Navigators Insurance Company Limited v Atlasnavios-Navegacao LDA

(The "B ATLANTIC") [2018] UKSC 26

22nd May 2018

This case concerned the detention of a vessel – the "B ATLANTIC" – in Venezuela after 132kg of cocaine had been discovered strapped to the hull in the vicinity of the rudder.

The owners had war risks cover in place on the Institute War and Strikes Clauses 1/10/83, with additional perils. As is almost invariably the case, the detainment period under the Clauses was reduced from 12 to 6 months and the owners presented a claim for a CTL to their war risks insurers after the detainment period had been exceeded.

A trial of preliminary issues took place before Mr Justice Hamblen, at which various points of construction were determined in the underwriters' favour. All remaining issues were tried before Mr Justice Flaux. Underwriters did not at that trial dispute the owners' contention that the detention had been caused by an insured peril, namely the malicious acts of the drug smugglers, which fell within clause 1.5: *"loss of or damage to the Vessel caused by…any person acting maliciously"*.

However, Mr Justice Flaux rejected the underwriters' case that the loss was excluded under clause 4.1.5 – *"arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations"* – on the basis that although the attempt to smuggle drugs was a customs infringement, that infringement was a *"mere manifestation"* of the malicious act. He held that clause 4.1.5 was subject to the implied limitation that it did not apply where the reason for the infringement was the malicious acts of third parties.

That conclusion was overturned by the Court of Appeal (Christopher Clarke LJ, Sir Timothy Lloyd and Lord Justice Laws), which held that the exclusion applied. The Court of Appeal held that the loss was caused by both the concealment of the drugs and the detention; the latter fell within the exclusion and so the claim failed. The Court of Appeal also held that clause 4.1.5 should not be read as being subject to the *"mere manifestation"* limitation or the implication imposed by Flaux J.

Owners obtained permission to appeal from the Supreme Court but were unsuccessful in their appeal. The Supreme Court unanimously agreed with the Court of Appeal that the claim was excluded by clause 4.1.5 but also held, interestingly and notwithstanding underwriters' concession of the point before Flaux J, that the claim did not fall within the cover provided by clause 1.5 in any event.

As to the latter, the courts had last considered the meaning of *"person acting maliciously"* in ***The Grecia Express*** [2002] 2 Lloyd's Rep 88 and in ***The North Star*** [2005] 2 Lloyd's Rep 76. In the former case, Mr Justice Colman held that the words were apt to cover the conduct of someone who was intending to cause loss of or damage to a vessel or was reckless as to whether such loss or damage would be caused; they did

not require proof that the person concerned had the purpose of injuring the assured or even knew his identity. In the latter case Colman J reiterated what he had said in ***The Grecia Express***.

The Supreme Court, however, preferred a different formulation suggested in ***The Mandarin Star*** [1968] 2 Lloyd's Law Rep 47 and ***The Salem*** [1982] 1 QB 946, namely that an element of spite or ill will, usually in relation to the property insured, is required for a person to be acting maliciously. It seems that recklessness will not suffice.

On the facts, there was no evidence that the placing of drugs on the hull of the "B ATLANTIC" involved an element of spite or ill will. Lord Mance, with whom the other Justices agreed, said at [29] that: *"…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."*

As such, the Supreme Court held that there was no cover on the war risks policy for the loss of the vessel and that the debate about the scope of the exclusion for infringements of customs regulations was academic.

The fact that the war risks underwriters of the "B ATLANTIC" had been prepared to concede at first instance that the smuggling of drugs fell within the scope of a *"person acting maliciously"* suggested that the Supreme Court's judgment on this point may come as a surprise to those operating in the London Market. Assureds and brokers would, accordingly, be well advised to consider whether the scope of the war risks cover that they have in place for malicious acts meets their or their client's needs and expectations. Underwriters may also need to consider revisions to the Clauses in the event that the scope of the cover on offer is now thought to be unduly restrictive.

A copy of the judgment of the Supreme Court can be found here.

Philippa Hopkins QC and David Walsh
Essex Court Chambers
Philippa Hopkins QC acted for underwriters in the "B ATLANTIC" in the preliminary issues trial before Hamblen J and David Walsh acted for the "B ATLANTIC" underwriters successfully resisting the owners' application to the Court of Appeal for permission to appeal to the Supreme Court.