IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a claim arising under and in terms of section 2(1) (1) of the Admiralty Jurisdiction Act No. 40 of 1983.

CA Case No: CA/REM/02/2018
Action in REM No: 08/2013

Navi- Bunkering Crop,
Room 1001, 10FL, Busan Trade Centre
87-7, 4Ga- Jungang-dong, Jung-Gu
Busan, Korea, 600-729.

Plaintiff

Against

1. M.V. "Evangeli"

2. KDB Capital Corp.
   KDB Capital Building
   30, Eunhaeng-ro,
   Yeongdeungpo-Gu
   Seoul 150-740,
   South Korea.

Defendants

And Now

In the matter of an appeal in terms of section 13(3) of the Judicature Act No. 02 of 1978 as amended, against the Judgment dated 02.11.2017 delivered by the High Court of the

Democratic Socialist Republic of Sri Lanka in the exercise of its Admiralty Jurisdiction in Action in Rem 11 /2013.

1. M.V. "Evangeli"

2. KDB Capital Corp.
   KDB Capital Building
   30, Eunhaeng-ro,
   Yeongdeungpo-Gu
   Seoul 150-740,
   South Korea.

Defendants- Appellants

Vs.

Navi- Bun kering Crop,
Room 1001, 10FL, Busan Trade Centre
87-7, 4Ga- Jungang-dong, Jung-Gu
Busan, Korea, 600-729.

Plaintiff-Respondent

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Suren De Silva with Jehan Samarasinghe for the Defendant-Appellant
Chandaka Jayasundera with Rehan Almeida for the Plaintiff-Respondent

Written Submissions : 26.05.2022 by the Plaintiff-Respondent

26.05.2022 by the Defendants-Appellants

On

Argued On : 22.03.2022

Decided On : 21.07.2022

B. Sasi Mahendran, J

The 2nd Defendant-Appellant, the Owner of the 1st Defendant Vessel, "M.V. Evangeli" (hereinafter referred to as "the Owner") invoked the appellate jurisdiction of this Court in terms of the Admiralty Jurisdiction Act No. 40 of 1983 read with Section 13 of the Judicature Act No. 2 of 1978, as amended, to impugn the judgment of the High Court of Admiralty, which entered judgment in favour of the Plaintiff-Respondent in action in rem 8/2013 dated 02nd November 2017.

The sequence of events is important in this matter.

It is undisputed that the 1st Defendant-Vessel, "M.V. Evangeli" (hereinafter referred to as "the Vessel") is owned by the Appellant, KDB Capital Corporation Ltd., which is a company incorporated in and has its registered office in South Korea. By virtue of a Lease Agreement (No. 2007-01841) entered into between the Owner and Bumyoung Shipping Co Ltd. (hereinafter referred to as "the demise charterer") on 01st August 2007 for a period of 63 months ending on 01st November 2012 (amended by Agreement No. 2007-01841-000 dated 02nd August 2007) the said Vessel was leased under a finance lease to Bumyoung Shipping Co Ltd. The Lease Agreement was subsequently renewed on 25th May 2012 by 'Renewed Lease Agreement' No. 2007-01841-040 for a further period of 36 months ending on 24th May 2015.

Subsequent to the initial Lease Agreement the demise charterer chartered the Vessel on multiple occasions, as transpired in the evidence. For example, time charters with JFE Logistics Corporation, Tokyo, and Toko Kaiun Kaisha, Ltd., Tokyo in 2012.

Bumyoung Shipping Co. Ltd., the demise charterer, by way of a Charterparty dated 10th October 2012 sub-chartered the Vessel to ST Korea Co. Ltd. (hereinafter referred to as "the Charterer") for a period of one year and thereafter on 7th February 2013

entered into a 'Vessel Bareboat Charterparty' with ST Korea Co. Ltd. It is evident that as per the terms of the Charterparty ST Korea Co. Ltd. was paying the hire to the Appellant, which is not disputed by the Appellant.

This agreement was purportedly terminated on 10th April 2013 by the Owner of the Vessel, who informed only the demise charterer of the purported termination. It should be noted that the purported termination took place due to non-payment of hire for a continuous period (since January 2013 as per the evidence of Mr. Lee Kwanyong on page 543 of the Brief – proceedings dated 16.03.2016) and not due to the fact that the demise charterer had acted in breach of the Agreement by not obtaining the consent of the Owner prior to chartering the Vessel to third parties, one of which was to ST Korea Co. Ltd, the charterer.

The Plaintiff-Respondent (hereinafter referred to as "the Plaintiff") which carries on the business of, inter alia, supplying marine diesel oil, marine gas, and other fuel and oil to vessels, supplied bunkers to the Vessel at the cost of USD 253, 989.49/- at the Port of Singapore East OPL on 5th April 2013. This was at the request of the charterer. The payment was due on 3rd May 2013. (See Commercial Invoice "X5" and Bunker Delivery Notes "X4(a)" and "X4(b)")

As the payment was not made (despite the assurance of the charterer that it will settle same by letter dated 13th June 2013 "X5(b)") the Plaintiff preferred a claim under Section 2(1)(l) of the Admiralty Jurisdiction Act No. 40 of 1983 against the Vessel, M.V. "Evangeli", in the High Court of Colombo, exercising admiralty jurisdiction. Upon the claim being supported the High Court issued a writ of summons in rem and a warrant of arrest against the said Vessel. The said Vessel was arrested on 19th July 2013 at the Port of Trincomalee.

On the Owner entering appearance on 08th August 2013 and providing security by furnishing a Bank Guarantee the Vessel was released from detention on 25th November 2013. Subsequently, the Plaintiff filed its Petition on 09th June 2014, the Owner (2nd Defendant) filed its Answer on 7th August 2014, and then the Plaintiff its Replication on 25th September 2014.

The following admissions were recorded by both parties:

1. The Motor Vessel "Evangeli" [1st Defendant] carries the flag of the Republic of Korea and was at all times material to this action and is presently in the ownership of the KDB

Capital Corp. [2nd Defendant] situated at KDB Capital Building, 30, Eunhaen-ro, Yeongdeungpo-gu, Seoul, 150-740, South Korea.

2. The 1st Defendant Vessel was leased under a finance lease arrangement to Bumyoung Shipping Company Limited of South Korea.

On behalf of the Plaintiff 11 issues were raised and on behalf of the Appellant 13 issues were raised. At the trial, the evidence of Mr. Lee Cheoloo (Managing Director of the Plaintiff company) was led on behalf of the Plaintiff through an affidavit and thereafter cross-examined. The Owner led the evidence of Mr. Lee Kwanyong (the Senior Deputy General Manager, Collection Management Department of the Owner, KDB Capital Corp.) through an affidavit and was thereafter cross examined.

The learned Trial Judge, after the trial, answering the issues in favour of the Plaintiff and dismissing the Owner's counterclaim, held that the arrest was lawful in terms of Section 3(4) of the Admiralty Jurisdiction Act and awarded the sum of money prayed for. It was the learned Judge's finding that the 'relevant person' when the cause of action arose (for the purpose of Section 3(4)(b) of the Act) was ST Korea Co. Ltd who was the 'charterer' of the Vessel and that the 'relevant person' when the action commenced (for the purpose of Section 3(4)(b)(i) of the Act) was either the Appellant as the 'beneficial owner' or Bumyoung Shipping Co Ltd. as demise charterer (issue no.3). Further, relying on the judgment of Chem Orchid [2015] SGHC 50, it was held that there was no proper termination of the demise charter due to the failure to physically re-deliver the Vessel to the Appellant.

The gravamen of the Appellant's claim is that the learned Trial Judge had failed to consider the following matters:

1. At the time of institution of the action, no valid Charter by demise was in operation with ST Korea Co. Ltd, the charterer, because the Appellant (the Owner) had purportedly terminated the Lease Agreement with the demise charterer.
2. At the time the action was instituted the Appellant (the Owner) had terminated the finance lease with Bumyoung Shipping Co., the demise charterer.
3. There was no privity of contract between the Appellant (the Owner) and the Plaintiff.

Before we deal with the issue of termination it is pertinent to provide a concise account of this branch of law.

Admiralty jurisdiction may be exercised in personam or in rem. In personam actions proceed against the person concerned directly. This type of claim is essentially no different to an ordinary claim in a civil court. In contrast, the action in rem comprises a unique form of action that is directed against the ship, and not the ship owner (vide The Bold Buccleugh 7 Moo PC 267) This type of action which is unique to the law of Admiralty was defined by Sir George Jessel M.R. in the City of Mecca (1881) 6 PD 106 thus:

"You may in England and in most countries proceed against the ship. The writ may be issued against the owner, and the owner may never appear and you get your judgment against the ship without a single person being named from the beginning to end. This is an action in rem, and it is perfectly well understood that the judgment is against the ship."

The primary purpose for the creation of this legal construct is to obtain security for the Plaintiff's claim, which, if successful, could be enforced by way of judicial sale of the vessel. As Lord Esher in The Cella [1989] 13 PD. 82 held,

"The moment that the arrest takes place, the ship is held by the court as security for whatever may be adjudged by it to be due to the claimants".

The above is succinctly encapsulated in the following dicta of this Court in the case of Colombo Commercial Fertiliser v. MV "SCI Mumbai", CA PHC APN 47/2013 decided on 05.05. 2014, by his Lordship A.W.A. Salam J.:

"It is a trite concept in Maritime Law that a vessel is considered a wrongdoer for the purpose of a suit. This is a concept that is peculiar only to admiralty law. This legal fiction was created by courts to allow an injured party to proceed in rem directly against the vessel. Thus, even if the owner of the vessel does not participate in the admiralty proceedings, the judgment entered in such proceedings is considered *interpartes*. One of the objectives of such an innovation is to protect the injured against the empty purse of the charterer by providing redress in the form a lien over the vessel. Thus, the legal fiction of the vessel's liability saves the embarrassment of the injured party having to circle the globe in his efforts to sue and enjoy the fruits of his victory."

Although the owner of the vessel is not obliged to enter an appearance in an in rem action, a very logical explanation is set out in The Gemma [1895-99] All ER Rep 596 as to why an owner would nevertheless enter an appearance. A.L. Smith L.J. held:

"For what purpose does a party appear to an action in rem? There are, as it seems to me, three reasons for the appearance: first to release the ship, so that it may go on

trading for the owner; secondly, to contest the plaintiff's allegations that the ship had been in default; and thirdly, in order to prevent it being sold."

In the instant case too, it is seen that the Appellant, as Owner of the Vessel, entered appearance of its own volition. Although an objection was taken by the Plaintiff, in view of the Admiralty Rules, for the failure and negligence on the part of the Owner with regard to its belated appearance, the Court permitted them to intervene and defend themselves.

The basis of the Admiralty jurisdiction of the High Court is found in the Admiralty Jurisdiction Act No. 40 of 1983 read with Section 13 of the Judicature Act No. 2 of 1978, as amended. **Section 3(4)** of the Admiralty Jurisdiction Act deals with actions in rem. This Section reads,

(4) In the case of any such claim as is mentioned in paragraphs (e) to (q) of subsection (1) of section 2, 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 ("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 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 it 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.

It must be noted that Section 3(4) of our Admiralty Jurisdiction Act is virtually identical to that of Section 21(4) of the United Kingdom's Senior Courts Act 1981 and Section 4(4) of the Singapore High Court (Admiralty Jurisdiction) Act. The Australian Admiralty Act 1988 contains similar provisions as well. Therefore, the case law emanating from these jurisdictions relied on by the learned Trial Judge and by both parties will be of utmost assistance in the tasks of interpreting and applying this Section.

The burden of proof is on the Plaintiff to satisfy the prerequisites as laid down in Section 3(4) of the Act, in order to successfully invoke admiralty jurisdiction against the

Vessel. In this regard, as referred to with approval in the Singaporean case of the Chem Orchid (supra) at paragraph 36, which was cited to us by both parties for different purposes, the Court of Appeal of Singapore in the judgment of the 'Bunga Melati 5' [2012] 4 SLR 546, clearly set out the steps and standards of proof the Plaintiff ought to satisfy in an action in rem:

"(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) [s. 2(1)(e) to 2(1)(q) in the Sri Lankan Act] 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 [i.e., 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").**" [emphasis added]

The above five steps and standards of proof were adopted by the English Court as well. (See Harms Bergung Transport und Heavylift Gmbh v. Harms Offshore AHT "Uranus" Gmbh [2015] EWHC 1269 (Admlty))

This Court will now determine whether the Plaintiff has satisfied these steps on a balance of probabilities. In Sumathipala v. National Insurance Corporation 2011 (2) BLR 446, this Court observed that in civil cases a claim may be decided on a preponderance of evidence or on a balance of probabilities and that in terms of Section 101 of the Evidence Ordinance the burden of proof lies generally on the Plaintiff in civil cases.

In the instant case, Steps 1 and 2 are not in dispute. It is undisputed that bunkers were supplied by the Plaintiff to the 1st Defendant Vessel and that this is a claim for unpaid bunkers which is a claim falling within Section 2 (1) (l) (i) of the Act. The said Section deals with claims in respect of goods and materials supplied or services rendered

to a ship for her operation or maintenance. It is common ground that the Plaintiff supplied bunkers to the Vessel to the value of USD 253,989.49/- on 5th April 2013, as evinced by the Bunker delivery note signed by the Master/ Chief Engineer of the Vessel. The payment fell due on 03rd May 2013.

As alluded to above, the learned Trial Judge found that in terms of **Section 3(4)(b) of the Act (the first limb)**, which deals the 'relevant person' who would be liable in an action in personam, when the cause of action arose was ST Korea Co. Ltd, as the 'charterer' of the Vessel. This fact is not disputed by both parties. (That is Steps 3 and 4). Further, there is no dispute regarding the Ownership of the Vessel.

The issue concerns Step 5 as the learned Trial Judge found that the 'relevant person' in terms of **Section 3(4)(b)(i) of the Act (the second limb)** when the in rem action commenced was either the Appellant as the 'beneficial owner' or Bumyoung Shipping Co. Ltd. as demise charterer.

Paragraph 13 (on page 4) of the Written Submissions of the Appellant (dated 26th May 2022) states the following:

"The case of the 2nd Defendant-Appellant before the Admiralty High Court was that:

(a) There was no cause of action that has arisen to the Plaintiff against the 2nd Defendant as there was no services provided to the Defendant Vessel at the request of the 2nd Defendant. Therefore, 2nd Defendant was not liable in any action in *personam*.
(b) The Defendant Vessel was not under a charter by demise to either Bumyoung Shipping or ST Korea at the time of the institution of the action
(c) Therefore that the action could not be maintained in terms of Section 3(4) as a matter of law as an action *in rem* against the Defendant Vessel.

If at all, it should have been an action *in personam* against ST Korea, with whom the Plaintiff had contracted."

With regard to point (a), the Appellant notes that as the bunkers were not requested for by it, it, therefore, would not be liable in an action in personam. We cannot accept this contention. This is because the Appellant as Owner of the Vessel (despite its initial denial) was aware that the Vessel had been sub-chartered. In the course of operating a vessel, a demise charterer is likely to incur debts of which liability for the cost of bunkers is a typical example. (Vide Bridge Oil Ltd. v. Owners and/or Demise Charterers of the Ship

'Guiseppe di Vittorio' [1998] C.L.C. 149) Therefore, we hold that a cause of action arose to the Plaintiff against the Vessel by service provided to the Vessel at the request of ST Korea.

Further, in answering the issues, we must consider who are the 'relevant persons' for the purposes of the second limb of the Act in this case.

The Owner strongly contended that there cannot be two 'relevant persons' under Section 3(4). That is to say, the learned Trial Judge erred in holding that the relevant person in terms of Section 3(4)(b)(i) of the Act (the second limb) was either the Appellant as the 'beneficial owner' or Bumyoung Shipping Co. Ltd. as demise charterer. It is their contention, that if the 'relevant person' in terms of Section 3(4)(b) (the first limb) was ST Korea Co. Ltd. then ST Korea Co. Ltd must be the 'relevant person' for the purposes of Section 3(4)(b)(i) (the second limb) as well. If the Section is interpreted in this way, then ST Korea Co. Ltd would be the 'relevant person' in the capacity of demise charterer, as ST Korea Co. Ltd. cannot be treated as the 'beneficial owner'.

However, it is the Owner's position that ST Korea Co. Ltd cannot be treated as 'demise charterer' because a demise charter is, on the authorities submitted, one entered into between **the shipowner** and the charterer, by which the shipowner hands over possession and control of the Vessel to the demise charterer. In the present case, it is undisputed that it was not the Owner of the Vessel but that it was Bumyoung Shipping Co. that chartered the Vessel to ST Korea Co. Therefore, Bumyoung Shipping Co. could not have entered into a Charter by demise with ST Korea Co. Ltd as Bumyoung Shipping Co. is not the Owner of the Vessel. Bumyoung Shipping Co. was merely the charterer by demise.

It must follow then, if ST Korea Co. Ltd cannot be treated as 'beneficial owner' or, for the aforementioned reason, if it cannot be treated as a demise charterer, the Plaintiff cannot institute an in rem action as there will not be any relevant person for the purposes of the second limb of the Section.

An authoritative definition of the term 'demise charter' is found in the judgment of Bridge Oil Ltd. v. Owners and/or Demise Charterers of the Ship 'Guiseppe di Vittorio' [1998] C.L.C. 149 by Evans L.J.:

"What then is a demise charter? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting — a lease, or demise, in real property terms —

of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement."

Further, Scrutton on 'Charterparties and Bills of Lading' 19th Edition (at page 47) provides,

"A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may or may not be superadded[1]. The charterer becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him".

On a plain reading of the Section, it is evident that Section (3)(4)(b)(i) (the second limb) expressly limits 'charterer' to 'charterer by demise'. This will not then include other charters such as voyage or time charters. In contrast, the term 'charterer' in Section (3)(4)(b) (the first limb) can include time, voyage, slot, demise, or any type of charter. This is well established.

For example, in the Mediterranean Shipping v. Owners of the Ship Tychy [1999] 1 ALL ER (Comm.) 819, [1999] C.L.C. 1046, Clarke L.J. held,

"Mr Kendrick submits that in the light of the reasoning in The Span Terza and Laemthong, there is no reason to construe the word 'charterer' as if it meant demise charterer. If the draftsman had meant to confine the expression 'charterer' to one type of charterer, namely the demise charterer, there is no reason why he should not have done so. Charterers have for many years ordinarily included demise charterers, time charterers and voyage charterers, among others…. I accept that submission."

However, a 'charter' (of whatever name or character, whether demise, slot, voyage, or time charter) can only be created by an owner or a demise charterer (which is also referred to as disponent owner/ quasi-owner/ de facto owner/ pro hac vice owner in several judgments). Specifically, in the case of a demise charter, it must be the owner that grants control and possession over the vessel. It is accepted by the Owner, that a demise charter was created, and continuing until the purported termination letter was issued. Further, the evidence shows that the Owner was aware the Vessel was sub-chartered by ST Korea,

[1] A charter by demise of a ship without master or crew is sometimes called a 'bareboat' charter.

and that the hire was paid by ST Korea to the Owner and that the letter dated 01st July 2013 was sent to both Bumyoung Shipping Co. Ltd and ST Korea Co by the Owner.

In the instant case, the Appellant did not enter into a charterparty with the charterer ST Korea. As mentioned above, the Appellant staunchly denies any dealings with ST Korea. (The Appellant even initially denied knowing that the Vessel was sub chartered to ST Korea. However, the Appellant changing its stance later admitted that it was aware of the sub charter sometime on or before 14th February 2013- as evidenced by the document marked "D3" on page 305 of the Brief.) Then, if the charter under which ST Korea was operating was not one entered into with the Owner of the Vessel, the charter could only have been created by the disponent owner, which would be Bumyoung Shipping. There is no dispute that it was Bumyoung as demise charterer that chartered the Vessel to ST Korea.

To succeed in an in rem action there must be a 'relevant person' in terms of the first limb of the Section. Meaning, the Plaintiff must identify the relevant person who would be liable in personam when the cause of action arose. (Steps 3 and 4 – supra) This relevant person can be an owner, charterer, or in control or possession, of the vessel. In the instant case, there is no dispute that the relevant person who would be liable in personam when the cause of action arose is ST Korea as the 'charterer' (Because as mentioned above the word 'charterer' in the first limb of Section 3(4) is not exclusive to demise charters and can include any charter).

On this basis, it is clear that the Plaintiff has satisfied the first four steps.

The issue then is at the time of commencement of the in rem action whether there existed a charter by demise under which ST Korea could have obtained and operated its Charterparty. To counter this, the Appellant argued that it had terminated its demise charter with Bumyoung Shipping Co. by the time the action was instituted. Ergo, the charter between Bumyoung Shipping Co. and ST Korea would also terminate.

However, the learned Trial Judge rejected this argument. It was held that termination could not have taken place since there was no physical re-delivery of the Vessel to the Owner. The relevant part of the judgment reads (at paragraph 73 on page 24):

"*Even if it assumed that the 2nd defendant had the right to terminate the agreement contractually, the notice of termination issued by the 2nd defendant was ineffective because in my view, a bareboat charter could be brought to an end only upon*

the withdrawal of both possession and control of the vessel. In the present case, the vessel was never re-delivered. However, the 2nd defendant allowed the demise charterer (Bumyoung) to engage the vessel in commercial activities and thus, she remained on bareboat charter to Bumyoung when the in-rem action was instituted".

Now, This Court will consider whether a proper termination had taken place when the in rem action was instituted.

As transpired in the evidence and supporting documents, the Owner purported to terminate the Lease Agreement or Charter by demise with Bumyoung Shipping by letter dated 10th April 2013 (marked "D6") and in turn, the sub-charter to ST Korea also ceased to be in effect. This was owing to the fact that the charterers had defaulted on their monthly hire payments.

At this juncture, this Court observes that it is striking that the Appellant did not purport to terminate the Agreement on the basis that the demise charterer Bumyoung Shipping Co. had chartered the Vessel to ST Korea without its consent, which is in contravention of the Lease Agreement. The Appellant having condoned that illegality only sought to terminate it when the hire payments were not made for a certain period.

Nonetheless, it must be seen whether the notice of termination dated 10th April 2013 was sufficient to terminate the Agreement.

It must be noted that there are two lines of authority on how a charter by demise can be terminated; either by notice of termination alone or notice along with physical re-delivery of the Vessel. The word 're-delivery' is utilized instead of the word 'delivery' because in the case of a charter by demise the owner of the vessel hands over complete possession and control of the vessel to the demise charterer and thus there must be a transfer of possession and control back to the owner, if the owner is to re-claim the vessel. The word 'delivery' is apposite in cases of time or voyage charters where the owner retains possession and control of the vessel, where there is no need to transfer possession and control back.

There are a number of cases in which the notice of termination by the owner to the charterer following the charterer's breach alone, in the absence of some act of repossession, was insufficient to terminate a demise charter.

One such judgment is the Singaporean Case of Chem Orchid (supra) which the learned Trial Judge relied on.

In this case, the owners of Chem Orchid, Han Kook Capital Co Ltd, in its application to set aside the writs contended that at the time the writs had been issued the party who was liable on the claims, that is, the bareboat charterer, Sejin Maritime was no longer the demise charterer of the vessel and as such the requirement of Section 4(4)(1) of the Singapore High Court (Admiralty Jurisdiction) Act was not satisfied. The Assistant Registrar struck out the writs in rem on the grounds that the charter had been terminated prior to the issue of the writs. Accordingly, the vessel could not be arrested in relation to claims arising in the interim between the notice of termination being given and the physical redelivery of the vessel to the shipowners.

This decision was reversed by Steven Chong J. who held that the charter had not been validly terminated, but even if it had, there was no concept of constructive delivery applicable to the termination of bareboat charters which continue until physical redelivery as "the complete transfer of possession and control from the ship-owner 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."

Therefore, at the time the in rem writs were issued by the bunker suppliers and the cargo claimants, the vessel was still in the possession of the demise charterers.

The prime consideration that tilted the balance in favour of requiring physical re-delivery of the vessel for termination was the interests of the third parties involved. As Steven Chong J. observed:

"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… 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"**…..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.

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**." [emphasis added]

Other cases that subscribe to this school of thought include the following:

The Australian case of The Turakina [1998] FCA 495, in which, the Turakina was sub-demise chartered by South Pacific Shipping Ltd from Deil Shipowners BV. Deil wrote to South Pacific stating that the charterparty was terminated with immediate effect. The charterparty provided that the vessel was to be in the full possession and complete control of South Pacific during the charter period. It also provided that Deil had, after default in payment of hire, a right to withdraw the vessel but that the hire of the vessel was to continue until redelivery. Tamberlin J. held,

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

….As mentioned earlier in these reasons a mere notification by the owner that redelivery is required does not itself amount to redelivery. Having regard both to the language of the demise charter, and the indications in the authorities as to the different character of a demise charter which confers an interest in the vessel and possession, **my conclusion is that the notice of withdrawal in the present case did not operate to terminate the charter at the time arrest proceedings were instituted**." [emphasis added]

Tamberlin J.'s analysis was followed by the High Court of New Zealand in the case of The 'Rangiora', 'Ranginui' and 'Takitimu' [2000] 1 Lloyd's Rep 36, which held that a demise charter can only be terminated by repossessing the vessel; notice alone is insufficient.

In the Australian case of CMS (Aust) Pty Ltd v Ship 'Socofl Stream' (1999) 95 FCR 403 Moore J. held,

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

Having considered the above authorities, this Court favours the view that a charter by demise can be terminated only by actual recovery of possession and control of the Vessel. An actual re- taking of possession is seen when physical redelivery of the Vessel has been achieved. In the absence of actual re-taking, such as in situations where it is impracticable to effect physical re-delivery there must be some overt act or active assertion of its rights on the part of the Owner/lessor of the Vessel to regain possession and control of the Vessel such as when the Owner's/ lessor's agent attends onboard the Vessel to announce that it had retaken possession of the Vessel. A mere notice of termination, in the absence of an overt act to accompany that intention of termination, will not be sufficient to terminate a demise charter.

This is because as explained in length in Tamberlin J.'s judgment in The Turakina (supra) demise charter unlike any other charter involves the grant of possession and control and thus requires a re-delivery.

This Court is also swayed by the claims of innocent third parties who would otherwise be left without any redress, as explained in the judgment of Steven Chong J. in the Chem Orchid, in the event the situation of the vessel is in limbo.

Notwithstanding this general proposition of law, the terms and conditions of the Charterparty will be instructive to determine the intentions of the parties to the Charterparty, with regard to when termination would take place.

The terms and conditions of the Lease Agreement No. 2007-01841 entered into between Bumyoung Shipping Co Ltd. and the Appellant on 01st August 2007 (as amended) relevant to termination read as follows:

Article 22 ('Termination of the Lease Agreement')

"1. If one of the causes mentioned in each of the following occurs to A [Bumyoung Shipping Co. Ltd.] or its joint guarantors then A shall notify such fact to B [KDB Capital Co. Ltd] without delay. Irrespective of A's such notice, in the event B deems that there exists a cause mentioned in the following, then B may send 10-day notice to correct such violation to A and if there is no removal of such cause within such specified time, then B may terminate this Lease Agreement. However, if any of the events set forth in subparagraph 7 to 13 occurs, B may immediately terminate this Lease Agreement.

1. In the event of delay of payment of lease charge or any amount payable by A to B according to this Lease Agreement
2. ….
3. ….
4. ….
5. ….
6. .... In the event the vessel is sold to a third party through auction or in the event A allows a third party use the Vessel without B's prior written approval.
7. ….
8. ….
9. ….
10. ….
11. ….
12. ….
13. ….

14. ….

2. In the event B recognizes that continuation of normal business operation by A or its joint guarantor is difficult due to application for process of bankruptcy, forcible mediation and winding up of the company or for other cause thus their payment of A's liabilities to B or maintenance of the Vessel is difficult, B may immediately terminate this Lease Agreement after notifying such reasons to A.

3.….

4. In the event this Lease Agreement is terminated after commencement of the Lease Term, A shall stop use of the Vessel immediately and according to Article 24 herein return the Vessel to B……"

Article 24 ('Return of Vessel')

"1. In the event the Lease term is expired or this Lease Agreement is terminated (except in the case of termination due to destruction or loss of the Vessel), A shall return the Vessel to the port of registration of the Vessel or to the place designated by B according to B's choice under A's responsibility and account without delay……

2. …..

3. …..

4. In case A delays carrying out its duty of returning the Vessel, B may take back the Vessel from A unilaterally on A's account."

This Court observes that the terms of this Lease Agreement, consistent with the general proposition of law, require the Owner to take actual re-delivery of possession (by stopping the use of the Vessel and immediately returning the Vessel to the Port of registration or the Port nominated by the Owner) or in the very least an overt act or assertion of the owner's rights, which in this case, would amount to a 'unilateral' act of the Appellant to take control of the Vessel. A mere letter of termination would not suffice for this purpose.

Although the Appellant contends that Bumyoung Shipping did not protest the purported notice of termination (which would, as it notes, amount to constructive re-delivery) the acceptance of a notice of termination by the charterer would be insufficient to bring the charter by demise to an end as the intention of the parties and the general position of law is that there must be actual re-delivery of the Vessel or an overt act or

assertion of rights to take back possession and control of the Vessel. Till such time, there will exist a valid charter by demise.

It should be noted following the termination letter there is no action on the part of the Owner to re-take the Vessel. The Owner had to re-issue a letter on 01st July 2013 (marked "D7") to Bumyoung Shipping (which was addressed to ST Korea Co. Ltd as well unlike the letter dated 10th April 2013) requesting the return of the Vessel pursuant to Article 24 of the Lease Agreement. No mention is made to which port the Vessel should be re-delivered to. The reason for inaction, following the initial letter of termination, was because of the Rehabilitation proceedings of Bumyoung Shipping Co. ongoing in the Busan District Court, which ended only on the 28th of June 2013. But it must be noted that the Appellant was also situated in South Korea. There is no evidence forthcoming whether the Appellant sought to make itself a party to the rehabilitation proceedings or at least make an application to Court to claim the Vessel back.

Bumyoung Shipping Co. Ltd. responded to the second letter sent by the Appellant by letter dated 02nd July 2013 that the Vessel will be returned "after discharge of cargo at Xiamen Port in the People's Republic of China". A port which, contrary to the Lease Agreement is neither the port of registration of the Vessel nor a port designated by the Owner but, as per the communication, one which the demise charterer dictated to the Owner.

Further, in the instant case, another reason why the above argument cannot be accepted is due to the fact that the Appellant had permitted ST Korea Co. to continue on its voyage to China, to discharge cargo that was onboard the Vessel. The Appellant did this at its own risk. It is a common sensical proposition that a Vessel will require bunkering on a particular voyage and thus, the Appellant cannot be said to have been blind-sided by a claim for unpaid bunkers, in the event the charterer fails to pay the same and an in rem action has been instituted against the Vessel. This raises the genuineness or lack thereof of the Appellant's intention to terminate the demise charter.

Therefore, at the time the in rem proceedings were commenced by the Plaintiff there existed a valid charter by demise for the purposes of the second limb of Section 3(4). On that basis, the relevant person for the purposes of the second limb of the Section would be Bumyoung Shipping Co. as the demise charterer.

Therefore, we affirm the judgment of the learned Trial Judge. Since we hold that the reason for arresting the Vessel was legal, there is no need to consider the

counterclaim. Therefore, we dismiss this appeal with costs. The Registrar is hereby instructed to send a copy of the judgment to the High Court.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J.

I AGREE

JUDGE OF THE COURT OF APPEAL