The "Vasiliy Golovnin"
[2008] SGCA 39

Case Number	: CA 109/2007, 110/2007, Adm in Rem 25/2006, RA 214/2006, 216/2006
Decision Date	: 19 September 2008
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Vivian Ang, Yap Fook Ken and Kimarie Cheang (Allen & Gledhill LLP) for the appellant in CA 109/ 2007 and respondent in CA 110/2007; Steven Chong SC and Gary Low (Rajah & Tann LLP) for the appellant in CA 110/2007 and respondent in CA 109/2007
Parties	: —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Arrest of vessel – Disclosure of material facts – Duty to make full and frank disclosure

Admiralty and Shipping – Admiralty jurisdiction and arrest – Arrest in pursuance of arbitration proceedings

Admiralty and Shipping – Admiralty jurisdiction and arrest – Requirements for determining whether claim fell within s 3(1) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

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

Civil Procedure – Duty of full and frank disclosure – Extent of disclosure of material facts in ex-parte hearings

19 September 2008 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 Admiral Vasiliy Mikhaylovich Golovnin[note: 1] was an 19th century Russian navigator and explorer. In 1819, while attempting to survey one of the Kuril Islands, sandwiched between Russia and Japan, he was apprehended by the Japanese. As the Kuril Islands were then the subject of rival sovereignty claims by both countries, Admiral Golovnin was promptly accused by the Japanese of having strayed too close to the island. He spent the next two years languishing in a Japanese prison as there were then no established international conventions on how to deal with such transgressions.

2 Almost 200 years later, a vessel named after him, the *Vasiliy Golovnin*, owned by the respondent, has been caught in the middle of an international legal melee, spanning several jurisdictions. As a result of an alleged contractual default by its sister ship, it was arrested in Singapore. Fortunately, in accordance with established Singapore shipping practice, it was promptly released after security was provided. The issues in these appeals, while having little apparent historical or political significance, are nevertheless of considerable commercial importance to the parties involved. Is the *Vasiliy Golovnin* an innocent party in the middle caught up in a legal muddle or do its owners have legal responsibility for failing to comply with the instructions of the appellant (*qua* consignee)? For ease of reference and to facilitate understanding, we now set out the schematic arrangement of this judgment:

Overview

3 Crédit Agricole (Suisse) SA ("Crédit Agricole"), the appellant in Civil Appeal No 109 of 2007 ("CA 109/2007"), and Banque Cantonale de Genève SA ("BCG") (collectively "the Banks") arrested a vessel, the *Chelyabinsk*, in Lomé, the capital of Togo, on 21 February 2006. Acceding to a setting-aside application by Far Eastern Shipping Co Plc ("FESCO"), the Lomé Court of First Instance ordered that the vessel be released on 24 February 2006. Dissatisfied with this outcome, the Banks, not long after, moved to arrest her sister ship, the *Vasiliy Golovnin*, in Singapore on 18 March 2006, pursuant to the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HCAJA"), on the same basis as the arrest of the *Chelyabinsk*.

4 On 10 July 2006, FESCO, the respondent in CA 109/2007, the owners of the two vessels, persuaded Assistant Registrar Ang Ching Pin ("AR Ang"), to set aside the warrant of arrest of the *Vasiliy Golovnin* and strike out the Banks' writ of summons. AR Ang, however, did not award FESCO any damages arising from the wrongful arrest of the *Vasiliy Golovnin*.

5 The Banks appealed against AR Ang's decision (*The Vasiliy Golovnin* [2006] SGHC 247) ("AR Ang's GD") to set aside the arrest warrant in Registrar's Appeal No 214 of 2006 ("RA No 214") to a High Court judge ("the Judge"). FESCO also concurrently appealed against AR Ang's decision not to award damages for wrongful arrest in Registrar's Appeal No 216 of 2006 ("RA No 216"). The Banks' appeals were on the whole unsuccessful. On 31 July 2007, the Judge upheld the decision of AR Ang in striking out the appellants' claims against the respondent, save for that part of the claim relating to damage to the cargo which he ruled could still be pursued *in personam*. This was notwithstanding his finding that the action *in rem* was wrongly instituted. The Judge also dismissed FESCO's appeal for damages. FESCO was awarded 70% of the costs in RA No 214 and the Banks were awarded costs in respect of FESCO's unsuccessful appeal in RA No 216 (see *The Vasiliy Golovnin* [2007] 4 SLR 277).

The appeals

6 CA 109/2007 is an appeal by Crédit Agricole against the High Court's decision. The appeal concerns the decision to set aside the warrant of arrest and strike out the writ *in rem*. However, it bears mention that BCG, the other bank responsible for the arrest of the *Vasiliy Golovnin*, has not pursued the matter any further.

7 Civil Appeal No 110 of 2007 ("CA 110/2007") is an appeal by FESCO against the High Court's decision declining to award it damages arising from the wrongful arrest of the *Vasiliy Golovnin*. The Banks are the respondents in this appeal.

8 In this judgment, we shall address CA 109/2007 before dealing with CA 110/2007. We first briefly set out the undisputed facts and then condense the Judge's grounds of decision ("the Judge's GD").

Background facts

9 The Judge has ably summarised the salient facts and we gratefully adopt substantial portions of the factual matrix set out in the Judge's GD. The unfortunate saga began somewhat uneventfully around September 2005. On 9 September 2005, FESCO chartered the *Chelyabinsk* ("the chartered vessel") on amended New York Produce Exchange ("NYPE") terms ("the head charterparty") to Sea Transport Contractors Ltd ("STC"). STC, in turn, sub-chartered the chartered vessel, also on amended NYPE terms, to Rustal SA ("Rustal"). The Banks provided financing to Rustal and received the relevant bills of lading as security.

10 In accordance with the terms of the head charterparty, STC instructed the chartered vessel to load a cargo of about 5,100mt of Chinese rice at Nanjing for discharge at "any African port". Three bills of lading were issued. All of these bills referred exclusively to the head charterparty dated 9 September 2005 and stated the port of discharge as "any African port".[note: 2] Of these three bills of lading, only one of them ("the African port bill of lading") is in issue in these proceedings. The holder of the other two bills of lading declined to institute proceedings against FESCO in Singapore, despite the fact that the holder was also a party to the proceedings in Lomé, Togo.

11 Immediately after loading the Chinese rice, the chartered vessel then proceeded to Kakinada, India, where it loaded about 15,000mt of Indian rice. Five new bills of lading (KKD/LT/01, KKD/LT/02, KKD/LT/03, KKD/LT/04, KKD/LT/05) all dated 10 September 2005 were issued in respect of the Indian rice. The port of discharge was stipulated in each and every one of them to be Lomé, Togo. Of these five bills, three bills (KKD/LT/01, KKD/LT/02, KKD/LT/03) are held by Crédit Agricole, the appellant in CA 109/2007. The other two bills (KKD/LT/04, KKD/LT/05) are held by BCG. The cargo covered by bills numbered KKD/LT/03 and KKD/LT/05 was eventually discharged in Abidjan, a port in Côte d'Ivoire, after letters of indemnity were provided. No claims arise in relation to these bills for the purposes of this appeal. Also, as BCG is not a party to this appeal, there is no issue in relation to KKD/LT/04. Only two of the new bills of lading (KKD/LT/01, KKD/LT/02), hereinafter referred to as "the Lomé bills of lading", and the African port bill of lading (see [10] above) are relevant for the purposes of the present appeal.

12 After a request by Rustal, STC instructed the chartered vessel to proceed to Abidjan. In Abidjan, part of the Indian rice (under KKD/LT/03 and KKD/LT/05, see [11] above) was discharged in exchange for letters of indemnity issued by STC. Presumably, the letters of indemnity were given because the bills of lading had named Lomé as the port of discharge. In early December 2005, Rustal also requested STC to effect a switch of the Lomé bills of lading in order to, *inter alia*, reflect a change of the port of discharge from Lomé to Douala in Cameroon. STC initially agreed to this. On receiving a request from STC, FESCO immediately agreed to do so provided that the original bills of lading were simultaneously surrendered in exchange for the new bills of lading. The agreed switch of documents was scheduled to take place on 12 December 2005 at the office of FESCO's chartering brokers in Surrey, England. However, neither Rustal's staff nor its agents turned up at the appointed time to effect the switch. While there is some disagreement between the parties as to the reason for the breakdown of this arrangement, nothing really turns on this. What is now significant is that the

Lomé bills of lading have never been switched.

13 Even though STC had initially instructed the chartered vessel to sail to Douala on 13 December 2005, immediately after the breakdown in effecting the switch occurred, it revoked its earlier directions to discharge the cargo at that port. On 14 December 2005, STC informed FESCO in no uncertain terms not to switch the Lomé bills of lading unless further instructions were given. On 15 December 2005, STC reiterated its earlier instructions and reminded FESCO that the chartered vessel should not enter the port of Douala or berth there without STC's prior instructions. It has now emerged that STC was then embroiled in an intractable dispute with Rustal about unpaid hire for the chartered vessel.

14 On 19 December 2005, STC sent an e-mail to FESCO instructing the chartered vessel to sail for Lomé and to discharge the cargo in accordance with the express mandate contained in the subject bills of lading. However, soon after this, on 21 December 2005, FESCO received a conflicting request from M/s Waterson Hicks, the solicitors of BCG, insisting that the discharge of the cargo of rice be effected at Douala in exchange for a letter of indemnity covering the proposed change of the port of discharge. FESCO promptly responded, asserting that in the light of STC's express instructions and the fact that BCG's cargo (KKD/LT/04) named Lomé as the port of discharge, it could not accede to BCG's request. Despite FESCO's refusal to accede to BCG's request, the latter's solicitors persisted in seeking confirmation that the cargo would be discharged in Douala in accordance with their clients' instructions. FESCO then replied to BCG's solicitors reiterating, first, that while it had carefully considered BCG's requests, it was unable to discharge the cargo at Douala because it had already received firm instructions from STC to sail to Lomé and, second, it could only change the port of discharge after receipt of STC's approval. There was also a similar request from Crédit Agricole to discharge its cargo under the Lomé bills of lading and the African port bill of lading (collectively, "the relevant bills of lading in the present appeal") at Douala instead of Lomé. It should be noted in passing that there is also some disagreement as to when that request was received by FESCO. Crédit Agricole claimed that its request was sent by fax on 16 December 2005, but FESCO maintained that it only received the fax on 29 December 2005, through its English solicitors, who in turn had received it from Crédit Agricole's English solicitors. Nothing of real moment, however, turns on this. In any event, by 16 December 2005, FESCO had already irrevocably decided not to discharge the cargo in Douala.

15 The parties had thus reached a stalemate. Who was to cut the Gordian knot and take delivery of the cargo at Lomé? To resolve this stalemate, on 22 December 2005, STC obtained from the Lomé Court of First Instance an order for the detention, after discharge, of 15,541mt of rice on board the chartered vessel ("the STC Court Order"). Pursuant to this order, the cargo was to be detained in Lomé as security for STC's claim against Rustal for unpaid hire under the sub-charterparty between STC and Rustal. As soon as the chartered vessel arrived at Lomé on 23 December 2005, the STC Court Order was served on her.

16 This unsurprisingly set in motion a legal chain reaction and resulted in a flurry of further court orders. On 24 December 2005, Rustal obtained an order from the Lomé court ("Ruling No 2081/2005") preventing the discharge of the cargo. On 27 December 2005, STC responded by obtaining a contrary court order authorising the discharge of the cargo ("the Discharge Order"). Matters did not rest here.

17 The Banks then decided to enter into the legal fray to protect their security. They applied to have the Discharge Order set aside and for the reinstatement of Ruling No 2081/2005 ("the Banks' application against STC"). On 16 January 2006, the Lomé court rejected the Banks' application against STC, set aside Ruling No 2081/2005, and ordered the cargo be discharged in Lomé ("Ruling No 0023/2006"). The court also determined that STC was entitled to retain the cargo as security. The Banks and Rustal then promptly applied for and obtained separate rulings for a temporary stay of

execution of this ruling.

18 On 2 February 2006, the Lomé Court of Appeal directed that the stay of execution made in relation to Ruling No 0023/2006 be lifted. This enabled the cargo to be immediately discharged in Lomé. Soon after this, FESCO commenced discharging operations. The discharge of the cargo was completed in mid-February 2006. This unfortunately did not resolve the problems. Upon the unloading of the cargo pursuant to the discharge order, STC alleged that part of the cargo had been damaged. Security for this particular claim by STC was provided by the chartered vessel's protection and indemnity ("P&I") club, the UK P&I Club, by way of a letter of undertaking dated 16 February 2006. Undeterred by what had transpired, soon after the unloading of the cargo on 18 February 2006, the Banks secured a court order in Lomé for the arrest of the chartered vessel on 21 February 2006 in connection with their claims for the damage to the cargo, as well as FESCO's refusal to effect discharge at Douala. This, however, was only a momentary respite for the Banks.

19 On 24 February 2006, FESCO decisively countered the arrest and succeeded, on the same day, in obtaining an order setting aside the arrest of the chartered vessel ("the Lomé Release Order"). It bears mention that these proceedings were vigorously contested and heard *inter partes*. Comprehensive oral and written submissions were made by counsel for the Banks and FESCO. In arriving at its decision to make the Lomé Release Order, the court made the following findings: [note: 3]

(a) The Banks must have known that STC, as charterers, had control over the commercial management of the chartered vessel and that FESCO was bound to follow the instructions of STC.

(b) FESCO was not at fault for routing the chartered vessel to the port of Lomé on the instructions of STC, the charterers.

(c) The Banks' claim that cargo was destined for Douala was rejected on the basis that the port of Douala was not a port named in the relevant bills of lading in the present appeal.

(d) The cargo was discharged at Lomé in fulfilment of orders issued by the Lomé court.

(e) Sufficient security was already provided for the alleged damage claim.

(f) Accordingly, the Banks had no right to arrest the chartered vessel as security for their alleged claims.

Further, it is also crucial to point out, at this juncture, that the Banks did not appeal against the Lomé Release Order to the Lomé Court of Appeal. The chartered vessel, after this, uneventfully left Lomé on 25 February 2006. The time allowed for an appeal against the Lomé Release Order expired on 17 March 2006. The legal wrangling did not end here. The dispute between the Banks and STC/FESCO then unexpectedly moved to a new forum, Singapore.

20 On 18 March 2006, the very next day after the expiry of the appeal period, the Banks successfully applied *ex parte* to the duty registrar, Assistant Registrar David Lee ("AR Lee") to arrest a sister vessel on the basis of the very same claims earlier made unsuccessfully to the court in Lomé. The *Vasiliy Golovnin*, a sister vessel of the chartered vessel, was then arrested in Singapore.

21 Meanwhile, the Banks were also busy concurrently pressing ahead with their claim against STC in relation to the discharge of the cargo directly to them. It bears mention that, on 28 March

2006, the Lomé Court of Appeal reversed Ruling No 0023/2006 and allowed the Banks' appeal against the original order (*ie*, the Discharge Order) that the cargo be discharged in Lomé. This, however, has no direct nexus with the Lomé Release Order. When the cargo was discharged in Lomé, FESCO was then legally obliged to do so. As stated earlier, on 10 July 2006, following an application by FESCO, AR Ang set aside the *ex parte* order for the arrest of the *Vasiliy Golovnin* and simultaneously struck out the Banks' writ against FESCO. She determined that:

(a) it was an abuse of process for the Banks to arrest one of FESCO's vessels again, as an issue estoppel had arisen by reason of the earlier decision of the Togolese court (AR Ang's GD at [20]);

(b) the Banks' claims were unmeritorious as the Banks had no arguable claim for breach of contract against FESCO apropos the relevant bills of lading in the present appeal (AR Ang's GD at [32]); and

(c) the Banks had failed to disclose material facts to AR Lee (AR Ang's GD at [38]).

Nevertheless, she did not award FESCO damages for the wrongful arrest of the *Vasiliy Golovnin* (see [4] above), as she felt that the Banks had honestly believed they had valid claims against FESCO (at [45] and [46] of AR Ang's GD).

The decision of the Judge

22 The Judge noted at the outset that a warrant of arrest of a vessel was a drastic remedy entailing full and frank disclosure of all material facts. Since the Banks had clearly failed to disclose three material facts at the *ex parte* hearing, the warrant of arrest ought to be set aside (at [22] and [35] of the Judge's GD).

23 The Judge also observed that, merely because a vessel had been previously released from arrest in a different jurisdiction, a fresh arrest did not constitute an abuse of process unless the vessel was arrested on grounds covered by an issue estoppel. For issue estoppel to arise: (a) the jurisdiction of that other court had to be competent, its judgment final and conclusive and on the merits of the case; (b) the parties to that action had to be the same as those in the present action; and (c) the issue before the present court had to be identical to the issue considered in that other court. As all three requirements for issue estoppel had been satisfied in the prevailing circumstances, the Banks had no right to arrest the *Vasiliy Golovnin* (at [36]–[38] and [51] of the Judge's GD).

24 A court, the Judge added, would not exercise its discretion to strike out a writ or pleading under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) or under its inherent jurisdiction unless the case was plainly unarguable. All of the Banks' claims, other than that relating to damage to the cargo, ought to be struck out as they failed to satisfy the threshold of being "arguable". As FESCO had performed the terms of the contract of carriage as evidenced by the relevant bills of lading in the present appeal, it "cannot be faulted for carrying the cargo to Lome" (at [59] of the Judge's GD). The claim for damage to the cargo, while arguably sustainable, was not, however, in itself a ground for arresting the ship, as sufficient security had earlier been provided for that claim by the letter of undertaking provided by the UK P&I Club (at [50], [70] and [72] of the Judge's GD).

25 Nevertheless, as it appeared that the Banks had honestly believed that they had valid claims against FESCO, they should not be required to pay damages for wrongful arrest (at [73], [75] and [76] of the Judge's GD).

CA 109/2007

26 In CA 109/2007, there are three main issues for our consideration:

(a) first, the *sustainability of the cause of action*: whether Crédit Agricole has an arguable case or whether its claims are wholly unmeritorious and/or clearly unsustainable;

(b) second, *material non-disclosure*: whether Crédit Agricole discharged its obligation to make full and frank disclosure of material facts in its *ex parte* application for a warrant of arrest; and

(c) third, *issue estoppel*: whether Crédit Agricole is estopped from arresting another of FESCO's vessels in respect of the same claims raised and determined in the prior proceedings that took place in Lomé.

27 The first and third issues are crucial in the determination of whether the writ *in rem* ought to be struck out, whilst all three issues are relevant in the assessment of whether the warrant of arrest alone should be set aside.

Sustainability of the cause of action

28 During the hearing of CA 109/2007, we queried counsel for Crédit Agricole, Ms Vivian Ang ("Ms Ang"), about Crédit Agricole's objective in pursuing the appeal, given that the ship had already been released, and security had already been provided through the UK P&I Club's letter of undertaking. In response, Ms Ang informed us that the appeal continued to be relevant as the parties had initiated arbitration proceedings to resolve the claim in London in accordance with an arbitration clause contained in one of the charterparties. She contended that the High Court's decision affirming the striking out of the claim might preclude further claims by Crédit Agricole in the arbitration proceedings. This contention does not pass muster upon closer scrutiny, particularly because BCG has apparently not taken the same view since it has not joined Crédit Agricole in this appeal. BCG's reasons for not appealing are unclear. However, this much can be quite readily inferred, BCG's failure to appeal certainly does not lend any support to Crédit Agricole's present stance because BCG is apparently also a party to the arbitration.

29 In its written submissions on the sustainability of the cause of action, Crédit Agricole contended that the High Court, in striking out the claim *in limine*, had seriously erred by considering the strengths and weaknesses of the conflicting claims when the parties had already agreed that the underlying disputes between the parties be referred to a three-man arbitration tribunal. Crédit Agricole further submitted that, pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), which it argued would apply to this case, the action in Singapore was subject to a mandatory stay and court proceedings in support of arbitration should not attempt to determine the merits of the matter. Crédit Agricole added, for good measure, that the court should strictly limit itself to deciding whether the plaintiff "could arrest or not arrest" and abstain from determining the merits, as such a determination could preclude the Banks from pursuing their claims in the arbitration proceedings either on the basis of issue estoppel or *res judicata*.[note: 4]

30 We note, however, that nowhere in the indorsement of the claim, and in its written submissions before AR Lee, did Crédit Agricole even hint that these proceedings were initiated to support the arbitral process or that the arrest was actually being made pursuant to s 7 of the IAA, which permits the court to order the provision or retention of security to satisfy an arbitration award as a condition to the stay of an action *in rem*. In fact, nowhere in Crédit Agricole's written

submissions to us is there any reference whatsoever to s 7 of the IAA. There was, however, some indication that arbitration *might* be pursued. Nevertheless, when the Banks took out the arrest application, it was not clearly stated that the arrest was being taken out in support of intended arbitration proceedings. Mr Kenny Yap, who appeared before AR Lee in the arrest proceedings, rather cryptically indicated to AR Lee that the Banks were "reserving their rights" under the IAA.[note: 5] Ironically, in the affidavit supporting the arrest application, the Banks acknowledged that while they might have a right to arbitration under the various charterparties, they *did not know* which charterparty conferred them this right. As we will see later, the Banks, even now, remain far from clear about which charterparty confers the right to arbitration. It must be said, however, that this omission to state categorically that the arrest was initiated in support of arbitration proceedings does create real doubt about the cogency of the stance adopted by Crédit Agricole in this appeal. It appears to us that this particular contention is very much an afterthought, not having been actively pursued either before AR Ang or the Judge. For completeness, nevertheless, we now examine the genesis of the alleged arbitration agreement since it appears to be one of Crédit Agricole's principal planks in this appeal.

The so-called arbitration agreement

31 In a letter from M/s Allen & Gledhill (Crédit Agricole's solicitors in Singapore) to M/s Rajah & Tann (FESCO's solicitors in Singapore) dated 13 April 2006, Allen & Gledhill wrote:[note: 6]

> *In the event* your clients' said application [for the warrant of arrest to be set aside] *is dismissed*, we would be grateful if you could let us know whether your clients will consent to the action herein being stayed in favour of London arbitration and that the London Arbitration Tribunal shall have jurisdiction to make an award in respect of the cost [*sic*] of this action. [emphasis added]

32 On 24 April 2006, Rajah & Tann wrote to Allen & Gledhill seeking clarification on Crédit Agricole's position on the reference to arbitration in London. They also sought particulars of the arbitration clause being relied on. On 4 May 2006, Allen & Gledhill replied, stating that the head charterparty, which all the bills of lading referred to, contained an arbitration clause "which provides for London arbitration". In that letter, they also said that FESCO had earlier furnished, in respect of the Singapore arrest, security by way of a UK P&I Club letter of undertaking payable against an award of a London arbitration tribunal. The letter of undertaking from the UK P&I Club stated:[note: 7]

> [W]e hereby undertake to pay you on behalf of the Shipowners on demand such sums as may be adjudged, awarded and/or declared by a London Arbitration Tribunal (or on appeal therefrom) to be or have been payable by, or as may be agreed to be or have been recoverable …

33 On 24 May 2006, Rajah & Tann responded to Allen & Gledhill emphasising:[note: 8]

> Our instructions are that the substantive dispute shall be referred to arbitration in London *in the event that our clients' application to set aside the arrest is fully and finally determined against our clients* (including the various levels of appeals therefrom).
>
> …
>
> Our clients *do not agree* that the London Arbitration Tribunal shall have the jurisdiction to make an award in respect of the cost [*sic*] of this action. All costs issues arising out of the Singapore proceedings shall be determined by the Singapore courts.
>
> [emphasis added]

34 This letter was the last reference to arbitration we can find in the documents placed before us. The dates of the correspondence confirm that this exchange took place only after FESCO applied to set aside the warrant of arrest. These letters also plainly evidence that the "agreed" arbitration proceedings had a rather limited scope. In our opinion, the UK P&I letter's reference to "such sums *as may be* adjudged, awarded and/or declared by a London Arbitration Tribunal"[note: 9] [emphasis added] cannot in itself be seen to signify FESCO's consent to arbitration in London. The UK P&I Club and FESCO are both different entities. In any event, the letter from Rajah & Tann stated explicitly that FESCO would not agree to arbitration until its application to set aside the *ex parte* arrest was "fully and finally determined"[note: 10] against their clients.

35 At the hearing, counsel for both sides, in response to further queries from the court, clarified that the arbitration proceedings were only at a preliminary stage, and their clients were still in the process of attempting to settle the appointment of arbitrators. This is pertinent.

36 In our estimation, Ms Ang's contention that any decision in Singapore would prevent or circumscribe the arbitration proceedings is plainly unmeritorious. First of all, the purported arbitration agreement was relatively nascent and contingent in nature and, in any event, narrowly limited in its intended scope. These particular arbitration proceedings could not have been even contemplated when the application for the warrant of arrest in Singapore was initiated. It also follows inexorably that the arbitration proceedings were not even contemplated when the Lomé court proceedings were initiated by the Banks. Certainly, we cannot find any reference, in the documents made available to us, to an intended arbitration in those proceedings save for a reference in the "Request for Arrest of Ship" to the Lomé court dated 21 February 2006 affirming that the arrest of the ship was intended to secure a claim "in anticipation of the *judicial or arbitration consequences* of the Banks' claims against FESCO with the *competent English courts*"[note: 11] [emphasis added]. This certainly does not evince any commitment to proceed to arbitration in England or anywhere else. From the parties' correspondence, it is also plain to us that the arbitration was not clearly on the horizon even when FESCO made the application to set aside the warrant of arrest.

37 Second, even if Crédit Agricole knew of and intended to rely on the arbitration clause contained in one of the charterparties, it failed to adequately disclose this fact to AR Lee when it made the application to arrest the ship. Mr Kenny Yap, who appeared on behalf of the Banks before AR Lee, failed to notify AR Lee (and subsequently AR Ang) that the arrest was being made in support of arbitration proceedings. It seems to us whether or not the application was being made to support prospective arbitration would have been an important factor that AR Lee would certainly have considered and required further clarification of. He would certainly have needed further information in deciding whether to issue the warrant of arrest unconditionally or issue it in conjunction with a stay under s 6 of the IAA.

38 We acknowledge that in admiralty disputes, an arbitration tribunal does not have *in rem* jurisdiction to arrest a vessel. A vessel can only be arrested pursuant to an application in the High Court. The retention of security or provision of alternative security to satisfy an arbitration award is expressly provided for in s 7(1) of the IAA. Pursuant to this provision, where a court stays admiralty proceedings under s 6 of the IAA, it "may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order — (*a*) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or (*b*) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award".

39 Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 2nd Ed, 2007), incisively observes at pp 559–560:

> It is well settled that the presence of a binding arbitration agreement does not preclude an action in rem from being brought, for parties may decide not to invoke it or the arbitration agreement may in the circumstances be inoperative. For the same reason, there is no necessity to disclose in the affidavit accompanying the application for a warrant of arrest the existence of such an agreement (although the Malaysian position may well be different). *The result would be different if arbitration is being actively pursued in reliance on an* ad hoc *agreement*. [emphasis added]

He further goes on to emphasise (at fn 37 at p 560):

> … Singapore law allows for the arrest of a vessel as security for a potential arbitration award. If the purpose of an arrest is to obtain such security, it is submitted that, as a matter of prudence, *such a purpose be disclosed in the application for a warrant of arrest*. [emphasis added]

40 We agree. Indeed, we would go further. It is *necessary* for a party who intends to *rely* on an arbitration agreement to disclose this to the court in an *ex parte* application (on the issue of full and frank disclosure, see [79]–[110] below). If the arbitration is consensual, the court hearing the application for warrant of arrest must be alerted to the fact that the proceedings are being brought only to assist the arbitration proceedings. This fact must be disclosed so that if the court grants the arrest, it can also consider whether to stay the arrest or make other appropriate directions pending the award by the arbitral tribunal pursuant to s 7 of the IAA. Care has to be also taken by the court not to directly or even indirectly pronounce on the merits of the matter or trespass onto the jurisdiction of the arbitral tribunal in any other way. If the validity of the arbitration agreement is or will likely be disputed, the court's attention must also be drawn to this fact. The court's determination of the application can then be appropriately calibrated to take these potential developments into consideration.

41 Can parties consent to arbitration after the application to arrest the vessel has been taken out? There is no reason why they should not be able to do so. However, once the decision to commence arbitration has been agreed upon, the parties ought to apply to the court to stay the subject proceedings without delay. Following this, the parties' agreement should reflect the consensus reached so that the authority of the arbitration tribunal to deal with the claim is not fettered by decisions made in the *in rem* proceedings.

42 Ms Ang's contention on the effect that the High Court's decision would have on the arbitration proceedings can be best described as an imaginative argument of convenience. It was not properly developed in her written submissions and was only fleshed out in response to our queries.

43 We summarise. There was plainly no obvious reliance on the existence of the arbitration agreement (assuming it then existed) when the arrest order was made. Neither has any application for a stay pursuant to s 6 of the IAA been made. We are therefore minded to treat the subject *ex parte* application as being no different from any other typical arrest warrant application.

44 We now turn to consider Ms Ang's contentions on FESCO's striking out application – whether Crédit Agricole met the threshold of an "arguable case" for the purposes of the HCAJA and/or whether its claims were not unmeritorious nor clearly unsustainable.

Requirements for determining whether a claim falls within section 3(1) of the HCAJA

45 The Banks' arrest of the *Vasiliy Golovnin* was chiefly predicated on ss 3(1)(*g*) and 3(1)(*h*) of the HCAJA which provide as follows:

3. —(1) The admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:

…

(*g*) any claim for loss of or damage to goods carried in a ship;

(*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;

46 Crédit Agricole pointed out that, unlike actions *in personam*, where the court's jurisdiction was founded on the presence of the defendant within the jurisdiction, admiralty jurisdiction *in rem* was made out whenever one of the requirements of s 3(1) of the HCAJA was satisfied. The only requirement under the HCAJA, it said, was to assess whether the subject matter of the claim was of the type stipulated for under s 3(1). Crédit Agricole further contended that since the applications to set aside the arrest and to strike out the writ and the action were all premised on the ground that there had been a failure to comply with s 3(1) of the HCAJA, a fundamental jurisdictional requirement, this was the sole threshold issue that the Judge should have considered and made a definitive finding on. Instead, it argued, the Judge appeared to have omitted this step and proceeded to address the court's ability to strike out a claim under O 18 r 19 of the Rules of Court or under the inherent jurisdiction of the court. Ms Ang vigorously submitted that the Judge seriously erred in this respect and should have first paused to address the issue of whether the jurisdictional requirements were met, by deciding whether the claim fell within one of the provisions of s 3(1) of HCAJA.

47 It is trite that the issue of whether or not the jurisdictional requirements of s 3(1) of the HCAJA are satisfied is a procedural rather than a substantive one dealing with the merits of the claim. In *The Jarguh Sawit* [1995] 3 SLR 840, MPH Rubin J noted at 852, [33]:

> The question of jurisdiction should not be compounded with the question whether the plaintiffs will ultimately succeed.

On appeal, M Karthigesu J aptly observed in *The Jarguh Sawit* [1998] 1 SLR 648 ("*The Jarguh Sawit (CA)*") at [43]:

> In a hearing an of application to *dispute jurisdiction*, *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. [emphasis added]

48 Pursuant to O 70 r 2(1) of the Rules of Court, admiralty proceedings in Singapore ought to be commenced by writ in the prescribed form. While O 70 prescribes certain special procedures for admiralty proceedings, it is now incontrovertible that the usual procedural remedies for the summary resolution of such matters continue to be available.

49 Toh Kian Sing SC in *Admiralty Law and Practice* ([39] *supra*) succinctly summarises the present position as follows (at pp 45–46):

> 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*

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 [HCAJA], 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 although there has been strong affirmation for the test of a 'good arguable case' in other jurisdictional contexts. … The position in Australia is that any such jurisdictional fact must be proved on a balance of probabilities. [emphasis added]

50 Satisfying the requirements of s 3(1) of the HCAJA cannot be said to be the end all and be all when assessing the sustainability of an admiralty action. Invoking the admiralty jurisdiction may be in one sense a procedural step but it also plainly attracts substantive considerations. There are two requirements that claimants in every admiralty action must satisfy: first, the *in rem* jurisdiction must be established, through, *inter alia*, ss 3 and 4 of the HCAJA. Second, the claim must, if challenged, also meet the requirement of being a good arguable case on the merits.

51 The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment (see also [120] below). Even the briefest of delays can sometimes cause significant losses. It can also in certain instances prejudice the livelihood of the ship's crew and the commercial fortunes of the shipowner. Maritime arrests can, when improperly executed, sometimes 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 warrant 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 also Karthigesu J'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 J had 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.

Crédit Agricole's substantive claim

53 We now examine the substantive claims against FESCO. Crédit Agricole's substantive claim is premised on two quite different planks:

(a) the non-delivery of the cargo that was carried on board the chartered vessel to it, *qua* lawful holder of the relevant bills of lading in the present appeal, and as the named consignee; and

(b) the damage suffered by the cargo whilst it was in the care and custody of FESCO.

As different considerations apply to the two different types of bills of lading (see [10]–[11] above) we

will identify these as well, when necessary.

54 At this juncture, it will be useful to set out the Banks' indorsement of claim (set out at [55] of the Judge's GD):

> The Plaintiffs' claim is for damages for breach of written and/or oral contracts *evidenced by and/or contained in various Bills of Lading* dated in or around September and/or October 2005 and/or a Charterparty and/or for conversion and/or wrongful detention and/or wrongful interference and/or breach of bailment and/or breach of duty and/or negligence in and about the bailment, loading, handling, custody, care delivery and discharge of the Plaintiffs' cargo of rice and the carriage thereof on board the ship or vessel "CHELYABINSK" from Nanjing, China and Kakinanda, India to Douala, Cameroon during September-December 2005 and/or for a declaration for an indemnity and/or for an indemnity for all loss and/or liability suffered and/or incurred and/or injury to the Plaintiffs' reversionary interests in the said cargo of which the Plaintiffs are or were owners and/or lawful bills of lading holders and/or insurers and/or persons in possession and/or entitled to immediate possession of the said cargo and/or which was at their risk which resulted in loss and/or damage and/or delay and/or expenses and/or liability being suffered and/or incurred. [emphasis added by the Judge]

55 This is a fairly turgid indorsement, but one thing is clear. It is common ground that Crédit Agricole was named as the consignee of the relevant bills of lading in the present appeal and the bills were duly indorsed to it (see AR Ang's GD at [28] and [30]–[32]; and the Judge's GD at [59]). It is hornbook law that the terms of a bill of lading are the only terms that govern contract of carriage between the carrier and the indorsee. This is true whether the claimant is both the consignee and indorsee or a subsequent indorsee. This legal position is also why any private antecedent arrangements between the shipper and the carrier cannot be relied on against a consignee or a subsequent indorsee of a bill of lading without the consent of all the relevant parties (see *Leduc & Co v Ward* (1888) 20 QBD 475 ("*Leduc v Ward*"), and also [64]–[66] below). Under the terms of the relevant bills of lading in the present appeal, FESCO's only delivery obligation was to deliver goods at the port of discharge that had been stipulated in these bills of lading. As the bills of lading in question had not, as had been originally proposed, been switched, the fact remains that two of the three relevant bills of lading in the present appeal named Lomé as the port of discharge while the remaining bill of lading provided for the discharge of the cargo at "any African port". In so far as the Lomé bills of lading are concerned, it was FESCO's contention that it could not be faulted for delivering the cargo at Lomé as it was strictly performing its obligations.

56 Crédit Agricole, however, maintained that the *de facto* port of discharge on a bill of lading would ultimately have to depend on the *circumstances* of each case. This, it contended, necessitated an individualised *interpretation* of the terms of the bill of lading and the contract of carriage as a whole. In support of this rather remarkable proposition, Crédit Agricole relied on *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 where Lord Hoffmann had generally observed at [76]:

> As it is common general knowledge that a bill of lading is addressed to merchants and bankers as well as lawyers, the meaning which it would be given by such persons will usually also determine the meaning it would be given by any other reasonable person, including the court. The reasonable reader would not think that the bill of lading could have been intended to mean one thing to the merchant or banker and something different to the lawyer or judge.

57 Primarily on the basis of this rather broad *dictum*, Crédit Agricole quixotically argued that the court should bear in mind "circumstances reasonably available to be known by a merchant or a bank"

when interpreting a bill of lading.[note: 12] While we have no quarrel with this general statement of principle, it bears mention that it is no more than a general restatement that a contract should be interpreted objectively (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 where this court restated the principles applicable in Singapore for interpreting contracts). In seeking to create an overlay of the circumstances reasonably available to just the bank rather than to all the relevant parties, Crédit Agricole is in fact seeking to import a subjective test unilaterally. This is, of course, impermissible.

58 In the final analysis, the real issue before this court is whether the bill of lading, without more, is binding and conclusive as to its terms (FESCO's position) or whether it is invariably flexible and open to interpretation based on surrounding circumstances and business practices (Crédit Agricole's position). Crédit Agricole boldly submitted that this was a novel point and the leading text books had only considered the delivery obligation at the contractual port of discharge without properly addressing the issue as to whether delivery can be refused by the shipowners when demanded by cargo owners at an intermediate port. This issue, Crédit Agricole added, had, however, been considered in a series of railway cases concerning the carriage of cargo by rail. It relied on a line of 19th century cases, namely, *Scothorn v The South Staffordshire Railway Company* (1853) 8 Exch 341; 155 ER 1378 ("*Scothorn*") and *The London and North Western Railway Company v Bartlett* (1861) 7 H & N 400; 158 ER 529 ("*London & NW Railway*") for the proposition that the holder of a bill of lading is entitled *qua* bailor to possession of the cargo in transit. We now turn to examine these decisions.

59 In *Scothorn*, the plaintiff agreed with the defendant for the goods to be taken from Staffordshire and delivered "to the East India Docks" in London (from where they were to be transported to Australia). The goods were packed and labelled "Scothorn & Co, to the East India Docks, passenger-ship 'Melbourne,' Australia". Payment was made for the carriage of the goods to the East India Docks. The goods were duly despatched from the Great Bridge Station of the defendant carrier. Before the goods reached the East India Docks, the plaintiff, who was the consignor, directed the defendant carrier to deliver the goods to a different place in London – the Bell Wharf, Ratcliffe. This was not done. Instead, the defendant carrier placed, as originally agreed, the goods on board the vessel *Melbourne*. The goods were then transported to Australia and eventually lost in transit. The plaintiff sued for the loss of the goods and succeeded before the Court of Exchequer.

60 Alderson B held that the issue of what the contract of carriage amounted to was "no more than a question of fact" (at 344; 1379). In this case, the contract was "to procure [the defendant's] agent to deliver according to the [plaintiff's] directions"; that since the defendant had not done so and occasioned a loss to the plaintiff, it was bound to make good that loss (at 345; 1380). Martin B observed (at 346; 1380):

> A carrier is employed as bailee of a person's goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is only bound to deliver goods according to the owner's first directions, is a proposition wholly unsupported either by law or common sense.

61 In *London & NW Railway*, the contract of carriage between Mr Bartlett, the plaintiff, and the defendant railway company was for the delivery of wheat to the mill of a Mr Badger in Birmingham. Mr Badger instructed the defendant to retain the wheat in Birmingham Railway Station until he gave written orders for the wheat to be sent to his mill. Acting on these instructions, the defendant held on to the wheat for over three months. In the meantime, the wheat deteriorated and was eventually returned to Mr Bartlett, who then claimed damages against the defendant for the losses thereby incurred. On appeal to the Court of Exchequer, the question was whether the consignee (Mr Badger)

was entitled to give the instructions he did. The court held that, under the contract of carriage, the consignee had the power to order delivery to him at any place *en route* to the final destination. Bramwell B wryly noted at 408; 532:

> It would probably create a smile anywhere but in a Court of law, if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor. The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor unless the consignee directs them to be delivered at a different place.

As such, the plaintiff had no case against the defendant as the delivery of the wheat to Birmingham Railway Station instead of to the mill was on the consignee's instructions.

62 Relying on these authorities, Crédit Agricole contended that the consignee was legally entitled to demand delivery while the goods were in transit at a place *en route* to the final destination. It added that it was settled law that courts would normally recognise the property rights of a consignee so long as they did not conflict with the carrier's rights.

63 We are of the view that Crédit Agricole's reliance on these authorities is entirely misplaced. It appears to us that the legal attributes of bills of lading have historically evolved very differently, and for good reason, we may add. The essential characteristics of a carriage of goods by sea and by rail are quite different.

64 It is settled law that as between the carrier and indorsee of a bill of lading, the terms of the bill of lading are conclusive evidence of the contract of carriage; in fact the bill is the contract of carriage, as Lord Esher MR held in *Leduc v Ward* ([55] *supra*) at 480–481:

> The object of the carriage of the goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at that place for sale or use there acts upon the assumption that they will arrive there at or about a certain time in the ordinary course of a voyage there from the port of shipment. If the argument for the defendants were correct, he could not tell at what time he could calculate on having them. The indorsee of a bill of lading could not tell when he was likely to receive the goods. Business could not be carried on upon those terms. Again, with regard to the insurance of the goods, similar difficulties would arise. How could the goods be insured, if it was not known [for] what voyage they were to be insured?

(See also generally Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2007) at paras 7.11–7.12; and Sir Guenter Treitel QC & FMB Reynolds QC, *Carver on Bills of Lading* (Sweet & Maxwell, 2nd Ed, 2005) at paras 3|007–3|008).

6 5 *Leduc v Ward* concerned a voyage from Fiume to Dunkirk. The ship deviated to Glasgow and sank with her cargo. The carrier attempted to rely on an excepted perils clause which exempted him from liability for perils of the sea. However, he was not able to rely on this clause if the ship deviated from the route, as defined by the carriage contract. The carrier claimed that the shipper knew, before the carriage contract was concluded, that the ship was intended to sail to Glasgow and, in effect, the deviation was permitted by the contract. The court held that the pre-contract agreement could not bind the indorsee, who took on the terms of the bill of lading. These terms did not permit deviation and, by deviating, the carrier lost the benefit of the excepted perils clause. Lord Esher MR said (at 480):

> [W]here the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract.

6 6 *Leduc v Ward* remains good authority today. The bill of lading is conclusive as to its terms between the carrier and indorsee, and general principles of contract ought to apply in interpreting it. Antecedent agreements and other surrounding circumstances will not suffice to vary the terms of a bill of lading, in particular, the port of discharge, unless known and agreed to by all affected parties.

67 In the present case, FESCO never ruled out the possibility of varying the contract of carriage. Indeed, FESCO was willing to alter the port of discharge provided the bills of lading were consensually switched. The switch, however, was never effected. As a result, the bills of lading were never altered to effect a change in the port of discharge, *ie*, the contract was never varied.

68 It does not appear to us that *Scothorn* ([58] *supra*) has set out any general principle of law. *Scothorn* was a case decided on its peculiar evidence. That particular contract was for delivery according to the specific instructions received from the plaintiff. The court also found that the defendant in *Scothorn* had in fact agreed to a variation of the contract by varying the destination of carriage. Crédit Agricole's reliance on *Scothorn* and *London & NW Railway* ([58] *supra*) confuses two related though distinct processes involved in the carriage of goods: discharge and delivery. Discharge is the physical operation for the unloading of cargo. The discharge takes place at the port of discharge, as stated in the bill of lading. FESCO contends, again rightly, that a bill of lading typically stipulates the port of discharge, and not the act or point of delivery. The holder of a bill of lading presents the bill of lading at the warehouse or terminal at the port of *discharge* to take *delivery* of the cargo. While the *discharge* location is explicitly mentioned in a bill of lading, railway consignment notes and transport documents for the transport of cargo by land refer to *delivery* locations. We also note with keen interest that *Scothorn* is generally regarded as an authority of limited application, having particular relevance mainly to contracts of carriage by land. N E Palmer, *Bailment* (The Law Book Company Limited, 2nd Ed, 1991) at p 1011 observes:

> Whereas, however, it is clear from *Scothorn* that if the consignor-consignee are the same person then he can demand a redelivery to himself *during transit*, it is less certain whether he can demand a delivery to himself at some other destination not on the agreed route as of right (rather than by an agreed variation of the contract, as was the case in *Scothorn* itself). The point seems never to have been directly decided in England, although it seems to have been thought in *L. & N.W. Ry v. Bartlett* that a consignee-owner has such a right. *Perhaps it could be argued that a consignor who was also the consignee could demand a redelivery to himself at any reasonable place to which the carrier normally delivers, provided that the person giving the order is prepared to pay any expense involved*. [emphasis added]

69 Notes of consignment for carriage by rail have a vastly different character from bills of lading. For example, the *Convention Internationale concernant le Transport des Marchandises par Chemin de Fer* ("CIM") sets conditions for the international transportation of goods by rail. CIM notes are documents which confirm that the rail carrier has received the goods and that a contract of carriage exists between trader and carrier. Unlike a bill of lading, a CIM note is not a document of title. It does not give its holder rights of ownership or possession of the goods. One of the key characteristics of a bill of lading is that it operates as a document of title apart from evidencing a contract of carriage and confirming that the carrier has received the goods. The bill of lading is a badge of constructive ownership. Such constructive ownership can be transferred by endorsement and delivery. It is sometimes described as a "key" to ownership. The effective transfer of the key will also transfer

property. As the bill of lading serves as a document of title, it requires certainty, and cannot be freely interpreted on an *ad hoc* basis according to the circumstances as Crédit Agricole suggests.

70 We are not persuaded that the approach taken in these railway cases can be crystallised into a broader principle in relation to bills of lading that sanctions an *ad hoc* approach to reinterpret the bills of lading to dovetail with any change of circumstances. It is instructive that a leading textbook on carriage by sea, *viz*, Raoul Colinvaux, *Carver's Carriage by Sea* (Stevens & Sons, 13th Ed, 1982), in footnoting both of these railway cases, has this to say at vol 2, para 1594:

> Where the contract of carriage has been made by the consignor on behalf of the consignee, the carrier may take his instructions from the latter, and will be discharged by a delivery in accordance with his directions. And even where the goods are at the risk of the consignor, and the contract is really with him, if he has directed that they are to be delivered to the named consignee at a particular place, and an arrangement is made between the carrier and consignee that they shall be delivered to him elsewhere, and that is done, the delivery will discharge the carrier. "*The obvious meaning of the contract is to deliver to the consignee at the place mentioned, unless the consignee chooses,* ***and*** *the carrier* ***is willing*** *that they shall be delivered somewhere else*." [emphasis in italics and bold italics added]

It is axiomatic that Crédit Agricole was itself aware of the need to expressly provide for alterations in the port of discharge, and that is why it sought to switch the bills of lading. Crédit Agricole's submission, that the port of discharge on a bill of lading should be considered and interpreted according to circumstances such as the type of trade, the usual practices of the trade and the carriage agreements for other cargo, is nothing short of a recipe for uncertainty, shorn of both logic and principle. If we were to accept Crédit Agricole's bold, and one might add bald, argument, bills of lading could well be reduced to the status of mere ambulatory consignment notes. This, to us, is a wholly unacceptable proposition.

71 FESCO complied with its duty to deliver goods at the port of discharge which was named in a bill of lading. In so far as the Lomé bills of lading which named Lomé as the port of discharge are concerned, FESCO cannot be faulted for carrying the cargo to Lomé as it was discharging its obligations in accordance with the terms of the said bills of lading. In the event that the consignee/indorsee instructs the carrier to vary the port of discharge, general principles of contract will apply, *viz*, the terms of the bills of lading must be consensually varied to effect the change in the port of discharge. We also agree with the observations of Colman J expressed in relation to the fundamental obligations between the parties to a time charter, whether on NYPE terms or most other forms, as stated in *The Goodpal* [2000] 1 Lloyd's Rep 638 at 643:

> (vii) Once the owners have become bound by the contract of carriage entered into on the terms of the bill of lading the charterers' entitlement to give instructions for the disposition of the cargo so loaded is limited by the terms of the bill of lading. In particular, he cannot change the discharging port without procuring the assent of all the relevant parties to the bills of lading contract.
>
> …
>
> (ix) Just as the charterer is not entitled to require the master to proceed to a discharge port different from that specified in or permitted under the bill of lading contract, so the receiver under that contract can have no greater entitlement to redirect the master than the terms of the bill of lading and charter-party permit. In his capacity as receiver he merely enjoys precisely that facility of discharge at the designated discharge port which the charterer himself would enjoy.

72 In relation to the African port bill of lading, Crédit Agricole additionally argued that FESCO was in breach of its instructions to discharge at "any African port" cargo at Douala when it was berthed there from 17 to 21 December 2005. Instead, the chartered vessel returned to Lomé where FESCO knew or ought to have known that the cargo would be seized by STC. FESCO responded, arguing that it did not receive Crédit Agricole's fax with those instructions on 16 December 2005 (see [14] above). Second, FESCO maintained that it was under no obligation to obey instructions from Crédit Agricole in any event. FESCO concluded this argument by emphasising that its obligations were to perform the terms of the contract of carriage as evidenced by the relevant bills of lading in the present appeal and to obey the lawful instructions of STC in so far as they were not inconsistent with the said bills of lading.

73 Crédit Agricole's argument, that it was the context that was all important, ought to be assessed in its proper perspective. FESCO declined to discharge the cargo at Douala in the light of Crédit Agricole's failure to switch the bills of lading because of the specific instructions it had received from STC. If FESCO maintained that it would not discharge the cargo at any other port than the port of discharge contained in the bills of lading, why then did it discharge some of the cargo at Abidjan? FESCO pointed out, however, that the cargo was discharged on the basis of letters of indemnity provided against the breach of the express terms of those bills of lading (see [11] and [12] above). No such letters of indemnity were offered by the Banks for the discharge of the cargo in Douala.

74 Crucially, we also note that it was not disputed that the cargo of the African port bill of lading cargo was actually stowed below the cargo to be discharged at Lomé. As such, it would be logical that the cargo due for Lomé be discharged first. It was, additionally, not disputed that when the chartered vessel reached Lomé, she was required to discharge *all* her cargo at that port by virtue of Ruling No 0023/2006, which was an order of court (see [17] above). In view of this, the reality is that FESCO had no option but to discharge *all* her cargo at Lomé, including the cargo shipped under the African port bill of lading. For this reason, we are of the view that the discharge of the cargo covered by the African port bill of lading in Lomé did not result in any breach of contract. Further, in discharging the African port bill of lading cargo in Lomé, FESCO was in fact complying with a valid court order to discharge *all* its cargo.

75 AR Ang and the Judge noted that the Banks did not (and could not) contend that FESCO could have legitimately refused to comply with Ruling No 0023/2006 requiring it to discharge all the cargo at Lomé. We accept that a refusal by FESCO to unload all the said cargo at Lomé would have, additionally, amounted to a contempt of court and Crédit Agricole's suggestion that FESCO should not comply because of existing contractual obligations was plainly absurd. All the interested parties, including the Banks, have consistently accepted that the Lomé court had the requisite jurisdiction to make Ruling No 0023/2006.

76 In response, Crédit Agricole attempted to assert that FESCO would not have had to comply with this Lomé order of court if the chartered vessel had avoided Lomé altogether. It claimed that FESCO well knew that if the chartered vessel entered Lomé, as it had been expressly warned by the Banks' solicitors, the cargo would be seized by STC. Crédit Agricole further submitted that FESCO knew or must have known that, under the terms of the "freight pre-paid" bills of lading between FESCO and the Banks, STC had no right whatsoever to arrest or exercise a lien over the cargo at Lomé and that exercise of such a lien would be clearly wrongful. Ms Ang vigorously concluded this particular contention by emphasising that FESCO had, in all the circumstances, a duty to deviate from Lomé and proceed to another port to discharge the cargo.

77 We are not at all impressed by this argument. There was no duty on FESCO's part to deviate from Lomé. To deviate from Lomé would render FESCO liable for breach of the head charterparty and

breach of the contracts of carriage evidenced by the bills of lading. It could also have compromised the existing insurance arrangements. It also cannot be controverted that a time charterer is entitled to give employment instructions to the shipowners. Such instructions can usually encompass directions as to how the voyage is to be performed by the vessel. Unless the charterparty provides otherwise, the master is obliged to obey such instructions subject only to considerations of seamanship and safety (see Michael Wilford, Terence Coghlin & John D Kimball, *Time Charters* (LLP, 5th Ed, 2003) at para 19.25 and *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd* [2001] 1 AC 638 at 647). In our view, FESCO cannot be faulted at all for complying with its contractual obligations.

78 Turning to the issue of loss of and damage to the cargo, even though the Banks' claim was still conceptually maintainable, the Judge rightly did not view this as being sufficient to justify the arrest of the *Vasiliy Golovnin.* We believe this to be a correct and principled approach. The arrest of a vessel *in rem* is purely to secure security for the underpinning claim. On 16 February 2006, the UK P&I Club issued a letter of undertaking to "the Cargo underwriters" for the sum of €113,411.00, inclusive of interest and cost, being security for alleged shortage or damage of the cargo during the discharge in Lomé. As security had already been furnished for the damage and loss of the cargo, an arrest was certainly not necessary. The Banks could have quite easily applied to the Lomé court for the security under the letter of undertaking to be enhanced. They chose not to take what, in our view, was the most appropriate, and indeed, expedient remedy. Instead, they launched another altogether unexpected and improbable salvo by initiating proceedings in Singapore. This was wholly off the mark. Accordingly, for these reasons, we dismissed Crédit Agricole's appeal on this issue. In our view, Crédit Agricole did not have a good arguable case, for the alleged breach of contract arising from the discharge of the subject cargo in Lomé, and for this reason alone its claim ought to be struck out. However, though fundamental, this is not the only grave procedural defect apropos the Banks' claims in these proceedings.

Material non-disclosure

79 When the application to set aside the arrest was heard, FESCO contended that five material facts had not been disclosed by the Banks to AR Lee, who heard the *ex parte* application for the arrest of the *Vasiliy Golovnin*. They are as follows (see the Judge's GD at [24]):

(a) the chartered vessel had been released from arrest by the Lomé court following an *inter partes* hearing (the Lomé Release Order);

(b) Lomé was the contractual port of discharge under three of the four bills of lading;

(c) the primary purpose of switching the bills of lading in question was to alter the port of discharge from Lomé to Douala;

(d) BCG had offered a letter of indemnity to FESCO on 21 December 2005 in consideration of the cargo being discharged at Douala instead of Lomé; and

(e) after failing to persuade FESCO to discharge the cargo at Douala, BCG had sought FESCO's confirmation that the cargo would be discharged in Douala in accordance with BCG's instructions.

80 AR Ang upheld FESCO's contentions in relation to the first and fourth facts, *ie*, facts (a) and (d). She ruled that there was sufficient disclosure in relation to the remaining three facts. The Judge found that, in addition to the first and fourth facts, the Banks had failed to disclose another material

fact, namely that the main purpose of switching the bills of lading was to change the port of discharge from Lomé to Douala. This relates to fact (c).

81 As Crédit Agricole is the only appellant in this appeal, it is only appealing against the first and third material facts; BCG is not appealing against any of these findings of material non-disclosure and, as such, a discussion on material fact (d) is not necessary as it relates primarily to BCG's non-disclosure. At the hearing, Crédit Agricole made no submissions on fact (d). This issue is worthy of mention at this juncture because FESCO submitted that BCG's decision not to appeal should be taken to mean that it has accepted the Judge's holding on material non-disclosure. It suggested that this now amounted to an admission of non-disclosure on BCG's part. Therefore, FESCO argued that, even taking Crédit Agricole's case at its highest, the arrest ought to be set aside because of BCG's non-disclosure at the *ex parte* hearing. While there is some force in this point of view, we also think it would only be right to examine the other grounds raised. This will also be relevant in our ultimate assessment of FESCO's claim for damages for wrongful arrest against the Banks.

82 We will examine the issue of material non-disclosure from two aspects: first, what ought to have been disclosed (*ie*, content and scope) and second, whether such facts have been sufficiently disclosed (*ie*, threshold). Before delving into these two aspects of disclosure, it would be apposite for us, first, to comment briefly on the duty to make full and frank disclosure in *ex parte* applications, in general, and for the arrest of ships in particular.

Duty to make full and frank disclosure

83 It is settled law that on an *ex parte* application, the applicant must disclose to the court all matters within his knowledge which might be material even if they are prejudicial to the applicant's claim (*The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington* [1917] 1 KB 486 at 504, endorsed by this court in *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 2 SLR 750 ("*Tay Long Kee Impex*") at [21]; see also Steven Gee QC, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at para 9.001). This applies to the arrest of ships in Singapore as well, though the position is presently quite different in England. It has been held by the English Court of Appeal that the effect of the 1986 amendments to the Rules of the Supreme Court (SI 1965 No 1776) (UK) which, *inter alia*, amended O 75 r 5 governing the issuance of warrants of arrest, was that the affidavit in support of the warrant of arrest need only comply with the requirements of the English rules (the relevant requirements are presently found in PD61 to the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK)) and need not make full and frank disclosure of all material facts (which was the position in England prior to the amendments (see *The Andria now renamed Vasso* [1984] QB 477 at 491–492)), given that a plaintiff is entitled *as of right* to issue a warrant of arrest if the requirements are complied with (see *The Varna* [1993] 2 Lloyd's Rep 253 at 257–258; and Nigel Meeson, *Admiralty Jurisdiction and Practice* (LLP, 3rd Ed, 2003) at para 4.42). In other words, a warrant of arrest has ceased to be a discretionary remedy in England after the 1986 amendments, and has become a remedy that is available as of right to a plaintiff in the circumstances prescribed by the English rules (*The Varna* at 257; see also the case note by M S Dockray, "Disclosure and Arrest of Ships" (1994) 110 LQR 382 at 384).

84 In *The Rainbow Spring* [2003] 3 SLR 362, Judith Prakash J, delivering the judgment of this court, stressed that the position in Singapore differed from that of England. This is because, apart from the differences between the English Rules and our Rules of Court, the warrant of arrest here is issued by the court at its discretion (at [32]). She further pointed out that as the arrest of a vessel was a drastic remedy given on an *ex parte* basis, the duty to make full and frank disclosure to the court was an important *bulwark* against the abuse of the arrest process (at [37]):

> There must be the possibility of a sanction for the failure to observe that duty [to make full and frank disclosure]. … 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. [emphasis added]

Indeed, so important is this duty that the failure to make full and frank disclosure can be an independent ground for setting aside an arrest (*id* at [35]; *The AA V* [2001] 1 SLR 207 at [47]; *The Evmar* [1989] SLR 474 at 479, [11]). However, while material non-disclosure is a legitimate ground for setting aside a warrant of arrest, the courts always retain an overriding discretion whether or not to do so. In *The Fierbinti* [1994] 3 SLR 864, L P Thean JA noted at 879–880, [42]:

> However, assuming that these matters are material and ought to have been disclosed, the court would still have a discretion whether or not to set aside the warrant of arrest on that ground. The court below did not consider this issue and therefore had not really exercised its discretion. We, in exercise of our discretion, would not have been disposed to set aside the warrant of arrest purely on the basis that the respondents had failed to disclose these matters in obtaining the warrant of arrest.

The courts will often apply the principle of proportionality in assessing the sin of omission against the impact of such default. This invariably requires a measured assessment of the material facts as well as the circumstances in which the application has been made.

The content/scope of disclosure

85 The duty to make full and frank disclosure is to disclose all *material* facts (*The Rainbow Spring* at [33]). The test of materiality for an arrest application is also the same as that required in other *ex parte* civil remedies (*ibid*). The underlying rationale is that these are all remedies that may potentially cause enormous and sometimes irreparable damage to a defendant or other connected parties. Further, the judge hearing the matter, not having the benefit of countervailing arguments, may not be appropriately sensitised to the real merits of the application and the potentially hazardous ramifications of the remedy, particularly (as is usually the case) if the relief is sought on an urgent basis. Fairly and logically, the onus of ensuring that the judge is given a balanced view of the matter rests squarely and uncompromisingly on every applicant in an *ex parte* application. A decade earlier, in *The Damavand* [1993] 2 SLR 717 at 731, [30], this court summarised the test of materiality for non-disclosure as follows:

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

86 In *Tay Long Kee Impex* ([83] *supra*), this court further attempted to clarify the elements of "materiality" at [21]:

> Any definition of 'materiality' has to be, by its very nature, general. In the words of Ralph Gibson LJ in *Brinks-MAT Ltd v Elcombe* [1988] 3 All ER 188 'material facts are those which it is material for the judge to know in dealing with the application.' *It need not be 'decisive or conclusive'* — per Warren LH Khoo J in *Poon Kng Siang v Tan Ah Keng* [1992] 1 SLR 562. We would add that the duty to disclose applies not only to material facts known to the applicant but also such additional facts which he would have known if he had made proper inquiries. The extent of the inquiries which an applicant should make would have to depend on the facts and

circumstances prevailing in the case. [emphasis added]

What is clear from the above two cases is that material facts are not strictly limited to facts which will have a determinative impact on the court's decision. So long as the facts are matters that the court should take into consideration in making its decision, they are material.

87 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).

88 That said, we think it necessary to add, that parties should not meticulously attempt to dissect the factual matrix in painstaking efforts to "invent" missing material facts. We note that, unfortunately, all too often, in setting aside applications, much unnecessary time is unhelpfully expended in dubiously making out a case of the alleged failure of a claimant to place all the material facts before the court. In many instances, these complaints amount to no more than factual peccadilloes that have no material bearing on the decision-making process or the outcome of the original application. This should be discouraged. What is material is, in the final analysis, essentially a matter of *common sense*. The duty to make full and frank disclosure does not, we should add, require the plaintiff to disclose every relevant document, as it must on discovery (Richard N Ough & William Flenley, *The Mareva Injunction and Anton Piller Order* (Butterworths, 2nd Ed, 1993) at para 6.1.5). Also, as mentioned by this court in *Tay Long Kee Impex* (at [21]), the duty to disclose extends to facts the applicant would have known if he had made proper inquiries, but the "*extent* of the inquiries which an applicant should make would have to *depend on the facts and circumstances prevailing in the case*" [emphasis added] (see [86] above). Adequate disclosure must be made directly to the court and it is the duty of the solicitor to ensure that this obligation is properly discharged. It is always preferable to err on the side of more disclosure rather than less. However, the wood should not be missed for the trees. We would agree with the learned author of *Commercial Injunctions* ([83] *supra* at para 9.005) that it is all about striking a right balance at the end of the day, though, admittedly, this is not a straightforward exercise:

> It is often a difficult exercise to settle a suitable affidavit which achieves the *right balance* between full and fair disclosure and a far too detailed description of the facts, with perhaps too much generosity towards the defendant. The duty of disclosure does not require the applicant to describe his case or the factual background in minute detail, nor does it require him to search for possible but unlikely defences. [emphasis added]

89 The decision of the Federal Court of Australia in *Lloyd Werft Bremerhaven GmbH v The Owners of the Ship "Zoya Kosmodemyanskaya"* [1997] FCA 379 ("*Lloyd Werft Bremerhaven GmbH*") is instructive in this respect. In that case, the plaintiff provided alteration, repair and equipping services to ships owned by Black Sea Shipping Co ("BLASCO"). BLASCO, in turn, failed to pay the plaintiff its charges. Consequently, the plaintiff arrested a ship named *Zoya*, which the plaintiff believed was a ship beneficially owned by BLASCO. BLASCO did not enter an appearance, but

appearance was instead filed by Tor Shipping Ltd ("Tor"), the demise charterer of the *Zoya*. The plaintiff's affidavit in support of the arrest asserted, without qualification, that BLASCO was the owner of the *Zoya*, and this was apparently based on entries on the Lloyd's Register (which eventually were proved to be outdated) that reflected BLASCO as the owner. It transpired that at the time of the arrest, the updated entries on the Lloyd's Register showed that Ukraine Shipping Company was the owner of the *Zoya*. Accordingly, Tor sought to set aside the arrest, *inter alia*, on the ground that there was a failure on the part of the plaintiff to make full and frank disclosure. At first instance, Tamberlin J declined to set aside the arrest on the ground of non-disclosure, and he explained his reasons as follows:

> In the present case, the supporting affidavit specifically and without qualification, stated that BLASCO was the owner at the relevant date. If it had been shown that there was credible relevant evidence known to the deponent but withheld from the Court, on the application, there may have been a ground for release in the present case.
>
> However, I have considered the testimony of the solicitor handling the matter both in chief and under cross-examination together with the material placed before me. *Whilst the Lloyd's Register entry relied on for the arrest was outdated, the evidence does not go so far as to satisfy me that either the solicitor or other persons acting on behalf of the plaintiff, or the plaintiff itself, was aware that the Lloyd's Register relied on had been updated*. Nor am I satisfied that the plaintiff or the solicitors withheld any relevant information from the Court in initiating the arrest proceedings. Should it subsequently become apparent that evidence placed before the Court on an arrest was incorrect then it is incumbent on the solicitors to correct it forthwith.
>
> [emphasis added]

90 Tamberlin J's decision on this point was upheld on appeal (see *Lloyd Werft Bremerhaven GmbH v Owners of Ship "Zoya Kosmodemyanskaya"* (1997) 79 FCR 71 at 94):

> Tor sought to challenge his Honour's rejection of its alternative argument, which had been based on an alleged failure by [the plaintiff], when applying ex parte for the arrest of the ship, to disclose information held, not by Ms Rusiti [the plaintiff's solicitor], but by Mr Haake [the plaintiff's general manager]. We see no ground for our intervention in this connection. His Honour was not satisfied that either [the plaintiff] or its solicitor withheld information. Ms Rusiti was cross-examined, and Mr Haake was in Germany. As has been seen, the ultimate question whether BLASCO was the beneficial owner at particular times was especially complex, both factually and in terms of the identification and the application of foreign law. On this alternative argument, questions of credit were central. We see no reason to interfere with the primary Judge's conclusions on this aspect.

Lloyd Werft Bremerhaven GmbH demonstrates the point that it is not open to a defendant to allege that the plaintiff has failed to disclose material facts which, in the first place, the plaintiff could not have *reasonably* be expected to know or to have found out through proper inquiries at the time of the arrest. It cannot be emphasised enough that the scope of disclosure should be what is reasonable in the given circumstances at the time of the arrest, and this is, at the very end of the day (as we have already noted above), a matter of common sense.

The threshold of disclosure

91 It should also be pointed out that mere disclosure of material facts without more or devoid of the proper context is in itself plainly insufficient to constitute full and frank disclosure; the threshold

of the disclosure to be met is also crucial. In this regard, we are referring specifically to the *manner* of disclosure that is required of a plaintiff making the *ex parte* application. In other words, we are concerned with how the material facts can best be presented to the court so as to ensure that the court receives the most complete and undistorted picture of the material facts, sufficient for its purpose of making an informed and fair decision on the outcome of the application, such that the threshold of full and frank disclosure can be meaningfully said to be crossed. It would be instructive to have reference to some cases that have commented on the proper manner of disclosure.

92 In *Intergraph Corporation v Solid Systems CAD Services Limited* [1993] FSR 617, Baker J penetratingly observed at 625 as follows:

> To present a judge with 600 pages of material on an *ex parte* application is coming a bit near abuse, unless he is firmly and carefully guided, through the material. Of course I recognise at once that legal advisers are in a difficult situation. If they do not put enough in, they get attacked because they have not made full disclosure. On the other hand if they put too much in then complaints arise that the judge cannot cope with it. That is something that legal advisers have to live with, because clearly it is of no use putting it in if the judge either cannot or does not read it. It is just as much not disclosed as if it had not been put in at all. *Unless the document is presented to the eyes and/or the ears of the judge, it is not disclosed.* [emphasis added]

93 In *National Bank of Sharjah v Dellborg* [1993] 2 Bank LR 109, Lloyd LJ (with Ralph Gibson LJ and Sir Michael Kerr concurring) additionally observed (at 112):

> *[T]he place to disclose the facts, both favourable and adverse, is in the affidavit and not in the exhibits*. No doubt it will usually be convenient to exhibit a few key documents where it is necessary to do so to explain the case. But the recent tendency to overload the case at the ex parte stage and to burden the judge with masses of documents in case something is left out, ought to be firmly resisted. *If the facts are not fairly stated in the affidavit, it will not assist the plaintiff to be able to point to some exhibit from which that fact might be extracted*. [emphasis added]

94 Thus, it is for the applicant's counsel, in his or her presentation of the material facts, to draw the judge's attention to the relevant papers, and it is not sufficient to produce exhibits which contain the papers if no specific reference is made to them; a failure to refer to material documents is a failure to disclose (Mark S W Hoyle, *Freezing and Search Orders* (Informa, 4th Ed, 2006) at para 5.18). Further, all material facts should be fairly stated in the affidavit, and it is not open to a plaintiff to say that it has fulfilled its duty to make full and frank disclosure because the relevant facts can be distilled somewhat from somewhere in the voluminous exhibits filed. In short, in the words of Bingham J in *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437, the applicant must "identify the crucial points for and against the application, *and not rely on general statements and the mere exhibiting of numerous documents*" [emphasis added].

95 In this appeal, it is worth noting that the affidavit filed by the Banks in support of the application for arrest constituted an impressive "tome" of some 400 pages. The narrative text, however, only amounted to a miserly 11 pages. The exhibits constituted the remaining pages. We reviewed the narrative text of the affidavit and found it to be conspicuous for its rather stark poverty of the relevant factual matters and, more crucially, context; there was plainly no mention of the first and third material facts condensed earlier at [79] above. We now turn to deal with each of the "missing" facts in turn to assess their materiality.

Non-disclosure of the inter parteshearing in Lomé

96 With regards to the Banks' failure to disclose to AR Lee that there had been a contested hearing in Lomé before the chartered vessel was released, AR Ang found (at [38] of AR Ang's GD):

> In my opinion, the fact that the *Chelyabinsk* was released from arrest in Lome pursuant to an order of court after an inter partes hearing *would have been something that a duty registrar would have wanted to know in deciding whether to issue a warrant of arrest*. I agree with FESCO's submissions that the duty registrar's attention would then be drawn to the fact that another court of competent jurisdiction had already determined that there was no right of arrest for the same claims by the plaintiffs. *The duty registrar might well have required further clarification as to whether a warrant of arrest should still be issued in Singapore despite the prior arrest having been set aside*. [emphasis added]

97 The Banks initially contended that while they had not specifically mentioned the contested hearing in Lomé to AR Lee, the fact that there had been a contested hearing at Lomé could quite easily have been gleaned from the exhibits in the affidavit filed in support of the application for arrest. They also pointed out AR Lee had intimated that he had read all the arrest papers, though it appears that there is no satisfactory evidence of this on record. The Judge, agreeing with AR Ang, noted that there was room for doubt as to whether the AR Lee had read the entire affidavit, including all the exhibits contained therein, which amounted to around 400 pages. We think, on the other hand, given the materiality, and crucial importance, of the Lomé proceedings, it was obviously necessary for the Banks' counsel to directly draw the court's attention to, and stress, this particular fact. It is wholly unsatisfactory for counsel, having left discovery of this issue purely to chance, to invite us now to make suppositions as to whether AR Lee was actually aware of this earlier development.

98 We also find it pertinent that in *The Kherson* [1992] 2 Lloyd's Rep 261 at 268, it was held that the existence of foreign proceedings in respect of the same claim was a material fact that had to be disclosed. In that matter, the claimant had obtained arrest applications in Rotterdam and London. Even though there was a brief reference in the affidavit to proceedings in Rotterdam described as "protective proceedings" said to have been "commenced solely for the purpose of protecting the time limit from prescription and no further steps have been taken in connection with such proceedings other than those necessary to preserve their validity", the court had no hesitation in finding that this buried reference was wholly insufficient to point out that the court in Rotterdam was seized of the proceedings. This obscured "the inevitable consequence that proceedings in [London] would be stayed or that jurisdiction would be declined" (*ibid*). Likewise, in *The Varna* ([83] *supra*), the English Court of Appeal held that but for the 1986 amendments to the English Rules of the Supreme Court (see [83] above), it would have been necessary for the plaintiff to disclose the existence of Bulgarian proceedings in respect of the same action in the affidavit (see also *Admiralty Law and Practice* ([39] *supra*) at p 173).

99 The fact that there had been an earlier *inter partes* hearing on the arrest of the chartered vessel on the same claims in Lomé was by any yardstick a highly pertinent fact that should have been drawn to AR Lee's attention. There is, upon closer scrutiny, no real difference between the essential features of the Togolese and Singapore claims mounted in rapid succession by the Banks. 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. It is quite pointless for the Banks to now belatedly invite us to speculate on whether AR Lee *might* have ascertained this fact after he had perused the affidavit and exhibits. As AR Ang quite

aptly put it, "the applicant must ensure that all which should be seen by the court is in fact seen" (AR Ang's GD at [40]). Likewise, as we have already mentioned (see [94] above), it is plainly the duty of counsel to draw the material facts to the judge's attention and not rely on the mere exhibiting of numerous documents in the affidavit.

100 The material fact that the Banks ought to have brought to AR Lee's attention is not merely that the chartered vessel was released from arrest in Lomé, but that the arrest was set aside in respect of the very same claims then being pursued again in Singapore. Furthermore, the release in Lomé was ordered after an *inter partes* hearing and grounds of decision had been given. The failure by the Banks to draw these material facts to AR Lee's attention was difficult to fathom and, bluntly put, nothing short of inexcusable. 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* ([84] *supra*) at [47]). This would certainly have allowed AR Lee to make a more informed decision. We would be startled if he had made the same orders once all these material facts had indeed been properly placed before him.

Non-disclosure of the proposed "switch" of the bills of lading

101 The Judge found that the Banks had failed to disclose another material fact, namely, that the main purpose of switching the bills of lading was to change the port of discharge from Lomé to Douala. In the affidavit filed in support of their application, the Banks created the impression that the agreement to switch the bills of lading was made primarily to facilitate dividing the consignment into different proportions.

102 It is evident from the notes of evidence and AR Ang's GD that AR Lee was aware that there had been a request for the cargo to be discharged at Douala. However, the fact that this had been preceded by a request to change the port of discharge from Lomé to Douala was not explained to him at all. This is material as it would have alerted AR Lee to the fact that, without the switch of bills, FESCO had correctly performed the terms of the contract of carriage, as recorded in the bills of lading, by transporting the cargo to Lomé. The Judge felt that the reason for the proposed switch of the bills of lading was material and ought to have been disclosed to AR Lee. This appears correct to us.

103 Crédit Agricole reiterated that, as some of the bills of lading stated the discharge port as "any African port", any change of the port of discharge was only "incidental" to the "re-cutting" of the bills and that "re-cutting" the bills was the primary motive for the switch. To support this, Crédit Agricole emphasised that some cargo originally destined for Lomé was discharged at Abidjan "without the need for a switch". Ms Ang insisted that, as the main purpose in switching the bills was to "re-cut" them and not to change the port of discharge from Lomé to Douala, there had been no material non-disclosure in relation to this point.[note: 13]

104 We find this argument unconvincing. The cargo discharged at Abidjan was not and has never been the subject of proceedings in either Lomé or Singapore and is wholly immaterial to the present appeal. Further, the cargo was discharged under a letter of indemnity in Abidjan, primarily because the bills of lading stated the port of discharge as Lomé and not Abidjan. In our view, the bills of lading were not as "flexible" in relation to the discharge port as Crédit Agricole made it out to be and Crédit Agricole ought to have made it clear to AR Lee that the main objective of switching the bills of lading was to permit a change of the port of discharge.

105 In order to properly and timeously dispose of cases, the courts must be able to repose

complete confidence in counsel and unflinchingly believe that counsel have placed all material facts before them. This is particularly true in admiralty cases where time is usually of the essence and an arrest order is often made after an *ex parte* hearing. Every arrest order entails serious, and sometimes irreparable, consequences. It is for this reason that the duty to make full and frank disclosure of material facts to the court has been called an important bulwark against the abuse of the arrest process. We are not prepared to weaken this bulwark by overlooking what appears to us, in this matter, to be a grave "oversight".

Synopsis

106 Upon reviewing the supporting affidavit and examining AR Lee's notes of evidence, we are more than satisfied that Crédit Agricole failed to disclose the two material facts above. First, in relation to the *ex parte* hearing in Lomé, even if this fact could be gleaned from the exhibits, Crédit Agricole did not meet the required threshold for disclosure because it did not draw this fact to AR Lee's attention. As for the objective behind the proposed switch of the bills of lading, Crédit Agricole failed to disclose this material fact altogether. AR Lee's notes of evidence are conspicuous for the lack of any reference to the *ex parte* hearing in Lomé. His notes of evidence give an inkling of what he had been led to believe was important:[note: 14]

> For the sea-web searches, exhibited at pages 27 and 29 of your affidavit, when were these searches done? Because I notice that the information for the vessels (at pages 27 and 29) were updated in May and July 2005 respectively, but that the information for FESCO was updated in February 2006. And the search results that are exhibited do not contain the usual web address and date printout at the bottom ...

There was no attempt whatsoever to draw his attention to any of the material facts. He seems quite clearly to have focused only on the issue of the actual ownership of the *Vasiliy Golovnin* and the chartered vessel.

107 The failure to disclose the main objective for the proposed switch of the bills of lading and the fact that there had already been an *inter partes* hearing in Lomé on the same claims is, plainly put, indefensible. These are facts which should have been disclosed to the court, for the court to carefully scrutinise and scrupulously assess them, prior to any determination to arrest the *Vasiliy Golovnin* being made.

108 Nevertheless, as mentioned above (at [84]), despite the finding of material non-disclosure, this court still retains the discretion in all such cases whether or not to set aside the warrant of arrest. The nature and the reasons for the disclosure are crucial. In *Tay Long Kee Impex* ([83] *supra*), Chao Hick Tin JA noted that where there was suppression, instead of innocent omission, of the material facts, it would have to be a *special case* before the court would exercise its discretion to grant the remedy sought, notwithstanding such omission (*id* at [35]).

109 Following this, in *Treasure Valley Group Ltd v Saputra Teddy* [2006] 1 SLR 358, a case involving the setting aside of an arrest warrant on the issue of non-disclosure, Belinda Ang Saw Ean J succinctly summarised the position thus at [23]:

> When a court condemns material non-disclosure by setting aside the *ex parte* order, it does so in the public interest to discourage abuse of its procedure in an *ex parte* application. The condemnation is a reminder of the importance of dealing in good faith with the court when *ex parte* applications are made. The court retains a discretion not to set aside the arrest even though the non-disclosure is deliberate, but this discretion will only be exercised in a special

case.

110 It seems to us that the relevance of the material facts would have been plainly obvious to any reasonable solicitor who had reviewed the matter diligently. In this matter, there was more than ample time for the Banks' counsel to properly obtain instructions and ascertain the correct position. We are therefore constrained by the circumstances to conclude that this was not a case of a mere oversight. This was by no means a complex case where a pardonable mistake in assessing materiality had been made as a result of haste. Further, we see absolutely no basis to exercise our discretion in favour of excusing Crédit Agricole for its grave serial lapses. It also bears reiteration that, given our earlier decision to affirm the striking out of crucial portions of the claim that pertain directly to the arrest, this decision is, at the end of the day, really a moot point. In the result, we also dismiss Crédit Agricole's appeal on the issue of material non-disclosure.

Issue estoppel

111 A further ground relied on by AR Ang and the Judge for setting aside the warrant of arrest was issue estoppel. It is trite that a foreign judgment can give rise to an issue estoppel so as to prevent a party to that foreign action from vexing another party to that action by an attempt to re-open an issue already resolved in the foreign court. In the light of our findings on the sustainability of the claim and material non-disclosure, we do not think it is necessary to deal with this ground in any detail. We do, nevertheless, agree with the Judge's determination on this point as well as his grounds for it (at [36]–[51] of the Judge's GD).

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112 We now turn to FESCO's cross-appeal. Both the Banks are the respondents in this appeal. FESCO contends that the Banks' conduct in arresting the *Vasiliy Golovnin* evinces *mala fides* or, at the very least, *crassa negligentia*. In these circumstances, FESCO maintains that it is entitled to damages for wrongful arrest.

The test of wrongful arrest

The Evangelismos test

113 In Singapore, the law on when damages may be recovered for wrongful arrest of ships has been authoritatively and lucidly set out in *The Kiku Pacific* [1999] 2 SLR 595. M Karthigesu JA, on behalf of this court, approved the test for awarding damages for wrongful arrest that was first enunciated some 150 years ago in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 ("*The Evangelismos*") by the Privy Council ("the *Evangelismos* test"). The *Evangelismos* test sets a high threshold for damages in wrongful arrest cases. The Rt Hon T Pemberton Leigh, delivering the judgment of the Privy Council in that case, laid out the famous test in the following terms (at 359; 948):

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

[emphasis in italics and bold italics added]

Briefly, in *The Evangelismos*, the court concluded that the factual matrix "afforded ground for believing that [the arrested] ship was the one that had been in collision with the barge" (*ibid*). While that belief was ultimately shown to have been misplaced, there was also objective evidence to show that the arrest was a genuine mistake supported by an honest belief. In those circumstances, damages were not awarded.

114 Subsequent to the decision of the Privy Council in *The Evangelismos*, the English Admiralty Court, in a series of decisions that followed in quick succession, settled decisively on the principle that damages could be recovered as a result of a wrongful detention only if there was evidence of *mala fides* or *crassa negligentia*, and in a number of these decisions, damages were actually awarded. It will be helpful, for present purposes, to briefly refer to some of these decisions. They are:

(a) *The Victor* (1860) Lush 72; 167 ER 38: The plaintiff's vessel, the *Vrede*, collided with the defendant's vessel, the *Victor*. The cargo in its hold, owned by the owners of the *Victor*, was insufficient to make good the damage to the *Vrede*. The plaintiffs then obtained a warrant of arrest for both the *Victor* as well as the cargo it carried. In his subsequent decision in *The Volant* (1864) 22 Br & Lush 321 at 323; 167 ER 385 at 386, Dr Lushington noted of his judgment in *The Victor*:

> The case of *The "Victor"* (Lush. 72), which has been referred to, was one in which, in a cause of collision, the plaintiff endeavoured to make the cargo of the opposing ship liable for his loss – a mere experiment, and an experiment contrary to the long practice of the Court, and the elementary principles of law.

The court directed that the cargo be released. Damages were awarded for the cargo's improper detention.

(b) *The Cheshire Witch* (1864) Br & Lush 362; 167 ER 402: The *Cheshire Witch* had been "arrested in a cause of damage" (at 362; 402). The defendant shipowner could not procure bail and the vessel remained under arrest until the cause was heard. Judgment with costs was then entered for the defendant shipowner. Although the plaintiff did not file a notice of appeal, he applied to court and obtained an order for the vessel to be detained for a further period of 12 days while he considered whether to appeal. At the end of that period, the plaintiff decided not to appeal. The vessel was released on the following day. The defendant shipowner then claimed damages for that period of 12 days. The court observed that the plaintiff had no cause of action and that the additional period of 12 days of the arrest had "operated very severely" on the shipowner (*ibid*). While not using the term *mala fides* or *crassa negligentia*, Dr Lushington, who decided *The Evangelismos*, at the first instance, had no qualms in ordering damages to be paid. More recently, Colman J in *The Kommunar (No 3)* [1997] 1 Lloyds Rep 22 at 30 pertinently observed:

> *The Cheshire Witch* must be treated as a case where, following judgment against the plaintiff, an appeal was manifestly so hopeless as to deprive the plaintiff of all reasonable grounds for continuing the arrest.

(c) *The Cathcart* (1867) LR 1 A & E 314: In this case, the parties were involved in a financial scheme, including a mortgage, involving a vessel. The defendant shipowner obtained a direction from a magistrate ordering the plaintiffs to allow the vessel to remain in the defendant's possession. Notwithstanding this, the plaintiffs arrested the vessel, *inter alia*, on grounds of non-

payment under the terms of the mortgage. It transpired that the contractual arrangements clearly did not support such a claim. Distinguishing *The Evangelismos* on its facts but nevertheless applying its principle, Dr Lushington held that it must have been obvious to the plaintiffs that they had arrested the vessel when no moneys were due to them. Further, the plaintiffs arrested the vessel just "on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim" (at 333). The court held the plaintiffs liable for damages and costs. This case suggests that a gross mistake can amount to *crassa negligentia*.

(d) *The Margaret Jane* (1869) LR 2 A & E 345: In this case, a "receiver of wreck" had valued a salved vessel at £746 and salvors thereafter commenced proceedings in the admiralty court for £2,500. The salvors subsequently applied for an appraisement of the vessel and eventually abandoned the claim. The shipowners claimed damages for wrongful arrest on the ground that when the salvors instituted the suit, they were aware that the admiralty court had no jurisdiction as the value of the property salved was below £1,000. After referring to the *Evangelismos* test as stating the applicable law, Sir R Phillimore held that there was no *mala fides* in this case, but that the salvors must have been aware, within a short time of taking out the appraisement application, that the value fixed by the receiver was substantially correct, and they were therefore liable in damages in respect of the period of time from such point of time until they released the vessel (at 346). Sir Phillimore did not make an express finding on whether the salvors' conduct amounted to *crassa negligentia*; in fact, he said he thought it might be harsh to say that the salvors were guilty of *crassa negligentia* in the given circumstances (*ibid*). This case demonstrates that damages may be awarded in some instances where it must have been so clear to the arrestor that there was simply no basis for detaining a ship.

115 Most of the above cases were considered more recently by Colman J in *The Kommunar (No 3)*, where he gave the modern formulation of the *Evangelismos* test. His decision in this case also best demonstrates the high threshold set by the *Evangelismos* test (see also Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (Routledge-Cavendish, 2nd Ed, 2007) ("*Modern Maritime Law*") at p 122). In an earlier judgment (see *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8), Colman J had set aside the arrest of the vessel, the *Kommunar*, on the basis that there the court had no jurisdiction to entertain proceedings *in rem* against the vessel, given that "the defendant owners at the time of the arrest ('AOL') were not the same legal entity as the owners, charterers or party in possession of the vessel when the cause of action arose against them in the period December, 1991 to August, 1992, ('POL')" (*The Kommunar (No 3)* at 24). The change in legal entity was a result of privatisation of POL under the Russian Federation privatisation legislation. Despite this finding, the shipowners failed in their claim for damages for wrongful arrest in *The Kommunar (No 3)*. Colman J reasoned that, on the evidence, there was no proof of *mala fides* or *crassa negligentia* on the part of the plaintiffs as he found it "quite impossible to say that it should have been obvious to the plaintiffs or their advisers that the claim to English jurisdiction was bound to fail" given the "relatively complicated nature of [the Russian] privatization [process]" and that the "resolution of the issue involved relatively complicated matters of analysis of the Russian legislation" (*id* at 31). In arriving at his conclusion, Colman J considered the *Evangelismos* test and held that it essentially envisaged two types of cases that the courts would award damages for wrongful arrest of ships (at 30):

Two types of cases are thus envisaged. *Firstly, there are cases of mala fides, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel.* It is, as I understand the

judgment [in*The Evangelismos*], in the latter sense that such phrases as "crassa negligentia" and "gross negligence" are used and are described as implying malice or being equivalent to it. The reference at the end of the passage from the judgment just cited to there being circumstances which afforded grounds for believing that the arrested ship was the one that had been in collision suggests that if on the evidence there is a genuine but understandable mistake as to the identity of the vessel, that will not amount to crassa negligentia. Taking the judgment as a whole, it would not appear that mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to [*crassa negligentia*] in the sense there used. [emphasis added]

116 Colman J's above formulation of the *Evangelismos* test was referred to approvingly by the English Court of Appeal in the subsequent case of *Gulf Azov Shipping Co Ltd v Idisi* [2001] 1 Lloyd's Rep 727 ("*Gulf Azov Shipping*") at 735 as "this exposition of the modern law" (see also Sarah C Derrington & James M Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2007) at para 7.72). This appears to be the latest English case that has touched on the topic of damages arising from wrongful arrest. In *Gulf Azov Shipping*, the claim for wrongful arrest succeeded as there was clear evidence of *crassa negligentia*. The first plaintiff's ship was arrested on 6 August 1997 by the defendants in Nigeria for an alleged claim of US$17m for lost cargo. In an application for the release of the vessel, the High Court in Lagos decided that the defendants' best arguable case was a claim in the sum of US$1m, and ordered that the ship be released on the strength of a security of US$1m that the first plaintiff's P&I club was willing to furnish by way of a letter of undertaking. Unfortunately, the ship was not released until much later on 9 May 1999, following an impasse in subsequent legal proceedings in Nigeria. After the release of the vessel, the plaintiff commenced an action for damages for wrongful arrest in England. On a summary judgment application, the English Court of Appeal held that as the defendants were clearly aware that their claim for US$17m was not sustainable, there was plainly no defence to the first plaintiff's action and that the first defendant could be said to have "acted without any serious regard to whether there were adequate grounds for continuing the arrest" (at 738). Accordingly, the court awarded damages.

117 Colman J's modern formulation of the *Evangelismos* test, together with the famous passage from the Rt Hon T Pemberton Leigh's judgment in *The Evangelismos*, were both cited with approval by Karthigesu JA in *The Kiku Pacific* ([113] *supra* at [14] and [17]). As mentioned, this court (at [30]) made it plain that in Singapore:

> [T]he test is that laid down by the Rt Hon T Pemberton Leigh in *the Evangelismos* of mala fides or gross negligence implying malice. In the context of the appeal, the question would be this; in bringing the action against the owners, did Fal [the arresting party] know or honestly [believe] that they could not legitimately arrest the ship so as to imply malice, or in arresting the vessel, did Fal fail to apply their mind as to whether they could legitimately arrest the vessel, and nevertheless [proceeded] to arrest the vessel because Fal [were] bent on putting pressure on the owners to accede to their demand, so as to imply gross negligence; and in refusing the security offered by the owners in March 1996, was Fal's refusal malicious or grossly negligent.

Some perceived problems with the Evangelismos test

118 Despite being decided some 150 years ago, the *Evangelismos* test continues to also prevail in several other parts of the Commonwealth, including Canada (see the decision of the Canadian Supreme Court in *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617 ("*Armada Lines Ltd*")), New Zealand (see the decision of the New Zealand High Court in *Mobil Oil New Zealand Ltd v The ship "Rangiora"* [2000] 1 NZLR 49 ("*Mobil Oil New Zealand Ltd*"); and Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (The Federation Press, 2nd Ed, 2003)

("*Law and Practice in Australia and New Zealand*") at p 151), Hong Kong (see the decision of the Hong Kong Court of Appeal in *The Maule* [1995] 2 HKC 769) and, of course, the United Kingdom (as referred to above). (See generally Michael Woodford, "Damages for Wrongful Arrest: Section 34, Admiralty Act 1988" (2005) 19 MLAANZ Journal 115 ("Woodford's article"), which provides a helpful survey of the international jurisprudence concerning wrongful arrest.) It appears to us that *mala fides* or *crassa negligentia* also continues to be the basis for the award of damages for wrongful arrest in the United States of America (see *Frontera Fruit Co, Inc v Dowling* 91 F 2d 293 (5th Cir, 1937) at 297; see also Woodford's article at 132 and Thomas J Schoenbaum, *Admiralty and Maritime Law* (Thomson West, 4th Ed, 2004) at pp 1091–1092).

119 The high threshold set by the *Evangelismos* test appears to have deterred many shipowners, including possibly even deserving ones, from pursuing claims for wrongful arrest. Indeed, this is reflected in the paucity of cases on wrongful arrest in England in the 20th century; after *E L Poulson v The Remaining Owners of the Schooner Village Belle* (1896) 12 TLR 630, a late 19th century case, the issue of damages for wrongful arrest did not arise again for consideration in the English courts until several decades later in *Astro Vencedor Compania Naviera SA of Panama v Mabanaft GmbH* (*The Damianos*) [1971] 2 QB 588 (see Woodford's article at 125). Given the dearth of claims, it is unsurprising that Lord Denning MR lamented in the latter case (at 595) that "[t]here have not been many claims for wrongful arrest recently".

120 Aside from deterring deserving shipowners from pursuing wrongful arrest claims, the difficulties in making out such claims have also given rise to some concerns that an arrest may be procured with impunity on insubstantial grounds so long as there is no malice or gross negligence (see *Admiralty Law and Practice* ([39] *supra*) at p 185). This is because the *Evangelismos* test is so plaintiff-oriented that the risk of having to pay damages, even if the arrest turns out to be unjustified, is so minimal that the plaintiff hardly ever needs to be concerned about it. Cases like *Gulf Azov Shipping* ([116] *supra*), where there is clear evidence showing either malice or *crassa negligentia*, are rare and "[t]he problem of discharging the burden of proof of wrongful arrest lies with the run-of-the-mill cases" (*Modern Maritime Law* ([115] *supra*) at p 123). The one-sidedness of the *Evangelismos* test seems especially harsh when one takes into consideration the fact that shipowners may suffer substantial financial losses through the arrest of their ships, even if a brief delay of a few hours is caused to the ship's sailing schedule (see *Admiralty Jurisdiction and Practice* ([83] *supra*) at para 4.29; Woodford's article at 115). Although costs may be awarded to an aggrieved shipowner against a frivolous litigant, such costs awarded, more often than not, do not sufficiently compensate the sometimes severe financial loss that flows from the disruption of the commercial activities of the arrested ship (*Admiralty Law and Practice* ([39] *supra*) at pp 185–186). The potential enormity of the losses that may be caused by an arrest may also assert significant commercial pressures on a shipowner to settle any claim, regardless of its merits (Woodford's article at 115). These problems have, in fact, prompted the governments in some commonwealth countries to take action.

121 In Australia, the government had in 1982 referred all aspects of admiralty jurisdiction, including the traditional test for obtaining damages for wrongful arrest, to the Australian Law Reform Commission ("ALRC") for review and recommendation (see ALRC, *Civil Admiralty Jurisdiction* (Report No 33, 1986) ("ALRC's report")). The result of this is the present s 34 of the Admiralty Act 1988 (Act No 34 of 1988) (Cth), a provision proposed by the ALRC (after undertaking a comprehensive review of the problems raised above), which specifically provides in sub-s (1)(a)(ii) for damages to be awarded to shipowners when a plaintiff "unreasonably and without good cause" arrests a ship:

34 Damages for unjustified arrest etc.

(1) Where, in relation to a proceeding commenced under this Act:

(a) a party *unreasonably and without good cause*:

(i) demands excessive security in relation to the proceeding; or

(ii) *obtains the arrest of a ship or other property under this Act*; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is *liable in damages* to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

(2) The jurisdiction of a court in which a proceeding was commenced under this Act extends to determining a claim arising under subsection (1) in relation to the proceeding.

[emphasis added]

By premising liability on unreasonableness and a lack of good cause, the present Australian test for wrongful arrest makes it ostensibly less onerous for shipowners to succeed in their claims, given that there is no longer a need to establish an absence of *bona fides* or *crassa negligentia* anymore (see *The Laws of Australia* (Thomson Lawbook Co, Looseleaf Ed, 1993) in vol 34 (John Livermore ed) at para 104; D A Butler & W D Duncan, *Maritime Law in Australia* (Legal Books, 1992) at para 3.2.18; D J Cremean, "Mala Fides or Crassa Negligentia?" [1998] LMCLQ 9 at 11).

122 Besides Australia, the test in Nigeria and South Africa for wrongful arrest is also specifically enacted in legislation and is tied to the concept of reasonableness and the existence of a good cause (see s 13 of the Admiralty Jurisdiction Decree (No 59 of 1991) (Nigeria) and s 5(4) of the Admiralty Jurisdiction Regulation Act (No 105 of 1983) (S Africa); see also generally Woodford's article at 138–140). In fact, s 34 of the Australian Admiralty Act 1988 was motivated by s 5(4) of the South African Admiralty Jurisdiction Regulation Act 1983 (see ALRC's report at para 302), though their spans are slightly different (see *The Law and Practice of Admiralty Matters* ([116] *supra*) at para 7.75). The test for awarding damages for wrongful arrest therefore now varies across the Commonwealth. It is perhaps pertinent to note here (in passing) that an even more liberal approach has been adopted by many civil law countries where the arrestor is simply held liable for damages once it is shown, without more, that the arrest was unjustified (see generally Woodford's article at 126–127).

The rationale behind the Evangelismos test

123 Given the real, as well as perceived, problems of the *Evangelismos* test, what then is the rationale behind this strict rule that has withstood the test of time in many Commonwealth countries? We note that the judgments that have applied the *Evangelismos* test have no, or hardly any, discussion of the origin or rationale of the rule and have simply accepted the Rt Hon T Pemberton Leigh's hallowed passage in *The Evangelismos* (see [113] above) as correctly stating the law for time eternal. To begin with, it is unclear from the very brief judgment of the Rt Hon T Pemberton Leigh on what basis he arrived at the formulation of the test. He, in fact, made no reference to any authorities in his judgment, not even to the cases raised by counsel. However, some light as to what he might have had in mind may perhaps be gleaned from his discussion of the arguments for and against the award of damages in the preceding paragraphs just before his famous passage (at 358–359; 948):

It is urged by the Appellant that damages ought also to have been awarded, as the rule of the

Admiralty Court is, that the party who has sustained injury has a right to be indemnified. *On the other hand it is said that the arrest of the ship, in this case, was the foundation of the action, and it is only for the purpose of founding the action that the ship was arrested, and therefore, the arrestment of the ship cannot be said to be an illegal or improper act, except to the extent of bringing the action*. [emphasis added]

124 Indeed, at the time when *The Evangelismos* was decided, *in rem* proceedings were begun by warrant of arrest and the jurisdiction of the admiralty court was properly invoked only upon the arrest of the ship (see *The Volant* ([114] *supra*) ; *Admiralty Jurisdiction and Practice* ([83] *supra*) at para 4.26; see also Shane Nossal, "Damages for the wrongful arrest of a vessel" [1996] LMCLQ 368 ("Nossal's article") at 376). Since the arrest of the ship constituted the commencement of an action then, a high threshold was required for wrongful arrest so as to protect plaintiffs who were unable to prove their claims on a balance of probabilities from liability for damages, and such liability would logically only arise in situations analogous to malicious prosecution, where the action was commenced with malice and without reasonable or probable cause (*ibid*); malice and no reasonable or probable cause are, *inter alia*, two essential elements of the tort of malicious prosecution (see the decision of this court in *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 3 SLR 121 at 137, [61]; W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 17th Ed, 2006) at paras 19–12, 19–7–19–10; and Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press, 6th Ed, 2008) at pp 475, 478–479). It has thus been said that the origin of the admiralty action for wrongful arrest is that of the common law action for malicious prosecution or that wrongful arrest is closely associated with malicious prosecution (see *The Walter D Wallet* [1893] P 202 at 205–207; *The Ohm Mariana* [1992] 2 SLR 623 at 637, [48]; and David Chong Gek Sian, "Wrongful Arrest in Actions in Rem" [1990] 1 MLJ lxxiii at lxxiii).

125 However, it has often passed unnoticed that the enactment of the Supreme Court of Judicature Act 1873 (c 66) (UK) and the Supreme Court of Judicature in England changed the practice of commencing admiralty proceedings with the introduction of the writ of summons. Since then, admiralty proceedings have been commenced by the issue of an admiralty writ *in rem* (now known as "*in rem* claim forms" in England) and the jurisdiction of the admiralty court is invoked by the service of that writ (see *Admiralty Jurisdiction and Practice* at para 4.26; and also Nossal's article at 376). Given this fundamental change in circumstances, *ie*, that the historical reason for having a high threshold test for wrongful arrest is now no longer valid, it has been searchingly queried if the *Evangelismos* test should still prevail, as pointed out by Shane Nossal (*id* at 376–377):

> Although the right to arrest the *res* "goes hand in hand" with the action *in rem*, the functions of the writ and the warrant for arrest are distinct and the two procedures do not have to be taken together to prosecute an action *in rem*. *Proceedings* in rem *can continue, and judgment in default in an action* in rem *may be taken, without the arrest of the* res *proceeded against*.
>
> *As a consequence of this development, the law ought not to perpetuate the now false analogy between malicious prosecution and damages for wrongful arrest*. If an action *in rem* is wrongfully commenced, then the rights and liabilities of the parties ought to be determined in accordance with principles of malicious prosecution. However, the arrest of a vessel, a step irrelevant to the commencement of the action *in rem* and taken to obtain pre-judgment security, is an interference with the property rights of the vessel's owner. If that arrest is wrongfully made, then the rights and liabilities of the parties ought to be determined in accordance with principles more compatible with the protection of property interests.
>
> [emphasis added]

126 With this historical background in mind and in the light of the legislative reforms undertaken by some other Commonwealth countries, it may be rightly asked if the *Evangelismos* test, which appears conceptually anachronistic, should continue to be the governing rule for wrongful arrest in Singapore. Should not a lower threshold be adopted instead? The test of "reasonable or probable cause", which was endorsed by G P Selvam JC in *The Ohm Mariana* has, in fact, been categorically rejected by Karthigesu JA, on behalf of this court, in *The Kiku Pacific* ([113] *supra* at [27]–[30]), on the (apparent) basis of the historic pedigree of the *Evangelismos* test and the need for international uniformity.

127 In *The Ohm Mariana*, Selvam JC, relying on the decisions in *Mitchell v Jenkins* (1833) 5 B & Ad 588; 110 ER 908 and *The Walter D Wallet*, and noting that the cause of action for wrongful arrest was akin to that of malicious prosecution or abuse of legal process in general, declared (at 637, [49]) that:

> The true basis of the claim [for wrongful arrest] … is, to use the common law phrase, 'without reasonable or probable cause', and to use the admiralty language '*crassa negligentia* or *mala fides*'.

Karthigesu JA pointed out in *The Kiku Pacific* (at [29]) that Selvam JC's reliance on these two cases were misplaced given the differences in context and that the importation of the term "reasonable or probable cause" would cause confusion and, more importantly, dilute the threshold required for an action in wrongful arrest to succeed. Interestingly, we note that Selvam JC had imported "without reasonable or probable cause", one of the required elements of malicious prosecution, into the action for wrongful arrest, but not the other element of malice (see [124] above). He appeared to take the view that the phrase "without reasonable or probable cause" would also encompass *crassa negligentia* or *mala fides* in the admiralty context (see his quoted sentence above). Nevertheless, Selvam JC had also referred to the Rt Hon T Pemberton Leigh's famous passage in *The Evangelismos* approvingly (at 636, [44]) and nowhere in his judgment did he hint that the threshold set by the *Evangelismos* test was too high. The award of damages in *The Ohm Mariana* for wrongful arrest was also based on Selvam JC's finding that there was malice on the part of the plaintiffs (at 637, [53]). As such, in our opinion, it is doubtful if Selvam JC had, in the first place, intended to lay down a less stringent test in *The Ohm Mariana* based on without reasonable or probable cause, identical to that adopted in Australia or South Africa. That aside, we note that counsel for FESCO, Mr Steven Chong SC, has not attempted to argue before us that the present high threshold set by the *Evangelismos* test has been problematic for the ship-owning community.

128 As pointed out earlier, the criterion in the *Evangelismos* test (see [113] and [115] above) is not an easy standard to satisfy, bearing in mind that the historical basis for this test appears to be the common law doctrine underpinning malicious prosecutions, which pre-dated the evolution of the tort of negligence. The high threshold also means that sometimes, even weak claims can be brazenly pursued by claimants arresting a vessel without fearing any serious financial repercussions arising from a wrongful arrest. The claimant, so long as it has an "honest" belief, faces no jeopardy even if it is plainly negligent. While we agree that plausible claims should not be stifled, it is clearly not desirable in the wider public interest that really implausible claims be allowed to be indiscriminately mounted with impunity. Litigants and their solicitors have an overriding responsibility to the courts not to pursue draconian remedies like Anton Pillar orders, Mareva injunctions and ship arrests, unless they honestly believe with good reason that they have plausible claims.

129 In fact, the similarity between admiralty arrest and the relief provided by Mareva injunctions was noted by Heald JA at the Federal Court of Appeal in the Canadian case of *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1995] 1 FC 3 at 20, where he commented that "[i]n each instance, the onus

is undoubtedly cast upon the plaintiff to show that the arrest requested is necessary for the protection of its rights". Although there was no express requirement in the relevant Canadian rules that an undertaking in damages be given for arrest of vessels unlike for Mareva injunctions, Heald JA was of the view that damages for wrongful arrest would be available on the same basis that damages would be available in the case of an improper Mareva injunction being obtained and held that it was a "necessary inference" that the plaintiff, who seeks the arrest, must carry the risk and burden of an illegal arrest, and the consequences flowing therefrom (at 19–20) (see also the case note by Robert Margolis, "Damages for the Wrongful Arrest of a Vessel: The Venerable Rule Confirmed" [1998] LMCLQ 11 ("Margolis' case note") at 12). The Supreme Court of Canada, however, reversed the Federal Court of Appeal's decision to award damages to the shipowner in *Armada Lines Ltd* ([118] *supra*), given that there was an absence of bad faith or gross negligence below. The Supreme Court did not accept (but not without sympathy) the respondent's argument for an award of damages based on the similarities between the maritime arrest procedure and the seizure of assets pursuant to a Mareva injunction for the ultimate reason that "the common law only imposes liability for damages flowing from the arrest of property if the plaintiff acted with either *mala fides* or *crassa negligentia*" (*Armada Lines Ltd* at [24]). However, Iacobucci J, delivering the judgment of the Supreme Court, did not deny that the two were, in fact, substantively similar (at [23]):

> In asking this Court to depart from the *Evangelismos* rule, the respondent focused on the similarities between the maritime arrest procedure, on the one hand, and the seizure of assets pursuant to a *Mareva* injunction, on the other. *And, indeed, in substance, the two orders are not dissimilar: both the admiralty arrest and the* Mareva *injunction restrain a defendant from dealing with his or her property prior to judgment*. [emphasis added]

130 The ALRC, in its report, has also commented that a less onerous test based on reasonability and existence of a good cause will "[strike] a fairer balance between plaintiff and defendant" and "[conform] to the principles upon which Mareva injunctions are granted", given that "[a] central concern in the development of such injunctions as a remedial device has been to strike an equitable balance between the interests of the plaintiff and defendant" (ALRC's report ([121] *supra*) at para 302). Admittedly, Mareva injunctions and ship arrests differ in some respects (see *Admiralty Jurisdiction and Practice* ([83] *supra*) at para 1.53; and the Supreme Court of Canada's judgment in *Armada Lines Ltd* at [23]–[24]), but undeniably, they both serve the same ultimate purpose (as pointed out by Iacobucci J) of restraining a defendant from dealing with his or her property before judgment is given. It seems to us only logical that the law should incline in future towards a common test for damages arising from the wrongful solicitation of any *ex parte* peremptory remedy. For now, however, the ship arrest cases stand alone as a separate category.

131 Despite the conceptual difficulties and criticism of the *Evangelismos* test, it may, on the other hand, arguably be said to serve a wider economic or policy purpose. It has been noted by a writer that cargo claimants face new difficulties these days in "trying to bring their actions in a convenient, that is local, forum, given the prevalence of exclusive jurisdiction clauses expressly contained in bills of lading or incorporated by reference therein" (Margolis' case note at 14). A reasonably high threshold for wrongful arrest is thus arguably justified on the basis that aggrieved claimants require friendly forums to initiate actions. Additionally, shipping is inherently international in nature, and international comity (in the area of admiralty law) may be another factor why the *Evangelismos* test should be maintained, though this reason may be increasingly harder to defend given that some Commonwealth countries have already departed from the test, and many of the civil law countries, to begin with, always had a much lower threshold test for wrongful arrest. Practically speaking, although the admiralty jurisdiction of the court now can be invoked without an arrest being made, the arrest of the ship provides security for the claim which cannot be defeated by insolvency and makes it exclusively available only to maritime claims (*Admiralty Jurisdiction and Practice* at

paras 1.53 and 4.28; *Admiralty Law and Practice* ([39] *supra*) at p 163). An unexpected arrest is undeniably the most effective means of requiring a shipowner to furnish some other type of security to ensure the swift release of its vessel. In today's modern world, with the advent of marine insurance and P&I clubs, there is usually no difficulty furnishing some other form of security, such as a letter of undertaking from a P&I club to secure the release of one's vessel. In fact, it seems more often than not in practice that the mere threat of an arrest will be sufficient to invoke the owners of the ship threatened with arrest into providing a voluntary security, and no actual arrest usually takes place after that (*Admiralty Jurisdiction and Practice* at para 4.27).

132 At the end of the day, the formulation of an appropriate benchmark boils down to trying to strike a fair balance between shipowners on the one hand, and the potential maritime claimants on the other. We note that in the Commonwealth countries that have departed from the *Evangelismos* test (see [121]–[122] above), the reforms have all been brought about by the legislature and not the courts. In *Armada Lines Ltd*, Iacobucci J, delivering the judgment of the Canadian Supreme Court, acknowledged that the *Evangelismos* test could be out of step with modern developments in the common law, but declined to depart from it. He was of the view that any change to the law should be brought by the legislature and not the courts (at [26]–[27]):

> *[I]n my view, any such change in the law falls not to the courts, but rather to the legislature to carry out*. As noted above, the rule in *The "Evangelismos"* is of long standing. *Whether it does or does not operate harshly upon defendants is a question best resolved by the legislature*. As this Court said in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at p. 531:
>
> > ... whether this regime is responsive to modern realities is a question of policy to be determined by Parliament and not the courts whose task is to interpret and give effect to the intention of Parliament.
>
> In this regard, I note that, apparently alone among the common law jurisdictions, Australia has departed from the rule in *The "Evangelismos"*. Section 34(1)(a)(ii) of the Australian *Admiralty Act 1988*, No. 34 of 1988, provides that a party may recover damages arising out of the arrest of property if the arrest was obtained "unreasonably and without good cause". As pointed out by counsel for the appellant, this change was effected not through judicial means, but rather by specific legislative enactment. *In my opinion, any analogous change in Canadian law must originate in the legislative branch of government*. For these reasons, in my view, the rule in *The "Evangelismos"* remains good law in Canada.
>
> [emphasis added]

133 Likewise, in New Zealand, Giles J in *Mobil Oil New Zealand Ltd* ([118] *supra*), expressed the view that it would be for the legislature to rebalance the odds which disproportionately favour the plaintiffs (at 65):

> In my view, the situation is rather unsatisfactory for ship-owning or chartering interests. In this jurisdiction, unlike our Australian counterparts, a plaintiff arresting a ship has little real vulnerability for the economic consequences visited upon an owner. Damages for wrongful arrest may only be recovered where the arrest has been procured with malice. … The situation for an owner is not so bleak in Australia where, as noted, the federal admiralty legislation imposes a liability for damages for unreasonable arrest on parties procuring the arrest of a ship. The test of unreasonableness is a much lesser burden than the test of malice. *In my view, a case can be made out for a legislative rebalancing of odds which disproportionately favour plaintiffs in this jurisdiction*.

In making these observations I acknowledge that our jurisdiction is modelled on the English system which has an ancient heritage. Arrest has always been a very powerful remedy recognised in most jurisdictions – malice is the measurement of English law in wrongful arrest actions. The need for international consistency is, as McGechan J observes in the *Samarkand* [*Baltic Shipping Co Ltd v Pegasus Lines SA* [1996] 3 NZLR 641], deserving of consideration. But, in my view, we ought not to allow that factor to deter reform where the interests of justice so require.

[emphasis added]

134 We would agree with the views of both Iacobucci J and Giles J to the extent that the *Evangelismos* test is long-standing, and should not be departed from lightly, without good reasons and due consideration. However, it is always open to this court to depart from this judicially-created test if the day comes when it no longer serves any relevant purpose. Having examined the genesis of the *Evangelismos* test and its current application in Singapore, we shall for now leave this issue to be addressed more fully at a more appropriate juncture. We are prepared to reconsider the continuing relevance and applicability of the *Evangelismos* test when we have had the benefit of full argument from counsel as well as the submissions of other interested stakeholders in the maritime community in the form of Brandeis briefs. For the present appeal, as will be demonstrated shortly, the outcome reached by this court would nonetheless be the same whether the *Evangelismos* test or a less onerous test is applied.

The proper application of the Evangelismos test

135 Before we elaborate on what we think should be the right and proper application of the *Evangelismos* test, we note briefly that, notwithstanding the high threshold set by the test, there have been quite a few instances in Singapore in recent times where it has been demonstrated that, in appropriate circumstances, the local courts would not be slow to find wrongful arrest and to award damages on the *Evangelismos* test (see *Admiralty Law and Practice* ([39] *supra*), at p 185, fn 240; see also *The Trade Resolve* [1999] 4 SLR 424; *The Dilmun Fulmar* [2004] 1 SLR 140; *The AA V* ([84] *supra*); *The Inai Selasih* [2005] 4 SLR 1). Two examples will suffice to illustrate this point:

(a) In *The Dilmun Fulmar*, the court awarded damages for wrongful arrest on the basis that the arrest was effected without an honest belief that the arrest was legitimate. In that case, the plaintiffs arrested the vessel for unpaid repairs. Subsequently, the plaintiffs reached a settlement with the shipowner under which the shipowner agreed to pay for the repairs in instalments. On the basis of the settlement agreement, the vessel was released from arrest. The shipowner later defaulted on the instalment payments. The plaintiffs then re-arrested the vessel on the basis of the original claim. The court held that the writ and second warrant of arrest did not reflect the true cause of action which was to enforce the terms of the settlement agreement (at [14]). The arrest in such circumstances was *mala fide* and an abuse of process because the original cause of action had been superseded by the settlement agreement.

(b) Damages for wrongful arrest can also be awarded if the plaintiff's non-disclosure of material facts is found to be deliberate or malicious. In *The AA V*, the plaintiffs supplied the defendants' tug with marine gas oil. The plaintiffs claimed for the balance of the price of the supply and arrested the tug. The defendants applied to have the writ struck out and the arrest set aside, and claimed damages for wrongful arrest. The assistant registrar who heard the application struck the writ out and set aside the arrest. Damages, however, were not awarded. On appeal, Prakash J held, *inter alia*, that the plaintiffs' non-disclosure of material facts was intentional and malicious, or at the very least, grossly negligent. They had recklessly arrested the

tug without ascertaining whether the defendants were in fact contractually liable to pay for the marine gas oil. The plaintiffs had also left out relevant material when they secured the arrest of the defendants' tug. This information had not been disclosed to the court "so that a proper assessment of the correctness of their claim could be made. Instead, they deliberately chose to leave out all information which would have caused doubt as to whether the defendants were the persons who would be liable in an action in personam" (at [50]). On that basis, the court awarded damages to the defendants for the wrongful arrest of their tug.

136 Reverting to the proper application of the *Evangelismos* test, we note that in many of the cases that have applied the test, the courts have always placed emphasis on the first part of the Rt Hon T Pemberton Leigh's famous passage at 359 (*ie*, "[u]ndoubtedly there *may* be cases in which there is either *mala fides*, or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained" [emphasis added]), focusing on the words *mala fides* and *crassa negligentia* (see also Nossal's article ([124] *supra*) at 369–370). A plain reading of that part merely suggests that he was of the view that, in cases involving *mala fides* or *crassa negligentia*, damages would naturally be awarded, especially given that he had used the word "may" at the start of the statement. It appears that the real focus of the test (if any) he had in mind is that found in the second part of his passage which begins with the opening words "[t]he *real question* in this case … comes to this" [emphasis added], *viz*, whether "the action was so unwarrantably brought, or brought with so little colour, or so little foundation" that it implies malice or gross negligence on the plaintiff's part.

137 In most cases, the fact that the *in rem* action (together with the arrest) was "so unwarrantably brought, or brought with so little colour, or so little foundation" would probably mean that there has been *mala fides* or *crassa negligentia* on the part of the plaintiff. The two may perhaps be said to be plainly apparent in most cases where the facts are clear, but we are of the view that where the focus or emphasis lies during the inquiry may prove to be determinative in other more difficult cases where it is hard to put a finger as to whether there is or there is no *mala fides* or *crassa negligentia* on the part of the plaintiff, but where it is clear that the arrest was wholly unwarranted in the circumstances at the time when the arrest was sought. Focusing on the first part of the passage (see [136] above) would mean that the inquiry would be both an objective and a subjective one into the plaintiff's state of mind at the time of the arrest as there would be a need to establish if the plaintiff had a genuine and honest belief that the arrest was legitimate then. On the other hand, if the focus is on the second part of the passage, this would mean a more objective inquiry into the circumstances prevailing and the evidence available at the time of the arrest, so as to determine if the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that they were brought with malice or gross negligence. The answer to this question may also, depending on the facts of the case, lead to an objective finding of the subjective intention of the plaintiff at the time of the arrest. In situations involving the more difficult cases as mentioned above, this approach could prove determinative as to whether damages should be awarded to the shipowner. In our view, this is indeed the correct approach, and the inquiry of wrongful arrest should be focused on the question of whether the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence on the plaintiff's part.

138 However, it should also always be borne in mind that the decision to award damages for wrongful arrest should never be lightly made. In *The Inai Selasih* ([135] *supra*), Chao Hick Tin JA had quite rightly cautioned at [32] that just because a plaintiff had been wrong in its interpretation or perception of events, it did not follow as a matter of fact that there was a lack of an honest belief and that the court should award damages. As mentioned, in assessing the facts, the courts must consider first and foremost whether the action and the arrest were brought "unwarrantably" or with

"little colour" or with "little foundation". This may include situations where there may be material non-disclosure in the affidavit in support of the warrant of arrest (see *The AA V* ([84] *supra*)), and where the writ of summons does not disclose a reasonable cause of action (see *The Cathcart* ([114] *supra*); *The Dilmun Fulmar* ([135] *supra*)). Further, the *Evangelismos* test calls for the objective assessment of the subjective intention of the arresting party, and this is to be objectively determined by reference to all the material facts (see [137] above).

Whether damages for wrongful arrest should be awarded to FESCO

139 Reverting to the case at hand, in assessing the viability of the grounds underpinning the issuance of the warrant of arrest, both AR Ang and the Judge concluded that the Banks had honestly believed that they had valid claims against FESCO which had not been protected in the course of the proceedings in Lomé. As such, they should not be required to pay damages for wrongful arrest. The Judge observed at [75]–[76] of the Judge's GD:

> FESCO contended that an inquiry as to whether the banks ought to be ordered to pay damages for wrongful arrest might begin with their pleaded cause of action, which was premised on the assertion that FESCO was in breach of contract in proceeding to Lome and discharging the cargo there despite instructions from them to discharge the said cargo at Douala. *However, AR Ang found that, as the banks had honestly believed that they had valid claims against FESCO that had not been protected at Lome, they should not be required to pay damages for wrongful arrest*. She pointed out that in *The Inai Selasih*, Chao Hick Tin JA had noted at [32] that where an applicant has been wrong in its interpretation or perception of arrangements, it does not follow that there is malice. As for non-disclosure of material facts, which can lead to an award of damages for wrongful arrest if it was intentional or malicious, a point reiterated in *The AA V* [2001] 1 SLR 207, *AR Ang found that the banks' non-disclosure in the present case was neither deliberate nor calculated at misleading or distorting the truth*.
>
> I accept AR Ang's reasoning and saw no reason why she should be overruled on the issue of damages for wrongful arrest. As such, the appeal against her refusal to order damages for wrongful arrest of the *Vasiliy Golovnin* in RA No 216/2006 is dismissed.
>
> [emphasis added]

140 In our view, both the Judge and AR Ang erred in concluding that wrongful damages could only be recovered if the non-disclosure was either deliberate or calculated to mislead. This is not quite correct. In our view, if material facts are not disclosed because of gross negligence or recklessness, damages for wrongful arrest may also be recovered. Further, it appears that the lower courts had entirely failed to factor in the considerations that the claim for the alleged failure to comply with the Banks' instructions was an abuse of process because there was no cause of action and, in any event, issue estoppel prevented this matter from being relitigated.

141 We have, after careful consideration, also taken a contrary view of the proper inferences to be drawn from the prevailing circumstances. On the facts, we are satisfied that the *Evangelismos* test has been satisfied. After examining the relevant documents and assessing Crédit Agricole's conduct, we conclude that there are at least three good reasons why the Banks' *in rem* claim and the arrest of the ship should be viewed as having been initiated "so unwarrantably" or with "so little foundation", that, in the present circumstances, they amounted, at the very least, to *crassa negligentia*. First, Crédit Agricole unreasonably persisted in arresting the sister ship of the chartered vessel in Singapore after its claim had been disposed of in Lomé, notwithstanding that the Lomé court had already ruled that sufficient security had been provided for the loss and damage to its cargo

claims. Second, the breach of contract claim, as we have pointed our earlier, is entirely without substance or, indeed, any foundation whatsoever. Third, the Banks failed to disclose material facts in the *ex parte* hearing before AR Lee. It appears clear to us that the Banks' conduct in initiating the arrest could not, after taking account all the circumstances, be fairly said to be the result of an honest belief that they had valid claims, but rather arose from an ill-conceived and reckless attempt to steal a march on FESCO and to force its hand in providing additional security for their claims. If the Banks felt that the security provided was insufficient, the Banks ought, in the prevailing circumstances, to have appealed this issue in Lomé rather than to open up a second, costly and inherently vexatious, front in Singapore. It is necessary to now assess in further detail the Banks' conduct in respect of each of these issues. We shall begin by dealing with the first and second reasons above under the rubric, "absence of any reasonable basis".

Absence of any reasonable basis

142 The Banks assert that they were entitled to arrest the *Vasiliy Golovnin* as they required further security for their claim arising from the loss of and damage to the cargo. However, the Lomé court had previously assessed that sufficient security had already been given for the claims in relation to the loss of and damage of the cargo by the UK P&I Club's letter of undertaking dated 16 February 2006. The Banks now complain that the undertaking to pay not more than €113,411.00 was, however, only addressed to the cargo underwriters.[note: 15] One might quite rightly ask: If this was indeed the essence of their grievance, why was it not drawn to the attention of AR Lee? FESCO also pointed out that, in any event, the Banks were not disadvantaged by this, as any loss resulting from cargo damage would first be claimed by the Banks against the cargo insurers in any event. What is, at the end of the day, pertinent to us is that the sufficiency of the security for the damaged and missing cargo had not been challenged in the original forum of this dispute, the Togolese courts.

143 Why then did the Banks proceed to arrest the *Vasiliy Golovnin* in Singapore? We can only objectively surmise that they did this because they were dissatisfied with the Lomé decision, and/or the security provided. We note that in their "Request for Arrest of Ship" addressed to "The President of the Court of First Instance in Lomé" dated 21 February 2006, the Banks estimated their losses at US$5,050,000.[note: 16] This, conceivably, must have included their alleged losses arising from FESCO's purported failure to comply with their directions.

144 In our view, these objectives were wholly misconceived and an unreasonable basis on which to ground the arrest of the *Vasiliy Golovnin* in Singapore. First, their original claims for relief had already been dismissed by the Lomé court, and further, the Lomé court appeared to have concluded that adequate security had already been provided for the claims arising from the loss of and damage to the cargo. Instead of appealing against the adverse decision of the Lomé court, the Banks abandoned their case against FESCO in Togo while pursuing their appeal against STC (see [21] above). The Banks then not only proceeded to arrest a sister vessel, but did so in an altogether different jurisdiction. The Banks now assert that they did not appeal against the Lomé Release Order as the chartered vessel had departed from Lomé immediately after the Lomé Release Order was made. Admittedly, the Banks may not have known where the chartered vessel would call next or whether she would return to Lomé and, in such an event, whether the order would be enforceable. This does not, however, exonerate the Banks. If this was indeed correct, we are minded to conclude that the Banks' persistence and impetuousness in arresting the ship here was precipitated by an ill-considered impulse to rectify their omission in failing to take adequate steps to fortify and/or enhance the security obtained in Lomé. There is no gainsaying, however, that the Banks had, it appears from the established facts, ample time and opportunity to address any shortcomings. The Banks could have, without any evident difficulty, applied for a stay of the Lomé Release Order and/or even appealed against it.

145 We also take into account that the Judge was highly critical of the Banks' conduct. He concluded that the arrest was an *abuse of process*. In arriving at this view, he found that the parties' arguments on the merits of the case had already been considered by the Togolese court when the arrest of the chartered vessel was set aside on 24 February 2006, *ie*, when the court made the Lomé Release Order. He also noted (at [48] of the Judge's GD), correctly, we may add, that it was highly pertinent:

> … that the parties' arguments on the merits of the case had been considered by the Togolese court. In fact, when setting aside the arrest and ordering the banks to pay costs, the Lome court made the following 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 Lome 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 Lome on STC's instructions since STC had control over the commercial management of the *Chelyabinsk* as charterers.
>
> (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 had been given for the claims for loss and damage to the cargo.

(See also AR Ang's GD at [16]). It seems to us, like the salvors in *The Margaret Jane* ([114] *supra*), the Banks, following the ruling of the Lomé court, must have been aware that they simply had no basis to arrest the *Vasiliy Golovnin* in Singapore. Sufficient security had already been provided for the claim for loss of and damage to the cargo, and the claim for breach of contract for failing to comply with their directions in relation to the discharge of the cargo had been adjudged by the Lomé court to be unmeritorious. We too have also found earlier that the breach of contract claim is not sustainable in the circumstances (see [71]–[77] above). Quite clearly, the *in rem* claim here and the arrest were brought unwarrantably and without foundation by the Banks. In the given circumstances, we are of the further opinion that the Banks must be aware that their claim of US$5,050,000, which allegedly included their losses arising from FESCO's purported failure to comply with their directions, was unsustainable, and by insisting on procuring an arrest of the *Vasiliy Golovnin* in Singapore, they have acted without any proper regard as to whether there were adequate grounds for the arrest. They can be said to be guilty of *crassa negligentia* (see *Gulf Azov Shipping* ([116] *supra*)).

146 To sum up, as we pointed out earlier at [19] above, there was no appeal by the Banks to the Togolese Court of Appeal. Like the Judge, we have also concluded that the *in rem* claim should be struck out as there is no foundation whatsoever for it to be pursued (see [5] above). In short, we rule that no reasonable litigant ought to or would have pursued the subject *in rem* claim in the prevailing circumstances. The present matter is quite unlike a case like *The Inai Selasih* ([135] *supra*) where the arresting party was merely "wrong in its interpretation or perception of the entire arrangement" (at [32]). Here, there was no foundation whatsoever. We also find it germane that, in that matter, the court found that there had been full disclosure of the material documentation, which, regrettably, is not the case here.

Material non-disclosure

147 We have noted earlier that Crédit Agricole had failed to disclose at least two material facts to AR Lee. We also found Crédit Agricole's proffered reasons for non-disclosure dubious and formed the

view that these two facts were not disclosed, if not deliberately, then certainly because of a patent (and inexcusable) lack of care in assessing what material facts ought to be disclosed. The Banks did not use the words "switch" or "split" at all in their affidavit in support of the arrest. Instead, they claimed that the bills of lading were "re-cut" because the cargo had to be discharged at different ports.[note: 17] While we are reluctant to ascribe improper motives to the Banks and/or their solicitors, it seems to us that the materiality of the events in Lomé and the aborted switch are so plainly relevant that no fair-minded and diligent litigant would have even momentarily considered not fully disclosing them. The Banks' decision to be factually economical may fairly be said to be *suppressio veri, suggestio falsi*. The non-disclosure of these material facts cannot now be airily brushed aside as a mere slip between the cup and the lip. In our view, these facts were clearly material for the *ex parte* hearing before AR Lee and, if disclosed, would have, in all likelihood, led to an altogether different outcome of the arrest application. As such, we feel, in all circumstances, it is correct to characterise the conduct of the Banks as being more than regrettable and much less than diligent; in short, *grossly negligent* or even reckless.

Synopsis

148 We accept FESCO's submissions that by the time the *Vasiliy Golovnin* was arrested in Singapore, the Banks had already fully participated in the Togolese court's assessment on the merits of their claim for security. The Banks were also aware that the Togolese court had specifically declared that adequate security had already been provided by the UK P&I Club for their claim for damage to the cargo and the missing cargo. Despite this, the Banks not only initiated arrest proceedings in Singapore, but also inexplicably omitted to mention these crucial facts. We do not accept the Banks' contention that they had an honest belief in their alleged claim or right to arrest the *Vasiliy Golovnin* in Singapore. No reasonably diligent litigant could have ever come to such a conclusion in these circumstances. The Banks' claims against FESCO for failing to comply with their instructions to discharge the cargo at a port other than Lomé were, politely put, absurd. Even Ms Ang had to acknowledge that some of her key legal planks were "novel".[note: 18] We need say no more.

149 The Judge has also pertinently pointed out at [70] of the Judge's GD that:

> The Lome court found, rightly or wrongly, that sufficient security had been furnished for this claim. … [T]his finding *prevents* the banks from arresting the *Vasiliy Golovnin* to obtain security for the claim with respect to damage to cargo. [emphasis added]

This is plainly a case where the arrest was so plainly an abuse of process that no reasonable litigant would have even begun contemplating, let alone executing, such a process. It has not passed unnoticed by us that the holder of the other two bills of lading with respect to the Chinese rice for discharge at "any African port" declined to initiate proceedings against FESCO in Singapore after initially participating in the Lomé proceedings (see [10] above). In invoking such a drastic remedy such as the arrest of a vessel, there is invariably a need for an honest belief in the legitimacy of the arrest. The fact that legal advice has been sought, as is invariably the case, will assuredly not immunise the decision from scrutiny as to whether it has been made improperly.

150 The sagacious observations of Dr Lushington, one of the most astute English admiralty judges, in *The Cathcart* ([114] *supra* at 333) remain highly instructive even today and are of particularly pertinence to this appeal:

> *The plaintiffs had full knowledge of the facts, and must be held to the legal effect of their own engagements. If they had regarded the terms of those engagements, they would have known they had no right to arrest the vessel. Add to this, the arrest of the vessel by the plaintiffs was*

> *made on the eve of commencing a profitable voyage, and after a decision of the magistrate adverse to their claim*, and the plaintiffs have attempted to support the proceeding by making charges of fraud against the defendant, which they have quite failed to prove. I think this is a case for damages. I therefore order the release of this vessel, and condemn the plaintiffs in costs and damages; the amount of damages to be estimated in the usual way, by the registrar and merchants. [emphasis added]

The Banks' conduct in effecting the further arrest in Singapore of the chartered vessel's sister ship was patently misconceived and shabbily executed. AR Lee was lulled into ordering the arrest because the Banks appeared to have decided that it was more important to promptly secure an arrest of the *Vasiliy Golovnin* than to be candid with the court. The truth of the matter is that the chartered vessel and FESCO were no more than innocent bystanders in the Togolese tug of war between the Banks, STC and Rustal. Whether STC had the right to detain the cargo was, strictly speaking, a matter entirely between the Banks and Rustal on the one hand and STC on the other.

151 The Banks knew this and ought not to have involved FESCO's vessels in their intractable legal wrangling with the other parties. The Togolese court had already ruled, and we respectfully concur, that "one cannot reproach FESCO for committing any wrong" in routing the chartered vessel to Lomé on the specific orders of the charterer.[note: 19] For the reasons above, we are, all said and done, satisfied that the Banks acted altogether inappropriately in arresting the *Vasiliy Golovnin*. This is not just a case of an applicant failing to apply its mind to the legitimacy of its course of conduct. This is a case of a claimant wilfully disregarding the plain stark adverse facts. A groundless claim was pursued. Material facts were omitted. A draconian remedy was recklessly sought. There can be no gainsaying, in the final analysis, that the Banks' *in rem* claim and the arrest of the ship were brought unwarrantably and without foundation. Unlike the lower courts, we are of the firm view that the Banks cannot be said to have entertained an honest belief that they had valid claims warranting the arrest of the subject vessel in Singapore. The Banks now have to accept the painful consequences of having abused the judicial process. For the reasons above, we allow FESCO's appeal in CA 110/2007 and order damages against the Banks to be assessed.

Conclusion

152 Crédit Agricole's appeal is dismissed. We allow FESCO's claim for damages arising from the wrongful arrest of the *Vasiliy Golovnin*. FESCO is entitled to the costs of both appeals as well as all the costs below in full. The usual consequential directions are to be observed.

[note: 1] Source: <http://www.britannica.com/EBchecked/topic/238111/Vasily-Mikhaylovich-Golovnin>
(accessed 28 August 2008).

[note: 2] Joint Record of Appeal at pp 1582–1587.

[note: 3] Appellant's Core Bundle vol 2 Pt 2 at pp 330–331.

[note: 4] Appellant's Case at para 196.

[note: 5] Joint Record of Appeal at p 491.

[note: 6] Joint Record of Appeal at p 1630.

[note: 7]Joint Record of Appeal at pp 1460.

[note: 8]Joint Record of Appeal at p 1636.

[note: 9]Joint Record of Appeal at p 1462.

[note: 10]Supra n 8.

[note: 11]Joint Record of Appeal at p 1114.

[note: 12]Appellant's Case at para 230.

[note: 13]Appellant's Case at para 483.

[note: 14]Joint Record of Appeal at p 491.

[note: 15]Appellant's Case at para 262.

[note: 16]Joint Record of Appeal at p 1113.

[note: 17]Joint Record of Appeal, p 218.

[note: 18]Appellant's Case at para 4.

[note: 19]Joint Record of Appeal at p 1133.