

The "Vinalines Pioneer"
[2015] SGHCR 1

Case Number : Admiralty in Rem No 163 of 2013 (Summons No 4029 of 2013)
Decision Date : 12 December 2014
Tribunal/Court : High Court
Coram : Jay Lee Yuxian AR
Counsel Name(s) : Vivian Ang, Yap Yin Soon, Bryna Yeo (Allen & Gledhill LLP) for the Plaintiff; Philip Tay, Yip Li Ming (Rajah & Tann LLP) for the Defendant.
Parties : The "Vinalines Pioneer"

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

12 December 2014

Judgment reserved.

Jay Lee Yuxian AR:

1 This was the Defendant's application to (a) set aside the Plaintiff's admiralty writ *in rem* for want of admiralty jurisdiction under the High Court Admiralty Jurisdiction Act ("HC(AJ)A") and/or (b) to strike out the admiralty writ *in rem* and the statement of claim pursuant to O 18 r 19 of the Rules of Court (Cap 322, R5, 2006 Ed) ("ROC") or the Court's inherent jurisdiction. Although not specifically prayed for in the original summons, the Defendant submitted at the hearing that as an alternative prayer, they sought to set aside the arrest of *The "Vinalines Pioneer"* on the ground of material non-disclosure in the hearing of the Plaintiff's application for the Warrant of Arrest ("Arrest hearing") as well as in the Plaintiff's affidavit supporting its application for the Warrant of Arrest ("Arrest Affidavit").

2 The Defendant's further prayed that the Plaintiff be ordered to return to the Defendant the Letter of Undertaking dated 11 June 2013 and also for the Plaintiff to pay the Defendant damages for the wrongful arrest of the vessel *The "Vinalines Pioneer"*.

Overview

Background facts leading to the arrest of The "Vinalines Pioneer"

3 The tragic incident at the heart of this application was the sinking of the vessel "Phu Tan" in the Tonkin Gulf on or around 16 December 2010 which led to the loss of lives and property on board the "Phu Tan". The relevant events leading up to the arrest which is the subject matter of this application are set out below.

4 The Plaintiff is Hung Dao Container Joint Stock Company ("HD"), a Vietnamese incorporated company who had supplied the containers which were used on the "Phu Tan". The Defendant is Vietnam National Shipping Lines, ("Vinalines"), the owner of "Phu Tan" and *The "Vinalines Pioneer"*. They are a state owned company incorporated in Vietnam, and are said to be in the commercial business of shipping, port operations and *inter alia*, the provision of coastal and ocean-going freight transportation services.

5 The Defendant has a branch office known as Vinalines Container Shipping Company ("VCSC").

The Plaintiff's case is that in or around June 2010 the Plaintiff and the Defendant (through their branch office VCSC) entered into a Container Lease Agreement no. 500710T/2010/HD-VCSC (the "2010 CLC"). It was conceded by the Defendant for the purposes of the present application, that Vinalines was the party to the 2010 CLC.

6 According to the Plaintiff, under the 2010 CLC, the Plaintiff agreed, *inter alia*, to lease containers to the Defendant for shipping their goods. I would note here that in the course of the hearings, there arose a dispute as to whether the 111 containers were in fact leased pursuant to the 2010 CLC. The parties also crossed swords on what was the correct translation of Article 1.1 of the 2010 CLC. These issues are addressed at [53] to [61] below.

7 Sometime in and around December 2010, the 111 containers which were on lease to the Defendant were loaded on the Defendant's vessel "Phu Tan" for carriage from Ho Chi Minh/Danang to Hai Phong. On 16 December 2010, the Defendant's vessel "Phu Tan" capsized and sank. The sinking of the "Phu Tan" resulted in the loss of lives as well as all containers on board, including the 111 containers which are the subject of contention in the present proceedings.

8 The Plaintiff was informed by the Defendants by way of a letter dated 10 March 2011 that the "Phu Tan" had sank with all containers on board and that the 111 containers were a total loss. The Plaintiff alleged that following the incident, they made numerous attempts to recover compensation for the loss of the containers but were unsuccessful. The Plaintiff filed proceedings in Vietnam on 7 August 2012 but allege that there has been little progress in the Vietnamese proceedings save that the Defendant had on 16 May 2013 belatedly filed a "purported Explanation" which I surmise is a court document to be filed in the normal course of court proceedings in Vietnam.

9 The Plaintiff subsequently filed proceedings in Singapore on 4 June 2013. On 7 June 2013, the Plaintiff applied for and obtained the warrant of arrest (at the "Arrest Hearing") and they arrested the vessel *The "Vinalines Pioneer"* ("the Arrested Vessel") on 9 June 2013. The Arrested Vessel was released on 11 June 2013 upon security being furnished. Subsequently, the Defendant entered appearance on 20 June 2013. The Plaintiff filed their Statement of Claim ("SOC") on 12 June 2013 and the amended SOC was served on the Defendant on 25 July 2013. The Defendant then brought the present application.

Procedural history of the application

10 The present application was initially heard on 27 September 2013 and then 31 October 2013. A further set of dates were taken in January 2014 in order to complete the hearing. Thereafter, the following series of procedural skirmishes, briefly set out below, ensued.

11 Prior to the adjourned hearing in January 2014, the Defendants filed a further affidavit by Tran Phuong Thuy dated 2 January 2014 and essentially sought to adduce further evidence which they alleged was relevant to their case on whether admiralty jurisdiction was properly invoked under section 3(1)(I) of the HC(AJ)A and whether there was material non-disclosure by the Plaintiff. Given the seriousness of the allegations and the potential significance of the further evidence to the determination of the issues, I granted leave for the further affidavit to be admitted and allowed parties the opportunity to file further affidavits to address the further points of contention raised. In the course of events, parties subsequently filed further affidavits and provided discovery of further documents. The further evidence essentially comprised documents known as the Equipment Interchange Receipts ("EIRs") and booking orders which were essentially documents exchanged between the parties to evidence the supply of a container from the Plaintiff to the Defendant.

12 The hearing resumed in end April 2014 and at the end of the hearing, parties were given leave to file written supplemental submissions to address some points which had not been fully addressed during the course of the hearing. However, the Plaintiff subsequently filed an application for leave to admit a further affidavit from their Vietnamese law expert, Luu Tien Dzung to address the issue of whether the Plaintiff's claim was time-barred. I allowed the admission of the Plaintiff's further affidavit, in the interests of the overall justice of the matter, given that it had potential significance to the time-bar issue which was being relied upon by the Defendant both as a ground for striking out and as a basis for setting aside the arrest for material non-disclosure. The Defendant was also given the opportunity to file reply affidavits on this issue. Another minor skirmish arose when the Defendant subsequently applied to strike out the further affidavit filed by the Plaintiffs' Vietnamese law expert and this was resolved in favour of the Plaintiff. The parties eventually returned before me in end August 2014 and made their final arguments in the application.

13 At this juncture, it would be useful to broadly outline the parties' respective arguments.

The Parties' Arguments

14 The Defendant's grounds for the setting aside were two-fold. First, they contended that the admiralty writ should be set aside as the Plaintiff's claim did not fall within the jurisdictional limbs which the Plaintiff sought to rely on under section 3(1) of the HC(AJ)A. Separately, and as an independent ground for setting aside the arrest, they alleged that there was material non-disclosure in the Arrest Hearing and in the Plaintiff's arrest affidavit filed by Tran Van Hung on 7 June 2013 ("Arrest Affidavit").

15 The Defendant's case on striking out was premised on O18 r 19(1)(b) of the ROC and the inherent jurisdiction of the court, and based on the grounds that first the Plaintiff's claim was time-barred and second that so far as the non-contractual claims were concerned, there was "not a shred of evidence" to support these claims, and that there is no evidence of "double actionability".

16 The Defendant further asserted that this was a case where damages for wrongful arrest should be awarded as the claim was entirely without substance or foundation and that there was material non-disclosure by the Plaintiff in the Arrest Hearing as well as in the Arrest Affidavit filed by Tran Van Hung dated 7 June 2013.

17 In response, the Plaintiff contended that their present claim did fall within section 3(1), in particular sections 3(1)(d), (g) and/or (l) of the HC(AJ)A such that Admiralty jurisdiction was properly invoked. The Plaintiff argued that the nature of their claim was fully set out in the Arrest Affidavit as well as in the Indorsement of Claim. In particular, the Plaintiff asserted that they had provided sufficient information on, *inter alia*, the following:

- (a) The details of the 2010 CLC between the parties and the material terms therein;
- (b) the subject matter of the claim i.e. the loss of the 111 containers,
- (c) The Plaintiff's locus to sue, i.e. as the owners and/or lessors and/or bailors and/or persons entitled to immediate possession or having a reversionary interests in respect of the 111 containers;
- (d) The basis upon which the claim was brought against the Defendant i.e. as the bailees and/or carriers of the containers;

(e) That the 111 containers were carried on board the Defendant's vessel "Phu Tan" in or around December 2010 from Ho Chih Minh City and/or Danang to Hai Phong;

(f) That the 111 containers were for the vessel's operation or maintenance or were equipment of the "Phu Tan";

(g) That the 111 containers were lost when the Defendant's vessel "Phu Tan" sank on 16 December 2010.

18 As to the striking out, the Plaintiff asserted that there were merits to their present claim and it was a legally and factually sustainable claim.

19 Finally, the Plaintiff asserted that there was no material non-disclosure on their part and that in any event there was no *mala fides* or *crassia negligentia* which would justify an award of damages for wrongful arrest being made against them.

The Issues before this Court

20 Distilled to its core, the issues before this court can be set out as follows:

(a) The invocation of the admiralty in rem jurisdiction of the court: whether the Plaintiff's claim falls within section 3(1)(d), (g) and/or (l) of the HC(AJ)A such that admiralty jurisdiction was properly invoked;

(b) The sustainability of the Plaintiff's claims: whether the Plaintiff's claim should be struck out under O 18 r 19 of the ROC and/or the inherent jurisdiction of the court;

(c) The material non-disclosure: whether there was material non-disclosure such that the Court should exercise its discretion to set aside the arrest; and

(d) In the event that the arrest was set aside or the claim struck out, whether the Plaintiff was liable to pay damages for the wrongful arrest

21 I address these issues in turn.

Issue I: Whether Admiralty jurisdiction was properly or validly invoked

The Law

22 I begin by examining the various steps and standards of proof involved in invoking admiralty jurisdiction under the HC(AJ)A. As set out by the Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546 (*"The Bunga Melati 5"*) at [112], the Plaintiffs have to satisfy a 5 step test when challenged, namely:

(a) prove, *on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s 3(1)(d) to (q) of the HC(AJ)A exist; and show *an arguable case* that its claim is of the type or nature required by the relevant statutory provision ("step 1");

(b) prove, *on the balance of probabilities*, that the claim arises in connection with a ship ("step 2");

(c) identify, *without having to show in argument*, the person who would be liable on the claim in an action in personam ("step 3");

(d) prove, *on the balance of probabilities*, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("step 4"); and

(e) prove, *on the balance of probabilities*, that the relevant person, was at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("step 5").

23 For the purposes of the present application, the Defendant was content not to dispute steps 2 to 5. The challenge on jurisdiction was thus focused solely on step 1 of the 5-step test as laid down in *The Bunga Melati 5*. There are two aspects to step 1. First, it must be proven on a balance of probabilities that the requisite jurisdictional facts exist. The second essential question is whether the Plaintiff's claim is of the legal character contemplated by the jurisdictional limb relied upon in section 3(1) of the HC(AJ)A.

24 For the present application, the Plaintiff asserted that their claim fell within sections 3(1)(d), (g) and/or (l) of the HC(AJ)A. Although the arrest was initially premised additionally on the jurisdictional limb under section 3(1)(m) of the HC(AJ)A, Plaintiff's counsel clarified that for the present application they were no longer relying on section 3(1)(m) of the HC(AJ)A as a basis for invoking admiralty jurisdiction of the court. The Plaintiff's counsel also submitted, rightly in my view, that if their claim was found to come within one of the jurisdictional limbs under section 3(1)(d), (g) or (l), it would suffice to bring the claim within the admiralty jurisdiction of the court.

25 The following analyses assesses if the Plaintiff's claim falls within the jurisdictional limbs under section 3(1)(d), (g) and/or (l) of the HC(AJ)A.

Section 3(1)(d) – Any claim for Damage done by a Ship

26 Section 3(1)(d) provides that the admiralty jurisdiction of the court shall extend to "any claim for damage done by a ship".

27 The main jurisdictional facts relied upon here are uncontroversial. It is not disputed that the "Phu Tan" sank and the 111 containers supplied by the Plaintiffs to the Defendants which were on board the "Phu Tan" were lost.

28 However, there appeared to be some dispute on whether the sinking of the "Phu Tan" and the loss of the containers was caused by those engaged in the navigation or management of the ship. The Plaintiff submitted that the Investigation Conclusion No/ 256/BCDTCVHHHP dated 15 March 2011 ("Investigation Conclusion") issued by the Hai Phong Port Authority revealed in its conclusions, *inter alia* that the poor navigation of the ship and inappropriate actions taken by the master and crew in the navigation or operation of the ship led to the sinking and loss of the containers. The Defendant's counsel on the other hand, brought to my attention a subsequent letter from the Hai Phong Port Authority dated 9 May 2011 which, they submitted, clarified that the bad weather condition was "the proximate cause of the incident, other contributing factors only considered as results of the bad weather condition". In my view, the letter from the Hai Phong Port Authority dated 9 May 2011 was unclear. Whilst it stated that the bad weather condition was "the proximate cause of the incident", it nevertheless still referred to the other factors as "contributing factors" and it did not expressly reject any of its earlier findings in the Investigation Conclusion. Having considered the totality of both

documents, I would accept that the loss was caused by those engaged in the navigation or management of the ship.

29 The main issue argued before me by parties was whether the claim was of the legal character contemplated under section 3(1)(d) of the HC(AJ)A. Citing various authorities including the English authorities of *The "Rama"* [1996] 2 Lloyd's Rep 291 ("*The Rama*"), *The "Eschersheim"* [1976] 2 Lloyd's Rep 1 ("*The Escherheim*"), *The "Eschersheim"*[1976] 1 Lloyd's Rep 81 (Court of Appeal ("*The Escherheim (CA)*"), the Hong Kong decision of *The "Asian Atlas"* [2008] 3 HKC 169 ("*The Asian Atlas*"), as well as passages from *Admiralty Law and Practice* 2nd Ed., Toh Kian Sing SC ("*Admiralty Law and Practice*"), Defendant's counsel forcefully argued that it was settled law that the ship which causes damage under section 3(1)(d) does not refer to the carrying ship, which in the present case was the "Phu Tan".

30 Underpinning this submission was the Defendants' further contention that it was also well settled that the 3 - criteria test as set out in *The Rama* (at 293) would apply. In *The Rama*, Clarke J opined that in order for there to be "damage done by a ship", 3 criteria must be satisfied:

- (a) The damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense;
- (b) The ship must be the actual or noxious instrument by which the damage is done; and
- (c) The damage must be sustained by a person or property external to the ship. ("externality requirement")

Specifically, the Defendant's counsel contended that the 3rd criterion (i.e. the externality requirement - that the damage must be sustained by a person or property external to the ship) was not met in the present case where the "Phu Tan" sank with the containers on board (and not external) to the ship. Defendant's counsel further submitted, as a secondary point, that even if it was accepted that the 3rd criteria of externality was not a requirement, then on the facts of this case it was clear that the 2nd requirement of the ship being the noxious instrument of damage was not satisfied as the "Phu Tan" merely sank with the containers on board and was therefore only a passive environment and not the instrument of damage.

31 Plaintiff's counsel on the other hand pointed out that it was by no means settled law that the 3rd criterion of externality as set out in *The Rama* was applicable to determine if jurisdiction was validly invoked under section 3(1)(d). She argued that prior to *The Rama*, 2 main requirements, were laid down by the House of Lords in *The Escherheim* at 926g: (1) that the damage is the direct result or consequence of something done by those in the navigation of the ship; and (2) the ship must be the actual instrument by which the damage was done, with the important qualifier that physical contact between the ship and the object damaged was not essential. In her submission, insofar as the *Rama* had introduced a 3rd criterion of externality, it seemed to be an additional requirement to the 2 main propositions in *The Escherheim* and one which was not supported by strong authority. The earlier English authorities such as *The "Tolten"* [1946] P 135 ("*The Tolten*") appeared not to insist on this 3rd requirement of externality, in *The Tolten* at 158, the court found that "cause of damage" was not limited to cases involving collisions between ships but that there could be jurisdiction "whenever ...negligent navigation caused damage with or without collision" and that such damage could include damage to any property whether moveable or immoveable. There was no externality requirement.

32 Plaintiff's counsel then argued that there were Australian and New Zealand authorities to the effect that the 3rd criterion of externality was not a requirement for there to be a claim within the ambit of section 3(1)(d). The cases she relied on were - from Australia: *The "Regis"* (1939 61 CLR 688 ("*The Regis*"), *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) ("Ferguson") 119 CLR 191; and from New Zealand: *Fournier v The Ship "Margaret Z"* [1999] 3 NZLR 111 ("*Margaret Z*"). In essence, Plaintiff's counsel argued that based on these authorities, the Plaintiff had an arguable case that their claim came was of the type and nature contemplated under section 3(1)(d).

33 In *The Regis*, the Australian High Court found that it had *in rem* jurisdiction (under the equivalent jurisdictional limb) over a claim suffered by a passenger against the vessel carrying him for negligent navigation resulting in its capsizing and causing personal injury to him. In my reading, a key point can be taken from *The Regis* that tells in favour of the Plaintiff and it is this - the facts of the case there involved a capsizing which caused injury to the claimant. This is analogous to the present case where the "Phu Tan" sank with the 111 containers on board. I do not agree with Defendant's counsel's suggestion that *The Regis* was a case where the ship was indeed found to be the instrument of damage because it *struck* the claimant (and not just because it capsized). Nothing in the judgment suggests that the decision there turned on this fact. Rather, the court in the final analysis (at 700) drew the distinction between:

(a) injury which "arises from some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving...[such that] ...the ship is treated as no more than a potential danger of a *passive kind*" [emphasis added]; and

(b) injury which "is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation...[such that]...the damage is to be regarded as done by the ship as ...the "noxious instrument"".

34 The court in *The Regis* then held (in the penultimate paragraph of the judgment) on the facts of that case that "the improper navigation of the ship caused her so to behave that *she capsized* [making no reference to the fact of the ship *striking* the claimant]. *Her behaviour as an active agent was the direct cause of the harm* and in that sense she was the noxious instrument" [emphases added]. In my reading, this case supports the view that a ship which capsizes and causes damage can be considered to be the instrument of damage and not merely a passive environment.

35 Another relevant authority for consideration is the *Margaret Z* where the New Zealand High Court at 122 - 123 considered the question whether an injured person or object must be "external to the ship" and decided that it did not. Referring directly to the 3rd criterion of externality prescribed in *The Rama*, Fisher J stated that he did not think "too much could be read into Clark J's use of the word "external"". He acknowledged that there was a "floodgates risk of bringing shipboard accidents into the scope of the damage maritime lien. *Cargo damage claims, for example might qualify*" [emphasis added] but concluded that "the precedents seem too far advanced to put the clock back in this respect" and that the main requirement was whether damage was "done by the ship" rather than the location of the accident.

36 In response, Defendant's counsel sought to cast doubt on the decisions of *Margaret Z* and *The Regis* by submitting that these cases were doubted in another New Zealand authority, *Ultimate Lady Ltd v The Ship "Northern Challenger"* AD 7/00 dated 10 August 2000 ("*Northern Challenger*"). I agree with the Plaintiff's counsel that Defendant's counsel's submission was misconceived. In *Northern Challenger*, Williams J cited the *Margaret Z* and *The Regis* but did not reject or doubt the legal propositions as stated in those cases. More significantly, at the subsequent main trial on the merits *Ultimate Lady Ltd v The Ship "Northern Challenger"* (No 2) AD7-SW2000 at [165] - [171], Williams J

cited and applied *The Regis* and *Margaret Z* and did not cast any doubt on those decisions.

37 In the final analysis, I find that the Plaintiff has an arguable case that their claim is of the nature and type contemplated under section 3(1)(d) of the HC(AJ)A. My analysis is as follows:

(a) First, I accept on the basis of the Investigation Conclusion that the damage was caused by something done by those engaged in the navigation or management of the ship in a physical sense;

(b) On the authority of *The Regis*, I am satisfied that, as was the present case, a ship can be said to be the instrument of damage or noxious instrument when it capsizes or sinks and as a result causes injury or damage. To my mind, there is a clear difference between a ship being a mere passive environment, premise or structure on which damage occurred and a ship physically capsizing/sinking and causing the damage as an active agent;

(c) The question of whether *The Rama's* 3rd criterion of externality is a requirement to ground jurisdiction under section 3(1)(d) appears *not* to have been conclusively determined as a matter of Singapore law and neither party contended otherwise before me;

(d) I agree with the Plaintiff's submission that the earlier English authorities, principally *The Escherheim*, had not insisted on this 3rd criterion of externality and had focused the inquiry on whether the damage was caused by something done by those engaged in the navigation or management of the ship and on whether the damage was done by the ship as an instrument of damage. It is significant to note that based on *The Escherheim*, physical contact between the ship and the object damaged is not essential. Indeed in *The Escherheim*, the damage was caused by the negligent beaching of the ship by the salvage tug leading to the ship being exposed to the harmful effects of the elements;

(e) The 3rd requirement of externality stated in *The Rama*, appears to be premised on two cases briefly referred to in the judgment: *The "Victoria"* (1887) 12 PD 105 ("*The Victoria*") and *The "Igor"* [1956] 2 Lloyd's Rep 271 ("*The Igor*"). I would note however, that *The Victoria* was decided prior to *The Escherheim*. In *The Victoria*, the court appeared to readily accept, without elaboration or analysis, the defendant's contention that this jurisdictional limb only applied "to damage done by a vessel to something *with which it can come in contact*, and not to cargo on board." (emphasis added) In the light of the subsequent House of Lords decision in *The Escherheim* that physical contact between the ship and the object sustaining the damage is *not essential*, there is some doubt whether *The Victoria* would have been decided in the same manner. As for *The Igor*, it too was decided prior to *The Escherheim*, the judgment appears to have been concerned with a claim for damage to goods carried in a ship rather than a claim for "damage done by a ship" and in my view, it is difficult to find therein any support for the 3rd requirement of externality;

(f) As to *The Asian Atlas*, in my reading, the Hong Kong Court of Appeal clearly applied *The Rama*. However, it must be appreciated that the facts of that case did not require the court to consider the issue of whether a claim for "damage done by a ship" applies when the damage is suffered by property on board the relevant ship. The externality requirement was applied to the question of whether it was fulfilled when there was damage sustained by the ship herself and this was plainly answered in the negative. Given that this issue was not squarely before the court, unsurprisingly, it appears that the court there was not referred to the other line of authorities in *The Margaret Z*, *The Regis* and *Ferguson* and did not hear arguments on the issue;

(g) The 3rd requirement of externality introduced by *The Rama* would appear to unnecessarily restrict the ambit of this jurisdictional limb and is not supported by strong authority. I see no reason in principle why a claim should not come within this jurisdictional limb just because the damage occurred on the ship even though the ship was in fact the instrument of damage.

38 I am fortified in my views by the following passages of the authoritative textbook *Admiralty Law and Practice*, where the learned author astutely observed that *The Rama* introduced an additional requirement of externality, specifically referred to *The Regis, Margaret Z*, and expressed the following views:

"the *additional requirement* of injury or damage sustained *external* to a vessel *is not always justifiable*, especially in the context of personal injury caused by the instrumentality of the ship" [emphases added] (see pg 56)

"In the decision of *The Rama*, Clarke J *appeared to have added another* requirement to the accrual of a damage lien, namely, that the damage must be sustained by a person or property external to the ship. This would rule out a claim for damage or loss of cargo carried on board or for loss of life or personal injury sustained on board a ship which was the instrument of damage. There are authorities suggesting that a maritime lien does exist in respect of personal injury sustained on board a ship. *While the requirement of instrumentality of the ship is more evidently seen in the case of damage caused to persons or property external to her, earlier authorities have not insisted on such a requirement. This additional requirement introduces an undesirable element of fortuity and it is significant to note that the New Zealand High Court [citing Margaret Z] has rejected it.*" [emphases added] (see pg 257)

I would agree with the learned author's view that as far as the 3rd criterion of externality is concerned, "*earlier authorities have not insisted on such a requirement. This additional requirement introduces an undesirable element of fortuity and it is significant to note that the New Zealand High Court [citing Margaret Z] has rejected it.*" [emphasis added]

39 For good measure, Plaintiff's counsel also brought my attention to a commentary in *The Law and Practice of Admiralty Matters* (Oxford 2007), Sarah C. Derrington, James M. Turner wherein at [4.22] the authors state, correctly in my view, that the holding in *Margaret Z* was consistent with Australian authority on the point that there is no requirement that the injury or damage that is sustained has to be external to the vessel. In my view, insofar as it can be said that *The Rama* represents the English position on the issue, the law appears to have developed in a different direction in Australia and New Zealand. Here I observe that the Singapore courts have been quite prepared to depart from English decisions in the realm of shipping and admiralty law to evolve its own jurisprudence in this area. Decisions such as *The Permina 108* [1974 – 1976] SLR (R) 850 suffice to illustrate this point.

40 In the premises, I find that the Plaintiff's claim falls within section 3(1)(d) of the HC(AJ)A. As stated earlier, I agree with counsel for the Plaintiff that as long as jurisdiction was found under any of the limbs in section 3(1)(d), (g) or (l), it would suffice to bring the claim within the admiralty jurisdiction of the court. Nevertheless, for completeness, I turn now to set out my observations on whether the Plaintiff's claim falls within section 3(1)(g).

Section 3(1)(g) – Any claim for loss of or damage to goods carried in a ship

41 Section 3(1)(g) provides that the admiralty jurisdiction of the court shall extend to any claim in

respect of "loss or damage to goods carried in a ship".

42 The undisputed jurisdictional facts the Plaintiffs relied on were that the "Phu Tan" sank and the 111 containers supplied by the Plaintiffs to the Defendants which were on board the "Phu Tan" were lost.

43 The main dispute centered once more on whether the Plaintiff's had an arguable case that their claim fell within the ambit of section 3(1)(g), HC(AJ)A. Counsel for the Defendant referring to *The Mezen* [2006] SGHC 35, *The Eschersheim (CA)* and passages from *Admiralty Law and Practice.*, argued that section 3(1)(g) applies only in respect of "goods carried as cargo" and "cargo" claims, the containers were not cargo and therefore did not fall within the ambit of the phrase "goods carried in a ship".

44 The key passage of *The Mezen* at [18] states as follows:

"I decided that *The Eschersheim* was correct that in the context of section 3(1)(g), "goods" carried in a ship referred to goods carried as cargo on board a ship, in other words, things or items carried on board a vessel for the purpose of being conveyed or transported from one place to another."

45 Plaintiff's counsel submitted before me that the 111 containers fell within the definition of "goods" under section 3(1)(g). Referring to the passage of *The Mezen* as out above, she submitted that although the court referred to the term "goods" as cargo carried on board a ship, the court in *The Mezen* had further explained that "cargo" referred to things or items carried on board a vessel for the purpose of being conveyed or transported from one place to another. Plaintiff's counsel further referred to the Scottish decision of "*The Steve Irwin*" [2011] CSOH 112 ("*The Steve Irwin*") where at [26] the court was prepared to accept that the tuna and transportation cages (although less plausibly so) which were on tow by the vessel and which suffered damage should qualify as "goods carried in a ship". Plaintiff's counsel's final point was that in the context of a claim under section 20(2)(m) of the UK Supreme Court Act 1981 (which is in *pari material* to section 3(1)(l) of our HC(AJ)A), the House of Lords in *The "River Rima"* [1988] 2 Lloyd's Rep 193 ("*The River Rima*") held at pg 195 that "containers are "goods" within the meaning of par. (m)", therefore it was submitted, there should be no difference in the meaning of "goods" used in the context of section 3(1)(g) of the HC(AJ)A.

46 All things considered, I find that the Plaintiff does *not* have an arguable case that their claim is of the nature and type contemplated under section 3(1)(g):

(a) In my reading, although *The Mezen* did not deal with the issue of whether containers can be considered as "goods" within the meaning of section 3(1)(g), the court rightly accepted that *The Eschercheim* was correct and that in the context of section 3(1)(g), "goods" referred to goods carried as cargo on board a ship. It is clear that the court rejected the wide definitions of "goods" to include "all chattels of which possession is possible notwithstanding that they are not easily moveable", "whatever conveyed in a ship" or "the load carried in a ship" (proposed by the plaintiff at [13]). The court's reference to "things or items carried on board a vessel for the purpose of being conveyed or transported from one place to another" must therefore be understood in the context of its clear finding that "goods" referred to "goods *carried as cargo* on board a ship";

(b) On a plain reading of the words "goods carried in a ship" and in the historical context of this jurisdictional limb (i.e. that it evolved from section 6 of the Admiralty Court Act 1861) I agree

that this jurisdictional limb should be understood as being applied to cargo-owners claims against the ship to which he has entrusted his cargo. It would be an extension to include under this limb a claim for loss of containers used to store the cargo carried on a container ship;

(c) I do not accept the Plaintiff's submission that "goods" was defined to include "containers" in section 3(1)(l) and so should be accorded the same meaning in section 3(1)(g). It is clear to me that the phrases in the various jurisdictional limbs are terms of art which must be understood with reference to authority: see *The Escherheim* at 926g. In any event, section 3(1)(l) pertains to "goods ...supplied to a ship for her operation and maintenance" and is therefore apt to encompass containers on board for the operation of a container ship. Section 3(1)(g) on the other hand refers to "goods carried on a ship" with no such interpretative flavour as provided by the words (appearing in section 3(1)(l)) "supplied...for her operation and maintenance";

(d) The slender authority relied on by the Plaintiff's counsel appeared to be *The Steve Irwin* but I note that the statements there were in *obiter*, without detailed analysis and heavily qualified. I note that even there, the court stated that it was "less plausibly so" that the transportation cages carrying the tuna could fall within the scope of the phrase "goods carried in a ship". In my view, such slender authority would not suffice to demonstrate that the Plaintiff has an arguable case that its claim is of the type and nature contemplated under section 3(1)(g).

47 In the premises, I would observe that the Plaintiff's claim *does not* fall within section 3(1)(g) of the HC(AJ)A. I turn now to consider whether the Plaintiff's claim falls within section 3(1)(l) of the HC(AJ)A.

Section 3(1)(l) – any claim in respect of goods or materials supplied to a ship for her operation and maintenance

48 Section 3(1)(l) provides that the admiralty jurisdiction extends to any claims in respect of "loss or damage to goods carried in a ship".

49 As I understand it, the Plaintiff's argument was premised on the following propositions, each of which, save for (a), is disputed by the Defendant:

- (a) The 2010 CLC was a contract entered into with the Defendants, Vinalines;
- (b) The translation of the 2010 CLC relied upon by the Plaintiffs was not false and is correct;
- (c) The 2010 CLC expressly or impliedly provide for the supply of containers for use on the Defendant's ships;
- (d) The 111 containers were supplied pursuant to the 2010 CLC;
- (e) The container loading list by the Tan Thuan Port Record database is authentic and shows that the 111 containers were loaded onto the "Phu Tan" for the particular voyage;
- (f) Containers have been held to be "goods" within the meaning of section 3(1)(l) and the court in *The River Rima* was prepared to accept without deciding the point that the use of a container on board a ship designed to carry containers is a use for the operation of such a ship;
- (g) To bring a claim under section 3(1)(l) of the HC(AJ)A, there is no need for the name of the ship on which the containers are to be supplied to be identified in the contract of supply or even

at the time of performance of the contract of supply so long as at the time of actual supply, the ship is identified.

50 It would be useful at this point to recognise that the matters set out in (a) to (e) can be seen as jurisdictional facts under limb 3(1)(l) that the Plaintiffs have to prove on a balance of probabilities whilst the matters set out in (f) and (g) go to the assessment of whether the claim is of the type or nature envisaged under section 3(1)(l) of the HC(AJ)A. My analysis proceeds on this basis.

(a) - The 2010 CLC was a contract entered into with the Defendants, Vinalines

51 This issue can be shortly dealt with. In the affidavit of Tran Phuong Thuy filed on behalf of the Defendants on 31 July 2013, the Defendant has stated that "they are willing to assume for the purposes of the application, that the Defendants were a party to the Container Lease Contract No. 500710T/2010/HD – VCSC ... dated 1 June 2010 with the Plaintiff...".

52 Even if a contrary position had been taken by the Defendant, had I required to do so, I would have found that the Defendant, Vinalines were the contractual counterparty to the 2010 CLC. The clear evidence on this was the Explanatory Statement dated 8 May 2013, sent in the name of "Vietnam Container Shipping Company – Branch of Vietnam National Shipping Lines" to the Vietnamese Court stating, *inter alia*, that:

"...VCSC only acted *on behalf of Vinalines* to sign the lease contract with Hung Dao Container Joint Stock Company. Accordingly, *the rights and obligations under the container lease contract will be at Vinalines' account*. In fact, Vinalines has sent to the Court the document on appointment of its Authorized Representative to participate in the proceedings as the Defendant in the above case." [emphases added]

(b) and (c) - The veracity of the Plaintiff's translation of the 2010 CLC and whether the 2010 CLC expressly or impliedly provided for the supply of containers for use on the Defendant's ships

53 I deal with (b) and (c) together. The Plaintiff's translation of the 2010 CLC was disputed by the Defendant as being false in two aspects. At the heart of the dispute was Art 1.1 of the 2010 CLC which, in the Plaintiff's translation which appears in the Arrest Affidavit, states:

"Party A agrees to lease the equipments (hereinafter abbreviated "Containers") *In Party A's possession* to Party B for shipping its goods *on Party B's ships*". [emphases added]

54 The Defendants produced and relied on two translations:

First translation (1st Affidavit of Ly Quang Long dated 16 July 2013)

"Party A [Hung Dao] agrees with Party B [VCSC] on equipment leasing (hereinafter called "container") which is being *owned by Party A* in order to transport the cargo *by sea mode by Party B*". [emphases added]

Second Translation (4th Affidavit of Tran Phuong Thuy dated 22 January 2014)

"Party A [Hung Dao] agrees Party B [VCSC] to lease the equipment (hereinafter referred to as "Container") under the *ownership of Party A* to transport commodities *on sea routes of Party B*". [emphases added]

55 The Defendant contended that the Plaintiff's translation of the 2010 CLC was false as the phrase "In Party A's possession" should be translated as "owned by Party A" and the phrase "Party B's ships" should be translated as either "by sea mode by Party B" or "on sea routes of Party B". The Defendant's contention was underpinned by their submission that the Plaintiff had deliberately procured a false translation of Art 1.1 of the 2010 CLC to mislead the court into allowing an arrest under section 3(1)(l) of the HC(AJ)A.

56 I am unable to agree with the Defendant's assertion. To begin with, I note that the Plaintiffs' translation as well the Defendants' two translations were all, on the face of it, official certified translations produced by the Justice Office of Binh Hanh District. There is no evidence whatsoever to suggest that any of these three official certified translations are unreliable. In my view, the explanation for the differences in translations is that this simply reflects the inexactitude inherent in the process of translating between different languages. To put it another way, I accept that the Vietnamese contractual terms can be correctly expressed in English within a range of literal to dynamic translations, all of which can properly be said to capture the essence of the terms in the original Vietnamese language.

57 The next question I consider is whether, based on a holistic view of the 3 different translations of Art 1.1 of the 2010 CLC, it can be said that the 2010 CLC provides for the supply of containers for use on the Defendant's ships. In my view, it does. My reasons are as follows:

(a) In the context of the scale of dynamic to literal translations I have referred to earlier, the phrase "on Party B's ships" can be seen as a dynamic translation whilst the phrases "by sea mode by Party B" and "on sea routes of Party B" are apt to reflect a more literal translation. In my view, the phrases that containers are to be used "by sea mode by Party B" or "on sea routes of Party B" can conceivably express the idea that the containers are to be supplied for use on Party B's ships;

(b) The Defendant's further contention was that according to their 2 "true translations", the phrase "by sea mode by Party B" or "on sea routes of Party B" could also be wide enough to cover situations where the containers were supplied for use on ships *not belonging to Party B*. They further asserted in an affidavit filed by Nguyen Ngoc Thuy Van on 7 Apr 2014 that "the containers are sometimes used on trucks". In my view, the documentary evidence available shows clearly that the containers were indeed used on the Defendant's ships. There is no documentary evidence to show either that the containers were put onto ships belonging to persons other than the Defendants or that the containers were used for the carriage of goods on containers over land. I agree with the Plaintiff's counsel's submission that the parties' conduct reflected the nature of their agreement under the 2010 CLC. Based on the available evidence, I am satisfied that the 2010 CLC did provide that containers are to be supplied for use on Party B's ships.

(d) - Whether the 111 containers were leased under the 2010 CLC

58 In the course of the hearing, evidence surfaced that of the 111 containers, 99 were in fact in the possession of the Defendants prior to the execution of the 2010 CLC between the parties. Further evidence also emerged that there was a prior 2006 agreement between the parties (which ended in 2007), that these 99 containers had been supplied to the Defendants in 2007, 2008 and 2009, and that between August 2007 and May 2010 there was in fact no written agreement in place for the supply of the containers between the parties.

59 Based on these revelations, the Defendants' contended that the 111 containers were not

leased under the 2010 CLC but instead were supplied by the Plaintiffs to the Defendants under another earlier 2006 agreement or at periods in time where there was no written agreement between the parties. I note here that counsel for the Defendants had also relied on this contention to further argue that this demonstrated that paragraph 20 of the Arrest Affidavit was misleading and constituted material non-disclosure but that is a separate issue which is addressed below at [109] to [113].

60 Returning to the main question of whether the 111 containers were leased under the 2010 CLC. The Plaintiff accepted that the 99 containers were picked up by the Defendants before the execution of the 2010 CLC. However they argued that this did not detract from the fact that so far as the Defendants continued to lease the containers for use on their ships, the 111 containers were leased pursuant to the 2010 CLC once the 2010 CLC had come into effect between the parties. The Plaintiff relied mainly on the Defendant's letter dated 10 March 2011 wherein the Defendant themselves had written to the Plaintiffs to inform them that their 111 containers leased under the 2010 CLC had been on board the "Phu Tan" and were a "total loss" as a result of the sinking of the "Phu Tan" on 16 December 2010. The Plaintiff further contended that the Defendant had by their conduct all along accepted that the 111 containers were leased pursuant to the 2010 CLC and had only now belatedly raised this as an issue.

61 On the available evidence, I am satisfied that the 111 containers were leased under the 2010 CLC. The clearest evidence in my view, is the Defendant's own letter dated 10 March 2011 informing the Plaintiff that the 111 containers leased under the 2010 CLC and which were on board the "Phu Tan" were a total loss as a result of the sinking of the "Phu Tan". The fact that 99 of the 111 containers were already in the Defendant's possession prior to the execution of the 2010 CLC is equivocal at best. It does not conclusively prove that the 99 containers did not come within the scope of the 2010 CLC. On the contrary, the Defendant's letter dated 10 March 2011 pointed clearly to the parties' intentions and understanding that the 111 containers did come within the ambit of the 2010 CLC.

(e) - Whether the container loading list of the Tan Thuan Port record database in Tab 10 of the Arrest Affidavit is authentic

62 The dispute here was on the authenticity of the container loading list which was exhibited at Tab 10 of the Arrest Affidavit ("Container Loading List"). In the Arrest Affidavit, the Plaintiff had relied on this Container Loading List to show that the 111 containers were carried on board the Phu Tan on that ill-fated voyage. The Defendant argued that the Container Loading List was not an authentic document. In the affidavit of Nguyen Ngoc Thuy Van dated 7 April 2014, the Defendant exhibited a letter from one Mr Mai Van Cu, who is said to be a director of the Tan Thuan Port authorities and in this letter, Mr Mai stated that the Tan Thuan Port "didn't supply the container Loading List that loaded on the M.V Phu Tan to Hung Dao Container Joint Stock Company".

63 The Plaintiff argued in response that the Container Loading List exhibited at Tab 10 of their Arrest Affidavit was authentic and was supplied by the Tan Thuan Port Authorities. They referred to the email correspondence found at pg 124 of the Arrest Affidavit which shows an email sent from the "Tan Thuan Port, Container Operation Department" to the Plaintiff's operation manager Mr Hieu, which purports to enclose the Container Loading List as an attachment. The Plaintiff further contended that taken at face value, the letter from Mr Mai which the Defendants' relied on does not clearly show whether it was speaking in relation to the Container Loading List for the particular voyage of the "Phu Tan" on which it sank or for some other voyage.

64 On the available evidence, I am prepared to accept that the Container Loading List exhibited in

the Arrest Affidavit was provided by the Tan Thuan Port and is authentic for the following reasons. First, the Defendant's own 10 March 2011 letter sent to the Plaintiff identified the 111 containers and these 111 containers correspond to the records in the Container Loading List. Second, there is no forensic evidence to suggest that the email from "Tan Thuan Port, Container Operation Department" or the attached Container Loading List was falsified. As for the letter from Mr Mai (relied upon by the Defendant), I would agree with the Plaintiff that is unclear as to whether it related to the particular voyage of the "Phu Tan" on which it sank. Even if I accepted, for the benefit of the Defendant, that the letter from Mr Mai was in relation to the particular ill-fated voyage of the "Phu Tan", then the Defendant has at best raised conflicting affidavit evidence on this point before me and all things considered I would find that the Container Loading List exhibited at Tab 10 of the Plaintiff's Arrest Affidavit is authentic.

65 Having addressed, what is in my view, the relevant jurisdictional facts the Plaintiff relied upon to establish admiralty jurisdiction under section 3(1)(l), I turn now to examine the centrepiece of the Plaintiff's arguments on the invocation of admiralty jurisdiction under section 3(1)(l) of the HC(AJ)A.

(f) and (g) – Is the Plaintiff's claim arguably of the type and nature contemplated under section 3(1)(l) of the HC(AJ)A

66 The parties' arguments centred on *The "River Rima"* [1988] 2 Lloyd's Rep 193 ("*The River Rima*") where the House of Lords examined section 20(2)(m) of the Supreme Court Act 1981 which is *in pari materia* to section 3(1)(l) of the HC(AJ)A. The other key authorities relied upon by the Plaintiff's counsel were the Australian authorities of *The "Bass Reefer"* [1992] FCA 378 ("*The Bass Reefer*") and *Patrick Stevedores No 2 Pty Ltd v MV "Turakina"* [1998] FCA 16900 ("*The Turakina*").

67 As to proposition (f), the Plaintiff's counsel submitted that containers have been held to be "goods" within the meaning of section 3(1)(l) of the HC(AJ)A and that the court in *The River Rima* (at 763B) was prepared to accept without deciding the point that the use of a container on board a ship designed to carry containers is a use for the operation of such a ship. The Defendant did not dispute this and I accept this as correct.

68 The main dispute was in relation to proposition (g). In essence, Plaintiff's counsel's submission was premised on the legal proposition that to bring a claim under section 3(1)(l) of the HC(AJ)A, there is no need for the ship to which the containers are to be supplied to be identified in the contract of supply *or even at the time of performance of the contract of supply* so long as *at the time of the actual supply to the ship, the ship is sufficiently identified*.

69 I set out the key passage in *The River Rima* (at 763C) for consideration:

"It is clear that paragraph (m) contemplates a contract of supply, whether by sale or hire, between the claimant and a shipowner. But the expression used in paragraph (m) is "supplied to a ship" and not "supplied to a shipowner". The question is what meaning should be given to the former expression. There are two main kinds of contract pursuant to which goods or materials required for the operation of a ship may reach her. The *first kind of contract* is one which *expressly provides* that the goods or materials are required for the use of a *particular ship*, the identity of which is *specified in the contract* or *will be specified by the time the contract comes to be performed*. The *second kind of contract* is one which contains no reference to a particular ship for the use of which goods or materials are required, leaving the shipowner to make his own decision about that later. The first kind of contract is, in my opinion, a contract under which goods or materials are "supplied to a ship" within the meaning of par. (m)"

[emphases added]

70 In my understanding, the Plaintiff's counsel's arguments proceeded as follows:

(a) *The River Rima* requirement (at 763C) was that for there to be goods "supplied to a ship" within the meaning of the jurisdictional limb, the identity of the particular ship should be specified in the supply contract *or will be specified by the time when the contract comes to be performed*;

(b) The court in *The Bass Reefer* considered *The River Rima* and concluded that the specification of the ship need not be express but *could be implied from the circumstances* at the *time when the supply was actually made to the ship*. The matter must be looked at the time the services were supplied and the question determined at that time, whether as a question of fact there was a supply to a ship within the meaning of the jurisdictional limb.

(c) The court in *The Turakina* applied the approach of implied identification of the ship as set out in the *The Bass Reefer* and agreed that the question was whether *at the time the services are provided* (and not at the time the contract is entered into), there was sufficient identification of the ship.

(d) It did not matter that the 2010 CLC did not specifically identify the "Phu Tan" or that the containers were earlier loaded onto other ships, as at the material time, the "Phu Tan" was in fact identified as the ship on which the 111 containers were supplied to and this is evidenced by the Container Loading List from the Than Thuan Port authority.

(e) The Plaintiff's claim did not fall within *The River Rima* situation and on the authority of *The Bass Reefer* and *The Turakina*, the claim arguably is one in respect of goods "supplied to a ship".

71 The Defendant's counsel disagreed with Plaintiff's submissions. His key argument was that the 2010 CLC was always a contract of the second kind as described in *The River Rima*. He further argued that even in the implied identification test employed in *The Bass Reefer*, it remained a requirement that the supply was to be limited to "a particular ship" and would not avail the Plaintiff as their 2010 CLC was, even by their own translation, a contract for the supply of containers to the Defendants' ships and not limited specifically to the "Phu Tan".

72 On this issue, I hold that the Plaintiff *does not* have an arguable case that their claim falls within the ambit of section 3(1)(d) of the HC(AJ)A. My analysis follows:

(a) *The River Rima* essentially distinguished between services rendered to a shipowner and services rendered to the ship itself. The court there first recognised that this jurisdictional limb contemplated a contract of supply, it then drew the distinction between a supply contract which was a contract for the provision of services to a ship (the first kind of contract) and a supply contract which was in reality a contract for the provision of services to a shipowner (the second kind of contract). In analysing when the first kind of contract existed, the court explained that this would be the case where the ship was specifically identified in the supply contract itself or where the identity of the ship was specified *by the time the supply contract came to be performed*. It should be noted that the Singapore courts have, in *The "Alexandrea"* [2002] 1 SLR(R) 812 at [29] ("*The Alexandrea*"), specifically referred to *The River Rima* analysis on the first kind of contract and accepted it as correct;

(b) In my reading, *The Bass Reefer* and subsequently *The Turakina* accepted the distinction

observed in *The River Rima* and added that the specification of the ship need not be expressly specified as between the contracting parties but could be *implied from the circumstances* which existed *at the time of performance of the supply contract*;

(c) It appears to me that the error in the Plaintiff's arguments was that it misunderstood the *The Bass Reefer* and *The Turakina* to stand for the proposition that the implied identification was to be assessed at the time when *the containers was supplied to the ship* as opposed to the *time of performance of the supply contract*. In my reading, it was clear in *The Bass Reefer* that the inquiry into whether there was implied identification still remained to be assessed at "the time of *performance of the contract of supply*" and the other statements by the court such as "when supply was actually made to the ship" or "was there supply to a ship" must be understood in this context. In particular, the court there stated at [38]:

"His Lordship's use of the expression "or will be specified by the time the contract comes to be performed" does not, in my respectful opinion, mean that his Lordship was laying down a requirement that there should be some express specification by the contracting parties of the identity of the ship *at the time of performance of the contract of supply*. Such specification could occur by way of implication from the circumstances obtaining at the time when supply was actually made to the ship, especially where the act of supplying was performed by the supplier himself and not, as in *The River Rima*, by the other party to the contract in exercise of an independent discretion"

[emphasis added]

On the facts of both *The Bass Reefer* and *The Turakina*, the implied identification was assessed at the time the supply of the stevedoring and other services to the ship was performed i.e. at the time of performance of the contract to supply *services*. This is different from the Plaintiff's case which pertains to a contract for the supply of goods (i.e. containers);

(d) No other authorities were canvassed by the Plaintiff to demonstrate that they had any legal basis for the proposition that the ship did not have to be specified *even at the time of performance of the contract of supply* so long as *at the time of the actual supply of the goods to the ship, the ship is sufficiently identified*;

(e) On the Plaintiff's case, the 2010 CLC is a contract for the supply of containers. The key question therefore is when is the *time of performance of this contract of supply*? In my view, the evidence is clear that the time of performance of the contract of supply is the point in time when the containers are supplied to and collected by the Defendant from the Plaintiff's depots and not at the time when the collected containers are subsequently physically loaded onto any of the Defendant's ships for various voyages during the period of their lease. The terms of the 2010 CLC bear this out:

(i) Art 1.4 of the 2010 CLC (as translated by the Plaintiff) states "Delivery location: At Party A's depots". This indicates that the point of delivery and supply is at the Plaintiff's depots.

(ii) This is fortified by Art 2.2 which provides that the Plaintiff would charge the leasing fee when the Defendant picked up the containers out of the Plaintiff's depots. In other words, the Plaintiff would charge the Defendant for the lease of the containers as soon as they were picked up from its depots and not only when they were placed on the Defendant's ships. Logic dictates the Plaintiff can only charge the leasing fee for their containers at the

point when the Plaintiff has first performed its key obligation under the 2010 CLC to supply the containers to the Defendants.

(f) There was no evidence to show that there was implied identification of the "Phu Tan" under the 2010 CLC at *the time of performance of the 2010 CLC*. Rather, at the time the containers were supplied to the Defendant and picked up from the Plaintiff's depots, it was recorded in the majority of the EIR and booking orders that the containers would be used on various ships (including the "Phu Tan") belonging to the Defendant;

(g) I agree with the Defendant's counsel that the 2010 CLC was clearly a contract of the second kind contemplated in *The River Rima*, i.e. a contract for the supply of goods to a shipowner i.e. the Defendant. The evidence showed that once the containers are picked up by the Defendant, they are then put onto various ships on various voyages at the discretion of the Defendant. True it was that the 111 containers ultimately were loaded onto the Phu Tan on the ill-fated journey, but that does not change the fact that it was loaded on the Phu Tan at the discretion of the Defendant and that these same containers had in the past been loaded onto various other ships also at the discretion of the Defendant.

73 Based on the foregoing analysis, I find that the Plaintiff's claim *does not* fall within section 3(1)(l) of the HC(AJ)A.

74 As I earlier observed, so long as jurisdiction was found under any of the limbs in section 3(1)(d), (g) or (l), it would suffice to bring the claim within the admiralty jurisdiction of the court. I have found that the Plaintiff's claim falls within section 3(1)(d) of the HC(AJ)A and in the final analysis, I find that the admiralty jurisdiction of the court was properly and validly invoked.

Issue 2: Whether the Plaintiffs' claim should be struck out under O 18 r 19 of the ROC and/or the inherent jurisdiction of the court

75 I turn to examine the Defendant's application for striking out. The Defendant contended that the Plaintiffs' claim was frivolous and vexatious and is liable to be struck out under O 18 r 19(1)(b) or under the court's inherent jurisdiction on the grounds that:

- (a) first the Plaintiff's claim was time-barred; and
- (b) second that so far as the non-contractual claims were concerned, there was "not a shred of evidence" to support these claims, and there is no evidence of "double actionability".

The Law

76 The interplay of legal principles involved in setting aside an arrest, striking out and material non-disclosure was explained with admirable clarity by the High Court in *The Eagle Prestige* [2010] 3 SLR 294 ("*The Eagle Prestige*") and *The Bunga Melati 5* [2011] 4 SLR 1017 ("*The Bunga Melati 5 (HC)*"). These principles were endorsed by the Court of Appeal in *The Bunga Melati 5*:

"96. ...when a plaintiff's invoking of admiralty jurisdiction or its arrest of the defendant's vessel was subsequently challenged, the plaintiff would need to show (on top of the requirements of ss 3 and 4 of the HCAJA being satisfied) a *good arguable case on the merits of its claim as well, in order to avoid having its claim struck out as being plainly and obviously unsustainable pursuant to the normal rules in civil procedure*. Should the plaintiff's cause of action be so unsustainable on the merits, as was the case in *The Vasilij Golovnin (HC)*, a court would on an application being

made have to strike out the Plaintiff's action at an early stage under O 18 r 19 of the ROC or the inherent jurisdiction of the court...

98. Indeed, *there is much to commend the clear distinction drawn by the Judge between challenging admiralty jurisdiction under O12 r 7 of the ROC vis-à-vis striking out a plaintiff's claim under O 18 r 19 of the ROC or the inherent jurisdiction of the court.* Drawing this distinction solidifies the established position that a plaintiff need not prove who "the person who would be liable on the claim in an action in personam" is (i.e. the "in personam liability requirement" under s 4(4)b of the HCAJA) for the purposes of establishing admiralty jurisdiction until the defendant subsequently challenges the plaintiff's action...

100. This distinction can be logically defended and provides analytical clarity to this area of law. As the Judge correctly recognised, "[j]urisdictional disputes were necessarily separate from, and logically prior to, the substantive, non-jurisdictional dispute between the parties over the issue of the defendant's liability (*ie*, the merits of the plaintiff's claim)"...

104. To sum up the discussion above, we agree with the Judge that this court in *The Vasilii Golovnin* (CA) did not introduce a new merits requirement before admiralty jurisdiction could be invoked under the HCAJA. An admiralty plaintiff would, however, still need to show a good arguable case on the merits of its claim if challenged; not for the purposes of satisfying the HCAJA, but to prevent its action from being struck out under O 18 r 19 of the ROC or the inherent jurisdiction of the court."

[emphases added]

77 It is trite that the burden lies on the applicant to show that a plaintiff's case is so unsustainable on the merits that it should be struck out. The authorities are also clear that this is a heavy burden. In the context of a striking out of an admiralty claim, the High Court in *The Eagle Prestige* noted:

"57. It is at this stage of striking out application that the court is asked to assess the sustainability of the action. It is at this stage of the striking out application that the validity or strength of the claim will be relevant, and the *burden on the issue of non-liability lies on the defendant* to show that the case is *wholly and clearly unarguable*. If there is *any arguable basis* put up by the plaintiff that the action could succeed then the *court should not order the striking out of the action*"

[emphasis added]

78 As to the question of when an action is plainly or obviously unsustainable, the Court of Appeal's guidance in *The Bunga Melati 5* at [33] – [39] is apposite:

"39. In our view, this analytical, fact-law distinction can similarly be applied to O18 r 19(1)(b) of the ROC or the inherent jurisdiction of the court to strike out unsustainable actions. Such a distinction helps to more clearly elucidate what a court means when it holds that an action is "plainly or obviously" unsustainable. Applying this conceptual prism, a "plainly or obviously" unsustainable action would be one which is either:

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 seek"; or

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”.

The Analysis

The Time Bar Defence

79 The Defendant’s primary attack in relation to its striking out challenge appeared to be its defence of time bar and I examine this first. The following preliminary points should be dealt with at the outset. First, the parties did not dispute that the substantive claims and defences raised were subject to Vietnamese law. Secondly, it is trite that matters of foreign law are treated as factual matters (see *The “H156”* [1999] 2 SLR(R) 419 at [27], endorsed by the Court of Appeal in *Poh Soon Kiat v Desert Palace (trading as Caesars Palace)* [2010] 1 SLR 1129), and I do not understand parties to have contended otherwise. Thirdly, in relation to the Defendant’s arguments on its time bar defence, it was also not disputed by parties that under the Foreign Limitations Periods Act Rev. Ed. 2013 (cap. 111A), foreign time bars (in this case the time bar under Vietnamese law) are applicable in relation to the Singapore actions or proceedings. *Insofar as the time bar defence is concerned, the question before me is whether it is plain and obvious that the Plaintiff’s claim commenced on 4 June 2013 is legally unsustainable because as a matter of fact it is time-barred under Vietnamese law.*

80 In essence, the Defendant argued, relying on the evidence provided by their Vietnamese law expert, that:

- (a) the Defendant had a complete defence of time-bar in relation to the Singapore action;
- (b) the Plaintiff’s expert’s evidence was wrong, inconsistent and unreliable;
- (c) the Plaintiff’s expert, Dr Luu Tien Dzung was not objective and dishonest;
- (d) the Defendant’s expert’s evidence on the applicability of the time bar defence is cogent and “is to be preferred”. The claim is time-barred and must be struck out unless [the Plaintiff] can prove otherwise”.

81 According to the Plaintiff’s expert, the Plaintiff’s claim was not time-barred as a matter of Vietnamese law. The Plaintiff’s expert explained in two affidavits that the Plaintiff’s claim was not time barred:

- (a) the Plaintiff’s claim arising out of the Defendant’s failure to make compensation for the 111 containers was not time-barred as the Plaintiff’s rights were infringed on 3 April 2012 and the two year limitation period would therefore expire on 3 April 2014 (Plaintiff’s first time bar argument”); and
- (b) under Vietnamese law, the nature of the Plaintiff’s claim is for the return of leased containers under the management and/or possession of the Defendants and there is no time bar for such actions (“Plaintiffs’ second time bar argument”).

82 I do not propose to enter into a minute examination of each of the experts’ opposing views, or the documents and the facts they rely on. The Court of Appeal in *Gabriel Peters & Partners (suing as a firm) v Wee Chong Jin* [1997] 3 SLR(R) 649 at [18] explained that such an exercise was not

appropriate in the context of a striking out application. The Court of Appeal in *The Bunga Melati 5*, after its illuminating analytical formulation of the test of sustainability of an action, stated at [45] that “save in the plainest of cases, a court should not in a striking out application choose between conflicting accounts of crucial facts”.

83 The conflicting evidence presented by the parties’ experts raise in essence a factual dispute (evidence on foreign law being matters of fact). The Defendant’s arguments essentially sought to persuade this court to resolve this key factual dispute conclusively in their favour and thereafter to find that the Plaintiffs’ action was therefore *legally unsustainable*. I am unable to do so. In my assessment, the Plaintiff’s expert as well as the Defendant’s expert presented their evidence on the Vietnamese time bar with reasonable clarity and with sufficient analysis of the supporting provisions of Vietnamese law such as the various articles in the Vietnamese Civil Code (Art 427, 490.1, 303.1), Commercial law (Art 271.2), Supplemental Civil Procedure Code (Art 159.3), Art 23.3(b) of the Resolution 3 of the “Resolution of the Justices’ Council of the Supreme People’s Court no. 03/2012/NQ-HDTP” (“Resolution 3”) as well as to the underlying facts. A brief examination of the conflicting evidence presented to the court in relation to the Plaintiff’s second time bar argument will illustrate the above point:

(a) The Plaintiffs’ expert’s evidence began with an analysis of Art 490.1 of the Civil Code, Art 271.2 of the Commercial Law and Art 303.1 of the Civil Code. These provisions state:

Article 490.1 of the Civil Code:

Article 490. Return of leased property

1. The lessee must return the leased property in the same condition as when received, except for natural wear, or in the condition agreed upon in the contract; if the value of the leased property has decreased as compared with its original condition upon receipt, the lessor shall be entitled to demand compensation for damage, except for natural wear.

Article 271.2 of the Commercial Law:

Article 271. Rights and obligations of lessees

2. To maintain and preserve leased goods in the lease duration and return such goods to lessors upon the expiration of the lease duration.

Article 303.1 of the Civil Code:

Article 303. Civil liability for failure to perform the obligation to hand over objects

1. When the obligor fails to perform the obligation to hand over a distinctive object, the obligee is entitled to demand the obligor to hand over that exact object; if the object no longer exists or is damaged, the obligor must pay for the value of the object

(b) The Plaintiff’s expert’s evidence is that Art 490.1 of the Civil Code and Art 271.2 of the Commercial Law demonstrate that as a matter of Vietnamese law, the *nature* of the Plaintiffs’ claim can be said to be one for the return of leased property by the Defendants. He goes on to explain that Art 303.1 of the Civil Code further provides that a plaintiff making a claim *in the nature* of the return of the leased property is entitled to ask for *relief* in the form of

compensation of the value of the leased property where the leased property no longer exists. As to the facts, he explained with reference, *inter alia*, to correspondence between the Plaintiffs and the Defendants as well as the Statement of Claim filed in the Singapore proceedings that the Plaintiffs' had been claiming for a return of the leased property or failing which compensation for the same;

(c) The Plaintiff's expert's further explained that, relying on Art 159.3 of the Supplemental Civil Procedure Code and Art 23.3(b) of Resolution 3 of the "Resolution of the Justices' Council of the Supreme People's Court no. 03/2012/NQ-HDTP" ("Resolution 3"), there is no time bar in relation to claims for the return of leased properties and that Example 2 of Resolution 3 makes clear the distinction between disputes where the underlying claim is over contractual terms of the property lease (which are subject to the statute of limitations under Art 427 of the Civil Code) and disputes where the underlying claim is for the return of leased property (which are not subject to any statute of limitations). These provisions state:

Article 159.3 of the Supplemental Civil Procedure Code:

The statute of limitations for initiating civil lawsuits complies with law. In case the law does not prescribe a statute of limitations for initiating civil lawsuits, the following provisions shall be complied with...

(a) No statute of limitations is applied to disputes over property ownership; *disputes over claim back of the properties under others' management or in others' possession*, disputes over land use rights in accordance with the land law"

[emphasis added]

Article 23.3(b) of Resolution 3:

Article 23. Regarding the statute of limitations for initiation of lawsuits prescribed in clause 3 of Article 159 of the CPC...

3.Regarding civil disputes arising from civil transactions (asset loan contract, contract for bailment of property, *contract for property lease*, asset package lease contract, processing contract, transport contract, land use rights lease contract, land use rights sub-lease contract), it shall be solved as follows:

(b) *No statute of limitations shall apply* to a dispute over the ownership of assets, *the claim back of properties*, reclaim of land use right managed, possessed by others through civil transactions.

Example 2. In case the lessor has the *dispute over contract for property lease*, *the statute of limitations for initiating civil lawsuits over such contract for property lease shall be determined in accordance with the provisions of Article 427 of the Civil code 2005*. With respect to the *dispute over claim back of leased properties under others' management or possession*, *no statute of limitation shall apply to such dispute, based on Article 159.3 (a) of the Civil Procedure Code and this Clause 3.(b) of this Article*.

[emphases added]

(d) To the contrary, the Defendant's expert contended that Art 490, Civil Code and Art 271.2,

Commercial Law were to be understood as referring only to situations where there was a "dispute over rights to ownership, possession or management of the 111 containers", and that Art 303.1, Civil Code, shows that the Plaintiffs' claim is "for compensation for the loss of containers" and not for "a claim back" of leased property. Further, the Defendant's expert's evidence was that Art 159.3 of the Supplemental Civil Procedure Code only applied if there were no other provisions under Vietnamese law which were applicable, and that Art 159.3(a) only applied where the "dispute concerns ownership, possession or management dispute and land rights". He contended that the phrase "disputes over claim back of the properties under others' management or in others' possession" as it appeared in Art 159.3(a) should be understood as limited to situations where there was an underlying dispute over rights of ownership, management or possession.

(e) Ultimately, what can be said is that on the available evidence, the parties' experts' views on the time bar defence under Vietnamese law were diametrically opposed but each offered a *plausible* interpretation and explanation of the relevant Vietnamese statutory provisions based on the plain words of the provisions. It was not possible to decide conclusively in favour of one interpretation or the other and I saw no compelling reasons to prefer the evidence of one expert over the other.

84 In submissions, both counsel for the Plaintiff as well as counsel for the Defendant sought to rebut and cast doubt on the evidence of the opposing party's experts. Much time was spent by counsel arguing on the plausibility and implausibility of the opposing experts' construction of the language in the Vietnamese statutory provisions in question. Attempts were also made to discredit the respective experts. In particular, Defendant's counsel submitted that:

(a) the Plaintiffs' expert was lacking in *credibility* because his new evidence on the Plaintiffs' second time bar argument conveniently emerged only by way of a subsequent affidavit filed after the initial close of submissions in May 2014; and

(b) insofar as the Plaintiff's expert had explained that he had, only after giving his first opinion (in his affidavit filed on 5 September 2013), come across these further Vietnamese regulations which formed the basis for the Plaintiff's second time bar argument, the Defendants' expert witness and the Defendant's counsel cast doubt on the *competency* of the Plaintiff's expert for not being aware of these regulations which had been in force for more than a year before the Plaintiff's expert provided his first opinion.

85 Even if I may be prepared to go so far as to accept that there are elements of doubt in the competency of the Plaintiffs' expert or in the circumstances relating to the emergence of the Plaintiffs' expert's evidence on the Plaintiffs' second time bar argument, I find that this is not the "plainest of cases" such that a court should in a striking out application "choose between conflicting accounts of crucial facts" (to paraphrase the Court of Appeal in *The Bunga Melati 5* at [45]). The crucial fact in dispute here was the applicability of the time bar defence as a matter of Vietnamese law. This critical factual dispute as well as doubts/challenges as to the competency or credibility of the expert witnesses are matters that should properly be tested at trial and be decided, *inter alia*, on the basis of cross-examination of the witnesses and/or in light of further documentary evidence that may surface in discovery. In the premises, I find that the Defendant has not shown that the Plaintiff's claim is plainly and obviously unsustainable because of the Defendant's complete time bar defence under Vietnamese law.

86 For completeness, I should say a word about the Plaintiff's first time bar argument. Although fairly extensive arguments and opposing affidavit evidence was presented by parties in relation to this issue, I saw no need, for the purposes of determining this particular point, to examine the arguments

in any great detail. Had I required to, I would venture to say that, by comparison with the Plaintiff's second time bar argument, the Defendant's counsel had perhaps raised more elements of doubt in relation to the cogency of the Plaintiff's first time bar argument. Yet again, however, I would have found no compelling reasons to conclusively prefer the evidence of one expert over the other and would see this as a critical factual dispute that would more properly be reserved to be tested at trial. In the final analysis, I am satisfied that there is a factual dispute as to whether the Plaintiff's claim was time-barred under Vietnamese law and it cannot be said that the Singapore proceedings was legally unsustainable.

There was "not a shred of evidence" to support the non-contractual claim, and there is no evidence of "double actionability"

87 The Defendant's second ground for striking out the Plaintiff's action can be more briefly dealt with. The Defendants' argued that in relation to the non-contractual claims (i.e. the claims for conversion, wrongful interference, negligence, breach of duty), these were plainly unsustainable as:

(a) "the arrest affidavit...did not provide any basis for these claims [and that] [t]here is not a shred of evidence to support these non-contractual claims";

(b) The Plaintiffs have provided no evidence to show that they satisfy the "Double Actionability Rule" and insofar as the Plaintiffs' expert appeared to concede that these non-contractual claims could not be made in Vietnam, then it followed that they could not be brought in Singapore.

88 The Defendant's first argument appeared to proceed on an incorrect understanding of the Court of Appeal's statements in *The Bunga Melati 5* at [115] which read:

"...although a court should address the sustainability of a plaintiff's action only upon a defendant's application to challenge the plaintiff's writ or warrant of arrest, this does not mean that the plaintiff should have a carte blanche right to arrest vessels without having to show a shred of evidence justifying the connection between the "relevant person" and the alleged defendant *prior to being challenged*"

[emphasis added]

89 The Defendant's argued, based on the above statement (at [115] in *The Bunga Melati 5*), that "the arrest affidavit did not provide any basis for these claims", that "there is not a shred of evidence to support these non-contractual claims" and further that "these non-contractual claims are liable to be struck out on the *separate grounds* stated by the CA" [emphasis added]. However, as counsel for the Plaintiff rightly submitted, in the above passage as well as in the preceding text in [114] of *The Bunga Melati 5*, the Court of Appeal was discussing the *jurisdictional requirement* and opining that *at an arrest hearing*, a plaintiff would still have to show at least some basic evidence to justify the connection between the "relevant person" and the alleged defendant. The Court of Appeal in no way suggested that at the arrest hearing or in the arrest affidavit, a plaintiff would have to adduce evidence going to support the *merits* of its claim, and that a failure to do so would be a "separate ground" to strike out of the action. Accordingly, there is no basis for the Defendant's contention that the non-contractual claims are unsustainable because the Plaintiff provided no evidence to support it in their Arrest Affidavit.

90 It should be noted that the Court of Appeal in *The Bunga Melati 5* had earlier on (in [33] to [39]) set out, with clarity, its guidance on when an action was plainly and obviously sustainable so as

to justify a striking out, explaining when an action was *legally unsustainable* and when an action could be said to be *factually unsustainable*. Insofar as the Defendant was contending that the Plaintiff's non-contractual claims are *factually unsustainable* (and this is not clear from the Defendant's submissions), then I would also reject this as, I agree with the Plaintiff that there was sufficient evidence to support an arguable case for the Plaintiff's non-contractual claims:

(a) First, it is not disputed that the 111 containers were placed on board the Defendants' ship and in their care and custody when they were lost due to the sinking of the ship;

(b) Secondly, the Investigation Conclusion dated 15 March 2011 issued by the Hai Phong Port authority stated *inter alia* that the poor navigation of the ship and inappropriate actions taken by the master and crew in the navigation or operation of the ship led to the sinking and loss of the containers. The Defendant may have put into dispute the contents of the Investigation Conclusion by referring to a later letter issued by the same authority which they asserted showed that the "proximate cause" of the sinking was due to the bad weather, however the mere raising of such a factual dispute does not show that there was no factual basis for the claim. This is not a case where it can be said with confidence before trial that the factual basis for the non-contractual claims are entirely without substance.

91 The Defendant's further argument on the "Double Actionability Rule" is also misconceived. Parties did not dispute that the "Double Actionability Rule" required a plaintiff to show that their claims are actionable under both Singapore law and the law of the other relevant jurisdiction (counsel for the Defendant citing *Low Tuck Kwong v Sukamto SIA* [2013] 1 SLR 1016 for this proposition). The Defendant's arguments really only amounted to this – that the Plaintiff adduced no evidence to satisfy the "Double Actionability Rule" and that the Plaintiff's expert's evidence "appeared to say that non-contractual claims cannot be made in Vietnam". However, as rightly pointed out by counsel for the Plaintiff, the Plaintiff's expert Dr Luu Tien Dzung had in fact presented clear evidence in his affidavit dated 5 Sep 2013 that the non-contractual claims existed and were actionable under Vietnamese law. The relevant portion of his affidavit read as follows:

"12. I further note that the claims made in the Singapore proceedings includes claims which are contractual i.e. for breach of the terms of the CLC. *It also includes claims which fall outside the contract such as claims based on negligence, breach of duty, bailment and conversion ...* Insofar as the claims which fall outside the contract are concerned, *Vietnamese law classifies such claims generally as "non-contractual damage claims"*

[emphases added]

92 It is therefore clear to me that the Defendant's argument that there was no evidence showing that non-contractual claims are actionable under Vietnamese law was misconceived and its arguments in relation to the point on the "Double Actionability Rule" are without merit.

Issue 3: Was there material non-disclosure by the Plaintiffs in the Arrest Affidavit and at the Arrest Hearing so as to justify setting aside the admiralty writ

93 I turn now to the Defendant's final string in its legal bow. The Defendant's counsel argued that the arrest should be set aside on the basis of material non-disclosure by the Plaintiffs both in the Arrest Affidavit as well as at the Arrest Hearing. By my count, Defendant's counsel set out a list of 8 alleged non-disclosures and misleading/false statements and documents. I go first to the law.

The Law

94 It was not in dispute that material non-disclosure is an independent ground for setting aside a warrant of arrest. The duty to make full and frank disclosure to the court was an important bulwark against the abuse of the arrest process.: *The "Rainbow Spring"* [2003] 3 SLR (R) 362 ("*Rainbow Spring*") at [37]. It is also settled law that the court retains an overriding discretion whether or not to set aside an arrest for non-disclosure: *The "Vasily Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasily*") at [84] endorsing *The "Ferbienti"* [1994] 3 SLR(R) 574 ("*The Ferbienti*").

95 In *The Vasily*, the Court of Appeal explained at [82] that the issue of material non-disclosure should be examined from two aspects: *first*, what ought to have been disclosed i.e. *content and scope of disclosure*, and *second*, the sufficiency of disclosure i.e. *the threshold of disclosure*. As to the content and scope of disclosure, the Court of Appeal stated at [87]:

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

[emphases added]

96 In *The Eagle Prestige* at [72], the Honourable Justice Belinda Ang had occasion to analyse the reference to "plausible defence" in *The Vasily*:

"72. In my view, the expression "*plausible defences*" has to be understood in the light of the realities of the situation in *The Vasily Golovnin (CA)*. The claim was held to be "*really implausible*" and unsustainable; the point that the cause of action was frivolous and vexatious could easily be taken and determined summarily based on plainly cogent affidavit evidence. In a way, the expression "*plausible defences*" is being used loosely; the meaning of "*plausible defences*" may be culled from the context and surrounding circumstances. First, *The Vasily Golovnin (CA)* was a case falling under Situation 2 where the merits of the claim including the defences to the claim were examined. Second, from a broader perspective, *plausible defences are matters referable to objections (factual and/or legal) to the claim being brought in the first place, or to the arrest being mounted at all*. They are material facts which objectively speaking, *are of such weight that their omission, at the application stage, is tantamount to or constitutes an abuse of process*. Such an abuse of process is strictly speaking not a defence to the claim; it is *an objection to the claim or arrest being brought an all*. In the context of the duty to make full and frank disclosure, a failure to disclose material facts that constituted the abuse, would be a ground for discharging or setting aside the warrant of arrest for material non-disclosure

73. I now come to the reasons for holding the view that in the context of an application for a warrant of arrest, the duty to disclose "plausible defences" is *not* generally directed at defences to the claim that may be raised at the trial in answer to the plaintiff's claim but in a broader perspective to *matters that constitute an abuse of the arrest process* (see [72] and [74]). In a case falling under Situation 2, there will be matters (factual and/or legal) of such weight as to

deliver the "knock-out blow" to the claim summarily, and, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process. These matters are likely to be, or at the very least, overlap with defences that deliver the "knock out blow" to the claim summarily, and it is their omission that is likely to or may mislead the court in the exercise of its discretionary powers of arrest.

75. ...In my view, the non-disclosure of defences that the defendant could raise at the trial in answer to the plaintiffs' 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 is so obviously frivolous and vexatious as to be open to summary dismissal and, on any reasonable view, their omission, at the application stage, is tantamount to or constitutes an abuse of process.* From a broader perspective, failure to disclose matters showing that the claim or arrest should not have been brought at all, are material facts that constitute the abuse of process. Simply put, *they constitute matters of such weight that their omission is likely to or may mislead the court in the exercise of its discretionary power of arrest* (see [72] above).

[emphases added]

97 In essence, the point made by the learned Judge was that the duty to disclose "plausible defences" was not generally directed at defences on the merits that may be raised at the trial but referred to matters, which if not disclosed, would be tantamount to an abuse of the arrest process. A clear example of such matters, if omitted at the application stage, which would constitute an abuse of the arrest process were "*matters (factual and/or legal) of such weight as to deliver the "knock-out blow" to the claim summarily*".

98 The learned Judge went on to conclude:

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

99 Cautioning against the undesirable practice of parties attempting to meticulously dissect the factual matrix to "invent" missing material facts upon which to mount non-disclosure challenges, the Court of Appeal in *The Vasily* astutely observed at [88] and [90] that the assessment of what is material is ultimately a matter of *common sense* and "the scope of disclosure should be what is reasonable in the given circumstances at the time of the arrest". This point was echoed by the High Court in *The Eagle Prestige*:

85. Paragraph [88] of *The Vasily Golovnin (CA)* warns against the "meticulous dissection of the

factual matrix to 'invent' missing material facts". Each case is fact-sensitive in terms of material facts advanced for consideration by the court. As Rajah JA observed, applying common sense, the scope of disclosure is based on "*what is reasonable given the circumstances at the time of the arrest*" (at [90])..."

[emphases added]

100 In the final analysis, the approach of the Singapore courts as explained by the Court of Appeal in *The Bunga Melati 5* at [116] and [117], is to strike an optimal balance between two equally important policy concerns of (i) *allowing the liberal invoking* of admiralty jurisdiction and (ii) *preventing the abuse* of the ship arrest process:

"116. The position which we have reached here strikes an optimal balance between allowing the *liberal invoking of admiralty jurisdiction* (as the authorities helpfully cited by the Judge suggest) and *preventing "the abuse of the [ship] arrest process"* (*The Vasily Golovnin (CA)* at [105]). The latter is as important a policy concern as the former. *Prior to* the defendant successfully applying to strike out the plaintiff's claim, the defendant could in the interim be inflicted by substantial financial losses due to the plaintiff's completely unjustifiable arrest of its vessel. While these losses might subsequently be the subject of a wrongful arrest claim by the defendant, it is important to keep in mind that not all wrongful arrests, based on the current state of the law, warrants liability and damages (see *The Vasily Golovnin (CA)* at [128]); and even if damages are awarded, a plaintiff might not always be in a sound financial state to pay.

117. 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*."

[emphases added]

The Analysis

101 I now turn to examine the parties' arguments. Underpinning the Defendant's list of alleged material non-disclosures, misleading/false statements and documents was the Defendant's case theory ("Case Theory") that:

- (a) although they purported to rely on section 3(1)(d), (g) and (l) of the HC(AJ)A, the Plaintiff knew all along that they had no basis to arrest the Defendant's vessel under sections 3(1)(d) and 3(1)(g) of the HC(AJ)A and the claim was always one based on the need to satisfy the requirements of *The River Rima* under section 3(1)(l) of the HC(AJ)A;
- (b) the Plaintiff knew that to come within section 3(1)(l) of the HC(AJ)A, they would have difficulty satisfying the requirements of *The River Rima*;
- (c) the Plaintiff therefore concocted a case of false documents and misleading statements in the Arrest Affidavit to try and meet the requirements of *The River Rima* in order to induce the arrest of the ship under section 3(1)(l) of the HC(AJ)A; and
- (d) the Plaintiff therefore deliberately avoided bringing *The River Rima* to the attention of the

court at the Arrest Hearing;

102 In total, the Defendants' set out a list of 8 material matters alleged to be falsely presented and/or not disclosed for the purposes of the arrest application:

- (a) the misleading and false statement in paragraph 20 of the Arrest Affidavit ("Disclosure (a)");
- (b) the misleading and false statement in paragraph 64 of the Arrest Affidavit ("Disclosure (b)");
- (c) the false translation of Art 1.1 of the 2010 CLC ("Disclosure (c)");
- (d) the false Container Loading List from Tan Thuan Port exhibited at Tab 10 of the Arrest Affidavit ("Disclosure (d)");
- (e) the non-disclosure of the Defendants' time bar defence to the Plaintiffs' claim ("Disclosure (e)");
- (f) the non-disclosure of the Defendants' *force majeure* defence ("Disclosure (f)");
- (g) the non-disclosure of matters relating to the Plaintiffs' claims under section 3(1)(d), (g) and (l) of the HC(AJ)A and deliberate avoidance of *The River Rima* at the Arrest Hearing ("Disclosure (g)");
- (h) the non-disclosure of the jurisdiction clause in the 2010 CLC and the letter at page 137 of the Arrest Affidavit ("Disclosure (h)").

The Defendants' Case Theory – fact or fiction?

103 Before turning to address each of the alleged non-disclosures and/or misleading/false statements and documents. It would be appropriate to first address the Defendants' Case Theory set out at [101] above.

104 I begin by noting that there was simply no evidence which could be found in the Notes of Evidence ("NE") of the Arrest Hearing that the Plaintiffs' counsel had made any such submissions as characterised in paragraph [101] above. As I understood the Plaintiff's counsel's arguments on section 3(1)(l), there was never any attempt to bring the Plaintiff's case within *The River Rima* test. This was also the Plaintiff's position right from the start of the hearings for the present application. As was recorded in my NE, the following submissions were made by Plaintiffs' counsel:

"Defendants accuse Plaintiffs of false translation because they try to argue that Plaintiffs required such a translation to bring the claim within s 3(1)(l) of the HCAJA

we accept that the CLC does not identify any particular ship. Don't understand why Defendant makes such an argument. *Plaintiffs rely on Bass Reefer*. Shows 2 things (1) don't need to expressly specify the ship and (2) don't need express wording in the contract that the ship will be specified by the time of performance of the contract. *Only question is to look at situation at the time, implication of the circumstances.*

Because of this authority, no need for Plaintiffs to massage the translation to bring it into the s 3(1)(l) as my learned friend has suggested. This is authority that disagrees with River Rima,

observes on authority. We have based our arrest on s 3(1)(l) which we have researched and conclude that our case is not a River Rima type case and therefore we do meet requirements under s 3(1)(l)"

[emphases added]

105 As I pointed out earlier at [70] and [72] above, the Plaintiff's case on section 3(1)(l), HC(AJ)A was premised on an erroneous reading of *The Bass Reefer* - that it would be sufficient to identify the ship by implication, assessing the matter *at the time the containers were supplied to the ship* (relying on the Container Loading List to evidence this) as opposed to identifying the ship at the *time of performance of the contract of supply*.

106 In the course of arguments, the Defendant's counsel found it necessary to further allege that this was a case "where having been caught by the Defendant, the Plaintiffs are trying to pull back and claim that they are not relying on the EIRs and the booking order to fulfil "THE RIVER RIMA" test now that their fraudulent position regarding the documents have been exposed by the revelation of the Defendants". I disagree. There is simply no evidence in the NE of the Arrest Hearing that the Plaintiff's counsel had made any such submissions that they relied on the EIRs and the booking order to fulfil the test in *The River Rima* in the first place.

107 I would make one last observation on this point and it is this. The Defendant's Case Theory is less compelling once it is appreciated that the Plaintiff had an arguable case that their claim was of the character contemplated under sections 3(1)(d) of the HC(AJ)A (see my earlier analyses at [27] to [40]). That being so, the alleged *motive* for the Plaintiffs' alleged manipulation of their facts and evidence to bring their case within the ambit of section 3(1)(l) of the HC(AJ)A is certainly questionable.

108 All things considered, the Defendant's case theory is more fiction than fact. I turn now to address each of the allegations of non-disclosure and/or false statements and documents.

Disclosure (a) & (d) - misleading and false statement in paragraph 20 of the Arrest Affidavit & the Container Loading List of the Tan Thuan Port authority exhibited at Tab 10 of the Arrest Affidavit is a false document

109 I address the arguments on Disclosure (a) and (d) together as they are said to be related. Disclosure (a) pertained to paragraph 20 of the Arrest Affidavit which stated:

"20. *Some time in December 2010*, the Plaintiffs supplied 111 containers to the Defendants *pursuant to the Container Lease Contract* for carriage on board the Defendants' vessel "Phu Tan" (the "**Vessel**") at Ho Chi Minh for carriage to Hai Phong. A copy of the Container Loading List provided by the Tan Thuan Port record database evidencing the shipment of the 111 containers on board the Vessel is annexed hereto at [Tab 10]"

[emphasis added]

110 The Defendant alleged that paragraph 20 was misleading and there was material non-disclosure as (i) the 111 containers had actually been supplied to the Defendant *before December 2010* and not "[s]ometime in December 2010"; (ii) the bulk of the 111 containers were not supplied "pursuant to the 2010 CLC" but were initially supplied to the Defendant under an earlier container leasing agreement in 2006; and (iii) there was no written agreement between the parties between 2007 and up to the execution of the 2010 CLC. The Defendant's allegation in relation to Disclosure (d) was that the

Container Loading List provided by the Tan Thuan Port record database (exhibited at Tab 10 of the Arrest Affidavit) was a false document.

111 In response, Plaintiff's counsel submitted that (i) the 111 containers were leased to the Defendant pursuant to the 2010 CLC. The earlier 2006 lease agreement referred to by the Defendant had ended in 2007 and was therefore irrelevant; (ii) at the time of the loss, the only contract in force between the parties was the 2010 CLC; and (iii) that the Defendant had themselves informed the Plaintiffs, by their letter dated 10 March 2011 (disclosed in the Arrest Affidavit), that all of the 111 containers carried on board the vessel "Phu Tan" which were leased pursuant to the 2010 CLC had been lost when the "Phu Tan" sank. Plaintiff's counsel submitted that in the circumstances, the object of paragraph 20 of the Arrest Affidavit was to state the point that the 111 containers had been leased under the 2010 CLC and were loaded on the Defendants' vessel "PHU TAN" sometime in December 2010 when thereafter the vessel sank.

112 I do not accept the Defendants' argument that there was material non-disclosure of the facts that (i) the 111 containers were not leased under the 2010 CLC but under a different lease agreement in 2006, and (ii) there was no written agreement between the parties between 2007 and up to the execution of the 2010 CLC. In this regard, I find the observations of Rajah JA in *The Vasilij* at [88] and [90] instructive i.e. that the matter was to be assessed applying common sense, based on *what is reasonable given the circumstances at the time of the arrest*. I have earlier noted at [58] to [61] that on the existing evidence before me, in particular, the Defendant's letter to the Plaintiffs dated 10 March 2011, I would accept that the 111 containers were leased pursuant to the 2010 CLC. In my view, the contents of the Defendant's 10 March 2011 letter clearly show that the Defendant had informed the Plaintiff that the 111 containers which were leased under the 2010 CLC were on board the "PHU TAN" and the containers were lost when the "PHU TAN" sank. In these circumstances, there was no objective basis for the Plaintiff to consider that the court at the Arrest Hearing might deem it relevant to know if the 111 containers had been leased pursuant to any agreements other than the 2010 CLC or that the Plaintiff had entered into any earlier lease agreements with the Defendants, or that there were no written agreements from 2007 to June 2010. What would have been relevant to the court at the Arrest Hearing was really the matter of whether the 111 containers were leased pursuant to the 2010 CLC which formed the basis of the Plaintiff's claims. As to this matter, the Plaintiff had provided adequate explanation in the Arrest Affidavit, and exhibited the Defendant's letter dated 10 March 2011 (at Tab 11) in support. Indeed the NE of the Arrest Hearing show that Plaintiff's counsel specifically referred the court to "[p]age 137 of 1st affidavit" which was where the Defendant's 10 March 2011 letter was exhibited.

113 The most that could be said for the Defendant at this juncture was that, whether or not the 111 containers was leased under the 2010 CLC was a factual dispute that they had raised post-arrest and which had not been determined in their favour. It follows that it is not open to them to contend that paragraph 20 of the Arrest Affidavit was false or misleading in this respect.

114 I also find no substance in the Defendant's argument that there was non-disclosure of the fact that the 111 containers were supplied "before December 2010" and not "[s]ome time in December 2010". Given the circumstances prevailing at the time of the arrest, in particular the Defendants' letter to the Plaintiffs dated 10 March 2011, there was no objective basis for the Plaintiff to consider that the court at the Arrest Hearing might deem it relevant to know the dates when the 111 containers were picked up by the Defendant. What would have been relevant to the court at the Arrest Hearing was really the matter of whether the 111 containers were leased pursuant to the 2010 CLC which formed the basis of the Plaintiff's claims and whether these were the 111 containers lost on the "Phu Tan". Further, the words "[s]ome time in December 2010" when read in the context of paragraph 20 and 21 of the Arrest Affidavit, refers back to the material time period when the 111

containers were supplied "for carriage on board the Defendants' vessel "PHU TAN" and which were lost when the "Phu Tan" sank. I accept the Plaintiff's submission that paragraph 20 was meant to state that the 111 containers was supplied *t o the Defendants' vessel "PHU TAN"* sometime in December 2010 when thereafter the vessel sank.

115 As for the allegation that the Container Loading List from the Tan Thuan Port records database was false. I have earlier found otherwise (see [62] to [65] above). The most that could be said for the Defendant was that, the authenticity of the Container Loading List was a factual dispute that had not been determined in their favour and it was not open to them to contend that the Container Loading List exhibited at Tab 10 of the Arrest Affidavit was a false document so as to constitute material non-disclosure.

Disclosure (b) - the misleading and false statement in paragraph 64 of the Arrest Affidavit

116 Disclosure (b) pertained to paragraph 64 of the Arrest Affidavit which stated:

"64. On 21 February 2013 at 9:59pm, the Plaintiffs responded to state that the proof is in the "Leasing Container Agreement and the Equipment Interchange receipt (EIR)" [Tab 35]. I attach by way of example a copy of one of the many EIRs together with the booking order from VCSC requesting us to supply containers for loading on "PHU TAN" for carriage from Tan Thuan, Ho Chi Minh to Hai Phong. *This shows that we supplied the container and that the Defendants received it*"

[emphasis added]

117 Defendant's counsel submitted that by paragraph 64, the Plaintiff had sought to present a picture that:

(a) VCSC would request for containers by the booking order and would name the ship in the document and that the name of the ship would be found in the corresponding EIR. The two documents exhibited at Tab 35 were presented as an example of all the other booking orders and EIRs that were issued between the Plaintiffs and the Defendants;

(b) The effect was that in each case the Defendant had identified the specific ship to which the containers should be sent to as the "Phu Tan" and the Plaintiff had accepted the identification by sending the containers requested to that specific ship.

118 Defendant's counsel then argued that:

(a) paragraph 64 was false as the booking orders and EIRs that were produced by both parties subsequently showed that there was a total of 7 different ships mentioned in these documents and not just the "PHU TAN";

(b) the false statement at paragraph 64 was designed to allow the Plaintiff's counsel to later argue in court that even though the 2010 CLC did not refer to any particular ship, nonetheless, because all the booking orders and EIRs referred to the "PHU TAN", therefore the "PHU TAN" was the identified vessel so as to satisfy *The River Rima* test and establish admiralty jurisdiction under section 3(1)(l) of the HC(AJ)A.

119 Plaintiff's counsel submitted in response that reading paragraph 64 of the Arrest Affidavit in context together with paragraphs 63 and 65, it was clear that the sample of the EIR and booking

order was exhibited simply to show that “[the Plaintiffs] supplied the container and that the Defendants received it”. The proper context of paragraph 64 was that it referred to an email sent from the Plaintiff in response to the Defendant’s earlier email query for proof of ownership of the containers. Plaintiff’s counsel’s contended, in essence, that the Defendants’ had read paragraph 64 out of context and constructed a misconceived allegation of non-disclosure around it.

120 I agree entirely with the Plaintiff’s submissions. Read in its proper context, there is no doubt that the purpose of paragraph 64 of the Arrest Affidavit was to respond to the Defendant’s earlier email query for proof of ownership of the Containers at the relevant time. In my view, the Defendants’ theory set out at [117] to [118] above was interesting but far-fetched as:

- (a) it ignored the plain words of the last sentence at paragraph 64 which read “This shows that we supplied the container and that the Defendants received it”;
- (b) it ignored the clear context of paragraph 64 read together with paragraphs 63 and 65 of the Arrest Affidavit;
- (c) there was no evidence in the NE of the Arrest Hearing that the Plaintiff’s counsel had made any such submissions as characterised in paragraph [118(b)] above. Further, as I understood the Plaintiff’s counsel’s arguments on section 3(1)(l), there was never any attempt to bring the Plaintiff’s case within *The River Rima* test. Rather, as I pointed out earlier at [71] to [72] above, the Plaintiff’s case was premised on an erroneous reading of *The Bass Reefer* - that it was sufficient to simply identify the ship at the time of *supply of the containers to the ship* (relying on the Container Loading List (Tab 10, Arrest Affidavit) to evidence this) as opposed to identifying the ship at the *time of performance of the contract of supply*.

Disclosure (c) – the false translation of the 2010 CLC

121 I have dealt with the Defendant’s contentions on this point earlier at [53] to [56] above. For the reasons set out at [56], I found this allegation to be without substance and accepted that the Plaintiff’s translation was authentic. The most that could be said for the Defendant was that they have, post-arrest, raised a factual dispute on the translated wordings of the 2010 CLC. It is not open for them to argue that the translation of the 2010 CLC exhibited in the Arrest Affidavit was false as this factual dispute had not been determined in their favour.

Disclosures (e) & (f) - non-disclosure of the time bar defence & the force majeure defence

122 It is useful to recapitulate at this juncture the analysis on the extent of disclosure required in respect of “plausible defences”: *The Eagle Prestige* at [72] - [75], [84]. The duty to disclose “plausible defences” was not generally directed at defences on the merits that may be raised at the trial but referred to matters, which if omitted from disclosure, would be tantamount to an abuse of the arrest process. This was the position so long as it cannot be said that the action is an abuse of process, or that it is obviously frivolous and vexatious so as to be open to summary dismissal. *Once this tipping point exists, there would be matters 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.

123 The starting point here is that in the present action, the Plaintiff’s claim was *not* obviously unsustainable and is not one which could be struck out or “knocked-out” summarily on the basis of the Defendants’ time bar defence (see my earlier analysis at [79] to [86] above). It follows that the omission to disclose the plausible time bar defence or matters overlapping with the plausible time bar

defence does *not* equate to an abuse of the arrest process which may justify setting aside an arrest.

124 As I understand it, Defendant's counsel sought to contend that a time bar defence, by its very nature, would be considered as *potentially* a "knock - out blow" defence and should therefore have been disclosed. There appears to be some attraction to this submission at first blush. However, in my view, adopting the analysis in *The Eagle Prestige*, in the context of alleged non-disclosure, "plausible defences" should be understood as matters (factual and/or legal) of such weight as to deliver the "knock-out blow" to the claim summarily and not merely a defence to the claim which *by their nature* would *potentially* deliver a "knock out" blow to the claim. Adopting the approach of Defendant's counsel may bring the court closer to an impermissible exercise of undertaking an assessment of the merits and sustainability of a plaintiff's action at the stage of the arrest hearing. In this regard, the guidance laid down by the Court of Appeal in *The Bunga Melati 5* (at [117]) is apposite and it is this:

- (a) at the arrest hearing, the court acts as a "gatekeeper" against a "completely unmeritorious claim";
- (b) a warrant to arrest may be refused if the plaintiff's claim is supported by "obviously insufficient or contradictory *documentary* evidence" ("emphasis added");
- (c) it is not the role of the court at the arrest stage to determine the sustainability of the plaintiff's action, and leave should be refused only in "plain cases of processual abuse".

125 Ultimately, the Defendant did not point to any circumstances which demonstrated that the non-disclosure of the potential time bar defence amounted to an abuse of process. There was, for example, no allegation or evidence to show that the Defendant had communicated to the Plaintiff that they relied on the time bar defence. I have earlier concluded that there is a legitimate dispute of fact whether or not the Plaintiff's claim is time-barred under Vietnamese law. At this juncture, the most that can be said for the Defendant is that this remains a point of controversy. Accordingly, the time bar defence is not a "plausible defence" which if not disclosed would amount to an abuse of process and justify setting aside the arrest.

126 For completeness, I note that had I concluded otherwise that there was material non-disclosure of the time bar defence, I would still not have exercised my discretion to set aside the arrest because I would have regarded such a step as a disproportionate response to the omission. In this regard, the courts apply the principle of proportionality to assess the sin of omission against the impact of such default: *The Vasilij* at [84]. Based on the evidence before me and the circumstances in which the arrest was made, I would not think there was any deliberate suppression of the time bar defence on the part of the Plaintiff. There was no allegation or evidence to show that the Defendant had communicated to the Plaintiff that they relied on the time bar defence. Further, I would not think that the impact of the default was so significant as I have noted earlier that there exists in the present action a legitimate dispute of fact as to whether or not the Plaintiff's claim is time barred under Vietnamese law.

127 The Defendant's arguments that there was non-disclosure of the *force majeure* defence go this way. They contend that it was clear "since day one" that the *force majeure* defence was a live issue and referred to the Defendant's 10 March 2011 letter to support this argument. Defendant's counsel pointed to the following statement found in the letter:

"As you are well aware, MV "Phu Tan" encountered the very heavy weather and sank with all containers onboard on 16 December 2919 in Tonkin Gulf although our crewmembers tried their best to take all possible necessary and admissible measures to remedy. As a consequence of this

sinking incident, your containers listed below are a total loss...”

I am unable to agree with Defendant’s counsel’s submissions which were premised on a rather strained construction of the letter. Read as a whole, the letter certainly did not clearly indicate that the Defendant intended to rely on a *force majeure* defence. The last paragraph of the same letter makes it clear that the Defendant had informed the Plaintiff that they were still waiting for the competent authority to issue the investigation conclusion on *the cause* of the sinking incident:

“We will consider and settle termination and liquidation of lost containers upon the receipt of a final investigation conclusion issued by the competent authority on *the cause* of sinking incident and in accordance with the existing provisions of Vietnam laws”.

[emphasis added]

128 Further, I have earlier found (at paragraph [28]), based on the Investigation Conclusion issued by the Hai Phong Port authority that the sinking of the ship (and consequently the loss of the containers) was attributable to those engaged in the navigation or management of the ship. At this juncture, the most that can be said for the Defendant is that they have raised the *force majeure* defence as a point of dispute which has not been determined in their favour. I also note that the Defendant had not sought to rely on the *force majeure* defence for the purposes of their striking out application. In my view, the *force majeure* defence is not a “plausible defence” which if not disclosed would amount to an abuse of process and justify setting aside the arrest.

Disclosure (g) - non - disclosure of matters relating to the Plaintiffs’ claims under section 3(1)(d), (g) and (l) of the HC(AJ)A and deliberate avoidance of The River Rima at the Arrest Hearing

129 The Defendant submitted that there was material non-disclosure of matters relating to the Plaintiffs’ claims under section 3(1)(d), (g) and (l) of the HC(AJ)A. The non-disclosures essentially relate to matters of law or legal principles which the Defendant’s submitted were such settled principles and so integral to the court’s assessment of whether or not the jurisdictional limbs could be invoked that they ought to have been disclosed at the Arrest Hearing:

(a) In relation to section 3(1)(d), the Defendant’s complaint was that the Plaintiff did not disclose to the court that the section “was not for claims against the carrying ship” and that “[they] did not think anyone can credibly claim that they did not know s 3(1)(d) does not apply to claims against carrying ship”;

(b) In relation to section 3(1)(g), it was alleged that the “AR was not advised that s 3(1)(g) was for cargo claims and that the containers were not cargo but claimed as equipment”;

(c) In relation to section 3(1)(l), the heart of the complaint was that the Plaintiffs had not referred the court to *The River Rima* which was the leading case.

I would note here that the above allegations of material non-disclosure were also made in the context of the Defendants’ Case Theory (which I have rejected at [103] to [108] above)

130 I will first address the complaints in relation to sections 3(1)(d). I have earlier found (at [27] to [40]) that the Plaintiff had an arguable case that their claim was of the type and nature contemplated under section 3(1)(d). The Defendant’s complaints of non-disclosure however appear to be premised on their perception (which I have disagreed with) that the Plaintiff did not have any arguable case that their claims were of the type and nature to fall within sections 3(1)(d). In relation to section

3(1)(d), Plaintiff's counsel relied on Australian and New Zealand authorities to show that they had an arguable case that their claim came within the ambit of this jurisdictional limb. I also earlier noted (at [38]) that the learned author in the authoritative local textbook *Admiralty Law and Practice* expressly recognised that there was differing authority on the scope of section 3(1)(d). In these circumstances, it could not be said that the alleged non-disclosure that this jurisdictional limb "was not for claims against the carrying ship" amounted to material non-disclosure;

131 In relation to section 3(1)(g), it was clear from the NE of the Arrest Hearing that the court was in fact referred to the "issue regarding whether containers amount to "goods" within the meaning of the limb. The NE recorded that the court was in fact referred to the case of *The Mezen* and that the Plaintiff in arguing their case, submitted to the court that the "[c]ontainers were being transported from one place to another". Significantly, the NE also further recorded that in submitting to the court on section 3(1)(l), Plaintiff's counsel stated "Section 3(1)(l) *if containers are not cargo* because the containers were for the operation of the ship which was a container ship" [emphasis added]. It is reasonably clear therefore that the issue of whether the containers were cargo within the meaning of section 3(1)(g) was in fact disclosed and brought to the court's attention. There is therefore no substance in the Defendant's complaint that "the court was not advised that section 3(1)(g) was for cargo claims and that the containers were not cargo but claimed as equipment" and that this amounted to material non-disclosure.

132 The Defendant's main complaints really centred on section 3(1)(l) and the allegation that the Plaintiff had not referred the court to *The River Rima* which was the leading case. Underpinning these complaints was the Defendant's (untenable) Case Theory. I am unable to agree with the Defendant that there was non – disclosure of *The River Rima* at the Arrest Hearing. My reasons are as follows:

- (a) The NE of the Arrest Hearing records that the Plaintiff's counsel brought the court's attention to the Singapore case of *The "Alexandrea"* [2002] 1 SLR(R) 812 ("*The Alexandrea*");
- (b) *The Alexandrea* discussed the case of *The River Rima* at [29], [30], [31], [36] and set out, in brief, at [29], the *River Rima* test of identification of the ship which was supplied; and
- (c) Plaintiffs' counsel affirmed to the court that she had brought the court's attention to *The River Rima* in the course of her submissions on *The Alexandrea*. There was no evidence to suggest this was not the case. Plaintiff's counsel further explained that she had referred to *The Alexandrea* as the comments therein, that section 3(1)(l) applied to claims in tort, were pertinent to the Plaintiff's claim.

133 In the course of the hearings, the Defendant's counsel sought clarification, by way of a letter, from the Assistant Registrar ("AR") presiding over the Arrest Hearing whether or not Plaintiff's counsel had referred the court to the case of *The River Rima*. The AR's response was "nothing further to add to the certified notes of evidence". Flowing from the AR's response, the Defendant's counsel contended that because the clarification of the AR was that there was "nothing further to add to the certified notes of evidence", and insofar as the NE of the Arrest Hearing did not expressly record the reference to "*The River Rima*", this meant that the Plaintiff's counsel had in fact not referred the AR to *The River Rima*, even though she claimed she had. This was, by all accounts, a relatively serious accusation levelled against Plaintiff's counsel, and one which I would dismiss as without any evidential basis.

134 To conclude on this point, I find, based on the foregoing analysis, that there is no merit in the Defendant's submissions that there was non-disclosure in respect of matters relating to section 3(1) (d), (g) and (l).

135 Before proceeding further, for completeness, I would make the further observations on a point of law that was raised by the Plaintiff's counsel in the course of her arguments. Plaintiff's counsel submitted that a distinction should be made between matters of fact and "pure questions of law" as regards the test for disclosure and that a plaintiff should bear a higher burden in relation to the disclosure of facts. The argument was premised on the proposition that the court on an *ex parte* application is reliant on the applicant to produce all material facts and evidence whereas in relation to "pure questions of law", the court was better placed to make its own assessment and would not be so reliant on the applicant. Plaintiff's counsel submitted that in cases such as *The Vasilii*, *The Eagle Prestige* and *The Bunga Melati 5*, the courts had hitherto focused on non-disclosure of *material facts* either relevant to a jurisdictional issue or in support of "plausible defences" and had not dealt with disclosure of matters of pure law.

136 In my view there is no need or basis to draw such a distinction between matters of fact and "pure questions of law". The statements found in *The Vasilii*, *The Eagle Prestige* and *The Bunga Melati 5* discussed the disclosure of both factual and legal matters/objections and the courts there did not express any intention to lay down different tests to govern disclosures of fact and disclosures of "pure questions of law". As stated by the Court of Appeal in *The Vasilii*, the test of materiality:

87. ...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]

137 The Court of Appeal in *The Bunga Melati 5* (at [116]) issued the salutary reminder that our courts ultimately seek to strike the balance between the twin policy concerns of allowing a liberal invoking of the admiralty jurisdiction and *preventing the abuse of the ship arrest process*. Whether or not there was material non-disclosure in the circumstances is ultimately to be assessed with reference to the question of whether the alleged non-disclosure amounted to *an abuse of the arrest process*. The (common)sensible guidance in *The Vasilii* (at [90]) is that the scope of disclosure should be what is reasonable in the given circumstances at the time of the arrest, assessed as a matter of common sense.

138 In my observation, whether it is a "pure question of law" or otherwise, the test of materiality would remain the same. In the context of disclosing matters of "pure questions of law" to the court at an arrest hearing, the policy concern is whether the alleged non-disclosure is tantamount to an abuse of the arrest process. I venture to illustrate this briefly. Under the various jurisdictional limbs of the HC(AJ)A, had there been Singapore authorities which *conclusively* determined the ambit of these provisions, then any applicant intending to contend for an interpretation of sections 3(1)(d) or 3(1)(g) which went against the grain of *conclusive* Singapore authorities would have the duty to disclose these *conclusive* Singapore authorities for the court's consideration failing which there would be strong suggestion that such non-disclosure amounts to an abuse of process which may warrant a setting aside of the arrest.

Disclosure (h) – non-disclosure of the jurisdiction clause in the 2010 CLC and the letter at page 137 of the Arrest Affidavit

139 I come now to the Defendant's final allegations of non-disclosure. The Defendant argued that the jurisdiction clause in the 2010 CLC and the letter at page 137 of the Arrest Affidavit were not disclosed to the court at the Arrest Hearing. However, the evidence indicates otherwise. The NE of the Arrest Hearing records:

“PC: ...Page 137 of 1st affidavit is a document showing that 111 containers belonging to the Plaintiff were lost.

[Goes through paragraphs 4 to 99 of 1st affidavit and exhibits]”

140 It is clear from the record that the letter at page 137 of the Arrest Affidavit was in fact disclosed and referred to the court *specifically*. As for the jurisdiction clause at Art 6 of the 2010 CLC, this was set out in the text of the Arrest Affidavit at paragraph 12 under a section listing out the relevant terms of the 2010 CLC. It was recorded in the NE that the Plaintiffs’ counsel (i.e. “PC”) went through paragraphs 4 to 99 with the court. Evidently this exercise would have included taking the court through paragraph 12 of the Arrest Affidavit. In short, there is no factual basis for the Defendant to allege non-disclosure of these matters.

Conclusion

141 For all the foregoing reasons, the Defendant’s application is dismissed. I will hear parties on costs.

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