The “Chem Orchid”
[2015] SGHC 50

Case Number	: Admiralty in Rem No 184 of 2011 (Registrar's Appeal No 426 of 2013), Admiralty in Rem No 197 of 2011 (Registrar's Appeal No 1 of 2014), Admiralty in Rem No 198 of 2011 (Registrar's Appeal Nos 2 and 8 of 2014), Admiralty in Rem No 201 of 2011 (Registrar's Appeal Nos 6 and 7 of 2014)
Decision Date	: 18 February 2015
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Yogarajah Yoga Sharmini and Subashini d/o Narayanasamy (Haridass Ho & Partners) for the plaintiff in ADM No 184 of 2011; Tan Hui Tsing (Gurbani & Co) for the plaintiffs in ADM Nos 197 and 198 of 2011; Philip Tay (Rajah & Tann Singapore LLP) for the plaintiff in ADM No 201 of 2011; Henry Heng and Darius Lee (Legal Solutions LLC) for the fourth intervener in ADM No 184 of 2011 and the defendants in ADM Nos 197, 198 and 201 of 2011.
Parties	: WINPLUS CORPORATION CO LTD — DEMISE CHARTERER OF THE VESSEL "CHEM ORCHID" — FRUMENTARIUS LTD — THE OWNERS AND/OR DEMISE CHARTERERS OF THE SHIP OR VESSEL OF "CHEM ORCHID" — KRC EFKO-KASKAD LLC — MERCURIA ENERGY TRADING SA

Admiralty and shipping – Admiralty jurisdiction and arrest – Actions in rem – Whether admiralty jurisdiction validly invoked under s 4(4) of High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) – Whether bareboat charterer remained as “relevant person” when actions in rem brought – Termination of bareboat charter – Validity of termination notice – Requirement of physical redelivery – Doctrine of constructive redelivery

Civil procedure – Striking out

Evidence – Admissibility of evidence – Foreign law – Expert opinion – Duties of foreign law expert – Construction of private documents

[LawNet Editorial Note: The appeals to this decision in Originating Summons No 21 of 2015 and Civil Appeals Nos 58, 59, 60 and 62 of 2015 were dismissed by the Court of Appeal on 26 October 2015. See [2016] SGCA 4.]

18 February 2015 Judgment reserved.

Steven Chong J:

Introduction

1 These appeals concern four separate *in rem* writs issued against the *Chem Orchid* (“the Vessel”). Each writ was filed pursuant to a different cause of action each plaintiff had against the demise charterer of the Vessel. In the court below, the defendant (the owner of the Vessel) applied to set aside all of the writs on the basis that the court’s admiralty jurisdiction had not been properly invoked under s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) (“HCAJA”) because the Vessel was no longer on demise charter at the time the writs were issued. The Assistant Registrar found for the defendant and set aside the writs. Two of the *in rem* writs also contained

separate *in personam* claims against the defendant as owners of the Vessel. Those claims remain alive as the Assistant Registrar found that there was no legal basis to justify their striking out at this stage of the proceedings. The plaintiffs now appeal against the Assistant Registrar's decision to set aside the writs while the defendant appeals against the Assistant Registrar's decision not to strike out the claims brought by two of the plaintiffs.

2 The key question in these appeals is whether the charter of the Vessel had already been terminated at the time of the issuance of the writs. This necessitates an examination of an important legal point, *viz*, the requirement of redelivery in the termination of a bareboat charter. This is not merely a matter of contract but has, in the context of admiralty law, crucial implications on the court's jurisdiction to order the arrest of bareboat or demise chartered vessels (the terms are used interchangeably in this judgment).

3 The right to arrest and the risk of a vessel being arrested are normal incidents arising from the operation and management of any vessel. Typically, parties dealing with vessels do not transact directly with the registered owner of the vessel but with managers and/or agents of the vessels which may vary from port to port. In the case of bareboat charters, this is almost invariably the case because the effect and essence of any bareboat charter is to grant the bareboat charterer complete control and possession of the vessel. Given that there is no public registry of bareboat charters available for inspection, third parties dealing with bareboat charterers have no way of finding out if the vessel is on bareboat charter and may well assume that they are in fact dealing with the owners of the vessel.

4 This point assumes critical significance when one considers that, until the 1980s, vessels on bareboat charter were insulated from arrest for most claims save for a limited class of maritime liens. Thus, third parties could not arrest a vessel to satisfy debts owed to them by the bareboat charterers. This placed third parties who transacted with bareboat charterers at a significant disadvantage for they could, unbeknownst to them, be left without security for their claims. In recent decades, many common law jurisdictions such as the United Kingdom, Hong Kong, Australia, Malaysia, Canada, and New Zealand have amended their laws to permit the arrest of the bareboat chartered vessel if, at the time the action is brought, the vessel still remains on bareboat charter to the party liable *in personam*. The laws in these jurisdictions are largely uniform save for that of New Zealand, which permits not only the arrest of the specific bareboat chartered vessel implicated in the cause of action but also the arrest of any other vessels which are on bareboat charter to the party who is liable *in personam*.

5 To bring our laws in line with the other maritime nations, Singapore amended the HCAJA on 1 April 2004 to permit the arrest of bareboat chartered vessels (see High Court (Admiralty Jurisdiction) (Amendment) Act 2004 (Act 2 of 2004) ("the 2004 Amendment")). Following this amendment, s 4(4) of the HCAJA now reads:

> (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> (*a*) the claim arises in connection with a ship; and
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> *an action in rem may* (whether or not the claim gives rise to a maritime lien on that ship) *be brought in the High Court against* —

(i) *that ship, if at the time when the action is brought the relevant person is* either the beneficial owner of that ship as respects all the shares in it or *the charterer of that ship under a charter by demise*; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

[emphasis added]

6 The hearings before the Assistant Registrar stretched over a long period of 14 calendar days with the first hearing date on 11 October 2012 and the last almost a year later in September 2013 (see *The "Chem Orchid"* [2014] SGHCR 1 ("the Judgment")). Unfortunately, much time and effort was expended on proof of Korean law (which was the governing law under the bareboat charter), to little end because none of the parties suggested that an application of the Korean "rules" of contractual interpretation would have yielded a different result from the application of Singapore law in this case. Thus, the introduction of expert evidence only served as a distraction and contributed to the protracted nature of the proceedings. To avoid a recurrence, I have included a *coda* on the use of expert witnesses in the proof of foreign law in this judgment. Hopefully, this will provide guidance on the circumstances when proof of foreign law is necessary and on the proper role of expert witnesses in that regard.

The background facts

The Lease Agreement between HKC and Sejin

7 The registered owner of the Vessel at all material times prior to its court-ordered sale in Singapore was Han Kook Capital Co Ltd ("HKC"), a Korean incorporated company. On 1 February 2010, HKC entered into an agreement to lease the Vessel to Sejin Maritime Co Ltd ("Sejin"), another Korean company, for a total period of 108 months ("the Lease Agreement").

8 Under the Lease Agreement, Sejin was to pay monthly rental to HKC on the third day of each month. Sejin was also responsible for the employment and payment of the crew and for the repair and maintenance of the Vessel. Sejin was effectively in possession and control of the Vessel and it is common ground that the Lease Agreement is in substance a charter of the Vessel by demise. The Lease Agreement also provided that, in the event of any disagreement as to its interpretation, Korean law shall apply.

The Asset Transfer Agreement and the Notice of Credit Transfer

9 Sejin complied punctually with its payment obligations during the initial months of the Lease Agreement but defaulted soon after. HKC's representative, Mr Sejun Kim, filed an affidavit in these proceedings stating that reminders were sent but no rental payments were received from Sejin after its last payment in October 2010.

10 In December 2010, a new corporate entity known as HK AMC Co Ltd ("HKA") was established to deal with the recovery of bad debts owed to HKC. On 27 December 2010, HKC and HKA executed an Asset Transfer Agreement ("ATA") in which the former agreed to sell certain credits which it had obtained in the course of its business to the latter at a fair price. The credits under the Lease Agreement were included in this transfer.

11 To be clear, the ATA did not effect a transfer of ownership of the Vessel – HKC remained the

registered owner of the Vessel at all times. Further, the ATA did not purport to transfer the entire Lease Agreement to HKA – it only purported to transfer the credits thereunder. These points are not disputed by the parties but I should highlight that their experts disagree on the question of whether the *ATA* had *validly* transferred the lease credits (see [145]–[146] below).

12 I should also mention in this connection that, prior to the ATA, on 24 December 2010, HKC had issued a Notice of Credit Transfer ("NCT") to Sejin in which it informed Sejin of the arrangement. There was, however, some dispute as to whether the NCT had transferred *more* rights than the ATA. This dispute centred on paras 3 and 4 of the NCT, which reads:

> 3. In addition to the Transfer Credit, we [*ie*, HKC] transferred the *right or status* in our possession or management out of personal or physical security, right to profit or the other rights incidental to the Transfer Credit.
>
> 4. In spite of the above transfer of Credit, the right, obligation or status of yours [*ie*, Sejin] based on the relating contract, agreement, security arrangement or the other contract shall remain unchanged and *the right, obligation or the other status* of ours based on the above contracts shall be succeeded by the Transferee [*ie*, HKA] to the extent of the transfer.
>
> [emphasis added]

13 The parties' experts disagreed on whether the NCT – in notifying Sejin that HKC had transferred its "right" or "status" under the Lease Agreement – conferred upon HKA the right to terminate the Lease Agreement. The experts' respective opinions dealt with this point extensively because, as will become clear, it was *HKA* (and not HKC) which had issued the purported termination notice.

The 4 April Notice

14 By early April 2011, Sejin had failed to make any rental payments under the Lease Agreement for a period of six consecutive months. Mr Sejun Kim described in his affidavit that, at the time, there was no sign that Sejin would be able to make further payments since the value of the Vessel had depreciated substantially and the prevailing market conditions for trading the Vessel were very poor. In his affidavit, Mr Sejun Kim explained that HKC had "grave concerns" about Sejin's ability to perform its obligations under the Lease Agreement and was thus entitled to terminate it by giving notice to Sejin in accordance with Art 24(2) of the Lease Agreement, which reads:

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

15 On 4 April 2011, a formal notice with the heading "Lease contract termination notice" was thus sent to Sejin ("the 4 April Notice"), informing the latter that it had "lost all the benefit of time" for repaying its outstanding debts. As the content of the 4 April Notice is of some importance, I reproduce the material portions here in full:

> [Logo] HK AMC Co. Ltd.

…

Document number: Hankook(Asset) No. 11-12

Recipient: Keunhyuk Park, CEO of Sejin Martitime Co., Ltd

…

Subject: Lease contract termination notice

1. I wish for your company's everlasting growth.

2. This is about the facility rent (lease) contract … between your company and [HKC], the credit of which was assigned to us on Dec. 29, 2010.

3. According to paragraph 2 of article 24 of the above lease contract, your company lost all the benefit of time of debt against our company. Therefore, please pay immediately all outstanding principal, period interest, overdue principal and interest, delayed compensation.

4. If the above point 3 is not implemented, in order to secure the remaining credit, our company will do the following:

(a) Demand an immediate repayment of the full amount of the credit

(b) Retrieve the leased object, consider an auction and register the information about the overdue payment according to the regulation of credit information management

(c) Take legal actions such as placing the collateral and other assets under distraint attachment and request for auctioning them. And we also let you know that you are responsible for enforcement cost when we do the above.

• Details (As of April 4, 2011)

…	…	…	Overdue lease payment	…	…	Total to be paid
…	…	…	289,430,562 won	…	…	16,934,476,554 won

The end.

HK AMC Co. Ltd

CEO Jaejeong Yoo [seal]

16 HKC claimed that the 4 April Notice validly terminated the Lease Agreement in accordance with Art 24(2). However, it is important to note that the 4 April Notice was issued by *HKA* rather than *HKC*. This, as mentioned earlier, led the parties' experts to examine the ATA and NCT more closely to determine whether HKA, despite being a non-party to the Lease Agreement, had nevertheless acquired the right to terminate it. A further source of disagreement among the experts concerned whether (assuming, *arguendo*, that HKA had the right to terminate the Lease Agreement) that right

was properly exercised in accordance with Art 24(2) of the Lease Agreement. Chiefly, the disagreement concerned the question of whether the 4 April Notice was defective in failing to specify the "cause" of the termination towards Sejin. According to some of the experts, the 4 April Notice did not state the cause for termination and this omission cannot now be cured by the explanations given by Mr Sejun Kim in his affidavit.

Subsequent correspondence and the continued trading of the Vessel

17 There was no formal written response from Sejin to the 4 April Notice. Instead, Mr Sejun Kim stated that he had a meeting with the Chief Executive Officer of Sejin, Mr Keunhyuk Park ("Mr Park"), sometime in mid-April 2011 to discuss matters. According to Mr Sejun Kim, Mr Park asked him whether the termination could be revoked and the Lease Agreement revived. In response, Mr Sejun Kim replied that the Lease Agreement had been terminated and that this termination could not be revoked with a mere promise by Sejin to pay the outstanding rental.

18 On 9 May 2011, the Chief Executive Officer of HKA who signed off on the 4 April Notice, Mr Jaejeong Yoo ("Mr Yoo"), issued a further notice to Mr Park reiterating that Sejin had "lost all the benefit of time" for payment of the rental arrears. In the notice, Mr Yoo demanded immediate payment of sums due as well as the return of the Vessel by 13 May 2011. However, Sejin failed to do either.

19 On 23 May 2011, Sejin wrote in response to HKA's 9 May letter. Sejin explained that it had been unable to discharge its monthly payment obligations because frequent breakdowns of the Vessel had affected her normal sailing schedule. However, Sejin went on to inform HKA that it "finally … [had] the opportunity to pay the entire overdue lease amount" out of freight earnings under certain prospective sub-charters which it had entered into. The details of these fixtures were provided to HKA and included a charterparty dated 13 May 2011 which Sejin had entered into with the plaintiff in Admiralty in Rem No 197 of 2011 ("ADM 197/2011"), Frumentarius Ltd ("Frumentarius"), for a voyage from Belawan, Indonesia to Taman, Russia. Sejin stated that the freight earnings from these fixtures would amount to roughly US$1.7m and requested that the deadline for repayment of the outstanding rental sums be changed to 17 June 2011. I pause to observe that the charter-hire arrears at this stage only amounted to 289,430,562 Korean Won (approximately US$261,445.52 at the current exchange rate). Sejin concluded its letter with the following statement: "If our company cannot keep the above payment promise, we promise that our company will agree to all the actions your company will take, and will implement all the instructions related to the ship retrieval."

20 Sejin did not receive any written response from either HKC or HKA until 14 June 2011. Sejin continued to trade using the Vessel in the intervening period and, on 31 May 2011, provided HKA with a written update that the Vessel had entered Belawan and was in the process of loading palm oil cargo. Sejin also stated that the Vessel would proceed next to Dumai, Indonesia for additional loading before heading towards the Mediterranean Sea and then the Black Sea for discharge. Neither HKC nor HKA reacted to Sejin's advice on the Vessel's loading schedule in spite of the purported termination of the Lease Agreement.

21 In accordance with the itinerary outlined in Sejin's letter, the Vessel completed loading three parcels of palm oil cargo at Belawan on 4 June 2011. The cargo was owned by the plaintiff in Admiralty in Rem No 198 of 2011 ("ADM 198/2011"), a Russian company known as KRC Efko-Kaskad LLC ("KRC"). KRC had sub-chartered the Vessel from Frumentarius for carriage of its goods to Taman. The Vessel then proceeded to Dumai, where she completed loading an additional parcel of palm oil cargo on 11 June 2011 owned by the plaintiff in Admiralty in Rem No 201 of 2011 ("ADM 201/2011"), a Swiss company known as Mercuria Energy Trading SA ("Mercuria"), to be shipped to Huelva, Spain.

On 13 June 2011, while at Dumai, the Vessel also stemmed bunkers which were supplied by the plaintiff in Admiralty in Rem No 184 of 2011 ("ADM 184/2011"), Winplus Corporation Co Ltd ("Winplus").

22 On 14 June 2011, HKA issued a formal written response to Sejin's letter dated 23 May 2011. In this response, HKA made reference to the 4 April Notice and its letter of 9 May 2011 and stated that, in light of Sejin's non-compliance with the demands for payment and return of the Vessel, Sejin's conduct was "an embezzlement and subject to criminal penalty". HKA further stated that it could not fully accept Sejin's request to postpone the deadline for repayment and then set out a number of conditions which Sejin had to fulfil if it wanted to revive the Lease Agreement. Despite HKA's position, however, the Vessel was neither redelivered nor was payment of the arrears made by Sejin. Instead the Vessel proceeded from Dumai to Singapore where she arrived on 16 June 2011. On 30 June 2011, the Vessel took on more bunkers, which were also supplied by Winplus.

23 In his affidavit, Mr Sejun Kim stated that he had learnt of the Vessel's presence in Singapore from Mr Park on 29 June 2011 and HKA immediately sent out a final notice for its redelivery. Sejin responded in a letter dated 4 July 2011 stating, *inter alia*, that it was not intentionally delaying the return of the Vessel and elaborating, "[w]e wanted to return the ship safely through the ship's normal sailing route, but the situation does not allow us to do that so far". On 15 July 2011, Sejin sent a further letter to Mr Sejun Kim which, while pertaining mostly to the description of certain transhipment arrangements, also contained the following statement: "we will do our best to return the ship to Korea as soon as possible."

The arrest and sale of the Vessel

24 Despite Sejin's express desire to *eventually* redeliver the Vessel to HKC, that was never in fact done because, on 28 July 2011, Winplus filed an *in rem* writ against the Vessel to commence ADM 184/2011 and arrested her in Singapore on the same day. Winplus' invocation of the court's admiralty jurisdiction was based on its claim solely against Sejin, the demise charterer of the Vessel, for the unpaid bunkers which were supplied in Dumai and in Singapore.

25 On 8 August 2011, three further *in rem* writs commencing ADM 197/2011, ADM 198/2011 and ADM 201/2011 were issued against the Vessel by Frumentarius, KRC, and Mercuria respectively. All three writs named the owners and/or demise charterers of the Vessel as defendant. Frumentarius' claim was for the loss or damage arising from the breach of the charterparty entered into with Sejin, while KRC and Mercuria's claims arose from the non-delivery of their cargoes to Taman and Huelva respectively.

26 Between 22 and 23 August 2011, HKC entered appearances in all the *in rem* actions as the registered owner of the Vessel. Sejin did not enter any appearances.

27 On 7 October 2011, after the parties with cargo remaining on board the Vessel had arranged for their transhipment, the court ordered the Vessel to be appraised and sold. As the bids received did not meet the Vessel's appraised value, the court approved of its sale below the appraised value on 23 December 2011.

The applications by HKC

HKC's setting aside applications

28 On 29 February 2012, HKC filed similar applications in all four admiralty actions seeking, *inter*

alia, to set aside the writs and all subsequent proceedings taken in these actions on the basis that the court's *in rem* jurisdiction had not been properly invoked.

29 The crux of HKC's case both here and below was that the Lease Agreement had been terminated by the 4 April Notice *prior* to the issuance of the *in rem* writs in all the actions. If HKC's submission is correct, the plaintiffs would fail in establishing a crucial jurisdictional fact under s 4(4)(*b*)(i) of the HCAJA, *viz*, that Sejin, as "the relevant person", was the bareboat charterer of the Vessel at the time when the various actions were brought. If that is so, the writs must be set aside on the basis that the court had no jurisdiction.

30 The plaintiffs strenuously denied that the Lease Agreement had already been terminated at the time their respective actions were commenced. Their arguments (both here and below) proceeded along the following lines:

(a) First, HKA had merely been transferred a right to claim the credits under the Lease Agreement and had not, whether by way of the NCT or the ATA, acquired a right to terminate the same. Thus, the 4 April Notice issued by HKA was ineffective in purporting to terminate the Lease Agreement.

(b) Second, even if HKA had the right to terminate the Lease Agreement, the 4 April Notice was nevertheless ineffective because it failed to comply with certain requirements under Art 24(2), such as the specification of the relevant "cause" for termination.

(c) Third, the plaintiffs further submitted that a bareboat charter could generally be brought to an end only upon physical redelivery of the vessel. Thus, the Vessel in this case, having never been physically redelivered, still remained on bareboat charter to Sejin when the *in rem* writs were issued.

HKC's striking out applications

31 As mentioned earlier, two of the four writs contained alternative claims brought directly against HKC as the registered owner of the Vessel. These were the writs issued by the cargo interests, KRC and Mercuria, in ADM 198/2011 and ADM 201/2011 respectively. They claimed that (even if the Lease Agreement had been terminated by the 4 April Notice) *in personam* liability attached to HKC, who, in permitting cargo to be loaded and in permitting the master to issue bills of lading for the same, had clothed the master with ostensible authority to bind HKC as the registered owner of the Vessel. If this is correct, then the court's admiralty jurisdiction would have been properly invoked as against HKC since there is no question that HKC, as "the relevant person" in this alternative claim, remained the registered owner of the Vessel at the time when these actions were brought.

32 In its applications filed in ADM 198/2011 and ADM 201/2011, HKC sought to strike out these alternative claims under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") and/or the inherent jurisdiction of the court.

The decision below

33 The Assistant Registrar's decision may be summarised as follows:

(a) In respect of HKC's setting aside applications, the Assistant Registrar held that the Lease Agreement was terminated *prior* to the issuance of the writs. Hence, the court's admiralty jurisdiction was wrongly invoked insofar as they were based on Sejin's *in personam* liability. She

reasoned thus:

(i) First, although the ATA and/or the NCT did not transfer HKC's right to terminate the Lease Agreement to HKA, HKA was nevertheless impliedly or apparently authorised to issue the 4 April Notice for and on behalf of HKC based on the conduct of the parties (see the Judgment at [42], [46]–[48]).

(ii) The 4 April Notice complied with Art 24(2) of the Lease Agreement (see the Judgment at [64]). In particular, the "cause" for termination, *viz*, Sejin's non-payment of rental arrears, was sufficiently clear from the 4 April Notice and this was borne out by, *inter alia*, the background against which this notice had been sent and the parties' subsequent correspondence which showed that Sejin did not question or challenge the termination (see the Judgment at [67]–[69]).

(iii) The 4 April Notice was not sufficient on its own, however, to terminate the Lease Agreement. At common law, a bareboat charter was brought to an end only when the vessel had been physically redelivered and even though this general rule could be contracted out of by the parties, the terms of the Lease Agreement in this case made it clear that physical redelivery of the Vessel was required for effective termination (see the Judgment at [112] and [122]).

(iv) Notwithstanding the need for physical redelivery, a bareboat chartered ship could be *constructively* redelivered if there was "some step or acknowledgment by the charterer to give effect to the redelivery" (see the Judgment at [126]). In this regard, Mr Park's acknowledgment at his meeting with Mr Sejun Kim in mid-April 2011 that the 4 April Notice was a notice of termination constituted constructive redelivery of the Vessel (see the Judgment at [129]). Alternatively, Sejin's declarations of intent to redeliver the Vessel on 4 and 15 July 2011 were also sufficient to effect constructive redelivery. The Lease Agreement had therefore terminated on 15 July 2011 at the latest (see the Judgment at [136]–[137]).

(b) In respect of HKC's application to strike out KRC and Mercuria' s alternative claims in ADM 198/2011 and ADM 201/2011, the Assistant Registrar found that these claims were not so legally and factually unsustainable as to warrant being struck out. If it were accepted that the Lease Agreement had been terminated by mid-April 2011, then HKC could have made it clear that Sejin no longer had the authority to load further cargoes and issue bills of lading. It was also open to HKC to take steps to recover possession of the Vessel but it did not do so. In light of the foregoing, HKC indirectly represented to shippers (such as KRC and Mercuria) that Sejin had the authority to bind HKC to the bills of lading which were issued at the material time (see the Judgment at [153]).

The present appeals

34 The plaintiffs all appealed against the Assistant Registrar's decision to set aside their respective *in rem* writs. They argued that Sejin was still the demise charterer at the time their actions were commenced. Their appeals are as follows:

(a) Registrar's Appeal No 426 of 2013 ("RA 426/2013") is Winplus' appeal in ADM 184/2011;

(b) Registrar's Appeal No 1 of 2014 ("RA 1/2014") is Frumentarius' appeal in ADM 197/2011;

(c) Registrar's Appeal No 2 of 2014 ("RA 2/2014") is KRC's appeal in ADM 198/2011; and

(d) Registrar's Appeal No 6 of 2014 ("RA 6/2014") is Mercuria's appeal in ADM 201/2011.

35 HKC also cross-appealed against the dismissal of its striking out applications against KRC and Mercuria's alternative claims:

(a) Registrar's Appeal No 7 of 2014 ("RA 7/2014") is HKC's appeal in ADM 201/2011; and

(b) Registrar's Appeal No 8 of 2014 ("RA 8/2014") is HKC's appeal in ADM 198/2011.

The plaintiffs' appeals

36 I begin by considering the plaintiffs' appeals against the Assistant Registrar's decision to set aside their *in rem* actions on the basis that Sejin was no longer the demise charterer at the commencement of these actions. The Court of Appeal has made clear in *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The Bunga Melati*") at [112] that when there is a challenge to the invocation of the court's admiralty jurisdiction, the onus is on the arresting party to discharge the following burdens under s 4(4) of the HCAJA:

> (a) prove, *on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s 3(1)(*d*) to 3(1)(*q*) exist; and show *an arguable case* that its claim is of the type or nature required by the relevant statutory provision ("step 1");
>
> (b) prove, *on the balance of probabilities*, that the claim arises in connection with a ship ("step 2");
>
> (c) identify, *without having to show in argument*, the person who would be liable on the claim in an action *in personam* [*ie*, the "relevant person"] ("step 3");
>
> (d) prove *on the balance of probabilities*, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("step 4"); and
>
> (e) **prove *on the balance of probabilities* , that the relevant person was, at the time when the action was brought**: (i) the beneficial owner of the offending ship as respects all the shares in it or **the charterer of that ship under a demise charter**; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("step 5").
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> [original emphasis in italics; emphasis added in bold]

37 In the context of the plaintiffs' appeals, all parties agreed that the "relevant person" under step 3 is Sejin and that the dispute centres only on step 5: was Sejin, on a balance of probabilities, still the demise charterer of the Vessel at the time the four *in rem* actions were brought?

38 The parties' arguments on appeal were broadly similar to what they had advanced below and may be briefly summarised. On one hand, HKC submitted that the 4 April Notice issued by HKA constituted a valid and sufficient termination under Art 24(2) of the Lease Agreement. Thus, HKC argued that Sejin was not the demise charterer of the Vessel at the time the writs were brought. On the other hand, the plaintiffs submitted that the 4 April Notice was invalid because, *inter alia*, HKA did not have the right to terminate the Lease Agreement. They also submitted, in the alternative, that physical redelivery of the Vessel was essential for the termination of the Lease Agreement and yet this was never done. The plaintiffs also submitted that the doctrine of constructive delivery, which the Assistant Registrar had recognised and applied, ought not to be a part of our law. In the result,

they argued that Sejin was still the demise charterer of the Vessel at the time the writs were brought.

39 These arguments raise the following sub-issues, each of which I will deal with in turn:

(a) Was HKA's issuance of the 4 April Notice a valid contractual termination of the Lease Agreement under Art 24(2) ("the contractual termination issue")?

(b) Was physical redelivery of the Vessel *further* required to bring about effective termination ("the physical redelivery issue")?

(c) If so, should Sejin nonetheless be regarded as having constructively redelivered the Vessel ("the constructive redelivery issue")?

The contractual termination issue

40 Before proceeding to examine the merits of the contractual termination issue, there is a preliminary point that needs to be disposed of. Sejin, in its correspondence with HKC/HKA, did not appear to challenge the validity of the termination under Art 24(2) of the Lease Agreement and has not entered appearance in these proceedings to do so. This raises the question of whether *the plaintiffs*, as strangers to the Lease Agreement, can question the validity of its termination given that this has not been challenged by *Sejin*.

41 As I have stressed at the outset, the question of termination is not merely a contractual issue affecting the immediate contracting parties, *ie*, Sejin and HKC. It has a pivotal bearing on the jurisdiction of this court in respect of the four *in rem* writs issued against Sejin. There is no dispute that questions affecting the jurisdiction of the court are to be determined by the *lex fori* (see *The "Kapitan Temkin"* [1998] 2 SLR(R) 537). HKC's reliance on the bald opinion of its expert witness (Prof In Hyeon Kim ("Prof Kim")) that "the Korean court is unlikely to accept any objection from a third party such as Winplus where the parties to the Lease Agreement and the Notice of Transfer are not questioning the same" is unhelpful. In my view, on issues that go to the root of the court's jurisdiction, it is entirely appropriate for the court to examine the objective evidence in order to be satisfied as to whether jurisdiction has been made out.

42 The admiralty jurisdiction of the High Court is conferred by statute and exists where the requisite statutory conditions have been satisfied; it cannot be conferred by the agreement or waiver of the parties if it does not exist under the HCAJA (see *The "Ohm Mariana" ex "Peony"* [1992] 1 SLR(R) 556 at [15] and *The "Alexandrea"* [2002] 1 SLR(R) 812 at [10]–[11]). Similarly, the admiralty jurisdiction of this court exists in this case only if the requisite statutory conditions have been satisfied (*ie*, if Sejin was the demise charterer at the time the writs were brought). HKC's submission that the doctrine of privity of contract would preclude the plaintiffs from challenging the termination, with respect, misses the point. The issue here is one of jurisdiction and not one of contract. The plaintiffs were not seeking, as non-parties, to sue on the Lease Agreement (which is a purely contractual point). Rather, they were seeking to show that the court has jurisdiction in this matter because the Lease Agreement was still valid when the *in rem* writs were issued – that is a jurisdictional issue. I agree that it is open to the plaintiffs to challenge the validity of the termination so as to establish jurisdiction in aid of the enforcement of their respective claims notwithstanding Sejin's apparent acceptance of the termination.

43 Counsel for Winplus, Ms Yogarajah Sharmini ("Ms Sharmini"), helpfully drew my attention to two cases where the validity of the termination of the bareboat charters was examined by the court on

points not pursued by the bareboat charterers. In *Ships "Hako Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress" v Programmed Total Marine Services Pty Ltd* (2013) 296 ALR 265 ("*The Hako Fortress*"), the arresting party (not the bareboat charterer) argued that the notice of termination was invalid as it was served at an address different from that specified in the bareboat charter. Similarly in *ASP Holdings Ltd v Pan Australia Shipping Pty Ltd* (2006) 235 ALR 554 ("*ASP Holdings*"), the arresting party attacked the validity of the termination notice on points which were not raised by the administrator of the bareboat charterer. In both cases, the court nonetheless examined the points raised by the arresting parties to determine whether the bareboat charters had been validly terminated pursuant to the notices. In the case of *The Hako Fortress*, the court held that the notice was valid while in *ASP Holdings*, the court accepted the argument raised by the arresting party and found the notice to be invalid. These cases illustrate that the validity of a termination notice – which has a material impact on jurisdiction – can and must be examined by the court notwithstanding the fact that the bareboat charterer might have accepted the termination as being valid.

(1) HKA did not acquire the right to terminate the Lease Agreement under the ATA and/or the NCT

44 The contractual termination issue received much attention by the experts. Much ink was spilled on the question whether the right to terminate the Lease Agreement had been transferred under the ATA and/or the NCT. On this issue, I agree with the Assistant Registrar that the ATA did not purport to transfer the right of termination from HKC to HKA and that the only asset which was transferred thereunder was the credit payable to HKC under the Lease Agreement. On this score, there can be no dispute that the right to terminate was not transferred under the ATA. I also agree with the Assistant Registrar that the NCT could not be relied on by HKA to terminate the Lease Agreement since it served merely as a notice to Sejin of the intended credit transfer and could not transfer *more* rights than was transferred under the ATA. In this context, it is pertinent to note that the NCT was served *prior* to the execution of the ATA. Accordingly the operative instrument which dealt with the transfer of the "assets" was the ATA and no more.

(2) The requisite opinion under Art 24(2) must have been formed by HKC

45 The Assistant Registrar, having arrived at the above finding, then proceeded to find that HKA had implied and/or apparent authority to issue the 4 April Notice on behalf of HKC. This is where I part company with the Assistant Registrar's reasoning. I am of the view that this inquiry is premature. Instead, I am of the view that a more fundamental question arises from the plain wording of Art 24(2) of the Lease Agreement. Article 24(2) was set out earlier but I reproduce it again for ease of reference:

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

46 It is clear that there are two conditions precedent to the exercise of the right of termination under Art 24(2). First, it is necessary for *HKC* to form an *opinion* that Sejin is unable to carry on with its normal business activities. Second, HKC must specify the *cause* for the formation of the *opinion* in the notification sent to Sejin. I shall deal with the second condition later. For now, I observe that the first condition premises the right to termination on the formation of a subjective, *bona fide* opinion by *HKC* regarding Sejin's circumstances and the viability of the Lease Agreement. However, there was

simply no evidence by any of the experts (whether under Korean law or otherwise) that this requirement could be satisfied upon proof that *HKA* (and not *HKC*) had formed the requisite opinion.

47 The Privy Council's decision in *Loke Hong Kee (S) Pte Ltd v United Overseas Land Ltd* [1981–1982] SLR(R) 424 ("*Loke Hong Kee*"), which arose on appeal from a decision of the Court of Appeal in Singapore, is apposite. In that case, the court had to consider a clause in a building contract which entitled the respondent employer to determine the appellant contractor's employment if, *inter alia*, the works were "in the opinion of the [respondent's] architect unsatisfactory". Lord Keith of Kinkel (delivering the judgment of the Board) interpreted this particular provision at [11] as follows:

> … The phrase "in the opinion of the architect unsatisfactory" which appears in art V(3) carries the kind of subjective connotation which is necessarily associated with words expressive of satisfaction or dissatisfaction. *It is the view of the particular architect* as to what is or is not satisfactory which is to be the criterion, not any objective standard. … [emphasis added]

48 The lack of any evidence to suggest that HKC had formed the requisite opinion when the 4 April Notice was issued is therefore an insuperable barrier to HKC's present claim that the Lease Agreement was validly terminated by HKA in accordance with Art 24(2). I note that Mr Sejun Kim filed an affidavit on HKC's behalf in these proceedings to state that HKC had indeed been gravely concerned about Sejin's continued performance of the Lease Agreement at the material time (see [14] above). He elaborated that several factors were responsible for HKC arriving at this view, *viz*, (a) Sejin's failure to make rental payments for a period of six months; (b) the Vessel's substantial depreciation in value; and (c) the extremely bad worldwide market conditions for trading the Vessel. However, apart from the non-payment of rental arrears, the two other points were not stated in the 4 April Notice. Further, Mr Sejun Kim's assertions were not supported by any sort of contemporaneous evidence: there was, for example, no email or other written evidence showing that HKC had formed and communicated such opinion to HKA before the latter proceeded to issue the 4 April Notice. This may be usefully contrasted with *Loke Hong Kee* where there was clear evidence at [6]–[7] that the respondent had only exercised its right to terminate the appellant's employment after receiving a letter from its architect explaining the basis of his opinion that the progress of the works was unsatisfactory. Mr Sejun Kim's assertions, it should be added, were also not supported by any affidavit from Mr Yoo of HKA confirming that the purported termination by HKA had indeed been exercised on the basis of HKC's opinion.

49 I observe that Prof Kim had stated in his first opinion that, given the circumstances described by Mr Sejun Kim, there was "enough for HKC to form its view" to terminate the Lease Agreement under Art 24(2) (see [139] below). Whether or not Sejin's circumstances were serious enough to warrant termination in HKC's opinion is irrelevant. The pertinent question is whether *HKC* did, *in fact, form such an opinion*. This point is, self-evidently, something which only HKC can know and which therefore only HKC can make good through the evidence of its authorised representatives. Prof Kim had been offered as an expert witness. He was not a factual witness who had been called to give evidence on HKC's behalf. Accordingly, it was entirely out of bounds for Prof Kim to express *his own opinion* as to what would constitute circumstances serious enough for *HKC* to form an opinion that the Lease Agreement should be terminated. I further observe that Prof Kim had also gone on to express in his second opinion that even if HKA did not have the express right to terminate the Lease Agreement in issuing the 4 April Notice, HKA was nevertheless authorised to do so for and on behalf of HKC (see [142] below). It bears repeating that this is a matter which Prof Kim has no personal knowledge of. In fact, his opinion on this issue was completely without foundation because there is nothing on the face of the 4 April Notice to suggest that HKA was issuing it on behalf of HKC. Ultimately, Prof Kim's apparent zeal to cover all bases in support of HKC's position here has, in my assessment, served only to compromise his standing as an expert.

50 In summary, *even if* HKA were authorised to terminate the Lease Agreement (as the Assistant Registrar had gone on to find), it could only do so under Art 24(2) if HKC had formed the requisite opinion, but there is no evidence on which I am able to conclude that it did. Thus, the 4 April Notice did not validly terminate the Lease Agreement under Art 24(2). Nevertheless, before I leave this point, I should express some views on the Assistant Registrar's finding of HKA's apparent authority to issue the 4 April Notice (see [33(a)(i)] above). She correctly cited relevant authority to demonstrate that, for apparent authority to arise, there must be: (a) a representation by the principal to a third party that the agent had the authority to enter into the transaction on its behalf; and (b) reliance by the third party on the principal's representation.

51 However it must be emphasised that the doctrine of apparent authority is typically relied on *by a third party* to prevent the principal from resiling from transactions entered into by the agent. The doctrine is *not* open to be invoked *by the principal* as a means of retrospectively legitimising or validating the otherwise unauthorised acts of its agent in the absence of ratification. The doctrine of apparent authority has therefore been described in G E Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd Ed, 2014) ("*Dal Pont*") at para 20.3 as having a "negative" as opposed to "positive" impact. This can be traced to the widespread judicial acceptance of its theoretical underpinning in the doctrine of *estoppel* (see, *eg*, *Rama Corporation Ld v Proved Tin and General Investments Ld* [1952] 2 QB 147 at 149; *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and another* [1964] 2 QB 480 at 503; *ING Re (UK) Ltd v R&V Versicherung AG* [2006] 2 All ER (Comm) 870 at [99]). Hence, the doctrine of apparent authority has erstwhile been referred to as "agency by estoppel" (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 15.040). Once it is recognised that apparent authority is based on estoppel, the uni-directional manner of its operation becomes clear: it may be called in aid by a third party to prevent the principal from denying the authority of his agent which he has represented to be genuine but, crucially for present purposes, it does not allow the principal to positively assert or rely on the apparent authority of his agent to improve his position. Many commentators have therefore stated that a principal may not rely on the apparent authority of its agent to *enforce* a contract which the latter has entered into (see Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 8-029; Roderick Munday, *Agency: Law and Principles* (Oxford University Press, 2nd Ed, 2013) at para 4.49; *The Law of Contract in Singapore* at para 15.044; *Dal Pont* at para 20.3). I do not see why the outcome should be any different where the principal seeks to rely on the same to argue that such a contract has been *terminated* to his advantage.

52 For the reasons stated above, I find that, with respect, the Assistant Registrar erred in her application of the doctrine of apparent authority. HKC (the apparent principal) cannot rely on HKA's apparent authority to issue the 4 April Notice to assert that the Lease Agreement had been validly terminated.

(3) Sejin's non-payment of rental *simpliciter* is a cause for termination under Art 24(1) and not Art 24(2)

53 In my view, there is a further difficulty with HKC's argument that the 4 April Notice validly terminated the Lease Agreement under Art 24(2). According to para 3 of the 4 April Notice, it appears that HKA relied on the fact that Sejin had "lost all the benefit of time of debt" as the basis for asserting its right of termination under Art 24(2) against HKA (see [15] above). The experts disagreed as to whether this sufficiently specified the "cause" of termination as required under Art 24(2). That dispute led the Assistant Registrar to consider the conduct of the parties prior to and subsequent to the issuance of the notice to determine whether Sejin was under any confusion as to the cause for the termination. However, I consider that the 4 April Notice is beset with a more fundamental

problem. It appears to me that the purported reason given, *viz*, Sejin's non-payment of rental arrears *simpliciter*, cannot even trigger the right to terminate under *Art 24(2)* to begin with. Let me explain.

54 Article 24(2) is a general provision which allows for the termination of the Lease Agreement. It is preceded by Art 24(1), which sets out a *separate* procedure for terminating the Lease Agreement predicated on the occurrence of certain clearly defined events. Article 24(1) is a lengthy provision but it suffices for me to reproduce only the following portion:

> **Article 24 (Termination of contract)**
>
> 1. [Sejin] shall notify immediately in the event of any of following [*sic*] has been caused by [Sejin] or its joint guarantor. Once [HKC] acknowledges that any of the following items were caused by [Sejin], regardless of receiving notifications, *[HKC] shall notify [Sejin] to rectify the cause within 10 days. This contract can be terminated if the cause is not rectified within the period*. However, the contract can be terminated immediately for item 8 to 14.
>
> (1) *More than one delay in payment as required by the contract from [Sejin] to [HKC].* …
>
> [emphasis added]

55 Article 24(1) of the Lease Agreement sets out a clear schema for an exercise of the right of termination. It lists a total of 14 specific events. If the first seven are present, it is unambiguously stated that HKC shall issue a *rectification notice* to Sejin and it is only if Sejin fails to make the necessary rectification after the expiry of a ten day period that the right to termination arises. For the next seven, HKC has the right to *immediate* termination without needing to give Sejin a period of time to make rectification.

56 Sejin's failure to make its monthly rental payments timeously falls within the former category of events. In my view, the comprehensive list of events as set out in Art 24(1) of the Lease Agreement shows that the parties had painstakingly addressed their minds to the situations in which termination should be preceded by the issuance of a prior rectification notice and those which should give rise to an immediate right of termination. The failure to make timely payment of rental belongs to the former category. Holding that this same ground, without more, can nevertheless provide cause for *immediate* termination *without prior notice* under Art 24(2) would render Art 24(1) otiose and would remove from Sejin a contractual safeguard against immediate termination which – on a proper construction of the termination regime in Art 24 – it appears the parties intended for Sejin to have.

57 This begs the question: what, then, is the ambit of Art 24(2)? Article 24(2) appears to be worded quite broadly: it states that the Lease Agreement may be terminated in the event that HKC is "of the opinion that [Sejin] is facing difficulties in continuing its normal business activities *due to any reason whatsoever*… [*HKC*] may terminate this contract with notification specifying the cause towards [Sejin]" [emphasis added]. However, one must be careful not to place undue emphasis on this italicised phrase or divorce it from the rest of the clause. The "cause" (which Sejin must be notified of) is not *any* reason underlying the termination at large. Instead, on my interpretation of Art 24(2), the "cause" must *specifically* refer to the reason why HKC has formed its opinion that Sejin "is facing difficulties in continuing its normal business activities". And, in this connection, it is of some significance that Art 24(2) has enumerated by way of illustration a list of events that might make it difficult for Sejin to continue its normal business activities, *eg*, application of bankruptcy, compulsory composition, and company rehabilitation procedure. While these reasons are expressly stated to be non-exhaustive, their collocation discloses the parties' intentions that the particular reason relied on for termination under Art 24(2) *without prior notice* must bear some relation to *Sejin's ability to*

operate as a going concern. Properly construed, Sejin's mere inability to pay its debts to HKC *simpliciter* does not fall within this category. Instead, that event is governed by Art 24(1) which specifically provides that termination on this ground must be preceded by a rectification notice.

58 For completeness, I will add that there is no evidence before the court that, at any time prior to the 4 April Notice, Sejin had been sent any notices to effect immediate rectification. Thus, there is no basis for concluding (and neither did HKC raise such a point) that the Lease Agreement had been terminated under Art 24(1).

(4) Conclusion

59 In summary, I find that the 4 April Notice was invalid for three reasons. First, HKA had not been transferred the right of termination and therefore could not have terminated the Lease Agreement under Art 24(2). Second, a valid termination under Art 24(2) is premised on HKC having first formed an opinion that Sejin could not continue its normal business activities. On the facts, HKC had not formed such an opinion. Third, the non-payment of rental arrears *simpliciter* is not a "cause" that gives rise to a right of immediate termination under Art 24(2). In the premises, I am satisfied on a balance of probabilities that Sejin remained the demise charterer under the Lease Agreement at the time the plaintiffs' respective *in rem* actions were commenced. Hence I allow the plaintiffs' appeals against the Assistant Registrar's order to set aside the four *in rem* writs. There is strictly no need for me to consider the remaining two issues which I had outlined earlier at [39] but, as I heard extensive submissions on both these matters, I will proceed to express my views on them.

The physical redelivery issue

60 Assuming that the 4 April Notice constituted a valid notice of termination, the question then arises as to whether the notice itself was sufficient to terminate the Lease Agreement or whether Sejin was nevertheless additionally required to physically redeliver the Vessel to bring the Lease Agreement to an end. In more general terms, is physical redelivery necessary to terminate a bareboat charter?

61 This is a novel question of law insofar as Singapore is concerned but it has been judicially considered in several other Commonwealth jurisdictions, notably, in Australia (see *Patrick Stevedores No 2 Pty Ltd v MV "Turakina"* (1998) 154 ALR 666 ("*The Turakina*"), *CMC (Australia) Pty Ltd v The Ship "Socofl Stream"* [1999] FCA 1419 ("*The Socofl Stream (jurisdiction)*"), *ASP Holdings*, *The Hako Fortress*), New Zealand (see *The "Rangiora", "Ranginui" and "Takitimu"* [2000] 1 Lloyd's Rep 36 ("*The Rangiora*")) and Hong Kong (see *Gulf Marine and Industrial Supplies Inc v The Demise Charterers of the Ship or Vessel MV 'Trident Dawn' (Qatar Flag)* [1992] HKCFI 273). The Assistant Registrar undertook an extensive survey of these cases and eventually arrived at the following view on the state of the law regarding the need for physical redelivery (see the Judgment at [112]):

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

62 According to the Assistant Registrar, two clear propositions emerge from the cases. First, as a general rule, physical redelivery is necessary to terminate a bareboat charter and, second, parties may contract out of this rule through the use of specific provisions in the bareboat charter itself. I agree with the first but not the second.

63 I should mention that in their submissions on the physical redelivery issue, the parties relied on the common law and not on Korean law. Counsel for HKC, Mr Henry Heng ("Mr Heng"), argued that, on a proper reading of the relevant clauses in the Lease Agreement, it is clear that the parties have contracted out of the general common law rule requiring physical redelivery. However, according to counsel for the respective plaintiffs, the Lease Agreement did not have such effect and in fact contained a clause which reinforced the requirement of physical redelivery.

64 Before analysing the parties' submissions, I will first explain why I agree with the Assistant Registrar's views on the general common law requirement for physical redelivery.

(1) The general rule at common law

65 The requirement of physical redelivery is intrinsically tied to the distinctive nature of a bareboat charter.

66 A bareboat charter essentially operates as a lease of the vessel to the charterer. The services of the master and crew may or may not be superadded but, ultimately, what is critical is that they are for all intents and purposes the servants of the charterer, and, through them, the possession and control of the vessel is vested in the charterer (see Sir Bernard Eder *et al*, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 22nd Ed, 2011) ("*Scrutton*") at para 4-002). It has therefore been said that the hallmark of a bareboat charter is the transfer of *possession and control* of the vessel from the owner to the charterer (see *The "Guiseppe di Vittorio"* [1998] 1 Lloyd's Rep 136 at 156). A bareboat charter does not transfer legal or beneficial title in the vessel to the charterer but, because possession and control of the vessel resides in him for the duration of the charter, it is not incorrect to speak of him as having temporary ownership of the vessel or as being its owner *pro hac vice* (see *Medway Drydock & Engineering Co Ltd v MV Andrea Ursula* [1973] 1 QB 265 at 269). This *semblance* of ownership explains why I stated at the outset of this judgment that third parties may well believe or assume, in their dealings with the bareboat charterer, that they are in fact dealing with the vessel's true owner.

67 It is useful, for present purposes, to observe how the key elements of a bareboat charter, *viz*, the transfer of possession and control, are absent in other forms of charters. As explained in *Scrutton* at para 4-003, under a charter which is not by demise, the owner agrees to render services by his master and crew to carry goods put on board his ship by or on behalf of the charterer. In these situations, control and possession remains with the owner at all times through the master and crew who continue to be his servants. This is so notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel.

68 The fundamental difference between a bareboat charter and other forms of charters is described succinctly in Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea* (Butterworths Asia, 2nd Ed, 1994) at p 219, where the learned author states:

> … Whereas a shipowner who has demised his vessel lets out the entire vessel and hands over total control and possession to the demise charterer, a shipowner who has entered into a time charterparty or a voyage charterparty is merely letting out the cargo carrying capacity of the vessel, which is manned by his own master and crew and the vessel remains in the shipowner's

possession and under his control.

69 With these general observations in mind, I turn now to consider the cases on physical redelivery. I begin with *The Turakina* which, as the Assistant Registrar observed at [77] of the Judgment, has been referred to in almost every case which has dealt with the point of law that concerns us here. In that case, the ship, *Turakina*, was sub-demise chartered from Deli Shipowners BV ("Deli") to South Pacific Shipping Ltd ("SPS") on the standard form known as Barecon 89. She was arrested in Sydney by the plaintiff stevedoring company pursuant to a claim for services rendered. The owner then applied for a release of the vessel on the basis that the court's admiralty jurisdiction had been improperly invoked. The owner's case was that the vessel was no longer on demise charter at the time when the proceedings for arrest were instituted because Deli had validly terminated it by issuing to SPS a notice of termination the day before. As in the present case, the crucial question which arose in *The Turakina* was whether the notice of termination was adequate to terminate the demise charter or whether physical redelivery was additionally required for this purpose. In this regard, the shipowner sought to rely on several cases involving the effective cancellation of *time charters* by the issuance of withdrawal notices to argue that Deli's notice was sufficient for terminating the *demise charter*. Tamberlin J was not persuaded by this approach. He rightly recognised at 675 that there was a "significant distinction" between a time or voyage charter and a demise charter before going on to observe as follows:

> … This distinction resides in the fact that in a non-demise charter there is no requirement for delivery or transfer of possession to the charterer at the commencement of the charter. Accordingly, redelivery cannot require a transfer back of possession. In such a case, the services provided to the charterer are terminated upon notice of withdrawal. However, *in the case of a demise charter the vessel itself is let and possession is taken by the charterer. Therefore*, ***once the vessel is withdrawn from the service of the charterer, an obligation to redeliver possession arises because possession has been delivered at the commencement of the charter****. Redelivery, in its natural and ordinary meaning, denotes a delivery back of that which was originally delivered.* … [emphasis added in italics and in bold italics]

70 The logic applied by Tamberlin J is simple and, in my view, sound. A bareboat charter commences only when the twin ingredients of possession and control have been transferred from owner to charterer. It is therefore brought to an end only if there is, by the same token, a transfer back of possession and control. It is difficult to see how that can be effected without a physical redelivery of the bareboat chartered vessel. Applying that reasoning, in the absence of physical redelivery, the demise charter was found to have remained valid in *The Turakina* and the owner's application for the vessel's release was accordingly dismissed. This finding was further reinforced by the terms of the bareboat charter which, at Cl 10(a), expressly stipulated that hire shall continue to be payable until the day and hour of redelivery of possession of the vessel. Tamberlin J then went on to observe at 677 that there was also no step or acknowledgment by the bareboat charterer to "give effect to the redelivery". This observation, as will be elaborated below, became the source of inspiration for the doctrine of constructive redelivery.

71 The subsequent case of *The Rangiora* involved the arrest of three of *Turakina's* sister ships in Auckland, New Zealand. These vessels were also demise chartered by SPS from Deli on the Barecon 89 form. Deli had issued termination notices prior to the commencement of various *in rem* actions against the vessels and, again, the question arose as to whether or not the court's *in rem* jurisdiction had been properly invoked. Giles J noted at 52 that the question of whether redelivery was necessary to terminate the demise charters constituted "the fulcrum of the case" and, on this crucial question, he agreed with Tamberlin J's views in *The Turakina*. The following passage from Giles J's judgment at 55 is relevant:

> In my opinion, *bearing in mind the two fundamental planks of a demise charter – the parting of both possession and control – the contract continues to have effect until both are withdrawn*, (albeit unilaterally, in a breach situation), from the demise charterer. *Notice of termination achieves resumption of, or cancellation of control but it does not effect redelivery.* … [emphasis added]

72 In summary, the complete transfer of possession and control from the shipowner to the charterer is the very quintessence of a bareboat charter. Thus, physical redelivery (which effects a reversion of the transfer of possession and control) is necessary for its termination.

(2) Can one contract out of the general rule?

73 Mr Heng submitted that the parties in the instant case had contracted out of the general rule requiring physical redelivery. He referred me to several provisions of the Lease Agreement to make good his submission. Before dealing with the factual analysis whether the contractual provisions were sufficient to allow the parties to contract out of the general requirement for physical redelivery, I should state that I have serious reservations whether this could be done as a matter of law.

74 The mere issuance of termination notices in *The Turakina* and *The Rangiora* were held to be insufficient to terminate the respective bareboat charters in the absence of physical redelivery. However, in *The Rangiora*, Giles J went on to observe that it is open for maritime parties to make specific provision as to how redelivery is to be effected upon early termination. On the facts, however, Giles J held at 56 that the Barecon 89 form used in *The Turakina* and *The Rangiora* did not provide for termination in the absence of physical delivery:

> I agree with the submission made by both Counsel for the plaintiffs that ***the deficiency here lies in the drafting of the contract*** . I hesitate to criticize a standard form deriving its pedigree from the Baltic and International Maritime Council. But, the reality is that at English law (and German law) a demise charter necessarily envisages a parting with possession and control. *The Barecon 89 form goes to great length to deal with redelivery at expiration of charter period; it expressly provides for withdrawal for breach but it fails to address how "redelivery" is to be secured in that situation.* ***I have no doubt that an experienced craftsman could cover "redelivery" in an early termination context in a way which would be contractually effective.*** It might include a "deeming" provision incorporating directions where a vessel was at sea and/or providing for a procedure constituting recovery of possession irrespective of the charterer's obligations to others. *For whatever reason that has been overlooked in the present form.* It is thus left to the Court to resolve, paying due regard to the common law. … [emphasis added in italics and in bold italics]

75 It is correct that the Barecon 89 form contains a particular provision that is wholly consistent with the continuation of the bareboat charter up to the point of physical redelivery. This is found in Cl 10(a), the relevant portion of which prescribes that the bareboat charterer's obligation to pay hire shall "*continue until the date and hour when the Vessel is redelivered* by the Charterers to her Owners" [emphasis added]. As Giles J noted in *The Rangiora* at 55, the fact that the contract recognises the continuing obligation to pay charter-hire until redelivery supports the view that redelivery is indeed necessary to terminate the bareboat charter. Tamberlin J also recognised at 676 of *The Turakina* the importance of Cl 10(a) when he stated that this clause was a sufficient answer to the shipowner's submission that SPS had, upon issuance of the termination notice by Deli, been reduced to a mere involuntary bailee of the vessel.

76 However, I fail to see how parties can contract out of the requirement of physical delivery. If it

is accepted that the requirement for physical redelivery as a requirement for termination stems from the unique nature of a bareboat charter (*viz*, that it effects the complete transfer of possession and control), I do not see how parties can simply contract out of its performance. Until physical redelivery is achieved, the bareboat charterer continues to enjoy the full rights of control and possession of the vessel. Perhaps more crucially, third parties will continue to deal with bareboat charterers on the basis of their actual control and physical possession of the vessel.

77 It may be queried whether the view which I have preferred here is unduly prejudicial to shipowners. Damien J Cremean has, for instance, expressed the opinion in *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (The Federation Press, 3rd Ed, 2008) at p 185 that "there will occur cases where one would want to say a demise charter is over even though possession has not been able to be retaken – perhaps the demise charterer has put it out of the owner's power to do so". The concern articulated here seems to be one of fairness – why should a *shipowner*, who may experience difficulties securing the immediate or prompt redelivery of his vessel upon valid contractual termination, continue to be exposed to the risk of having his vessel arrested in the intervening period as a result of the *charterer's* unauthorised trading of the same? There is no doubt some attraction in this view but, to my mind, it fails to take into account the position of *third parties* in the overall calculus of competing interests.

78 It is pertinent to stress that third parties who provide services to or load cargo on vessels will often be unaware that the particular vessel is on bareboat charter. Previously, this placed them in an acutely vulnerable position because bareboat chartered vessels were insulated from arrest. Following legal reforms in many jurisdictions, this is no longer the case (see [4] above). The consultation paper prepared by the Attorney-General's Chambers which preceded the 2004 Amendment in Singapore noted that, although allowing a bareboat chartered vessel to be arrested might, at first blush, appear rather "startling" as it effectively allowed recovery against the shipowner for the liabilities of the charterer, this was nevertheless internationally acceptable and, on the whole, desirable because "an effective admiralty regime should not cast the burden of determining ownership or other relationship with the vessel on the person dealing with the vessel" (see *Admiralty Jurisdiction of the High Court: Arrest of Ships on Demise Charter to Secure the Obligations of the Demise Charterer (Consultation Paper)* (24 April 2003) LLRD No 1/2003 at paras 4.3–4.4 and 4.8). The legislative scheme in Singapore today – as it is the case across many leading maritime jurisdictions – therefore appears to have struck the balance in favour of third parties who can now deal with a vessel safe in the knowledge that, regardless of whether the party with whom they directly transact is the owner or bareboat charterer, they can arrest the vessel as security for their claims.

79 In my judgment, holding that a valid *contractual* termination suffices to bring a bareboat charter to an end in the absence of physical redelivery may upset the aforementioned balance. This is because third parties will find that it is no longer safe to assume that they have contracted with either the owner or bareboat charterer of a vessel in *all* circumstances. If they deal with the vessel after contractual termination but before redelivery, it is possible that they may have in fact dealt with *neither* – the owner certainly does not have control and possession of the vessel during this curious period where she is in "limbo" whereas the party in full possession and control is no longer the bareboat charterer following contractual termination. In that event, the third party will have no basis for arresting the vessel and is thus left without security for its claim. This appears to me to cut against the spirit of the 2004 Amendment which, as I have stated, was aimed at lifting third parties from the burden of determining the true state of the relationship between owners and charterers.

80 I recognise, however, that it may still be possible for third parties to arrest the vessel in certain limited situations notwithstanding the contractual termination of the bareboat charter. This is where it is shown that the master had acted with the ostensible authority of *the owner* in dealing with third

parties, in which event the court's admiralty jurisdiction may yet be validly invoked on the basis of the owner's *in personam* liability. This was found to be so in the case involving the *Socofl Stream* (discussed below) which is, unsurprisingly, also the principal authority relied on by KRC and Mercuria to resist the striking out of their alternative claims against HKC in ADM 198/2011 and ADM 201/2011. On this view, one may argue that allowing a shipowner to contract out of the general rule may not be as harsh on third parties as it appears.

81 I am not persuaded by this argument. It is important to appreciate that the *Socofl Stream* exception does not arise automatically by operation of law. Instead, it is a fact-specific finding limited to circumstances resembling that in the *Socofl Stream* as discussed at [117]–[121] below. If it were otherwise, it would entirely defeat the shipowner's purpose in terminating the bareboat charter to begin with (which is to prevent the vessel from being arrested in satisfaction of *in personam* claims against the bareboat charterer). The *Socofl Stream* exception remains only of limited application and, with that being so, I am not convinced that it affords sufficient protection to third party interests.

82 Therefore, in my view, allowing a shipowner to contract out of the general rule requiring physical redelivery works unfairness on third parties because, ultimately, in the absence of such redelivery, it is difficult to see how the change in legal status of the vessel can be made apparent to them. A shipowner is fully aware that, by executing a bareboat charter, he vests complete possession and control of his vessel in the charterer who, as the vessel's owner *pro hac vice*, can incur liabilities in respect of the vessel's use *vis-à-vis* third parties (even to the extent of exposing the vessel to the possibility of arrest). In other words, an owner who lets his vessel out on bareboat charter does so with his eyes wide open: he knows the risks attendant to such an arrangement and has made a considered commercial decision to proceed. By contrast, a third party has little way of knowing whether the vessel he is dealing with is on bareboat charter, let alone that the bareboat charter has been terminated.

83 When I examine the balance of competing interests in this context, it seems eminently fair to me that the risk ought to fall on the shipowner. I therefore consider the better position to be that parties *cannot* contract out of the general common law rule which requires physical redelivery to bring an end to a bareboat charter.

84 I should point out, however, that the position which I have stated here has not been shared elsewhere. A case illustrating the proposition that parties can contract out of the general rule is *The Socofl Stream (jurisdiction)*. There, the court had to deal with an application by Sovremenniy Kommercheskiy Flot ("Sovcomflot") to strike out the *i n rem* proceedings commenced by CMC (Australia) Pty Ltd ("CMC") against the ship *Socofl Stream* in February 1999 on the basis that the court lacked jurisdiction. The relevant persons named in the writ issued by CMC were Sovcomflot, Kamchatka Shipping Company ("Kamchatka"), and Aurora Navigation SA ("Aurora"). Sovcomflot had demise chartered the vessel from its owners, Aurora, in 1990 and, in turn, sub-demise chartered it to Kamchatka in 1993. On 15 December 1998, Sovcomflot issued a notice purporting to terminate the sub-demise charter on the basis that Kamchatka had failed to make two quarterly payments of hire. Sovcomflot subsequently demanded redelivery of the vessel but Kamchatka did not comply and continued to trade the vessel by loading cargo (which was the subject of the proceedings) in Singapore and Port Klang, Malaysia in early January 1999. The *Socofl Stream* was finally arrested by Sovcomflot on 25 January 1999 after it had entered the Port of Brisbane. In its striking out application, Sovcomflot argued that its 15 December 1998 notice was effective in terminating the sub-demise charter, notwithstanding Kamchatka's failure to redeliver the vessel. Thus, Sovcomflot argued, the court had no *in rem* jurisdiction over the vessel since Kamchatka was no longer the demise charterer at the date of commencement of the proceedings by CMC in February 1999.

85 One of the central questions which arose in *The Socofl Stream (jurisdiction)* was the nature of the relationship between Sovcomflot and Kamchatka at the commencement of CMC's action. Did Kamchatka remain the sub-demise charterer given its continued possession and control of the vessel? Or had Sovcomflot's termination notice brought an end to the sub-demise charter at an earlier time? Moore J held that the latter view was correct. A key plank of his reasoning concerned Art 11(2)(a) of the sub-demise charter, which read (see [9]):

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

86 In Moore J's view at [27]–[28], this provision conferred on Sovcomflot a "clear contractual right" to terminate the sub-demise charter by giving a telex notice and, in such circumstances, it was "difficult to avoid a conclusion that … the charterer ceased to be a demise charterer from the time of termination at least in the absence of provisions in the charterparty that suggested some other result". Moore J distinguished *The Turakina* by observing as follows at [27]:

> In the present case the structure and terms of the 1993 sub-demise charterparty are *materially different* to those of the charterparty considered by Tamberlin J in *The "Turakina"* and there is *a clear contractual right* conferred by article 11(2)(a) on Aurora or Sovcomflot to terminate the 1993 sub-demise charterparty by giving a telex notice. It was exercised by Sovcomflot. *There was no equivalent power to terminate in the charterparty considered by Tamberlin J.* … [T]he 1993 sub-demise charterparty clearly contemplated, in my opinion, the termination of the demise charter by the notice. *Unlike the charterparty in The "Turakina", the 1993 sub-demise charterparty did not contain provisions which fairly unambiguously point to the continuation of the demise charter pending redelivery of the vessel.* … [emphasis added]

87 With respect, I do not find the distinction drawn by Moore J to be entirely convincing. Why should the contractual right to withdraw the vessel and to terminate by telex make such a significant difference? In my view, the latter is no different from the contractual right to withdraw the vessel for non-payment and to claim damages as was the case in *The Turakina*. Neither clause changes the fact that the bareboat charterer continues to enjoy actual control and possession of the vessel pending actual physical redelivery.

88 It is worth noting that the revised Barecon 2001 form, which succeeded Barecon 89, was introduced to address the practical difficulties faced by owners in retaking possession of their vessels when the bareboat charter is terminated while the vessel is on the high seas. Clauses 28 and 29 of Barecon 2001 provide as follows:

> **28 Termination**
>
> (a) Charterers' Default

The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:

(i) *the Charterers fail to pay hire in accordance with Clause 11.* However, where there is a failure to make punctual payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Owners shall give the Charterers written notice of the number of clear banking days stated in Box 34 (as recognised at the agreed place of payment) in which to rectify the failure, and when so rectified within such number of days following the Owners' notice, the payment shall stand as regular and punctual. *Failure by the Charterers to pay hire within the number of days stated in Box 34 of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw the Vessel from the service of the Charterers and terminate the Charter without further notice*;

…

29 Repossession

In the event of the termination of this Charter in accordance with the applicable provisions of Clause 28, *the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call*, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities. ***Pending physical repossession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as gratuitous bailee only to the owners.*** The Owners shall arrange for an authorised representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. *The Vessel shall be deemed to be repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owners' representative.* All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterers' Master, officers and crew shall be the sole responsibility of the Charterers.

[emphasis added in italics and in bold italics]

89 The decision of Rares J in *The Hako Fortress* is instructive in explaining how Cll 28 and 29 are intended to operate (see [61], [63] and [64]):

The terms of the Barecon 89 and 2001 forms *differed materially* on the circumstances in which the owners could withdraw the vessel and its consequences: see M Davis: *Bareboat Charters*, 2nd ed, LLP London, 2005, at [28.13]–[28.14]. *More importantly, cl 29 of the Barecon 2001 form was a new provision that Davis observed at [29.01] was designed to clarify and strengthen the owners' position if the charter was terminated under cl 28 and to address the practical difficulties that may occur in such circumstances.* As he pointed out if the owners terminated a demise charter while the ship was on the high seas, they were in a potentially vulnerable position if they were unable, then and there, to retake possession. Clearly, cl 29 was formulated with this in mind.

…

I am of opinion that as a matter of principle the terms of cll 28 and 29 of the Barecon 2001 form of charterparty can operate as they were intended without requiring the owners, first, to physically retake possession of the ship following her withdrawal and the termination of the charterparty. … The charterer becomes entitled to possession of the ship under and by virtue of the contractual rights that the owners confer on it by the terms of the demise. But that right to

possession and control can be affected by another of the terms of the Barecon 2001 form. Thus, *cl 29 provides that upon withdrawal of the ship and termination of the charter, the nature of the charterer's possession changes from possession for the charterer's use and benefit to possession as a gratuitous bailee for the owners*. Possession of the latter kind is substantively different in character to the plenary right to possession and use of the ship formerly enjoyed by the charterer while the charter remained on foot.

When the charterer is in possession as a gratuitous bailee under cl 29, he holds the ship for the sole use and benefit of the owners. When, however, he is in possession because of the demise of the ship to him, the charterer holds her for his own use and benefit. *The effect of the withdrawal and termination of the charter under cl 29 is the same as a physical redelivery to the owners because the charterer has lost his contractual authority and right to use and employ the ship as he pleases.* …

[emphasis added]

90 While the intention behind Barecon 2001 might have been to address the redelivery issue, it is not clear to me how making the bareboat charterer a gratuitous bailee, on paper, can dispense with the general requirement for physical redelivery. While it appears to be a neat legal solution that seems to notionally re-vest possession and control in the shipowner, it does not change the reality on the ground (or at sea, as is the case here). Third party rights and liabilities arise from the *actual* operation of the vessel by the bareboat charterer by reason of the *actual* transfer of complete control and possession of the vessel to the bareboat charterer. Similar concerns were expressed in *ASP Holdings* where Cll 28 and 29 of Barecon 2001 came up for consideration. For the sake of comity, Finkelstein J felt constrained to rule at [13] that, consistent with Moore J in *The Socofl Stream (jurisdiction)*, Cll 28 and 29 entitled an owner to terminate a demise charter by merely issuing such notice. However, Finklestein J nonetheless expressed reservations about the notion that one could contract out of the requirement for physical redelivery at [13]–[15]:

Comity requires me to apply *The Socofl Stream* and thus hold that in the case of this charterparty, in particular because of cll 28 and 29, the charter can be terminated on written notice. Clause 28 provides for termination by notice and cl 29 says that when the charter is at an end the charterer is the "gratuitous bailee" of the vessel.

If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying *The Socofl Stream*, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. There is also the possibility that the owner may decide to retake possession at the next port of call or at a convenient port or place as contemplated by cl 29. The result of the application of *The Socofl Stream* is that the owner has control of the vessel during the voyage. The true position is probably different.

I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer's possession before delivery as that of "gratuitous bailment" is not to the point. *The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description.* I appreciate, however, that others take a different view.

[emphasis added]

91 While others might have been of a different view from Finklestein J, his concerns certainly resonated with me. I do not see how the parties' attempt at constituting the charterer as a "gratuitous bailee" can be effective in transferring possession and thereby bring about an end to the charter. Having reviewed the authorities, the Assistant Registrar concluded at [112] of the Judgment that since a bareboat charterparty is in essence a contract between the owner and the charterer, parties are free to include such terms as to how possession of the vessel is to be terminated. With respect, I do not fully agree with this statement. The question of repossession goes right to the heart of whether the bareboat charter remains in force and, that being the case, I do not consider it to be within the parties' private sphere to stipulate when or how this may occur *short of what the general law requires*. As I have stressed in this judgment, a bareboat charter is only at an end in law if the two ingredients of control and possession *in fact* revest in the owner – parties cannot, through the use of an inapposite label, declare this to be the case when that is not reflected in the reality of their situation.

(3) Had the parties contracted out of the general rule?

92 For completeness, I will now examine whether, even assuming that it were possible to contract out of the general rule requiring physical delivery, this is provided for in the Lease Agreement.

93 Mr Heng drew my attention to two provisions. First, he pointed out that Art 24(2) of the Lease Agreement conferred a right on HKC to terminate the Lease Agreement upon issuance of a notice. This provision, he argued, closely resembled Art 11(2)(a) of the sub-demise charter in *The Socofl Stream (jurisdiction)* which, as will be recalled, conferred a clear contractual right on the owner to terminate the sub-demise charter by telex notice. Second, Mr Heng pointed me to Art 24(4), which stated that Sejin shall immediately halt use of the Vessel and return it to HKC in the event of termination. He argued that, cumulatively, these provisions suggested that the parties had intended to contract out of the requirement of physical redelivery, as was found to be the case in *The Socofl Stream (jurisdiction)*.

94 While there is some force in Mr Heng's submission (assuming that it is possible to contract out of the general rule requiring physical redelivery), I do not see how he can overcome Art 26(3) of the Lease Agreement which provides:

> **Article 26 (Return of Vessel)**
>
> …
>
> 3. In the event [HKC] delays the return procedure stated in the previous clause, [Sejin] shall continue to pay the lease fee to [HKC] up till the point when [HKC] confirms the return of the Vessel. The validity of this contract shall remain in force and effect up till the aforementioned confirmation by [HKC].

95 As the plaintiffs rightly pointed out, Art 26(3) is akin to Cl 10(a) of the Barecon 89 form which was considered in *The Turakina* and *The Rangiora* in that it specifies that hire shall continue to be payable by Sejin up to the point when HKC confirms the return of the Vessel. This clause reinforces the fact that the Lease Agreement is consistent with the general requirement for physical redelivery.

96 Mr Heng submitted that Art 26(3) was a "red herring". He emphasised that Art 26(3) only operated where HKC has delayed the return of the Vessel and that this was not the case on our

facts. I am not persuaded by this narrow reading of Art 26(3). If Mr Heng were correct, Sejin could deliberately delay the return of the Vessel without suffering financial penalty and conversely, HKC could, by deliberately delaying the return of the Vessel, continue to keep Sejin's payment obligations alive, notwithstanding the latter's desire to return the Vessel. This construction makes no commercial sense. In my view, the better reading of Art 26(3) is that Sejin is under a continuing obligation to make rental payments up till the point that redelivery is made and HKC confirms the return of the Vessel. This is so regardless of the party responsible for the delay. This is because, in the absence of such redelivery, the parties do not consider the Lease Agreement to have come to an end. This view is reinforced by the final sentence in Art 26(3) which unambiguously and unqualifiedly states that the Lease Agreement "shall remain in force and effect" until HKC confirms the return of the Vessel.

97 Indeed, this also appears to be how the parties themselves understood Art 26(3) because the evidence before me suggests that Sejin did in fact continue to be charged charter-hire subsequent to the 4 April Notice. As shown in the 4 April Notice (see [15] above), HKA demanded outstanding lease payments amounting to 289,430,562 Korean Won (approximately US$261,445.52 at the current exchange rate) at the time of the purported termination. However, by the time HKA issued its 14 June 2011 letter warning Sejin that its conduct amounted to embezzlement (see [22] above), HKA now demanded a significantly higher overdue lease amount of 190,000,000 Korean Won (approximately US$171,628.71) plus US$210,000 (which makes a total of US$381,628.71). As no explanation has been provided by HKA or Mr Sejun Kim on behalf of HKC for the difference in the amounts, and given the interlocutory nature of the applications, it is permissible to draw the inference at this stage that this increase could well be due to the fact that Sejin continued to be charged charter-hire under the Lease Agreement which remained in full effect. On this view of events, it would appear that the parties themselves interpreted Art 26(3) the same way which I have, *viz*, that charter-hire continued to be payable by Sejin until the Vessel was redelivered, irrespective of the fact that HKC was not responsible for the delay in redelivery.

98 In light of the above, I find that HKC's appeal also fails on the physical redelivery issue. In my view, a bareboat charter can only be terminated with the physical redelivery of the vessel. Further, even if it were possible to contract out of that general rule (which I doubt), I find that the Lease Agreement did not have such an effect and in fact *reinforced* the general requirement of physical redelivery at common law. Therefore, even if the 4 April Notice were valid, I find that the Lease Agreement had not been validly terminated as physical delivery had not been effected. Thus, Sejin continued to be the demise charterer at the time the plaintiffs commenced their respective *in rem* actions.

The constructive redelivery issue

99 I have thus far held that HKC has failed on both the contractual termination and physical redelivery issues. For completeness, given the Assistant Registrar's ruling on the doctrine of constructive redelivery and the parties' extensive submissions on this issue, I will go on to explain why I think that HKC also fails on the constructive redelivery issue.

100 Like the doctrine of contracting out discussed above, the doctrine of "constructive redelivery" also appears to mitigate the perceived harshness of the general requirement of physical redelivery. This concept was first raised in *The Turakina* (see [70] above). It seems to me that the point was raised somewhat in passing without the benefit of full arguments as to whether such a doctrine should be accepted in the first place. Tamberlin J had reached the conclusion that (due to the intrinsic nature of a bareboat charter and the terms of the Barecon 89 form) redelivery was essential to bring the bareboat charter to an end. It was then argued by the applicant that withdrawal of the vessel *ipso facto* constituted constructive redelivery. This submission was eventually rejected by the

court on the facts. However, Tamberlin J appeared to implicitly endorse the doctrine of constructive redelivery when he went on to observe at 677 that the "notion of redelivery of possession of the vessel suggests some step or acknowledgment by the charterer to give effect to the redelivery".

101 Since *The Turakina*, several cases have referred to the doctrine of constructive redelivery but, to the best of my knowledge, none until the decision by the Assistant Registrar has actually found constructive redelivery of a vessel to have been made out. Before examining the reasons which persuaded the Assistant Registrar to break new ground in holding that the Vessel was constructively redelivered, it may be useful to first examine the necessity for such a doctrine.

(1) Should the doctrine of constructive redelivery form part of our law?

102 I agree with Ms Tan Hui Tsing ("Ms Tan"), counsel for KRC and Frumentarius, that the courts typically resort to constructive analogies to address a gap in the law that, if left unaddressed, would result in an inequitable or unfair outcome. I begin by echoing the observation of Lionel Smith in "Constructive Trusts and Constructive Trustees" [1999] 58 CLJ 294 that "[w]e have quite a lot of 'constructive' in different parts of our law", such as the vehicle of the constructive trust, constructive knowledge, and constructive possession to name but a few. It is clear that in appending the term "constructive" to these various orthodox concepts, the law essentially projects legal *fictions* into the analytical process (see Nancy J Knauer, "Legal Fictions and Juristic Truth" [2010] 23 St Thomas L Rev 70 at p 71). As Sir Robert Megarry once stated extra-judicially, the term "constructive" seems to simply mean that "[i]t isn't, but has to be treated as if it were" (see "Historical Development" in *Special Lectures of The Law Society of Upper Canada 1990: Fiduciary Duties* (Toronto, 1991) 1 at p 5). It is clear that the law does not conjure up and employ legal fictions for no good reason. There is always some underlying motivation behind their creation and sustained usage. For instance, it is something used to enable courts to incrementally test and probe the boundaries of a potential new rule before definitively acknowledging it as such (see, *eg*, Maksymilian Del Mar, "Legal Fictions and Legal Change" (2013) 9 Int JLC 442 at p 450 on "exploratory fictions"), or as a means of articulating a rational basis for and achieving coherence with existing legal precepts (see, *eg*, Roscoe Pound, *Jurisprudence* (The Lawbook Exchange Ltd Union, 1959) at p 450 on "dogmatic fictions").

103 For present purposes, however, I consider that the term "constructive" may also be used to avoid the potential injustice that may result from the rigid application of orthodox principles (in this case, the general rule on physical redelivery). The "constructive trust" is a fitting example and I should clarify here that I am specifically referencing that class of constructive trusts which Millett LJ (as he then was) identified in *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 409 as one where the defendant had never assumed or intended to assume the office of a trustee at all but is yet made liable to account as a "constructive trustee" by reason of some fraud or wrongdoing on his part such as by rendering his dishonest assistance in the misapplication of trust assets or in knowingly receiving the same (see also *Williams v Central Bank of Nigeria* [2014] 1 AC 1189 at [9], *per* Lord Sumption). As Justice James Edelman has observed, extra-judicially, in "Two Fundamental Questions for the Law of Trusts" (2013) 129 LQR 66 at p 76, the constructive trust is used in this context as "a method of imposing liability to account in equity *as if* the defendant *were a trustee*" [original emphasis] when, in truth, he is not. This is no doubt a form of fictional reasoning but the law resorts to it because it would be unconscionable, for example, to allow the defendant to profit unjustly from his participation in an unlawful transaction. Viewed in this way, it is clear that the use of "constructive" reasoning in this context was necessitated by the need to address a "gap" in trusts law. Another relevant example in this connection concerns a legal concept which I have already examined in some detail above, *viz*, the doctrine of apparent authority, which is sometimes also referred to as "constructive agency" (see, *eg*, Gail Pearson and Simon Fisher, *Commercial Law: Commentary and Materials* (LBC Information Services, 1st Ed, 1999) at p 390). The use of this

concept may again be regarded as being fictional since it only arises in circumstances where there is no *actual* authority but it is necessary for reasons of fairness and justice to recognise that the agent in question was nevertheless cloaked with the authority of his apparent principal to avoid prejudice to third parties who have transacted with him. In other words, the inadequacy of the orthodox notion of actual authority (the application of which would not lead to a just outcome) again provides an impetus for the law's recognition of apparent or constructive authority despite the latter's undeniably fictional character.

104 With that in mind, I now return to the issue at hand, *viz*, the notion of constructive redelivery in the context of bareboat charters. Having considered the issue, I do not see where the *need* lies for its creation and acceptance into Singapore maritime law. As I have explained at [77]–[83] above, as between the owner and innocent third parties, it is not unfair that third parties should be able to proceed *in rem* against the vessel so long as such liabilities arise and the suit is commenced *prior* to physical redelivery of the vessel. To my mind, it does not appear that there is any injustice which needs to be remedied so I do not see the need for such a doctrine in our law. Further, I am of the view that importing such a doctrine would, instead, visit significant injustice on *third parties*, who have no way of knowing if the bareboat charterer with whom he is transacting has already terminated the bareboat charter by effecting constructive delivery. My previous comments, though made in the context of the notion of contracting out of the general rule, also apply readily in this context. On our facts, this outcome is also a just one. HKC knowingly allowed Sejin to continue to represent itself as the bareboat charterer of the Vessel to third parties like the present plaintiffs notwithstanding the purported termination.

105 As a concluding remark, I note that the cases which accept the doctrine of constructive delivery *also* held that it is possible to contract out of the requirement for physical redelivery. With respect, it seems to me that both concepts are not compatible. If parties can contract out of the requirement of physical redelivery then there is clearly no "gap" which needs to be filled. In these circumstances, I do not see why the doctrine of constructive delivery is still needed.

(2) Had the Vessel been constructively redelivered?

106 However, should it come to pass that, contrary to my holding, there is place for such a doctrine, then, in my view, constructive redelivery is still not made out on the facts. I begin by reviewing the observations made in *The Turakina* and *The Rangiora* on this issue. In determining whether a vessel could be regarded to have been constructively redelivered, Tamberlin J in *The Turakina* held at 677 that the inquiry should be focussed on "some step or acknowledgment *by the charterer* to give effect to the redelivery" [emphasis added]. This is understandable because physical redelivery requires a clear act by the charterer; thus, constructive redelivery, as an equitable substitute, must likewise emanate from the conduct of the charterer. Tamberlin J did not provide examples of such "steps" but in *The Rangiora*, Giles J observed at 55 that it would suffice if the owner's agent attended onboard the vessel to announce that it had retaken possession of the vessel or if the owner issued proceedings seeking repossession. However, I note that these examples concern acts by the *owner* and not the *charterer* and therefore may not be particularly useful to illustrate conduct sufficient to constitute constructive redelivery. In any event, as highlighted by Mercuria's counsel, Mr Philip Tay ("Mr Tay"), such examples are tantamount to a physical retaking of the vessel by the owners.

107 In finding that the Vessel was constructively redelivered, the Assistant Registrar relied on the following conduct of Sejin and found that any one of them was sufficient:

(a) The implicit acknowledgment of the termination by Mr Park, the CEO of Sejin, at a meeting

in mid-April 2011 in which he requested that HKC withdraw the 4 April Notice.

(b) Sejin's letter of 4 July 2011 to HKA stating that it "wanted to return the ship safely through the ship's normal sailing route but [that] the situation does not allow us to do that so far".

(c) Finally, Sejin's letter of 15 July 2011 stating that it "will do our best to return the ship to Korea as soon as possible".

It did not matter to HKC for the purposes of setting aside the *in rem* writs which of the three dates terminated the bareboat charter because the earliest of the *in rem* writs was issued by Winplus on 28 July 2011 while the latest of the three dates occurred on 15 July 2011, *prior* to the issuance of any of the *in rem* writs.

108 After examining the evidence before me, I am not able to agree with the Assistant Registrar that constructive redelivery had been effected. As a starting point, I first observe that certainty is critical in the shipping trade since it invariably involves multiple third party interests. Therefore any step or conduct as regards redelivery by the bareboat charterer must be clear and unequivocal. The examples cited by counsel in their further submissions bear this out. For pledges, constructive delivery or possession can arise from the delivery of the keys to the property. A bank can be regarded as being in constructive possession of goods upon the deposit of the bill of lading which, in shipping parlance, is "the key to the warehouse". Likewise, a seller in possession can be considered to have constructively delivered the chattel if he assents to hold the thing sold on account for the buyer. In each of these examples, the conduct of the relevant party is both clear and unequivocal.

109 As a preliminary point, I pause to note that the Assistant Registrar stated at [129] of the Judgment that in *The Rangiora*, "a letter from the liquidators acknowledging receipt of the notice of termination and accepting the termination was sufficient to constitute constructive redelivery of the ship". This is incorrect. First, it was opposing counsel and not the court who was prepared to accept in principle that the letter of acknowledgment could constitute constructive redelivery (see *The Rangiora* at 50). In any event, the concession was moot because the letter was not despatched prior to the commencement of the action. Second, the court in fact found that there was no redelivery – actual, symbolic or constructive (see *The Rangiora* at 55).

110 This brings me to the crux of the issue: was the conduct of Sejin clear and unequivocal? In the present case, there was no overt act by Sejin capable of representing redelivery. Instead HKC's reliance was on correspondence and matters alleged to have been said at a meeting. It is therefore imperative to examine the context and factual matrix surrounding the three events found to have been sufficient by the Assistant Registrar.

111 First, as regards the meeting in mid-April 2011, she found that in requesting for the revocation of the 4 April Notice, Sejin had implicitly acknowledged the termination of the Lease Agreement. While that may be correct, it is not sufficient. It is important always to bear in mind that, to bring an end to a bareboat charter, *both* control and possession must be withdrawn. As rightly observed by Giles J in *The Rangiora* at 55, "[n]otice of termination achieves resumption of, or cancellation of *control* but it does not effect *redelivery*" [emphasis added]. An acknowledgement of termination deals with the requirement of control but not with possession. On the facts, there was no clear act which represented the reversion of possession. Instead, the conduct of Sejin following the mid-April meeting was entirely inconsistent with any intention to redeliver. On 23 May 2011, Sejin, in response to HKA's 9 May letter, informed HKA that it had entered into a charterparty dated 13 May 2011 with Frumentarius. On 31 May 2011, Sejin provided HKA with a written update that the Vessel had entered

Belawan and was in the process of loading palm oil cargo and that the Vessel would proceed next to Dumai for additional loading and then onwards to the Mediterranean Sea and the Black Sea for discharge. Sejin's sailing instructions clearly showed that it had no intention to redeliver the Vessel in response to the 4 April Notice.

112 Second, neither the letter of 4 July 2011 nor the letter of 15 July 2011 was clear and unequivocal enough to constitute constructive redelivery. On 4 July 2011, Sejin wrote that it "wanted to return the return the ship safely through the ship's normal sailing route, but the situation does not allow us to do that". On 15 July 2011, Sejin wrote, "we will do our best to return the ship to Korea as soon as possible". These letters were couched in tentative and equivocal language: "*wanted* to return…. *but* the situation does not allow us to" and "we will *do our best* to return the ship" [emphasis added]. The reason for this is clear from the context. At the time the letters were authored, the Vessel – as HKC/HKA were well aware – was already laden with cargoes which had yet to be delivered at their discharge ports. Viewed holistically, what Sejin was in fact saying was that it intended to continue using the Vessel to deliver the cargoes to their discharge ports *before* contemplating the return of the Vessel – it is clear that Sejin did not, through either of these letters, evince a clear intention to redeliver the Vessel.

113 In the circumstances, I am unable to accept that any of the three events constituted a clear and unequivocal step or acknowledgment by Sejin to redeliver the Vessel to HKC in response to the 4 April Notice. Thus, HKC also fails on the issue of constructive redelivery.

HKC's appeals

114 This portion of the judgment deals with HKC's appeals against the Assistant Registrar's decision to dismiss its striking out applications in ADM 198/2011 and ADM 201/2011. I first pause to observe that this alternative claim is only relevant if the *in rem* writs against Sejin as bareboat charterers are, contrary to my primary finding, set aside. In these actions, KRC and Mercuria claim, in the alternative, against HKC directly. The thrust of their argument is that, in permitting cargo to be loaded onboard the Vessel and allowing the master to issue bills of lading in respect thereof (notwithstanding the termination of the Lease Agreement), HKC must be treated as having clothed the master with the *ostensible authority* to enter into contracts of carriage on its behalf as owner of the Vessel. If they are correct that HKC is directly liable for their losses, there is no doubt that the Vessel may be arrested as HKC is the owner of the Vessel. Ms Tan and Mr Tay, counsel for KRC and Mercuria respectively, relied principally on the cases arising from the arrest of the *Socofl Stream* to establish this point.

115 HKC applied to strike out these alternative claims against it on the basis that they were "factually unsustainable". The crux of Mr Heng's case was that HKC had never, by words or conduct, represented or permitted it to be represented that the master had authority to act on its behalf in issuing the bills of lading or in carrying the cargo owned by KRC and Mercuria. Mr Heng submitted that the contrary was true instead: he argued that the facts showed that HKC had consistently treated the Lease Agreement as having been terminated with the issuance of the 4 April Notice, as evinced by HKC's repeated demands for the return of the Vessel.

116 I do not agree with Mr Heng's submissions. To begin with, I do not think that it is entirely accurate to state that HKC had consistently treated the Lease Agreement as having been terminated from the 4 April Notice onwards. That position may have been reflected in its written correspondence with Sejin, but its conduct of *knowingly* permitting the Vessel to be traded even after the 4 April Notice suggests otherwise. Furthermore, I do not see how HKC's conduct of repeatedly demanding the redelivery of the Vessel takes Mr Heng's case very far. Those communications were wholly private

in nature and were never made known to third party shippers dealing with the Vessel (such as KRC and Mercuria) who would ordinarily assume that they were transacting with the actual or disponent owner of the Vessel. Publicly, the picture was very different. It appeared that HKC *knowingly* permitted the Vessel to be traded even after the 4 April Notice. If the Lease Agreement had been terminated, as HKC argued, it should and could have taken steps to ensure that third parties were aware of this in order to avoid attracting potential liability to itself through the continued trading of the Vessel. HKC was slow, however, to take any such steps prior to the loading of KRC and Mercuria's cargo at Belawan and Dumai respectively. The decisions arising from the arrest of the *Socofl Stream* are highly instructive in this regard and I turn now to consider them.

The Socofl Stream cases

117 The factual matrix leading to the arrest of the *Socofl Stream* has already been outlined at [84] above. It will be recalled that Sovcomflot purportedly terminated the bareboat charter on 15 December 1998. On 25 December 1998, Sovcomflot demanded that the vessel be redelivered but did not nominate a port for this to be done. On 30 December 1998, Kamchatka replied stating that it disputed the debt claimed by Sovcomflot and that, until the parties' rights and obligations had been finally determined, "we … do not propose to return possession of the … vessel to you or to whoever may be entitled thereto" (see *The Socofl Stream (jurisdiction)* at [7]). As Moore J noted at [8], it was at least implicit in this response that Kamchatka intended to continue to use the vessel for trading as it had done up to that point as the sub-demise charterer, pending resolution of Sovcomflot's disputed debt. Following this, Kamchatka continued to deploy the vessel for the carriage of goods. It loaded goods belonging to CMC in Singapore and Port Klang in early January 1999 before it was finally arrested on 25 January 1999 by Sovcomflot in Brisbane. CMC commenced *in rem* proceedings against the vessel in February 1999 and Sovcomflot's application to strike it out for want of jurisdiction was the subject of the proceedings in *The Socofl Stream (jurisdiction*).

118 I have already stated how, in *The Socofl Stream (jurisdiction*), Moore J found that the sub-demise charter had been validly terminated by Sovcomflot through its issuance of the termination notice. CMC's invocation of the court's admiralty jurisdiction on the basis that *Kamchatka* was the relevant person was therefore invalid. However, that was not the end of the matter. As with KRC and Mercuria here, CMC also argued, in the alternative, that *Sovcomflot* had clothed the master with ostensible authority to bind it in respect of the bills of lading issued by permitting the vessel to be traded notwithstanding the termination of the sub-demise charter. Moore J expressed the view at [31] that this submission was "not untenable" and he had the opportunity to revisit it more fully when the merits of CMC's claim came before him in *CMC (Australia) Pty Ltd v 'Socofl Stream'* [2000] FCA 1681 ("*The Socofl Stream (merits; 1st instance)*").

119 In *The Socofl Stream (merits; 1st instance)*, Moore J held that Sovcomflot was liable to CMC on the basis that it had clothed the master with ostensible authority. In arriving at this view, Moore J placed importance on the fact that Sovcomflot was contractually obliged to nominate a port for redelivery but had failed to do so. He reasoned as follows at [87]:

> Sovcomflot's demand for redelivery in its telex of 25 December 1998, in which it demanded that Kamchatka "forthwith re-deliver the above vessel to the disponent owner as soon as possible at a safe port to be nominated by us, failing which re-delivery the disponent owner (or their agent) may itself enter upon and repossess the vessel," was a barren one in the absence of the nomination of a port for redelivery. Moreover, *the failure of Sovcomflot to nominate a port might reasonably have been taken by Kamchatka to be an indication that Sovcomflot was not prepared to assert or enforce its legal rights, at least fully*. Sovcomflot neglected to nominate a port for redelivery even when Kamchatka made it plain (again) in its telex of 30 December 1998 that it

proposed to continue to trade. *Sovcomflot thus afforded Kamchatka the opportunity to continue to trade using the Vessel under the command of the Master. Sovcomflot effectively clothed the Master with authority to issue bills of lading on behalf of the "owner", that is, the person who was, at that time, in fact and in law the demise charterer. Sovcomflot would have had no reasonable basis, in my opinion, for assuming that what had occurred in late December 1998 between it and Kamchatka would be known to shippers who might use the Vessel before Sovcomflot regained physical possession of it. It should have known that by allowing Kamchatka to trade in the way just discussed, shipowners would enter contracts of carriage on the assumption that the Master could bind the owner.* [emphasis added]

120 Sovcomflot's appeal against Moore J's decision was heard by Ryan, Tamberlin, and Conti JJ who delivered a joint judgment in *The Ship "Socofl Stream" v CMC (Australia) Pty Ltd* [2001] FCA 961 ("*The Socofl Stream (merits; appeal)*"). Counsel for Sovcomflot attacked Moore J's reasoning on the issue of ostensible authority by arguing that it rested on the implied finding that, had Sovcomflot demanded the redelivery of the vessel to a port nominated by it, Kamchatka would necessarily have complied. He argued that, on the facts, Kamchatka would have ignored such a demand. The appellate judges stated at [20] that it was "unnecessary to resolve this question". Instead, they held that, for the purpose of determining whether the master had been clothed with ostensible authority, it was necessary to focus on the events which transpired between Sovcomflot's issuance of the termination notice and the time CMC's cargo was loaded and the bills of lading issued. On this analysis, they had no doubt that Sovcomflot – by its conduct of allowing cargo to be loaded onto the vessel rather than taking steps to make clear that it was no longer on demise charter – had represented to third parties that the master had ostensible authority to bind it which was relied on by CMC (see [37]):

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

121 While the courts at first instance and on appeal focused on different aspects of Sovcomflot's conduct, it seems clear to me that the general thrust of their reasoning was similar. The point was that, following Sovcomflot's termination of the demise charter, it was informed of the possibility that Kamchatka might continue trading the vessel and, despite knowing that, Sovcomflot did not do anything to prevent Kamchatka from perpetuating this state of affairs. In the circumstances, Sovcomflot could not argue that the master had no authority to bind it when issuing bills of lading to third party shippers who loaded cargo onto the vessel. After all, as the appellate court observed in *The Socofl Stream (merits; appeal)* at [22], such third parties generally operate on the assumption that they are dealing with either the actual or disponent owner of the vessel and would not know that there was a demise charter that had been terminated:

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

third parties dealing with the ship. … [emphasis added]

Whether the master had ostensible authority to bind HKC

122 The parallels between the *Socofl Stream* cases and the present case are clear. In both cases, the vessels in question were under demise charters which were purportedly terminated by the issuance of a notice. Demands were also similarly made for the redelivery of the vessel but these were not complied with. The demise charterers in both cases also communicated their intentions to continue trading the vessel which they went on to do by loading cargo belonging to the respective plaintiffs.

123 In fact, the argument for ostensible authority appears to be even stronger in this case. In the *Socofl Stream* cases, Sovcomflot was not provided with details of the shippers, whereas, here, Sejin provided full details of the shippers to HKC. HKC was therefore in a better position than Sovcomflot was to prevent the loading of cargoes and could have done so by taking the simple step of contacting the shippers but it failed to do so despite being informed of the details of prospective fixtures and an update on the movement of the Vessel on 23 and 31 May 2011 respectively (see [19]–[20] above). By the time HKA issued its formal written reply some two weeks later on 14 June 2011, the Vessel had already completed loading cargoes belonging to KRC and Mercuria respectively and issued separate bills of lading in respect of each.

124 I should mention that Mr Sejun Kim has stated in his affidavit that HKC was "very upset" to learn from Sejin's 23 May 2011 letter that Sejin refused to return the Vessel. He stated that HKC then "complained" about the prospective fixtures, "objected" to the continued use of the Vessel, and "demanded" its immediate return. Notably, however, there was no documentary proof which showed that HKC did any of these things. This is particularly striking given that, during the critical period after the 4 April Notice had been issued, the parties frequently communicated their respective positions through written correspondence. Mr Sejun Kim's bare assertions in this respect were unsupported with reference to the objective evidence before me.

125 However, even if I accept Mr Sejun Kim's assertions to be true, I fail to see how this assists HKC's case. The purported termination of the Lease Agreement and the subsequent demands for redelivery were known only to the immediate contracting parties. What is important was that the Vessel's change in status had not been brought to the attention of the outside world by some manifest act of HKC. As I had pointed out earlier in this judgment, third parties in the position of KRC and Mercuria do not have the benefit of a public registry to check whether a vessel is on bareboat charter. They therefore could not have been expected to know that the Lease Agreement had at one time been in force, let alone that it had been terminated. On the other hand, HKC had full knowledge of the state of play: it knew of the purported termination of the Lease Agreement and that, despite the purported termination, Sejin still intended to load cargo onto the Vessel. By failing to take any overt steps to prevent that, HKC must be taken to have represented to third parties that the master had the authority to bind it.

126 In this connection, it must be emphasised that Sejin's continued trading of the Vessel could hardly be described as surreptitious. Sejin was open in providing explicit information regarding the Vessel's trading route under the prospective fixtures and also the names and addresses of the charterers whom it had contracted with, such as Frumentarius. Mr Tay rightly pointed out in his submissions that HKC could easily have contacted these charterers to inform them that Sejin no longer had any right to continue with the Vessel's employment and that cargo should not be loaded on board. In fact, a more effective means at HKC's disposal to prevent the Vessel from being traded was simply to have obtained a warrant for her arrest. This had in fact been contractually provided for

in Art 26(5) of the Lease Agreement which states that HKC may unilaterally retrieve the Vessel at Sejin's expense if Sejin delays the return of the Vessel. However, this right was never exercised. Mr Sejun Kim's explanation for HKC's inaction in this regard was that he "did not know where the Vessel was or how to retrieve the Vessel". That, however, did not strike me as a convincing reason, especially when Sejin had provided an update on the Vessel's location at Belawan and its subsequent trading route. In this regard, I note that Sovcomflot's representative made similar arguments in *The Socofl Stream (merits; 1st instance)*, but, likewise, this argument did not gain much traction before Moore J (see [15]–[17]):

> Mr Izmailov said during cross-examination that when the charterparty was terminated no port for re-delivery was nominated because Sovcomflot did not know where the Vessel was. He appeared to accept that, in theory, he could have contacted Kamchatka to ascertain the location of the Vessel but said that to do so would have been useless. He also accepted that a way of finding out the whereabouts of the Vessel would have been to use the Lloyd's Register and other services which provided updates on the location of vessels. He asserted that after the notice of termination had been given, any trading by Kamchatka would be "illegal". He appeared to accept, however, that the Vessel might continue to trade after the notice had been given. He said that his expectation was, at the time the notice was given, that Kamchatka would agree to the notice and provide, I infer, a trading schedule of the Vessel identifying where it was located. …
>
> Mr Neill, CMC's solicitor, gave evidence about steps Sovcomflot could have taken to locate the Vessel. It was admitted over objection though the general thrust of the evidence was not challenged. Some of it was self-evident. The first means of locating the Vessel was by asking Kamchatka. The second was using one of two commercial tracking services, namely MRC or one maintained by Lloyd's. The third was through Sovcomflot's London solicitors though on the basis they would also use these commercial tracking services. The last was for Sovcomflot to inquire of their shipbroker. …
>
> *I am satisfied that it would have been open to Sovcomflot to have ascertained the location of the Vessel before issuing the notice terminating the demise charterparty.* It could have done so with a view to nominating a port for redelivery. *I accept that the Vessel would not have been located immediately. However, by not taking steps to locate the Vessel as a step towards nominating a port for redelivery, Sovcomflot created a circumstance in which Kamchatka could continue to trade using the Vessel though no longer as a demise charterer.* …
>
> [emphasis added]

127 In *The Socofl Stream (merits; appeal)*, the appellate court referred to Moore J's finding above and stated as follows at [56]:

> … *[H]is Honour's finding … supports the conclusion that it was open to Sovcomflot to locate the vessel and circumscribe, in an appropriately public way, the master's authority to bind it.* Such a conclusion is not tantamount to saying, as Counsel for Sovcomflot argued, that "it may have been possible, if Sovcomflot had ordered its affairs entirely in order to protect the interests of persons such as [CMC], there were things which Sovcomflot could have done which may have prevented any loss to [CMC]" … [original emphasis omitted; emphasis added in italics]

128 Here, HKC did not need any assistance in locating the Vessel. HKC was kept informed of the Vessel's sailing route at all material times. In light of the above, I fail to see how KRC and Mercuria's alternative claims against HKC were "factually unsustainable" as Mr Heng argued. The manner in which events unfolded between the issuance of the 4 April Notice and the completion of loading at Belawan

and Dumai supports the view that the master was clothed with ostensible authority to bind HKC. In the result, I find that KRC and Mercuria's alternative claims should not be struck out.

129 Let me be clear. A finding of ostensible authority is necessarily *fact-specific* (see also [81] above). I have arrived at this finding because of HKC's conduct in *knowingly* allowing Sejin to continue loading cargoes notwithstanding the purported termination and its abject failure to take any steps to regain possession of the Vessel. It is not the case that every shipowner, after having terminated a bareboat charter, will inevitably thereafter be liable for the trading activities of the vessel on basis of the master's ostensible authority. This would lead to the ironic situation where shipowners, in seeking to defeat *in rem* claims against the bareboat charterer by terminating the bareboat charter at the earliest opportunity, nevertheless end up with the same liability in a different form, *ie*, in the form of a direct claim by virtue of the doctrine of ostensible authority. This anomalous outcome was also noted by Finkelstein J in *ASP Holdings* in the passage which I have quoted above at [90].

Conclusion

130 In the premises, I allow the plaintiffs' appeals in RA 426/2013, RA 1/2014, RA 2/2014, and RA 6/2014 against the Assistant Registrar's decision to set aside the four *in rem* writs. I hold that Sejin was, on a balance of probabilities, still the bareboat charterer of the Vessel at the time the plaintiffs' respective actions were commenced. I have given five alternative reasons for reaching this conclusion, although the last two are essentially *obiter*, given that the determination of the contractual termination issue against HKC is sufficient for me to allow the plaintiffs' appeals:

(a) First, the 4 April Notice was invalidly issued by HKA because the right of termination had not been transferred to HKA under the ATA and/or the NCT.

(b) Second, the Lease Agreement had not been validly terminated by HKA because *HKC* did not form the opinion that Sejin was facing difficulties in continuing its normal business activities required for the right to termination under Art 24(2) and the 4 April Notice had, in any event, failed to identify the "cause" which led it to form such an opinion.

(c) Third, the non-payment of hire *simpliciter* was not a proper ground for the immediate termination of the Lease Agreement under Art 24(2).

(d) Fourth, physical redelivery is required at common law to terminate a bareboat charter and even if this general rule can be contracted out of (a possibility which I have expressed my doubts on), that does not appear to be what the parties had done, especially given the presence of Art 26(3) in the Lease Agreement.

(e) Fifth, even if the doctrine of constructive redelivery were accepted as a part of our law (a position which I have also expressed reservations on), the Vessel had not been constructively redelivered to HKC because there was no clear and unequivocal act by Sejin capable of representing redelivery on the facts of this case.

131 I also dismiss HKC's appeals in RA 8/2014 and RA 7/2014 to strike out KRC and Mercuria's alternative claims in ADM 198/2011 and ADM 201/2011 respectively. I find that KRC and Mercuria's claims are not factually unsustainable and thus should not be struck out.

132 In the court below, the Assistant Registrar awarded HKC 90% of the costs for the setting aside applications and ordered costs against HKC in favour of KRC and Mercuria in respect of the unsuccessful striking out applications. The costs orders were to be taxed if not agreed.

133 Before me, the plaintiffs have succeeded in their respective appeals while HKC's appeals have been dismissed. There is no reason for me to depart from the usual order for costs to follow the event. I invited the parties to submit on costs. Their submissions on costs in the event that the plaintiffs' appeals are allowed and HKC's appeals are dismissed ranged from $12,000 to $19,500 plus reasonable disbursements for the hearing below (HKC's new counsel who did not have conduct of the case below, did not submit on costs for the hearing below) and $5,000 to $7,000 for the plaintiffs' appeals and $3,000 for HKC's appeals. While HKC was represented by the same counsel for all the proceedings, the plaintiffs were separately represented except in the case of Frumentarius and KRC. They were represented by the same counsel, Ms Tan, who rightly submitted that there should only be one set of costs for Frumentarius and KRC.

134 Although the facts are relatively undisputed, the appeals involved novel and interesting points of law. The hearing spanned a total of 14 calendar days though much time was spent on the unnecessary dispute over Korean law. However, it was HKC who put Korean law in issue. Though it might not have been necessary for the plaintiffs to respond to HKC's reliance on Korean law, as was the experience of Mercuria, it was not unreasonable for them to have done so. Therefore, I would not discount the costs incurred in respect of the Korean law issue. Taking into account all the circumstances, I order HKC to pay the following costs:

(a) To Winplus – costs fixed at $15,000 for the hearing below and $5,000 for the appeal in RA 426/2013, both inclusive of disbursements.

(b) To Frumentarius and KRC – one set of costs fixed at $15,000 for the hearing below, $5,000 for the appeals in RA 1/2014 and RA 2/2014, and $3,000 for RA 8/2014, all inclusive of disbursements.

(c) To Mercuria – costs fixed at $15,000 for the hearing below, $5,000 for the appeal in RA 6/2014, and $3,000 for RA 7/2014, all inclusive of disbursements.

A *coda* on the use of expert evidence in the proof of foreign law

135 This *coda* is necessitated by my observation that even though HKC's applications first came up for hearing before the Assistant Registrar on 11 October 2012, the next day of hearing only commenced some nine months later on 2 July 2013. In my view, this lengthy delay between hearings is regrettable. After having reviewed the record of the proceedings below, it is clear that this delay was a result of a dispute between the parties over the opinion expressed by one of the Korean law experts. However, I am of the view that *all* the opinions filed in these proceedings were ultimately indistinguishable from submissions which offered the court no substantive assistance in terms of *proof of foreign law*. All that trouble could have been avoided if an expert's role in providing an opinion on foreign law was properly understood at the outset. That role, as I will explain, is also a targeted one where, as in the present case, the expert is asked to provide an opinion to aid the local court in the *construction of private documents* such as the Lease Agreement, NCT, and ATA.

136 In order to illustrate why the proceedings below were so protracted, it is necessary for me to first set out the various expert opinions in some detail.

The prominent use of expert opinions below

The expert evidence on Korean law

137 There were three Korean law experts who had each filed multiple opinions in the proceedings

below:

(a) Prof Kim was the expert appointed by HKC. He filed a total of three affidavits exhibiting his opinions prior to the commencement of the hearings below.

(b) Mr Soo Keun Kyung ("Mr Kyung") was the expert appointed by Winplus. He filed two affidavits exhibiting his opinions prior to the commencement of the hearings below and a third affidavit thereafter to make a minor correction to his first opinion.

(c) Mr Jong Hyeon Choi ("Mr Choi") was the expert jointly appointed by Frumentarius and KRC. He filed two affidavits exhibiting his opinions prior to the commencement of the hearings below. As I will explain, the opinion provided in his second affidavit was the source of the parties' dispute below and that led to him filing three further affidavits to clarify his position.

(d) To the credit of Mercuria, it consistently maintained the view that Korean law was irrelevant to the determination of the issues before the court and therefore elected not to file any affidavit on Korean law. Unfortunately, Mercuria was alone in this view.

138 Each of the three experts filed at least two rounds of opinions prior to the commencement of the hearings below. I note that the views expressed in these opinions, in particular those of Prof Kim and Mr Kyung, covered extensive ground but, unfortunately, none was particularly relevant. Once one cuts through the chaff, it becomes apparent that, on the crucial question which the experts sought to provide an opinion on – *viz*, whether the 4 April Notice had terminated the Lease Agreement under Korean law – there essentially emerged two fundamental points of disagreement which were alluded to earlier in this judgment at [13] and [16]. In my view, these two points are best presented by tracking how they arose in the different rounds of exchanges between the experts.

139 In the first round of opinions, the central point of departure between the experts was whether the 4 April Notice had been issued in compliance with Art 24(2) of the Lease Agreement so as to constitute a valid termination. In Prof Kim's opinion, Art 24(2) enabled HKC to exercise a right of *immediate* termination; hence the reasons justifying such termination had to be "very serious ones". He then went on to emphasise that Sejin's failure to make rental payments for the past six months had resulted in arrears of a "very substantial amount". When this was taken together with the sharp drop in the price of the Vessel and the poor market conditions (reasons which were not stated in the 4 April Notice), Prof Kim concluded that there was "enough for HKC to form its view" under Art 24(2) and to issue a termination notice as it did. Mr Choi disagreed. In his view, Art 24(2) clearly required a termination notice to specify the "cause" for termination but this was absent from the 4 April Notice whose validity was therefore "disputable". This point was similarly raised by Mr Kyung.

140 I pause here to make an important observation. The first set of legal opinions was disappointingly short on legal analysis. None of the experts endeavoured to provide any explanation whatsoever as to how their views were derived from particular Korean law principles or rules of interpretation and no such sources of foreign law had been cited in support of the conclusions reached. One is therefore left with the distinct impression that the experts' conclusions were grounded in little more than their personal opinion rather than the result of a considered application of Korean law. Their opinions were entirely unhelpful and revealed a fundamental misapprehension of the role of expert evidence in the proof of foreign law. It therefore came as no surprise that the experts' further round of opinions was afflicted with the same problems.

141 The second round of expert opinions was dominated by the differing views of Prof Kim and Mr Kyung on the rather separate question of whether *HKA* could terminate the Lease Agreement by

issuing the 4 April Notice (see [16] above). I should explain that this issue came to be at the forefront of their considerations because, in the first round of opinions, Mr Kyung noted that Prof Kim had wrongly assumed the 4 April Notice to have been issued by *HKC* (rather than *HKA*, as was the case). Mr Kyung pointed out that this was a "fundamental error" of fact and that Prof Kim's opinion on the effectiveness of the 4 April Notice should be rejected as a result.

142 Prof Kim sought to overcome Mr Kyung's objection in his second opinion by stating that, even if HKA had sent the 4 April Notice, this did not cause it to be invalid. He pointed to the NCT which appeared to transfer, in addition to the credits under the Lease Agreement, certain other "right[s]" or "status" to HKA (see [13] above). In Prof Kim's interpretation, these terms encompassed the *right to terminate* the Lease Agreement and so HKA could properly issue the 4 April Notice. Alternatively, Prof Kim stated that, even if HKC had retained the right to terminate, "HKA can be said to have terminated the Lease Agreement for and on behalf of HKC" as its authorised agent. It bears mention that none of these views were supported by any references to Korean law principles. In short, it was simply a matter of interpretation of the contractual documents before the court. In my view, such an argument could well have been presented by counsel before me in their own right. There was no enhancement in the value of the argument by having it articulated through the Korean law experts.

143 As for Mr Kyung, he maintained in his second opinion that the issuance of the 4 April Notice by HKA (as opposed to HKC) was a fundamental defect. In particular, he disagreed with Prof Kim on the effect of the NCT. According to Mr Kyung, the NCT was "merely a notice" and so could not exceed the ATA in terms of what was transferred. Since the ATA only purported to transfer the *credits* under the Lease Agreement, it followed that HKA could not acquire the altogether separate right to terminate the same despite what the NCT purported to transfer. It is again noteworthy, however, that Mr Kyung's opinion here was similarly bereft of any references to Korean law principles although it is correct as a legal submission (see [44] above).

144 As for Mr Choi, his second opinion was silent on whether the 4 April Notice could be issued by HKA. This "silence" became the source of much controversy in the proceedings below and that ultimately led to the wholly unnecessary delay between hearings.

145 To be fair to the experts, it was not the case that their submissions were entirely devoid of references to legal authority. For example, the exchange between Mr Kyung and Prof Kim over the validity of the ATA in transferring the lease credits to HKA (see [11] above) was keenly contested on a point of legal principle. In his first opinion, Mr Kyung pointed out that Art 37 of the Lease Agreement required the transfer of rights belonging to HKC to be "with prior consent from [Sejin]", yet the ATA, which purported to transfer HKC's right to the lease credits to HKA, appeared to have been executed without such consent. In response, Prof Kim relied heavily on a judgment of the Supreme Court of Korea to establish that, as a matter of Korean law, an agreement not to transfer credits without the prior consent of the obligor (*ie*, Sejin) could only be raised against the transferee (*ie*, HKA) *if* the transferee knew of the agreement in the first place, and there was nothing to suggest that HKA knew of Art 37 of the Lease Agreement between HKC and Sejin.

146 The problem, however, was that these references were of little assistance because they ultimately pertained to a moot point. The scope of what the ATA purported to transfer was merely the *credits* under the Lease Agreement (see [11] and [44] above). Even if HKC succeeded in proving that the ATA was valid, this would only mean that the right to receive the credits was indeed transferred to HKA. However, the transfer of *credits* under the Lease Agreement does not, in and of itself, answer the critical question of whether HKA could properly *terminate* the Lease Agreement by issuing the 4 April Notice. The central inquiry is still whether the *right to terminate the Lease Agreement* had been transferred to HKA and that point, in the experts' views at least, turned on the

construction of the words "right" or "status" in the *NCT* which, unfortunately, was a subject on which conclusions were reached without adequate reference to legal authority. In this regard, I note that the question of the validity of the ATA featured neither in the Assistant Registrar's decision nor was it raised on appeal before me.

147 It is therefore regrettable that the experts' opinions on the appropriate construction of the *NCT* were not supplemented with references to Korean law principles in the same way their opinions on the validity of the ATA were.

The protracted nature of the proceedings below

148 In the proceedings below, HKC was represented by Ms Vivian Ang ("Ms Ang") but, by the time of the appeal before me, HKC had engaged new solicitors and was represented by Mr Heng. As for the plaintiffs in the four admiralty actions, they were represented by the same counsel throughout. Winplus was represented by Ms Sharmini, Frumentarius and KRC were represented by Ms Tan, and Mercuria was represented by Mr Tay.

149 The first day of hearing before the Assistant Registrar commenced on 11 October 2012. It is notable that, at the end of this hearing, Ms Ang was recorded as having submitted that Mr Choi had "no issue with the April termination notice". It appears that what Ms Ang had meant by this submission is that Mr Choi agreed with Prof Kim that the NCT was effective in transferring the right to terminate the Lease Agreement to HKA. This point was only followed up on some time later by Ms Tan.

150 The parties appeared before the Assistant Registrar the next day but this hearing was adjourned because an objection was raised that certain Korean documents which Prof Kim had referred to in his opinions had not been translated in full. Prof Kim was given until 5 November 2012 to file and serve an affidavit with all additional translations and the Assistant Registrar also fixed four additional days of hearing on 19, 20, 21 and 23 November 2012. On 5 November 2012, however, Ms Ang's firm wrote to inform the court that her clients were unable to complete the translation of all the relevant Korean documents as they were quite substantial and requested for a one week extension. In light of this, the court wrote to all parties two days later informing them to attend a special pre-trial conference ("PTC") on 15 November 2012.

151 At the 15 November 2012 PTC, the Assistant Registrar inquired into the status of the translation and was informed that the relevant documents had already been filed and served. However, the Assistant Registrar was then informed by Ms Tan that Mr Choi had filed a third affidavit to clarify that, contrary to Ms Ang's submission on the first day of hearing, he did *not* agree with Prof Kim's opinion on the effect of the NCT but was, instead, aligned with Mr Kyung on this issue. Ms Ang objected to this. In her view, Mr Choi was taking a "radically different" position in his third affidavit and thus she requested for time to advise her clients on the legal avenues available to them, including making an application under O 40A r 4 of the ROC for leave to put questions to Mr Choi in relation to his third affidavit. In the result, the Assistant Registrar vacated the four hearing dates which had earlier been scheduled and directed that if Ms Ang were minded to make an application under O 40A r 4, she was to do so by 29 November 2012.

152 The parties next attended before the Assistant Registrar at a PTC on 13 December 2012. Ms Ang informed the Assistant Registrar that she had yet to file an application under O 40A r 4. She explained that she had held back from doing so because her clients were exploring the possibility of transferring the issues which were subject to Korean law to be heard by the Korean courts. This was the first time that the other parties had heard of this proposal and, in the face of their resistance, Ms

Ang eventually agreed to have the matter proceed in Singapore. She sought an extension of time to file the O 40A r 4 application and the Assistant Registrar directed that this be done by the following day. This was duly complied with. Ms Ang filed Summons No 6434 of 2012 ("SUM 6434/2012") on 14 December 2012 seeking leave to put questions to Mr Choi regarding his third affidavit. The hearing of this summons was fixed for 15 February 2013.

153 Prior to the hearing of SUM 6434/2012, Mr Choi filed a fourth affidavit on 11 January 2013 in which he maintained that his third affidavit was merely clarificatory in nature and did not constitute a substantive change in his position. He explained that his silence on the effect of the ATA and NCT in his second opinion did not mean that he agreed with Prof Kim's views and reiterated that he shared the same opinion as Mr Kyung on this issue. In conclusion, he stated that it was unnecessary for questions to be put to him pursuant to O 40A r 4. I pause to observe that Mr Choi was right in saying that his silence did not mean that he had agreed with Prof Kim as the burden of proof of foreign law rests with the party asserting it. However, after several rounds of hearings on 15, 20 February and 22 April 2013, the Assistant Registrar eventually granted leave for questions to be put to Mr Choi who was, in turn, required to provide his answers by 10 May 2013. Mr Choi complied by duly filing a fifth affidavit within the stipulated time. However, nothing of note emerged from this application.

154 This long-drawn skirmish over Mr Choi's position on the ATA/NCT issue finally drew to a close at a special PTC on 19 June 2013. The Assistant Registrar was informed that HKC would not be filing further affidavits in reply to Choi's third, fourth, and fifth affidavits and this paved the way for HKC's setting aside and striking out applications to recommence hearing. This was scheduled to take place on 2 July 2013, regrettably almost nine months after the first day of hearing.

155 There were 13 days of hearings between 2 July 2013 and the final day on 20 September 2013. Having perused the Notes of Evidence below, it is plain to me that the parties spent a considerable amount of this time poring over the experts' various rounds of opinions and pitting one against the other on the two material points of departure that arose from their first two rounds of opinions. Was this at all necessary? Unfortunately not. The opinion of a foreign law expert is used to *prove* the *content* of that foreign law by reference to relevant sources of law. However, not only were the opinions poor guides to the content of Korean law, the parties themselves did not appear to think that the case would have been decided differently if Korean law, rather than Singapore law, applied. That being the case, I fail to see how it was relevant or useful for the parties to trawl through the opinions as they did below. Given this state of affairs, I consider it beneficial to express some views on the proof of foreign law in general before expounding, in particular, on what an expert's opinion on foreign law should seek to encompass, particularly where the matter concerns the construction of private documents.

156 Before doing so, I should mention that, from my reading of the Judgment below, little weight, if any, was eventually accorded to the opinions of the Korean law experts. Although the contest on the differing opinions on Korean law dominated the hearings before the Assistant Registrar, the opinions barely featured in the Judgment. Of the four principal grounds of her decision summarised in [33(a)] above, the only issue in which the Assistant Registrar appeared to have peripherally relied on Korean law was whether HKA could exercise the right of termination. In this regard, she preferred Mr Kyung's opinion over Prof Kim's that the ATA did not transfer the right to terminate and that the NCT could not transfer more rights than those transferred under the ATA. In my view, that was a conclusion capable of being reached based on a simple construction of the terms of the ATA and the NCT. The experts did not add any value to the analysis of that issue which, in any case, is a matter ultimately for the court to construe.

Proof of foreign law

General principles

157 It is well-established that the content of foreign law is a question of fact which must be pleaded and proved. In general, however, parties are not *obliged* to do so even if, according to the rules of private international law, the issue at hand is governed by foreign law. Indeed, parties often have sound reasons for choosing to ignore foreign law. Undertaking to prove foreign law can be an expensive exercise. Furthermore, where an application of foreign law will lead to the same result as an application of the law of the forum, it is also unnecessary (see Pippa Rogerson, *Collier's Conflict of Laws* (Cambridge University Press, 4th Ed, 2013) at p 50).

158 Where, however, a party has pleaded and wishes to prove foreign law, he has two modes by which he can adduce such proof. As the Court of Appeal noted in the leading case of *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54], such a party has the option of (a) directly adducing raw sources of foreign law as evidence; and/or (b) adducing the opinion of an expert on foreign law. However, as the Court of Appeal went on to observe at [60], even if raw sources of foreign law were admissible under the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), it is still "preferable" for them to be accompanied by expert opinions whenever possible. This is simply "a matter of prudence" because our courts may well find it difficult to competently interpret such raw sources of foreign law unaided (see *Wong Kai Woon alias Wong Kai Boon and another v Wong Kong Hom alias Ng Kong Hom and others* [2000] SGHC 176 at [55]).

159 Where the foreign law is not proved, the content of foreign law will be presumed to be the same as the law of the forum (see *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811 at [84]). This result is unsurprising. As the Court of Appeal explained in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [57], the court lacks knowledge of foreign law and must therefore be informed of its content by evidence from the parties. In the absence of satisfactory proof of foreign law, Singapore courts will simply apply Singapore law. The court will generally not take judicial notice of foreign law, subject to the exceptions provided in s 59 of the Evidence Act.

The role of the foreign law expert generally

160 The role of an expert in providing an opinion on foreign law was neatly summarised by Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc and others* [1999] CLC 417 ("*MCC Proceeds*") and adopted by the Court of Appeal in *Pacific Recreation* at [76]. According to Evans LJ, the three main duties of a foreign law expert are:

> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

161 It is clear from this exposition that the foremost function of an expert witness on foreign law is to inform the court of the relevant *contents* of the foreign law and he does so chiefly by placing the relevant sources of foreign law before the court, whether they be statutory or in the form of foreign decisions (see *Pacific Recreation* at [77]). Indeed, this is a requirement under O 40A r 3(2)(*b*) of the

ROC which states that an expert's report must "give details of any literature or other material which the expert witness has relied on in making the report".

162 Evans LJ acknowledged, however, that there may well be circumstances where there is no authority directly in point. In such circumstances, there is much greater scope for the expert to give opinion evidence on the matter. However, it is notable that Evans LJ stressed at [24] of *MCC Proceeds* that the expert's role was still restricted to "predict[ing] the likely decision of a foreign court" and not to "press upon the English judge the witness's personal views as to what the foreign law might be". This merely expresses the commonsensical view that the court can derive no meaningful assistance from the bare assertions of experts on foreign law advanced without any objectively explicable basis. This point was reinforced by the Court of Appeal in *Pacific Recreation* at [85]:

> Whatever the case, it is clear that the expert cannot merely present his conclusion on what the foreign law is without also presenting the underlying evidence and the analytical process by which he reached his conclusion. …

163 In the event that there are relevant sources of foreign law, the expert's role generally extends further than simply placing them before the court: he should also explain the effect of such foreign law because the raw contents on their own might often mislead persons not familiar with the particular system of law (see *Pacific Recreation* at [78]). Therefore, where the expert has cited foreign cases, he should seek to explain how the foreign court would regard it in terms of its precedential value. Likewise, where the court is concerned with the construction of a foreign statute, the expert should set out the relevant foreign rules of statutory construction and state his views on the meaning and effect of the foreign statute in question (see *Pacific Recreation* at [79]). I pause to observe that it is somewhat ironic that *Pacific Recreation* was repeatedly cited by HKC to remind the opposing experts of their *duties* to the court even though the more important lesson to be extracted from *Pacific Recreation* concerned the *role* of experts in the proof of foreign law.

The limited role of the foreign law expert in the construction of private documents

164 It is important to note for present purposes, however, that the foreign law expert's role is more circumscribed where he is asked to provide the court with an opinion concerning the construction of a private document. In such circumstances, expert evidence is only admissible for the "limited purpose" of identifying the relevant foreign law principles of construction and *not* for the additional purpose of expressing an opinion as to the true construction applying those principles (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 18th Ed, 2013) at para 33-83; see also Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 6.39). This nuanced distinction was also recognised by the Court of Appeal in *Pacific Recreation* at [81]:

> … **[I]t should be noted that the expert's role differs slightly when the issue is the construction of a foreign *document* , as opposed to a foreign *statutory provision* .** In *King v Brandywine Reinsurance Co* [2005] 1 Lloyd's Rep 655, the court had to consider the meaning of the phrase "removal of debris" contained in an insurance policy document which was governed by New York law. Waller LJ incisively stated at [68] that:
>
> > It is perhaps also important to remember that **the role of an expert, unless the court is concerned with special meanings, is to prove the rules of construction of the foreign law, and it is then for the court to interpret the contract in accordance with those rules**. In other words the view of the expert as to the meaning which would be given to the word "debris" is **not admissible** evidence unless he is saying that it has a special meaning

under New York law [see Dicey & Morris 13th ed., 32-189].

[original emphasis in italics; emphasis added in bold]

165 The proposition set out by Waller LJ in *King v Brandywine Reinsurance Co* [2005] 1 Lloyd's Rep 655 in the passage above has been repeatedly endorsed by the English courts (see, *eg*, *Rendall v Combined Insurance Co of America* [2005] EWHC 678 (Comm) at [68]; *Commissioners for Her Majesty's Revenue and Customs and another v Ben Nevis (Holdings) Ltd and others* [2012] EWHC 1807 (Ch) at [41]). A good illustration of its application can be seen in *Rouyer Guillet Et Compagnie v Rouyer Guillet & Co Ltd* [1949] 1 All ER 244. There, the defendants were English companies which had applied to stay an action for passing off against them commenced by the plaintiff French company. The applications essentially turned on the construction of two sources of foreign law: (a) a 1925 French statute; and (b) a document which was, in effect, the articles of association of the French company. Expert evidence was adduced in respect of both these matters and what is particularly instructive is the different treatment accorded to each of them by the English Court of Appeal. This can be seen in the speech of Lord Greene MR (with whom Somervell and Evershed LJJ agreed) at 244:

> *I must make it clear that the evidence of French law is subject to* ***a certain differentiation*** *as between the evidence of the meaning of the law of 1925 and the evidence of the meaning of the articles.* As I understand the law of England, evidence as to the meaning of the statute is to be obtained from the evidence of expert French witnesses and the decisions of the French courts. On a matter of French law the decision of a French court would be most persuasive. *On the other hand*, ***evidence on the construction of a private document, such as articles of association, is admissible so far as it deals with French rules of construction or French rules of law or the explanation of French technical terms, but evidence as to its meaning after those aids have been taken into account is not admissible. It is for the court to construe the document, having fortified itself with the permissible evidence.*** … [emphasis added in italics and in bold italics]

166 The origin of the principle as articulated above appears to stretch back to the early case of *The Duchess Di Sora v AL Phillipps and others, executors, etc* (1863) 10 HLC 624 ("*Di Sora*"). In *Di Sora*, the court had to construe a particular article in a pre-nuptial agreement executed in Rome in the Italian language between parties domiciled there. Many Italian witnesses were examined at the first instance hearing in order to elucidate the legal meaning and effect of this single article. When the matter came up before the House of Lords, however, it was noted that there appeared to be some confusion over the role of expert opinion in the construction of a foreign private document. This state of relative uncertainty was neatly summed up in the opening passages of Lord Chelmsford's speech at 636–637:

> My Lords, this case, in which the evidence fills so large a volume, and which has occupied so many days in hearing the arguments only of the counsel for the Appellants, turns upon the construction of one short clause in a written contract executed in a foreign country. Hence has arisen the necessity of having recourse to witnesses skilled in the law of that country, in order to assist the English Judge in his duty of construing the clause in question. This necessity has given rise to a controversy at the bar as to the extent to which the Judge requires and is bound to accept the opinions of these skilled witnesses. The limits within which experts in foreign law (always assuming their credibility), are to be authoritative in cases in which their aid is required, seem never to have been exactly defined. …
>
> … [It] is said on one side, that upon a question of the construction of a contract, the province of the witnesses ought to be confined to giving information as to the law of the country applicable

to the case, and as to the sense of words and phrases in the instrument which bear a peculiar or technical meaning, or which, taken together, require a peculiar construction, and that the mind of the Judge will then be sufficiently instructed to enable him to assume the office of construction which properly belongs to him.

On the other side it is contended that the skilled witnesses must be the guides of the Judge, and must lead him by the hand throughout; that they must not only inform his mind as to the law, but must teach him the correct construction of the instrument itself. …

167 Lord Chelmsford then went on to explain why, of the two contrasting approaches as set out above, the latter was wrong in principle. In his view, the true construction to be placed on a private document was a question of law to be answered by the judge who would, if he merely adopted the views of the foreign experts uncritically, be derelict in his duties. Viewed in this manner, the role of the expert must therefore be confined to the giving of evidence on the *content* of the foreign law, such as the relevant rules of construction. As Lord Chelmsford stated at 638–639 of *Di Sora*:

… *[I]t is difficult to understand how the construction of a contract can be a question of fact. The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used.* If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound to that meaning; but if there is no such established sense, the intention must be collected in the ordinary manner from the language employed, and we know from experience that different minds often arrive at opposite conclusions of intention from the same expressions. ***The meaning of a foreign instrument, therefore (cleared of the difficulty of technical terms), cannot be a fact to be proved; it is at the utmost merely a probable opinion of the witnesses as to the construction which would be likely to be put upon it by the foreign tribunal. And if the Judge is implicitly to receive the opinion of the witnesses, or of the majority of them, they in fact perform his office, and construe the instrument for him.***

… ***The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals, properly belongs to the Judge.*** *In the case of a foreign instrument, he necessarily requires some person's assistance. In the first place he must have a translation of the instrument*, a translator being (as I have already said) a witness as to the meaning and also the grammatical construction of the words. *He must then have the way cleared for him by explanatory evidence, of any words which are of a technical description, or which have a peculiar meaning, different from that which, literally translated into our language, they would bear; and, if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given.* ***But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties; or, in other words, of construing the language of the instrument in question.***

[emphasis added in italics and in bold italics]

The quality of the expert evidence in the present case

168 Armed with a proper appreciation of the foreign law expert's role, especially in the context of construing private documents, I turn now to consider the opinions of the three Korean law experts here to determine whether the experts had kept within their remit.

169 In *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd and others* [2006] 4 SLR(R)

451 at [14], Andrew Phang Boon Leong J (as he then was) stated that the ability of the (domestic) court to make an informed decision on a question determinable by reference to foreign law "is dependent largely on the quality of the expert evidence adduced". It should be clear by now that I was less than impressed by the quality of the expert opinions in the present case. Round after round of opinions were filed but, each time, they were wide off the mark in terms of what *should* have been addressed. There was little attempt by any of the experts to put forward and explain the sources of foreign law which they were relying on to aid the court's construction of the Lease Agreement, ATA and NCT, but where they did cite such foreign sources of law, for example to establish the validity of the ATA, this turned out to be irrelevant. To put it bluntly, the experts were offering their personal views of the matter instead of assisting this court with evidence of the content of foreign law. In *The "H156"* [1999] 2 SLR(R) 419, G P Selvam J noted perceptively at [14] that the expert opinion there consisted only of "one judgmental sentence" which was also unaccompanied by any propositions of foreign law or foreign materials to support the expert's conclusion. In these circumstances, Selvam J witheringly described the expert's report at [27] as a mere "pretended opinion" and held that any reliance placed on it would be "completely misconceived because there was no opinion before the court". In my view, Selvam J's observations are equally applicable in the present case.

170 To compound matters, the experts' opinions here were not only problematic for what they lacked but also for what they contained. In my view, the experts were effectively making *submissions* on what the true construction of the relevant documents should be. In doing so, they had clearly overstepped their role which, as I have explained, is limited only to the provision of the rules of construction under Korean law. For example, it was not for Prof Kim to opine on the meaning of the terms "right" and "status" as used in the NCT and to conclude that incorporated within these terms was precisely the right to terminate the Lease Agreement as HKC hoped to establish. Neither was it for Mr Kyung and Mr Choi to interpret the requirements of Art 24(2) of the Lease Agreement and conclude that the 4 April Notice was deficient by reference to those requirements. They merely expressed their own views on these issues without attempting to provide the court with any source of Korean law in aid of their conclusions.

171 To clarify, I am not suggesting that the experts were necessarily wrong in their submissions. All I am saying is that this is not the role of the foreign law expert. It is the court's duty to determine the correct construction of a private document but, unfortunately, the parties appeared not to have appreciated this point. The protracted battle over the expert opinions (which dominated the hearings below) only served to prolong matters unnecessarily and at great cost. It is hoped that, in future, such a misunderstanding on the role of foreign law experts will not be repeated. Having said that, it is the duty of the Singapore instructing counsel to apprise the foreign law experts of their limited and targeted role.