The “Xin Chang Shu”
[2015] SGHCR 17

Case Number	: ADM No 239 of 2014 (Summons Nos 6218 of 2014 and 6364 of 2014)
Decision Date	: 11 August 2015
Tribunal/Court	: High Court
Coram	: Teo Guan Kee AR
Counsel Name(s)	: Lawrence Teh and Khoo Eu Shen (Rodyk & Davidson LLP) for the plaintiff; Toh Kian Sing, S.C. and Miss Koh See Bin (Rajah & Tann Singapore LLP) for the defendant.
Parties	: BIG PORT SERVICE DMCC — THE OWNERS OF THE SHIP OR VESSEL "XIN CHANG SHU"

Admiralty and shipping – Admiralty Jurisdiction – Striking Out – Material Non-Disclosure

11 August 2015 Judgment reserved.

Teo Guan Kee AR:

1 Following the issuance of the Writ *in rem* in this action on 19 November 2014, on an *ex parte* application by the plaintiff, a Warrant of Arrest (the "**Warrant of Arrest**") in respect of the vessel "Xin Chang Shu" (the "**Vessel**") was issued by the Assistant Registrar (the "**AR**") and the Vessel was arrested in Singapore on 10 December 2014.

2 The Vessel was released on 12 December 2014 following the provision (under protest) of security in the sum of US$2,600,000 by the Defendant by way of payment into Court.

3 Shortly thereafter, on 15 December 2014, the Plaintiff filed Summons No. 6218 of 2014 for these proceedings to be stayed in favour of arbitration.

4 On its part, the Defendant, on 29 December 2014, filed Summons 6364 of 2014, seeking orders for:

(a) the Warrant of Arrest to be set aside;

(b) the Writ *in rem* to be struck out and/or set aside; and/or

(c) damages for wrongful arrest.

5 After hearing parties, on 9 July 2015, I dismissed Summons 6218 and allowed Summons 6364 in part. I now set out the grounds for my decision in these summonses.

Background

6 The Plaintiff, Big Port Service DMCC, commenced this action on 19 November 2014 against the Defendant, China Shipping Container Lines, seeking payment of sums allegedly due from the Defendant to the Plaintiff arising out of the supply of 4,000 metric tonnes ("**MT**") of marine bunker fuel to the Vessel. The Vessel was at all material times owned by the Defendant.

7 The background to the supply of the bunkers to the Vessel is as follows:

(a) On or about 24 September 2014, one of the Plaintiff's employees, Mr Maxim Verbin, was contacted by Ms Daria Kuznetsova, a bunker trader in the employ of OW Bunker Far East (Singapore) Pte Ltd ("**OW Singapore**"), requesting a quotation for the supply of 3,000 to 4,000 MT of marine bunker fuel to the Vessel at Kavkaz, Russia.

(b) Following the request, on 24 September 2014, Mr Verbin sent an email to Ms Kuznetsova essentially offering the options of having 3,200 MT of fuel delivered to the Vessel on one barge or alternatively 4,000 MT of fuel delivered on 2 separate barges.

(c) It was eventually agreed between Ms Kuznetsova and Mr Verbin on 25 September that 4,000 MT of marine bunker fuel would be delivered to the Vessel by the Plaintiff at a price of USD 442 per MT (the "**Plaintiff-OW Singapore Agreement**").

(d) During the same period, the Defendant was in communications with a company known as OW Bunker China Limited ("**OW China**"), seeking to have the Vessel supplied with marine bunker fuel.

(e) On 26 September 2014, agreement was reached between OW China and the Defendant for the Vessel to be supplied with 4,000 MT of marine bunker fuel at USD 469 per MT (the "**Defendant-OW China Agreement**").

(f) Separately, there was a further agreement between OW China and OW Singapore for the sale of 4,000 MT by OW Singapore to OW China at USD 445 per MT, to be delivered to the Vessel at Kavkaz.

(g) 4,000 MT of marine bunker fuel was physically supplied to the Vessel at the port of Kavkaz on or about 1 November 2014 (the "**Supply**").

The Plaintiff's case

8 The Plaintiff submits that OW Singapore, in entering into the Plaintiff-OW Singapore Agreement, was doing so as an agent for the Defendant and that accordingly the Defendant was bound by the terms of any agreement agreed between OW Singapore and the Plaintiff in respect of the Supply.

9 Accordingly, the Plaintiff submits that it was entitled to arrest the Vessel pursuant to section 4(4) read with section 3(1)(l) of the High Court Admiralty Jurisdiction Act (Cap 123, the "**HCAJA**").

The Defendant's case

10 The Defendant denies the existence of any contract between itself and the Plaintiff. Instead, the Defendant asserts that:

(a) the Defendant had contracted with OW China on or about 26 September 2014 to purchase 4,000 MT of marine bunker fuel from OW China;

(b) OW China had in turn contracted with OW Singapore to purchase 4,000 MT of marine bunker fuel from OW Singapore; and

(c) thus it was OW Singapore, and not the Defendant, which was the purchaser of the bunker

fuel under the Plaintiff-OW Singapore Agreement. The Defendant was only the purchaser of the bunker fuel under the Defendant-OW China Agreement.

The Applications

The Stay Application

11 Summons 6218 of 2014 (the "**Stay Application**") is the Plaintiff's application for this action to be stayed in favour of arbitration, pursuant to an arbitration clause contained in the Plaintiff's "General Terms and Conditions for Sale and Delivery Marine Bunkers from Big Port Service DMCC" (the "**GTC**").

12 Before me, counsel for the Defendant did not dispute that:

(a) the GTC contains an arbitration clause, the scope of which would cover the dispute between the Plaintiff and the Defendant;

(b) the GTC was incorporated into the terms of any agreement that the Plaintiff may be found to have entered into in relation to the Supply (it being the Defendant's position that no such agreement was entered into by the Plaintiff with the Defendant); and

(c) the Plaintiff is ready and willing to proceed to arbitration.

13 The Defendant's objection to the Stay Application centres on whether there was in fact an agreement between the Plaintiff and the Defendant into which the GTC (and the arbitration clause) was incorporated.

14 The Stay Application will be considered together with the Defendant's application to strike out the Writ herein pursuant to O 18 r 19 of the Rules of Court (see below) as the existence of an agreement between the Plaintiff and the Defendant is an issue common to these two applications.

The Striking-out Application

15 Summons 6364 of 2014 (the "**Striking-Out Application**") is the Defendant's application for this action to be struck out or, alternatively, for the arrest of the Vessel to be set aside.

16 The Defendant's application herein is premised on three distinct grounds:

(a) The Writ of Summons and action herein should be struck out as being frivolous, vexatious, oppressive or otherwise an abuse of process pursuant to O 18 r 19(1) of the Rules of Court (the "**Sustainability Objection**").

(b) The Warrant of Arrest should be set aside as the Plaintiff failed to satisfy a requirement of section 4(4) of the HCAJA (the "**Jurisdiction Objection**").

(c) The Warrant of Arrest should be set aside as the Plaintiff failed to discharge its duty of full and frank disclosure at the hearing of its application for a warrant of arrest (the "**Arrest Hearing**") to be issued against the Vessel (the "**Disclosure Objection**").

17 Each of the aforementioned grounds raised by the Defendant will now be considered in turn.

The Sustainability Objection

18 The Defendant submits that the Plaintiff's action herein should be struck out, pursuant to O 18 r 19 of the Rules of Court or the Court's inherent jurisdiction, on the ground that the arrest of the Vessel was frivolous, vexatious, oppressive or otherwise an abuse of process.

19 In this regard, the parties did not dispute that I am entitled to strike out the action as being frivolous or vexatious if it is plainly or obviously unsustainable.

20 In the decision of the Court of Appeal in *The Bunga Melati 5*, it was held [at [39]) that there are two ways in which an action could be said to be unsustainable:

(a) *legally unsustainable*: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks";

(b) *factually unsustainable*: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

21 It will be recalled that the existence of an agent-principal relationship underpins the Plaintiff's entire action herein because the Plaintiff did not at any time communicate directly with the Defendant.

22 If, therefore, the Plaintiff is unable to show a good arguable case for the existence of such an agent-principal relationship between the Defendant and OW Singapore (being the party which concluded the agreement with the Plaintiff), whether as a matter of law or fact, the Plaintiff's claim would be unsustainable.

23 For the reasons set out below, I find that the Plaintiff's claim herein is neither legally nor factually sustainable.

Legal unsustainability

24 An agent-principal relationship may arise in one of several ways, dependent upon the manner in which an agent has been or is deemed to have been clothed with the authority to act on behalf of his principal.

25 In this regard, before me, the Plaintiff did not suggest that the Defendant had expressly conferred authority on OW Singapore to act on behalf of the Defendant in relation to the Supply. The Plaintiff also did not suggest that OW Singapore was vested with any usual or customary implied authority to bind the Defendant to the Plaintiff-OW Singapore Agreement since there is no evidence of any commercial relationship in respect of the Supply between the Defendant and OW Singapore and hence no basis for implied authority premised upon, say, custom or a course of dealing.

26 Instead, the Plaintiff's submission on the issue of authority before me was that the Defendant, by its conduct, represented to the Plaintiff that OW Singapore was the Defendant's agent in respect of the Supply. Therefore, the Plaintiff submits, the Defendant is estopped from denying such representation, which thenceforth clothed OW Singapore with *apparent* authority to conclude the Plaintiff-OW Singapore Agreement as an agent of the Defendant.

27 To further elaborate, the Defendant submitted in its written submissions that:

> apparent authority is represented through the allowance by a principal of a state of affairs that gives the party transacting with the agent the impression that the agent is authorized to represent the principal.

28 In support of the above-proposition, the Defendant cited the judgment of Robert Goff LJ in the Court of Appeal of England and Wales (the Defendant's written submissions suggest that this was part of the judgment of the House of Lords but this is incorrect) in *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 at 731, where the Judge opined that:

> The representation which creates ostensible authority may take a variety of forms; but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.

29 The Plaintiff also referred to the English decision of *Crabb v Dunn* [1976] 1 Ch 179 at 193D, where it was said that

> …those to whom a defendant entrusts the conduct of negotiation must be treated as having the authority, which, within the course of the negotiations, they purport to exercise.

30 The Plaintiff submitted that the alleged conduct of the Defendant set out below amounted to a representation or holding out by the Defendant of OW Singapore's authority to act on behalf of the Defendant:

> (a) the Defendant permitted OW Singapore's Ms Daria Kuznetsova to negotiate with the Plaintiff on the commercial as well as technical aspects of the Supply.
>
> (b) the Defendant did not take any steps to inform OW China that it was not to hold itself out as an agent of the Defendant in relation to the Supply and thereby held out or permitted OW Singapore and/or OW China to be held out as its agents.
>
> (c) the Defendant apparently made available the Vessel for the stemming of the bunkers in the manner agreed on between the Plaintiff and OW Singapore.

31 I should state at the outset that, insofar as the proposition in paragraph 30(b) is concerned, in my view whether OW China was the Defendant's agent is irrelevant since, even on the Plaintiff's own case, OW China was not a party to the Plaintiff-OW Singapore Agreement.

32 Insofar as the submission that the Defendant allegedly permitted OW Singapore to negotiate the Plaintiff-OW Singapore Agreement was concerned, one obstacle to the Plaintiff's submission is the undisputed fact that the Defendant was, until well after the Plaintiff-OW Singapore Agreement was concluded, wholly unaware of the involvement of OW Singapore in the chain of transactions that led to the Supply to the Vessel, because the Defendant had corresponded with only OW China in relation to the Supply.

33 To overcome this, the Plaintiff's counsel submitted that if a purchaser of bunkers permits a bunker trader to carry on and conclude negotiations with a third party for the supply of bunkers and does not instruct that bunker trader to ensure that it does not act in a way that conveys the impression that it is contracting as the purchaser's agent, that purchaser will have clothed the bunker

trader with ostensible authority, even if the purchaser was wholly unaware of the involvement of the bunker trader in question.

34 At the hearings before me, the Plaintiff's counsel was unable to furnish any authority in support of this proposition.

35 Nevertheless, an absence of supporting authority may not be sufficient to justify striking out a claim. The approach of the Court of Appeal in *The Bunga Melati 5* is instructive in this regard.

3 6 *The Bunga Melati 5* was a case in which the plaintiff, Equatorial Marine Fuel Management Services Pte Ltd ("**Equatorial**") a company in the business of supplying bunkers, sought payment for bunkers supplied, through middlemen, directly from the owners of the vessel to which bunkers were supplied, MISC Berhad ("**MISC**").

37 As is the case here, in *The Bunga Melati 5*, one key issue was whether one of the middlemen who brokered the transaction, a company known as Market Asia Link Sdn Bhd ("**MAL**"), had been held out by MISC as its agent in respect of the transaction.

38 In *The Bunga Melati 5*, the Court of Appeal held that on the facts before it, Equatorial's action against MISC was neither factually nor legally unsustainable and therefore should not be struck out under O 18 r 19 of the Rules of Court.

39 On the issue of factual unsustainability, the Court of Appeal felt that the claim was not factually unsustainable for lack of a representation by MISC of MAL's authority. The Court of Appeal reached this decision because:

(a) one of Equatorial's representatives had deposed that an employee of MISC had informed him that MAL was effectively its agent;

(b) there was evidence that MISC routinely directed bunker suppliers to contact MAL instead and this was not controverted by MISC.

40 On the issue of legal unsustainability, the Court of Appeal considered Equatorial's argument that MISC's conduct gave rise to an agency by estoppel between MISC and MAL and found that this was not legally unsustainable.

41 In coming to this conclusion, one issue which the Court of Appeal had to consider was Equatorial's submission that an alleged representation made by a representative of MISC in 2006 still remained operative so as to amount to a holding by MISC as to MAL's authority to enter into the agreement forming the subject matter of *The Bunga Melati 5*, even though the agreement was only entered into in 2008.

42 In this regard, the Court of Appeal stated, at [61] of its judgment, that:

> 61…
>
> **Although the appellant did not cite any authority which positively established the proposition it sought to rely on** (ie, that representations of a general nature can be continuing unless withdrawn as well), **we were unable to dismiss the proposition as being legally unsustainable summarily**. In our provisional view, it would be surprising indeed should the law require a principal to make repetitive representations to a long-term business counterparty as to

the authority of the same agent for each separate transaction before "agency by estoppel" could be established

62 Crucially, this provisional view of ours is not intended to be binding on any court – least of all the trial court which would be hearing this case – since we did not have the opportunity to hear the parties fully on this issue. In our view, **even if the appellant should eventually be held to have been mistaken on this legal element, the arguments it had mounted certainly sufficed to establish "a point of law which require[d] serious argument"** (Singapore Civil Procedure 2007 ([32] supra) at para 18/19/6; *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215).

(Emphasis added in bold)

43 The Court of Appeal then went on to give examples of claims which it said were legally unsustainable. It highlighted, at [70] of its judgment, a group of three cases where

> …a bunker supplier, albeit having contracted with a time-charterer for the sale of bunkers, has sought to argue that the ship-owner or the demise charterer was the principal of the time-charterer, and should therefore be liable for the bunkers supplied.

44 The Court of Appeal in *The Bunga Melati 5* then went on to note that claims brought in the aforementioned context were almost always set aside or struck out and, significantly for our purposes, opined that this was because such claims were based on a "legally unsustainable" proposition (that a ship-owner by its mere act of receiving bunkers supplied) which ran counter to the "universally accepted" basis of a time charter (that it is the time charterer who is responsible for the provision of and payment for fuel). It then concluded that Equatorial's claim was distinguishable from claims in which it was sought to characterise time charterers as the ship-owners agents since MAL was not a time charterer but an independent third party and as such, the allegation that MAL had contracted on behalf of MISC "could be" a legally sustainable proposition.

45 The *absence* of case law authority in support of the Plaintiff's position is therefore not sufficient on its own to strike out a claim on the ground of legal unsustainability.

46 In this case, however, I am of the view that the claim put forward by the Plaintiff is legally unsustainable because the claim is founded upon legal submissions that run contrary to the requirements (enunciated in case law) which must be satisfied before agency by estoppel can arise.

47 The Plaintiff's claim of agency is based on the doctrine of agency by estoppel, such estoppel allegedly arising out of a representation made by the Defendant by way of its failure to instruct OW China that it as well as OW Singapore was not to act as the Defendant's agent.

48 As will be explained below, the Plaintiff's argument is bound to fail insofar as it suggests that estoppel by representation (in the form of the Defendant's inaction in this case) can arise even if:

(a) the Defendant was unaware that the Plaintiff was operating under a mistaken belief that OW Singapore was allegedly acting as an agent of the Defendant; and

(b) the Defendant was unaware of OW Singapore's involvement in the Supply.

The Defendant's lack of knowledge as to the Plaintiff's mistaken belief

49 As to why the Plaintiff's claim is bound to fail to the extent the Plaintiff relies on the

Defendant's conduct as the basis for a representation that OW Singapore was its agent, I begin with the decision of the Court of Appeal in *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35 (" ***Yongnam*** ").

50 In *Yongnam*, the Court cited with apparent approval the English decision of *Willmott v Barber* (1880) 15 Ch 96, in which Fry J set out five prerequisites for "acquiescence to constitute estoppel". The following passage from the judgment of Fry J was one noted by the Court of Appeal in *Yongnam*:

> the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.

51 It is therefore a requirement, acknowledged by the Court of Appeal in *Yongnam*, that in order for estoppel by representation to arise out of an alleged principal's acquiescence to the conduct of its alleged agent, the party against whom an estoppel is raised must know that the party seeking the benefit of the estoppel was labouring under a mistaken belief.

52 Turning to the Plaintiff's claim herein, I note that it is nowhere suggested by the Plaintiff that the Defendant must have known that the Plaintiff was labouring under a mistaken belief as to his rights under the Plaintiff-OW Singapore Agreement (the mistaken belief being that the Plaintiff would have a right of action under that agreement against the Defendant). Further, the focus of the Plaintiff's argument and evidence has been on the Plaintiff's *impression* of the Defendant's purported conduct and not on the Defendant's knowledge of the Plaintiff's mistaken belief.

53 To the extent, therefore, that the Plaintiff's argument posits that estoppel by representation may arise even where the alleged representor is unaware of the representee's mistaken belief, I am of the view that this is inconsistent with the established principle that such knowledge on the part of the alleged representor is in fact required, and is therefore legally unsustainable.

The Defendant's lack of awareness as to OW Singapore's involvement in the Supply

54 Separately, the Plaintiff's submission is also legally unsustainable insofar as it is submitted that if the Defendant did not wish to be bound by the Plaintiff-OW Singapore Agreement, it should have instructed OW Singapore not to portray itself as an agent of the Defendant.

55 It bears repeating it is undisputed that the Plaintiff and the Defendant had no direct contact of any kind up to and including the date on which the Supply to the Vessel was carried out. No positive act was carried out by the Defendant directed at the Plaintiff.

56 In particular, the Defendant's alleged "conduct" as alleged by the Plaintiff (as set out in paragraph 30 above), are merely instances of inaction on the part of the Defendant paraphrased as positive acts on the part of the Defendant. Accordingly, in substance the Plaintiff is relying on the Defendant's *inaction* as constituting the conduct amounting to the representation.

57 On this analysis, the Plaintiff's case comes into conflict with the established principle that no representation will be inferred from silence unless the alleged principal is under a duty to disclose certain facts. In this regard, counsel for the Defendant highlighted the following passage from *The Law of Waiver, Variation and Estoppel* by Sean Wilken QC and Karim Ghaly:

> Inaction, or silence, by contrast with positive conduct or statement, is said to be colourless: it cannot influence a person to act to his detriment unless it acquires a positive content that entitles the representee to rely on it. **This positive content is acquired by the imposition of a**

legal duty to disclose some fact to another. The duty to disclose must be owed to the person seeking to raise the estoppel…

(Emphasis added)

58 In the course of the hearing on 24 March 2015, I expressly asked counsel for the Plaintiff to refer me to any authority for the proposition that on the facts here the Defendant could have been required to take steps to disabuse third parties of the misconception that OW Singapore was its agent. Counsel for the Plaintiff was unable to do so. Further, the Plaintiff's case was not even cast as one which required the imposition of such a duty on the Defendant, which runs counter to the principle highlighted in the preceding paragraph.

59 Further, in this case the Plaintiff faces an additional obstacle in that the Defendant did not even communicate with OW Singapore for the Supply; it contracted with OW China instead.

60 To address this issue, the Plaintiff suggested that the Defendant could have instructed OW China not to portray itself as the Defendant's agent and that its failure to do so somehow constituted a holding out of OW Singapore as the Defendant's agent. To my mind, this is a complete *non sequitur* and accordingly need not be considered further.

Factual unsustainability

61 Alternatively, on another view of the Plaintiff's claim, it is also *factually* unsustainable. This is because the evidence adduced militates against the existence of facts which must be proved to exist in order for the Plaintiff's claim to succeed.

62 As highlighted earlier, it is essential that a plaintiff show, in a claim founded upon estoppel by representation, that the alleged representor was aware that the alleged representee was labouring under a mistaken belief.

63 Transposed to the facts of this case, this means that the Plaintiff must show that the Defendant was aware that the Plaintiff mistakenly believed that OW Singapore was an agent of the Defendant for the purpose of the Supply. However, the evidence adduced by the parties clearly shows that the Plaintiff will not be able to satisfy this requirement.

64 To begin with, the Defendant at all material times dealt with OW China and not with OW Singapore.

65 The uncontroverted evidence is that there was no direct communication between the Plaintiff and the Defendant until the Plaintiff contacted the Defendant to assert its claim by way of its letter dated 12 November 2014; this was well after the agreements pertaining to the Supply had been concluded. The evidence of the Plaintiff's Mr Maxim Verbin (the sales executive of the Plaintiff who dealt with OW Singapore in relation to the Supply) shows that he did not have any direct contact with the Defendant. To the contrary, Mr Verbin's own evidence is that he dealt only with OW Singapore in relation to the Supply.

66 Mr Verbin's affidavit evidence makes great play of the fact that OW Singapore's Ms Daria Kuznetsova was familiar with the Plaintiff's GTC which contained, *inter alia*, a warranty to the effect that OW Singapore was authorised as an agent of the Defendant in relation to the Supply. He also suggested that OW Singapore would have been aware, based on past dealings with the Plaintiff, that signing the Plaintiff's Bunker Sales Confirmation would give the Plaintiff the impression that OW

Singapore was acting as the Defendant's agent in relation to the Supply. Mr Verbin's affidavit is replete with statements to the effect that OW Singapore appeared to the Plaintiff to be the Defendant's agents in respect of the Supply.

67 A similar assertion as to the authority of OW Singapore to bind the Defendant is found in the evidence of the Plaintiff's other witness, Mr John Kevin Philips. [note: 1]

68 With respect, even taking the evidence of the Plaintiff's witnesses at its highest, there is nothing to show whatsoever that the Defendant was aware of OW Singapore's actions in entering into the Plaintiff-OW Singapore Agreement. In particular, there is no basis for attributing Ms Kuznetsova's knowledge of the GTC (even assuming she had such knowledge) to the Defendant when the Defendant had no knowledge of OW Singapore's involvement in the Supply.

69 All that the evidence shows is the Plaintiff's subjective state of mind as regards the authority possessed by OW Singapore; as for the Defendant's state of mind, the *uncontroverted* evidence in fact positively shows that, at the time the agreements culminating in the Supply were being entered into, the Defendant was completely unaware that OW Singapore was purchasing the bunkers in question from the Plaintiff in order to resell this to OW China. [note: 2]

70 Separately, Mr Verbin also refers in paragraph 17 of his affidavit to Mr John Kevin Philips' affidavit as containing a "demonstration" of how OW Singapore had control of every commercial and technical aspect of the Supply:

> "from price, to quality, to quantity, to location, and so forth, through to authorising the Plaintiff to arrange for and provide a local agent for the Vessel in Kavkaz."

71 With respect, Mr Philips' evidence demonstrates no such thing. Taken at its highest, Mr Philips' evidence is no more than *consistent* with the Plaintiff's suggestion that OW Singapore had control of the commercial and technical aspects of the Supply. However, to submit that this means that OW Singapore therefore had control of the Supply is to confuse correlation with causation. The apparent "control" over the Supply allegedly enjoyed by OW Singapore is equally consistent with a chain of back-to-back contracts entered into for the Supply and therefore cannot amount to an unambiguous holding out by the Defendant.

72 The Defendant has filed several affidavits explaining the chain of contracts that gave rise to the Supply:

(a) On or about 26 September 2014, the Defendant entered into the Defendant-OW China Agreement. This is evidenced by a chain of emails exchanged between the representatives of the Defendant and OW China as well as a Bunker Order Confirmation dated 26 September 2014 issued by OW China to the Defendant. Under the Defendant-OW China Agreement, the Defendant was to pay OW China for the bunkers supplied at a rate of USD 469 per metric tonne and the seller of the bunkers was identified as OW China.

(b) In order to fulfil the requirements of the Defendant-OW China Agreement, OW China entered into an agreement with OW Singapore for the purchase of the same quantity of fuel at a rate of USD 445 per metric tonne. This is evidenced by a Sales Order Confirmation issued by OW Singapore to OW China (not the Defendant) dated 30 September 2014.

(c) On or about 30 September 2014 as well, OW Singapore concluded the Plaintiff-OW Singapore Agreement for the sale and purchase of the same quantity of bunkers for the Supply at

a rate of USD 442 per metric tonne. This is evidenced by the Plaintiff's own Bunker Sales Confirmation dated 30 September 2014.

73 The authenticity and veracity of the contents of the contemporaneous documents (being the emails and various sales confirmations exhibited in the affidavits filed for the applications being considered) were not challenged by the Plaintiff.

74 That being the case, a number of features present in the agreements described above lend themselves to a finding that there was, in this case, a chain of back-to-back sale and purchase agreements, without any overarching agreement entered into between the Plaintiff and the Defendant via the agency of OW Singapore:

(a) The unit rates set out on the sales confirmations issued by the Plaintiff, OW Singapore and OW China respectively are all different and in each case reflect the price mark-up that would be expected of parties making onward sales of the bunkers to the final consumer as it were.

(b) There is no evidence that the sales documentation issued by the Plaintiff was ever transmitted to the Defendant up to the point when the Plaintiff first asserted its claim against the Defendant well after the Supply had taken place. To the contrary, the uncontroverted evidence of the Defendant's Qiao Qiming is that "the Defendants were not aware of the involvement of either OW Singapore or the Plaintiffs in the [Supply] until 12 November 2014, when the Defendants received an email from the Plaintiff's demanding payment…" [note: 3]

(c) None of the sales documentation issued by OW Singapore referred to the Defendant as the buyer of the fuel. OW Singapore's purchase confirmation to the Plaintiff identifies itself and not the Defendant as the purchaser.

75 It would not be appropriate for me, at this interlocutory stage, to assess the weight of the evidence adduced by the parties; the Plaintiff's claim should only be struck out if it is obviously unsustainable.

76 In order to succeed in its claim, this being a case in which the imposition of apparent authority on OW Singapore (and of attendant liability on the Defendant), the Plaintiff must show a good arguable case that the Defendant was aware of the mistaken belief of the Plaintiff.

77 However, given that the Defendant's uncontroverted evidence is that it believed at all times that it was purchasing the bunker fuel from only OW China, for the reasons set forth above, there simply does not seem to be any room for a possible finding that the Defendant was aware that the Plaintiff mistakenly believed that OW Singapore was acting as an agent of the Defendant in the Supply. It follows that the Plaintiff's claim is, in this sense, factually unsustainable.

78 Given my view that the Plaintiff's claim against the Defendant is obviously unsustainable, I ordered that the writ and the claim herein be struck out pursuant to O 18 r 19(1)(b) of the Rules of Court.

The Stay Application

79 My finding that the Plaintiff has not shown, on a good arguable case, the existence of an agreement between the Plaintiff and the Defendant in relation to the Supply also fatally undermines the Plaintiff's Stay Application herein.

80 It is trite that before I can grant the Stay Application pursuant to section 6 of the International Arbitration Act (Cap 143A, the "**IAA**"), as prayed for by the Plaintiff herein, it must be shown, *inter alia*, that the parties to this application are parties "to an arbitration agreement" (in the words of section 6).

81 However, the Plaintiff need only show the existence of an arbitration agreement between itself and the Defendant on a *good arguable case*. The authority for this is the decision of *The Titan Unity* [2013] SGHCR 28, which the parties here both relied on.

82 The arbitration agreement which the Plaintiff relies on in support of the Stay Application is allegedly found at Clause 18.1 of the GTC, which provides that:

> "18. Law and Jurisdiction
>
> 18.1 Should any dispute arise out of this Agreement, the dispute shall be referred to a three person arbitration panel in the City of New York, one person to be appointed by each of the parties hereto, and the third person by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. This Agreement shall first be governed by the Federal Maritime Law of the United States. If an issue of state law shall govern an issue in dispute, the laws of the State of New York shall apply. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc. However, the choice of law is for the sole benefit of the Seller and the Seller may apply and benefit from any law granting a maritime lien and/or right to arrest the Vessel in any country as stipulated in Section 10 hereof."

83 The Plaintiff submits that the above arbitration clause was incorporated into the Plaintiff-OW Singapore Agreement because the Bunker Sales Confirmation issued by the Plaintiff to OW Singapore in respect of the Supply incorporated the GTC, and that since OW Singapore was contracting as an agent of the Defendant, the Defendant is bound by the terms of the GTC including the arbitration clause.

84 Given the case theory adopted by the Plaintiff as described in the preceding paragraph, it will be apparent that the Defendant would only be bound by the terms of Clause 18.1 if it was a party to and bound by the terms of the Plaintiff-OW Singapore Agreement. However, since I have already found that the Plaintiff has not demonstrated a good arguable case that the Defendant was in fact a party to the Plaintiff-OW Singapore Agreement, it follows that the Defendant has not shown, on a good arguable basis, that the Plaintiff and the Defendants were parties to the arbitration agreement found in Clause 18.1 of the GTC, which is itself part of the broader Plaintiff-OW Singapore Agreement.

85 The Stay Application was therefore dismissed.

The Jurisdiction Objection

86 I turn now to consider whether, independently of my finding above that the Plaintiff's claim should be struck out pursuant to O 18 r 19(1)(b) of the Rules of Court, the Plaintiff's Writ of Summons herein should be set aside in any event for failure to satisfy the requirements for invoking admiralty jurisdiction under the HCAJA.

87 Section 4(4) of the HCAJA provides that:

> **Mode of exercise of admiralty jurisdiction**

4.—(1)…

…

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

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

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

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

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

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

88 The Court of Appeal in *The Bunga Melati 5* [2012] SGCA 46 held at [112] of its judgment that in order to invoke admiralty jurisdiction, a plaintiff must, *inter alia*,

…

(c) identify, *without having to show in argument*, the person who would be liable on the claim in an action in personam [i.e. the "relevant person] ("Step 3");

89 The Court of Appeal made it clear in *The Bunga Melati 5* that the *invoking of admiralty jurisdiction* under the HCAJA would not be fatally undermined if a plaintiff is unable to prove on a good arguable case that the alleged defendant was the relevant person (see [108] of the judgment).

90 Notwithstanding this, the Defendant's counsel submitted that the Plaintiff must still provide "some evidence" that the alleged Defendant is the "relevant person". My attention was drawn by Defendant's counsel to the following passages from the judgment of the Court of Appeal in *The Bunga Melati 5*:

At [114] of the judgement:

> While the assistant registrar hearing an *ex parte* application for a warrant of arrest should not be overly concerned with the merits or sustainability of the plaintiff's action, he or she could still exercise discretion *not* to grant the warrant of arrest if *obviously insufficient or contradictory documentary evidence* have been adduced to show that the defendant is indeed the "relevant person" under s 4(4) of the HCAJA…

At [117] of the judgment:

> For that reason, an assistant registrar hearing an application for *a warrant of arrest* must act as the first "gatekeeper" against a completely unmeritorious claim, by refusing to grant

the warrant should the plaintiff's claim be supported by *obviously insufficient or contradictory documentary evidence*. However, we also caution that as it is not the role of the assistant registrar *at that stage* to determine the sustainability of the plaintiff's action, he or she should refuse to grant leave in only plain cases of processoral abuse.

91 The Court of Appeal gave an example of an application supported by obviously insufficient or contradictory documentary evidence, stating at [114] that:

> To use an extreme example, had the appellant in this case chose to apply for a warrant of arrest (although it did not actually do so) and yet did not disclose either Mr Middleton's affidavit or the bunker confirmations identifying the respondent as the "buyers" (see above at [7]), an assistant registrar would have been justified in not granting the appellant a warrant of arrest. This is because without these documents, the appellant would have *absolutely no basis* whatsoever to argue that the respondent was the party liable for the bunkers supplied via the doctrine of agency by estoppel.

92 On this issue, Defendant's counsel submitted as follows at paragraph 70 of his written submissions of 4 March 2015:

> On the facts, there is obviously insufficient or contradictory documentary evidence to justify refusal of the grant of the warrant of arrest. The Plaintiffs have absolutely no basis to argue that OW Singapore are agents of the Defendants and are therefore unable to satisfy the evidential threshold requirement under Section 4(4)(b) of the HC(AJ)A to justify the *warrant of arrest*. Accordingly, the *admiralty jurisdiction of this Honourable Court was improperly and invalidly invoked*. (Emphasis added)

93 With respect, I think the Defendant's submissions, as framed in the above-cited manner, conflated the two distinct issues of whether a *writ in rem* should be set aside for want of jurisdiction under the HCAJA and whether a *warrant of arrest* should be set aside for failure to make full and frank disclosure.

94 In my view, it is clear from *The Bunga Melati 5* that the consideration of whether a claim was founded upon obviously insufficient or contradictory evidence does not form part of the process of considering whether admiralty jurisdiction has been properly invoked. This is because:

(a) The Defendant's submission that admiralty jurisdiction will not have been properly invoked (and therefore the *writ in rem* must be set aside), where the evidence supporting the plaintiff's assertion as to the identity of the "relevant person" is obviously insufficient or contradictory, is difficult to reconcile with the Court of Appeal's repeated statements that:

(i) for the purposes of invoking admiralty jurisdiction, a plaintiff need only "identify, without having to show in argument" who the "relevant person" is; and

(ii) that a plaintiff need not show a good arguable case on the merits of its claim to establish admiralty jurisdiction.

(b) A corollary of the submission described in (a) above is that the Court must engage in an exercise, in considering whether a plaintiff's claim is supported by obviously insufficient or contradictory documentary evidence, of considering whether a plaintiff's evidence meets some *undefined* standard of proof which is *lower* than that of a good arguable case where the identification of the "relevant person" is concerned (since the Court in *The Bunga Melati 5* held

that a plaintiff need not meet this threshold).

(c) The Court of Appeal does not state, in those portions of the judgment (in particular from [114] to [117]) wherein it said that a *warrant of arrest* might not be issued if there is obviously insufficient or contradictory documentary, that in such circumstances the writ *in rem* would also accordingly be set aside.

95 For the purposes of considering whether the identity of the "relevant person" has been established for jurisdictional purposes under section 4(4) of the HCAJA, therefore, I am of the view that all I need have regard to is whether the plaintiff has identified, without showing in argument, the "relevant person".

96 There is no need, therefore, in considering the issue of whether jurisdiction has been properly invoked, for me to consider whether the documentary evidence supporting such identification was obviously insufficient or contradictory; *this latter requirement is only relevant to the issue of whether the warrant of arrest was properly issued, premised on a plaintiff's duty to give full and frank disclosure in an application for a warrant of arrest so as to safeguard against abuse of process (in the form of a claim brought with absolutely no basis)*.

97 This siting of an AR's role as a "gatekeeper" (to exclude claims supported by obviously insufficient or contradictory documentary evidence) within the framework of the duty of full and frank disclosure is consistent with the decision of the Court of Appeal in *The Bunga Melati 5*; the Court there was at pains to emphasise that it is not an AR's role to determine the "sustainability" of a plaintiff's action on an *ex parte* hearing, but it was nevertheless the role of an AR to guard against plain cases of "processoral abuse" such as where a plaintiff attempts to bring a claim supported by obviously insufficient or contradictory documentary evidence (and in respect of which, therefore, material facts to support the claim could not be said to have been fully disclosed). [note: 4]

98 Another case which appears to support this approach is *The Eagle Prestige* [2010] SGHC 93. At [75] of that judgment, Belinda Ang J noted that in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994, the Court of Appeal had approved of the proposition that:

> … at the interlocutory stage *save for frivolous claims*, the *in rem* plaintiff need not establish at the outset that he has a cause of action sustainable in law, and neither the existence of a good defence to a claim would negate the court's admiralty jurisdiction.

99 In the same paragraph, Ang J also stated that in her view,

> the **non-disclosure of defences** that the defendant could raise at the trial in answer to the plaintiff's claim (as that pertains to the ultimate merits of the action and the question of who is likely to win), are ***generally* not characterised as a failure to give full and frank disclosure *unless*** (and this is the qualification (*ie*, Situation 2) mentioned in *The St Elefterio* (see [56] above)) **they are *matters that show up the claim as an abuse of process*** *, or one that it is so obviously frivolous and vexatious as to be open to summary dismissal and, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process*.
>
> (Emphasis in bold added)

100 It therefore appears that Ang J viewed the consideration of defences that might show up a claim as an abuse of process as one that should take place within the framework of a plaintiff's duty,

on *an ex parte* application for a warrant of arrest, to make full and frank disclosure.

101 By virtue of the foregoing, the consideration of matters which could be seen as showing up the claim as an abuse of process or as a "knock out blow" (in the words of Ang J in *The Eagle Prestige*) or to a claim founded on "obviously insufficient or contradictory documentary evidence" (in the words of the Court of Appeal in *The Bunga Melati 5*) must necessarily speak, not to the issue of jurisdiction (whether the writ *in rem* should be set aside), but to the issue of whether a plaintiff has complied with its duty of full and frank disclosure (whether the *warrant of arrest* should be set aside).

102 Approached in this way, the Jurisdiction Objection can be disposed of in short order, because all that the Plaintiff is required to do is to have identified, without showing in argument, the Defendant as being the person who would liable on the claim in an action *in personam.*

103 On the evidence, I find that the Plaintiff has met the requirement to identify, without showing in argument, the Defendant as the "relevant person". In this regard, a large portion (see paragraphs 6 to 17) of Mr John Kevin Philips' affidavit filed in support of the application for a warrant of arrest against the Vessel was taken up with setting out the Plaintiff's case for identifying the Defendant as the "relevant person" for the purposes of the HCAJA as described earlier in these Grounds of Decision.

104 I therefore found that the Jurisdiction Objection had not been made out.

The Disclosure Objection

105 I turn now to consider the third ground upon which the Defendant's counsel sought to challenge the arrest of the Vessel by the Plaintiff.

106 It is well established that a plaintiff who applies for a warrant of arrest against a vessel is under a duty to disclose to the court hearing the application all matters within his knowledge which might be material even if they are prejudicial to the plaintiff's claim: see *The Vasiliy Golovnin* at [83].

107 The test of whether a fact is material or not is an objective one and based solely on relevance: see *The Vasiliy Golovnin* at [87]. A failure to discharge the duty of full and frank disclosure can be an independent ground for setting aside an arrest: see *The AA V* [1999] 3 SLR(R) 664 at [47].

108 In considering whether a plaintiff has discharged his duty to give full and frank disclosure, the court must not only be satisfied that the material facts have been disclosed (the content and scope of disclosure), but also that the disclosure has been *sufficient* (the threshold of disclosure).

109 The Court of Appeal in *The Vasiliy Golovnin* succinctly described the first aspect of full and frank disclosure as a question of "what ought to have been disclosed" (at [82] of the Judgement). The Court of Appeal then went on to elaborate that what must be disclosed are the material facts, which need not be strictly limited to facts which will have a determinative impact on the court's decision; a fact is material if it is a matter that the court should take into consideration in making its decision (see *The Vasiliy Golovnin* at [87]).

110 As for the second aspect of disclosure, the Court of Appeal in the *Vasiliy Golovnin* held (at [91]) that the

> 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.

111 Accordingly, in order to cross the necessary threshold in the disclosure of a material fact, an applicant's counsel was expressly required to draw the attention of the judge to the relevant papers (see the *Vasiliy Golovnin* at [94]).

112 Before me, counsel for the Defendant submitted that the Plaintiff had failed to give disclosure of the following to the AR hearing the application for the Warrant of Arrest, or had failed to give sufficient disclosure of the same: [note: 5]

(a) The correspondence exchanged between the parties or their solicitors showing that the Defendant had contracted with OW China for the Supply and had denied any agency relationship with OW Singapore.

(b) The Purchase Order Confirmation issued by OW Singapore to the Plaintiffs.

(c) The fact that the proceedings herein are being brought to obtain security in aid of New York arbitration.

Disclosure of the Defendant's objection to the Plaintiff's claim

113 Turning first to consider (a) and (b) above, it appears to me that these are documents in support of material facts, rather than material facts *per se*. Indeed, the Defendant's written submissions reveal that in fact the Defendant's true objection is that its denial of the existence a contractual relationship between the Plaintiff and the Defendant (and the basis for such denial) was not properly disclosed during the Arrest Hearing. [note: 6] It was further submitted that this objection, if properly disclosed, would have been a "knock out blow" to the Plaintiff's claim (and also showed that the Plaintiff's claim was supported by insufficient or contradictory evidence).

114 For reasons which I will elaborate on below, I am of the view that the Plaintiff at the Arrest Hearing did adequately disclose the evidence of the Defendant's position to the AR, who nonetheless granted the Plaintiff's application.

115 Insofar as objections to a claim are concerned, in *The Eagle Prestige* (at [84]), Belinda Ang J opined that what must be disclosed are

> … matters (factual and/or legal) which are of such weight as to deliver the "knock out blow" to the claim summarily, and their omission is likely to or may mislead the court in the exercise of its discretionary powers of arrest.

116 On a related note, it has already been mentioned that in *The Bunga Melati 5*, the Court of Appeal noted that an AR hearing an application for a warrant of arrest *might* not grant the application if "obviously insufficient or contradictory documentary evidence" has been disclosed to show that the defendant is the person who would be liable in an *in personam* claim.

117 In this case, the facts pertaining to the defence raised by the Defendant in response to the Plaintiff's claim are referred to in paragraphs 24 and 25 of the affidavit of John Kevin Philips filed in support of the Plaintiff's application for the Warrant of Arrest, and set out in exhibit JKP-8 which is expressly referred to in those paragraphs. In particular, I note that JKP-8 contains the following documents:

(a) An email from the Defendant's Hong Kong solicitors, Messrs Stephenson Harwood, stating, *inter alia*, that

> It is incorrect to claim that [OW Singapore] was our client's agent. [OW Singapore] is not and has never been our client's agent. As mentioned by our client in their email of 17 November 2014, our client's contract was with [OW China].

and also that

> In our view, [the retention of title clauses in the GTC] is ineffective against our client for various reasons, not least there is no contractual relationship between your client and our client.

(b) A letter from the Defendant's counsel herein dated 24 November 2014 stating, *inter alia*, that

> Our clients [ie. the Defendant] are not the party liable in personam for your clients' claim, and are under no obligation or liability to make payment to you. Your clients' remedy for non-payment of your invoice lies solely against your contractual party, [OW China] or [OW Singapore] as the case may be. Our clients are not concerned with, and are not privy to, the contractual arrangements between your clients and [OW China] or [OW Singapore] or any of their related entities. The allegation that [OW Singapore] had acted as our clients' agent in relation to the bunker supply is completely groundless. Indeed, your clients' allegation suggests that they are not only one but two layers removed from our clients in the chain of bunker supply contracts.

(c) A sales confirmation issued by OW China to the Defendant dated 26 September 2014, recording the terms of the bunker purchase as between OW China and the Defendant, including:

> (i) identifying the "seller" as OW China;
>
> (ii) recording a price of USD 469 per MT of fuel; and
>
> (iii) identifying, as the physical supplier of the fuel, an entity known as "TTK" (and not the Plaintiff).

118 It is pertinent to note that the duty to make full and frank disclosure does not require a plaintiff to "disclose every relevant document, as it must on discovery" (see *The Vasiliy Golovnin* at [88]). At the end of the day,

> …the material facts are those which are material to enable the judge to make an informed decision.
>
> (see *The Vasiliy Golovnin* at [87])

119 The portions of the affidavit filed in support of the Plaintiff's application for the Warrant of Arrest, together with the documents exhibited described in paragraph 117 above, clearly set out the Defendant's objection to the Plaintiff's claim. Assuming these were adequately brought to the AR's attention at the Arrest Hearing (that is, the threshold of disclosure was met), I think that Plaintiff would have discharged its duty to disclose matters pertaining to the Defendant's objection to the Plaintiff's claim herein.

120 Turning now to consider whether the threshold of disclosure has been satisfied, it has been mentioned that a material fact must be expressly drawn to the attention of the judicial officer hearing

the arrest application before it can be found that the fact in question has been *adequately* disclosed.

121 In this regard, I note that the Notes of Evidence of the Arrest Hearing expressly record:

(a) that the attention of the AR was drawn to paragraphs 24 and 25 of the affidavit of John Kevin Philips filed in support of the application for the Warrant of Arrest;

(b) that emails exchanged between the Plaintiff's solicitors and the Defendant's Hong Kong and Singapore solicitors were brought to the attention of the AR. Further, one of these emails includes, as an attachment, the Sales Confirmation issued by OW China to the Defendant in respect of the Supply; and

(c) the Defendant's argument that OW Singapore did not act as agents of the Defendant and that the Defendant was not liable *in personam*.

122 In my view, therefore, the fact of and even evidence pertaining to the Defendant's position in these proceedings (that is, that there was no contractual nexus between the Plaintiff and the Defendant) was not just disclosed but adequately disclosed to the AR hearing the application for the Warrant of Arrest.

Disclosure of the fact that arrest was sought in aid of arbitration

123 Separately, the Defendant submitted that the Warrant of Arrest should be set aside as the Plaintiff failed to disclose to the AR that the Warrant of Arrest was being sought in aid of arbitration. In support of this submission, counsel for the Defendant cited the decision of the Court of Appeal in *The Vasiliy Golovnin* [2008] SGCA 39, wherein it was held that:

> 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… 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.

124 In *The Vasiliy Golovnin*, the Court of Appeal had expressed the above view because counsel for the plaintiff sought to have the Court reverse the decision of the Judge, arguing, *inter alia*, that in striking out the Plaintiff's claim, the Judge had entered the domain of the arbitrator.

125 The point I make here is that in *The Vasiliy Golovnin*, the failure to raise the arbitration clause was *not* an issue raised as a ground to set aside the arrest. Instead, this failure on the part of the plaintiff formed the basis of the Court of Appeal's decision that, as no such disclosure had been made to the AR hearing the arrest application in that case, there was no need to treat that particular arrest application in any manner different from "any other typical" application for a warrant of arrest (see [43] of judgment).

126 The failure to disclose that the arrest was being sought in aid of arbitration was therefore *not*

a ground upon which the CA found there was material non-disclosure justifying the setting aside of the arrest of *The Vasiliy Golovnin*.

127 This is abundantly clear from [106] of the judgment of the Court of Appeal, which sets out the material facts which the Court of Appeal felt had not been properly disclosed – the fact that the arrest had been sought in aid of arbitration was not one expressly considered by the Court of Appeal to be an omitted material fact. It is therefore not the case that such a failure will invariably amount to material non-disclosure.

128 In *The Vasiliy Golovnin*, the Court of Appeal opined that the disclosure of an intention to arbitrate would allow the court to take care not to pronounce on the merits of the claim in presiding over hearings for this matter (see [40] of *The Vasiliy Golovnin*) and also to calibrate its orders so as to take into account the possible arbitration.

129 In this case, it is not apparent to me how the intention of the plaintiff to commence arbitration proceedings, apart from and in addition to the existence of an allegedly applicable arbitration clause which *was* highlighted by the Plaintiff to the AR, would have been a material fact to be disclosed to the AR at the Arrest Hearing.

130 In my view, the express reference to the arbitration clause would have had the same effect on the AR's decision at the Arrest Hearing as a further statement that the Plaintiff intended to commence arbitration, bearing in mind that following *The Bunga Melati 5*, the AR at the Arrest Hearing would not have been concerned with the merits of the Plaintiff's claim save to be mindful of evidence showing that the bringing of the claim itself was an abuse of process; on the facts of this particular case, had the AR agreed with the Defendant's assertion that there was in fact no agreement between itself and the Plaintiff and thus considered the bringing of the claim by the Plaintiff as an abuse of process, the AR would in any event not have considered the arbitration clause a material fact since it formed part of the impugned agreement.

Conclusion on the Disclosure Objection

131 For the reasons set out above, I found that there was no material non-disclosure on the part of the Plaintiff at the Arrest Hearing and declined to set aside the Warrant of Arrest.

Damages for Wrongful Arrest

132 In the *Vasiliy Golovnin*, the Court of Appeal held (at [136] of its judgment) that damages for wrongful arrest can issue if it can be said that that action was so unwarrantably brought or brought with so little colour or foundation that implies malice or gross negligence on the part of the plaintiff.

133 Further guidance was also offered by the Court of Appeal in *The Vasiliy Golovnin* on this issue. At [137] and [138] of the its judgment, the Court of Appeal opined that:

> 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).

(Emphasis in bold added)

134 For the reasons set out below, I find that in this case, it cannot be said that the Plaintiff's claim was "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".

135 First, the Defendant submitted that the Plaintiff tried to portray this case as straightforward when this was not the case. With respect, I do not see how the Plaintiff could be said to have portrayed the case as straightforward given that the affidavit in support of the arrest runs to 121 pages and the text to 18 pages setting out in detail the basis of the Plaintiff's claim. Further, as mentioned earlier there was no material non-disclosure of the Defendant's position on the part of the Plaintiff at the Arrest Hearing.

136 Secondly, counsel for the Defendant submitted that the Plaintiff's claim was conjured *ex post facto* because the Plaintiff had, in its initial correspondence with the Plaintiff, sought to rely on a cause of action premised on a purported lien over the bunkers, rather than one based upon the existence of an agent-principal relationship between the Defendant and OW Singapore.

137 With respect, even if I accept that the Plaintiff's case theory as against the Defendant arose after the financial collapse of the OW Bunkers group of companies became a matter of public

knowledge, I do not see how it invariably follows that the claim was brought in a way that "implies malice or gross negligence". Even if I accept that the Plaintiff did change the basis of its claim against the Defendant in the course of its correspondence with the Defendant, this appears, even on the Defendant's own submission, to have come about because the Plaintiff appointed (and therefore received advice from) Singapore counsel acting in good faith (there is no suggestion to the contrary) to advise the Plaintiff on its rights of action. To the extent that the Plaintiff's claim *in these proceedings* is (and indeed, has always been) premised upon advice received from Singapore counsel, I am unable to see how it could be said that its change of tack in the course of pre-litigation correspondence implies either malice or gross negligence.

138 Thirdly, whilst the Defendant claims that the Plaintiff proceeded maliciously or reckless once "confronted with the true state of affairs", with respect the characterisation by the Defendant of the contents of its emails as setting out the "true state of affairs" is one that is inherently subjective. At the time the emails were exchanged the parties were simply setting out their respective positions and it is too simplistic to suggest that their position should have been accepted by the Plaintiff as the "true position". In this regard, it is important to bear in mind that in *The Vasiliy Golovnin*, the Court of Appeal expressly recognised (at [138] of the judgment) 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.

139 I therefore declined to make any award of damages for wrongful arrest.

Conclusion

140 By reason of the foregoing, I made the following orders:

(a) The Striking-Out Application is allowed in that the Writ of Summons as well as this action shall be struck out pursuant to O 18 r 19(1)(b) of the Rules of Court. However, I decline to set aside the Writ of Summons on the ground that section 4(4) of the HCAJA has not been complied with. I also decline to set aside the Warrant of Arrest, this having been sought by the Defendant on the ground of non-disclosure of material facts at the arrest hearing.

(b) The security provided to the Plaintiff by way of payment into Court in the sum of US$2,600,000.00 (United States Dollars Two Million and Six Hundred Thousand) for the release of the Vessel be paid out and returned to the Defendants or their solicitors forthwith.

(c) The Stay Application shall be dismissed.

141 Further, having heard the parties on costs on 9 July 2015, I made the following costs orders:

(a) For the Stay Application, I fixed costs to be paid by the Plaintiff to the Defendant at $3,500 plus reasonable disbursements to be taxed or agreed.

(b) For the Striking-Out Application, I fixed costs at S$12,000 plus reasonable disbursements to be taxed or agreed to be paid by the Plaintiff to the Defendant.

[note: 1] See for instance paragraph 14 of John Kevin Philips' affidavit filed on 6 February 2015.

[note: 2] See for instance paragraph 23 of the affidavit of Qiao Qiming filed on 2 January 2015.

[note: 3] Paragraph 24 of the affidavit of Qiao Qiming filed on 2 January 2014.

[note: 4] See [117] of the judgment.

[note: 5] See paragraph 32 of the Defendant's written submissions dated 4 March 2015.

[note: 6] Paragraphs 35 and 36 of the Defendant's written submissions dated 4 March 2015.