Easter Term
[2018] UKSC 26
On appeal from: [2016] EWCA Civ 808

JUDGMENT

Navigators Insurance Company Limited and others (Respondents) *v* Atlasnavios-Navegacao LDA (formerly Bnavios-Navegacao LDA) (Appellant)

before

Lord Mance, Deputy President
Lord Sumption
Lord Hughes
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

22 May 2018

Heard on 20 March 2018

Appellant	*Respondents*
Alistair Schaff QC Alexander MacDonald (Instructed by W Legal Ltd)	Colin Edelman QC Guy Blackwood QC (Instructed by Stephenson Harwood LLP)

LORD MANCE: (with whom Lord Sumption, Lord Hughes, Lord Hodge and Lord Briggs agree)

Introduction

1. In August 2007, the vessel "B Atlantic", owned by the appellant, was used by unknown third parties in an unsuccessful attempt to export drugs from Venezuela. After her consequent detention by the Venezuelan authorities and the expiry of a period of more than six months, the owners treated the vessel as a constructive total loss. The issue is whether the vessel sustained a loss by an insured peril, entitling the owners to recover the vessel's insured value from the respondents, her war risks insurers.

2. The war risks insurance policy was for a year commencing 1 July 2007. According to section A, it afforded hull and machinery cover

> "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."

The cover afforded was on the terms of the Institute War and Strikes Clauses Hulls-Time (1/10/83). These provide as follows:

> "1. PERILS
>
> Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the vessel caused by
>
> 1.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
>
> 1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

1.3 derelict mines torpedoes bombs or other derelict weapons of war

1.4 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

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 12 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

…

4.1.2 the outbreak of war (whether there be a declaration of war or not) between any of the following countries:

United Kingdom, United States of America, France,

the Union of Soviet Socialist Republics,

the People's Republic of China

4.1.3 requisition or pre-emption

4.1.4 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered

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

4.1.7 piracy (but this exclusion shall not affect cover under Clause 1.4),

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 …"

The period of 12 months in clause 3 was by agreement reduced to six months.

3. The appeal turns on the inter-relationship of the perils identified in clauses 1.2, 1.5 and 1.6 with clause 3 and with the exclusions identified in clause 4.1.5. This was considered in the courts below in two stages. First, four preliminary issues were identified, three of which were determined by Hamblen J by a judgment given on 23 March 2012: [2012] EWHC 802 (Comm). There was then a trial before Flaux J of all other issues of fact and law extending over some 14 days in October 2014, leading to a judgment dated 8 December 2014: [2014] EWHC 4133 (Comm); [2015] All ER (Comm) 439. An appeal against aspects of Hamblen J's and Flaux J's judgments was heard on 14-15 June 2016 and determined on 1 August 2016 by the Court of Appeal (Laws LJ, Clarke LJ and Sir Timothy Lloyd): [2016] EWCA Civ 808; [2017] 1 WLR 1303.

4. Hamblen J determined that, in order to rely on clause 4.1.5, insurers did not need to show privity or complicity on the part of (a) the insured or (b) any servant or agent of the insured. There has been no challenge to these conclusions. He also answered in the negative a third issue

> "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."

5. On that basis, Flaux J determined that owners were entitled to recover from insurers. The cause of the vessel's loss was the malicious act of unknown third parties in attaching the drugs to the hull, and the exclusion of detainment, etc "by reason of infringement of any customs … regulations" in clause 4.1.5 was to be read as subject to an implied limitation where the only reason for such infringement was such an act. The Court of Appeal reached the opposite conclusion, holding that no basis existed for any such implied limitation, and that the vessel's loss could both be attributed to a malicious third party act within clause 1.5 and be excluded as "arising from … detainment … by reason of infringement of any customs … regulations" within clause 4.1.5. The Court of Appeal also dismissed owners' cross-appeal (in support of which owners had offered no submissions) against Hamblen J's determination of the third issue before him. Before the Supreme Court, owners have preserved their case that Hamblen J was wrong on this point as an alternative

to their primary case that, assuming he was right, clause 4.1.5 still does not cover the present circumstances.

6. As is evident from this summary, it has been common ground since at least the hearing before Flaux J that the attempted use by unknown third parties of the vessel for the purpose of smuggling involved the unknown third parties "acting maliciously" within the meaning of clause 1.5. Only on that basis can owners claim under clause 1.5 and argue that clause 4.1.5 is inapt to cut back the cover against malicious acts which clause 1.5 affords. However, during the course of the hearing before it, the Supreme Court concluded that it was necessary to re-examine the resulting common ground, to avoid the risks attaching to any exercise of deriving conclusions from what might prove a false premise. The parties were therefore invited to make and after the hearing made further written submissions on the effect of clause 1.5. The owners continued to resist the proposed expansion of the issues on this appeal, but in my view it involves no real prejudice on a point which is one of pure construction and law.

Events in detail

7. The vessel had in early August 2007 loaded a cargo of coal in Lake Maracaibo, Venezuela for discharge in Italy. During an underwater inspection on 12 August 2007, divers discovered a loose underwater grille, in the space behind which were a grappling hook, a saw, a rope and other tools. The Master was told to have the grille rewelded because of the risk of drug smuggling, but declined as the vessel was due to sail that night. In fact, there had been a miscalculation of the vessel's draft, which, when appreciated, enabled her to load a further 800 metric tons. Her sailing was thus delayed to 13 August 2007, enabling a second underwater inspection to take place, during which the divers now discovered three bags of cocaine weighing 132 kg strapped to the vessel's hull, ten metres below the waterline and some 50 metres from the grille. Unknown third parties were responsible - presumably associated with a drug cartel intent on smuggling drugs out of South America into Europe. It is not suggested in these proceedings that either the owners or their crew were in any way implicated (although, as will appear, a different conclusion was reached in Venezuela with regard to the master and second officer).

8. The concealment of the drugs constituted an offence under article 31 of the Venezuelan Anti-Drug Law 2005, which provides:

> "Whoever illicitly traffics, distributes, conceals, transports by any means, stores, carries out brokering activities with the substances or their raw materials … for the production of

> narcotic drugs and psychotropic substances, will be punished with a prison sentence of between eight and ten years."

In case of an offence under article 31, article 63 authorised seizure of any ship involved "as a precautionary measure until … confiscation in a definitive judgment", with a proviso that "the owner is exonerated from that measure when circumstances demonstrate its lack of intention". Article 66 further provides:

> "The … property … ships and other items employed to commit the investigated offence, as well as property about which there is a reasonable suspicion that it originates 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 …"

9. The vessel was detained and the crew were arrested. On 25 September 2007 the master and second officer were charged with complicity in drug smuggling, and on 31 October 2007 they were sent for trial and the judge, Judge Villalobos, ordered the continued detention of the vessel under articles 63 and 66 of the Anti-Drug Law. In August 2010, following a jury trial, both officers were convicted. They were sentenced to nine years' imprisonment and the vessel was ordered to be confiscated. It is accepted that the arrest and detention of the officers and the detention and confiscation of the vessel were all lawful under Venezuelan law.

10. Meanwhile, the owners had on 18 June 2008 served a notice of abandonment. Insurers accept that, if the peril which materialised fell within the scope of the insurance cover, this notice of abandonment was effective to constitute the vessel a constructive total loss under clause 3 of the Institute War Risks and Strikes Clauses.

Analysis

11. The premise of the case as advanced until now has been that unknown third parties acted maliciously within the meaning of clause 1.5, shifting the focus to the question whether in the circumstances the exclusion in clause 4.1.5 applies. If clause 1.5 does not apply, then owners would have to fall back on the perils of detainment, etc in clause 1.2, to which, in linguistic terms, clause 4.1.5 directly responds. If the peril relied on had been "detainment", it would be difficult, indeed one might have thought impossible, to argue that the present was not a case of "detainment … by reason of infringement of any customs … regulations" within clause 4.1.5.

12. An attempt to mount such an argument failed unequivocally in the Court of Appeal in a smuggling case with some similarities to the present: *Sunport Shipping Ltd v Tryg Baltica International (UK) Ltd (The "Kleovoulos of Rhodes")* [2003] 1 Lloyd's Law Rep 138. A large quantity of cocaine was there discovered by divers behind a grille in a sea chest at the vessel's discharge port, Aliveri - having been placed there by unknown third persons at the load port in Colombia, South America. The crew were ultimately acquitted of any involvement, but the vessel's detainment lasted so long that she could be and was declared a constructive total loss under clause 3. Owners evidently did not think to advance a case based on clause 1.5, so the dispute turned solely on whether clause 4.1.5 applied. The Court of Appeal held that the phrase "infringement of any customs … regulations" extended naturally to smuggling, citing in this respect *Panamanian Oriental Steamship Corpn v Wright (The "Anita")* [1971] 1 WLR 882. Owners argued nevertheless that the detainment of the vessel as part of the proceedings against the crew and her subsequent constructive total loss was not by reason of the infringement of customs regulations by unknown persons in Colombia. The Court of Appeal held that the infringement was "not simply the historical causa sine qua non of the detention but remained the proximate or operative cause of the detention for the whole relevant period" (para 66). Owners' claim therefore failed. It is to my mind inconceivable that the result could have been any different had the drugs been discovered and the vessel detained at the load port before setting out on her voyage.

13. The present owners' case thus turns on the fact that the Institute War and Strikes Clauses identify as perils insured, not merely detainment etc under clause 1.2, but also loss or damage to the vessel caused by "any person acting maliciously" under clause 1.5. Once relied on, the specific cover against malicious acts should not, owners submit, be undermined or cut back by an exception of "detainment … by reason of infringement of customs … regulations" which owners submit is most obviously addressing other situations - or which, on owners' alternative case, is not even addressing clause 1.5 at all.

14. It is in the light of these submissions that the Supreme Court concluded that, despite the common ground between the parties, the necessary starting point is to examine the scope of the concept of "any person acting maliciously" in clause 1.5. This is a phrase which must be seen in context, appearing as it does in the middle of perils insured involving "loss of or damage to the Vessel caused by … [1.5] any terrorist or any person acting maliciously or from a political motive". Its companions in that context are terrorists and persons acting from a political motive, causing loss or damage to the vessel. What the drafters appear to have had in mind are persons whose actions are aimed at causing loss of or damage to the vessel, or, it may well be, other property or persons as a by-product of which the vessel is lost or damaged. Applying a similar rationale to the central phrase "any person acting maliciously", it can be said that the present circumstances involve no such aim. Foreseeable though the risk may be that drugs being smuggled may be detected, their detection

and any consequent loss or damage to the vessel were the exact opposite of the unknown smugglers' aim or, presumably, expectation.

15. The Institute War and Strikes Clauses must also be read in the context of established authority, particularly at the time when they were drafted and, on 1 October 1983, issued. Here, the position is also instructive. The Clauses were part of a determined attempt by the London market to update its marine forms. This included the replacement of the old Lloyd's SG policy which, however quaintly attractive to those initiated in the mystique, had with justification been criticised as to its form and content for some 200 years: see eg *Brough v Whitmore* (1791) 4 Term Rep 206, 210, per Buller J; *Rickards v Forestal Land, Timber and Railways Co Ltd* [1941] 1 KB 225, 246-247, per MacKinnon LJ; *Panamanian Oriental Steamship Corpn v Wright (The "Anita")* [1970] 2 Lloyd's Rep 365, 372, per Mocatta J; and *Shell International Petroleum Co Ltd v Gibbs (The "Salem")* [1982] QB 946, 990D-F, per Kerr LJ and 998F-999B, per May LJ. It also included the replacement of the Institute War and Strike Clauses Hulls - Time (1/10/59) which had been used to insure, inter alia, risks excluded under the Lloyd's SG form by the FC&S warranty ("warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat"), as well as the replacement of the Institute Strikes, Riots and Civil Commotions Clauses used to cover cargo.

16. The attempt came to fruition with the issue of a series of freshly drafted Clauses on 1 October 1983, some 18 months after Kerr LJ's and May LJ's words in *The Salem*. While the clauses were freshly drafted, they did not abandon, but sought to bring fresh order and clarity to, many of the time-honoured concepts used in the market. In the present context, prior authority on the concept of persons acting maliciously is therefore potentially relevant. By clause 1 of the Institute Strikes Riots and Civil Commotions Clauses (issued for use with cargo insurance), cover was granted in respect of

> "loss or damage to the property hereby insured caused by
>
> (a) strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions;
>
> (b) persons acting maliciously."

17. The scope of the cover provided by clause 1(b) in respect of "persons acting maliciously" had been recently considered in two important cases: *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd (The "Mandarin Star")* [1968] 1 WLR 1325 (Donaldson J); [1969] 2 QB 449 and *The Salem* in early 1982. Neither

case would have escaped the knowledge of marine insurance practitioners and lawyers or of the specialist drafters of the revised Clauses - and particularly not the sensational case of *The Salem*. In *The Mandarin Star* the vessel's owners had, following a dispute about unpaid charter hire, directed the master to sail from off Kobe, the discharge port, to Hong Kong, where, in collusion with the charterers, they purported to mortgage the cargo. The insured cargo interests recovered the cargo, but (in a friendly test case) claimed under the insurance the expenses of doing so and of returning the cargo to Kobe. They alleged that there had been a "taking at sea" or theft under the SG form or loss "caused by … persons acting maliciously" within the Institute Strikes, Riots and Civil Commotions Clauses. Their claim succeeded in the Court of Appeal on the basis that there had been a taking at sea, when the vessel sailed from off Kobe. (This conclusion was regarded as erroneous in *The Salem* by Lord Denning at pp 987E-988C and Kerr LJ at pp 989-993E, on the basis that a change in the character of the shipowner's possession vis-à-vis cargo-interests without any dispossession from outside, was outside the policy cover.) The claim failed by a majority on theft, on the basis that the vessel's owners may have thought that they had a lien justifying their conduct. It failed on malicious act both at first instance and in the Court of Appeal. Donaldson J said, at p 55, that: "in the context in which the cover is afforded … an element of spite towards someone, although not necessarily the cargo-owners, is an essential element". Lord Denning MR said (p 462H) that: "'maliciously' here means spite, or ill will, or the like. There is none such here." Edmund Davies LJ agreed at p 463D with Lord Denning on this point - even though in his view the taking also amounted to theft. Phillmore LJ also agreed that the claim for malicious act failed, saying, less compellingly in my view, that (p 467G-H):

> "it seems to me that that claim ignores the terms of the policy, which under the Institute Strikes, Riots and Civil Commotions clauses is obviously intended to deal with damage effected in the course of some civil disturbance which has nothing whatever to do with the facts of this case."

18. *The Salem* involved the audacious making away with a whole cargo of crude oil, in order to supply South Africa in breach of international sanctions. The conspirators purchased and manned a tanker, *The Salem*. They chartered her to an innocent charterer, Pontoil SA, for a voyage to Europe carrying a cargo of oil which Pontoil acquired from Kuwait Oil Co in Mina al Ahmadi and agreed to resell to Shell, whose interest was insured with the defendant and other insurers for some USD56m. Instead of performing the chartered voyage, the conspirators procured the tanker to enter Durban, where most of its cargo (some 180,000 mt) was discharged and delivered to the South African Strategic Fuel Fund Association in return for payment to the conspirators of a price of over USD32m. They then took the vessel to sea again with a residue of the cargo (some 15,000 mt), and had her scuttled to conceal what had happened.

19. Shell as insured cargo-owners claimed for barratry or taking at sea under the SG policy form and/or for "persons acting maliciously" under the Institute Strikes, Risks and Civil Commotions Clauses. In the event, it was held that there was no barratry, because the conspirators who owned the vessel were privy to its crew's acts; there was no taking at sea in respect of the bulk of the cargo, because its effective taking was not at sea, but was in Durban (per Kerr LJ at pp 993F-996B, 997H-998D and May LJ at pp 1000H-1002A) or at the load port, Mina al Ahmadi (per Lord Denning MR at pp 986G-987D). Shell's claim for the residue of the cargo succeeded as a loss by perils of the sea, under the language of a special clause introduced (following the House of Lords decision in *F Samuel & Co Ltd v Dumas* [1924] AC 431) to allow an innocent assured to recover for loss otherwise "attributable to the wrongful act or misconduct of the shipowners or their servants".

20. Shell's claim for "persons acting maliciously" failed before Mustill J on the ground that, giving these words the meaning attributed to them in *The Mandarin Star*:

> "… they are plainly not appropriate to the present loss. The conspirators were not inspired by personal malice against Pontoil; they simply wished to steal the cargo, the identity of the owner being immaterial. The same is the case as regards the destruction of the cargo remaining on board when the vessel sank. Perhaps there may, consistently with the decision in *The Mandarin Star*, be a right to recover where the insured property is damaged by an act of wanton violence, the malice being directed, so to speak, at the goods rather than their owner. But it is unnecessary to decide this here, for the cargo was not lost because the conspirators desired to harm either the goods or their owner. The loss was simply a by-product of an operation carried out for the purposes of gain. On the reasoning of the Court of Appeal this is not within the scope of the peril." (pp 965-966)

In the Court of Appeal, Lord Denning referred to Mustill J's ruling on this point, and recorded that it was accepted by Shell.

21. In June 1982, some four months after the Court of Appeal's judgment in *The Salem*, Mr Hallgarten QC representing owners in *Athens Maritime Enterprises Corpn v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1983] 1 QB 647 recited the effect of the statements in *The Mandarin Star* and *The Salem* on the meaning of any person acting maliciously. The context was cover in respect of "persons acting maliciously" afforded by the Association under old-form rules covering war risks, which included cover in the same terms as those quoted from

clause 1 of the Institute Strikes Riots and Civil Commotions Clauses in para 16 above. Mr Hallgarten did not suggest that the judge (Staughton J) could do anything but apply the statements in the two cases cited, but said merely that "the position was reserved in case the matter goes further". Counsel's precautionary reservation in this case cannot to any significant extent weaken the force of the two recent authorities of *The Mandarin Star* and *The Salem* as aids to understanding the meaning of clause 1.5.

22. In my view, therefore, the concept of "any person acting maliciously" in clause 1.5 would have been understood in 1983 and should now be understood as relating to situations where a person acts in a way which involves an element of spite or ill-will or the like in relation to the property insured or at least to other property or perhaps even a person, and consequential loss of, or damage to, the insured vessel or cargo. It is not designed to cater for situations where the state of mind of spite, ill-will or the like is absent. In the present case, foreseeable though the vessel's seizure and loss were if the smuggling attempt was discovered, the would-be smugglers cannot have had any such state of mind. They were, on the contrary, intent on avoiding detection. If the commission of a wrongful act, coupled with the foreseeability of loss or damage affecting the insured property were sufficient, irrespective of motive or aim, then the claims for malicious acts should have succeeded in both *The Mandarin Star* and *The Salem*. (That said, I confess to some hesitation about the narrowness of Mustill J's decision in *The Salem*, excluding from the concept both theft of the majority of the cargo and deliberate destruction of the rest, on the ground that these were simply by-products of a larger operation carried out for gain. I do not however suggest that, even if others were to share this hesitation, a different interpretation should, after so long a period, necessarily follow if a similar issue were now relitigated.)

23. The contrary common ground in this case until the Supreme Court was based on two later judgments of Colman J. The first was in *Strive Shipping Corpn v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Grecia Express")* [2002] EWHC 203 (Comm); [2002] 2 Lloyd's Rep 88, 96 and the second in *North Star Shipping Ltd v Sphere Drake Insurance plc (The "North Star")* [2005] EWHC 665 (Comm); [2005] 2 Lloyd's Rep 76 at para 83, where he reiterated what he had said in the former case. In *The Grecia Express*, it is important to note the submission which was being made by insurers to and was rejected by Colman J. The submission was that "maliciousness" required the owners to show that the sinking was directed at them, rather than, for example, the result of random vandalism: see pp 95-96. After considering *The Mandarin Star* and *The Salem*, Colman J said (p 96) that:

> "Since the factual basis upon which the Court of Appeal reached its conclusion in both cases was such that the 'persons acting maliciously' cover was inapplicable whether it had

> either of the meanings considered by Mr Justice Mustill in *Shell Petroleum* the point is at large in this Court."

On the face of this passage, therefore, Colman J saw himself as operating within the parameters set by the previous two authorities.

24. Colman J's ensuing discussion has nonetheless been seen by some as supporting a broader interpretation of the concept of "persons acting maliciously". He said:

> "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."

In this passage, I do not consider that Colman J was intending to do more than decide the narrow issue before him, which was, as indicated, whether spite, ill-will or the

like required conduct targeted specifically at the insured property or its owner, rather than casual or random vandalism. He had started by indicating that he was addressing the distinction between the possible meanings identified by Mustill J in *The Salem*. His references to recklessness must be read in the context of the issue before him, whether the cover extended to casual or random vandalism. He was focusing on conduct in relation to the vessel or other property in circumstances where the perpetrator was either aiming at the occurrence of loss or damage to the vessel or engaging in random vandalism. That, as I have already pointed out, is not the present case. Finally, both cases before Colman J concerned loss or damage which was due either to a deliberate attempt to write the ship off or to vandalism. So the question of a criminal act with a quite different intention but which might, however foreseeably, lead to seizure and detention of the vessel by public authorities did not actually arise or require to be addressed.

25. In support of an interpretation of "any person acting maliciously" broad enough to embrace any wrongful act, however motivated, committed in circumstances where the actor could be said to foresee the possibility of loss or damage to property, owners rely not only on their interpretation of Colman J's judgments, but also on discussion in authority of the concept of malice in a tortious context. They point in this connection to the authority of *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* (1946) 79 Lloyd's Rep 417. In that case, at pp 431-432, Atkinson J cited *Allen v Flood* [1898] AC 1 to assist in the construction of the then Riots and Civil Commotions Clauses. These clauses covered loss or damage by persons taking part in riots and civil commotions or "from any other malicious act whatsoever by any persons", but excluded war risks and all other risks ordinarily covered under the vessel's marine policy. Atkinson J held on the facts that the vessels insured had been taken away by rioters, rather than combatants in the Spanish Civil War, and that this also amounted to a loss by a malicious act.

26. In his judgment, Atkinson J cited passages from the speeches of Visc Halsbury LC and Lord Herschell in *Allen v Flood*. In *Allen v Flood*, Mr Flood had in the course of his duties as a trade union official told the employers of some ironworkers that the ironworkers would go on strike, unless the employers ceased employing some woodworkers, who the ironworkers believed had worked on iron for another firm. The employers discharged the woodworkers (without breach of contract). Two of the woodworkers sued Mr Flood for loss of their employment, arguing that mere malice, in the sense of doing that which was calculated in the ordinary course to damage, and which did damage, without just cause or excuse, sufficed to ground tortious liability. The majority of the House rejected this sense in this context, affirming that, although in a colloquial sense malice means simply ill-will, "in its legal sense it means a wrongful act done intentionally without just cause or excuse" (per Lord Herschell at p 124). However, so wide a definition would appear to have been unnecessary for the actual decision in *Pesquerias y Secaderos*. The rioters who there made off with and caused the loss or damage of the vessels

plainly intended to deprive the owners of the vessels in question. Their conduct would appear to have satisfied the tests indicated in *The Mandarin Star* and *The Salem*. But whether it would have or not, those tests constitute a sounder basis for a proper understanding of the intention of the drafters of the 1983 Institute Clauses than Atkinson J's shortly reasoned importation from an entirely different area of the law of the definition used in *Allen v Flood*.

27. A similar observation applies to the meaning of malice in the criminal law context of the Malicious Damage Act 1861, to which Colman J referred. Apart from the fact that very few sections of the Malicious Damage Act remain on the statute book after the Criminal Damage Act 1971, there seems a negligible chance that either of the Acts was in the minds of the drafters of the Institute Clauses in 1983. However, Colman J was right to regard both the insurance and the criminal law concepts of a person acting maliciously as covering casual or random vandalism; and they each involve significant, if not necessarily identical, subjective mental elements. Some authors have suggested that the use of a criminal law test would offer practical benefits of simplicity and avoid the need to consider the state of mind of the actor: see Professor Bennett on *The Law of Marine Insurance*, 2nd ed (2006), para 14.24 and Michael D Miller's work on *Marine Insurance War Risks*, 3rd ed (2005), pp 201-205, where reference is also made to the Offences against the Person Act 1861. But a long stream of authority under the 1861 statutes act established that the criminal law concept of malice involved a very significant mental element: see *R v G* [2003] UKHL 50; [2004] 1 AC 1034. However, this old criminal law definition (for which, see *R v Cunningham* [1957] 2 QB 396, quoted by Lord Bingham in *R v G*, para 11), was developed in a context and for a purpose very different from those applying to the Institute War and Strikes Clauses.

28. For these reasons, neither *Allen v Flood* nor authority under Victorian criminal law statutes of 1861 appears to me a very helpful guide to the meaning of "any person acting maliciously" in clause 1.5 of the Institute Clauses. The more helpful approach is therefore to read the phrase in those Clauses in its immediate context and in the light of the recent marine insurance authorities to which I have referred which must have been in the drafters' mind. What the context and authorities indicate is that an element of spite, ill-will or the like is required. But I would not limit the concept to conduct directed towards the insured interest. An act directed with the relevant mental element towards causing the loss of or damage or injury to other property or towards a person could lead to consequential loss of or damage to an insured interest within clause 1.5, whether the actor was a terrorist, a person acting maliciously or a person acting from a political motive.

29. On the basis of the above, what matters is that this is not a case where the attempted smuggling can be regarded as having been aimed at the detention or constructive total loss of or any loss or damage to the vessel or any property or person. Under Venezuelan law, the smuggling was no doubt itself a wrongful act

done intentionally without just cause or excuse. But the smugglers were not intending that any act of theirs should cause the vessel's detention or cause it any loss or damage at all. In my opinion, they were not acting maliciously within the meaning of clause 1.5.

30. The conclusion is that clause 1.5 is not apt to cover the present circumstances, and that the premise on which this appeal reaches the Supreme Court is incorrect. That is sufficient to dismiss this appeal.

The position if the premise adopted below were correct

31. I have rejected the premise which was common ground between the parties. I will nevertheless address the position had it been accepted. For this purpose, the assumption is therefore that (contrary to my view) the attempted smugglers could and should be regarded as having caused the loss of the vessel acting maliciously. Two questions then arise. The question which is logically first arises from owners' fall-back challenge to Hamblen J's decision on the third issue before him. Can clause 4.1.5 be read as having any application at all to clause 1.5? The second question, if Hamblen J's affirmative answer to this first question was correct, is whether clause 4.1.5 applies in the particular circumstances, bearing in mind the apparent coincidence in this case of the malicious act insured under clause 1.5 and the infringement of customs regulations excluded under clause 4.1.5.

32. As to the first question, the force of owners' case is that clause 4.1.5 uses terminology which echoes relentlessly the terminology of clauses 1.2 and 1.6, and in no way that of clause 1.5. On the other hand, it would be surprising if, by putting a claim on the basis of a malicious act under clause 1.5, an insured could improve the position which would apply if it had invoked clause 1.2 or 1.6. Further, and even more significantly, owners themselves must, by relying on clause 3 to establish a constructive total loss, be accepting and asserting that the vessel has been the subject of seizure, arrest, restraint or detainment, and has been lost thereby, which is exactly the subject matter of the exclusion introduced by clause 4.1.5 ("loss … arising from … arrest restraint detainment …"). In these circumstances, owners were correct to regard their fall-back case with a distinct lack of enthusiasm.

33. The second question therefore arises whether clause 4.1.5 applies in the circumstances of this case, bearing in mind the apparent coincidence of the malicious act insured under clause 1.5 and the infringement of customs regulations excluded under clause 4.1.5. Flaux J saw this coincidence as necessitating an implied limitation to the effect that clause 4.1.5 would 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" (para 258). The problem about this is that no

apparent basis exists for any such implied limitation. None of the criteria for implication of an implied term is satisfied. It is entirely understandable that clause 4.1.5 should cut back or define the limits of cover otherwise available under clause 1. That is its clear role in relation to clause 1.2 or 1.6 if relied on. (It is also an element of the role of, for example, clause 4.1.2 in relation to the cover otherwise provided by clause 1.1.) It makes sense that clause 4.1.5 should have a similar effect in relation to clause 1.5, if clause 1.5 is engaged at all.

34. Flaux J thought the contrary. He referred to a concession made by insurers that clause 4.1.5 would not apply in the event of a "put-up" job. That was a reference to a situation hypothesised by Lord Denning MR in *The "Anita"* [1971] 1 WLR 882. *The Anita* was decided under the Institute War and Strikes Clauses Hull - Time (1/10/59), which, as noted in para 15 above, insured inter alia the risks excluded from the SG form by the FC&S warranty. Such insurance was subject in clause 4 to a precursor of the present clause 4.1.5. Clause 4 read:

> "This insurance excludes
>
> (1) loss, damage or expense arising from
>
> (a) requisition or pre-emption
>
> (b) arrest, restraint or detainment under quarantine regulations or by reason of infringement of any customs regulations; …"

35. *The Anita* was a case of crew smuggling. The vessel was confiscated by order of a special court set up by decree in Vietnam. Mocatta J held that what occurred was not ordinary judicial process, but involved a seizure or restraint of princes within the FC&S clause. He went on to hold that insurers had also failed to discharge an onus on them to show that the confiscation arose by reason of infringement of customs regulations, rather than by a decision of the special court which was not only given outside its jurisdiction, but may well have been given with the knowledge of that fact and upon the orders of the executive (p 365). The Court of Appeal held that Mocatta J was wrong to place the onus on insurers to disprove political interference. As Lord Denning MR put it (p 888H): "Suffice it for them to prove the breach of regulations and that the confiscation was the result of it. That they proved." Fenton Atkinson LJ said that he could "for the purposes of this case ... see no distinction between smuggling and infringement of customs regulations" (p 889C) and that insurers "showed a blatant case of smuggling, or, perhaps more correctly, a strong prima facie case of an infringement of customs regulations followed by a

proper hearing by a lawfully constituted tribunal to whom this court should be slow indeed to attribute bad faith" (p 889D-E). The special court did not appear on the evidence to have acted outside its jurisdiction. There had been no plea that it had acted under executive orders and the evidence did not show this either.

36. The discussion in *The Anita* indicates that there may be situations in which a loss is not attributable to infringement of customs regulations, but to the improper exercise of judicial or political power. Lord Denning's reference to a "put-up job" postulated another situation in which there would be no loss by infringement of customs regulations, as follows (p 888A):

> "Of course, if there were no goods smuggled and the seizure was a put-up job, it would be quite different."

However, that seems obvious. There would be no infringement of customs regulations at all. There would also be no goods smuggled, even if one assumes in this example that the authorities went to the length of planting drugs on board, or attaching them to the hull.

37. Flaux J postulated two further scenarios which he suggested would fall outside clause 4.1.5: (a) a malicious third party plants drugs in order to blackmail the owners and when they refuse to pay informs the authorities about the drugs leading to the vessel's seizure; and (b) the same scenario without the blackmail attempt, but with the malicious third party simply planting the drugs and informing the authorities in order to get the vessel detained. I note that both scenarios fall within the narrow concept of malicious act indicated in *The Mandarin Star* and *The Salem*. Even if the concept of malicious has a wider scope, capable of embracing the different scenario presented by the present appeal, these two scenarios are on this basis distinguishable. The centrality of the intentional motivation to the causation of a loss may well be capable as a matter of causation of taking the loss outside the scope of the exception in clause 4.1.5. That does not mean that any other malicious acts, such as that involved in this appeal, involve loss falling outside the scope of clause 4.1.5, as a matter of either construction or causation.

38. Flaux J also found support for a confined interpretation of clause 4.1.5 in dicta of Toulson J approved by Potter LJ in *Handelsbanken ASA v Dandridge (The "Aliza Glacial")* [2002] EWCA Civ 577; [2002] 2 Lloyd's Rep 421, para 52, treating a vessel's loss, following owners' refusal to meet an outrageous ransom demand by a terrorist organisation, as outside the scope of a loss by "any financial cause" in clause 4.1.7: see also *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd (The "Silva")* [2011] EWHC 181 (Comm); [2011] 2 Lloyd's Rep 141, para 46(ii), per Burton J. I see little difficulty about this. Clause

4.1.7 is obviously aimed at ordinary financial vicissitudes, of one sort or another, not at the outrageous sequela of terrorist activity. The cause of the vessel's loss would still be the terrorist activity. But that throws no light on the scope or application of clause 4.1.5 in the present case.

39. Neither as a matter of construction nor as a matter of causation is there in my view any basis for treating clause 4.1.5 as inapplicable to the present loss. Mr Alistair Schaff QC for owners submitted that the malicious act, rather than the infringement of the customs regulations, fell to be regarded as the proximate, effective or real cause of the insured loss. This submission faces a number of problems. The first is that the malicious act is the infringement of the customs regulations. There is (as Fenton Atkinson LJ thought in the parallel circumstances of *The Anita*) no distinction between them. The role of clause 4.1.5 is, as I have said, to cut back on cover in respect of loss caused by perils otherwise insured under clauses 1.2 and 1.6. If clause 1.5 applies in the present circumstances, the role of clause 4.1.5 with regard to that clause appears on its face to be the same.

40. Secondly, even if some meaningful distinction existed between the malicious act and the infringement of customs regulations, it does not follow that this gives rise to a binary choice between two competing proximate, real or effective causes of the insured loss. What is required is an exercise of construction of the particular wording, giving effect at each stage to the natural meaning of the words in their context. This is also how the House of Lords saw a somewhat similar issue in the famous case of *John Cory & Sons v Burr* (1883) 8 App Cas 393. The question there was whether a loss fell to be attributed (solely) to the insured peril of barratry or fell within the warranted FC&S exception. This was treated as a question as construction: see eg at pp 396-397 per the Earl of Selborne LC, pp 402-403 per Lord Blackburn, p 403 per Lord Bramwell and pp 405 and 406 per Lord Fitzgerald.

41. As a matter of construction, the analysis of the present Clauses falls into three stages. The first stage, if clause 1.5 is capable of applying at all, is that there was a loss caused by a "person acting maliciously". Assuming that there was, the second stage is that the means by which loss arose was the vessel's consequent detainment and the fact that this lasted for a continuous period of six months. Only on this basis were the owners able to treat the vessel as a constructive total loss under clause 3. The third stage involves the question whether such detainment was by reason of any infringement of customs regulations within clause 4.1.5.

42. At each stage, different factors are introduced, and are capable of shifting the focus of attention. In *Royal Greek Government v Minister of Transport (The "Ann Stathatos")* (1949) 83 Lloyd's Rep 228, 237 (as I noted in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2) (The Kos)* [2012] 2 AC 164, para 43) Devlin J pointed out that the existence of an exceptions clause is itself likely to affect what falls to be regarded

as dominant, proximate or relevant; and that this is because "the whole of what one might call the area naturally appurtenant to the excepted event must be granted to it". In the present case, it makes it possible that a loss may both be caused by a person acting maliciously within clause 1.5 and at the same time arise from detainment by reason of infringement of customs regulations within clause 4.1.5. The scheme of the Clauses directs attention first to whether there was prima facie a loss by a specified peril and then to whether the same loss arises from an excepted peril. The transition from the question whether there was a loss caused by a malicious act to the question whether the loss arose from detainment by reason of infringement of customs regulations is furthermore inevitable, since owners have to rely on clause 3 to establish any case of constructive total loss at all.

43. Thirdly, while the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes. This is particularly so where an exceptions clause takes certain perils out of the prima facie cover: *ENE Kos*, at paras 41-43 and *International Energy Group Ltd v Zurich Insurance plc* [2016] AC 509, para 73. The possibility of such an analysis is in the present case evident when detainment is, in terms, a peril insured against by clause 1.2, and, in order to claim at all, owners have to invoke a detainment under clause 3. It is only by refraining from relying on the most obviously applicable peril covered, that owners are able to seek to suggest any way at all round the otherwise obviously applicable exception in clause 4.1.5. Putting the matter the other way round, if the attempted smuggling constituted a malicious act within clause 1.5 at all, this was at best only one element in the causative events leading to the loss, which is relevant under the wording of this policy; detection, detainment and its continuation for a period of at least six continuous months were equally essential contributing causes of any loss.

44. Owners submit that the detainment and its continuation can be regarded, and dismissed causatively, as no more than incidents of or sequela to the original malicious act. This is unreal in practical terms. They were by no means bound to occur. The unknown smugglers must have acted on the basis that there was a considerable prospect of their activity going undetected and being successful. Owners' submission on this point is also inconsistent with authority. A very similar argument was run in *Cory v Burr*, where the master of a vessel took on board at Gibraltar eight tons of tobacco, for delivery to a smaller vessel for the purpose of being smuggled into Spain. Spanish revenue officers seized the vessel, and took it into Cadiz with a view to its confiscation, which was only avoided by heavy expense. It was argued that the master's barratrous smuggling was the cause of the vessel's loss, rather than the capture or seizure or its consequences from which the vessel was warranted free by the FC&S clause.

45. The argument was shortly dismissed. The Earl of Selborne viewed such a construction of the policy and the warranty taken together as "leading to

consequences altogether destructive of the whole operation of the warranty" (p 397). Lord Blackburn said that it was true that the insurance had not been warranted free from barratry, but went on (pp 400-401):

> "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, … 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?"

46. Lord Bramwell noted the argument that the loss was not from the seizure but in truth from the barratry, and the "ingeniously" made suggestion that the seizure was "an intermediate step", and responded: "But it was the ultimate and final step which occasioned the loss" (p 403). Finally, Lord Fitzgerald, after observing that barratry "may be either harmless or effect but a small loss" (p 406) put 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."

47. *Cory v Burr* therefore makes clear that there is no question of dismissing a vessel's capture and detainment in such circumstances as a mere incident of, or sequela to, an underlying cause such as barratry in that case, or a malicious act in the present. Similarly, in *The Salem*, the majority concluded that the relevant "taking" of the bulk of the cargo occurred on its discharge in Durban, rejecting submissions that it occurred when the vessel deviated from her voyage to put into Durban, or when she sailed from Mina al Ahmadi with the intention of discharging

the cargo in Durban - however much these events signalled the forthcoming appropriation.

48. There are of course cases where one peril will dominate and exclude from relevance a later development which taken by itself might otherwise be seen as engaging an exception. The two scenarios hypothesised in para 37 above can be seen as examples. The case of *In re Etherington and the Lancashire and Yorkshire Accident Co* [1909] 1 KB 591 may be regarded as another. The insured there suffered a riding accident, inflicting a shock to his system and involving him in a severe wetting which he had to endure on his way home. He caught pneumonia within just over a day, from which he died. The policy contained an exception of "disease or other intervening cause", but it also covered death occurring within three months of an accident, suggesting that the natural sequela to an accident were intended to be covered. The policy exception was in the circumstances read contra proferentem so as to be confined to situations where some new intervening disease was the cause of death, rather than a case like the actual one, where pneumonia afflicted the insured within a little over a day. The Court of Appeal understandably regarded the case as difficult and it was probably near the borderline. The court's readiness to apply the maxim contra proferentem in the way it did is also readily understandable in a personal injuries context, far removed from the present, which lies in an area well-covered by authority.

49. Fourthly, there are, in *Cory v Burr*, differences evident in the approaches of Lord Blackburn on the one hand and Lords Bramwell and Fitzgerald on the other. Lord Blackburn, whose speech has proved to have the greatest resonance in subsequent authority, saw the case as one where it made sense to speak of concurrent causes. Lord Bramwell and Lord Fitzgerald approached it as one where it was possible to identify a single real or effective cause of the loss. For my part, I prefer Lord Blackburn's approach in the present case, where the perils insured include both detainment and malicious acts and the policy wording introduces different stages in an enquiry, at each of which different considerations may apply. Subsequent authority confirms Lord Blackburn's conclusion that, where an insured loss arises from the combination of two causes, one insured, the other excluded, the exclusion prevents recovery: see eg *P Samuel & Co Ltd v Dumas* [1924] AC 431, 467, per Lord Sumner; *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corpn Ltd* [1974] QB 57, per Lord Denning MR at p 67B-F, per Cairns LJ at p 69B-D and per Roskill LJ at pp 74E to 75D. Here, the two potential causes were the malicious act and the seizure and detainment. The malicious act would not have caused the loss, without the seizure and detainment. It was the combination of the two that was fatal. The seizure and detainment arose from the excluded peril of infringement of customs regulations, and the owners' claim fails. In *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor MOPU)* [2011] UKSC 5; [2011] 1 Lloyd's Rep 560, para 88, I expressed a reservation in the very different context of the inter-relationship in the light of the Marine Insurance Act 1906 and of existing

authority between hull cover against perils of the seas and inherent vice. That reservation does not on any view have traction in relation to the present careful exclusion of the peril of loss arising from detainment by reason of infringement of customs regulations from cover under the Institute War and Strikes Clauses Hulls-Time.

50. Fifthly, echoing the Earl of Selborne's words in *Cory v Burr*, owners' construction would be at least significantly destructive of the purpose of clause 4.1.5. Clause 4.1.5 is unnecessary to cater for cases of smuggling by owners themselves. Cases of crew barratry are, at least generally, excluded by the conjunction of clause 4.2 of the Institute War and Strikes Clauses Hulls - Time with clause 6.2.5 of the Institute Time Clauses Hulls, which covers barratry: see per Colman J in *The Grecia Express* at p 97 and in *The North Star*, para 82. It is true that clause 6.2.5 is subject to a proviso, which Colman J did not mention - "provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers". But it seems improbable that the Institute War and Strikes Clauses Hulls - Time were intended to pick up a narrow band of barratrous conduct, to which owners were not privy, but against which they had failed to exercise due diligence to guard.

51. It may of course be suggested that clause 4.1.5 was inserted simply in order to make the position express in relation to smuggling to which either the owners or the crew were privy. But there is no indication that it is limited to them, and there has, rightly in my view, been no appeal against Hamblen J's decision that it is not. There is nothing to suggest that insurers were willing to accept the risks of smuggling by third parties. A considerable risk of detainment and constructive total loss exists, whoever is responsible for the smuggling. Indeed, it will commonly be very difficult for customs authorities, insurers or anyone to know whether or not crew members were implicated. Owners point to various situations in which clause 4.1.5 could still bite, even if it does not apply to third party smuggling: the innocent importation or exportation of prohibited goods, or breaches of customs regulations not involving smuggling. No doubt such cases exist, but there is nothing to confine clause 4.1.5 to them, or to make it likely that anyone contemplated so narrow a confine to its operation.

52. Owners also point to scenarios which would not be caught by clause 4.1.5, including the scenario, on which the drafters of the clause may perhaps be forgiven for not focusing, of purely domestic "smuggling" within a particular country. These too provide no reason for not giving clause 4.1.5 its ordinary meaning, in the relatively commonplace situations which its drafters were clearly addressing.

53. Owners also submit that it would be surprising if barratrous smuggling (without any want of due diligence on owners' part) was covered by clause 6.2.5 of

the Institute Time Clauses Hulls (see para 49 above), whereas third party smuggling were not covered by the Institute War and Strikes Clauses Hulls - Time. They point out, correctly, that the two sets of Clauses would, at least generally, be expected to mesh together to achieve a coherent picture. The inter-relationship of the two sets of Clauses in this area is however specifically addressed by a clause in the Institute Time Clauses Hulls. This reads:

> "23. WAR EXCLUSION
>
> In no case shall this insurance cover loss damage liability or expense caused by
>
> > 23.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
> >
> > 23.2 capture seizure arrest restraint or detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat
> >
> > 23.3 derelict mines torpedoes bombs or other derelict weapons of war."

54. Assuming, without having to decide, that the effect of clause 23.2 is that detainment following a barratrous smuggling attempt is covered by the Institute Time Clauses Hulls, it is clear that any other detainment is left to be addressed by other arrangement, most obviously by the Institute War and Strikes Clauses Hulls - Time. The specific reference in clause 23 to "capture seizure arrest restraint or detainment … and the consequences thereof or any attempt thereat" takes one straight to clause 1.2 of those Clauses, where loss by detainment is expressly covered. But the cover is subject to the exclusion in clause 4.1.5 in respect of loss by "detainment … by reason of infringement of customs … Regulations". The natural inference from the interrelationship of the two sets of Clauses is not that third party smuggling was left by the Institute Time Clauses Hulls to be covered by the Institute War and Strikes Clauses Hulls - Time. Rather it is that detainment by third party smuggling was not contemplated as covered by the latter Clauses at all. Instead, assuming detainment by barratrous smuggling to be covered by the combination of clauses 6.2.5 and 23.2 in the Institute Time Clauses Hulls, detainment by third party smuggling was understood to be excluded by both sets of Clauses. Whether that is commercially satisfactory or whether cover is available on the market for owners to fill any gap in respect of third party smuggling which may

be perceived as a result is not a matter which we have the material to judge or upon which we can speculate.

Conclusion

55. For these reasons, I would conclude:

i) First, (contrary to the common ground between the parties in the courts below) the vessel's loss was not caused by "any person acting maliciously" within the meaning of clause 1.5 of the Institute Clauses. It was caused simply by detainment, which entitled the owners to invoke clauses 1.2 as well as clause 3, but which, since the detainment itself arose by reason of infringement of customs regulations, also brought the exception in clause 4.1.5 into operation.

ii) Second, if it had been possible to view the loss as caused by a person acting maliciously within clause 1.5, it would still have been excluded by clause 4.1.5 as arising, at least concurrently, from detainment by reason of infringement of customs regulations.

I arrive therefore at the same result as the Court of Appeal, though by different reasoning. The appeal should be dismissed.