Sunport Shipping Ltd and others v Tryg-Baltica International (UK) Ltd and others

[2003] EWCA Civ 12

COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON, CLARKE AND SCOTT BAKER LJJ
5,6 DECEMBER 2002, 24 JANUARY 2003

Marine insurance – War risks policy – Exception clause – Exclusion of liability for loss by reason of infringement of customs regulations – Confiscation of ship by order of foreign court on smuggling charge – Whether 'customs regulations' including narcotics offences – Whether loss attributable to infringement of customs regulations – Institute War and Strike Clauses (Hulls–Time), cl 4.1.5.

The claimants' vessel was insured by the defendant underwriters against war and other perils. The policy incorporated the Institute War and Strike Clauses (Hulls-Time) of 1 October 1983 (the Institute Clauses), cl 4.1.5 of which excluded from cover 'loss, damage ... arising from ... detainment ... by reason of infringement of any customs or trading regulations'. Having sailed from Colombia, the vessel was detained in Greece following the discovery of cocaine in a sea chest below the waterline. The master and crew were charged with drugs offences, although all were acquitted. In the meantime, the vessel was detained long enough to be deemed a constructive total loss (CTL) under the terms of the insurance. The defendants rejected a claim under the insurance and the claimants issued proceedings. It was common ground that the defendants were liable for loss unless their liability was excluded by cl 4.1.5 of the Institute Clauses. The judge held that the phrase 'detainment ... by reason of infringement of any customs or trading regulations' had to be construed in accordance with English law; be given a businesslike interpretation; be given a wide meaning to the extent that it was intended to cover laws in force in the particular country concerned, which could be anywhere in the world; and be construed in a reasonable manner. He further held that the Greek law which led to the vessel's detention fell within the expression 'customs .... regulations' and that the detention which constituted the CTL was loss 'arising from ... detainment of the vessel by reason of any infringement of any customs ... regulations' within the meaning of cl 4.1.5, and accordingly that the defendants were not liable. The claimants appealed on the grounds (i) that the judge had misconstrued the expression 'customs ... regulations' in cl 4.1.5 of the Institute Clauses; and (ii) that he had been wrong, as a matter of causation, to hold that the CTL of the vessel was a loss arising from her detention by reason of an infringement of customs regulations.

Held – (1) Like any term in a commercial contract, the expression 'customs ... regulations' in cl 4.1.5 had to be construed in its context. Thus it had to be construed having regard to its place in the contract as a whole and the contract had to be construed having regard to the surrounding circumstances. The most important surrounding circumstance in the instant case was that the Institute Clauses were drafted for use in insurance contracts throughout the world. There was therefore no reason to construe them by reference to European as opposed

to international practices. Equally, it was not appropriate to construe the phrase 'customs ... regulations' by reference to English statutes which conferred powers and imposed duties on HM Customs and Excise. In all the circumstances, while European Community (and thus English) customs laws were relevant to the question of the meaning of 'customs ... regulations' in cl 4.1.5, they were not determinative of it. In the context of the Institute Clauses, the natural meaning of the expression was much wider and included both regulations imposing import duties and regulations prohibiting imports altogether. It did not make commercial sense in the context of the Institute Clauses to construe 'customs ... regulations' as including the latter but not the former because there was no reason why the parties to an insurance contract of the kind entered into in the present case should draw such a distinction; in particular, there was no reason why the parties should have agreed to exclude a CTL arising from detention caused by the infringement of a regulation prohibiting the import unless duty is paid and not to exclude a CTL caused by detention caused by the infringement of a regulation which prohibited import absolutely. However, it did not follow that all regulations enforced by customs in a particular port would fall within cl 4.1.5, and each case would have to be examined on its facts in the light of the regulations concerned. The judge had construed cl 4.1.5 correctly and accordingly the appeal on the construction point would be dismissed (see [22], [29], [30], [37], [38], [41]–[43], [56], [57], [67]–[70], below); *Panamanian Oriental Steamship Corp v Wright* [1971] 2 All ER 1028 explained; *IDC Group Ltd v Clark* [1992] 2 EGLR 184, *International Fina Services AG v Katrina Shipping Ltd, 'The Fina Samco'* [1995] 2 Lloyd's Rep 344 and *Handelsbanken ASA v Dandridge* [2002] 2 All ER (Comm) 39 considered.

(2) The proximate cause of the initial detention of the vessel had been the unlawful importation of drugs into Greece, albeit not by the crew. Thereafter, the continued detainment of the vessel was necessary for as long as the investigation continued. In those circumstances, the judge had been right to conclude that the whole detention had arisen from the infringement of the customs regulations. Accordingly, the appeal on the causation point would be dismissed (see [64]–[70], below); *Panamanian Oriental Steamship Corp v Wright* [1971] 2 All ER 1028 considered.

Decision of Cresswell J [2002] 2 All ER (Comm) 350 affirmed.

Notes

For arrests, restraints, detainments etc, see 25 *Halsbury's Laws* (4th edn reissue) para 158.

Cases referred to in judgments

Aliza Glacial, The (11 May 2001, unreported), QBD; *affd* sub nom *Handelsbanken ASA v Dandridge* [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39.

Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229, [1985] AC 191, [1984] 3 WLR 592, HL.

Arbuthnott v Fagan, Deeny v Gooda Walker Ltd (in liq) [1995] CLC 1396, CA.

Blaine Richards & Co Inc v Marine Indemnity Insurance Co of America (1980) 635 F 2d 1051, US Ct of Apps (2nd Cir).

Goodwin (Criminal proceedings against) Case C-3/97 [1998] All ER (EC) 500, [1998] ECR I-3257, ECJ.

Handelsbanken ASA v Dandridge [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39.

Hooley Hill Rubber & Chemical Co Ltd, Re [1920] 1 KB 257, KBD and CA.

IDC Group Ltd v Clark [1992] 2 EGLR 184, CA; *affg* [1992] 1 EGLR 187.
Ikerigi Cia Naviera SA v Palmer, Global Transeas Corp v Palmer, The Wondrous [1991] 1 Lloyd's Rep 400; *affd* [1992] 2 Lloyd's Rep 566, CA.
International Fina Services AG v Katrina Shipping Ltd, The Fina Samco [1995] 2 Lloyd's Rep 344, CA.
Johnson v American Home Assurance Co (1998) 192 CLR 266, Aust HC.
Panamanian Oriental Steamship Corp v Wright [1971] 2 All ER 1028, [1971] 1 WLR 882, CA; *rvsg* [1970] 2 Lloyd's Rep 365.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Shipping Co [1976] 3 All ER 570, [1976] 1 WLR 989, HL.
Schuler (L) AG v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39, [1974] AC 235, [1973] 2 WLR 683, HL.
Stanley v Western Insurance Co (1868) LR 3 Ex 71, Exch Ct.
Tullihallitus v Kaupo Salumets Case C-455/98 [2000] ECR I-4993, ECJ.

Appeal

The claimants, Sunport Shipping Ltd, Prometheus Maritime Corp, Celestial Maritime Corp and Surzur Overseas Ltd, respectively the owner, named assured, manager and mortgagee of the vessel MV Kleovoulos of Rhodes, appealed with the permission of Clarke LJ granted on 17 April 2002 from the order of Cresswell J on 27 February 2002 ([2002] 2 All ER (Comm) 350) dismissing their claim on a policy of war risks insurance underwritten by the defendants, Tryg-Baltica International (UK) Ltd and 31 others. The facts are set out in the judgment of Clarke LJ.

Stephen Morris QC and *Andrew Baker* (instructed by *Clyde & Co*) for the claimants.
Michael Thomas QC and *Philippa Hopkins* (instructed by *Ince & Co*) for the defendants.

Cur adv vult

24 January 2003. The following judgments were delivered.

CLARKE LJ (giving the first judgment at the invitation of Peter Gibson LJ).

INTRODUCTION

[1] This is an appeal from an order dated 27 February 2002, in which Cresswell J dismissed the claimants' claim with costs. He also refused permission to appeal, although I myself subsequently granted permission on 17 April, albeit with less enthusiasm on the issue of causation than on the issue of construction. The appeal raises two issues. The first is a question of construction of cl 4.1.5 of the Institute War and Strikes Clauses, Hulls-Time of 1.10.83 (the Institute Clauses) and the second is an issue of causation.

[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. Although the precise date on which the contract of insurance was made was not in evidence, it appears to have been in early 1998 because 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 $US8,000,000. It was common ground that after her release the vessel was sold for a net sum of $US1,362,573 and that the quantum of the respondents' liability, if any, for a CTL was therefore $US6,637,427 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 cl 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 cl 4.1.5 of the Institute Clauses. His judgment is reported as [2002] EWHC 235 (Comm), in [2002] 2 All ER (Comm) 350, to which detailed reference should be made.

THE FACTS AND INSURANCE

[5] The primary facts are common ground and are set out, together with the relevant terms of the policy, in [2002] 2 All ER (Comm) 350 at [9]–[26]. I shall refer to only a few of them here. The judge set out (at [13]) some of the provisions of cll 1, 3 and 4 of the Institute Clauses, as amended by the express terms of the policy. For present purposes it is sufficient to quote only these, which appear under the heading 'This insurance is subject to English law and practice':

> '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 ...
>
> 1.6 confiscation or expropriation ...
>
> 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 ...
>
> 4.1.4 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 ...'

[6] On 19 August 1998 the vessel arrived in the port of Aliveri in Greece in order to discharge her cargo of coal which had been loaded in Colombia. On the next day, during an underwater inspection of the vessel required by the port authority, a large quantity (188·9 kg) of cocaine was discovered in waterproof packaging behind a grill in a sea chest on the starboard side of the vessel, well below the waterline.

[7] The officers and crew were immediately charged with drugs offences under Greek criminal law and the vessel was detained pursuant to the provisions of the Greek Narcotics Act, no 1729 of 1987, as amended. The judge quoted part of the report on seizure of the vessel, which was signed by the examining magistrate, as follows (in translation):

> 'Aliveri ... Thursday 20th August 1998 ... enquiring into the transportation of drugs, an investigation which took place on 20.8.98 in relation to the crew of the "Kleovoulos of Rhodes", a vessel sailing under the flag of Cyprus, we proceeded to take into possession—1. the vessel above described and its certificates of seaworthiness ... as these items have a bearing on the above offence, and we appoint as custodian and sequestrator the Port Authority of Aliveri ...'

[8] On 17 September 1998 the first appellant, as owner of the vessel, formally applied to the Halkida District Court Committee for the release of the vessel, but the application was dismissed by a decision published on 30 November 1998. On 25 January 1999 the Halkida District Court acceded to an application that the vessel be moved to Piraeus for her own safety.

[9] On or about 25 February 1999 the appellants gave notice of abandonment to the respondents, who did not accept it. As at that date, the vessel had remained under detention (or, in the words of the Institute Clauses, detainment) for a continuous period of over six months and the claimants had not had the free use and disposal of the vessel during that six-month period.

[10] On 17 March 1999 the Public Prosecutor of the Athens Court of Appeal indicted the members of the crew with the same drugs offences. The appellants did not make a further application for the release of the vessel until 5 April 1999. However, on that date they applied to the Athens Court of Appeal for her release. As a result, the vessel was released on 13 May 1999, subject to the provision of bail in the sum of GRD 500m. On 7 June the appellants applied for the bail to be lifted and that application was granted on 6 July 1999. The trial of the officers and crew was concluded on 10 January 2000, when they were all acquitted.

THE JUDGMENT

[11] The judge summarised first the issues between the parties ([2002] 2 All ER (Comm) 350 at [27]–[30]) and then the appellants' and the respondents' submissions respectively (at [31]–[48], [49]–[60]). Finally, between [61] and [82] he set out his own analysis and conclusions.

[12] As already indicated, the judge held that the respondents were not liable by reason of cl 4.1.5 of the Institute Clauses. His conclusions may be summarised as follows.

(i) The respondents must discharge the burden of bringing themselves within the clause (see [62]).

(ii) The words 'detainment ... by reason of infringement of any customs or trading regulations': (a) must be construed in accordance with English law; (b) must be given a businesslike interpretation (see *Panamanian Oriental*

Steamship Corp v Wright [1971] 2 All ER 1028 at 1032, [1971] 1 WLR 882 at 886 (*The Anita*) per Lord Denning MR and see also *The Aliza Glacial* (11 May 2001, unreported), where Toulson J held that the expression 'trading regulations' in the same clause should be given a 'businesslike interpretation'); (c) must be given a wide meaning to the extent that they are intended to cover laws in force, not in a particular country, economic union of countries or geographical area, but in the particular country concerned, which could be anywhere in the world (see *The Anita* and *Arnould's Law of Marine Insurance and Average* (16th edn, 1981) vol II, p 774 (para 906) and (16th edn, 1997) vol III, p 213 (para 357)); and (d) must be construed in a reasonable manner (see the decision of the United States Court of Appeals in *Blaine Richards & Co Inc v Marine Indemnity Insurance Co of America* (1980) 635 F 2d 1051 (see [2002] 2 All ER (Comm) 350 at [63], [65]–[70]).

(iii) The court should follow the settled meaning given to clauses of this kind in the interests of commercial certainty and should not alter or narrow the meaning to take account of subsequent events such as the development of European Community customs law (see [68]).

(iv) In the light of *The Anita* the expression 'customs regulations' in cl 4.1.5 should not be narrowly construed as meaning rules of law concerned with duties levied on imports but as wide enough to include provisions having the force of law in the country concerned (i) as to import or export duties and licences, and (ii) as to import or export of controlled drugs and other prohibited goods, substances and materials (see [70], [71]).

(v) The Greek law which led to the detention of the vessel was a law relating to the import of controlled drugs and therefore fell within the expression 'customs regulations' in the clause (see [72], [73]).

(vi) As to causation, the detention of the vessel for the necessary six months which amounted to the CTL of the vessel was loss 'arising from ... detainment of the vessel by reason of infringement of any customs ... regulations' within the meaning of the clause (see [75]–[81]).

THE APPEAL

[13] The appellants submit that the judge misconstrued the expression 'customs regulations' in cl 4.1.5 and, in any event, that he was wrong, as a matter of causation, to hold that the CTL of the vessel was a loss arising from her detention by reason of an infringement of customs regulations. I will consider those issues in turn.

Clause 4.1.5

[14] The appellants accept, as stated in [35] of the judgment, that an offence is committed contrary to art 5 of the Greek Narcotics Act if someone in Colombia plants cocaine on a vessel bound for Greece so that, unknown to those on board or otherwise connected with the vessel, the vessel arrives in Greece with cocaine on board. However, they submit that the Greek Narcotics Act, and in particular art 5, does not enact 'customs regulations' within the meaning of cl 4.1.5.

[15] The critical question is whether an 'infringement of customs ... regulations' extends to an infringement of a law which prohibits the import of particular classes of drugs. The appellants submit that it does not but, as I understand it, accept that, if it does, there was such an infringement in this case. By contrast, Mr Thomas QC accepts on behalf of the respondents that, if it does not, the appeal should be allowed. The judge (at [29]) correctly so stated the relevant question.

[16] The appellants' submissions may be summarised as follows.

(i) The word 'customs' is a legal term which means duty levied upon imports from abroad (see Macfarlane *Customs and Excise Law and Practice* (1st edn, 1993), *Jowitt's Dictionary of English Law* (2nd edn, 1977), *The Concise Oxford Dictionary* (6th edn, 1976, and 10th edn, 1999) and *Merriam-Webster's Collegiate Dictionary* (2002)).

(ii) Thus 'customs regulations' mean rules of law concerning duty levied on imports from abroad and 'infringement of customs regulations' means infringement of laws which impose import duties.

(iii) There is a difference in character between law-breaking in connection with matters of revenue (including customs) and law-breaking involved in bringing into a state an inherently illegal, absolutely prohibited, non-tradeable substance. Thus there is a difference in character between infringements of customs law in relation to lawful trade and commerce and drug smuggling. (The appellants say that this submission is not crucial to their case.)

(iv) It is nothing to the point that the Greek customs service is involved (with others) in investigating offences under the Greek Narcotics Act. While it is no doubt an obvious administrative convenience and common practice worldwide for customs services to play a role in the policing of drug-trafficking laws, since the remit of such services may be wider than customs properly so called, one cannot equate 'customs regulations' with 'laws policed by Customs' (ie, as it were, with a capital 'C').

(v) For example, 'quarantine regulations' and 'trading regulations', which are both expressly referred to in cl 4.1.5, are likely to be policed by customs, yet cannot thereby become 'customs regulations'.

(vi) Where a legal term is used in a commercial contract, it should be given its proper legal meaning (see eg Lewison *The Interpretation of Contracts* (2nd edn, 1997) p 102–103 (para 4.08) and *IDC Group Ltd v Clark* [1992] 2 EGLR 184 at 186 per Nourse LJ).

(vii) Quite apart from the meaning of 'customs', there is an established legal meaning under English law for the expressions 'customs regulations', 'customs rules' and 'customs law/legislation'. The appellants rely upon the provisions of European Community law, which form part of English law and are contained in arts 23 to 27 EC (formerly arts 9, 10, 12, 28, 29 of the EC Treaty), the Customs Code and the Implementing Regulation.

(viii) The essential subject matter of Community (and therefore English) customs law is customs duties. Moreover drugs fall outside the scope of customs law. They are wholly 'extra commercium' (see *Criminal proceedings against Goodwin* Case C-3/97 [1998] All ER (EC) 500 at 509, [1998] ECR I-3257 at 3271 (para 15)). They 'are not subject to customs regulations' (see *Tullihallitus v Kaupo Salumets* Case C-455/98 [2000] ECR I-4993 at 4999–5000 (para 18) per Advocate General Saggio).

(ix) There is no reason to depart from the proper meaning of 'customs regulations', unless *The Anita* requires such a departure, which it does not. The only reason given by the judge for not construing the expression as contended for by the appellants was the decision and reasoning in *The Anita*.

(x) The Institute Clauses do not exclude detainment by reason of ordinary criminal process, cl 4.1.6 having been construed as limited to civil process. Mr Baker gives a number of examples of such cases, of which two will suffice: suppose that a vessel is detained after a murder on board or after illegal immigrants are found on board; in either such event her owners would be entitled to recover for a CTL after six months.

(xi) The references to 'regulations' in the expressions 'quarantine regulations', 'customs regulations' and 'trading regulations' connote a body of rules of law of a certain character or nature (see e g *Handelsbanken ASA v Dandridge* [2002] EWCA Civ 577 at [30], [2002] 2 All ER (Comm) 39 at [30] per Potter LJ, giving the judgment of the court allowing an appeal from the decision of Toulson J).

(xii) The appellants' submissions read 'customs regulations' in that way by using the word 'customs' to define the type of law-breaking the consequences of which are excluded, namely non-payment or evasion of customs duties or infringement of formalities relating thereto.

(xiii) The judge nowhere attempts to define what is meant by the expression 'customs regulations' but merely says (in [73]) that it is wide enough to include regulations prohibiting the importation of controlled drugs. This is described as the appellants' central criticism of the judgment.

(xiv) The respondents do not offer any definition of the expression except (as the judge observed in [27]) that it means any law which figuratively might be described as in the realm of customs, the words being wide enough to include smuggling of prohibited goods, as well as smuggling of dutiable goods.

(xv) That definition is not acceptable for the reasons already given, namely that it depends not upon the character of the rules of law but upon the jurisdiction of the customs authorities in a particular state. It also leads to the absurdity that, if the vessel had been detained after drugs had been found in Colombia, the exception would not apply because in Colombia the customs authority has no authority in the matter of narcotics, whereas the exception would apply in Greece because the customs authority does have authority in that regard.

(xvi) *The Anita* is not in point. Nor is the discussion in *Arnould*. Alternatively they are wrong. I will set out the appellants' submissions with regard to both *The Anita* and *Arnould* in more detail in the course of the discussion below.

[17] The respondents submit that the judge was right essentially for the reasons he gave. It is not necessary to set out the submissions made on their behalf separately here because they seem to me to appear sufficiently from the discussion below.

Discussion

[18] I have reached the clear conclusion that the decision of the judge was correct and that this appeal should be dismissed. There is undoubted force in some of the submissions made on behalf of the appellants, but there are two principal reasons which have led me to the conclusion that they cannot be accepted. The first is what to my mind is the ordinary meaning of the expression 'customs regulations' in an international contract of insurance, coupled with the improbability of the Institute Clauses excluding detention caused by infringement of regulations which impose import duties but including detention caused by infringement of regulations which prohibit import of the same goods altogether. The second arises out of the decision and reasoning in *The Anita* coupled with the fact that the wording of the exception in cl 4.1.5 was retained (even expanded) in the 1983 edition of the Institute Clauses. Before considering those two aspects of the case, I say a word about the correct approach to construction of contracts of this kind.

The approach to construction

[19] The appellants submit that the judge should have defined 'customs regulations' before deciding whether it included a prohibition against

importation. They submit that, if he had done so, he would have appreciated that 'customs regulations' must mean (and mean only) regulations relating to duties. However, I would not accept that submission. It is not always easy to define an expression used in a contract in the abstract. As I see it the role of the court is limited to deciding the particular question which it is necessary to answer in order to resolve the issue between the parties. Thus here the question is whether 'customs regulations' in cl 4.1.5 is wide enough to include prohibitions on imports. The judge was in my view right to approach the question in that way.

[20] There are of course many cases which have discussed the principles of contractual construction in recent times. Mr Thomas referred to two in particular. The first is *International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd's Rep 344 at 350, where Neill LJ (with whom Roch and Auld LJJ agreed) summarised some of the relevant principles in this way:

> 'It is necessary to remember that this is a commercial document and that one must therefore strive to attribute to it a meaning which accords with business commonsense. Moreover, this approach conforms with the following guidance which can be collected from recent authority:
>
> (1) The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear [*L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 at 44–45, [1974] AC 235 at 251 per Lord Reid] ...
>
> (3) If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense [*Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233–234, [1985] AC 191 at 201 per Lord Diplock].
>
> (4) Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must so do *in situ* and not be transported to the laboratory for microscopic analysis [*Arbuthnott v Fagan, Deeny v Gooda Walker Ltd (in liq)* [1995] CLC 1396 at 1400 per Bingham MR].
>
> (5) Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision. [*Arbuthnott v Fagan* [1995] CLC 1396 at 1402 per Steyn LJ].'

[21] The second case to which Mr Thomas made particular reference was *Arbuthnott v Fagan*, part of which is quoted in the passages from the judgment of Neill LJ set out above. I do not think that further reference to it is necessary here

save perhaps to note that, after the passage from his judgment quoted above, Steyn LJ referred to the speech of Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Shipping Co* [1976] 3 All ER 570, [1976] 1 WLR 989 and to a passage from what he described as the seminal work, *Corbin on Contracts* (1960) vol 3, and stressed the importance of identifying the purpose of the contract. See also, to the same effect, *Arbuthnott v Fagan* [1995] CLC 1396 at 1403 per Hoffmann LJ.

[22] To my mind those principles are of importance here. In particular it seems to me that, like any term in a commercial contract, cl 4.1.5 should be construed in its context. As Lord Steyn recently put it more generally in the last sentence of his speech in *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26 at [28], [2001] 3 All ER 433 at [28], [2001] 2 AC 532, 'in law context is everything'.

[23] The appellants rely upon the principle expressed by Nourse LJ in *IDC Group Ltd v Clark* [1992] 2 EGLR 184 at 186 that where a word has a proper legal meaning it is that meaning which must ordinarily prevail in a legal document. To my mind that too is a principle of construction which is entirely consistent with the principles set out above. Nourse LJ (at 185) identified the question in that case as being whether a deed, made between the owners of adjoining land and expressed to 'grant licence' to the owners and occupiers for the time being of one property to pass over parts of the other in case of fire, operated as the grant of an easement or merely as the grant of a licence. It was common ground that the deed had been professionally drafted. In those circumstances the court held that the starting point was that for over 300 years it had been well known to lawyers that the grant of a licence properly so-called created no interest in the land.

[24] It was in that context that Nourse LJ said that where a word has a proper legal meaning it is that meaning which must ordinarily prevail in a legal document. However, he made it clear that he was considering the question in what he called 'the present legal context'. Thus, as I read the decision, it is an example of the application of the general principle that a word in a contract must always be construed in its context.

[25] Another aspect of the same principle is the proposition which is common ground between the parties, namely that where the relevant expression has been given a settled meaning by the courts the court should so construe it in the same context in the future. The only issue of principle between the parties is whether it is necessary for that settled meaning to have been given to the expression by way of decision. In order to be a settled meaning for this purpose, must the meaning be part of the ratio decidendi of an earlier case or is something less sufficient? I will briefly touch on that question below.

[26] At present it is sufficient to state the principle as it has been held to apply in the context of contracts of insurance. In the most recent, looseleaf, edition of his work *The Law of Insurance Contracts* (4th edn, 2002) Dr Clarke puts the principle thus:

> '**15–2A Technical Meaning: Precedent**
>
> If the meaning of the words used has been previously settled by the courts, it can be inferred that the parties intend the words to bear that meaning. Precedent is respected, not only when the policy words are exactly the same as those previously settled but also when the court regards them as substantially the same; the same is true of words used in a statute. It is assumed that the draftsman works with a view to certainty of sense and

standardisation of terms. "Courts should be chary in interfering with the interpretation given to a well-known document and acted on for any considerable period of time", and courts are ready to assume that, as in the case of a statute, a phrase has been used in the same sense as it was in previous contracts of insurance on the same risk. Insurance "is commonly offered in standard form policies which have a national or international provenance. Courts recognise this fact and the consequence that risks may be assessed, and reinsurance procured, on the footing that settled interpretations of commonly used language will not be disturbed without good reason" ... However, although precedent is respected, the court is not bound by the doctrine of *stare decisis* to respect it.'

[27] The second of those quotations is from the judgment of Kilby J in *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 272–273. The first is a quotation from the judgment of Bankes LJ in *Re Hooley Hill Rubber & Chemical Co Ltd* [1920] 1 KB 257 at 269. Bankes LJ added:

> 'The decision in [*Stanley v Western Insurance Co* (1868) LR 3 Ex 71 at 74, 75] has been unchallenged and presumably acted on for fifty years, and even if I did not agree with the view there expressed I should hesitate before overruling it.'

Scrutton LJ (at 272) said that he felt bound to read the words of the condition in the light of existing English decisions.

[28] To my mind, that principle is essentially a principle of construction. Thus the court is trying to ascertain the intention of the parties in using the expression deployed in the contract. Where a contract has been professionally drawn, as in the case of the Institute Clauses, the draftsman is certain to have in mind decisions of the courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning.

The meaning of cl 4.1.5

[29] As just stated, the expression 'customs regulations' must be construed in its context. Thus it must be construed having regard to its place in the contract as a whole and the contract must be construed having regard to the surrounding circumstances. The most important of the surrounding circumstances in this case seems to me to be that the Institute Clauses were drafted for use in insurance contracts throughout the world. It is common ground that they date from 1959 and that the present cl 4.1.5 is in the same form now as it was in 1959 except that the words 'or trading' did not then appear in the clause. They were added when the Institute Clauses were reviewed in 1983.

[30] The Institute Clauses are intended for use in policies insuring vessels trading worldwide and wherever they are owned or managed. Thus there is no reason to construe them by reference to European as opposed to international practices. Equally I do not, for my part (and contrary to the respondents' submissions), think it is appropriate to construe the expression 'customs regulations' by reference to the English statutes which confer powers and impose duties on Customs and Excise. While they no doubt throw some light on matters which might be regarded as the subject of 'customs regulations', given that the

Institute Clauses are intended to operate in an international sphere and that they are more likely than not to be used in cases which have no connection with England at all, English statutes of that kind do not seem to me to be of particular significance. The express provision that 'this insurance is subject to English law and practice' does not have the effect that terms intended for use in an international context should be construed by reference to English statutes such as the Customs and Excise Management Act 1979 or the Misuse of Drugs Act 1971 or their predecessors the Customs and Excise Act 1952 or the Dangerous Drugs Act 1951.

[31] Similarly, it does not seem to me to be to be correct to approach the construction of the expression 'customs regulations' in cl 4.1.5 by trying to ascertain the meaning of the word 'customs' in an English legal dictionary, or indeed in English law and, having done so, by holding that 'customs regulations' should be construed accordingly. To do so seems to me to run the risk of failing to construe the expression 'customs regulations' in the context of the Institute Clauses.

[32] I would accept Mr Morris QC's submission that the word 'customs' has the meaning ascribed to it in the dictionaries relied upon by the appellants. Thus, typically, *Jowitt* describes 'customs' as 'duties charged upon commodities on their importation into, or exportation out of, a country'. Equally, for some purposes at least, I would accept Mr Morris' submission that there is an extensive body of EC 'customs law' which forms part of English law and which is concerned, and concerned only, with import duties.

[33] Thus I would accept these further propositions advanced by the appellants, which are set out in para 19 of (and expanded in a detailed annex to) their skeleton argument, without the need further to lengthen this judgment by setting out the provisions of Community law in detail.

(i) European Community customs law applies directly in this jurisdiction and forms part of English law. Member states cannot have customs rules of their own and the customs rules laid down by the Community are the customs rules of each member state. Thus, since 1977 at the latest, English customs rules are Community customs rules.

(ii) The entire corpus of customs laws is comprised in, and therefore all customs rules are contained in, arts 23 to 27 EC, the Customs Code and the Implementing Regulation. The essential subject matter of Community (and therefore English) customs law is customs duties.

(iii) Drugs fall wholly outside the scope of customs law: see eg the decisions of the Court of Justice of the European Communities referred to in [16](viii), above.

(iv) The jurisdictional competence of national customs services, however, is or may be wider than the administration of customs rules.

[34] As I understand it, the respondents accept those propositions, so far as they go. They do, however, point to other provisions of European conventions which they say support a wider interpretation of the expression 'customs laws' in a European context. Thus, in an argument advanced by Miss Hopkins, they point to the Convention on the Provision of Mutual Assistance by Customs Authorities 1967 (Rome, 7 September 1967; TS 93 (1980); Cmnd 8080) (Naples I) which concerns the provision of mutual assistance by the customs authorities of member states and which, by art 2 defines 'customs laws' as:

'... provisions laid down by law or regulation concerning the importation and transit of goods, whether relating to customs duties or other charges, or to measures of prohibition, or restriction or control.' a

[35] It is intended that Naples I should be replaced by a 1997 convention [Convention drawn upon the basis of art K.3 of the EU Treaty on Mutual Assistance and Co-operation between Customs Administrations 1997 (Brussels, 18 December 1997; EC 2 (2000); Cm 5020)], known as Naples II, which is expressed by art 3 to cover mutual assistance and co-operation in criminal investigations 'concerning infringements of national and Community customs provisions'. It is plain from art 4(1) and (3) that the definition of 'national customs provisions' includes laws and regulations concerning cross-border traffic in goods 'subject to bans'. The respondents say that the definitions in Naples I and Naples II show that, in the context of these European agreements, the expression 'customs regulations' is amply wide enough to extend to regulations concerning the prohibition on imports of controlled drugs. I agree. b c

[36] The appellants object that these provisions are not part of Community and thus of English law and that they do not therefore affect the meaning of 'customs law' or 'customs regulations' as a matter of English law. While it is strictly true that the provisions of Naples II are not yet part of English law, they will be when the convention comes into force for the United Kingdom (see the European Communities (Definition of Treaties) (The Convention on Mutual Assistance and Co-operation between Customs Administrations (Naples II)) Order 2001, SI 2001/413). Although, as I understand it, that has not yet occurred, the definitions in Naples I and II seem to me to underline the point that the definition of an expression like 'customs regulations' will depend upon its context. It may have different meanings in different contexts. d e

[37] In all these circumstances, while I would accept that the European Community (and thus English) customs laws are relevant to the question what is the meaning of 'customs regulations' in cl 4.1.5 of the Institute Clauses, they are not determinative of it. Like the dictionaries, they show that 'customs regulations' include regulations imposing import and export duties, but they do not show that they are limited to provisions of that kind. f

[38] In the context of the Institute Clauses which, as already stated, are intended to govern the insurance of vessels on an international (and not solely English or European) basis, the natural meaning of the expression seems to me to be much wider. It seems to me naturally to have the wide meaning given to it by *The Anita*, to which I return below. As Lord Denning MR put it ([1971] 2 All ER 1028 at 1032, [1971] 1 WLR 882 at 886), the words should be given a businesslike interpretation. Like Fenton Atkinson LJ ([1971] 2 All ER 1028 at 1034, [1971] 1 WLR 882 at 889), I too can see no distinction between smuggling and infringement of customs regulations. g h

[39] Very recently, in *Handelsbanken ASA v Dandridge* [2002] 2 All ER (Comm) 39 at [33], Potter LJ noted that the Vietnam decree under consideration in *The Anita* was stated to cover inter alia 'contraband' and 'referred specifically to "those who import or attempt to import products or goods whose import is prohibited by the legislation in force"'. Potter LJ added: j

'Thus, while no formal customs code was apparently involved, the nature and purpose of the provision was quite clearly one relating to contraband, the traditional area of concern of customs regulations. As observed by Sir Gordon Willmer in [*The Anita* [1971] 2 All ER 1028 at 1036, [1971] 1 WLR 882

at 891]: "The ordinary man, if asked what was the reason for the ship's confiscation would surely reply that it was by reason of the members of the crew having been caught smuggling."'

[40] Potter LJ (at [24]) recorded three preliminary propositions which were not in dispute, just as they are not in dispute before us. They are that: (i) the court should give cll 4.1.5 and 4.1.6 a businesslike construction in the context in which they appear; (ii) it is for underwriters to bring themselves within the exceptions in those clauses; and (iii) in defining the insured risks under the war risks policy it is necessary to have regard both to the perils insured and the exclusions, since together they delimit the risk (see *Ikerigi Cia Naviera SA v Palmer, Global Transeas Corp v Palmer, The Wondrous* [1991] 1 Lloyd's Rep 400 at 416–417 per Hobhouse J).

[41] Quite apart from the question whether *The Anita* gives the expression 'customs regulations' a settled meaning, the construction of the term adopted by the court seems to me to be correct. In ordinary parlance I would describe customs regulations as including both regulations imposing duties and regulations prohibiting imports altogether. It seems likely that both might be drafted in the same way. Thus a regulation might provide that the import of goods is absolutely prohibited or prohibited unless duty at a certain rate is paid. It does not seem to me to make sense to construe 'customs regulations' in cl 4.1.5 as including the latter but not the former because I can see no reason why the parties to an insurance contract of this kind should draw that distinction. In particular I can see no reason why the parties should agree to exclude a CTL arising from detention caused by the infringement of a regulation prohibiting the import unless duty is paid and not to exclude a CTL caused by detention caused by the infringement of a regulation which prohibits the import absolutely. Such a distinction seems to me to make no commercial sense.

[42] In all the circumstances I agree with the judge that, when construed in its context in the light of the principles identified above, the expression 'detainment ... by reason of infringement of any customs or trading regulations' in cl 4.1.5 of the Institute Clauses includes both the above types of regulation. In short, it naturally includes regulations absolutely banning imports just as it includes regulations imposing import duties and any other construction would make no commercial sense in the context of the Institute Clauses.

[43] I would, however, add that it does not follow that all regulations enforced by customs in a particular port would be within the clause, or indeed that regulations not enforced by such customs would be outside the clause. Thus there may be many regulations which happen to be enforced by customs which would not be 'customs regulations' and indeed there may be others which happen to be enforced, say, by the police, which would nevertheless be 'customs regulations' within the clause. Thus I would not accept the appellants' submission summarised in [16](xv), above. Each such case would have to be examined on its facts in the light of the regulations concerned.

The Anita

[44] I turn briefly to the question whether the meaning of cl 4.1.5 should properly be regarded as settled so that, whatever conclusion the court might otherwise reach, it should follow it for the reasons given in *Re Hooley Hill Rubber & Chemical Co Ltd* [1920] 1 KB 257. The leading work on the English law of marine insurance and thus on the correct approach to the Institute Clauses is *Arnould*.

[45] The two passages from *Arnould* relied upon by the judge, and indeed by the respondents, are these. In para 906 (p 774) of vol II of the 16th edition published in 1981 the editors, who were Sir Michael Mustill (then Mustill J) and Mr Jonathan Gilman, said:

> 'The exception relating to customs regulations was construed in [*The Anita*]. It was held that the words "customs regulations" are to be given a wide meaning, and as referring to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the realm of customs.'

It thus appears that in 1981, which was of course before the 1983 review of the Institute Clauses, the editors regarded this court as having given the expression a settled meaning.

[46] In para 357 (p 213) of vol III, which was edited by Mr Jonathan Gilman QC and which was published in 1997 and thus after the 1983 review but before the date of the contract in the instant case, the point is put as follows:

> 'The exception relating to "customs regulations" has been broadly construed, as referring to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the realm of customs.'

The footnote to that statement expressly refers to *The Anita* and to para 906 of vol II and is part of the text which considers the 1983 review in general and cl 4.1.5 (or its equivalent) in particular.

[47] It thus appears that the editors of *Arnould* have throughout understood *The Anita* as construing the expression 'customs' regulations' in cl 4(1)(e) in the then edition of the Institute Clauses to include laws dealing with smuggling. Moreover vol III makes it clear that, in the editor's view, the same meaning should be given to cl 4.1.5. In these circumstances I would, if necessary, hold that the clause had a settled meaning for the purposes of the principle stated above, even if on analysis the court's decision as to the true construction of the clause was not part of the ratio decidendi. That is because the question is what was intended by the draftsman of the clause and it seems to me that, other things being equal, he would be likely to use the same expression in the new version of cl 4.1.5 as in the old only if he intended it to have the same meaning as ascribed to it in *The Anita*, whether that meaning was strictly part of the decision in *The Anita* or not.

[48] However that may be, it seems to me that the true construction of the clause was part of the ratio decidendi of *The Anita* in this court. In para 13 of their skeleton argument drafted for the purposes of the appeal the respondents accepted that the meaning of the expression 'infringement of customs regulations' did not arise for decision in *The Anita*. They accepted the appellants' submission that it was common ground in *The Anita* that there had been an 'infringement of customs regulations'. However, in the light of discussion during the course of the argument they withdrew that concession. In my opinion they were justified in doing so.

[49] The case came before Mocatta J at first instance (see [1970] 2 Lloyd's Rep 365). The plaintiff owners were represented by Mr Robert Goff QC, Mr Basil Eckersley and Mr Ian Kinnell and the defendant underwriters by Mr Michael Mustill QC, Mr Christopher Staughton QC and Mr Jonathan Gilman—a battle of the Titans. The facts were these. The vessel was boarded by Vietnamese customs

officials while she was at anchor off the mouth of the Saigon River. She was in ballast bound for Saigon. A large amount of unmanifested transistor radios and the like were found, both at the anchorage and after she had been escorted into Saigon. The master and crew were arrested and nine members of the crew admitted being parties to the concealment of the goods in question with a view to disposing of them in Vietnam. Subsequently some of the crew were convicted and sent to prison while others, including the master, were acquitted. The vessel was initially seized by the customs and then detained for a considerable period before being confiscated by the order of a special court. Her owners claimed that she was an actual or constructive total loss. There were a number of issues before the judge, although we are concerned with only one of them, namely whether the exception in cl 4(1)(e) applied to defeat the claim should it be otherwise valid. The judge held that it was otherwise valid on the basis that the vessel was a CTL proximately caused by 'restraints of people'.

[50] The judge, however, decided the case against the underwriters on the basis that the loss did not arise from detainment 'by reason of the infringement of customs regulations', but from a decision of the special court which was (as he put it at 385) not only made in excess of its jurisdiction but which may well have been given with knowledge of that fact and upon the orders of the executive. He held that in these circumstances, as a matter of causation, the underwriters had failed to discharge the onus which was on them. The owners' claim accordingly succeeded.

[51] In the course of his judgment Mocatta J considered the meaning of cl 4(1)(e). He said (at 383):

> 'No authority was cited as to the true construction or meaning of the exception. Since it forms part of the Institute clauses and its application may arise in relation to events in a wide variety of countries, it does not seem to me that the words "customs regulations" should as a matter of construction be restricted to what in any particular jurisdiction may be designated as a customs code. This view is strengthened by the use of the word "any". As a matter of the ordinary use of the English language the words seem to me to cover the provisions of art. 5 of decree 4/65, whether the prohibition by the legislation in force relates to the avoidance of the payment of duty, the absence of an import licence or a list of absolutely prohibited goods.'

I agree. Although it is not clear whether the distinction which the appellants seek to draw here played any, and if so what, part in the argument, it is plain from that passage that Mocatta J considered whether the clause should be restricted to a prohibition which relates to the avoidance of payment of duty and expressed the view that it should not.

[52] In this court the underwriters appealed on the basis that Mocatta J's decision on causation was wrong. All three members of the court agreed but, in order to allow the appeal, they had to consider and resolve the issues raised by a respondent's notice, which included the assertion that art 5 of Vietnam Decree 4/65, pursuant to which the special court purported to order the confiscation of *The Anita*, was not a customs regulation within the meaning of cl 4(1)(e) of the Institute clauses.

[53] Lord Denning MR described the position in Vietnam at the time in some detail ([1971] 2 All ER 1028 at 1030–1031, [1971] 1 WLR 882 at 884–885). He observed that at first the customs took proceedings under art 429 of some old customs regulations of 1931 which had existed from the time of the French

regime. Under that article the customs had authority to seize the goods, to levy fines and to seize the vessel as security for the fines. However, it was decided to proceed under a new decree, namely Decree 4/65, because the old law was thought to be too lenient. Lord Denning MR observed ([1971] 2 All ER 1028 at 1030, [1971] 1 WLR 882 at 885) that Decree 4/65 had been enacted specially to deal with 'speculation, illegitimate transfers, contraband and the like'. He set out ([1971] 2 All ER 1028 at 1030–1031, [1971] 1 WLR 882 at 885) the relevant part of the translation of the decree as follows:

> '[These] Are punishable by imprisonment: Those who import or attempt to import products or goods, the import of which is prohibited by the legislation in force ... The products, goods and means of transport belonging to private persons [it is to be noted that the French text read "moyens de transport des particuliers"] shall be confiscated.'

It is plain from Lord Denning MR's judgment that he treated the case as proceeding on the basis that the vessel was confiscated pursuant to Decree 4/65 on the ground that goods were being imported 'whose import is prohibited by legislation in force'.

[54] As I see it the question which the court had to determine in order to resolve the issue raised by the respondent's notice was whether, in those circumstances, there was an 'infringement of customs regulations' within the meaning of cl 4(1)(e). It is clear from the following passage in the judgment of Lord Denning MR that he held that there was. After setting out the terms of the clause he said:

> 'The underwriters said that there was infringement of the Vietnam "customs regulations". The owners denied it. I think the underwriters are clearly right. The words "customs regulations" must be given a businesslike interpretation. They cover the customs code of 1931 which dates from the French regime. Also the Special Decree 4/65, which was passed by the new regime in Vietnam to deal with emergency conditions. The regulations in it were clearly broken.' (See [1971] 2 All ER 1028 at 1032, [1971] 1 WLR 882 at 886.)

To my mind the reference to 'it' in that last sentence is a reference to Decree 4/65 and Lord Denning MR was there expressing the clear view that the expression 'customs regulations' included regulations prohibiting the import of goods. Moreover that view was essential to his conclusion that the appeal should be dismissed because of the terms of the respondent's notice.

[55] It is I think clear that both Fenton Atkinson LJ and Sir Gordon Willmer were of the same opinion because, in the passages from their judgments at [1971] 2 All ER 1028 at 1034, 1036, [1971] 1 WLR 882 at 889, 891 respectively, to which I have already referred, they both held in effect that the crew were smuggling. Thus Fenton Atkinson LJ said ([1971] 2 All ER 1028 at 1034, [1971] 1 WLR 882 at 889): '... for the purposes of this case I can see no distinction between smuggling and infringement of customs regulations.' By 'smuggling' both Fenton Atkinson LJ and Sir Gordon Willmer plainly meant bringing goods into Vietnam 'whose import is prohibited by the legislation in force'.

[56] In all these circumstances this court's view of the true construction of cl 4(1)(e) is part of the ratio decidendi of *The Anita* and is (on any view) settled law. It follows that the judge was in my opinion correct to construe cl 4.1.5 in accordance with that settled meaning. Moreover that is, to my mind, so even if the precise argument now advanced was not advanced before either Mocatta J or

this court. It was decided that regulations or laws prohibiting the import of goods were 'customs regulations' within the relevant clause of the Institute Clauses. That clause remained, in relevant respects, in the same terms after the 1983 review and should in my opinion be construed in the same way in a contract made in 1998.

[57] For all these reasons I would dismiss the appeal on the construction point.

Causation

[58] It is common ground that, as stated in [3], above, the vessel was detained for the necessary six months to be deemed a CTL under the terms of the insurance. The judge held that that detention (or detainment) was by reason of an infringement of customs regulations, namely the prohibition on importation of drugs as discussed above. The appellants submits that he was wrong so to hold as a matter of causation.

[59] They rely upon the evidence of the only expert on Greek law before the court, namely the report of Professor Anagnastopoulos. His evidence was to the effect that (as stated in [7], above) the vessel was detained pursuant to the provisions of the Greek Narcotics Act no 1729 of 1987 (as amended). As he put it in para 3.1 of his report, that detention was in connection with the criminal proceedings instituted against the crew on 20 August 1998 and, if such proceedings had not been instituted, the vessel could not have been detained for longer than necessary to secure the drugs found on board because a detainment is not provided for irrespective of criminal proceedings.

[60] The appellants submit that if (contrary to their submissions but as concluded above) the Greek Narcotics Act enacts 'customs regulations', there was no infringement of those customs regulations by the crew (because they were acquitted). The appellants say that it follows that the detainment of the vessel as part of the proceedings against her officers and crew was not a detainment by reason of any infringement of customs regulations. Conversely, they say, the infringement of customs regulations by a persons or persons unknown in Colombia was not the reason for the detainment of the vessel which caused her to become a CTL. That infringement detained the vessel, if at all, only for such time as was required to secure the drugs discovered below her waterline.

[61] The judge rejected those submissions. Having set out a passage from the judgment of Lord Denning MR in *The Anita* [1971] 2 All ER 1028 at 1033–1034, [1971] 1 WLR 882 at 888, he observed ([2002] 2 All ER (Comm) 350 at [76]) that it was common ground that there was an infringement of the Greek Narcotics Act and that that it was the arrival of the vessel in Greek territorial waters with drugs on board which constituted the infringement. He drew attention (at [77]) to the provisions of Greek law that the means of transport used for the commission of such offences could be seized if their seizure was deemed necessary for the purposes of the investigation and/or if it could be reasonably assumed that they would be confiscated by the decision of a trial court.

[62] The judge added:

> '[77] ... Seizure of the vessel as the means of transport of cocaine was effected by virtue of the above statutory provisions. The vessel had been used for transport and import of drugs into Greece, while the participation of the crew in drug trafficking was prima facie assumed and ought to be further investigated ...

[79] The majority decision (30 November 1998) of the [Halkida District Court] on the application by owners for the release of the vessel held that the application should be rejected on the merits, even if it was admissible, because detainment was necessary as long as the investigation was continuing.'

[63] In these circumstances the judge, while not (as I read his judgment) anywhere rejecting the evidence of Professor Anagnastopoulos, rejected the submission that the infringement of the customs regulations was only capable of causing the detention of the vessel for as long as it would take to secure the drugs or to clear the vessel of drugs. His view was that the cause of the detention was and remained the infringement of the customs regulations.

[64] I agree with the judge. It is true that the crew were in due course acquitted of being party to the infringement of the customs regulations, but the fact remains that the drugs were smuggled into the country on board the vessel, albeit by others. That infringement naturally led to the investigation and charging of the crew and to the detention of the vessel on 20 August 1998 as stated in the notice of seizure quoted in [7], above. It thus seems to me to be a reasonable conclusion that the proximate cause of the initial detention of the vessel was indeed the unlawful importation of the drugs into Greece. Thereafter, as held by the Halkida District Court on 30 November 1998 (albeit by a majority), the continued detainment of the vessel was necessary for as long as the investigation was continuing. There is no suggestion that the investigation was not still continuing when the six-month period required for the vessel to be deemed a CTL expired.

[65] In these circumstances the judge was in my opinion right to conclude that the whole of the six-month detention or detainment arose from the infringement of the customs regulations. In the words of cl 4 of the Institute Clauses, the loss (ie the deemed CTL after six months) arose from detainment by reason of infringement of customs regulations, even though the infringement was not the responsibility of the crew and even though, if criminal proceedings against the crew had not been instituted and continued, the detention could not lawfully have continued for six months. The proximate cause of the detention remained the initial infringement.

[66] Finally I note that a similar causation point was advanced in *The Anita*. Albeit on somewhat different facts, the court declined to find a break in the chain of causation between the infringement and the confiscation (see [1971] 2 All ER 1028 at 1033–1034, 1034–1035, 1036, [1971] 1 WLR 882, 888, 889, 891 per Lord Denning MR, Fenton Atkinson LJ and Sir Gordon Willmer, respectively). To my mind there was no break in the chain of causation here between the infringement and the six months' detainment of the vessel. 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.

CONCLUSION

[67] I apologise for the length of this judgment, especially since it does little (if anything) more than express my reasons for concluding that the judge was right for the reasons he gave. I would uphold the judge on both construction and causation and would dismiss the appeal.

Postscript

[68] I would like to record my thanks to all counsel, but especially to Mr Baker, who provided the following explanation of the provenance of

Kleovoulos of Rhodes, which I hope that I have noted correctly. Kleovoulos of Rhodes was a tyrant ruler of Lindos in the sixth century BC and one of the seven sages of Ancient Greece. He is said to have been responsible for an adage freely translated by Mr Baker as 'know when to stop'.

SCOTT BAKER LJ.

[69] I agree that this appeal should be dismissed for the reasons given by Clarke LJ.

PETER GIBSON LJ.

[70] I agree.

Appeal dismissed.

James Brooks Barrister.