IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 69

Civil Appeal No 56 of 2021

Between

(1) An Guang Shipping Pte Ltd (judicial managers appointed)
(2) An He Shipping Pte Ltd (receivers appointed)
(3) An Hua Shipping Pte Ltd (receivers appointed)
(4) An Kang Shipping Pte Ltd (receivers appointed)
(5) An Sheng Shipping Pte Ltd (receivers appointed)
(6) An Xing Shipping Pte Ltd
(7) Da An Shipping (Pte) Ltd (in members' voluntary liquidation)
(8) Da Guang Tankers (Pte) Ltd (judicial managers appointed)
(9) Da Xin Tankers (Pte) Ltd (judicial managers appointed)
(10) Da Zhong Tankers (Pte) Ltd (judicial managers appointed)
(11) Dafa Shipping (Pte) Ltd (judicial managers appointed)
(12) Dong Fang Shipping & Trading (Pte) Ltd (in creditors' voluntary liquidation)
(13) Dong Jiang Tankers (Pte) Ltd (judicial managers appointed)
(14) Dong Nan Tankers (Pte) Ltd (in creditors' voluntary liquidation)
(15) Dong Sheng Tankers (Pte) Ltd (judicial managers appointed)
(16) Dong Ya Tankers (Pte) Ltd (judicial managers appointed)

(17) Hua An Shipping Pte Ltd (in creditors' voluntary liquidation)
(18) Hua Guang Shipping Pte Ltd (in creditors' voluntary liquidation)
(19) Hua Kang Shipping Pte Ltd (in creditors' voluntary liquidation)
(20) Hua Sheng Shipping Pte Ltd (judicial managers appointed)
(21) Hua Xin Shipping Pte Ltd (in creditors' voluntary liquidation)
(22) Hua Zhong Shipping Pte Ltd (judicial managers appointed)
(23) Nan Chiau Maritime (Pte) Ltd (judicial managers appointed)
(24) Nan Chuan Maritime (Pte) Ltd (judicial managers appointed)
(25) Nan Hai Maritime (Pte) Ltd (in creditors' voluntary liquidation)
(26) Nan King Maritime (Pte) Ltd (in creditors' voluntary liquidation)
(27) Nan Sia Maritime (Pte) Ltd (in creditors' voluntary liquidation)
(28) Nan Ya Maritime (Pte) Ltd (in members' voluntary liquidation)
(29) Nan Yi Maritime (Pte) Ltd (in creditors' voluntary liquidation)
(30) Nan Zhou Maritime (Pte) Ltd (judicial managers appointed)
(31) Xin An Shipping (Pte) Ltd (judicial managers appointed)
(32) Xin Bo Shipping (Pte) Ltd (judicial managers appointed)
(33) Xin Chun Shipping (Pte) Ltd (judicial managers appointed)
(34) Xin Dun Shipping (Pte) Ltd (judicial managers appointed)
(35) Xin Guang Shipping (Pte) Ltd
(36) Xin Hui Shipping (Pte) Ltd (judicial managers appointed)
(37) Xin Kang Shipping (Pte) Ltd (judicial managers appointed)

(38) Xin Sheng Shipping (Pte) Ltd (judicial managers appointed)
(39) Xin Ya Shipping & Trading (Pte) Ltd (in creditors' voluntary liquidation)
(40) Xin Ying Shipping (Pte) Ltd (judicial managers appointed)

… *Appellants*

And

Ocean Tankers (Pte) Ltd
(in liquidation)

… *Respondent*

In the matter of Originating Summons No 452 of 2020
(Summons No 2085 of 2021)

In the matter of the Companies Act (Cap 50)

And

In the matter of Sections 227B and 227G of the Companies Act (Cap 50)

And

In the matter of Ocean Tankers (Pte) Ltd

Ocean Tankers (Pte) Ltd

… *Applicant*

JUDGMENT

[Companies — Receiver and manager — Judicial management order]

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Court of Appeal — Civil Appeal No 56 of 2021
Andrew Phang Boon Leong JCA and Judith Prakash JCA
10 August 2022

26 October 2022 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 After a company enters into liquidation, expenses and liabilities incurred by its liquidators for the purposes of the winding up may be accorded priority over the company's other unsecured debts, pursuant to what is known as the liquidation expenses principle. Although this principle was articulated and developed in the context of liquidation, it also applies by extension in the context of *judicial management*, where expenses and liabilities are incurred by a company's judicial managers for the benefit of the company. This was first recognised in Singapore – tentatively but, in our view, rightly – by Kannan Ramesh J in *Re Swiber Holdings Ltd* [2018] 5 SLR 1358 ("*Swiber Holdings*") at [89]. We refer to this as the "judicial management expenses principle" or "the Principle".

2 The present appeal provides us with an occasion to consider the scope of the Principle and its application to a case involving the retention and use of property by a company's judicial managers while the company is in judicial management. The appellants are 40 vessel-owning subsidiaries of Xihe Holdings (Pte) Ltd ("the XH Companies"), while the respondent is Ocean Tankers (Pte) Ltd ("OTPL"). Both the XH Companies and OTPL are presently in judicial management and are represented in these proceedings by their judicial managers, whom we refer to as "the XH JMs" and "the OTPL JMs", respectively. Central to the parties' dispute is the question whether the XH Companies' claims under various bareboat charters, which OTPL had entered into with the XH Companies prior to being placed in interim judicial management, fall within the scope of the Principle so as to enjoy priority in OTPL's judicial management.

3 To state our conclusion upfront, we agree with the decision of the General Division of the High Court judge ("the Judge") below, the full grounds of which were set out in *Re Ocean Tankers (Pte) Ltd* [2022] SGHC 55 ("the GD"), that the Principle would generally *not* apply to the XH Companies' claims, subject to certain exceptions based on how specific vessels were used. In our judgment, the Judge did not err in inferring from the material before him that the OTPL JMs generally did not retain the vessels for the benefit of OTPL's estate, nor did the Judge err in requiring the XH Companies to prove that their ancillary claims for repair costs were linked to the period that these vessels were retained by the OTPL JMs for the benefit of OTPL's estate. Accordingly, we dismiss the XH Companies' appeal against the Judge's decision.

4 We begin by setting out the facts and background to the present appeal. Thereafter, we explain in detail the reasons for our decision.

Facts

5 Much of the factual background has been helpfully recounted by the Judge in the GD, and we restate only the facts material to the present appeal. As there are several overlapping categories and classifications of the 76 vessels which are the subject of the parties' dispute, we also make reference where appropriate to a table which summarises the relevant facts in relation to each of these vessels ("the Table of Vessels"). This Table of Vessels is contained in the Annex to our judgment.

Parties and background

6 Mr Lim Oon Kuin had procured the incorporation of various companies including OTPL, Xihe Holdings (Pte) Ltd ("XH"), Xihe Capital (Pte) Ltd ("XC") and Hin Leong Trading (Pte) Ltd ("HLT"). XH and XC were part of the Xihe Group. Some of XH's subsidiaries owned vessels, and 40 such subsidiaries are relevant to the present appeal ("the XH Companies").

7 Prior to the entry into insolvency processes of OTPL, HLT and certain companies in the Xihe Group, their businesses were connected. In particular, the XH Companies (as shipowners) chartered their vessels to OTPL, principally under bareboat charters. OTPL would then sub-charter those vessels to, or enter into contracts of carriage with, various other parties (including HLT) on time or voyage charters. This formed a significant part of OTPL's business of ship chartering and ship management (see [2] of the GD).

8 In late April 2020, HLT filed an application to be placed under judicial management. OTPL filed a similar application on 6 May 2020, and the OTPL JMs were appointed as interim judicial managers of OTPL on 12 May

2020 pursuant to an order of court ("the OTPL IJM Order") (see [4] of the GD). OTPL's judicial management had the following objectives:

(a) to propose a debt restructuring plan with OTPL's creditors under the supervision and control of the OTPL JMs and with the protection of the judicial management regime;

(b) to urgently stabilise OTPL's business, in particular, its business with third party charterers; and

(c) to restore the confidence of OTPL's business partners in continuing dealings with OTPL under the OTPL JMs' management.

Events taking place during OTPL's interim judicial management

18 May 2020 Meeting

9 On 18 May 2020, a meeting took place between the OTPL JMs and the management of the Xihe Group ("the Meeting") regarding vessels that OTPL had chartered from the XH Companies (see [6] of the GD). In their presentation slides ("the Slides") for the Meeting, the OTPL JMs stated that due to the market's loss of confidence in the trading ability of OTPL's fleet, OTPL was unable to continue servicing its bareboat charter obligations to the XH Companies, and as such *wished to consensually terminate* the bareboat charters. In this connection, the OTPL JMs proposed arrangements for the physical redelivery of the chartered vessels to the XH Companies, or alternatively for ship management agreements to be entered into between OTPL and the XH Companies.

Termination Notices issued by the XH Companies

10 From 20 May 2020 to 3 June 2020, notices of termination ("the Termination Notices") were issued by the XH Companies in respect of bareboat charters for 41 vessels, 30 of which are relevant to this appeal. These 30 vessels are identified in ***Column A*** *of the Table of Vessels*.

11 On 27 May 2020 and 30 May 2020, these Termination Notices were accepted by the OTPL JMs, who agreed to redeliver the vessels subject to payment of the cost of bunkers "remaining on board" ("ROB") as provided for under the charterparties. The OTPL JMs and the XH Companies then discussed redelivery for 28 of these 30 vessels. However, redelivery of these vessels did not take place (see [7]–[8] of the GD).

OS 652 – the XH Companies' redelivery application

12 According to the XH Companies, the OTPL JMs had initially proceeded on the basis that they could redeliver the 37 vessels to the relevant XH Companies without an order of court. However, at a meeting on 22 June 2020, the OTPL JMs said that they needed an order of court, and that either they or the XH Companies should apply for such an order.

13 On 6 July 2020, the relevant XH Companies filed HC/OS 652/2020 ("OS 652") seeking leave of court to take redelivery of 37 vessels that were the subject of bareboat charters with OTPL. They also sought a declaration that the XH Companies (upon taking delivery of their respective vessels) were entitled to take over and pay for various expenses for their vessels (*ie*, outstanding ROB) by way of set off against the bareboat charterhire due and payable by OTPL to the XH Companies. As the Judge noted, it is unclear why leave of court for redelivery was not sought for all 41 vessels (see [9] of

the GD), but this is not material for present purposes. Of the 37 vessels that were in issue in OS 652, nine were not included in HC/SUM 2085/2021 ("SUM 2085") (*viz*, the "Ocean Gar", the "Reliance", the "Ocean Buri", the "Ocean Seal", the "Ocean Clover", the "Ocean Moray", the "Ocean Dolphin", the "Ocean Cod" and the "Ocean Bass") and the owners of these vessels are not parties to the present dispute. The Judge's decision in respect of SUM 2085 is the subject of the present appeal. Hence, only 28 of the vessels in issue in OS 652 are relevant to the present proceedings (identified in ***Column B*** *of the Table of Vessels*). It should, however, be noted that the XH Companies' supporting affidavit stated that *their* view was that the OTPL JMs (then *interim* judicial managers), with all the powers of judicial managers pursuant to the OTPL IJM Order, could redeliver the 37 vessels *without* an order of court.

14 No hearing date was fixed for OS 652 as the consent of the mortgagees of the vessels to the termination of the bareboat charters had yet to be obtained, and the terms of redelivery had yet to be worked out between the XH Companies and the OTPL JMs. The discussions on the terms of redelivery did not reach any conclusion (see the GD at [9]–[10]).

Marketing and deployment of the XH Companies' vessels by the OTPL JMs

15 Concurrently, from 12 May 2020 to 8 September 2020, the OTPL JMs marketed some of the XH Companies' vessels for hire in the lists of vessels in OTPL's fleet which were sent to brokers and charterers. Some of these marketed vessels (though not all) were then successfully deployed on sub-charters. The facts pertaining to these vessels are discussed in more detail at [95]–[104] below.

Events taking place after OTPL was placed in judicial management

16 On 7 August 2020, the OTPL JMs were appointed as judicial managers of OTPL pursuant to an Order of Court ("the OTPL JM Order") (see the GD at [4]).

17 On 13 August 2020, XH and four of the XH Companies were placed in interim judicial management, and the XH JMs were appointed as interim judicial managers ("the XH IJM Order") (see the GD at [10]).

Notices of Non-Adoption issued by the OTPL JMs

18 From 31 August 2020 to 3 September 2020, the OTPL JMs sent notices to the relevant XH Companies electing not to adopt the bareboat charters in respect of 74 out of the 76 vessels ("the Notices of Non-Adoption") (identified in ***Column C*** *of the Table of Vessels*). No Notices of Non-Adoption were necessary for the remaining two vessels because these had been on time charters which had already been terminated, and they had already been redelivered by OTPL prior to the OTPL JM Order (see the GD at [11]).

XH Companies' retraction of the Termination Notices, affirmation of the bareboat charters and discontinuance of OS 652

19 On 1 and 2 September 2020, the XH JMs issued notices to the OTPL JMs retracting the Termination Notices. In response to the Notices of Non-Adoption, between 10 and 15 September 2020, the XH JMs issued notices to the OTPL JMs affirming the bareboat charters. The XH JMs also sought leave to discontinue OS 652 (their application for leave of court for the redelivery of vessels), and this was granted on 28 September 2020 (see the GD at [12]).

SUM 4257 – OTPL's disclaimer application

20 On 1 October 2020, the OTPL JMs *applied for leave to disclaim and terminate* various bareboat charters as unprofitable contracts in HC/SUM 4257/2020 ("SUM 4257"). On 23 November 2020, the Judge granted such leave in respect of the bareboat charters for 52 vessels, on the basis that the leave was to be deemed to have taken effect on 10 November 2020. All 52 of those vessels were among the 76 vessels in issue in SUM 2085. The 52 vessels are identified in ***Column D*** *of the Table of Vessels*. The order made by the Judge also contained consent orders pertaining to how redelivery of the specified vessels (save for three of the vessels) was to be effected, and stipulated that the XH Companies would bear all costs for crewing, maintenance and upkeep that might be reasonably incurred from 10 November 2020 until redelivery (albeit that this was without prejudice to the XH Companies' rights to claim such costs from OTPL) (see the GD at [13]–[14]).

21 Before the OTPL JMs were granted leave to disclaim the bareboat charters in SUM 4257, they presented their First Judicial Managers' Report to the court on the progress of OTPL's judicial management on 6 November 2020. This report stated that, as the OTPL JMs "ha[d] been unable to find meaningful employment for nearly all of the vessels in order for them to provide a benefit to OTPL", in early September 2020, they had sought to *repudiate* the bareboat charters for these vessels *and arrange redelivery*. *However, seven specified vessels* owned by the XH Companies had not been included in SUM 4257 because they were *to be retained and employed* by OTPL for an interim period *in order to generate a benefit for OTPL*. The OTPL JMs issued Notices of Adoption in respect of these vessels (see the GD at [59]).

22 On 13 November 2020, the XH JMs were appointed judicial managers (see the GD at [10]).

OTPL's summons for directions

23 A dispute subsequently arose between the parties regarding whether the XH Companies' claims against OTPL for charterhire and various costs (such as costs for crewing, maintenance, upkeep, insurance, surveys and the repair of the vessels) incurred in relation to the vessels were *priority claims* in OTPL's judicial management or winding up. This began with the XH JMs' solicitors' letter to the OTPL JMs' solicitors on 2 December 2020, in which they reserved the XH JMs' right to lodge proofs of debt in OTPL's judicial management for claims amounting to over US$156m and asserted that these were priority claims ranking *pari passu* with the OTPL JMs' remuneration and expenses. The XH JMs' solicitors also stated that, pending the adjudication of these proofs of debt and the determination of their priority, the OTPL JMs should preserve sufficient funds to meet these claims and should not make any distributions to other priority claimants. The XH Companies' proofs of debt were filed on 18 December 2020 (see the GD at [15]–[22]).

24 On 1 May 2021, the OTPL JMs filed SUM 2085 seeking the court's directions regarding these claims arising out of OTPL's bareboat charters of the 76 vessels owned by the XH Companies. These claims fell within two categories: (a) charterhire for the period of use (*ie*, the period of sub-charter or carriage entered into by OTPL with various parties), and (b) ancillary liabilities (*ie*, sums other than charterhire payable or to be borne by OTPL under the bareboat charters) incurred during the period of use (see the GD at [23]). The former category of claims will be referred to as "Charterhire Claims" while the latter category will be referred to as "Ancillary Claims", and both categories of

claims arising out of or in connection with the bareboat charters will be collectively referred to as "the Claims". The OTPL JMs were prepared to admit the Claims (to the extent that the amounts were agreed) as OTPL's debts, but argued before the Judge that the Principle did ***not*** apply to confer ***priority*** on them because the OTPL JMs did *not* choose to *retain* possession of the vessels *for the benefit of the judicial management*; *they had wanted to* ***return*** *these vessels* ***and*** *had taken steps to do so, and it was the XH Companies' refusal to take possession of their vessels that had forced them to remain in OTPL's hands*. Accordingly, the OTPL JMs contended that the Claims should be treated as ordinary unsecured debts ranking *pari passu* with OTPL's other unsecured debts. The XH JMs, on the *other hand*, argued before the Judge that the Principle applied to elevate the Claims to priority expenses in OTPL's judicial management which should be paid in priority to OTPL's unsecured debts, because the OTPL JMs had retained the vessels *for the benefit* of OTPL's creditors and judicial management, and they thereby took a calculated risk that this could lead to the XH Companies having preferential claims against OTPL.

25 After the filing of SUM 2085, the XH Companies' solicitors asked whether OTPL had put the vessels on the market or advertised their availability for charter, with the intention of chartering the vessels to generate income for OTPL. OTPL's solicitors responded via e-mail on 3 July 2021 ("the OTPL Solicitors' E-mail"), stating that it was part of the OTPL JMs' duties as interim judicial managers to assess initially whether OTPL's vessels could be redeployed in a commercially viable way, as part of their consideration of the options available for OTPL's ship management and chartering business. The OTPL Solicitors' E-mail also stated that, as was common in the ship chartering industry, enquiries from potential customers would be received by OTPL, and suitable vessels would be identified for further discussion. The

OTPL chartering team had also telephoned brokers and potential clients to seek new business and/or to make them aware that OTPL remained open to chartering business.

26 To put the practical significance of the parties' dispute in context, the quantum of the Claims is very large. As we noted in *An Guang Shipping Pte Ltd (judicial managers appointed) and others v Ocean Tankers (Pte) Ltd (in liquidation)* [2022] 1 SLR 1232 ("*An Guang Shipping (SUM 89)*") at [4], treating the Claims as preferred debts would result in applying all of OTPL's assets towards them, leaving nothing for OTPL's unsecured creditors. That said, we note that (as OTPL points out) the XH Companies have not provided any figures to quantify the specific Claims they are pursuing in the present appeal.

27 Separately, OTPL also highlights that there are ongoing proceedings in which the XH JMs assert that they are not obliged to pay the sums that they had undertaken to bear (which were expenses incurred by the OTPL JMs in respect of the vessels) as a priority payment in the XH Companies' judicial management.

28 On 20 September 2021, the Judge delivered his brief oral grounds in respect of SUM 2085 ("the Oral Judgment"), in which he held that the Principle would generally not apply to the XH Companies' claims. The Judge set out the detailed reasons for his decision in the GD issued on 14 March 2022. We summarise the key aspects of the Judge's reasoning at [31]–[34] below.

Procedural history

29 On 19 October 2021, the XH Companies filed their Notice of Appeal against the Judge's decision. As the Judge's decision was in respect of a summons (namely, SUM 2085), a two-Judge *coram* of the Court of Appeal was

constituted to hear the appeal pursuant to para 4(*i*) of the Seventh Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

30 While not material to the present appeal, we mention by way of background that on 1 November 2021, OTPL applied in CA/SUM 89/2021 to strike out the Notice of Appeal on the ground that the XH Companies had not obtained leave of court before filing the appeal, which OTPL argued was required under s 133(1) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("the IRDA"). We dismissed this application on 21 February 2022, with our full reasons set out in *An Guang Shipping (SUM 89)*.

Decision below

31 The Judge held that a "clear line" had to be drawn between vessels for which Notices of Non-Adoption were issued from 31 August 2020 to 3 September 2020, and vessels in respect of which no such notices were issued. The Notices of Non-Adoption were an *unequivocal* statement by the OTPL JMs that they did not wish to retain possession of the vessels for the benefit of the estate and wished to redeliver them. Thus, the Principle generally could not apply to either the Charterhire Claims or the Ancillary Claims for the period of use of the relevant vessels once the Notices of Non-Adoption had been issued by the OTPL JMs (see the GD at [52]). This aspect of the Judge's decision is accepted by the XH Companies on appeal.

32 However, the Judge also held that the Principle would generally not apply even during the period *before* the Notices of Non-Adoption were issued. The Judge found that the facts generally demonstrated that the OTPL JMs had

been compelled to retain the vessels, at first due to extraneous circumstances, and later due to the actions of the XH JMs (see the GD at [35]):

> (a) During the period from 7 May 2020 to 12 August 2020, *before* the XH JMs were appointed as interim judicial managers under the XH IJM Order, the OTPL JMs and the management of the Xihe Group shared the position that the vessels should be redelivered to the XH Companies and the bareboat charters brought to an end. This was clear from three key events: the Meeting, the issuance and acceptance of the Termination Notices, and the commencement of OS 652. Once the Termination Notices had been accepted by the OTPL JMs, OTPL had to redeliver the relevant vessels subject to the consent of the mortgagees and leave of court being obtained. However, redelivery could not be carried out as the OTPL JMs had not yet obtained such consent and leave (see the GD at [39]–[44] and [49]).
>
> (b) *After* the XH JMs were appointed as interim judicial managers under the XH IJM Order on 13 August 2020, the XH Companies' position changed. The XH JMs took no further steps to take redelivery of the vessels (as they were obliged to do once the Notices of Non-Adoption were issued), and instead took steps that essentially compelled the OTPL JMs to retain possession of the vessels – namely, retracting the Termination Notices, affirming the bareboat charters, and discontinuing OS 652. The XH JMs took this course for strategic reasons: they wished for the operational costs of the vessels to fall on OTPL and not on the estate of the XH Companies (see the GD at [50]–[57]).

33 Accordingly, the Judge concluded that the OTPL JMs had not retained the vessels for the benefit of the estate, and the Principle would thus generally not apply to the Claims arising out of the vessels that were the subject of SUM 2085 (see the GD at [35], [57] and [84]).

34 Nevertheless, the Judge went on to hold that this general conclusion was *subject to certain exceptions*. Several categories of vessels had been used for various purposes, and the Judge's conclusions on each of these categories were as follows:

(a) The first category comprised vessels in respect of which the OTPL JMs had issued Notices of Adoption, and which were thus not the subject of SUM 2085. The Principle *applied* to any claims arising out of the use of these vessels, which would thus be accorded priority (see the GD at [59]).

(b) The second category comprised vessels which had been used by the OTPL JMs to store and transport cargo prior to the Notices of Non-Adoption, and this use continued after the issuance of the Notices of Non-Adoption (from May to early December 2020) ("the Second Category"). The Principle *applied* to both Charterhire Claims and Ancillary Claims for expenses for the period of use of these vessels, though not to repair costs as it was "difficult to establish a link between the repair costs which ought to be borne by OTPL and the use of the vessels in the period of use" (see the GD at [60]–[64]).

(c) The third category comprised vessels which had been used by the OTPL JMs to store and transport cargo after applying for leave in interpleader proceedings (from May to late September or early October 2020) ("the Third Category"). The Principle *did not apply* as

the OTPL JMs needed to retain the vessels to hold on to their cargo while creditors resolved their competing claims in interpleader proceedings, and they thus did not retain these vessels for the benefit of the estate (see the GD at [65]–[66]).

(d) The fourth category comprised vessels which were deployed on sub-charters by the OTPL JMs, and which were used at various times before and after the issuance of the Notices of Non-Adoption ("the Fourth Category"). The Principle *applied* to both Charterhire Claims and Ancillary Claims for expenses for the period of *use* of these vessels after the relevant Notices of Non-Adoption were issued (albeit not to repair costs), because being deployed in sub-charter was clearly for the benefit of the estate. For the five vessels within this category which stopped operating for months at a time, the period of use would not include such periods of inactivity; and whether the Principle applied to the period of use resuming after the Notices of Non-Adoption were issued would depend on why the deployment of these five vessels resumed (see the GD at [67]–[71]).

(e) The fifth category comprised vessels deployed by the OTPL JMs for various in-house services ("the Fifth Category"). The Principle *applied* to both Charterhire Claims and Ancillary Claims for expenses arising out of these vessels after the relevant Notices of Non-Adoption were issued (albeit not to repair costs), because if the OTPL JMs had redelivered these vessels, they would have needed to secure other vessels to achieve the same purpose, in which case they would have incurred expenses under post-insolvency contracts which would then have enjoyed priority as judicial management expenses. Notably, the Principle also applied to expenses incurred during the periods of

downtime when the vessels were not used, because these vessels were nevertheless retained for a purpose regarded as being beneficial to the estate (see the GD at [72]–[74]).

(f) The sixth category, labelled "Others", consisted of only one vessel ("the Sixth Category"). It was unclear to what use this vessel was put. The Judge thus left the parties to use the guidance provided on the other categories to determine the correct outcome for this category (see the GD at [75]).

35 The vessels falling within the Second to Sixth Categories are identified in ***Column E*** *of the Table of Vessels*.

The parties' cases

36 The parties' cases on appeal focus on four main areas of dispute, and we summarise their arguments on each area in the sections that follow. The XH JMs' key contention, however, should – in the interests of clarity – be stated at the outset. The XH JMs take issue with the Judge's finding that the Principle would generally not apply to the XH Companies' Claims in the period *before* the issuance of the Notices of Non-Adoption, which in turn was based on the Judge's inference that the OTPL JMs had wanted to redeliver the vessels during this period but were forced to retain them due to leave of court and the mortgagees' consent being required for redelivery. The XH JMs' position is that the Judge erred in so inferring and that the contemporaneous evidence instead shows that the OTPL JMs made a conscious choice to retain the XH Companies' vessels in furtherance of their judicial management objectives. Let us now turn to the four main areas of dispute.

On the position of interim judicial managers

37 ***First***, the XH Companies submit that the Judge erred in suggesting (at [29] of the GD) that a degree of latitude should be afforded to an *interim* judicial manager in assessing whether leased property was retained for the benefit of the estate. They contend that OTPL JMs, acting as interim judicial managers, should be held to the same standard as judicial managers because they had already taken concrete steps to advance the restructuring of OTPL to ensure its survival as a going concern, and had retained the vessels in furtherance of that stated goal.

38 In response, OTPL argues that this suggestion did not influence the Judge's decision that the OTPL JMs had not retained the vessels for the benefit of the estate. In any event, the Judge's suggestion was correct given that the application of the Principle is fact-sensitive and the factual and legal situation at the interim judicial management stage is very different from that at the judicial management stage.

On whether the OTPL JMs retained vessels for the benefit of OTPL's estate

39 ***Second***, the XH Companies submit that the Judge erred in inferring that the OTPL JMs had not retained various groups of vessels for the benefit of OTPL's estate in the period up to the issuance of the Notices of Non-Adoption. The XH Companies argue that the OTPL JMs had retained two (overlapping) groups of vessels for the benefit of OTPL's estate:

> (a) For the vessels in respect of which *Termination Notices* were issued and accepted, the predominant reason that redelivery could not take place was that the OTPL JMs withheld redelivery as commercial leverage, to secure technical or commercial management (or ship

management) contracts and payment of ROB in full, for the benefit of OTPL's judicial management. The alleged extraneous reasons impeding redelivery were only secondary reasons for the failure of redelivery.

(b) For the vessels which the OTPL JMs *marketed for hire*, these can be further subdivided into: (i) vessels for which Termination Notices were never issued and where no steps were taken by the OTPL JMs to implement redelivery, at least up to the issuance of the Notices of Non-Adoption; and (ii) vessels for which Termination Notices were issued and which were the subject of redelivery negotiations. For (i), these were retained by the OTPL JMs to rehabilitate OTPL's chartering business and restore market confidence, or at least to generate income for OTPL's estate. For (ii), the Judge's inference that the OTPL JMs were marketing these vessels as potential future ship managers is unsupported; instead, the OTPL JMs used these vessels as commercial leverage. Thus, these vessels were also retained for the benefit of the estate.

40 In reply, OTPL submits that the Judge was correct to infer that the OTPL JMs had not retained the vessels for the benefit of the estate, but instead had been compelled to do so.

(a) For the vessels in respect of which *Termination Notices* were issued and accepted, the OTPL JMs intended at all times to redeliver the vessels and were actively taking steps towards doing so. However, there were matters subject to ongoing discussions between the OTPL JMs and the management of the Xihe Group, and there were also other unresolved matters which prevented the OTPL JMs from redelivering the vessels – namely, the need to obtain leave of court and the mortgagees' consent for the termination of the bareboat charters.

(b) For the vessels which the OTPL JMs *marketed for hire*, this was done to earn revenue to defray the operating expenses that OTPL continued to incur while it was being compelled to retain these vessels for reasons beyond its control.

On the application of the Principle to periods of inactivity between deployments

41 ***Third***, for the vessels which the OTPL JMs deployed on sub-charters, the XH Companies contend that the Judge erred in finding that the Principle did not apply to the periods of inactivity before, between and after redeployment on sub-charters in the period up to the issuance of the Notices of Non-Adoption. They argue that, given the preparation work (such as marketing and negotiations) that had to be done prior to actual deployment of the vessels, the OTPL JMs' intention to retain the vessels for the benefit of OTPL's estate must have existed once they started marketing the vessels, rather than manifesting only when the vessels were actually deployed.

42 OTPL, on the other hand, submits that the Judge did not err in this regard as the OTPL JMs did not generally retain these vessels for the benefit of OTPL's estate during this period (having been forced to remain in possession of these vessels), and the Principle should therefore only apply where the vessels in this category were actually used for OTPL's business by being deployed on sub-charters.

On the Ancillary Claims

43 ***Fourth***, the XH Companies submit that the Judge erred in requiring them to prove that the Ancillary Claims were linked to the period during which the vessels were beneficially retained by the OTPL JMs before they could

constitute judicial management expenses (which they label "the relative approach"). Instead, they contend that *any liability which accrues during* the period of beneficial retention should be payable in full as a judicial management expense ("the accruals approach").

44 In response, OTPL points out that the only Ancillary Claims that the Judge did not allow despite holding that the Principle applied were claims for repair costs, which were not limited to repairs arising from the periods of use for which charterhire had to be paid, but instead were for *all* repairs purportedly carried out on the vessels concerned. OTPL submits that the accruals approach proposed by the XH Companies should not be adopted as it is wrong in law and does not make sense where there is no general intention to retain leased property for the benefit of the estate.

Issues to be determined

45 From the parties' arguments on appeal, four issues arise for this court's determination:

(a) first, whether the Judge erred in suggesting that a degree of latitude should be afforded to an *interim* judicial manager in assessing whether leased property had been retained for the benefit of the estate;

(b) second, whether the Judge erred in inferring that the OTPL JMs had *not retained various categories of vessels for the benefit of OTPL's estate* in the period up to the issuance of the Notices of Non-Adoption;

(c) third, whether, for vessels in the Fourth Category, the Judge erred in finding that the Principle did not apply to *periods of inactivity*

between redeployment on sub-charters in the period up to the issuance of the Notices of Non-Adoption; and

(d) fourth, whether the Judge erred in requiring the XH Companies to prove that the Ancillary Claims were *linked* to the period during which the vessels were beneficially retained by the OTPL JMs before they could constitute judicial management expenses.

46 The specific vessels relevant to each disputed issue are identified in ***Column F*** *of the Table of Vessels*. Before we consider each of these issues in turn, we set out the applicable legal principles that guide our analysis. These are, in the main, not disputed by the parties, as the focus of their cases on appeal is instead on the Judge's *application* of the Principle to the Claims in issue.

The applicable legal principles

47 The statutory starting point is s 227J(3)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed), which provides that "any remuneration and expenses properly incurred by [a judicial manager]" shall be charged on and paid out of the property of the company in his custody or under his control in priority to all other debts. Although the principal function of s 227J(3)(*b*) appears to be to confer priority on claims by the *judicial manager himself* against the company, claims by *third parties* might also be treated as expenses of the judicial management, and hence may fall within the scope of s 227J(3)(*b*), *if the Principle applies.* In such cases, even though these claims are not made by the judicial manager himself, they may be *treated as expenses of the judicial management* (see *Swiber Holdings* at [85]–[86] and [90]). For completeness, we note that s 227J(3)(*b*) of the Companies Act is now s 104(3) of the IRDA.

48 The Principle applies where, after a company is placed in judicial management, its judicial managers incur "liabilities relating to property used for the benefit of the company" (see *Swiber Holdings* at [90]). While this principle was originally formulated and developed in the context of liquidation (see the decision of this court in *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 ("*Chaly Chee*") at [51]–[56]), it was held in *Swiber Holdings* at [89] that it would also apply in the judicial management context, and this is not disputed by the parties. Importantly, for the purposes of the present appeal, expenses incurred in relation to the *retention* and *continued use* of *property* under pre-judicial management contracts will fall within the ambit of the Principle if this was "for the benefit of" the estate (see *Chaly Chee* at [52]–[56]). The rationale for the Principle is that liabilities incurred before the judicial management in respect of property afterwards retained by the judicial managers for the benefit of the estate, or in the continued use of that property, should on equitable grounds be *treated as if they were* expenses of the judicial management and should be accorded the same priority (see *Chaly Chee* at [52], citing the English cases of *In re Oak Pits Colliery Company* (1882) 21 Ch D 322 ("*Oak Pits Colliery*") at 330 and *In re Toshoku Finance UK plc* [2002] 1 WLR 671 ("*Toshoku*") at [27]; see also *Toshoku* at [29]). The scope of the specific acts relating to the retention and use of property that would fall within the Principle would include situations where the judicial manager "has retained possession for the purposes of the [judicial management], or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it" (see *Chaly Chee* at [52], citing *Oak Pits Colliery* at 330).

49 More recently, the principle was explained by the English Court of Appeal in *Jervis and others v Pillar Denton Ltd and others* [2014] 3 WLR 901 ("*Jervis*") at [101] in the terms set out below:

> The true extent of the principle, in my judgment, is that *the office holder must make payments at the rate of the rent for the duration of any period during which he retains possession of the demised property* ***for the benefit of the winding up or administration*** (as the case may be). The rent will be treated as accruing from day to day. *Those payments are payable as expenses of the winding up or administration.* The duration of the period is a *question of fact* and is not determined merely by reference to which rent days occur before, during or after that period. This, in my judgment, is the way that James LJ formulated the underlying principle in *In re Lundy Granite Co* LR 6 Ch App 462 itself ["*Lundy*" or "*Lundy Granite*"].
>
> [emphasis added in italics and bold italics]

Although the court in *Jervis* referred to "administration", the administration procedure in English law is broadly similar to Singapore's judicial management regime, which was *based on* the English administration procedure (see *Swiber* at [81] and [89], and T C Choong & V K Rajah, *Judicial Management in Singapore* (Butterworths, 1990) ("Choong & Rajah (1990)") at p 6).

50 It should, however, be noted that the Principle ought to be "restrictive in its application". It is for the party seeking to rely on the Principle to show why he should have priority over the other creditors. Furthermore, it is "not sufficient that the [judicial manager] retained possession for the benefit of the estate if it was also for the benefit of the [party making the claim]", and "[n]ot offering to surrender or simply doing nothing [is] not regarded as retaining possession for the benefit of the estate" (see *Chaly Chee* at [53]–[54], citing *Toshoku* at [27]–[29]). In *Toshoku* at [28], Lord Hoffmann (delivering the judgment of the House of Lords) illustrated these points with two cases involving liquidators, which he explained as follows:

(a) In *In re ABC Coupler & Engineering Co Ltd (No 3)* [1970] 1 WLR 702 ("*ABC Coupler*"), "the liquidator on appointment closed down the business which had been conducted on the premises, had the company's plant and machinery valued and thought about what he should do. It was *only from the time he decided to put the lease on the market* that Plowman J held that he was retaining the premises for the benefit of the winding up and was liable to pay the rent in full" [emphasis added]. In *ABC Coupler* itself, Plowman J expressly observed that where the official receiver had not indicated an *election* to retain the lease, and had instead merely left the company's plant and machinery where he found them, had them valued and took no steps to surrender the company's interest in the factory, "those were all matters which Lindley LJ in the *Oak Pits Colliery* case … said were not sufficient to entitle the landlord to be paid in full" (see *ABC Coupler* at 716G).

(b) In *In re HH Realisations Ltd* (1975) 31 P & CR 249, it was held that "a company ceased to be liable to pay the rent in full from the time it *gave notice to the landlord that it was seeking authority to disclaim the lease*, even though it remained in occupation for nearly two months longer" [emphasis added].

51 Lord Hoffmann in *Toshoku* at [28] also referred in passing to *In re Downer Enterprises Ltd* [1974] 1 WLR 1460 ("*Downer Enterprises*"). In that case, shortly after the commencement of the winding up of the company, the liquidator took legal advice to ascertain what he should do with certain property, and, in particular, whether he should disclaim it. Having decided on advice not to disclaim it, he then gave instructions to his agents to find a purchaser. Pennycuick VC held that, from the date when the liquidator *gave instructions to find a purchaser*, the liquidator "[had to] be treated as having

remained in possession of this property with a view to the realisation of the property to the best available advantage, or, in other words, he [had to] be treated as having kept the property in order to sell it or do the best he could with it" (see *Downer Enterprises* at 1467A–1467D).

52 Ultimately, the critical question is whether the property was retained and used "for the benefit of" the estate. This will depend on the *purpose* of the judicial managers in retaining possession of such property (see *ABC Coupler* at 709B). The judicial managers' purpose, in turn, "will be found or will be inferred from what [they] in fact did", rather than being "dependent on the subjective processes in [their] mind[s]" (see *Downer Enterprises* at 1466H). Thus, as the Judge observed (at [27] of the GD), the mere fact of retention is not the focus of the inquiry, and the assessment of the purpose of retention is an *objective* one based on the judicial managers' conduct. It will also be apparent from what we have said above that determining whether the Principle applies in a given case is necessarily a *highly fact-sensitive inquiry*, the answer to which will turn on the precise facts as well as all the circumstances of each case.

53 With these principles in mind, we turn to the four issues in dispute in the present appeal.

Issue 1: Application of the Principle to *interim* judicial managers

54 The XH Companies first contend that the Judge erred in venturing to suggest that, "in assessing whether an interim judicial manager has retained the property for the benefit of the estate, *some degree of latitude ought to be afforded to the interim judicial manager* given the purpose of his appointment" [emphasis added] (at [29] of the GD). This suggestion was made by the Judge in the context of his holding that the Principle would apply even where a

company was in *interim* judicial management, as "interim judicial managers are also faced with decisions that need to be made for the benefit of the estate" (at [28] of the GD). We stress that the *applicability* of the Principle to interim judicial managers is not contested by the parties; the only point in dispute in this regard is whether any *latitude* should be afforded to *interim* judicial managers in applying the Principle.

55 It is unclear what role this point serves in the context of the present appeal in so far as the XH Companies are concerned. As OTPL points out, the XH Companies have not identified how this suggestion led the Judge into error and, if so, what that error is. At no point in the GD did the Judge indicate that he was *in fact* affording any latitude to the OTPL JMs in assessing the purpose of retaining the vessels prior to 7 August 2020, when they were acting in their capacity as interim judicial managers. Instead, the Judge considered whether, on the facts, the OTPL JMs' retention of the vessels could be said to be *for the benefit of the estate*. Although the XH Companies suggest in their skeletal submissions that the Judge's "faulty starting premise" (that an interim judicial manager should be afforded a degree of latitude) may have led the Judge to draw overly charitable inferences in the OTPL JMs' favour and omit to examine the correspondence between the parties from 12 June to 1 July 2020, we do not think this assertion is borne out by our own examination of the available evidence (as will be seen below).

56 The question of whether and how the position of interim judicial managers should differ from that of judicial managers with regard to the application of the Principle thus does not arise for our determination in the present appeal. Nevertheless, we express, for completeness, our *tentative* views on the matter.

57 The starting point is that the Principle *applies* in principle to both interim judicial managers and judicial managers, and the central question in both contexts is whether the property was *retained for the benefit of the estate*. However, in ascertaining whether an interim judicial manager has *in fact* retained property for the benefit of the estate, it must be borne in mind that the position of an interim judicial manager differs from that of a judicial manager because of the nature of this appointment. The purpose of appointing an interim judicial manager under s 227B(10)(*b*) of the Companies Act (now s 92 of the IRDA) is typically to *protect* the assets and business of a company where there is an immediate danger thereto, pending the appointment of judicial managers (see the High Court decision of *Re KS Energy Ltd and another matter* [2020] 5 SLR 1435 ("*KS Energy*") at [14]–[16]; see also the decision of this court in *Hin Leong Trading (Pte) Ltd (in liquidation) v Rajah & Tann Singapore LLP and another appeal* [2022] SGCA 28 ("*Hin Leong Trading*") at [18]). In this regard, a parallel may be drawn between the appointment of an interim judicial manager and the appointment of a provisional liquidator (see *KS Energy* at [17]). As we have explained (at [50] and [52] above), the mere *fact* of retention is not determinative, and what is crucial is the *purpose* behind the retention. This point takes on particular significance in the context of *interim* judicial management, the overarching aim of which is essentially *protective*. As we highlighted to counsel at the hearing of the appeal, an interim judicial manager may rightly be cautious about taking *irrevocable steps* to dispose of property that may later be important for the company's business. Contrary to what the XH Companies suggest, this protective aim is not incompatible with the interim judicial manager also taking steps to advance the restructuring of the company.

58 The XH Companies rely on the English decision of *MK Airlines Property Ltd v Katz* [2014] BCC 103 ("*MK Airlines*") (which the Judge referred to at [28] of the GD) for the proposition that questions of whether it is beneficial to retain property can arise regardless of whether the company is in judicial management or interim judicial management. That is certainly true. However, this does not take the XH Companies very far. The issue in *MK Airlines* was whether the liquidation expenses principle was *applicable* to a provisional liquidation (see *MK Airlines* at [33]–[34]). Nicholas Strauss QC, sitting as a deputy High Court judge in the Chancery Division (Companies Court), answered this question in the affirmative. It was in this context that he held as follows (see *MK Airlines* at [35]–[36]):

> *It would indeed be anomalous if the position differed as between administration and liquidation on the one hand and provisional liquidation on the other.* In all these, there can be uncertainties as to the future course of the company's business, and as to whether it is beneficial to maintain in being a lease, or indeed some other kind of contract. … There is no sensible reason why the position of a company's landlord, in such a case, should be worse where the decision is taken by a provisional liquidator. *Provisional liquidators are not mere caretakers, incapable of taking decisions for the benefit of the company.*
>
> …
>
> I do not accept [counsel]'s submission that the landlord would in all cases be entitled to priority: ***it will always depend upon whether or not the administrator, provisional liquidator or liquidator, as the case may be, has either retained the property for the purpose of advantageous disposing of it, or has continued to use it***. Doing nothing would not suffice …
>
> Accordingly, I must consider first *whether, on the evidence before me, the joint provisional liquidators' motive in retaining the lease and in not seeking the power to disclaim it was the convenience or benefit of the provisional liquidation, and whether they used the premises for the benefit of the liquidation.* …
>
> [emphasis added in italics and bold italics]

59 When the decision in *MK Airlines* is read more closely, we do not think it stands for the proposition that the position of interim judicial managers is *the same as* that of judicial managers *vis-à-vis* the application of the Principle. To be clear, the same inquiry is to be undertaken in both contexts: the question is whether the property was *retained for the benefit of the estate*. However, this does not mean that the court should be precluded from taking into account the *different aims* of interim judicial management and judicial management, and the *differences in the respective positions* of interim judicial managers and judicial managers, in answering this question.

60 Aside from the protective overarching aim of interim judicial management, the *powers* of an interim judicial manager are also generally much more limited. Unlike a provisional liquidator, who "shall have and may exercise *all the functions and powers of a liquidator, subject to* such limitations and restrictions as may be prescribed by the Rules or as the Court may specify in the order appointing him" [emphasis added] (see s 267 of the Companies Act), an interim judicial manager may only exercise "*such functions, powers and duties as the Court may specify* in the order" appointing him [emphasis added] (see s 227B(10)(*b*) of the Companies Act). Thus, the powers of the interim judicial manager are circumscribed by the express terms of the relevant order of appointment (see Choong & Rajah (1990) at p 54; see also *Hin Leong Trading* at [19]). For example, and notably in the present context, a judicial manager's power to disclaim onerous property under s 332 (read with s 227X(*b*)) of the Companies Act generally takes effect only *after the making of a judicial management order*. This was noted by the Judge at [29] of the GD.

61 In this connection, we turn to address the XH Companies' submission that the OTPL JMs (when they were acting as *interim* judicial managers) were in fact empowered and authorised by the OTPL IJM Order "to exercise all

powers and entitlements of a judicial manager … conferred by the Companies Act". This is a new point which the XH Companies seek leave to raise on appeal under O 57 r 9A(4) of the Rules of Court (2014 Rev Ed). In response, OTPL relies on the unpublished decision of the Judge in respect of a related summons, wherein the Judge held that the cause of action under s 227T of the Companies Act, to set aside transactions at an undervalue or unfair preferences, would vest in the judicial manager only upon the making of a judicial management order, and would not vest in an *interim* judicial manager (see *Ocean Tankers (Pte) Ltd (under judicial management) v Lim Oon Kuin and others* HC/S 630/2020 (HC/SUM 4234/2020) (13 April 2021) at [13]). We pause to note that this holding may be contrasted with that in *Hin Leong Trading* at [19]–[24], where this court held that the OTPL IJM Order granted the OTPL JMs (acting as *interim* judicial managers) the powers in ss 227G(3) and 227G(4) read with the Eleventh Schedule of the Companies Act.

62 We did not have the benefit of full arguments on the precise effect of the relevant paragraph of the OTPL IJM Order in this case, and we do not intend to make any determinations thereon as this is not necessary for our decision in this appeal. However, in our view, there is some merit in OTPL's submission that the power to disclaim onerous property under s 332 (read with s 227X(*b*) of the Companies Act) crystallises only upon the making of a judicial management order, and would not have been exercisable by the OTPL JMs acting as *interim* judicial managers. Section 227X(*b*) states that it applies "when a judicial management order is in force in relation to a company under judicial management", and goes on to reserve "*the power of the Court to order* that any other section in Part X [of the Companies Act, within which s 332 falls] shall apply to a company under judicial management as if it applied in a winding up by the Court" [emphasis added]. The plain wording of this part of the provision

suggests that, absent such a specific court order, s 332 will not apply to a company under judicial management, much less one under *interim* judicial management (see also the High Court decisions of *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375 at [36] and [48]–[50] and *Altus Technologies Pte Ltd (under judicial management) v Oversea-Chinese Banking Corp Ltd* [2009] 4 SLR(R) 296 at [13], emphasising the role of the court's discretion in making orders under s 227X(*b*) as to the application of Part X). In this regard, s 332 differs from s 227G (which this court considered in *Hin Leong Trading*), which sets out the *general* powers and duties of a judicial manager on the making of a judicial management order.

63 Be that as it may, the ultimate question for the court is still whether the OTPL JMs could be said to have retained the vessels *for the benefit of the estate*. Had the OTPL JMs exercised the power to disclaim the bareboat charters and the vessels chartered thereunder, this might have placed it beyond doubt that they did not intend to retain the vessels for the benefit of the estate. However, the fact that the OTPL JMs did *not* exercise this power does not, conversely, show that they *did* retain the vessels for the benefit of the estate. Whether this is so will, as we have stated at [52] above, require an examination of the precise facts and all the circumstances of each case.

64 We return at this juncture to the Judge's suggestion that a "degree of latitude" should be given to interim judicial managers in assessing whether they have retained property for the benefit of the estate. In our view, this should be read as no more than an expression of the common-sense principle that the purpose, powers and position of *interim* judicial managers should be borne in mind by the court in determining whether the Principle applies in a given case. In this regard, we note that it was, for a time, the position in English law that the Principle would not apply automatically or inflexibly in the context of

administration, unlike in the context of liquidation. In *In re Atlantic Computer Systems plc* [1992] Ch 505 ("*Atlantic Computer Systems*") at 526G and 527E–528H, the English Court of Appeal held as follows:

> … [O]ne of the primary functions of an administrator is that frequently, if not normally, he will continue to carry on the company's business and, hence, will continue to use the land and goods currently being used by the company for the purposes of its business. Indeed, it is of the essence of his appointment that an administrator should do these very things in cases when the purpose sought to be achieved by the administration order is … the survival of the company, and the whole or any part of its undertaking, as a going concern.
>
> …
>
> … *[M]uch of the reasoning which caused the courts to adopt what we have referred to as the "liquidation expenses" principle in the case of liquidations is also applicable in administrations but* ***subject, in our view, to a very important qualification***. In liquidations the principles on which the court will exercise its discretion have hardened into a set practice … [a]nd in the circumstances in which the "liquidation expenses" principle is applicable, entitlement to have the outgoings paid as an expense of the liquidation seems to have become more or less automatic. ***In our view there is no place for comparable hard-and-fast principles in the case of administrations. The reason for this difference is that the objectives of winding up orders and administration orders are different and, hence, the approach that should be adopted by the court when exercising its discretion under the two regimes is different***. In the case of winding up the company has reached the end of its life. The basic object of the winding up process, in the case of an insolvent company, is to achieve an equal distribution of the company's assets among the unsecured creditors. …
>
> In contrast, ***an administration is intended to be only an interim and temporary regime***. *There is to be a breathing space while the company, under new management in the person of the administrator, seeks to achieve one or more of the purposes [of administration].* … Whether those whose land or goods are being used by the company during this interim period should be given leave to enforce their proprietary rights forthwith or should be paid ahead of everyone else *must depend on all the circumstances, which will vary widely from one case to the next.*
> …

> … *If this flexible approach is right,* ***there is no room in administrations for the application of a rigid principle*** *that, if land or goods in the company's possession under an existing lease or hire-purchase agreement are used for the purposes of an administration, the continuing rent or hire charges will rank automatically as expenses of the administration and as such be payable by the administrator ahead (so it would seem) of the pre-administration creditors.* Nor, even, for a principle that leave to take proceedings will be granted as of course. Such rigid principles would be inconsistent with the flexibility that, by giving the court a wide discretion, Parliament must have intended should apply.
>
> [emphasis added in italics and bold italics]

65 The English Court of Appeal's judgment in *Atlantic Computer Systems*, including the qualification as to how the Principle should apply in the context of administration (in contrast to liquidation), was referred to by Ramesh J in *Swiber* at [88]–[89] in holding that the Principle applied to judicial management under Singapore law. The flexible approach in *Atlantic Computer Systems* has since hardened into a rule more akin to the liquidation expenses principle, following the English Court of Appeal's subsequent decision in *Jervis* (see John Birds *et al*, *Boyle & Birds' Company Law* (Jordan Publishing, 10th Ed, 2019) at para 21.20). As noted in *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 11–112:

> … [The liquidation expenses principle], although founded on judicial discretion, has hardened into a set practice in liquidation … There is no reason to treat its application in administration any differently. If the matter were left to the court's discretion, on what principle would that discretion be exercised other than that enunciated in *Lundy Granite* and now crystallised into a rule? …

66 Nevertheless, in our view, the reasoning in *Atlantic Computer Systems* remains instructive in respect of the application of the Principle to *interim* judicial managers. As we have stated at [52] above, determining whether the Principle applies in a given case is a highly fact-sensitive inquiry, and part of the relevant factual matrix is the *context* in which the Principle is being applied.

The English Court of Appeal's reasoning in *Atlantic Computer Systems* that some "breathing space" should be accorded in view of the "interim and temporary" nature of administration applies *a fortiori* to *interim judicial management* in our context. For the avoidance of doubt, this is not to say that a more relaxed "test" should apply to interim judicial managers: the central question remains *whether the property was retained for the benefit of the estate* (see [57] above). Our view is, instead, that the court may take cognisance of the position of interim judicial managers in determining whether the property has indeed been retained for the benefit of the estate in the case before it.

Issue 2: Whether the Principle applies to the OTPL JMs' retention of vessels

67 We turn now to the main issue in dispute in the present appeal – namely, whether the Judge erred in inferring from the material before him that the OTPL JMs did not retain two overlapping groups of vessels for the benefit of OTPL's estate, but had instead been compelled to retain these vessels. As outlined at [39] above, these are: (a) the vessels in respect of which Termination Notices were issued by the XH Companies and accepted by the OTPL JMs (identified in ***Column A*** *of the Table of Vessels*), and (b) the vessels which the OTPL JMs marketed for hire, including vessels in respect of which Termination Notices were never issued and no steps were taken by the OTPL JMs to implement redelivery. We deal with each group of vessels in turn.

Vessels in respect of which Termination Notices were issued and accepted

68 In so far as the 30 vessels in respect of which Termination Notices were issued and accepted are concerned, the XH Companies' case has two main aspects. First, the XH Companies submit that the OTPL JMs withheld the

redelivery of these vessels as commercial leverage to secure valuable ship management contracts for OTPL and the payment of ROB in full, both of which were for the benefit of OTPL's estate, as well as to preserve optionality. Second, the XH Companies submit that the need to obtain leave of court and the consent of the vessels' mortgagees (*ie*, the financing banks) for the redelivery of the vessels were at best only secondary reasons for the failure of redelivery, which served the purpose of buying more time for the OTPL JMs for negotiations on the payment of ROB and the entry into ship management contracts and which concurrently gave the OTPL JMs the opportunity to generate income by deploying these vessels. They were not genuine concerns in the minds of the OTPL JMs.

69 This argument by the XH Companies necessitates a closer examination of the OTPL JMs' conduct from May 2020 (when OTPL was placed in interim judicial management) up to 2 September 2020 (when the relevant Notices of Non-Adoption were issued). There are, in our view, three key events that took place during this period: (a) the Meeting; (b) the correspondence between the OTPL JMs and the XH Companies from 27 May 2020 to 1 July 2020; and (c) the OTPL JMs' Interim Judicial Managers' Report dated 7 July 2020 ("the OTPL IJM Report").

Meeting between the OTPL JMs and the management of the Xihe Group

70 We begin with the Meeting. That took place less than a week after the OTPL JMs were appointed as OTPL's interim judicial managers on 12 May 2020 under the OTPL IJM Order. The Slides presented by the OTPL JMs at the Meeting stated that the OTPL JMs were "prioritizing OT[PL]'s limited cash resources to vessel opex / onshore costs and so [were] unable to pay bareboat hire". The Slides went on to state as follows:

> Given the market's loss of confidence in the trade-ability of the OT[PL] fleet (as a result of negative developments in HLT), as the Xihe owners are already aware, *OT[PL] is unable to continue servicing its [bareboat] charter obligations to the Xihe ship owners and as such* ***would like to consensually terminate the [bareboat] charters***. In light of this, we understand that the Xihe shipowners are considering their options.
>
> While the IJMs wish to work with the Xihe ship owners to find a workable solution, in parallel OT[PL] must consider its own options in the event that a solution cannot be found in time before its cash resources reach critical levels. *The IJMs' are very conscious of the need to retain, if possible, sufficient cash resources to safely terminate / repatriate the crew and safely deal with the vessels in the event that a solution with the Xihe ship owners is delayed / does not materialise.*
>
> OT[PL]'s cash flow forecast suggests that it will only have sufficient cash until the end of June, and accordingly ***OT[PL] now needs to urgently plan for the possibility of a redelivery of vessels to the Xihe ship owners***. The purpose of this presentation is to give Xihe notice of these handover plans so that the ship owners can best consider their options.
>
> In the absence of the Xihe ship owners coming forward with a credible fully funded alternative plan, OT[PL] will need to activate its handover plans by no later than 30 May 2020. …
>
> [emphasis added in italics and bold italics]

71 It should be noted, at this juncture, that the position in the Slides quoted above was stated *generally* in respect of the *entire fleet of vessels* chartered by OTPL, and not only the subset of vessels in respect of which Termination Notices would later be issued by the XH Companies. We also highlight that the need for a "consensual" termination of the bareboat charters would have been particularly significant in this context given the *nature of the property involved* in this case – namely, vessels. The OTPL JMs could not simply have abandoned the vessels, especially given the hardship to the crew (for those vessels which had crew on board), the risk of pollution and the danger to shipping that this would have posed. As counsel for OTPL, Mr Narayanan Sreenivasan SC ("Mr Sreenivasan"), put it during the hearing, it was "not like locking up premises, going to the landlord, and dropping off the keys". Moreover, as we

pointed out during the hearing, it would also not have been sensible for the OTPL JMs to have dry docked the vessels as this would have incurred further expenses.

72 In the handover plans referred to in the Slides, the fleet of vessels chartered by OTPL was divided into six groups.

(a) For Groups 1 to 4 (which comprised 83 off-hire vessels in total), the Slides indicated that OTPL wished to physically redeliver the vessels in June or July 2020; and that, as an "alternative" to physical redelivery, OTPL was willing to consider entering into ship management agreements with the XH Companies.

(b) For Group 5 (which comprised 36 off-hire vessels which were unencumbered and had no known contingent claims against them), OTPL would "consider further whether it wishe[d] to retain any of these vessels on varied bareboat hire terms mutually agreeable" with the relevant XH Companies; and for those vessels OTPL did not wish to retain, OTPL wished to physically redeliver the vessels in July 2020. As an "alternative" to physical redelivery, OTPL was willing to consider entering into ship management agreements with the XH Companies.

(c) For Group 6 (which comprised 21 vessels then employed with third parties), the Slides stated that "OT[PL]'s preference [was] to continue to bareboat charter the relevant vessels" with a variation of terms (relating to the payment of bareboat hire), but for the vessels to be redelivered upon completion of employment.

73 From 20 May 2020 to 3 June 2020, Termination Notices were then issued by the XH Companies in respect of 30 of the vessels in issue in this

appeal. Of these 30 vessels, 27 vessels fell within Groups 1 to 4, two fell within Group 5 (the "Ocean Pride" and the "Ocean Princess") and one fell within Group 6 (the "Ocean Summer"). The OTPL JMs accepted these Termination Notices and agreed to redelivery subject to payment of ROB.

74 We read the Slides as stating in no uncertain terms that OTPL wished to "consensually terminate" the bareboat charters and needed to "urgently plan for the possibility of a redelivery of vessels" to the XH Companies. In our view, the general position taken in the Slides is indicative of the OTPL JMs' ***central desire*** *from the outset*, which was for the vessels to be redelivered to the XH Companies. The Slides also made proposals for the redelivery of the vessels falling within Groups 1 to 4 as a first resort; entry into ship management agreements with the XH Companies was simply something OTPL was willing to consider as an "*alternative*" [emphasis added] to the physical redelivery of these vessels. As for the two vessels falling within Group 5 and the vessel falling within Group 6, although OTPL was prepared to retain these vessels on *varied* bareboat hire terms, the fact that Termination Notices were ultimately issued and accepted for these vessels suggests that this variation did not materialise. In that event, the OTPL JMs would have wished to redeliver these vessels as well. In our view, the Slides evince the OTPL JMs' ***clear intention*** *at the outset* to terminate the bareboat charters and redeliver the vessels, as OTPL simply did not have the financial means to continue servicing its bareboat charter obligations to the XH Companies.

Correspondence between the OTPL JMs and the XH Companies

75 We turn next to consider why the vessels were not in fact redelivered. To this end, it is necessary to peruse the relevant e-mail correspondence between the OTPL JMs and the XH Companies' representatives from 27 May 2020 to

1 July 2020 where they discussed redelivery for some of the vessels. In our judgment, this correspondence – read as a whole and in context – is consistent with the OTPL JMs' position that they did not wish to retain the vessels for the benefit of OTPL's estate.

76 On 27 May 2020, the OTPL JMs wrote to the XH Companies' representatives ("the 27 May E-mail"). This e-mail made reference to the Termination Notices that had been issued and reiterated the OTPL JMs' previous queries regarding whether the XH Companies had obtained the requisite consent from the mortgagee banks to terminate the bareboat charters. They noted that this was an issue which "impact[ed] the validity of the Termination Notices" and asked the XH Companies' representatives to "address these requests and queries before the re-delivery of the vessels". Subject to their review of the master bareboat charters and the requirement of the mortgagees' consent for termination, the OTPL JMs were "prepared to agree to re-delivery of the Vessels to the respective [XH Companies] whereupon [they understood] that [the XH Companies'] intention [was] for [OTPL] to take over as technical and crewing managers for the Vessels on terms to be agreed". The 27 May E-mail went on to set out the OTPL JMs' suggestions regarding the redelivery of 40 vessels. They stated that they could effect the redelivery of the 35 vessels which were not then under employment "relatively promptly" once certain matters were resolved, such as the XH Companies' payment of ROB due to OTPL upon redelivery and the finalisation of the terms under which OTPL would act as the managers of the vessels. As for the remaining five vessels which were then mid-voyage and/or still under employment, OTPL would only be in a position to effect redelivery to the XH Companies following the completion of the voyages and the discharge of the cargo on board these vessels. The 27 May E-mail concluded with the OTPL JMs asking

the XH Companies to provide the requested documents and input regarding the above "as promptly as possible to enable [them] to progress matters".

77 We pause here to note that, of the 30 vessels in respect of which Termination Notices had been issued, 28 were included in these redelivery suggestions (only the "Ocean Pride" and "Ocean Princess", which were on time charter, were omitted), albeit that two of those 28 vessels were then mid-voyage and/or still under employment (namely, the "Ocean Neptune" and the "Ocean Summer").

78 In our view, the 27 May E-mail further supports the OTPL JMs' position that they were working towards the redelivery of the vessels for which Termination Notices had been issued. Indeed, they appeared to be eager to "progress matters" (see [76] above). Nevertheless, there remained some outstanding matters that had to be resolved before redelivery could take place, such as the mortgagees' consent, the payment of the ROB due to OTPL upon redelivery, the finalisation of the terms of the ship management agreements, and of course the completion of the voyages for the vessels which were then still under employment. Notably, as the OTPL JMs point out, para 3 of this e-mail recorded the OTPL JMs' understanding that it was the XH Companies' "intention … for [OTPL] to take over as technical and crewing managers for the Vessels on terms to be agreed".

79 A meeting then took place on 28 May 2020 regarding the redelivery of the vessels. On 30 May 2020 at 11.05am, the XH Companies' representatives wrote to the OTPL JMs informing them that they had written to the mortgagees to inform them about the terminations of the bareboat charters. Later on the same day, at 7.11pm, the OTPL JMs responded ("the 30 May E-mail") stating that, with respect to the vessels which were not under employment or laden with

cargo, they accepted the Termination Notices "to the extent that [OTPL] intends to re-deliver the Vessels to the [XH Companies], concluding the [bareboat charters], and transition from its present role as bareboat charterers to its future role as technical managers for the Vessel". On 31 May 2020, the XH Companies' representative replied, stating (among other things) that any future possible role OTPL might play in the technical and crew management of the vessels was "a separate matter" and "[would] not affect the obligation to redeliver". This e-mail also stated that the XH Companies "look[ed] forward to discussing the terms of the technical and crew management so that if there [was] an agreement, [they would] have a clear working relationship with [OTPL] as managers in the employment of [their] vessels".

80 Subsequently, on 12 June 2020, the XH Companies sent the OTPL JMs the proposed redelivery protocol, which (in brief) was that OTPL would "take over the current crew contracts in its capacity as a crew manager …with the same existing terms and conditions" and would also "enter into a crew management agreement with Xihe". In reply, the OTPL JMs stated on 15 June 2020 that "at this stage OTPL takes no position on the redelivery protocol nor any plans for redelivery of the 41 vessels", as they had queries regarding "the terms upon which the [XH Companies] wish to engage OTPL as crew manager as referenced in the redelivery protocol", and further sought the XH Companies' "clear agreement" that they would pay for the ROB for each vessel prior to any redelivery. The OTPL JMs ended this particular e-mail by stating that, without the above information and confirmations, it was "not reasonable for the [XH Companies] to ask OTPL to take any position on the redelivery protocol".

81 On 17 June 2020, the XH Companies responded, expressing surprise that OTPL did not take any position on the redelivery of the vessels, and stating

that OTPL's failure to redeliver the vessels promptly might cause them and/or the lenders losses by reason of claims against those vessels and because they had not been able to deploy them. The XH Companies then highlighted various sums due from OTPL in respect of the vessels, before stating that they were nevertheless "prepared to discuss a resolution of the redelivery process". The XH Companies also provided an Interim Shipman Agreement for the technical and crew management of the vessels, which would be effective from the date of physical redelivery of the vessels, and asked that redelivery be effected "over the weekend or early next week".

82 The OTPL JMs replied two weeks later (on 1 July 2020), with their comments on the Interim Shipman Agreement and with their proposal on dealing with the ROB on the vessels. After this time, there appears to have been no further correspondence between the XH Companies and OTPL on this point.

83 The XH Companies argue that the correspondence above shows that the OTPL JMs only contemplated redelivery of the vessels being *conditional* on the XH Companies granting the ship management contracts to OTPL, which would have furthered the survival of OTPL's business as a going concern. We disagree with this reading of the correspondence. Instead, what emerges from this correspondence is that, although the redelivery of the vessels may have been hindered by the OTPL JMs' insistence on resolving certain outstanding issues before redelivery could be effected, *at no point* did the OTPL JMs express any intention to *retain* the vessels, or to make redelivery *conditional* on the XH Companies acceding to their wishes regarding the ship management contracts. As the OTPL JMs submit, the correspondence shows that *both* parties were discussing and working towards redelivery. In these circumstances, we do not think that the Judge erred in finding that "the evidence suggested that the OTPL JMs were merely exploring options and seeking input from the

[XH Companies]", as was in line with their duties as (then) *interim* judicial managers; and that, "at its highest, the OTPL JMs' conduct was equivocal, and hardly qualifies as evincing an intention to retain the vessels for the benefit of the estate" (at [46] of the GD).

OTPL IJM Report

84 The XH Companies' position is further undermined by the OTPL IJM Report dated 7 July 2020, which was submitted to the court on the same date. This was the day after the XH Companies had filed OS 652 seeking leave of court for redelivery of some of the vessels (on 6 July 2020). We set out the salient portions of the OTPL IJM Report below.

85 The section of the OTPL IJM Report on the stabilisation of OTPL's business operations noted that the OTPL JMs were "currently in discussion with the shipowners for redelivery of 39 vessels without employment which are bareboat chartered from SPVs under the Xihe Group".

86 The section of the OTPL IJM Report on the vessels in OTPL's fleet for which Termination Notices had been received stated as follows:

> There are a number of issues arising in relation to the termination and corresponding obligation by OTPL to redeliver the vessels in question, dealt with below. ***Notwithstanding those issues, it remains the IJM's position that all the unladen Terminated Vessels should be redelivered as soon as possible.***
>
> Issues arising with the legality/lawfulness of the Owners' termination:
>
> - Whether there was, in fact, non-payment when the Termination Notices were issued. This issue is further complicated by there being two sets of bareboat charter agreements (containing different payment terms/ quantum).

- In respect of financed vessels, *whether the consent of mortgagee banks was obtained before termination*.
- The IJM's purported 'acceptance' of the Termination Notices in respect of the unladen vessels and the Owners' corresponding contention that those bareboat charters have come to an end notwithstanding physical redelivery has yet to take place.

Issues arising relating to redelivery:

- *The IJM's potential exposure to mortgagee banks who have not given their consent to termination and/or who have expressly forbidden OTPL from doing so*.
- The IJM's inability to redeliver vessels presently laden with cargo.
- *The Owners' present inability to take physical redelivery of each vessel due to the lack of crew, competence/capacity and money to pay for ROB*.
- The Owners' expressed intention to exercise purported rights of set-off against their liability to pay cash for the ROB of the vessels being redelivered.

In respect of the remaining XH Fleet vessels for which notices of termination have not been issued, *if these vessels cannot be re-employed, there is no benefit in them remaining in the possession of OTPL*. The IJMs will engage the Owners on this. ***The issues highlighted above in relation to the vessels for which Termination Notices have been issued are likely to be in issue in respect of those other vessels too.***

[emphasis added in italics and bold italics]

87 A subsequent section provided the OTPL JMs' preliminary assessment of the prospects of a restructuring or rehabilitation of OTPL. It set out two potential restructuring options which had been put forward for discussion:

Restructuring option A

The OTPL business is made up of 2 key businesses – (i) ship chartering, ship management and related services and (ii) oil storage and lubricant processing.

(i) Ship Chartering, ship management and related services

Both parties to work out a consensual solution for the fleet of vessels OTPL bareboat charters from Xihe Group.

> OTPL would retain a role as the commercial and/or technical manager of the fleet which would form the basis for a restructuring of OTPL and Xihe Group would have to provide advance funding for such services in line with industry practice.
>
> The on-going chartering business of OTPL would thus be preserved and it would also be less disruptive and align the interests of OTPL and Xihe Group.
>
> **(ii) Oil storage and lubricant processing business**
>
> …
>
> **Restructuring option B**
>
> The IJMs are prepared to consider the HLT IJMs' recommendation of restructuring of HLT, OTPL, UGH, UT and XH as an integrated petroleum trading platform.

88 The XH Companies suggest that the OTPL IJM Report "made explicit" the OTPL JMs' objective of making the redelivery of the vessels to the XH Companies conditional on the grant of ship management contracts to OTPL, so as to exert commercial pressure on the XH Companies to enter into these ship management contracts with OTPL. With respect, however, we find this to be a somewhat blinkered view of the OTPL IJM Report. The OTPL IJM Report maintained the OTPL JMs' consistent position that "all the unladen Terminated Vessels should be redelivered as soon as possible", but also noted various issues relating to the legality of the XH Companies' Termination Notices as well as the redelivery itself (including the XH Companies' "present inability to take physical redelivery of each vessel due to the lack of crew, competence/capacity and money to pay for ROB"). The possibility of OTPL retaining a ship management role was simply put forth as one of two potential restructuring options, and was dealt with separately from the OTPL JMs' intention to redeliver the vessels.

89 In any event, as the Judge emphasised (at [41] and [48] of the GD), the bareboat charters would come to an end regardless of whether the vessels were

physically redelivered or whether OTPL entered into ship management agreements with the XH Companies. In the latter situation, these agreements would be *post-insolvency contracts* replacing the pre-insolvency bareboat charters. In neither situation would the OTPL JMs be retaining the vessels for the benefit of the estate under the *pre-insolvency* bareboat charters. Accordingly, the Principle would not be engaged.

90 In so far as the full payment of ROB was concerned, the Judge found that the payment of ROB was a term stipulated in the charterparties, and that by communicating this condition, the OTPL JMs were "simply reminding the vessel owners of their contractual obligations" before redelivery rather than retaining the vessels for the benefit of the estate (see the GD at [45]). The XH Companies argue that ROB payment was made a condition of redelivery *because* that would benefit OTPL's estate, and that the fact that OTPL was entitled to be paid ROB on redelivery did not change the fact that the OTPL JMs *wrongfully withheld redelivery* in order to secure the payment of ROB. However, we do not accept this submission. In our view, even if OTPL did not have any possessory lien over the vessels which would have entitled it to withhold redelivery for the purposes of securing the payment of ROB, it would be contrived to regard the OTPL JMs' insistence on obtaining payments which were contractually due from the XH Companies to OTPL before effecting redelivery as showing that they *retained the vessels "for the benefit of" OTPL's estate*, so as to confer priority on the expenses incurred by OTPL and owing to the XH Companies for these vessels. The XH Companies have not shown how the Judge erred in this regard.

91 For these reasons, we do not think the evidence supports the XH Companies' position that the OTPL JMs withheld the redelivery of the vessels as commercial leverage to secure ship management contracts with

the XH Companies or to secure the full payment of ROB for the benefit of OTPL's estate.

92 We deal briefly with the XH Companies' submission that the retention of property as bargaining leverage "can in principle attract liability upon a [judicial manager] to pay rent or compensation to a lessor who is kept out of possession of his property", a submission that is made in reliance on the English case of *Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd and others* [1992] 1 WLR 1253 ("*Barclays Mercantile*"). It should be noted that *Barclays Mercantile* was not a case dealing with the liquidation expenses principle (or the Principle), but one where an application had been made for the administrators' release to be postponed until after various claims against them had been dealt with, including a personal claim for damages for wrongful interference with goods. Millett J (as he then was) held that, whether or not the administrators had committed the tort of conversion, they remained exposed to such a claim so long as they had not been released, because they were officers of the court subject to the court's direction. It was in this context that the learned judge stated that "[i]f administrators wrongly retain goods otherwise than for the proper purposes of the administration, for example, to use them as a bargaining counter, the owner can apply to the court to direct the administrators to hand over the goods without the need for action, and to pay compensation for having retained them in the meantime" (see *Barclays Mercantile* at 1257–1259, and 1259F–1259G in particular). Thus, *even if* we were to agree with the XH Companies that the OTPL JMs had withheld the vessels as bargaining leverage (which we do not), *Barclays Mercantile* would not assist the XH Companies in the present case.

93 The XH Companies also argue that the need to obtain leave of court and the consent of the vessels' mortgagees for redelivery were only secondary

reasons for the failure of redelivery. In this regard, the XH Companies stress that the issue of the mortgagees' consent appeared to be fully resolved by 30 May 2020 (before it was "revived" by the XH Companies' filing of OS 652 in mid-July 2020), and that the leave of court issue only arose in end-June 2020. We do not think this takes the XH Companies very far. The XH Companies do not dispute that, at the material time, *both* parties accepted that leave of court and the mortgagees' consent ought to be obtained before effecting the redelivery of the vessels. OS 652 was, as OTPL emphasises, an application taken out *by the XH Companies themselves*, at a time when they were advised by an established shipping firm. In any event, even if these factors were merely secondary considerations for the OTPL JMs (alongside other matters which had yet to be resolved between the parties), this does not automatically lead to the conclusion that the OTPL JMs *retained the vessels for the benefit of OTPL's estate*. The requirements of leave of court and the mortgagees' consent would have posed further obstacles to the redelivery of the vessels, and would further weigh against an inference that the OTPL JMs had *elected* to retain the vessels for the purpose of benefiting OTPL's estate.

94 Thus, in our view, the various motives that the XH Companies *impute* to the OTPL JMs, to support their suggestion that the OTPL JMs intentionally withheld redelivery of the vessels as commercial leverage, are not supported by the evidence before us. On our reading of the available and relevant evidence, the *central thread* running through the OTPL JMs' conduct from the outset was their desire to redeliver the vessels to the XH Companies.

Vessels which were marketed for hire

95 We turn now to the second group of vessels which the XH Companies allege were retained by the OTPL JMs for the benefit of OTPL's estate –

namely, the vessels which the OTPL JMs marketed for hire. The XH Companies have identified specific vessels as having been marketed for hire based on the lists of vessels in OTPL's fleet sent to brokers and charterers on 14 May 2020, 29 June 2020, 5 August 2020, 13 August 2020, 20 August 2020 and 8 September 2020 ("the Fleet Lists"), as well as those that the OTPL JMs stated in the OTPL IJM Report that they were "actively pursuing potential charter opportunities" for (as at 7 July 2020). However, the XH Companies highlight that this may not be a complete list of all the vessels marketed by the OTPL JMs as it is based only on the available express documentary evidence. The XH Companies' position is that *most, if not all*, of the vessels must in fact have been marketed by the OTPL JMs.

96 Preliminarily, we note that the group of vessels which were marketed for hire would overlap significantly with the group of vessels in respect of which Termination Notices were issued and accepted, which we have dealt with in the previous section. For that group of vessels, it is in our view clear that the evidence we have considered thus far does *not* support the XH Companies' position that these vessels were retained for the benefit of the estate, at least during the period up to the OTPL IJM Report. As for the XH Companies' position that the position was different for the vessels in respect of which *no* Termination Notices were issued by them and accepted by OTPL, this contention must be considered against the backdrop of the OTPL JMs' *expressed desire* from the outset for the vessels to be redelivered to the XH Companies. This desire was expressed generally in respect of the entire fleet of vessels chartered by OTPL and not only those in respect of which Termination Notices were later issued (see [71] and [74] above). It must also be borne in mind that the Termination Notices were issued *by the XH Companies*, and not by OTPL. As such, whether or not Termination Notices were issued in

respect of particular vessels is more indicative of *the XH Companies'* intentions, rather than those of the OTPL JMs. Therefore, instead of separately analysing the position in respect of the vessels for which Termination Notices were issued and those for which no Termination Issues were issued, we focus on the question of whether the OTPL JMs' *marketing* of the vessels itself discloses an intention on their part to retain the marketed vessels for the benefit of OTPL's estate.

97 The XH Companies' case in this regard is that the logical and realistic inference from the marketing of these vessels is that the OTPL JMs retained them in order to rehabilitate OTPL's chartering business and restore market confidence, to ensure the survival of the business as a going concern, or at least to generate income for OTPL's estate, such that the Principle ought to be engaged. They argue that the OTPL JMs had no intention of redelivering the vessels until it was clear that there were no re-employment opportunities available, and that the OTPL JMs took no steps to implement redelivery from 12 May 2020 to 2 September 2020.

98 We disagree. In our view, the marketing of the vessels for hire was *not incompatible* with the OTPL JMs' desire to redeliver the vessels as a first resort, and – when viewed in the context of all of the parties' dealings in the present case – does not support an inference that the OTPL JMs intended to retain these vessels for the benefit of OTPL's estate.

99 The first of the Fleet Lists was sent out by OTPL's Captain Steven Tan on 14 May 2020. On the same day, an e-mail was sent by OTPL's Chartering Department to OTPL's customers, brokers and charterers, which stated (*inter alia*) that the continuation of the statutory moratorium under the judicial management regime enabled OTPL to continue chartering its vessels without

the threat of action being taken against the vessels and OTPL itself; that OTPL's fleet would be available to the market while it was under interim judicial management, and the OTPL JMs were working with OTPL's management and charterers to fix new voyages and fulfil their shipping needs; and that OTPL had applied for judicial management to protect its counterparties and to allow it to continue doing business without the threat of legal action. Notwithstanding this, at the Meeting just a few days later on 18 May 2020, the OTPL JMs took the clear position in their Slides that they wished to "consensually terminate" the bareboat charters and plan for the redelivery of the vessels to the XH Companies, in view of the depletion in OTPL's cash resources. A second Fleet List was then sent out on 29 June 2020. On 7 July 2020, the OTPL IJM Report was presented, in which the OTPL JMs stated that they were "actively pursuing potential charter opportunities with viable customers on reasonable terms", and that out of 48 potential charter opportunities explored and evaluated, 17 had been successful and six were being pursued. The OTPL IJM Report also stated that the total gross freight receivable for the 17 new charters amounted to US$12.6m as at 7 July 2020. In a subsequent paragraph in the same report, however, the OTPL JMs stated their position that the vessels for which Termination Notices had been received should be redelivered as soon as possible, though they noted several issues that arose in this connection. They then went on to state that, even for the vessels for which Termination Notices had *not* been issued, "if these vessels cannot be re-employed, there is no benefit in them remaining in the possession of OTPL", and that they would engage the XH Companies on this. Even after this point, the OTPL JMs maintained in their notification letter to OTPL's customers on 12 August 2020 (after OTPL had been placed into judicial management) that "[OTPL's] existing fleet, save for vessels that [were] being redelivered to their owners, [would] be available to the market and the JMs [were] working with

[OTPL]'s management and charterers to fix new voyages and fulfil their shipping needs".

100 Thus, as Mr Sreenivasan pointed out at the hearing, the marketing of the vessels for hire took place ***alongside and concurrently with*** the parties' discussions regarding the redelivery of the vessels. Based on the evidence before the court, the OTPL JMs consistently maintained their general position that they wished to terminate the bareboat charters and redeliver the vessels to the XH Companies as they were generally of no benefit to OTPL (unless they were actually re-employed and therefore used for the benefit of OTPL's estate). Until redelivery could be effected, however, it was sensible for the OTPL JMs to continue marketing these vessels as this might generate some income for OTPL in the meantime, instead of simply doing nothing. However, taking this step would ***not necessarily*** mean that the OTPL JMs had *retained the vessels for the benefit of OTPL's estate*. Indeed, that the marketing of vessels for hire was not inconsistent with the OTPL JMs' desire to redeliver the vessels is illustrated by the fact that vessels in respect of which Termination Notices had been issued and accepted were *also* being marketed pending their redelivery. This was the case for 23 out of the 40 vessels which the XH Companies specifically identify as having been marketed for hire. In our view, this makes clear that the mere fact that the vessels were *marketed* does not mean that they were retained by the OTPL JMs for the benefit of OTPL's estate.

101 We are also unable to agree with the XH Companies' argument that the statement made in the OTPL IJM Report that "if these vessels cannot be re-employed, there is no benefit in them remaining in the possession of OTPL" (set out at [99] above) evinced the OTPL JMs' "desire to re-deploy these vessels as a first resort". The more natural reading of this sentence *in its context* is that advanced by OTPL – that the OTPL JMs were reiterating their general position

that these vessels should be redelivered; and the more logical inference based on the circumstances is that, given the OTPL JMs' recognition that "[t]he issues highlighted … in relation to the vessels for which Termination Notices have been issued are likely to be in issue in respect of those other vessels too", the OTPL JMs were simply doing what they could in the meantime to earn revenue to defray the operating expenses that OTPL continued to incur pending redelivery of all the vessels.

102 As for the XH Companies' argument that any initial intention the OTPL JMs may have had at the time of the Meeting to redeliver the vessels *changed* as they became more optimistic about OTPL's cash position over time, marketed the vessels for hire and pursued new charter opportunities, this is, in our view, not supported by the close perusal of the evidence that we have undertaken above. As we pointed out to counsel for the XH Companies, Mr Thio Shen Yi SC ("Mr Thio"), during the hearing, there is no clear or unambiguous indication that the OTPL JMs at any point resiled from their original intention for the vessels to be redelivered to the XH Companies. Mr Thio also made much of the fact that the OTPL IJM Report did not mention that the OTPL JMs sought to market the vessels for hire so as to defray the operating expenses that OTPL incurred as a result of the continued retention of the vessels, and neither did the OTPL Solicitors' E-mail to the XH Companies' solicitors on 3 July 2021, after the present dispute arose. However, this is, in our view, neutral at best and does not take the XH Companies very far. Although a clear statement to this effect in the OTPL IJM Report and/or the OTPL Solicitors' E-mail would certainly *strengthen* the inference that this was their intention, the critical point is that when the OTPL JMs' conduct is viewed *in context*, it evinces, in our judgment, a consistent intention for the vessels to be redelivered to the XH Companies. The fact that this was not expressly stated in

the OTPL IJM Report or in the OTPL Solicitors' E-mail does not lead us to take a different view.

103 The XH Companies rely on *ABC Coupler* to argue that a liquidator's attempts to sell property for the company's benefit, even if ultimately unsuccessful, should enable the rent accruing for the period of beneficial retention to be treated as a priority expense. However, in our view, *ABC Coupler* can be ***distinguished*** from the present case. In *ABC Coupler* (at 720D–720E), Plowman J inferred from the correspondence that "from the time when the official receiver had been given leave to sell the company's assets and had taken advice as to the best method of doing so, his tactics were directed towards carrying out that advice and that he retained the lease for the purpose of carrying it out and for the benefit of the liquidation", and the rent payable would therefore fall within the liquidation expenses principle "unless the retention of the lease [could], on the facts, fairly be regarded as having been for the joint benefit of the applicants and the company". In the present case, however, the evidence does not support any inference that the OTPL JMs' "tactics" were directed towards retaining the vessels or that they did so for the benefit of the estate. Further, in so far as the XH Companies rely on the fact that the OTPL JMs took no concrete steps towards redelivery and only issued the Notices of Non-Adoption on 2 September 2020, this is insufficient to make good their case. It has been established that merely taking no steps to surrender the property will *not* be regarded as retaining possession for the benefit of the estate (see [50] and [50(a)] above).

104 Thus, in our judgment, the marketing of vessels for hire does not show that these vessels were retained by the OTPL JMs for the benefit of OTPL's estate, and the XH Companies have therefore not succeeded in showing why the Principle should apply to this group of vessels on this basis. The *mere fact* that

these vessels were in fact marketed for hire does *not* change our analysis of the OTPL JMs' *purpose or motivation* in retaining these vessels.

Other reasons for the delay in the redelivery of the vessels

105 What, then, may help to explain why the vessels were not redelivered to the XH Companies as the parties had agreed? Although there is insufficient evidence before us on this point to arrive at a definitive answer, some light is shed on this question by the XH JMs' Interim Judicial Managers' Report dated 5 October 2020 ("the XH IJM Report"), which stated (among other things) as follows:

> *When the IJMs were appointed, it was ascertained that there was insufficient cash and inadequate arrangements to take redelivery and maintain the whole of [the] fleet.* The XH subsidiaries to whom the vessels would be redelivered also did not have the benefit of a moratorium. In these circumstances, XH procured its subsidiaries to retract the termination notices and withdrew the redelivery applications.
>
> …
>
> *There is insufficient cash to take physical delivery of the whole fleet at short order and to maintain all the vessels.* If the redelivery schedule has to be accelerated in the light of the disclaimer application, *short-term interim funding is required from the banks to bridge the cash gap between taking redelivery and receipt of sale proceeds.*
>
> [emphasis added]

106 This is consistent with the position taken by the XH JMs in opposing the OTPL JMs' disclaimer application in SUM 4257 (which was filed on 1 October 2020). In that connection, the XH JMs had argued that allowing the application would greatly prejudice the XH Companies as they did not have sufficient cash at that point to take immediate redelivery (see the GD at [55]).

107 The picture that emerges from this is that, upon the XH JMs' appointment on 13 August 2020 (see [17] above), it became apparent to them that the XH Companies had insufficient cash and inadequate arrangements to take redelivery of the vessels as well as to maintain the whole of the fleet. Accordingly, in September 2020, the XH JMs went on to retract the Termination Notices (on 1 and 2 September 2020), affirm the bareboat charters (from 10 to 15 September 2020), and discontinue OS 652 (on 28 September 2020) (see [19] above). This led the Judge to observe that the XH Companies' conduct after the Notices of Non-Adoption were issued by the OTPL JMs was "a *volte face* to that of the management of the Xihe Group", and that there was "a strategic reason behind this change of tack" – namely, that the XH JMs did not have sufficient cash to take immediate redelivery (as they did not have the funds for the necessary operating expenses for all the vessels) and thus wished to stall until they themselves were ready to take redelivery (see the GD at [55]–[57]). Although both the XH IJM Report and the XH JMs' opposition to SUM 4257 date from the period *after* the Notices of Non-Adoption were issued, during which time the inapplicability of the Principle is undisputed by the XH Companies, this evidence shows that the non-delivery of the vessels in the period between 13 August 2020 and the issuance of the Notices of Non-Adoption was attributable at least in part to the XH Companies. Such evidence further suggests that the non-delivery of the vessels even *prior* to 13 August 2020 may also have been attributable to the XH Companies' financial position, or at least that delaying redelivery may have been beneficial to the XH Companies. Indeed, the difficulties faced by the XH Companies in accepting redelivery were alluded to as early as 7 July 2020 in the OTPL IJM Report, which listed the XH Companies' "present inability to take physical redelivery of each vessel due to the lack of crew,

competence/capacity and money to pay for ROB" as one of the issues arising in relation to the matter of redelivery.

108 We pause here to emphasise that the critical inquiry for the purposes of the Principle is into the *OTPL JMs'* purpose *vis-à-vis* the vessels, not that of the XH JMs or the XH Companies. Nevertheless, the XH Companies' likely financial situation and likely willingness (or otherwise) to take redelivery of the vessels at the material time also forms part of the entire *context* against which the relevant events ought to be viewed, to fully appreciate the true state of affairs.

Issue 3: Whether the Principle should apply for periods of inactivity between redeployment of vessels in the Fourth Category

109 The next issue is whether, for vessels in the Fourth Category (which the OTPL JMs deployed on sub-charters), the Judge erred in finding that the Principle did not apply to *periods of inactivity* before and between redeployments of the vessels on sub-charters in the period before the issuance of the Notices of Non-Adoption. The XH Companies submit that, *in addition* to applying to the periods of actual deployment of these vessels on sub-charters, the Principle should *also* apply to the periods of inactivity between deployments. Notably, the Judge's finding that the Principle would not apply to periods of inactivity relates to only *five* out of the 22 vessels in the Fourth Category. These five vessels are: the "Ocean Quest", the "Ocean Hero", the "Ocean Falcon", the "Ocean Premier" and the "Ocean Pitta". The Judge noted that these vessels "stopped operating for months at a time before resuming operations" (see the GD at [70]).

110 In our judgment, the Judge did not err in holding that the Principle would not apply to such periods of inactivity.

111 The Judge's finding on this point appears to have flowed from the premise that the OTPL JMs did not choose to retain these five vessels generally for a purpose regarded as being beneficial to OTPL's estate, based on the "general position" which the Judge found to subsist at [35]–[57] of the GD and which the Judge saw no reason to deviate from in respect of the vessels deployed on sub-charters. In contrast, the Judge considered that the vessels in the *Fifth Category* – which were deployed for various in-house services – would attract the application of the Principle even in respect of expenses incurred during "periods of downtime" because, if the OTPL JMs had redelivered the vessels in the Fifth Category, they would have needed to secure other vessels to achieve the same purpose under post-insolvency contracts and the costs of doing so would then have enjoyed priority as judicial management expenses (see the GD at [74]).

112 We see no reason to depart from the Judge's findings above. In their Slides presented at the Meeting on 18 May 2020, the OTPL JMs had placed all five of these vessels in Groups 1 and 2, which the OTPL JMs indicated they wished to physically redeliver to the XH Companies. Subsequently, in the OTPL IJM Report dated 7 July 2020, the OTPL JMs stated that "if these vessels cannot be re-employed, there is *no benefit in them remaining in the possession of OTPL*" [emphasis added]. Although, as events later transpired, these vessels were marketed and deployed on sub-charters, the evidence supports the Judge's inference that the OTPL JMs did not intend to retain these vessels *generally* for the benefit of OTPL's estate. The exception to this was where the vessels were *actually* deployed on sub-charters and thereby generated some income for OTPL, as this would incontrovertibly amount to use for the benefit of OTPL's estate.

113 In this regard, the vessels in the Fifth Category – namely, the "Marine Protector", the "Ocean Solar", the "Marine Power" and the "Marine Alliance" – provide a useful contrast to those in the Fourth Category. These four vessels were all placed in Group 5 in the Slides presented at the 18 May 2020 Meeting, which denoted the group of vessels that the OTPL JMs would "consider further" whether OTPL wished to retain on varied bareboat hire terms before deciding which vessels it did not wish to retain. These vessels were ultimately deployed by the OTPL JMs for various in-house services, such as the transportation of bunkers, provisions or crew from the shore to other vessels. As the Judge found, if the OTPL JMs had redelivered these vessels, they would then have needed to secure other vessels to perform the same in-house services (see the GD at [72]–[74]). This reasoning does not, however, apply to the vessels in the Fourth Category, which were deployed on sub-charters. The Judge also noted elsewhere in the GD that the OTPL JMs had *conceded* that the Principle applied to the "Marine Power", the "Marine Alliance" and the "Marine Protector", while the Judge separately held that the Principle applied to the retention of the "Ocean Solar" to transport bunker to other vessels (see the GD at [80] and [82]).

114 Thus, while the vessels in the Fourth Category were used for the benefit of OTPL's estate during the periods of deployment on sub-charters, we are of the view that there is no basis for disturbing the Judge's finding that the OTPL JMs did not retain these vessels *generally* for the benefit of OTPL's estate, such that the Principle should apply only to the *specific periods of actual use*.

115 We add that this is not, in our view, inconsistent with the Judge's holding at [33] of the GD. The Judge stated there that, where an asset under a pre-insolvency contract is retained and used for the benefit of the estate, the Principle applies to liabilities that are payable under the terms of the pre-

insolvency contract for the *entire period* that the asset is retained for the benefit of the estate, and not just for the specific period of *use*. Consistently with this, the Judge held that expenses incurred even during "periods of downtime" for vessels in the *Fifth Category* (which were retained *generally* for the benefit of OTPL's estate) enjoyed priority under the Principle (see [111] above). The vessels in the *Fourth Category*, however, warrant different treatment because they were – as explained above – not retained *generally* for the benefit of OTPL's estate.

Issue 4: Whether the Ancillary Claims must be linked to the period of beneficial retention

116 The final issue raised by the XH Companies in this appeal is that the Judge erred in requiring them to prove that the Ancillary Claims were linked to the period of beneficial retention. As OTPL points out, the only claim to which this argument applies is the claim for *repair costs* in respect of the Second, Fourth and Fifth Categories of vessels – the other Ancillary Claims were held to fall within the scope of the Principle (see the GD at [64], [69] and [73]). The repair costs referred to here are those which OTPL was required to bear as part of its obligation under the terms of the bareboat charters to maintain the vessels in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice, prior to redelivery. We note for completeness that the other heads of the Ancillary Claims were for survey and certification costs, insurance and crew costs, all of which OTPL was required to bear under the bareboat charters.

117 Two issues arise in this connection: (a) whether the accruals approach or the relative approach should be adopted in determining whether the Principle applies to the Ancillary Claims; and (b) applying the relevant approach, whether the repair costs claimed in this case fall within the scope of the Principle.

Whether the accruals approach or the relative approach should be adopted

118 The XH Companies contend that the court ought to adopt the *accruals approach*, under which any liability which accrues while the property in question is being beneficially retained attracts the Principle. The Judge (without expressly considering the issue of which approach should be preferred as a matter of principle) instead applied what the XH Companies labelled as the *relative approach*, which required a link to be established between the repair costs claimed and the use of the vessels in the period of use (see the GD at [64]). The XH Companies acknowledge that the relative approach is an available approach, but urge this court to adopt the accruals approach instead, on the ground that the relative approach "imposes an impossible evidential burden for lessors" in this context. This is said to be because such lessors would then need to inspect and ascertain the condition of each bareboat chartered vessel daily, in order to determine the precise day on which an ancillary liability arose and consequently whether it was attributable to the judicial managers' beneficial retention of the property.

119 In our view, the relative approach applied by the Judge should be preferred. In support of the accruals approach, the XH Companies rely on the English cases of *In re Levi & Co Ltd* [1919] 1 Ch 416 ("*Re Levi*") at 419 and *Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration)* [2010] Ch 455 ("*Goldacre*") at [20]. The XH Companies characterise the relative approach as "[t]he other view" set out in *Re London Bridge Entertainment Partners LLP (in administration) v London Trocadero (2015) LLP* [2019] EWHC 2932 (Ch) ("*London Bridge*"). However, the XH Companies omit to mention that *Goldacre* was overruled on this point by the English Court of Appeal in *Jervis* at [100]–[102] and that *Re Levi* was held to no longer be good law in *London Bridge* at [149]. As Insolvency and

Companies Court Judge Barber, sitting in the English High Court, explained in *London Bridge* at [145], [149] and [155]:

> 145. As rightly noted by [counsel], … '… It is not about categorising liability … ***it is about identifying the extent to which the liability under the pre-administration contract is correlative to the benefit to the estate after commencement of insolvency proceedings*** and the whole point of Lewison LJ's decision [in *Jervis*] is to say that *it is not a strict accruals basis*.' I accept these submissions.
>
> …
>
> 149. Moreover whilst *Re Levi* was not a rent case, Astbury J (at p419) clearly treated the liability to deliver up in good repair at the end of the term as what Lewison LJ would later describe in *Jervis* as a 'happenstance' of timing; that is to say, if, having entered into beneficial possession of premises, a liquidator happens to remain in possession of those premises at the time of accrual of a given liability (in this case at the end of the term), that liability in its entirety is treated as an expense, regardless of whether it, or any part of it, is referable to the period of the liquidator's beneficial retention of the premises. ***Such an approach in my judgment does not accord with the equitable basis of the* Lundy *principle*** [*ie*, the Principle] ***and cannot survive the reasoning of* Jervis**. [Counsel's] submission that the approach adopted in *Jervis* should be limited simply to rent or periodical payment cases was entirely unpersuasive and I reject it. In my judgment, **Re Levi *is no longer good law and I decline to follow it***.
>
> …
>
> 155. Anyone seeking to elevate a pre-insolvency claim to expense status within the insolvency must demonstrate why he should enjoy such priority over other creditors. In a leasehold case such as this, for reasons already explored, ***it is not enough to state simply that the liability accrued during the office-holders' beneficial retention of the leased premises***. That 'happenstance of timing' approach ***does not accord with the equitable basis of the* Lundy *principle and cannot survive the reasoning of* Jervis**.
>
> [emphasis added in italics and bold italics]

120 There is thus scant support in the authorities relied on for the XH Companies' position that the accruals approach should be followed.

121 Further, the relative approach seems to us to be preferable as a matter of principle. The requirement of a "link" (*per* [64] of the GD) or "nexus" (*per* [12] of the Oral Judgment) between the expenses claimed and the retention or use of the property coheres with the nature and rationale of the Principle, which is an *equitable* principle developed to permit pre-judicial management expenses incurred for the benefit of the estate to be treated *as though* they are judicial management expenses for priority purposes (see *Chaly Chee* at [53]–[54], citing Lord Hoffmann's observations in *Toshoku* at [27] and [29]; see also *London Bridge* at [155] (quoted above at [119])). It is also more consistent with the focus of the Principle, which is on the *purpose* for which expenses are incurred (and whether this was for the benefit of the estate), and not merely on the *time* at which these expenses were incurred. Expenses which happen to be incurred during the period of retention of property for the estate's benefit, but which have no correlation with the beneficial retention itself, should consequently not be accorded priority.

Whether the Principle applies to the repair costs

122 Applying the relative approach in the present case, the XH Companies have not shown how the Judge erred in excluding the repair costs from the scope of the Principle. The XH Companies' submissions on this issue are focused on arguing that the relative approach would place an "impossible evidential burden" on lessors such as themselves (see also [118] above), and – as OTPL points out – they have made no attempt to draw a link between the repair costs claimed and the OTPL JMs' use of the vessels for the benefit of OTPL's estate. Indeed, the XH Companies appear to *implicitly concede* that the XH Companies would struggle to establish the requisite link because they "would have to inspect and ascertain the condition of every one of their bareboat chartered vessels daily" so as to ascertain "the precise day on which an ancillary liability

[for repair costs] arose, and consequently, whether it is attributable to the JMs' beneficial retention of the property". This illustrates the difficulty faced by the XH Companies in establishing the requisite link between the repair costs they claim and the retention and use of the vessels for the benefit of OTPL's estate.

123 In these circumstances, the XH Companies have not provided us with any basis for interfering with the Judge's conclusion on this issue.

Conclusion

124 For the foregoing reasons, we dismiss the appeal. We order the XH Companies to pay the sum of $40,000 (inclusive of disbursements) to OTPL as the costs of the appeal. The usual consequential orders will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Thio Shen Yi SC and Crystal Tan (TSMP Law Corporation) (instructed), Leo Zhen Wei Lionel, Chong Yi-Hao Clayton and Kwong Kai Sheng (WongPartnership LLP) for the appellants; Narayanan Sreenivasan SC, Rajaram Muralli Raja, Jonathan Lim Jien Ming, Tan Kai Ning Claire and Eva Teh Jing Hui (K&L Gates Straits Law LLC) for the respondent.

Annex: Table of Vessels

A.1 The table overleaf sets out the following information for each vessel:

(a) First, whether a Termination Notice was issued by the XH Companies and accepted by the OTPL JMs (Column A).

(b) Second, whether it was the subject of OS 652 (Column B).

(c) Third, whether a Notice of Non-Adoption was issued by the OTPL JMs (Column C).

(d) Fourth, whether it was the subject of the leave granted by the Judge in SUM 4257 (Column D).

(e) Fifth, which category it was placed in by the Judge (with reference to the categories proposed by the XH JMs before the Judge) based on how it was used (Column E).

(f) Sixth, which issue(s) on appeal it is relevant to (Column F).

A.2 To elaborate on point (f) above, in relation to Column F:

(a) "Issue 2" indicates that the Judge found that the Principle *did not apply*, and the XH Companies seek to challenge this on appeal.

(b) "Issue 3" indicates that the Judge found that the Principle did apply, but *only* to periods of use, and the XH Companies contend that it should also apply to *periods of inactivity between redeployments*.

(c) "Issue 4" indicates that the Judge found that the Principle did apply, but not to *Ancillary Claims for repair costs*, and the XH Companies contend that it should also apply to these repair costs.

		(A)	(B)	(C)	(D)	(E)	(F)
S/N	**Vessel**	**Termina-tion Notice?**	**OS 652?**	**Notice of Non-Adoption?**	**SUM 4257?**	**Category based on use**	**Issue(s) on appeal**
1	**Ocean Eagle**	Yes	Yes	Yes	Yes	-	Issue 2
2	**Ocean Gull**	Yes	Yes	Yes	Yes	-	Issue 2
3	**Ocean Pitta**			Yes	Yes	~~Fourth Category~~	Issue 3 & Issue 4
4	**Ocean Hero**			Yes		~~Fourth Category~~	Issue 3 & Issue 4
5	**Fly Seal**			Yes		-	
6	**Ocean Leader**			Yes		~~Fourth Category~~	Issue 4
7	**Ocean Progress**	Yes	Yes	Yes		-	Issue 2
8	**Ocean Premier**			Yes		~~Fourth Category~~	Issue 3 & Issue 4
9	**Ocean Supreme**			Yes		-	
10	**Ocean Falcon**			Yes	Yes	~~Fourth Category~~	Issue 3 & Issue 4
11	**Ocean Lark**	Yes	Yes	Yes	Yes	-	Issue 2
12	**Ocean Hawk**			Yes	Yes	-	
13	**Ocean Venus**	Yes	Yes	Yes	Yes	-	Issue 2
14	**Ocean Sedna**	Yes	Yes	Yes	Yes	-	Issue 2
15	**Ocean Unicorn**	Yes	Yes	Yes		-	Issue 2
16	**Ocean Mercury**	Yes	Yes	Yes		-	Issue 2
17	**Tai Hu**	Yes	Yes	Yes		~~Fourth Category~~	Issue 2 & Issue 4
18	**Hong Ze Hu**	Yes	Yes	Yes	Yes	-	Issue 2
19	**Ocean Jupiter**	Yes	Yes	Yes		-	Issue 2
20	**Ocean Winner**			Yes	Yes	-	Issue 2
21	**Chao Hu**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
22	**Ocean Pride**	Yes		*Not needed – time charter*		-	Issue 2

		(A)	(B)	(C)	(D)	(E)	(F)
S/N	**Vessel**	**Termina-tion Notice?**	**OS 652?**	**Notice of Non-Adoption?**	**SUM 4257?**	**Category based on use**	**Issue(s) on appeal**
23	**Ocean Pegasus**	Yes	Yes	Yes	Yes	-	Issue 2
24	**Ocean Prestige**			Yes		-	
25	**Ocean Mars**	Yes	Yes	Yes	Yes	-	Issue 2
26	**Marine Emerald**			Yes	Yes	-	
27	**Ocean Voyager**			Yes	Yes	Third Category	
28	**Ocean Globe**			Yes	Yes	-	Issue 2
29	**Ocean Tiara**	Yes	Yes	Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
30	**Ocean Vela**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
31	**Po Yang Hu**			Yes	Yes	-	Issue 2
32	**Hua San**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
33	**Lu San**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
34	**Tai San**			Yes	Yes	-	Issue 2
35	**Jiu Hua San**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
36	**Tai Hung San**			Yes		~~Fourth Category~~	Issue 2 & Issue 4
37	**E Mei San**			Yes	Yes	Third Category	
38	**Chang Bai San**			Yes	Yes	Second Category	Issue 4
39	**Zhu Jiang**	Yes	Yes	Yes	Yes	-	Issue 2
40	**Bei Jiang**	Yes	Yes	Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
41	**Qi Lian San**			Yes	Yes	Third Category	
42	**Jing Gang San**			Yes	Yes	-	Issue 2
43	**Pu Tuo San**			Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4

		(A)	(B)	(C)	(D)	(E)	(F)
S/N	**Vessel**	**Termina-tion Notice?**	**OS 652?**	**Notice of Non-Adoption?**	**SUM 4257?**	**Category based on use**	**Issue(s) on appeal**
44	**Long Hu San**			Yes		-	Issue 2
45	**Wu Yi San**			Yes	Yes	Second Category	Issue 4
46	**Ocean Sunrise**	Yes	Yes	Yes	Yes	-	Issue 2
47	**Dong Ting Hu**	Yes	Yes	Yes	Yes	-	Issue 2
48	**Ocean Stellar**	Yes	Yes	Yes	Yes	Sixth Category	Issue 2
49	**Marine Priority**			Yes	Yes	~~Fourth Category~~	
50	**Marine Venture**			Yes	Yes	-	
51	**Marine Protector**			Yes	Yes	Fifth Category	Issue 4
52	**Marine Ace**			Yes	Yes	-	
53	**Maxico II**			Yes		-	
54	**Marine Dignity**			Yes		~~Fourth Category~~	Issue 4
55	**Ocean Quest**	Yes	Yes	Yes		~~Fourth Category~~	Issue 3 & Issue 4
56	**Ocean Cosmos**	Yes	Yes	Yes	Yes	-	Issue 2
57	**Marine Amber**			Yes	Yes	-	
58	**Ocean Pluto**			Yes	Yes	-	Issue 2
59	**Marine Onyx**			Yes		-	
60	**Marine Ruby**			Yes		-	
61	**Ocean Energy**			Yes		-	
62	**Ocean Solar**			Yes		Fifth Category	Issue 4
63	**Ocean Neptune**	Yes	Yes	Yes	Yes	~~Fourth Category~~	Issue 2 & Issue 4
64	**Marine Topaz**			Yes		-	

		(A)	(B)	(C)	(D)	(E)	(F)
S/N	**Vessel**	**Termina-tion Notice?**	**OS 652?**	**Notice of Non-Adoption?**	**SUM 4257?**	**Category based on use**	**Issue(s) on appeal**
65	**Ocean Spring**			Yes	Yes	-	Issue 2
66	**Ocean Summer**	Yes	Yes	Yes	Yes	Fourth Category	Issue 2 & Issue 4
67	**Ocean Crown**			Yes	Yes	Fourth Category	Issue 2 & Issue 4
68	**Ocean Regent**	Yes	Yes	Yes	Yes	Fourth Category	Issue 2 & Issue 4
69	**Marine Power**			Yes	Yes	Fifth Category	Issue 4
70	**Marine Alliance**			Yes	Yes	Fifth Category	Issue 4
71	**Ocean Moonbeam**	Yes	Yes	Yes	Yes	-	Issue 2
72	**Ocean Victory**	Yes	Yes	Yes		-	Issue 2
73	**Ocean Trader**	Yes	Yes	Yes	Yes	-	Issue 2
74	**Ocean Autumn**	Yes	Yes	Yes	Yes	-	Issue 2
75	**Ocean Winter**			Yes	Yes	-	Issue 2
76	**Ocean Princess**	Yes		*Not needed – time charter*		-	Issue 2
No.	**76**	**30**	**28**	**74**	**52**	**32**	**-**