The “Eagle Prestige”
[2010] SGHC 93

Case Number : Admiralty in Rem No 233 of 2008 (Registrar's Appeal No 178 of 2009)

Decision Date : 23 March 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Vivian Ang, Leona Wong and Henry Ng (Allen & Gledhill LLP) for the plaintiff; Timothy Tan and Magdalene Chew (AsiaLegal LLC) for the intervener.

Parties : The "Eagle Prestige"

Admiralty and Shipping

23 March 2010

Belinda Ang Saw Ean J:

1 This Registrar’s Appeal No 178 of 2009 (“RA 178”) was brought by the plaintiff, T S Lines Ltd, to reverse a decision of the Assistant Registrar (“AR”) made on 13 May 2009 to set aside the arrest of the *Eagle Prestige* renamed *Engedi*. The main question in the appeal concerned the degree of disclosure required on an application for a warrant of arrest. On 29 May 2009, I allowed the plaintiff’s appeal with costs of the appeal and below to be taxed, if not agreed. I now publish the reasons for my decision.

Background facts and circumstances leading to the arrest of the *Eagle Prestige*

2 By way of summary, the proceedings herein arose out of the grounding of the *TS Bangkok* in Tanjong Priok, Indonesia, on 10 November 2007 which resulted in hull and propeller damage to the vessel. At all material times, the plaintiff was the disponent owner of the *TS Bangkok*. By a time charterparty dated 22 May 2007 (“the May sub-charter”), the plaintiff sub-chartered the *TS Bangkok* to the defendant, EP Carriers Pte Ltd (“EP Carriers”).

3 On arrival at Tanjong Priok, the *TS Bangkok* grounded whilst berthing thereby sustaining hull and propeller damage. The damage was later repaired in Hong Kong. The head owner of the *TS Bangkok* sought to recover the costs of the repairs related to the grounding from the plaintiff who, in passing on the claim to EP Carriers, *inter alia*, brought an action *in rem* against the defendant’s vessel, the *Eagle Prestige*, the short title of which is Admiralty In Rem No 233 of 2008 (“Adm 233”).

4 It is the plaintiff’s case that in breach of the May sub-charter, EP Carriers had directed the *TS Bangkok* to berth at Tanjong Priok, an unsafe port/berth. The principal claim was put forward on the basis that the defendant’s orders to berth the *TS Bangkok* at Tanjong Priok amounted to breach of the charterparty terms because it was an unsafe port/berth; alternatively, the loss was sustained as a consequence of complying with the orders of EP Carriers as charterer of the *T S Bangkok*. In correspondence, the plaintiff also claimed the sum of US$42,753.94 being outstanding charges and expenses due under the May sub-charter. Before me, however, the arguments centred on the principal claim which, according to the endorsement of claim, was for damages and/or an indemnity for breach of contract and/or duties contained in or evidenced by the May sub-charter.

5 The *Eagle Prestige* was first arrested in Singapore waters on 8 January 2009 by the master and crew in Admiralty in Rem No 9 of 2009 for unpaid wages ("Adm 9"). On 17 February 2009, the master and crew applied for the vessel to be sold *pendente lite*. Eventually, the claim in Adm 9 was amicably resolved and the *Eagle Prestige* was released from arrest on 27 February 2009. Adm 9 was discontinued on 3 March 2009. On the same day of her release, the plaintiff arrested the *Eagle Prestige* in Adm 233 for breach of the May sub-charter in respect of the vessel *TS Bangkok*.

6 Fortunately for the plaintiff, the writ *in rem* in Adm 233 was issued on 2 December 2008 *before* the vessel's ownership changed on 22 December 2008. At the time of the plaintiff's arrest, not only had the ownership of the *Eagle Prestige* changed, by 17 February 2009, EP Carriers was in provisional liquidation by way of a creditors' voluntary winding up, and provisional liquidators were also appointed. [note: 1] It appears that the creditors approved the liquidation of EP Carriers on 6 March 2009.

7 The circumstances leading to the plaintiff's arrest of the *Eagle Prestige* were recounted in the two affidavits of Li Kang-Lin ("Li"), both filed on behalf of the plaintiff on 27 February 2009. I begin at the point when the plaintiff received notice of the grounding claim from the head owner's P&I Club, The Swedish Club. In formally denying liability under the head charter of the *TS Bangkok* between the head owner and the plaintiff, the UK P&I Club (on behalf of the plaintiff), in its fax of 6 October 2008 requested, *inter alia*, details of the damage and the subsequent repairs. In addition, the UK P& I Club referred to a possible defence to the damage claim. The last paragraph of the fax read as follows: [note: 2]

> … we find that there is a special provision in Clause 90 [of the Head Charterparty] which states that "The Charterers shall not be responsible for… loss or damage to the vessel and/or other objects arising from perils insured by customary policies of insurance" and Clause 102 states that the owner has a proper hull insurance against all hull risks. As the repair costs arising out of the ship's damage is well covered by the ship's Hull insurance policy, Clause 90 will take effect and the [plaintiff] is not responsible for the [head owner's] loss covered by their insurer.

8 It was common ground that the head charter and May sub-charter were back to back, and there was a comparable provision in the May sub-charter. Capital Gate Holdings Pte Ltd ("Capital Gate") who intervened in the proceedings alleged that cl 90 was a complete defence to the plaintiff's claim, and as such was a material fact that should have been (but was not) disclosed in the affidavits leading the warrant of arrest (see [98]–[111] below).

9 On 6 November 2008, The Swedish Club, on behalf of the head owner, replied rejecting the alleged defence with the counter argument that "the damage caused by the ship's grounding [was] a peril that [was] covered under the prevailing c/p." The Swedish Club also stated that the head owner had already notified EP Carriers of the repairs made to *TS Bangkok*, and that surveyors on behalf of EP Carriers had duly attended the surveys carried out in connection with the repairs. In short, the grounding damage was notified to the defendant and its liability insurers. On 10 November 2008, the plaintiff passed on the head owner's claim of US$ 481,572.19 to the defendant. In particular, the UK P&I Club on behalf of the plaintiff wrote as follows: [note: 3]

> As [the plaintiff's] C/P terms with you are on back to back basis and in other words [the plaintiff] is entitled to bring an indemnity claim on similar grounds as contended by the headowner against you, we are grateful that you can confirm to furnish an acceptable form of security for the owner's claim plus interest and costs to [the plaintiff].

10 EP Carriers had presumably notified the claim to its insurers because some 18 days later, QBE

Marine Underwriting Agency Pte Ltd ("QBE"), a subsidiary of QBE Insurance (International) Limited, responded in an email to the plaintiff's Hong Kong lawyers, DLA Piper ("DLA"). The email of 28 November 2008 stated: [note: 4]

> (1) We are considering your security wording in detail and please give us time to revert on the same latest next by Wednesday…
>
> …
>
> Ernest, you know us very well. We will not run away from our responsibilities as we consider ourselves as reputable insurers. Please rest assured we will sort out the security issue and hence please do not in the meantime take pre-emptive action against the Insured's vessel.

11 Since security was not forthcoming, the plaintiff went ahead to file the writ *in rem* against the *Eagle Prestige* on 2 December 2008. The picture that emerged was a pattern of unfulfilled assurances from the defendant's insurers, QBE, over the security issue. DLA sent reminders to QBE on 4 December 2008, and again on 8 December 2008. On 11 December 2008, QBE replied to DLA stating that they were still in discussions with EP Carriers on this claim and asked that they be given time till the next day at which time they said that DLA would receive a substantive response on the security demanded from their lawyers in Singapore. However, no positive response on security as promised materialised.

12 In the meantime, unbeknown to the plaintiff, EP Carriers had, on 22 December 2008, sold the *Eagle Prestige* to the intervener "in consideration of the sum of one dollar (US$1.00) … and other good and valuable consideration …". [note: 5] The shipping manager of Capital Gate, Tan Siew Ling ("TSL") was the deponent of all the affidavits filed on behalf of the intervener. It is apposite to note that the only reason why TSL said she was in a position to testify on matters involving the defendant was because she was a director of EP Carriers from March 2001 to March 2009, and I noted from the documents that the bank facilities provided by United Overseas Bank ("UOB") continued to be guaranteed by TSL and two others. The bill of sale of the *Eagle Prestige* was co-signed by TSL in her capacity as director of EP Carriers.

13 TSL had deposed in her 4th affidavit that the defendant's liability to UOB in the region of US$10.335m and S$1.61m was assumed by Linford Pte Ltd following an Assignment and Novation Agreement dated 24 December 2008 ("Novation Agreement"). Furthermore, ownership of the *Eagle Prestige* was transferred to Capital Gate as nominee of Linford Pte Ltd. The Novation Agreement was executed by TSL on behalf of EP Carriers. Tan Eng Joo, a director of EP Carriers signed the Novation Agreement on behalf of Linford Pte Ltd in his capacity as director of the company. Tan Eng Joo is also the sole shareholder of Linford Pte Ltd, a company newly incorporated in Singapore on 11 November 2008. It was a term of the Novation Agreement that Linford Pte would provide security in favour of UOB. Linford Pte Ltd agreed to give security by way of a legal mortgage on *Eagle Prestige*. Linford Pte Ltd was to procure its nominee, Capital Gate, to execute a first priority statutory mortgage over the *Eagle Prestige*. As TSL acknowledged in her affidavit, the value of the vessel was S$1.8m (and not US$8.2m as stated in the UOB facility letter dated 19 December 2008), and it was not surprising to find UOB requiring additional security to cover the indebtedness, namely a fresh legal mortgage on the same office property belonging to Eagle Stevedoring (Pte) Ltd and the same residential property of Tan Kheng Chong and Lim Guat. Furthermore, the same three directors of EP Carriers, Tan Kheng Chong, Tan Eng Joo and TSL were to execute in favour of UOB fresh joint and several guarantees for S$1.61m and US$10.335m respectively. For completeness, the Novation Agreement also involved the mortgage on another vessel, the *Eagle Pride*. I need only mention two events of default under the

UOB facility that are relevant. The first event of default is that the *Eagle Prestige* is not to remain under arrest for more than three days. The other event of default is the failure to pay the wages of the master and crew of the *Eagle Prestige* by 31 December 2008. [note: 6] The master and crew arrested the *Eagle Prestige* in Adm 9 on 8 January 2009 and she was not released until 27 February 2009.

14 Reverting to the narration of the procedural history, the first arrest of the *Eagle Prestige* was on 8 January 2009. On learning about the first arrest in Adm 9, the plaintiff filed a caveat against release on the same day. As stated earlier, Capital Gate entered an appearance in Adm 9. On 15 January 2009, AsiaLegal LLC ("AsiaLegal") on behalf of Capital Gate wrote to Allen & Gledhill LLC ("A&G") as solicitors for the plaintiff to demand that the caveat be withdrawn on the basis that the intervener owed no liability to the plaintiff. In response, A&G pointed out that the plaintiff's writ *in rem* was issued *before* the change of ownership, and as such its claim was unaffected by the ownership change. At that point, AsiaLegal requested details of the plaintiff's security requirements on 21 January 2009. Meanwhile, on 16 January 2009, DLA wrote to EP Carriers repeating the request for security in respect of the plaintiff's claim. This time, the request was totally ignored. It later transpired that EP Carriers being insolvent and unable to carry on business had gone into provisional liquidation on 17 February 2009, and provisional liquidators appointed. Upon the vessel's release from the first arrest on 27 February 2009, she was arrested by the plaintiff in Adm 233.

15 On 9 March 2009, EP Carriers (through the liquidators) entered an appearance in Adm 233 as owner of *Eagle Prestige* at the time the writ was issued. One month later, Capital Gate intervened in Adm 233 and entered an appearance on 16 April 2009 as the new owner of the vessel. I noted that Capital Gate as early as 15 January 2009 had entered an appearance in Adm 9 as owner of the vessel.

Summons No 1777 of 2009 to set aside the warrant of arrest and outcome

16 In Summons No 1777 of 2009 ("Summons 1777"), the intervener, Capital Gate, applied for the setting aside of the warrant of arrest (and not the writ *in rem*) and damages for wrongful arrest. The grounds of the application were set out in TSL's 2nd affidavit filed on 16 April 2009, and they were entirely based on the plaintiff's failure to make full and frank disclosure of material information in the affidavits leading the warrant of arrest. In particular, cl 90 of the May sub-contract would absolve the defendant from all and any liability arising from the alleged grounding incident, and cl 90 should have been disclosed in the affidavit leading the warrant of arrest. TSL also alleged that the plaintiff had failed to disclose in the affidavits leading the warrant of arrest that the plaintiff was disputing the claim against the head owner and had raised the very same clause and cl 102 in the head charter in defence against the head owner's damage claim.

17 Clauses 90 and 102 of the May sub-charter read as follows:

> 90 The Charterers shall not be responsible for loss of life nor personal injury nor arrest or seizure or loss or damage to the vessel and/or other objects arising from perils insured by customary policies of insurance.
>
> ….
>
> 102 Owners to keep the vessel fully insured against all hull risks as per institute time clause (HULLS) 1.10.1983 including RDC or equivalent conditions and usual deductibles.

18 TSL's 3rd affidavit filed on 5 May 2009 introduced other areas of non-disclosure. They were:

(a) There was no information on the status of the head owner's claim against the plaintiff, and since the head owner's claim against plaintiff had not been determined the claim against the defendant was premature.

(b) EP Carriers had liability cover with QBE and the plaintiff was aware of that cover.

19 In the midst of the additional areas of non-disclosures raised in the affidavits was the incongruous argument that there was a need for the plaintiff to demonstrate a "good arguable case" against the defendant. The latter argument was raised in TSL's 3rd affidavit filed on 5 May 2009 wherein she made the cursory allegation that there was no good arguable case because there was no evidence or contemporaneous correspondence that the grounding occurred. It is unclear what else was said before the AR hearing Summons 1777 who had noted down in his minute sheet the contention of Mr Timothy Tan, counsel for the intervener, that first, *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin (CA)*") required the plaintiff to show a good arguable case and that second, this onus was not discharged by the plaintiff. The main objection was still material non-disclosure.

20 The AR agreed with the intervener and ordered that the warrant of arrest be set aside for material non-disclosure. The AR explained that:

> [the plaintiff] had failed to disclose the material fact that they had raised the defence of Clause 90 against the [head owner]. They ought to have done so, even if only to add that they themselves felt that to be a weak argument, or that the failure to raise the same argument in the pre-arrest correspondence showed that they too did not believe it to be a strong defence, or that the defence available to the [plaintiff] vis-à-vis the [head owner] would not have been available to the [intervener] for some reason or another.

21 Notably, Capital Gate chose to confine its objection to material non-disclosure. TSL's affidavits did not rely on jurisdictional grounds to set aside the warrant of arrest. Equally, there was no separate application in Summons 1777 to strike out the writ *in rem* and action under O 18 r 19 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC"). At the risk of stating the obvious, if a claim is made without foundation, the defendant can always challenge jurisdiction under O 12 r 7 of the ROC as well as strike out the writ *in rem* and action under O 18 r 19.

Application to adduce further affidavit evidence after first hearing

22 At the hearing of RA 178, the plaintiff applied for leave to adduce further evidence by way of an affidavit from Henry Ng ("Mr Ng"), a Senior Associate in A&G who attended before Assistant Registrar, Mr Adrian Loo ("AR Loo"), for the issuance of the warrant of arrest. Counsel for the plaintiff, Ms Vivian Ang, explained that the purpose of filing Mr Ng's affidavit was to set out the various matters that were orally conveyed to AR Loo. According to Mr Ng, he attended before AR Loo for more than an hour but the certified true copy of AR Loo's minute sheet recorded the following limited matters:

> PC: When action was commenced, name of ship was Eagle Prestige. After writ issued, vessel changed name (and ownership) to Engedi. New name is reflected in amended writ and papers. Another arrest currently in place; seeking to take over arrest.
>
> Caveat search for "Engedi" done at 5.06 pm. No caveat against arrest. Caveat search for

"Eagle Prestige" done at 5.08 pm. Five caveats. One is Plaintiff's against release. Three of remaining four have commenced actions against release. For last one, UOB, have not commenced action but have been invited to and according to correspondence, have requested to withdraw caveat.

PC: Owner of TS Bangkok at time of incident is disponent owner. Defendants were charterers and/or in possession of and/or in control of TS Bangkok at time of incident, 10 November 2007. Proceeding against Eagle Prestige under s 4(4) of HC Admiralty Jurisdiction Act. (Details in affidavit.)

Court:Request for warrant of arrest approved.

23 I granted leave to the plaintiff to file Mr Ng's affidavit. At the hearing of RA 178, Mr Tan argued that Mr Ng's affidavit was plainly an afterthought and the court should not give it weight. Although Mr Tan objected to the lateness of the application and doubted its veracity and credibility, the intervener did not appeal against my decision granting leave to adduce further evidence.

Judicial sale of *Eagle Prestige*

24 Before proceeding further, it is necessary to mention that after I allowed the plaintiff's appeal in RA 178, the plaintiff's adjourned application for the sale of the vessel *pendente lite* was listed for hearing before Lai Siu Chiu J who ordered the judicial sale of the *Eagle Prestige* on 5 June 2009. Interestingly, the intervener did not appeal against Lai J's judicial sale order, but instead filed a notice of appeal against my decision on 22 June 2009 without seeking, in the meantime, an order to stay execution of the judicial sale order pending the intervener's appeal against my decision to the Court of Appeal. The judicial sale of the *Eagle Prestige* was completed on 25 August 2009, and the proceeds of sale were paid into court on the same day. The sale proceeds have remained with the Sheriff as the plaintiff's claims are being disputed. As I understand from Ms Ang's arguments, the mortgage on the *Eagle Prestige* was created after the plaintiff's writ *in rem* was issued.

Jurisdiction *in rem* against *Eagle Prestige*

25 As provided by s 3(1) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HCAJA"), the High Court has admiralty jurisdiction to hear and determine:

…

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

…

26 So far as material, s 4(4) of the HCAJA provides:

4. -(4) In the case of any such claim as is mentioned in section 3 (1) (*d*) to (*q*), where —

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

(b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

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

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

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

27 Against this statutory background, it is not disputed that the plaintiff whose claim is for breach of the May sub-charter, has to satisfy both ss 3(1)(*h*) and 4(4) of the HCAJA to maintain the arrest. Conversely, in order to have the arrest set aside, it would have been sufficient for Capital Gate to succeed on either statutory provision. If either statutory provision was not satisfied, the arrest could not be sustained. Even if the statutory provisions were satisfied, the court retains the discretion to set aside the arrest on a separate and independent ground if there was material non-disclosure (see *The Rainbow Spring* [2003] 3 SLR(R) 362 ("*The Rainbow Spring (CA)")* at [37]).

28 In Summons 1777, the intervener applied for the warrant of arrest to be set aside for material non-disclosure. As stated, there was no application to set aside the writ *in rem* on jurisdictional grounds under O 12 r 7, or to strike out the writ *in rem* and action under O 18 r 19 or under the court's inherent jurisdiction for frivolous or vexatious proceedings. Mr Tan, on behalf of the intervener, explained that there was no dispute that the plaintiff's claim fell squarely within s 3(1)(*h*) of the HCAJA having regard to the existence of the May sub-charter of the *TS Bangkok* made between the plaintiff and EP Carriers. He averred that the plaintiff's claim arose from the May sub-charter. Furthermore, although the *Eagle Prestige* was not the ship in connection with which the claim was said to have arisen, the arrest was of a vessel owned by EP Carriers who was the charterer of *TS Bangkok* at the time the plaintiff's cause of action arose. There was no contest on the rightful ownership of the *Eagle Prestige* at the time the writ *in rem* was issued on 2 December 2008 as ownership had remained constantly with EP Carriers. However, Mr Tan argued that even though the plaintiff had satisfied the requirements of s 3(1)(*h*) and s 4(4)(*b*)(ii), the plaintiff must still demonstrate that it had a good arguable case on the merits. Mr Tan contended that the plaintiff's claim was premature, and went so far as to argue that *The Vasiliy Golovnin (CA)* in effect changed the *in personam* test in s 4(4)(*b*) to a higher threshold, and in doing so, departed from the legal principles enunciated in *The St Elefterio* [1957] 1 Lloyd's Rep 283 ("*The St Elefterio")*.

29 Ms Ang pointed out that since the same facts were used in arguments, the intervener was muddling issues of a lack of jurisdiction with issues of non-disclosure such that it was not clear if the arguments made were directed to one issue or both. In short, it was far from clear whether the intervener in raising the need to show a "good arguable case" on the merits was mounting a jurisdictional challenge when Summons 1777 was grounded entirely on material non-disclosure.

30 Mr Tan first raised two broad issues in his written submissions. They are paraphrased as follows:

(i) Whether the arresting party is required to show, at the stage when the warrant of arrest is being challenged ("the challenge stage") that it has a "good arguable case" on the merits of the claim; and

(ii) Whether the duty of disclosure in applications for warrant of arrest extends to cover plausible defences on the merits of the claim.

In the course of argument, Mr Tan raised a third issue which is whether at the application for a warrant of arrest ("the application stage"), the arresting party is required to show that it has a "good arguable case" on the merits of the claim. The issues will be examined shortly. Suffice it to say at this point of time, I did not accept Mr Tan's various contentions.

The Court of Appeal's decision in *The Vasiliy Golovnin*

31 Mr Tan's arguments were supposedly drawn from what was said to be legal propositions laid down in the recent decision of *The Vasiliy Golovnin (CA)*. Before examining *The Vasiliy Golovnin (CA)* on the three issues identified by Mr Tan and paraphrased in [30], it is necessary that I begin by summarising the relevant facts. A fuller account of the facts is reported in *The Vasiliy Golovnin* [2007] 4 SLR(R) 277 ("*The Vasiliy Golovnin (HC)*"). It must also be remembered that the defendant, Far Eastern Shipping Co Plc ("FESCO"), applied (a) to set aside the writ *in rem* and the warrant of arrest for, *inter alia*, non-compliance with s 3(1) of the HCAJA (*ie*. want of jurisdiction) and (b) for the writ *in rem* and action to be struck out as vexatious and an abuse of process under O 18 r 19 of ROC or under the inherent jurisdiction of the court. At the risk of stating the obvious, the striking out application under O 18 r 19 is a separate process under the ROC and available as a procedural remedy for the summary disposal of clear and wholly unmeritorious, and hence, unsustainable actions. Tan Lee Meng J in *Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2009] 4 SLR(R) 43 at [17] helpfully summarised the meaning of "frivolous or vexatious" and "abuse of process" as decided by our Court of Appeal in two cases:

> In *The Osprey* [1999] 3 SLR(R) 1099, LP Thean JA reiterated at [8] that the words "frivolous and vexatious [in O 18 r 19(b)] mean actions which are "obviously unsustainable" or "wrong" and this expression also connotes "a lack of purpose or seriousness in the party's conduct of the proceedings." As for what amounts to an "abuse of process" [in O 18 r 19(d)], in [*Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649] [15] *supra*), the Court of Appeal stated at [22] stated as follows:
>
> > The term, 'abuse of process of the Court', in Order 18 Rule 19(1)(*d*), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. …

32 FESCO as the head owner chartered the vessel *Chelyabinsk* on amended New York Produce Exchange ("NYPE") terms to head charterers, Sea Transport Contractors Ltd ("STC"). STC, in turn, sub-chartered the *Chelyabinsk* on amended NYPE terms to Rustal SA ("Rustal") for the carriage of a shipment of rice on a voyage from China and India for discharge at Lomé, Togo. The banks who provided financing to Rustal and received the relevant bills of lading as security were Crédit Agricole (Suisse) SA ("Crédit Agricole") and Banque Cantonale de Genève SA ("BCG"). The relevant bills of lading named Lomé as the port of discharge. The dispute that arose was over the payment of hire for the *Chelyabinsk*. As a result, FESCO received conflicting instructions from STC and the banks, "Crédit Agricole" and BCG. STC instructed the *Chelyabinsk* to sail to Lomé, Togo, while the banks gave instructions to discharge the cargo at Douala, Cameroon, in exchange for a letter of indemnity. Two of the three pertinent bills of lading stated the port of discharge to be Lomé, and the third was "any African port."

33 One pertinent fact in the case was that STC, on Rustal's instructions, had requested FESCO to switch the bills of lading to alter the port of discharge of the cargo from Lomé to Douala but the switch never took place. Even without the switch, the banks still wanted the cargo discharged at Douala. FESCO, under instructions to discharge the cargo at Lomé, refused. On discharge, some of the cargo sustained damaged, and FESCO's P&I Club provided security for the cargo damage. Meanwhile, on 21 February 2006, the banks obtained a Lomé court order for the arrest of the *Chelyabinsk* in connection with FESCO's refusal to discharge the cargo at Douala and for damage to cargo. At an *inter partes* hearing, FESCO successfully opposed the arrest by obtaining an order to set aside of the arrest. The banks did not appeal against the Lomé decision of 24 February 2006. The Lomé court made the following important findings:

(a) The banks could not deal directly with FESCO without going through Rustal and STC, and FESCO could only follow STC's instructions since Lomé was stipulated as the port of discharge in a number of the bills of lading.

(b) FESCO had not been at fault in proceeding to Lomé on STC's instructions since STC had control over the commercial management of the *Chelyabinsk* as charterer.

(c) Douala was not listed as a port of discharge on the bills of lading although the banks claimed that the cargo was bound for Douala.

(d) Sufficient security was given for the claims for loss and damage to the cargo and the banks could not claim that they had suffered any loss.

34 On 18 March 2006, the banks started *in rem* proceeding in Singapore and arrested the *Vasiliy Golovnin*, a sister ship of the *Chelyabinsk*, in respect of the very same claims earlier made unsuccessfully to the court in Lomé. FESCO duly applied to set aside the writ *in rem* and warrant of arrest of the *Vasiliy Golovnin*. The Assistant Registrar, Ms Ang Ching Pin ("AR Ang") allowed FESCO's application. The writ *in rem* and the warrant of arrest of the *Vasiliy Golovnin* were set aside for three reasons, namely (a) issue estoppel, (b) material non-disclosure and (c) lack of an arguable case against FESCO. On appeal, Tan Lee Meng J affirmed AR Ang's decision (except for the cargo damage claim, which Tan J did not strike out). Crédit Agricole and *not* BCG, appealed to the Court of Appeal against Tan J's decision. However, FESCO's cross-appeal for wrongful arrest was against both banks.

35 In deciding against Crédit Agricole, the Court of Appeal held that the bank did not have a "good arguable case" because FESCO had no duty to obey Crédit Agricole, the holder of the bills of lading and named consignee, in deviating to Douala from Lomé. To do so would have made FESCO liable for breach of the head charter and breach of the contracts of carriage contained in or evidenced by the relevant bills of lading. Furthermore, unless the sub-charter provided otherwise, the master was obliged to obey all instructions of STC who was entitled to give employment instructions to FESCO.

36 On the subject of material non-disclosure, the Court of Appeal held that Crédit Agricole had insufficiently disclosed the existence of proceedings in Lomé. The Court of Appeal noted that there was no real difference between the "essential features of the Togolese and Singapore claims". The bank should have disclosed to Assistant Registrar, Mr David Lee (AR Lee), who heard the application for a warrant of arrest that the objective of the proposed switch of the bills of lading was to change the port of discharge without which the discharge port remained the same. Further, Crédit Agricole should have disclosed to AR Lee the fact that there had been an *inter partes* hearing in Lomé and its outcome in FESCO's favour to the effect that it had correctly performed the terms of the bills of lading contract by discharging the cargo at Lomé. If those facts were disclosed, AR Lee would have made enquiries in order to be better placed to make an informed decision as to whether or not to

issue the warrant of arrest.

37 On issue estoppel, it was not necessary for the Court of Appeal to discuss the plea in detail and the Court of Appeal agreed with Tan J that issue estoppel was made out on the facts.

38 I now turn to examine *The Vasiliy Golovnin (CA)* in order to consider the three issues raised by Mr Tan as supporting his arguments. I will deal with issues (i) and (iii) together as the arguments are the same.

"Good arguable case"

39 In respect of issue (i) set out in [30] above, Mr Tan submitted that paras [51] and [52] of *The Vasiliy Golovnin (CA)* supported his proposition that, at the challenge stage, the plaintiff is required to show that he has a good arguable case on the merits. Paragraphs [51] and [52] of *The Vasiliy Golovnin (CA)* read as follows:

> 51 The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. … Maritime arrests can, when improperly executed, sometime be as destructive as Anton Piller orders and even as potentially ruinous as Mareva injunctions, the two nuclear weapons of civil litigation. As such, a plaintiff must always remain cautious and rigorously ascertain the material facts before applying for a warrant of arrest. While there is no need to establish a conclusive case at the outset, there is certainly a need to establish a good arguable case, before an arrest can be issued. This determination plainly requires a preliminary assessment of the merits of the claim.
>
> 52 The standard to be applied in Singapore at this early stage of the matter, if there is a challenge on the merits, is indeed the "good arguable case" yardstick (see Karthigesu JA's observations in *The Jarguh Sawit* (CA), at [47], above). The plaintiff does not have to establish at this stage that he has a cause of action that might probably prevail in the final analysis. Karthigesu JA has rightly pointed out in *The Jarguh Sawit* (CA) that the plaintiff need only show that he has a "good arguable case" that his cause of action falls within one of the categories provided for in s 3(1) of the HCAJA. The party invoking the arrest procedure must be prepared, when challenged, to justify that it was entitled right from the outset to invoke this remedy.

40 At the hearing, Mr Tan expanded on his contention to include issue (iii) which is set out in [30] above. He said he was relying on *The Vasiliy Golovnin (CA)* for the proposition that at the time of applying for the warrant of arrest, the plaintiff has to satisfy the yardstick of a good arguable case on the merits. He claimed that his contention was reinforced by the Court of Appeal enlarging the arresting party's duty to disclose material facts to cover plausible defences on the merits. That enlargement of the disclosure duty, so the argument developed, served to affirm the need to show a good arguable case on the merits at the application stage. In doing so and as a result, the Court of Appeal departed from the legal principles in *The St Elefterio* (see [28] above).

41 In my view, Mr Tan had misunderstood *The Vasiliy Golovnin (CA)* which discussed and decided two different challenges: (a) procedural challenge to jurisdiction which encompasses the existence of jurisdiction and the court's exercise of such jurisdiction; and (b) substantive challenge on the merits of the claim as it was without foundation in the context of an application to strike out the writ *in rem* and action under O 18 r 19 of the ROC. Turning to specifics, in *The Vasiliy Golovnin (CA)*, there was an application to set aside the writ *in rem* and warrant of arrest on grounds of want of jurisdiction *in rem* under s 3(1) of the HCAJA. There was also a further application to strike out the writ *in rem* and action under O18 r 19 or under the court's inherent jurisdiction which is a different point from

jurisdiction. As stated in [34] above, Tan J struck out all of the banks' claims other than that relating to damage to the cargo as the action failed to satisfy the threshold of being "arguable" (see [24] of *The Vasiliy Golovnin (CA)*). On appeal to the Court of Appeal, VK Rajah JA (delivering the judgment of the appellate court) discussed (a) the setting aside of the writ *in rem* and warrant of arrest (under O 12 r 7) on the ground that the claims did not fall with s 3(1) of the HCAJA, and (b) striking out the writ *in rem* and action under O 18 r 19 or under the court's inherent jurisdiction on the ground that the claims were unmeritorious or clearly unsustainable (see [44] of *The Vasiliy Golovnin (CA)*). As Rajah JA observed (at [48] of *The Vasiliy Golovnin (CA)*), O 18 r 19 of the ROC is a useful procedural remedy for the summary disposal of an action *in rem* which is vexatious in the sense that the action is clearly hopeless, unmeritorious and, hence, unsustainable.

42 As I have alluded to earlier, Mr Tan had argued that paras [51] and [52] of *The Vasiliy Golovnin (CA)* supported his contentions in issue (i) and issue (iii). The contentions are, in my view, misconceived. Paragraphs [45] to [52] fall under the heading "Requirements for determining whether the claim falls within section 3(1) of the HCAJA" and they have nothing to do with the *in personam* test in s 4(4)(*b*) (*per* Selvam JC (as he then was) who coined the phrase "*in personam* test" in *The Opal 3*, [1992] 2 SLR(R) 231 at [10]).

43 Turning first to the discussions on s 3(1) of the HCAJA in *The Vasiliy Golovnin (CA)*, Rajah JA discussed in [45] to [52] the statutory requirements for determining whether a claim falls within s 3(1)(*h*) of the HCAJA. Rajah JA began the discussions on s 3(1)(*h*) of the HCAJA by citing *The Jarguh Sawit* [1997] 3 SLR(R) 829 ("*The Jarguh Sawit*") and quoted with approval extracts from Toh Kian Sing SC, *Admiralty Law & Practice* (Lexis Nexis, 2nd Ed, 2007 at pp 45-46) ("*Admiralty Law & Practice*"):

> When the claim is challenged at the jurisdictional stage, the court is not usually concerned with its merits. The concern at this stage is whether the nature of the plaintiff's claim is within a particular head of jurisdiction, rather than the strength of the claim. *So long as the claim is not so frivolous as to be dismissed in limine, the plaintiff does not have to establish at the outset that he has a cause of action substantial at law*. Neither would the existence of a good defence to a claim negate the court's admiralty jurisdiction. If the subject matter jurisdiction of the court is challenged, *the plaintiff under the law of Singapore only has to show that he has a good arguable case that his claim comes within one of the limbs of section 3(1) of the High Court (Admiralty Jurisdiction) Act, as opposed to the more onerous test of a balance of probabilities*. The test in England, at least where the jurisdictional challenge relates to the existence of particular facts, remains that of a balance of probabilities… The position in Australia is that any such jurisdictional fact must be proved on a balance of probabilities.
>
> [emphasis in the original]

44 M Karthigesu JA in *The Jarguh Sawit* pointed out, at [42] of the report, that the nature of the legal examination and the standard of proof will be different if one is asserting jurisdiction as compared with liability which is another question. If the dispute is whether the requirements of s 3(1) are satisfied, Karthigesu JA at [43] held that:

> In a hearing of an application to dispute jurisdiction [under s 3(1)], the plaintiff need only show that he has a good arguable case that his cause of action falls within one of the categories of s 3(1), in this case, ground (c). His objective is to persuade the court that there is sufficient evidence that a claim of the type specified in s 3(1)(c) exists. As the plaintiff in the present case did so, the court was entitled to find that the plaintiff rightly invoked its jurisdiction.

45 Karthigesu JA went on to explain at [44] that it would be later when the action reaches trial stage that the very same facts used to establish jurisdiction must be proved at the hearing of the substantive dispute on liability and the standard of proof then is on a balance of probabilities. In *The Jarguh Sawit*, the appellants, before filing their defence, applied to set aside the writ *in rem* under O 12, r 7 on the grounds that the court had no jurisdiction to hear the action as they were not liable *in personam* to the respondents. On the facts, the procedural issue in *The Jarguh Sawit* had already been conclusively determined in an earlier interlocutory application and the point was *res judicata*.

46 Subsequently, at [52] of *The Vasiliy Golovnin*, Rajah JA agreed with Karthigesu JA that at the early stage of the application filed to dispute jurisdiction (*ie*, the challenge stage), all the plaintiff needed to do was to merely demonstrate that "he has a good arguable case that his cause of action falls within one of the categories s 3(1)". The standard of proof is the "good arguable case" yardstick, that is to say the "plaintiff does not have to establish at this stage that he has a cause of action that might probably prevail in the final analysis" at the trial. In practice, in order for the plaintiff to establish that he has a good arguable case within one of the categories of s 3(1), and using as an example s 3(1)(*h*), the plaintiff will have to set out the grounds comprising the factual foundation of the claim and the assertion of a legal right consequential upon those grounds. A claim that a breach of contract has occurred is thus a claim for relief founded on grounds where an essential part of the claim is a contract relating to the hire or use of a ship. Significantly, at that stage, the strength of the claim is not relevant as the plaintiff does not have to establish at the outset that he has a cause of action substantial at law (see *The St Elefterio* (see [29] above); *Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641 at 647-648 & *Admiralty Law & Practice* at p 46 (see [43] above)).

47 The dictum in [52] of *The Vasiliy Golovnin (CA)* is consistent with the line of authorities that an *in rem* plaintiff need do no more than demonstrate that the claim falls within one of the claims listed in s 3(1), and that there is *no* onus on the in *rem* plaintiff to go beyond that early stage to prove the further point that the claim is likely to succeed *unless* there is a *separate challenge* that the action is so frivolous as to be summarily dismissed. This is the approach adopted in *The St Elefterio* and *The Moschanthy* [1971] 1 Lloyd's Rep 37 at 42 ("*The Moschanthy*"). One must therefore read paras [45] to [52] of the *The Vasiliy Golovnin (CA)* in the context of the discussion on first, whether or not the plaintiff's cause of action fell within one of the categories in s 3(1) of the HCAJA and second, in the context of Rajah JA's agreeing with the observations of Karthigesu JA in *The Jarguh Sawit* on the standard of proof at the challenge stage.

48 In relation to the applicable standard of proof, one must always keep in mind the context of the case. In *The Jarguh Sawit*, the nature of the claim for the purposes of s 3(1)(*c*) of the HCAJA was not controversial. It concerned an undisputed fact that the claim was in respect of a ship's mortgage that came within s 3(1)(*c*). The complaint was whether the current owner of the vessel without notice of the plaintiff's unregistered mortgage was liable to the respondent and that was an issue to be resolved at trial (see MPH Rubin J's decision reported in [1995] 2 SLR(R) 913 at [37] which was upheld on appeal in Civil Appeal No 122 of 1995). Similarly, in *The Vasiliy Golovnin (CA)*, the nature of the claim was not in dispute. Crédit Agricole was able to establish, at the challenge stage, a claim for relief founded on grounds an essential part of which was a contract relating to the hire or use of a ship that came within s 3(1)(*h*). Again context is important.

49 I digress here a little for a brief reminder on the proper standard of proof of jurisdictional questions under the HCAJA. When jurisdiction *in rem* is challenged (and the challenge to set aside the writ *in rem* and warrant of arrest is usually made under O 12 r 7), the proper standard of proof on jurisdiction is on a balance of probabilities. It is clear that where jurisdiction *in rem* is based on the existence of particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. In the event, the particular facts or state of

affairs must be established on the balance of probabilities in the light of all the affidavit evidence before the court to determine whether there is jurisdiction *in rem*. This approach is illustrated by such cases as *The Catur Samudra* [2010] SGHC 18 ("*The Catur Samudra*"), *The Alexandrea* [2002] 1 SLR(R) 813 ("*The Alexandrea*"), *The Andres Bonifacio* [1991] 1 SLR(R) 523 ("*The Andres Bonifacio*"), *The Inai Selasih* (*ex "Geopotes X"*) [2005] 4 SLR(R) 1 ("*The Inai Selasih* ") and the Court of Appeal's decision reported in [2006] 2 SLR(R) 181. A review of those cases will show that where, for instance, the nature of the claim requires, for example, the establishment of factual preconditions in s 3(1) or contemplates a s 4(4) ownership question, the *in rem* plaintiff was obliged to prove the existence of the particular jurisdictional fact and to show jurisdiction on a balance of probabilities.

50 In *The Catur Samudra*, a recent decision of Steven Chong JC, one of the issues that arose was, *inter alia*, whether a claim under a guarantee for the liabilities of a related company as charterer under a charterparty was a claim arising out of an agreement relating to the use or hire of a vessel within the scope of s 3(1)(*h*) of the HCAJA. The plaintiff was required to satisfy the burden of proof on a balance of probabilities in respect of an essential jurisdictional issue. In that case, the nature of the claim went to the heart of the jurisdiction *in rem*, and at the challenge stage, it was for the plaintiff to prove on a balance of probabilities the jurisdictional issue in question.

5 1 *The Alexandrea* concerned the supply of contaminated marine fuel oil to the vessel, *Front Melody*, resulting in damage to *Front Melody*'s machinery. The plaintiff commenced an action *in rem* against the *Alexandrea* and arrested the vessel. One of the grounds upon which the court's jurisdiction was challenged by the defendant was that the plaintiff's claim did not arise "in connection with a ship" (see s 4(4) of the HCAJA). The High Court held that the *Front Melody* and not the *Alexandrea* was the ship in connection with which the claim arose. The plaintiff had to prove on a balance of probabilities the jurisdictional issue in question.

52 In *The Inai Selasih*, the plaintiff there entered into a joint venture with the defendant pursuant to a memorandum of understanding (the "MOU"). Thereafter, the plaintiff provided a dredger, the *Inai Seroja*, to the defendant for its use. Various claims under the MOU arose between the parties and the plaintiff eventually commenced proceedings against the defendant and arrested the *Inai Selasih*, a vessel owned by the defendant. The defendant applied to set aside the writ *in rem* and the warrant of arrest on the basis, *inter alia*, that it was not the charterer of the *Inai Seroja* because the charterparty relied upon by the plaintiff in the *in rem* action was a sham, and it could not have the effect of conferring the status of charterer on the defendant. The High Court held that the onus was on the plaintiff to establish, on a balance of probabilities, that the defendant was the charterer of the *Inai Seroja* when the cause of action arose. That burden was not discharged as the requirements of s 4(4) were not satisfied (see the Court of Appeal's decision reported in [2006] 2 SLR(R) 181 at [15] upholding the High Court on this point).

53 In *The Andres Bonifacio*, the plaintiffs arrested the *Andres Bonifacio* as security for their claim arising from the charter of another vessel. The defendant applied to set aside the writ *in rem*. The main issue for determination was whether the defendant was the beneficial owner of the *Andres Bonifacio*. Karthigesu J (as he then was) decided (at [47]) that

> [o]n the balance of probabilities, I am satisfied that [the defendant was] the beneficial [owner] of all the shares in the 'Andres Bonifacio' from 1980 through to the date when these *in rem* proceedings were commenced.

The Court of Appeal in [1993] 3 SLR(R) 71 upheld Karthigesu J's findings on beneficial ownership.

Unmeritorious substantive claim

54 I now come to the other part of *The Vasiliy Golovnin (CA)* relating to the question of whether the banks' claims were unmeritorious or clearly unsustainable (see [44] of *The Vasiliy Golovnin (CA)*). On the facts of that case, a good starting point is the test of jurisdiction under s4(4)(b) (*ie*, the *in personam* test). It is important to bear in mind the *in personam* test in two contexts. The first concerns what has been described as "the low threshold of the merits enquiry" ("Situation 1"), and the second is where the proceedings are frivolous or vexatious or otherwise an abuse of process so as to warrant halting such proceedings *in limine* by striking out the action under O18 r 19 of ROC or under the court's inherent jurisdiction ("Situation 2"). Under Situation 2, the merits of the claim are examined as a summary disposal of the action is being sought. Notably, *The Vasiliy Golovnin (CA)* was concerned with Situation 2. In contrast, the present case falls typically within Situation 1.

55 In *The St Elefterio*, the defendant shipowner applied to set aside the writ *in rem* arguing that the plaintiff's claim against the defendant for damages arising out of the antedating of the bills of lading did not fall within s 1(1) (*h*) of the Administration of Justice Act 1956 ("the 1956 Act (UK)") (our s 3(1)(*h*) of the HCAJA). Willmer J held that the words "claims arising out of any agreement relating to the carriage of goods in a ship" in s 1(1)(*h*) were wide enough to cover claims in tort as well as in contract. As such, the plaintiff's claim came within s 1(1)(*h*) and (*g*) and it was properly brought against the vessel *St Elefterio* under s 3(4) of the same Act (our s 4(4) of the HCAJA). The question whether the court had jurisdiction to entertain the plaintiff's claim *in rem* against the *St Elefterio* was answered by reference to the *nature of the claim* as put forward without going beyond that to ask whether it was likely to succeed or not in the final analysis. In construing the wording of s3(4)(*b*) (the equivalent of our s 4(4)(*b*)), Willmer J made clear that the existence of a good defence to a claim would not "negate the court's admiralty jurisdiction". The principles enunciated by Willmer J in his judgment (at 287-288) are reproduced here in *extenso* as follows:

> I need hardly say that none of these contentions advanced on behalf of the defendants was accepted as correct by the plaintiffs; but I do not propose to go into the merits of these various contentions now, or to decide whether the defendants are right or whether the plaintiffs are right. *It seems to me having regard to the view I take of the construction of section 3(4) of the Act [our s4(4) of the HCAJA], that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the points of law raised. If they are right on all or any of these various points advanced, it may well be that in the end they will show a good defence to the action. But that, in my judgment, furnishes no good reason for setting these proceedings aside in limine, and thereby depriving the plaintiffs of the right to have these issues tried*. …
>
> *It has not been suggested that the proceedings are frivolous or vexatious, so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings in limine*. The defendants' argument is founded on the proposition that section 3 (4) of the Act of 1956 [our s4(4) of the HCAJA] introduces a new restriction on the right to proceed *in rem*, and that a plaintiff cannot arrest a ship under that subsection unless he can prove – and prove at the outset – that he has a cause of action sustainable in law. In my judgment that proposition rests upon a misconception of the purpose and meaning of section 3 (4). As it appears to me, that subsection, so far from being a restrictive provision, is a subsection introduced for the purpose of enlarging the Admiralty jurisdiction of the court. As I view it, its purpose is to confer, and to confer for the first time in England, the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership. …
>
> In my judgment the purpose of the words relied on by Mr Roskill, that is to say, the words "the person who would be liable on the claim in an action *in personam*" is to identify the person or persons whose ship or ships may be arrested in relation to this new right (if I may so express it)

of arresting a sister ship. *The words used, it will be observed, are "the person who would be liable" not "the person "who is liable,"* and it seems to me, bearing in mind the purpose of the Act, that *the natural construction of those quire simple words is that they mean the person who would be liable on the assumption that the actions succeeds". …*

… [A]ny other construction of section 3(4) of the Act other than the construction I have sought to put upon it, would as it seems to me, lead to the most intolerable difficulties in practice. If Mr Roskill is right in saying that a plaintiff has no right to arrest a ship at all, unless he can show *in limine* a cause of action sustainable in law, what is to happen in a case (and, having regard to the argument I have listened to, this may be just such a case) where the questions of law raised are highly debatable, and questions on which it may be desired to take the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following Mr Roskill's argument, that this court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that a higher court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country.

The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is true that if, as they say it will, the action fails, they will probably not recover *inter partes* the whole of the costs of furnishing the bail; but in that respect I do now know that they are in any different position from other defendants in other types of action. That observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, and who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which, as it seems to me, parties have to accept in modern conditions.

[emphasis added]

56 It must be highlighted that the only application before Willmer J in *The St Elefterio* was the application to set aside the writ and warrant of arrest on the basis that the court had no jurisdiction *in rem*. There was no application to strike out the writ *in rem* and action as disclosing no cause of action, or that the proceedings were frivolous, vexatious or otherwise an abuse of process. One other fact to note in *The St Elefterio* is that the relevant agreement in s 1(1)(*h*) of the 1956 Act (UK) had in fact been made between the two parties to the action. In addition, and this is a significant distinction to note, the further point on likely success is relevant, as Willmer J recognised in his judgment, *only if* the defendant *separately* contends that the writ *in rem* and action should be struck out on the ground that it is frivolous, vexatious or otherwise an abuse of process (*ie*, Situation 2 as in [54] above). The action is said to be vexatious because it is unlikely to succeed (see [31] above). This separate process is brought under O18 r 19 of the ROC or under the court's inherent jurisdiction. As McKay and Henry JJ correctly observed in *Baltic Shipping v Pegasus Lines SA* at 650 (see [46] above):

If a claim is made unreasonably, in the sense of being without foundation, the defendant can always move to strike out as well as challenging jurisdiction, as was done in *The "Moschanthy"*.

57 In short, it is open to a defendant to apply at an early stage of the proceedings for the writ *in rem* and action to be struck off on the ground that the action has no chance of success and is, therefore, vexatious. It is at this stage of striking out application that the court is asked to assess the sustainability of the action. It is at this stage of the striking out application that the validity or strength of the claim will be relevant, and the burden on the issue of non-liability lies on the defendant to show that the case is wholly and clearly unarguable. If there is any arguable basis put up by the plaintiff that the action could succeed then the court should not order the striking out of the action. In *The Vasiliy Golonvin (CA)*, the hopelessness of the plaintiff's claim was beyond doubt. Crédit Agricole could not show that it had an arguable case for the breach of contract arising from the discharge of the cargo at Lomé, and the Court of Appeal concluded that for that "reason alone its claim ought to be struck out" (see [78] of *The Vasiliy Golonvin (CA)*).

58 From the analysis of *The Vasiliy Golonvin (CA)* and explanation above, there is no substance and merit in Mr Tan's contentions on issue (i) and issue (iii). There was no basis or room for Mr Tan's contention that *The Vasiliy Golovnin (CA)* changed the position at law enunciated in *The St Elefterio* which was followed in *The Wigwam* [1981-1982] SLR(R) 689 ("*The Wigwam"*). If *The St Elefterio* is no longer good law in Singapore, the Court of Appeal would have explicitly said so. *The St Elefterio* was not even referred to by its case name in *The Vasiliy Golovnin (CA*). In fact, the Court of Appeal in [49] of the judgment quoted with approval *Admiralty Law and Practice* where the author had at pp 45-46 of the text summarised the legal principles from *The St Elefterio* which were followed in *The Wigwam*. *The St Elefterio* received approval for the propositions that

> So long as the claim is not frivolous as to be dismissed *in limine*, the plaintiff does not have to establish at the outset that he has a cause of action substantial at law;
>
> …
>
> Neither would the existence of a good defence to a claim negate the court's admiralty jurisdiction.

59 In *The Wigwam*, the claim there was brought under s 3(1)(*l*) and (*m*) of the HCAJA. Following *The Elefterio*, FA Chua J held that the plaintiff was not required to prove at the outset that his cause of action was substantial in law. Chua J specifically noted that there was no suggestion that the proceedings were frivolous or vexatious. Further, the affidavits had disclosed conflicting evidence which could only be resolved at trial. Chua J's decision was upheld by the Court of Appeal (see [1984] SGCA 24 at [12]).

60 The assumption under s 4(4)(*b*) of the HCAJA- that a party would be liable on the claim in an action *in personam* on the assumption that the action succeeded – is the default position so long as there is no suggestion that the claim is frivolous or vexatious or otherwise an abuse of process (*ie*, Situation 1 as in [54] above). This default position is reflected in O70 r 4(7)(a) of the ROC which requires the affidavit leading the warrant of arrest to state the name of the person who would be liable on the claim in an action *in personam*. Willmer J in *The St Elefterio* left open the possibility of striking out the action if the action on the evidence is frivolous or vexatious or otherwise an abuse of process (*ie*, Situation 2 as in [54] above). Choo Han Teck JC (as he then was) in *Lok Maheshwari* [1996] SGHC 212 cited *The St Elefterio* and *The Wigwam* and observed as follows:

> 11 Insofar as the construction of the words "the person who would be liable on the claim in an action in personam" are concerned, I am in complete agreement with Willmer J as Chua J was in "the Wigwam".

12 However, *the judgment of Willmer J does not invariably open a door which cannot be shut until the matter has been ventilated in full at trial. Although the courts will not deny access to any party who is able to formulate a cause of action against a party identified as the person who would be liable in personam on that cause of action (whether the party suing succeeds or not is a matter for the trial judge)*, *nonetheless, if it is clear that the evidence relied upon by the Plaintiffs is obviously tenuous the courts will strike out the action. In other words, if the action appears to the court to be frivolous then it would not be permitted to proceed*.

…

20 To found an action in rem in this case, the Plaintiffs must show that the person who *would be* liable in personam is the Defendants. On the evidence adduced by the Plaintiffs themselves I find that there is no reasonable ground to assume that the Defendants were the contracting party whether as principal or through an agent.

[emphasis added]

61 In that case, the plaintiffs supplied bunkers and marine fuels to the *Lok Maheshwari*. This was done pursuant to a telefax request on 10 January 1996 stating the buyer to be "the master and/or owner and/or operator and Portserv Limited". On the same day, the plaintiffs received a telefax from "Portserv Limited", a company in Canada, stating that the vessel would arrive in Singapore on 12 January 1996. The next day, the master of the *Lok Maheshwari* sent a telex to the plaintiffs stating "…Understand u stemming IFO 200mt n MDO 50 mt outside Singapore Port limits as advised by Transmar Shipping…". The vessel was at all material times on a time charter to Halla Merchant Marine Co Ltd of Seoul, Korea who sub-chartered the vessel to the Transmar Shipping referred to in the master's telex of 11 January 1996. In the circumstances, the defendants, owners of the *Lok Maheshwari*, refused to pay on an invoice sent by the plaintiffs for the supply of the bunkers and marine fuels. Subsequently, the plaintiffs sued the defendants and arrested the vessel in an action *in rem*. The defendants then applied to strike out the writ of summons on the grounds that the court had no jurisdiction over the claim since the defendants were not the party liable *in personam*. The defendants' application was allowed. Choo JC held that the plaintiffs' claim was frivolous as "[i]t was clear that the party whom the Plaintiffs intended to contract with was the party who requested the bunkers, and that was undisputedly, Transmar Shipping, the sub-charterers." Even on the plaintiffs' own case, the defendants would clearly not be liable *in personam* for the plaintiffs' claim. There was clear affidavit evidence that the claim against the defendant was misconceived as the defendant was not the contracting party. It was therefore plain that the action was unsustainable and, in the circumstances, frivolous. Choo Han Teck JC at [18] of the judgment said:

The court need not make any finding whether any particular party had lied as that is a matter for trial, but the basic foundation must be laid, and this the Plaintiffs have failed to do and up to the date of the hearing before me this was not done.

62 Similarly, in *The Rolita* (1988 WL 1057731), an unreported decision of the Hong Kong High Court No AJ 105 of 1988, 22 August 1988, Cruden J (at 6) observed:

Where a plaintiff has an unsupportable case and would be unable to establish its claim at trial, I recognise that it would be unjust to allow it to exploit at an interlocutory stage the legal assumption that its allegations of fact are true. In that hopefully uncommon situation at defendant's safeguard is to bring a summons under Order 18 Rule 19 R.S.C. and have the claim struck out. Unless and until a claim is struck out as vexatious or otherwise, the legal assumption that the plaintiff's allegations are true prevails.

… *The Moschanthy* (1971) 1 Lloyd's Rep 43 is an example of where a defendant's application to set aside was supported by an application for a stay on the ground that the proceedings were vexatious. In the present action there is no application for striking out or for stay on the grounds that the claim is vexatious or otherwise. If that issue were before the Court, the plaintiff's stance was that the affirmations, telexes and other documents showed that the claim was far from being frivolous or vexatious.

63 Cruden J's decision was upheld on appeal (see [1989] 1 HKLR 394). The appellate court reaffirmed *The St Elefterio* approach as it covers

> the agreement (as in our s 3(1)(*h*) of HCAJA) as well as the breach, the establishment of the cause of action and damages.

64 As I mentioned earlier, *The St Elefterio* is a case where the relevant agreement had in fact been made between the two parties to the action. In other words, there was no dispute on the proper defendant in an *in personam* action and there was no question that the plaintiff should have sued someone else *in personam* in respect of the claim arising under the bills of lading. There have been cases where the writ *in rem* is sought to be set aside under O 12 r 7 on the ground that the claim did not fall within s 4(4) because the plaintiff should have sued someone else *in personam*. In other words, there was *no subsisting* claim *in personam* against the person who was at that time the owner of the vessel, and there was no jurisdiction *in rem* because the basis of an action *in rem* arose from the personal liability of the owner of the vessel. The common argument in the decisions of *The Thorlina* [1985-1986] SLR(R) 258, *The Lok Mashewari*, *The AA V* [1999] 3 SLR(R) 664 ("*The AA V*") and *The Rainbow Spring* [2003] 2 SLR(R) 117 ("*The Rainbow Spring (HC)*") and *The Rainbow Spring (CA*) reported in [2003] 3 SLR(R) 362 was that the plaintiff should have sued someone else *in personam*, and there was clear evidence of the absence of a subsisting claim against the defendant shipowner at the time the writ *in rem* was filed. There was want of jurisdiction *in rem*. The substance of the underlying claim was factually inseparable from the basis of jurisdiction. The jurisdictional fact in dispute could on the evidence be summarily disposed of. In *The Vasiliy Golovnin(CA)*, the relevant agreement under s 3(1)(*h*) of the HCAJA was between the parties to the action, namely Crédit Agricole and FESCO. At the risk of repetition, FESCO, at the challenge stage, separately argued that the bank's claim was without foundation; it was hopeless and was bound to fail. FESCO had applied to strike out the writ *in rem* and action under O 18 r 19 or under the inherent jurisdiction of the court, an avenue recognised in the *St Elefterio*.

Non-disclosure of material facts

The law

65 It is not in dispute that non-disclosure of material facts is an independent ground upon which the court will, as a general rule, set aside any order made in favour of an applicant in interlocutory proceedings. The duty to disclose is to inform the court of any facts which the plaintiff knows which might tell in the defendant's favour (*per* Warner J in *Re A Debtor (No 75 of 1982), ex p The Debtor v National Westminster Bank* [1983] 3 All ER 545 at 551). There is no doubt that the duty to disclose applies to an *in rem* plaintiff applying *ex parte* for a warrant of arrest under O 70 r 4 of the ROC.

66 In the present case, Capital Gate, the intervener, only applied to set aside the warrant of arrest for material non-disclosure. Although no application was made under O 12 r 7 or O 18 r 19 on the ground that the claim did not fall within s 4(4) of the HCAJA, suggesting that there was jurisdiction to sue *in rem* and that the procedural requirements in O 70 r 4 were met, the avenue of non-disclosure as an independent ground to discharge the warrant of arrest was available to Capital

Gate. In short, it is possible to apply to set aside the warrant of arrest because either there was a lack of *in personam* liability or there was non-disclosure of material facts (see *The Rainbow Spring (CA)* at [35] – [37]). In *The Harima* [1987] 2 HKC 118 ("*The Harima*"), the defendant there (not unlike Capital Gate) did not apply under O 12 r 8 of the Rules of the Supreme Court (HK) to set aside the writ *in rem* or strike out the action under O 18 r 19 on the ground that the claim did not fall within s 21 of the Supreme Court Act in the (UK) (the equivalent of our s 4(4) of the HCAJA). The setting aside was only on the ground of non-disclosure of material facts. Hunter J in *The Harima* advocated that the proper course was for the defendant to apply to strike out the action, rather than to rely on non-disclosure which was a backdoor route. As Hunter J reminded, there was no application before him to strike out and that even if there was an application to strike out, he would not have acceded to it. Although there were difficulties in the plaintiff's case with a back-dated bill of lading and allegations of illegality arising from the back-dating, Hunter J did not think it was possible to say that there was no arguable case so as to warrant a striking out. On the issue of setting aside of the warrant of arrest on the basis of non-disclosure, Hunter J said (at 405):

> But in my judgment, such power [to arrest] is not being abused or misused if a plaintiff is bringing an action which prima facie falls within the subsection but may hereafter fail, so long as the action itself cannot be said to be an abuse of process or vexatious or demurrable. Further that is a separate process. If it is being asserted that the claim is demurrable, that must be asserted properly and openly by the defendant on the appropriate application [*ie* at the challenge stage], and you do not reach the same result by the indirect or backdoor route of a process of non-disclosure. In other words, in my judgment at least, although the same principle about disclosure on ex parte applications plainly applies to this process as to any other, the material facts which have to be considered at the time on an application under O 75 are very different, for example, to the material facts which would be considered on an application for something like a Mareva injunction, where the whole relief largely turns upon the apparent validity of the plaintiff's claim. In these circumstances, in my judgment, the defendant's application fails.

67 Nonetheless, the Hong Kong Court of Appeal recognised that non-disclosure could be an independent ground for discharging the warrant of arrest, but on the facts of that case, the appellate court upheld Hunter J's decision that the legality of the bill of lading was not directly relevant to the issue of the warrant of arrest, and as such the plaintiff was not obliged to depose to the merits of its claim when it applied for the warrant following the legal principles enunciated in *The St Elefterio* and *The Moschanthy*.

68 It is settled law in Singapore that (a) non-disclosure of material facts is an independent ground for setting aside an arrest, and (b) the court retains an overriding discretion whether or not to set aside or discharge the arrest for non-disclosure. Judith Prakash J in *The Rainbow Spring (CA)* referred to *The AA V* and *The J Faster* [2000] 1 HKC 652 as decisions where the courts in Singapore and Hong Kong have acknowledged that an arrest can be set aside because either there was a lack of *in personam* liability or there was non-disclosure of material facts.

69 Rajah JA reaffirmed Prakash J's dicta in *The Rainbow Spring (CA)*(at [37]) that the duty to make full and frank disclosure to the court was an important bulwark against the abuse of the arrest process and went on to quote the rest of [37] which stated:

> … The courts must retain the discretion to set aside an arrest for non-disclosure if the facts warrant it notwithstanding that otherwise they would have jurisdiction over the matter and that the procedure in the Rules had been followed

Materiality of "plausible defences": Meaning and scope

70 I now come to Mr Tan's issue (ii) as set out in [30] above. It is not controversial that material facts that have to be disclosed are determined by what is "material" to the grant or refusal of the *ex parte* application for the issue of the warrant. Rajah JA in *The Vasiliy Golovnin (CA)* reiterated that facts are material if they have a "bearing on the decision-making process or outcome of the original application" to issue a warrant of arrest (at [88]) and the scope of disclosure is based on what is "reasonable in the given circumstances at the time of the arrest" (at [90]). Elaborating, Rajah JA at [87] said:

> The test for materiality is always an objective one. In the words of Prakash J in *The Rainbow Spring*, the test is to simply ask "how *relevant* the fact is" [emphasis added] (at [33]). However, the duty imposed on the applicant requires him to ask what might be relevant to the court in its assessment of whether or not the remedy should be granted, and not what the applicant alone might think is relevant. This inevitably embraces matters, both factual and legal, which may be prejudicial or disadvantageous to the successful outcome of the applicant's application. *It extends to all material facts that could be reasonably ascertained and defences that might be reasonably raised by the defendant*. *It is important to stress, however, that the duty extends only to plausible, and not all conceivable or theoretical, defences*. For example, if there have been unsuccessful prior proceedings, the context as well as the reasons for the dismissal must be adequately disclosed. In short, the material facts are those which are material to enable the judge to make an informed decision (see *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 *per* Ralph Gibson LJ at 1356).
>
> [emphasis added]

71 In his review of *The Vasiliy Golovnin (CA)* in the Singapore Academy of Law Annual Review, (2008) 9 SAL Ann Rev 54, Toh Kian Sing SC (at 2.13) observed that the decision appears to have extended the duty to disclose to "defences that might be reasonably raised by the defendant" in an application for the arrest of a vessel under O 70 r 4 of the ROC. This part of my decision examines whether or not *The Vasiliy Golovnin (CA)* indeed enlarged the duty to disclose to include plausible defences to the plaintiff's claim. I interpose to mention that central to the intervener's argument in RA 178 was cl 90 of the May sub-charter, which Mr Tan, for the intervener, said gave the defendant a complete defence to the plaintiff's claim for the grounding damage. Mr Tan's view of the matter invariably raised the question of the merits of the claim for the grounding damage. His argument rested on the statement in [87] of *The Vasiliy Golovnin (CA)* that the duty of disclosure extended to "plausible, and not all conceivable or theoretical defences". That dictum, Mr Tan argued, imposed a duty on the *in rem* plaintiff to inform the court of plausible defences to the claim which the defendant would seek to raise at the trial, and a failure to make full and frank disclosure of the plausible defences was sufficient ground to discharge or set aside the warrant of arrest. Putting Mr Tan's argument in perspective, the real issue before me was whether or not the merits of the claim could be called into question in the context of an application for a warrant of arrest so much so that a failure to refer to cl 90, an argument which the defendant may seek to raise in answer to the plaintiff's claim at the trial, should be characterised *as a failure to make full and frank disclosure*.

72 In my view, the expression "plausible defences" has to be understood in the light of the realities of the situation in *The Vasiliy Golovnin (CA)*. The claim was held to be "really implausible" and unsustainable; the point that the cause of action was frivolous and vexatious could easily be taken and determined summarily based on plainly cogent affidavit evidence. In a way, the expression "plausible defence" is being used loosely; the meaning of "plausible defences" may be culled from the context and surrounding circumstances. First, *The Vasiliy Golovnin (CA)* was a case falling under Situation 2 where the merits of the claim including the defences to the claim were examined. Second, from a broader perspective, "plausible defences" are matters referable to objections (factual and/or

legal) to the claim being brought in the first place, or to the arrest being mounted at all. They are material facts which, objectively speaking, are of such weight that their omission, at the application stage, is tantamount to or constitutes an abuse of process. Such an abuse of process is strictly not a *defence* to the claim; it is an objection to the claim or arrest being brought at all. In the context of the duty to make full and frank disclosure, a failure to disclose material facts that constituted the abuse, would be a ground for discharging or setting aside the warrant of arrest for material non-disclosure.

73 I now come to the reasons for holding the view that in the context of an application for a warrant of arrest, the duty to disclose "plausible defences" is *not* generally directed at defences to the claim that may be raised at the trial in answer to the plaintiff's claim but in a broader perspective to matters that constitute an abuse of the arrest process (see [72] and [74]). In a case falling under Situation 2, there will be matters (factual and/or legal) of such weight as to deliver the "knock out blow" to the claim summarily, *and*, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process. These matters are likely to be, or at the very least, overlap with defences that deliver the "knock out blow" to the claim summarily, *and* it is their omission that is likely to or may mislead the court in the exercise of its discretionary powers of arrest.

74 At the application stage, one must be mindful of the distinction between questions of jurisdiction and questions of merits of the claim (see *The Jarguh Sawit* and *The St Elefterio*). If the expression "plausible defence" is referable to a plausible defence *to the claim*, it will invariably raise the question of the merits of the claim, and the question that arose in RA 178 was this: are the merits of the claim (not jurisdiction *in rem*) *now* relevant in the context of an application for a warrant of arrest under O 70 r 4 of ROC even under Situation 1 as in [54] above because of *The Vasiliy Golovnin (CA)*? Or is the requisite disclosure of material facts, at the application stage, still confined primarily to considerations of jurisdiction and not to merits so that the failure to refer to defences to the claim (which the defendant may seek to raise in answer to the plaintiff's claim at the trial) should *not* generally be characterised as a failure to make a full and frank disclosure? The answer is that there is *no* change to what has previously been established by case law. *The 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*. Notably, *The Vasiliy Golovnin (CA)* applied existing legal principles to the facts of the case which brought into sharp focus the interplay between the court's twin concerns at the application stage for a warrant of arrest (as to what the twin concerns are see also [81]-[82] below) and the duty to make full and frank disclosure. For purposes of the present discussion, at the application stage, the distinction between questions of jurisdiction and questions of the merits of the plaintiff's claim must be appreciated. The jurisdiction *in rem* principles allow the *in rem* plaintiff to arrest the defendant's vessel to obtain security based on the plaintiff's *best arguable case* (see *The Moschanthy* at [47] above), rather than with the question "who is likely to win". The line of authorities show that at the application stage, an *in rem* plaintiff is required to show that the claim falls within one of the heads of claim listed in s 3(1) rather than the strength of the claim *and* that there is *no* onus on the in *rem* plaintiff to go further at that early stage to show that the claim is likely to succeed *so long as it cannot be said that the action is an abuse of process or that it is so obviously frivolous and vexatious as to be open to summary dismissal*. What this means and amounts to is that in typically Situation 1 cases, the *in rem* plaintiff is *generally* not required to go to the merits of the claim at the application stage. Undoubtedly, there may be many points which would be relevant to the ultimate merits of an action, but which could not on any reasonable view affect the court in deciding whether to grant the application for a warrant of arrest. Thus, defences to the claim such as exclusion clauses and Hague Visby Rules defences go to the merits of the claim, not to jurisdiction, and they need not be disclosed as they are not material to

the grant or refusal of the *ex parte* application.

75 Rajah JA approved in [49] of *The Vasiliy Golovnin (CA)* the various legal propositions summarised in *Admiralty Law and Practice* at pp 45-46 and that included endorsing the proposition in *The St Elefterio* that at the interlocutory stage *save for frivolous claims*, the *in rem* plaintiff need not establish at the outset that he has a cause of action sustainable in law, and neither the existence of a good defence to a claim would negate the court's admiralty jurisdiction. Enlarging the duty to disclose plausible defences would effectively let in an aspect of considering the merits of the claim by the backdoor after agreeing with the aforementioned principles in *The St Elefterio* and that could not have been intended by Rajah JA. In my view, the non-disclosure of defences that the defendant could raise at the trial in answer to the plaintiff's claim (as that pertains to the ultimate merits of the action and the question of who is likely to win), are *generally* not characterised as a failure to give full and frank disclosure *unless* (and this is the qualification (*ie* Situation 2) mentioned in *The St Elefterio* (see [56] above)) they *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*. From a broader perspective, failure to disclose matters showing that the claim or arrest should not have been brought at all, are material facts that constitute the abuse of process. Simply put, *they constitute matters of such weight that their omission is likely to or may mislead the court in the exercise of its discretionary power of arrest* (see [72] above).

76 A strong and direct pointer in support of the view subscribed comes from the specific example given in [87] of *The Vasiliy Golovnin (CA)*. Immediately following the sentence stating that the duty to disclose extends to only "plausible, and not all conceivable or theoretical, defences", Rajah JA followed up with an example of plausible defences that would constitute material facts that have to be disclosed since they would have a "bearing on the decision-making process or outcome of the original application" to issue a warrant of arrest (at [88]) and are also "reasonable in the given circumstances at the time of the arrest" (at [90]). Rajah JA's illustration found at [87] is as follows:

> … if there have been unsuccessful prior proceedings, the context as well as the reasons for the dismissal must be adequately disclosed.

77 Putting that example into a legal framework, it is of a party seeking to arrest a vessel or sister ship in respect of the same claim in one jurisdiction after another, and it might well be an abuse of the arrest process to permit a second arrest. Rajah JA's example is drawn from the factual circumstances leading to the arrest and subsequent release of the *Chelyabinsk* by the Lomé court, and more pointedly, their relevance to the question of whether the sister ship arrest in Singapore in respect of the same claim could in any way be regarded as an abuse of the arrest process and hence oppressive. In that case, the second arrest, including the issue as to whether the bringing of the action based on the same claim as in the Lomé proceedings, was an abuse. It is not always the case that the mere fact that a plaintiff has arrested a vessel which has previously been released by order of a court of competent jurisdiction will amount to an abuse of the arrest process (see for example, *The Blue Fruit* [1979-1980] SLR(R) 238). A lot depends on the circumstances, and that is what the court will want to know at the application stage. It is for the arresting party to explain fully the propriety of the second arrest, and show that the second arrest is not an abuse of the arrest process. In short, the court will want to know whether it is oppressive and vexatious to re-arrest. Obviously, if the application to arrest is proper, an abuse of process argument cannot be founded on the basis that the consequences of the proper application may produce an oppressive result. The non-disclosures in *The Vasiliy Golovnin (CA)*, in a nutshell, were with the question of vexatiousness arising from the Lomé proceedings, and the arrest was an abuse of process and unjustly oppressive. The present case is very different (see [86] to [116] below).

78 In the context of the facts of *The Vasiliy Golovnin (CA)*, the problems in the background for the banks in the arrest application, and of which AR Lee was unaware of, were the Lomé court's (a) finding that sufficient security had been provided for the loss and damage to cargo claims; and (b) finding in FESCO's favour on the very same claims that were being pursued in Singapore against a sister ship. The clear stipulation in the relevant bills naming Lomé as the port of discharge, and the objective behind the proposal to switch bills was to change the port of discharge, but no switch materialised in the end. Certainly, they were matters that showed the breach of contract claim to be without foundation. All those facts were found by the Court of Appeal to be material facts and circumstances that ought to be disclosed as they made it difficult for the banks to apply to court for a warrant of arrest on the reasonable basis that there was valid breach of the contracts of carriage contained in the relevant bills. The banks were aware of all those facts, but went before the court in effect on the basis that there was no issue or problem as to the banks' rights to claim in contract. The Court of Appeal held that this basis was not in fact the case, and it was something that was either known or ought to have been appreciated. The failure of disclosure could not be regarded as proceeding from a mere oversight or from a pardonable mistake as a result of haste. In the light of the decision of the Lomé court, it would be an abuse of the arrest process for the banks to arrest again by re-running the same claim for breach of contract which had already been determined in FESCO's favour at the *inter partes* hearing in Lomé.

79 Quite clearly, the arrest of the *Vasiliy Golovnin* in Singapore was based on obviously frivolous and vexatious claims ("really implausible claims") having regard to the fact that the Lomé court ordered the release of the *Chelyabinsk* after an *inter partes* hearing that found, *inter alia*, that the discharge of the cargo at Lomé was pursuant to the contract of carriage that named the port of discharge as Lomé. The first arrest of the *Chelyabinsk* in Lomé and the decision of the Lomé court would have a "material bearing on the decision making process or the outcome of the original application" (see [88] of *The Vasiliy Golovnin*). Not only were the prior Lomé proceedings and outcome considered as material facts, the objective for the proposed switch of the bills of lading was also important. On the prior proceedings, Rajah JA observed (at [99]):

> The fact that the Lomé court had already considered and dismissed the Banks' arguments as to whether the chartered vessel could be arrested by the Banks at Lomé was, certainly, a material fact to be taken into account by AR Lee in considering whether or not a warrant of arrest of the *Vasiliy Golovnin* should be issued here in Singapore. He would have in all likelihood have pursued this line of enquiry further.

80 Again at [100], Rajah JA made the same point:

> If the Banks had been frank in their disclosure to the court about the existence of the prior *inter partes* hearing (and its outcome), the court may "well have required further clarification on the situation before deciding to issue the warrant" (per Judith Prakash J in *The AA V* (at [47]). This would certainly have allowed AR Lee to make a more informed decision.

81 It must always be remembered that the court's twin concerns at the application stage, are with (a) questions of jurisdiction *in rem* (as explained in [74] above), and (b) that its power of arrest is not being abused or misused (and this is where the duty to make full and frank disclosure is germane). The twin concerns are noted by Hunter J in *The Harima* [1987] 1 HKC 397 at 405 in the following manner:

> It seems to me that on an application for a warrant under O 75 r 5 [our O 70 r 4] the court's first concern is to see whether the facts alleged prima facie bring the plaintiff within one or other of the relevant subsections in s 20(2) [our s 3(1) of HCAJA]. That is the main purpose of the

filtering process established by r 5. It also concerned at that stage, with the absence of any other facts which might show that the power is being abused or misused.

82 Likewise, the Hong Kong Court of Appeal in *The Harima* quoted with approval Clough J in *The Cynthia G* (1985, unreported) on the twin concerns of the court at the application stage:

> Whilst it is not for the plaintiff to prove his case when he applies for the issue of a warrant of arrest in an action in rem but only to comply with O 75 r 5(4), it seems to me that *it is the duty of the registrar when presented with an affidavit of the plaintiff's solicitor acting on his client's instructions and expressing grounds of belief required under O 75 r 5(8), to inquire into any matter coming to the registrars notice that gives rise to doubts as to whether the grounds for belief expressed are genuinely those of both the plaintiff and of the solicitor acting for him. Otherwise the way would be open for abuse*.
>
> [emphasis added]

83 The duty to make full and frank disclosure at the application stage is, as Prakash J reminded in *The Rainbow Spring (CA)*, the bulwark against abuse of the arrest process. *The Cynthia G* aptly illustrates this principle of abuse of the arrest process. In *The Cynthia G*, the plaintiff there arrested the vessel for unpaid bunkers and lubricating oil that were on board and sold together with the *Cynthia G*. After the sale, ownership of the *Cynthia G* was registered in Huofung Maritime & Enterprises (Panama) Incorporated ("Huofung"). For purposes of the arrest, evidence was adduced that the *Cynthia G* was beneficially owned by Huofung. One week later, the plaintiff applied for a second warrant of the *Cynthia G* to recover unpaid bunker and lubricating oil that were on board and sold together with the *Marcia*. The registered owner of the *Marcia* was Ocean Venture Shipping Co SA ("Ocean Venture"). It was therefore necessary for the plaintiff to adduce evidence that the *Cynthia G* and *Marcia* were sister ships. The *Marcia* was not nominally owned by Huofung. The plaintiff in the second arrest alleged that Huofung and Ocean Venture were nominees of a third party, and this third party was the true beneficial owner. On the application for the second arrest of the *Cynthia G*, the plaintiff did not disclose that it had a week earlier put before the court evidence that Huofung was the beneficial owner. The inconsistent allegations were found to be material facts and the failure to disclose the inconsistent allegations was tantamount to an abuse of the arrest process. Had the Registrar hearing the application been told of the previous inconsistent allegation on ownership, he might not have been satisfied that jurisdiction *in rem* had been established. The non-disclosure was significant as it related to a matter on which the jurisdiction to bring the action *in rem* was based.

84 To summarise, in the light of the low threshold of the merits enquiry (*ie*, typically Situation 1 as in [54] above), the omission to refer to defences on the merits which the defendant may seek to raise in opposition of the plaintiff's claim would *not* generally be characterised as a failure to make full and frank disclosure. This is the position so long as it cannot be said that the action is an abuse of process, or that it is obviously frivolous and vexatious so as to be open to summary dismissal. Once this tipping point exists (as was the case in *The Vasiliy Golovnin (CA)*), there will be matters (factual and/or legal) which are of such weight as to deliver the "knock out blow" to the claim summarily, and their omission is likely to or may mislead the court in the exercise of its discretionary powers of arrest, then these matters are material facts that will have to be disclosed (*ie*, Situation 2 as in [54] above). Equally, a failure to disclose facts which constituted the abuse of the arrest process would be ground for discharging or setting aside the warrant, whether under Situations 1 or 2 (see [72], [74] and [75] and instances of abuse of the arrest process at [77] and [83] above). It is for the arresting party to bring out the material facts to the court's attention and show that what is being done by an application for a warrant of arrest does not constitute abuse of the arrest process. This duty to make full and frank disclosure stems from the application of the principle that if the plaintiff knew or ought

to have known of matters which might reasonably caused the court to inquire or have doubts as to whether or not to issue the warrant of arrest these matters are material and should be disclosed; otherwise "the way would be open for abuse" of the court's power of arrest (see [82] above).

85 Paragraph [88] of *The Vasiliy Golovnin (CA)* warns against the "meticulous dissection of the factual matrix to 'invent' missing material facts". Each case is fact-sensitive in terms of material facts advanced for consideration by the court. As Rajah JA observed, applying common sense, the scope of disclosure is based on "what is reasonable in the given circumstances at the time of the arrest" (at [90]) The Court of Appeal found the material non-disclosures there "indefensible" (at [107]), and rightly so, since on the facts the tipping point was reached and there was *equally* a clear failure to disclose facts which constituted the abuse and was thus, ground for setting aside the warrant of arrest.

RA 178 of 2009: discussions and decision

86 As stated earlier, Capital Gate applied to set aside the warrant of arrest only on the ground of non-disclosure of material facts. Before I deal with the non-disclosure argument in detail, I propose, for completeness, to comment on Mr Tan's assertion on the need to show a good arguable case on the merits.

No arguable case on the merits

87 Mr Tan argued that *The Vasiliy Golovnin(CA)* required the plaintiff to show a good arguable case on the merits at the application stage, and at the challenge stage (hereafter referred to collectively as "the interlocutory stage"). The plaintiff's claim was allegedly premature, and as such the plaintiff had no "good arguable case" on the substantive merits of its claim. Mr Tan pointed out that, at the time of the arrest, the head owner had not commenced legal proceedings or arbitration against the plaintiff nor demanded security. In fact, it was the plaintiff who forced the issue by commencing arbitration against the head owner. Furthermore, Mr Tan also argued that the plaintiff had no "good arguable case" because, by virtue of cl 90 read with cl 102 of the May sub-charter, the defendant was exonerated from liability as such grounding damage would fall to be covered under the vessel's customary policies, particularly its hull and machinery policy.

88 On the other hand, Ms Ang denied that the plaintiff was under any duty to show that it had a "good arguable case" on the substantive merits of the case at the interlocutory stage. This was because the intervener was not challenging the plaintiff's claim on jurisdictional grounds in that the claim fell under s 3(1)(*h*) of the HCAJA. There was also no application to strike out the writ *in rem* and action under O 18 r 19. Ms Ang averred that the plaintiff's claim against the EP Carriers was not dependent on the plaintiff being found liable to the head owner in the arbitration between the latter and the plaintiff. The presence of cl 90 in the May sub-charter of itself did not prevent the plaintiff from having a "good arguable case". It was pointed out that the effectiveness of cl 90 as a defence could not be resolved at the interlocutory stage as there were issues to be determined before the effect of cl 90 is known. In any case, in the present action, there was an arbitration agreement between the plaintiff and the defendant which the plaintiff intended to rely on. Therefore, this court was urged to take care not to trespass into the merits of the claim, an issue intended for the arbitration tribunal to determine. I pause here to mention that it was not necessary to deal with the arbitration point in the light of my analysis of *The Vasiliy Golovnin(CA)*.

89 For the reasons stated in [39] to [48], there was no substance in Mr Tan's assertions. As explained above, his understanding of what *The Vasiliy Golovnin (CA)* stood for was incorrect. To summarise, first, the jurisdictional challenge in *The Vasiliy Golovnin(CA)* was based on s 3(1) of the

HCAJA, and any reference to a "good arguable case" yardstick must be understood in that context. Apart from that, Mr Tan accepted in the course of arguments, and rightly so, that s 3(1)(*h*) of the HCAJA was not in issue in the present case. Second, and more generally, the Court of Appeal did not change the law on s 4(4)(*b*) of the HCAJA which has its equivalent in jurisdictions like England and Hong Kong. As stated previously, *The Vasiliy Golovnin (CA)* was concerned with Situation 2. The bank's claim was so obviously frivolous and vexatious, and it was struck out for that reason alone under O 18 r 19 or under the inherent jurisdiction of the court. In contrast, the present case is a Situation 1 case. There was no question that, in the present case, the statutory requirements under s 3(1)(*h*) and s 4(4)(*b*) of the HCAJA were satisfied.

90 Turning to the related argument that the plaintiff's claim was premature, I agreed with Ms Ang that Mr Tan's contention was untenable. Firstly, although Mr Tan argued that the plaintiff's claim for an indemnity was premature, it is telling that Capital Gate did not separately apply to strike out the writ *in rem* and action under O 18 r 19 or under the inherent jurisdiction of the court on the ground that there was *no subsisting* cause of action. Inferentially, the intervener accepted that there was a *prima facie* cause of action as it was not suggesting that the action was frivolous or vexatious or otherwise an abuse of process. Secondly, the cause of action was not inchoate at the time the writ *in rem* was issued. Once there is a *prima facie* breach of the May sub-charter, the plaintiff has a cause of action against the defendant. Thirdly, although the May sub-charter was back to back with the head charter, the plaintiff's claim for an indemnity was founded on breach of the May sub-charter.

91 Turning to the facts before me, the defendant had contracted with the plaintiff and was required to observe cl 6 of the May sub-charter on safe port/berth which read as follows:

> That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or place or anchorage that Charterers [the defendant] or their Agents may direct, provided the vessel can safely lie always afloat at any time of tide.

Besides cl 6, the employment clause in the May sub-charter (cl 8) obliges the master to follow the instructions and orders of the charterer.

92 The plaintiff's case is that the defendant was in breach of the May sub-charter in that the *TS Bangkok* was damaged because the defendant had chosen an unsafe port/berth. Repairs were carried out by the head owner in Hong Kong. According to The Swedish Club, the head owner had notified EP Carriers of the repairs made to *TS Bangkok* and that surveyors on behalf of EP Carriers had duly attended the damage surveys carried out in connection with the repairs. In short, the grounding damage was notified to the defendant and its liability insurers. The head owner back then in 2008, gave notice of its repair claim amounting to US$ 481,572.19. Since then, the head owner has indicated an additional claim for loss of hire in its defence and counterclaim filed in arbitration on 18 May 2009. In any back to back charters, the head charterer/disponent owner in the position of the plaintiff is "sandwiched" between the head owner and the sub-charterer. It is not uncommon that the head charterer/disponent owner, out of pragmatism, suggests to the sub-charterer to take over from the head charterer/disponent owner the conduct of answering the head owner's claim. It was no different here but the plaintiff's practical requests was not taken up as was the prerogative of the sub-charterer. Obviously, each charter is a separate contract with different contracting parties, and it is for the plaintiff to prove at the trial that the *TS Bangkok* was damaged because the defendant breached the safe port/berth clause, and liability would lie solely with the defendant. So far as the cause of action is concerned, the plaintiff has shown a *prima facie* case of breach of the May sub-charter. The plaintiff's claim for damages is for breach of cl 6 and the further claim for indemnity is for consequential loss arising from the breach. In short, the relief sought is founded on a *prima facie*

breach of cl 6 of the May sub-charter arising from the orders given under cl 8 of the May sub-charter and damage was sustained as a consequence of complying with the defendant's orders as charterer. The indemnity claim here is distinguishable from *The Caroline P* [1985] 1WLR 553, which has to do with the nature of the indemnity to be implied when an owner's agent was required under the terms of the charterparty to sign bills of lading as presented. I agree with the sentiments expressed by Mr Geoffrey Brice QC sitting as Deputy Judge in *The Catherine Helen* [1998] 2 Lloyd's Rep 511 that it would be a commercially strange result that the head charterer/disponent owner has to wait until the head owner's claim is ascertained before the head charterer/disponent owner's right to claim indemnity from the sub-charter can arise. After all back to back charters are not uncommon commercial transactions and the passing on to the sub-charterer of the head owner's potential claims against the head charterer/disponent owner are events that do occur and are within the reasonable contemplation of the parties. In the present case, at the time the writ *in rem* was filed, there had been clear intimation from The Swedish Club of the head owner's claim based on what it knew and anticipated. More importantly, the cause of action for breach of the May sub-charter had come into existence at the time the writ *in rem* was filed.

93 I now come to the other related argument which is whether the defendant would be liable in an action *in personam* as the defendant had a good defence to the plaintiff's claim in law because of cl 90 read with cl 102 of the May sub-charter. Mr Tan's argument was premised on cl 90 being an exclusion clause that effectively exonerates the defendant from liability for grounding damage and consequential losses. Ms Ang denied that cl 90 is a total exclusion clause. She disagreed with Mr Tan that on a construction of cl 90 read with cl 102 of the May sub-charter, the meaning of "customary policies of insurance" is ambiguous. She submitted that it is unclear from the May sub-charter who determines what is "customary" and whose custom is being referred to. It is also unclear who the customary policy is to be taken out by and who it is to benefit. The nature and extent of the indemnity cover under the customary policy is unclear, and in particular, whether it covers damage and consequential loss like loss of hire, and expenses. There was also no express link between cl 102 (which requires the owners to insure the vessel and against specified risks) and cl 90 which refers to "customary polices of insurance." If cl 90 and cl 102 are intended to be linked, it could have been easily provided for in the terms of the May sub-charter. In discussions hereafter, I have proceeded on the assumption (without deciding the point) that cl 90 is to be read with cl 102 as argued by Mr Tan and taking his case at the highest.

94 So far as cl 90 is concerned, the clause does not purport to transfer the sole risk of all loss or damage to the vessel to the plaintiff. It is not entirely clear based on the wording of cl 90 what risks have been passed to the owners and what risks to the charterer. The position here is to be contrasted with *Norwich City Council v Harvey* [1989] 1 WLR 219 where it was clear that the first part of the clause in question transferred the entire risk of damage by fire and other stipulated listed risks to the building to the owners.

95 As stated, I agreed with Ms Ang that cl 90 is ambiguous. Furthermore, having regard to the wording of cl 102 which imposed on the owner the obligation to insure, it is clear that a mere obligation to insure does not render and make the clause an exclusion clause (see *Wisma Development v Sing-The Disc Shop Pte Ltd* [1994] 1 SLR(R) 749).

96 Even if, for the sake of argument, cl 90 is an exclusion clause, the defendant has to show that it is an effective exclusion clause in that the grounding was fortuitous, and the incident was an insured peril within the meaning and scope of "customary policies of insurance". These are matters to be resolved at trial.

97 In the light of the low threshold of the merits enquiry, the merits of the claim in the present

case were not called into question, there being no question of want of jurisdiction *in rem* nor suggestion that the claim was frivolous, vexatious or otherwise an abuse of the court. As such, Mr Tan's contention that the plaintiff needed to establish its case beyond the low threshold must fail. In the present case, the person who "would be liable" on *The St Elefterio in personam* test was clearly the defendant. Mr Tan's submission that the warrant of arrest be set aside on the ground that the plaintiff had failed to establish a good arguable case on the merits of its case, at the application and challenge stage, was plainly without basis and was untenable.

Non-disclosure

98 I now turn to the arguments on non-disclosure of material facts. I will deal with the facts alleged to be material and not disclosed in turn. The intervener, Capital Gate, had accused the plaintiff of failing to disclose the following material information to AR Loo:

(a) The May sub-charter contained cll 90 and 102 and that cl 90 as a defence was raised by the plaintiff in answer to the head owner's claim, and the latter's claim had not commenced against the plaintiff at the time of the arrest ("Disclosure (a)");

(b) EP Carriers had liability cover with QBE ("Disclosure (b)");

(c) No arbitration proceedings had in fact been commenced against EP Carriers at the material time ("Disclosure (c)");

(d) The plaintiff, in Originating Summons No 238 of 2009 ("OS 238/2009"), only sought leave to continue with the *in rem* action but did not obtain leave to bring arbitration proceedings against EP Carriers ("Disclosure (d)"); and

(e) The leave obtained in OS 238/2009 was pursuant to an *ex parte* application when the rules of court called for the application to be made *inter partes* ("Disclosure (e)").

99 So far as Disclosure (a) is concerned, Ms Ang submitted that: (i) cl 90 was indeed disclosed; (ii) it was not necessary to disclose cl 90 since it was not a material fact; and (iii) this court should, in any case, exercise its discretion not to set aside the arrest in view of the circumstances of the case. The plaintiff also did not agree that the defendant's liability with QBE had to be disclosed as such cover did not amount to security for the plaintiff's claim. In fact, disclosures (b) to (e) are irrelevant, and one views them as attempts by the intervener to "invent missing material facts" to bolster the non-disclosure. It was alleged that the plaintiff had pointed out that arbitration may be commenced between the plaintiff and the defendant in OS 238/2009.

(i) Disclosure (a): Premature indemnity claim and cl 90 exclusion clause

100 Mr Tan argued that the plaintiff had failed at the application stage to sufficiently disclose that the plaintiff's claim for an indemnity was premature; it was a premature action because the claim for indemnity was in respect of an alleged liability to the head owner of *TS Bangkok* who had not, at the time of the arrest of the *Eagle Prestige*, commenced legal proceedings or arbitration against the plaintiff. The plaintiff should have disclosed, so the argument developed, the status of the head owner's claim and whether proceedings had been brought or not. Furthermore, the plaintiff did not disclose that it was disputing the claim against the head owner, and that cl 90 was raised as a defence to the head owner's claim.

101 I have explained in [90]-[92] above my reasons for rejecting Mr Tan's contention that the

plaintiff's claim was premature. The cause of action was not inchoate so much so that the suggestion that there was no jurisdiction *in rem* was incorrect and misconceived.

102 I have also explained in [93]-[95] above my reasons why the argument that cl 90 read with cl 102 of the May sub-charter (reproduced in [17] above) amounts to an exclusion clause is not free from ambiguity. As such, it is not a matter that could be readily and summarily resolved from a mere construction of the clauses without further proof of facts in issue. That is a significant point to note in the non-disclosure argument. Since the alleged non-disclosure of cl 90 read with cl 102 depended upon it being clearly an exclusion clause, or a clause that afforded the defendant a complete defence to the plaintiff s claim, and given the fact that the character of the cl 90 was plainly in issue and cannot be readily and summarily resolved, it would be, in my view, certainly inappropriate to set aside the warrant of arrest for non-disclosure of cl 90 alone, or read together with cl 102.

103 The intervener had emphasised that the plaintiff was obviously aware of cl 90 as the plaintiff used this clause against the head owner's claims as evidenced by the fax dated 6 October 2008 sent by the UK P&I Club to The Swedish Club. Therefore, it was the plaintiff's duty to disclose in the affidavits leading the warrant of arrest that it had used cl 90 against the head owner. The plaintiff's first line of opposition against the intervener's allegation that cl 90 was not disclosed was that the clause was indeed brought to the attention of AR Loo by Mr Ng.

104 As previously mentioned, AR Loo's minute sheet from the hearing of 27 February 2009 consisted of only three short paragraphs on ownership and made no mention of cl 90 (see [22] above). AR Loo's minutes were not verbatim notes of the hearing judging from the fact that Mr Ng attended before AR Loo for over an hour. Ms Ang submitted that AR Loo had simply noted down what he regarded as important matters. Mr Ng, who attended before AR Loo, set out in a subsequent affidavit, filed on 19 May 2009, that cl 90 was brought orally to AR Loo's attention. In that affidavit, Mr Ng affirmed that:

> 37 Thereafter, I referred AR Loo to the matters set out in Li's 2nd Affidavit. In particular, I brought AR Loo through paragraphs 1 to 11 of Li's 2nd Affidavit, and the exhibits thereto, including the letter from the UK P&I Club to the Swedish Club of 6 October 2008 at page 14, where the Plaintiffs had raised certain queries with the Head Owners on the merits of the Head Owners' claim including amongst other things the applicability of clause 90 of the charterparty between the Head Owners and the Plaintiffs. In this regard, I emphasized that notwithstanding the Plaintiffs' position vis-à-vis the Head Owners the Plaintiffs were entitled, as against the Defendants, to security for their best arguable case and that the Plaintiffs believed that they had a good arguable case on the merits.

105 Clause 90 was not mentioned in the text of the affidavits leading the warrant of arrest. The clause was referred to in one of the exhibits (the letter of 6 October 2008 sent by the plaintiff's UK P&I Club to The Swedish Club) to the Li's 2nd affidavit (see [7] above). In this case, the plaintiff's position was that Mr Ng had pointed out and explained cl 90 to AR Loo. The problem with leaving information to oral arguments and submissions, however, is one of proof, especially, in circumstances where AR Loo's notes were not verbatim notes. To my mind, a supplementary affidavit recording the disclosure of cl 90 to AR Loo ought to been filed soon after the hearing. Such an affidavit would have certainly carried more weight than the one now filed on the very day RA 178 was listed for hearing. Even with the best will in the world, Mr Ng's late affidavit coming after the AR's decision on Summons 1777 was bound to lack some objectivity. In any case, it was not necessary to resort to Mr Ng's affidavit in the light of my analysis of *The Vasiliy Golovnin(CA)* and my conclusion on the materiality of cl 90 and observations in [102] above.

106 Mr Tan had relied on *The Vasiliy Golovnin(CA)* for the proposition that cl 90 must be disclosed as it was a complete defence to the plaintiff's claim. It followed, so the argument developed, that the plaintiff did not have an arguable case on the merits against the defendant. In relation to cl 90, the first point is whether cl 90 is an exclusion clause, and second, if it was an exclusion clause, did it give the defendant a plausible defence to the plaintiff's claim so that it must be disclosed in the affidavit leading the warrant of arrest.

107 Mr Tan's mechanistic argument that defences to the claim so long as they are plausible (not conceivable or theoretical) have to be disclosed is misconceived for the reasons explained. In the light of the low threshold of the merits enquiry applicable to the facts of the present case, the merits of the claim were not called into question in the context of an application for a warrant of arrest so much so that the omission to refer to cl 90 of the May sub-charter (assuming cl 90 is an exclusion clause) would not be characterised as a failure to make full and frank disclosure. It followed that the factual evidence - that UK P&I Club in its fax of 6 October 2008 raised cl 90 in purported response to the head owner's claim for grounding damage (assuming that was the intention) - need not be disclosed. It was not information that was material to the exercise of AR Loo's function and discretion, and it need not be disclosed to him.

108 Even if I had concluded that the omission of cl 90 and the plaintiff's reliance on the same clause in the UK P&I Club's fax of 6 October 2008 to The Swedish Club were facts that ought to have been disclosed to AR Loo as they were material to AR Loo's decision whether or not to issue the warrant of arrest, I would still decline to set aside the warrant of arrest because I would have regarded such a step as a disproportionate response to the omission for the following reasons taken cumulatively. A court may in a proper case refuse to set aside an arrest even if it was found that there was non-disclosure of material information (see *The Fierbinti* [1994] 3 SLR(R) 574).

109 I accepted the plaintiff's submission that it did not intentionally set out to omit mentioning cll 90 and 102 in the body of the affidavits leading to the warrant of arrest. I noted that, given the ambiguity of cl 90, the character of the clause was plainly in issue. It must be remembered that it was not the intervener's case that the action *in rem* was frivolous or vexatious or otherwise an abuse of process. As such, it could not be said (and it was not said) that cl 90 read with cl 102 was a clear and obvious defence to show up the claim as frivolous and vexatious. That said, the tenor of the UK P&I Club's fax dated 6 October 2008 sent on behalf of the plaintiff indicated that the raising of cll 90 and 102 were tentative and even speculative rather than with a solid amount of conviction. At that stage, the plaintiff had no information on the grounding damage as evidenced by the fact that, in the same communication, the UK P&I Club requested more information on the incident, damage and repairs made to *TS Bangkok*. Not unexpectedly, one month later, the head owner roundly rejected cl 90 and its validity as a defence to the head owner's claim. Above all, after cl 90 was raised by the UK P&I Club until the time of arrest, the circumstances had changed. The events that unfolded painted the picture of the defendant walking away from the claim. I start at the time when the plaintiff passed on the claim to the defendant by seeking damages against it (on 10 November 2008), and it never raised the two clauses again, and for good reason. According to The Swedish Club, the defendant was aware of the grounding incident involving *T S Bangkok* and the extent of the damage. Surveyors representing the defendant's insurers attended the repairs at Hong Kong. On the defendant's part, it did not deny the validity of the plaintiff's claim against it, nor raised cll 90 and 102 at all. The first time cl 90 was raised was in early March 2009 after the arrest of the *Eagle Prestige*. However, that event is not crucial. Of importance were the events before the arrest which on any reasonable view of the defendant's conduct could be interpreted as evincing an intention to defeat what appeared to be a genuine claim the defendant was well aware of through a change of ownership of the vessel, and the liquidation of EP Carriers. According to TSL, EP Carriers had carried out a writ search on 23 December 2008 to find out if there were any *in rem* writs filed against the *Eagle Prestige*. The writ

search did not reveal the plaintiff's writ in this action filed on 2 December 2008. The vessel's ownership changed on 22 December 2008, and the defendant was placed in provisional liquidation by way of a creditors' voluntary winding up on 17 February 2009 (see [6] to [13] above). Between 10 November 2008 and 27 February 2009, the plaintiff was led to believe that the defendant through QBE would provide security for the plaintiff's claim. As it turned out, QBE's assurances that security would be provided were empty promises; they were excuses to buy time for the defendant as well as to stop the plaintiff from arresting the vessel as early as November 2008 (see [10] above).

110 On the ownership change, the plaintiff found out from a search carried out on 16 February 2009 that on 18 December 2008, the Panamanian Registry was requested to issue a provisional patente to effect change of owners of the *Eagle Prestige* to Capital Gate as well as to change the vessel's name from *Eagle Prestige* to *Engedi*. The preliminary registration was done on 22 December 2008 but permanent registration of the ownership had not taken place. If and when completed within six months of the preliminary registration, the permanent registration would be recorded as of the date of preliminary registration *ie* 22 December 2008. On 18 February 2009, A&G conducted a search against EP Carriers and found that EP Carriers was in provisional liquidation under a creditors' voluntary winding up and that provisional liquidators had been appointed. It was after the arrest that the then solicitors for the liquidators of EP Carrier entered an appearance and in March 2008 raised cl 90 as a defence. By 13 April 2009, the liquidators of EP Carrier decided that they would no longer deal with the plaintiff's claim. [note: 7] Had the plaintiff entirely relied on QBE's assurances and been slow in filing a writ *in rem* against the defendant, it would, for all intents and purposes, have lost its *in rem* claim against the *Eagle Prestige* and *in personam* claim against EP Carriers would be pointless against an insolvent company under creditors' voluntary winding up. It also appears that the transfer of ownership of *the Eagle Prestige* was to a company whose director and shareholder was also a director and shareholder of EP Carriers (see [13] and [14] above).

111 For those reasons, I was not disposed to set aside the warrant of arrest on the basis of material non-disclosure of cll 90 and 102. The above views regarding the exercise of my discretion also applied to the other allegations of non-disclosure, thereby rendering them irrelevant. I shall, nevertheless, examine them briefly for the sake of completeness.

(ii) Disclosure (b): QBE liability cover

112 In her 3rd affidavit of 5 May 2009, TSL had argued that the defendant possessed insurance cover with QBE which covered the defendant against any liability owed to the plaintiff. Upon the liquidation of the defendant, such insurance cover was transferred to and vested in the plaintiff pursuant to the UK Third Parties (Rights against Insurance) Act. As such, the plaintiff possessed adequate security for its claim. In the present action, the intervener argued that such facts were material and were not disclosed at the hearing of 27 February 2009. There is nothing in this allegation. How rights under that legislation can amount to security for the plaintiff's claim is inexplicable. Until there is a judgment against EP Carriers, the legislation has no relevance.

113 In a letter from A&G addressed to AsiaLegal dated 30 April 2009 and exhibited in Leona Wong's third affidavit, filed on 6 May 2009, A&G disputed the adequacies of the policy as security for the plaintiff's claim on several grounds. There had been no response from the intervener in answer to A&G's allegation that the policy did not amount to good security. As such, I was of the view that the intervener did not seriously consider that such information was material. This, to my mind, was a belated attempt to "invent missing material facts" and merited no consideration (see *The Vasiliy Golovnin(CA)* at [88]).

(iii) Disclosure (c): Commencement of arbitration proceedings

114 The intervener also alleged that the plaintiff had failed to disclose that no arbitration had, in fact, been commenced against the defendant as of 27 February 2009. While it is true that the plaintiff did not expressly so state, this was implicit from the first arrest affidavit filed by Li Kang-Lin on 27 February 2009. The relevant portions of the affidavit stated:

> 19 The parties hereto have agreed to refer their disputes to London arbitration. Clause 51 of the Charterparty [Tab 1] provides so far as is material as follows: …
>
> 20 The Plaintiffs are ready, willing and able to refer the disputes to arbitration. The Plaintiffs' writ herein and application for a Warrant of Arrest are not to be construed as a waiver of their rights to refer their claims and disputes to arbitration in London or a step in the proceedings. The Plaintiffs expressly reserve all their rights under the applicable laws and legislation, including but not limited to the International Arbitration Act (Cap. 143A) ("IAA"). In particular, the Plaintiffs reserve their rights to commence and pursue arbitration proceedings pursuant to the provisions in the Charterparty as aforesaid and to apply for a stay of the action herein in favour of arbitration in London and for the property arrested to be retained as security or for equivalent security to be provided, pursuant to sections 6 and 7 of the IAA.

Hence, it was readily discernible that while there was an arbitration agreement between the plaintiff and the defendant, no arbitration had yet been commenced. The intervener's allegation had no merit.

(iv) Disclosure (d): No leave to bring arbitration proceedings

115 Another baseless allegation was the assertion that there was no disclosure of the fact that leave was not sought to bring arbitration proceedings against the defendant. This was not a material fact which required to be disclosed as no arbitration proceedings had been commenced at the point in time. What was material, at the hearing of 27 February 2009 for the purpose of the arrest, was that arbitration was contemplated and that, if so commenced, the vessel would be used as security for the arbitration proceedings. As mentioned above, such an intention was indeed disclosed in the affidavits leading the warrant of arrest.

(v) Disclosure (e): OS 238/2009 – ex parte application

116 Similarly, the intervener's argument that the fact that OS 238/2009 was heard *ex parte* ought to have been, but was not, disclosed was disingenuous. The reasons for the urgency of the hearing were explained to the court hearing the application and it was accepted. Accordingly, this was not a matter that AR Loo needed to take into account in deciding whether to grant the application to arrest the *Eagle Prestige*.

Conclusion

117 The intervener's application to set aside the arrest of the *Eagle Prestige* was unmeritorious. In the circumstances, the appeal against the order made on 13 May 2009 to set aside the warrant of arrest was allowed. Costs of the appeal and below were ordered to be taxed, if not agreed.

[note: 1] CB Tab 26 Business Profile of EP Carriers

[note: 2] Li Kang-Lin's 2nd affidavit dated 27 February 2009, exhibit marked "LKL-2" at p15

[note: 3] Li Kang-Lin's 1st affidavit dated 27 February 2009, exhibit marked "LKL-1" at p 56

[note: 4] Li Kang-Lin's 1st affidavit dated 27 February 2009, exhibit marked "LKL-1" at p97

[note: 5] Tan Siew Ling's 1st affidavit dated 14 April 2009, para 4

[note: 6] Tan Siew Ling's 4th affidavit dated 26 May 2009 at p 37

[note: 7] Tan Siew Ling's 1st affidavit dated 14 April 2009, para 6