Neutral Citation Number: [2016] EWCA Civ 808

Case No: A3/2015/0123

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HON. MR JUSTICE FLAUX AND THE HON. MR JUSTICE HAMBLEN
2011 Folio 537

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2016

Before :

LORD JUSTICE LAWS
LORD JUSTICE CHRISTOPHER CLARKE
and
SIR TIMOTHY LLOYD

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Between :

ATLASNAVIOS - NAVEGAÇÃO, LDA
(formerly BNAVIOS - NAVEGAÇÃO, LDA)
Respondent/Cross-Appellant/Claimant ("owners")

- 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

Appellants/Cross-Respondents/Defendants (“insurers”)

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- -

Alistair Schaff QC and Mr Alexander MacDonald (instructed by W Legal Ltd) for the Claimant
Mr Colin Edelman QC and Mr Guy Blackwood QC (instructed by Stephenson Harwood LLP) for the Defendants

Hearing dates : 14 and 15 June 2016

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Approved Judgment

Lord Justice Christopher Clarke :

1. The respondents are the owners of the vessel "B ATLANTIC". The appellants are their war risk insurers. Hereafter I refer to the "owners", the "vessel" and the "insurers". The question in this appeal is whether Flaux J was right to find that the owners were entitled to be indemnified by the insurers in respect of the constructive total loss of the vessel in the following circumstances.

2. On 13 August 2007 the vessel completed loading a cargo of coal in Lake Maracaibo, Venezuela for discharge in Italy. An underwater inspection by divers discovered three bags of cocaine weighing 132 kg strapped to the vessel's hull in the vicinity of the rudder, 10 metres below the waterline.

3. This concealment itself constituted an offence contrary to Article 31 of the *Venezuelan 2005 Anti-Drug Law* which provides:

> *"Whoever illicitly traffics, distributes, **conceals**, transports by any means, stores, carries out brokering activities with the substances or their raw materials…. .to which this Law refers and which were deviated, even in a discarded form, for the production of narcotic drugs and psychotropic substances, will be punished with a prison sentence of between eight and 10 years"*

4. Article 63 and 66 of the same Law provides:

> *"Preventive seizure*
>
> ***Article 63 -** When the offences covered by Articles 31, 32 and 33 of this Law are committed on ships ... such items will be seized as a precautionary measure until their confiscation in a definitive judgment. The owner is exonerated from that measure when circumstances demonstrate its lack of intention. That question will be resolved at the preliminary hearing."*
>
> *Secured, seized and confiscated property*
>
> ***Article 66** – The moveable or immoveable property... ships ... and other items employed to commit the investigated offence, as well as property about which there is a reasonable suspicion that it originated from the offences envisaged in this Law or related offences …..will be in all cases seized as a preventive measure and, when there is a final and definitive judgment, an order will be given to confiscate and the property will be awarded to the decentralised agency in the field…"*

Article 63 involves, as the judge found a reverse burden of proof [283].

5. When exactly the drugs were attached to the vessel is unknown. There was an inspection on 12 August 2007 when the divers noticed that an underwater grille on the hull was loose and that various objects not belonging to the vessel (a grappling hook,

a saw, a rope and other tools) were inside the space behind the grille. The Master was told 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. But the vessel did not sail then because there had been a miscalculation of the vessel's draft and consequently a short loading, so that 800 m.t. of additional cargo was loaded. A second inspection was carried out the next day. It may well be that the drugs were attached after the first inspection after which the smugglers did not expect to be, but were, caught out by a second inspection.

6. On 16 August 2007 the vessel was detained and the crew were arrested. The Master and the Second Officer were charged with complicity with 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 Procedure Code. The vessel remained in detention until in August 2010, following a jury trial, the two officers were convicted and sentenced to 9 years' imprisonment. The court ordered the final confiscation of the vessel, which the owners had abandoned to the court in September 2009.

7. The drugs were affixed to the vessel by persons unknown, presumably members of a drug cartel engaged in smuggling drugs from South America to Europe. The insurers do not suggest that the owners were implicated in these activities in any way and the case has proceeded on the basis that the Master and Chief Officer were wrongly convicted in Venezuela.

The policy

8. 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:

> *"Institute War and Strikes Clauses Hulls – Time Clause 281. 01.10.1983. 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.*
>
> *Line 20 of the Institute War and Strikes Clauses Hulls-Time Clause 281.01.10.1983 amended from 12 to 6 months."*

9. The Institute War and Strikes Clauses, as amended, provided, relevantly, 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 ...

4.2 loss damage liability or expense covered by the Institute Time Clauses-Hulls 1/10/83 (including 4/4ths Collision Clause) or which would be recoverable thereunder but for Clause 12 thereof."

10. Clause 6 of the Institute Time Clauses-Hulls 1/10/83 provides:

"PERILS

> *6.1. This insurance covers loss of or damage to the subject-matter insured caused by:*
>
> *6.1.5 piracy*
>
> *...*
>
> *6.2.5 barratry of Master Officers or Crew*
>
> *Provided such loss or damage has not resulted from want of due diligence by the assured, owners or Managers."*

11. In March 2012 Hamblen J, as he then was, heard the trial of various preliminary issues in this case. Those 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.

12. Hamblen J answered each of the first three questions in the negative. It was common ground that the fourth question involved questions of fact and did not need to be decided at that stage.

13. Flaux J set out and adopted the conclusions of Hamblen J as to the general principles to be derived from the authorities on clause 4.1.5., which were as follows:

> "*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. Much of the judgment below was concerned with the issue of political interference. The owners claimed that the decisions of the Venezuelan judges leading to the detention of the vessel, the failure to release her and her ultimate confiscation were perverse and wrong (probably as a result of some form of political interference) such that there was a break in the chain of causation between any customs infringement and the detainment of the vessel. The judge rejected that contention and held that the decisions of the Venezuelan courts (by Judge Villalobos at first instance and then by the Court of Appeal and the Supreme Court) were not even arguably wrong. They

were correct as a matter of Venezuelan law; and there was no unwarranted political interference with the decision making of any of the judges involved.

The reasoning of the judge

15. The judge considered the authorities to which Hamblen J had referred and concluded that the owners were right to contend that, as a matter of construction, the exclusion in clause 4.1.5 was not, on the facts of this case, engaged. The reasoning which led him to decide what he described as "*not an easy point*" was essentially as follows.

16. The cover extends to "*malicious acts*": see clause 1.5. That that is a central part of the cover is apparent from the Conditions in Section A which encompass "*Malicious damage .... and/or Malicious Mischief and/or Malicious Damage".* It was common ground that the act of concealing a large quantity of cocaine close to the rudder of the vessel was a malicious act involving malicious mischief and malicious damage, since those who were responsible concealed the cocaine reckless as to whether or not it led to the detention or confiscation of the vessel.

17. It was, however, accepted by the insurers that the exclusion did not apply to a so-called "put-up job". This meant a situation where the authorities deliberately planted the drugs (or got someone else to do so) so as to be able to detain the vessel. There was, thus, a recognition of some implied limitation on the scope of what constituted an "*infringement of any … customs regulations"* within the meaning of clause 4.1.5. In the judge's view there was no principled distinction between a put- up job like that and a case, such as the present, where the deliberate and malicious act of the drug smuggler leads to the detention of the vessel. If the exclusion did not apply in the former case it was difficult to see why it should apply in the present one.

18. The judge placed some reliance on the approach taken in two cases in relation to the exclusion for "*any financial cause of any nature*" in the Clauses. He did so in the following terms:

> "*254 Mr Schaff QC drew my attention, albeit in relation to … 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"."*

19. The judge himself suggested two other possible put-up job scenarios. In one of them the malicious third party, who planted the drugs, demands a large payment as the price of his silence and, when the managers of the vessel refuse to make it, informs the authorities that the drugs have been concealed on board. In the second scenario the intentionally malicious third party plants the drugs and then informs the authorities in order to get the vessel detained without any intervening blackmail.

20. In both of these cases, so the judge thought, there might literally be an infringement of customs regulations but that conclusion would not accord with the spirit of the policy. In those cases of actual malice, which could be said to be paradigm examples of malicious mischief or persons acting maliciously there must, he held, be an implied limitation on the scope of the exclusion, in which case there could be no justification for distinguishing those cases from the present simply because in the present case there was recklessness and not intent.

21. Accordingly, he held [257] that the words of the exclusion in clause 4.1.5 were:

> *"... 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 persons 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...*
>
> ……
>
> *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."*

First principles

22. In determining whether there is cover under the policy the insured must show that his loss (in this case a constructive total loss which arose 6 months after 16 August 2007, being the date when the owners lost the free use and disposal of the vessel) was caused by a peril insured against. Here the owners' loss was caused by the detainment of the vessel which was caused by the malicious act of the persons who concealed the cocaine on the vessel. The remaining question is as to whether the loss also arose from, i.e. was caused by, one of the matters excluded.

23. In this context the search is for what is sometimes expressed as the proximate or operative, and sometimes as the dominant or effective, cause. The different adjectives (which I shall compress to "proximate") all seek to identify what event or events have the necessary causative potency. That event is not necessarily the cause which is closest in time to the relevant loss.

24. In a case where one or other or both of events A and B are said to be the proximate cause(s), and where B is the last in time, a number of possibilities arise. Either A or B may be adjudged to be the sole proximate cause. The court may, depending on the facts, select A as the proximate cause because its causative potency is such as to eclipse the significance of the fact that it is earlier in time than B or that something else had to happen before the loss arose; or because putative cause B is the inevitable consequence of cause A or will, in the ordinary course of events, arise from A without any intervening fortuity, or will usually do so.

25. Thus in *Etherington v The Lancashire and Yorkshire Accident Insurance Company* [1909] 1 KB 591 the assured fell from his horse, got wetted to the skin, and died of pneumonia. The accident was held to be the direct or proximate cause of loss as opposed to "*disease or other intervening cause*" which the policy expressly did not cover. This was on the basis that "*direct or proximate cause*" covered not only the immediate result of the accident but also "*all those things which may fairly be considered as results usually attendant upon the particular accident in question*". "*Disease or other intervening cause*" was treated as some disease or cause intervening which was "*independent of the accident and the ordinary results of the accident*" or "*independent and unconnected with the accident*" or something which was "*not a natural sequela of the accident*".

26. Alternatively, both A and B may both be adjudged to be proximate causes. If so, it may be that in order for the event in question to have happened it was necessary for both A and B to occur. Or it may be that the event would have happened if either A or B had occurred but, on the facts, both of them can be said to have caused it. If there are two proximate causes one of which is covered and one of which is within the exclusion, insurers are not liable, at any rate if, as here, both causes need to operate if the loss is to occur: *Cory v Burr* (1889) 8 App Cas 393 per Lord Blackburn; *Wayne Tank and Pump Co Ltd v Employers Liability Corporation Ltd* [1974] 1 QB 57. The effect of the exclusion is that, if the matter excluded is a cause, liability does not arise even if an insured peril is also one.

27. Exclusion clauses come in various forms. In an insurance policy the exclusion may simply be the reverse of the cover as where negligence is covered and dishonesty is excluded; or the exclusion may simply carve out from the cover some event which otherwise falls within the peril.

Cory v Burr

28. The potential difficulty in determining proximate cause is illustrated by the facts of *Cory v Burr* (1889) 8 App Cas 393. In that case a policy of marine insurance provided cover against perils which included "*barratry of the master*" as well as "*restraints and detainments of all kings, princes and people*" and the ship was warranted "*free from capture and seizure and the consequences of any attempts thereat*". The master engaged in smuggling – a barratrous act, which is defined by paragraph 11 of Schedule 1 of the *Marine Insurance Act 1906* to include "every *wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer*" – in consequence of which the ship was seized by Spanish revenue officers and proceedings were taken to procure her condemnation and confiscation. The House of Lords, affirming the decision of the Court of Appeal, held that the loss must be imputed to "*capture and seizure*" and that the insurers were not liable.

29. The Earl of Selborne LC was wholly satisfied that there was a capture or seizure without which the loss would not have occurred. But he considered the argument that, if a claim might have been made on the footing of barratry then the warranty did not apply, and rejected it. In setting out the argument he appears to have treated the seizure as the sole cause ("*and though the capture or seizure only caused the loss*": page 397) but the argument only arose if barratry was at least a proximate cause and he does not seem to have rejected it on the ground that it was not, referring later on

the same page to the application of the warranty "*whether remotely [the loss] was occasioned by barratry*".

30. Lord Blackburn, whose analysis has often been preferred, held that both the malicious act and the seizure were proximate causes. Lord Bramwell thought that it was possible that in some cases where there had been barratry and a consequent loss within the perils insured against, that you might call that a loss by barratry, but that that was not possible in this case. The ultimate loss was caused by a seizure. Lord Fitzgerald held that the seizure was the cause of the loss and that "*there was no loss occasioned by the act of barratry".*

31. I, in company with many others, would have difficulty in concluding that barratry was not at least a cause of the loss in that case. If that were so it would mean that there could be no recovery under a policy in which barratry was one of the perils and there was no exclusion clause. It would mean, as Professor Bennett put it in *The Law of Marine Insurance* that "*the proximate cause of criminals being imprisoned was their arrest by the police rather than their commission of the crimes for which they are imprisoned*".

32. In the present case it seems to me apparent from the judge's findings, and in any event to be the case, that the loss in question – the constructive total loss resulting from the detainment of the vessel – was caused both by the malicious act of the drug smugglers and by the detainment of the vessel by reason of the infringement of customs regulations, which infringement was constituted by the concealment of the drugs. Putting the drugs on the vessel was the malicious act which the judge plainly and rightly found to be a cause of the loss. If the malicious act was not a cause there would have been no cover. But putting the drugs on the vessel would not have caused the owners any loss if the detainment had not occurred; and the detainment by reason of the customs infringement was, itself, a proximate cause of the loss as the judge must necessarily have found (since, if it was not, it would not have been necessary to imply any limitation into the exclusionary wording of clause 4.1.5.). I do not accept that discovery of the drugs was the inevitable, natural or usual result of concealing them on the vessel. Most smugglers bank on their drugs not being discovered and often they are not. In the present case it was only the occurrence of a second unexpected inspection that led to discovery of the drugs.

Conclusion

33. In the light of the principles and facts to which I have referred, and for the reasons that I am about to state I have come to the conclusion that the judge was wrong to decide that clause 4.1.5 did not operate to exclude liability. My reasons are as follows.

34. First, the Clauses begin with the words "*Subject always to the exclusions hereinafter referred to...*" Mr Schaff understandably placed importance on the multiplicity of references to malicious acts in the cover. At the same time the structure of the Clauses is that the risks covered are the perils subject always to the exclusions. The perils and exclusions together express the ambit of the cover and they have to be construed together, each of them being looked at in the light of the other; you do not start from the premise that one has primacy over the other.

35. Second, as Hamblen J has held, the exclusions in 4.1.5 are not necessarily restricted to the cover provided by clauses 1.2 and 1.6. In those circumstances there is no warrant for thinking that the parties cannot possibly have intended that cover for malicious acts would be excluded if the malicious act constituted the infringement.

36. Third, whilst detention of vessels for infringement of customs regulations does not always involve smuggling – see, for example *The Wondrous* - smuggling is a paradigm case in which detention occurs because of such infringement. In "*The Kleovoulos of Rhodes*" (see [57] below) Clarke LJ said that he could "*see no distinction between smuggling and infringement of customs regulations*"; echoing precisely the same words in the judgment of Fenton Atkinson LJ in the Court of Appeal in *The "Anita"* at 889. Clarke LJ held that the true construction of what was then clause 4 (1) (b) (now clause 4.1.5) of the Clauses was part of the *ratio* of *The Anita* and that it had a meaning which included smuggling.

37. In the unamended version of the Clauses 12 months have to elapse before a detainment is treated as giving rise to a constructive loss. In the present policy that has been amended to six months. In either case it is much more likely that some form of smuggling activity, rather than some less heinous breach of regulation, will be what has given rise to the detainment for that length of time. It would be strange in those circumstances that the one detention for infringement of customs regulations to which clause 4.1.5 did not apply was detention on account of smuggling (or preparation therefor). Yet, if the owners are right, clause 4.1.5 does not, in practice, exclude smuggling which would otherwise be covered. The owners would not be covered by the policy if they were complicit in the smuggling because that would be contrary to public policy. If the crew were party to the smuggling that would be barratry which would be excluded by clause 4.2. as being covered by the Hulls Clauses (unless excluded from that cover because the owners failed to show due diligence). In relation to constructive total loss Clause 4.1.5 would appear then to apply only to the rare case of a vessel detained for six months on account of some customs infringement not amounting to smuggling e.g. the legitimate importation of goods without payment of the correct dues.

38. Further, Clause 4.1.5 appears to me to manifest an intention to exclude from cover any detainment attributable to breach of customs laws – and that would seem to me to form part of the "spirit of the policy" (itself a somewhat elusive concept). As Mr Michael Mustill, QC, as he then was, put it for the underwriters, in *The "Anita"* [1970] 2 Lloyd's Rep 365, 369:

> *"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 the quarantine regulations owing to characteristics of the vessel or crew and where the vessel gets into trouble with Customs."*

In the Court of Appeal Sir Gordon Willmer observed:

> *"The common sense of the matter, as Mr Mustill puts it, is that by that clause the underwriters were in effect saying: "We will not pay for loss caused by reason of the crew being sick or being caught smuggling". That is to put it in everyday*

> *language, but I would agree that that is prima facie what the exception means."*

39. *The Anita* was a case in which the policy provided cover for barratry. Here the War Clauses provide cover for malicious acts. But I cannot see that that should alter the analysis of the Court of Appeal which I have cited or lead one to adopt a different construction.

40. It may be, as Mr Schaff submitted, that clause 4.1.5 would not catch activities which were close to smuggling but did not involve any breach of customs regulations e.g. attaching drugs to the vessel which were to be picked up in the port or in territorial waters. But that does not, as it seems to me, justify a construction which does not exclude from cover that which is "*within the realm of customs*" (as Mr Mustill put it, *arguendo*, in *The Anita*). Mr Schaff submitted that this would lead to unacceptably fine distinctions. I disagree. In any event the application of exclusions does sometimes involve fine distinctions, although not in this case.

41. The conclusion I have reached as to the ambit of clause 4.1.5 tallies with the observations of Lord Selborne in *Cory v Burr,* 397*:*

> *"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 arguments that it must be the case as to barratry."*

42. Lord Selborne made it clear that he would be equally dismissive of an argument which, in a case of belligerent capture, relied on the primary cover in respect of "men-of-war" or "enemies" or "takings at sea" or "pirates" or "restraint and detainments of kings, princes and people", all of which were perils expressly covered. It seems to me that, were it otherwise, the case of *Powell v Hyde* (1855) 5 E & B 607 was wrongly decided. In that case it was accepted that the loss arose from an insured peril (not precisely identified in the judgment but possibly the "all other perils" clause) but the policy was warranted free from capture and seizure. Whilst sailing down the Danube flying the British flag the vessel was fired at from a Russian fort and sunk. The underwriters were held to be entitled to rely on the warranty on the footing that the intention of the Russians, who were at war with the Turks, and had been exchanging shots with a Turkish fort, was to detain the vessel.

43. The Clauses in effect at the time of *The Anita* were the 1959 Clauses. They provided cover for "*destruction of or damage to the property hereby insured caused by persons acting maliciously*". The exclusion in clause 4 (1) (a) was in respect of "*arrest restraint or detainment under quarantine regulations or by reason of infringement of any customs regulations*". That exclusion was apt to cover losses attributable to smuggling. It cannot, however, be said to have been designed to exclude liability in relation to malicious acts not involving destruction of or damage to property since there was no such cover. Nevertheless, the exclusion, which, for present purposes, is materially the same in the 1983 Clauses, seems to me apt to apply to present circumstances. In 1983 barratry came to be included in the Hull Clauses, so that cover against barratry was provided under the Hull cover provided that the loss or damage had not resulted from want of due diligence by the Assured Owners or Managers. Mr Schaff submits that it would be curious in those circumstances if smuggling activities by third parties were excluded from cover under the War Clauses. However, in circumstances where those clauses have traditionally excluded loss caused by smuggling that result does not seem to me to be surprising.

44. In this case each side argued that the position taken by the other was unbusinesslike. The owners say that whether the malicious acts cover is available should not depend on whether a put-up job of one or other of the three kinds can be established (which would, itself, be difficult) and that it made little sense to offer cover against detainment by reason of infringement of customs regulations arising from barratry of the crew (under the Hulls clauses) but not in respect of malicious third parties (under the War clauses). The insurers say that on their approach all smuggling falls outside the scope of the War clauses. They are thereby relieved of the necessity, which on the judge's construction would in practice arise, of having to show that the Master, Officers or crew were complicit (so that the case came within 4.2), a construction which would itself render otiose the conclusion of Hamblen J that it was not necessary for the insurers to prove complicity of the crew to come within clause 4.1.5.

45. As so often the question of what is business-like depends on whose business is being considered. For present purposes it is sufficient to state that there is nothing unbusinesslike in the insurers' position even though it is favourable to them. The construction for which they argue is not therefore one from which the court should instinctively resile. On the contrary there is much to be said for casting the onus of proof on the owners of (i) barratry by the crew and due diligence in respect of a claim under the Hulls policy; and (ii) circumstances which might mean that the exclusion under the War clauses was inapplicable in respect of a claim under those clauses (as to which see [54] below). Further the anomaly relied on by the owners does not take account of the facts (i) that the Hull and War Risk Underwriters are not likely to be the same and (ii) that the latter do not provide cover against barratrous smuggling by the crew.

46. Fourth, the proposition that "infringement" cannot be taken to include an infringement which is itself no more than the manifestation of the relevant malicious act involves writing in (whether by a process of construction or implication) words which are not there. Unless one does so the answer is clear. If the malicious act is the concealment of drugs on the vessel and the concealment of drugs is an infringement of the customs regulations, the vessel will have been detained by reason of an infringement of the customs regulations.

47. The court should be reluctant to do some form of writing in in clauses drafted for use in insurance contracts throughout the world. The submission also pays little heed to the difference in function between clause 1.5 and clause 4.1.5. The insured must bring himself within clause 1.5 and in this case does so. The next question is whether the loss arose from detainment by reason of infringement of customs regulations. I can see no good reason why the latter wording must be interpreted as inapplicable in the case of a malicious act which amounts to an infringement, particularly given that the wording of clause 4.1.5 is available to exclude the insurers from liability at least in some cases in respect of, *inter alia,* malicious acts within clause 4.1.5.

48. If the owners be right I find it difficult to see how clause 4.5 could ever do so. Mr Schaff gave as an example a situation where there are independent proximate causes each of which, operating separately would by itself have detained the vessel. There the exclusion would bite. The example he gave was of malicious vandalism of a vessel when independently the vessel was being detained for non-payment of customs duties. The second example was of what he described as interdependent causes. Assume that some malicious acts damage the vessel. Then upon importation of some vital part needed for repair there is a failure to pay customs dues which causes a substantial period of delay; after that happens the delay, he submits, could be said to be caused by both causes and the exception would apply.

49. Neither of these examples appears to me to involve an interplay between clause 4.1.5 and 1.5. In the former case clause 4.1.5 is operating within its own province and is not providing an exception to the malicious acts cover. In the latter case it is difficult to see how the delay arising from the failure to pay customs dues for the imported part is to be attributed to the original malicious act. If the vessel would have been repaired within 3 months if the duty had been paid but in fact took six months because of wrangling about the customs duty payable, the proximate cause of the first three months delay would seem to be the malicious act and of the second three months the failure to comply with the customs regulations.

50. The interpretation argued for might have force if all malicious acts were caught by the exemption. But they are not. There are many malicious acts e.g. sabotage, the explosion of goods secreted on the vessel, the killing or wounding of a crew member, or the smuggling of illegal immigrants, which do not involve any infringement of customs or trading regulations. In short there is, in my view, no necessity arising from the language of the clause or otherwise to imply a limitation.

51. I do not, in this respect, think that the owners derive much assistance from "*The Aliza Glacial*" and Toulson J's observation that the words "*any financial cause*" must have some limitation. The approach that he adopted was to find that the effective cause of the detainment of the vessel was the fact that she had been caught fishing "*and the fact that its release might have been procured by a payment of money should not lead to the conclusion that the cause of the detainment was financial*". The case did not involve any implied limitation on clause 4.1.6. In the present case the effective causes are the malicious act and the detainment. The two are not to be conflated, not least because the structure of the policy requires consideration of two separate questions: (i) what loss was caused by the peril and (ii) whether there was a detainment by reason of infringement of customs regulations.

52. Fifth, if the construction chosen by the judge is the correct one, the application of the exemption will be anomalous. Assume that the drug laden vessel sails and is arrested in Venezuelan waters there would, on the judge's analysis, be no cover, since the infringement i.e. the transportation would be more than a mere manifestation of the malicious act.

53. Sixth, the "put-up job" cases are all examples of circumstances in which the court may well be able to find that detention did not in truth occur by reason of infringement of customs regulations (if the authorities were behind it all along) or that the stratagem of the authorities or the malice of the villain was the proximate cause of the loss. In each case – planting by the authorities and planting by the villain either with or without blackmail – detention is the inevitable and intended consequence of the primary actor. After that malicious act there is no further fortuity. Detection and detention are inevitable and intended; and in the case of the first example "detection" is itself an illusion since the authorities know the position all along, and are the planners of it. Mr Schaff submitted that the policy was intended to cover all types of malicious acts and not to exclude a subset of acts which were reckless and not intentional. I would view it differently. The policy intended to exclude a subset of loss which arose from detainment by reason of breach of customs regulations. If it is clear that the loss was so caused the exception applies.

54. Seventh, the judge's construction does not tally with previously decided cases. It is inconsistent with what Lord Selborne said in *Cory v Burr* (see [41] above) and also with what was said by Lord Blackburn. 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.'"*

55. Lord Blackburn then considered the effect of the warranty, 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."*

The "Kleovoulos of Rhodes"

56. In *The "Kleovoulos of Rhodes* the facts were as follows:

> *"2. The appellant claimants were insured under the terms of a war risk insurance which included the Institute Clauses. The defendant respondents were the underwriters and one of the 16 vessels insured was the KLEOVOULOS OF RHODES. ... the insurance was to provide cover for 12 months from 15 March 1998. The vessel sailed from Colombia to Greece, where she was detained on 20 August 1998 following the discovery of cocaine in a sea chest below the waterline. Her master and crew were charged with drugs offences, although they were all acquitted in January 2000.*
>
> *3. In the meantime the vessel was detained long enough to be deemed a constructive total loss ('CTL') under the terms of the insurance. The insured value of the vessel was agreed to be US$8,000,000. It was common ground that after her release the vessel was sold for a net sum of US$1,362,573 and that the quantum of the respondents' liability, if any, for a CTL was therefore US$6,637,427 plus interest. In these circumstances it was and remains common ground that the respondents are liable in that amount unless their liability is excluded by clause 4.1.5.*

> 4. *In the event the judge held that the claim failed because the loss arose from detention of the vessel by reason of loss arising from "detainment ... by reason of infringement of customs regulations" and was excluded by clause 4.1.5 of the Institute Clauses."*

57. The Court of Appeal upheld the decision. The critical question in the case was whether an infringement of customs regulations extended to an infringement of a law which prohibited the import of particular classes of drugs, as opposed to one which imposed duties, to which the answer was that it did. No argument was based on the "*malicious act*" peril then in the Clauses. Whether that was because "malicious" was then - the case being argued before the decision of Colman J in *The "Grecia Express*" *[2002] EWHC 203 (Comm)* - thought to require intentional harm or something like spite is unknown. But if the owners' contention be right the case was wrongly decided, unless the fact that the drugs were discovered in the country of destination makes all the difference.

58. I can see no rational basis for making a distinction between cases where the vessel is static and the infringement consists of putting goods for smuggling on board her and cases where the smuggled goods are discovered in transit or at their point of destination. Mr Schaff in effect agreed and submitted that a decision in a case equivalent to *The "Kleovoulos of Rhodes"* could be decided in favour of the owners on the basis that the importation of the drugs into Greek waters was "*no more than the execution of the stratagem of the malicious third party*" or that the infringement was "*independent of the insured peril*". This submission produces a yet further form of implicit qualification for which there is, in my view, no warrant and has the effect that, in a smuggling case, clause 4.1.5 can never operate as an exclusion since all parts of the smuggling operation - concealment, transit, delivery, export and import are part of the execution of the stratagem. It is also inconsistent with the decision of Hamblen J that, as a matter of construction, clause 4.1.5 is applicable to clause 1.5.

59. Some discussion took place at the hearing as to whether the words "***by reason of** an infringement of the customs regulations*" involved a question of proximate cause. For his part Mr Edelman (who did not appear below) made a distinction (not drawn below) between a "how?" cause and a "why?" cause and submitted that the words "*by reason of*" introduced a "why?" question which involved a form of causation which was not identical to proximate causation. In his submission the answers to the "how?" questions were (a) the malicious act; and (b) the detention; and the answer to the "why" question, which only applied to the detention, was because there was an infringement of the customs regulations. He referred to a number of passages in *The Anita*, where "by reason of" was treated as a "why?" question; see 384, col 1 at first instance, and pp 888 ff in the Court of Appeal. The fatal flaw in the argument accepted by the judge – that infringement was only a manifestation of the malicious act - was, he submitted, that it asked the "how?" question in relation to the infringement not the "why?" question in relation to detainment.

60. There is a distinction between a "how?" and a "why?" question. But in many cases the question can be asked in either form ("How/Why did the apple come to fall from the tree?); and receive the same answer ("Because Newton pulled at the branch it was on"). I also doubt the justification for, or at any rate the utility of, categorising the answer to the "How?" question as giving the proximate cause and the answer to the

"Why?" question as giving some cause short of the proximate one. I note that in *The "Kleovoulos of Rhodes*" Clarke LJ concluded [64] that "*the proximate cause of the initial detention of the vessel was indeed the unlawful importation of the drugs into Greece",* although he was in fact answering a "why?" question.

61. At any rate the matter can be put more simply as follows. The concealment of the drugs was the malicious act. It was also an infringement of the regulations. Concealment carried with it the risk of discovery and, thereafter detention. The malice of the smugglers lay in their reckless indifference to the consequences to the vessel of the discovery of what they had concealed on the vessel. The loss was caused by the combination of (i) the initial concealment and (ii) the subsequent detention. That detention was by reason of the concealment, which constituted the infringement. The argument of the owners is designed to remove *infringement* as a proximate cause because it duplicates the malicious act which constituted the infringement. But that is to jettison the wrong thing. The second cause was the *detention*, which undoubtedly occurred by reason of the concealment which constituted the infringement. Hence the owners' need to exclude, as a matter of construction or implication, from the operation of clause 4.1.5 an infringement consisting of the relevant malicious act, which, for the reasons that I have given, does not appear to me to be justified.

62. I would, therefore, allow the insurers' appeal and dismiss the cross appeal against Hamblen J's decision in relation to the third preliminary issue in relation to which Mr Schaff made no submissions.

Sir Timothy Lloyd:

63. I agree that the appeal should be allowed and the cross appeal dismissed for the reasons set out in the judgment of Christopher Clarke LJ.

Lord Justice Laws:

64. I also agree.

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