MSC Mediterranean Shipping Company SA v "Tychy", Owners Of Ship [2001] Int.Com.L.R. 07/24

CA on appeal from Admiralty (Mr Justice David Steel) before Lord Phillips; Jonathan Parker LJ; Lord Mustill. 24th July 2001

LORD PHILLIPS MR. This is the judgment of the Court.

Introduction

1. This is an appeal against a judgment of David Steel J., sitting in the Admiralty Court, in two consolidated actions *in rem*. The judgment awarded the respondents, 'MSC', sums in excess of $6million, inclusive of interest and costs, by way of sums outstanding in respect of slot charter hire in relation to a number of vessels. The appellants, Polish Ocean Lines Joint Stock Company, were formerly the State owned company, Polish Ocean Lines. We shall refer to the appellants as 'POL'.

2. The Judge held that POL were liable to MSC because POL were, at all material times, the slot charterers of the vessels. POL challenge that finding. They contend that the slot charterers were their subsidiary company, POL Atlantic ('POL-A'). They assert that this is the only issue raised by this appeal. They contend that if they are correct, there is no foundation for asserting jurisdiction *in rem* against POL and the proceedings must be set aside. MSC do not accept that this is the position. They submit that POL have submitted to the *in personam* jurisdiction of the court and that, even if their claim does not found Admiralty jurisdiction *in rem*, or even fall within the *in personam* jurisdiction of the Admiralty Court, they have a valid claim against POL for the sums awarded by the Judge.

Procedural history

3. The difference between the parties as to the jurisdiction of the court reflects a procedural history of some complexity. It is necessary at the outset to explore that history.

4. Jurisdiction *in rem* was asserted against POL pursuant to the following provisions of the Supreme Court Act 1981.

"The Admiralty jurisdiction of the 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 or hire of a ship…

21(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r) where?

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

(b) 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 was common ground that, in order to be able to found Admiralty jurisdiction *in rem*, MSC had to prove:

i) that the claim arose out of an agreement relating to the carriage of goods in a ship or to the use of a ship;

ii) that the claim arose in connection with the ship;

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

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

v) that at the time when the writ was issued POL were the beneficial owners of the TYCHY.

6. It has always been common ground that POL were the beneficial owners of the TYCHY, so that the fifth requirement was satisfied. It became common ground that MSC's claims were claims arising out of agreements relating to the carriage of goods in ships or to the use of ships and in connection with the various ships in relation to which slot charter hire was due. Thus the first and second requirements were satisfied.

7. As to the third requirement, POL have always denied that they were under any *in personam* liability to MSC.

8. As to the fourth requirement, POL have always denied that they were 'the owner or charterer of, or in possession or in control of' the ships in relation to which the hire charges arose, either within the meaning of those words in section 21(4)(b) of the Supreme Court Act 1981, or at all.

9. There is an overlap between the issues in relation to the third requirement and those in relation to the fourth requirement for the following reasons. It is common ground that POL were party to two agreements, each described as a Memorandum of Decisions ('MoD') and each dated 17 May 1993, under which POL agreed to purchase as slot charterer space in vessels owned or operated by MSC and employed on trans-Atlantic trade. POL alleges that in March 1996, before the sums claimed in these proceedings became due, there was a novation under which they were replaced as parties to the MoDs by POL-A. MSC deny this. They contend that POL have always remained slot charterers under the MoDs and that it is in that capacity that they have become liable to pay the sums claimed.

10. If this contention is rejected MSC advance two alternative bases for their claim. On 13 February 1999 a tripartite agreement ('the February 1999 Addendum') was concluded between MSC, POL and POL-A. MSC contend that if, contrary to their primary case, POL was replaced by POL-A in March 1996, there was a re-novation under the February 1999 Addendum whereby POL once again replaced POL-A and, as slot charterers, agreed that they would pay the sums now claimed. Alternatively, MSC claim that, under the February 1999 Addendum, POL entered into a free-standing agreement to discharge POL-A's indebtedness, in the nature of a guarantee.

11. If POL were at all material times slot charterers, they were properly subject to *in rem* jurisdiction, provided always that slot charterers fall within the meaning of 'charterers' in section 21(4)(b) of the Supreme Court Act 1981. If POL only became slot charterers as a result of a re-novation under the February 1999 Addendum, a nice question arises as to whether *in rem* jurisdiction covers indebtedness that existed prior to the time when they took up the role of slot-charterers once again. If they are merely liable pursuant to a free standing agreement under the February 1999 Addendum, no question of *in rem* jurisdiction can arise.

12. At the outset of the proceedings POL sought to have the warrant of arrest of the TYCHY set aside and the TYCHY released from arrest on grounds which included (i) that they were under no liability in personam and (ii) that they were not the 'charterers' of the vessels in respect of which the claims arose. These two grounds overlap. The issue of whether POL were liable *in personam* was, of course, an issue that went not merely to jurisdiction, but to substantive liability.

13. POL have subsequently pleaded a defence and counterclaim in the proceedings. The latter seeks rectification of the February 1999 Addendum, designed to make it clear that POL neither agreed to replace POL-A as slot charterers, nor to become directly liable for POL-A's debts on a free standing basis.

14. There is now an issue between the parties as to whether POL's conduct, as described above, has amounted to a submission to the *in personam* jurisdiction of the court or whether, as POL contend, they have at all times reserved their position as to jurisdiction, so that if *in rem* jurisdiction is not established, these proceedings must be struck out. We should add that MSC have commenced a separate action *'in personam'* and that, should it prove necessary, POL intend to challenge the jurisdiction in that action also.

15. In summary, there are the following live issues between the parties:
    (1) Was there a novation of the MoDs in March 1996 under which POL-A replaced POL as slot charterer? If so:
    (2) Did POL replace POL -A as slot charterer on true construction of the February 1999 Addendum? If so:
    (3) Should the February 1999 Addendum be rectified to show that no such agreement was made? If not:
    (4) Did liability *in rem* attach to POL in respect of indebtedness incurred by POL-A before the February 1999 Addendum?
    (5) [If the answer to 2 is 'no'] Did the February 1999 Addendum accurately record a free-standing agreement under which POL agreed to discharge POL-A's liabilities, or should it be rectified to a form which imposed no such liability?
    (6) Have POL submitted to the jurisdiction of the court to decide issue (5)?

The first round of proceedings

16. We have referred to the challenge made by POL to the *in rem* jurisdiction. That challenge took the form of notice of motion seeking, among other relief, an order that the warrant of arrest be set aside and the TYCHY released. The motion came on for hearing before Mr Peter Gross, Q.C., sitting as a Deputy Judge of the Admiralty Court, on March 22 1999. Because it had not been possible in the time available to prepare evidence of fact, he dealt only with issues of law that were raised in relation to jurisdiction. For the purposes of argument it was assumed that POL were liable as slot charterers under the two MoDs. On this premise, the issues were (i) whether a slot charterer fell within the definition of a 'charterer' for the purposes of section 21(4)(b) of the Supreme Court Act 1981; if so, (ii) whether POL were 'charterers' of each vessel in respect of which hire was due and, if so (iii) whether POL were charterers of each vessel at the time that the relevant cause of action arose. This final issue was a narrow one, based on a provision in the MoDs that provided for a credit period that extended beyond the time that the relevant voyage terminated.

17. Mr Gross found in favour of MSC on each of these issues. On appeal to the Court of Appeal his judgment was upheld on each point - [1999] 2 Lloyd's Rep. 11.

The current proceedings

18. The remaining issues came before David Steel J. He held that POL had remained slot charterers under the MoDs at all material times and were liable to MSC in that capacity. It followed that both *in rem* jurisdiction and POL's liability were established simultaneously. It also followed that none of the issues (2) to (6), that we have set out above, arose. The Judge nevertheless went on to hold that he disbelieved evidence given by POL's witnesses in support of the plea of rectification that they had neither read nor appreciated the purport of the February 1999 Addendum. Early in his judgment he observed that the parties had agreed that the question of whether POL had submitted to the jurisdiction in relation to an *in personam* claim under the February 1999 Addendum, i.e. issue (6), should be reserved pending the outcome of his judgment.

19. Our primary task is to decide whether the Judge was correct to hold that the novation alleged by POL to have taken place in March 1996 did not occur. If he was not correct we will then have to consider the cluster of issues that arise in relation to the February 1999 Addendum.

The March 1996 agreement

20. POL's case is that the novation under which they were replaced by POL-A as slot charterers under the MoDs was concluded, or at least confirmed, by an exchange of two faxes. The first was sent by Mr Osinski, who was at the time a Director of POL-A, to Mr Formisano, MSC's Commercial Director, on 7 March 1996. It was headed "Subject: Financial Agreement" and read as follows:

"In reference to our telephone conversation of today am I would like to confirm agreement reached by both parties:

1. On 08 March 1996 POL will arrange remittance of $1,731,696.76 being the overdue balance as of 10th March 1996…

2. Effective MSC Claudia VI at Antwerp 31.03.96 and MSC Dominique XI at Antwerp 19.03.96 payment terms will be splitted for westbound and eastbound separately. The credit term to remain as per present agreement i.e. 28 days from the date of call at first loading port. This means that the credit term will be counted as follows

North Atlantic service westbound: 28 days after call at Antwerp
eastbound: 28 days after call at Boston
South Atlantic and Gulf service westbound: 28 days after call at Antwerp
eastbound: 28 days after call at Miami.

3. Effective vessels as per point 2 invoices will be issued for POL-ATLANTIC (and not POL any longer) as with these vessels POL-ATLANTIC is taking over the North Atlantic service from POL which was advised to you earlier this year.

4. If above meets your acceptance please confirm by return so we can effect payment as per point 1 (tomorrow)."

The answer from Mr Formisano by return was in a telex headed 'Re: Credit Terms'. It read:

"Many thanks you message dated March 7th contents of which are being discussed at all internally.

We hereby confirm the agreement as per your message however this facility of extending the credit terms i.e. splitting east/westbound will be immediately be withdrawn on old system will be applied if POL fail to pay in due time the invoice as per existing date and if POL fail to pay the outstanding facility of US$800,000 due March 31st US$400,000 on April 30th US$400,000. Your reconfirmation will be highly appreciated."

21. It is POL's case that this exchange of faxes evidenced agreement on behalf of MSC, POL, and POL-A that POL-A would replace POL as slot charterer under the MoDs.

22. We would observe that Mr. Osinski appears to have had authority to speak not only for POL-A, of which he was a Director, but also for POL. MSC have certainly not suggested that he was not in a position to agree the novation on behalf of both members of the group. MSC's point is that the terms of these faxes are not nearly clear enough to effect a contractual novation. With this submission the Judge agreed. He held at paragraph 65 of his judgment that in order to achieve a novation the consent of all parties 'must be clearly established on the evidence as being only consistent with the intent of achieving a novation'. We do not read this as indicating that the Judge was applying other than the civil standard of proof. We believe that he was indicating that, where there is an established contract in existence, clear evidence of an intention to produce a novation is likely to be needed if that standard of proof is to be discharged. With that proposition we would agree.

23. The Judge had this to say about the exchange of faxes, at paragraphs 72 and 73 of his judgment:

"Mr Osinski's telex focuses on the accounting arrangements as from the sailing of Claudia and Dominique whereby invoices would thereafter be issued to POL-A on 28 day credit terms. Whilst the assertion is made that 'with these vessels POL-ATLANTIC is taking over the North Atlantic service from POL which was advised to you earlier this year' it is very difficult to derive from it any proposal that POL-A should be treated not merely as operating the service but as replacing POL as a party to the MOD, particularly where the telex is headed 'Financial Arrangements'. The answer from Mr Formisano, headed 'Credit Terms', is equally inapt for the purpose of constituting consent to such a proposal.

It may well be that the reference to MSC having been advised 'earlier this year' maybe a mistaken reference to the 1st December letter and was fully perceived as such. But as already explained, that letter contained in effect two proposals, one for POL-A to be the operator and the second for POL-A to replace POL as a party to the MOD. Accordingly the implications of the telex dated 7th March viewed in isolation remain very confined and I am not persuaded that it is appropriate to regard that telex, together with the reply, as constituting evidence of tri-partite consent to the novation of the contract. Nor am I persuaded that it is appropriate to view the exchange, in the alternative, as a trigger of a novation already established in principle by the despatch of the 1st December letter, the contents thereof being in some way accepted by the absence of any express rejection by MSC of the proposals contained in it."

24. The Judge referred to a letter of 1 December, and we shall consider this in due course. He declined to pay any regard to written and oral evidence of witnesses, as to their understanding of the implications of the contemporary correspondence. We have followed his example. Such evidence is of no assistance to the Court's task of making an objective assessment of the implications of what the representatives of the parties wrote at the time.

25. A much more difficult problem is to identify what contemporary evidence both pre-dating and post-dating the March exchange of faxes is admissible as an aid to construing what those faxes agreed. It is POL's case that it is legitimate to look at dealings between the parties before March 1996 as an important part of the background to what was agreed in March 1996. Indeed, Mr Young, QC, for POL described the March faxes as the 'trigger' which activated what had been agreed before.

26. As to conduct after March 1996, Mr. Young submitted that the Court could and should have regard to the fact that POL-A in fact stepped into the shoes of POL as slot charterers under the MoDs and that MSC dealt with POL-

A on that basis. In POL's Defence and Counterclaim these dealings were relied upon as creating an estoppel by convention, which precluded MSC from denying that the novation had been agreed.

27. The starting point when considering evidence of events before the March 1996 agreement must be the statement of Lord Wilberforce in ***Reardon Smith Line v. Hansen-Tangen*** [1976] 1 WLR 989 at 996:

"No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

28. Some twenty years on, in ***I.C.S. Ltd v. West Bromwich B.S.*** [1998] 1 WLR 896 at p.912, Lord Hoffmann had this to say about the use of extrinsic evidence as an aid to the construction of contracts:

"I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in ***Prenn v Simmonds*** *[1971] 1 W.L.R. 1381, 1384-1386 and* ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** *[1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.*

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."

Lord Hoffmann has recently emphasised that his reference to *'absolutely anything'* meant *'absolutely anything which would have affected the way in which the language in the document would have been understood by a reasonable man'* ***BCCI v Ali*** [2001] 2 WLR 735 at 749.

29. With respect to Lord Hoffmann, we are inclined to think that a little intellectual hand luggage is no bad thing when approaching the task of construing a contract. Before taking extrinsic evidence into account, it is important to consider precisely why it is said to assist in deciding the meaning of what was subsequently agreed and to consider whether its relevance is sufficiently cogent to the determination of the joint intention of the parties to have regard to it. It is also important, though not always easy, to identify what is extrinsic to the agreement and what forms an intrinsic part of it. When a formal contract is drawn up and signed, care must be taken to distinguish between admissible background evidence relating to the nature and object of the contractual venture and inadmissible evidence of the terms for which each party was contending in the course of negotiations. Where, as in the present case, an agreement is alleged to have been reached in the course of dealings which do not culminate in the drawing up of a formal contract, the task is to identify whether, and if so which, terms proposed in the course of negotiations have become the subject of a joint agreement.

30. Mr. Young invited us to look at evidence that predated the March 1996 agreement for the following purposes:

i) to demonstrate the nature of the role of the slot charterer under the MoDs. We consider this to be a legitimate exercise and, in large measure, it involves consideration of the MoDs themselves.

ii) to demonstrate that POL and MSC were agreed in principle that a subsidiary of POL would replace POL as contracting party in the MoDs. We consider that this also is a legitimate justification for considering the evidence in question. Indeed, before David Steel J. MSC also sought to rely on this evidence for it demonstrated that, while MSC were agreeable in principle to the proposed novation, they made it clear that this was subject to the provision by POL of a 'back letter' guaranteeing the obligations of its subsidiary. Mr. Kendrick, QC, for MSC urged that this reservation weighed against construing the March 1996 agreement as giving rise to a novation and the Judge accepted the validity of this argument.

31. More generally, we do not consider that it would be appropriate to attempt to construe the March 1996 agreement other than in the context of the prior dealings between the parties. The agreement was contained, not in a formal contract, but in an exchange of faxes which formed part of a protracted course of dealing. The Judge held that the implications of the fax of 7 March *'viewed in isolation'* remained very confined. That fax could not be

viewed in isolation. The fax itself referred to advice given to MSC earlier in the year, and it was appropriate to attempt to identify that advice. Indeed the Judge did so, concluding that the reference may well have been to a letter of December 1 1995. Later, at paragraph 67, the Judge remarked that it was not possible to view the 1 December letter in isolation but that it was necessary to revert to earlier discussions between the parties. We endorse that approach

32. As far as the conduct of the parties after the March 1996 agreement is concerned, Mr. Young argued that this demonstrated quite unequivocally that all three parties were conducting themselves on the understanding that POL-A had replaced POL as the contracting party in the MoDs. The Judge considered the evidence and held that it did not lead to the conclusion for which POL contended. POL-A's role was 'equally consistent with a book-keeping exercise whereby POL-A were treated as the sole operator of the trans-Atlantic service under the umbrella of POL with the latter remaining the sole contracting party' - see paragraph 78 of his judgment.

33. We have considered whether it is legitimate to consider the conduct of the parties after the March agreement as an aid to determining whether a novation was agreed by the exchange of faxes. There is clear authority of the House of Lords that it is not legitimate to have regard to the subsequent conduct of the parties as an aid to construing the meaning of the words that they used: ***Whitworth Street Estates Ltd. v. Miller*** [1970] AC 583 at 603, 606, 611 and 615. Yet in the same case, Lord Reid observed at p.603: "*Of course the actings of the parties (including any words they use) may be sufficient to show that they made a new contract.*"

34. David Steel J. had regard to this evidence on the basis that it might give rise to an estoppel by convention. In ***Amalgamated Property Co. v. Texas Bank*** [1982] QB 84, Brandon L.J. approved the following definition of estoppel by convention in *Spencer Bower and Turner, Estoppel by Representation, 3rd ed.* p.157:

"When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed."

35. Earlier, at p.120 in the same case, Lord Denning M.R. had commented of this estoppel:

"So here we have available to us - in point of practice if not in law - evidence of subsequent conduct to come to our aid. It is available - not so as to construe the contract - but to see how they themselves acted on it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it."

36. The principles to be derived from these authorities lead us to the following conclusions:

i) If the exchange of faxes in March 1996 (a) did not, on their true construction, constitute an agreement to a novation or (b) were ambiguous as to whether or not such an agreement was reached, POL can only establish that a novation occurred if they can demonstrate that the conduct of the parties after March 1996 has given rise to an estoppel by convention.

ii) If the exchange of faxes on their true construction constituted an agreement to a novation, the fact, if so it be, that the parties thereafter acted in accordance with that agreement will do no more than provide the Court with the comforting reassurance that its construction of the March 1996 agreement accords with the intention of the parties.

37. Having established the basis upon which we shall be looking at evidence of events both before and after March 1996, we turn to events before the March 1996 agreement.

The MoDs

38. Before the MoDs were concluded, a note made by MSC recorded that initially the contract would be made by POL and that it would then be passed to POL America. POL America was another company in the group. We were told that that company had substantial assets.

39. The first MoD was a tripartite contract between Atlantic Container Line ('ACL'), MSC and POL. POL was, however, defined to mean 'Polish Ocean Lines and/or POL-America Inc'. The contract provided that ACL and MSC, as the two ship operators, would offer two ocean common carrier container services between the Atlantic coasts of the United States and Canada and European ports. POL's contractual role was identified in clause 6.1, which provided:

"<u>Slot Chartering</u>

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 vessels whenever necessary"

A TEU is a twenty foot container unit and a 'slot' is the space on a containership for the equivalent of a TEU.

40. Thus, under the MoD, POL contracted to purchase space to ship POL's containers on MSC's ships. Scheduled to the MoD was a slot charterparty which set out the mutual obligations of POL as container operator and MSC as vessel operator. This included provisions that POL would issue its own bills of lading to its clients and be responsible for booking and delivering cargo at each loading and discharge port. Thus POL was placed in a position of being able to offer a container service across the Atlantic as if POL were a ship owner or operator, but using space on MSC's ships.

41. The other MoD was similar in form, but concluded simply between POL and MSC. POL was again defined to mean 'Polish Ocean Lines and/or POL-America Inc'. The trade on this occasion was between ports on the Atlantic and Gulf Coasts of the United States and European ports.

42. Mr. Young made the point that POL's role under the MoDs was not simply to pay for the hire of space on MSC's vessels, but to run a shipping business across the Atlantic. Bills of lading were issued in the name of POL and the service was operated in the name of POL.

43. In 1994 the Polish economy was in the course of transition from state control to a free market. POL was beginning to restructure itself by making various subsidiaries responsible for different aspects of the business which it had previously conducted as the state shipping company. In June 1994 POL entered into an agreement with a subsidiary, POL-Eureca to take over 'the conduct and supervision on behalf and on account of POL of the maritime activity of POL in the North American Line Service'. Thereafter POL- Eureca acted as POL's agent, contracting expressly as 'General Agents for Polish Ocean Lines, Gdynia'. The service continued to be operated in POL's name and POL's bills of lading continued to be issued.

The meeting in May 1995

44. On 16 and 17 May there was a meeting in Gdynia between Mr. Formisano of MSC, Mr. Hapko of POL and Mr. Osinski, who had been transferred from POL to work for POL-Eureca. The main subject of discussion was slot allocations and prices, but there was also discussion about a proposal by POL to introduce a subsidiary as the operator of the trans-Atlantic trade in place of POL. Agreement was accurately recorded in a fax sent to MSC by POL-Eureka on 19 May:

"Name of Party in M.O.D.

MSC AGREED THAT IF IN PLACE OF POL, POL'S SUBSIDIARY BECOMES THE OPERATOR ON THE TRANSATLANTIC TRADE THIS SUBSIDIARY WILL BECOME THE PARTY OF M.O.D. INSTEAD OF POL. POL TO PROVIDE MSC WITH BACK LETTER GUARANTEEING THE FULFILLMENT OF THE M.O.D."

45. In late September 1995 POL decided that a separate legal entity should take over the operation of the North Atlantic Service and that Pol-Eureca should be reconstituted to do this. The company would conduct the business *"in its name and on its own account"*. This decision was not communicated to MSC at the time, but on 1 December 1995 a letter was written by Mr Hapko to Mr. Formisano and to Mr Aponte, the President of MSC, and at the same time and in the same terms to ACL. It read as follows:

"Further to our previous discussions, we would confirm that beginning January 1, 1995 POL will transfer its North America Services to a newly incorporated company POL-ATLANTIC which will be an autonomous entity of the Polish Ocean Lines Group.

The ownership of the new company does remain in the hands of POL, as the mother company, thus ensuring the continuation in all respects of the present agreements concluded between our companies. In particular, we would stress that all POL obligations towards your company will be paid by us in full on mutually agreed terms.

The establishment of POL-ATLANTIC is the result of POL efforts to entirely commercialise their industries in order to become more competitive in the general conditions of free market economy.

At the same time, please, take this letter as an Annex to our Agreement by which POL-ATLANTIC is to be officially entitled to act as the party that replaces POL in our arrangement and co-operation.

The approval of the U.S. Federal Maritime Commission of POL-ATLANTIC activities and operation is expected to be obtained before 15th inst.

For good order's sake, we would add that POL-ATLANTIC will substitute POL as a member of TACA and the Canadian Conferences, and that the present POL agency and port/terminal/stevedoring set-up will be taken over by POL-ATLANTIC with no alteration.

Also, by this opportunity, the management of Polish Ocean Lines take pleasure in expressing sincere thanks for the close relationship and co-operation, hoping that same will be maintained and still more grounded between your goodselves and POL-ATLANTIC."

46. David Steel J. used the adjective 'obscure' to describe this letter. At paragraph 70 of his judgment he commented: "Whilst obviously making it clear that POL will transfer to POL-A the operation of the North Atlantic service as from 1st January 1996, the letter is somewhat coy as to POL's perceived status thereafter. The letter emphasises that POL-A is a subsidiary '*thus ensuring the continuation in all respects of the present agreement… in particular we would stress that all POL obligations towards your company will be paid by us in full*'. The later passage that the letter be taken as an annex to the MOD whereby POL-A is to be '*officially entitled to act as the party that replaced POL*' is equally ambivalent. "

47. We do not agree with the Judge that this letter left POL's intentions unclear. The previous discussion referred to in the first paragraph can only have been the discussion at Gdynia the previous May, when it had been clear to MSC that POL was proposing that an independent company would 'become the party of the MoD in place of POL'. The rest of the letter was entirely consistent with this. In particular, the reference to POL-A substituting POL as a member of the conferences was significant. This clearly indicated that POL-A was taking over the operation of POl's trans-Atlantic service in its own name, not merely as an agent. We also observe that at paragraph 73 of his judgment the Judge observed that the letter *'contained in effect two proposals, one for POL-A to be the operator and the second for POL-A to replace POL as party to the MoD'.*

48. Our view about the meaning of the 1 December letter receives support from the fact that ACL were in no doubt that what was proposed was the substitution of POL by POL-A as the party to the MoD. ACL replied that they were not prepared to agree to this unless they received a 'separate *guarantee from POL for the fulfilment of all obligations'*. POL duly provided a letter of guarantee.

49. MSC, in contrast to ACL, made no response to the 1 December letter. That letter could not, of course, effect the novation. POL-A were not a party to it, indeed it was not until early in 1996 that POL-Eureca was reconstituted as POL-A. The letter was, however, a declaration of POL's intention to proceed with the substitution that they had proposed to MSC the previous May.

The March 1996 agreement

50. It is necessary at this point to say something about the manner in which the agreements between POL and MSC had been performed over the period between 1993 and 1996. The Atlantic trade is cyclical and it seems to have hit a trough during this period. POL were unable to earn enough from the Atlantic trade to meet their liabilities to MSC under the MoDs. They repeatedly fell into arrears and built up substantial debts which, from time to time, they discharged by the sale of a vessel. MSC were accommodating. Perhaps their patience reflected satisfaction that they had sold forward to POL space in their vessels at rates above those to which the market descended.

51. The position when Mr Osinski sent his fax to Mr Formisano on 7 March was that POL were in arrears to the tune of some $2.5 million. His fax was largely about finance, in that it dealt with (i) the discharge of POL's indebtedness and (ii) credit terms and invoicing to POL-A instead of POL, to cater for the fact that POL-A was replacing POL.

52. The Judge concluded that the reference to POL-A 'taking over the North Atlantic service from POL which was advised to you earlier this year' may have been a reference to the 1 December letter, albeit that this was written at the end of the previous year. We think that this conclusion was probably correct. In any event, we believe, having regard to the discussions in May 1995 and to the 1 December letter, that it should have been plain to Mr Formisano that Mr Osinski was speaking of the replacement of POL by POL-A as the party to the MODs. It is fair to say that, both in the letter of 1 December and in the fax of 7 March, MSC's agreement to this appears to have been taken for granted.

53. That Mr Formisano was agreeable to the replacement of POL by POL-A was, objectively, the inference to be drawn by his faxed reply to Mr Osinski confirming 'the agreement as per your message'. In our judgment at this stage of the story the novation was complete.

54. The Judge appears to have been influenced in his conclusion that there was no agreement to the novation by the fact that, in May 1995, MSC had made it plain that they would only agree to this if POL provided a guarantee of POL-A's obligations. Thus, at paragraph 17, he remarked: *'given POL's own poor payment record, made good from time to time by sale of assets, it cannot have been surprising that MSC were insisting on a guarantee of the subsidiary's performance'*. At paragraph 67, when discussing the proposal in the 1 December letter that POL-A should replace POL as party to the MoD, he said *'I accept the evidence of all the MSC witnesses that MSC were agreeable, but only so long as POL furnished a guarantee of the subsidiary's performance (and payments) under the MOD'*.

55. This raises the question of why MSC did not respond to the December 1 letter in the way that ACL had done by demanding a letter of guarantee. This was explored in evidence and the Judge quoted the following extracts from the transcript:

"…the author of the 1st December letter, Mr Hapko, was not called to give evidence by the Defendants. In contrast, if it be relevant, Mr Aponte's reaction to the letter is exemplified by his evidence in cross-examination at Day 3 pp.12 and 13:

Q. Your understanding of this letter… was… that MSC should do business with the new subsidiary company as if it was Polish Ocean Lines, that Polish Ocean Lines should remain a party supporting the contracts and Polish Ocean Lines would be responsible for Pol-Atlantic. That was your understanding. A. Both. First of all that Polish Ocean Lines would be responsible for the contract and responsible for Pol-Atlantic as well.

Q. On the basis of your understand, you were therefore content to accept this letter as an annex to the MOD's as requested. A. Yes.

Q. You saw no reason not to comply with Polish Ocean Lines' requested. A. As long as they were assuring me of their responsibility under the MOD, I had no problems.

Mr Formisano's reaction was in a similar vein as recorded at Day 1 p.53:

Q. How did you understand that, that it was an offer of the guarantee that you wanted? A. I understand that we continue to with Polish Ocean Lines, okay, and if a change had to happen we were asking for a proper guarantee, okay, and it was up to them, if they were minded to continue to do business with us, to provide with the guarantee - very simple. We had no reason to refuse doing business if they were giving to us the proper guarantee or satisfaction. "

56. The Judge did not consider this evidence relevant to his task of deciding what the 1 December letter meant, and we agree. In any event, we find it equivocal in a way that the letter was not. It does suggest, however, that it is possible that Mr Aponte and Mr Formisano read the letter as giving an undertaking that POL would stand behind POL-A and that this satisfied their requirement for a *'back letter'*.

57. Mr Kendrick submitted that it was inconceivable that, in March 1996, MSC would have been willing to agree to a novation which released POL from their obligations under the MoDs in the absence of a binding guarantee of POL-A's obligations. He emphasised that the North Atlantic trade was traditionally loss-making so that it had been necessary for POL regularly to sell vessels in order to discharge their obligations to MSC. MSC could not be expected to accept the substitution of a subsidiary with no vessels to sell.

58. We agree with Mr. Young that there cannot have been a joint assumption underlying the contractual adventure that the slot charterers would persistently lose money so that they would regularly be forced to dispose of their vessels to meet their obligations. Up to 1996 POL had indeed been selling vessels in order to discharge their liabilities to MSC, and under the March 1996 agreement they were undertaking to pay some $1.7m, to be realised by the sale of a further vessel. We do not consider, however, that the parties can be assumed to have entered into the March agreement in the expectation that the slot charterers would be perpetually condemned to making losses. Such conduct would be patently absurd.

59. The evidence shows that, as the parent company, POL were in fact anxious to stand behind POL-A in order to maintain the group's North Atlantic container trade. MSC made no adverse reaction to the 1 December letter and Mr Formisano agreed to the proposals in the 7 March fax. We consider that the natural conclusion to be drawn from this was that MSC were content that the proposed substitution should proceed on the strength of the assurances given in the 1 December letter.

Conduct after the March 1996 agreement

60. David Steel J. devoted 7 pages of his judgment to summarising the conduct of the parties after March 1996, before considering the events leading up to the February 1999 Addendum. We agree with Mr Young that these events are entirely consistent with POL's case that they had been replaced as slot charterers under the MoDs by POL-A. We propose to deal with this period by reference to a number of different aspects of POL-A's involvement.

Financial arrangements

61. MSC gave effect to the March agreement by looking to POL to discharge the slot charterers' indebtedness up to 1 March 1996 and to POL-A thereafter. Considerable correspondence ensued between POL-A and MSC in ensuring that this was done correctly. Where invoices were wrongly addressed to the wrong company, this was corrected. There was considerable delay by POL in discharging a small amount of their pre March 1 indebtedness, which led MSC to write on 27 March 1997 asking when POL planned to make a final payment, *'so that this long lasting account can be finally closed'*.

62. The Judge's conclusion in respect of this area of evidence was that the accounting process was *'equally consistent with a book-keeping exercise whereby POL-A were treated as sole operator of the trans-Atlantic service under the umbrella of POL, with the latter remaining the sole contracting party'*. We do not agree. Had this been merely a book-keeping exercise, POL would have both remained liable for the slot charter hire and been entitled to the earnings from the trans-Atlantic trade. Such a scenario was not compatible with POL and POL-A's positions, as made plain to MSC. Thus on 2 May 1996, Mr Klein, the Financial Director of POL, wrote to MSC a letter dealing with POL's indebtedness, which explained:

"The process of gradual take over of POL operational activities by the newly formed companies has had, as an unavoidable side effect, that mainly the POL income from previously maintained activity is also diminishing step by step."

The letter proposed that POL should clear their indebtedness by a schedule of payments, and continued:

"We hope, that the proposed schedule of payments shall be satisfactory to You and will not affect Your cooperation with POL-ATLANTIC, who from the legal point is a separate entity and from the beginning has been in line with the agreed terms with Your Company."

63. More, generally, we do not consider that the importance that was attached by both POL and POL-A to ensuring that, after the March agreement, invoices were addressed to the correct company is consistent with POL-A's involvement with the financial arrangements being merely a book-keeping one.

POL-A take over the container service

64. With effect from 1 March 1996 POL-A replaced POL as operator of the Polish trans-Atlantic container service. POL-A bills of lading were issued instead of POL bills and freight payments were made to POL-A.

Joining TACA

65. In order to operate the trans-Atlantic service, it was necessary to be a member of the Transatlantic Conference Agreement (TACA). POL had been a member. On 1 December 1995 POL had written to the secretariat of TACA to inform them of POL's substitution by POL-A:

"This is to advise that beginning January 1, 1996 POL will transfer their North Atlantic common service to a new autonomous entity of the Polish Ocean Lines Group with the name of POL-ATLANTIC.

The ownership of the new firm remains in the hands of Polish Ocean Lines as the mother company.

POL-ATLANTIC will be registered in Poland before 29th December, 1995 and the company's head office will be domiciled in POL building in Gdynia with the present address."

66. The approval of the Federal Maritime Commission ('FMC') to POL-A's membership of TACA was required. To obtain such approval it was necessary to be the operator of a ship. As slot charterer of spaces on ships operated

by MSC, POL-A was unlikely to satisfy this requirement. Accordingly MSC and POL-A entered into a fictitious time charter on the New York Produce Exchange Form in respect of an MSC vessel. MSC offered to designate a specific vessel for the purpose, which POL-A would be entitled to name and to identify by painting the company logo on the funnel.

67. It seems to us that this part of the story demonstrates that POL-A was taking over the operation of the trans-Atlantic service in their own right, and not merely on behalf of POL. Mr Kendrick sought to counter this evidence by drawing our attention to the fact that the American attorney, who applied on behalf of POL-A for the approval of the FMC to the substitution, described this as a 'change of name'. We do not know how or why he came to do this. It cannot be suggested, however, that MSC were led to believe that POL-A's intervention was no more than a change of name.

Negotiation of contractual variations

68. After March 1996 POL-A negotiated with MSC a number of variations of the terms of the MoDs. Thus, by way of example, on 27 February 1997 there was a meeting between representatives of MSC and POL-A in Geneva at which variations to slot prices and a modified bunker clause were agreed. After a meeting in December 1997 Mr Formisano faxed to Mr Osinski details of new slot rates, with the comment:

"*The above prices will give to POL ATLANTIC an economy of about USD 3.5 million which, as you can appreciate, is an enormous amount and which has been granted to your company only in view to keep the actual relation, for sake of good order, we wish to mention that we cannot consider any additional discount and if same is not accepted, we will be compelled to review the entire agreement which, as discussed, will not be beneficial to both of us.*"

69. In August 1997 there were negotiations between MSC and POL-A with a view to concluding a fresh MoD between the two companies to cover their relationship under the earlier tripartite MoD which included ACL. POL-A informed MSC that they had concluded a separate MoD with ACL and suggested that they should do the same with MSC. The negotiations were not taken to a conclusion, but at no stage did MSC demur to the fact that the appropriate party to the agreement was POL-A.

70. It is right to observe that before March 1996 POL-Eureca had agreed contractual variations on behalf of POL, but dealings between POL-A and MSC after March 1996 gave every indication that POL-A were negotiating on their own account.

The August 1998 agreement

71. It appears that in 1998 the North Atlantic trade was again experiencing hard times. POL-A fell into arrears with their payments, and MSC agreed to a reduction of the slot price. Despite this, by 7 August 1998 POL-A were some $1.5 million in arrears. At this point Mr Hapko, wrote to Mr Aponte in the following terms:

"Having in mind the problems which have been prevailing since several months in the co-operation between your esteemed Company and POL-ATLANTIC as well as the endeavours of Mr P. Formisano and POL-ATLANTIC Management directed towards consenting on a most favourable solution to both Parties, I think - in my capacity of the General Director of Polish Ocean Lines, owners of POL-ATLANTIC - that we should schedule a meeting at the earliest possible convenience.

On our part, we would propose optionally end of week nr 35 or 36 (in Geneva, if preferred by you).

I think that you will share our opinion that all aspects of our present and future cooperation (mainly economical and financial matters, as also own tonnage deployment) should be discussed and adequate determinations taken."

72. It is to be noted that Mr Hapko expressly wrote in his capacity as the General Director of POL-A's parent company and that he made reference to 'own tonnage deployment', which could only be a reference to POL. A meeting took place at which Mr Hapko was present, as well as representatives of both MSC and POL-A. At that meeting an agreement was signed with the following heading:

"NEW AGREEMENT FOR SLOT PAYMENTS BETWEEN MSC MEDITERRANEAN SHIPPING COMPANY S.A. (MSC) AND POL-ATLANTIC (POL)"

It was signed by representatives of MSC and POL-A, but not by Mr Hapko. Under the agreement MSC agreed to reduce the number of slots and POL-A agreed to settle the outstanding indebtedness in 5 monthly instalments and to pay the weekly current invoices as they fell due.

73. David Steel J. remarked at paragraph 80 of his judgment that, viewed in isolation this agreement might fairly be regarded as only consistent with novation. He went on, however, to make the following comments:

"…it has to be borne in mind that the meeting which led to the agreement was set up by Hapko of POL by his letter of the 7th August which spoke in terms of an agenda to discuss 'all aspects of our future and present co-operation'. This was just as equivocal as to POL's status (whether as a party to the MOD, a guarantor of pronouncements in the letter of 1st December.

Furthermore, while the agenda may have been a broad one, the written agreement was expressly confined to slot numbers and payments. In short, there were mutual promises of payment on the one hand by POL-A of outstanding sums in return for relaxation by MSC of the number of slots required as a minimum. These matters were foursquare within the sphere of interest of POL-A if acting merely as operator of the route and not as the counter party to the MOD."

74. We do not share the Judge's view. It seems to us that Mr Hapko's role was most consistent with that of a parent company that was concerned to support a subsidiary. Nor can we agree with the Judge's comment that the August

1998 agreement covered matters that were foursquare within the sphere of interest of POL-A if acting as the operator of the route and not as the counter party to the MoD. It seems to us that the undertaking made by POL-A to settle the outstanding indebtedness by instalments strongly suggests that the liability in question was that of POL-A.

75. Nor do we consider that the distinction drawn by the Judge between the operator of the route and the counter party to the MoD is a natural one. On a natural reading of the MoD one would expect the party operating the container service to be the party to the agreement with MSC. The picture of POL-A carrying out the various activities that we have described above, without having any contractual rights or obligations to do so, is a strange one.

76. Before us Mr Kendrick advanced an argument that does not seem to have been advanced in the court below. This was that, instead of agreeing to a novation, the parties agreed that POL-A should become a joint contracting party under the MoDs with POL. On this basis POL and POL-A would have been jointly entitled to the use of the slots in MSC's vessels and jointly liable for the slot charter hire. Such an arrangement, while not impossible in legal theory, would be a strange one in practice. The only basis upon which Mr Kendrick urged this interpretation of the contractual arrangements was that it was highly unlikely that MSC would release POL from their contractual commitment under the MoDs. This is not an adequate basis for concluding that a type of agreement was reached for which the evidence provides no support.

77. Mr Young challenged Mr Kendrick to draw our attention to any evidence in the period between the March 1996 agreement and the February 1999 Addendum which supported his argument that POL remained party to the MoDs. Mr Kendrick took up this challenge, but by doing so merely demonstrated the paucity of the evidential support for his case.

78. Mr Kendrick drew attention to a number of communications addressed by MSC to POL Gdynia after March 1996. The Judge also observed that the telexes and faxes were addressed almost randomly to either POL or POL-A. This does not take the appellants' case far. Both POL and POL-A shared the same address and it does not surprise us that those who typed the faxes or telexes did not distinguish nicely as to the detail of the address. What was much more significant was the identity of the individuals to whom those at MSC wrote, which could be identified because the communications were marked 'for the attention of'. These were officials of POL-A and not POL.

79. Mr Kendrick also referred, as did the Judge, to the fact that on two occasions when lawyers made claims under the MoDs against MSC, they gave notice of arbitration in the name of 'POL-Atlantic/Polish Ocean Lines'. The Judge did not attach much weight to this point and he was right not to do so. The natural caution of the lawyer to cater for all possibilities is sufficient explanation for this.

80. Our conclusion is that events between the March 1996 agreement and the February 1999 Addendum lend strong support to POL-A's case that it was agreed in March 1996 that POL-A should replace POL as slot charterers, operators of the group's trans-Atlantic container service and parties to the MoDs, all of which were different facets of a single status. Had the March 1996 faxes been ambivalent, as the Judge concluded, the parties' conduct thereafter would have supported POL's alternative case that there was an estoppel by convention. In the event that conduct reassures us that our construction of the March 1996 faxes accords with the intention of the parties.

The February 1999 Addendum

81. The Judge devoted 4 pages of his judgment to a careful exposition of the background to the February 1999 Addendum. We can summarise the position as follows. POL-A proved unable to discharge the payment obligations agreed in the August 1998 Agreement. POL then proceeded to explore the possibility of using the TYCHY as security to obtain banking finance. No satisfactory offer was forthcoming. At the end of December 1998, Mr Wyzomirski, the President of the Managing Board of POL-A, enquired whether MSC would be interested in a purchase and lease-back of this vessel. In his witness statement he stated that he was authorised by Mr Hapko to make this proposal. Mr Formisano replied that they would not.

82. On 26 January 1998 Mr Rubin, who had recently been appointed Chairman and Chief Executive of POL-A wrote to Mr Formisano:

"After your confirmation that you are not interested to proceed with the sale/lease back transaction concerning one of POL ro-ro vessels, the ship was placed on the market and POL is now considering several options and offers.

According to the confirmation received from our parent company Polish Ocean Lines, after transaction is finally concluded funds will be released to POL-ATLANTIC to cover outstanding amount due to MSC.

We hope that above procedure should take about 4-6 weeks."

83. On 2 February 1999, Mr Blanc of MSC wrote to Mr Rubin, suggesting that MSC should be granted a mortgage over the TYCHY. The response came on 4 February in a letter signed both by Mr Hapko on behalf of POL and Mr Rubin on behalf of POL-A:

"Due to very unfavourable market situation (well known to you as well) at the end of '98 and in January of 1999, our payments are not meeting the agreed terms.

We do not deny this fact and at the same time appreciate your patience and understanding. During last 5 years of co-operation we were always able to find solution to the problems and I am convinced that also now in spite of the existing difficulties POL-ATLANTIC will be able to meet its obligations. This is not the standpoint of POL-ATLANTIC

only, but Polish Ocean Lines, being very well aware about the present position, is fully supporting our company with the necessary guarantees and funds.

To materialise it Polish Ocean Lines have already approached several financial institutions and some interested companies to enter into financing transactions. Basing on the actual status of negotiations we expect that the funds will be available in 4-6 weeks time. POL guarantees that immediately upon completion of the deal, funds will be released to POL-ATLANTIC. Consequently POL-ATLANTIC will cover the outstanding obligations.

Unfortunately at this stage of POL financial negotiations it would not be possible to proceed with the idea of the mortgage."

84. On 12 February a meeting took place at Geneva between Mr Barski of POL and Mr Rubin of POL-A on the one hand and Mr Aponte and Mr Formisano of MSC on the other. Mr Young referred us to a number of passages from the transcript of the evidence which showed that agreement was reached in principle at this meeting, but not in the detail that was incorporated in the February 1999 Addendum. That Addendum was prepared by Mr Aponte. It read as follows:

"ADDENDUM TO AGREEMENT DATED 12TH AUGUST 1998 BETWEEN MSC MEDITERRANEAN SHIPPING COMPANY S.A. (MSC) AND POL-ATLANTIC

Following the meeting held at Geneva on Friday 12th February 1999 between Mr A. Ruben, Managing Director of POL ATLANTIC, Mr J Barski, Director of Polish Ocean Line, Mr P Formisano, Director of MSC and Mr G Aponte, President of MSC, the following agreement was reached:

In view of Pol Atlantic's inability to pay the accrued outstanding of US$3,614,738.04 as per 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 MV TYCHY 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 Polish Ocean Lines are ready to make the settlement payment.

2. Until such date, i.e. up to 12th March 1999 or up to 19th 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 to help Polish Ocean Lines overcoming their liquidity problems until the sale of the above vessel has taken place.

MSC and Polish Ocean Lines agreed that as from 15th February 1999, Polish Ocean Lines will undertake to buy from MSC the following slots:

? North Atlantic West and Eastbound 150 TEU's weekly + 100 TEUs buffer

? South Atlantic West and Eastbound 75 TEU's weekly + 100 TEUs buffer

? Price as per existing agreement."

85. The Addendum was signed by Mr Rubin, Mr Barski and Mr Formisano. Although it was MSC's pleaded case that, if there had been a novation in March 1996, the February 1999 Addendum effected a re-novation, the MSC witnesses accepted that there had been no question of any substitution of parties having been agreed in the Addendum or the meeting that preceded it. The POL witnesses, for their part, were bent on seeking to establish that it had never been agreed that POL would make payments direct to MSC, but merely that POL would put POL-A in funds to discharge the latter's liability. As we read David Steel J.'s judgment, he held that both Mr Barski and Mr Rubin read the Addendum before they signed it and could not now be heard to challenge its effect. As to that effect, the Judge held that it was consistent with his finding that POL had at all times remained party to the MoDs, so that POL were entering into undertakings in relation to their own indebtedness.

86. We have to approach the February 1999 Addendum in the light of our conclusion that POL-A had been substituted for POL in the MoDs by the March 1996 agreement. Our first task is to address the second issue that we identified at paragraph 15. Did POL replace POL-A as slot charterer on the true construction of the February 1999 Addendum?

87. The recital and first paragraph of the Addendum unequivocally records an agreement on the part of POL to sell its own assets in order, within 4 to 5 weeks, to discharge the existing indebtedness of POL-A. As such this accords with the fact that a novation had taken place.

88. Paragraphs 2 and 3 deal with an undertaking on the part of POL to discharge additional indebtedness that would be incurred in the period of 4 or 5 weeks pending the realisation of the assets referred to in paragraph 1. These paragraphs are neutral as to whether the contemplated indebtedness is that of POL or of POL-A.

89. The final part of the Addendum suggests that POL had agreed to undertake primary liability for the purchase of future weekly slots. Are these provisions enough to establish a re-novation under which POL were to replace POL-A as the slot-charterers under the MoD. We have concluded that they are not, for the following reasons.

    i) Having regard to the background to the novation which we have described above, it was inherently unlikely that the parent company would once again wish to take over the operation of the trans-Atlantic trade.

    ii) The dealings between the parties before the signing of the Addendum gave no hint that the object of the agreement was that POL should replace POL-A as slot charterers. On the contrary, those dealings suggested

that the object of the exercise was to agree a basis upon which the parent would undertake to discharge its subsidiary's debts.

iii) The more natural meaning of the final part of the Addendum was that POL would purchase and pay for slots on behalf of their subsidiary rather than that POL should replace their subsidiary as the contracting party.

iv) While, in construing the Addendum it is not right to have regard to statements of the witnesses that there was no intention to effect a substitution of parties, we can have regard to the fact that, had that been the intention, one would expect some express reference to this in the Addendum

90. In summary, it is our conclusion that there was not a re-novation under the February 1999 Addendum. Inasmuch as this gave rise to obligations on the part of POL to MSC, these were free standing obligations in the nature of a guarantee. They were not obligations in relation to the use or hire of ships of which POL were the charterers. It follows that MSC's claims do not fall within Admiralty jurisdiction *in rem* under section 21(4)(b) of the Supreme Court Act 1981.

91. Our conclusions thus far leave unanswered issues 5 and 6 identified in paragraph 15 above. It is necessary first to decide whether the appellants have submitted to the jurisdiction, that is issue 6. Only if they have can the court proceed to decide the extent of any *in personam* liability, that is issue 5.

92. The parties agreed that issue 6 should be reserved, pending the outcome of the arguments advanced before the Judge. On the Judge's finding issue 6 did not arise. Counsel for each party advanced some argument at the end of his submission on the question of whether or not POL had submitted to the jurisdiction of the Court. On reflection we have decided that it would not be right for this Court to make the first ruling on that issue. The trial Judge is better placed than are we to assess the implications of the procedural steps taken by the parties in the earlier stages of this litigation.

93. Accordingly we have decided that the appeal against the judgment of David Steel J. must be allowed and the matter must be remitted for him to decide whether the Court has jurisdiction to entertain an *in personam* claim by MSC against POL and, if it has such jurisdiction, what is the outcome of that claim.

94. The TYCHY has been sold by the Admiralty Court and we shall hear counsel on the appropriate order in relation to the proceeds of sale.

ORDER:

1. Appeal allowed with costs.
2. Costs below to be remitted to the trial judge Mr Justice David Steel.
3. Proceeds of sale are to return into court, including $500,000 paid in relation to costs, that sum to be paid back with interest to await the result of the matters referred to the judge below, without prejudice to any issues that may arise as to the claimant's rights to access to that fund to meet their claim.
4. Appellant's to have £50,000 on account of the costs before the Court of Appeal, that sum to be paid within 14 days.

(Order does not form part of approved Judgment)

Timothy Young, QC and Christopher Smith (instructed by More Fisher Brown for the Appellant)
Dominic Kendrick, QC and Simon Kerr (instructed by Richards Butler for the Respondent)