The “Chem Orchid”
[2014] SGHCR 1

Case Number : ADM Suit No 184 of 2011(SUM No 999 of 2012), ADM Suit No 197 of 2011(SUM No 1009 of 2012), ADM Suit No 198 of 2011(SUM No 1002 of 2012) and ADM Suit No 201 of 2011(SUM No 1005 of 2012)

Decision Date : 06 January 2014

Tribunal/Court : High Court

Coram : Tan Teck Ping Karen AR

Counsel Name(s) : Ms Yoga Sharmini and Ms Subshini Narayanasamy (Haridass Ho & Partners) for the plaintiff in ADM 184; Ms Tan Hui Tsing (Gurbani & Co) for the plaintiffs in ADM 197 and ADM 198; Philip Tay (Rajah & Tann LLP) for the plaintiff in ADM 201; Ms Vivian Ang and Mr Paul Tan (Allen & Gledhill LLP) for the 4th Interveners in ADM 184 and the Defendants in ADM 197, ADM 198 and ADM 201.

Parties : The "Chem Orchid"

Admiralty and Shipping – Setting Aside

Admiralty and Shipping – Striking Out

6 January 2014 Judgment reserved.

Tan Teck Ping Karen AR:

THE FACTS

1 Han Kook Capital Co. Ltd (“HKC”) was at all material times the registered owners of “CHEM ORCHID” (the “Vessel”) until she was sold in Singapore pursuant to a Court Order.

2 By a Vessel Lease Contract (“Lease Agreement”) entered into between HKC and Sejin Maritime Co. Ltd (“Sejin”), HKC leased the Vessel to Sejin for a total of 108 months. The Lease Agreement is governed by Korean law. It is not disputed that the Lease Agreement is akin to a charter by demise.

3 In December 2010, HK AMC Co. Ltd (“HKA”) was formed to deal with the bad debts of HKC. The credit under the Lease Agreement was transferred to HKA, but the ownership of the Vessel remained at all times with HKC.

4 Notice of Credit Transfer from HKC to HKA was given by HKC to Sejin on 24 December 2010. By an Asset Transfer Agreement dated 27 December 2010, the lease credit of the Lease Agreement was transferred from HKC to HKA.

5 On 4 April 2011, HKA issued a letter titled “Lease contract termination notice”. HKC’s position is that this letter effectively terminated the Lease Agreement. The plaintiffs in the various writs dispute this.

6 ADM 184/2011 (“ADM 184”) is an action commenced by Winplus Corporation Co. Ltd (“Winplus”) against only “[the] Demise Charterer of the Ship or Vessel “CHEM ORCHID””. The indorsement of claim found in the ADM 184 writ states that Winplus’ claim is for “interest…alternatively damages, interest and costs in respect of the supply of bunkers (180 CST), 5 drum Rimula 30, 5 drum Argina T40 and 5

drum Turbo T68 to the vessel "CHEM ORCHID" for her operation and maintenance on or about 13 June 2011 at Dumai Port, Indonesia at the request of the Defendant, their servants or agents for which the Defendant failed to pay the price of the bunkers under the Plaintiff's invoice dated 13 June 2011; and for interest…alternatively damages, interest and costs in respect of the supply of bunkers (380 CST and MGO) to the vessel "CHEM ORCHID" for her operation and maintenance on or about 30 June 2011 at the Port of Singapore at the request of the Defendant, their servants or agents for which the Defendant failed to pay the price of the bunkers under the Plaintiff's invoice dated 5 July 2011".The writ was filed on 28 July 2011 and the Vessel arrested on 28 July 2011.

7 ADM197/2011 ("ADM 197") is an action commenced by Frumentarius Ltd ("Frumentarius") against "[the] Owners and/or Demise Charterers of the Ship or Vessel "CHEM ORCHID"". The indorsement of claim found in the ADM 197 writ states that Frumentarius' claim "is for damages for breach of contract and/or duty and/or negligence in and about the carriage of cargo of palm oil/products from Belawan, Indonesia to Taman, Russia in or about 4th June 2011 under a charterparty dated 13th May 2011, together with interest and costs." The writ was filed on 8 August 2011.

8 ADM 198/2011 ("ADM 198") is an action commenced by KRC Efko-Kaskad LLC ("KRC") against "[the] Owners and/or Demise Charterers of the Ship or Vessel "CHEM ORCHID"". The indorsement of claim found in the writ states that KRC "as owners of the cargo lately laden onboard the Defendants' ship or vessel "CHEM ORCHID" and/or as lawful holders of the bills of lading nos. BLW/TAM-01 dated 4th June 2011, BLW/TAM-02 dated 2nd June 2011 and BLW/TAM-03 dated 3rd June 2011 whereunder the above cargoes were shipped, claim damages from the Defendants for loss, damage, delay, costs, expenses arising in connection with the Defendants' carriage of the cargo under the aforesaid bills of lading from Belawan, Indonesia to Taman, Russia in or about 4th June 2011, sustained by reason of the Defendants', their servants and/or agents negligence and/or breach of duty and/or breach of contract thereof, together with interests and costs." It appears that KRC had sub-chartered the Vessel from Frumentarius who in turn had chartered it from Sejin. The writ was filed on 8 August 2011.

9 ADM 201/2011 is an action by Mercuria Energy Trading SA ("Mercuria") against "[the] Owners and/or Demise Charterers of the Ship or Vessel "CHEM ORCHID"". In the indorsement of claim, Mercuria claims "as holders freight prepaid shipped on board Tanker Bill of Lading DUM/HAV-01 dated Dumai Port of Indonesia, 11 June 2011 issued for and on behalf of the Master of the ship or vessel "CHEM ORCHID" of the Port of Jeju South Korea, and/or as owners and/or as persons entitled to possession of the 4815 metric ton of Palm Methyl Ester in bulk that is lately laden on the vessel "CHEM ORCHID" for shipment from the port of Dumai, Port of Indonesia to the Port of Huelva…". The writ was filed on 8 August 2011.

10 HKC filed similar applications in these actions seeking *inter alia* an order that the writ, service thereof and all subsequent proceedings in the said actions be set aside on the basis that the admiralty *in rem* jurisdiction of the High Court under the High Court (Admiralty Jurisdiction) Act ("HCAJA") was not properly or validly invoked against the Vessel.

11 In respect of ADM 198 and ADM 201, both KRC and Mercuria have raised an alternative claim against HKC on the ground that the Master of the Vessel had ostensible authority to bind HKC. HKC argues that this claim is so unsustainable that it should be struck out under O 18 r19 of the Rules of Court ("ROC") and/or the inherent jurisdiction of the court.

THE LAW ON INVOKING THE ADMIRALTY JURISDICTION OF THE COURT

12 The law on invoking the admiralty jurisdiction of the court was set out by Belinda Ang Saw Ean J in *The "Bunga Melati 5"* [2001] 4 SLR 1017 ("*Bunga Melati HC*") and subsequently by the Court of Appeal in [2012] 4 SLR 546 ("*Bunga Melati CA*").

13 Section 4(4) of the HCAJA provides:

> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where –
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a martitime lien on that ship) be brought in the High Court against –
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respect all the shares in it.

14 The onus is on the plaintiff to establish jurisdiction and he does so by demonstrating that his claim falls within s4(4) of the HCAJA: per Belinda Ang J in *Bunga Melati HC* at [80].

15 As to the standard of proof that has to be satisfied by the plaintiff, the Court of Appeal in *Bunga Melati CA* referred to Belinda Ang J's analysis of section 4(4) of the HCAJA and stated at [112]:

> In summary, we re-state the various steps and respective standards of proof for a plaintiff to invoke the admiralty jurisdiction in Singapore. Under s 4(4) of the HCAJA, a plaintiff has to, when challenged:
>
> (a) prove, *on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s3(1)(*d*) to (*q*) exist; and show *an arguable case* that its claim, is of the type or nature required by the relevant statutory provision ("step 1");
>
> (b) prove, *on the balance of probabilities*, that the claim arises in connection with a ship ("step 2");
>
> (c) identify, *without having to show in argument*, the person who would be liable on the claim in an action *in personam* ("step 3");
>
> (d) prove *on the balance of probabilities*, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("step 4"); and
>
> (e) prove on *the balance of probabilities*, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respect all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner

of the sister ship as respect all the shares in it ("step 5").

16 For the purpose of step 3, Sejin, the demise charterer, has been identified as the person who would be liable on the claim in an action *in personam* ("the relevant person"). The dispute between parties is in respect of step 5 i.e. whether Sejin was the demise charterer at the time of the issue of the respective writs. The onus is on the plaintiffs in the various writs to prove this on a balance of probabilities.

SETTING ASIDE ON THE BASIS OF LACK OF ADMIRALTY JURISDCTION

THE LAW APPLICABLE TO INTERPRETING SECTION 4(4) OF THE HCAJA

17 A preliminary point had been raised as to the law applicable to the interpretation of the HCAJA and the role of foreign law in the interpretation of the HCAJA.

18 The plaintiff's counsel in ADM 201 took the position that whether there was a demise charterparty and whether the charter was terminated at the time the action was commenced is to be decided by Singapore law and not Korean law. He relied on *Halcyon Isle* [1980] 2 MLJ 217 and *The "Andres Bonifacio"* [1993] 3 SLR(R) 71.

19 It is not in dispute that the issue of whether Singapore has jurisdiction pursuant to s 4(4) of the HCAJA is governed by Singapore law. Therefore, the issue of whether the charterparty in this case is a demise charterparty is to be determined according to Singapore law. All the parties agree that the charter being considered in this case is a demise charterparty. Therefore, this issue is not in dispute.

20 The next question is whether the termination of the Lease Agreement is to be determined in accordance with the terms of the charterparty, i.e. the Lease Agreement. The Lease Agreement states that it is governed by Korean law. Therefore, Korean law should be applied in determining whether the Lease Agreement has been validly terminated. Support for this position may be found in the decision of the Singapore Court of Appeal in *The Sangwon* [1999] 3 SLR(R) 919 which applied North Korean law to determine whether the party who would be liable *in personam* was the beneficial owner of the arrested vessel.

WHO IS THE PERSON WHO WOULD BE LIABLE ON THE CLAIM IN AN ACTION IN PERSONAM ("THE RELEVENT PERSON")

WHETHER SEJIN WAS THE CHARTERER OF THE VESSEL UNDER A DEMISE CHARTER AT THE TIME OF THE ISSUE OF THE WRIT

21 To determine whether Sejin was the demise charterer at the time of issue of the respective writs, the following issues were considered:

(a) Did HKA have authority to terminate the Lease Agreement?

(b) Whether a valid notice of termination had been issued?

(c) Whether redelivery was required to terminate the Lease Agreement?

(A) DID HKA HAVE AUTHORITY TO TERMINATE THE LEASE AGREEMENT?

(1) ***Asset Transfer Agreement and Notice of Credit Transfer***

22 HKC argued that it had transferred the right to terminate the Lease Agreement to HKA pursuant to a Notice of Credit Transfer ("NCT") dated 24 December 2010. In the alternative, it is HKC's position that it had authorised HKA to terminate the Lease Agreement on its behalf. The plaintiffs in the respective writs dispute this.

23 First, it is not disputed that the entire Lease Agreement was not transferred to HKA. HKC's position is that only the credit in the Lease Agreement was transferred to HKA, and that in transferring this credit, the "right or status in [HKC's] possession or management out of personal or physical security, right to profit or the other rights incidental to the [credit]" was transferred from HKC to HKA.

24 HKC had initially stated that HKA was established in December 2010 to deal with bad credits of HKC. As part of this arrangement, the Lease Agreement was transferred to HKA, but the ownership of the vessel remained at all times with HKC.

25 HKC appointed Professor In Hyeon Kim ("Professor Kim") to give his opinion on (i) the nature of the Lease Agreement; (ii) when the Lease Agreement was terminated; and (iii) when Sejin ceased to be the demise charterer of the vessel.

26 In his 1st opinion, Professor Kim dealt with the above issues and came to the conclusion that the Lease Agreement was terminated on 5 April 2011, which is the date the 4 April 2011 notice ("4 April Notice") was received by Sejin. He is of the view that this position was reinforced by subsequent letters sent on 9 May, 14 June and 29 June 2011.

27 However, in rendering his 1st opinion, Professor Kim had overlooked the fact that the 4 April Notice and the subsequent letters of 9 May, 14 June and 29 June 2011 were all issued *by HKA* and not HKC. This was highlighted as a "fundamental error" by Mr Soo Keun Kyung ("Mr Kyung"), the expert appointed by the Plaintiff in ADM 184,.

28 In response, Sejun Kim, Assistant Manager of HKC, clarified that it was the "*credit* of the Lease Agreement that was transferred" and not the Lease Agreement as he had stated earlier. A copy of the Asset Transfer Agreement between HKC and HKA dated 27 December 2010 ("ATA") and NCT were provided.

29 The ATA states as follows:

> Article 3 (assets subject to the transfer)
>
> (1) The assets, which [HKC] shall transfer to [HKA] in accordance with this Agreement, shall be the assets which are defined in the attachment 3.1 possessed by [HKC] as of the execution date of this Agreement (hereinafter referred to as the "Assets Subject to the Transfer".) To eliminate any uncertainty, the parties confirm that all liabilities of [HKC], regardless of their name or title, which [HKC] has in relation to the Assets Subject to the Transfer, including contractual liabilities of [HKC], shall be excluded from the Assets Subject to the Transfer.

30 At No. 5 of attachment 3.1 of the ATA, the type of asset transferred in respect of Sejin is described as the "financial lease credit" with "Sejin Maritime Co. Ltd".

31 The NCT states as follows:

2. We hereby give a notice that we transfer following credit (hereinafter referred to as the "Transfer Credit", the amount as of November 30, 2010, applicable exchange rate of 1,157.30/US$) in full to HK AMC Co. Ltd (hereinafter referred to as the "Transferee") as of December 29, 2010.

- Obligor: Sejin Maritime Co. Ltd

- Principal sum of credit: W15,504,035,200

- Interest (including delay interest): W68,671,492

- Occurrence date: February 3, 2010

- Expiry date: February 3, 2019

3. In addition to the Transfer Credit, we transferred the right or status in our possession or management out of personal or physical security, right to profit or the other rights incidental to the Transfer Credit.

4. In spite of the above transfer of Credit, the right, obligation or status of yours based on the relating contract, agreement, security arrangement or the other contract shall remain unchanged and the right, obligation or the other status of ours based on the above contracts shall be succeeded by the Transferee to the extent of the transfer.

32 Sejun Kim, on behalf of HKC, expressed the view that pursuant to the ATA and the NCT, the right to terminate the Lease Agreement was included in the "*right or status*" transferred from HKC to HKA. Alternatively, HKC takes the position that after the credit transfer, all the matters involving the Lease Agreement was solely determined and handled by HKA. Therefore, all of HKA's communications with Sejin including the 4 April Notice was done with the full knowledge and authority of HKC.

33 Professor Kim agreed with HKC and is of the view that the right of termination of the Lease Agreement is included in the "right" or "status" transferred by HKC to HKA as mentioned in paragraph 3 of the NCT and in the "right, obligation or status" of HKC based on the Lease Agreement mentioned in paragraph 4 of the NCT. He concluded that HKA had the right and was legally entitled to terminate the Lease Agreement with Sejin, and HKA's exercise of this right of termination was lawful. However, Professor Kim did not explain the reason for his view.

34 Mr Kyung criticises Professor's Kim's opinion and notes that Professor Kim is relying on the words "rights or status" found in paragraph 3 of the NCT and "the right and obligation or status" found in paragraph 4 of the NCT as the basis for his opinion that the right of termination of the Lease Agreement was transferred from HKC to HKA. Mr Kyung points out that other than the transfer of the credits which is the assets subject to transfer under the ATA, there was no reference to the transfer of the "right or status" or "right, obligation or status" in article 3 of the ATA. Since the NCT is merely a notice, the contents of the NCT cannot exceed the ATA and the NCT cannot transfer more rights than that transferred under the ATA.

35 It is Mr Kyung's opinion that the ATA clearly states that it was only the financial credit with Sejin that was transferred to HKA. This financial credit does not include the transfer of the status of the contractual parties. Since the right to terminate was not one of the rights transferred from HKC to HKA under the ATA, then it would follow that the right to terminate the Lease Agreement was not transferred from HKC to HKA under the ATA. Since the NCT is a document that gives Sejin *notice* of

the ATA and the rights that were transferred under it, the words of the NCT cannot be relied on to transfer rights that exceed the ATA.

36 In response, Professor Kim clarifies that he is of the opinion that the right of termination was given by HKC to HKA based on the parties' true intentions which is evidenced by the facts and documents, in particular the NCT.

37 With respect, it is trite law that the court should only look at parties' intention when there is ambiguity in the terms of the contract entered into between parties. In this case, I am of the view that the terms of the ATA clearly state that it is the credit that was transferred and there is no ambiguity which needs to be interpreted.

38 I agree with the opinion of Mr Kyung on this matter. I am of the view that the ATA only transferred the credit from HKC and HKA. There was no transfer of the right to terminate the Lease Agreement in the ATA. There was also no reference to the transfer of "right or status" in the ATA. The NCT was merely a notice to Sejin that the credit had been transferred pursuant to the ATA. Since the NCT is merely a notice, the contents of the NCT cannot exceed the ATA and the NCT cannot transfer more rights than was transferred under the ATA. Therefore, I find that there was no transfer of the right to terminate the Lease Agreement pursuant to the ATA and the NCT.

(2) ***Authorisation***

39 I now come to the issue of whether HKA was authorised to issue the 4 April Notice and subsequent notices on behalf of HKC. The evidence that I have considered above show that HKC intended to authorised HKA to terminate the Lease Agreement.

40 The NCT issued by HKC stated in paragraph 3 that HKC transfers the "right or status in their possession" to HKA. Sejun Kim on behalf of HKC explained that, in HKC's mind, the right to terminate the Lease Agreement was included in the "right or status". This appeared to be also be HKA's understanding. For the reasons stated above, I am of the view that the NCT did not transfer the right to terminate to HKA and HKA did not have express authority to terminate the Lease Agreement. However, I am of the view that based on the conduct of parties and the facts of the case implied authority may have been given by HKC to HKA.

41 The Court of Appeal in *Banque Nationale de Paris v Tan Nancy and another* [2001] 3 SLR(R) 726 ("BNP") referred at [64] to *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583; [1967] 3 All ER 98 at 102, in which Lord Denning MR said:

> [A]ctual authority may be express or implied. It is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director.

42 Turning to the facts of the present case, the evidence that has been given by HKC is that HKC intended to transfer the right to terminate the Lease Agreement to HKA. HKA conducted itself in line with this intention and issued the 4 April Notice which expressly referred to the transfer of credit from HKC to HKA, notice of which had been given to Sejin by way of the NCT. Therefore, I am of the view that HKC had intended to authorise HKA to issue the 4 April Notice pursuant to ATA and NCT and HKC had impliedly authorised HKA to issue the 4 April Notice.

(3) ***Apparent authority***

(3) ***Apparent authority***

43 Even if it is argued that HKC did not give implied authority to HKA to issue the 4 April Notice, the circumstances of this case and the conduct of the parties show that HKC had represented that HKA had the necessary authority to issue the 4 April Notice.

44 *Bowstead & Reynolds on Agency* (Swee & Maxwell, 19th Ed, 2010) in Art 72 states as follows at p364:

> Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority,

45 The Court of Appeal in *BNP* (see above at [41]) stated at [69] the two requirements that have to be satisfied to establish apparent authority:

> (a) there must be representation made by the [principal] that [the agent] had authority to enter into the transaction on their behalf; and
>
> (b) [the third party] must have relied on this representation.

46 In respect of the first requirement, HKC had given Sejin notice of the asset transfer by way of the NCT. By issuing the NCT, HKC represented to Sejin that HKA had the authority to deal with all the "*right and status*" under the Lease Agreement. HKA subsequently issued the 4 April Notice pursuant to the transfer of credit. Therefore, I find that these facts show that HKC had represented that HKA had the authority to issue the 4 April Notice on their behalf.

47 In respect of the second requirement, it is clear that Sejin relied on the representation. There is no evidence that Sejin questioned HKA's authority or right to issue the 4 April Notice. Sejin's conduct after receiving the 4 April Notice, in which, *inter alia*, it requested for a statement of account and requested for more time to make payment and for the lease to be revived showed that it accepted and relied on the representation that HKA had authority to issue the 4 April Notice.

48 In my view, HKA had authority, actual or apparent, to issue the 4 April Notice on behalf of HKC.

(4) ***Conclusion***

49 For the reasons stated above, HKA was authorised to issue the 4 April Notice and the subsequent notices on behalf of HKC.

(B) WAS A VALID NOTICE OF TERMINATION ISSUED?

50 Having established that HKA had the right to terminate the Lease Agreement as agent for HKC, the following issues arise:

> (a) Was a valid notice of termination ("NOT") issued?
>
> (b) Does the NOT have to expressly contain the word "termination" in the body of the NOT?

(1) ***Termination under the Lease Agreement***

51 The dispute between the parties is whether the Lease Agreement was terminated prior to the commencement of each of the respective actions. The resolution of this dispute will turn on the answer to this question: did the 4 April Notice from HKA to Sejin terminate the Lease Agreement?

Article 24 of the Lease Agreement

52 The parties all agree that article 24(2) of the Lease Agreement govern the termination of the lease.

53 Article 24(2) of the Lease Agreement states as follows:

> 2. In the event [HKC] is of the opinion that [Sejin] is facing difficulties in continuing its normal business activities due to any reason whatsoever, including but not limited to reasons of application of bankruptcy, compulsory composition or company rehabilitation procedure or work-out, giving rise to concerns about [Sejin's] ability to perform its obligations to [HKC] or to maintain or manage the Vessel, [HKC] may terminate this Contract with notification specifying the cause towards [Sejin].

The 4 April Notice

54 HKC argued that the 4 April Notice complies with article 24(2) and it is effectively terminates the Lease Agreement. To understand this argument, it is necessary to set out this notice in full. It reads:

> Document number: Hankook(Asset) No. 11-12
>
> Recipient: Keunhyuk Park, CEO of Sejin Martitime Co., Ltd
>
> Address: […]
>
> Subject: Lease contract termination notice
>
> 1. I wish for your company's everlasting growth.
> 2. This is about the facility rent (lease) contract (contract number: 2010L10006-01) between your company and Hankook Capital, the credit of which was assigned to us on Dec. 29, 2010.
> 3. According to paragraph 2 of article 24 of the above lease contract, your company lost all the benefit of time of debt against our company. Therefore, please pay immediately all outstanding principle, period interest, overdue principal and interest, delayed compensation.
> 4. If the above point 3 if not implemented, in order to secure the remaining credit, our company will do the following:
>
> (a) Demand an immediate repayment of the full amount of the credit
>
> (b) Retrieve the leased object, consider an auction and register the information about the overdue payment according to the regulation of credit information management
>
> (c) Take legal actions such as placing the collateral and other assets under distraint attachment and request for auctioning them. And we also let you know that you are responsible for enforcement cost when we do the above.
>
> - Details (As of April 4, 2011)

…	…	…	Overdue Lease Payments	…	…	Total to be paid
			289,430,562 won			16,934,476,545 won

The end.

HK AMC Co. Ltd

CEO Jaejeong Yoo [seal]

55 HKC argued that this is a valid notice of termination pursuant to article 24(2). Professor Kim expressed the view that HKC had the right to invoke the right of immediate termination based on article 24(2) because the rental had not been paid for six months, which was a very substantial amount. Second, even though the it was not expressed in the main body that the Lease Agreement was terminated, the title of the notice clearly shows that it is a letter for "Lease contract termination notice". Thirdly, there is a demand for the amount which is equal to the balance of the vessel's acquisition price and this is consistent with the Lease Agreement being terminated as the demand is not for the rental arrears but for the entire outstanding amount under the Lease Agreement, which clearly indicates that the Lease Agreement has come to an end.

56 Mr Choi disagreed with Professor Kim. He formed the view that the 4 April Notice did not comply with the requirements of article 24(2) as it did not specify the cause for termination. The said notice was, therefore, not an effective notice of termination. However, Mr Choi stated that the cause for termination can be given by way of a separate notice.

57 On reading Mr Choi's opinion, Sejun Kim, on behalf of HKC, clarified that many oral demands for payment of the outstanding lease rental had been made and it was only when it was clear that this could not be paid that the 4 April Notice was issued. This was followed by Professor Kim's opinion that article 24(2) states that as long as HKC is "of the opinion" that Sejin is facing difficulties in continuing its normal business activities due to any reason whatsoever, which gives rise to concerns about Sejin's ability to perform its obligations to HKC or to maintain or manage the Vessel, HKC may terminate the Lease Agreement with notification specifying the cause towards Sejin. Professor Kim's view is that unless HKC's opinion and exercise of its right to terminate based on this view is manifestly wrong, HKC's judgment to invoke the provision should be respected.

58 Upon reading Sejun Kim's clarification, Mr Choi appeared to have no further issue with the 4 April Notice as he does not raise any objection to the same in his subsequent opinions.

59 Mr Kyung's major objection to the 4 April Notice is that HKA did not have the right to issue the said notice as HKC did not transfer the right to terminate to HKA by way of the ATA and NCT. I have already dealt with this issue earlier and have found that HKA had the authority to issue a notice of termination on behalf of HKC. The other objection that Mr Kyung had is that the 4 April Notice does not state the cause for termination as required by article 24(2). However, Mr Kyung does not elaborate further and does not give his reasons for his belief that the 4 April 2011 Notice is an invalid notice of termination as it fails to state the cause for the termination.

Did HKC have cause to terminate the Lease Agreement?

60 In my view, it is clear that HKC had cause to terminate the Lease Agreement based on the outstanding arrears.

61 Article 24(2) states that "[*in] the event [HKC] is of the opinion that [Sejin] is facing difficulty in continuing its normal business activities…[HKC] may terminate the Contract with notification specifying the cause towards [Sejin]*". As stated by Professor Kim, the decision to terminate is based on the opinion of HKC. HKC has given evidence that six months of lease rental was outstanding. It was based on this outstanding lease rental that HKC formed the view that it had cause to terminate and the 4 April Notice was issued. This is HKC's subjective opinion and I agree with Professor Kim that unless HKC's exercise of this right of manifestly wrong, HKC's decision to terminate the Lease Agreement based on the outstanding arrears is to be respected.

Did the 4 April Notice comply with Article 24(2)?

62 There is no bright line test to determine whether a valid notice of termination has been issued. The court will examine the notice to determine if it effectively terminated the charter. As stated by Finkelstein J in *ASP Holdings Ltd v Pan Australia Shipping Pty Ltd [2006] FCA 1379* ["*ASP*"] at [27]:

> …there is no bright light test by reference to which a notice can be held good or bad. It is a question of degree in each case…The focus of attention, correctly in my view, was the notice itself: was it good or bad in an objective sense.

63 Finkelstein J also observed at [18]:

> …under English law, which is the governing law, a notice of termination must clearly and unambiguously indicate that the owner has decided to terminate the charter. In *The Aegnoussiotis* [1977] 1 Lloyds's Rep 268, Donaldon J said (at 275): "**No particular form of words or notice is required [to terminate a charter]**, but the charterers must be informed that the owner is treating the non-payment of hire as having terminated the charterparty." Although notice of termination may be informal, **what is required is "an unequivocal act or statement [by the owner] communicated to [the charterer]** showing that [the owner intends to terminate the charter]": *The Mihalios Xilas* [1979] 2 Lloyd's Rep 303, 307 per Lord Diplock. Put rather more simply, the owner must make plain his decision to terminate the charter, not to lawyers but to the person who is to act on the notice.
>
> [emphasis added]

64 On reading the 4 April Notice I am of the view that it is an effective notice which terminates the Lease Agreement. First, the subject matter is stated to be "Lease contract termination notice". While the use of the word "termination" in the subject line is not sufficient by itself to create an effective notice of termination, the use of the word "termination" in the subject line is an indication of the owner's intention in issuing the notice. The subject line would immediately highlight to Sejin that the intention of this notice is to terminate the Lease Agreement. Second, in paragraph 3 of the 4 April Notice reference is made to "paragraph 2 of article 24" of the Lease Agreement which is one of the clauses dealing with termination of the Lease Agreement. Sejin is informed that it had "lost all the benefit of time of debt against [HKC]" and a demand for immediate payment of all outstanding amounts is made. Third, in paragraph 4 of the notice, Sejin is informed that if the payment demanded is not made, HKC will, inter alia, "[retrieve] the lease object". To my mind, the effect of this notice is clear. Sejin is being warned that no further time will be granted for the payment of the outstanding

amount and that it is to make immediate payment of this outstanding amount failing which HKC will take steps to retrieve the vessel, which will effectively terminate the Lease Agreement.

65 As stated by Finkelstein J in *ASP*, no particular form of words or notice is required to terminate a charter. Therefore, there is no requirement for the word "termination" to be used in the body of the notice when it is clear that the effect of the notice is to terminate the agreement. What is required is a clear and unequivocal statement from the owner to the charterer stating the owner's intention to terminate the charter. In the 4 April Notice, HKC had made it very clear to Sejin that if the full amount outstanding is not paid immediately, it will take steps, which include the retrieval of the vessel. This is a clear indication of the owner's intention to terminate as once the vessel is retrieved the charter is effectively at an end.

66 For the above reasons, the combined effect of the subject title read together with the content of the 4 April Notice makes it clear that the intention of the notice is to terminate the Lease. To my mind, though the word termination is not used in the content of the notice, it is a clear and unequivocal notice which states that, if the outstanding payments are not paid immediately, the owner will retrieve the vessel and terminate the Lease Agreement. Therefore, I find that the 4 April 2011 Notice effectively terminates the Lease Agreement.

67 I note that both Mr Choi and Mr Kyung had taken issue with the 4 April 2011 Notice on the basis that it does not state the "cause" as required by article 24(2). However, on reading the 4 April Notice, I am of the view that it does sufficiently state the cause which entitles HKC to terminate the Lease Agreement under article 24(2). I agree with Professor Kim that the cause is sufficiently stated for the following reasons:

(a) The 4 April 2011 Notice was sent to Sejin against the background that Sejin had failed to pay the lease rental for the vessel for six months despite repeated demands. This demonstrated that Sejin were clearly facing difficulties in carrying out its normal business activities.

(b) Paragraph 3 of the 4 April 2011 Notice stated that *"[according] to paragraph 2 of Article 24 of the above lease contract, your company lost all the benefit of time of debt against our company. Therefore, please pay immediately all outstanding principal, period interest, overdue principle and interest, delayed compensation."* This paragraph shows that outstanding amounts have been due and owing by Sejin and HKC was no longer prepared to allow Sejin the benefit of time to make their payment for the full debt in instalments. HKC was demanding immediate payment of all the outstanding amounts.

(c) HKC has given evidence that the outstanding amount of KRW 289,430,562 in the table at the bottom of the 4 April 2011 Notice equates to 6 months of lease rental. Professor Kim is of the view that this is a very substantial sum and amounts to a very serious breach of the Lease Agreement.

68 It is, therefore, clear from the 4 April Notice that Sejin has been unable to pay the lease rental for a substantial period of time and HKC was not prepared to grant Sejin any further time to make payment of these arrears. In light of the background facts where 6 months arrears are due and owing, I agree with Professor Kim that the 4 April Notice clearly showed that HKC was terminating the Lease Agreement pursuant to Article 24(2) because Sejin was clearly "*facing difficulties in continuing its normal business activities*" which gave rise to "*concerns about [Sejin's] ability to perform its obligations to [HKC] or to maintain or manage the Vessel*".

69 Further, as Professor Kim correctly pointed out, when Sejin received the 4 April Notice, they did

not question or challenge the termination, nor did they ask for the reason for the termination. This shows that the cause for the termination was clear to Sejin and they knew the reason for the termination. If not, Sejin would have queried the notice and asked for clarification of the cause of termination.

70 The correspondences that follow the 4 April Notice support this. There was no document from Sejin that challenged the 4 April Notice. Sejun Kim has given evidence on behalf of HKC that after the 4 April 2011 Notice was issued, Mr Keunhyuk Park, the CEO of Sejin meet him in mid-April to ask whether the termination could be revoked and the Lease Agreement revived. Mr Park was informed that the termination could not be revoked by a mere promise to pay and that HKC might consider revocation of the termination only if actual payment of the outstanding amounts was made. Mr Park then asked for the details of the overdue amounts and this was sent to Sejin in an email dated 21 April 2011.

71 As no payment was received, HKC sent a further notice on 9 May 2011 ("9 May Notice") with the subject matter stated as "*Demand for payment of the liquidated loss amount and the return of the leased ship*". HKC referred to the 4 April 2011 Notice and informed Sejin that if it did not make full payment of the outstanding amount and return the vessel immediately, HKC would, *inter alia*, "[*take] legal actions (pursuing a criminal charge of embezzlement) for refusing to return the leased object*".

72 It is clear from the 9 May Notice that HKC treated the Lease Agreement as terminated and was demanding full payment of the outstanding amount and return of the vessel, failing which legal action may be commenced. Again, Sejin did not challenge this notice. Sejin's response to this notice was made on 23 May 2011 when it wrote to HKA, apologising that they were not able to pay the lease payment by the deadline and pleading for an extension of time for the payment of the lease payment as they had entered into some contracts and will use the freight from these contracts to pay the outstanding arrears. Sejin stated that if they cannot make payment as promised, then they will agree to all the actions that HKA will take and will implement all the instructions related to the ship retrieval.

73 Sejin's understanding that the Lease Agreement had been terminated may also be seen in the following:

(a) In an email dated 25 May 2011 from Sejin to HKA, Sejin stated: "*I am asking you that you allow us to revive the terminated lease contract as I requested…*".

(b) In an email dated 4 July 2011 from Sejin to HKA, Sejin stated: "*From April until now, our company's position regarding the lease termination was delivered many times, and our company worked hard to try to revive [the company or the lease contract] (sic) to the last minute…*"

74 For the above reasons, the cause for termination was sufficiently set out in the 4 April Notice and Sejin understood the same which may be seen from its subsequent conduct and correspondence. Therefore, I am of the view that the 4 April Notice was an unequivocal notice of termination and was understood by Sejin to terminate the Lease Agreement.

(C) IS RE-DELIVERY REQUIRED?

75 The next issue is whether redelivery is required to terminate the Lease Agreement. The plaintiffs in the various writs all argue that redelivery is required under the terms of the Lease Agreement to terminate the Lease Agreement. HKC takes the opposing position that a notice of termination is sufficient to terminate the Lease Agreement and re-delivery is not required.

REDELIVERY - THE CASES

REDELIVERY – THE CASES

76 The cases that I have considered appear divided on the issue of whether redelivery is required to terminate a demise charterparty. The cases are:

(a) Cases that required redelivery for termination:

(i) Australia : *Patrick Stevedores No 2 Pty Ltd v MV "Turakina"* May 1998, unreported ("*Turakina*");

(ii) New Zealand : *The "Rangiora", "Ranginui" and "Takitimu"* [2000] 1 Lloyd's Reports 36 ("*Rangiora*")

(b) Cases that do not required redelivery for termination:

(i) Hong Kong : *Gulf Marine and Industrial Supplies Inc. v The Demise Charterer of the Ship or Vessel M.V. 'Trident Dawn'* [1992] HKCFI 273 ("*Sea Empire*")

(ii) Australia : *CMC (Australia) v The Ship "Socofl Stream"* [1999] FCA 1419 ("*Socofl Stream 1st instance*") and on appeal [2001] FCA 961 ("*Socofl Stream Appeal*")

(iii) Australia : *ASP* [see above at [62]]

(iv) Australia : *Ships "Hako Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress" v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21 ("*Hako Fortress*")

The Turakina

77 I will start with Tamberlin J's decision which has been referred to in almost every case that I have considered in this decision.

78 The facts in brief are as follows. *The Turakina* was sub-demised by Deil Shipowers ("Deil") to South Pacific Shipping Limited ("SPS") by way of a demise charterparty. On 18 February 1998, Deil sent a letter by fax to SPS stating that pursuant to clause 10 of the charterparty, the charter hire is payable every 14 days and that the hire monies have remained upaid for more than 60 days. Therefore, Deil stated that they have no alternative but to terminate the charterparty and take possession of the ship. The termination was with immediate effect. Deil also directed that the ship be redelivered to the possession and control of the beneficial owners whose representatives will make contact in respect of the necessary aspects of re-delivery.

79 There was no dispute that the charter was a demise charter. Clause 10 provides for the payment of hire and reads:

10. Hire

(a) The Charterer shall pay to the Owners for the hire of the Vessel at the lump sum per 14 days as indicated in Box 21, commencing on and from the date and hour of her delivery to the Charterers… **Hire to continue until the date and hour when the Vessel is redelivered by the Charterers to her Owners.**

...

(**e**) **Time**

Time shall be of the essence in relation to payment of Hire hereunder. **In default of payment beyond a period of seven running days, the Owners shall have the right to withdraw the Vessel from the service of the Charterers without noting any protest and without interference by any court or any other formality whatsoever**, and shall, without prejudice to any other claim the Owners may otherwise have against the Charterers under the Charter, be entitled to damages in respect of all costs and losses incurred as a result of the Charterers' default and the ensuing withdrawal of the Vessel.

(emphasis added)

80 Tamberlin J held that the notice of withdrawal was insufficient to terminate the charter at the time the arrest proceedings were commenced and redelivery is required to terminate a demise charterparty.

81 Tamberlin J noted that the notice does not refer to the withdrawal of the vessel from SPS. It merely requires re-delivery of possession to be made, which in itself cannot amount to redelivery of possession.

82 In coming to his decision, Tamberlin J examined the difference between a time charterparty and a demise charterparty. He observed at p7 that:

A charter by demise is one by which the owner parts the whole possession and control of the ship and gives the charterer a power and right independent of him and without reference to him to do what he pleased with the regard to the appointment and employment of crew. …

…

A time charter, which is not by demise, in contrast, is an agreement between shipowner and charterer to render services by the shipowners's Master and crew to carry the goods, which are put on board a ship by or on behalf of the charterer. In these charters, the ownership and also the possession of the ship remain with the original owner through the Master and crew, who continue to be his servants. …

83 After examined various cases that dealt with the termination of time charterparties, Tamberlin J came to the follow conclusion at p14-15:

Although the above authorities do not expressly decide that redelivery of possession is necessary in order to terminate a charter by demise, they proceed on the basis that there is a significant distinction between a time or voyage charter and a demise charter. This distinction resides in the fact that in a non-demise charter there is no requirement for delivery or transfer of possession to the charterer at the commencement of the charter. Accordingly, redelivery cannot require a transfer back of possession. In such a case, the services provided to the charterer are terminated upon notice of withdrawal. However, **in the case of a demise charter the vessel itself is let and possession is taken by the charterer. Therefore, once the vessel is withdrawn from the service of the charterer, an obligation to redeliver possession arises because possession has been delivered at the commencement of the charter. Redelivery, in its natural and ordinary meaning, denotes a delivery back of that which was originally delivered.** Upon withdrawal, if the charterer refuses to redeliver possession, there will be a repudiation by the charterer, which could then be accepted by SPS. It is clear that if an owner is

entitled to treat the breach as a repudiation or on behalf accepts the repudiation the charter is thereafter at an end: "*The Munster*" (1983) 1 Ll. LR 20, on appeal, 1983 1 Ll LR 370, "*The Gregos*" (1995) 1 Lloyd's Rep 1 at 9. (emphasis added)

84 It was argued at p15 that once notice of withdrawn had been given, the charterer had lost the possession and control of the ship which is the hallmark of a demise charter. However, Tamberlin J disagreed. He noted that hire continues to be payable under clause 10(a) of the charter until the day and hour of redelivery of the possession of the vessel. This indicated that the obligations of the charterparty continue to operate after the notice of withdrawal until redelivery of the vessel. Redelivery of the vessel was required to effectively bring an end to the charterer's possession of the ship. Since there was no redelivery of the ship at the time the arrest proceedings had commenced, Tamberlin J concluded that the notice of withdrawal did not operate to terminate the charter at the commencement of the arrest proceedings.

The Rangiora

85 A similar scenario was considered by Giles J in New Zealand where the sister ships of the *Turakina* were under arrest.

86 The brief facts are as follows. SPS demise chartered the vessels *Rangiora, Raninui* and *Takitimu* from Deil. SPS was in default of hire and on 18 February 1998 formal notice of withdrawal was given by Deil to SPS. At 1330 hours on 19 February 1998 a shareholders resolution for voluntary winding up of SPS was passed. On 20 February 1998 at 1430 hours, Caterbury Stevedoring Services Ltd commences its action in rem against the vessel *Raninui* in respect of moneys owed to it by SPS for services provided. This was followed Mobil Oil New Zealand Ltd which commence in rem proceedings against the vessel *Rangiora* at 1645 hours on 20 February. At approximately 1700 hours on 20 February 1998 the liquidator of SPS despatched a letter acknowledging receipt and recording acceptance of the notice of termination of the demise charters.

87 Giles J considered the issue of whether redelivery was necessary to terminate the charter and stated at p52:

> This is the fulcrum of the case. If the notice of withdrawal was sufficient to determine the charterparty by removing the right of both control and possession in such a way that SPS no longer had possession under the contract but rather only as bailee, or, if the physical retaking of possession is not necessary, owners must succeed.

88 Giles J agreed with Tamberlin J's views in the *Turakina* that a demise charterer is only terminated when both control and possession are withdrawn. A notice of termination removes control from the charterer, but it does not remove possession. Redelivery is required for possession by the charterer to be terminated. He said at p55-56:

> …as did Tamberlin J.. I conclude that at English law a demise charter is effectively brought to an end when the right to possession and control is withdrawn (the notice of termination) and redelivery is achieved.
>
> …
>
> In my view, recovery of possession is necessary and the law recognizes that by allowing for a charter hire obligation to continue until it is effected.

…

In my opinion, bearing in mind the two fundamental planks of a demise charter – the parting of both possession and control – the contract continues to have effect until both are withdrawn, (albeit unilaterally, in a breach situation), from the demise charterer. **Notice of termination achieves resumption of, or cancellation of control but it does not effect redelivery.** The form of advice given to SPS by Deil recognizes that – arrangements will be made about redelivery. Unless and until that is done, owner retains a right recognized at law to recover charter hire down to the point of redelivery. See, *Italian State Railways v. Mavrogordatos & Another*, [1919] 2 K.B. 305. (emphasis added)

Socofl Stream(1st instance)

89 On 24 April 1990, Aurora Navigation S.A. ("Aurora") demise chartered the vessel "Socofl Stream" ("the Ship") to Sovremenniy Kommercheskiy Flot ("Sovcomflot"). On 31 August 1993, Sovcomflot demise chartered the Ship to Kamchatka Shipping Company ("Kamchatka"). In December 1998, a notice of termination was issued by Sovcomflot to Kamchatka on the basis that there was default in payment of charter hire principal. Kamchatka denied that there was a default and continued in possession of the Ship. In January 1999, bills of lading on behalf of the master of the vessel were issued in Singapore. Further bills of lading on behalf of the master were issued in Port Kelang. On 5 February 1999, CMC (Australia) Pty Ltd ("CMC") commenced in rem proceedings against the Ship.

90 One of the issues in the proceedings was whether Kamchatka was a demise charterer when the proceedings commenced.

91 The relevant clauses were considered by the court. Article 11(2)(a) deals with default and the remedies in the event of default::

(2)(a) If any Event of Default occurs and is not remedied within seven (7) business days from the date of telex notice by the Owner or Disponent Owner as the case may be to the Charterer, then the Owner or Disponent Owner may, by telex notice to the Charterer, forthwith terminate this Agreement and upon such termination the Charterer shall forthwith pay to the Owner or Disponent Owner as the case may be a sum equal to the then outstanding Charter Hire Principal together with all other sums then due and unpaid under this Agreement and any other indebtedness of the Charterer under other agreements with the Owner and Disponent Owner and interest on the Charter Hire Principal calculated at the Default Rate for such period of time as the Charter Hire Principal remains overdue, whereupon the Charterer's obligation to pay the Charter Hire shall cease and the owner or Disponent Owner as the case may be shall thereupon transfer title to the [Ship] to the Charterer in the manner mutatis mutatandis provided in Articles 17 and 18 below.

92 Redelivery is dealt with in Article 11(2)(d):

(d) Upon the receiving of any notice of termination under the provisions of this Article the Charterer shall, if required by the Owner or Disponent Owner as the case may be restore the [Ship] to the condition in which she was at the time she was delivered to the Charterer hereunder except for ordinary wear and tear and subject to changes allowed under Article 7 hereof and re-deliver the [Ship] to the owner or Disponent Owner as soon as possible thereafter at such safe port as the Owner or Disponent owner may nominate, failing which re-delivery the Owner or Disponent Owner (of (sic)their agent) may itself enter upon and repossess the [Ship].

93 Moore J in the *Socoflo Stream 1st instance* considered the decision of Tamberlin J in the *Turakina* and observed at [24]:

> [Tamberlin J's] conclusion that SPS was the demise charterer was based both on the fact that Deil retained physical possession of the Vessel and also that, as a matter of construction, the charterparty provided that SPS remained both in possession and absolute control of the vessel (sic) and liable for hire until there had been redelivery of possession to Deil".

94 Moore J formed the view that the key in determining whether delivery is required to terminate the charterparty is the terms of the agreement. Moore J said at [26]:

> …In my opinion, consistent with the approach of Tamberlin J in *The "Turakina"* and Evans LJ in *The "Guiseppe di Vittorio"*, **it is necessary to ascertain from the terms of the charterparty** whether continuing possession of a vessel by the charterer (pending the taking of physical possession by the owner either by redelivery or some other means) is co-extensive with continuing possession and absolute control of the vessel of the type characteristic of a demise charter. (emphasis added)

95 Moore J then held at [27] that the terms of the charterparty before him were "materially different" from that in the *Turakina* on two basis. First, "*there is a clear contractual right conferred by article 11(2)(a) on Aurora or Sovcomflot to terminate the 1993 sub-demise charterparty by giving a telex notice. It was exercised by Sovcomflot. There was no equivalent power to terminate in the charterparty considered by Tamberlin J"*. Second, "*[unlike] the charterparty in The "Turakina", the 1993 sub-demise charterparty did not contain provisions which fairly unambiguously point to the continuation of the demise charter pending redelivery of the vessel. The possession and control of Kamchatka after a notice of termination had been received was not unconditional. It was possession subject to the rights of Aurora and Sovcomflot to direct redelivery or charter the [Ship].*"

96 Moore J concluded that Kamchatka was not a demise charterer at the time of commencement of the proceedings for the reasons stated at [28]:

> …it is difficult to avoid the conclusion that if a charterparty expressly provided for its termination and the power to terminate was exercised then the charterer ceased to be a demise charterer from the time of termination at least in the absence of provisions in the charterparty that suggested some other result. …

ASP

97 The parties had entered into a charterparty in the Barecon 2001 form. The Court had found that the notice of termination was not effective and therefore, held that the charterparty was not terminated at the time the action in rem was commenced. The action was thus not set aside.

98 Finkelstein J considered the issue of whether a notice of termination would bring the charter to an end or whether redelivery is required to terminate the charter. Due to comity, he applied *Socofl Stream 1st instance* and held that the charterparty may be terminated on written notice due to clause 28 and 29 of the Barecon 2001 form. Clause 28 provided for termination by notice and clause 29 says that when the charter is at an end the charterer is the "gratuitous bailee" of the vessel.

99 However, Finkelstein J at [13] to [15] was troubled by this conclusion as he was of the view that this would result in the charterer retaining possession of the vessel though the charter has been terminated and may result in the master having ostensible authority to bind the owner. He was of the

view that the use of the label "gratuitous bailment" cannot disguise the real relationship between the charterer and the vessel

The Hako Fortress

100 The next case that considered the effect of clauses 28 and 29 of the Barecon 2001 form on the issue of redelivery is the *Hako Fortress.* The court in *Hako Fortress* stated affirmatively that clauses 28 and 29 would allow the demise charterparty to be terminated once a notice of termination was issued. No redelivery was required.

101 Clauses 28 and 29 of the Barecon 2001 form provided:

> 28 Termination
>
> (a) Charterer's Default
>
> **The Owner shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:**
>
> (i) **the Charterers fail to pay hire in accordance with Clause 11.** However, where there is a failure to make punctual payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Owners shall give the Charterers written notice of the number of clear banking days stated in Box 34 (as recognised at the agreed place of payment) in which to rectify the failure, and when so rectified within such number of days following the Owner's notice, the payment shall stand as regular and punctual. **Failure by the Charterers to pay hire within the number of days stated in Box 34 of their receiving the Owners' notice as provide herein, shall entitle the Owners to withdraw the Vessel from the service of the Charterers and terminate the Charter without further notice;**
>
> …
>
> 29 Repossession
>
> In the event of the termination of this Charter in accordance with the applicable provisions of Clause 28, **the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call**, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities. **Pending physical repossession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as gratuitous bailee only to the owners.** The Owners shall arrange for an authorities representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. **The Vessel shall be deemed to be repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owners' representative.** All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterers' Master, officers and crew shall be the sole responsibility of the Charterers. (emphasis added)

102 It was recognised that clauses 28 and 29 of the Barecon 2001 form was redrafted to expressly address the difficulty raised by the earlier Barecon 89 charterparty, which was interpreted to required

redelivery to effectively terminate the charterparty.

103 The court held that when the charterparty contains express terms, such as clause 28 and 29, a notice of termination is sufficient to terminate the charterparty without physical redelivery of the vessel.

104 Rares J pointed out at [58] that while the analogy of a demise charter with real property is a useful one, it cannot be taken literally. A ship is not realty but is a chattel. He then went on to analysis the charterparty at [63] to [67]:

> 63 I am of the opinion that as a matter of principle the terms of cll 28 and 29 of the Barecon 2001 form of charterparty can operate as they were intended without requiring the owners, first, to physically retake possession of the ship following her withdrawal and the termination of the charterparty…
>
> 64 When the charterer is in possession as a gratuitous bailee under cl 29, he holds the ship for the sole use and benefit of the owners. When, however, he is in possession because of the demise of the ship to him, the charterer holds her for his own use and benefit. The effect of withdrawal and termination of the charter under cl 29 is the same as a physical redelivery to the owners because the charterer has lost his contractual authority and right to use and employ the ship as he pleases. The concept of constructive delivery of chattels, without any change of physical possession, is well established in the law of bailment. In the classic text by Pollock and Wright, *An Essay on Possession in the Common Law* (Oxford 1888) at pp72-73, the learned authors discussed the position of a seller in possession of goods who could assent to holding what was sold on account of the buyer. They said:
>
> > "A seller in possession may assent to hold the thing sold on account of the buyer. **When he begins so to hold it, this has the same effect as a physical delivery to the buyer** or his servant, and is an actual receipt by the buyer (*Elmore v Stone* (1808), 1 Taunt. 458); and this whether the vendor's custody is in the charterer of a bailee for reward or of a borrower (*Marvin v Wallace*, (1856), 6 Ex. B. 726, 25 L.J.Q.B. 369). **The important thing is his recognition of the purchaser's right to possess as owner, and his continuing to hold the goods either as the purchaser's servant or as his bailee with a possession derived from that right.**" (emphasis added)
>
> 65 Tamberlin J recognised in his analysis in "Turakina"… that the terms of the Barecon 89 charterparty before him contemplated redelivery of the ship at a port or place indicated in the charter. For that reason he rejected an argument that upon withdrawal there was a constructive redelivery to the owners and the charterer became an involuntary bailee. The redraft of that earlier form in cll 28 and 29 of the Barecon 2001 form expressly addressed that difficulty.
>
> 66 Hako Offshore contracted in cll 28 and 29 that it would become the owners' gratuitous bailee of *Hako Fortress* upon the owner exercising its right of withdrawal and termination. That is, parties contemplated and provided in their contract that the nature of Hako Offshore's possession would change, if the ship was withdrawn and the charterparty termination, from that of a contractual right to the full use and enjoyment of the ship to become that of gratuitous bailee for the owners, Dolphin 2. That change was effected by Dolphin 2's notice of termination, that Hako Offshore acknowledged receiving on 5 March 2012. …

105 Since clause 28 and 29 expressly provided that the charterer held the ship as gratuitous bailee once a notice of termination had been issued, there was no requirement for redelivery to terminate

the charterparty.

Redelivery – my analysis

106 As recently as 2006, Finkelstein J in *ASP* said at [12]:

> …whether a notice of termination will bring the charter to an end or whether the charter remains on foot until the vessel is repossessed…is still a controversial topic

107 As may be seen from the above cases, the Courts in different Commonwealth jurisdictions reached different conclusion on the issue of whether redelivery is required to terminate a demise charterparty. How are the cases to be reconciled?

108 To answer this question, it is essential to understand that the essence of a demise charterparty is that the owners confer on the charterer possession and control of the ship so as to place the charterers in the same position as the owners for the duration of the demise charterparty. To effectively terminate a demise charterparty, both possession and control of the ship have to be withdrawn.

109 It should however be noted that demise charterparties are contracts and their construction should be governed, in general, by the ordinary principles of the law of contract, subject, of course to statutory provisions and the principles of the law maritime: as per Rares J in the *Hako Fortress* at [59].

110 Therefore, it follows that whether redelivery is required to terminate a demise charterparty will depend on the terms of the charterparty. In *Socoflo Stream 1st instance*, Moore J stated at [26]:

> …it is necessary to ascertain from the terms of the charterparty whether continuing physical possession of a vessel by the charterer (pending the taking of physical possession by the owner either by redelivery or some other means) is co-extensive with continuing possession and absolute control of the vessel of the type characteristic of demise charter.

111 Moore J continued at [28]:

> …is difficult to avoid a conclusion that if a charterparty expressly provided for its termination and the power to terminate was exercised, then the charterer ceased to be a demise charterer from the time of termination at least in the absence of provisions in the charterparty that suggested some other result.

112 Bearing the above in mind, I am of the view that the guiding principle that may be drawn from the above authorities is that, in general, both a notice of termination and redelivery of the ship are required to terminate a demise charterparty so that control and possession by the demise charterer may be brought to an end. This is due to the unique nature of the demise charterparty. However, as a demise charterparty is in essence a contract between the owner and the charterer, parties are free to include terms in the demise charterparty as to how possession of the ship is to be terminated. Such terms may vary or affect the obligation of redelivery upon the termination of a demise charterparty. This is the common thread that may be found to run through all the cases considered on this issue.

113 In the *Turakina* and the *Rangiora*, it was held that redelivery was required as it was specifically stated in clause 10(a) of the charterparty that hire was to be paid until the day and hour of

redelivery of the possession of the vessel. This meant that possession of the ship continued until it was redelivered to the owner. Therefore, the notice of termination was insufficient to terminate the demise charterparty.

114 The charterparty in the *Socofl Stream 1st instance* did not contain any clause requiring hire to be paid till redelivery. The charterparty contained a clear contractual right to terminate. As stated by Moore J, the charterparty "*did not contain provisions which fairly unambiguously point to the continuation of the demise charter pending redelivery of the vessel.*" Therefore, the court held that a notice of termination was sufficient to terminate both control and possession of the ship by the charterer.

115 The contractual terms of the charterparty in *ASP* and *The Hako Fortress* were even clearer. It is specifically stated in Clause 29 of the Barecon 2001 form that once a notice of termination is issued, the charterer shall hold the vessel as gratuitous bailee pending physical repossession by the owner. This meant that once the notice of termination was issued, both control and possession of the ship were terminated and the charterer held the ship on bailment for the owner.

116 The only cases that that does not appear to fit in with this analysis is the *Sea Empire*. The charterparty contained a clause in the same words as clause 10(a) in the *Turakina* and the *Rangiora* i.e. that hire was to be paid until the day and hour of delivery of possession of the vessel. However, the Hong Kong court held that redelivery was not required and the charterparty was terminated once the notice of termination was issued. I note that the *Sea Empire* was decided before the decision of Tamberlin J in the *Turakina* and the Hong Kong court did not have the benefit of Tamberlin J's careful analysis of the law in relation to demise charterparties. Having read both cases, I prefer the position taken by the *Turakina* as it is in line with the fundamental elements of a demise charterparty – the parting of possession and control. A charterparty that states that hire is to be paid until redelivery indicated that possession has not passed to the owner and the charterparty continues after the notice of termination is issued. For the above reasons, I decline to follow the decision of the Hong Kong court in the *Sea Empire*.

The terms of the Lease Agreement

117 The Lease Agreement is not in the Barecon 2001 form and there are no terms that are similar to clause 28 and 29 of that form.

118 Article 24(4) of the Lease Agreement states:

> 4 . **B shall immediately halt the usage of the Vessel and return it to A according to Article [26]** [note: 1] **of this document in the event this contract is terminated after the commencement of lease period.** Upon receiving the Vessel and stipulated loss value stated in article 19 and confirming that there are no other losses, A (sic) may handover the Vessel to B (sic) at the state it is in. However, A (sic) shall be payable towards all expenses and taxes pertaining to the aforementioned handover. (emphasis added)
>
> [A is HKC and B is Sejin]

119 Article 26 deals with return of the vessel:

> **Article 26 (Return of the Vessel)**
>
> 1. At the point of lease contract termination (excluding termination arising from loss of Vessel) B

shall immediately return the Vessel to a point designated by A at the port of registration or any nearby local port and bear all related expense. B shall ensure and guarantee that the Vessel maintains the same integrity and navigability with no outstanding maritime lien or any other liens,

2. …

3. In the event **A delays the return procedure stated in the previous clause, B shall continue to pay the lease fee to A up till the point when A confirms the return of Vessel. The validity of this contract shall remain in force and effect up till the aforementioned confirmation by A**.

4. In the event that the Vessel differs from its original state at the time of return, excluding normal wear and tear as acknowledge by A, B shall bear the expenses to repair such damage.

5. In the event B delays the return of the Vessel, A may unilaterally retrieve the Vessel from B, under B's expense.

(emphasis added)

[A is HKC and B is Sejin]

120 Articles 26(1) read with 26(5) are similar to Article 11(2)(d) in the *Socofl Stream 1*st*instance*. At first blush, this appears to indicate that, in line with *Socofl Stream 1*st*instance*, once a notice of termination is issued, the demise charterparty is terminated and redelivery is not required.

121 However, upon reading article 26 more closely, it may be seen that article 26(3) provides that in the event HKC delays the redelivery, Sejin is to continue to pay the lease fee until the HKC confirms the return of the vessel. The clause then goes on to expressly provide that the contract is to remain in force and effect till HKC confirms the return of the vessel.

122 I am of the view that article 26(3) is similar to Clause 10(a) in the *Turakina* as both provide for payment of the hire due under the charterparty to continue until redelivery of the vessel. This is supported by the last line in article 26(3) which states that the charterparty shall remain in force and effect until the owner confirms the return of the vessel. This effectively means that possession of the Vessel is not terminated when the notice of termination is issued. The possession of the Vessel continues to remain with Sejin until the Vessel is redelivered to HKC. This is the reason the lease fee is to be paid by Sejin to HKC until the return of the Vessel. In light of this and in line with the reasons given in the *Turakina* and *Rangiora*, I am of the view that art 26(3) indicates that the obligations of the Lease Agreement continues and demise charterparty is not terminated until the vessel is redelivered to HKC.

123 Before I leave this point, I wish to address the point raised by Professor Kim which is that article 26 provides that the Lease Agreement is to remain in force purely for the purpose of protecting HKC's rights and to allow them to enforce their rights under the contract. He is of the view that article 26 does not give Sejin continued rights to use the vessel as demise charterer until redelivery. I disagree with Professor Kim. The charterparty does not have to remain in force for HKC to enforce their rights. A charterparty is a contract and normal contract law will apply. This means that once the charterparty is terminated, the owner has the right of bring an action against the charterer for any damages arises from the breach of the charterparty. There is no need to keep the charterparty alive for the owner to exercise these rights.

Symbolic/Constructive redelivery.

124 The *Turakina* and the *Rangiora* both recognise that an act of symbolic delivery of possession or constructive redelivery would be sufficient to show that redelivery has been effected.

125 Tamberlin J in the *Turakina* expressed the view at p16 that redelivery can be by way of actual or symbolic delivery of possession:

> As at the time of commencement of the arrest proceedings there had been no redelivery of the vessel of possession. There has been no action of actual or symbolic delivery of possession. Nor was there any attornment or **statement of intent by the charterer to the effect that possession was surrendered or redelivered**. The evidence does not indicate that any or that any steps had been taken by or on behalf of SPS to redeliver possession of the vessel to Deil prior to commencement of arrest proceeding. (emphasis added)
>
> …

126 A constructive redelivery may also be sufficient. In reply to the submission that there had been constructive redelivery, Tamberlin J stated at p17:

> …**redelivery of possession of the vessel suggests some step or acknowledgement by the charterer to give effect to the redelivery** and not merely a notice by or on behalf of the owner that redelivery is required, No such step was taken nor was any acknowledgement made in the few hours between withdrawal and commencement of proceedings. (emphasis added)

127 In the *Rangiora*, Giles J was also of the view that there could be symbolic or constructive redelivery. He said at p55:

> In *The Turakina*, as with the present vessels, as at the time of commencement of proceedings there had been no act of actual or symbolic delivery of possession back to Deil. Neither was there any act capable of being construed as constructive redelivery – a concept I would not be prepared to rule out.

128 The evidence from Sejun Kim of HKC is that after the 4 April Notice was issued, he met with Mr Park, CEO of Sejin in mid-April 2011. At the meeting, Mr Park asked if the termination could be revoked and the Lease Agreement revived. Sejun Kin informed him that HKC would only consider revoking the termination if actual payment of the outstanding amounts were made.

129 In the *Rangiora*, a letter from the liquidators acknowledging receipt of the notice of termination and accepting the termination was sufficient to constitute constructive redelivery of the ship. Therefore, following the *Rangiora*, Mr Park had acknowledged that the 4 April Notice was a notice of termination and had accepted it when he met with Sejun Kim in mid-April. This acknowledgement during the meeting can be taken as constructive redelivery of the vessel.

130 Even if what was stated in this meeting is challenged, this meeting was followed by correspondences which show Sejin's intention to return the ship.

131 In Sejin letter to HKA dated 4 July 2011, Sejin stated:

> 4. From April until now, your company's position regarding the lease termination was delivered many times, and our company worked hard to try to revive (the company or the lease contract)

to the last minute. Also, when it comes to the return of the ship, it is really clear to everybody that we have not intentionally delayed the return of the ship. **We wanted to return the ship safely through the ship's normal sailing route, but the situation does not allow us to do that so far**. We would have done so if the situation had allowed. (emphasis added)

132 On 15 July 2011, Sejin wrote to Sejun Kim with a further proposal on how transhipment may be conducted. Sejin acknowledged that they were trying to return the ship and said:

> If you think that collecting money by allowing the ship's continuous sailing is burdensome, please pay just the cost that has already been incurred. Then, **we will do our best to return the ship to Korea as soon as possible**. (emphasis added)

133 It will be recalled that Tamberlin J in the *Turakina* (see above at [125]) had indicated that a "*statement of intent by the charterer to the effect that possession was surrendered or redelivered*" would be an act of symbolic delivery of possession.

134 Tamberlin J also stated (see above at [126]) that "*some step or acknowledgement by the charterer to give effect to the redelivery*" is required to show constructive redelivery.

135 Following the *Turakina*, the above letters clearly show Sejin's intention to surrender and redeliver the vessel.

136 In light of the above, I am of the view that there was constructive redelivery of the ship in mid-April 2011 when Mr Park acknowledged and accepted the termination. Even if this is challenged, I hold that there would be symbolic and/or constructive redelivery on 4 July 2011 followed by confirmation of the same on 15 July 2011.

137 Therefore, as both control and possession of the Vessel had been terminated, the Lease Agreement was effectively terminated on 15 July 2011 at the latest.

CONCLUSION ON SETTING ASIDE

138 In conclusion, I am of the view that, on a balance of probabilities, the Lease Agreement was terminated at the latest on 15 July 2011 and Sejin was not the demise charterer at the time of the commencement of the action in the various ADM proceedings. Therefore, the ADM proceedings are to be set aside.

STRIKING OUT UNDER ORDER 18 RULE 19 OF THE ROC

Introduction

139 HKC has also applied to strike out the claim against them under O18 r19 of the ROC and/or the inherent jurisdiction of this Court in ADM 198 and ADM 201

The law on striking out under O18 r19

140 An action may be struck out pursuant to O18 r19 of the ROC under the following circumstances:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleadings or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court.

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

141 HKC's application in ADM 198 and ADM 201 did not state which of the four limbs of O 18 r19(1) ROC were relied on as the basis for striking out the respective claims. Their written submissions also did not make it clear which limb of O18r19(1) of the ROC they were relying on. A similar situation arose in the *Bunga Melati CA* and the CA observed at [31]:

> In our view, it would be good practice for an applicant of a striking out order to precisely correlate the arguments it advances to the *exact limb* under O18 r19(1) of the ROC which it seeks to rely on…

142 In this case, it appears that HKC's arguments were premises on O18 r19(1)(b) of the ROC – i.e. the plaintiff's claim in ADM 198 and ADM 201 were "frivolous or vexatious". This may be seen from their usage of the phrases "plainly unsustainable" to describe the plaintiff's claim, which is the phrase that has been used to describe actions which are said to be "frivolous or vexatious". See *Bunga Melati CA* at [32].

143 In respect of the test governing inherent jurisdiction of the court to strike out a party's claim, the Court of Appeal noted at [33]:

> We note that whether an action is *plainly or obviously unsustainable* is also the relevant test governing the inherent jurisdiction of the court to strike out a party's claim, since it is trite law that the court "has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process" (*Singapore Civil Procedure 2007* at para 18/19/16). In other words, when the proceedings are "frivolous or vexatious" (*i.e*, obviously or plainly unsustainable), the court can also exercise its inherent jurisdiction to halt such proceedings *in limine* …This provides coherence between O18 r19(1)(b) of the ROC and the inherent jurisdiction of the court to strike out a party's claim.

144 On the issue of when an action is plainly and obviously unsustainable, the Court of Appeal referred to Lord Hope's holding in *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 *("Three Rivers")* and said at [38]:

> An analytical understanding of Lord Hope's holding would reveal the two grounds upon which, in his view, a party's claim may be struck out by the court: First, on the *legal ground* that it is "clear as a matter of a law at the outset that even of a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; and second, on the *factual ground* that "the factual basis for the claim is fanciful because it is entirely without substance".

145 The Court of Appeal then held that this distinction may be applied to O18 r19(1)(b) of the ROC

or the inherent jurisdiction of the court to strike out unsustainable actions. The Court of Appeal said at [39]:

> …a "plainly or obviously" unsustainable action would be one which is either:
>
> (a) *Legally unsustainable:* if "it may be clear as a matter of law at the outset that even of a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or
>
> (b) *Factually unsustainable*: if it is "possible to say with confident before trial that the factual basis for the claim is fanciful because it is entirely without substance [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

146 I will now apply this analysis in my consideration of the plaintiffs' claim in ADM 198 and ADM 201 against HKC.

Ostensible authority

147 Reliance has been placed on Moore J's decision in the *Socofl Stream 1st instance* and the Court of Appeal's decision in the *Socofl Stream Appeal* as authority for the plaintiff's position in ADM 198 and ADM 201 that HKC's conduct in allowing the vessel to take on cargo after 4 April 2011 clothed the master with ostensible authority to issue bills of lading on behalf of HKC.

Socoflo Stream and the issue of ostensible authority

148 It will be recalled that in the *Socoflo Stream 1st instance* (see above at [89]), Sovcomflot issued a notice of termination to Kamchatka in December 1998 on the basis that an event of default had occurred. Kamchatka disputed this. Sovcomflot did not take any steps to repossess the vessel and Kamchatka continued to trade the vessel. The vessel took on cargo in Singapore and Port Klang before sailing to Brisbane where she was arrested on 25 January 1999.

149 At first instance, Moore J found that the Master of the "Socofl Stream" was not employed by Sovcomflot and did not have actual authority to act as its agent. Moore J proceeded to hold that Sovcomflot's failure to nominate a port for redelivery constituted a representation that the Master had authority to bind it even though the Master was not its employee. It was on this basis that Moore J found that Sovcomflot was bound by the bills of lading and is, for the purpose of the bills, the carrier.

150 This issue came up for consideration on appeal and it was contended by the appellant that merely allowing a vessel to continue to trade did not constitute a representation to the world by Sovcomflot that the Master has been authorised by it to issue bills of lading.

151 The Court of Appeal in *Socoflo Stream Appeal* considered the issue and its' reasoning is as follows:

> (i) First, the legal effect of Art 11(2)(a) and (c) of the charterparty between Sovcomflot and Kamchatka and the telex message of 15 December 1998 was that possession and control of the vessel passed immediately to Sovcomflot. This meant that by the time the bills of lading had been signed, the ship was no longer in the possession and under the control of Kamchatka, although that company continued to employ the master and crew. See [26].

(ii) Second, having terminated the charterparty, Sovcomflot had placed Kamchatka in the position as their representatives in respect of bills of lading issued and indirectly *represented* to shippers that they, Sovcomflot, have authorised Kamchatka to bind them to these bills of lading.

(a) The Court of Appeal said at [22]:

> … The assumption to be imputed to CMC is that, when the ship, in the person of the Master, received the cargo on board and issued bills of lading, that was done on behalf of the actual or disponent owner of the ship for the time being. On that analysis, although there may have been a "complete change" of ownership by reason of Sovcomflot's termination of the demise charter to Kamchatka, that did not change any assumption which might reasonably have been made by third parties dealing with the ship. …

(b) The Court of Appeal then referred at [32] to *Homburg Houtimport B.V. v Agrosin Private Ltd (The Starsin)* [2000] 1 Lloyd's Rep 85, where Colman J at 96 applied the general principle of ostensible authority to the issuing of bills of lading by a time charterer or local agent, and observed:

> Once such a time charter has been entered into or letter issued, the shipowners have placed the time charterer or such local agent in the position of their representative in respect of the issue of bill of lading contacts relating to the cargo to be loaded and have thereby indirectly represented to the shippers and to indorsees of the bills that they, the shipowners, have authorized the time charterers or agents to bind them to contracts of that kind. Consequently, the shippers and indorsees are entitled to assume that the owners are content to be bound by the terms of the bill even if, unknown to them, there was no actual authority to issue the bill in precisely the terms in which the bill was issued.

(iii) The Court of Appeal found that there was *reliance* by CMC on Sovcomflot's conduct and said at [37]:

> …In our view, the relevant conduct by Sovcomflot was its allowing the "Socofl Stream" to take on cargo after 15 December 1998 for which the master or his agent issued bills of lading. The evidence does not exclude the natural inference that Sovcomflot, at any time after 15 December 1998, could have made clear by arresting the ship (as it ultimately did) or otherwise, that the ship no longer had the disponent's owner's authority to take on cargo and issue bills of lading. CMC relied on the conduct of Sovcomflot which we have just identified by having its agents at Singapore and Port Klang put consignments of steel on board the vessel and obtain bills of lading in respect of those consignments in the usual way.

152 As there was both representation by Sovcomflot and reliance by CMC, the Court of Appeal concluded that the Master had signed the bills of lading as the ostensible agent of Sovcomflot. The Court of Appeal said at [51]:

> … in our view, in the present case, Sovcomflot intended to, and did, become the "absolute owner" or "really and substantially the owner" of the "Socofl Stream" on and from 15 December 1998 and impliedly took control of the master and crew so that acts which it thereafter permitted the master to do in the ordinary course of trade were done as its ostensible agent.

Is there ostensible authority based on the current facts?

153 Following the Court of Appeal's reasoning in the *Socofl Stream Appeal* and applying it to the

current facts:

(i) First, as stated in [136] above, I am of the view that the Lease Agreement terminated in mid-April 2011. Even if this is eventually challenged and found to incorrect at trial, the fact remains that at this juncture there is an arguable case that the charterparty was terminated in mid-April 2011. This means that the possession and control of the Vessel passed immediately to HKC in mid-April 2011 and the Vessel was not in the possession and control of Sejin when the bills of lading were signed though Sejin continued to employ the master and crew.

(ii) Second, having terminated the Lease Agreement, HKC had placed Sejin in the position as their representatives in respect of bills of lading issued and indirectly *represented* to shippers (the plaintiffs in ADM 198 and 201) that they, HKC, have authorised Sejin to bind them to these bills of lading.

(iii) There was reliance by the plaintiffs in ADM 198 and 201 on HKC's conduct. As highlighted by the Court of Appeal in *Socoflo Stream Appeal*, the natural inference is that after the Lease Agreement was terminated, HKC could have made it clear that the Vessel no longer had their authority to take on cargo and issue bills of lading. HKC claimed that they had treated the Lease Agreement as terminated from 4 April 2011 and had repeatedly demanded the return of the Vessel. Since Sejin did not return the Vessel, it was open to HKC to take steps to recover the Vessel as expressly provided for in article 26(5) of the Lease Agreement. However, HKC did not take any steps to recover possession of the Vessel.

154 In light of the above, it cannot be said that the plaintiffs' claim in ADM 198 and ADM 201 against HKC are legally and factually unsustainable such that their claim based on ostensible authority should struck out at this time. Accordingly, the plaintiff's actions in ADM 198 and ADM 201 against HKC will not be struck out pursuant to O18 r19 of the ROC and/or the inherent jurisdiction of the Court.

CONCLUSION

155 For the above reasons, I find that Sejin was not the demise charterer at the time of the commencement of the action in the various ADM proceedings. Therefore, the four ADM proceedings against Sejin are set aside on the basis that the admiralty jurisdiction *in rem* of the Court under the HCAJA had been improperly invoked against the Vessel.

156 I also decline to strike out the plaintiffs' respective claim against HKC in ADM 198 and ADM 201 pursuant to O18 r19 of the ROC and/or the inherent jurisdiction of the Court.

[note: 1] All parties agree that Article 25 referred to in the Lease Agreement is incorrect and that this reference should be Article 26 instead.