

# THE OWNER'S VULNERABILITY TO THE LIABILITIES OF THE DEMISE CHARTERER

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## 1 Introduction

Demise charters differ from other forms of charterparty in that they involve the charterer having possession and control of the owner's vessel. The leading statement on the nature of a demise charter is that of Lord Justice Evans in *The Guiseppe di Vittorio*:<sup>1</sup>

What then is the demise charter? Its hallmark ... is that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting – a lease, or demise, in real property terms – of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a 'bareboat' lease or hire arrangement.

That statement was with reference to the meaning of the phrase 'charter by demise' in s 21(4) of the *Supreme Court Act 1981* (England and Wales) enacting Article 3(4) of the *1952 Arrest Convention*.<sup>2</sup> It was adopted by the Full Court of the Federal Court of Australia in *The Hako Endeavour*.<sup>3</sup> Rares J also recognised that a demise charterer has often been described as 'the owner *pro hac vice* or the temporary owner because of the extent of his possession and control'.<sup>4</sup>

Because the charterer has possession and control of the vessel, peculiar issues arise with regard to the vulnerability of the owner through the possible arrest of the ship for the debts and liabilities of the demise charterer. The charterer may through the use of the owner's vessel incur tortious liability, or it may contract for its own purposes and interests and thereby place the vessel at risk for contractual debts.

These issues will be analysed in two categories, namely liabilities that give rise to maritime liens and those that are enforceable by statutory lien (i.e. by the arrest of a vessel on a general maritime claim in *in rem* proceedings). In each case, the circumstances can be further categorised into those cases in which the claim arose before termination of the charterparty and those in which the claim arose after termination of the charterparty.

## 2 Maritime liens

Since the master and crew are not employed by the owner, the owner will not be liable for the acts and omissions of the master and crew on the basis of vicarious liability. However, the ship itself will be susceptible to arrest and ultimately judicial sale – and the owner's asset will be imperilled and the owner will in that sense be liable – where the acts and omissions of the master and crew give rise to a maritime lien. Similarly, although the owner will not in the ordinary course be liable for the contractual debts of the charterer, where those debts give rise to a maritime lien the owner will be vulnerable to the debts through the enforcement of the lien against the ship.

A maritime lien is a privilege or security interest 'which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged'.<sup>5</sup> It is enforceable against the ship even if at the time of enforcement the ship is no longer owned by the person who owned it when the events that gave rise to the lien occurred.<sup>6</sup>

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<sup>1</sup> [1998] 1 Lloyd's Rep 136 at p 156 2<sup>nd</sup> col. Curiously the reports of this and other judgments published in Lloyd's Reports concerning the same dispute spell the name of the ship as reflected here (i.e. Guiseppe) although the ship was presumably named after the Italian post-war trade-union and communist leader Giuseppe di Vittorio.

<sup>2</sup> *International Convention Relating to the Arrest of Sea-going Ships* (Arrest Convention), 1952, 439 UNTS 6330.

<sup>3</sup> (2013) 211 FCR 369, 386 [54] (Rares J), 372 [1] (Siopis J), 404 [138] (Buchanan J).

<sup>4</sup> *Ibid* 386 [55], citing *inter alia*, *The Andrea Ursula* [1973] QB 265, 269H (Brandon J).

<sup>5</sup> *The Two Ellens* (1872) LR 4 PC 161, 169.

<sup>6</sup> *The Bold Buccleugh* (1861) 7 Moo PC 267.

In England and the jurisdictions which have adopted the English admiralty law, there are generally five recognised maritime liens although their categorisation may vary.

*First*, there is the lien for collision damage (i.e. damage done by a ship). The liability for negligence giving rise to collision damage will attach to the ship herself.<sup>7</sup> In *The Father Thames*<sup>8</sup> the ship was under bareboat charter and it was the negligence of the charterer's employees that resulted in the collision, but the lien still attached, i.e. the owner became vulnerable to the *in personam* liability of the bareboat charterer through the mechanism of the lien. The lien does not arise if the fault is not attributable to the owner or demise charterer as owner *pro hac vice*.<sup>9</sup>

*Second*, there is the maritime lien for salvage. Under the terms of the charter, the bareboat charterer will typically be liable to the owner to repair any damage to the vessel as well as to take out hull and machinery insurance, but the claim for salvage attaches to the vessel itself. In other words, even though the successful salvage effort will save the charterer and/or the charterer's insurer the expense of repairs, the owner will through the salvage lien be vulnerable to the salvage reward. The salvage lien is not dependent on the personal liability of the owner or demise charterer.<sup>10</sup>

*Third*, there is the maritime lien for the master's and the seamen's wages. That is to say, even though the wage debt is incurred by the bareboat charterer and for its benefit and interests, the owner will through the lien be vulnerable to that debt. As a matter of public policy, the wages lien does not depend upon the personal liability of the owner or demise charterer.<sup>11</sup>

The same is true for the *fourth* maritime lien, namely bottomry – that is where the keel or bottom of the ship is pledged as security for the payment of necessities that are contracted for by, and for the benefit of, the bareboat charterer or other person in possession. It is the credit of the ship itself that is pledged, not the credit of the owner.<sup>12</sup>

*Finally*, there is a lien for master's disbursements, i.e. the master has a lien for disbursements made by him for the employment and operation of the vessel. This lien does not arise if the master is employed by the demise charterer unless the master has authority to incur expenses for the owners.<sup>13</sup>

### 3 Statutory liens

Article 3(4) of the *1952 Arrest Convention*<sup>14</sup> allows for the arrest of a ship under 'a charter by demise' when the charterer is liable in respect of a maritime claim relating to that ship. Article 3(1)(b) of the *1999 Arrest Convention*<sup>15</sup> is to similar effect. These provisions, and in particular the statutory provisions which give effect to them, raise the question of whether a ship is under a charter by demise at a particular time. Controversy has arisen in connection with the period after the owner has purported to exercise a right of termination of the bareboat charterparty but the vessel is still in the possession of the charterer.

#### 3.1 Charter Terminated Prior To The Claim Arising But Before Redelivery

If the charterparty is held to have terminated when the proceedings were commenced then the statutory lien will not be available even if the charterer still had possession. Claimants have, however, on occasion sought to justify proceedings against the vessel on the basis of the owner's *in personam* liability, or otherwise sought to hold the owner personally liable, in such circumstances on the basis of ostensible authority, i.e. that by allowing the erstwhile charterer to be in possession of the vessel and operating it as if it was the owner, the owner represented that the charterer had the authority of the owner to incur debts on its behalf.

An example of such a case is *The Guiseppe di Vittorio*,<sup>16</sup> referred to above. The vessel was owned by the Republic of Ukraine and operated by Black Sea Shipping Co, known as Blasco, under a statutory scheme.

<sup>7</sup> *The Dictator* [1892] P 304; *The Father Thames* [1979] 2 Lloyd's Rep 364.

<sup>8</sup> [1979] 2 Lloyd's Rep 364.

<sup>9</sup> *The Castlegate* [1893] AC 48, 52 (Lord Watson).

<sup>10</sup> DR Thomas, *Maritime Liens* (Stevens & Sons, 1980) [274].

<sup>11</sup> *The Castlegate* [1893] AC 48.

<sup>12</sup> *The Ripon City* [1897] P 226, 245-6 (Gorell Barnes J).

<sup>13</sup> *The Castlegate* [1893] AC 48, 51-3 (Lord Watson).

<sup>14</sup> 439 UNTS 195.

<sup>15</sup> International Convention on the Arrest of Ships (Arrest Convention), 1999, 2797 UNTS 49196.

<sup>16</sup> [1998] 1 Lloyd's Rep 136.

When the vessel was arrested pursuant to a statutory lien for the supply of bunkers, the Republic argued that Blasco was the debtor *in personam* and there was no demise charter in place. The plaintiffs argued that if there was no demise charter, then the debtor *in personam* was the Republic on the basis that Blasco had contracted for the Republic.

As is customary, the contract for the supply of bunkers was stated to be for and on behalf of '[the vessel], her Master, owners and operators'. At first instance, Clarke J held that the Republic had permitted Blasco to represent to the world, including to the plaintiffs, that Blasco was the owner and thus that it could contract (as it were) on behalf of the vessel and that it could commit the vessel as security for any claim.<sup>17</sup> Applying the principles of ostensible authority, or authority by estoppel, expounded in *Freeman & Lockyer v Buckhurst Park Properties*,<sup>18</sup> the Republic was estopped from denying that it was liable on the contract, at least to the extent necessary to bind the ship.<sup>19</sup>

On appeal, the Court of Appeal analysed the factual circumstances of the relationship between the Republic and Blasco and concluded that there was a charter by demise within the meaning of the relevant statutory provision.<sup>20</sup> This was consistent with the finding of Clarke J at first instance. However, on the question of Blasco's authority to contract on behalf of the Republic, Evans LJ (Aldous and Waller LJ agreeing) held that the very factors which meant that Blasco was the demise charterer led to the conclusion that it, and not the Republic, was liable *in personam* on the plaintiffs' claim, and that even if there was no demise charter the facts would be the same which would lead to the same result.<sup>21</sup>

When there is a demise charter, it is not relevant that a third party dealing with the vessel may or may not have known what the terms of the charter were, or even whether a charter existed or not. The demise charterer is bound because the third party believes that he is dealing with him, or with his representatives, even if he also knows that another person is the registered or 'actual' owner of the vessel.

The reliance on the ostensible authority of the person in possession of the vessel accordingly failed. The reasoning was substantially based on the authority of the House of Lords decision in *Baumwoll Manufactur von Carl Scheibler v Furness*,<sup>22</sup> which held that a master employed by a demise charterer has no apparent authority to bind the owner in signing bills of lading.

In *The Socofl Stream*,<sup>23</sup> counsel for the plaintiff sought to distinguish *Baumwoll v Furness* on the basis that unlike in that case the vessel was not still under demise charter; the charter had been terminated but the owner had done nothing to retake possession. It was contended that in those circumstances bills of lading signed by the master bound the owner. Moore J (in the Federal Court of Australia), in a jurisdictional challenge, held that the plaintiff's contentions were not untenable and therefore allowed them to proceed to trial.

In an appeal from the judgment following the trial in which the issue had been fully tried out, *The Socofl Stream (No 2)*,<sup>24</sup> the Full Court of the Federal Court in *The Socofl Stream (No 3)*<sup>25</sup> held that the plaintiff was entitled to assume that when the master received cargo on board the vessel he did so for the owner or the disponent owner for the time being,<sup>26</sup> the implication being that if there was no demise charter in place then the master could be taken to have signed for the owner. The other elements of estoppel having been made out, the owner was not able to deny the ostensible authority of the master to sign bills of lading binding the owner.

The High Court of Singapore (Steven Chong J) in *The Chem Orchid*<sup>27</sup> applied the reasoning of the Full Court in *The Socofl Stream (No. 3)*. On the assumption that the demise charter had been terminated (the Court having found that it had not been terminated making the findings on this point purely *obiter*), the vessel nevertheless remained in the possession and control of the erstwhile demise charterer when bills of lading were issued. His Honour held that the case based on the ostensible authority of the master to bind the owner rather than its erstwhile demise charterer was stronger than in *The Socofl Stream*; the owner knew that the vessel was

<sup>17</sup> Ibid 149, 1<sup>st</sup> col.

<sup>18</sup> [1964] 2 QB 480.

<sup>19</sup> [1998] 1 Lloyd's Rep 136, 149 1<sup>st</sup> col.

<sup>20</sup> Ibid 159, 2<sup>nd</sup> col.

<sup>21</sup> Ibid.

<sup>22</sup> [1893] AC 8.

<sup>23</sup> (1999) 95 FCR 403.

<sup>24</sup> [2000] FCA 1681.

<sup>25</sup> [2001] FCA 961 (Ryan, Tamberlin and Conti JJ).

<sup>26</sup> Ibid [22]-[26], [37].

<sup>27</sup> [2015] SGHC 50 (18 February 2015) [122]-[129]; the judgment is on an appeal from a decision of the Assistant Registrar reported at [2014] SGHCR 1; [2014] 1 Lloyd's Rep 520.

continuing to trade and could have taken the simple step of contacting the shippers and informing them of the termination of the charter and the absence of authority to trade the vessel. Its failure to take overt steps to prevent the erstwhile charterer from loading the vessel was a representation (by silence) to third parties that the master had authority to bind the owner.

### 3.2 Is The Charter Terminated Even Though There Is No Redelivery?

The cases that deal with the situation where the claim arose prior to termination but the proceedings are brought against the ship still in the possession of the erstwhile demise charterer after the charter is terminated or purportedly terminated can be divided into three categories. *First*, there are cases where the demise charterer repudiated the charterparty and the owner accepted the repudiation. As will be seen, in each case the court has accepted that the charterparty was terminated and that the vessel was not susceptible to proceedings on the erstwhile charterer's liabilities. *Second*, there are cases in which notice of termination by the owner to the charterer following the charterer's breach alone has been sufficient to bring the charter to an end with the result that proceedings against the vessel on the charterer's liabilities are not competent. *Third*, there are cases in which it has been held that in addition to notice of termination, the retaking by the owner of possession of the ship, either actually or symbolically, is required in order to bring the charter to an end and thereby protect the vessel from proceedings on the charterer's liabilities.

#### 3.2.1 Repudiation

In *The Munster*,<sup>28</sup> the claim was for payment for bunkers supplied to the ship in August 1982 under a writ issued in September 1982. The issue was whether the ship was under demise charter at the later time. On 6 April 1982 (only a few weeks after the commencement of the charter) the charterers had sent a telex to the owners saying that they could not continue with the charter as they had lost their entire capital. There was an immediate reply from the owners saying that the telex was treated as a repudiation and the claim in damages was being formulated.

There was therefore a repudiation of the charter which was accepted and the charter was held by the Court of Appeal (Ackner LJ, Waller and Purchas LJJ agreeing) to have come to an end. This was notwithstanding that the repudiation letter recorded that the vessel was abroad and could not be returned to the owners because the charterers were without means.

In *The Rangitata*,<sup>29</sup> an argument was advanced in the Federal Court of Australia that the sub-demise charter in question had been repudiated by the sub-charterer by non-payment of hire, the repudiation had been accepted by the intermediate charterer and the sub-charter had consequently come to an end prior to the commencement of proceedings to enforce the claim against the sub-charterer. The argument failed on the facts because the intermediate charterer had allowed non-payment of hire to persist for lengthy periods without insisting on compliance. The original 'time shall be of the essence' requirement had accordingly been waived and there was no repudiation.

In *The Mahakam*,<sup>30</sup> Eder J in the High Court of Justice of England and Wales held that the charter's non-payment of hire in the context of a 'time shall be of the essence' provision amounted to a repudiation that the owner had accepted thereby bringing the charter to an end.

#### 3.2.2 Notice of Termination Only Required

In *The Sea Empire*<sup>31</sup> in the Supreme Court of Hong Kong, Court of First Instance, prior to writs against the two vessels concerned having been issued, the owner had issued notices of withdrawal of the vessels to the demise charterer. The issue was whether those notices had terminated the charterparties. The plaintiffs referred to terms of the charterparties that provided for the payment of hire between withdrawal and redelivery and for redelivery in specified areas to argue that the charters did not terminate until redelivery. Barnett J rejected this argument and held that:<sup>32</sup>

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<sup>28</sup> [1983] 1 Lloyd's Rep 370.

<sup>29</sup> [1998] FCA 885 (15 July 1998).

<sup>30</sup> [2012] 1 Lloyd's Rep 87.

<sup>31</sup> [1992] HKCFI 48 (9 March 1992); [1992] HKCFI 273 (9 March 1992).

<sup>32</sup> *Ibid* [20].

... a demise charterparty is terminated when, in accordance with the provisions of the charterparty, an owner acquires a right to withdraw the vessel and asserts that right. Such assertion could, as in the present cases, be no more than a formal notice to the charterers. If the vessel is conveniently located the right might be asserted by the owner taking actual possession. The recovery of possession from the charterer is not, however, crucial to the termination of the charterparty. The charterparty terminates, I am satisfied, upon the owner asserting his right to withdraw the vessel from the charterer.

The circumstances of the termination of bailment were referred to as authority for this conclusion. The reasoning is that a contract of bailment can be terminated with immediate effect even though the bailee may continue to have possession of the *res* with the bailee's liability for the goods, and obligation to care for the goods, continuing even after termination.

In *The Socofl Stream*,<sup>33</sup> Moore J in the Federal Court of Australia held that it is necessary to ascertain from the terms of the charterparty whether continuing physical possession of a vessel by the charterer (pending taking of possession by the owner by redelivery or some other means) is coextensive with continuing possession and absolute control of the vessel of the type characteristic of a demise charter.<sup>34</sup> His Honour reasoned that the case before him was different from *The Turakina*<sup>35</sup> (discussed in the following section below) because there was in the case before him a clear contractual right to terminate by giving notice and it was exercised.<sup>36</sup> He said that it is difficult to avoid a conclusion that if a charterparty expressly provided for its termination and the power to terminate was exercised then the charterer ceased to be a demise charterer from the time of termination.<sup>37</sup>

The issue arose again in the context of a charterparty with similar terms (being in that case a charter on the Barecon 2001 form) in *Re Pan Australia Shipping Pty Ltd (under administration): ASP Holdings Ltd v Pan Australia Shipping Pty Ltd (The Boomerang I)*.<sup>38</sup> Clause 28 provided for the owner to 'withdraw the vessel from the service of the charterers and terminate the charter with immediate effect by a written notice to the charterers' in the event of non-payment of hire'. Clause 29 dealt with repossession: 'the owners shall have the right to repossess the vessel from the charterers at the current or next port of call' and that 'pending physical repossession of the vessel ... the charterers shall hold the vessel as gratuitous bailee only to the owners'.

Finkelstein J felt compelled to follow the precedent of Moore J in *The Socofl Stream* but expressed some disquiet about it:<sup>39</sup>

If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying *The Socofl Stream*, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. ...

I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer's possession before delivery as that of 'gratuitous bailment' is not to the point. The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description.

Most recently, also in the context of the Barecon 2001 form, the issue was dealt with in *The Hako Endeavour*.<sup>40</sup> In the Full Court of the Federal Court of Australia, Rares J reasoned as follows:<sup>41</sup>

... The charterer becomes entitled to possession of the ship under and by virtue of the contractual rights that the owners confer on it by the terms of the demise. But that right to possession and control can be affected by another of the terms of the Barecon 2001 form. Thus, cl 29 provides that upon withdrawal of the ship and termination of the charter, the nature of the charterer's possession changes from possession for the charterer's use and benefit to possession as a gratuitous bailee for the owners. Possession of the latter kind is substantively different in character to the plenary right to possession and use of the ship formerly enjoyed by the charterer while the charter remained on foot.

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<sup>33</sup> (1999) 95 FCR 403.

<sup>34</sup> *Ibid* 419 [28].

<sup>35</sup> (1998) 154 ALR 666.

<sup>36</sup> *The Socofl Stream* (1999) 95 FCR 403, 419-20 [29].

<sup>37</sup> *Ibid* 420 [30].

<sup>38</sup> (2006) 235 ALR 554.

<sup>39</sup> *Ibid* 558 [14]-[15].

<sup>40</sup> (2013) 211 FCR 369.

<sup>41</sup> *Ibid* 389 [63]-[64].

When the charterer is in possession as a gratuitous bailee under cl 29, he holds the ship for the sole use and benefit of the owners. When, however, he is in possession because of the demise of the ship to him, the charterer holds her for his own use and benefit. The effect of withdrawal and termination of the charter under cl 29 is the same as a physical redelivery to the owners because the charterer has lost his contractual authority and right to use and employ the ship as he pleases.

The notice of withdrawal and termination thus amounted to symbolic conferral of possession of the ship in the owner even though physical possession remained with the former demise charterer.

Buchanan J reasoned similarly,<sup>42</sup> and Siopis J agreed with Rares and Buchanan JJ.<sup>43</sup>

In *The Chem Orchid*,<sup>44</sup> the Court disagreed with the reasoning in *The Hako Endeavour*.<sup>45</sup> Steven Chong J held that there is a general rule of the common law that physical redelivery of the vessel is necessary for a bareboat charter to be validly terminated,<sup>46</sup> and that it is not possible to contract out of that general rule.<sup>47</sup>

While others might have been of a different view from Finklestein J [in *Boomerang I* quoted above], his concerns certainly resonated with me. I do not see how the parties' attempt at constituting the charterer as a "gratuitous bailee" can be effective in transferring possession and thereby bring about an end to the charter. ... The question of repossession goes right to the heart of whether the bareboat charter remains in force and, that being the case, I do not consider it to be within the parties' private sphere to stipulate when or how this may occur short of what the general law requires. As I have stressed in this judgment, a bareboat charter is only at an end in law if the two ingredients of control and possession in fact revert in the owner – parties cannot, through the use of an inapposite label, declare this to be the case when that is not reflected in the reality of their situation.

It was also held that constructive redelivery is not part of the law of Singapore, actual physical redelivery being required.<sup>48</sup> *The Chem Orchid*, although obiter on these points, marks a clear departure from the position in Australia.

### 3.2.3 Notice of Termination Plus Some Act of Repossession Required

Perhaps the most influential judgment in this category is that of Tamberlin J in the Federal Court of Australia in *The Turakina*.<sup>49</sup> The charterparty in question was on the Barecon 89 form which in clause 10(a) contemplates the continued payment of hire under the charter until the day and hour of redelivery of possession to the owner. Clause 10(e) provides for the right to withdraw the vessel from the service of the charterer for non-payment of hire. Unlike clause 28(1) of the Barecon 2001 form, it does not expressly provide for termination of the charter with immediate effect.

In response to the owner's argument that the notice of withdrawal had the effect that the charterer lost complete possession and control (which is the distinguishing hallmark of the demise charter) with an obligation to give back possession of the vessel at the direction of the owner, so the demise came to an end,<sup>50</sup> his Honour referred to the obligation to continue to pay hire until redelivery.<sup>51</sup>

Whilst holding that there had been no redelivery in this case and that the charter had accordingly not come to an end when the proceedings were commenced, his Honour allowed for the possibility that redelivery of possession could be achieved by symbolic delivery or attornment.<sup>52</sup>

The notion of redelivery of possession of the vessel suggests some step or acknowledgment by the charterer to give effect to the redelivery and not merely a notice by or on behalf of the owner that redelivery is required. No such step was taken nor was any acknowledgment made in the few hours between withdrawal and commencement of proceedings. In the light of these considerations there is no substance in the

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<sup>42</sup> Ibid 408 [159];

<sup>43</sup> Ibid 372 [1].

<sup>44</sup> [2015] SGHC 50 (18 February 2015).

<sup>45</sup> (2013) 211 FCR 369.

<sup>46</sup> *The Chem Orchid* [2015] SGHC (18 February 2015) [72].

<sup>47</sup> Ibid [91].

<sup>48</sup> Ibid [104]-[105].

<sup>49</sup> (1998) 154 ALR 666.

<sup>50</sup> Ibid 675.

<sup>51</sup> Ibid 676.

<sup>52</sup> Ibid.

suggestion that constructive delivery was made simply by issuing and serving the notice of withdrawal of the vessel.<sup>53</sup>

The New Zealand High Court came to consider the same factual situation of withdrawal or termination but in relation to different vessels chartered out under the same charterparty in *The Rangiora, Ranginui and Takitimu*.<sup>54</sup> After analysing the judgment in *The Turakina*, Giles J came to the same conclusion that since there had been no act of actual or symbolic redelivery of possession the charter had not terminated:

... a demise charter is effectively brought to an end when the right of possession and control is withdrawn (notice of termination) and redelivery is achieved. Neither act need be consensual. ... Provided the default relied on gives a right to termination (which it does) then cancellation is effective by giving notice ... but the owner must nevertheless recover possession, actual, symbolic or constructive.<sup>55</sup>

#### 4 Conclusion

How are the different decisions to be reconciled, and where they cannot be reconciled, which approach is correct?

It is important to recognise that the termination of demise charters is under consideration here in the context of the exercise of the statutory lien by the arrest of a 'demise chartered' ship. As between owner and charterer different considerations may apply as to whether the charter has been terminated, but as between the third party plaintiff and the owner who asserts that by the time the proceedings were commenced the vessel was no longer subject to 'a charter by demise' (Article 3(4) of the *1952 Arrest Convention*,<sup>56</sup> or similar phraseology in its statutory analogues) the question has to be answered with reference to the statutory language and purpose: is the possessor of the ship at the time that proceedings are commenced in such a relationship with the ship and its owner that it is 'a charterer by demise'? It was established in *The Guiseppe di Vittorio* that it is not necessary that that relationship be one governed by written contract. In that case it was governed by statutory provisions of the Republic of the Ukraine. But it can presumably equally be governed by the rules of the common law such as those that apply to a relationship of bailment.

When the owner has served a notice of termination and has actively asserted its right to take possession of the vessel, the situation may be clear enough. But where the owner has been content merely to serve notice and do nothing further to retake possession, the former charterer continues to enjoy the possession and operation of the vessel for its own purpose, including employing the master and crew, with the effective consent of the owner. It may be that the contract that originally governed their relationship has terminated, but there is an argument to be made that the new relationship of consensual gratuitous bailment (or some other relationship that gives possession to the 'charterer', cf. *The Sydney Sunset*<sup>57</sup>) ought to still amount to 'a charter by demise' for the purposes of the exercise of the statutory lien.

The argument is that if whether or not the vessel is demise chartered for these purposes is to turn on the right of the owner to retake possession rather than on the retaking of possession, as suggested by the repudiation cases and the cases which say that notice of termination only is enough, then the statutory purpose is easily avoided. The vessel can trade indefinitely under the owner's immediately exercisable (but not yet exercised) right to retake possession. The charterer can gather debts and liabilities as it trades and these will not be able to be pursued against the vessel as Article 3(4) of the *1952 Arrest Convention*<sup>58</sup> and its statutory analogues envisage.

But the answer is that when notice of termination has been given and no steps to retake possession have been taken then the vessel is either still under demise charter or it is being operated with the consent of the owner. In other words, if it is under demise charter the debts and liabilities incurred in its operation will be the demise charterer's debts and liabilities and they will be able to be pursued against the vessel, but if the charter has terminated and possession remains with the former charterer then the debts and liabilities may be the owner's debts and liabilities which will then also be able to be pursued against the vessel. The latter position is established by the ostensible authority cases and assumes that the other elements of ostensible authority have been established.

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<sup>53</sup> Ibid 677.

<sup>54</sup> [2000] 1 Lloyd's Rep 36.

<sup>55</sup> Ibid 55, 1<sup>st</sup> col.

<sup>56</sup> 439 UNTS 195.

<sup>57</sup> [2001] FCA 210 (9 March 2001).

<sup>58</sup> 439 UNTS 195.

Only two windows of avoidance for the vessel remain. One is where the charter is regarded as terminated by notice and the owner actively sought to retake possession but has failed because the former charterer has not cooperated (i.e. where it cannot be said that the former charterer holds possession with the consent of the owner). Only maritime liens arising from the actions or omissions of the former charterer in this period will be able to be pursued against the vessel. The other window is in respect of (non- maritime lien) debts arising prior to termination but in respect of which proceedings were not commenced prior to termination. The risk that a creditor will not be able to pursue the demise chartered vessel for payment is a risk that is always present and it is not made worse by the possibility of the charter being terminated but the vessel remaining in the former charterer's possession through the owner's inaction.

It follows that the cases are ultimately to be reconciled on the basis, *first*, that the terms of the charter in question are all important when determining whether it has been terminated in a given factual situation and, *second*, that notice of termination and retaking of possession are required, but it may be that in a particular case (because of the terms of the charter and possibly the terms of the notice, but not in Singapore following *The Chem Orchid*<sup>59</sup>) the notice of termination itself amounts to the constructive taking of possession.

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<sup>59</sup> [2015] SGHC (18 February 2015).