**22 May 2018**

**PRESS SUMMARY**

**Navigators Insurance Company Limited and others (Respondents) v Atlasnavios-Navegacao LDA (formerly Bnavios-Navegacao LDA) (Appellant) [2018] UKSC 26**
***On appeal from [2016] EWCA Civ 808***

**JUSTICES**: Lord Mance (Deputy President), Lord Sumption, Lord Hughes, Lord Hodge and Lord Briggs

## BACKGROUND TO THE APPEAL

In August 2007 'B Atlantic' ('**the Vessel**'), owned by the Appellant, was used by unknown third parties in an unsuccessful attempt to export cocaine from Venezuela by strapping a parcel of drugs to the vessel underwater. The Vessel was detained by Venezuelan authorities. After a period of more than six months, the Appellant treated the Vessel as a constructive total loss. The issue raised by the present case is whether the owners are entitled to recover the Vessel's insured value from the Respondents, the Vessel's war risk insurers. This turns on the terms of the insurance policy. The cover afforded was on the terms of the Institute War Strikes Clauses Hulls-Time ('**the Institute Clauses**'). The key provisions were:

*Clause 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 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.*

*Clause 3: DETAINMENT*
*In the event the Vessel shall have been the subject of capture seizure arrest 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.*

*Clause 4.1.5: EXCLUSIONS*
*This insurance excludes…arrest restraint detainment confiscation or expropriation…by reason of infringement of any customs or trading regulations…*

On a trial of preliminary issues Hamblen J held that Clause 4.1.5 was not confined to Clause 1.2 and 1.6, but left open whether it applied to Clause 1.5. At trial, Flaux J held that the owners were entitled to recover, because Clause 4.1.5 did not apply to an infringement of customs regulations occurring due to malicious acts of third parties falling within Clause 1.5, such as the attempted smugglers' act in attaching the drugs to the hull. The Court of Appeal disagreed, holding that the Appellant's claim was excluded under Clause 4.1.5 even if it fell within Clause 1.5. The owners appealed on the basis of common ground that the attempted smugglers were 'acting maliciously' within the meaning of Clause 1.5. During the course of the hearing the Supreme Court considered that it was necessary to re-examine that common ground. The parties made further written submissions on this point **[6]**.

## JUDGMENT

The Supreme Court unanimously upholds the Court of Appeal's decision and dismisses the appeal. First, the Vessel's loss was not caused by 'any person acting maliciously' within the meaning of Clause 1.5 of the Institute Clauses. Second, even assuming that there was loss caused by a person acting maliciously, it was still excluded by Clause 4.1.5. Lord Mance writes the judgment.

## REASONS FOR THE JUDGMENT

**'Acting Maliciously'**

The attempted smugglers were not 'acting maliciously' within Clause 1.5 **[30]**. An element of spite, ill-will or the like is required, although this is not limited 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 **[28]**. The attempted smuggling cannot here be regarded as aimed at the detention of or any loss or damage to the Vessel or any property or person **[29]**.

Clause 1.5 must be read in its immediate context and in the light of the recent marine insurance authorities which would have been in the minds of the drafters of the Institute Clauses **[28]**. With regard to context, 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 other property or persons as a by-product of which the vessel is lost or damaged. Detection of the smuggled drugs and any consequent loss or damage to the Vessel were the exact opposite of the unknown smugglers' aim **[14]**.

The Institute Clauses were issued on 1 October 1983 **[15]**. They were drafted to bring fresh order and clarity to many of the concepts used in the market. Prior authority on the concept of persons acting maliciously is therefore relevant **[16]**. *The Mandarin Star* [1968] 2 Lloyd's Law Rep 47 and *The Salem* [1982] 1 QB 946 establish that for a person to be acting maliciously an element of spite or ill will towards someone is required. The (earlier) Institute Clauses were held to be obviously intended to deal with damage effected in the course of some civil disturbance **[17]**. Whether the malice had to be directed to the cargo owner as opposed to the goods themselves was left unclear **[17 and 20]**. Authorities dealing with malice in a tortious context and Victorian criminal law statutes from 1861 do not provide helpful guidance to the meaning of 'any person acting maliciously' in Clause 1.5 **[25-28]**.

**The Operation of Clause 4.1.5**

Even if the attempted smugglers had been 'acting maliciously' within Clause 1.5, the Appellant's claim was still excluded under Clause 4.1.5 as arising, at least concurrently, from detainment by reason of infringement of customs regulations **[55]**. First, Clause 4.1.5 is applicable to circumstances falling within Clause 1.5. It would be surprising if an insured could improve its position by invoking one particular sub-clause of Clause 1, such as Clause 1.5, as opposed to Clauses 1.2 or 1.6. Further, the owners are relying on Clause 3 to establish constructive total loss which is exactly the subject-matter of Clause 4.1.5 **[32]**. Second, neither as a matter of causation nor as a matter of construction, is it possible to treat Clause 4.1.5 as inapplicable by drawing some distinction between the malicious act and the infringement of customs regulations as the proximate, real or effective cause of the loss **[39]**. The two are here effectively the same. Even if some meaningful distinction could be drawn between them, it does not follow that there is a binary choice between two competing proximate, real or effective causes of the insured loss.

What is required is a construction of the particular wording, giving effect at each stage to the natural meaning of the words in their context **[40]**. The general aim in insurance law is to identify a single real, effective or proximate cause of any loss, but in some cases there may be two concurrent causes of loss, particularly where an exception takes certain perils out of the prima facie cover **[43]**. Where an insured loss arises from the combination of two causes, one insured, the other excluded, the exclusion prevents recovery **[49]**. Here two potential causes can be identified viz the malicious act and the subsequent seizure and detainment. It was the combination of the two that was fatal. As the seizure and detainment arose from the excluded peril of infringement of customs regulations, the Appellant's claim fails **[49]**.

*References in square brackets are to paragraphs in the judgment*

**NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:** http://supremecourt.uk/decided-cases/index.html