CA on appeal from Admiralty (Mr Peter Gross QC sitting as a Deputy Admiralty Judge) before Otton LJ; Waller LJ; Clarke LJ. 31st March 1999.

LORD JUSTICE OTTON: I will ask Lord Justice Clarke to give the first Judgment.

LORD JUSTICE CLARKE:

INTRODUCTION

1. This is an appeal from the decision of Mr Peter Gross QC, sitting as a deputy judge of the Admiralty Court on 22 March 1999, when he refused the application by the defendants to release the ship "TYCHI" from arrest.

2. The plaintiffs are MSC Mediterranean Shipping Company, SA ("MSC"). This is an action in rem in which the defendants are named as "*The Owners of the Ship 'TYCHI'*". It is common ground that the beneficial owners of the TYCHI when the action was brought were Polish Ocean Lines ("POL"). On 17 March 1999 MSC issued a writ in rem and arrested the TYCHI. On 19 March POL issued a notice of motion seeking various orders, including an order that the warrant of arrest be discharged and that the TYCHI be released from arrest. The hearing of the motion began on 19 March and concluded on 22 March 1999 when the judge announced his decision to refuse the relief sought. He gave his reasons on 26 March and he also gave POL leave to appeal. In the meantime, MSC had issued a second writ in rem on 22 March 1999. It is now 31 March 1999 and the last day of term. I would have wished to take more time to consider this judgment, but it seems right that both the decision and the reasons should be given today.

THE ISSUES

3. MSC's case is that POL are liable to them in personam, either under the terms of the contract or contracts or by way of damages. They say that they are entitled to bring their claim or claims by an action in rem against the TYCHI. POL say that they are not the person who would be liable to MSC in an action in personam because that person would be POL Atlantic. They rely upon an alleged novation. That issue has not yet been considered by the judge and is not relevant on this appeal. Both before the judge, and before this court, the argument has proceeded on the assumption that the person who would be liable to MSC in an action personam is POL. The question is whether on that assumption MSC were entitled to bring this action in rem against the TYCHI.

4. Sections 20 and 21 of the Supreme Court Act 1981 provide, so far as material, as follows:

   "The Admiralty jurisdiction of High Court

   20(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say-

   (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2)...

   (2) The questions and claims referred to in subsection (1)(a) are-...

   (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use of hire of a ship....

   21 ....

   (4) In the case of any such claim as is mentioned in section 20(2)(e) to (r) where-

   (b) the claim arises in connection with a ship; and

   (c) the person who would be liable on the claim in action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

   an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against-

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

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

5. In the light of those provisions, it is common ground that in the circumstances of this case, in order to be entitled to bring action in rem against the TYCHI, MSC must establish:

   (1) that the claim arises out of an agreement relating to the carriage of goods in a ship or to the use of a ship;

   (2) that the claim arises in connection with the ship;

   (3) that POL would be liable on the claim in an action in personam;

   (4) that when the cause of action arose POL were the charterers of the ship; and

   (5) that at the time when the writ was issued POL were the beneficial owners of the TYCHI.

6. It is important to note that MSC must establish all five points. It is now accepted by POL that MSC can establish points (1) and (2), although they were not accepted before the judge. As to points (3) and (5), I have already indicated that it is to be assumed that POL would be liable to MSC in an action in personam and that it is common ground that POL were the beneficial owners of the TYCHI when the writ was issued. The question is whether MSC have established point (4).

7. MSC's case is not that the TYCHI was the ship or ships in connection with which the claim or claims arises or arise. She is not therefore said to be "that ship" within the meaning of section 21(4)(i) but "*any other ship*" within the meaning of section 21(4)(ii).

8. I shall consider each of the issues in turn, but they depend to a greater or lesser extent upon the terms of the contract or contracts between MSC and POL.

THE CONTRACTS

9. The principal contract between MSC and POL is dated 27 May 1993. It is entitled "Memorandum of Decisions Among ACL/MSC/POL Regarding Their Slot Charter Agreement Under the Trans Atlantic Agreement FMC No 202-011375", ("MOD"). It is a tripartite agreement, although we are not concerned with ACL (Atlantic Container Line AB). The definitions clause in the MOD provided, so far as material,

"Definitions

In this MOD and the Schedules hereto:

....

Containership means Those vessels identified from time to time in Schedule 1.

Container Operator means the party which is the carrier under the bill of lading or other contract of carriage in respect of goods.

Slot means the space on any Containership for the equivalent of a Twenty Foot Unit (TEU) (Loaded or empty).

Vessel Operator means the Party supplying the Containership."

10. MSC and ACL were the vessel operators and POL was the container operator. The MOD further provided, so far as material:

"1. TRADE:

The Trade.... is the ocean carriage of cargo between ports on the Atlantic Coast of the United States, and the Atlantic Coast of Canada, on the one hand, and the ports of Le Havre, Antwerp, Rotterdam, Bremerhaven, Hamburg and Felixstowe, on the other hand....

4. SERVICE

4.1 The Parties agree that they shall offer two ocean common carrier container services in the Trade as follows:

(a) a service at not greater than 7 day intervals provided by ACL constituting 'Service A'; and

(b) a service at not greater than 7 day intervals provided by MSC constituting 'Service M'.

....

4.2 The Containerships to be operated by the Parties in the Trade shall be compatible and homogeneous within each Service.

....

Each Party may substitute another containership for any committed containership, provided always that:

(a) its classification, speed, capacity, technical compatibility and any other relevant data do not significantly affect the homogeneous character of the fleet in each Service;

(b) the number of Containerships remains unchanged; and

(c) the sailing schedule remains unchanged.

5. VESSEL SCHEDULING :

5.1 Ad-hoc Schedule Changes :

If for any reason other than those specified in sub-clause 5.2, a Vessel Operator believes it is in the Parties' joint interest to omit a port of loading or discharge, add a port of loading or discharge, change port rotations, or make similar or related scheduling changes pertaining to a particular voyage, and such action would represent a change in the sailing schedule, it shall consult with the other Parties in order to obtain their consent to such change, which shall not be unreasonably withheld....

6. SLOT CHARTER/SPACE ADMINISTRATION :

....

6.1 Slot Chartering :

POL will charter from ACL 350 TEUs per sailing in each direction on a 'whether used or not' basis at the Basic Slot Price per Schedule 2.

POL will charter from MSC 450 TEUs per sailing in each direction on a 'whether used or not' basis at the Basic Slot Price per Schedule 2.

Notwithstanding the above financial allocation, the vessel operators will have the right to swap up to 100 TEUs of POL cargo on each other's vessels whenever necessary.

....

6.3 Compensation for Unavailable Slots :

If ACL or MSC cannot make the weekly ocean Slots available to the other Parties as guaranteed due to vessel deficiency, then the Vessel Operator shall be liable to the Container Operators for the total sum of Unavailable Slots multiplied by the then current Basic Slot Price, as set forth in Schedule 1, unless agreed otherwise.

....

9. SUB-CHARTERING:

....

Space available to each Container Operator on the Containerships of the Vessel Operator may not be sub-chartered by those Container Operators to a third party, unless agreed to by the Vessel Operator.

....

13. <u>SLOT CHARTER PARTY</u> :

The provisions of the Slot Charter Party attached as Schedule 4 are hereby incorporated in this Memorandum, and the definitions set forth herein shall be equally applicable to the Slot Charter Party.

<u>SCHEDULE 1</u> :

<u>CONTAINERSHIPS/CAPACITY/SCHEDULES</u>:

1.1 <u>CONTAINERSHIPS</u>:

...

<u>SERVICE M -MSC</u>

.... Panamanian 1550 TEUS

Giovanna or TBN Panamanian 1850 TEUS

Frederica or TBN Panamanian 1650 TEUS

Daniela or TBN Panamanian 1650 TEUS

<u>SCHEDULE 2</u> :

1. <u>Financial Arrangements</u> :

<u>Basic Slot Price</u> :

The Basic Slot Price for the named direct discharge ports on A and M Services shall initially be set at $275 per TEU one way for a loaded TEU either Eastbound or Westbound.

The Basic Slot Price shall be reviewed periodically by the Parties....

<u>Payment Procedures</u> :

....

2. ACL/MSC will extend to POL a credit term of 21 days after sailing from the first outbound port for full settlement of all slot costs and other charges relating to cargo on that voyage.

....

3. Late payments shall be subject to interest .... ACL/MSC shall in addition to any other rights granted to them under the memorandum to which this is a schedule or inuring to their benefit by operation of law, statutory or common, have the right to exercise their liens on POL's goods and containers provided for pursuant to Section 17 of the Slot Charter Party attached hereto as Schedule 4.

<u>SCHEDULE 4</u> :

<u>SLOT CHARTER PARTY</u> :

1. <u>Employment</u>:

The Containerships shall be employed in lawful trades only and always within the Institute Warranty Limits ....

<u>Dangerous, Obnoxious Goods and Explosives</u> :

Dangerous, obnoxious goods or explosives shall not be shipped ....

The Container Operator shall indemnify the Vessel Operator .... against all consequences of the shipment of any such goods....

<u>Documentation and Cargo Procedure</u> :

The Container Operator will comply with the general procedures in force with the Vessel Operator for booking and delivering cargo at each loading and discharging port ....

The Vessel Operator will cooperate fully with the Container Operator by providing the latter with all necessary information.

The Container Operator will issue its own bills of lading to its clients....

<u>Bills of Lading</u> :

The Container Operator warrants that any bill of lading issued in respect of the carriage of its goods and containers under this Slot Charter Party shall contain or be deemed to incorporate the following clauses:-

A Clause Paramount applying the Hague or Hague Visby Rules or the Carriage of Goods by Sea Act, making either of these mandatorily applicable.

A 'New Jason' Clause

A 'General Average' Clause providing for adjustment at a port or place at the option of the Carrier or actual Carrier according to the York-Antwerp Rules 1974 as amended 1990 or any subsequent amendment thereto.

A 'Himalaya'.... Clause....

<u>Accounting</u>:

....

For Bills of lading issued by the Container Operator with either 'freight prepaid' or 'freight collect' remarks .... it is understood and agreed that in a case of failure by the Container Operator to pay the freight under this agreement the Vessel Operator shall have an absolute lien on the containers, goods and upon all sub freights and/or sub-hire for unpaid hire....

9. <u>Cargo Claims</u> :

Cargo claims are to be dealt with by the party having issued the bill of lading....

10. Mutual Obligations :

The Vessel Operator and the Container Operator shall provide each other with such information in relation to any goods and containers shipped under this Slot Charter Party as may reasonably be required in connection with this Slot Charter Party and .... warrant that such information shall be complete and accurate.

11. Indemnity and Agency :

....

12. Responsibilities, Liabilities and Exceptions:

Without prejudice to the provisions of Clauses 1, 10 and 11 hereof, as between the Vessel Operator and the Container Operator, the responsibilities arising out of and in connection with this Slot Charter Party shall be borne and divided as follows:-

The Vessel Operator shall be responsible for the seaworthiness of the Containership in accordance with the Hague Rules and for all purposes in connection with this Slot Charter Party and shall be entitled to the rights and immunities as set out in the said Rules.

Subject to the paragraph immediately above, the Vessel Operator will be responsible for the proper and careful carriage, custody and care of the goods and containers whilst on board the Containership....

14. Liabilities:

The liability of the parties under Clauses 12 and 13 shall in every case be subject to Article III rule 6 bis of the Hague-Visby Rules.

The liability of the Vessel Operator for any loss or damage to or in connection with the goods carried hereunder, shall be subject to Article IV, Rule 5 of the Hague-Visby Rules....

17. Liens:

....

The Vessel Operator shall have a lien .... upon the Container Operators' Goods and Containers for all sums due to the Vessel Operator from the Container Operators....

18. Limitations:

....

19. General Average :

....

23. Law and Arbitration :

This Charter Party shall be governed by and construed in accordance with laws of England.

Any dispute or claim arising out of or in connection with this Charter Party shall be referred to arbitration ...."

11. It appears by that by August 1998 POL owed MSC over US$1.5m under the MOD because on 12 August MSC and POL Atlantic entered into an agreement entitled "New Agreement for Slot Payments" under which provision was made for a reduction in the number of slots to be taken up by POL or POL Atlantic, and for the amount outstanding at 7 August 1998 of US$1,596,066.77 to be paid in five monthly instalments of US$319,213.35, the first instalment to be payable on 31 August 1998 and the last one on 31 December 1998. They also agreed to pay the weekly current invoices as from 10 August 1998 as they fell due.

12. On MSC's evidence the arrears were not cleared; on the contrary, they stood at US$3,614,738.04 as at 12 February 1999. As a result a meeting took place on that day between representatives of MSC, POL and POL Atlantic. An agreement was made on 13 February 1999 by way of addendum to the 12 August 1998 agreement. That addendum provided, inter alia, as follows:

"In view of POL Atlantic's inability to pay the accrued outstanding of US$3,614,738.04 as per the attached statement of accounts and in view of POL Atlantic's momentarily inability to pay the weekly slot costs, MSC agreed to assist POL Atlantic overcoming their cash flow problems as per the following reasons and commitments.

1. Polish Ocean Line and POL Atlantic gave their undertaking to sell the motor vessel M/V TYCHI and/or other assets within a maximum of four to five weeks. The proceeds of such sale will be transferred to MSC up to the total outstanding amount of due invoices at the time when Policy Ocean Lines are ready to make the settlement payment.

2. Until such date, ie up to 12 March 1999 or up to 19 March 1999 at the latest, MSC will accept an on account payment of not less than US$100,000 weekly pending the sale of the above vessel.

3. After the above-mentioned period, Polish Ocean Line will settle the balance due to MSC for the slots carried during the 4/5 weeks less the on account payments as mentioned above.

This agreement has been reached in order the help Polish Ocean Lines overcoming their liquidity problems until the sale of the above vessel has taken place."

13. In addition the number of slots to be taken up by POL was further reduced. Thereafter, on MSC's evidence, one payment of US$100,000, as contemplated by clause 2 of the addendum was made. Thus as at the date of the issue of the writ (17 March 1999), three weekly payments of $100,000 were outstanding.

THE CLAIM

14. In the indorsement to the writ, the claim is put in this way:

"(1) Sums due and owing and/or damages in the like amount, arising out of agreement(s) relating to the carriage of goods on the ships 'MSC LEVINA', 'MSC FLORIDA', 'MERKUR SKY', 'POL AMERICA', 'MSC DYMPHNA', 'MSC

BOSTON', 'MSC JAMIE', MSC SABRINA', MSC NEW YORK', and 'MSC BRIANNA' in the period February-March 1999 and/or

(2) sums due and owing and/or damages in the like amount, arising out of agreement(s) for the use or hire of the said ships in the said period,

the said agreement(s) being a written contract dated at Geneva the 13th day of February 1999 .... amending and/or varying and/or supplementing a charter agreement between the said parties dated 17th May 1993 known as 'Memorandum of Decisions regarding their Slot Charter Agreement under the Transatlantic Agreement'...."

15. In paragraph 3 of Mr Sanford's affidavit to lead the warrant of arrest, he describes the claim in a similar way, although the first part of his formulation is that:

"the Plaintiff's claim is for sums due and owing and loss and damages for breach of contract namely failure to pay US$300,000 which is due to the Plaintiffs in respect of the carriage of goods on the Plaintiff's ships...."

16. He then names the same ships as contained in the writ. The reason why the claim was limited to US$300,000 was that the perceived effect of clause 2 of the addendum, namely that in the period 13 February to 19 March MSC could not claim the amounts outstanding under the MOD or 12 August agreement. The reason for the second writ, which was issued on 22 March, was that after 19 March MSC could on any view again claim the total amounts outstanding. The second writ is indorsed with a claim for over $5m in respect of 20 named vessels. MSC also issued a caveat against the release of the TYCHI so that they will have an opportunity to arrest the vessel in that action if this appeal succeeds.

DISCUSSION

17. I turn to the points which I identified earlier as the points which MSC must establish:

(1) Does the claim arise out of an agreement relating to the carriage of goods in a ship or to the use or hire of the ship?

This point is now conceded by POL. As I understand it, it is conceded on this basis:

(a) The expression "*arising out of*" in section 20(2)(h) of the Supreme Court Act 1981 is to be given its wider meaning (***The Antonis P Lemos*** [1985] AC 711).

(b) By contrast, the expression "relating to" in the same paragraph should be given the narrow, or reasonable narrow, meaning discussed in ***Gatoil International v Arkwright-Boston Manufacturers Mutual Insurance Co*** [1985] 1 AC 255, as explained by Lord Brandon in ***The Antonis P Lemos*** at pages 728 - 730.

(c) The relevant ship need not be named in the contract but may be nominated later: ***The Lloyd Pacifico*** [1995] 1 Lloyd's Rep 54 at 60 - 61.

It is on the basis of those propositions that it is now accepted by POL that MSC's claims arise out of the MOD and/or the August agreement and/or the addendum, and that those agreements relate to the carriage of goods in a number of different ships. That concession is, in my judgment, correctly made since, as the judge pointed out, MSC's underlying claim relates to the actual carriage of specific cargoes in specific ships. Given the concession, it is not however necessary to say more about point (1).

(2) Does the claim arise in connection with the ship?

It is now accepted that the answer to this question is "yes". The claims as put forward, as I understand it, are said to arise in connection with five of the ships referred to in the indorsement on the writ. The plaintiff's evidence is to the effect that the MSC BOSTON was the first ship in respect of which sums were due after the addendum. The five ships were the next five ships carrying relevant containers after the MSC BOSTON. The amount due in each case was just over $70,000. The basis of the plaintiff's case is that the single payment of $100,000 was appropriated to the whole of the sum due in respect of the MSC BOSTON, and to part of the sum due in respect of the MSC SABRINA so the claim for $300,000 arises in connection with those five ships. The position is explained in the most recent affidavits sworn on behalf of MSC. It is not suggested that the five claims cannot be joined on one writ, although the relevant criteria in sections 20 and 21 of the 1981 Act must be separately satisfied in the case of each ship.

(3) Would POL be liable in the claim in an action in personam?

I have already indicated that it is to be assumed that the answer is "yes". Moreover that assumption is made on the basis that POL persisted as parties to all three agreements.

(4) Were POL the charterers of the ship when the cause of action arose?

This question involves a consideration of a number of sub-issues as follows:

(i) What is meant by "the charterer of the ship" in section 21(4) of the 1981 Act? In particular:

(a) is the expression "the charterer" confined to a demise charterer?

(b) can the expression "the charterer" include a slot charterer?

(ii) In the light of the answer or answers to question (i) were POL the charterers of the particular vessel within the meaning of the section?

(iii) If the answer to question (ii) is "yes" were POL the charterers when each cause of action arose?

Question (i)

18. The underlying question is whether POL were the owners or charterers or persons in possession or control of the relevant ship when the cause of action arose. It is not suggested that they were her owners or that they were in possession or control of her. Indeed MSC were her owners or demise charterers. Were POL the charterers? Mr

Young would like to submit that "*charterer"* in section 21(4) means demise charterer or its equivalent. However, he now concedes that that submission cannot succeed in this court because the decision in ***The Span Terza*** [1982] 1 Lloyd's Rep 225 is binding upon us. It is authority for the proposition that "*charterer*" in section 21(4) includes "*time charterer"*. Mr Young does not concede that it follows that charterer includes "*voyage charterer*", but he recognises the difficulty in submitting that although it includes a time charterer it does not include a voyage charterer.

19. In these circumstances I shall only refer briefly to the authorities. There are a number of cases in which it has been said or suggested, and in some cases held, that charterer means demise charterer or its equivalent. They include the dicta of Lord Diplock in ***The Eschersheim*** [1976] 1 WLR 339 at 346; the dissenting judgments of Donaldson LJ in ***The Span Terza ,*** repeated in ***The "Evpo Agnic"*** [1988] 2 Lloyd's Rep 411, albeit without reference to the majority view in ***The Span Terza*** ; and the decision of Li J in Hong Kong in ***The Ledesco Uno*** [1978] 2 Lloyd's Rep 99. Sheen J also reached the same conclusion in ***The Maritime Trader*** [1981] 2 Lloyd's Rep 153, but only because of the dicta in ***The Eschersheim .***

20. The authorities to the contrary include the decision of the majority of Court of Appeal in the ***Span Terza*** , namely Stephenson LJ and Sir David Cairns; the decision of the Court of Appeal in Singapore in ***The Permina 108*** [1978] 1 Lloyd's Rep 211; the decision of Penlington J in Hong Kong in ***The Sextum*** [1982] 2 Lloyd's Rep 532; the decision of Power J in ***The Djatianom*** [1982] 2 HKLR 427; the decision in New Zealand in ***The Fua Kavenga*** [1987] 1 NZLR 550; and most recently the decision of the High Court of Australia in ***Laemthong International Lines Co Ltd v BPS Shipping Limited*** [1997] 149 ALR 675.

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

22. The reasoning of the judges who have adopted that construction is essentially the same. It is demonstrated by Sir David Cairns in ***The Span Terza*** where he said in the case of a time charterer at pages 226 - 227:

"The defendants are the charterers of Neptunia. They would be the persons who would be liable in personam. The claim arises in connection with the ship. The defendants were at the material times the charterers of that ship. They were the beneficial owners of another ship, namely Span Terza, at the time when the action was brought. Therefore the action in rem can be invoked against that ship, Span Terza.

On the literal meaning of the words of the Act, this seems to be an inescapable conclusion.

The only way of escaping from it is by interpreting the word 'charterer' in s.3(4) to mean 'demise charterer'. If it is to be supposed that Parliament meant to be included as the 'person' mentioned in the sub-section only a person who, like the owner or one of the types of person mentioned after "charterers", was at the time in question a person in possession or control of the ship, then that interpretation would give effect to that contention.

For my part, as a matter of construction I find it impossible to construe the words in that way. If only a demise charterer were meant, one would of course have expected the word 'demise' to have been inserted before the word 'charterer'. Alternatively the word 'charterer' could have been omitted altogether, because a demise charterer would be included in the words 'the person in possession or control."

23. Although in the light of Mr Young's concession it is not necessary for the purposes of the determination of this appeal to express a view on this point, it is relevant to the issues before the court. I entirely agree with the reasoning in the passage just quoted. Lord Diplock did not address his mind to this question in ***The Eschersheim*** and, in my opinion, none of the other cases referred to by Mr Young or Mr Kendrick provides a convincing answer to Sir David Cairns' reasoning. On the contrary, it has the powerful support of the High Court of Australia in the ***Laemthong*** case, to which we were referred.

24. The High Court was considering sections 18 and 19 of the Admiralty Act 1998 which are in similar terms to section 21(4) of the Supreme Court Act 1981. It rejected the argument that a voyage charterer was not a charterer within the meaning of section 19 where the question was the same as here, namely, whether he was *"the owner or charterer of, or in possession or control of, the first mentioned ship"*. The court considered all the cases which I have mentioned and rejected the submission that charterer was limited to demise charterer or what was called owner type charterer. It is of interest to note that Toohey J refers in passing to a slot charter. He said at page 681:

"The term 'charter' has a number of possible connotations such as voyage charter, time charter, slot charter or subcharter. Nevertheless the usual distinction made is between a voyage charter and a demise charter. Since the legislation has chosen to refer expressly to the latter in s 18(b) but to speak generally of charterer in s 18(a) and s 19, the conclusion is inevitable that no limitation was intended in the latter provisions."

25. Gaudron, Gummow and Kirby JJ delivered one judgment. They said at page 688:

"Rather the submission has to be that in each of ss17, 18 and 19, para (a) directs attention to the time when the cause of action arose, and requires identification of which of the owner or the charterer or some other person was in possession or control of the ship, there being only one person which can answer the description at any time. However, even with that modification, the submission should not be accepted. The point is illustrated by the decision of the Privy Council in ***The 'Utopia' .*** *There the owners had not given up their rights to possession of the wreck, but a port authority*

had assumed control of the wreck. Thus there may be control without possession. Within the meaning of s19(a), at the same time one party may have possession and another control.

A further difficulty with the construction urged by the appellant is that s18 uses both the terms 'charterer' and 'demise charterer' in respect of the one ship but at different points of time. On a fair reading of s18 'demise charterer' is used as a narrower term than 'charterer'. It is sufficient for s18 that, at the time when the cause of action arose, the relevant person was merely a charterer provided that, when the proceeding is commenced, the relevant person is a demise charterer. In those circumstances, a proceeding on a maritime claim concerning the ship may be commenced as an action in rem."

26. I entirely agree with that reasoning. The same point can be made in the case of section 21(4) as was made by the High Court in relation to the Australian Act. In ***The Span Terza*** the Court of Appeal was considering section 3(4) of the Administration of Justice Act 1956, which was identical to section 21(4) of the 1981 Act except that the equivalent of section 21(4)(i) read:

    "That ship, which at the time when the action was brought it is beneficially owned as respects all the shares therein by that person."

27. That is to be compared with section 21(4)(i) which reads:

    "That ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise."

28. The reason for the change was no doubt the difference in judicial opinion between Brandon J in the ***Andrea Ursula*** [1973] QB 265 and Robert Goff J ***in I Congresso del Partido*** [1978] QB 500. The importance of it in the context of the instant case is that in section 21(4) the draftsman expressly referred to a charter by demise when he intended to do so. If he had intended that the expression "charterer" in the immediately preceding part of the subsection should be limited to a demise charterer, he would surely have expressly so provided. In this regard I accept Mr Young's point ***that The Span Terza*** had not yet been decided when the 1981 Act was enacted.

29. There is a further point. The Administration of Justice Act 1956 was based upon the International Convention Relating to the Arrest of Sea Going Ships 1952 ("the Convention"). The Act did not follow the Convention precisely so that there is perhaps only limited assistance which can be derived from it.

30. Sir David Cairns describes the position as follows:

    "Article 3 of the Convention contains provisions about what ships may be arrested. In the first four numbered paragraphs there, there is nothing which would enable a charterer or a shipowner to be brought in, other than a charterer by demise, a charterer by demise being expressly referred to in par.(4). But then, at the end of the article, these words appear:

    The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship....

    - *words which seem to be far wider than s.3(4) because they do not include the limitation of any such person as the charterer.*

    In the circumstances, I do not find that the provisions of the Convention are of assistance to me in deciding this case; I prefer to go on my interpretation of the words themselves."

31. He thus concluded that the provisions of the Convention were of no assistance. However, it can at least be said that there is nothing in the Convention to suggest that a narrow interpretation should be given to what was then section 3(4) of the 1956 Act and is now, with some amendment, section 21(4) of the 1981 Act. The 1956 Act was narrower than the Convention but there is nothing in the Convention to suggest that "charterer" should be given an unnaturally narrow meaning. Moreover, Mr Kendrick relies upon the following opinion expressed by Professor Jackson in the second edition of his book Enforcement of Maritime Claims at 203:

    "*The majority view provides further English adherence to the Convention as well as accords with a policy of making ships owned by those liable on maritime claims available to claimants...."*

32. The purpose of the statute was, as I see it, to ensure that before a person's ship could be arrested in respect of a maritime claim, that person had some relationship with the ship in connection with which the maritime claim arose. I can see no reason in principle why a time or voyage charterer of the ship should not have been regarded as having a sufficient relationship. There is no reason to narrow the scope of that relationship by giving the words of section 21(4) other than their ordinary and natural meaning. The protection for the defendant is to be found in the last part of the subsection. Thus it is important to note that in the case of a sister ship the ship being arrested must be wholly beneficially owned by the person liable in personam. Nothing less will do. For these reasons, I agree with the judge that the expression "charterer" in section 21(4) is not confined to a demise charterer. That is now conceded, but I have analysed the position in some detail because, in my opinion, the analysis throws considerable light on the answer to question (1)(b) which asks whether the expression "the charterer" in section 21(4) can include a slot charterer.

33. Mr Young submits that both the judge and Mr Kendrick have asked the wrong question. He submits that it was the question which the judge asked himself which led him in to error. The reason is, as Mr Young submits, that section 21(4) does not refer to " *an owner or charterer of, or in possession or control of, the ship*", but both *" the owner or charterer of, or in possession or in control of, the ship."* He submits that the use of the definite article shows that in order to satisfy the criteria in section 21(4) the plaintiff must show that the person who would be liable in

personam was the charterer of the whole ship. I see the force of that submission as a matter of language. It is, however, first necessary to give some further consideration to the word "charterer".

34. Before the judge, Mr Smith submitted in the alternative, no doubt in the light of ***The Span Terza ,*** that charterer included time charterer but not voyage charterer. As to that the judge said at page 14:

"If the question is then posed, as to whether there is good reason to limit 'charterer' to a time charterer, the observations of Donaldson, LJ illuminate the difficulty of drawing any meaningful distinction in the present context other than that between demise charterers and all other charterers. Once that divide is rejected as the touchstone contemplated by the section, then there does not seem to me any good reason for drawing a distinction here between time and voyage charterers. I would be reluctant to accept that all time charterers enjoy such greater control over the chartered vessels as to put them in a separate category from all voyage charterers. It is not, for example, apparent that there is any commercial justification for saying that a time trip charterer is within the section but a consecutive voyage charterer, enjoying wide liberties as to the nomination of loading and discharge ports, is not. I conclude therefore that 'charterer' within s21(4) is capable of including both time and voyage charterers and that Mr Smith's attempt to draw the line at time charterers is unsustainable."

35. I entirely agree with that reasoning. Moreover. it is powerfully supported by the reasoning in ***Laemthong.*** It is true that in that case no-one sought to draw a distinction between a time charterer and a voyage charterer, perhaps because it was thought futile to attempt do so, but the reasoning of the High Court is wholly inconsistent with the proposition that charterer might include a time charterer but not voyage charterer.

36. In my judgment, if charterer includes time charterer it must include a voyage charterer. If it does, the next question is whether it includes a voyage charterer of part of the ship. Apart from the use of the definite article, I would answer that question "yes". Such charterers are by no means unknown. In the 20th edition of Scrutton on Charterparties 1996 the authors say at page 2, in a footnote against a reference to "*the whole ship"*:

"*Charters for part of a ship are relatively rare but occasionally used when bills of lading are inappropriate, eg between liner companies chartering space on one another's ships.*"

37. The 13th edition of Carver on Carriage by Sea has a statement to similar effect in volume 2 at paragraph 1077. It also refers to a number of cases, including ***Caffin v Aldridge***_[1895] 2 QB 366 and 648. In that case a charterparty, after stating that the ship's dead weight capacity was 125 tons, provided she should load:

"....'a cargo of estimated quantity of 470 quarters wheat in sacks and/or other lawful merchandise'."

38. The ordinary words "*full and complete*" before *"cargo"* in the printed form had been struck out and 470 quarters of wheat would only weigh 102 tons. The charterparty gave liberty to call at any port. It was held that the shipowner was at liberty to carry other cargo than the wheat for other persons.

39. As I see it, that was an example of a voyage charter of a ship. The only difference between the voyage charter in that case and a voyage charter under which the charterparty entitles the charterer to load a full and complete cargo is the amount of cargo which the charterer is entitled to ship. In either case the charterers would, in my judgment, properly be regarded as the charterers of the ship.

40. The evidence shows that charterers of part of a ship are well known in some trades. Thus in the chemicals trade charterers of a part or parts of parcel tankers are common. I agree with the judge that once "charterer" extends to a voyage charterer, there can be no good reason for excluding such charterers. Unless there is anything in the language of the section which requires their exclusion, it makes no sense to hold that where "A" charters the whole of the parcel tanker, one of his ships can be arrested to secure a maritime claim arising in connection with that tanker, but where he charters, say half the tanker, his ships are immune from arrest in respect of an identical claim. There is certainly nothing in the Convention which would support such a distinction and, in my opinion, there is nothing in the policy behind section 21(4) of the 1981 Act to do so either.

41. Moreover Mr Young was not able to give any convincing reason for the existence of such a distinction. Consideration of policy should lead to the conclusion either that such an arrest is permitted in both cases or in neither, but not in the one case and not in the other. Since in my judgment "charterer" includes voyage charterer, an arrest should in principle be permitted in both such cases.

42. What then of a slot charter? Slot charterers are now common. As the judge pointed out, in the third edition of their book, Limitation of Liability for Maritime Claims, Griggs and Williams define slot charterer as:

"...a party who has the right to use a specified part [but not the whole] of the cargo carrying capacity of a vessel on a particular voyage and who often issues his own bills of lading. Such a party is described in common parlance as a 'charterer'."

43. I accept that as an accurate definition. It can thus be seen that there is no distinction in principle between a slot charter and a voyage charter of a part of a ship. They are both in a sense charterers of space in a ship. A slot charter is simply an example of a voyage charter of part of a ship.

44. It follows that the reasoning which leads to the conclusion that the voyage charterer of is a charterer within section 21(4) also leads to the conclusion that the slot charterer is such a charterer. In this regard it may be noted in passing that Griggs and Williams express the view that a slot charterer is, in principle, entitled to limit his liability as a charterer under the relevant provision of the Merchant Shipping Act 1995. Mr Young accepts that is so, but he submits that the relevant provisions are very different. He relies in this regard on the recent decision of Thomas

J in ***The Aegean Sea*** [1998] 2 Lloyd's Rep 39. The provisions are indeed very different. As Thomas J pointed out by reference to Article 1 of the London Convention 1976, a charterer can limit his liability, as it were, qua shipowner. The reason is that by Article 1.2 of the Convention the term "*shipowner shall include the owner charterer, manager or operator of a seagoing ship"*. As I understand it, it is accepted by POL that they are charterers within the meaning of that provision. While I recognise that that is indeed a different provision from section 21(4), it is perhaps a pointer at least to POL being a charterer within the meaning of section 21(4).

45. Mr Kendrick submits that the court should recognise that the categories of charterparty have not irrevocably closed but are subject to evolution as the market evolves and the ships on which cargoes are carried evolve. In recent times, dry cargo ships have been containerised, ie designed or adapted for the carriage of container boxes in Twenty foot or Equivalent Units ("TEUs") in "slots" or cells". In consequence, space is now commonly hired on such ships by reference to a specified number of TEU spaces by slot charterers. That is no different in principle from the charter of part of a ship by a traditional bulk charterer who will describe his charter as being, perhaps, for the carriage of 5,000 metric tons 5% more or less.

46. I accept those submissions. In my judgment a slot charter satisfies, for example, the characteristics of a charterparty identified by Hobhouse J in ***The Torenia*** [1983] 2 Lloyd's Rep 210 at page 216.

47. In a similar vein the judge said:

"Even leaving aside Mr Kendrick's arguments as to the ramifications for limitation of liability if he is wrong (on which I express no opinion), I think I am entitled to observe that slot chartering is an important, comparatively modern commercial activity in the dry cargo container trade. In this area, it is of importance that the law adapts to changing business practices and it is desirable that such commercial developments should be accommodated within the Admiralty jurisdiction if it is proper and permissible to do so. While labels are of course not decisive, the fact that the market refers to these arrangements as 'slot charters' is a pointer in the same direction."

I entirely agree with those views.

48. In all the circumstances I have reached the clear conclusion that a slot charterer can properly be described as a charterer, but can he be described as "the charterer" of the ship? Mr Young submits that the answer is "no", because if the section is approached as it was by Sir David Cairns and Stephenson LJ, by giving it a literal or natural interpretation, the charterer of part of a ship cannot fairly be described as "the charterer" of the ship. Nor, it would seem to follow, could several charterers of the ship. He submits that that approach is consistent with the wording of the section and with the reasoning of Sir David Cairns, who said in ***The Span Terza*** at page 227 that arrest was justified "in the very special circumstances of the case". Mr Young draws attention to the fact that Sir David Cairns did not say that the phrase "charterer" embraced any person who could be described as a charterer no matter what of and no matter on what terms.

49. I see the force of Mr Young's submission but on balance I have reached the conclusion that it should not be accepted. The special circumstances referred to by Sir David Cairns were simply that in the vast majority of cases the person liable in personam will be the owner of the ship in connection with which the claim arises, but not the time charterer or the voyage charterer. It is accepted by Mr Young that there can be more than one charterer at any one time who can properly be described as "the charterer" of this ship. For example, it is common to have a string of charterparties. There might be a demise charterer, a time charterer, a sub time charterer, a sub-sub time charterer, a voyage charter and even a sub voyage charter. There is no difficulty in describing each of the charterers under each of those contracts as the charterer of the ship.

50. The matter can also perhaps be tested in this way. It was held in ***The Evpo Agnic*** that "owner" in section 21(4) means registered owner. It is accepted that a ship can have two registered owners as, for example, where A and B each own 32 out of the 64 shares in the ship. As I see it both A and B would be the "the owner" within the meaning of section 21(4). Mr Young accepts that that is so, although he rightly says that they would be joint owners. It seems to me to follow that a claimant could arrest a ship beneficially owned as respects all the shares by either A or B. In all these circumstances, I do not see any difficulty in describing each of the two charterers of a ship as the charterer of the ship. Equally, for the reasons I have given, I do not see any difficulty in describing the charterer of part of a ship as the charterer of the ship.

51. In all these circumstances I would hold that the expression "*the charterer of the ship*" can include a slot charterer and that a slot charterer can properly be described as the charterer of the ship.

52. **Question (ii).** The question here is whether in the light of the above POL were the charterers of each relevant ship. I am not sure that Mr Young submits to the contrary but, in any event, on this point I entirely agree with the judge. He said:

"In short it seems to me that the structure, terms and wording of the 17th May Agreement [MOD] and, in particular, the slot charterparty forming part thereof amply justify Mr Kendrick's submission that these were 'recognisably charter terms'. In a sense, the point does not benefit from elaboration and, having already set out the relevant terms, I will not repeat them here. I simply underline the following:

(1) The Slot Charterparty, forming Schedule 4 to the main body of the 17th May agreement and incorporated therein, contains what can only be described as a collection of typical charterparty terms. It deals, amongst other things, with employment (cl.1), dangerous goods (cl.2) the issue by POL of bills of lading (cll. 3, 4 and 9), seaworthiness and other obligations of MSC being in accordance with the Hague Rules (Cll.12 and 14) and liens (cll.5 and 17) including a reference to freight.

(2) The language of the Slot Charterparty speaks for itself - see for example the law and arbitration clause, cl.23. Labels cannot be decisive but the wording seems naturally apt here. It would be straining language to describe the agreement as anything other than a charterparty and POL as anything other than a charterer.

(3) There are similar pointers in the main body of the agreement; for example, cl.6 which talks of slot chartering and cl.9 which, while limiting POL's right to sub-charter space, must contemplate that POL was a charterer in the first place.

I am accordingly satisfied that the 17th May agreement was or contained a charterparty. If so, the same material points to POL being naturally and properly described here as a slot charterer."

53. It also points to POL being the slot charterer of the ship.

Question (iii)

54. The question here is whether POL were charterers when each cause of action arose. Mr Young submits that they were not because whether the claim is put under the addendum or under the MOD, POL were no longer charterers when the cause of action accrued. He relies in particular upon paragraph 2 under "Payment Procedures" in Schedule 2 of the MOD, to which I have referred. The relevant part reads:

"ACL/MSC will extend to POL a credit term of 21 days after sailing from the first outbound port for full settlement of all slot costs and other charges relating to cargo on that voyage."

55. Mr Young then submits that by the time the 21 days elapsed, and thus by the time any money was due under the MOD under which the parties operated a running account, POL could no longer he regarded as charterers because the containers would have been delivered and the vessel would have sailed. He demonstrated his point by reference to the schedules. He submits that by the time the payments were due POL no longer had the status of charterers.

56. Mr Kendrick does not accept Mr Young's construction of the payment provision, but whether that construction is correct or not, I am unable to accept Mr Young's submission. The charterparty remains on foot so long as obligations remain to be performed under it. Obligations under the charterparty include both MSC's obligation qua owner to carry and discharge the containers and POL's obligation to pay.

57. It is wholly artificial to hold that POL retain their status as charterers only so long as the containers remain on board the vessel. In my judgment they retain that status at least so long as primary obligations remain to be performed under the charterparty. Thus here they retain their status as charterers so long as monies remain to be paid under the charterparty arrangements.

58. It seems to me that any other view would make section 21(4) as construed in ***The Span Terza*** and in the ***Laemthong*** case unworkable. It follows that question (iii), which was whether POL were the charterers when each cause of action arose must be answered "yes". It also follows that the other points which were argued under this head do not arise. It follows that, in my judgment, this appeal must be dismissed.

LORD JUSTICE WALLER: I agree and there is nothing I can usefully add.

LORD JUSTICE OTTON: I agree.

Order: Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

MR T YOUNG QC AND MR C SMITH (Instructed by Messrs More Fisher Brown, London, E1 6DA) appeared on behalf of the Appellant
MR D KENDRICK QC (Instructed by Messrs Richard Butler, London, EC3A 7EE) appeared on behalf of the Respondent