Neutral Citation Number: [2024] EWHC 611 (Comm)

Claim No: CL-2023-000829

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London

Date: 21/03/2024

Before:

THE HON SIR WILLIAM BLAIR

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Between :

(1) SY RORO 1 PTE LTD
(2) SY RORO 2 PTE LTD

Claimants/ Applicants

- and –

(1) ONORATO ARMATORI S.R.L.
(2) F.LLI ONORATO ARMATORI S.R.L.
(3) MOBY S.P.A.
(4) COMPAGNIA ITALIANA DI NAVIGAZIONE S.P.A.

Defendants/ Respondents

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James Leabeater KC and Edward Jones (instructed by **Stephenson Harwood LLP)** for the Claimants
Michael Collett KC and Malcolm Jarvis (instructed by **Hill Dickinson LLP**) for the Defendants

Hearing dates: 12-14 March 2024

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JUDGMENT

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Sir William Blair :

1. This is the hearing of the expedited trial of this action. Expedition was ordered by the order of Cockerill J dated 7 February 2024.

2. The issue in the case relates to two Ro-Ro ferries which were the subject of a series of back-to-back bareboat charters entered into by way of the financing of the acquisition of the vessels by the charterers from the owners (who also owned the yard where the vessels were built). The owners' case is that the charters have been validly terminated and they are entitled to redelivery. Orders for redelivery have been made by an arbitral tribunal under the head charterparties, but not complied with. The charterers (using that term generically) deny that the charters have been validly terminated, alternatively submit that they are entitled to relief against forfeiture.

3. Whereas the arbitral proceedings were brought under the head charters, these proceedings are brought pursuant to Multipartite Agreements to which all the parties to the transaction are parties. They are subject to the jurisdiction of the English courts. All relevant contracts are subject to English law.

4. Having heard the parties at trial, and in accord with Cockerill J's view, I am satisfied that the redelivery issue needs to be determined quickly. The vessels are presently in a legal limbo which needs to be brought to an end. I record the Claimants' submissions (not challenged) in this regard: "Part of the justification for expedition was that the Owners were facing a serious and unsatisfactory position in which the Vessels' underlying bareboat registry (Malta) needed to be (and still needs to be) informed of the termination of the Head Charters and will remove the Vessels' sub-registration (Italy). The Vessels' insurance policies incorporate by reference the Institute Time Clauses - Hulls (1.10.83) which provide at cl.4.2 for automatic cancellation in the event of a change in the vessel's flag. Whilst it is unclear whether that refers to the underlying Flag or the bareboat Flag or both or either, this gives rise to a real risk."

The parties

5. The Claimant Owners, SY Roro 1 Pte Ltd and SY Roro 2 Pte Ltd, are companies incorporated in Singapore. Each is the owner of a Flensburger Ro-Ro type 4100 ferry, named "ALF POLLAK" (First Claimant) and "MARIA GRAZIA ONORATO" (Second Claimant) (together, "Vessels"). Both are companies within the Siem group of companies. The Vessels were built at the Flensburger Shipyard in Germany, which was also part of the Siem group. The Claimants' skeleton argument states that the cost of each vessel was around € 55m.

6. The Defendants are companies incorporated in Italy with offices at No. 26, Via Larga, Milan. The Defendants are within the Onorato group of companies, which (among other activities) specialises in ferries and operates in the Italian domestic ferry business. Their ownership and control is relevant in the case. In summary, and together with the role that each played in the transactions:

   (1) The First Defendant (D1), Onorato Armatori S.r.l., the holding company for the group, is wholly owned by Mr Achille Onorato (40%) and his father, Mr Vincenzo Onorato (60%). This company is the Charter Guarantor in the transactions.

   (2) The Second Defendant (D2), F.lli Onorato Armatori S.r.l., is wholly owned by the Third Defendant. This company is a SPV which was set up specifically for the transactions and D2 is Charterer under the head charterparties with the Owners.

   (3) The Third Defendant (D3), Moby S.p.A., is the Sub-Charterer in the transactions. A change to the shareholdings in this company is the subject of the alleged termination rights.

   (4) The Fourth Defendant (D4), Compagnia Italiana di Navigazione S.p.A.**,** known as CIN, is the Sub-Sub-Charterer in the transactions, and since the transactions took place, CIN has entered into time charters in relation to the Vessels with the ferry company, DFDS.

7. As noted, the purpose of the transactions was to facilitate the financing of the acquisition of the Vessels. The Tribunal found that the reason that the head charterparties were entered into with D2, rather than Moby S.p.A. – which is the operating company – is because Moby was prevented by accounting or financial reasons from entering into a bareboat charter of 12 years duration (that period being required by the Owners' financiers). It was therefore decided that F.lli Onorato Armatori Srl (i.e., D2, the Charterers), an SPV that from July 2018 was 100% owned by the Onorato family's holding company, Onorato Armatori S.r.l. (which was itself the Charter Guarantor), would enter into bareboat charters with the Owners. The Vessels were in turn bareboat chartered to Sub-Charterers, who in turn bareboat chartered them to Sub-Sub-Charterers, CIN, the company that was directly engaged in providing ferry services.

8. I record that for the purposes of these proceedings, the parties are agreed that the First Defendant (i) owns, directly or indirectly, the majority of the shares in the Second, Third and Fourth Defendants and (ii) controls the Second, Third and Fourth Defendants by virtue of its direct and indirect ownership of the majority of the shares in the Second, Third and Fourth Defendants. The Second and Fourth Defendants are wholly owned by the Third Defendant.

<u>The proceedings in the Commercial Court</u>

9. As explained below, the dispute emerged with clarity in September 2023, though the precise dates are in dispute. The Owners' demands for redelivery were not complied with, and on 9 October 2023, under claim CL-2023-000617, the Owners applied to the court under s. 44(3) Arbitration Act 1996 for urgent injunctive relief in the form of an order requiring the Charterers to redeliver the vessels which are the subject of the head bareboat charters to the Owners.

10. The head charters contain a London Maritime Arbitrators' Association ("LMAA") arbitration clause. An arbitration between the Owners and the head charterers had by this point commenced with the appointment of the Owners' arbitrator. The application for an injunction was refused by Foxton J because there was not sufficient urgency to make it appropriate to make an order of this kind ahead of the arbitration. Foxton J pointed out that the issues between the parties are, principally

but not exclusively, issues of law or the consequences of undisputed facts (save for certain limited issues).

11. He expressed the view that it should be possible for an arbitral hearing to proceed to an award in six to eight weeks. The course of the arbitration (which did indeed result in an award within this time frame) is set out below. Among other things, by an Award of 22 December 2023, the tribunal ordered that "Charterers [*that is, D2, F.lli Onorato Armatori S.r.l*] are required immediately to redeliver the Vessels to the Owners". This did not take place, and has not taken place, though there were two further Awards by the tribunal to the same effect on 12 February 2024.

12. Meanwhile, on 28 November 2023, the Owners commenced the present action claiming relief under Multipartite Agreements and Guarantees entered into in the transactions. The reason that the matter comes before the court is that the arbitration agreements with the Owners are to be found in the head charters only. The arrangements included materially back-to-back sub-charters and sub-sub-charters by other members of the charterers' group to which the Owners were not privy. However, the Multipartite Agreements (**MPA**s) entered into between the parties to the transactions set out certain rights and obligations between them inter se. These agreements were subject to the jurisdiction of the English courts. All relevant contracts are subject to English law.

13. On 17 January 2024, the Claimants applied for expedition and directions. On 2 February 2023, Cockerill J ordered that the trial be expedited, giving directions for a three-day trial commencing on 12 March 2024. The first item in the directions given by Cockerill J required the parties to agree a List of Issues and a List of Facts. There was no provision for general disclosure (nor was it needed). In practice, and as conscientiously actioned by the parties, these directions have allowed the action to come on for trial expeditiously with each party having had a full opportunity to put its case.

14. Prior to the commencement of the hearing, the parties provided skeleton arguments and reading lists. There was documentary material before the court including from the arbitration. Oral evidence was tendered by the Defendants from (i) Professor Gualtiero Brugger who is an independent director and Chairman of D3, Moby S.p.A.

and (ii) Professor Pietro Maria Putti who is Chairman of the Board of Directors appointed from among the independent directors of D4, Compagnia Italiana di Navigazione S.p.A., of which D3 is the sole shareholder.

15. Both witnesses gave their evidence helpfully, and Professor Brugger in particular emphasised the different role and functions of shareholders and directors in the corporate context when considering issues of control. Where relevant, I have noted further the oral evidence below.

The facts

16. My factual findings include all the agreed facts (which are based partly on the findings of the Tribunal so far as they are common ground), together with my further findings based on the evidence.

(i) The contracts

17. The Vessels were let by the Owners on a sequence of back-to-back charterparties. The head charters were with D2 (which as explained above was an SPV formed for the transactions) as Charterers. There were then Sub-Charters and Sub-Sub Charters between companies in the group. The three together are referred to as "the charterers".

18. A material distinction between the charterparties is that the Head Charters contained purchase options, but the Sub-Charters and Sub-Sub-Charters did not. It was also part of the Defendants' submissions that there were other differences between the contracts.

19. In detail, the structure was as follows.

(1) By two bareboat charterparties dated 13 December 2017 on amended BARECON 2001 forms plus additional clauses as amended by novation agreements dated 11 October 2018 ("**Head Charters**") the Claimants ("**Owners**") demise chartered the Vessels to D2 (*F.lli Onorato Armatori S.r.l.*) ("**Charterers**"). At this time, the Vessels were still under construction.

(2) By bareboat charterparties dated 11 October 2018 (in the case of the Alf Pollak) and 5 February 2019 (in the case of the Maria Grazia Onorato) ("**Sub-Charters**")

the Charterers demise chartered the Vessels to D3 (*Moby S.p.A.*) ("**Sub-Charterers**"). This was shortly before delivery of the respective vessel.

(3) By bareboat charterparties dated 11 October 2018 (in the case of the Alf Pollak) and 5 February 2019 (in the case of the Maria Grazia Onorato) ("**Sub-Sub-Charters**") the Sub-Charterers demise chartered the Vessels to D4 (*CIN*) ("**Sub-Sub-Charterers**"). Again, this was shortly before delivery of the respective vessel.

20. The Charterparties (as subsequently extended in the case of the Sub-Charters and Sub-Sub-Charters) were each for a period of 12 years.

21. The terms common to all parties were contained in two MPAs dated 13 December 2017 (that is to say the same date as the Head Charters) as amended by novation agreements dated 11 October 2018 (that is to say, shortly before delivery of the Alf Pollak) between the Owners (on the one part) and the First Defendant ("**Charter Guarantor**"), Charterers, Sub-Charterers and Sub-Sub-Charterers (on the other part). The four together are referred to as "the **Defendants**". As already noted, the MPAs were signed in the expectation that a chain of back-to-back sub-charterparties would be executed (as indeed occurred). By the MPAs, the parties agreed various matters relating to the Vessels and the charterparties (together, "**Charterparties**").

22. The payment and performance obligations of the charterers under each of the Charterparties was guaranteed by the Charter Guarantor, under six separate guarantees bearing the same date as the Charterparties ("**Guarantees**").

23. As noted in part above:

(1) All the contracts referred to above are subject to English law.

(2) The MPAs and the Guarantees on which this claim is brought contain exclusive jurisdiction clauses in favour of the High Court of Justice.

(3) Each of the Charterparties contain LMAA arbitration clauses.

24. It is an agreed fact that there is no material difference, for the purposes of this dispute, between the provisions of the suites of contracts as between each of the Vessels.

25. Delivery of each Vessel down the charterparty chains was simultaneous. Thus:

    (1) The Alf Pollak was delivered (a) by Owners to Charterers at 16:19 hours on 12 October 2018, (b) by Charterers to the Sub-Charterers at the same place at 16:20 hours on the same date and (c) by the Sub-Charterers to the Sub-Sub-Charterers at the same place at 16:21 hours on the same date.
    (2) The Maria Grazia Onorato was delivered (a) by Owners to Charterers at 13:41 hours on 14 March 2019, (b) by Charterers to Sub-Charterers at the same place at 13:42 hours on the same date and (c) by the Sub-Charterers to the Sub- Sub-Charterers at the same place at 13:43 hours on the same date.

26. Sub-Sub-Charterers then let the Vessels out on time charters. The details have not been explored in the hearing, but as I understand it, the Alf Pollak is currently let under a time charter to DFDS due to expire on 9 January 2025. The Maria Grazia Onorato is fixed for a two year time charter to DFDS following completion of dry docking which is said to have happened in December 2023.

27. The effect of the registration of the Vessels in the Italian Bareboat Registry was followed up at my request. The parties sent the registration details of the Vessels after the hearing. They carry the date of 13/10/2023 and show (as is not disputed) that the Vessels were registered. It is not appropriate for me to try to interpret the contents of the registration so far as notice to third parties is concerned without explanation from the parties. As a matter of fact, the registrations record the interest of Credit Agricole Corporate and Investment Bank, and it is not in dispute that this bank is the Owners' financiers in relation to the Vessels.

28. The Tribunal said, rightly in my view, that fundamental to the above recital of the somewhat involved contractual chain is that the Onorato family controlled the Charterers, the Sub-Charterers and the Sub-Sub Charterers (sometimes referred to as the "Moby Group") through a family holding company which was itself the Charter

Guarantor. Owners negotiated the Charterparties with Vicenzo and Achille Onorato, through brokers.

(ii) Relevant terms of the Charterparties

29. The Head Charters are based on the BARECON 2001 form plus additional clauses. They contain a bespoke list of "Termination Events".

30. Under Clause 40 of the Head Charters, the occurrence of a Termination Event granted the Claimant Owners a right "to exercise all or any of the remedies set out below in this Clause 40". Clause 40(2) states as follows:

> "A Termination Event shall constitute (as the case may be) either a repudiatory breach of, or breach of condition by the Charterers under, this Charter or an agreed terminating event the occurrence of which will (in any such case) entitle the Owners to exercise all or any of the remedies set out below in this Clause 40."

31. Those rights included a right to terminate the Head Charters in accordance with Clause 40(3) in the following terms:

> "(3) At any time after a Termination Event shall have occurred and be continuing ... the Owners may at their option and by notice in writing to the Charterers (a "Termination Notice") terminate this Charter with immediate effect or on the date specified in the Termination Notice and withdraw the Vessel from the service of the Charterers without noting any protest and without interference by any court or any other formality whatsoever, whereupon the Vessel shall no longer be in the possession of the Charterers with the consent of the Owners, and the Charterers shall redeliver the Vessel to the Owners in accordance with Clause 37."

32. The list of stated Termination Events included at 40(1)(m): "Change of Control. A Change of Control Event occurs in relation to the Charterers, the Charter Guarantor or the Sub-Charterer."

33. A "Change of Control Event" was defined as follows:

> "an event whereby either (i) the Charter Guarantor ceases to hold directly or indirectly 77.40% of the shares or voting rights in the Sub-Charterer, or one person or company (other than the Charter Guarantor

> and/or any of its affiliates), or two or more persons or companies acting in concert acquires 51 per cent, or more of the shares or voting rights in the Sub-Charterer (except in relation to share acquisitions in the Sub-Charterer made by the Charter Guarantor and/or any of its affiliates) or (ii) the Charter Guarantor ceases to hold directly or indirectly any less than 100% of the shares or voting rights in the Charterers. Any reorganization at any time within the Onorato Family will not cause a Change of Control Event."

34. The Sub-Charters and Sub-Sub-Charters contained the same list of Termination Events and provided that upon termination, the relevant Vessel would be redelivered "free of any sub-charter".

35. The Termination Event relied upon by Owners was the occurrence of a Change of Control Event (see further Clause 40(1)(m) and Clause 32). This occurred when the Charter Guarantor that is, D1, Onorato Armatori S.r.l) "…cease[d] to hold directly or indirectly 77.40% of shares… in the Sub-Charterers…" (that is, D3, Moby S.p.A.), by reason of SAS Shipping Agencies Services Sarl ("**SAS**") having become a 49% shareholder in the Sub-Charterers.

36. As further set out below, SAS is part of the MSC Mediterranean Shipping Company group, "**MSC**".

37. It is not in dispute that a Termination Event occurred across all the Charterparties. The issue between the parties relates to the Defendants' case that the Owners' right to terminate in the case of the Sub-Charterers and Sub-Sub-Charterers was lost by effluxion of time or election (such an argument having been rejected by the Tribunal in the case of the Charterers).

(iii) Relevant terms of the MPAs

38. The express terms of the MPAs included the following.

39. By recitals (D) and (F), the parties (i.e. both Claimants and all Defendants) record the parties' agreement that the charterparties were to be "on back-to-back terms".

40. By cl.3.1, the Charterers covenanted with Owners "duly and punctually to pay the Indebtedness to the Owner", which includes the Termination Sums.

41. Clause 10 (Covenants) provides that:

> 10.l Each of the Charterer, the Sub-Charterer or the Sub-Sub-Charterer shall each comply with the following provisions of this Clause 10 at all times during the Charter Period except as the Owner may otherwise permit.
>
> …
>
> 10.3 It [*which must mean "they" as a reference to "each of the Charterer, the Sub-Charterer or the Sub-Sub-Charterer"*] shall:
>
> 10.3.1 observe and perform all its obligations and meet all its liabilities under or in connection with each Assigned Contract [*which includes the charterparties*] to which it is a party;
>
> 10.3.2 use its best endeavours to ensure performance and observance by the other parties of their obligations and liabilities under each Assigned Contract to which it is a party; and
>
> 10.3.3 take any action, or refrain from taking any action, which the Owner may specify in connection with any breach, or possible future breach, of an Assigned Contract to which it is a party by it or any other party or with any other matter which arises or may later arise out of or in connection with an Assigned Contract to which it is a party.

[*Owners state, and it is not disputed, that Assigned Contract is defined as, together, the Charterer's Assigned Contracts, the Sub-Charterer's Assigned Contracts and the Sub-Sub-Charterers' Assigned Contracts. Those terms are further defined as including the Head Charters, the Sub-Charters and the Sub-Sub-Charters (and the Operating Charters, meaning the time charters under which the Vessels were employed).*]

> 10.4 It shall not, whether by a document, by conduct, by acquiescence or in any other way:
>
> …
>
> 10.4.4 rescind or terminate any Assigned Contract to which it is a party or treat itself as discharged or relieved from further performance of any of its obligations or liabilities under an Assigned Contract to which It is a party or, in the case of the Charterer, withdraw the Vessel from the Sub-Charter or in the

> case of the Sub-Charterer, withdraw the Vessel from the Sub-Sub-Charter;
>
> 10.4.5 purport to vary or revoke any notice or instruction relating to this Deed which it has given or may give to any person
>
> Provided that:
>
> (a) any termination of the Sub-Charter by either the Charterer or the Sub-Charterer (or withdrawal by the Charterer of the Vessel from the Sub-Charterer); or
>
> (b) any termination of the Sub-Sub-Charter by either the Sub-Charterer or the Sub-Sub-Charterer (or withdrawal by the Sub-Charterer of the Vessel from the Sub-Sub-Charterer),
>
> after the permission of the Owner is given shall (as each hereby acknowledges) be without responsibility on the part of the Owner who shall not be under any liability whatsoever in the event that such termination or withdrawal is subsequently adjudged to have constituted a wrongful repudiation of the Sub-Charter or the Sub-Sub-Charter by the Charterer, the Sub-Charterer or the Sub-Sub-Charterer, as the case may be.

42. By clause 10.6.2, each of the Charterer, the Sub-Charterer or the Sub-Sub-Charterer agreed "… to take any action which the Owner may specify with a view to ensuring or protecting the validity, enforceability and/or priority" of contractual interests and rights.

43. By clause 10.7.1, each of the Charterer, the Sub-Charterer or the Sub-Sub-Charterer agreed to "take any action which the Owner may direct for the purpose of enforcing (through legal process, arbitration or otherwise) any right which is part of, or relates to, the Assigned Property".

44. Clause 10.8 provided that, "Without limiting its generality, Clause 10.6 applies to:

> 10.8.1 the termination of any Assigned Contract or the withdrawal of the Vessel from the Sub-Charterer or the Sub-Sub Charterer".

45. Clause 17.1 of the MPAs provides that in the event of there being any conflict between the MPA and the charterparties, the MPA shall prevail.

(iv) Relevant terms of the Guarantees

46. As noted above, the First Defendant, Onorato Armatori S.r.l., the holding company for the group, is Charter Guarantor in the transactions. It is the Owners' case, disputed by the Defendants, that the Charter Guarantor should be ordered to perform obligations under the Head Charters to the extent that they have not been performed by the Charterers.

47. The operative part of the Guarantees provides as follows:

> "In consideration of the Owner agreeing to enter into the Agreements, the Guarantor hereby irrevocably and unconditionally guarantees to the Owner, as primary obligor and not merely as surety, that the Charterer will pay to the Owner in full when due each sum payable from time to time under and in connection with each Agreement and will perform fully all of the its other obligations under each Agreement. If for any reason the Charterer should fail to pay to the Owner when due any amount for which it is liable under or in connection with an Agreement or should fail to perform any of its obligations under an Agreement in a timely manner and such failure continues for a period of 10 days from the earlier of the date on which the relevant payment or the performance of any other obligation is due and the date the Guarantor is notified thereof, the Guarantor undertakes to:
>
> (a) pay any amount owing under or in connection with an Agreement directly to the Owner, immediately upon the Owner's first demand; and
>
> (b) perform any obligations under or in connection with an Agreement, immediately upon the Owner's first demand."

(v) The Concordato

48. It is not in dispute that the group began to experience financial difficulties. With effect from 30 June 2020, and following an application made by the Sub-Charterer (that is, D3, Moby S.p.A.), the Court of Milan admitted the Sub-Charterer to a "*concordato preventivo*" procedure ("Concordato"). This is a procedure available under Italian law for companies suffering financial difficulties. The aim of the Concordato is to allow a company to continue its business and to pay creditors out of the cash flow generated therefrom in accordance with a restructuring plan to be

proposed to and approved by the relevant Italian Court which, in this case, was in Milan.

49. In or about March 2022, MSC agreed on terms to make (either itself or through a company in the MSC group) a capital injection into the Sub-Charterers in exchange for acquiring a minority (25%) shareholding in the Sub-Charterers. The funds were to be used to pay off debts as part of the Concordato procedure.

50. By July 2022, the Sub-Charterers' Concordato plan had been amended with an increased MSC investment in exchange for a 49% shareholding in the Sub-Charterers, the effect of which would mean that the Charter Guarantor would no longer be able to hold any more than 51% of the shares in the Sub-Charterer. This revised plan was approved by a majority of creditors. It then needed to be approved by the Milan Court.

51. The Court approval process was delayed in October 2022 by a challenge by Grimaldi Euromed SpA ("Grimaldi") who complained about an abuse of a dominant position on the Italy-Sardinia ferry routes by Moby/CIN.

52. In November 2022, the Milan Court approved the Concordato plan. Grimaldi then appealed. In May 2023, the Court of Appeal in Milan rejected Grimaldi's appeal. Grimaldi then had 30 days to appeal further but, in the end, did not do so.

(vi) SAS becomes a shareholder in the Sub-Charterers

53. As described below, MSC then made its capital injection in July 2023 and through a subsidiary (SAS) acquired a 49% shareholding in Sub-Charterers.

54. In relation to relevant Italian corporate law:

(1) The Sub-Charterers are a *Società per Azioni*. The relevant Companies Register is the Camera di Commercio di Milano Monza Brianza Lodi ("CCIAA Milano").

(2) An increase in the number of shares in a *Società per Azioni* requires for that company's articles of association (*statuto*) to be amended.

(3) By Article 2436 of the Italian Civil Code:

(i) the resolution to amend the articles must be recorded by a notary;

(ii) the notarised resolution must then be registered with the relevant Companies Register; and

(iii) until the notarised resolution has been registered, it is of no effect.

(4) By Article 2444 of the Italian Civil Code:

(i) Once the resolution increasing the capital has been adopted and registered, and the new shares have been underwritten, the directors of the company must file a certificate to that effect (*attestazione*) with the relevant Companies Register.

(ii) Until that certificate has been published in the register, the share capital increase cannot be mentioned in the company's deeds (*atti della società*).

55. On 5 July 2023, SAS's €150 million share-capital increase was approved at a Sub-Charterers' extraordinary shareholders' meeting which required that the subscription and release of 66,176,325 new shares to SAS be completed no later than fifteen days after registration of the shareholders' resolution in the companies register. The resolution also recorded (at resolution (c)) that SAS's subscription of €150 million was to be made (a) by the transfer to Tirrenia (another company in the Onorato group) of €82 million which MSC had already deposited into a notary's account and (b) the deposit of €68 million in the Sub-Charterers' cash register.

56. On 10 July 2023, SAS made its €150 million capital injection into the Sub-Charterer in accordance with the 5 July 2023 resolution, namely by (a) payment of €82 million from the notary's escrow account to Tirrenia and (b) payment of €68 million to the Sub-Charterers.

57. On 14 July 2023, the Resolution of 5 July 2023 was published by the CCIAA Milano in accordance with article 2436 of the Italian Civil Code referred to above.

58. Accordingly, it is common ground between the parties in this case that a Termination Event occurred on either 10 July 2023 or 14 July 2023.

59. On 24 July 2023, a share certificate for 66,176,325 new shares in the Sub-Charterer, representing 49% of the shares in the Sub-Charterers, was issued in favour of SAS.

60. On 24 July 2023, the board of directors of the Sub-Charterers certified that the new shares had been underwritten pursuant to the 5 July 2023 shareholders' resolution. The attestazione was deposited with the companies register on 26 July 2023.

61. On 30 August 2023, the change in shareholding was published in the Milan companies register.

62. On 2 September 2023, the Owners became aware that the change in shareholding had been published in the Milan companies register.

(vii) Termination

63. There is no dispute factually about what happened next, but the effect of the various notices that were given by the Owners is in dispute.

64. On or about 5 September 2023, the Owners gave notices to the Charterers terminating the Head Charters due to the occurrence of a Change of Control event, and requiring immediate redelivery of the Vessels. The Owners' notices were copied to the other Defendants. No reference appears to be made to the MPAs in the notices.

65. On 8, 11, 15, and 19 September 2023, the Owners gave further notices to the Charterers requiring redelivery of the Vessels. These further notices were copied to the other Defendants. The Defendants did not take any steps to redeliver the Vessels to the Owners following these notices. Again, no reference appears to be made to the MPAs in the notices.

66. On 6 October 2023, the Owners served a notice on the Charter Guarantor requiring the Charter Guarantor to perform the Charterers' obligations, including redelivery of the Vessels.

67. On 1 November 2023, the Owners served (without prejudice to their earlier notices) notices dated 31 October 2023 under the MPAs requiring the Charterers to terminate the Sub-Charters and the Sub-Charterers to terminate the Sub-Sub-Charters, and requiring redelivery of the Vessels. At the same time, the Owners served a notice to the Sub-Sub-Charterers dated 31 October 2023 under the MPAs requiring redelivery of the Vessels.

68. These notices informed the recipients that, "As you know, the Owner's primary position is that, following the Head BBCP Termination, all secondary interests deriving from the Head BBCP have automatically come to an end and/or are termination by operation of law. Without prejudice to that contention, the Owner hereby directs the Sub-Charterer to terminate the Sub-Sub-Charterparty as between the Sub-Charterer and Sub-Sub-Charterer". This was said to be pursuant to the covenants given at clauses 10.4.5, 10.6.2, 10.7.1 and/or 10.8.1 of the Multipartite Agreement.

The arbitration and Partial Final Awards

69. On 20 September 2023, the Owners appointed Mr Simon Rainey KC as their arbitrator and commenced arbitration against the Charterers under the Head Charters, claiming declarations that they were entitled to and did validly terminate the Head Charters, and withdraw the Vessels, and for orders requiring redelivery ("**Arbitration**").

70. On 28 September 2023, the Charterers appointed Alistair Schaff KC as their arbitrator in the Arbitration under the Head Charters.

71. Following the appointment of Mr Simon Rainey KC and Mr Alistair Schaff KC as party appointed arbitrators, Ms Sara Masters KC was appointed as Chair of the Tribunal.

72. During the Arbitration, Charterers argued inter alia (a) that it was not possible for them to redeliver the Vessels, because the Vessels were in the possession of the Sub-Sub-Charterers over whom the Charterers had no control and (b) that the Charterers were entitled to, and should be granted, relief against forfeiture.

73. On 6, 11, and 12 December 2023, an expedited hearing was held to determine the liability issues in the Arbitration.

74. During the Arbitration, the Charterers argued that it was not possible for them to redeliver the Vessels, because (it was said) they were not in possession of the Vessels and had no control over the Sub-Charterers or Sub-Sub-Charterers.

75. On 11 December 2023, the Charterers called Mr Achille Onorato to give evidence. Mr Achille Onorato is the sole director of the Second Defendant, and also the Chief Executive Officer and Managing Director of the Third Defendant, which (as explained above) is in turn the 100% shareholder of the Fourth Defendant.

76. Mr Onorato's oral evidence included the following matters (bold is in the agreed list of facts):

> Q. And what shares have been pledged by way of security?
> A. **Moby** [D3].
> Q. And what about shares in CIN [*D4*]?
> A. **Well, that is a consequence because CIN is a hundred per cent controlled by Moby.**
>
> Q. And are you authorised to make a representation on behalf of Onorato Armatori in relation to those matters?
> A. **I am not a director of Onorato Armatori, I am a shareholder. When I speak, when I make representations, I do it on behalf of on behalf of Moby, of which I am the managing director.**
> Q. This email, Mr Onorato, says that the charterers, that is Flli Onorato Armatori, are willing to offer that the charter guarantors shareholding, that is the shareholding belonging to Onorato Armatori in the subcharterers, that is Moby, will not reduce any further. Are you able to tell the Tribunal that that has been authorised on behalf of Onorato Armatori?
> A. **Onorato Armatori is a family holding where the only asset is the shareholding in Moby, the sole director is my father, so there is an authorisation.**
> Q. Do I understand that your father is the person who authorised it or is it you who authorised it or is it you and your father acting together?
> A. **In this case, I speak on behalf of the family, I am in constant contact with my father who has been following this matter with extreme concern.**
> Q. Now, your father has 60 per cent of the shares and you have 40 per cent of the shares; is that right?
> A. **Correct**.
>
> Q. Mr Onorato, without wishing to get too far into the legalities or the formalities of the situation , is it your position that the Onorato family still has control of Moby?
> A. **Yes, of course, absolutely.**

> Q. And CIN?
> A. **Yes, they have the control of both companies and this is the reason why there has not been any change in control.**
> Q. If the Tribunal finds we are entitled -- let me start again. If the Tribunal finds that owners are entitled to have these two vessels redelivered to them, will you ensure that Moby and CIN comply with that order?
> A. **Yes, of course, we comply with the decisions of the Tribunal and we will do everything possible to comply with the decisions and with the law.**
>
> Q. Now, Mr Ross said in his evidence that he understood that the Onorato family are a multigenerational ship owner, which is deeply rooted and highly experienced in the Italian domestic ferry business; is that right?
> A. **(In English) Yes**.
> Q. And, indeed, are there five generations of ship owners now in your family?
> A. **Yes**.
> Q. And you're highly experienced and specialised particularly in ferries with Sardinia; is that right?
> A. **We --our group specializes in ferries for the transport of goods and passengers and also towing and also port terminals.**
>
> **… So the board of directors are waiting for the results , the outcome, of this arbitration.**
> Q. The board of directors of CIN is waiting; is that right?
> A. **The whole company, we are all waiting for it. This is normal. But obviously the board of directors are independent so they act independently.**
> Q. But in any event, your understanding is that the board of directors at CIN is awaiting a result of this arbitration ; is that right?
> A. **Well, I think this is obvious.**

77. Following Mr Onorato's evidence, the Charterers no longer contended that it would be impossible for them to comply with such an order, referring to Mr Onorato's evidence that the entities in the charter chain would comply with the Tribunal's decision.

78. Further submissions were made on 14, 17, and 19 December 2023 regarding the relief sought by the Owners, in the course of which Charterers repeated the point that certain issues had fallen away and did not arise for decision in view of the evidence.

79. On 22 December 2023, the Tribunal (Ms Sara Masters KC, Mr Simon Rainey KC and Mr Alistair Schaff KC) published its Partial Final Award ("Award").

80. By the Award, the Tribunal:

(1) declared that the Owners were entitled to terminate and did validly terminate the Head Charterers (at §104(2)); and

(2) refused to grant the Charterers relief against forfeiture.

81. At paragraph 97 of the Award, the Tribunal recorded that:

> "Following the oral hearing, the issues have narrowed considerably. In particular, Charterers no longer contend that it is impossible for them to comply with an order for specific performance, although Charterers maintained their case that the impact on third parties (time charterers) is relevant to our discretion as to whether to grant specific performance. No evidence was tendered in that respect and in fairness, the point was not pressed with any conviction by Mr Collett KC."

82. By paragraph 103 of the Award, the Tribunal made the following orders:

> "(a) Charterers are required immediately to redeliver the Vessels to the Owners.
>
> (b) Charterers are also required immediately to de-register the Vessels from the Italian Bareboat Registry.
>
> (c) The parties are to co-operate to agree precise arrangements in relation to redelivery."

At paragraph 103 of the Award, the Tribunal recorded that further declarations sought by the Owners were not necessary and did not need to be determined "in the light of Mr Onorato having expressly confirmed when giving his evidence that Sub-Charterers and Sub-Sub-Charterers would comply with the Tribunal's award. … ".

83. The vessels were not redelivered, but the Charterers maintained that the Tribunal was unable to award any further or modified relief relating to the time by which they were required to redeliver the Vessels to the Owners and to de-register the Vessels from the Italian Bareboat Registry ordered in §104(a) and (b) on the basis that the Tribunal was *functus officio*.

84. That contention was rejected by the Tribunal. On 12 February 2024, by its Second Awards, the Tribunal decided that the Owners were entitled to further relief. As regards the specified dates / places for redelivery, that was because:

> "15 …
>
> (2) Notwithstanding, Mr Onorato's clear statement on behalf of Charterers when he was giving his evidence that they would comply with the Tribunal's order, and also our order under Paragraph 104(2) of the Award that the parties cooperate with arrangements for the re-delivery of the Vessels, Charterers have failed to do so.
>
> (3) Given that in breach of our orders, Charterers have failed to apply to de-register the Vessels and/or to re-deliver the Vessels and/or to cooperate with Owners with arrangements for the re-delivery of the Vessels, we accept Owners' submission that they now need the Tribunal to specify precisely what Charterers are obliged to do, including where delivery is to take place."

85. Further, the Tribunal ordered that the Charterers pay the sums of €36,790,665.77 in respect of Alf Pollak and € 39,115,491.04 in respect of Maria Grazia Onorato (these were the Termination Hire Sums).

86. The Tribunal also ordered that the Charterers pay indemnity costs in relation to the Second Awards, given that, "Notwithstanding Mr Onorato's confirmation when he gave his evidence that he would comply with the Tribunal's award (including that he would ensure Sub-Charterers and Sub-Charterers' compliance), Charterers have blatantly failed to comply (and continue to fail to comply) with our Order to re-deliver the Vessels." (at [38]).

87. At the present time, the Vessels have still not been redelivered.

<u>The issues</u>

88. It is not contended that the fact that the Tribunal has made orders under the arbitration clause in the Head Charters precludes the Owners from seeking the same relief against the Charterers under the MPA. Under ordinary principles, however, the case must be proved to the satisfaction of the court, and there must be no double recovery.

89. In summary, under the Agreed List of Issues, the issues fall under a number of main headings:

    a. The Claimants' case of abuse of process.
    b. The legal consequences of termination of the Head Charters upon the Sub-Charters and Sub-Sub-Charters.
    c. The legal effect or consequence of the Owners' notices to the Defendants.
    d. The claim for relief against forfeiture.
    e. Relief sought by Owners including against Charter Guarantor.
    f. Defendants' claim for an indemnity.

90. As usefully summarised by the Defendants, the core issues are:

    (1) The legal consequences of termination of the Head Charters upon the Sub-Charters and the Sub-Sub-Charters and, if the latter two charters did not terminate automatically on the termination of the Head Charters, whether (a) the Charterers were obliged to terminate the Sub-Charters and (b) the Sub-Sub-Charterers were obliged to terminate the Sub-Sub-Charters in accordance with the Owners' instructions; and
    (2) Whether, if the Sub-Charters and Sub-Sub-Charters did terminate (automatically) or are now ordered to be terminated, the Sub-Charterers and/or Sub-Sub-Charterers are entitled to relief from forfeiture of possession of the Vessels under the Sub-Charters and the Sub-Sub-Charters.

<u>The Claimants' case of abuse of process</u>

91. Based on the evidence of Mr Achille Onorato to the Tribunal as set out above, the Owners say that it is abusive and vexatious for the Defendants to advance arguments before the Court which are directly contrary to: (a) the case advanced by the Charterers in the arbitration; (b) the clear statements (and concessions) made by Mr Onorato during the arbitration including that he would ensure that all parties would comply with the Tribunal's Awards; and (c) the Tribunal's findings in the Arbitration. Based on Mr Onorato's answers set out in full above, the Owners submit that the Defendants be barred from advancing their contrary case before the court.

92. The Defendants dispute this analysis, saying that it is correct that in the Charterers' closing submissions in the arbitration the Charterers did not contend that it would be impossible for the Charterers to comply with an order requiring the Vessels to be redelivered, but did not assure the Tribunal that the Sub-Charterers and the Sub-Sub-Charterers would redeliver the Vessels if the Charterers were ordered to do so. Nor was that Mr Onorato's evidence.

93. In my view, the Owners seek to read too much into the responses given by Mr Onorato in cross-examination. He was asked a simple question as to whether the other members of the group would comply with an order for redelivery against the Charterers, and he answered with a simple answer in the affirmative. There is no reason to suppose that this was a dishonest answer, indeed the Tribunal described him as a truthful and honest witness. But although the reality is that this is (or was) a closely bound group of family companies, something which has consequences in relation to the issues in the case, the separate companies have a separate legal identity. I accept the evidence of Professors Brugger and Putti that Mr Onorato had no authority to bind the Sub-Charterers or Sub-Sub Charterers to a particular course of action by his answers when giving evidence in the arbitration.

94. I do accept the Owners' contentions to this extent. In appropriate circumstances, and approaching the issue with caution, it may be an abuse of process to seek to relitigate in court an issue which has already been determined in an arbitration award, even where there is no identity of parties for issue estoppel purposes: see *PJSC National Bank Trust v Mints* [2022] 1 W.L.R. 3099 at [79], Foxton J, *Arts and Antiques Ltd v Richards* [2014] Lloyd's Rep IR 219 at [20], Hamblen J, and in Hong Kong, *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd* [2010] HKCFI 817 at [157], Reyes J. But in this case there was no determination as regards the Sub-Charterers or Sub-Sub Charterers – this is because, understandably in the light of Mr Onorato's evidence – the Tribunal did not feel the need to determine their position (even assuming, which again they did not determine, that they had jurisdiction to do so).

95. The present case is the only opportunity that the Sub-Charterers or Sub-Sub Charterers will have to put their case, and in my view, it would be unfair to deprive them of that opportunity. That is sufficient to dispose of the abuse of process point.

96. I think that it is appropriate to add a footnote to this conclusion. As noted, at the time of the hearing of the arbitration, the Tribunal proceeded on the basis that its Award would be honoured by the Sub-Charterers or Sub-Sub Charterers, and so they did not have to consider any legal complications in relation to the Sub-Charters or Sub-Sub Charters and the subsequent time charters in the way of redelivery to the Owners.

97. The Tribunal did however state at paragraph 97 of the Award that:

> "Following the oral hearing, the issues have narrowed considerably. In particular, Charterers no longer contend that it is impossible for them to comply with an order for specific performance, although Charterers maintained their case that the impact on third parties (time charterers) is relevant to our discretion as to whether to grant specific performance. No evidence was tendered in that respect and in fairness, the point was not pressed with any conviction by Mr Collett KC [*counsel for the Charterers*]."

98. By the time of the second Awards, the Tribunal had been disabused of the understanding that its Award would be honoured, yet made their order still more specific, specifying a particular port for redelivery. It has no particular legal significance perhaps, yet as a matter of comment, this experienced maritime tribunal, though cognisant of all the charters, clearly did not regard their existence as a legal obstacle in itself, since they described the Charterers' failure to comply with their Order to re-deliver the Vessels as a "blatant" one.

<u>The legal consequences of termination of the Head Charters upon the Sub-Charters and Sub-Sub-Charters</u>

99. It is common ground that a Termination Event occurred on either 10 July 2023 or 14 July 2023, and that the Head Charters have been lawfully terminated by the Owners. The Defendants however contend that the Sub-Charters and Sub-Sub-Charters continue and are binding on the Owners, and that the Sub-Charterers and Sub-Sub-

Charterers are not obliged to redeliver the Vessels, and the Owners cannot now terminate the chartering arrangements.

100. This issue has been argued by reference to the Owners' case that the Sub-Charters and Sub-Sub-Charters were "automatically" brought to an end, alternatively that the Owners are entitled to instruct the Sub-Charterers and Sub-Sub-Charterers to redeliver the Vessels and have done so, and the Sub-Charterers and Sub-Sub-Charterers are obliged to comply with Owners' instructions. These contentions are disputed by the Defendants.

(i) Owners' automatic termination case

101. The Owners argue that since, as found by the Tribunal and not disputed, the Head Charter has terminated, termination of the Sub-Charters and Sub-Sub-Charters is not necessary, because when the Head Charters were terminated, the Sub-Charters and the Sub-Sub-Charters were "automatically and necessarily brought to an end as the Charterers were not able to give possession to the Vessel to any sub-charterer". This was described as the automatic termination argument. It was put partly as a matter of contract on the basis that all of the contracts envisage that the charter chain would collapse or terminate automatically following the termination of the Head Charter, but also as a matter of principle.

102. The Owners rely on the principle in land law that where a head lease is terminated, all sub-interests derived from the lease also terminate. They assert the more general proposition that subsidiary or secondary interests in assets (a vessel being an asset), such as sub-bailments, are inherently precarious, always defeasible and at risk of being foreshortened by events up the chain of entitlement.

103. The Charterers submit that the Sub-Charters and Sub-Sub-Charters did not terminate automatically on termination of the Head Charters. Since the Charterers and the Sub-Charterers acted within the scope of the actual authority conferred by the Owners in entering into, respectively, the Sub-Charters and the Sub-Sub-Charters, a relationship of bailment arose directly between the Owners (as original bailor) and the Sub-Charterers and the Sub-Sub-Charterers (as sub-bailees).

104. The Charterers submit that as a matter of principle, landlord and tenant cases have no application to a lease of chattels because (a) the doctrine of estates does not apply to chattels and (b) the Sub-Sub-Charterers' interest in the Vessels is not carved out of the Head Charters, but is an independent interest that is derived from their possession of the Vessels. Where a bailor (here the Owners) has given a bailee (here the Sub-Charterers and Sub-Sub Charterers) authority to sub-bail a chattel (here a vessel) to a third person, the bailor is taken to have consented to the sub-bailment and a relationship of bailment arises directly between the original bailor and the sub-bailee. Accordingly, termination of the Head Charters did not "automatically and necessarily" bring the Sub-Charters and the Sub-Sub-Charters to an end. As it was put in oral argument, you can quite possibly have a situation where the head bailor has consented to a sub−bailment which can outlast the head bailment. It is all a question of looking at the terms.

105. In terms of authority, in addition to the landlord and tenant cases, the Owners relied upon *BMBF (No 24) Ltd v Inland Revenue Commission* [2002] STC 1450, a case concerned with the leasing of equipment, in which Etherton J suggested that any entitlement of the sub-bailee to retain possession must "turn upon the contractual provisions contained in the Headlease and the Sublease" (at [148]). In that regard, the authority and consent of the Owners to the sub-bailment was on terms, including the term of the charters that upon termination the Vessels would be redelivered "free of any sub-charter" (clause 38), and compliance with Owners' instructions under clause 10 of the MPAs.

106. In terms of authority, the Defendants relied on Goode, *Commercial Law* (2021, 6th ed) at 28.28 (cited in Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title Based Financing* (3rd ed 2018) at 7-048) in the context of finance leases. The passage in question is in a footnote to Goode para 28.28, and is to the effect that in the case of chattels, a sub-lease does not automatically come to an end with the cessation of the head lease, for the sub-lessee's interest in the equipment is not carved out of the head lease but is an independent interest derived from possession.

107. I agree with the Defendants that the landlord and tenant cases in respect of real property cannot seamlessly be carried over to cases involving chattels such as ships.

I agree with the Owners that the Defendants' case does not (as it submits) gain much support from the decision of the Privy Council in *The Pioneer Container* [1994] 2 AC 324, where the issue was whether the terms of the sub-bailment were binding on the head bailor, in this case the cargo interests – this view is consistent with the view taken by Etherton J in the *BMBF* case (see above) at [147].

108. It is perhaps not surprising that no authority was cited by either party which deals with how the principles apply where the sub contracts are themselves bareboat charters beneath a head charter which is also a bareboat charter. The reasons for the duplication of bareboat charters within the Onorato group had to do with the financial and accounting reasons mentioned earlier. In any case, as I have said earlier, the Onorato group is a closely bound group of family companies.

109. In fact, the differences between the parties are not as great as may be supposed, because both accept that whether or not the Sub-Charters and Sub-Sub-Charters automatically came to an end with the termination of the Head Charters ultimately depends on the contractual arrangements between the parties. Indeed, there is support for this view in other writings of Professor Goode (see '*The Power to Dispose under the Cape Town Convention and Aircraft Protocol*', Cape Town Convention Journal (2017) fn.7, which distinguishes the general situation from that in which conditions are attached to the grant of the sub-lease).

110. Although the Defendants have (as noted above) observed that there are differences in the terms of the instruments, by recitals (D) and (F) of the MPAs, the parties expressly record their agreement that the charterparties were to be "on back-to-back terms". It is an agreed fact that the Vessels were "let by the Claimants on a sequence of back-to-back charterparties". I agree with the Owners that the commercial purpose behind the MPAs was to enable them to enforce and recover the Vessels, so that they were not disadvantaged by the need to put in place a chain of intra-group back-to-back charters. In this regard, counsel for the Defendants at the earlier hearing before Foxton J described (correctly in my view) the MPAs as "… the overarching agreement between the parties which you might think was intended to deal with the problem which arises here, which is simply that the Charterer is not actually in possession and control of the vessel and therefore not in a position to

deliver the vessel itself". It is also relevant that clause 37 and clause 38(iv) of the Head Charters provide that Owners are entitled to possession and recovery of the Vessels, which must be redelivered "free of any sub-charter".

111. So this is the context in which the point arises. The right to redelivery on termination is an essential part of financing arrangements of this kind. I would respectfully doubt in the present case, where the MPAs record expressly that the charterparties were to be "on back-to-back terms", that on termination of the Head Charters there is any room for a relationship of bailment to arise directly between the original bailor and the sub-bailee or sub-sub bailee. I regard the *BMBF* case (see above) in which Etherton J said at [148] that any entitlement of the sub-bailee to retain possession must "turn upon the contractual provisions contained in the Headlease and the Sublease" as authority to the contrary. It is not by any means a straightforward point, because it is correct to say that each of the charters creates possessory rights. But on balance, I accept the Owners' submission that when the Head Charters were terminated, the rest of the charter chain should be treated as coming to an end also. The foundation on which the possessory rights created by the Sub-Charters and the Sub-Sub Charters was built had gone. This conclusion best reflects the particular contractual arrangements between the parties in this particular case.

(ii) Owners' case that the Defendants are obliged to redeliver Vessels under MPAs

112. Given the conclusion just stated, the Owners' case that the Sub-Charterers and Defendants are in any event obliged to redeliver the Vessels under MPAs does not need to be decided, nor does the Defendants' case as to what it contends are defects in the notices given, and the vitiating effect of delay need to be decided. However, these points were argued at trial, and I should deal with them.

113. I do not think it is in dispute that under the terms of the MPAs, the Owners are entitled to instruct the Sub-Charterers and Sub-Sub Charterers to redeliver the Vessels and they are obliged to comply with the Owner' instructions, though it is in dispute whether such instructions were validly given. In any event, I so find. I have set out earlier in this judgment the terms of the MPAs relied on by the Owners in their 31 October 2023 notices to the Sub-Charterers and Sub-Sub Charterers.

114. In summary, as regards the September 2023 notices addressed to the Charterers, the Defendants argue that these were ineffective as regards the Sub-Charterers and Sub-Sub-Charterers because (1) they were addressed to the Charterers and copied to the other Defendants, (2) they referred exclusively to the Head Charters (and did not refer to the Sub-Charters, Sub-Sub-Charters or Time Charters), and (3) they called on the Charterers (and not the other Defendants) to comply with terms and conditions in the Head Charters (and not the Sub-Charters, Sub-Sub-Charters or Time Charters) following termination of the Head Charters (and not the Sub-Charters, Sub-Sub-Charters or Time Charters).

115. The Owners seek to meet these objections by reference to clause 10 of the MPAs, but as mentioned above, the MPAs are not referred to in these September notices at all. In any case, as the Defendants point out, the notices do not specify what action is required of the Sub-Charterers and Sub-Sub-Charterers, and do not in terms direct the Sub-Charterers and Sub-Sub-Charterers to redeliver the Vessels.

116. The September 2023 notices make sense on the assumption that the termination of the Head Charters brings the Sub-Charters and Sub-Sub Charters to an end also – as I have found that they do. But if that is not correct, I agree with the Defendants, for the reasons that they give, that although these notices do make perfectly clear to the Sub-Charterers and Sub-Sub-Charterers that the Owners' intention is to terminate these charters and require the redelivery of the Vessels, they do not actually require the Sub-Charterers and Sub-Sub-Charterers to take any action in that regard. In short, I think something more specific is needed for this purpose.

117. As noted under the findings of fact, and summarised by the Defendants, these notices were followed by notices given by the Owners dated 31 October 2023 served on 1 November 2023 on:

    (1) The Charterers under clauses 10.4.5, 10.6.2, 10.7.1 and/or 10.8.1 of the MPAs requiring the Charterers immediately to terminate the Sub-Charters on the grounds of a Change of Control Event (clause 40(1)(m) of the Sub-Charters) and Impossibility (clause 40(1)(f) of the Sub-Charters) and requiring immediate redelivery of the Vessels;

(2) The Sub-Charterers under clauses 10.4.5, 10.6.2, 10.7.1 and/or 10.8.1 of the MPAs, requiring the Sub-Charterers immediately to terminate the Sub-Sub-Charters on the grounds of a Change of Control Event (clause 40(1)(m) of the Sub-Sub-Charters) and Impossibility (clause 40(1)(f) of the Sub-Sub-Charters) and requiring immediate redelivery of the Vessels;

(3) The Sub-Sub-Charterers under clauses 10.4.5, 10.6.2, 10.7.1 and/or 10.8.1 of the MPAs, requiring the Sub-Sub-Charterers to redeliver the Vessels (but not requiring the Sub-Sub-Charterers to terminate the Time Charters which were entered into with the Owners' consent pursuant to clause 57(a) of the Head Charters though the Time Charters are 'Assigned Contracts' under the MPAs).

118. The Defendants contend that the covenants in clause 10 of the MPAs relied on in these further notices did not apply because compliance with the Owners' specifications and/or directions pursuant to them (i.e. to terminate the Sub-Charters and/or Sub-Sub-Charters) would amount to a wrongful repudiation of the Sub-Charters or the Sub-Sub-Charters.

119. In that regard, the Defendants say, two sub-issues arise, being (1) whether the covenants in clause 10 of the MPAs apply if compliance with them would amount to a wrongful repudiation of the Sub-Charters or the Sub-Sub-Charters, and if so (2) would compliance with the Owners' specification and/or direction to terminate the Sub-Charters and/or the Sub-Sub-Charters amount to a wrongful repudiation of those charters?

120. The first question is put as a point of principle – but while the answer in the abstract is likely to be in the negative, it has to be seen against the background of the back-to-back nature of these charterparties, which is fundamental to these transactions. But as I understand the way the question is framed by the Defendants, it turns on the meaning of the word "permission" in the proviso to clause 10.4.5 of the MPAs (this is set out above). In short, they contend that the word "permission" in the proviso is not broad enough to apply where termination was specified (under clauses 10.3.3 or 10.6.2) or directed (under clause 10.7.1) by the Owners. On this point, I am inclined to agree with the Owners that the better construction of this provision is that permission includes permission plus instruction, or, to put it slightly more fully, that

construed in the light of the agreement as a whole, the term "permission" in context includes the case where permission comes out of a direction or instruction as it did in the present case.

121. As to the second question, the Defendants' case is one of affirmation or election through delay. It is contended that the Charterers and Sub-Charterers have lost the right to terminate and/or elected not to terminate the Sub-Charters and/or Sub-Sub-Charters on the occurrence of the Change of Control Event in clause 40(1)(m) of those charters as a result of the delay between the occurrence of the Change of Control event on 12 July 2023 and the Owners' specification and/or direction under clause 10 of the MPAs to terminate the Sub-Charters and Sub-Sub-Charters on 1 November 2023 (i.e. nearly 4 months later). The Charterers and the Sub-Charterers, it is said, plainly knew of the Change of Control Event the moment it occurred on 10 July 2023. If the Charterers and Sub-Charterers had terminated respectively the Sub-Charters and the Sub-Sub-Charters on or shortly after 1 November 2023 in accordance with the Owners' notices, such terminations would have been neither prompt nor within a reasonable time after the occurrence of the Change of Control Event. The legal effect of that four-month delay (during which period the Charterers and the Sub-Charters continued to accept payment of hire) is that the Charterers and the Sub-Charterers lost the right to terminate the Sub-Charters and the Sub-Sub-Charters either (a) on the basis of an implied term (necessary to give the Sub-Charters and the Sub-Sub Charters business efficacy) that the Charterers and Sub-Charterers would exercise any option to terminate them within a reasonable time or (b) by reference to principles of election: see *The Northern Pioneer* [2003] 1 Lloyd's Rep. 212 at [38]-[56], and *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 at 400.

122. However, the reliance on a four month period of delay has to be seen in the light of the finding of the Tribunal in paragraph 45 of the Award that it was reasonable for the Charterers to wait until September before exercising their right to terminate. I agree with the Tribunal's findings as follows:

> "Certainty that the Change of Control had in fact taken place was of critical importance to Owners before they exercised their right to terminate the BBCs, given the potentially very serious consequences if they got it wrong and terminated the BBCs prematurely.

> Notwithstanding our conclusion that the Termination Event had occurred on 10-14 July 2023, and whatever confidence Owners may have felt that the shareholding change was going ahead, they could not be certain that it had been finally effected until the Milan Register was updated on 30 August 2023 and they were advised of this fact by their Italian lawyers, which they were very promptly on Saturday 2 September 2023. Although the Italian law evidence of the importance of the updating of the Milan Register as regards a third party's deemed knowledge of the transfer is not in itself 1egally determinative on the issue of knowledge, it forms an important part of the evidential background that Owners were being advised that they could not be sure about, and therefore could not reliably or safely act on any shareholding change until it had been updated on the Register."

123. Clearly, the fact that it was reasonable to wait for certainty applies to the Sub-Charterers and Sub-Sub-Charterers equally who were simply part of the chain. It is true that the notices of termination of 5 September 2023 to the Charterers (copied to the Sub-Charterers and Sub-Sub-Charterers) followed within a few days of certainty, whereas nearly two months ensued before separate notices were served on Sub-Charterers and Sub-Sub-Charterers. But given the structure of the transaction, this could not possibly have caused the Sub-Charterers and Sub-Sub-Charterers to entertain any belief that the Owners intended the Sub-Charters and Sub-Sub-Charters to continue. Further, there were consequential notices which followed the notices of 5 September 2023 including a notice of 11 September (again copied to the Sub-Charterers and Sub-Sub-Charterers) by which the Owner declared that the Vessel was to be redelivered to Sete Port, France. Nor do I think that the Sub-Charterers and Sub-Sub-Charterers can pray in aid the lateness of the notices as showing that such terminations would have been neither prompt nor within a reasonable time after the occurrence of the Change of Control Event. If not earlier, at that point in time they had to be actioned.

124. The reality of the position was plain. As the Owners put it, it is unrealistic to submit that they have lost the right to terminate either by effluxion of time or election in circumstances where the Sub-Charterers and Sub-Sub-Charterers were being repeatedly told the vessels had to be redelivered. Any acceptance of hire does not alter that conclusion on these facts.

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125. In the circumstances, I need not consider the Owners' case on the anti-waiver provision in clause 51 of the Sub-Charters and Sub-Sub-Charters.

126. A separate point of defect is raised on the basis that the notice of 31 October 2023 requiring the Sub-Sub-Charterers to redeliver the Vessels did not require the Sub-Sub-Charterers to terminate the Time Charters. These it is said were entered into with the Owners' consent pursuant to clause 57(a) of the Head Charters, the Time Charters being 'Assigned Contracts' under the MPAs.

127. This was not a direction which the Owners were required to give, in my opinion. I accept the Owners' contention that the Sub-Sub-Charterers had it within their power to redeliver the Vessels because, the time charters not being demise charters, their master and crew were on board the vessels. It is a matter for the Sub-Sub-Charterers how they comply with the obligation to redeliver the Vessels, and whether that would in practice need the termination of other contracts is not a matter for the Owners to direct.

128. I find that the Owners are entitled to orders requiring the Defendants (except the D1, the Charter Guarantor, whose position is set out below) to redeliver the Vessels to the Owners' immediately.

<u>The claim for relief against forfeiture</u>

129. The Charterers' claim for relief against forfeiture was subject to detailed consideration in the arbitration and refused by the arbitral Tribunal. The claim is made in these proceedings by the Sub-Charterers and Sub-Sub Charterers who (as explained previously) were not parties to the arbitration agreement in the Head Charter.

130. The Owners seek to rule out the claim *in limine* on essentially the same grounds as their abuse of process argument – I disagree, on grounds set out above in relation to that argument which I need not repeat.

131. I also reject the Owners' submissions that the claim for relief against forfeiture falls outside these proceedings as arising under charterparties to which the Owners are

not privy. I agree with the Defendants that the substance of the matter arises in these proceedings since these were back-to-back charters, and the court's jurisdiction arises, and is invoked, under the MPAs.

132. The parties, like the Tribunal, have approached this issue by distinguishing the question of the court's jurisdiction to grant relief against forfeiture in this case from the question whether the court should exercise its discretion to grant relief from forfeiture and, if so, on what terms. I shall take the same course.

(i) Jurisdiction

133. As to the court's jurisdiction to give relief, the Sub-Charterers' and Sub-Sub-Charterers' submissions are in summary as follows. Their contracts, as charters by demise involving the transfer of possessory rights, are contracts to which the doctrine of relief against forfeiture applies. The rights to terminate the Sub-Charters and Sub-Sub-Charters were part of a chain of bareboat charterparties that were, so far as the Owners were concerned, finance leases. As explained by Hamblen J in *Celestial Aviation v. Paramount Airways* [2011] 1 Lloyd's Rep. 9 at [53], the lessor's interest under a finance lease such as the Charterparties is "in payment of the rent rather than return of the chattel. In substance it is more of a security interest than an ownership interest". There is no rigid rule that relief is available only if the forfeiture is in response to a breach, and it has been assumed that the forfeiture jurisdiction may operate even if, for example, the termination of a lease is seen as arising from an event other than D's breach (*Snell's Equity* (34th ed, 2020) at 13-025). It is not wrong in principle for the court to impose new contracts on the Owners with the Sub-Charterers or the Sub-Sub-Charterers. The court does have inherent equitable jurisdiction to grant relief from forfeiture to the Sub-Charterers or Sub-Sub-Charterers and, if relief is granted, to instate a new bareboat charter with the Owners on such terms as the court in the circumstances thinks fit. The terms of the charters do not preclude it, neither does legal policy.

134. As to the court's jurisdiction to give relief, the Owners' submissions are in summary that there is no jurisdiction because (1) of the fact that the parties expressly agreed that no relief from forfeiture should be permitted under the terms of relevant contracts, (2) similarly, the terms and nature of these bespoke, commercial contracts

(as a matter of legal policy), (3) of the fact that the termination did not arise on breach, but upon the occurrence of an event giving rise to an option to terminate, (4) of the fact that the termination right was not intended to secure performance of an obligation, (5) of the fact that neither the Sub-Charterer nor the Sub-Sub-Charterer is suggesting that the supposed 'breach' can or will be remedied through the reversal of the Change of Control, meaning that the Court will be required to effectively rewrite the parties' bargain, and (6) a new contract cannot be imposed upon the Owners.

135. These submissions raise points of possible complexity which do not arise for decision in view of my conclusion on discretion. I shall therefore adopt the same course as the Tribunal, and proceed on the assumption that there is jurisdiction to grant relief against forfeiture on the present facts without deciding the point. In any case, I have kept in mind the decisions that seem most directly relevant, particularly *The Jotunheim* [2005] 1 Lloyd's Rep. 181, Cooke J, *Celestial Aviation Trading 71 Ltd v Paramount Airways Pvt Ltd* [2011] 1 Lloyd's Rep. 9, Hamblen J, and *The Courage and The Amethyst* [2022] EWHC 452 (Comm) at [156], Sir Andrew Smith, (not challenged on this point on appeal). There is also important general guidance in the decision of the Privy Council in *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2016] AC 923, and the decision of the Supreme Court in *Manchester Ship Canal v Vauxhall Motors Ltd* [2020] AC 1161.

136. There is a caveat, however, concerning one point as to the terms of any relief which is raised by the Defendants (and which did not arise in the arbitration). In the landlord and tenant context, the Defendants point out that the court has long had a jurisdiction to grant relief from forfeiture to underlessees of land on conditions as to the execution of a new deed or other document between the lessor and the under-lessee as the court in the circumstances of each case may think fit. This has been extended to leases of chattels by cases such as *BICC plc v Burndy Corpn* [1985] Ch. 232. On this basis, it is submitted that the court has inherent equitable jurisdiction to grant relief from forfeiture to the Sub-Charterers and Sub-Sub-Charterers and, if relief is granted, to instate a new bareboat charter with the Owners on such terms as the court in the circumstances thinks fit. The new charter would be on materially the same terms as the Head Charters (including as to term and rate of hire but without

the purchase right at the end of the charter term). That, it is submitted, will put the Owners in no worse position and in some respects a better position because they will get the Vessels back at the end of the 12-year term.

137. The Owners submit there is no such jurisdiction in the court, and to grant it would entail the court rewriting the parties' contract. In this respect, they rely on well-known authority emphasising the need for certainty in commercial transactions: e.g., *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 1 QB 529 at 540.

138. The Defendants did not cite any authority in support of its case in this respect, or indeed any other material which suggested that the court had adopted this course before. This is not surprising. In my view, cases contemplating the execution of a new deed or other document between the lessor and the under-lessee in the case of underleases of land (or chattels) should be considered with caution in cases involving a series of ship charters where the law must operate in a very different commercial context. In a sense, relief against forfeiture involves in its nature the adjustment of contractual rights by the court. But the interposition by the court of a new charter between Owners and Sub-Charterers or Sub-Sub-Charterers raises some difficult questions and is, in my view, unlikely to be ordered whatever view is taken as to the grant of relief.

(ii) Discretion

139. The Defendants' case is that the court should exercise its discretion to order relief from forfeiture because it would be unconscionable if the Vessels were forfeited in circumstances where the drastic consequences of forfeiture for the Sub-Charterers and the Sub-Sub-Charterers, and the significant benefit of forfeiture for the Owners, are out of all proportion to any legitimate benefit that the Owners would enjoy if the Charter Guarantor did not cease to hold 77.4% of the shares in the Sub-Charterers. In relation to the discretion to grant relief from forfeiture, and applying *Shiloh Spinners v Harding* [1973] AC 691 at 723-33 to the present case:

(1) The Owners have suffered no material detriment as a result of the Charter Guarantor's shareholding in the Sub-Charterer reducing from 77.4% to 51%. If

MSC / SAS had acquired 22.6% (rather than 49%) in the shares of the Sub-Charterers, the position (with regard to security for performance of the Charterparties) would be as it is now. The Charter Guarantor remains the majority shareholder and in control of the Sub-Charterers.

(2) If anything, the Owners' position is improved because the MSC Group has injected €150 million into the Sub-Charterers to enable the Sub-Charterers to continue in business under a Concordato plan approved by the Italian court while the Charter Guarantor remains the majority shareholder.

(3) The Sub-Charterers and the Sub-Sub-Charterers will suffer irremediable prejudice if the Vessels are forfeited because they will be required to pay the Termination Sums under the Charterparties (circa €80 million) representing all the hire that would have been payable under the Sub-Charterers and the Sub-Sub-Charters up to the end of the charter periods and forfeiture would result in the Sub-Sub-Charterers being in repudiatory breach of the Time Charters with DFDS with the risk that a substantial claim for damages against the Sub-Sub-Charterers which they may – or may not – be able to pass up the line depending on whether the Charterers and Sub-Charterers were, respectively, entitled to terminate the Sub-Charters and/or the Sub-Sub-Charters. Forfeiture would also risk serious harm to the reputation and standing of the Sub-Charterers and the Sub-Sub-Charters in the market.

(4) By contrast, if the Vessels are forfeited, the Owners will obtain the Termination Sums (€80 million) and the ability to earn hire from the alternative employment of Vessels during the remaining 7 years of the Charterparty periods and thereafter to the end of the economic life of the Vessels.

(5) The Change of Control Event did not come about as a result of any wilful default on the part of the Sub-Charterers or the Sub-Sub-Charterers.

(6) It is accepted that considerations of commercial certainty are relevant to the exercise of discretion. However, commercial certainty is only one factor to weigh in the balance. Here it is outweighed by the disproportionality of the benefits to the Owners if they are allowed to forfeit, compared with the benefits

which they would receive if the Sub-Charters and the Sub-Sub-Charters ran their course.

140. The Owners in response endorse and rely upon the Tribunal's reasoning for refusing relief in their First Award, and the recitation of the Owners' arguments at that stage: see paragraphs 89 to 94. The position of the Sub-Charterers and Sub-Sub-Charterers is, they contend, even less meritorious than that of the Charterers, in view of the facts that:

(1) The Sub-Charters and Sub-Sub-Charters are operating, not financing, leases. These parties are merely losing the right to operate the Vessels for a further 6-7 years.

(2) The Onorato family, which controls these entities, has made clear that it will not stand by its word, and will not comply with awards, judgments or even promises provided to a very experienced London arbitration tribunal. The Owners have lost faith in the willingness of all of these entities to play by the rules, now or in the future. The Court should not force the Owners – least of all on equitable grounds - to continue in a relationship in those circumstances.

(3) The new shareholder (SAS) has commenced legal proceedings in Italy against Owners. That is based upon documents and information used in breach of the confidentiality obligations in the arbitration; contains a number of factual inaccuracies; and is wholly without merit.

141. My conclusion on this issue is as follows. The Owners' three supplemental points are factually (and in the case of (1) legally) disputed by the Defendants. I do not think that they carry much weight on the present facts.

142. The key point, in my view, is the Defendants' case that the effects of Termination are disproportionate compared to the effect of the terminating event relied on by the Owners, namely D1's shareholding in the Sub-Charterer (D3) reducing from 77.4% to 51%. D1 (the Charter Guarantor), it will be recalled, is the holding company for the Onorato group, and the Sub-Charterer is an operating company. Before the

Tribunal, the Charterers put the case in terms of windfall. They submitted that "Owners will acquire a windfall, receiving benefits substantially in excess of those which would accrue if the BBCs [bareboat charters] simply ran their course. These consist of (a) the Termination Sums (circa €80 million representing all of the hire that would be payable under the BBCs), plus (b) the value of the Vessels (circa €61-65 million for each Vessel 10) and (c) the ability to earn hire during the remaining seven years of the Charterparty periods (and thereafter to the end of the economic life of the Vessels)".

143. The case is now (and probably more appropriately) put by the Defendants in terms of disproportionality – and the economic effect is disproportionate because, to put it another way, this is a security context, the Vessels being security for the price of the Vessels, but upon this Termination (if relief is not given) on the Owners' case the charterers lose the Vessels but remain liable for the price, and further the Owners can lease the Vessels out on the market again free of the charterers' interest. As to the latter point, the Owners say that it is not possible to predict future rates – it is also right to say that the Termination Sums have not been paid. Nevertheless, the point is there, and in my view it comes broadly within the ambit of a situation in which in some limited circumstances relief would be given by the court.

144. I observe, incidentally, that the case before the Tribunal included how it came to be that the Onorato group entered into this arrangement with MSC given the drastic implications. The Tribunal did not accept an argument that the Owners had misled the Charterers as to the stance it would take. This has not been further explored before me.

145. The heart of the matter on this key point is expressed in paragraph 93 of the Award as follows:

> " … even if there may be some force in Charterers' point that the capital injection by the MSC Group has improved Owners' position, it is our view that this cannot permit Charterers to effectively re-write the parties' bargain. The parties agreed that the Onorato family would retain a 77.4% shareholding in Sub-Charterers, on pain of termination. It is not for us to assess the commercial value or importance to Owners of that bargain, nor to evaluate the comparative commercial value to them of any continuing bargain in which that shareholding is reduced

> to 51 %. That was what was agreed. Even if this particular termination provision might, on extreme facts, be susceptible as a matter of jurisdiction to relief from forfeiture, Charterers' first proposal that the contracts should be performed from the current starting point of a 49% shareholding in Sub-Charterers by an MSC subsidiary is something entirely different to that which the parties originally contracted for. Owners did not agree to that. And it seems to us that an entity which is 100% or 77.4% family-controlled may well be rather different from one which is only 51 % family controlled, particularly when the 49% is concentrated in the hands of a major organisation like MSC which is likely to have its own commercial interests and agenda very much in mind."

146. In short, the Owners had a legitimate interest in the shareholding in the sub-charterers, and it cannot be said that a reduction in the controlling shareholding from 77.4% to 51% was immaterial – it may be very material. But the Owners do not have to justify the term or its effects. I accept that there was no wilful default on the part of the Defendants, and it may seem a hard result, but these are international transactions between commercial parties, and it was what they agreed. The proportionality of the result has to be measured against what they agreed would be the result. An argument that the Owners are actually better off because of the cash injection into the group does not change the position. As the arbitral Tribunal put it, " … these are bespoke commercial contracts negotiated between sophisticated counterparties advised by lawyers. Considerations of commercial certainty are very important and the case law demonstrates that relief from forfeiture is (rightly) rarely granted in bespoke contracts negotiated between experienced commercial counterparties". That was the Tribunal's view, and I agree with it.

147. The passage from the Award quoted reflects the fact that the Charterers put to the Tribunal a proposal for a renegotiation with the Aponte family (who control the MSC group) to resolve the diminution of the shareholding, and presumably resolve the issue between the parties. As to that the Tribunal said:

> " … particularly significant in our view, is the fact that Charterers have not taken any, let alone any adequate steps to remedy the event giving rise to the forfeiture (i.e., the Change of Control Event). If, as was Mr Onorato's evidence, the 'family relationship' between the Onorato family and the Aponte family (who control MSC) was so strong that he really thought that MSC would be very happy to find a solution, we would have expected Charterers to have raised the issue with MSC

> (who it was Mr Onorato's evidence were aware of the arbitration with Owners) and to have already come up with a workable and properly evidenced solution well before the hearing. However, Mr Onorato's evidence was that a dialogue would only commence once the Sub-Charterers had exited the Concordato. His optimism seemed to us little more than an exercise in wishful thinking. The suggestion was that MSC might somehow be prepared to 'trade' a 49% share in Sub-Charterers for a 49% share in the family holding company but it seems most unlikely to us that the Onorato family would want this, and in any event, Mr Aponte's attitude to this is pure conjecture. …"

The Tribunal's scepticism appears to have been justified – at the hearing no renegotiation was suggested on behalf of the Sub-Charterers or Sub-Sub-Charterers as an option in this case.

148. Accordingly, on the assumption that the court has jurisdiction, in the court's discretion, the application by the Sub-Charterers and Sub-Sub-Charterers for relief against forfeiture is refused.

149. As mentioned, the transactions can be considered as the giving of security to secure obligations in the context of financing. At the hearing, I raised the question whether this may affect the present case. A principle of the law of secured transactions is that the mortgagee's interest in the security is limited to the amount of the advance and costs, etc, and the balance has to be accounted for to the mortgagor. However, neither party has raised this point, and its relevance or non-relevance was not explored at the hearing, and beyond raising it, I do not say anything further.

<u>Relief sought by Owners against Charter Guarantor</u>

150. As set out above, under the Charter Guarantees, the Charter Guarantor's (D1) promises include obligations to pay sums of money, but the Owners submit that they go beyond that and include express obligations on the part of the Guarantor to perform any obligations under or in connection with the Head Charters if and to the extent they have not been performed by the Charterers. The Owners submit that there is no reason in principle why a guarantor should not be the subject of an order for specific performance. The burden of proving that compliance with a mandatory order would be or is impossible rests squarely on the party asserting its impossibility

and nothing short of impossibility will do. It is submitted there is no reason why the Guarantor should not be required to comply with its contractual obligations.

151. The Charter Guarantor disputes this on the grounds that the relief sought is too vague to be the subject of specific performance, and specific performance by a guarantor of non-monetary obligations is unusual and problematic.

152. I agree with the Charter Guarantor on this issue. As is pointed out on its behalf, it is uncertain what the Charter Guarantor would have to do as a matter of fact to perform the relief sought by the Owners to "compel, cause and/or instruct each of the Charterers, Sub-Charterers and Sub-Sub-Charterers to redeliver the Vessel". Reliance is placed on *Co-Operative Insurance Society Limited v Argyll Stores (Holdings) Ltd* [1997] 2 W.L.R. 898, at 14, and see also Snell's Equity at 17-022. This is not a matter of the guarantor invoking impossibility and bearing the burden of proving it. It is a matter of providing the necessary certainty, and here it is for the creditor to prove its case.

153. Such authority as has been cited to me on this subject relates to the possibility of specific performance of a distinct obligation to be performed by the guarantor provided for in the guarantee itself. The court will not order specific performance of an obligation which, as sought to be imposed on the guarantor, is problematic. In my view, the guarantor's obligations under these guarantees are of a monetary nature in the usual way.

Defendants' claim for an indemnity

154. On my findings, the Defendants are not entitled to an indemnity.

Conclusion

155. For reasons set out above, the Vessels must be redelivered in accordance with the Owners' instructions immediately. The Vessels must also be de-registered immediately from the Italian Bareboat Registry. There has been a long delay already, and the Charterers are in breach of an arbitral award to this effect of 22 December 2023. Now the court adds its order to that of the arbitral Tribunal. The

parties' agreements are subject to English law and jurisdiction. That is the parties' choice, and that is why it falls to this court to deal with the matter.

156. As regards other relief sought by the Owners, the Defendants have objected that matters going to monetary liability need to be proved in the normal way. I doubt that there will be much dispute as to the basic amounts at issue, which were dealt with in the arbitration. But this is an expedited hearing, and the court did not (and this is not a matter of criticism) have quantification matters placed before it in a way that enabled findings. In any case, the Defendants are entitled to put the Claimants to proof.

157. I invite the parties to agree the orders that follow from this judgment, and will hear the parties as to any consequential matters that arise.