# The "Genius Star II"
# [2013] SGHCR 23

**Case Number** : Admiralty in Rem No 224 of 2013 (Summons No 3770 of 2013)

**Decision Date** : 17 October 2013

**Tribunal/Court** : High Court

**Coram** : Ruth Yeo AR

**Counsel Name(s)** : Mr Hussainar bin K. Abdul Aziz (H.A. & Chung Partnership) for the plaintiff; Mr Prem Gurbani (Gurbani & Co) for the defendant.

**Parties** : The "Genius Star II"

*Admiralty and Shipping – Admiralty jurisdiction and arrest*

17 October 2013

**Ruth Yeo AR:**

1 This is an application by Wisdom Marine Lines SA ("the Defendant"), the owners of the ship "Genius Star II" ("the Vessel"), to set aside the Warrant of Arrest issued on 5 July 2013 for the arrest of the Vessel on the ground of non-disclosure of material facts by Impa Marina Pte Ltd ("the Plaintiff") in the Plaintiff's affidavit supporting its application for the Warrant of Arrest ("the Arrest Affidavit").

**Background**

2 On 5 July 2013, the Plaintiff filed its Writ of Summons (In Rem) in Admiralty in Rem No 224 of 2013 ("ADM 224/2013"), claiming S$9,101.43 against the Defendant in respect of goods and materials supplied to the "Genius Star II" for her operation and maintenance. Counsel for the Plaintiff appeared before the duty assistant registrar ("the AR") that same evening seeking the issuance of a Warrant of Arrest against the Vessel.

3 The Arrest Affidavit filed by the Plaintiff consisted of 52 pages, comprising 5 pages of narrative text and 47 pages of exhibits. In particular, paragraph 13 of the Arrest Affidavit lies at the heart of the application before me, and I reproduce it below in full:

> The Plaintiffs had on numerous occasions sent emails and/or reminders to the managers and/or agents of the ship or vessel "GENIUS STAR II" to demand payment for all outstanding for all vessels under their management and/or ownership. *Until todate, the Defendants and/or their servants and/or agents have not given any indication on payment or made payment thereto or to offer security in respect of the claim against the vessel "GENIUS STAR II".* There is now produced before me and marked and exhibited as "CHW-03", a copy of the email sent by the Plaintiffs to the Owners and/or Managers of the vessel "GENIUS STAR II".
>
> [emphasis added]

4 The exhibit referred to, 'CHW-03', contains a single email from the Plaintiff's Mr KE Tan to the Defendant's Ms Joan Lai dated 4 June 2013, the relevant portions of which are extracted below:

> Please refer to the attached SOA and arrange the payment immediately.

> If you can arrange the payment within this week, we can waive off the 2% interest charges as a goodwill gesture to you.
>
> However, we shall reserve the right to take action against the master & owner of the vessels if we did not receive the payment from you.

No other correspondence between the parties was annexed in the exhibits or anywhere else in the Arrest Affidavit. In particular, it is critical to note that no emails from the Defendant to the Plaintiff were annexed.

5 The AR approved the issuance of the Warrant of Arrest, and the Vessel was arrested on 6 July 2013. On 9 July 2013, counsel for the Plaintiff filed a request for release of the Vessel as the Defendant had provided security for the sum of S$95,665.00 by way of payment into court. The request was approved and the Vessel was duly released on the same day.

6 On 23 July 2013, counsel for the Defendant filed the present application before this court, Summons No. 3770 of 2013 ("SUM 3770/2013"), to set aside the Warrant of Arrest on the ground of non-disclosure of material facts in the Arrest Affidavit, and for damages for wrongful arrest of the Vessel. The matter came before this court for hearing on 4 September 2013, and for further arguments on 12 September 2013. At the hearing on 12 September 2013, I directed parties to file further submissions on the issue of whether the alleged non-disclosure in question was material. I allowed the application to set aside on 4 October 2013, giving my oral grounds of decision. I now set out my full grounds of decision.

**Parties' arguments**

7 At the hearings before me, counsel for the Defendant submitted that the Plaintiff failed to disclose the following material facts in the Arrest Affidavit:

(a) By an email dated 7 February 2013, the Defendant's manager Ms Anna Chan ("Ms Chan") wrote to the Plaintiff's Mr Alan Saw ("Mr Saw") requesting a discount for the complete order. Mr Saw replied by email on the same day agreeing that "for goodwill, 2% discount will be given for complete order" [note: 1] ("the Discount Request emails").

(b) Based on the quotations and the agreed discount of 2% of the price, on 8 February 2013 the Defendant sent a purchase order to purchase the goods and materials shown on the Plaintiff's quotations for the sum of S$9,095.43. However, the Plaintiff did not render an invoice for 98% of S$9,095.43. Instead, the Plaintiff rendered seven invoices for the erroneous sum of S$9,586.73, which was subsequently reduced to S$9,101.43 by a Statement of Account dated 28 February 2013.

(c) On 28 May 2013, the Defendant's manager Ms Anna Chan ("Ms Chan") sent an email to the Plaintiff's Mr Kevin Chum ("Mr Chum") querying why the Plaintiff was charging 2% late payment interest when the Defendant's position was that the invoices were only received in April 2013, and stating that the Defendant would make payment when it received a credit note for the 2% discount from the Plaintiff [note: 2] ("the Credit Note Request email"). The relevant portion of the email is reproduced below:

> With reference to your below message regarding the late payment charges, we are very disappointed of your company unprofessional business ethics [*sic*].

> As agreed, there will be a 2% discount given from your company as to issue our complete order to you. We had seek Ms Radhiah for clarifying upon received your invoice's regarding the 2% discount [*sic*]. However there are not respond from her neither your company [*sic*].
>
> For all fairness, please explain why do we have to pay you for late payment of 2% charges as we only received your February invoice's during mid April.
>
> Please provide us your 2% credit note in order we can make payment soonest.

(d) On 29 May 2013, the Plaintiff replied stating that it was entitled to charge late payment interest. However, the reply did not address the issue of the 2% discount.

8 Counsel for the Defendant submitted that none of these material facts were stated in the Arrest Affidavit. Instead, by only disclosing the single email dated 4 June 2013 (*supra* [4]), "far from showing that the Defendants were disputing the amounts stated in the said invoices, [the email] suggests to the Court that the Defendants were refusing to pay the sums due for no good reason. This was clearly not the Defendant's position." [note: 3] Counsel for the Defendant submitted that Defendant was merely seeking to clarify the terms of the agreement. As the invoiced sum was different from what was agreed upon, the Defendant requested an explanation concerning the issue of the 2% discount on multiple occasions. However, the Plaintiff did not provide any response to the Defendant's queries. Counsel for the Defendant submitted that by failing to inform the court of the above factual matrix, and indeed by stating in its affidavit that the Defendant had never given any indication on payment to date, the Plaintiff failed to discharge its duty of full and frank disclosure to ensure that all material facts were placed before the court, and instead painted a distorted and incomplete picture of the facts.

9 Counsel for the Plaintiff submitted that the Defendant was seeking to set aside the arrest only on the basis of non-disclosure of the Discount Request emails, which were "not material nor relevant for purposes of the issuance of the Warrant of Arrest." [note: 4] He argued that it was not necessary to disclose "countless emails" as "it would put undue burden on Plaintiffs to disclose each and every correspondence." [note: 5] Plaintiff's counsel further took the position that material non-disclosure must relate to facts which are relevant to issues of either *in rem* jurisdiction or *in personem* liability to constitute grounds for setting aside an arrest. As such, counsel for the Plaintiff argued that the Discount Request emails only related to the question of whether the Defendant was entitled to a discount, which went to the merits of the claim rather than the issue of whether the court had jurisdiction to grant the Warrant of Arrest.

**Issue before this court**

10 The issue before this court is as follows: whether there was non-disclosure of material facts in the Arrest Affidavit, such that the court should exercise its discretion to set aside the Warrant of Arrest on the ground of material non-disclosure.

***Whether there was non-disclosure or insufficient disclosure of material facts in the Arrest Affidavit***

11 It is settled law that non-disclosure of material facts is an independent ground for setting aside a warrant of arrest in Singapore: *The "Rainbow Spring"* [2003] 3 SLR 362 ("*Rainbow Spring*"), *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy*"), *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati*"). The Court of Appeal in *Vasiliy* enjoined at [82] that the issue of material non-disclosure is to

be considered from two aspects: first, the content and scope of disclosure; and second, the threshold of disclosure. I will analyse each aspect in turn.

*a) Content and scope of disclosure: what ought to be disclosed?*

12 The applicant is under a duty to disclose facts that are *material* to the decision whether or not to issue a warrant of arrest. The test of materiality was laid down by the Court of Appeal in *The "Damavand"* [1993] 2 SLR 717 at 731 and underscored in *Rainbow Spring* at [33]:

> In this connection it is helpful to reiterate the test of whether a fact is material as set out by this court in *The Damavand* [1993] 2 SLR 717 at 731 which is:
>
> > [W]hether 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]

13 In the seminal case of *Vasiliy*, the Court of Appeal elaborated on the ambit of the test of materiality at [87]:

> 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.
>
> [emphasis added]

14 It is thus clear that the test of materiality is a broad one, which covers a wide ambit of facts that should properly be placed before the court to facilitate the delicate balancing exercise of weighing all the circumstances of the case. The test includes an *objective* element which requires the applicant to consider what the *court* might deem relevant, not solely what seems relevant to the mind of the *applicant*. Additionally, it encompasses not only facts that are within the applicant's actual knowledge, but also facts that the applicant could have reasonably ascertained.

15 The rationale for adopting this broad objective test is rooted in the inherent concern which arises in all *ex parte* applications, *viz*, the fact that one party is not represented at the hearing and has no opportunity to raise facts which lie in its favour. As the Court of Appeal in *Vasiliy* enjoined at [85], the responsibility to ensure that the court has a complete picture of the facts thus lies solely on the applicant:

> 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.

16 Indeed, in all types of *ex parte* applications, the absolute nature of the obligation to make full and frank disclosure is heavily emphasized. In *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 ("*Tay Long Kee Impex*") at [19] – [20], the court made the following observations:

> An applicant for an *ex parte* injunction, as in every *ex parte* application is under a twofold obligation: First, he must make a full and frank disclosure of all material facts and circumstances. *Nothing relevant must be suppressed*. *This is an absolute obligation.* It is absolute because the obligation is not based on a corresponding right of the plaintiff. It is a duty based on a duty to keep faith with the Court to which the applicant comes without knowledge of the other party. *Because the duty is absolute, even a minor breach will ordinarily will be a basis to aside the order.*
>
> …
>
> An additional rationale for making the obligation absolute is that a duty judge who hears urgent applications has neither the time nor the facility to determine whether the *ex parte* application is well-formed. He cannot be sure whether *all* the facts and circumstances are fully and frankly disclosed. *The other side or its counsel is not there to expose falseness and weakness of the application. The Court inevitably relies on the applicant and his counsel to act in good faith and state all points which can be fairly made against the application.* The basis of urgency, if there is one must be supported by good evidence. Unless the breach of duty entails some effective sanction, human nature will tempt the applicant to angle his case in his own favour.
>
> [emphasis added]

17 Although these observations were made in the context of an application for an *ex parte* injunction, they carry no less weight in the present context as the test of materiality remains consistent across the different types of applications: "the same test [of materiality] has been adopted in other areas where full and frank disclosure is required and the expression should have the same meaning across the board for consistency," per Prakash J in *Rainbow Spring* at [33].

*b) Threshold of disclosure: have the material facts been sufficiently disclosed?*

18 Apart from the content and scope of disclosure, the court is also closely concerned with the *manner* and *degree* to which the material facts are *effectively* disclosed to the court. This concern with the manner of presentation can be characterized as one of procedural fairness: it is incumbent upon the applicant to ensure that the manner of presentation of facts should be fair and clear, instead of presenting them in an obfuscating manner where the material facts are buried deep inside the voluminous material and are thereby lost. This concern arises from the underlying premise that if the material facts are not specifically brought to the court's attention but instead submerged in a sea of exhibits, the purpose of the duty of disclosure – *viz*, to give the court a balanced view of the matter by informing it of matters that may be prejudicial to one's own case – would be defeated, and the applicant's duty of disclosure could not have been said to have been meaningfully discharged. As the Court of Appeal held in *Vasiliy* at [91]:

> 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.
>
> [emphasis added]

19 The issue of the proper manner of disclosure was comprehensively analyzed in *Vasiliy*, and the relevant paragraphs are reproduced below:

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.

[emphasis added]

20 Several helpful practical pointers can be gleaned from the Court of Appeal's analysis above:

(a) First, in the course of submissions, applicant's counsel should specifically *draw the court's attention* to the relevant papers and material documents in the exhibits.

(b) Second, all material facts should be stated in the *narrative text* of the affidavit. It is not sufficient for the material facts to be submerged somewhere in the exhibits, especially if the exhibits are voluminous. The narrative text should contain a sufficiently full description of the relevant factual matters.

(c) Third, the affidavit should specifically identify *both* the crucial points which support the application, *as well as the points which weigh against the application*. It should be precise and clear in pinpointing the material facts, rather than relying on general statements.

21 Bearing the above pointers in mind, I now turn to the application of the law to the facts in the instant case.

**Application to the facts**

***Whether the facts raised by the Defendant were material***

22 Here, I find that the facts raised by the Defendant (*viz*, that there was written correspondence suggesting that there had been an agreement by the Plaintiff to give a 2% discount on the complete order, and that the Defendant's Credit Note Request email stated that the Defendant would make payment once it had received the 2% credit note ("the Material Facts")) fall clearly within the ambit of material facts that come under the scope of disclosure. I find that the Material Facts are relevant as they are "fact[s] which should properly be taken into consideration when weighing all the circumstances of the case:" *Rainbow Spring* at [33]. I accept the Defendant's submission that by failing to disclose the Material Facts and only exhibiting a single email wherein the Plaintiff made a demand for payment, the picture presented to the AR was that the Defendant simply refused to pay

the entire sum without offering any explanation, and had never replied to any of the Plaintiff's emails and reminders asking for payment.

23 From the discussion of the case law above (*supra* [15] – [16]), it is evident that the *onus* is *on the Plaintiff* to give the AR hearing the application a balanced view of the matter. The Plaintiff's duty is to disclose all material facts so that the AR can have the full picture in mind when deciding whether or not to exercise her discretion, bearing in mind that the Defendant is not present at the hearing to present the facts in its favour that support its side of the story. As counsel for the Defendant submitted, because of the Plaintiff's non-disclosure compounded by the positive misstatement, the AR in effect exercised her discretion on the basis of an incomplete and distorted picture of the facts. Counsel for the Defendant further submitted that if the Material Facts had been disclosed in the Arrest Affidavit, and there had not been a statement that the Defendant had not given any indication on payment to date, this would have given the AR a more balanced and holistic picture by highlighting the Defendant's side of the story, *viz*, that the Defendant was still in the process of clarifying the terms of payment as it wanted to ensure that it received what it was entitled to under the agreement. This was starkly distinct from the Plaintiff's side of the story, in which the Defendant had never once bothered to respond to the plaintiff's demands for payment and thus appeared to be defaulting on its payment obligations. I accept this submission, and thus find that the Material Facts fall clearly within the ambit of facts which may be prejudicial to the Plaintiff's application as they cast the Defendant's conduct in a different light, and should thus have been disclosed to give the AR a balanced picture of the facts.

24 Counsel for the Plaintiff submitted that in the Plaintiff's view, the Discount Request and the Credit Note Request emails were not relevant, and to require disclosure of these emails "would put undue burden on Plaintiffs to disclose each and every correspondence." [note: 6] However, it is no answer for the Plaintiff to say that on its part, it did not think the correspondence was relevant. As explained above at [16], the test of materiality has an *objective* element, and extends even to facts not within the applicant's knowledge that could be reasonably ascertained. Here, the Material Facts raised by the Defendant were objectively relevant to the AR's inquiry, and were clearly within the Plaintiff's knowledge. In the context of an *ex parte* application, it is not for the Plaintiff to cherry-pick which of the basic facts it will not disclose to the court, especially when these facts fall squarely within the ambit of "any facts which the plaintiff knows of which might tell in the defendant's favour" (*per* Warner J in *Re a debtor (No 75*n *of 1982, Warrington), ex parte the debtor v National Westminster Bank plc* [1983] 3 All ER 545 at 551), endorsed by the Singapore High Court in *The "Eagle Prestige"* [2010] 3 SLR 294. Indeed, considering that the Plaintiff only disclosed a single email, no concerns of an undue burden of disclosure even arise on the facts. In any event, the Court of Appeal has held that as a general rule, "it is always preferable to err on the side of more disclosure rather than less:" *Vasily* at [88].

25 As such, I find that Material Facts should have been brought to the AR's attention so that they could have been properly taken into consideration by the AR in deciding whether this was an appropriate case in which to exercise her discretion to issue the Warrant of Arrest. This is especially critical in light of the fact that arrest is an extremely draconian remedy which has serious financial consequences for the defendant shipowner. For the avoidance of doubt, I am not making a finding that having known these facts, the AR would have decided differently. Indeed, as alluded to at [12] above, this is *not* a requirement of the test of materiality. I am merely making the observation that these are relevant facts which should have been placed before the AR for her consideration, so that she could have cognisance of all the circumstances of the case *before* she arrived at her decision.

***Whether the Material Facts were sufficiently disclosed***

26 Here, I find that the Material Facts were insufficiently disclosed: not only were they omitted from the brief 5 page narrative text of the Arrest Affidavit, they were also conspicuously absent in the exhibits, which did not contain the email correspondence containing the Material Facts (*viz*, the Discount Request and Credit Note Request emails). As counsel for the Defendant submitted, paragraph 13 of the Arrest Affidavit was the only paragraph of the entire affidavit that dealt with the factual matrix concerning the Plaintiff's demands for payment. In the words of the Court of Appeal in *Vasiliy* at [95], I found the Plaintiff's affidavit "conspicuous for its rather stark poverty of the relevant factual matters, and, more crucially, context; there was plainly no mention of the… material facts condensed earlier." Not only did the brief paragraph 13 inaccurately oversimplify the matter by painting it as a clear-cut scenario where the Defendant had never once bothered to respond to the Plaintiff's multiple requests for payment, it also took the Plaintiff's email demanding payment completely out of context by isolating it from the entire chain of email correspondence which painted a very different picture of what transpired between the parties – *a picture that was more favourable to the Defendants than would otherwise appear from the face of the Plaintiff's affidavit.*

27 Indeed, not only were the Material Facts insufficiently disclosed, paragraph 13 of the Arrest Affidavit actually contained a *positive misstatement* that "until todate, the Defendant and/or their servants and/or agents have not given any indication on payment..." ("the Misstatement"). This statement is clearly untrue in light of the Credit Note Request emails, in which the Defendant clearly states, "please provide us your 2% credit note in order we can make payment soonest." When queried by the court on this point in the course of oral submissions, counsel for the Defendant submitted that the meaning of the Misstatement was that the Plaintiff had not received any indication on payment from the Defendant from the date of the last email exhibited in 'CHW-03', *viz*, 4 June 2013. However, I find this to be a strained and untenable interpretation of the Misstatement. On a plain reading, the Misstatement (and, more broadly, the entire paragraph 13) clearly suggests that no indication on payment whatsoever had ever been given by the Defendant up until the date the affidavit was filed, which would have given the AR a distorted picture of the material facts. It is thus clear that the Plaintiff has failed to meet the threshold of disclosure sufficient to give the court hearing the arrest application 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:" *Vasiliy* at [91].

28 In conclusion, I find that the facts raised by the Defendant were material. However, the Material Facts were not contained in the narrative text of the Arrest Affidavit – indeed, they were not even contained in the exhibits, which merely contained a single email from the Plaintiff demanding payment from the Defendant without further context. The effect of this material non-disclosure was compounded by the fact that paragraph 13 of the Arrest Affidavit actually contained a *positive misstatement* that *to date*, the Plaintiff had *never* received any indication on payment from the Defendant. As such, in light of the considerations above, I find that this is an appropriate case for this court to exercise its discretion to set aside the Warrant of Arrest on the ground of material non-disclosure, and do so accordingly.

***Whether damages for wrongful arrest should be awarded***

29 While the Defendant's application to set aside the Warrant of Arrest also included a prayer for damages for wrongful arrest, parties only made brief submissions on this issue in the course of oral argument. The Court of Appeal in *Vasiliy* at [137] laid down the approach to be adopted in assessing damages for wrongful arrest:

> 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*.

[emphasis added]

It is clear from the decision in *Vasiliy* that there is a high threshold to be met to warrant a finding of wrongful arrest. As enjoined by the court at [138]:

…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.

[emphasis added]

30 Here, I find that it cannot be said that the arrest was brought with so little foundation as to imply malice or gross negligence on the part of the Plaintiff. Unlike the plaintiff in *Vasiliy*, the Plaintiff's conduct in initiating the arrest in the instant case could fairly be said to be the result of a genuine and honest belief that it had a valid claim for the outstanding amount. Accordingly, I find that there was neither actual malice nor negligence implying or amounting to malice on the part of the Plaintiff, and thus decline to award damages for wrongful arrest.

***Whether the material non-disclosure must relate to facts which are relevant to issues of either in rem jurisdiction or in personem liability to constitute grounds for setting aside an arrest***

31 In the course of submissions, Plaintiff's counsel took the position that material non-disclosure must relate to facts which are relevant to issues of either *in rem* jurisdiction or *in personem* liability to constitute grounds for setting aside an arrest. As such, counsel for the Plaintiff argued that the Discount Request emails only related to the question of whether the Defendant was entitled to a discount, which went to the merits of the claim rather than the issue of whether the court had jurisdiction to grant the Warrant of Arrest. In light of my decision above, it is not strictly necessary for me to make a finding on this issue. However, for the sake of completeness, I will make some brief observations on the Plaintiff's argument in this regard.

32 I am of the opinion that the Plaintiff's position is untenable, as it is clear from the case law that lack of *in personem* liability and non-disclosure of material facts are *distinct* grounds for a setting aside application. In *Eagle Prestige* at [66], the court clearly stated thus:

In short, it is possible to apply to set aside the warrant of arrest because *either* there was a lack of *in personam* liability *or* there was non-disclosure of material facts

[emphasis added]

33 Additionally, I am of the preliminary view that accepting the Plaintiff's argument would arguably be tantamount to collapsing the two distinct grounds into one. To limit the ground of non-disclosure of material facts only to facts which go towards proving a lack of *in personem* liability would constitute an unreasonably restrictive view of the non-disclosure doctrine that would undermine its purpose as a bulwark against abuse of process. As enjoined by the Court of Appeal in *Rainbow Spring* at [37]:

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.

**Conclusion**

34 In the premises, I set aside the Warrant of Arrest on the ground of material non-disclosure. The security provided by the Defendant to the Plaintiff for the release of the Vessel is to be returned to the Defendant forthwith. The costs of this application are fixed at S$5,000, inclusive of disbursements, payable by the Plaintiff to the Defendant.

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[note: 1] Defendant's 1st affidavit dated 24 July 2013, p 29.

[note: 2] Defendant's 1st affidavit dated 24 July 2013, p 67.

[note: 3] Defendant's 1st affidavit dated 24 July 2013 at [14].

[note: 4] Plaintiff's written submissions at [9].

[note: 5] Defendant's written submissions at [8] – [9].

[note: 6] Plaintiff's 2nd affidavit at [9].