The “Xin Chang Shu”
[2015] SGHC 308

Case Number	: Admiralty in Rem No 239 of 2014 (Registrar's Appeal No 226 of 2015)
Decision Date	: 04 December 2015
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Lawrence Teh and Khoo Eu Shen (Rodyk & Davidson LLP) for the plaintiff; Toh Kian Sing SC, Koh See Bin and Tan Yong Jin Jonathan (Rajah & Tann Singapore LLP) for the defendant.
Parties	: Big Port Service DMCC — Owner of the vessel(s) "Xin Chang Shu"

Admiralty and shipping – Admiralty jurisdiction and arrest – Wrongful arrest – Damages for wrongful arrest

4 December 2015 Judgment reserved.

Steven Chong J:

Introduction

1 The law on wrongful arrest was developed to protect shipowners against malicious arrests or arrests brought with “so little colour” or “so little foundation” that implies malice on the part of the arresting party.

2 Proof of actual malice is often difficult to establish, especially at the interlocutory stage, where most applications for wrongful arrest are pursued. However, the malice threshold can be satisfied by inference in circumstances where the case is so hopelessly bereft of merit that it warrants a finding that the claim is seriously lacking in “*colour*” or “*foundation*”.

3 Ship arrest is an extremely draconian remedy. It can be very disruptive and may inflict severe economic hardship on the shipowner’s trade and operations. In order for the protection against this draconian measure to be meaningful and effective, the judicial threshold should not be set too high so as to render the right to damages practically illusory.

4 In appropriate cases, where the threshold has been crossed, the court should express its opprobrium towards the arresting party’s conduct by ordering it to be accountable for the damages occasioned by its wrongful arrest. Indeed, our courts have in a number of cases held the arresting party accountable for wrongful arrest.

5 After considering the facts and the arguments presented by the parties, I am satisfied that the line was crossed in this case. Not only was the arrest pursued, *inter alia*, on a *false* and/or factually and legally misconceived premise, there was also non-disclosure of material facts at the *ex parte* stage where the warrant of arrest was sought. The plaintiff must therefore bear the damages arising from the wrongful arrest of the vessel, *Xin Chang Shu* (“the Vessel”).

Factual background

6 On 19 November 2014, the plaintiff commenced admiralty *in rem* proceedings against the defendant claiming US$1,768,000 for the supply of 4,000 metric tonnes of marine bunker fuel to the Vessel. The claim was based on a contract for the supply of bunker fuel entered into between the plaintiff and OW Bunker Far East (Singapore) Pte Ltd ("OW Singapore") ("the Contract"). The plaintiff claims that OW Singapore was the defendant's agent and entered into the Contract on the defendant's behalf.

7 Prior to the arrest of the Vessel (on 10 December 2014), the parties exchanged a series of correspondence in which the defendant made its position and defence clear. Specifically, the defendant clearly informed the plaintiff of the following: [note: 1]

(a) OW Singapore was not the defendant's agent and did not contract with the plaintiff in that capacity.

(b) The defendant only dealt and contracted with OW Bunker China Limited ("OW China"), not OW Singapore or the plaintiff.

(c) The plaintiff was not only one, but two layers removed from the defendant in the chain of bunker supply contracts. The defendant had contracted with OW China who had in turn contracted with OW Singapore and who eventually contracted with the plaintiff in respect of the same bunker supply but on different terms.

8 In the same chain of correspondence, the parties also negotiated the provision of alternative security to the plaintiff. No agreement was, however, reached prior to the arrest of the Vessel. The plaintiff insisted that the terms of the security should answer to any judgment "by any court or arbitral tribunal of competent jurisdiction", but the defendant was willing to furnish security that would answer only to a judgment of the Singapore court. [note: 2] Thus, on 9 December 2014, the plaintiff obtained a warrant of arrest and proceeded on 10 December 2014 to arrest the Vessel. On 12 December 2014, the parties agreed that the defendant would furnish security by way of payment into court in the sum of US$2.6 million to secure the release of the Vessel, and the Vessel was duly released on the same day. The Vessel was thus arrested for approximately three days.

9 Shortly after, on 15 December 2014, the plaintiff filed Summons No 6218 of 2014 ("SUM 6218/2014") for a stay of proceedings in favour of arbitration under ss 6 and 7 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). On 29 December 2014, in Summons No 6364 of 2014 ("SUM 6364/2014"), the defendant applied to strike out the proceedings, set aside the warrant of arrest, and applied for damages for wrongful arrest.

The decision below and the appeals before me

10 The plaintiff's application for a stay of proceedings in favour of arbitration (*ie*, SUM 6218/2014) and the defendant's application to strike out the proceedings, to set aside the warrant of arrest and for damages for wrongful arrest (*ie*, SUM 6364/2014) were heard together by the assistant registrar ("the AR"). In *The "Xin Chang Shu"* [2015] SGHCR 17 ("the AR's judgment"), the AR decided as follows:

(a) the writ was struck out for being frivolous and/or vexatious pursuant to O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) but not on the basis that s 4(4) of the High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ("the HC(AJ)A") had not been complied with;

(b) the security provided to the plaintiff by way of payment into court be returned to the

defendant;

(c) the stay application was dismissed;

(d) there was no material non-disclosure on the plaintiff's part, and therefore, the warrant of arrest was not set aside; and

(e) damages for wrongful arrest were not awarded.

11 Dissatisfied with the AR's decision, both the plaintiff and the defendant appealed. In Registrar's Appeals No 224 and 225 of 2015 ("RA 224/2015" and "RA 225/2015" respectively), the plaintiff appealed against the AR's decision in striking out its writ and in dismissing its stay application. In Registrar's Appeal No 226 of 2015 ("RA 226/2015"), the defendant appealed against the AR's decision in not awarding damages for wrongful arrest, and in not setting aside the writ and warrant of arrest on the basis of lack of admiralty jurisdiction and material non-disclosure respectively. At the appeal hearing, the defendant withdrew their appeal against the AR's finding that the court had admiralty jurisdiction.

12 After hearing the parties on 23 September 2015, I dismissed the plaintiff's appeals in RA 224/2015 and RA 225/2015 while I reserved judgment in relation to RA 226/2015.

13 I shall briefly explain my grounds for dismissing RA 224/2015 and RA 225/2015 because it has a material bearing on my present decision in RA 226/2015. In dismissing the plaintiff's appeals in RA 224/2015 and RA 225/2015, I agreed with the AR's reasoning, which I found to be commendably clear. In brief, the AR found that the plaintiff's claim, premised on the agency of OW Singapore, was *both* legally and factually unsustainable:

(a) Based on the authority of *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35, the defendant had to be aware of the plaintiff's mistaken belief for acquiescence on the defendant's part to constitute estoppel by representation (the AR's judgment at [50]–[52]).

(b) No representation could be inferred from the defendant's silence or omission to disabuse the plaintiff of its mistaken belief unless the defendant was aware of the plaintiff's mistaken beliefs and had a duty to disclose certain facts (the AR's judgment at [53] and [57]).

(c) The uncontroverted evidence was that there was no direct communication between the plaintiff and the defendant until the plaintiff sent its letter of demand dated 12 November 2014 to the defendant (the AR's judgment at [65]).

(d) Even taking the plaintiff's evidence at its highest, there was nothing to show that the defendant was aware of the involvement of OW Singapore and the plaintiff in the supply of the bunkers (the AR's judgment at [68] and [69]).

(e) The evidence on the chain of back-to-back sale and purchase agreements for the bunkers was not challenged by the plaintiff. The AR found that there was no overarching agreement between the plaintiff and defendant *via* the agency of OW Singapore. First, under the back-to-back contracts, the bunkers were sold at different prices; under the Contract *dated 30 September 2014* (US$442 per metric tonne), the agreement between OW Singapore and OW China *dated 30 September 2014* (US$445 per metric tonne) and the agreement between OW China and the defendant *dated 26 September 2014* (US$469 per metric tonne). Second, there is

no evidence that the sales documentation issued by the plaintiff were ever transmitted to the defendant before the plaintiff's 12 November 2014 letter of demand. Third, none of the sales documentation issued by OW Singapore referred to the defendant as the buyer of the bunkers (the AR's judgment at [72]–[74]).

14 To this, I would add that based on the affidavit of John Kevin Phillips ("Mr Phillips") dated 8 December 2014 filed in support of the application for a warrant of arrest ("the arrest affidavit"), the plaintiff relied on two key facts to support its agency claim:

(a) Its General Terms and Conditions for Sale and Delivery of Marine Bunkers from Big Port Service DMCC (incorporated by reference into the "Bunker Sales Confirmation" dated 25 September 2014 issued by the plaintiff and accepted by OW Singapore) ("GTC") which asserted that OW Singapore was contracting as agent on behalf of the shipowner (*ie*, the defendant) [note: 3].

(b) The alleged supply of certain commercial details by OW Singapore, which purportedly gave the plaintiff the appearance that OW Singapore was fully authorised to conclude the Contract on the defendant's behalf. [note: 4]

This position was maintained on appeal. [note: 5] Notably, the plaintiff never asserted that the *defendant* did or said anything to lead the plaintiff to believe that OW Singapore was acting as its agent. As the AR noted, the plaintiff relied solely on the defendant's *omission* to act (see the AR's Judgment at [55]–[56]).

15 At the hearing before me, the defendant's counsel, Mr Toh Kian Sing SC ("Mr Toh"), pointed out that the commercial details referred to in the arrest affidavit were in fact supplied by the plaintiff, not OW Singapore. Having considered the evidence before me, in particular, the email sent by the plaintiff's Mr Maxim Verbin to Ms Daria Kuznetsova of OW Singapore on 24 September 2014 at 4.07pm [note: 6], I agree that the objective evidence suggests, contrary to the plaintiff's repeated assertions, that the commercial details were in fact supplied by the plaintiff, rather than OW Singapore. The plaintiff's reliance on OW Singapore's alleged supply of important commercial details is therefore based on a false premise, the consequences of which will be elaborated below.

16 Regarding the plaintiff's GTC, it is crucial to note that at its highest, the terms of the GTC only prove that OW Singapore *held itself out* to be an agent of the defendant. It is well-established that the law does not recognise the notion of a "self-authorising" agent. As the Court of Appeal held in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*") at [38], "an agent who has no authority, whether actual or ostensible, to perform a certain act cannot confer upon himself authority to do that act by representing that he has such authority."

17 The plaintiff's counsel, Mr Lawrence Teh ("Mr Teh"), sought to rely on *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd and PS Refson & Co Ltd (The "Raffaella")* [1985] 2 Lloyd's Rep 36 ("*The Raffaella*") and *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 ("*First Energy*") as exceptions to the self-authorising agent rule. These cases, however, were of no assistance to the plaintiff. As the Court of Appeal held in *Skandinaviska* at [51], both *First Energy* and *The Raffaella* were "based on a specific finding of fact that the principal concerned had held out its agent as having authority to make, in relation to the transaction in question, representations of the class or kind of representations that the agent actually made, even though the agent knew he had no actual authority to enter into the transaction itself." In the present

case, there was no evidence, or even an assertion by the plaintiff, that the *defendant* (the purported principal) had held out OW Singapore as having authority to make representations relating to the bunker transaction on its behalf. The plaintiff had no reason to believe that OW Singapore was authorised to make representations about its authority to act on behalf of the defendant. In fact, as explained at [78] below, the defendant was not even aware of OW Singapore's involvement in the bunker transaction prior to this action. There was therefore no basis for the court to find that the defendant was bound by the Contract *via* the agency of OW Singapore.

Setting aside the warrant of arrest

18 Although the AR struck out the writ, he declined to set aside the warrant of arrest. It appears to me that the AR's decision on this score was in part the product of the manner in which the defendant's application and arguments were framed in the court below. The defendant applied to set aside the warrant of arrest on the basis of non-disclosure of material facts. Given the AR's finding that there was no material non-disclosure, he ruled as a consequence that the warrant of arrest should not be set aside. No submissions were made before the AR on whether the warrant of arrest should nevertheless be set aside as a consequence of the striking out of the *in rem* writ.

19 Before dealing with the merits of the defendant's arguments in support of its claim for damages for wrongful arrest, it is perhaps useful to begin by examining whether a warrant of arrest can exist independently of the *in rem* writ under which it was issued, and whether damages for wrongful arrest can be awarded if the warrant of arrest was not first set aside. It is necessary to embark on this analysis because it has an impact on the AR's decision in not setting aside the warrant of arrest notwithstanding the striking out of the *in rem* writ.

20 Although damages for wrongful arrest are typically awarded in cases where the warrants of arrest are also set aside, the setting aside of the warrant of arrest is strictly not an invariable requirement at law. It is correct that in a number of local cases where damages for wrongful arrest were awarded, the warrants of arrest were also expressly set aside (see *The Dilmun Fulmar* [2004] 1 SLR(R) 140 ("*The Dilmun Fulmar*"), *The "Inai Selasih" (ex "Geopotes X")* [2005] 4 SLR(R) 1 (though the award of damages was reversed on appeal in *The "Inai Selasih" (ex "Geopotes X")* [2006] 2 SLR(R) 181 ("*The Inai Selasih*")) and *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*")). Further, *dicta* in cases such as *The "Evmar"* [1989] 1 SLR(R) 433 ("*The Evmar*") and *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 ("*Treasure Valley*") may, *prima facie*, give the impression that the warrant of arrest must first be set aside before damages for wrongful arrest may be awarded. However, in my view, these decisions do not require the setting aside of the warrant of arrest as a *precondition* to an award of damages.

21 In *The Evmar* at [27], Chao Hick Tin JC (as he then was) held that the question of damages for wrongful arrest did not arise *at that stage* because there were no grounds to set aside the warrant of arrest. However, Chao JC's observation in the subsequent sentence makes it clear that he did not intend to lay down any principle that damages could only be awarded if and when the warrant of arrest was set aside. Chao JC stated "[w]hether any damages are due *eventually* to the defendants on account of that arrest would have to await the outcome of the substantive claim" [emphasis added]. The court therefore did not foreclose the possibility that damages for wrongful arrest may be *subsequently* awarded notwithstanding the fact that the warrant of arrest was not set aside.

22 Similarly, the court's observation in *Treasure Valley* at [32] that "there is no legal basis for a claim for an inquiry for damages for wrongful arrest to be assessed without the arrest being set aside" was made in the context of the defendant's failure to set aside the warrant of arrest at the

interlocutory stage. In fact, the court went on to state explicitly at [33] that "a dismissal of the appeal does not bar the defendants and Ultramarine (if so advised) from pleading and contending at the trial that there was malice in bringing this action for possession."

23 There is therefore no rule that precludes an award of damages for wrongful arrest just because the warrant of arrest is not set aside. Clearly, in an interlocutory setting, if an application to set aside the warrant of arrest does not succeed, it would follow that there is some legal and/or factual basis to support the arrest of the vessel. That being the case, the underlying claim will have to be determined at the trial of the action. At the trial, it is open to the defendant to pursue a claim for wrongful arrest as a counterclaim in the action if so advised. This course of action was adopted by the defendant/shipowner in *Fal Energy Company Limited v Owners of the Ship or Vessel "Kiku Pacific"* [1998] SGHC 370 ("*The Kiku Pacific (HC)*"). At the trial of the action, Choo Han Teck JC (as he then was) dismissed the plaintiff's *in rem* claim entirely and proceeded to consider the defendant's counterclaim for wrongful arrest even though there was no application to set aside the warrant of arrest. In that case, damages for wrongful arrest were *eventually* not awarded because the court found that there was no malice in the arrest. On appeal, the Court of Appeal affirmed Choo JC's decision without commenting on the propriety of awarding damages for wrongful arrest where the warrant of arrest was not expressly set aside – see *The "Kiku Pacific"* [1999] 2 SLR(R) 91 ("*The Kiku Pacific*"). It is also worth mentioning that in *The "Trade Resolve"* [1999] 2 SLR(R) 107 ("*The Trade Resolve*"), Chan Seng Onn JC (as he then was) awarded damages for wrongful arrest even though he held that the *in rem* writ and warrant of arrest were both validly *issued* (see [17]). On the facts, damages for wrongful arrest were awarded because the court's *in rem* jurisdiction was not validly *invoked* when the plaintiff arrested the vessel outside the port limits of Singapore, which it *knew* it had no authority to do under the warrant of arrest (at [78]). The significance of the arresting party's *prior knowledge* on matters relating to its right of arrest to the question of malice will be expounded on below.

24 Based on the above discussion, damages for wrongful arrest can be pursued in at least three ways. Typically and most commonly, it is brought in conjunction with an interlocutory application to strike out the writ and as a consequence of the successful striking out, the warrant of arrest would fall away as well. By adopting this course of action, the shipowner seeks to convince the court that arising from the striking out, the claim is so lacking in merit that an inference of malice can and should be drawn. Next, there are instances where the shipowner does not seek to strike out the *in rem* writ because the claim is brought within the HC(AJ)A. However, due to non-disclosure of material facts which led to the issuance of the warrant of arrest, the shipowner applies *only* to set aside the warrant of arrest and seeks damages for wrongful arrest. This was done in *The Eagle Prestige* [2010] 3 SLR 294 ("*The Eagle Prestige*") albeit unsuccessfully on the merits. Proceeding by this mode, the *in rem* writ remains alive and if the shipowner is successful in setting aside the warrant of arrest, the arresting party would be at liberty to proceed with the claim *without security*. Depending on whether the malice threshold has been crossed, an award of damages may be made against the arresting party. The third mode which is less common is for the shipowner to provide security and defend the merits of the claim at the trial (as was done in *The Kiku Pacific (HC)*) and to seek damages for wrongful arrest as a counterclaim following the dismissal of the claim. In this way, neither the writ nor the warrant of arrest is set aside. A plaintiff is fully entitled to proceed with its claim for wrongful arrest in this manner. In fact, *The Trade Resolve* suggests that there could perhaps be a fourth way to pursue a claim for damages for wrongful arrest at the interlocutory stage without first applying to strike out the writ or even set aside the warrant of arrest. Such instances are rare given that damages were awarded in that case due to the unique circumstances of the court's finding that the arrest was effected knowingly and unlawfully outside the territorial jurisdiction of the courts.

25 In my judgment, it is clear that the setting aside of a warrant of arrest is not a prerequisite to

pursuing a claim for damages for wrongful arrest. As stated in *The Evmar* at [10] citing *The Vasso* [1984] 1 Lloyd's Rep 235 at 241 with approval, "[t]he only prerequisite to the court's jurisdiction to issue a warrant of arrest is that a writ must have been filed in an action *in rem*". Following from this, it is clear that a warrant of arrest cannot exist without an issuance of a valid *in rem* writ. As such, once the *in rem* writ is set aside as was ordered by the AR and affirmed on appeal, it must follow that the warrant of arrest must be set aside as well. However, it does not follow that damages for wrongful arrest would be awarded as a matter of course. It remains for the court to examine whether the arrest was actuated by malice, express or inferred.

Wrongful arrest of the Vessel

26 I now turn to the crux of the present judgment, which is the issue of damages for wrongful arrest raised by the defendant in RA 226/2015.

Principles governing the law on wrongful arrest

27 In *The Vasiliy Golovnin* at [134], the Court of Appeal affirmed the long-standing test set out in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 ("*The Evangelismos*") (at 359; 948):

> Undoubtedly there may be cases in which there is either *mala fides, or that crassa negligentia, which implies malice*, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. …
>
> The real question in this case … comes to this: is there or is there not, reason to say, that the action was *so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it*?
>
> [emphasis added]

28 Elaborating on the "focus or emphasis" of the inquiry under the two parts to *The Evangelismos* test, the Court of Appeal held at [137]:

> … Focusing on the *first part* of the passage… would mean that the inquiry would be *both an objective and a subjective one* into the *plaintiff's state of mind at the time of the arrest* as there would be a need to establish if the *plaintiff had a genuine and honest belief that the arrest was legitimate* then. On the other hand, if the focus is on the *second part* of the passage, this would mean *a more objective inquiry* into the circumstances prevailing and the evidence available at the time of the arrest, so as to *determine if the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that they were brought with malice or gross negligence*…
>
> [emphasis added]

29 The court then held that the inquiry should generally be focused on the second part of *The Evangelismos* test, *ie*, "whether the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence on the plaintiff's part" (*The Vasiliy Golovnin* at [137]).

30 It thus appears that the test is ultimately premised on a finding of ***malice*** (see also, *The Kiku Pacific* at [30]). Malice may be found on the basis of direct evidence of the plaintiff's state of mind at

the time of the arrest, or it can be inferred if the claim is so unmeritorious that the arresting party could not have honestly believed that he had an entitlement to arrest the vessel (or at least recklessly disregarded whether he had grounds to do so).

31 Specifically, the action or arrest may be considered to have been brought "unwarrantably" or with "little colour" or with "little foundation" where, *inter alia*, there is "material non-disclosure in the affidavit in support of the warrant of arrest", or where "the writ of summons does not disclose a reasonable cause of action" (*The Vasiliy Golovnin* at [138]). Given that the defendant has, in the present case, relied on both these grounds to seek damages for wrongful arrest, it is helpful to consider them in some detail.

No reasonable cause of action

32 Malice may be inferred from the fact that a claim *lacks merit*. How weak, however, must the claim be before malice may be inferred? In *The Kiku Pacific* at [29], the Court of Appeal rejected the notion that malice may be inferred on the sole ground that there is no "reasonable or probable cause" for the arrest because it "dilute[s] the threshold required for an action in wrongful arrest to succeed". This explains why damages for wrongful arrest are not *always* awarded whenever the court strikes out the plaintiff's writ for lacking a reasonable cause of action and/or for being frivolous and vexatious (*eg*, *The "Catur Samudra"* [2010] 2 SLR 518). Instead, something *more* than a lack of reasonable or probable cause is required before damages for wrongful arrest may be awarded – the claim must have been brought with *so little colour or foundation that it implies malice*. In this regard, it is useful to examine how previous decisions have approached this issue when awarding damages for wrongful arrest.

33 In *The Dilmun Fulmar*, the plaintiff brought a claim against the shipowner for unpaid repairs and arrested the vessel. The plaintiff subsequently reached a settlement with the shipowner under which the shipowner agreed to pay for the repairs in instalments. Pursuant to this settlement agreement, the vessel was released. When the shipowner defaulted on the instalment payments under the settlement agreement, the plaintiff re-arrested the vessel. The plaintiff claimed that the settlement agreement entitled it to revive its original claim in the event of the defendant's default of any of the instalment payments, and it was therefore entitled to re-arrest the vessel. However, the sum claimed in the statement of claim, the affidavit leading the arrest, and the plaintiff's submissions, was the sum due and owing *under the settlement agreement* (at [9] and [10]). The High Court found that despite the non-payment of the instalments, the plaintiff had affirmed the settlement agreement by electing to enforce it in the proceedings. The original cause of action had therefore been superseded, and the court had no jurisdiction in respect of the original claim (at [16]). The settlement agreement gave rise to a new cause of action which clearly did not fall under the court's admiralty jurisdiction. On this basis, Belinda Ang Saw Ean J concluded that the re-arrest of the vessel was *mala fide* and an abuse of the court process, and awarded damages for wrongful arrest (at [17] and [18]).

34 In *The "AA V"* [1999] 3 SLR(R) 664 ("*The AA V*"), which will be considered in greater detail below, damages were also awarded, *inter alia*, on the ground that the plaintiffs' claim lacked merit. The claim against the defendants for unpaid bunkers was premised on the case theory that New Acmes Trading Pte Ltd ("New Acmes") were the defendants' agent and had contracted with the plaintiffs on behalf of the defendants. Judith Prakash J awarded the defendant damages for wrongful arrest, and held that the plaintiffs had acted recklessly in arresting the defendants' vessel without investigating into whether the defendants were in fact contractually liable to them (at [50]). The learned judge found that the plaintiffs *knew* when arresting the vessel that they had dealt solely with New Acmes, and had no contact with the defendants (at [49]). By neglecting the information which would have caused doubt as to whether the defendants were the parties liable *in personam*, the

plaintiffs had acted recklessly.

35 Finally, in *The Vasiliy Golovnin*, the plaintiffs, Crédit Agricole (Suisse) SA ("Crédit Agricole") and Banque Cantonale de Genève SA ("BCG"), arrested Far Eastern Shipping Co plc's ("FESCO") vessel, the *Vasiliy Golovnin*, in respect of a claim against FESCO arising out of a contract of carriage relating to a sister ship, the *Chelyabinsk*, and for damage to their goods. FESCO had chartered out the *Chelyabinsk* to Sea Transport Contractors Ltd ("STC"), which, in turn, sub-chartered the vessel to Rustal SA ("Rustal"). Five bills of lading were issued in respect of some Indian rice cargo, and the port of discharge was stipulated in each of the bills of lading to be Lomé, Togo. Crédit Agricole and BCG provided financing to Rustal, and held the bills of lading as security. The parties had initially agreed to effect a change of the port of discharge from Lomé to Douala in Cameroon. The agreed switch of the bills of lading, however, did not ultimately take place because there was a breakdown in the arrangement. Following the breakdown, STC informed FESCO not to switch the bills of lading and not to enter the port of Douala unless further instructions were given. It transpired that STC was embroiled in a dispute with Rustal over unpaid hire for the chartered vessel. Subsequently, STC instructed FESCO to discharge the cargo at the port of Lomé, in accordance with the bills of lading. Soon after, FESCO received conflicting requests from Crédit Agricole and BCG insisting that the cargo be discharged at Douala. FESCO informed the banks that it could not discharge the cargo at Douala without STC's approval, and thereafter, discharged the cargo at Lomé. There were allegations that part of the cargo was damaged upon the discharge of the cargo, but security for this claim was provided by way of a letter of undertaking from the vessel's protection and indemnity club. After the cargo was discharged, the banks arrested the *Chelyabinsk* in Lomé in connection with their claims for the damage to the cargo as well as for FESCO's refusal to effect discharge of the cargo at Douala. FESCO successfully applied to set aside the arrest. The Lomé court found, *inter alia*, that FESCO was not at fault for acting on the instructions of STC, the charterers, as it was bound to do so. Further, sufficient security had already been provided for the damaged cargo claim. The banks did not appeal against this order.

36 Subsequently, the banks arrested the sister ship of the *Chelyabinsk*, the *Vasiliy Golovnin*, in Singapore. FESCO applied to strike out the writ, set aside the arrest and sought damages for wrongful arrest. The writ was struck out by the assistant registrar and the striking out was affirmed on appeal, but both the assistant registrar and the High Court on appeal declined to award damages for wrongful arrest. On further appeal by both parties, in addition to affirming the decision to strike out the writ and to set aside the warrant of arrest, the Court of Appeal also awarded FESCO damages for wrongful arrest. Not only did the court find that material facts were not disclosed when obtaining the warrant of arrest, the court also found that the arrest was without any reasonable basis. Given the merits of the banks' claims had already been considered and dismissed by the Lomé court, the banks *must have been aware* that they had no basis to arrest the *Vasiliy Golovnin* in Singapore (at [145]). In fact, the Court of Appeal found that "there was no foundation" (at [146]) and further found that the "[b]anks' claims against FESCO for failing to comply with their instructions to discharge the cargo at a port other than Lomé were, politely put, absurd" (at [148]).

37 Notwithstanding the high threshold of *The Evangelismos* test, it can be seen that our courts would not be slow to find wrongful arrest and to award damages in appropriate circumstances. Indeed, this sentiment was expressed by the Court of Appeal in *The Vasiliy Golovnin* at [135]. From the above cases, it is clear that the court will pay particular attention to *what the arresting party knew, or must have known, at the time of the arrest* (see [34] and [36] above). Where facts which *clearly* undermine the plaintiff's claim, and consequently, its right of arrest are known or must have been known to the plaintiff at the time of the arrest, the courts will be more inclined to award damages for wrongful arrest.

38 In this regard, the question as to how weak a claim must be before malice can be inferred is perhaps a question that cannot be comprehensively answered in every case by a single threshold test. While the courts have held that malice may be inferred if the claim is *without colour or foundation*, what that means in practice is inevitably a matter of judgment, and can only be determined by the court on the facts of each case.

39 I would add at this juncture that because the focus of the inquiry is on malice of the arresting party, special attention should be paid to *what the arresting party knew or must have known at the time of the arrest*. While this is not the only factor the court should consider, it is certainly an important one in evaluating the merits of the claim for wrongful arrest. If, based on the information available, the court finds that the arresting party knew or must have known that it had no reasonable or probable cause to arrest the vessel, the court may well be justified in awarding damages for wrongful arrest. By contrast, if the court only arrives at the finding that the arresting party had no reasonable or probable cause to arrest the vessel after a legal analysis of the jurisdictional basis of the claim (as in the case of *The Inai Selasih*), or based on documents or information which were not available to the arresting party at the time of the arrest, the judicial finding in such circumstances *may* not be a sufficient basis for an award of damages.

40 While *The Kiku Pacific* did reject the use of the phrase "reasonable or probable cause" (see [32] above), it did so, in my view, in the context of counsel's submission that an absence of a reasonable or probable cause *alone* can be sufficient to give rise to an inference of malice (see *The Kiku Pacific* at [18]). I accept that the absence of a reasonable or probable cause *alone* would not normally be sufficient to give rise to a finding of malice. However, if the court finds not only that there was no reasonable or probable cause for the arrest, but also that the arresting party knew or must have known that it did not have reasonable or probable cause at the time of the arrest, malice may be inferred and damages for wrongful arrest accordingly awarded.

41 The critical difference between cases where the arresting party knows or must have known that it had no reasonable cause of action at the time of the arrest, and cases where no such finding on the knowledge of the arresting party is made, may explain in part why the courts award damages for wrongful arrest only in *some* cases where the admiralty *in rem* writ is struck out. The fact that an arrest is made on the basis of a plainly and obviously unsustainable claim may not *always* justify an award of damages. In the *The Inai Selasih*, while the appellant's writ and warrant of arrest were set aside summarily, the Court of Appeal was satisfied that "the appellant genuinely thought that it had a claim in admiralty"; the court found that the appellant was merely "wrong in its interpretation or perception of the entire arrangement" (at [32]). In other words, the arresting party did not know *at the time of the arrest* that it did not have a reasonable cause of action to arrest the vessel. As the Court of Appeal observed at [32], the correct inquiry is whether "the appellant applied for the Warrant of Arrest *knowing or honestly believing* that it could not legitimately arrest the ship or *failing to apply its mind* as to whether it could legitimately arrest the vessel and nevertheless proceeding to do so" [emphasis added].

42 Thus, to conclude, a claim that is "so unwarrantably brought, or brought with so little colour, or so little foundation" may *alone* be sufficient to justify a finding of malice, regardless of the arresting party's subjective state of mind at the time of the arrest. The finding of malice would be made even more compelling in circumstances where the court determines that the arresting party knew or must have known that it had no reasonable cause of action when arresting the vessel. Malice, however, remains the centrepiece of the inquiry, and a finding of malice is ultimately a fact-sensitive exercise.

Material non-disclosure

43 Material non-disclosure is a ground for setting aside a warrant of arrest and consequently, for awarding damages for wrongful arrest if the non-disclosure is deliberate, calculated to mislead, or if it was caused by gross negligence or recklessness (*The Vasiliy Golovnin* at [140], *The AA V* at [50]). The test of materiality for non-disclosure was summarised in *The "Damavand"* [1993] 2 SLR(R) 136 at [30] (cited with approval in *The Vasiliy Golovnin* at [85]):

> ... [T]he test of materiality is whether the fact is relevant to the making of the decision whether or not to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made. ...

44 The duty of disclosure requires the applicant for a warrant of arrest to draw the court's attention to material documents, even if they are exhibited in the supporting affidavit. As observed in *The Vasiliy Golovnin* at [94], "it is not open to a plaintiff to say that it has fulfilled its duty to make full and frank disclosure because the relevant facts can be distilled somewhat from somewhere in the voluminous exhibits filed".

45 In the present case, the defendant relies on the plaintiff's failure to sufficiently disclose the defences available to the defendant and the fact that security was sought in aid of arbitration. [note: 7] It is thus important to clarify the extent of an arresting party's duty to disclose the defences available to the defendant and the existence of and reliance on any arbitration agreement.

Disclosure of defences

46 In *The Vasiliy Golovnin* at [87], the Court of Appeal held that the arresting party had a duty to disclose "defences that might be reasonably raised by the defendant", but that the duty only extended to "plausible, and not all conceivable or theoretical, defences". In the immediate aftermath of *The Vasiliy Golovnin*, there was some uncertainty as to whether the Court of Appeal had expanded the scope of disclosure to include all the defences a defendant may reasonably raise to the plaintiff's claim (see Chan Leng Sun, Teo Cheng Chuah Jack and Toh Kian Sing, "*Admiralty, Shipping and Aviation Law*" (2008) 9 SAL Ann Rev 54 at paras 2.13 and 2.21).

47 The question about the meaning and scope of "plausible defences" was subsequently considered in *The Eagle Prestige*. In that case, the defendant had applied to set aside the warrant of arrest on the ground of material non-disclosure. In particular, the defendant argued on the strength of *The Vasiliy Golovnin* that the plaintiff had failed to disclose the defences available to the defendant when obtaining the warrant of arrest. In discussing the scope of the duty to disclose "plausible defences", Ang J held that it was "*not* generally directed at defences to the claim that may be raised at the trial in answer to the plaintiff's claim" [emphasis in original] (at [73]). Instead, "plausible defences" are "*matters that show up the claim as an abuse of process, or one that it is so obviously frivolous and vexatious as to be open to summary dismissal and, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process*" [emphasis in original] (at [75]). These objections were further described as matters "of such weight as to deliver the "knock-out blow" to the claim summarily" (at [73] and [84]).

48 I agree with Ang J's interpretation of *The Vasiliy Golovnin*. In my view, an arresting party is not obliged to disclose all the defences which a defendant may reasonably raise at trial. It is only obliged to disclose, *inter alia*, defences which are of such weight as to deliver, in Ang J's words, a "knock-out blow".

49 This understanding of the duty of disclosure is consistent with the underlying principle governing material non-disclosure – which is that only facts which are *relevant* to the *ex parte* application need to be disclosed. Commenting on the process of obtaining a warrant of arrest, Ang J observed that "*[t]he concerns of the court at the application stage are firstly, with considerations of jurisdiction in rem (and generally not the merits of the claim) and secondly, disclosure of material facts which are germane to considerations of jurisdiction in rem and overlaying that is the absence of facts and circumstances suggesting an abuse of the arrest process*" [emphasis in original] (*The Eagle Prestige* at [74]). Given that the merits of the arresting party's claim are *not generally relevant* when obtaining a warrant of arrest, it must follow that there is generally no duty to disclose defences which only affect the merits of the underlying claim (as opposed to the admiralty jurisdiction of the court) . As Ang J opined, "[e]nlarging the duty to disclose plausible defences would effectively let in an aspect of considering the merits of the claim by the backdoor" (*The Eagle Prestige* at [75]).

50 Indeed, the Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*The Bunga Melati 5*") at [94] confirmed that *The Vasiliy Golovnin* "did not intend to introduce a new merits requirement for the invoking of admiralty jurisdiction". As was opined in Chan Leng Sun, Teo Cheng Chuah Jack and Toh Kian Sing, "*Admiralty, Shipping and Aviation Law*" (2012) 13 SAL Ann Rev 46, by endorsing Ang J's view that "the strength of the plaintiff's claim on the merits did not go to jurisdiction", the Court of Appeal "appears to have also endorsed Ang J's observation in the court below as well as in *The Eagle Prestige* that a plaintiff is not required to disclose defences to the claim at the stage of applying for a warrant of arrest, unless those defence [*sic*] are of a nature that may potentially result in the action being struck out…" (at para 2.14).

Disclosure of arbitration clauses

51 Is the existence of an arbitration agreement between the parties a material fact that must be disclosed when obtaining a warrant of arrest? In *The Evmar* at [13]–[14], Chao JC held that the omission to disclose the arbitration clause in the bill of lading and the failure to depose that the defendants were not able to satisfy the arbitration award did not constitute material non-disclosure. It should be noted that Chao JC came to this conclusion even though there was no equivalent of s 7 of the IAA in force then. When *The Evmar* was decided, a party could only arrest a vessel in aid of an arbitration if it satisfied the court that the defendant would not be able to satisfy an arbitration award which might eventually be obtained against it (see *The Rena K* [1978] 1 Lloyd's Rep 545 ("*The Rena K*"), cited in *The Evmar* at [23]). Chao JC reasoned that because the defendants could have allowed the action to proceed and not apply to stay the action, the question whether the parties would eventually abandon the *in rem* action and proceed with arbitration, and hence whether the defendants were able or unable to satisfy an arbitration award, did not arise at that stage (at [14]).

52 In my view, Chao JC's holding applies with even more force now in light of s 7 of the IAA. Section 7(1) specifically grants the court the power to order that "the property arrested be retained as security for the satisfaction of any award made on the arbitration", or that "equivalent security" be provided. The common law requirement that the arresting party must prove that the defendant would not be able to satisfy any eventual arbitration award has been supplanted. The court's jurisdiction to arrest a ship is no longer confined to providing security in respect of an action *in rem* (for the previous common law position, see *The Andria now renamed Vasso* [1984] 2 WLR 570 at 579–580). An arresting party now may arrest a vessel as security for arbitration proceedings under the IAA. It follows that the existence of an arbitration agreement is now far less relevant to the court's exercise of its *in rem* jurisdiction to issue a warrant of arrest; the *same test* focused on the admiralty jurisdiction of the court (see *The Bunga Melati 5* at [112]) applies regardless of whether the vessel is arrested to obtain security for Singapore court proceedings or arbitration proceedings.

53 Mr Toh however pointed out that the Court of Appeal in *The Vasiliy Golovnin* at [40] appears to have taken the contrary view that "[i]t is *necessary* for a party who intends to *rely* on an arbitration agreement to disclose this to the court in an *ex parte* application" [emphasis in original]. It must first be noted that the Court of Appeal's observation was *not* made in the context of setting aside the warrant of arrest on the ground of material non-disclosure. In fact, the Court of Appeal's decision on material non-disclosure in *The Vasiliy Golovnin* was not based on the appellant's failure to disclose the arbitration clause (see *The Vasiliy Golovnin* at [106]). Instead, these observations were made in the context of the appellant's submissions that the court below had erred in determining the merits in striking out the writ when the dispute should rightly be referred to arbitration (*The Vasiliy Golovnin* at [29]). This submission was a complete non-starter because it was the respondent's prerogative to choose to strike out the *in rem* writ, rather than apply to stay the proceedings.

54 In any case, I do not think that the Court of Appeal intended to lay down any *rule* that a failure to disclose an intention to rely on an arbitration agreement would *always* constitute material non-disclosure such as to justify the setting aside of the warrant of arrest. It cannot be said that the existence of an arbitration agreement would *always* be a material fact. Instead, the Court of Appeal's observation must be read in the context of the reasons it gave for the relevance of the existence of an arbitration agreement to the court's decision to issue a warrant of arrest (see *The Vasiliy Golovnin* at [40]). I agree with the AR (see the AR's Judgment at [128]–[130]) that an assessment of materiality should be made on a case by case basis, keeping in mind the considerations stated in [40] of *The Vasiliy Golovnin* (*eg*, the need to avoid directly or indirectly pronouncing on the merits). However, as the AR correctly reasoned at [130] of his judgment, at the stage of obtaining a warrant of arrest, the court would generally not be pronouncing on the merits of the claim. The need for the court to be cognisant of any arbitration agreement to avoid the risk of trespassing onto the jurisdiction of the arbitral tribunal is thus usually not engaged at that stage.

55 To sum up, I am of the view that there is no definitive rule requiring the disclosure of an arbitration agreement for the purposes of obtaining a warrant of arrest. The materiality of an arbitration agreement must be assessed on a case by case basis. If the arbitration agreement cannot reasonably be considered relevant to the decision to issue a warrant of arrest, especially in light of s 7 of the IAA which expressly provides for the retention of property arrested or provision of alternative security to satisfy an arbitration award, the failure or omission to disclose the arbitration agreement should *not per se* constitute material non-disclosure. And, even if the court finds that the existence of an arbitration clause is a material fact that should have been disclosed, consideration should always be given to the impact of the arresting party's default, and whether the court should nevertheless exercise its "overriding discretion" not to set aside the warrant of arrest (*The Vasiliy Golovnin* at [84], citing *The "Fierbinti"* [1994] 3 SLR(R) 574 at [41]).

Grounds relied on by the defendant

56 Having set out the governing principles on the law of wrongful arrest, I will turn to consider the grounds advanced by the defendant for its claim for damages: [note: 8]

(a) The plaintiff mis-portrayed its claim as a straightforward claim for unpaid bunkers when obtaining the warrant of arrest.

(b) The plaintiff's case was conjured *ex post facto* after the insolvency of the OW Bunker group.

(c) The plaintiff persisted with the arrest despite being confronted with the contractual chain of bunker supply contracts (plaintiff – OW Singapore – OW China – defendant).

(d) The plaintiff wrongfully alleged in the arrest affidavit that OW Singapore, acting as the defendant's agent, had supplied "important commercial details" for the bunker supply when the commercial details had originated from the plaintiff and not OW Singapore.

(e) The plaintiff did not disclose the arbitration clause at the *ex parte* application.

(f) The plaintiff falsely asserted that it had previous course of dealings with the defendant through OW Singapore involving vessels "WMS Amsterdam" and "Tong Hai".

The plaintiff's basis for arresting the Vessel

57 As stated at [14] above, the arrest affidavit was sworn by Mr Phillips on 8 December 2014. It is clear from the arrest affidavit that the *sole basis* of the plaintiff's claim against the defendant is that the party who ordered the bunkers, OW Singapore, had acted as the defendant's agent in the transaction. This much is clear from para 6, which expressly states "the Plaintiff was contacted by Daria Kuznetsova, a bunker trader with OW Bunker Far East (Singapore) Pte Ltd ("the Defendant's agent")". The agency allegation is essentially repeated and somewhat embellished in paras 11, 13, 16 and 24 of the arrest affidavit.

58 Given that there was no direct dealing or communication between the defendant and the plaintiff *at any time prior* to the supply of the bunkers (see [13(c)] above), what then was the basis of the plaintiff's belief that OW Singapore had acted as the defendant's agent in ordering the bunkers?

59 As outlined at [14] above, from the arrest affidavit, it would appear that the plaintiff had two bases for its assertion of agency:

(a) OW Singapore's acceptance of the plaintiff's Bunker Sales Confirmation dated 25 September 2014, which in turn incorporated the GTC under which OW Singapore confirmed that the order was placed on behalf of the Vessel's registered owner, *ie*, the defendant.

(b) The alleged transmission of "important commercial detail of [*sic*] relating to the Vessel and the manner in which marine bunker fuel was to be supplied by the Plaintiff to the Vessel". [note: 9] According to the plaintiff, the transmission of the commercial details by OW Singapore to the plaintiff gave the "appearance" that OW Singapore was fully authorised by the defendant to order the bunkers on its behalf.

60 From my examination of the evidence before me, as briefly discussed at [15]–[17] above, it is clear that these two alleged bases are groundless, misleading and somewhat false. Before embarking on a closer scrutiny of the facts leading to my conclusion that the two bases do not support the plaintiff's case, it is perhaps apposite, as forcefully submitted by Mr Toh, to first examine the correspondence exchanged between the parties immediately preceding the arrest of the Vessel. The correspondence would reveal the information relating to the alleged agency which was available to the plaintiff *prior to the arrest of the vessel*, and that would assist in the inquiry as to the state of the plaintiff's knowledge then. As elaborated at [39] above, the material inquiry is to examine "*what the arresting party knew or must have known at the time of the arrest*".

Information available to the plaintiff prior to the arrest of the Vessel

61 Shortly after the supply of the bunkers to the Vessel on 1 and 2 November 2014, an event

caused the plaintiff to communicate directly with the defendant *for the first time* – the announcement of the insolvency of the parent company of OW Singapore, OW Bunker Trading A/S, on or about 7 November 2014, which was followed shortly by the commencement of winding up proceedings against OW Singapore in Singapore on or about 13 November 2014. It is critical to examine the correspondence exchanged between the parties because it would amply demonstrate that the plaintiff must have known that it neither had a factual nor legal basis to assert that OW Singapore had acted as the defendant's agent in respect of the supply of the bunkers. More importantly, despite knowing the defendant's position prior to the arrest, no legitimate effort was made in the arrest affidavit to address the court as to why or how OW Singapore could conceivably have acted as the defendant's agent. Instead, as will be elaborated below, the plaintiff sought to give the false appearance that the defendant had authorised OW Singapore to order the bunkers on its behalf. As regards the point that the defendant had contracted with OW China, all that Mr Phillips said was that "any alleged involvement of OW China is *irrelevant* to the Plaintiff's contractual claim against the Defendant" [emphasis added]. [note: 10] As is now clear from the striking out of the plaintiff's claim, the involvement of OW China was not only entirely relevant, it in fact operated as the effective "*knock-out blow*" à la *The Eagle Prestige*.

62 The direct communication between the parties commenced with a letter of demand dated 12 November 2014 from the plaintiff to the defendant. It is pertinent to observe that in the letter, the legal basis of the plaintiff's claim was stated to be a "lien on the supplied vessel [which] stems (amongst other grounds) from the terms and conditions stipulated by us vis-à-vis both O.W. Bunker Far East (Singapore) Pte Ltd and the vessel owners". [note: 11] The plaintiff did not condescend to explain what "amongst other grounds" was meant to include. There is, however, a conspicuous absence of any assertion that OW Singapore had acted as the defendant's agent in respect of the supply of the bunkers. As mentioned at [57] above, the ground that OW Singapore had acted as the defendant's agent has since become the *only* basis for the plaintiff's claim and the issuance of the warrant of arrest. If this was in fact the plaintiff's belief and understanding all along, I would have expected this ground to be specifically highlighted, instead of being camouflaged (if at all) under the rubric of "amongst other grounds".

63 The plaintiff sent a reminder to the defendant on 14 December 2014. [note: 12] The letter of demand and the reminder letter contained some details of the claim which have a material bearing on the legitimacy of the arrest. First, it identified the invoice which the plaintiff is relying on – invoice no 1014090. Second, the amount owing under the invoice is stated to be US$1,768,000. Finally, it sought to charge interest at five percent per month from the due date of 14 November 2014. I will return to explain the significance of these details when the defendant's contract with OW China and the plaintiff's proof of debt against OW Singapore are examined below. As the defendant never had any dealings with the plaintiff before, a robust reaction from the defendant was hardly unexpected.

64 In the defendant's response by email dated 17 November 2014 [note: 13], the defendant categorically informed the plaintiff that it had ordered the bunkers from OW China and consequently, it "has the contractual obligation to pay" OW China. The defendant warned the plaintiff that "any business interruption (such as a ship arrest) suffered, and/or any purported exercise of a lien" would be vigorously challenged since the plaintiff's letter of demand had specifically alluded to the purported existence of a lien.

65 On 17 November 2014, the plaintiff's solicitors, Rodyk and Davidson LLP ("Rodyk") entered the scene. Rodyk wrote to the defendant to allege that the defendant had bought, through OW Singapore (the defendant's alleged agent), 4,000 metric tonnes of bunkers at US$442 per metric tonne from the plaintiff and that a sum of US$1,768,000 is due and owing from the defendant. [note: 14] This was the

first time the plaintiff asserted that OW Singapore had acted as the defendant's agent in the bunker supply. It is clear from the letter that the plaintiff had purported to rely on the signing of the Bunker Sales Confirmation by OW Singapore *as a warranty by OW Singapore* that it was authorised to order the bunkers on the defendant's behalf. Rodyk also asserted in the letter that "[t]he communication between you and your agent… show that you had authorised specifically your agent to conclude the sale on your behalf". This alleged "communication" was the ostensible basis of the plaintiff's belief that OW Singapore had acted as the defendant's agent. The letter further stated that "despite the delivery of [the plaintiff's] invoice and despite [the plaintiff's] reminder letters to [the defendant] of 12th and 14th November 2014", the defendant had failed to pay the amount due and owing under the plaintiff's invoice.

66 These assertions are either misleading or false. First, there was never any communication between the defendant and OW Singapore prior to the bunker supply. It is telling that no such correspondence was ever disclosed in any of the plaintiff's affidavits. Second, the plaintiff knew that its invoice was never delivered to the defendant prior to its 12 November 2014 letter of demand. It was instead delivered to its contracting party, OW Singapore. The fact that the invoice was unilaterally addressed to all and sundry – "To MASTER AND/OR OWNERS AND/OR AGENT AND/OR OPERATORS AND/OR CHARTERERS OF M/V XIN CHANG SHU" – does not change the undeniable fact that the invoice was to the plaintiff's explicit knowledge never actually delivered to the defendant for payment.

67 In a further letter of 20 November 2014, Rodyk reiterated the plaintiff's case that it "had dealt solely with [the defendant's] agent", OW Singapore. Implicitly, it acknowledged that it never dealt with the defendant. It is clear from the letters sent by the plaintiff (whether directly, or through its solicitors) that no specific allegation was ever made that the defendant had done anything to lead the plaintiff to believe that it had appointed OW Singapore to act as its agent for the bunker supply.

68 In response, the defendant's English solicitors, Stephenson Harwood ("Stephenson"), wrote to Rodyk on 25 November 2014 to reiterate the defendant's stance that it had contracted with OW China and not OW Singapore. [note: 15] More importantly, the reply made it clear that OW Singapore was never the defendant's agent. Stephenson also provided Rodyk with a copy of the contract between OW China and the defendant dated 26 September 2014 for the purchase of the same bunkers. A simple perusal and comparison of the contract between the defendant and OW China and the Contract would reveal significant differences in the terms. This dispels any notion that OW Singapore was acting as the defendant's agent, or at least casts serious doubts on the agency case theory. Apart from the obvious differences in the identities of the sellers and the dates of the contracts, the following differences are critical:

(a) The price under the OW China/defendant contract was stated as *US$469 per metric tonne* which is to be contrasted with the price of *US$442 per metric tonne* as stipulated under the Contract.

(b) Payment is due within *30 days* of the supply under the OW China/defendant contract instead of *14 days* under the Contract.

(c) Default interest of five percent per month from the due date is payable under the Contract while there is no reference to any default interest under the OW China/defendant contract.

69 These salient differences would and should have alerted the plaintiff to the fact that OW Singapore had acted as principal and not as agent for the defendant in entering into the Contract. This becomes even clearer when the plaintiff's proof of debt against OW Singapore is examined below.

At any rate, if the plaintiff was still minded to proceed with the arrest, it was at least incumbent on the plaintiff to address these obstacles which clearly laid in the way of its agency case theory. It must have been apparent to the plaintiff that it makes no sense for the defendant to order the bunkers from the plaintiff *via* the alleged agency of OW Singapore at a price of *US$442 per metric tonne* and at the same time enter into a *separate contract* to purchase the same quantity of bunkers from OW China at a higher price of *US$469 per metric tonne.*

70 On 24November 2014, the defendant's Singapore solicitors, Rajah & Tann Singapore LLP ("R&T") wrote to Rodyk to re-emphasise that the "allegation that [OW Singapore] had acted as [the defendant's] agent in relation to the bunker supply is completely groundless". [note: 16] Based on the correspondence disclosed in the affidavits before me, there does not appear to be any response from Rodyk as to why the plaintiff believed that OW Singapore had acted as the defendant's agent in spite of the fact that the defendant had entered into a separate contract with OW China to purchase the same bunkers on entirely different terms.

71 Against this backdrop, it is now appropriate to examine the assertions and omissions in the arrest affidavit with a view to determining whether the plaintiff had crossed the threshold for an award of damages for wrongful arrest. By the time Mr Phillips filed the arrest affidavit, all the information disclosed in the exchange of correspondence described above was available to the plaintiff. How did the plaintiff address the agency issue when obtaining the warrant of arrest?

Assertions and omissions in the arrest affidavit

72 The plaintiff relied heavily on its own GTC to support its claim that OW Singapore had acted as the defendant's agent. The arrest affidavit is saturated with copious references to the plaintiff's GTC. In particular, the plaintiff referred to cll 3.2 and 10.11 of the plaintiff's GTC which state, *inter alia*, that the sale and delivery of the bunkers was "for the account of the registered owners" and "all sales… are made to the registered owner", respectively. [note: 17] According to the plaintiff, OW Singapore had confirmed that it acted as the defendant's agent by signing the Bunker Sales Confirmation issued by the plaintiff, which incorporated the GTC.

73 The short answer to the plaintiff's misconceived references to its own GTC is that none of them can remotely assist the plaintiff to establish an agency relationship between OW Singapore and the defendant. As explicated at [16]–[17] above, it is trite law (an expression which I use very sparingly) that a person cannot hold itself out as an agent on behalf of a principal. Equally, a third party cannot unilaterally create an agency relationship when none existed by relying on its own terms without the knowledge or consent of the principal. In this case, it is clear beyond peradventure that at no time prior to the supply of the bunkers did the plaintiff deal with the defendant (see [13(c)] and [66] above). It has not been alleged in the exchange of correspondence prior to the arrest or in the arrest affidavit that the *defendant* did *anything* to lead the plaintiff to believe that OW Singapore was acting as its agent. The only suggestion that the defendant had acted to lead the plaintiff to believe that OW Singapore was its agent relates to the alleged transmission of "important commercial details", which I will now deal with.

74 It appears to me that the plaintiff was well aware of the need to establish some direct linkage between itself and the defendant in respect of the supply of the bunkers in order to justify the intended arrest of the Vessel. Here, the imperative to do so heightened because the plaintiff had, in its letter of demand dated 12 November 2014, alluded to a "lien" as the "legal basis" of its claim. Realising that such a lien for necessaries is not recognised under Singapore law (see *The "Halcyon Isle"* [1979–1980] SLR(R) 538), the plaintiff needed to construct or perhaps contrive a case based on agency for it to have any hope of arresting the Vessel in Singapore. How did the plaintiff seek to

achieve this? In my view, it sought to do so in a most misleading manner in paras 8 and 17 of the arrest affidavit:

> 8 It will also be seen from the Purchase Order Confirmation that beneath the details that I have described above, *there are details given by the Defendant's agent on the commercial aspects of the supply*. The Defendant's agent the [*sic*] records the commercial details relating to the supply or [*sic*] marine bunker fuel to the Vessel, for example, that the marine bunker fuel is to be supplied by 2 barges (with technical specifications), details on Kavkaz port, the time within which the marine bunker fuel is to be delivered to the Vessel, the requirement that all documentation is to be sent at least 4 days before the estimated time of arrival of the Vessel in Kavkaz, that 5, 4, and 3 days advance notice of the estimated time of arrival of the barges is to be notified to the local agent of the Vessel with an email copy to the Plaintiff… *I respectfully request the Court to take note of these two aspects of the Purchase Order Confirmation*…
>
> 17 … I would also add that the Defendant for its part authorised the Defendant's agent to transmit important commercial detail of [*sic*] relating to the Vessel and the manner in which marine bunker fuel was to be supplied by the Plaintiff to the Vessel. *This gave the Plaintiff the appearance that the Defendant's agent was fully authorized by the Defendant to also conclude a contract on its behalf*, especially in [*sic*] when such important commercial details are given at the same time as the inquiry by the Defendant's agent with the Plaintiff on possible supply of marine bunker fuel to the Vessel and especially when such commercial details were carried through and finalised in the course of contractual negotiations…
>
> [emphasis added]

75 The alleged "important commercial details" which the plaintiff was seeking to rely on were, *inter alia*: [note: 18]

(a) that the bunkers would be delivered at the Kavkaz roads in the Black Sea Anchorage;

(b) the nomination of the local agent, Trans Taman Expo;

(c) the quantity and quality of the bunkers, *ie*, 4,000 metric tonnes of 380 cst fuel oil;

(d) that 5/4/3 days followed by 48/24/12 hours ETA notices to be sent to the local agent;

(e) that the delivery date is between 13 and 17 October 2014 and the delivery time of the bunkers is between 30 to 60 hours, weather permitting;

(f) that the bunkers would be delivered by two barges; and

(g) that payment is to be made within 10 days of supply.

76 As stated in paras 8 and 17 of the arrest affidavit, the plaintiff relied on OW Singapore's Purchase Order Confirmation dated 30 September 2014, wherein the above details were stated, to ground its belief that the defendant had authorised OW Singapore as its agent to transmit "important commercial details" to the plaintiff. The allegation that OW Singapore had supplied the commercial details to the plaintiff was presented in the arrest affidavit as a critical building block to support the agency argument. At the *ex parte* hearing for the issuance of the warrant of arrest, the plaintiff's solicitor, Mr Khoo Eu Shen ("Mr Khoo"), specifically drew the court's attention to this allegation given its perceived importance to the plaintiff's agency case theory. [note: 19]

77 However, as pointed out at [15] above, this assertion is patently false as those commercial details in fact emanated from the plaintiff. The details were substantially lifted verbatim from an email dated 24 September 2014 sent by the plaintiff to OW Singapore. This was admitted as much by Mr Teh during the appeal hearing, though he attempted to suggest that one of the commercial details relating to the choice of two barges came from OW Singapore. This is also incorrect because the use of the two barges was the result of the plaintiff's own operational constraints. The plaintiff must have known that paras 8 and 17 of the arrest affidavit were false given that the information came from itself, not OW Singapore. At the very least, it was hopelessly reckless and in my view, plainly inexcusable.

78 Although the plaintiff's case theory is entirely premised on its belief that OW Singapore had acted as the defendant's agent in ordering the bunkers from the plaintiff, interestingly, Mr Teh acknowledged during the appeal hearing that there is in fact no evidence before the court to even suggest that the defendant was aware of OW Singapore's involvement in the bunker transaction. Nevertheless, he maintained that the relationship between OW Singapore and the defendant, *if any*, should be investigated at the trial. The facts in the present case are therefore entirely different from *The Bunga Melati 5* where the Court of Appeal refused to strike out the claim because there was evidence before the court that an employee of the defendant/shipowner had informed the plaintiff that the party who ordered the bunkers was its agent. It bears mention that the bunkers were to be delivered to the Vessel at the port of Kavkaz, Russia. The bunker transaction had no connection with Singapore. On the face of all the disclosed documents and correspondence, there is nothing to suggest that the defendant was ever aware of OW Singapore's involvement, let alone that the defendant appointed or held out OW Singapore as its agent. That might well explain why the agency allegation was not even raised by the plaintiff in its initial two letters of demand to the defendant.

79 At the *ex parte* hearing before the assistant registrar on 9 December 2014 for leave to issue the warrant of arrest, it is clear from the minute sheet of the hearing that the plaintiff proceeded on the *assumption* that OW Singapore was the defendant's agent. No explanation was offered by Mr Khoo as to why and how OW Singapore could have acted as the defendant's agent in the purchase of the bunkers given that the objective evidence has revealed that the defendant had purchased the same bunkers from OW China on different terms. This was fully known to the plaintiff by then.

80 In referring to para 6 of the arrest affidavit, Mr Khoo informed the assistant registrar that the "Defendant agent had dealt with the Plaintiff in the past and were familiar with Plaintiff bunker sales confirmations and general Terms & Conditions". [note: 20] The impression from both para 6 of the arrest affidavit and Mr Khoo's elaboration as recorded in the minute sheet is that there has been a course of past dealings *between the plaintiff and the defendant* through the agency of OW Singapore and therefore, the defendant ought to be familiar with the plaintiff's GTC. However, this is misleading or cavalier, to say the least, because the defendant never had any prior dealings with the plaintiff either directly or *via* OW Singapore. Whatever prior dealings the plaintiff might have had with OW Singapore concerned the vessels *WMS Amsterdam* and *Tong Hai*, which the plaintiff knew have no connection whatsoever with the defendant.

81 Further, although Mr Khoo drew the assistant registrar's attention to the exchange of correspondence between the parties' respective solicitors, he described the defendant's position that it was contractually obliged to pay OW China for the bunkers under a separate contract as a "[n]ew allegation" which is "irrelevant to the [Plaintiff's] contractual claim". [note: 21] Mr Khoo also gave the court the impression that the defendant was simply denying that OW Singapore was its agent. However, the defendant's position was neither "new" nor "irrelevant". It was also not a bare denial of the alleged agency. Unless the plaintiff could offer a legitimate explanation to surmount the hurdles to

its agency argument (and none was attempted by Mr Khoo or the plaintiff in the arrest affidavit), the defendant's position was in fact fatal to the plaintiff's case. Indeed, the plaintiff's case has since been disposed of summarily precisely on the bases raised by the defendant right from the start.

82 In light of the above analysis of the indisputable facts leading to the arrest of the Vessel, has the plaintiff crossed the threshold for an award of damages for wrongful arrest to be made against it? I am satisfied that the line is crossed. The *legal* foundation of the plaintiff's case, premised on its own GTC to create the agency relationship, is a complete legal non-starter. It is not a complex point of law at all. In the words of Ang J in *The Eagle Prestige* at [73], the summary dismissal of the plaintiff's reliance on its own GTC to create the agency relationship would unequivocally constitute a "*knock out blow*" to its claim.

83 The *factual* foundation of the plaintiff's case theory is equally misconceived. Factually, the plaintiff's case was largely premised on the alleged transmission of "important commercial details" by the defendant to the plaintiff *via* OW Singapore, which has since been admitted to be false. Also, contrary to the plaintiff's assertion through Rodyk's letter of 17 November 2014, the plaintiff knew that there was in fact no communication between OW Singapore and the defendant and that its invoice was never delivered to the defendant for payment prior to the arrest of the Vessel. This case is therefore not simply a case with "*so little foundation*", or even a case with "*no foundation*" as was found to be the case in *The Vasiliy Golovnin* at [146]. It was instead a case which the plaintiff knew or ought to have known was based on a *false foundation*. Further, it was plainly inadequate to simply inform the AR that the defendant's position was that it was contractually obliged to pay OW China for the bunkers under a separate contract. The plaintiff was well aware of the undisputed fact that the defendant had purchased the same bunkers from OW China not only on different terms but, most significantly, *at a higher price.* This fact effectively demolishes its agency case theory. It was a significant fact which should have specifically been brought to the attention of the AR. As observed at [44] above, the mere exhibiting of the OW China/defendant contract in the arrest affidavit was manifestly insufficient to discharge the duty of full and frank disclosure given the critical importance of the different terms between the two contracts.

84 Accordingly, the malice threshold was crossed on both fronts – the plaintiff's case had "so little foundation", and there was at least reckless non-disclosure of material facts. My findings are not arrived at with the benefit of hindsight or based on information which only became available to the plaintiff after the arrest. Instead, they are squarely premised on information which was readily available to the plaintiff *prior* to the arrest.

85 There is therefore no reason why the plaintiff should not be answerable for the damages occasioned by the wrongful arrest of the Vessel. I would add that the courts have awarded damages under less egregious circumstances. In this regard, it is relevant to refer to the decision in *The AA V*, where Prakash J awarded damages for wrongful arrest under circumstances quite similar to the present case. In that case, the claim was also for a sum owing in respect of a supply of bunkers to the defendants' tug allegedly at the request of the defendants' agent. The defendants argued, *inter alia*, that they were not liable to the plaintiffs *in personam* as the latter had contracted with New Acmes for the sale of the bunkers and New Acmes were not the defendants' agent.

86 Prakash J found that the plaintiffs should have disclosed (a) the fact that the orders were originally made by New Acmes purporting to act as the defendants' agent, (b) why they believed the alleged agency representation even though the Portnet search subsequently undertaken showed another entity was the tug's general agent, and (c) the fact that 80 percent of the bunker supplied had been loaded onto the barge rather than the tug (at [46]).

87 Awarding damages for wrongful arrest, Prakash J reasoned:

> 49 The defendants on the other hand submitted that there had been malice on the part of the plaintiffs particularly in relation to the non-disclosure of the material facts mentioned in [46] above. The plaintiffs knew at the time they applied for the warrant that their only contact had been with New Acmes and that the defendants themselves had done nothing to indicate that New Acmes were their agents. *The plaintiffs had only New Acmes' alleged representation of the relationship on which to rely. They were also experienced bunker suppliers and should have known that a person ordering bunkers for a vessel who is not the owner of the vessel himself need not necessarily be the owner's agent*. He could be the charterer's agent or a third party altogether. It is a common term of time charter contracts that the fuel for the chartered vessel would be paid for by the charterer and therefore a bunker supplier should make careful enquiries as to whom he is actually dealing with before making any supply to a vessel. Quite apart from the common knowledge in the trade, the fact in this case which must have alerted the plaintiffs to the possibility that the fuel was not bought by the owners of the tug for its operation was that most of it went into another vessel altogether. The purpose of a tug is to tow a barge carrying cargo from one place to another. It is highly unusual, if not completely unheard of, for a tug to tow a barge behind it simply so that it should have a reserve fuel tank for its own voyage. What would be the purpose of such a long voyage for a general-purpose tug when no cargo is to be transported?
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> 50 I accepted the defendants' submission that the plaintiffs' *non-disclosure of material facts was intentional and malicious*. Even if Mr Lui had made a representation to them that he was acting as agent for the defendants, *the plaintiffs had acted recklessly in attempting to arrest the ship without any further investigation as to whether the defendants were in fact the persons who were contractually liable to them*. All their dealings had been with New Acmes. The invoices had been sent to New Acmes and when they were chasing for payment the plaintiffs had chased New Acmes and their efforts had been rewarded by part-payment made by New Acmes. *The plaintiffs had had no contact with the defendants directly apart from the actual physical delivery of the fuel to the tug and barge and had no basis to believe that the defendants were the contracting purchaser other than Mr Lui's so-called representation.* There was information before them (*ie* the Portnet search) that that representation could have been false and they should either have carried out further investigations or at the least have disclosed the information to the court so that a proper assessment of the correctness of their claim could be made. Instead, they deliberately chose to leave out all information which would have caused doubt as to whether the defendants were the persons who would be liable in an action in personam.
>
> [emphasis added]

88 There are significant factual similarities between *The AA V* and the present case, but in my view, the differences in fact enhance the justification for awarding damages for wrongful arrest in the present case:

(a) The agency representation in *The AA V* was never made by the defendants, but only by the agent itself. Here, the plaintiff's case that there was a representation of agency by the agent itself is even weaker. It is based solely on OW Singapore's acceptance of the plaintiff's GTC, which unilaterally imposed the alleged agency. The plaintiff never addressed the fact that OW Singapore, in its Purchase Order Confirmation, expressly stated that the bunkers were ordered under *its own account*. [note: 22]

(b) In both cases, the plaintiff had no contact with the defendant and had no basis to believe

that the defendant had contracted to purchase the bunkers from the plaintiff. In fact, in the present case, the plaintiff knew *prior to the arrest* that the defendant had contracted with another party, OW China for the same bunkers on different terms, and most significantly, at a higher price.

(c) As observed by Prakash J at [49] of *The AA V*, as experienced bunker suppliers, the plaintiffs should have known that a person ordering bunkers for a vessel who is not the owner of the vessel need not necessarily be the owner's agent. Here, the evidence strongly suggests that the plaintiff did not believe that OW Singapore was ever the defendant's agent to begin with. The agency allegation was not mentioned in its initial letters of demand. In fact, the plaintiff must have been aware that OW Singapore had contracted with it as principal. In response to the court's query, Mr Teh informed the court that the plaintiff has filed a proof of debt against OW Singapore for the *same claim*. The proof of debt dated 30 January 2015 against OW Singapore was lodged with the provisional liquidators. Significantly, the proof of debt was based on the *same bunker supply* under the *same invoice* no 1014090 dated 2 November 2014, and was for the *same amount* of US$1,768,000. It is noteworthy that in the proof of debt, the plaintiff stated that the "marine bunker is sold and delivered on the credit of the vessel" and that it "may assert a maritime lien against the vessels". There is no mention of any alleged agency. The reason for this is clear – by filing the proof of debt against OW Singapore, the plaintiff is asserting that OW Singapore contracted as *principal*, and not as agent. This is entirely in line with the plaintiff's initial letter of demand dated 12 November 2014 which referred to the purported lien and made no mention of any agency. The plaintiff's filing of the proof of debt merely reinforces my finding that it never believed that OW Singapore was the defendant's agent in ordering the bunkers. In fact, it was aware at all material times that the converse was the truth.

(d) From a Portnet search, the plaintiffs in *The AA V* knew that another entity was the tug's general agent, and not as alleged. Here, the plaintiff knew from the exchange of correspondence that the defendant had contracted to purchase the bunkers from another party, *ie*, OW China. Therefore, the defendant could not possibly be liable to the plaintiff under a different contract with OW Singapore.

89 To conclude, I find that the plaintiff knew or at least must have known at the time of the arrest that its claim was entirely without factual or legal basis. In the circumstances, the fact that it nevertheless proceeded to arrest the Vessel suggests malice. I also find that the plaintiff was, at the very least, grossly negligent and reckless in not sufficiently disclosing the defendant's position when applying for leave to issue the warrant of arrest. There was clearly material non-disclosure in that regard. The plaintiff's dismissive and cavalier attitude towards the defendant's position that it had purchased the bunkers from OW China on different terms, which it knew was effectively a "knock-out blow" to its claim, is deserving of opprobrium.

90 For the reasons set out at [51]–[55] above, I do not find that the plaintiff's omission to state its intention to proceed to arbitration constitutes material non-disclosure in this case. In any event, the plaintiff did disclose the arbitration clause in the arrest affidavit and this was brought to the assistant registrar's attention. [note: 23] Further, in my view, the intention to proceed to arbitration would not have made a difference to the assistant registrar's decision to grant leave to issue the warrant of arrest.

Conclusion

91 In the result, the defendant's appeal in RA 226/2015 is allowed. The warrant of arrest is set aside and the plaintiff is ordered to pay the defendant damages to be assessed for the wrongful

arrest of the Vessel from 10 to 12 December 2014. Costs of $10,000 inclusive of disbursements are awarded to the defendant for the hearings here and below. In the event that an application for assessment of damages for the wrongful arrest is filed by the defendant, I direct that the assessment hearing be fixed before me.

[note: 1] Qiao Qiming's affidavit dated 30 December 2014 at paras 26–29, pp 149–154

[note: 2] Qiao Qiming's affidavit dated 30 December 2014 at paras 40(e) and (f)

[note: 3] John Kevin Phillip's affidavit dated 9 December 2014 at para 13

[note: 4] John Kevin Phillip's affidavit dated 9 December 2014 at para 17

[note: 5] Plaintiff's submissions dated 21 September 2015 ("Plaintiff's submissions") at paras 12, 15–19

[note: 6] Maxim Verbin's affidavit dated 4 February 2015 at p 25

[note: 7] Defendant's submissions for RA 226/2015 dated 18 September 2015 at paras 32 and 79

[note: 8] Defendant's submissions for RA 226/2015 at para 79

[note: 9] John Kevin Phillip's affidavit dated 9 December 2014 at para 17

[note: 10] John Kevin Phillip's affidavit dated 9 December 2014 at para 24

[note: 11] John Kevin Phillip's affidavit dated 9 December 2014 at pp 48–49; Qiao Qiming's affidavit dated 30 December 2014 at para 33, pp 157–158

[note: 12] John Kevin Phillip's affidavit dated 9 December 2014 at p50

[note: 13] John Kevin Phillip's affidavit dated 9 December 2014 at p 82

[note: 14] John Kevin Phillip's affidavit dated 9 December 2014 at pp 52–53

[note: 15] DBOD, pp 87–88

[note: 16] Defendant's bundle of documents ("DBOD"), p 93

[note: 17] John Kevin Phillip's affidavit dated 9 December 2014 at paras 13(c) and 13(g)

[note: 18] John Kevin Phillip's affidavit dated 9 December 2014 at p 23

[note: 19] AR Jay Lee's minute sheet dated 9 December 2014 at p 5 lines 11–18

[note: 20] AR Jay Lee's minute sheet dated 9 December 2014 at p 4 line 35 – p 5 line 1

[note: 21] AR Jay Lee's minute sheet dated 9 December 2014 at p 8 line 33 – p 9 line 3

[note: 22] John Kevin Phillip's affidavit dated 9 December 2014 at p 23

[note: 23] John Kevin Phillip's affidavit dated 9 December 2014 at para 13(j), AR Jay Lee's minute sheet dated 9 December 2014 at p 7 lines 14–16