

Case Comment

**SEVERED BY JUDICIAL SALE**

***The Victor 1* [2024] 5 SLR 237**

**[2024] SAL Prac 22**

It is an established principle in shipping law that when a vessel is sold by the admiralty court, rights *in rem* are transferred to the proceeds of sale of the vessel. However, whether and to what extent other rights and obligations continue to subsist as against the proceeds of sale now representing the vessel is as yet undecided. This case considers whether a demise charter (and any *in rem* claims against the demise charterer) survives a judicial sale of the chartered vessel.

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**I. Introduction**

1 It is trite law that when a vessel is sold by the admiralty court, rights *in rem* are transferred to the proceeds of sale.<sup>1</sup> A sale of the vessel by the admiralty court typically arises from the earlier arrest of that vessel and the sale proceeds are usually paid into court until an application is made to pay out the proceeds. As with the custody of a ship under arrest, the Sheriff is notionally in charge or in possession of the proceeds of sale representing the ship. Hence, originating claims issued after a judicial sale would be served on the Sheriff.

2 All said, when raising an *in rem* claim after the vessel has been sold, the same test and consideration shall be applied in

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<sup>1</sup> See *The Turtle Bay* [2013] 4 SLR 615 at [15].

terms of formulating the claim against the proceeds of sale of the vessel. In this regard, if the claim *in rem* is premised on an underlying contract or relationship with the vessel, would the sale of the vessel affect the underlying contract or relationship? This was the question raised when a bunker supplier brought an *in rem* claim against the demise charterers of a vessel.

## II. Facts of *The Victor 1*

3 In *The Victor 1*,<sup>2</sup> the crew of “Victor 1” (the “Vessel”) commenced an action for unpaid wages and arrested the Vessel. The Vessel was subsequently appraised and sold, and proceeds from the sale of the Vessel were paid into court. After a determination of priorities and payment out was made in satisfaction of the crew’s claim, the remaining sums were held in court.

4 A year later, a bunker supplier Meck Petroleum DMCC (“Meck”) commenced an action *in rem* for unpaid bunkers supplied to the Vessel. Meck identified the defendant as “owner and/or demise charterer” of the Vessel. Ceto Shipping Corp (“Ceto”) filed a notice of intention to contest as “owner and/or demise charterer” of the Vessel.

5 Meck and Ceto reached a settlement agreement regarding Meck’s claim and a consent judgment was recorded. Six months later, Savory Shipping Inc (“Savory”) filed a notice of intention to contest as “owner” and applied to set aside the consent judgment, and to strike out Meck’s *in rem* action and Ceto’s notice of intention to contest.

6 It was not disputed that the Vessel was demise chartered by Savory to Ceto and that Ceto was the demise charterer and person liable *in personam* for Meck’s claim.

7 Savory argued that as Ceto had ceased to be demise charterer by the time Meck filed its action *in rem* on 12 April 2023, the demise charter had terminated:

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2 [2024] 5 SLR 237.

(a) on 1 April 2022 pursuant to cl 35<sup>3</sup> of the demise charterparty; or

(b) on 16 January 2023, at the latest, being the date on which judicial sale was completed.

**A. Judicial sale terminated the demise charterparty**

**(1) The *Tarik III* distinguished**

8 Meck and Ceto relied on the South African Supreme Court's decision in *The Tarik III*<sup>4</sup> in support of their argument that admiralty claims against a demise charterer may be pursued via an action *in rem* commenced after the vessel has been judicially sold.

9 Briefly, the facts of *The Tarik III* are as follows. The appellant, CEB, arrested the vessel, then still demise chartered to one Caliskan. The vessel was sold and a fund was constituted. Seventeen parties came forward to claim against the fund; their claims were based on Caliskan's *in personam* liability. CEB argued that claims premised on Caliskan's *in personam* liability could only be made against the fund if that claimant had first arrested the vessel before its judicial sale.

10 The South African Supreme Court unanimously decided that the demise charterparty remained in force up until the judicial sale had been completed. Referring to the South African Admiralty Jurisdiction Regulation Act 105 of 1983 ("AJRA"), the court held that pursuant to s 1(3)<sup>5</sup> Caliskan was deemed to be the owner of the vessel for the period of charter by demise, and by

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3 Clause 35 states: "Subject to the terms of this Charter, the period of chartering of the Vessel hereunder (the 'Charter Period') shall commence on the Delivery Date and shall terminate on the date which falls 36 months after the Delivery Date."

4 [2022] ZASCA 136.

5 Section 1(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (South Africa) states: "For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or have been, the owner of the ship for the period of the charter by demise."

reason of s 3(11)(b)<sup>6</sup> the fund was deemed the property of whoever owned the vessel at the time the judicial sale was completed. Therefore, Caliskan was to be regarded as the owner of the vessel up until the judicial sale was completed.

11 S Mohan J in *The Victor 1* considered and concluded that *The Tarik III* did not assist Meck and Ceto's case. Mohan J observed that the question whether a judicial sale terminates a subsisting demise charterparty was not expressly considered by the South African Supreme Court. He noted that the South African Supreme Court's finding that the charterparty was in effect at all material times prior to the judicial sale implied that the charterparty did in fact come to an end when the vessel was sold.

12 Mohan J also noted that the express language of the AJRA deemed Caliskan the owner of the sale proceeds in court, there being no equivalent in the Singapore legislation.<sup>7</sup>

## (2) The Chem Orchid distinguished

13 Meck and Ceto also relied on *The Chem Orchid*<sup>8</sup> to support the proposition that physical redelivery is an essential step in the termination of a demise charterparty. Meck and Ceto argued that in circumstances where physical redelivery was not possible, the demise charterparty can only terminate with a constructive redelivery.

14 Mohan J noted that *The Chem Orchid* concerned a situation where the shipowner purported to terminate a demise charter for breach by the demise charterer. It did not concern the effect of a judicial sale on a demise charterparty.

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6 Section 3(11)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (South Africa) states: "A fund shall, for all purposes, be deemed to be the property sold or the property in respect of which the security or an undertaking has been given."

7 That is, the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed).

8 [2015] 2 SLR 1020.

(3) *Section 4(4)(c) of High Court (Admiralty Jurisdiction) Act 1961 refers to vessel, not sale proceeds*

15 Mohan J also considered the reference to “ship under a charter by demise” in s 4(4)(c)<sup>9</sup> the High Court (Admiralty Jurisdiction) Act 1961<sup>10</sup> (“HCAJA”). Mohan J observed that the reference to the ship being under a charter by demise could not be read as referring to the proceeds of a judicial sale of that ship.

16 On a plain reading, Mohan J considered that the arguments raised by Meck and Ceto could not be accepted without giving s 4(4) of the HCAJA a construction that its language could not reasonably bear.

17 Following his analysis above, Mohan J concluded that the demise charterparty terminated upon completion of the judicial sale of the Vessel on 16 January 2023.

**B. Demise charterparty came to an end**

18 In response to the termination of the charterparty pursuant to cl 35 of the charterparty, Meck and Ceto argued that despite

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9 Section 4(4) of the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed) states:

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 General Division of the High Court against —

(c) 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

(d) 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.

10 2020 Rev Ed.

cl 35, a subsequent addendum to the charterparty prescribed for service of a written notice to effect termination.<sup>11</sup>

19 However, upon examination of the addendum, Mohan J held that the giving of notice mandated by the addendum was not a precondition to the operation of cl 35; that the duty to give notice would only be triggered by an exercise of the rights of withdrawal from, or termination and/or cancellation of the demise charterparty. This exercise of rights connoted a discretionary act; the express effect of cl 35 was automatic and brought the demise charterparty to an end through effluxion of time.

**C. Demise charterer was not beneficial owner at time when action was brought**

20 Relying on the purchase obligation under the demise charterparty, Ceto ran an alternative argument that it had become the beneficial owner of the Vessel at the time when the action was brought. Ceto argued that it became the beneficial owner by reason of the sale of the Vessel by Savory to Ceto upon the expiry of the demise charterparty.

21 According to the purchase obligation under the demise charterparty, transfer of title to Ceto was conditional upon Ceto's payment of all hire and other sums due under the charterparty including management fees and any sums due under the management agreement. Savory submitted that there were sums outstanding under the management agreement. Ceto did not dispute this, arguing instead that non-compliance was not a bar to transfer of title.

22 Mohan J considered the cases regarding the passing of title and concluded that none of the authorities supported

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11 Clause 5.1 of the addendum states:

The Parties have mutually agreed to amend the [Charterparty] so that any exercise of the rights of withdrawal from, or termination and/or cancellation of, the [Charterparty] may only be exercised 72 hours after service of a written notice to Charterers. This provision shall be paramount and shall prevail over any other term of the [Charterparty] to the contrary including, but not limited to, clause 28 and 44.

the proposition that a transferee who fails to meet an express obligation may be regarded in equity as the beneficial owner of that property. Mohan J dismissed the argument.

### **III. Analysis**

23 Mohan J's decision is a logical and practical conclusion. It would be a strange position indeed for a demise charter to survive a judicial sale and subsist against the pool of sale proceeds. The impossibility of performance alone would hamper any survival of the demise charterparty.

24 It is a reminder that when formulating an admiralty claim *in rem*, the claimant has to establish that its claim arises in connection with a ship and the person who would be liable in an action *in personam* was, when the cause of action arose, the owner or charterer of the ship; and that when bringing the action *in rem* against that ship, the person who would be liable *in personam* remains and still is the beneficial owner or charterer of the ship under a charter by demise.<sup>12</sup>

25 In *The Victor 1*, the court was not asked to and did not have to consider to whom the proceeds of sale belonged. In this case, the balance sale proceeds, pending payment of claims which have crystallised before the sale of the Vessel, would likely revert to Savory.

26 An interesting and potentially awkward scenario arises if Meck was the party who first arrested the Vessel and caused the judicial sale of the Vessel. In that scenario, Meck would be entitled to share in the sale proceeds alongside the crew. This brings to mind situations where claims against demise charterers are satisfied against assets not their own and owners find themselves in the invidious position of paying for other people's liabilities.

27 The timing in the prosecution of claims remains key in obtaining a successful outcome. Had Meck served its claim

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<sup>12</sup> See n 5 above.

before the sale of the Vessel, it would be sharing the proceeds of sale alongside the crew.