rightly pointed out, difficult criminal cases often call for difficult decisions by senior prosecutors on which there may be differing views, of which the CPS decisions in Operation Yewtree provide a good recent example in our own jurisdiction.

66. In his evidence Mr Fernandez-Concheso sought to portray Mr Guerra as a political animal and in his closing submissions Mr Schaff QC sought to make much of the fact that he was the brother in law of Colonel Reverol and subsequently became Deputy Minister when Colonel Reverol became the Minister of the Interior. I do not find it surprising that in a country where power is in the hands of a political elite, the senior drugs prosecutor should be a political animal. Furthermore it may be that his decision to prosecute the two officers was politically motivated, in the sense that the Venezuelan government had decided to get tough on drug smuggling, but it simply

does not follow that that decision to prosecute was an arbitrary or improper one. Whilst the Master and Second Officer were in fact innocent, I consider that the prosecutors genuinely thought that there were sufficient suspicious circumstances to justify bringing the prosecution against them.

67. On Tuesday 25 September 2007, the prosecutors filed their *Acusacion* or indictment bringing charges against the Master and the Second Officer. In a report the following day Mr Fernandez-Concheso said that, until the end of the previous week, the information they had had unofficially was that the prosecutors were typing a dismissal petition. He then asserted that there was political pressure exerted over the Prosecutors Central Office in Caracas by Corpozulia, the ONA and the Ministry of the Interior to prosecute, allegedly part of a plan by the Venezuelan state to steal the vessel. I agree with Mr Rainey QC that, as he put to Mr Fernandez-Concheso in cross-examination, there was no support for that view from anything which had taken place up until then, other than his strong personal belief as a maritime lawyer that there was no basis for the charges against the two officers. Furthermore, it is notable that the report states that at meetings which Mr Fernandez-Concheso had in Caracas on the Monday and Tuesday with senior prosecutors, he was told that it was the local prosecutors in Maracaibo who believed that the two officers were involved. Taking that at face value, it is somewhat inconsistent with the suggestion that Mr Guerra had to impose his decision on reluctant local prosecutors or that there was political pressure brought to bear on the prosecutors. In my judgment, the true position is that after internal discussion, the prosecutors had formed the opinion there was enough evidence against the two officers to go to trial.

68. In the indictment, as against the Master, the prosecution placed particular importance on the fact that the divers had advised the Master to fix the grille and warned him of the risks, but he had stated that he would fix the grille at the discharge port, citing lack of time as the reason for not doing it at Maracaibo. They pointed out that he had said in his deposition that he feared it was a dangerous port, in which case why had he not given importance to the fact that his vessel had been tampered with. They focused also on the fact that because the vessel had to load 800 metric tons of additional cargo and wait for the next high tide, the vessel had not sailed until the following day, in which case why was the grille not repaired as there was time to effect repairs. As against the Second Officer who was the security officer, the prosecution pointed out the same warnings had been given to him by the divers but accused him of ignoring the irregularity on the vessel's hull and failing to take any measures to protect the vessel, thereby creating the conditions whereby the vessel was vulnerable to having the drugs attached to the hull.

69. The owners contend that this was a derisory basis for prosecution, but I agree with Mr Rainey QC that it is important not to judge the indictment by the standards of English criminal law or, for that matter, by the standards of lawyers, whether in England or in Venezuela, with knowledge and experience of shipping cases. Mr Fernandez-Concheso acknowledged both at the time and in cross-examination that one of his biggest problems was that the prosecutors had no maritime experience. It is not difficult to see how someone with no maritime experience might well find the circumstances which I have summarised in the previous paragraph highly suspicious and a sufficient basis for pressing charges. In my judgment, there is simply no basis for saying that the decision to prosecute was not genuine or was in bad faith or arbitrary, as the owners submitted.

70. In fact, as Mr Gonzalez said in evidence, following the meeting at which Mr Guerra gave the instruction to prosecute, a further investigation was instituted into the delayed departure of the vessel. On 25 September 2007, Mr Villanova, the P&I correspondent, reported to the managers and Gard that the judge had requested the deposition of Captain Urrego, the surveyor from Incolab who had noted that there was short loading of cargo by 800 metric tons. The prosecutors were also seeking the assistance of the harbour master in understanding how the cargo shortage came about. Mr Fernandez-Concheso agreed in cross-examination that this additional suspicion was another problem and that, even on the day of the indictment, there were new elements which the prosecution were investigating which in their view pointed to the vessel being in some way complicit.

71. Having set out the basis for the charges against the two officers and enumerated the witness, documentary and other evidence relied upon, the indictment requested the preventive detention of the vessel under Articles 63 and 66 of the Anti-Drug Law. The indictment requested the control judge to send the officers for trial and it then contained the following paragraph (in translation):

> "Without prejudice to the legal propriety established in law, which guarantees due process, the charge may be extended, by way of the inclusion of new facts or circumstances that have not been mentioned and that change the judicial standing or the penalty being debated; or new charges may be introduced for reasons yet to be definitively [summarised] by the public prosecutors at this time, which could lead to the development of an investigation into crimes discrete from those being accused today and against other people".

72. Although Mr Gonzalez said in evidence that this was a standard paragraph, he stated that its effect was to permit the prosecutors to continue to investigate new elements that had been found or new evidence. The insurers relied upon this provision as leaving the investigation open, with the prosecutors reserving their right to bring further charges against third parties in the future, which as Mr Rainey QC submitted was scarcely surprising, given that there must have been a complex drug-trafficking operation in Maracaibo and the prosecutors suspected others of involvement, including the stevedores.

73. The owners challenged that analysis, submitting that the wording of the provision only leaves open the possibility of a new investigation in the future if further facts and circumstances came to light and is not an indication that there was an ongoing investigation. They also relied upon the evidence of their Venezuelan law expert, Dr Cabrera that the *acusation* was an *acto conclusivo* under the COPP, the filing of which closed the file and the investigation in order to preserve the unity of process protected by Article 73 of the COPP. That provides (in translation) as follows:

> "For one single crime or offence different cases will not proceed even if there were to be several different defendants, nor at the same time will they proceed with various different proceedings against one defendant even if that defendant may have committed different crimes or offences."

74. I have to say that I found the evidence of Dr Cabrera on Article 73, that it meant that any charges against further suspects, such as the stevedores or any captured drug

smugglers would have to be brought in a new investigation which could not be joined to the case against the two officers, unsatisfactory and puzzling. I agree with Mr Rainey QC that the much more likely explanation of Article 73 is that it is the Venezuelan equivalent of the provisions of the Indictments Act 1915 to the effect that as a general rule all charges against a particular accused should be brought in one proceeding, and that it is not dealing with the situation where, after the indictment is filed against one accused, evidence emerges implicating another person not yet accused. I simply do not accept Dr Cabrera's evidence that the effect of Article 73 is that that other person cannot be tried in the same criminal proceedings as the original accused.

75. Furthermore, in her judgment at the preliminary hearing, Judge Villalobos, who had six years judicial experience of criminal cases, stated that the case was still in the investigative stage. It is striking that, although Mr Schaff QC submitted that this was one of the aspects of her decision which she had got perversely wrong, that particular submission was not one which occurred to the Venezuelan lawyers who appealed her decision to the Court of Appeals. The grounds of appeal did not include that her conclusion that the case was still at the investigative stage was wrong. The Court of Appeals also appears to have considered that investigations in the case were still ongoing. For reasons set out later in the judgment when I examine her judgment and that of the Court of Appeals in more detail, I consider that there is no sound basis for the assertion that the finding by Judge Villalobos that the case was still in the investigative stage was wrong, let alone perversely wrong. Rather, it seems to me that finding supports the insurers' case that the provision in the indictment left open the investigation as to whether others were involved in the drug smuggling.

Events from the filing of the accusacion to the preliminary hearing

76. On 27 September 2007, Judge Villalobos issued her decision dealing with the request from the Ministry of the Interior in their letter of 5 September 2007 (following Colonel Reverol's recommendation of 24 August 2007 which Mr Carreno approved in response to the judge's own letter of the same date) that the use, conservation and custody be assigned to Carbozulia. Having referred to Articles 66 and 67 of the Anti-Drug Law and to Colonel Reverol's concern about loss of or deterioration of the cargo due to the hostile meteorological conditions it had faced, she then referred to the risk of combustion and to the fact that the owners of the cargo had not made any application for its release under Articles 311 or 312 of the COPP. Taking account of those matters, she ordered the transhipment of the cargo to protect biological diversity and the environment, the evaluation of a contingency plan guaranteeing environmental safety by a multi-disciplinary team to be set up by Corpozulia including the National Guard, the army, the fire brigade, the harbour master and the ministry of the environment and that the transhipment should be supervised by a representative of the Ministry of the Environment. The vessel and cargo were to be administered by Corpozulia pursuant to instructions from the ONA, but the judge emphasised that neither must exceed their mere administrative functions in relation to the vessel and the coal cargo, since there was only a preventive detention in place and no final judgment.

77. This judgment is hardly that of a judge who was bending to the demands of the executive. Mr Fernandez-Concheso accepted in cross-examination that making this order was the proper thing for the judge to do, but he then sought to characterise it as having been understood by him at the time as some sort of put up job, lining the

owners up for the inevitability of a long trial. In my judgment this is far fetched and, as Mr Rainey QC put it, an indication of the revisionist nature of much of his evidence. It seems to me that the order was a perfectly sensible one, given that Bulk Trading had not sought the delivery up of their cargo, but seem to have decided to keep quiet and await the fate of the vessel at the preliminary hearing and given the judge's evident concerns about environmental risks.

78. On 1 October 2007, Gard appointed Mr Charles de Leo of Fowler, White & Burnett in Miami as their lawyer. He was a Venezuelan American with a number of contacts and was evidently instructed to develop the owners' and the Club's strategy, in conjunction with Mr Fernandez-Concheso and others, for lobbying the judge, her judicial superior, Colonel Aponte, (who at the time was the Vice-President of the Criminal Chamber of the Supreme Court and President of the Judicial District of the State of Zulia), the ONA and the Ministry of the Interior. I agree with Mr Rainey QC that, despite the revisionist approach of Mr Fernandez-Concheso in his oral evidence, suggesting that the strategy was one of getting the officials being lobbied to instruct the judge to stop the case against the two officers and release the vessel, the actual strategy, as it emerges from the contemporaneous email exchanges, was to seek to persuade the judge of the innocence of the two officers by educating her about the maritime context and seeking to ring fence her from any outside political interference and to leave her free to decide the case for herself on the merits. Because the owners and their advisers were convinced that the merits were that the two officers were innocent, there was what Mr Rainey QC described as a single strategy to have the officers cleared at the preliminary hearing and the vessel automatically released as a consequence.

79. That this was the strategy emerges from a number of the contemporaneous emails. For example, in an email from Mr Ruan the local Gard representative to Mr Christoffersen of the Club on 2 October 2007, Mr Ruan records Mr Fernandez-Concheso's views in these terms:

> "In [his] view it is crucial to convince the high rank officials, mainly the Ministers of the Interior and Justice, to back off from this case as to allowing this judge and prosecutor to decide the case based on its legal merits. In his view there are no legal merits for any formal accusation against the master and second officer and/or owners, therefore the vessel and crew should be allowed to leave Maracaibo without any further delay."

80. Similarly, in an email of 8 October 2007 to Mr Christoffersen, Mr de Leo sets out a report of his meeting that afternoon with Mr Fernandez-Concheso in which he says:

> "As can be seen from my comments above, the crucial pending point, remains to get the Interior Minister to signal that he does not oppose allowing the judge free rein to rule on the merits without political pressure."

81. Although Mr Fernandez-Concheso sought to cavil at that and suggest that this was Mr de Leo's spin or his way of accommodating his client, that evidence was distinctly unimpressive and did him no credit. At the end of the email (which was copied to Mr Fernandez-Concheso), Mr de Leo says in terms that, if Mr Fernandez-Concheso

thinks something needs further emphasis or clarification, Mr de Leo would welcome his input by reply. If it really had been the case (as Mr Fernandez-Concheso asserted in his oral evidence) that his strategy was to get the Minister to direct the judge to dismiss the indictment, so that there was a fundamental misunderstanding on Mr de Leo's part as to the strategy, it is inconceivable that Mr Fernandez-Concheso would not have corrected that misunderstanding. The reality is that there was no misunderstanding and Mr de Leo had correctly set out what the strategy was.

82. Furthermore, a moment's reflection on the implications of the strategy which Mr Fernandez-Concheso alleged in his oral evidence that he had, demonstrates the implausibility of this revisionist evidence. There clearly was a serious problem of the drug cartels using vessels as a new route to export drugs abroad, in circumstances where, in the past, the Venezuelan state had been criticised for being too slack in relation to drug smuggling. Whether the owners like it or not, there clearly were matters which potentially implicated the two officers and which had led to a decision by the prosecutors to file an indictment against them. In the circumstances, it would have been quite extraordinary for the owners to lobby the Minister of the Interior, Colonel Aponte, the ONA or the prosecutors to give a positive direction to the judge to dismiss the indictment and release the vessel.

83. Contrary to the evidence Mr Fernandez-Concheso now gives, there is no hint in the contemporaneous correspondence that this was the strategy. Mr Fernandez-Concheso's evidence is also inconsistent with that of Mr Gonzalez who said that the search was *"for a completely autonomous decision…for her…to take an independent decision on her own"*. In the circumstances, I reject Mr Fernandez-Concheso's evidence that he was seeking a positive instruction from the Minister (or any one else) to the judge to acquit the officers and release the vessel. The strategy was to get people in power to back off and to confirm that the judge would be allowed to decide the case for herself on the merits. For the reasons set out hereafter, the owners did get what they were lobbying for and the judge was told she was free to decide the case on the merits.

84. Part of the strategy was for Dr Parra Saluzzo to contact and meet with the head of the ONA, Colonel Reverol. Mr Fernandez-Concheso reported that they knew each other well because they had taught at the National Guard School together and had a very sincere and frank relationship. Dr Parra's evidence about this was more guarded. He said that he knew Colonel Reverol, but they were not friends, they "interrelate". However, as Mr Fernandez-Concheso reported back and Dr Parra confirmed in evidence, what Colonel Reverol told Dr Parra, during their telephone conversation on 3 October 2007, was that in his opinion, because of the way the drugs were affixed to the vessel, there was crew involvement in the drug smuggling. Part of the owners' strategy was to seek to convince Colonel Reverol to the contrary.

85. In his witness statement, Dr Parra asserted that it was his belief from the telephone conversation that Colonel Reverol had the: *"final goal to keep the vessel all along"*. I agree with Mr Rainey QC that that piece of evidence is worthless, not just because it appears to overlook that Colonel Reverol was saying that, in his opinion the crew were implicated, a matter that the owners took seriously, but also because it ignores the subsequent meeting on 9 October 2007 between Colonel Reverol and Mr Hector Flores, another lawyer used in place of Dr Parra. As recorded in an email from Mr de Leo to the Club passing on what he had just been told by Mr Fernandez-Concheso, that meeting went favourably and Colonel Reverol confirmed that the ONA would not

intervene in the Judge's decision, that they had always gone about matters by the judicial route and that they wished to meet owners after the hearing to discuss how to deal with these sorts of cases in the future. Dr Parra must have been informed of that favourable development by Mr Fernandez-Concheso, not least because Mr de Leo records Mr Fernandez-Concheso as saying he would be discussing this development shortly with Dr Parra and Mr Gonzalez.

86. In his oral evidence, Mr Fernandez-Concheso sought to distance himself from this up-beat report by Mr de Leo and suggest that he did not regard it as a favourable development at the time. This was yet another example of Mr Fernandez-Concheso seeking to disavow in his evidence what Mr de Leo was reporting that Mr Fernandez-Concheso had told him, because what was reported does not fit in with the revisionist approach he now advocates. However, there is no reason to suppose Mr de Leo was not accurate in his reporting and, had he not been, Mr Fernandez-Concheso would surely have corrected him. Furthermore since, as Mr Fernandez-Concheso accepted in answer to me, he was not saying the ONA was a corrupt agency, there is no reason to disbelieve what Colonel Reverol told Mr Flores. The idea, put forward by Mr Fernandez-Concheso in his evidence, that Colonel Reverol was part of some plot to steal the vessel and cargo, is frankly absurd.

87. The preliminary hearing was due to take place before Judge Villalobos on 10 October 2007 but was adjourned at the request of the lawyers for the owners and crew because, whilst they were telling the owners that they were confident of success, more time was needed as Mr de Leo put it: *"to be sure the right message has been received by [the judge] and fully understood by her that she can rule on the merits without fear of political consequences adverse to her tenure"*, in other words more time was needed to implement the strategy of ensuring that those in power backed off and reassured the judge she was free to decide the case for herself on the merits. Mr Fernandez-Concheso was evidently concerned that, if the hearing proceeded on 10 October, the judge would decide against the crew and owners. This was borne out by what a court reporter told Mr Gonzalez, that if the hearing had gone ahead at that time, the judge was minded to rule against the owners, although she would have struck out a lot of the prosecution evidence.

88. In view of what is now said by the owners about the decision eventually made by the judge at the adjourned hearing on 31 October 2007 to maintain the preventive detention of the vessel being perverse, it is interesting that in his email report of the 11 October 2007, Mr Fernandez-Concheso said this: *"A ruling taking the matter to trial would have entailed the need to appeal as a remedy to have the vessel released…if the appeal did not succeed it would have entailed that [the officers] be subjected to trial…and the vessel most likely detained during that period."* This not only reflects the single strategy of getting the crew acquitted and the vessel automatically released as a result, but suggests that Mr Fernandez-Concheso thought at the time that, if the crew were sent for trial, in all probability the preventive detention of the vessel would be maintained pending that trial.

89. As part of the strategy of seeking the assurances I have referred to from those in power, an approach was to be made to the Minister, Mr Carreno, to get him to speak to Colonel Aponte as the head of the local judiciary, to tell him that there would be no problems from the Ministry if the judge decided the case on the merits. Dr Parra was originally going to be used for this approach, but he was not very successful in gaining access to the Minister, so another lawyer, Mr Higuera (who apparently knew

the Minister's brother) was instructed to lobby the Minister and, as at 11 October 2007, was in contact with the Minister.

90. On 10 October 2007, a team consisting of Mr Fernandez-Concheso, Dr Parra, Mr Gonzalez and the Ukrainian consul attended a meeting at Colonel Aponte's offices. Colonel Aponte in turn asked Judge Villalobos to join the meeting. Mr Fernandez-Concheso says in his email report that the *"objective was to measure in a detailed analysis what the current thoughts of the judge were and what her ruling today would have been, an exercise which of course required quite a lot of analysis, psychology and intuition."* This *"analysis, psychology and intuition"* was evidently the speciality of Dr Faroh, (a partner of Mr Fernandez-Concheso), who apparently prides himself on being able to gauge what people are thinking from such inferences and intuition, although he was evidently not at this particular meeting What Mr Fernandez-Concheso reported in his email report of the meeting was thus based in large measure on assessment of the judge's body language (evidently without the assistance of Dr Faroh, the expert in such matters) rather than anything she said. As Mr Fernandez-Concheso put it in his report to the owners and Mr de Leo the following day:

> "Our conclusion after the meeting, which went on for about an hour, was that although she is convinced of what is right and fair in this case, she still has a degree of fear. We therefore need more days to be able to have our different variables materialised in the proper way so as to erase her fears in full. You are aware of the strategic plan we have devised and deployed, namely that since the situation is that the judge is reasonable and, to me, convinced that the crew is not involved and the crew and the vessel have to be released, she is fearful of the political consequences. A well devised and effort intensive plan to cover all necessary variables to ensure that the judge be at ease in making the right and fair decision is in place."

91. It is not possible to say how accurate that mind-reading in the absence of Dr Faroh really was. However, if what the court reporter told Mr Gonzalez is accurate, that, at that stage, the judge was minded to rule against the owners, that suggests that the mind-reading was not accurate. For all that Mr Fernandez-Concheso thought that she listened to what they had to say politely, it seems to me that was not a reliable guide to what she was really thinking. It also has to be borne in mind that, due to the peculiarities of the Venezuelan system at the time, she would also have been having private meetings with the prosecutors and, as Mr Gonzalez accepted in cross-examination, there is no way of knowing what she was saying to them or indeed, what they were telling her about their case. She may have been equally polite and receptive in her meetings with the prosecutors.

92. In his witness statement Mr Gonzalez says that, at the meetings he had with the judge she explained that, because of the political situation in Zulia, she could not take any decision that would put her integrity in question. In drug cases, every time a judge orders a release he or she is subject to questioning by high ranking officials in entities such as the ONA. She was nervous and Mr Gonzalez said that she had told him she would admit the accusations against the officers so that the trial judge could decide, in order to avoid being sacked. I very much doubt whether she said anything of the kind and, indeed, when Mr Gonzalez was challenged about this in cross-examination, he said he was not putting her honesty in question. Given the power of the drug cartels

and concerns that they might seek to corrupt the judiciary, concern about being subject to scrutiny would be perfectly understandable and it may be that, as Mr Rainey QC submitted, that will have led to judges erring on the side of caution in their application of the law. However, despite the owners' submissions to the contrary, I do not consider such understandable concern would have led this judge to disregard the law or make an arbitrary decision.

93. On 18 October 2007, Mr Higuera met the Minister and provided a detailed explanation. He considered that the Minister understood that the owners were victims and that pursuit of the victims would send the wrong message to the real perpetrators. The Minister indicated that he would help with Colonel Aponte and promised to do so, as well as also agreeing to meet the owners. Both Mr Fernandez-Concheso and Mr de Leo regarded this as productive and encouraging. A few days later Dr Parra met Colonel Aponte who was willing to assist provided that the Minister assured him there would be no political interference, in other words that, if the judge decided to release the vessel and crew, the Minister would not say it was the wrong thing to have done.

94. On 23 October 2007 Mr Magnelli flew to Caracas and the following day there was a meeting with the public prosecutors which he attended together with Mr Fernandez-Concheso, Mr de Leo, Dr Faroh and Dr Parra. Mr Magnelli did not take to Mr Guerra whom he described in evidence as "hateful", but as he stated in his report of the trip to Venezuela and confirmed in cross-examination, Mr Guerra was determined to emphasise the changes imposed by the Government to make the fight against drug trafficking more effective and impose harsh penalties, which made Mr Magnelli think the vessel might be confiscated *"regardless of liability assessed"*. Whilst Mr Schaff QC sought to portray this as Mr Guerra acting politically, seeking to punish the owners irrespective of the law, that all depends on what the relevant Venezuelan law was or is, a matter to which I return in detail below. Furthermore, as both Mr Fernandez-Concheso and Mr Magnelli accepted in cross-examination, both Mr Guerra and Ms Veccionache made it clear that the decision as to whether the case should proceed was for the judge, a clear indication that, even if Mr Guerra was politically motivated, he respected the judicial process.

95. Also at that meeting, although Ms Veccionache appeared confused as to where the burden of proof lay under Article 63, as Mr Fernandez-Concheso accepted, Mr Guerra made it clear that the owners would have to make an application to the judge at the preliminary hearing on 31 October 2007. Mr Fernandez-Concheso raised with the prosecutors the possibility of the vessel being released against a bond in the event that the judge decided at the preliminary hearing that the case should proceed to trial. Mr de Leo records that neither Mr Guerra nor Ms Veccionache rejected the idea out of hand although they both indicated that such a provisional release was not contemplated by the anti-drug legislation. Mr Magnelli accepted in cross-examination that Mr Guerra agreed to evaluate the release of the vessel against a bank guarantee or letter of undertaking. Overall, Mr de Leo records that it seemed positive that the positions of the prosecutors had somewhat softened.

96. On 25 October 2007, Mr Magnelli, Mr Fernandez-Concheso, Mr de Leo and Mr Gonzalez attended a meeting with the judge in Maracaibo in the absence of the prosecutor. It was from this meeting that Mr Magnelli formed his colourful impression of the judge as being like Gloria Gaynor. Importantly, he thought she was not timid at all, although he said that he formed the impression she was a puppet or, as

he put it in his report of the trip: *"largely devoted to the Minister of the Interior"*. That rather emotive impression was perhaps understandable given the anger and frustration Mr Magnelli must have felt at having the vessel detained in Venezuela, a country which he clearly did not like, but I doubt whether that impression from one meeting would be a safe basis for concluding that, when the judge made her decision, she simply did what her political masters wanted or what she thought they wanted.

97. A rather more measured impression of the judge emerges from the report of the meeting made by Mr de Leo by email to Mr Christoffersen of Gard later the same day, which is more likely to be accurate than what is said by witnesses in their evidence given many years later. He referred to the meeting as positive and said:

> "She of course indicated that she could not promise anything in that type of meeting but it was clear that she is an intelligent woman who understands what is involved legally, factually and unfortunately also politically. She made it rather clear in diplomatic terms that she needs 'support', hinting rather broadly that she is waiting for political back-up…"

Mr Fernandez-Concheso agreed with this in cross-examination, confirming (as did Dr Parra) that the judge made no promises at the meeting. In my judgment the reference to making it clear in diplomatic terms that she needed support is to her statement, recollected by Mr Fernandez-Concheso, that "the rope would break in its weakest part".

98. Mr Fernandez-Concheso said that the main point of the meeting was to demonstrate to her that, by Mr Magnelli being in Venezuela as the owners' representative, they had nothing to fear and thus to support the case of "lack of intent" on the part of the owners, on the basis that someone guilty of an offence of this kind would not travel voluntarily to Venezuela. Various plans and drawings of the vessel, including longitudinal sections, were produced to demonstrate to the judge that the owners could not have been involved in the drug smuggling. The owners' team did not argue at the meeting that the vessel ought to be released, even if the case against the crew went to trial, which was consistent with the overall strategy that if the crew were acquitted or not sent to trial, the vessel would be automatically released.

99. Mr Fernandez-Concheso also agreed in cross-examination that they were telling the judge that they were raising the case at a very high level and were seeking to give her comfort. When Mr Rainey QC put to Mr Fernandez-Concheso that it was not a case of her saying: "I need particular persons in power to be contacted" but rather them telling her that they had contacted particular people and asking if that would help her, he fairly accepted that his recollection of the meeting was imprecise. Mr Gonzalez's evidence about the question of support as it was discussed at the meeting was difficult to follow because of interpretation problems. Initially he was apparently saying that she was giving the "impression" about what she needed, but he later went further and said that she had actually said she needed a call from Colonel Aponte. Mr Magnelli also said in cross-examination that the judge *"told them very clearly that she needed assistance from the top, from Colonel Aponte"*.

100. I do not accept that evidence of Mr Gonzalez and Mr Magnelli, not least because it seems to me that, if she had said something express like that, Mr de Leo, who was careful in his reporting, which was contemporaneous, would surely have recorded an express statement rather than saying she made it clear in diplomatic terms. So far as

Mr Magnelli is concerned, he could not speak Spanish, so was dependent on what the Venezuelan lawyers told him. It is also striking that, in his report of the trip written days later, Mr Magnelli does not say she told them she needed help from Colonel Aponte but that the team "interpreted" the help she needed as a call from the Ministry or from Colonel Aponte.

101. Furthermore, it is extremely unlikely that an experienced criminal judge, which she clearly was, would have committed herself, at a meeting from which the prosecutors were absent, to saying in terms that she needed political support before she could order the acquittal of the crew and the release of the vessel. In my judgment, the correct analysis of what happened is that the owners' team were indicating who they had approached at the highest level and the judge was giving them the impression that that would provide the "help" ("aiuto" in the Italian in Mr Magnelli's report) she needed, all veiled hints and reading between the lines.

102. Unfortunately the meeting which was due to take place later on 25 October 2007 between Mr Magnelli and the Minister could not take place because there were student riots in Caracas and the Minister had his hands full as he was in charge of national security. Mr Magnelli had to fly out the following morning and could not postpone his flight. Mr Fernandez-Concheso accepted that it was not the Minister's fault that the meeting could not take place.

103. Over the following weekend, Mr Higuera spoke to the Minister's brother who apologised for failing to arrange the meeting as promised due to the civil disturbances, but promised that the meeting would take place on Monday 29 October 2007 and that thereafter the Minister would telephone the justice [i.e Colonel Aponte]. The meeting duly took place at 6 in the evening with the Minister and his brother. Mr Higuera telephoned Mr Fernandez-Concheso immediately after the meeting and Mr Fernandez-Concheso then telephoned Mr de Leo who reported by email to the Club in these terms:

> "The minister's initial reaction was that he had already indicated to Cesar [Higuera] that he would deal with the problem and questioned why Cesar was bringing it up again. Cesar responded that he specifically needed him to call the justice [Aponte] in his presence to avoid any questions later as to whether the call was made. Cesar says that the minister asked a secretary to call the justice…They talked for some time about various issues and the minister was then heard by Higuera specifically stating to the justice that the minister wanted a just resolution of the case and expected justice to take its course based on the law and facts i.e. without fear of political interference. Aurelio [Mr Fernandez-Concheso] believes this is now direct evidence that the call has been made by the minister to the justice."

104. Mr de Leo reported again to the Club the following day 30 October 2007 that Mr Fernandez-Concheso had telephoned him to say that Colonel Aponte had sent a text message to Dr Parra confirming that he was called by the Minister. In cross-examination Mr Fernandez-Concheso confirmed that Mr de Leo's email accurately recorded what Mr Higuera had told him at the time and that the next step was to get the minister's assurances to Colonel Aponte conveyed to the judge. However, Mr Fernandez-Concheso then suggested that his current view was that Mr Higuera was

lying to them. I found that piece of evidence unconvincing and can see no conceivable reason why Mr Higuera would have lied. In any event, as stated above, Colonel Aponte himself had confirmed to Dr Parra that he had had the call from the Minister.

105. Equally unimpressive was Mr Fernandez-Concheso's suggestion in his evidence that in this email Mr de Leo was reporting inaccurately because what he, Mr Fernandez-Concheso, required was a direct order from the Minister to the judge to release the vessel. That was another example of the revisionist approach of Mr Fernandez-Concheso, seeking to suggest that the strategy had been to get the Minister to order the judge to release the vessel, whereas it is quite clear from the contemporaneous correspondence that the strategy was to get those in power to tell the judge that she was free to decide the case for herself on the merits, without political interference. Furthermore, if Mr Fernandez-Concheso, who was copied in on Mr de Leo's report to the Club, had thought for one minute that the report was inaccurate, particularly over such an important issue as what was to be communicated to the judge, I have no doubt he would have corrected Mr de Leo straight away.

106. On 30 October 2007, Mr Fernandez-Concheso and Dr Parra met Colonel Aponte at his chambers in Maracaibo. Mr de Leo's report to the Club (which Mr Fernandez-Concheso confirmed in cross-examination accurately reflected what Colonel Aponte had told him) stated:

> "The Justice confirmed that he was fully committed to having the judge decide the case at tomorrow's hearing on the merits free from any political constraints. The justice assured them that he would directly confirm to the judge either by phone or in person in advance of the hearing scheduled for tomorrow morning at 10.30 that she has the full support of both the judicial and executive branches to rule freely based on the facts presented…[Mr] Gonzalez was also present personally in the hallway of the courthouse together with [Judge Villalobos'] personal assistant, who in turn will be confirming to his judge that [Mr Fernandez-Concheso] and [Dr Parra] were in fact seen personally tonight by the justice in his chambers."

107. In cross-examination, Mr Fernandez-Concheso exhibited an unimpressive reluctance to accept that he would have spoken to Judge Villalobos' personal assistant immediately after the meeting to say that Colonel Aponte had spoken to the Minister and was committed to the case going ahead on the facts without any political interference, but I have little doubt that he would have spoken to the personal assistant along those lines, as it was another means of ensuring that the right message got through to the judge.

108. Dr Parra confirmed in his evidence that Colonel Aponte had said he would speak to the judge and that he was committed to having the judge free to decide the case as she saw fit. He also said that in his last meeting with Colonel Aponte before the preliminary hearing, Colonel Aponte said that he had spoken to the judge.

109. Although there is no direct evidence either from the judge or Colonel Aponte, I see no reason to suppose that Colonel Aponte was spinning some cynical political line and lying when he said he would speak to the judge and tell her that she was free to decide the case on the merits, particularly given that the Minister had told him he was happy for the case to be decided on the law and the facts. In my judgment, in all probability,

Colonel Aponte did speak to the judge and tell her he had spoken to the Minister and that they were both happy for her to decide the case on the merits, without political interference. In any event, that is what her personal assistant will have told her anyway was the outcome of the meeting between Colonel Aponte and Mr Fernandez-Concheso and Dr Parra on the evening of 30 October 2007. In other words, up to this point, the owners' strategy had worked.

The owners' application under article 63 and the preliminary hearing

110. On 30 October 2007, the day before the preliminary hearing, Mr Fernandez-Concheso filed with the control court a written application for the release of the vessel. The application began by asserting that the Master and Second Officer were victims of a crime committed by third parties and that the matters relied upon by the prosecution did not remotely establish any criminal liability. Having explained why the Master had not repaired the grille, the application stated that the Master suspected the grille had been removed by the diver so it would have to be repaired. It was then explained that the place where the drugs were attached was in a completely different location on the hull from the grille, namely near the rudder and no sailor who was complicit in the smuggling would have chosen that location because of the risk to the vessel nor would he have recommended placing the drugs on the hull in Lake Maracaibo given the possibility of inspections. It was then explained that the miscalculation of the draft which led to the need to load an additional 800 metric tons of cargo was a common mistake in navigation and, far from being a point against the Master was a point in his favour, since it would have been irresponsible to leave with too little cargo, leading to deadfreight being incurred.

111. The application continued that intent on the part of the owners would necessarily involve the owners being complicit in the offence and yet the prosecution had not accused the owners or managers and in 75 pages of indictment did not even mention the owners or their directors or managers. The application then argued at some length that the burden of proof under Article 63 of the Anti-Drug Law was upon the prosecution, in other words on such an application it was for the prosecution to prove intent, not for the owners to disprove it. Mr Fernandez-Concheso cited case law on the burden of proof and relied on the presumption of innocence, his submission being that that principle applied to a precautionary detention as much as it did to a final seizure. Thus the principal argument being advanced was that, because the prosecution had not even mentioned the owners in the indictment, let alone actually charged them, no intent had been proved by the prosecution for the purposes of Article 63, so that the vessel should be released.

112. The application then set out information about his clients having been in business for 30 years, operating 40 vessels with a total value of U.S. $1,500 million. The vessel herself was said to have a value of U.S. $40 million and to command charter rates of U.S. $50,000 a day. It was stated that his clients were internationally well-established and a major coal carrier coming to Venezuela for 20 years and that they were members of Gard, one of the most prestigious P&I Clubs, in existence for 100 years, which insures 40% of the world fleet and does not insure drug dealers. Supporting documentation was attached. Mr Fernandez-Concheso then made the point that the owners would hardly have put their reputation at risk for the sake of an income (from the drugs) equivalent to six days hire. Finally he made the point that the detention of the vessel without any proof of intent of the owners was irresponsible, disregarded the specific characteristics of the shipping industry and would cause damage to

Venezuela's maritime trade because other owners would decide not to come to Maracaibo because of the risk to their assets and the deleterious effect this would have on local industry, essentially a plea *in terrorem*.

113. In the event, the application did not include any suggestion that the vessel should be released against the provision of a guarantee or letter of undertaking, although Mr Fernandez-Concheso had told Mr Magnelli as long ago as 21 August 2007 that there was a possibility of getting the vessel released against such a guarantee. It appears that this suggestion was not made in the application at least in part because Gard was not prepared to put up security, but in my judgment, another reason was that the owners did not think that the prosecutors would accept the proposal to provide a guarantee in return for the release of the vessel. There had been some discussion internally within the owners of a form of security called "justicia custodia" but this was not known to Venezuelan law. Overall, it seems to me that Mr Magnelli's assessment at around that time that the notion that the vessel could be released against security was "fried air" was realistic.

114. This was the first time that a control court had had to rule on the application of Article 63 of the 2005 Anti-Drug Law (or its predecessors) at a preliminary hearing in relation to a vessel. In the cases of other vessels found previously with drugs attached to their hulls with which Mr Fernandez-Concheso had been involved, the vessels had been released, so neither he nor the court had had to consider the application of Article 63 to a vessel. However, as a control court judge with six years experience, in all probability Judge Villalobos will have encountered Article 63 previously in relation to motor vehicles. In that context, it is important to note that Mr Fernandez-Concheso's argument that lack of intent under the Article was demonstrated because the owners had not been charged or accused in the indictment was not only a novel one, but wrong as a matter of Venezuelan law. Neither Venezuelan law expert considered that lack of intent could be demonstrated merely by the owner not being charged with an offence. As for the argument about the burden of proof, it was a matter of dispute between Dr Cabrera and Professor Ortiz where the burden of proof lay in relation to the issue of intent under Article 63. However, for reasons elaborated later in the judgment when I deal with the outstanding issues of Venezuelan law, I have concluded that the burden is upon the owners to prove lack of intent, not on the prosecution to prove intent. In those circumstances, the likelihood is that the judge will have been unimpressed by the owners' arguments.

115. The preliminary hearing in Maracaibo before Judge Villalobos on 31 October 2007 began at 11.30 a.m. and continued until 7.30 p.m. There is an official written record of the whole proceedings. After preliminaries, Ms Vecchionace corrected an error in the indictment which described the Master and Second Officer as charged as "co-offenders" when they should have been charged as accessories. The Master then spoke. In relation to the grille he explained that he told the ship's agent that it would be repaired when the vessel was next in dry-dock. In relation to the decision to load 800 metric tons of additional cargo he said that was taken at 2.30 p.m. on 12 August 2007 after the inspection upon completion of loading, by which time the vessel had already missed her sailing time and the vessel could not sail at night because the channel was being dredged at night. In relation to the ISPS Safety Code, he explained that the vessel had an echo sounder and radar which were used in port, but they had no special equipment on board for underwater detection, like submarines and army vessels, nor divers or diving equipment.

116. The defence lawyers Mr Gonzalez and Dr Parra then submitted that the officers could not be accessories as a matter of law because no principal perpetrator had been identified. They then developed various aspects of the defence case and also asked that the prosecution case for detention of the vessel under Article 63 be ruled inadmissible as the owners had not participated in any crime, had no intention of committing a crime and had cooperated with the authorities. They asked for the indictment to be quashed and the vessel released, thus continuing the single strategy.

117. The Second Officer then spoke and explained that, under the ISPS Code if there was a risk of a security incident, the security level was 2, but at Maracaibo it was only level 1. During the round the clock watch, the radar was used but there was a blind spot with a 24 metre radius because at the stern it was blocked by the funnel, so they could not see 10 metres around the vessel. It was not possible to detect small boats or wooden ones. Dr Faroh and Mr Perez then explained various aspects of his defence case and concluded by also asking for the indictment to be quashed and the vessel released.

118. Mr Fernandez-Concheso was then called upon. He ratified his written application submitted the day before. He is recorded as saying only that Article 63 provides that the owner should be exonerated from responsibility if there are no elements of evidence proving that the vessel was used to commit the crime and that only one element was mentioned in the indictment, at point 30 and as he pointed out all the owners had said at the time was that they would collaborate with the police. He asked that the detention be lifted because the prosecution had not mentioned his clients. In cross-examination Mr Fernandez-Concheso said that he made quite a lengthy speech running through the various points in his written application, including that the owners had shown their face to the Venezuelan state. He agreed that, in summary, his case was that this was an accessory penalty and the owners were not accused, so that was the end of the matter.

119. Judge Villalobos then issued her decision, which was effectively an extempore judgment. For the present I simply record the decision she made and her reasoning for that decision. I will consider later in this judgment whether this decision was wrong or perverse or a decision no reasonable judge could have reached. She began by rejecting the defence case that the indictment should be declared a nullity because the officers were charged as accessories and no principal perpetrator had been identified and also overruled another exception raised by the defence. She held in effect that the indictment demonstrated a sufficient case to go to trial and that the evidence put forward by the prosecution and the defence was all admissible, since they were all obtained during the investigation phase and were useful and relevant to better clarify the events in the case. She referred to the purpose of every criminal process being to search for the truth so that the action of justice is not rendered void, especially when faced with this type of offence, considered a scourge against every moral principle of society. As I see it, this confirms how seriously the war against drugs was being taken in Venezuela.

120. Her fifth ruling was on Mr Fernandez-Concheso's application. She recorded that he based his submission that the vessel should be released from preventive detention on Article 63 of the Anti-Drug Law since the prosecution did not prove the owners' intention or even mention his client, much less any facts or proof which could connect his client with the incident. She then stated that having considered the request and with regard to Article 66 of the Anti-Drug Law and Article 285 of the Constitution

which set out the functions of the public prosecutor, she quoted Article 108 of the COPP which sets out the functions of the prosecution. She underlines some of these functions, including the functions to direct the investigation of offences and the activities of the police to establish the identity of offenders and accessories, to request precautionary measures and custodial measures over assets related to the offence and to watch over the victim's interest.

121. She then referred to some decisions of the Constitutional Court which appear to emphasise that the head of a criminal investigation in the Venezuelan system is the prosecutor's office and it is for them to investigate offences, assisted by the police. Judge Villalobos stated that from this binding jurisprudence, fundamental procedural guarantees, in the context of the requirements of due process, acknowledged the victim as the person whose legally protected rights had been damaged by the criminal action. Although the judge does not spell out who she regarded as the victim in this case of drug smuggling, her reference just a little earlier to this sort of offence being a scourge against the moral principles of society suggests that she regarded Venezuelan society and social order as the victim of this sort of drug smuggling.

122. She then sets out what is in effect the ratio of her decision:

> "Therefore this Court, in accordance with what is set forth in Article 108 of [the COPP] where the Prosecutor's Office's capacities are set forth, among which are [she then identifies the various functions she had underlined earlier]. And since we are in the investigation phase of the criminal offences, with the main purpose of finding the truth to present a conclusive act according to the results of the investigation, this Judge, considering the present state of the case investigated and having had the Prosecutor prove that there is serious risk that the execution of the judgment may not be carried out properly (*periculum in mora-danger in delay*) and the presumption of having a sound legal basis (*fumus boni iuris*), as well as preventing the State's criminal process from being left void. Which is why this [Control Court] to safe keep the effective judicial protection contained in Article 26 of the Constitution, in accordance with the principles of prosecution and the purpose of process, established in Articles 11 and 13 of [the COPP] **DECLARES OVERRULED** the request lodged by [Mr Fernandez-Concheso] and MAINTAINS THE PREVENTIVE SEIZURE MEASURE of the vessel B ATLANTIC. **SO IT IS DECIDED**".

123. Having confirmed the measures she had previously approved, whereby the two officers were effectively under house arrest in a flat rather than being held in prison, the judge ordered the opening of the trial proceedings against the two officers and ordered a five day period to appeal before the trial court.

124. Mr Fernandez-Concheso's immediate reaction to the decision was in an email on 1 November 2007 to Mr de Leo in which he said she had not even mentioned Article 63 in her decision because if she had, she would have no way of getting out of it and would have had to release the vessel. That was wrong in the sense that she clearly recognised at the beginning of her fifth ruling that his application was under Article 63. He said: *"Clearly she decided to protect her job, her paycheck and avoid any*

criticism of the street". Mr Fernandez-Concheso explained in cross-examination that "the street" was a reference to everything outside the courtroom, not just public opinion but the media and the political and military establishment. As Mr Rainey QC rightly pointed out, there was no suggestion in that email that she had in fact been leant on by Colonel Aponte or the Minister to decide the case in a particular way. Furthermore, in my judgment, unless the decision she made could be said to be perverse or a decision no reasonable judge could have made, she cannot be criticised for making a cautious decision as a control judge, sending the two officers for trial and maintaining the preventive detention of the vessel.

125. Mr Fernandez-Concheso sent Mr de Leo a more considered response a few days later on 5 November 2007, in these terms:

> "Having assessed the atmosphere at the hearing, reading the decision and after a brainstorming of the whole team and conversations by Parra with the Justice and Higuera with his contacts, we are clear in what happened.
>
> The legal arguments in the hearing were overwhelming in favour of our position and against the prosecutors. The hearing lasted nine hours and the prosecutors did not speak more than 10 or 15 minutes, simply because they had no arguments whatsoever and in fact behind scenes agreed with us that it was an unfair accusation to which they had been forced by their superiors. Incredibly, when the ruling was read, they could not believe it.
>
> The distance between what should have happened (given the different oral arguments in the hearing and the elements relevant to substance) and the decision by the Judge, clearly shows, as you correctly put it in your first email that she decided to wash her hands. We have had our team member enquire both the Minister's brother and the Justice confirm that they provided comfort to her that she could make the right decision. However, we are pretty sure that what occurred in terms of those calls was that their messages were soft. Surely this is a consequence of the fact that (as we had discussed) it is a drug related case and people even agreeing to provide support, do not want to see themselves pointed at as having pressed very hard. Hence the team is sure that the messages sent in each case were simply along the lines of "make the right decision and you will find support". The Judge went out of her way to rule against the Master, Second Officer and the vessel, so we conclude that her thoughts were that she would let somebody else risk the Judgeship (and her salary) in the release of the Master and the vessel.
>
> There is no doubt whatsoever that legal arguments overwhelmingly favour the Master and the Second Officer and the Owners and there is no evidence or legal argument whatsoever against them, but the Judge was not sufficiently *brave* to take a firm stand in favour of the accused, even with support. We therefore convey as essential, that the strategy then

> must point towards causing that those called upon to rule lose fear of what may happen to them for the right decision. So we (or whomsoever is entrusted with the defence) must follow this path without mistake. We are talking of the lives of two people so the first thing is to start by understanding the exact nature of the problem."

126. The reference to "our team member" is evidently to Dr Parra and/or Mr Higuera and it is clear from this email that both Colonel Aponte and the Minister had confirmed that they had called the judge and provided comfort to her that she could make the right decision, in other words confirmation that the call or calls which the owners had been seeking before the hearing had been made. It is striking that in this contemporaneous email, Mr Fernandez-Concheso does not suggest what he now asserts in evidence, either that the support the owners had been seeking was in fact a call to the judge ordering her to quash the indictment and release the vessel or that he believed Colonel Aponte and the Minister were lying when they said that they had called the judge to give her comfort. The basis for what Mr Fernandez-Concheso now says about them lying is that, since Colonel Aponte fell out of favour and fled Venezuela he has appeared on CNN and said that he interfered with the judiciary in some cases. However, there is simply no evidence that, in the present case, he said anything to the judge other than that she was free to decide the case on the merits and I decline to draw the inference, from what Colonel Aponte has said in general terms many years later, that he leant on the judge to order the trial of the two officers and to continue the detention of the vessel.

127. The reason why Mr Fernandez-Concheso regarded the messages from Colonel Aponte and the Minister as "soft" was, as he said in the email and accepted in cross-examination, even people as powerful as they were could not be seen to be interfering too much in a drugs case or to be soft on drugs by ordering the release of the officers and the vessel, a further indication that the suggestion he now makes that what he was expecting at the time was a call ordering the judge to release the officers and the vessel is thoroughly implausible.

128. In their closing submissions, the owners sought to rely upon this as what Mr Schaff QC described as "negative political interference", that is the absence of positive political interference to counter the judge's concerns about state involvement or about making a decision which might be contrary to the interests of the state by telling the judge she could release the vessel. Ingenious though this argument is, I cannot accept it. I do not consider that the failure to give a positive order to release the vessel could be said to be unwarranted political interference, given that to give such an order would be to appear to be soft on drug smuggling, nor do I consider that this negative political interference could be said to break the chain of causation between the infringement of the customs regulations and the detention of the vessel. Of course, if the decision was perverse or a decision no reasonable judge could reach, then the chain of causation would be broken, but not because of unwarranted political interference. This is a matter to which I return below when I consider the decision of Judge Villalobos further.

The appeal to the Court of Appeals

129. On 7 November 2007, Mr Maldonado, who was Mr Fernandez-Concheso's assistant, filed a petition to the Court of Appeals. The principal ground of appeal was that the judge had violated Article 173 of the COPP and case law by failing to give a reasoned

decision on the issue of lack of intent and being silent on this issue and that since the prosecution had failed to prove intent, the control court should have released the vessel. That ground of appeal (which, as set out below, was rejected by the Court of Appeals) remains one of the grounds of criticism made by the owners of the judgment of Judge Villalobos. However, given that the other principal criticism directed by the owners at the judgment is that the judge was wrong (and indeed perverse) in concluding that the case was still in the investigation phase and in relying on article 108 of the COPP, it is striking that that was not a ground of appeal raised contemporaneously by Mr Maldonado. Also, in December 2007, Dr Vergara who was one of the top criminal lawyers in the country was instructed, apparently because of discontent on the part of the owners with the situation. He too does not appear to have thought that the judge's conclusion that the case was still in the investigation phase was an arguable ground of appeal.

130. At the same time as that petition for appeal, the two officers lodged an appeal, on one narrow ground, that the control court had failed to inform them about their right at the end of the hearing to plea bargain and plead guilty. On 5 December 2007, the panel of three judges originally due to hear the appeals were given leave to go on vacation as a group and a replacement panel was appointed, of provisional judges. Mr Magnelli saw this as a "planned trick" but Mr Fernandez-Concheso assured him (on the basis of information from Dr Vergara) that there was nothing sinister, and no political scheme behind the original panel going on vacation. They had to ask for their vacation a few months beforehand because they could not leave until alternates had been appointed. The Supreme Court Judicial Commission had appointed the alternates on 3 December, so the original panel had to go on vacation. Mr Fernandez-Concheso confirmed this in cross-examination. The change in constitution was simply a consequence of holiday arrangements. To the extent that Dr Vergara sought to suggest in his evidence that there were political connotations to the change of constitution, I do not accept that evidence.

131. In the meantime, on 2 November 2007, Mr Fernandez, a lawyer for Corpozulia wrote to Judge Villalobos asking her to vary her decision of 27 September 2007 referred to at [76] above, whereby she had ordered the transhipment of the cargo. He asked the court to authorise delegation of responsibility to Carbozulia and PDV Marina and the depositing at Palmarejo dock of an equivalent quantity of coal to the cargo on board the vessel which would remain under the direction of the court, in order to avoid the large cost of transhipment. There was no response to that request. On 29 November 2007, Corpozulia lodged another application making the same request to another judge, Judge Abreu. Again, there was no response to that request, which formed the background to the letter from Colonel Reverol to Judge Finol of 30 January 2008 referred to below.

132. On 8 January 2008, the Court of Appeals dismissed the owner's appeal, but allowed the two officers' appeal in relation to the failure of Judge Villalobos to inform them of their right to make admissions. The Court of Appeals declared the decision of the control court a nullity, restoring the case before the control court so that the officers could be informed of that right. However, the Court of Appeals stated expressly that all other parts of the decision of the control court remained in force, that is the admission of the indictment, the admission of the evidence and other issues unaffected by that right. The Court of Appeals also stated that the decision of the control court in relation to the provisional seizure was confirmed. Dr Cabrera sought to suggest in his evidence on Venezuelan law that there was no scope for such a

declaration of partial nullity and that the effect of any reversal of part of the decision of the control court was to render the entire decision a nullity. That stance was also adopted by Mr Fernandez-Concheso. Professor Ortiz took the opposite view. I agree with him about that and reject Dr Cabrera's and Mr Fernandez-Concheso's evidence that a partial nullity is not possible in Venezuelan law, not least because that evidence seemed to me to defy common sense. This conclusion, that apart from the plea bargain point, the decision of the control court stood and was confirmed by the Court of Appeals, has considerable significance in relation to the question considered below as to whether Judge Finol had jurisdiction to revisit the Article 63 issue and release the vessel in March 2008.

133. In its judgment, the Court of Appeals first set out the owners' grounds of appeal as set out above and then set out the prosecutors' response, which was that the judge had decided whether the vessel should be released, which was evident from that part of the judgment where she denied release and decided to maintain the preventive detention of the vessel under Articles 66 and 67 of the Anti-Drug Law. The Court of Appeals then stated that it had reviewed the court file. Professor Ortiz relied upon this as demonstrating that in some way the Court of Appeals was making a fresh determination of its own that there as a lack of intent. I reject that suggestion. The process before the Court of Appeals was one of review of the lower court's decision, not a *de novo* determination of its own. However, the significance of their review of the court file is that it shows that the Court of Appeals judges satisfied themselves that the judge had made a decision on the point.

134. The Court of Appeals then set out case law for the proposition that there is a lack of legal basis for a decision when the judge fails to determine in a clear precise and intelligible manner the reasons of law and fact that justify or are the basis for the decision. The Court of Appeals then quoted various passages from the fifth ruling of Judge Villalobos and stated:

> "From the analysis of the appealed decision, we note that the [judge] denied the request advanced by the defence, providing legal grounds, considering that the asset should be provisionally seized in accordance with Article 66…and also based on the fact that, as the holder of the right to exercise a criminal action, the Public Prosecutor is the one who must determine and investigate whether someone participated or not in an illegal act, thereby establishing reasons of law and fact that justified the decision about this particular issue."

135. The Court then said it was pertinent to quote Article 66, which they did and then said that according to the Article, any asset employed to perpetrate a drugs offence must always be seized as a preventive measure, in other words the general rule was that the asset was seized as a preventive measure until final judgment. The Court of Appeals continued:

> "It must be observed that while it is true that Article 63 of the Law establishes that the seizure will not be ordered in circumstances that evidence the lack of intent of the owner of the asset in the perpetration of any of the offences [under] the Law, as the appellant mentions, it is no less true that in this case this circumstance was not proved during the preliminary hearing, given that this hearing took place upon the request of

> the Public Prosecutor to subject persons other than the owners of the asset to criminal proceedings, that is [the two officers] who are charged…If the Public Prosecutor, as the party capable of exercising the criminal action and who is in charge of investigating whether a crime was committed, failed to mention the participation or lack of it by the owners of the vessel during the preliminary hearing, the judge would be wrong to decide this issue especially since it would imply determining whether a party is guilty or not at this stage and it is not known whether an investigation has been commenced against this party or if, on the contrary it has been decided not to commence an investigation against it.
>
> It is necessary to indicate that in Article 63 when the legislator mentions the lack of intent by the owner of the asset, such lack of intent must be proved during the preliminary hearing, the legislator refers to the preliminary hearing as the occasion when the participation by it in the perpetration of an illegal act established [under the Anti-Drugs Law] is decided. In our case the hearing took place to determine the existence of sufficient elements to prosecute completely different parties who allegedly used the vessel owned by the appellants as the means of transportation to perpetrate the crime and therefore since the lack of intent of the owners of this vessel was not proved, the appropriate step was to order the preventive seizure of the vessel in accordance with Article 285 of the Constitution, Articles 108 and 328 of the [COPP] as well as Article 66 of [the Anti-drug Law].
>
> Having established that the appealed decision did not lack legal grounds, and much less violate any legal or constitutional provision in connection with the arguments raised by the appellant, the appropriate decision according to the law is to DENY the appeal."

136. Mr Fernandez-Concheso's reaction to the judgment at the time appears from an email to Mr de Leo of 10 January 2008, in which he said that the Court of Appeals had ruled that the issue of release of the vessel be dealt with at trial and that the Court had *"silenced all reference to Article 63"*, suggesting the decision was politically motivated. In cross-examination he agreed that it was not correct that the Court of Appeals had not dealt with Article 63, but he did not like the way they had dealt with it. The owners are not in a position to point to any actual political interference with the Court of Appeals which had influenced their decision. The highest Mr Schaff QC was able to put it was that, as temporary or provisional judges without security of tenure, they were affected by general concerns about losing their jobs if they decided against the state. As with the similar argument in relation to Judge Villalobos, I was not impressed by this point, which does not see to me to be anywhere near the sort of political interference with a judicial decision which might break the chain of causation between the infringement of customs regulations and detention of the vessel.

137. What is striking about the decision of the Court of Appeals is that, whilst, contrary to Professor Ortiz's opinion, it did not engage in a *de novo* finding that there was a lack

of intent, nonetheless, having considered the court file and the arguments before it, the Court confirmed that Judge Villalobos had dealt with the issue of lack of intent under Article 63 and had given sufficient reasons for her decision. The owners' case is that the decision of the Court of Appeals was perverse and wrong. I will consider that argument later in the judgment when I analyse more closely the decisions of the Venezuelan courts in the present case, and for present purposes simply record that, unless the owners can establish that the decision of the Court of Appeals was perverse and wrong, they are asking this court to revisit the issue whether Judge Villalobos did or did not deal with lack of intent or give sufficient reasons for her decision, an issue the owners raised and lost before the Court of Appeals. I consider that, if the decision of the Court of Appeals was a regular and reasonably arguable one and not perverse and wrong, then that presents a serious obstacle in the way of any attempt to invite me to go behind that decision and conclude that Judge Villalobos did not deal with lack of intent and did not give sufficient reasons for her decision.

The applications before Judge Finol

138. On 17 January 2008, a strategy meeting was held at the owners' P&I brokers' offices in Genoa, attended by representatives of the owners/managers, the brokers, the Club and Mr Fernandez-Concheso and Mr de Leo. The strategy discussed at that meeting included filing a constitutional appeal to the Supreme Court and negotiating with the attorney-general for the release of the vessel. As Mr Fernandez-Concheso accepted in cross-examination, at this stage, another application to a different control court for the release of the vessel was not one of the matters under consideration, although his position was that such an application could be made at any time.

139. The part of the original decision remitted by the Court of Appeals to the control court, namely the issue of affording the two officers the opportunity to plea bargain, was assigned to a new control judge, Judge Finol. He was a permanent judge of the fifth control court in Zulia. He had experience of drugs cases involving ships, having been the judge, according to his witness statement, in the case of the AFRICAN FUTURE. That was a case of a tanker found with drugs under the hull and he had refused a prosecution application for preventive detention of the vessel and crew, which appears to have been a refusal to make an order at the stage of Judge Villalobos' decision on 16 August 2007 (which owners do not criticise in this case) rather than consideration of an Article 63 application at a preliminary hearing. At least at the time he was first assigned to the case and considered the judgment of the Court of Appeals, Judge Finol recognised that the case had been remitted to him solely for the purposes of enabling the crew to plea bargain, as he recorded in a ruling of 30 January 2008, at which he fixed a hearing to be attended by the prosecutors and by the two officers and their lawyers. It is noteworthy that he did not order the owners and their lawyers to attend that hearing. That the matter had been remitted to him solely for that limited purpose was accepted by him in cross-examination.

140. On 30 January 2008, Colonel Reverol, the head of the ONA wrote a letter to Judge Finol referring to the order of Judge Villalobos of 27 September 2007 in relation to the transhipment of the cargo. He said it had not been possible for Corpozulia to carry out the transhipment up to that point, because it would entail a cost of some U.S. $1,000,000. He then referred to the two applications of 2 and 29 November 2007 made to Judge Villalobos and Judge Abreu respectively, asking for permission to carry out the transhipment by a different means, by delegating the responsibility placed on Corpozulia to Carbozulia and/or PDV Marina and/or any other coal

company that could carry out the task. He pointed out that no response to those requests had been received to date, a situation which could cause the risk of fire on board the vessel due to the heating up of the cargo, causing material and environmental damage or a force majeure event on Lake Maracaibo. For that reason, he asked the judge to issue a decision and give urgent authorisation for public health reasons to PDV Marina and/or another coal company to carry out the operation.

141. On 31 January 2008, Mr Fernandez, the lawyer for Corpozulia then made an application to Judge Finol, along the lines of his applications to the other judges in November, seeking the permission of the court to deposit an equivalent amount of coal to the cargo on board the vessel at Palmarejo Dock, to be under the direction of the court, and thereby avoid the immense cost of transhipment. On the basis that this equivalent amount of coal was deposited, he sought permission for Corpozulia to sell the cargo on board the vessel.

142. Although in his witness statement Judge Finol sought to suggest that this letter and visits and telephone calls from the ONA and Corpozulia were unusual, because they were not parties to the proceedings and that they were seeking to put pressure on him, as he accepted in cross-examination, Corpozulia were involved because it was to them that Judge Villalobos had given responsibility for transhipment of the cargo. I do not regard it as at all unusual for them and the ONA to seek the court's assistance in resolving issues about the cargo, in circumstances where the applications made to the courts in November had gone unanswered and where, as Judge Finol accepted in cross-examination, the cargo presented a danger. Since, as he said, Corpozulia did not have the equipment to tranship the cargo from the vessel without causing a danger to the eco-system in Lake Maracaibo, that would no doubt explain why they were seeking from the court a variation of the order of Judge Villalobos of 27 September 2007.

143. It was in relation to this request from Corpozulia for a variation of the order of 27 September 2007, that there was a striking example in the evidence of how the conviction on the part of the owners and their lawyers that they were the subject of political persecution and political attempts to steal the vessel and cargo, led to exaggerated and inaccurate multiple hearsay about events. On 15 February 2008 Mr de Leo reported to the Club what he had just been told by Mr Fernandez-Concheso, after the latter had spoken to the legal team in Maracaibo: "*Apparently the General [Martinez] in charge of Corpozulia together with his entourage arrived without prior warning yesterday afternoon at the courthouse in Maracaibo demanding that the judge 'return his ship' to him, ranting and raving that the 'the vessel was the property of the republic that had been seized from drug traffickers'*." This was developed further by Mr Fernandez-Concheso at the time of the order from Judge Finol releasing the vessel, in an email to Mr de Leo of 14 March 2008: *"A loose gun however is General Martinez of Corpozulia who as you know, pictured himself as newborn shipowner at the expense of the member"*.

144. However, the truth was much more prosaic. According to Judge Finol's evidence in his witness statement, it was only Corpozulia's lawyers who attended at court (not a ranting and raving general) to press their application of 31 January 2008 for an order in relation to the cargo. As is clear from the evidence generally, attendance upon the judge by one side's lawyers was quite normal in Venezuela at the time. Judge Finol confirmed in cross-examination that they were not seeking the vessel, but only discharge of the cargo and then on environmental grounds.

145. On 7 February 2008, Mr Maldonado on behalf of the owners filed an application to Judge Finol for the release of the vessel under Article 311 of the COPP which provides for the prosecution to return at their earliest convenience detained assets which are not necessary for the investigation. The application referred to Judge Villalobos' decision detaining the vessel under Article 63, but not to the judgment of the Court of Appeals. It asserted that the assignment of the vessel to the ONA and subsequently Corpozulia showed a clear intention to deprive the owners of the vessel and referred to the financial hardship being suffered by the owners, in terms of operating expenses of U.S. $600,000 per day without any earnings from the vessel. The application included a short paragraph asking in the alternative for the release of the vessel against the provision of reasonable security.

146. On 15 February 2008 Mr Fernandez-Concheso reported by email that General Martinez from Corpozulia had come and demanded of Judge Finol in pretty strong terms that the vessel be passed to Corpozulia, in accordance with the agreement between the ONA and Corpozulia of 12 September 2007. The judge said he could not authorise that, because the current detention was not a final confiscation. Although Mr Fernandez-Concheso put this in somewhat emotive language in his email, what emerged in cross-examination was again more prosaic and in no sense sinister. Mr Rainey QC put to him that the General had come down and said look there is this problem, when is the court going to rule on it? Although Mr Fernandez-Concheso did not accept this in terms, he accepted that Corpozulia kept pressing for an order from the court for something to be done, because nothing was happening. He accepted in answer to me that an order had been made in September, then Corpozulia had made two applications in November, but there had been no ruling. In those circumstances, it was scarcely surprising that General Martinez was pressing for a solution to the problem.

147. As recorded in his judgment dated 21 February 2008 in relation to the applications by Corpozulia and the ONA, Judge Finol received contrary submissions from lawyers for Bulk Trading saying that 25,733.38 metric tons of the cargo was Colombian coal and about 8,000 metric tons was Venezuelan coal. Bulk Trading pointed out the vessel was under charter to them, the cargo was their property and was for carriage to Italy. In those circumstances, Bulk Trading opposed any request made by any third party to discharge the cargo. In his judgment, Judge Finol decided that, since the coal on board the vessel posed a risk of fire due to overheating, the order of Judge Villalobos of 27 September 2007 authorising the transhipment should be suspended and he made an order that Corpozulia and Bulk Trading should co-operate urgently in dealing with the cargo, to avoid environmental damage. In cross-examination, he said that all he was doing by this decision was saying they should abstain from transhipping the cargo, until the cargo owners could sort out the charterparty contract with the owners, and he agreed that he was satisfied that there was a risk to the environment and to safety, which is why he required the cargo owners to do something urgently. In fact they did nothing, no doubt for tactical and financial reasons.

148. I am quite satisfied that, at this time in January and February 2008, there was a genuine concern about the risk of overheating. This is reflected in an email from Mr Kjebekk of the Club to Mr Villanova on 26 February 2008 headed "URGENT!!! B-Atlantic Spontaneously heating of cargo", asking Mr Villanova to appoint an expert surveyor to attend the vessel to examine the situation and suggest safety requirements and other precautions to eliminate the risk of explosion and spontaneous combustion. He said consideration should also be given to contacting local IMO/SOLAS

authorities and the shippers who would know the type of coal shipped. From this email, it is clear the Club was taking the risk quite seriously, from which it seems to me that the concerns expressed by ONA and Corpozulia in their applications to the court were equally genuine, as was the urgent request by Corpozulia on 5 March 2008 that the cargo owners transfer or unload the cargo from the vessel to avoid the risk of combustion. Although Mr Magnelli sought to downplay in his evidence the extent to which there was ever a real concern about overheating of the cargo and suggested that his only concern was that high temperatures in the cargo would cause damage to the coatings of the holds, I was unimpressed with that stance, which is difficult to reconcile with what he said in contemporaneous correspondence about the risk of self-combustion.

149. In the same email report of 15 February 2008 as he reported on the visit to court of General Martinez, Mr Fernandez-Concheso reported that it was Judge Finol who had come up with the idea of security being provided for the release of the vessel, as he put it: *"as a means for him to be able to cover his back in the event that upon release of the vessel he is pointed at for having favoured our position".* In that email Mr Fernandez-Concheso said he had discussed with Mr de Leo and conveyed to the team how reluctant he had been throughout to provide security. As he pointed out there were two issues, the nature of the security and the quantum. So far as the former is concerned, it could not be a Club letter of undertaking as the judge would not know what that was, but would have to be from a Venezuelan insurance company, to guarantee payment if the owners were found guilty after a final judgment. As for quantum, the security would be for the value of the vessel but converted from dollars to bolivars, not at the official exchange rate, but at the rate on a parallel bond market in which currency related transactions took place, which was two and a half times the official exchange rate. I have to say immediately that, like Mr Magnelli, I am extremely sceptical as to the viability and legality of this unofficial exchange rate. It seems to me likely that, if negotiations for the provision of security had ever reached an advanced stage with the prosecutors, quite apart from a likely stumbling block as to what event(s) would trigger the security (a matter to which I return below), the prosecutors would have demanded that any security was for the full value of the vessel in U.S. dollars, not in local currency, which would not have been acceptable to the owners.

150. On 18 February 2008, Gard declined to put up a bond or guarantee because there was no Club cover for confiscation of the vessel. However, on the same day Mr Fernandez-Concheso told Mr Stasio he was confident of lowering the amount of any bond to U.S. $4 million. Mr Fernandez-Concheso was then authorised to raise the issue of the bond before Judge Finol and, on 21 February 2008, a draft of the bond was circulated by Clydes. That draft wording contemplated that the order for detention of the vessel might be suspended. That was something that did not seem possible to Mr Magnelli, because after the vessel had sailed it was difficult to see how that order could be revived. This led him to think that the bond proposal would not lead anywhere.

151. A hearing which was due to take place before Judge Finol on 22 February 2008 was postponed, in order to buy time to come up with the bond. On 25 February 2008, Mr Maldonado made an application to the court on behalf of the owners for the valuation of the vessel. By 26 February 2008, Generali, one of the hull underwriters, had indicated a willingness in principle to provide security through an associated local insurer in Venezuela, Seguros Pirimide. The local insurer would provide the security

which would be 100% reinsured by Generali. However, it is to be noted that nothing was ever finalised with Generali. On 26 February 2008, Mr Stasio raised with Mr Fernandez-Concheso various questions raised by Generali, specifically whether putting up a guarantee would prejudice the owners' case, leading the court to find the owners were involved, in order to cash the bond or whether the court would try to enforce the bond in respect of criminal liability of the crew as well as the owners. Mr Stasio said in re-examination that Mr Fernandez-Concheso never provided answers to those questions.

152. On the morning of 3 March 2008, Mr Fernandez-Concheso was reporting that the request for the release of the vessel against the bond provided by the local insurer had been submitted to the court and the local insurer was acceptable to the court. However, a few hours later Mr Fernandez-Concheso was reporting on a new proposal from Dr Vergara and his team, that the vessel could be released for the payment of a "no cure, no pay" fee of U.S. $360,000 to a new lawyer, Dr Alcala Rhode, who seems to have had more impact on Judge Finol than Dr Vergara. Mr Magnelli was initially suspicious of this new proposal, saying to Mr Maggiolo that Mr Fernandez-Concheso had a "fox under the armpit" (an Italian metaphor for having something to hide) but then agreed to it.

153. Thereafter, the issue of the bond seems to have fallen away. The insurers submitted that this was because the owners decided to go down the Alcala "no cure, no pay" route instead and challenged the evidence of Mr Magnelli and Mr Stasio in cross-examination that putting up a bond was no longer a possibility after 3 March 2008. Mr Magnelli essentially accepted in cross-examination that the bond proposal had been put to one side because the Alcala proposal *"was another hot dish on the plate which we needed to evaluate".*

154. Furthermore, although in his witness statement and in cross-examination, Judge Finol sought to maintain that, when Dr Vergara and Dr Alcala raised the possibility of the release of the vessel against a bond, he rejected it out of hand, albeit possibly after considering it for some hours or overnight, that evidence simply cannot be true, as Mr Rainey QC put to Judge Finol in cross-examination, but he would not accept. The contemporaneous reports from Mr Fernandez-Concheso are to the effect that the judge was amenable to the provision of security and, indeed, that it was he who had suggested it. Judge Finol's attempt in cross-examination to suggest that the owners' lawyers were putting forward security proposals, in the face of his maintenance that providing security was impossible, was simply not credible evidence. Not only did it do him no credit, but in my judgment it cast doubt on various other aspects of his evidence, such as his assertions that he had been leant on politically before he made his decision to release the vessel and that he has been persecuted politically in Venezuela since making that decision. Regrettably, despite the statement made on his behalf by Mr Schaff QC at the outset of his evidence that, although he was called by the owners, he had not come to assist them, but to tell the truth to this court, I formed the firm view that in a number of respects (and his refusal to accept that he was amenable to the provision of security was one) his evidence was indeed tailored to assist the owners.

155. However, Mr Fernandez-Concheso said in his second witness statement that either on 3 March 2008 or shortly thereafter, he was told by the team in Maracaibo that the bond route was no longer possible and conveyed this to Mr Stasio and that evidence was not challenged in cross-examination. In my judgment, the correct position is that

whilst the owners did concentrate on the "no cure no pay" proposal once it was raised and cannot really be criticised for that, if it gave rise to the possibility of securing the release of the vessel without putting up a bond, nonetheless the bond route was no longer possible, for whatever reason, after early March 2008. If it had remained a possibility after the order of Judge Finol releasing the vessel was reversed, then it seems to me inconceivable that the owners would not have explored the possibility further. The fact that they did not and resorted to the less conventional proposals referred to below supports their case that the bond route was no longer possible after early March 2008.

156. In any event, even if, contrary to that conclusion, the bond route remained a theoretical possibility, there are a number of factors which need to be placed in the equation against the insurers' argument that the continued detention of the vessel was caused by the failure to provide security. One is the uncertainty as to whether Generali would in practice have agreed the bond. As I have said, the questions they raised on 26 February 2008 remained unanswered and Mr Magnelli said in cross-examination that he did not think the draft of the bond being circulated would have been acceptable to insurers. A further uncertainty is what the attitude of the prosecution would have been to any proposal to release the vessel against a bond or other security. The draft bond in circulation seems to have contemplated some form of suspension of the detention order of the vessel and it seems to me Mr Magnelli was right in being sceptical about how that could have worked if the vessel had sailed. I doubt whether that would have been acceptable to the prosecution. Furthermore, I have already indicated that I am sceptical about the viability and legality of the alternative bond market rate of exchange and consider it likely that the prosecutors would have insisted that any security was provided in U.S. dollars for the full value of the vessel and that a major stumbling block would have been what event(s) would trigger the response of the security. I consider those matters further below when dealing with the issue as to whether the exclusion applies.

157. Before considering in more detail the events from the first involvement of Dr Alcala to the decision by Judge Finol to release the vessel on 12 March 2008, it is important to note that, until shortly before the trial, the insurers' pleaded case was that the owners had bribed Judge Finol and that that bribery was the explanation for his decision in the owners' favour to release the vessel. That case was abandoned abruptly a matter of weeks before trial, no doubt because it was a case for which there was, on analysis, no foundation. However, the insurers maintained their case that the decision of Judge Finol to release the vessel was irregular because of an absence of due process and that is a case which it was open to the insurers to pursue. It is to that case that I now turn.

158. It appears from his witness statement that Judge Finol had similar one-sided meetings with either the prosecutors or the defence and owners' lawyers to those which Judge Villalobos had had, which was perfectly normal in Venezuela at that time. Judge Finol said in evidence that, so far as the two officers were concerned, he said to their lawyers that there were no evident violations of their constitutional rights so they should stand trial. In cross-examination, he maintained that in meetings with both the owners' lawyers and the prosecutors he had said that in relation to the detention of the vessel there were violations of the constitution. Whether that is true or not, it seems to me that the prosecutors would have assumed and were entitled to assume that the issue as to whether there had been such violations and the vessel should therefore be released would be determined at a hearing at which they would have an opportunity to

make representations. On 7 March 2008, Judge Finol did fix a preliminary hearing in relation to the proceedings against the officers to be heard at 10 a.m. on 13 March 2008, of which Dr Alcala was also notified.

159. On 7 March 2008, which was a Friday, Mr Maldonado filed a further application for the release of the vessel, which referred to his earlier applications and repeated that the operating expenses being incurred by the owners were U.S. $600,000 per month and they had already incurred expenses of U.S. $3 million. He sought the release of the vessel under Article 311 of the COPP. It appears that after this, events moved very quickly. In an email to Mr Stasio and others at 15.56 CET that day Mr Magnelli reported that he had spoken to Mr Fernandez-Concheso and the latest news was:

> "We will try and get the release order signed by the judge during the weekend. The release order will then go to into the hands of the competent authorities. One of these will be the office of the harbour master, by whom General Martinez may be more easily tipped off. We hope that with the weekend in between it does not reach the recipient"

160. As Mr Rainey QC rightly submitted, in cross-examination Mr Fernandez-Concheso did not really dispute that Dr Alcala's strategy was to get the application to release the vessel dealt with by Judge Finol over the weekend, although Mr Fernandez-Concheso was extremely defensive about what was going on and gave some very emotive evidence about how this strategy was fully justified, because the detention of the vessel was unconstitutional. In his evidence Judge Finol denied ever having a meeting with Dr Alcala over the weekend and it may be that the meeting between them did not take place until the Monday 10 March 2008, but by the evening of the Monday, European time, Mr Fernandez-Concheso was reporting to Mr Stasio that the release order should be issued any time between that evening and the Wednesday morning. Then on the Wednesday 12 March 2008, Mr Stasio reported that Mr Fernandez-Concheso had indicated that the release order would be issued between 12.00 and 15.00 that day. From those emails it is quite clear that Mr Fernandez-Concheso had advance warning of when the release order was going to be issued, but it is equally clear that the authorities in Venezuela, including the prosecutors, had no advance warning of what was going on.

161. In the event, Judge Finol's judgment ordering the release of the vessel was issued on 12 March 2008. Having set out the background and quoted Article 271 of the constitution and Articles 2(6), 63 and 66 of the Anti-Drug Law, Judge Finol set out four conditions necessary for the provisional seizure of assets: (1) that the assets originated from the criminal act; (2) that the asset seized is owned by the person accused of the drugs crime so that he can be deprived of his asset and in this case the vessel was not owned by the accused; (3) that the asset had been used to commit the crime or there was a strong suspicion that it was the fruits of the crime and (4) when the asset is owned by a third party, the owner has acted in bad faith or with intention.

162. He went on to conclude that the burden of proof in relation to intention was on the prosecutor, but that in this case the prosecutor did not investigate what intention the owner may have had at all. He then stated that neither the second control court which ordered the seizure nor the Court of Appeals had explained the grounds of law or fact on which the application for seizure or the judgment ordering seizure were based, which was in effect unconstitutional as affecting such matters as due process and the right to own property. Accordingly, he ordered the release of the vessel.

163. Leaving aside the issue of burden of proof under Article 63 on which as I have already stated, I consider that the burden is on the owner of the vessel, I consider that this was not an order which Judge Finol had jurisdiction to make, for a number of reasons. First, the matter had only been remitted to Judge Finol by the Court of Appeals on the one narrow issue of the opportunity of the two officers to plea bargain, as he recognised himself in the ruling he made on 30 January 2008. I see no reason not to accept Professor Ortiz's evidence that such partial remission is possible in Venezuelan law. I reject the suggestion by Dr Cabrera that the reversal of Judge Villalobos' decision on one narrow point about the opportunity to plea bargain had the effect of rendering her whole decision a nullity, not merely because that suggestion makes no sense, but because it is contrary to what the Court of Appeals itself ordered.

164. Second, I also accept Professor Ortiz's evidence (in preference on this point to that of Dr Cabrera) that the decision of the Court of Appeals which had upheld the preventive detention of the vessel could not be revisited by a first instance control court, unless there had been a material change of circumstances since the earlier hearing. There had been no material change of circumstances and, as Professor Ortiz said, continuing financial hardship for the owners was not such a material change of circumstances because that had been present from the outset of the preventive detention. In any event, Judge Finol did not rely upon a material change of circumstances in his judgment.

165. Third, what Judge Finol purported to do was to revoke or, at the very least, disregard the decision of a superior court, the Court of Appeals, on the ground that he considered it unconstitutional. Dr Cabrera sought to justify that approach as an application of the principle in Venezuelan law of diffuse constitutionality. However, whilst that principle entitles the court to disapply a statute which it regards as unconstitutional as between the parties before the court, in my judgment and contrary to Dr Cabrera's evidence, that principle does not entitle a court to disregard the decision of a superior court on the same subject-matter, merely because it regards that decision as unconstitutional. It is striking that Dr Cabrera was not able to cite any authority for such a surprising proposition, which would undermine legal certainty and the hierarchy of the courts.

166. Fourth, the decision was made *ex parte*. Although, as Professor Ortiz accepted in cross-examination, *ex parte* applications and hearings are possible in Venezuela, that does not seem to me to assist the owners much here since, in this case, a hearing had been fixed for 13 March 2008, which would have been *inter partes* and yet the judge decided an issue which was for decision at that hearing in advance of the hearing in the absence of any opportunity for the prosecutors to make representations.

167. I consider that the way in which the judgment came to be obtained and the way in which it was disseminated thereafter were seriously irregular. The judge handed the judgment to Mr Maldonado. In fact, the prosecutors were at the court on 12 March 2008 and Judge Finol did not hand them a copy of the judgment. Although he sought to suggest in cross-examination that they were aware of the judgment, they cannot have been, as they did not know he was going to issue an order at the request of the owners, prior to the preliminary hearing on 13 March 2008, at which they would have assumed this issue was going to be decided.

168. I agree with Mr Rainey QC's submission that the owners' lawyers knew that what was going on before Judge Finol was irregular. Mr Fernandez-Concheso was very

defensive in cross-examination about the fact that the application was dealt with in secret, saying that formalities were irrelevant and likening the detention of the vessel to torture, in very emotive evidence which seemed to me to be an acknowledgment that what had occurred was irregular. It was also clear from his evidence that the idea to keep the application secret was entirely Dr Alcala's and that left to his own devices Mr Fernandez-Concheso would have wanted to do things in accordance with ordinary procedure; hence his proposal at the strategy meeting in Genoa to make an application to release the vessel on notice to the attorney-general. I have little doubt that the principal reason why Dr Alcala wanted to proceed *ex parte* was to render nugatory any appeal by the prosecutors once they found out about the judgment. The effect of an appeal in Venezuelan law was to suspend any release order, but Dr Alcala no doubt hoped that the vessel would have sailed before the prosecution could lodge an appeal. The fact that Judge Finol was prepared to go along with this secret approach does him little credit.

169. Not only was the application kept secret, but the order releasing the vessel was kept from the prosecutors. The judgment does not seem to have been entered in the court file for 12 March 2008. The prosecutor Ms Diana Vega performed a review of the court file at 15.30 hours local time on 12 March 2008 and there was no record of the decision. Judge Finol's explanation for this was that she must have missed it, but that cannot be right, since the prosecutors inspected the court file again on the morning 13 March 2008 and the judgment was still not on it, but they did find a document notifying the vessel's representatives that the vessel had been released. The prosecutors then asked for a copy of the judgment at 12.20 hours local time, which is simply not explicable if they were already aware of what had been going on. In cross-examination, Mr Fernandez-Concheso accepted that if the prosecutors had found out about the judgment, they would have been bound to appeal because the way in which the local legal team had gone about obtaining the judgment and order was manifestly irregular.

170. In my judgment, the contemporaneous documents show that the prosecutors had not been put on notice of the release order and demonstrate that due process was not followed. The "minutes" produced by Ms Diana Vega at 12.30 p.m. on 13 March 2008 confirm that, when she inspected the court file the previous day, the judgment of Judge Finol was not on the file and that when she first attended that day, 13 March 2008, the file which evidently contained the judgment was not provided, on the basis that it was still in the diary. The relevant file was subsequently provided. From this it is fairly clear that, contrary to Judge Finol's denial in cross-examination, attempts were being made by him or on his behalf to keep the judgment secret from the prosecutors. I was particularly unimpressed by his assertion that he had no need to hand over the judgment to the prosecutors, but it was up to them to ask for a copy.

171. In the minutes, Ms Vega also noted that, as a result of the decision to release the vessel, six official letters numbered 893/08, 894/08, 895/08. 896/08, 899/08 and 900/08 issued by the court were not on the file. These were the so-called *boletas de notification* or notification certificates referred to at the end of the judgment and signed by the judge. Three of these, those addressed to the owners' lawyers, the National Guard and the Port Captain were served direct on 12 March 2008 and returned to the court receipted on 13 March 2008. The other three, addressed to the prosecutors, the ONA and Corpozulia, were not served direct but by the court bailiff service, as a result of which the ONA had not received the notice on 14 March 2008

and the prosecutors only received the actual notice addressed to them on 24 March 2008.

172. The court bailiff service wrote to the prosecutors on 14 March 2008, informing them that the official letters addressed to the prosecutors, the ONA and Corpozulia had been received by them on 13 March 2008. They had not received the other three official letters (i.e. the ones which were served direct) and presumed that they had been sent by a different method by the control court. In re-examination, Judge Finol sought to suggest that the court bailiff service was the official channel for service of the official letters addressed to the prosecutors, the ONA and Corpozulia. However, as Mr Rainey QC pointed out, that was not what the owners were saying in response to the prosecutors' appeal against Judge Finol's decision, which, on the question of lack of due process, complained about the absence of notification of the decision. Furthermore, if it was correct that the court bailiff service was the official channel for service of all such official letters, one might have expected the second Court of Appeals to pick up that point on its review of the court file and yet it did not. Once the prosecutors discovered that different methods of service had been employed by the court, a disciplinary complaint against Judge Finol was immediately filed and an investigation ordered by the public prosecutors' office.

Events leading up to the second judgment of the Court of Appeals

173. Even once the order by Judge Finol to release the vessel had been served on the harbour master, there were inevitably formalities which had to be complied with before the vessel could sail. The owners submit that the harbour master found various pretexts for delaying the sailing of the vessel, but I agree with the insurers that a careful analysis of the evidence reveals a different picture. As Mr Fernandez-Concheso accepted in cross-examination, there was a period of genuine delay owing to the fact that some of the certificates for the vessel's fire extinguishers and life rafts had expired. As Mr Rainey QC put it in his closing submissions: *"The vessel was subject like any other vessel to the normal minutiae of Port State Control clearance and Owners had not put the necessary steps in place before obtaining the order. This was undoubtedly frustrating for Owners, but there is no reason to suppose that the cause of this delay was Machiavellian window dressing."* The owners were obviously not expecting matters to move as fast as they did and were caught unawares in terms of readiness to sail.

174. On 14 March 2008, the ONA wrote a letter to the harbour master stating that the order of Judge Villalobos of 16 August 2007 had mandated the ONA to be responsible for the custody of the vessel and that no judicial decision overturning that decision had been received, so that the vessel remained under their custody. Although Mr Schaff QC submitted that there was no legal basis for that intervention, at the time the letter was written, the ONA had not received the formal notification certificate of Judge Finol's judgment. In any event, although it was written on 14 March 2008, it appears from Mr Fernandez-Concheso's subsequent report to Mr de Leo, that the letter was only received by the harbour master on the morning of Monday 17 March 2008. It was only on that morning that the vessel's certificates had been renewed and the owners again asked to sail. However, by that time, on the 17 March 2008, the prosecutors had appealed against the order of Judge Finol and the effect of the appeal was to suspend the order. It follows that, even if as Mr Fernandez-Concheso contended, the harbour master described the order to Mr Maldonado as "toilet paper", the real reason why the vessel did not sail was not some arbitrary action of the

harbour master at the bidding of the ONA, but the fact that, by the time the vessel was ready to sail on 17 March 2008, the order of Judge Finol was suspended.

175. On 18 March 2008, the prosecutors made an application to another control court judge, Judge Nola Gomez Ramirez, for a declaration that the order of Judge Finol was suspended because of their appeal. On the same day she made an order, directed to the harbour master declaring the order of Judge Finol suspended pending the ruling by the Court of Appeals on the prosecutors' appeal. In cross-examination, Dr Cabrera appeared to accept that her order was in accordance with Venezuelan law and the owners no longer pursue a case that the order was unlawful, no doubt wisely, since her order was no more than declaratory of the relevant law, whereby under Article 439 of the COPP the effect of an appeal against an order is to suspend that order unless the court orders otherwise.

176. There were two grounds of appeal pursued by the prosecutors against the judgment of Judge Finol: (1) that he had exceeded his jurisdiction and overreached himself in circumstances where the matter had only been remitted to him to deal with the plea bargaining and where his decision was contrary to that of Judge Villalobos as upheld by the Court of Appeals' first decision in January 2008 and that he had misapplied Articles 63 and 66 and (2) that he had breached the requirements of due process by failing to notify the prosecutors of his decision, contrary to Article 175 of the COPP.

177. Before considering the judgment of the Court of Appeals, I should mention the further somewhat unconventional proposal for the provision of security which emerged at a dinner attended by Mr Maggiolo (but not Mr Magnelli) of the managers on 17 April 2008 with a Mr Pozzo, representing a prominent Venezuelan-Italian businessman, Mr Serafino. This was a proposal for security to be posted of U.S. $650,000, initially by payment into escrow, later revised to the depositing of a bearer cheque in a safety deposit box. Mr Magnelli met Mr Pozzo the following day and was unimpressed, describing him and his colleagues as *"millantatori"*, boasters or braggarts. This assessment was almost certainly correct: although owners were told that a guarantee would be lodged with the court in Maracaibo, nothing ever materialised, nor was it ever going to from this unconventional proposal.

178. By its judgment of 4 June 2008, the majority of the Court of Appeals held that Judge Finol had breached principles of jurisdiction and judicial hierarchy, because the matter had only been remitted to him to deal with the plea bargaining issue and the Court of Appeals had already ruled on the matter. The owners seek to criticise the decision of the majority, because they failed to address the fact that, so it is contended, the Judge had jurisdiction under Article 311 of the COPP, (which was the view of the minority) and failed to recognise that an order for preventive detention is not a final decision giving rise to a *res judicata*. It seems to me that submission overlooks the clear evidence of Professor Ortiz, which I accept, that it was not open to the control court to review the decision of the Court of Appeals, except where there had been a material change of circumstances. In any event, for the reasons I have set out earlier, I consider that Judge Finol did not have jurisdiction to make the order he did and on this ground of the appeal, I consider the majority of the Court of Appeals was clearly right.

179. So far as the ground of appeal concerning want of due process is concerned, the Court of Appeals reviewed the court file for itself and all three members of the Court of Appeals considered there had been a breach of due process. The majority concluded that the judge's conduct: "*evidently damages the Prosecutor's Office's right to due*

process and to defence, because the failure to send notice on the appealed decision undoubtedly prevented it from knowing the content of the Court action issued." The minority Court of Appeal judge in fact considered that the judge had failed to follow due process by failing to notify the prosecutors' office before making any decision and would have annulled Judge Finol's order on that ground alone. Although the owners contend that that view was wrong, in my judgment it was correct because it recognised that on the facts of this case it was not appropriate for Judge Finol to have proceeded on an *ex parte* basis.

180. By way of a coda to this whole part of the case, I should deal with two matters raised by the owners which they submitted demonstrated the extent to which political interference was occurring. The first concerns the alleged political persecution of Judge Finol by the disciplinary proceedings against him and his removal from office. I was not persuaded that, as the owners would have it, this was really evidence that the one judge brave enough to stand up to the executive was subjected to political persecution. For the reasons I have set out in detail above, I consider what occurred before Judge Finol was wholly irregular, both as regards the way the decision came about and the way in which it was subsequently disseminated. That irregularity and his involvement in it would have merited some form of disciplinary proceedings against him in most jurisdictions, including our own. Furthermore, I agree with Mr Rainey QC that the context is that due process towards the prosecution is important in Venezuela to avoid corruption of the judiciary in drugs cases. It also appears to be the case that this was not the first occasion upon which Judge Finol had been criticised for failing to notify the prosecution of a decision. Whatever the rights or wrongs of his conduct in the earlier *Torres* case, about which he was cross-examined, and however strongly he felt about the merits of Mr Torres' case or the owners' case here, due process had to be observed. I consider that he failed to observe due process in the present case and that his conduct of the matter was irregular. In the circumstances, I decline to find that his dismissal from office or the disciplinary proceedings against him were part of some improper political revenge for a decision which the state did not like.

181. The second matter was the case of the ASTRO SATURN, another vessel found with drugs strapped to her hull in Lake Maracaibo in August 2008. It appears that, in that case, the control court adjourned the preliminary hearing and decided to issue its decision only once the investigations by the prosecution were completed. Before the adjourned hearing, the prosecution had brought an indictment against the Master and one of the officers as well as against two Colombian nationals who were presumably the drug smugglers. The owners made an application for the return of the vessel under Article 311 of the COPP, on the basis that the investigation had completed and the prosecution were not therefore suggesting that the vessel was essential for the investigation. So far as one can tell from the rather opaque reasoning in the decision of 19 November 2008, reliance was not being placed on Article 63 of the Anti-Drug Law, in that the prosecutors were not seeking an order that the vessel remain under detention and the owners were not saying that their lack of intention was demonstrated. It seems to me that the decision provides limited support for the owners' case and certainly does not demonstrate that the decision of Judge Villalobos was perverse or wrong.

182. What the owners particularly rely upon is that, according to the evidence of Mr Villanova (who acted for the owners in that case and who provided a witness statement in this case but was not required for cross-examination), the judge in that

case was then put under pressure from the ONA and changed his decision the next day, ordering the detention of the vessel. The basis for the decision of 20 November 2008, revoking his previous decision was that Article 66 of the Anti-Drug Law required preventive seizure of property used in the commission of drug crime in all cases. The vessel had already sailed but was chased, unsuccessfully, to the edge of territorial waters by the Venezuelan navy. The judge was then removed from office and made the subject of criminal charges. The owners' lawyers were also victimised.

183. All of that demonstrates that there was what could be described as political interference in that case. However, without knowing the detail of why the ONA intervened and having all the details of the case, it is not possible to say whether the interference was entirely unjustified or not and it is worth remembering that Mr Fernandez-Concheso, who was only too ready to ascribe every set-back for the owners in the present case to political interference, accepted that the ONA was not a corrupt agency. In my judgment it would be unwise to use another case about which one knows very little to determine that there was unwarranted political interference in the present case.

The judgment of the Supreme Court

184. On 17 July 2008 the Constitutional Chamber of the Supreme Court ruled on the owners' appeal. The core of the owners' argument, as recorded in the judgment of the Supreme Court remained, as in the lower courts, that the burden of proving intent under Article 63 of the Anti-Drug Law rested upon the prosecution and, in the present case, the prosecution had not even alleged intent since they had not accused the owners or even mentioned them in the indictment against the two officers. Accordingly, the owners submitted that, by the decision of the control court and the Court of Appeals continuing the detention of the vessel, their constitutional rights had been violated, in particular that the decisions had infringed their right to a defence, due process and the right to own property.

185. The majority of the Supreme Court dismissed the appeal for constitutional protection *in limine litis*, that is on the basis that there were no grounds whatsoever for granting such protection. The dissenting judge, Judge Rondon Haaz only dissented because he considered the appeal ought not to have been dismissed *in limine* because it was arguable. I was not impressed by the owners' case that, because the appeal was dismissed *in limine*, the scope of the review by the Supreme Court was limited. This was not some cursory examination of the case. The majority judgment states in terms that they have studied the court file, so this was a full review of the decision of the Court of Appeal, as Professor Ortiz said. The dismissal *in limine* simply means the majority of the Supreme Court did not think it sufficiently arguable to merit further hearing or evidence, not unlike a disposal of a matter by way of summary judgment in this jurisdiction.

186. Furthermore, it seems to me that, if the decisions of the control court and the Court of Appeals really were as perverse and wrong as the owners contend, then their argument that their constitutional rights had been infringed would have jumped off the page at the Supreme Court and they would have been bound to do something to redress the wrong the owners had suffered. There is no basis for saying that the Supreme Court in this case simply acted as political puppets. Although Dr Cabrera did not participate in the decision, his name is on the judgment as one of the justices of the Supreme Court. In the witness box he came across as someone with an independence of mind, which was an indicator of the standard of the higher judiciary

in Venezuela, although I did not accept all the evidence he gave. In the present context, I was not impressed with his suggestion when taxed about this decision of the Supreme Court, that sometimes the Supreme Court would allow manifest breaches of constitutional rights to go unchecked, because the protection provided by the Court is not there to examine constitutional rights but only a particular situation. I doubt very much whether, if the Supreme Court had thought there were manifest breaches of constitutional rights in the present case, they would not have said so.

187. In its reasons ("Grounds of Judgment") the majority, having referred to the owners' argument that the judgment of the Court of Appeals infringed their rights, then referred to the previous decision of the Supreme Court in *Escriba* (2006):

> "This Court observes that in relation to the illegal traffic of [drugs] we have previously resolved that the assets employed to perpetrate the offences…and/or those that originate from the benefits obtained through those offences cannot be a source of personal wealth, even for those who were not involved in the perpetration of the offence and this is why by securing those assets it is sought to seize the ones that were linked to the offence (*Escriba*). "

188. The majority then cited Articles 63 and 66 which they said gave criminal courts authority to order preventive seizure and/or confiscation (the latter through a final judgment on conviction) of assets used to perpetrate drugs offences. They then quoted the passage from the judgment of the Court of Appeals which I have set out at [135] above and continued:

> "From this [passage] we can see the Second Court of Appeals denied the release and return of the B Atlantic based on its opinion that during the provisional hearing it was not proved that her owners did not participate or it is not known with certainty whether a criminal investigation in relation to the facts of the case has been opened against them and therefore the requirements of Article 63…dealing with the exoneration from seizure of assets was not met.
>
> It can be observed that the reasons that guided the Second Court of Appeals to reach its decision fall within the authority granted to review judges in criminal matters to resolve an appeal, especially since such reasoning was grounded on the provisions of the law dealing with drug traffic and therefore there is no evidence that the Court exceeded its jurisdiction or infringed any rights or constitutional guarantees and even less the right to own property.
>
> To determine whether there was intent by the owner in the perpetration of offences [under] Article 31, 32 and 33 of the Law…in order to decide if a seized asset is to be released falls within the authority of any criminal judge and outside of the scope of a constitutional protection action…
>
> …

> In addition this Court points out that the Second Court of Appeals did not affect the right to a defence of the claimant since it did resolve the main allegation submitted by the legal representatives of [the owner] referring to the release of [the vessel]. Furthermore the right to due process has been guaranteed to the claimant, the Court notes that the file of the criminal proceedings evidences that the provisions from the [Anti-Drug Law] that refer to the release and return of the asset subject to provisional seizure were complied with."

189. Thus, not only did the Supreme Court not consider that the judgments of the lower courts were unconstitutional, but they clearly did not think they were wrong either, otherwise they would surely have said so. It is striking that in the analysis I have just quoted the majority, which had examined the court file, appears to have agreed with the lower courts that the investigation by the prosecution was still continuing at the time of the preliminary hearing (a conclusion which as I have already noted was never the subject of any appeal by the owners) and also considered that the control court had dealt with the application under Article 63. It also clear that the majority considered that the Court of Appeals had reached its own decision that the lack of intent of the owners had not been proved for the purposes of the release of the vessel under Article 63 and that that decision was in accordance with the Anti-Drugs Law.

Events leading up to the trial and conviction of the two officers

190. Initially there was a dispute between divisions of the criminal court as to which court should hear the trial of the Master and the Second Officer, apparently because neither division wanted to hear such a case. The matter had to be resolved by the Court of Appeals. The case was assigned to Judge Faria and at the adjourned preliminary hearing on 6 June 2008 the case was sent for trial. There was then a delay selecting jurors, as the panel did not want to be involved in such a controversial case and Mr Fernandez-Concheso's assessment was that Judge Faria wanted the comfort of jurors trying the case with him.

191. A jury was then empanelled in February 2009 and the trial started promptly at the beginning of March. The Master and Second Officer gave evidence and the assessment of the defence team was that they had done well. However, Mr Gonzalez alleged in his witness statement that Judge Faria had told him that he was put under political pressure to convict by Dr Arteaga, who was the son-in-law of the President of the Supreme Court and who was by then Colonel Aponte's successor as head of the Zulia Judicial Circuit. I did not accept this evidence, since it seems to me that something of that importance would have been reported by Mr Gonzalez to Mr Fernandez-Concheso, who in turn would have reported it to the owners, but there are no such reports. At all events, Judge Faria was either rotated away to another court, rotation being something quite normal in the Venezuelan system or, according to Mr Gonzalez, retired through ill-health.

192. A new judge, Judge Isabel Araujo, was appointed and new jurors were empanelled. The officers gave evidence again but there was then a delay whilst there was an attempt by the prosecutors to have Judge Araujo removed for bias towards the crew, which was rejected by the Court of Appeals on 23 July 2009. On 6 August 2009, the judge ordered that the detention of the officers could continue for another 15 months until November 2010. After the trial resumed with new jurors in September 2009, the judge fell ill and was not expected to be back at work until March 2010.

193. As regards the vessel, on 18 June 2008, the owners served a Notice of Abandonment on the insurers. The leading underwriter scratched the notice, saying abandonment was declined and the insurers agreed to put the owners in the same position as if a writ had been issued that day, a so-called writ clause or writ agreement. The owners served a second Notice of Abandonment on 16 October 2008, which the insurers' solicitors declined on 24 November 2008, reminding owners of their obligation to act as a prudent uninsured.

194. Before that, in September 2008, at the instigation of Mr Fernandez-Concheso, the owners entered into a so-called Safety and Investigation Consulting Contract with an entity called Nowake Intertrade Corp under which the owners were to advance U.S. $70,000 ostensibly for Nowake as private investigators to find out who the real perpetrators of the drug smuggling were, with a further U.S. $610,000 success fee to be paid if the vessel was released. The owners paid over the U.S. $70,000, although Mr Magnelli said in evidence he was very sceptical about anyone being able to find the persons responsible for planting the drugs more than a year after the event. As appears from a subsequent email in March 2009 and, as he confirmed in evidence, Mr Magnelli thought the contract was a sham and that what was really going on was an attempt to buy off the ONA in order to procure the release of the vessel. It should be pointed out that, whatever Mr Magnelli's suspicions, it was not put to Mr Fernandez-Concheso in cross-examination that this was really an attempt to buy off the ONA. At all events, whatever the purpose of the agreement with Nowake, it came to nothing.

195. On 22 August 2009 the vessel was laid up. On 17 September 2009, the owners served a third Notice of Abandonment under cover of a letter from Clydes asking the insurers to either accept the Notice or agree the writ issued clause. On 29 September 2009, the insurers declined the Notice, the leading underwriter again stating owners were placed in the same position as if a claim form had been issued. On 29 September 2009, the owners' lawyers notified the court that the owners were formally abandoning the vessel. On 1 October 2009, Mr Magnelli gave notice to the P&I Club via the brokers that the vessel had been "necessarily abandoned" to the court in Maracaibo the previous day.

196. Judge Araujo briefly resumed control of the case against the two officers. According to Mr Gonzalez, Dr Arteaga gave the judge an order to revoke the house arrest pursuant to which the Master and Chief Officer had been held since the Orders of Judge Villalobos in August and October 2007 and send them to the local prison for common criminals. Judge Araujo refused to do so. Mr Fernandez-Concheso asserted in his evidence that this refusal to comply with the order of Dr Arteaga led to the judge being rotated to another court, but that was another example of seeking to ascribe everything to political interference. Mr Gonzalez accepted in cross-examination that this was simply part of the routine rotation to which Venezuelan judges were subject.

197. The new judge appointed was Judge Urdaneta who gave evidence before me. He was regarded as a "government man" who would follow orders from his superiors. He was very ambitious and had been appointed a judge to deal with a controversial political ruling which won the appreciation of Colonel Aponte, although he insisted in cross-examination that his reputation was as a judge of probity. One of the first things he did was to transfer the two officers from house arrest to prison, an indication of taking a hard line, but not one which (even if politically motivated) could be said to be wholly unjustified. In taking a tough line on drug crime, the Venezuelan authorities

may well have had in mind the importance of treating nationals and foreigners alike, in circumstances where Venezuelan nationals accused of drug smuggling would be detained in a prison not under house arrest. In any event Mr Urdaneta said in cross-examination that he had brought the officers out of house arrest to ensure the trial came on quickly. Taking that at face value, it is difficult to see events in the opening stages of the trial as politically motivated and I decline to so find.

198. The trial took place before Judge Urdaneta and two jurors. The owners were not represented, because Mr Gonzalez felt that tactically it would jeopardise the trial. In fact the trial went badly for the officers for a number of reasons. Mr Gonzalez was on his own representing the two officers and lacked the assistance of a maritime expert and a psychologist to help "read" the jurors. Despite his protestations in cross-examination that he did not need the latter, I am quite satisfied that, at the time, it was thought he did need that assistance, but he did not get it. Also the jurors may not have understood the technical explanation as to why the vessel delayed sailing from 12 to 13 August 2007 because of the miscalculation of the draft necessitating the loading of further cargo. Also, part of the strategy in relation to the miscalculation was to blame the Chief Officer for the mistake, but Miss Sebastianelli at least was concerned this strategy would backfire and lead to indirect responsibility of the Master.

199. Neither the Master nor the Second Officer made a good impression on the jury. Mr Gonzalez told Mr Fernandez-Concheso that they performed badly as witnesses. In an email of 5 May 2010, Mr Fernandez-Concheso said: "*Idemaro is not happy and thinks the Prosecutors scored. He considers the master was to[o] hesitant on what his duties in respect to security are. I am aware that there is an issue with the translator, whom I know and consider awful.*" The Second Officer was even worse. There was clearly a personality clash between him and Mr Gonzalez and neither trusted the other. Although Mr Gonzalez was prepared to accept in cross-examination that the evidence of the Second Officer had not gone well, he sought to downplay how bad that evidence was. In the circumstances, I considered the contemporaneous reports about how badly that evidence had gone were more reliable than Mr Gonzalez's evidence. The Second Officer's evidence was bad on what was regarded as the critical aspect of vessel security and ISPS matters. As Mr Morales reported to the owners: "*Dr. Gonzalez is very disappointed due to Mr. Datchenko's answers when questioned by him, his answers were mistaken/wrong in about 80%*". Furthermore, as Mr Fernandez-Concheso accepted in cross-examination, the Second Officer came across as very angry and arrogant, which Mr Gonzalez thought was jeopardising the position of both defendants.

200. In the light of the amended witness statement of Mr Urdaneta, in which he withdrew any suggestion that he was leant on by anyone to convict or that he had pressurised the jury to convict, there is simply no credible evidence that either the judge or the jury were pressurised into convicting the two officers. To the extent that Mr Gonzalez suggested the contrary, his evidence was not objective and I do not accept it. It is noteworthy that the reason why Mr Gonzalez wanted jury trial in the first place was because: *"he considered jury members could deliver justice and no authority would be able to pressure them"*. In my judgment, what happened here was not that the jury were pressurised but that the officers made a bad impression on the jury and, as Mr Urdaneta said in cross-examination: *"the jury grew convinced that the crew were guilty."*

201. The judgment of Judge Urdaneta was detailed and nearly 100 pages long. It records that the behaviour and omissions of the two officers in relation to matters such as the grille were contrary to the Vessel Safety Plan and the ISPS Code. Mr Schaff QC was very critical of the judgment in his submissions, but however much one may sympathise with the two officers and consider that the jury reached the wrong verdict, as Mr Rainey QC pointed out, the jury, who decided the facts, saw the witnesses and this Court did not. Wrong verdicts are an aspect of any jury system, even in this country. I do not consider that the guilty verdict in this case in any sense points to political interference with the judge or jury.

202. At the end of the trial, Mr Gonzalez applied for the release of the vessel, but Judge Urdaneta ordered her confiscation. Contrary to the owners' submissions, I do not regard that order as unjustified political intervention. Mr Gonzalez was not acting for the owners and, as the *Tin Airlines* case in the Venezuelan Supreme Court (which I consider further below) demonstrates, any application for the release of an asset from detention or confiscation has to be made by its owner. Furthermore, the owners had abandoned the vessel to the local court in September 2009 and no attempt was made by the owners thereafter to obtain the release of the vessel. As Dr Cabrera accepted in cross-examination, under Venezuelan law all abandoned goods belong to the state and, if the owner of the vessel did not appear at the criminal trial and seek an order for release, then the vessel became the property of the state.

203. There remained the owners' assertion, based on the amended statement of Mr Urdaneta, that towards the end of the trial, he received an order from Colonel Aponte to confiscate the vessel. Quite apart from the inherent unreliability of that evidence, since Mr Urdaneta had changed the timing and content of the order and from whom it emanated since his original statement, in my judgment it is extremely unlikely any such order was given. As the vessel had been abandoned nearly a year earlier and would be automatically confiscated at the end of the trial as a matter of Venezuelan law if the owners did not seek her release, there was no need for any such unjustified pressure to be put upon the judge by Colonel Aponte or anyone else representing the Venezuelan state.

Subsequent appeals and the fate of the cargo

204. Subsequent appeals to the Court of Appeals and the Supreme Court were held to be inadmissible because the appeal petition was not signed or certified by a court clerk. However surprising that may be to an English lawyer, Dr Cabrera accepted in cross-examination that that was the position as a matter of Venezuelan law and that it was not just an empty formality.

205. Once the owners had abandoned the vessel in September 2009 with the cargo on board, Corpozulia was obliged to apply to the court for permission to discharge the cargo and pay for the costs of doing so. On 19 November 2009, Judge Carmen Parra ratified the need to transfer the cargo in view of the environmental risks. By March 2010, Corpozulia had discharged the coal and it was deposited at the North Mine to the order of the court. I agree with the insurers that this is scarcely consistent with an intention to steal the cargo.

206. Thereafter, Bulk Trading made an application for an order for delivery up of the cargo, not having made such an application in the previous three years, despite Judge Finol's order for urgent cooperation, presumably because, if they had made such an application, they would have incurred the costs of transhipment. The court made an

order for delivery up which was reversed on appeal by the Court of Appeals, on the application of the ONA which contended that confiscation of the vessel also entailed confiscation of its contents, the cargo. Although it is difficult to see how that contention can be justified as a matter of construction of the Anti-Drugs Law, at least from an English lawyer's perspective, the Venezuelan law experts agreed that, as a matter of Venezuelan law, the position is unclear. The Court of Appeals having decided the point against the cargo owners, the matter is currently pending before the Supreme Court. Although the owners have sought to rely upon these subsequent events in support of their case that the Venezuelan authorities are intent on stealing the cargo, the fact that it is now more than seven years since the incident belies that suggestion. A much more likely explanation for the ONA resistance to Bulk Trading taking delivery of the cargo seems to me to be that this is all part of the war on drugs and the ONA taking a tough stance, not unwarranted political interference for the collateral purpose of stealing the cargo.

The Anita

207. Before considering the various ways in which the owners put their claim under the war risks insurance and the defences raised by the insurers by reference to the exceptions, a more detailed examination is required of *Panamanian Oriental Steamship v Wright ("The Anita")*[1970] 2 Lloyd's Rep 365 (Mocatta J); [1971] 1 WLR 882 (Court of Appeal) on which both parties rely and which, as Hamblen J said in his judgment on the preliminary issues is generally regarded as the leading case in this area. The Anita was an elderly vessel which was insured with Lloyd's underwriters under a war risks policy which excluded "loss…arising from arrest, restraint or detainment…by reason of infringement of any customs regulations." In March 1966, during the Vietnam war, she was bound in ballast for Saigon for delivery under a time charter and arrived at an anchorage off the mouth of the Saigon river, where she was boarded by Vietnamese customs officials who found carefully secreted in a cavity behind the rudder a large quantity of unmanifested goods consisting of transistor radios, watches, linament, batteries and cigarettes. The cavity opening was closed by wooden planks, over which was a layer of cement and bolts. As Lord Denning MR said at [1971] 1 WLR 882 at 885A: *"It was a deliberate concealment of materials of war*".

208. Initially the customs authorities took proceedings under old 1931 regulations from the French colonial period, but after a few days they recommended to the government commissioner that proceedings should be taken under a tougher new law passed in July 1965 specifically to deal with contraband and the like, which provided for confiscation of the means of transport belonging to persons concerned in the importation of prohibited goods or private persons. The case was sent before a special court just set up under a decree of February 1966 to deal with black market transactions and transactions entered into by dishonest merchants. The decree provided that the special court was to be manned by: *"judges who can be vouched for from all points of view as to integrity and who, above all, have an exact idea and profound comprehension of the higher interests of the nation and the people at the present time."*

209. The Master and nine crew were arrested and tried by the special court, the three judges of which wore red robes over military uniforms. They all had degrees in law, but no practical training in the law. The master and crew were represented by a distinguished lawyer. The case lasted all day and the court heard representations by

the advocates and then retired to consider their decision, returning after two hours to deliver their decision in public. They acquitted the master but found the crew guilty, sentencing five of them to several years' imprisonment and fining the other four. They ordered the confiscation of the goods and also of the vessel which was used as the means of transport. Despite all efforts to procure her release, the vessel remained confiscated.

210. The owners claimed under the war risks policy for a constructive total loss, and although that was denied by the insurers at first instance before Mocatta J, he held that the vessel was a constructive total loss. This was common ground by the time of the hearing before the Court of Appeal. There were a number of grounds of claim and defences, but for present purposes all that is relevant is the insurers' reliance on the exclusion for loss by reason of infringement of customs regulations. In argument before Mocatta J, the learned judge asked whether it mattered that the government of Vietnam had decided to take more stringent action against smuggling, to which Mr Michael Mustill QC for the insurers responded: *"It does not. All you have to be satisfied about is that this is in the realm of customs. It is a very strong thing to ask an English Judge to say that on a question of Vietnamese law a Vietnamese Court has got it wrong when there is no evidence about how they got it wrong and no reasons why they got it wrong."* Later in argument Mr Mustill QC submitted: *"There is no need to go into the minutiae of Vietnamese law. The underwriter said: I am a war risks underwriter. But there are two types of situation which I am not taking upon myself: where the vessel gets into trouble under quarantine regulations owing to characteristics of the vessel or crew and where the vessel gets into trouble with Customs".*

211. Before the learned judge, evidence of Vietnamese lawyers was called and the judge preferred the evidence of the owners' lawyers that the court had exceeded its jurisdiction, because the decree only permitted confiscation of the means of transport owned by someone guilty of an offence under the decree. Mocatta J went on to consider the effect of this finding on the insurers' defence of loss by infringement of customs regulations. He held at [1970] 2 Lloyd's Rep 365 at 384:

> "What is the effect of this finding? Is a loss by confiscation ordered by a Court in excess of its jurisdiction, when the Court is purporting to punish the infringement of a customs regulation, a loss by reason of such infringement? If the order is made bona fide and is simply due to an error of construction, I think it would be. If, however, the order is made arbitrarily in that it was made on the instructions of the Government of the time without any genuine belief in the Court that it had jurisdiction to make the order, then I think the conclusion would be different and Mr. Mustill accepted this."

212. Having considered the evidence before him further, he concluded at 385:

> "I am left in grave doubt whether the decision to confiscate the *Anita*, which I have found to have been in excess of jurisdiction, was a bona fide and impartial decision of the Special Court. Had it been, even though wrong in law, I would for the reasons given have held that the defendant brought himself within the exception. The onus is upon the defendant to do this. All that has been established is that while the original

> restraint upon the vessel was undoubtedly exercised by reason of the infringement of customs regulations, the sentence of confiscation and the subsequent deprivation of the plaintiffs of the possession of their ship arose from a decision, which was not only in excess of jurisdiction, but on the evidence before me may well have been given with the knowledge of that fact and upon the orders of the executive. In these circumstances the defendant in my judgment has failed to discharge the onus upon him and the defence under the exception accordingly fails."

213. The Court of Appeal allowed the insurers' appeal. The judgments are *ex tempore* and not always entirely easy to reconcile with one another. Lord Denning MR disagreed with Mocatta J about the burden of proof, holding at [1971] 1 WLR 882 at 887E-H that, once the insurers had adduced evidence that the goods were smuggled on board and the vessel was confiscated for smuggling by order of the Vietnamese court, the legal burden of proof shifted to the owners in relation to the issue whether the foreign court had acted without jurisdiction and under political direction. The owners had not discharged that burden, so the insurers were entitled to rely on the exception.

214. Lord Denning MR then identified potential circumstances in which a different conclusion might be reached, in these terms at 888A-F:

> "Of course, if there were no goods smuggled and the seizure was a put-up job, it would be quite different. But, once it was proved and admitted that it was a plain case of deliberate smuggling — such as would be condemned by any court in any civilised country — and that the case was brought in regular manner before the courts of the country, I think the evidence was quite enough to discharge the burden on the underwriters and put it on to the shipowners.
>
> Again, if there were no laws of Vietnam which warranted the seizure, and the court acted knowingly outside its jurisdiction, it would be different. But we have been given the translation of the French and Vietnamese texts of Decree 4/65. It is quite clear that the decree not only authorises, but requires, the confiscation of "the means of transport." The lawyers in Vietnam argued that it should be confined to the means of transport owned by the guilty smugglers: but the language of the text, particularly of the French "des particuliers," is wide enough to cover any means of transport belonging to private persons — provided, of course, that it is used for the illegal smuggling. There is nothing very unusual about such a provision. Mr. Mustill drew our attention today to our own Customs and Excise Act 1952. Section 75 says that a ship is liable to forfeiture if it is constructed, adapted, altered or fitted in any manner for the purpose of concealing goods. Seeing that the *Anita* was altered and fitted so as to conceal these transistor radio sets and other goods, she might have been liable to forfeiture here if the offence had occurred here. In my opinion, therefore, the interpretation put upon this decree by the special court in Vietnam was quite justifiable: and there is no reason

> for saying that that court went outside its jurisdiction, either knowingly or at all.
>
> Yet again, if there were evidence of political interference with the course of justice — so that the court acted on the instructions of the politicians and not on its own judgment — it might be different. I can conceive of some instructions which would not render the confiscation invalid. For instance, if the government were to say to the court: "Smuggling is very prevalent and serious. The penalties should be more severe": there would be nothing sinister in it. But, if there was direct intervention by politicians commanding the court to confiscate the vessel, without any foundation for it, then, of course, the loss would not be covered: because the confiscation would not be by reason of customs regulations, but by reason of the political interference. But there was no evidence of this, or, at any rate, no evidence worthy of the name. Maitre Rochon's letter of June 1967 was quite insufficient for the purpose."

215. He concluded at 888G-H that the case raised an issue of causation:

> "Looking at this case quite broadly, it seems to me to raise simply a point on causation. Was the confiscation of the *Anita* due to a breach of the customs regulations of Vietnam? or was it due to political intervention unconnected with the breach? On the facts of this case there was a clear breach of the customs regulations: and everything followed in direct sequence from it, namely, the discovery of the hiding place, the seizure of the vessel, the proceedings before the special court, and the sentence of confiscation."

216. Fenton Atkinson LJ considered that the case depended upon the answer to the question whether the decision of the special court to order confiscation was a bona fide and independent exercise of its powers or what it honestly believed to be its powers and then said at 889B-C:

> "If the answer is "Yes," then in my view the plaintiffs' loss arose by reason of the infringement of customs regulations and the underwriters are entitled to rely on the exception 4 (1) (e).
>
> If, on the other hand, the answer is "No," because the special court was not acting bona fide as an independent judicial body, but merely acting as a puppet court following directions of the government, or knowingly exceeding its powers, then the loss arose by reason of a political or executive act and in my view was therefore covered by clause 1 of the Institute War and Strike Clauses (Hulls — Time)."

217. In considering the main argument for the owners he pointed out that their pleaded case stopped short of a direct allegation that the special court had acted in bad faith or simply followed government orders in ordering confiscation, but said the point was taken that the court exceeded its jurisdiction because the decree only gave power to confiscate the means of transport if it belonged to those actually concerned in the

smuggling and that that excess of jurisdiction broke the chain of causation. He rejected that argument in these terms at 889H-890B:

> "For my part I cannot accept this argument. In my view article 5, in making confiscation of the means of transport mandatory, did not make it clear whether such means of transport must belong to those guilty of the smuggling. Reputable lawyers could and did take different views of the true construction of the article. Maitre Jacquemart only took the point tentatively before the court and it was not raised in subsequent representations to the government by Maitre Rochon.
>
> Therefore if the special court took the wrong view about it, which I doubt, there is no reason to suppose they did so arbitrarily or without genuine belief in their duty to order confiscation. I agree with Mocatta J. and Lord Denning M.R. that a bona fide error in construction on this point would not break the chain of causation."

218. Fenton Atkinson LJ went on to consider the owners' second argument, which as he pointed out went beyond their pleaded case, that the decision of the special court was an arbitrary one given on government orders or at least in the knowledge that they were deliberately going beyond their powers, which was the basis upon which Mocatta J had decided the point in favour of the owners. Fenton Atkinson LJ disagreed at 890E-G:

> "With respect to Mocatta J., I find myself unable to agree. As already stated, the allegation that the court acted on the orders of the executive was not pleaded by the shipowners. The argument to that effect seems to have developed as the case went on and certainly to have been stressed during Mr. Goff's final speech. Nobody has been able to advance any motive for anybody ordering confiscation of the *Anita* other than a genuine desire to stamp out smuggling by a deterrent sentence as one step in setting their state in order. I think that was Mr. Duncanson's phrase. It is to me difficult in the extreme to suppose that a court acting on orders to confiscate the ship regardless, would have acquitted the master in circumstances where there was ample justification for drawing the inference that he must have known about the elaborate hiding place which had been constructed and which could have had no other possible purpose but smuggling. On that point Mr. Goff does not hesitate to suggest that it was a Machiavellian piece of window dressing by the court; but I find it very hard to think that that could be so. For my part, I do not think the shipowners' evidence went far enough to cast any real doubt on the good faith of this special court, and I think on a balance of probabilities it was established by the underwriters that the special court acted in good faith and independently, and that they proved a restraint by reason of infringement of customs regulations."

219. The third member of the Court of Appeal, Sir Gordon Willmer, agreed in the result, but on a basis that the chain of causation would only be broken between the infringement of the customs regulations and the confiscation of the vessel if the special court was shown to be more probably wrong than right, (see 891G-H), which is not an approach which commended itself to either Lord Denning MR or Fenton Atkinson LJ, so that it does not really assist in the present context.

220. Mr Rainey QC submitted that the principles which emerge from *The Anita* can be summarised as follows:

(1) Once the insurers have established a *prima facie* case that a loss is excluded by reason of an excluded peril, that the vessel has been detained by reason of infringement of customs regulations, then the burden of proof is upon the owners to show that the court decision detaining the vessel operates in some respect as a new cause covered by the policy, in other words the burden is upon the owners to show a break in the chain of causation between the infringement of the customs regulations and the detention of the vessel pursuant to a court order under the relevant customs law.

(2) In order to establish such a break in the chain of causation, the owners have to establish either:

a. That the court knowingly acted without jurisdiction in detaining the vessel;

or:

b. That the decision of the court to detain the vessel was made following direct political instruction or intervention for reasons unconnected with the infringement, without there being any legal basis for the detention.

221. The first principle is not really controversial, but the second is, particularly because Mr Schaff QC disputes the proposition that there will only be a break in the chain of causation if the court knowingly acted without jurisdiction. Mr Rainey QC relies upon the passages from the judgments of Lord Denning MR and Fenton Atkinson LJ which I have quoted at [214] and [216] above to submit that it is not enough that the decision of the court was wrong, either as a matter of law or on the facts, so that the court has exceeded its jurisdiction, if the court has made a *bona fide* decision, honestly arrived at. However wrong the decision, if it is *bona fide* that is an end of the matter. It is only if the court acts *mala fide* and makes a decision it knows is wrong that the relevant break in the chain of causation would be established.

222. Mr Schaff QC challenged that conclusion, essentially on the basis that the *ex tempore* judgments of the Court of Appeal were not to be interpreted as statutes and that the Court of Appeal were giving examples of situations where the chain of causation was broken, not prescribing the only circumstances in which it would be broken. He submitted that there was nothing in *The Anita* to suggest that, in such a case of an objectively perverse and wrong decision of the foreign court, there was an additional requirement that the judge subjectively appreciated that the decision was wrong. He pointed out that this had appeared to be common ground before Hamblen J at the trial of the preliminary issues where, as quoted at [13] above, Hamblen J recorded at [63] of his judgment: *"It was therefore effectively common ground that the exclusion in clause 4.1.5 does not apply if an infringement of customs regulations is not*

reasonably arguably a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel in question as a matter of the relevant local law."

223. Accordingly, whilst Mr Schaff QC did not contend that this precluded Mr Rainey QC from arguing the point, he submitted in effect it was a factor in favour of his argument that it had been accepted by counsel for the insurers, albeit different counsel, before Hamblen J. Mr Schaff QC also pointed out that what was common ground before Hamblen J was very close to the test formulated by Burton J in *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd ("The Silva")* [2011] EWHC 181 (Comm); [2011] 2 Lloyd's Rep 141 at [44] namely: "*whether any reasonable court could have acted as the [foreign] court did"*. Mr Schaff QC pointed out that in their written opening submissions, the insurers in the present case had endorsed that test and invited the court: *"to ask in connection with each of the Venezuelan judiciary's decisions which owners seek to impugn whether any reasonable court could have acted as they did."*

224. Mr Schaff QC submitted that in other contexts the courts have decided that a plainly wrong or perverse judicial or arbitral decision will operate to break the chain of causation. He relied by analogy on the decisions of Clarke J in *Stargas S.p.A v Petredec Ltd ("The Sargasso")*[1994] 1 Lloyd's Rep 412 at 415 and 425 and of the Court of Appeal in *Sun Life Assurance v Lincoln International* [2004] EWCA Civ 1660; [2005] 1 Lloyd's Rep 606 at [57] per Mance LJ, in neither of which was it suggested that, for an obviously wrong or perverse decision to break the chain of causation, there was an additional requirement that the judge or tribunal should know that the decision was wrong or perverse and be acting in bad faith. Mr Schaff QC also relied by analogy upon the judgment of Potter LJ in *Commercial Union v NRG Victory* [1998] 2 Lloyd's Rep 600 at 610-611, where in laying down the limits to the principle that in a reinsurance dispute, the English courts will treat the decision of a foreign court as to the reinsured's original liability as decisive and binding, one of which is that the judgment of the foreign court is not manifestly perverse, there is again no suggestion that the foreign court had to know that its decision was manifestly perverse or be acting in bad faith.

225. I agree with Mr Schaff QC that *The Anita* was not dealing with a perverse decision, but one where all members of the Court of Appeal were agreed that the decision of the special court was justifiable. In those circumstances, what they said about the circumstances in which the chain of causation would be broken between the infringement of the customs regulations and the detention of the vessel was not only *obiter*, but not intended to be an exhaustive definition of what those circumstances were. It seems to me that, as a matter of principle, a decision of the foreign court which is clearly perverse and not even reasonably arguable as a matter of the foreign law should break the chain of causation, so that the exclusion in clause 4.1.5 of the Institute War and Strikes Clauses does not apply, irrespective of whether the judge subjectively appreciated that he or she was making a wrong decision or acting without jurisdiction. In other words, there does not seem to me to be any additional requirement that the decision is made in bad faith for it to break the chain of causation.

226. So far as the second aspect of Mr Rainey QC's second principle is concerned, Mr Schaff QC categorised "unconnected" political interference as what he described as unwarranted or unjustified. I did not regard this as a distinction of any significance, since it seems to me that the critical point (which Lord Denning MR was highlighting)

is that the foreign court has made a decision without any legal or juridical basis as a consequence of the political interference so that, by definition, the interference is unconnected or unwarranted or unjustified. It does not seem to me that, although Lord Denning talks about "direct" interference, that is an essential requirement, since what it is that will break the chain of causation between the infringement of the customs regulations and the detention is unconnected or unjustified political interference.

227. As a matter of fact, the only such interference which would be unconnected or unjustified and which would lead in turn to a wholly perverse or unjustified decision is likely to be direct interference, in the sense of a political figure putting specific pressure on the judge on behalf of the executive. However, it is possible to conceive of such a high degree of "indirect" or negative interference in the sense of the executive not supporting the judges and making it clear they are free to decide the case on the merits, against the background of fear on the part of the judges of making a decision which might be perceived as anti-government, so that a judge made a wholly unjustified decision. It seems to me that would still be political interference unconnected with the breach within Lord Denning MR's analysis, even though it was indirect. However the critical question in any given case, including the present one, is whether, even if there was such indirect or negative political interference, it led to a wholly unjustified decision. If it did not, then that indirect or negative interference (for example judges err on the side of caution because of concerns that if they are too lenient they will be accused of collaboration with the drug cartels) will not be "unconnected" or unjustified, any more than in Lord Denning's example of the positive stricture to be tough on smuggling and impose severe penalties, if the decision then made by the judge is one which is not unjustified.

Coverage for malicious acts of third parties

228. The owners' primary case is that the deliberate affixing of the drugs to the hull of the vessel by unknown drug smugglers, knowing that or being reckless as to whether the vessel would be detained, constitutes "malicious damage" or "malicious mischief" within the Conditions for Section A of the Policy and/or constitutes "loss… of the Vessel caused by…any person acting maliciously" within clause 1.5 of the Institute War and Strikes Clauses and that the exclusion for infringement of customs regulations is not applicable. Before considering the parties' rival submissions on that issue in more detail, three matters should be mentioned.

Preliminary matters

229. First, by the end of the trial, it was common ground that the test for what constitutes "malice" is the criminal law definition, including its reference to recklessness, as confirmed by Colman J in *Strive Shipping Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd ("The Grecia Express")* [2002] EWHC 203 (Comm); [2002] Lloyd's Rep IR 669 at [32]-[33]:

> "Accordingly, when considering the meaning of "persons acting maliciously" it is necessary to ask whether it is necessary to adopt a meaning which is so limited that it will cover loss or damage caused for the purpose of injuring the particular insured but will not cover random vandalism. That the word "maliciously" is quite capable of covering wanton damage is clear from its use and the meaning accorded to it under the Malicious Damage Act 1861. Section 58 provides that where

> malice is an ingredient of an offence under that Act it is immaterial whether the offence was committed "from malice conceived against the owner of the property in respect of which it shall be committed or otherwise". That opens up the meaning to cover any conduct whereby the property in question is intentionally caused to be lost or damaged or is lost or damaged in circumstances amounting to recklessness on the part of the same person.
>
> In my judgment, there is no reason why the meaning of "person acting maliciously" should be more narrowly confined than the meaning which would be given to the word "maliciously" under The Malicious Damage Act 1861. Provided that the evidence establishes that the vessel was lost or damaged due to the conduct of someone who was intending to cause it to be lost or damaged or was reckless as to whether such loss or damage would be caused, that is enough to engage the liability of war risks underwriters. The words therefore cover casual or random vandalism and do not require proof that the person concerned had the purpose of injuring the assured or even knew the identity of the assured."

230. Colman J confirmed the applicability of that test in his later judgment in *North Star Shipping v Sphere Drake Insurance ("The North Star")* [2005] EWHC 665 (Comm); [2005] 2 Lloyd's Rep 76 at 83:

> "The causing of deliberate or reckless damage to the vessel by someone who is neither a terrorist nor someone acting from a political motive and is not a member of the crew is therefore an insured peril for which the insurers will be liable unless they prove to the requisite standard of proof that the claim is fraudulently advanced because the assured was complicit in the causing of damage."

231. In both those cases, Colman J also held that, since barratry is not a peril insured under a war risks policy, the scope of the phrase: *"persons acting maliciously"* had to be construed as excluding conduct of the master and crew amounting to barratry: see *The Grecia Express* at [39] and *The North Star* at [82]. In the present case, whatever the Venezuelan judge and jury may have thought in convicting the Master and Second Officer, there is absolutely no evidence whatsoever that the Master and crew were complicit in the planting of the drugs on the hull of the vessel, nor have the insurers suggested the contrary.

232. The second matter is the concession made by the insurers as to the scope of the exclusion for infringement of customs regulations, which arose in this way. In their opening written submissions, the owners contended that the logic of the insurers' case would mean that, even if the infringement of customs regulations had arisen from the deliberate acts of the Venezuelan authorities in placing drugs on the hull so as to facilitate the confiscation of the vessel, the exclusion would still be triggered. In response to that point, the insurers conceded that the deliberate acts of the authorities in planting drugs so as to facilitate the confiscation of the vessel would not trigger the exclusion.

233. The third matter is the well-known and slightly problematic decision of the House of Lords in *Cory v Burr* (1883) 8 App Cas 393. In that case, the vessel was seized by the Spanish revenue authorities as a result of the barratrous act of the master, smuggling. The owners sought to recover from the insurers the expenses of procuring the release of the vessel. The policy covered marine risks, including barratry, but an F C &S ("free of capture and seizure") clause excluded only losses proximately caused by seizure. The House of Lords found for the insurers, though their reasons for doing so differed. Lord Bramwell at 403-4 and Lord Fitzgerald at 405-6 considered that the seizure was the sole proximate cause and that barratry created no more than a liability to seizure which might or might not eventuate. The reasoning of Lord Fitzgerald at 406 was as follows:

> "I ask the question, By what was the loss occasioned? I apprehend that there can be but one answer to this question, namely, that the loss arose from the seizure. There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless; but the seizure, which was the effective act towards confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry but that it was a violation of the revenue laws of Spain. "

234. That reasoning has been criticised by some commentators on the basis that barratry clearly was a proximate cause of the loss, see: *Bennett: The Law of Marine Insurance 2nd edition* at [11-59]. The reasoning of Lord Blackburn was that the barratry and the seizure were both proximate causes. He considered first at 398-9 whether, absent the F C&S warranty, there would have been an insured loss by reason of barratry and concluded in emphatic terms that there would have been:

> "…supposing there had been no warranty at all, was there a loss here which would be one for which the underwriters would be liable? Upon the facts stated I cannot doubt it. The definition of barratry in the case of *Earle v. Rowcroft* has never been departed from. The effect of that case is that the act of a captain, for his own purposes and to serve his own ends, engaging in a smuggling transaction which might tend, and in fact in this case did tend, to the injury of his owners and to the ship being seized, is barratry. The captain in the present case had done that—he had employed the ship for the purpose of carrying tobacco. When he was off the coast of Spain he caused the engines to be stopped to look out for the ship into which he had intended to trans-ship the tobacco in order that it might be smuggled; and he proceeded "dead slow" while he was looking out for that vessel. That was a clear case of barratry. While he was doing this 'two craft came alongside with Spanish revenue officers on board, who seized the ship and took her into Cadiz.'"

235. He then went on to consider the effect of the warranty in these terms at 400-401 and at 402:

> "Now here [the underwriters] are "warranted free from capture and seizure and the consequences of any attempts thereat." It

> was argued that here they have not been warranted free from barratry. That is true, but the barratry would itself occasion no loss at all to the parties insured. If it had not been that the Spanish revenue officers, doing their duty (they were quite right in that respect), had come and seized the ship, the barratry of the captain in coasting along there, hovering as we should call it along the coast, in order that the small smuggling vessel might come and take the tobacco, would have done the assured no harm at all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, as I said before, I think the seizure was as direct a consequence of the barratry as could well be. But still, as Mr. Justice Field says, it was the seizure which brought the loss into existence—it was a case of seizure. Then why should it not be protected by this warranty?
>
> …
>
> The question then is reduced, as it seems to me, to this. When the whole loss was occasioned by that which was certainly a 'seizure,' is it within the meaning of the warranty? I say certainly it is. "

236. The Earl of Selborne LC considered that the warranty operated to exclude the loss on the basis that the capture and seizure caused the loss although barratry was a remote cause. In other words, his reasoning at 397 is a half-way house between that of Lords Bramwell and Fitzgerald on the one hand and Lord Blackburn on the other:

> "But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty.
>
> …
>
> It is quite manifest that the object of this warranty is and must be to except such losses otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are losses occasioned by "capture or seizure." That appears to me to be equally the case whether remotely it was occasioned by barratry or not—in fact the remoter it is the stronger the argument that it must be the case as to barratry."

237. In subsequent cases, Lord Blackburn's speech has been cited as authority for the proposition that, where the loss is attributable to two causes, one covered and one excluded, the insurers will be able to rely upon the exclusion clause. See for example per Lord Denning MR in *Wayne Tank and Pump Co. Ltd v Employers Liability*

Assurance Corporation Ltd [1974] 1 QB 57. Having concluded that the excepted cause was the dominant cause in that case, he went on to deal, albeit *obiter* with the alternative case at 67C-E:

> "That is enough to decide the case. But I will assume, for the sake of argument, that I am wrong about this: and that there was not one dominant cause, but two causes which were equal or nearly equal in their efficiency in bringing about the damage. One of them is within the general words and would render the insurers liable. The other is within the exception and would exempt them from liability. In such a case it would seem that the insurers can rely on the exception clause. There is not much authority on it, but it seems to be implied in *John Cory & Sons v. Burr* (1883) 8, App.Cas. 393, especially from what Lord Blackburn said at pp. 400, 401. That case was submitted, as used by Mr. R. A. Wright K.C. arguing in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Co*. [1918] A.C. 350 , 353, for the proposition:
>
> '... where there are two perils both of which are proximate causes of the loss and in an open policy the shipowner could have recovered on either, then, if one of those perils is excepted by the warranty the underwriters are not liable.'
>
> Lord Shaw of Dunfermline, at p. 371, expressed his indebtedness to that argument."

The owners' submissions

238. The owners' submissions as to why in the present case, there is cover under the policy because the proximate or effective cause of the loss suffered by reason of the detention of the vessel was the malicious acts of the unknown third parties who attached the drugs to the hull can be summarised as follows.

239. First, on the basis of the definition of "malice" or "malicious" which is common ground, the unknown drug smugglers were undoubtedly malicious, since they must have known that or, at the very least, been reckless as to whether, as a consequence of the attachment of the drugs to the hull, if the authorities in Venezuela discovered the drugs, the vessel would be detained. It matters not that their motive may have been to make profit from the smuggling of drugs which would be retrieved from the hull in Europe by their confederates in the event that the drugs went undiscovered by the authorities. The fact remains that it was the malicious planting of the drugs which caused the vessel to be detained.

240. Second, Mr Schaff QC submitted that, whilst it was correct that the insurers' construction that there was no cover for malicious acts which involve the infringement of customs regulations did not deprive the malicious acts cover of all effect, this carve-out of malicious acts which involve the infringement of customs regulations was uncommercial, in giving cover with one hand and taking it away with the other. It was completely illogical that the owners should be deprived of what was intended to be wide cover for malicious acts which caused loss damage or detainment of the vessel, merely because the particular *modus operandi* of the third parties in question involved an infringement of customs regulations. There was no qualitative

difference between the malicious act of the third party terrorist who strapped explosives to the vessel, with the intention that the vessel be used as a floating bomb which exploded and destroyed government installations, but the plot was thwarted when the authorities discovered the explosives and the malicious act of the drug smugglers in the present case, who strapped drugs to the hull of the vessel with a view to the drugs being smuggled into Europe, but as happened here, the authorities discovered them before the drugs could be smuggled out of Venezuela. In the case of the explosives, there would be cover if the vessel was detained, whereas in the case of the drugs, on the insurers' case, there was no cover. However, in each case the third parties were using the vessel for their own ends and acting maliciously because they were reckless as to whether the vessel was detained.

241. In that context, Mr Schaff QC submitted that the insurers' concession that the exclusion did not apply to the "put up job" by the authorities could only be explained either as a matter of construction or as a matter of causation. In terms of construction, once it was accepted that there was the "put up job" limitation on the scope of the exclusion, then there was no principled distinction between that case and the present case, in both of which, on the basis that the owners were not complicit in the smuggling, the attachment of the drugs was a put up job so far as the owners were concerned, as Mr Schaff QC put it: "the manifestation of a third party assault on the vessel". In other words, if the concession were analysed in terms of construction of the policy, as between the insured and the insurer what occurred in the present case was not an "infringement" within the meaning of the exclusion. There had to be some implied limitation on the scope of the exclusion.

242. Alternatively, if the concession is analysed in terms of causation, the effective cause of the detention in the example of the deliberate attachment of drugs by the authorities is not the presence of the drugs in breach of the customs regulations, but the deliberate act of the authorities. Again, in terms of causation, Mr Schaff QC submitted that there could be no principled distinction between that case and the present case where, on that analysis, the effective cause of the detention of the vessel was the deliberate and malicious acts of the third parties who attached the drugs, whether it was the Venezuelan authorities or unknown drug smugglers.

243. If the rationale for the concession was to be found in causation and there was no reasoned distinction between that case and the present, then Mr Schaff QC submitted that this case must fall outside the principles set out in *Wayne Tank* which was concerned with two concurrent causes, one covered and one excluded, in which event the claim failed because the exclusion applied. On this hypothesis, there was only one effective cause of the loss, the malicious acts of the third parties and not two causes.

244. Equally, Mr Schaff QC submitted that the claim could not be defeated by reference to the principles in *Cory v Burr*, essentially because the concession recognised the non-application of the exclusion in the case of the put up job, behind which lay the deliberate acts of the authorities and there was no principled distinction between that case and the present case. If the matter was correctly analysed in terms of construction, namely that the exclusion was not applicable as a matter of construction where the "infringement" only occurred because of the deliberate acts of either the authorities in the case of the concession or the third party smugglers in the present case, then Mr Schaff QC submitted that *Cory v Burr* (1883) 8 App Cas 393 was irrelevant, because that case was only concerned with causation.

245. If the matter were to be correctly analysed in terms of causation, then nonetheless, Mr Schaff QC submitted that the principles established in *Cory v Burr* were not applicable, because in this case it was the deliberate malicious act of planting the drugs on the vessel (a peril insured against) which led inevitably to an exception (the infringement of the customs regulations) which led to loss. He submitted that, in such a case, the proximate cause of the detainment and the loss was the insured peril. In support of that proposition, Mr Schaff QC relied upon a passage in *Clarke: The Law of Insurance Contracts* at [25-7] where, under the heading "Successive Connected Causes: Peril-Exception-Loss", Professor Clarke states his "Rule (g)": *"If an insured peril leads inevitably to an exception and then to loss, the proximate cause is the peril".*

246. In support of that proposition, Professor Clarke cites the decision of Wright J in *Mardorf v Accident Ins Co* [1903] 1 KB 584. However, I do not regard that case or the various other cases cited by Professor Clarke in a footnote as authority for the rule he states, as a matter of English law. Indeed, as Professor Clarke himself recognises in another footnote, the decision of the House of Lords in *Cory v Burr* poses a substantial obstacle in way of this supposed rule and his attempt to explain away that case consistently with his rule is ingenious, but not a sure foundation for concluding that the rule he states represents English law. Ultimately, Mr Schaff QC sensibly did not press this point in oral argument.

247. Rather, in his reply submissions, Mr Schaff QC sought to distinguish *Cory v Burr* on the basis that the exclusion there was for seizure (i.e. equivalent to an exclusion for detainment here) whereas the exclusion in clause 4.1.5 is for loss arising from detainment by reason of infringement of customs regulations. Those being words of proximate cause, the proximate cause of the detainment must be the infringement. Mr Schaff QC submitted that here the effective or proximate cause of the detention was the malicious act, which automatically gave rise to the infringement, then the detention and it was not possible to separate out the malicious act and its automatic consequence.

The insurers' submissions

248. In response to the owners' submission that, on the insurers' construction, there was a carve-out from the malicious acts cover where the malicious acts involved the infringement of the customs regulations, Mr Rainey QC submitted that that was simply the effect of reading the policy as a unitary whole. As Hobhouse J put it in *The Wondrous* [1991] 1 Lloyd's Rep 400 at 416-7: *"The risks are the perils with the exclusions; together they delimit the risks covered"*. Mr Rainey QC submitted that there was nothing surprising or uncommercial in such a carve-out. In answer to Mr Schaff QC's point that the insurers' construction gave with one hand and took away with the other, Mr Rainey QC submitted that the decision of the Court of Appeal in *Woolfall & Rimmer v Moyle* [1942] 1 KB 66 relied upon by the owners in their written opening submissions was a case where the insurers' construction of the exclusion deprived the cover of any real effect at all: see per Lord Greene MR at 72 and Goddard LJ at 77. In the present case, there would be cover for any other malicious acts, just not malicious acts which led to an infringement of customs regulations.

249. However, Mr Rainey QC submitted that the obverse was true: the effect of the owners' argument was to deprive the exclusion of any real effect. Deliberate acts of smuggling by the crew would be barratry and would fall within the hull insurance, so

the exclusion was not needed. On Mr Schaff QC's analysis, whether viewed as construction or causation, in every case of a third party smuggler or contrabander, the deliberate act of using the vessel as an innocent conveyance would constitute a malicious act and if there was insurance cover in those circumstances, the exclusion in clause 4.1.5 of the Institute Clauses would be deprived of much of its significance. Mr Rainey QC submitted that the sensible approach which the court should adopt was that advocated by Mr Mustill QC in argument before Mocatta J in *The Anita*, that if the case was in the realm of the customs, there was no cover since, as war risk underwriters, the insurers were not agreeing to cover where the vessel was in trouble with the customs.

250. In relation to the "put up" job by the authorities planting drugs on the vessel for their own ends, in order to seize the vessel, he submitted that the reason why there was no cover in that case was that, on analysis, that was exactly the same as the case of unjustified political interference leading to a perverse judicial decision in favour of detention and confiscation of the vessel. The only difference was one of timing, so that in both cases the exclusion did not apply.

251. In terms of causation, Mr Rainey QC submitted that the malicious act of strapping drugs to the hull does not inevitably lead to loss. There is only loss if the authorities discover the drugs and thus discover the infringement. Accordingly, what occasions the loss arising from the detainment is the infringement. Whichever analysis one adopts from the speeches in *Cory v Burr*, the present case is indistingushable from this case.

Analysis and conclusions

252. Whilst this is not an easy point, I have ultimately concluded that the owners are right as a matter of construction. I agree with Mr Schaff QC that the insurers' concession that the exclusion does not apply to the "put up job" where the authorities deliberately plant the drugs (or presumably engage a third party to plant the drugs) so as to detain the vessel, amounts to a recognition that there is some implied limitation on the scope of what constitutes an "infringement of customs regulations" within the meaning of the exclusion. In my judgment, there is no principled distinction between that "put-up job" and a case such as the present of the drugs smuggler whose deliberate and malicious act in planting the drugs leads to the vessel being detained. It is difficult to see what the justification is for saying that the former case is outside the exclusion whereas the latter is within it.

253. It does not seem to me that Mr Rainey QC's submission that the concession is only dealing with another species of unconnected political interference provides a satisfactory ground of distinction from the present case of the malicious act of third parties in planting the drugs. Both cases still involve what is on a literal construction of the exclusion an "infringement of the customs regulations", but in the case of the put-up job which is conceded, there must be some implicit limitation to the exclusion that it does not apply to such a case. However, on the insurers' case, one is still left asking how it is that in the case of the concession the exclusion does not apply, whereas in the present case it does.

254. Mr Schaff QC drew my attention, albeit in relation to a different exclusion in the Institute War and Strike Clauses, the exclusion for "any financial cause of any nature", to what Toulson J said in *Handelsbanken v Dandridge ("The Aliza Glacial")*. The actual decision in that case, that the claim was excluded because there had been

an infringement of trading regulations, was reversed on appeal, but at [52] of the judgment of the Court of Appeal ([2002] EWCA Civ 577; [2002] 2 Lloyd's Rep 421), Potter LJ quoted with approval this passage from Toulson J's judgment:

> "Wide as the words 'any financial cause' are, it seems to me they must have some limitation. Suppose that a vessel was seized by a terrorist organisation wanting to raise money, a ransom demand was made for a million pounds and the owner declined to pay the money: could it be said that the detention of the vessel thereafter was through a financial cause? In a literal sense, it could, but no one would suggest that such a conclusion would accord with the spirit of the policy."

255. Although Toulson J went on to decide the particular point as a matter of causation, that the proximate cause of the detention was not a financial cause, it seems to me that he was recognising that some implied limitation on the wide wording of the exclusion was appropriate. That there should be some such implied limitation was confirmed by Burton J in *The Silva* at [46(ii)]:

> "…although the words "*any financial cause of any nature*" appear wide, they must be construed in their context, namely as an exemplar of "*Exclusions of claims arising out of ordinary judicial process etc*", and, so far as necessary, both eiusdem generis to the other exceptions, and contra proferentem. Lord Denning's words above [in *The Anita*] would appear to be applicable. The words of Lloyd LJ in *The Wondrous* [1992] 2 Lloyd's Law Rep 566 at 573 emphasise that, wide as the words are, the "*financial cause must, of course, affect the ship*" – which this did not. Potter LJ in *The Aliza Glacial* [2002] 2 Lloyd's Law Rep 421 at 432 quoted with approval words of Toulson J at first instance, namely that the detention of a vessel for ransom by a terrorist organisation could not be detention for a *financial cause*, because "*no-one would suggest that such a conclusion would accord with the spirit of the policy*": Professor Bennett in *The Law of Marine Insurance* (2nd Ed) at 13.76 stated (in part by reference to *The Aliza Glacial*) that "*the exclusion has to be understood as subject to an implied limitation that the financial issue must be triggered by a reasonable and legitimate claim against the vessel*"."

256. I agree with Mr Schaff QC that this court should adopt a similar approach to the exclusion for "infringement of customs regulations". A number of different scenarios can be envisaged which would in a literal sense be an infringement of customs regulations, but where a conclusion that the exclusion applied would not accord with the spirit of the policy. Two particular examples which I posited during the course of argument are: (a) the malicious third party who plants the drugs in order to blackmail the owners and telephones the managers to demand a large payment as the price of silence and when the managers refuse informs the authorities that the drugs have been planted, leading to the vessel's seizure and (b) the same scenario but without the blackmail, where the malicious third party deliberately plants the drugs to get the vessel detained and then telephones the authorities to inform them, procuring the detention of the vessel.

257. In my judgment, in both those cases, applying the reasoning of Toulson J, they may literally be examples of infringements of customs regulations, but that conclusion would not accord with the spirit of the policy, as they are on analysis both variants of what Lord Denning MR would have regarded as a "put-up job". I do not see how the exclusion could apply in those cases of actual malice which could be said to be paradigm examples of malicious mischief or persons acting maliciously within the meaning of the cover provided by the policy. Accordingly, in those cases, as in the case of the put-up job which is conceded, I consider there must be an implied limitation on the scope of the exclusion. However, if the exclusion does not apply in those cases, it is difficult to see what justification there is for distinguishing those cases from the present case, which is just as much a case of malice within the accepted definition, albeit of recklessness not actual malice. I consider that any attempt to draw a distinction between cases of deliberate and actually malicious acts of third parties and deliberate and recklessly malicious acts of third parties is unsustainable.

258. Wide though the words of the exclusion in clause 4.1.5 of the Institute War and Strikes Clauses are, in my judgment they must be subject to the implied limitation that they do not apply where the only reason why there has been an infringement of the customs regulations by the vessel is because of the malicious acts of third parties, whether the authorities themselves or their agents in the conceded case or the blackmailer or person acting with actual malice in my two examples or the drug smugglers in the present case who strapped the drugs to the hull for their own ends, knowing that or being reckless as to whether the vessel would be detained by the Venezuelan authorities if they discovered the drugs. In each case, the "infringement" brought about by the drugs being strapped to the hull of the vessel is no more than the manifestation of the relevant act of persons acting maliciously.

259. I was not impressed by Mr Rainey QC's submission that the owners' construction would deprive the exclusion of any real effect. Whilst it is correct that the cases from *The Anita* onwards have recognised that smuggling is an infringement of customs regulations within the meaning of the exclusion, it is equally likely that there will be an infringement where legitimate goods are brought into or out of the country by the vessel without customs dues being paid or where the vessel sails without customs clearance: see the argument of counsel in *Sunport Shipping Limited v Tryg-Baltica International (UK) Limited ("The Kleovoulos of Rhodes")* [2003] EWCA Civ 12; [2003] 1 Lloyd's Rep 138, accepted by Clarke LJ at [32] and [33] of the judgment. That type of infringement would be unaffected by the owners' argument that the exclusion does not apply to malicious acts of third parties, leaving a substantial area where the exclusion would be applicable.

260. Accordingly, in my judgment upon the correct construction of the policy and reading the malicious acts cover and the exclusions together, "infringement of customs regulations" in the exclusion does not include an "infringement" which is itself no more than the manifestation of the relevant act of third parties acting maliciously and the exclusion is subject to that limitation, equally applicable on the facts of this case as in the cases of the various "put-up jobs" I have identified above.

261. The other way in which Mr Schaff QC puts his case, that the exclusion does not apply where the proximate cause of the loss or detainment is the malicious act, also seems to me to have considerable force. However, the point is better put as one of construction than one of causation, since, notwithstanding the merits of the submission that the real

or effective or proximate cause of the detention here was the malicious acts of the third parties in strapping the drugs to the hull of the vessel, it seems to me that it is difficult to distinguish this case from *Cory v Burr* on a causation analysis. However, since that case was not concerned with issues of construction, there is nothing in the speeches in the House of Lords to preclude the conclusion I have reached that, as a matter of construction of the policy in this case, the exclusion does not apply where the infringement is brought about by the malicious act of a third party.

262. One effect of the conclusion that the detainment of the vessel was caused by the malicious acts of third parties and that the exclusion for infringement of customs regulations does not apply to a case such as the present, is that the six month period of detainment under clause 3 of the Institute War and Strikes Clauses as amended, runs from the moment the vessel was detained on 13 August 2007 and expired on 13 February 2008, before Judge Finol's judgment releasing the vessel. In those circumstances, the insurers' argument that the effect of Judge Finol's judgment was to interrupt the running of the period of detainment so that there was not an uninterrupted six month period during the currency of the insurance (an argument to which I return below) does not apply and the vessel was clearly a constructive total loss when the first Notice of Abandonment was served on 18 June 2008.

Infringement of customs regulations

263. In the light of my conclusion that the exclusion does not apply here because the "infringement" was the manifestation of the malicious act of third parties, so that the owners have cover for malicious acts, the claim under the policy succeeds. In the circumstances, it might be thought that it is not strictly necessary to consider the owners' alternative case that the exclusion does not apply because the real cause of the detainment was the perverse and wrong decisions of the Venezuelan courts (whether or not as a consequence of unwarranted political interference). However, given that the bulk of the trial was occupied with that issue and given that this case may go further, it is necessary to deal fully with that alternative case.

264. In considering the owners' case that the exclusion does not apply because of perverse and wrong decisions of the Venezuelan courts, it is necessary first to make findings about the relevant Venezuelan law. However, before doing so, I should set out in summary what the owners' case was by the end of the trial, in order to establish the context in which the remaining issues of Venezuelan law fall to be decided.

265. In closing Mr Schaff QC put his case as to why Judge Villalobos made a wrong or perverse decision in not ordering the release of the vessel in one or other of three ways, which I quote from [9] of his written closing submissions:

> "(a) The first possibility is that Judge Villalobos went inexplicably but <u>independently</u> wrong by failing to grapple with and decide the lack of intent question at all (a fair reading of her judgment suggesting that she made no determination on that point). If that is the case, her decision was not just wrong but plainly or perversely wrong in circumstances where it is common ground that that issue simply had to be resolved at the preliminary hearing.
>
> (b) The second possibility is that, 'sub silentio', Judge Villalobos <u>independently</u> did resolve the lack of intent question

> but inexplicably did so against Owners. It is Underwriters' case that she did decide the issue; and for good measure,
>
> Underwriters appear to suggest that the Court of Appeals did so as well. Owners will say that the possibility that Judge Villalobos and/or the Court of Appeals actually decided the lack of intent issue is unrealistic. However, even if that did happen, any decision on this basis is still plainly or perversely wrong in circumstances where (i) the unchallenged circumstances clearly demonstrated Owners' lack of intent and (ii) neither Judge Villalobos' judgment nor that of the Court of Appeals contain any rational foundation for the proposition that as a matter of fact, Owners' lack of intent was not demonstrated at the preliminary hearing.
>
> (c) The third possibility is that Judge Villalobos went wrong in either of the two foregoing respects because she felt unable to reach an independent decision on Article 63 without clear political support, in the particular factual circumstances surrounding this case. In other words, there was direct or indirect, positive or negative political interference which explains her decision. On the evidence of fact, Owners consider that this remains the most likely explanation for what happened." (underlining in the original written submissions)

266. Although the owners still maintain that the decision of the Court of Appeals dismissing the appeal against Judge Villalobos' judgment was also perverse and wrong, it is fair to say that point was not pressed in closing and the owners submitted that one possible explanation for the decision on appeal was the limitations on the appellate process in Venezuela, because her judgment disclosed on its face no basis for intervention. They submitted that was certainly true of the decision of the Supreme Court, which found no constitutional grounds for reviewing the decision of the Court of Appeals. That analysis is not accepted by the insurers who submit in summary: (a) that the Court of Appeals reviewed the court file and concluded Judge Villalobos had dealt with the issue of lack of intent. Their decision is not perverse and wrong but regular and (b) that the Supreme Court also studied the court file and that, if the decisions of the courts below had been unconstitutional or perverse and wrong, the Supreme Court would have said so, a submission with which I have already indicated agreement at [186] above. I will consider the rival arguments about the decisions of the Venezuelan courts in more detail below, when I have set out my findings as to Venezuelan law.

Venezuelan law

267. Before setting out the remaining issues of Venezuelan law, I propose to set out some of the background to the Venezuelan legal system which is essentially common ground between the Venezuelan law experts and the parties. The Bolivarian Republic is a civil law system, with a Constitution. The sources of law include statutes and case law, although as regards court decisions, only the decisions of the Constitutional Chamber of the Supreme Court have the force of binding precedent. Decisions of lower courts only have persuasive force. As is apparent from the chronological history I have set out, there is a hierarchy of courts in three tiers: (i) the first instance courts including in the present context the control courts: (ii) the Court of Appeals and (iii)

the Supreme Court. As I have already held in relation to Judge Finol's judgment of 12 March 2008 at [164] and [165] above, it is not open to a first instance court to go behind the decision of the Court of Appeals in the same case, absent a material change of circumstances. Likewise, the principle of diffuse constitutionality under Venezuelan law does not entitle a lower court to disregard the decision of a superior court merely because it regards that decision as unconstitutional.

268. There are three forms of appeal. The most common form is the *apelacion* applicable to both preliminary and final decisions where there is a wide jurisdiction in the appellate courts to review the decision at first instance. The appeal from Judge Villalobos to the Court of Appeals in this case was by way of *apelacion*. This is the form of appeal known in other civil jurisdictions as "cassation". The second form of appeal is the *amparo* where the appellant complains that his constitutional rights have been infringed by the judgment of the lower court. The Constitutional Chamber of the Supreme Court has jurisdiction to consider both the grounds of unconstitutionality alleged in the *amparo* appeal and any other unconstitutionality it identifies of its own motion. The appeal from the Court of Appeals to the Supreme Court in this case was in this category. The third form of appeal is the *avocamiento*, exceptionally only used in serious cases and not relevant here.

269. There are two categories of judges. "Permanent" judges are career civil servants appointed and sworn in by the Supreme Court after a competitive examination and they enjoy security of tenure. "Provisional" judges, who can preside at first instance and in the Court of Appeals do not enjoy security of tenure but are appointed by a Judicial Commission for a fixed period. The Judicial Commission has discretion as to the appointment, removal or suspension of such judges.

270. There are three phases to criminal investigations in Venezuela governed by the COPP, the Criminal Procedure Code. The first phase is the preparatory one when criminal investigations are carried out by police and other agencies under the supervision of the public prosecutor. This phase is presided over by the control judge who deals with the initial arraignment of the accused, takes evidence in advance and decides whether to order the preventive detention of the accused or, in the context of drugs cases, whether to order preventive detention of an asset used in the commission of the offence. If the control judge decides to maintain the preventive detention of an accused (which must be determined within 48 hours of arrest) the prosecutor must bring charges within 30 days of the decision to maintain detention, which can be extended for a further 15 days, after which the prosecutor must bring charges against the accused or archive the file.

271. The preparatory phase is brought to an end by one or other of the *actos conclusivos* set out in the COPP, which includes the *acusacion* or indictment. The next phase is the intermediate phase. Where an indictment is filed, there has to be a preliminary hearing where the judge decides whether the case should go for trial or be dismissed. Any issue as to the preventive detention of assets used in the commission of the crime is also to be determined at the preliminary hearing, as Article 63 of the 2005 Anti-Drugs Law makes clear.

272. One issue which was in dispute between the experts and to which I will have to return below, as one of the outstanding issues of Venezuelan law, is the question whether once an *acusacion* has been laid against a particular accused (here the Master and Second Officer), the preparatory or investigatory phase comes to an end not only against that accused but against anyone else whom the authorities might be

investigating for the same drugs crime (for instance in this case the stevedores), so that any indictment against them has to be brought in separate criminal proceedings. This is Dr Cabrera's view, not shared by Professor Ortiz, who considers that, even after the indictment is laid against a particular accused, the investigation phase can continue against others who may be implicated in the same crime and, in due course, if an indictment is laid against those others, there will be one set of criminal proceedings.

273. The third phase is the trial phase which begins if the control judge decides at the preliminary hearing that the accused should stand trial and then sends the relevant evidence to the trial judge.

274. On the pleadings and experts' reports on Venezuelan law in the present case the parties were adopting extreme positions: the owners' pleaded case was that a vessel could not be preventively detained under Articles 63 and 66 of the Anti-Drug Law unless the owner of the vessel was accused (which was, of course, the case that Mr Fernandez-Concheso ran unsuccessfully before the Venezuelan courts) and the vessel could not be confiscated unless the owner was convicted of the drug smuggling or of being an accessory or accomplice. In contrast, the insurers' case, at least as set out in Professor Ortiz's reports, appeared to be that the vessel could continue to be detained unless the owners could demonstrate that the vessel was not in fact used to commit the crime (i.e. an *instrumentum sceleris*) and that was what was meant by lack of intent under Article 63.

275. However, in cross-examination, Dr Cabrera accepted that the owner did not have to be an accused for the vessel to be preventively detained and Professor Ortiz accepted that lack of intent was not exclusively concerned with the vessel not having been an instrument of crime. Accordingly, by the end of the trial, it was common ground that a vessel belonging to someone who is not accused can be preventively detained if (a) it is required for the purposes of an investigation (this being the effect of Article 108 of the COPP) or (b) it was used for the commission of drugs crime, subject always to the right of the owner to make an application to the court and have lack of intent demonstrated under Article 63 either at the preliminary hearing or (as Professor Ortiz accepted in cross-examination) at any time thereafter, including at the trial and possibly even after the trial.

276. By the end of the case, there remained in issue between the experts essentially four issues of Venezuelan law (although for reasons set out below, one of them may really be better analysed as a question of fact). The first issue is where the burden of proof lies under Article 63. Although during the course of argument I was inclined to think this was an arid dispute, on reflection I can see that is viewing the issue through too much of an English lawyer's perspective and that the issue is in fact of considerable significance, providing an important pointer as to why the Venezuelan courts decided this case the way they did.

277. The owners made much of the presumption of innocence under Venezuelan criminal law and of the fact that, as in most criminal law systems, it is for the prosecution to prove guilt. However, in my judgment, it is clear that whilst those principles apply to an accused, they do not apply to a third party whose property has been preventively detained. It is clear that the owners have to make an application under Article 63 to have the vessel released, so the court does not decide lack of intent of its own motion. The relevant provision in the Article: *"the owner is exonerated from that measure when circumstances demonstrate its lack of intention"* is worded in such a way as to

suggest that it is for the owner to prove lack of intent. If it had been intended to put the burden on the prosecution, the Article would surely have been put the other way round: *"the owner is exonerated from that measure unless the prosecutor can demonstrate intention"*.

278. Furthermore, that the burden of proof under the Article is upon the owner is demonstrated by the case law. The clearest statement is in the decision of the Court of Appeals in *Sosa* (2009):

> "The attachment of assets, as provided for by [Article 63 and 66-67] is a pre-emptive interim measure issued with the sole purpose of temporarily prohibiting any act of trade [with] the said asset during the proceedings and until the final ruling, unless the asset's owner proves his lack of intent to use the asset as a means to commit a crime. During the investigative stage of the proceedings, therefore, this measure cannot be argued to violate property rights and cause irreparable damage since the owner, who bears the burden of proof, may provide evidence of his lack of intention to use the asset in committing or facilitating a drug crime as well as prove that it was rightfully acquired, which may lead to lifting the pre-emptive attachment during the intermediate stage of the proceedings."

279. Dr Cabrera sought to belittle this case, on the basis that it was only a decision of the Court of Appeals and therefore not a binding precedent. Although he asserted in cross-examination that he knew of more than fourteen cases going the other way and stating that the burden of proof was on the prosecution, he did not produce any such judgments and I did not regard that as reliable evidence. Furthermore, he accepted that, under Article 66, the burden of proof in relation to whether an asset is derived from the fruits of crime, is upon the owner to prove the innocent origin of the asset, since only the owner will be aware of the relevant facts. That is an important concession, since under the successor law to the 2005 Anti-Drugs Law, the 2010 Anti-Drug Trafficking Law, Article 183 now amalgamates the two provisions and provides:

> "The control judge, upon the application of the Public Prosecutor will order the preventive seizure of movable and immovable assets that have been employed in the committal of the crime investigated in conformity with this Law or around which there may be suspicion of illicit provenance…The owner is exonerated from such measures when circumstances exist that demonstrate their lack of intention, which will be resolved at the preliminary hearing."

280. It was common ground between the experts that, because this provision was effectively declaratory of the existing law and did not change the law, the 2010 Law sheds light on the meaning of the 2005 Law. It is clear from Article 183 of the 2010 Law that the "lack of intention" being referred to is referable both to an asset which is used in the commission of a crime and an asset which is the fruits of crime (which also illuminates the issue as to what lack of intention means in Article 63, one of the other outstanding issues of Venezuelan law which I deal with below). If the burden of proof is on the owner to show lack of intention in relation to fruits of crime, it is

inconceivable that the burden is different where the question of lack of intention arises in relation to an asset used in the commission of crime.

281. That the burden of proof to establish lack of intention is upon the owners is supported by the decision of the Supreme Court in *Tin Airlines* (2011) concerned an aircraft owned by a Portuguese bank which was seized after drugs were found in the baggage of various individual passengers which was stowed in the hold. The pilot was tried and acquitted. After the trial, the operators of the aircraft, Tin Airlines, but not the bank, made an application for the release of the aircraft. That application was refused by the trial judge and the Court of Appeals dismissed the appeal in 2006, ruling the appeal inadmissible on the ground that Tin Airlines was not the owner of the aircraft and only the owner could apply for the release of the aircraft. The appeal was to the Constitutional Chamber on the ground that the decision of the Court of Appeals was unconstitutional.

282. The Supreme Court cited their own previous decision in *Escriba* (as did the Supreme Court in the present case as referred to at [187] above) in support of the proposition that goods used for the commission of drugs offences or which are the fruits of such drugs crime cannot be the source of personal enrichment, even for persons not involved in the commission of the offence. They went on to conclude that the criminal courts could preventively detain such assets without infringing the Constitution. The Supreme Court then referred to Article 186 of the 2010 Law which had introduced a new procedure under which the automatic confiscation of goods which have been abandoned or which the owner has not sought to reclaim at the end of the trial, can be reversed if the owner of the goods establishes various matters which the Supreme Court summarised as follows: *"[The owners] will have to demonstrate to the [criminal] court…that certainly they possess the status of owners and that the impounded or confiscated article has no relationship with, nor is the profit from the drugs offence"*. The Court went on to hold that, since Tin Airlines was only the lessor of the aircraft and not its owner, they had no right to call for the release of the impounded aircraft. The Supreme Court dismissed the appeal holding that there was no ground for any constitutional review of the decision of the Court of Appeals.

283. Although the Supreme Court in that case referred to the 2010 Law (which was not in fact in force at the time of the decision of the Court of Appeals under appeal), it seems to me that that case clearly demonstrates that the burden of proof in any case where the owner of the asset, here the vessel, seeks its release from preventive detention, is upon that owner not only to establish that it is the true owner but that it can satisfy whatever the requirements are under the relevant law for the release of the vessel, under Article 63, lack of intention. In the circumstances, I have no doubt that the burden of proof was upon the owners under Article 63 to establish lack of intention and the prosecution do not have to prove anything, least of all that the owners are accused of the relevant offence. Once it is appreciated that the burden of proof was on the owners as a matter of Venezuelan law, in my judgment the decisions of the Venezuelan courts in the present case become explicable.

284. The second issue of Venezuelan law is what is meant by "lack of intention" under Article 63. The owners maintain that intention under the Article as a matter of Venezuelan law, as would be the case as a matter of English law, must mean criminal intention, so that mere negligence by the owners in relation to safety and security measures (even if established, which the owners strenuously deny) would not suffice to constitute "intention". Mr Schaff QC makes the perfectly valid point, supported by

Dr Cabrera's evidence that, in the context of a criminal statute, intention must mean specific criminal intention and not mere negligence.

285. In support of his contention that "lack of intention" for the purposes of procuring the release of the vessel under Article 63 also involves the owner establishing that he has taken all relevant precautionary measures to prevent the commission of the drugs crime (in other words that establishing absence of negligence is an aspect of establishing lack of intention), Professor Ortiz relied upon the "check list" under Article 186 of the 2010 Law of matters which the owner seeking to claim the return of the vessel after trial would have to establish. It is fair to say that his opinion at its most extreme (which appeared to involve the proposition that the construction of Article 63 of the 2005 Law could be influenced by what was an entirely new provision in the 2010 Law) was really impossible to justify. However, the less extreme analysis, that the "check list" in Article 186 reflects the sort of matters which Venezuelan law would have been looking for, to establish lack of intention under Article 63, seems to me to be a much more sustainable position.

286. In particular, I consider that analysis is supported by the decision of the Supreme Court acting as a court of cassation in *Agropecuaria Geici* (2009). In that case the police had raided a storehouse. Two individuals were apprehended trying to escape in a pick-up truck that was found to contain cocaine and two other individuals were apprehended in the store room in possession of firearms. A tanker truck was also seized which contained cocaine. Two of the men detained provided information that there was a stash of drugs on adjacent land owned by the appellants, which formed part of a tourist complex and was used as a go-cart track. Another quantity of drugs and plastic bags containing firearms were found on the land. The total gross weight of the drugs found appears to have been three million grams, some three metric tons. The majority of the gang were convicted at trial, but the trial court refused the application by the prosecutor to seize the storehouse and the adjacent land comprising some seven and a half hectares on which the appellants operated the go-cart track.

287. The prosecutor appealed that ruling to the Court of Appeals, which allowed the appeal and declared that the confiscation of Geici's land was in accordance with, inter alia, Article 66 of the 2005 Anti-Drug Law. The basis of its decision was that it was sufficient for Article 66 and Article 60.6 which provided: *"the loss of movable and immovable property…which will be enforced through confiscation, in accordance with the terms of Article 66…is necessarily auxiliary to the main penalty"*, that the land had been used in the commission of the offence.

288. Geici then appealed to the Supreme Court to quash that decision. In their Complaint, the appellants contended that neither the company nor any of its directors and shareholders been convicted of any offence or of being accessories. They said it was illogical to impose a penalty on them and confiscate their land on the ground that unknown persons had broken into their property and, without their knowledge and consent, hidden the drugs there. They had acquired the land lawfully twenty three years before the drugs were found there. The imposition of such a penalty was an auxiliary penalty where they were not charged with the main penalty, contrary to Articles 116 and 271 of the Constitution. Thus, albeit in the context of Article 66 rather than Article 63, the arguments run in that case were similar to the arguments run by Mr Fernandez-Concheso in the present case and similar to the criticisms levelled at the decisions in the present case by Dr Cabrera. Although much cited in the case law, Articles 116 and 271 of the Constitution do not assist and certainly do not

establish that Articles 63 and 66 of the 2005 Anti-Drug Law are unconstitutional, as Dr Cabrera essentially accepted in cross-examination.

289. The Supreme Court, having quoted Article 66 and Article 60.6 concluded that the Court of Appeals had not misinterpreted these provisions:

> "Consequently…it is possible for a [criminal] judge to declare the confiscation of the property employed (actively and passively) to commit the offence of the unlawful trafficking of…drugs. As the purpose of the opinion on the confiscation measure is to secure the property involved in the unlawful and criminal act, this [Supreme] Court feels that the Court of appeals did not make the mistakes alleged by the complainants [of] mistaken interpretation or undue application of Article 66."

290. That case is inconsistent with Dr Cabrera's thesis that, in the context of final confiscation of an asset, the asset cannot be confiscated unless the owner has been convicted of the drugs offence or of being an accessory and he had no answer to it, other than suggesting that it was *"confusing*", when in reality it is clear. I agree with Mr Rainey QC that, although that case is one of final confiscation, it throws some light on the approach of the Venezuelan courts to applications by owners of assets for their release under Article 63. It is apparent that, had the same facts arisen at the stage of preventive detention rather than final confiscation, the same result would have been reached. If one asks why that would have been the case, it seems to me to be because, in order to procure the release of the asset which was used in the commission of the drug crime, the owner has to prove more by way of "lack of intention" than that he was the owner and that he was innocent of the actual crime. Quite what more he has to prove, is fact specific. Whilst it is difficult to glean much from *Geici* as to what more is required in any given case, it would appear that the Supreme Court expected the owner of the land to establish more than that it was not involved in the crime and did not know the drugs were hidden on its land, perhaps because it would have expected some evidence of what security precautions the owner had taken to prevent third parties getting onto the land and hiding such a substantial quantity of drugs.

291. At first blush, there is some force in the owners' submission that *Geici* is hard to reconcile with the earlier decision in *Fernandez* (2009), although on closer analysis, I consider that it is possible to reconcile the decisions. It is interesting to note that the much maligned Dr Aponte was a member of the Court in *Fernandez*. In that case, one Marmolejo and Mr Fernandez were apprehended in a truck owned by the latter, in the back of which the police found drugs hidden in a consignment of fruit which Mr Marmalejo had hired Mr Fernandez to transport. Both were charged with drug smuggling. Mr Marmalojo was convicted after a trial and the convicting court ordered the confiscation of the truck on the basis it had been used in the commission of the crime. Later Mr Fernandez was acquitted but the court confirmed the confiscation of the truck under Article 66. The Court of Appeals dismissed the appeal against the confiscation of the vehicle.

292. In allowing the appeal of Mr Fernandez and quashing the confiscation the Supreme Court quoted the findings of the trial judge that the behaviour of Mr Fernandez (who was calm and surprised when they were stopped by the police whereas Mr Marmolejo was agitated) demonstrated that he was unaware that the drugs seized were on the vehicle at the time he was in the vehicle with Mr Marmalejo, because he had only been hired by the latter a few hours earlier to transport the fruit to Valencia. In the

circumstances, the Supreme Court found that the decision of the trial judge to order confiscation of the vehicle was unlawful and legally incomprehensible. The Supreme Court referred to Articles 63 and 72 of the 2005 Law. The latter Article provides that if the defendant is acquitted after trial, the judge shall suspend measures or court orders made and order the return of the affected property.

293. Mr Schaff QC asked rhetorically how the owners in the present case, against whom no charges were ever brought, could be in a worse position than Mr Fernandez, who was charged, but subsequently acquitted, and relied upon that anomaly as part of his case that Professor Ortiz's opinion on lack of intention should not be accepted and that the decision of Judge Villalobos was perverse and wrong. It seems to me that it is important to note that *Fernandez* was a case of final confiscation at the end of the trial and there was a specific provision in Article 72 that, in the event of acquittal at trial the property was to be returned. The present case is one of preventive detention and, because the owners abandoned the vessel to the court and did not themselves make an application to the court for the release of the vessel at the end of the trial, as Dr Cabrera accepted in cross-examination, as a matter of Venezuelan law, the vessel was automatically confiscated. The court was not asked to rule on lack of intention again by the owners, although it would have been open to them to make an application.

294. Furthermore, although the Supreme Court in *Fernandez* did not specifically address the issue of lack of intention, it did cite Article 63 and it may be that it had in mind that, on the basis of the findings of the trial judge to which I have referred above, there was no question of Mr Fernandez having failed to take reasonable steps to prevent his property being used in the commission of drugs crime. Although I accept that is speculation on my part, it does provide a means of reconciling the decision with the later case of *Geici* where the implication behind the continued confiscation of the land appears to be that the Supreme Court did not consider that the owners had taken all reasonable steps to prevent the gang gaining access and hiding a substantial quantity of drugs on the land. That seems to be a more likely analysis than concluding that *Geici* was wrong or politically motivated.

295. I consider that Mr Rainey QC is right that the decision in *Geici* does support Professor Ortiz's opinion that the approach of the Venezuelan courts is to require more than merely asserting that one has not been accused or convicted of the drug crime. As Mr Rainey QC submitted, behind what might appear to the English eye to be a harsh approach to the owners of vessels used in the commission of drug crime, there is an obvious public policy in Venezuela of taking a tough line on drug smuggling and thus of requiring more of the owners than the assertion of innocence of the crime, for example requiring the owners to show that they have taken all reasonable steps to avoid the use of the vessel or the land in the commission of the crime. Thus, in my judgment, although Articles 185 and 186 of the 2010 Law are new, Professor Ortiz is correct in saying that the matters set out in Article 186 reflect the previous position under the 2005 Law, as to what needed to be proved by the owners to establish "lack of intention". Furthermore, contrary to the owners' submissions, it seems to me that establishing "lack of intention" must necessarily involve more than establishing that the owners were not accused or named in the indictment, given that it is common ground that there is jurisdiction to order preventive detention under Article 63, if the vessel was used in the commission of the drugs crime, notwithstanding that the owners are not accused.

296. The third outstanding issue of Venezuelan law which Mr Schaff QC identified in his closing submissions is closely tied to that second issue, and is: what circumstances are capable of being relevant for the purposes of demonstrating lack of intent. For my part, I doubt whether this point is really a separate point of law once the first two issues are answered in the way in which I have answered them. The obvious answer to the specific question is that any number of circumstances may be relevant and which ones are relevant in any given case is fact specific, as I have said. Ultimately, Mr Schaff QC characterised this issue in his oral closing submissions as a question of fact: whether in this case lack of intent was demonstrated. His case that it was demonstrated depended in large measure on the way in which he sought to answer the first two issues of Venezuelan law, that the burden of proof was on the prosecution and that lack of intent did not mean failure to take reasonable steps to prevent the vessel being used for drug smuggling but meant no more than that the owners were never charged or convicted and the prosecutors never put forward any case against them.

297. However, I agree with Mr Rainey QC that if those first two questions of Venezuelan law are answered the other way, in the way in which I have answered them, that the burden of proof is on the owner and that demonstrating lack of intent may well involve satisfying the court that reasonable steps were taken to prevent the vessel being used for drug smuggling then on the facts of this case, lack of intent may well not have been demonstrated or, putting it another way, it cannot be said that the decisions of the Venezuelan courts maintaining the detention of the vessel were perverse and wrong. I will return to this question when I consider those decisions in more detail below.

298. The fourth outstanding issue of Venezuelan law is as to the effect of the indictment of the Master and the Second Officer on any continuing investigation. The owners contend, based upon the opinion of Dr Cabrera that, once the indictment was filed, which was an *acto conclusivo* under the COPP, the investigation came to an end and that any further investigations against others (including for example the stevedores) have to take place in separate criminal proceedings with their own preliminary, intermediate and trial phases, because of the unity of process provision in Article 73 of the COPP. Instinctively, one feels that it is a surprising proposition that once one accused is indicted, no-one else can be joined in the same indictment later or tried at the same time even though charged and indicted later. I agree with Mr Rainey QC that the proposition is misconceived. The point about the indictment being an *acto conclusivo* begs the question: conclusive against whom? It seems to me the answer to that is that once the indictment was filed against the Master and Second Officer, the investigatory phase against them may have concluded (although presumably if the police or prosecutors uncovered further evidence against them before trial, they could deploy that against them). However, it had not concluded against other possible suspects, as the closing paragraph of the indictment (which I quoted at [71] above) made clear. Furthermore, it is striking that all the Venezuelan courts in the present case considered that the case was still at the investigatory stage, at least as regards other suspects, and that is the one finding of Judge Villalobos that the owners never sought to challenge on appeal, one suspects because to a Venezuelan lawyer, the finding that the investigation was still open was entirely correct, despite Dr Cabrera's opinion to the contrary, which I cannot accept.

299. As I have already said in [74] above, I also cannot accept his evidence that the effect of Article 73 of the COPP is that any other suspect against whom the investigation

continues and who is indicted later, cannot be tried in the same criminal proceedings as the original accused. In my judgment, the unity of process to which that Article refers is to do with ensuring that (a) different defendants accused of the same crime are charged in the same criminal proceedings and (b) if there are different charges against one defendant, they are brought in the same criminal proceedings. In other words, it is dealing with what in English criminal law would be described as joinder under the Indictments Act 1915. It is not dealing with a drug trafficking incident such as the present one, where a number of potential offences may have been committed by a variety of people (for example, the individuals who smuggled the drugs into Lake Maracaibo, the individuals who strapped them to the hull, whether part of the stevedores' organisation or not, others within the stevedores or the port who may have been complicit and the confederates in Europe who would have collected the drugs in Italy if they had been successfully smuggled out of Venezuela on the hull).

Were the decisions of the Venezuelan courts perverse or wrong?

300. As is apparent from the section of the judgment above dealing with *The Anita*, I accept Mr Schaff QC's submissions at least to this extent, that there will be a break in the chain of causation between the infringement and the detainment if the decision pursuant to which the vessel was detained was perverse or wrong (in the sense that it is a decision which no reasonable court could have reached) without any additional requirement that the court acted in bad faith, knowing that its decision was perverse or wrong. In my judgment, it is not sufficient that the decision was arguably wrong (from which it would follow that it could equally be arguably right) because that would involve the English court in effect determining an appeal against the decision of the Venezuelan court, something this court should not do, *a fortiori* if, as in the present case, the decision has already been the subject of an unsuccessful appeal in Venezuela. However, even if I were wrong about the legal test as to what will break the chain of causation in cases such as the present, that would not matter since, in my judgment, for the reasons set out below, the decisions of the Venezuelan courts in this case are not even arguably wrong, but correct as a matter of Venezuelan law.

301. I have already set out extensively at [115] to [123] above, the course of the preliminary hearing and the judgment of Judge Villalobos on the owners' application under Article 63 and do not propose to repeat those matters here. The first two ways in which Mr Schaff QC puts his case that the judgment was perverse and wrong, as set out in [265] above, can be considered together: (a) that the judge simply failed to grapple with the issue of lack of intent at all, notwithstanding that that was an issue that had to be dealt with at the preliminary hearing and (b) that, even if she did deal with that issue *sub silentio*, her decision was perverse and wrong because the owners had clearly established their lack of intent and there is no rational foundation for any finding by the control court or on appeal that the owners had not established their lack of intent.

302. I consider that, when the judgment is viewed against the background of the relevant Venezuelan law as I have found it to be, much of the criticism levelled by the owners against the judgment can be seen to be unjustified. In particular, I consider that the judgment has to be viewed against the background of the following principles of Venezuelan law: (a) the burden of proving lack of intention under Article 63 is upon the owners and therefore the prosecution do not have to prove or do anything (which is the point made by the Court of Appeals in dismissing the appeal as set out at [135] above) which Judge Villalobos must have had well in mind as an experienced

criminal judge; (b) as is now common ground, there is jurisdiction to order preventive detention under Article 63 in respect of a vessel used in the commission of drug crime, notwithstanding that the owners are not accused or indicted of the crime; (c) proving lack of intention under Article 63 involves more than the owner establishing that it has not been accused and is innocent of the crime and may well involve establishing that it has taken all reasonable steps to ensure that its property is not used in the commission of drug crime and (d) the filing of the indictment against the Master and the Second Officer did not mean that the case overall was not still at the investigation stage as regards other possible suspects.

303. In her judgment, Judge Villalobos set out that the owners' application is for release of the vessel under Article 63 and Mr Fernandez-Concheso's argument that the prosecution had not proved intention or mentioned his client or proved their involvement in the incident in any way. She then went on to cite Article 108 of the COPP and decisions of the Constitutional Court. She then set out what is effectively the ratio of her decision (quoted at [122] above), to the effect that the case was still at the investigative stage and the prosecution had established that there was a serious risk that, unless the vessel was preventively detained, any judgment in favour of confiscation thereafter would be thwarted.

304. It is thus clear from the judgment that the judge was aware that the owners' application involved the assertion that: (a) the burden of proof was on the prosecution and (b) the prosecution had not proved lack of intention because the owners had not been accused or named. On the basis of Venezuelan law as I have found it to be, both those assertions were wrong as a matter of law, from which it follows that the judge would in all probability have regarded the assertions as misconceived. Whilst to an English lawyer, her reasoning was terse, that is true of judgments in many civil law systems and, having stated the basis of the application and then dismissed it, it may well be that the judge dealt with the application sufficiently, from the perspective of the Venezuelan civil law system. As Mr Rainey QC rightly says, there is very little to assist this court as to how well-reasoned or otherwise the decisions of control courts are. I decline to find that she has failed to deal with the issue of lack of intention at all, as Mr Schaff QC submitted, let alone that the reason why she has failed to do so is because she could not bring herself, as an honest and reasonable judge, to make a finding against the owners. I consider that, viewing the judgment as a whole, the judge, albeit implicitly, did deal with the issue of lack of intention.

305. That conclusion is borne out by the decision of the Court of Appeals before which as I said at [129] above, the owners' principal ground of appeal was that the judge had violated the COPP, by failing to give a reasoned decision on the issue of lack of intent. The Court of Appeals dismissed the appeal and concluded in the passages in its judgment referred to and set out at [133] to [135] above, that the judge had dealt with the issue of lack of intent. Of course Mr Schaff QC submits that that judgment is also perverse and wrong, but given that he has no basis for suggesting that the judgment was induced by unwarranted political interference, other than the generalised assertion that all provisional judges are in fear of the political elite, which I do not consider at all compelling, the suggestion that both the control court and the Court of Appeals produced judgments which were perverse and wrong is implausible.

306. However, the matter does not rest there. The majority of the Constitutional Chamber of the Supreme Court dismissed the owners' further appeal *in limine litis*, in other words on the ground that the appeal was unarguable. As I found at [188] above, the

Supreme Court not only did not consider the judgments of the courts below to be unconstitutional, but did not consider them to be wrong either and considered that the Court of Appeals had reached its own decision that lack of intent had not been proved. If it really had been the case that, under the Venezuelan legal system the control court had failed to deal with the issue of lack of intent at all and the Court of Appeals had simply fudged that issue and found that the issue had been dealt with, when it clearly had not, it seems to me inconceivable that the Supreme Court would not have said so. The explanation for their not having raised the point is much more likely to have been that, as far as they were concerned, as Venezuelan judges and lawyers, the issue had been dealt with in the courts below, than that they had been politically suborned. I decline to find that in the present case the Supreme Court simply acted as puppets of the regime.

307. Returning to the judgment of Judge Villalobos, one of the other main criticisms levelled against it by Mr Schaff QC was that the judge's conclusion that the case was still at the investigative stage, so that the preventive detention of the vessel should be maintained pursuant to Article 63 and 66 of the 2005 Anti-Drug Law and Article 108 of the COPP pending those investigations, was perverse and wrong. However, contrary to that submission, if the case against other potential suspects was still at the investigation stage, the preventive detention of the vessel was not perverse and wrong but entirely in accordance with Venezuelan law, as demonstrated by the subsequent decision of the Supreme Court in the case of *Pacheco Diaz* (2010), also known as *The Bichitos*, after the vessel subject to detention in that case.

308. In *The Bichitos* the police had found cocaine at a country club which led to an investigation into offences of drug trafficking and money laundering. Evidence was produced against a number of individuals and preventive measures were ordered against a number of vehicles and horses found at the country club. It appears that the vessel *Bichitos*, the owner of which was not one of the people against whom evidence had been filed, had been seen at a fishing contest alongside a National Guard vessel and people were moving from one vessel to another in circumstances which infringed military security, so that the ONA and drug prosecutors were brought in. The prosecutor applied for the preventive detention of the vessel. It is unclear from the judgment of the Supreme Court whether there had been a preliminary hearing by the time that application was heard, but it seems to me likely that there had been, since the control court had already refused an application for a special hearing to allege new facts, which only really makes sense if there had already been a preliminary hearing and was already an indictment against the various individuals. The control court ordered preventive detention of the vessel.

309. The owner of the vessel then applied to the control court for its release. That application was refused, the control court stating that the matter was in the "trial phase" (evidently a reference to the case in relation to the individuals against whom evidence had been filed, a further indication that there had already been a preliminary hearing). The court continued that *"in the case in question we are in the intermediate phase…the possibility of involvement by third parties in the commission of this offence cannot be ruled out"*. It seems to me that the court was drawing a distinction between the case against those already accused and indicted, and other possible suspects against whom the investigation was ongoing, a demonstration that Dr Cabrera's opinion that the effect of the indictment was to preclude an investigation in the same criminal proceedings against other suspects, is wrong.

310. The owner appealed to the Court of Appeals which dismissed the appeal on the ground that the: *"prosecutor's investigation has still not been concluded in connection with third parties or goods involved in the case."* Before the Court of Appeals, the owner sought to argue, as had the owners in the present case, that preventive detention under Article 63 could not be ordered unless the owner was accused in the criminal proceedings. The Court of Appeals rejected that argument, holding that, so long as the matter was being investigated and the ONA and the drugs prosecutor had not ruled out the involvement of third parties, there was no impediment to a preventive order being made against the vessel, notwithstanding that the owner was not an accused.

311. There was then an appeal to the Constitutional Chamber of the Supreme Court, in which the owner contended that the judgment of the Court of Appeals refusing release of the vessel violated his constitutional rights because preventive detention had been ordered against his property when he was not involved in the crime and had not been accused. The Supreme Court stated that, on previous occasions it had stated in connection with goods employed in the commission of drug offences that they cannot be a source of personal enrichment, citing *Escriba*. Having referred to Articles 63 and 66 the Court emphasised the deleterious effect of drugs on Venezuelan society and the world and the considerable efforts by Venezuela to combat drugs offences *"which jeopardise not only the structure of the State but also the foundations of society. It is therefore appropriate to emphasise the firm commitment made by the organs of the administration of justice to the constant fight against the trafficking and consumption of…drugs"*. The Supreme Court then went on to emphasise that in such cases, judges were obliged to take all appropriate legal measures to ascertain the truth and *"transform it into a decisive factor in the fight against the [drugs] trade"*, a statement of the importance of taking a tough line against drugs which echoes what Judge Villalobos said in her judgment in the present case.

312. In deciding that the Court of Appeals proceeded according to the law and within its jurisdiction, the Supreme Court concluded that:

> "[the preventive detention of the vessel] is not contrary to law until the completion of the public prosecutor's investigations and until it is established if that moveable property was used as a means of committing the offence being investigated or if it originates from the criminal and illicit activity in question. In addition, once the ownership has been proven, it will be decided if the owner took part in the events being investigated, so that the auxiliary penalty of confiscation would be added if necessary to the main penalty of loss of liberty...The attachment measure [under Articles 63 and 66] is preventive, so it does not jeopardise the title to the right of ownership, so it will be at the conclusion of the investigative phase or otherwise through the definitive judgment when it will be decided to whom the goods belong, if they were linked to the commission of the offence and if they belong to the person(s) who are held criminally responsible."

313. Mr Schaff QC sought to distinguish *The Bichitos* from the present case essentially on two grounds: (a) that there had been no preliminary hearing in that case and (b) that, in that case the prosecutors had positively asserted that they were continuing

investigations against other suspects whereas here the prosecutors had said nothing. So far as the first ground is concerned, I have already concluded that there had in all probability been a preliminary hearing and an indictment filed against the individuals against whom the prosecutors had evidence. So far as the second ground is concerned, in my judgment, the reservation at the end of the indictment against the Master and Second Officer in the present case was a sufficient indication by the prosecutors, even if in standard form, that investigations were continuing against other potential suspects. Not only did the courts at all three tiers in the present case consider that the investigation was ongoing against third parties, but so apparently did the owners and their legal advisers. It is particularly striking that, although Mr Schaff QC is so critical of the conclusion of Judge Villalobos that the investigation was ongoing against third parties, so that Article 108 of the COPP was applicable, that was not a point taken by Mr Fernandez-Concheso or the owners' other Venezuelan lawyers as a ground of appeal, suggesting that, like the judges, as Venezuelan lawyers, they thought the investigation was still open against third parties.

314. It follows that, in my judgment, far from being distinguishable, in my judgment the decision of the Supreme Court in *The Bichitos* is on all fours with this case and provides strong support for the conclusion, which I have reached, that far from being perverse or wrong, the decision of Judge Villalobos in favour of continuing preventive detention of the vessel whilst the investigation was continuing was right as a matter of Venezuelan law. If anything, the present case was an even stronger case for such preventive detention than *The Bichitos* because, whereas in that case the prosecutors had yet to find evidence to show that the vessel was used in the commission of drugs crime or was the fruits of such crime, in the present case, with drugs strapped to the hull, the vessel was undoubtedly used in the commission of drugs crime.

315. The other principal ground for the submission on behalf of the owners that the decision of Judge Villalobos was perverse and wrong is that, even if, contrary to their case, the burden of proof to show lack of intention was on the owners, they had demonstrated that lack of intention. As Mr Schaff QC put it, they had shown that they were not accused, they were not even mentioned in the indictment, they maintained their complete innocence and the prosecutors had not put forward any submissions or evidence to the contrary and Mr Magnelli had come to Venezuela which he would hardly have done if the owners were implicated in drug smuggling. Mr Schaff QC asked rhetorically what more owners could have done to demonstrate lack of intention. As I see it, there are three fallacies in that argument. First, it is apparent from the judgments of the Venezuelan courts, including *The Bichitos*, that because the burden of proof is on the owner, at least where investigations are ongoing, the prosecutors do not have to allege that the owners were involved in the drugs crime to justify a preventive detainment of the vessel. Second, as I have held, as a matter of Venezuelan law, the matters relied upon the owners are not sufficient to establish lack of intention, but more is required in demonstrating what steps were taken to prevent the vessel being used as an instrument of crime.

316. The third point is the one I have already made in the previous section of the judgment dealing with Venezuelan law, that although Mr Schaff QC seeks to categorise this as a question of law, whether or not in any given case the owners have established lack of intention is a question of fact, assuming that the court has applied the correct legal test, which in my judgment it did in this case. I agree with Mr Rainey QC that it is not

appropriate for this court to criticise the factual findings or conclusions of a foreign court.

317. Once the conclusion is reached that the judgment of Judger Villalobos was not perverse or wrong, it must necessarily follow that the decision of the Court of Appeals upholding that decision and, in due course, of the Supreme Court dismissing the owners' appeal, cannot be perverse and wrong. So far as the decision of the Court of Appeals is concerned, the principal attack of the owners is on the conclusion that the control court had dealt with the issue of lack of intention. If, as I have held, the judge did deal sufficiently with that issue, then the decision of the Court of Appeals cannot have been perverse and wrong. Furthermore, as the Supreme Court recognised in its judgment as set out at [188] above, the Court of Appeals in the passage I quoted at [135] above, reached its own decision that the lack of intent of the owners had not been proved, in circumstances where the investigations against third parties were continuing. The conclusion that in those circumstances preventive detention should be maintained was not perverse and wrong, but in accordance with Venezuelan law, as the subsequent decision in *The Bichitos* demonstrates.

318. Mr Schaff QC did not press hard any suggestion that the decision of the Supreme Court was perverse and wrong, focusing more on the suggestion that because the possible scope of its review was limited, it had not necessarily appreciated that the decisions of the courts below were perverse and wrong. For the reasons already given at [185]-[186] above, I was unimpressed by the suggestion that the scope of the review by the Supreme Court was limited: it was a full review of the decision of the Court of Appeals. Furthermore, if the decisions of the courts below had really been so perverse and obviously wrong as Mr Schaff QC suggests, then as I said, their argument that their constitutional rights had been infringed would have jumped off the page at the Supreme Court, who would have been bound to do something to redress the wrong the owners had suffered. The fact that they did not do so is far more likely to be because the decisions were not perverse and wrong as a matter of Venezuelan law than because the judges in the Supreme Court were political puppets of the regime.

No unwarranted political interference

319. Once it is decided that the decisions of the Venezuelan courts in this case were not perverse and wrong, then, even if there was political interference, it will not have been unconnected with the breach of customs regulations for the reasons given by Lord Denning MR in *The Anita* [1971] 1 WLR 882 at 888F quoted at [35] above. In any event, on the basis of the findings of fact I have made, there was no unwarranted political interference with the decision making of Judge Villalobos (or for that matter the Court of Appeals or the Supreme Court). In summary, the position is as follows:

    (1) There was a desire on the part of the executive in Venezuela to be seen to be cracking down on drug trafficking and to apply the Anti-Drug Laws strictly. It is unclear whether that desire translated itself into some form of direction to prosecutors and judges to be tough on drug crime as opposed to the judges appreciating the deleterious effect of drugs on society and the need to adopt draconian measures to stamp them out. However, that may not matter, since in my judgment, even if there was such a direction, it was to apply the law strictly, not to disregard the law altogether, so that it fell within what Lord Denning MR would have regarded as legitimate political interference.

(2) Contrary to the owners' submissions, I have found at [109] above that, in accordance with the owners' strategy, Colonel Aponte did speak to Judge Villalobos prior to the preliminary hearing and tell her he had spoken to the Minister and they were both happy for her to decide the case on the merits without political interference. This telephone call was the very opposite of unwarranted political interference.

(3) I have rejected at [37] and [128] above the owners' submission that there was "negative political interference" in the sense that in order to counter the judge's concerns about making a decision contrary to the interests of the state, Colonel Aponte and the Minister should have ordered the judge to release the vessel. In my judgment, given the need to be seen to be tough on drug crime, the authorities went as far as they could realistically go by telling the judge she was free to decide the case on the merits. To have gone further and ordered her to release the vessel would indeed have been unwarranted political interference, not in favour of the interests of the state but of the owners. Given my conclusions as to Venezuelan law, the effect of which is that the preventive detention of the vessel was justified, it would have been quite wrong for such an order to be given.

(4) There is no evidence whatsoever that there was any direct political interference with the decision making of the Court of Appeals or the Supreme Court. The only point which remains is the suggestion by the owners that there was indirect political interference exerted over those courts particularly the provisional judges (and Judge Villalobos was included in this submission) because judges in Venezuela are wary of making decisions which are contrary to the interests of the state. It seems to me that, unless it could be said the decisions reached were perverse and wrong (which they were not for the reasons I have given) this generalised point is hard to evaluate and it is impossible to gauge what, if any, effect it might have had on the decision making process. Even if the judges were wary, if they still made decisions which were not perverse or obviously wrong, then this point cannot possibly break the chain of causation between the infringement of the customs regulations and the detention of the vessel.

(5) I was unimpressed by the owners' attempt to set up Judge Finol as the one shining beacon of judicial independence in this case. As set out at [162]-[170] above, the judgment he delivered was one he had no jurisdiction to make and the way in which it came to be obtained and the way in which it was disseminated thereafter were seriously irregular. As set out at [179]-[180] I do not consider that the dismissal of Judge Finol from office or the disciplinary proceedings against him were part of some political revenge for the decision he made. Equally for the reasons set out at [181] and [182] I was unassisted by the case of the *Astro Saturn*, which would be an unreliable basis for concluding there had been political interference in the present case.

(6) For the reasons set out at [197]-[203] above, I do not consider there was any unwarranted political interference in the trial of the two officers, nor do I accept judge Urdaneta's evidence that he was instructed by Colonel Aponte towards the end of the trial to confiscate the vessel.

(7) Accordingly, I do not consider that Mr Schaff QC can establish his third way of putting his case as to why the decisions of the Venezuelan courts were perverse and wrong as set out in [265] above, any more than he can the first and second ways.

Whether delay from 13 to 17 March 2008 suspends the period of detainment

320. Finally on this part of the case, I should deal with the insurers' argument that, even if the cause of the detention from 31 October 2007 onwards was a perverse and wrong decision of Judge Villalobos, once the order of Judge Finol was made releasing the vessel, there was then a period of genuine delay between 13 and 17 March 2008, when the vessel was not ready to sail because her certificates were not in order and because the harbour master was genuinely taking stock of the situation, so that although the order had been made for the release of the vessel, she had not sailed before the lodging of the appeal suspended Judge Finol's order. The insurers contend that this period of genuine delay interrupted any period of detainment by reason the order of Judge Villalobos before the period of six months detainment under clause 3 of the Institute War and Strikes Clauses required before there is a deemed deprivation so as to constitute a constructive total loss.

321. It seems to me that the short answer to this point is that the insurers cannot have it both ways. If, as they contended in their Defence, the order of Judge Finol was *"illegal, invalid and a nullity"* and if, as I have found, Judge Finol had no jurisdiction to make the order he did, then that order was of no effect and did not break the chain of causation. Furthermore, irrespective of whether the order of Judge Finol was valid or not, it never in fact procured the release of the vessel and the vessel remained detained without sailing. Once the appeal had been lodged the order was suspended and the vessel continued to be detained. On this hypothesis, the order of Judge Villalobos of 31 October 2007 for the preventive detention of the vessel remained the effective and proximate cause of the detainment.

322. In the circumstances, it is unnecessary to consider the owners' alternative case that if the period of detainment from 31 October 2007 was interrupted by Judge Finol's order or the delay for a few days thereafter, a fresh period of detainment ran from 17 March 2008. Although the point was not formally conceded by the owners, in his written closing submissions, Mr Schaff QC expressed the view that the alternative case added nothing to the claim and involved an unrealistic view of the facts.

323. In conclusion in relation to the application of the exclusion for infringement of customs regulations, if I had not concluded that the owners had cover for malicious acts to which that exclusion does not apply on the proper construction of the policy, I would have concluded that the owners' claim for constructive total loss was excluded by that exclusion.

Alleged failure to provide security

324. The other exclusion relied upon by the insurers is in clause 4.1.6 of the Institute War and Strikes Clauses. The insurers contend that the loss of the vessel arose from failure on the part of the owners to provide security. The security in question must be reasonable security: see *The Aliza Glacial* [2002] EWCA Civ 577; [2002] 2 Lloyd's Rep 421 at [62] per Potter LJ:

> "In this connection, however, if it be shown that it was not reasonable for the owners to provide the surety demanded in respect of the vessel because the sum required exceeded the full value of the ship and would otherwise enable her to be treated as a constructive total loss, the exclusion should be treated as inapplicable."

325. The insurers' case in their closing submissions was that the proximate cause of the detainment of the vessel after October 2007 was the owners' failure to put up security, either because no application was made to Judge Villalobos at the time of the preliminary hearing or because no application was pursued before Judge Finol in March 2008 or because the owners did not revive any attempt to provide security thereafter. It seems to me that, even before one considers the detail of the efforts to provide security, this whole case suffers from two fundamental problems. The first is that, as Mr Magnelli confirmed in evidence, the instinctive reaction of any owner to the detention of his vessel is to endeavour to procure her release by putting up security. This is not a case where the owner was unwilling or unable to provide security. It is clear that in February 2008, the owners did take reasonable steps towards the provision of security. For whatever reason, the provision of a bond fell out of the picture in early March 2008, but in my judgment that was through no fault of the owners but rather due to internal issues in Venezuela. I return to this in more detail below.

326. The second problem with the insurers' case is that it assumes that, but for the owners' failure to put up security, reasonable security could and would have been agreed with the Venezuelan authorities and courts. In my judgment, that is an unrealistic assumption. For reasons I develop below, I consider it likely that, even if the prosecutor and the court had been prepared to agree to the release of the vessel against a bond or guarantee, they would have insisted on the security being for the full value of the vessel in U.S. dollars and the terms of the security as regards when it could be called are unlikely to have been acceptable to the owners and the insurers who were providing any bond.

327. It is noteworthy that the anti-drug legislation dealing with preventive seizure (i.e. Articles 63 and 66 of the 2005 Law) does not provide for the release of property against provision of security and whilst I accept that there was no reason in principle why security should not be agreed as a matter of Venezuelan criminal law, despite the owners' arguments to the contrary, it clearly was a novel proposition. Although, at the meeting which Mr Magnelli attended on 24 October 2007 with the prosecutors, Mr Guerra did not reject the idea out of hand and agreed to evaluate the proposal, it would appear that the prosecutors never came back subsequently and said that they would accept security in any particular form.

328. In the event, the owners did not include any application for release of the vessel against security as part of their application to the court under Article 63 at the preliminary hearing. As I held at [113] above, this was in part because the P&I Club, Gard, was not prepared to put up security, because they considered there was no cover under the P&I insurance for what had occurred and/or because they were concerned about the form of any security and that, if provided, it might be called on for its full value even if there was no judgment against the owners. However, leaving the reluctance of Gard to one side, it seems to me that the owners did not put forward the proposal because they did not think that the prosecutors would accept a guarantee in return for the release of the vessel. As I have held, I consider that the assessment of Mr Magnelli at around this time that release against security was "fried air" was a realistic one.

329. The idea of providing security was revived in February 2008. Gard declined to put up a bond or guarantee because there was no Club cover for confiscation of the vessel, but the bond that was to be provided by a local insurer and backed by Generali was

circulated by Clydes. As I held at [149] to [151] above, it seems to me there were a number of problems with this proposal. First, although Mr Fernandez-Concheso was putting it forward on the basis that the owners could take advantage of an unofficial exchange rate where they could put up security for the full value of the vessel in Bolivars but only pay the equivalent of U.S. $4 million (not the full value of U.S. $20 million) I have considerable doubts as to the viability of that suggestion. In evidence Mr Magnelli said that when he arrived in Venezuela he was warned not to use this unofficial "market" for foreign exchange and if that was true of small amounts of foreign exchange required by visitors, it would be all the more dodgy for a substantial transaction like this. In my judgment, if the proposal had gone further, in all probability the Venezuelan authorities would have insisted on any bond being for the full value of the vessel in U.S. dollars. That would have been unacceptable to owners and understandably so.

330. Furthermore, Generali clearly had concerns that if security was provided, some pretext might be found for calling on the full value of the bond even though there had been no judgment against the owners, for example if the two officers were convicted, and it remained far from clear that the form of the bond being circulated by Clydes would have been acceptable to Generali. As I noted at [151] above, on 26 February 2008 Generali raised a number of questions about the proposed bond to which Mr Fernandez-Concheso never provided answers. It remains unclear whether, in the ultimate analysis, a form of security acceptable to Generali could have been devised and that leaves entirely out of account whether the Venezuelan authorities would have agreed it.

331. As I have already found at [154] above, I simply did not accept Judge Finol's evidence that he rejected the provision of security out of hand. As recorded in the contemporaneous communications from Mr Fernandez-Concheso, Judge Finol was amenable to the idea of security and may even have suggested it and it is inconceivable that owners would have been making the efforts they clearly did make to procure a bond, if this had all been a futile exercise because the judge would never approve it. However, what the attitude of the prosecutors was is a different matter. What is clear is that some time around 3 March 2008, the proposal for release against security disappeared from the picture.

332. The insurers sought to suggest that the reason for this was that the owners had abandoned the proposal because they found the "no cure no pay" proposal from Dr Alcala more attractive. However, that ignores the unchallenged evidence of Mr Fernandez-Concheso that on 3 March 2008 or shortly thereafter, he was told by the team in Maracaibo that the bond route was no longer possible. As I have already found at [155] above, the correct position is that whilst the owners did concentrate on the "no cure no pay" proposal once it was raised and cannot really be criticised for that, if it gave rise to the possibility of securing the release of the vessel without putting up a bond, nonetheless the bond route was no longer possible, for whatever reason, after early March 2008. If it had remained a possibility, then it seems to me inconceivable that after the release order of Judge Finol was suspended, the owners would not have revived their proposal to put up security. The fact that they did not and resorted to the less conventional proposals involving Mr Pozzo and Nowake suggests very strongly that the bond route was no longer possible after early March 2008.

333. Furthermore, even if the provision of security to procure the release of the vessel had been acceptable in principle to the Venezuelan authorities and Generali had been prepared to agree the form of the bond, I have considerable doubts whether, when it came to it, it would have been possible to negotiate satisfactory and reasonable security with the Venezuelan authorities. The question of reasonableness must affect not only the amount but the terms of the security. As I have said, I am very sceptical about the unofficial exchange rate being used to the owners' advantage. In my judgment, the Venezuelan authorities would in all likelihood have insisted on security for the full value of the vessel in U.S. dollars and would have wanted a wide ranging provision enabling the bond to be called on even if there was no judgment against the owners. They would have been all the more likely to do so after the order of Judge Finol had been suspended, even if at that stage they had been amenable to the offer of security, which seems unlikely. Security on those sort of terms would not have been reasonable and the owners would have been entitled to refuse to give it, without falling foul of the exclusion.

334. Although it was part of the insurers' pleaded case that the subsequent abortive proposal put forward in April 2008 by Mr Pozzo (referred to in [177] above) was in some way a failure on the part of the owners to provide security, that point was sensibly not pressed by Mr Rainey QC in his submissions. Whatever the reason for the failure of that proposal, it was no fault of the owners. Overall, in my judgment, the owners made every effort to put forward proposals for security, but through no fault of theirs, the proposals came to nothing. In the circumstances, there was no failure to provide security and the exclusion in clause 4.1.6 of the Institute War and Strikes Clauses does not apply.

Sue and labour expenses

335. By the end of the trial the scope of the dispute between the parties in relation to sue and labour expenses claimed by the owners had narrowed considerably. There are three issues of principle which remain. The first issue of principle is whether the owners can recover at all as sue and labour any expenses incurred after the date of the notice of abandonment, 18 June 2008. The insurers' case is that, when notice of abandonment was served and the leading underwriter declined the notice but scratched the so-called "writ clause" on the notice that the insurers agreed to put the owners in the same position as if a writ had been issued that day, the position between the owners and the insurers crystallised, not only in the sense that if, on that date, a right to claim for a constructive total loss by reason of detainment of the vessel for more than six months existed, it would not be affected by the subsequent recovery or release of the vessel, but also in the sense that both the obligation to sue and labour and the entitlement to claim for expenditure in suing and labouring ceased.

336. It is well established in the law of marine insurance that, as at the date of the issue of a writ (now a claim form) in a claim for constructive total loss, the position between the insured and the insurer is crystallised, in that if there was a right on that date to claim for a constructive total loss by reason of a capture or detainment, that right would not be affected by the subsequent recovery of the vessel, avoiding the doctrine of ademption of loss. That principle had been established before the Marine Insurance Act 1906 and, although the Act is silent on the point, the principle was restated and confirmed after the Act by Kennedy LJ (whose judgment read by Warrington J after his death was taken as the judgment of the Court of Appeal) in *Polurrian Steamship v Young* [1915] 1 KB 922 at 927-8:

> "Now it is indisputable that according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel. (See the judgment of Collins J. *in Ruys v. Royal Exchange Assurance Corporation*, which reviews the history of the law upon this point.) In strictness, therefore, in regard to the facts, I might, I think, confine myself for the purpose of this judgment to a statement of them as they stood on October 26, which, as I have said already, is by agreement to be taken as the date of the issue of the writ in this action, and was also the date of the plaintiffs' notice of abandonment. As, however, the learned judge has in his judgment included a review of the events which occurred in reference to the *Polurrian* after she had been taken by the Greek naval forces out of the possession of the plaintiffs on October 25, 1912, until her release seven weeks later, on December 8, and has drawn therefrom, in support of his conclusions, inferences more favourable to the defendants' case than, I venture with all respect to think, the evidence warrants, I do not think that it would be proper for me, having to consider that judgment, wholly to confine my reference to the facts to their position on October 26. But that is the material date; and I shall deal with the later period as briefly as possible."

337. As that passage demonstrates, that was in fact a case where it was agreed that the date of the notice of abandonment was to be treated as the date of issue of the writ, and the Court of Appeal proceeded to consider the question of whether the vessel was a constructive total loss on the basis that the writ had been issued on that date. The correctness of the principle confirmed by *Polurrian Steamship* was stated by Lord Wright in the House of Lords in *Rickards v Forestal Land, Timber and Railways* [1942] AC 50 at 84-5.

338. In support of their case that the position as between insured and insurer at the date of issue (or where there is a "writ clause" the date of deemed issue) of the claim form is crystallised not only as regards the loss, but that any obligation or right to sue and labour ceases, the insurers rely on the judgment of Rix J in *Kuwait Airways v Kuwait Insurance* [1996] 1 Lloyd's Rep 664 at 696-7. Although that was not a marine insurance case, the learned judge applied principles of the law of marine insurance in considering the question whether the right to sue and labour extended beyond the time when a total loss has been claimed or a writ claiming for a total loss has been issued. In that case the insurers contended that the sue and labour engagement came to an end either when the insured made a claim for a total loss or when the writ for such a claim was issued. Rix J rejected the former date but accepted the latter in this passage:

> "I do not see why the making of a total loss claim should bring the right to sue and labour to an end. It does not in the marine context. The date of payment ushers in the right of subrogation.

> It might be said that at that date, if the right to sue and labour were still extant, it made way for the insurer's right of subrogation: but that point has not been pressed. The date of issue of a writ for a constructive total loss, however, is a familiar date in the case of marine insurance. Up to that date any recovery by an assured goes to reduce his claim, even though notice of abandonment has already been given; after that date any recovery does not reduce the claim: *Polurrian Steamship Co. Ltd. v. Young*, [1915] 1 K.B. 922 at pp. 927-928, *Rickards v. Forestal Land, Timber and Railways Co. Ltd.*, [1942] A.C. 50 at pp. 84-85. That suggests that the date of issue of writ is a watershed in respect to not only the effect of recovery but also the right to sue and labour. Mr. Webb submitted that this was some irrelevant peculiarity of the concept of constructive total loss in marine insurance law. It seems to me, however, that if that were so, then the watershed date would be the date of notice of abandonment, rather than of issue of writ. In *Ruys v. Royal Exchange Assurance Corporation*, [1897] 2 Q.B. 135 at p. 142 Mr. Justice Collins said:
>
> > '. . .and much might be said for the view suggested by Lord Eldon and adopted in the American and other systems, that the rights of the parties should be finally ascertained upon a proper abandonment. But, the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained, and the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years . . .'
>
> Moreover, in *Roura & Forgas v. Townend*, [1919] 1 K.B. 189 at pp. 195-196 Mr. Justice Roche gave as the reason for the rule the general one that "an assured cannot, under a contract of indemnity, recover in respect of a loss if before action it has been made good to him". Although that explanation has been criticised as being circular (see Arnould at par. 1178), it seems to me to emphasize the point made by Mr. Justice Collins that it is at the time of issue of proceedings that the rights of the parties must be viewed as crystallized. Since therefore recovery after action brought does not affect the total loss indemnity to which an assured is entitled as of that date, that also seems to me to be an appropriate date at which to find that an assured's right (and correlative duty under s. 78(4) of the MIA) comes to an end. In the present case that would be on July 30, 1991."

339. This part of the judgment of Rix J was *obiter* since he decided the case against the insured on another ground, and, in the Court of Appeal, [1997] 2 Lloyd's Rep 687 at 696, Staughton LJ declined to express a view on the conclusion reached by Rix J because he did not consider it was the relevant enquiry. He determined that the right to sue and labour had been lost at an earlier date in September 1990 when the insurers

admitted and paid the claim for U.S. $300 million, the maximum ground limit under the policy.

340. The insurers also relied upon the discussion of that case in *Arnould on Marine Insurance* at [25-13] where the editors say:

> "…it is common practice when a notice of abandonment is given for the insurers to agree to treat a writ or claim form as having been issued. In such a case, assuming the claim for constructive total loss is ultimately admitted or succeeds at trial, it would seem to follow from the reasoning of Rix J in *Kuwait Airways* that any expenses incurred after the deemed date of commencement of the action will not be recoverable as sue and labour."

Accordingly, the insurers contended that, since on 18 June 2008 the insurers agreed to put the owners in the same position as if a claim form had been issued on that date, the right to sue and labour came to an end on that date.

341. Mr Schaff QC challenged that contention. He submitted that, as at 18 June 2008, the date of the first notice of abandonment, both parties had an interest in expense being incurred to avoid or minimise the loss, whether expense of maintaining and manning the vessel or the expense of continuing efforts to procure her release. The owners had an interest in mitigating the loss in case their constructive total loss claim proved invalid, but the insurers equally had such an interest in mitigating the loss in the event that claim was upheld since there would be an obvious benefit to them if the vessel was eventually released from detainment and was in a seaworthy condition. That interest of the insurers was normally reflected in an express requirement in the writ clause or agreement that the insured carry on acting as a prudent uninsured and even where that requirement was not express (as it was in the responses by the insurers in this case to the second notice of abandonment) Mr Schaff QC submitted it was necessarily implicit because that is what the insurers would expect of the insured.

342. Mr Schaff QC submitted that, in determining that the date of the issue of the claim form was the date when the right and duty to sue and labour ceased, Rix J was not dealing with the effect of the writ clause in response to the notice of abandonment and that it was significant that he, like Collins J before him in *Ruys*, rejected the date of notice of abandonment as the date for ascertaining the position between the parties. Mr Schaff QC submitted that there was good reason for deciding that the line should be drawn as at the date of issue of proceedings. At that point, the parties' dispute has crystallised and is regulated by the rules of court. However, the writ clause or agreement does not have that effect, it is simply a sensible arrangement whereby the insured is not prejudiced by a change of circumstances after the service of a notice of abandonment, so that the insured does not have to rush off and issue a claim form.

343. I agree with Mr Schaff QC that, although *Polurrian* was a case of a writ agreement, in citing that case in support of the proposition that the date of issue of the writ crystallised the position between the parties, Rix J was not purporting to deal with the position where there was a deemed date of issue of a writ under a writ agreement and, indeed, it might be said that, in rejecting the date of notice of abandonment as the date when the right to sue and labour ceased, he was implicitly rejecting any suggestion that that should be the relevant date when the right (and concomitant obligation) ceased. Furthermore, despite Mr Blackwood QC's strenuous efforts to suggest that

everything changed once there was a writ agreement, in that it polarised the parties' positions, I consider that the commercial reality is that, in many cases (including the present one), at the time of the writ agreement, the vessel is still in the grip of the relevant insured peril and it is in the interests of both parties that expense continues to be incurred in mitigating the loss, for the reasons Mr Schaff QC gave. The writ agreement protects the insured from prejudice in the event of change of circumstances and obviates the need to issue proceedings at the time a notice of abandonment is rejected but, in my judgment, it does not have the wider effect for which insurers contend. The position is different once proceedings are actually issued: the dispute is now regulated by the Civil Procedure Rules and in those circumstances it may well be that Rix J is right that the entitlement to sue and labour ceases on issue of proceedings. However, in my judgment, it does not cease at the earlier stage of a writ agreement.

344. That conclusion is supported by the terms of the insurers' response to the second notice of abandonment. The insurers' solicitors declined the notice but reminded the owners of their obligation to act as a prudent uninsured. It seems to me that the purpose of that reminder was to ensure that the owners continued to comply with their obligation under section 78 of the Marine Insurance Act and clause 13 of the Institute Clauses incorporated in this policy to take all reasonable measures to avert or minimise the loss, thereby protecting the insurers' position and acting for their benefit in relation to the vessel. That obligation carries with it the entitlement of the insured to recover as sue and labour the expense of averting or minimising the loss in the event that its claim under the policy succeeds. The reminder to the owners in November 2008 of that obligation to act as a prudent uninsured is inconsistent with the insurers' case that the writ agreement in response to the first notice of abandonment brought the right to sue and labour to an end. The logical consequence of the insurers' argument would be that the right and obligation to sue and labour came to an end in June 2008 but was somehow revived in November 2008, which is absurd and wrong as a matter of law. The obligation was a continuing uninterrupted one from August 2007 onwards when the vessel was first in the grip of the peril.

345. I also agree with Mr Schaff QC that, although the response to the first notice did not include an express reference to the obligation to act as a prudent uninsured, it was necessarily implicit in the response that the owners should so act. Furthermore, the fact that, in the second response the insurers reminded the owners of the obligation, which was only consistent with the obligation being continuing and uninterrupted, is also a complete answer to the suggestion by Mr Blackwood QC, rather as a plea *in terrorem*, that if I were to hold that the obligation and right to sue and labour continued after the writ agreement, there would be consternation in the insurance market.

346. The second issue of principle concerns the sum of about U.S. $1.4 million incurred by the owners by way of legal fees. At the outset of the trial the insurers contended that because those expenses were incurred for a dual purpose, namely the release of the vessel and the defence of the crew, they were not recoverable as sue and labour. That contention is not only partially inaccurate as a matter of fact (since U.S. $180,000 of the sum alleged by the insurers to be paid in defence of the crew was in fact paid to Dr Alcala in relation to obtaining the release of the vessel) and wrong as a matter of law. Where expenses are incurred both for the purpose of extricating the vessel from the insured peril and for some other purpose which is not sue and labour (here the defence of the crew), there is no principled basis for apportioning the expenses

between those purposes, so they are all to be properly regarded as sue and labour expenses: see *Royal Boskalis v Mountain* [1997] LRLR 523 at 647 per Phillips LJ and *Standard Life v Ace* [2012] EWCA Civ 1713; [2013] Lloyd's Rep IR 415 at [46]-[49] per Tomlinson LJ. It is only if the insurers can demonstrate that the relevant expenditure was incurred solely for the other purpose that the expenditure will not be recoverable as sue and labour. By the end of the trial, the insurers accepted this principle. However, of the overall sum the owners were able to identify some U.S. $300,000 as having been incurred in defence of the crew and the insurers submitted that this sum should not be recoverable as sue and labour. In my judgment that submission was misconceived. Since if all the crew had been released and acquitted, the vessel would have been released, the expenditure incurred in defence of the crew was inextricably bound up with the release of the vessel and is thus recoverable as sue and labour.

347. The other point taken by the insurers about the legal fees was that some U.S. $1.2 million of the overall total was funded by Gard on an *ex gratia* basis, since the case fell outside the scope of Club cover. The insurers contended that, in the circumstances, the owners were not entitled to recover that sum. Their case was that if the owners were to recover that sum from the insurers it would represent a windfall, given that Gard do not expect reimbursement, their statement of account expressly stating: *"no payment required"*.

348. As Mr Schaff QC pointed out, this particular point was unpleaded. I agree with him that it is a bad point, to which the short answer is that the fact that Gard has funded some of the legal fees is *res inter alios acta* as between the owners and the insurers. Mr Blackwood QC sought to counter that argument by reference to the brokers' funding cases such as *Merrett v Capital Indemnity Corp* [1991] I Lloyd's Rep 169, but, as that case demonstrates, where the funding is voluntary (as it was in the present case) and therefore does not diminish the (re)insured's loss, it is to be disregarded in assessing the recoverable loss: see per Steyn J at 171 lhc and *MacGillivray on Insurance Law* 12th edition at [34-069].

349. The third point of principle concerns the costs of manning the vessel and providing for its technical management during the period of detention, for which the owners claim some U.S. $3.4 million. The insurers contended that those costs were not recoverable for two reasons, although only the first was pursued in their oral closing submissions. First, the insurers contended that they are not recoverable because, on the true construction of the policy, they are excluded by clauses 16 and 17 of the Institute Time Clauses which provide:

> "16 WAGES AND MAINTENANCE
>
> No claim shall be allowed, other than in general average, for wages and maintenance of the Master, Officers and Crew, or any member thereof, except when incurred solely for the necessary removal of the Vessel from one part to another for the repair of damage covered by the Underwriters, or for trial trips for such repairs, and then only for such wages and maintenance as are incurred whilst the Vessel is under way.
>
> 17 AGENCY COMMISSION

> In no case shall any sum be allowed under this insurance either by way of remuneration of the Assured for time and trouble taken to obtain and supply information or documents or in respect of the commission or charges of any manager, agent, managing or agency company or the like, appointed by or on behalf of the Assured to perform such services."

350. However, I agree with Mr Schaff QC that those provisions are dealing with cases of partial loss or particular average, not with claims under the supplementary engagement in relation to sue and labour and do not preclude the recovery of crew wages and management expenses which have been incurred in averting or minimising the loss. As Mr Schaff QC pointed out, from October 2007 the owners sent a second Master to the vessel and from February 2008, a replacement Second Officer, specifically to assist in the sailing of the vessel in the event that her release was procured. Furthermore, as Miss Sebastianelli said in her evidence, the owners needed to keep the vessel fully manned and maintained, rather than simply having a skeleton crew on board, so that, if release of the vessel was procured, she could sail as quickly as possible. On the face of it, therefore, those expenses were sue and labour expenses.

351. The second reason why these expenses were said by the insurers in their written closing submissions not to be recoverable as sue and labour is that they were incurred (at least up until April 2009 when Bulk Trading declared the charterparty frustrated) at a time when there was a current charterparty. In those circumstances, the insurers submitted that crew wages and running costs cannot be recovered either because they were not extraordinary expenses incurred to avoid or minimise the loss, but expenses the owners were contractually obliged to incur under the charterparty or because the loss of use of the vessel was suffered by the owners not by the vessel and thus outside the scope of the policy.

352. In support of that submission, Mr Blackwood QC relied upon *Arnould on Marine Insurance* 18th edition at [25-22]:

> "In the opinion of the present Editors the problem cannot be answered simply by determining whether or not the contract of affreightment has been frustrated. There can be little doubt, in view of the authorities, that where there is a contract of affreightment current at the time when the expenses are incurred, and this has not been frustrated, ordinary running expenses of the type under discussion cannot be recovered whether this is to be put on the ground that the expenses are of a type that the ship-owner is obliged by his contractual commitments to incur, or on the ground (which to the present Editors seems more persuasive) that loss of the use of the vessel and consequent inability to cover expenses out of earnings, is damage suffered by the ship-owner, not by the ship, and is for that reason outside the Hull policy."

353. In response to that submission, Mr Schaff QC relied upon the passage in *Arnould* immediately following that passage:

> "It is when the contract of affreightment has been frustrated or where the vessel was idle at the time when she was detained that the real difficulties arise. The principle that the policy does not cover loss of use is prima facie applicable in such circumstances as well as in the context of a vessel under current employment. Although the authorities cited earlier in this paragraph do support by inference the proposition that wages and similar expenses incurred after frustration of the adventure may be recovered, it is submitted the mere fact that the vessel is not or is no longer subject to any current commitments does not in itself enable ordinary running expenses to be recovered under the S&L clause. It must be shown in such circumstances that the primary purpose of keeping or sending a person on board or of continuing their employment was either to procure or facilitate the recovery of the vessel from detention or possibly to prevent the condition of the vessel from deteriorating by reason of the continued operation of perils."

354. Mr Schaff QC submitted that clearly once the charterparty was frustrated in April 2009, the only reason for keeping the crew on board and maintaining the vessel was to facilitate her recovery from detention. However, he submitted that that was equally the position before the formal frustration of the charterparty, from October 2007 onwards. The vessel was off-hire and the only reason for keeping a full crew rather than a skeleton crew on board was not to fulfil the owners' contractual commitment to Bulk Trading (for which no more than a skeleton crew would have sufficed during the period of detainment and off-hire) but to ensure that if the order detaining the vessel was lifted, she could sail as quickly as possible without having to incur any delay. Mr Schaff QC submitted that the expenses incurred in keeping a full crew on board and maintaining the vessel were expenses incurred to avoid or minimise the loss and thus recoverable as sue and labour.

355. Like Mr Schaff QC and despite the views of the current editors of *Arnould*, I consider that the better reason why running expenses would not ordinarily be recoverable as sue and labour, whilst the vessel was on charter, is that those expenses were not unusual or extraordinary but expenses the owners were contractually obliged to incur. However, in the present case, it seems to me that, at least to the extent that the owners incurred running expenses over and above the minimal expense of a skeleton crew on board, those expenses were not incurred because of any contractual commitment, the vessel being off-hire during the whole of the relevant period, but because the owners wanted to be ready to sail as and when the opportunity arose. Accordingly those expenses are recoverable as sue and labour, except that the owners will have to give credit for the expense of maintaining a skeleton crew on board which has been agreed at U.S. $1,182,630.69. By the end of the trial, Mr Blackwood QC accepted that this analysis, which I had put to Mr Schaff QC in oral argument, was correct.

356. By the end of the trial, the only outstanding point of detail in relation to sue and labour which remained in dispute in relation to which the parties addressed submissions in closing, apart from those issues of principle, concerned the payment of U.S. $70,000 to Nowake. The insurers contended that the incurring of this sum was simply not reasonable. If this really did relate to putting in a team of investigators more than a year after the incident to investigate who committed the offence, that could not be reasonable. Equally, if the real purpose of the payment was, as Mr

Magnelli suspected, to pay off the ONA, it was not reasonable expenditure for which the insurers should be held liable.

357. Mr Schaff QC submitted that it was too harsh to describe the payment as unreasonable, even if Mr Magnelli did not think much of it. It was part of an overall attempt to secure the release of the vessel and, since only the first U.S. $70,000 was paid, it was reasonable and should be recoverable. I agree with that submission. As I pointed out in argument, if the vessel had been successfully released as a result of whatever efforts were made by Nowake, the insurers would have been only too happy. Furthermore, although Mr Magnelli was suspicious of the arrangement and thought it may have been a sham to disguise an attempt to buy off the ONA, this was never put to Mr Fernandez-Concheso in cross-examination, although he was evidently behind the proposal. In the circumstances, I consider it would be quite wrong to conclude that the arrangement with Nowake was anything other than what it appeared to be on its face and, accordingly, I consider the sum in question is recoverable as a sue and labour expense.

358. In so far as there are other points on the sue and labour expenses which have not been resolved since the end of the trial, I will hear whatever submissions the parties wish to make about those and will give any necessary directions for their determination at the hearing when this judgment is handed down.

Conclusion

359. My principal conclusions are as follows:

(1) The owners' claim for a constructive total loss succeeds on the basis that there was cover under the policy for the malicious acts of the third parties who strapped the drugs to the hull of the vessel and the exclusion for infringement of customs regulations does not as a matter of construction apply to exclude cover in the circumstances of this case.

(2) If that conclusion were wrong, the exclusion for infringement of customs regulations would apply to exclude the claim because there was no break in the chain of causation between the infringement and the detainment of the vessel. The decisions of the Venezuelan courts ordering such detainment were not perverse or wrong and were not procured by unwarranted political interference.

(3) The exclusion for failure to put up security does not apply.

(4) The owners are entitled to recover sue and labour expenses including after the writ agreement on 18 June 2008.

(5) The owners are entitled to recover as sue and labour expenses: (a) the legal expenses incurred in seeking the release of the vessel and defence of the crew; (b) the running costs during the detainment of the vessel until her actual abandonment, less the U.S. $ 1,182,630.69 agreed cost of a skeleton crew and U.S. $ 46,175.02 expenses incurred before the vessel was first detained and (c) the U.S. $70,000 paid to Nowake.