IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHCR 3

Admiralty in Rem No 45 of 2020 (Summons No 1766 of 2020)

Admiralty action in Rem against the vessel "MIRACLE HOPE"

Between

Natixis, Singapore Branch

… *Plaintiff*

And

Owner and/or demise charterer of the vessel "MIRACLE HOPE"

… *Defendant*

And

Clearlake Shipping Pte Ltd

… *1st Intervener*

And

Petróleo Brasileiro S.A. – Petrobras

… *2nd Intervener*

JUDGMENT

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Navin Anand AR:

Introduction

1 Ship arrest has been described as a draconian remedy that may cause irreparable loss and damage to a shipowner and others who had, have, or would have, dealings with the vessel. It is for this reason that the court expects all who seek the arrest of a vessel to approach it with candour and to bring all material facts before it.

2 In this case, the Plaintiff, the Singapore branch of the bank, Natixis ("Natixis") arrested the vessel "Miracle Hope" ("Vessel") for breach of the contract of carriage evidenced by bills of lading. The 2nd Intervener, Petróleo Brasileiro S.A. – Petrobras ("Petrobras"), applied to set aside the warrant of arrest on the basis that Natixis had failed to bring certain material facts to the court's attention at the time it applied for the warrant of arrest.

3 I heard parties remotely by way of video-conference on 18 May 2020

pursuant to s 28(10)(a) of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020), read with Registrar's Circular Nos 4 and 5 of 2020.

4 After hearing the parties, I have decided to dismiss Petrobras' application to set aside the warrant of arrest. I set out my full grounds below.

Background Facts

The Parties

5 Natixis is a bank which asserts its rights in this suit as the holder of original bills of lading ("Bills of Lading") issued in respect of 1,001,649.37 US barrels (net) of crude oil ("Cargo") loaded onboard the Vessel for carriage from Porto Do Acu, Brazil, to one or more safe ports in China ("Voyage").[1]

6 The Defendant, Ocean Light Shipping Inc ("Owners"), is the registered owner of the Vessel.[2]

7 The Owners had time-chartered the Vessel to Trafigura Maritime Logistics Pte Ltd ("Trafigura").[3] Trafigura then voyage-chartered the Vessel to the 1st Intervener, Clearlake Shipping Pte Ltd ("Clearlake"), which in turn sub-voyage-chartered the Vessel to Petrobras.[4] The chain of charterparties implicated in the Voyage may be illustrated as follows:[5]

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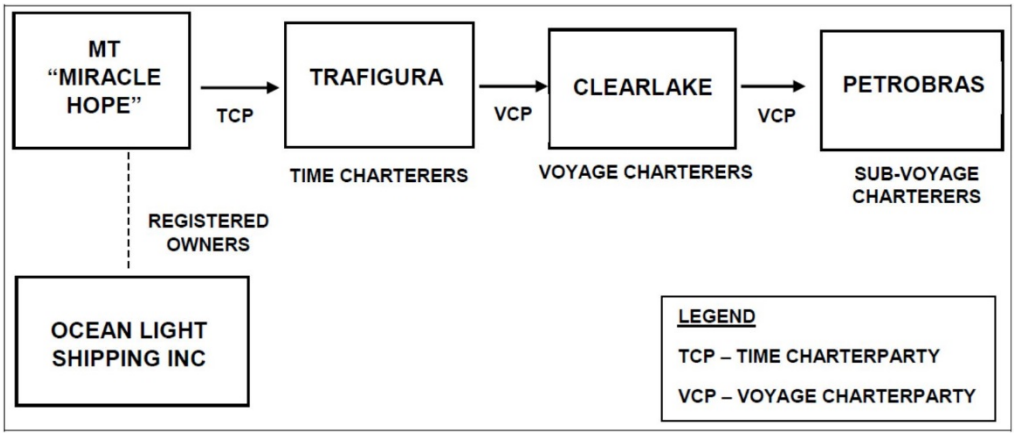
1 Statement of Claim dated 1 April 2020 at paras 3, 5 and 6. 1st Affidavit of Lee Jing Yi dated 12 March 2020 ("Lee's 1st Affidavit") at paras 5-9.

2 Lee's 1st Affidavit at para 12.

3 2nd Affidavit of Alan Ong Tiong Wee dated 7 April 2020 ("Alan's Affidavit") at para 10.

4 *Ibid.*

5 Natixis' Written Submissions ("NWS") at para 10.



The Sale Contract & Letter of Credit

8 The Voyage itself arose out of an international sale of goods. By way of a sale contract dated 2 September 2019 ("Sale Contract"), Hontop Energy (Singapore) Pte Ltd ("Hontop") purchased the Cargo from Petrobras Global Trading BV ("PGT"),[6] a related company of Petrobras.[7] Hontop is a customer of Natixis, and Natixis extended trade facility financing to Hontop as evidenced by the following documents:[8]

(a) a bank facility agreement dated 19 February 2019 ("Facility Agreement");

(b) a "General Agreement for Commercial Business" dated 28 February 2019; and

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6 4th Affidavit of Lee Jing Yi dated 6 May 2020 ("Lee's 4th Affidavit") at para 22.

7 2nd Affidavit of Pedro Jardim de Paiva Barroso dated 8 May 2020 ("Pedro's 2nd Affidavit") at para 7.

8 Lee's 4th Affidavit at para 21.

(c) a "Master Security Agreement" dated 28 February 2019 ("Master Security Agreement").

9 Under the Sale Contract, the Cargo was to be delivered "*DES AS PER "INCOTERMS 2000"*".[9] "DES" is an abbreviation for "delivered ex ship", and it refers to a process in which a seller delivers the goods by placing the goods at the buyer's disposal at the port of destination (see *Incoterms 2000: ICC official rules for the interpretation of trade terms* (International Chamber of Commerce, 1999), at p 98 (obligation A4 for DES)).

10 Payment for the Cargo under the Sale Contract was to have been made by way of an irrevocable letter of credit.[10] Hontop applied to Natixis, which issued a letter of credit dated 25 October 2019 ("Letter of Credit") to finance Hontop's purchase of the Cargo from PGT.[11] Under the Letter of Credit, payment for the Cargo would be made against the presentation of Bills of Lading issued or endorsed to the order of Natixis.[12] It was also provided that if the Bills of Lading are not available, a letter of indemnity issued by PGT to Hontop on the terms set out in the Letter of Credit could be presented for payment instead. The salient terms of the Letter of Credit read as follows:[13]

> 46A: Documents Required
>
> THIS LETTER OF CREDIT IS AVAILABLE WITH ADVISING BANK BY NEGOTIATION AT 10 CALENDAR DAYS AFTER THE NOTICE OF READINESS DATE TENDERED AT DISCHARGE PORT (NOR DATE TO COUNT AS DAY ZERO) AGAINST PRESENTATION OF THE FOLLOWING

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9 Pedro's 2nd Affidavit at p20.

10 *Ibid* at p21.

11 Lee's 4th Affidavit at paras 23-24.

12 Lee's 1st Affidavit at p36.

13 *Ibid* at pp36-37.

> DOCUMENTS:
>
> …
>
> 2) *FULL SET OF 3/3 ORIGINAL CLEAN ON BOARD BILLS OF LADING ISSUED OR ENDORSED TO THE ORDER OF NATIXIS, SINGAPORE AND MARKED 'FREIGHT PAYABLE AS PER CHARTER PARTY'.*
>
> …
>
> IN THE EVENT THAT THE DOCUMENTS NO. 2 … ARE UNAVAILABLE AT THE TIME OF NEGOTIATION, PAYMENT WILL BE MADE ON THE DUE DATE AGAINST PRESENTATION OF THE FOLLOWING DOCUMENTS:
>
> ….
>
> C) *LETTER OF INDEMNITY ISSUED IN THE FOLLOWING FORMAT*… [emphasis added in italics]

11 Between 13 November 2019 and 3 December 2019, Natixis disbursed US$65,134,924.70 to PGT for the Cargo against the latter's presentation of, *inter alia*, a letter of indemnity dated 31 October 2019 ("Letter of Indemnity") in lieu of PGT presenting the Bills of Lading.[14] The relevant portion of the Letter of Indemnity reads as follows:[15]

> TO: HONTOP ENERGY (SINGAPORE) PTE LTD
> LETTER OF INDEMNITY
>
> WE REFER TO [THE CARGO] DISCHARGED AT ONE OR MORE SAFE PORT(S), CHINA BY THE VESSEL MIRACLE HOPE … IN ACCORDANCE TO OUR SALES CONTRACT…
>
> ALTHOUGH WE HAVE SOLD AND TRANSFERRED TITLE TO THE ABOVE-NAMED CARGO TO YOU, WE HAVE BEEN UNABLE TO PROVIDE TO YOU THE FULL SET OF 3/3 ORIGINAL CLEAN ON BOARD BILL OF LADING … REQUIRED UNDER THE CONTRACT (THE "DOCUMENTS").
>
> IN CONSIDERATION OF YOUR MAKING PROVISIONAL PAYMENT … FOR THE AFOREMENTIONED CARGO, WE

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14 3rd Affidavit of Pedro Jardim de Paiva Barroso dated 15 May 2020 ("Pedro's 3rd Affidavit) at pp66 and 80.

15 Pedro's 2nd Affidavit at p49.

> HEREBY EXPRESSLY REPRESENT AND WARRANT THAT IMMEDIATELY PRIOR TO THE TRANSFER OF THE ABOVE MENTIONED CARGO TO YOU, WE HAD MARKETABLE TITLE TO SUCH CARGO FREE AND CLEAR OF ANY LIEN OR ENCUMBRANCE AND WE HAD THE FULL RIGHT AND AUTHORITY TO TRANSFER AND EFFECT DELIVERY OF SUCH CARGO TO YOU.
>
> WE FURTHER AGREE TO MAKE ALL REASONABLE EFFORTS TO OBTAIN AND SURRENDER THE DOCUMENTS TO YOU AS SOON AS POSSIBLE AND TO INDEMNIFY AND HOLD YOU HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, COSTS, AND EXPENSES … WHICH YOU MAY SUFFER BY OUR FAILURE TO PRESENT THE DOCUMENTS TO YOU…
>
> …
>
> [Signature]
> AUTHORISED SIGNATURE(S) OF [PGT]

Delivery of the Cargo

12 The Cargo was delivered to Hontop at Dongjiakou, China, between 13 and 16 November 2019 without presentation of the Bills of Lading and upon the invocation of cl 33(6) of the charterparty between Clearlake and Petrobras ("Voyage Charterparty"),[16] which read as follows:[17]

> (6) Notwithstanding any other provision of this Charter, [Clearlake] shall be obliged to comply with any orders from [Petrobras] to discharge all or part of the cargo provided that they have received from [Petrobras] written confirmation of such orders.
>
> If [Petrobras] by telex, facsimile or other form of written communications that specifically refers to this clause request [Clearlake] to discharge a quantity of cargo … (a) without bills of lading … then [Clearlake] shall discharge such cargo in accordance with [Petrobras'] instructions in consideration of receiving [a letter of indemnity] as per [Clearlake's] P&I Club wording…

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16 Alan's Affidavit at para 10(iv). Pedro's 2nd Affidavit at paras 19-20.

17 Alan's Affidavit at para 10(iv).

13 In essence, the effect of this clause was that Clearlake was *bound* to comply with any order from Petrobras to discharge the Cargo without presentation of the Bills of Lading, provided Petrobras furnished Clearlake with a letter of indemnity in the latter's P&I Club's terms. It is not disputed that a similar indemnity provision was found in the charterparties up the chain (ie, the voyage charterparty between Trafigura and Clearlake, and the time charterparty between the Owners and Trafigura). These indemnities existed on a back-to-back basis, such that Petrobras would ultimately be liable for the consequences of its request to discharge the Cargo without presentation of the Bills of Lading.[18]

The Arrest

14 Hoptop failed to repay the amounts disbursed by Natixis under the Letter of Credit to PGT.[19] On or around 3 March 2020, Natixis demanded the full set of the Bills of Lading from PGT as assignee of Hontop's rights under the Letter of Indemnity issued by PGT to Hontop (see [11] above).[20] PGT complied with Natixis' demand, and on 6 March 2020, it delivered the full set of the Bills of Lading endorsed to the order of Natixis.[21]

15 On 11 March 2020, Natixis, as holder of the Bills of Lading, made a demand to the Owners for delivery of the Cargo.[22] Natixis received no response, and on 12 March 2020, arrested the Vessel as security for what it described as

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18 Pedro's 3rd Affidavit at para 20.

19 Lee's 1st Affidavit at para 6.

20 *Ibid* at para 8.

21 *Ibid.*

22 *Ibid* at para 11.

a "straightforward misdelivery claim" ("Arrest").[23]

16 The Arrest sparked off a series of proceedings in England between the parties in the charterparty chain on the furnishing of security for the release of the Vessel. The proceedings occurred in England because the back-to-back indemnities (referred to in [13] above) granted under the various charterparties were subject to the jurisdiction of the High Court of England. Thereafter, the following events transpired:

(a) On 13 March 2020, Natixis demanded security of US$76,050,000 from the Owners to secure the release of the Vessel.[24]

(b) The Owners looked to Trafigura to put up security for the release of the Vessel pursuant to the indemnity contained in the time charterparty and Trafigura, in turn, looked to Clearlake for the same (see [13] above and the judgment of the English High Court in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2020] EWHC 726 (Comm) ("*Trafigura v Clearlake*") at [2], and [23]-[24]). When Clearlake refused to do so, Trafigura successfully applied to the English High Court for a mandatory injunction to compel Clearlake to do so, obtaining this order on 24 March 2020 (see *Trafigura v Clearlake* at [1] and [57]).

(c) Clearlake, in turn, looked to Petrobras to put up security for the Arrest pursuant to the indemnity in the Voyage Charterparty and it likewise successfully obtained a mandatory injunction against Petrobras

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23 NWS at para 2.

24 Lee's 4th Affidavit at p147.

compelling it to furnish security for the Arrest on 1 April 2020 (see *Clearlake Chartering USA Inc. & Anor v Petróleo Brasileiro S.A.* [2020] EWHC 805 (Comm) ("*Clearlake v Petrobras*")).

(d) On 27 April 2020, the English High Court varied the mandatory injunctions it granted in *Trafigura v Clearlake* and *Clearlake* v *Petrobras* by specifying that Clearlake and Petrobras were to put up security by way of payment into the Singapore Court by 7 May 2020 (see *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2020] EWHC 995 (Comm)).

17 On 8 May 2020, Petrobras paid the sum of US$76,050,000 into the Singapore Court as security for the release of the Vessel. On 11 May 2020, the Vessel was released.

The Parties' Positions

18 Petrobras did not challenge Natixis' invocation of the admiralty jurisdiction of this court under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed).[25]

19 Instead, the sole ground relied on by Petrobras was alleged material non-disclosure by Natixis in the course of obtaining the warrant of arrest. Petrobras contended that Natixis failed to disclose the following four "material facts" to Assistant Registrar Jacqueline Lee ("AR Lee"), before whom Natixis' solicitors attended to obtain the warrant of arrest:[26]

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25 NWS at para 17.

26 Petrobras' Written Submissions ("PWS") at paras 33-113.

(a) First, Natixis had consented to delivery without production of the Bills of Lading.

(b) Second, the Bills of Lading were spent.

(c) Third, Natixis did not furnish copies of the Master Security Agreement and other banking documents that provided the alleged basis of Natixis' claim that it was the assignee of the rights under the Letter of Indemnity issued by PGT to Hontop (see [11] above).

(d) Fourth, the large gap of time between the delivery of the Cargo in November 2019 and Natixis' demand to PGT on 3 March 2020 for the Bills of Lading.

20 Petrobras submitted that the warrant of arrest should be set aside on the basis of the non-disclosure of these facts.[27] Petrobras also sought damages for wrongful arrest, and contended that the non-disclosure was deliberate and calculated to mislead the court.[28]

21 Natixis raised two preliminary objections to Petrobras' application.

(a) First, Petrobras, as mere intervener in this action, has no *locus standi* to set aside the warrant of arrest.[29]

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27 *Ibid* at paras 114-117.

28 *Ibid* at paras 118-144.

29 NWS at paras 25-42.

(b) Second, the application is out of time, as it was filed more than 14 days after the statement of claim was filed, and *after* Petrobras itself filed a defence in the action.[30]

22 If Petrobras crosses this preliminary hurdle, Natixis submitted that the application is unmeritorious because the so-called "material facts" are nothing more than conjectures, speculations, and conclusions drawn by Petrobras from the underlying documents.[31] Insofar as these facts amounted to defences, they need not be raised at the time of applying for a warrant of arrest.[32] In other words, it argues that the so-called "material facts" are not, in fact, material.

23 For completeness, I note that the Owners and Clearlake, both of whom were represented at the hearing before me, took no position on Petrobras' application.

Issues

24 Three issues arise for consideration. I propose to deal first with whether Petrobras has standing as intervener to apply to set aside the warrant of arrest. I will next consider whether Petrobras' application was filed out of time. Finally, I will consider the allegations of material non-disclosure.

Issue 1 – *Locus Standi*

25 The general principles regarding intervention are not controversial. A person who is not party to an *in rem* action but has an interest in the arrested

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30 *Ibid* at paras 19-24.

31 *Ibid* at paras 61, 65, 67, and 94.

32 *Ibid* at paras 66, 72-74, and 89.

vessel or the proceeds of sale in court, or whose interests are affected by any order made in the *in rem* action, may be permitted to intervene in the action to protect that interest (see *The "Engedi"* [2010] 3 SLR 409 at [21]). An intervener protects his interest by defending the action *in rem*, and is permitted to set up any and such defences that the defendant shipowner could have set up had it elected to defend the action itself (see *ibid*).

26 There is no dispute that Petrobras was granted leave to intervene in this action. On a straightforward application of the above principles, Petrobras, as intervener, has the right to apply to set aside the warrant of arrest for material non-disclosure, which is a procedural defence available to the Owners.

27 Natixis however argued against Petrobras' standing to set aside the warrant of arrest on the following two reasons.

(a) Petrobras' interest in this action is limited to issues pertaining to the provision of security, and it does not have an interest in the Vessel itself.[33]

(b) The Owners have entered an appearance in this action, and there is no basis for Petrobras to have to step into the shoes of the Owners, which can bring an application to set aside the warrant of arrest in its own name.[34]

28 I have no hesitation in rejecting Natixis' arguments. First, no authority has been cited in support of the proposition that distinctions should be drawn

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33 *Ibid* at paras 32-35.

34 *Ibid* at paras 40-42.

between the rights of interveners to participate in the action based on the specific nature of the interests they assert. In my respectful view, such a gloss is unwarranted, and would unnecessarily fetter the rights of interveners to protect their interests.

29 Second, and in any event, I find that Petrobras does have an interest in the Vessel because it is the voyage charterer of the Vessel for the Voyage (see [7] above). The back-to-back indemnities in the charterparty chain mean that Petrobras would ultimately be liable if Natixis succeeds in its claim against the Owners for a breach of the bill of lading contract (see [13] above). Petrobras thus has an interest in whether the Owners and the Vessel are liable under Natixis' claim.[35]

30 Even if Petrobras' interest were merely limited to the provision of security (which I do not agree with), I do not see why this precludes it from applying to set aside the warrant of arrest. Petrobras paid slightly over US$76 million into court as security to release the Vessel, and Natixis would look to this sum to satisfy any judgment it obtains in its favour. On any view, Petrobras is a person adversely affected by the Arrest, and it would be unjust to deny it the right to challenge the Arrest for material non-disclosure and seek the return of its security.[36]

31 Natixis' argument that the Owners have entered appearance and can bring a setting aside application in its own name also does not take it very far, for the following reasons:

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35 Pedro's 3rd Affidavit at para 20.

36 *Ibid* at paras 18-19.

(a) First, the Owners have hitherto not applied to set aside the warrant of arrest. Until and unless the Owners actually take out an application in their own name, Petrobras would have no other means (that is, other than continuing with the present action) of challenging the legality of the Arrest and recovering the security which it had furnished.

(b) Second, the purpose of the procedure of intervention is to allow non-parties to participate in the admiralty proceedings and protect their interests by defending the action, irrespective of whether the defendant enters an appearance. In *The "Soeraya Emas"* [1991] 2 SLR(R) 479, an intervener applied to set aside a consent summary judgment entered into by the plaintiff mortgagee and the defendant shipowner, who entered an appearance but did not defend the action (at [12], [17] and [22]). M Karthigesu J (as his Honour then was) held that the intervener had *locus standi* to challenge the validity the mortgage, and further ordered that the consent judgment be set aside with the intervener to file a defence to the mortgagee's claim (at [38]-[43]).

32 In light of the following, I find that Petrobras has *locus standi* to apply to set aside the warrant of arrest.

Issue 2 – Whether Petrobras lost the right to challenge the Arrest

33 Natixis' argument is predicated on O 12 r 7 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) (the "Rules"), which applies to admiralty actions by virtue of O 70 r 2(3) of the Rules. Under O 12 r 7(1), any challenge to the jurisdiction of the court has to be taken out 14 days after the filing of the statement of claim which, in this case, was 15 April 2020, as Natixis' statement of claim was filed on 1 April 2020. By filing a defence *and* an application to set aside the warrant of arrest on 16 April 2020, Natixis submitted, citing O 12

r 7(6) of the Rules, that Petrobras was not only out of time, but also must be treated as having accepted the jurisdiction of the court.[37]

34 I do not accept Natixis' argument. In my respectful view, Natixis has failed to appreciate that Petrobras' challenge is not a jurisdictional one.

35 The warrant of arrest has a dual function in admiralty law.

(a) First, it is a means by which admiralty jurisdiction is invoked. Admiralty jurisdiction can be invoked either by service of the admiralty writ or the arrest of the vessel, whichever first occurs: see *The "Fierbinti"* [1994] 3 SLR(R) 574 at [39].

(b) Second, it is a means by which security is obtained for the claim against the vessel: see *The "Fierbinti"* at [34].

36 It is clear that Petrobras does not challenge the invocation of the court's admiralty jurisdiction. Petrobras' complaint is instead that Natixis had breached its duty of full frank disclosure to the court in seeking to obtain security for its claim through the mechanism of an arrest. This is a separate ground to set aside the arrest, independent of any question on jurisdiction. As explained by the Court of Appeal in *The "Rainbow Spring"* [2003] 3 SLR(R) 362 at [37]:

> …Arrest is a drastic remedy given on an *ex-parte* basis. The duty to make full and frank disclosure is an important bulwark against the abuse of the process of arrest. There must be the possibility of a sanction for the failure to observe that duty… *The courts must retain the discretion to set aside an arrest for non-disclosure if the facts warrant it notwithstanding that otherwise they would have jurisdiction over the matter and that the procedure in the Rules had been followed.*

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37 NWS at paras 23-24.

[emphasis added in italics]

37 Since Petrobras' challenge is not a jurisdictional one, O 12 r 7 does not apply, and Petrobras has not lost its right to challenge the arrest.

Issue 3 – Material Non-Disclosure

General Principles

38 It is well established that a plaintiff who applies for an arrest on an *ex parte* basis is under a duty to make full and frank disclosure of all material facts, even if these facts are prejudicial to the plaintiff's claim: see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [83] and [85]. The underlying rationale for this duty is that the arrest of a ship may cause enormous damage to a shipowner and other connected parties, and the onus is on the plaintiff to ensure that the court hearing the matter is apprised of all relevant facts and given a balanced view of the matter (see *ibid* at [85]).

39 In approaching a setting aside application based on material non-disclosure, the court must first decide whether there has in point of fact been non-disclosure (see *Treasure Valley Group Ltd v Saputra Teddy & Anor (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 ("*Treasure Valley*") at [24]). If non-disclosure is established, the court will thereafter determine whether the facts that were omitted from disclosure were material, and if so, whether the court's discretion should be exercised to set aside the warrant of arrest (see *ibid*).

40 When determining whether a fact is material, the touchstone is *relevance*. As explained by the Court of Appeal in *The "Damavand"* [1993] 2 SLR(R) 136 at [30]:

> … the test of materiality is whether *the fact is relevant to the*

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

41 Matters that go towards the existence of the court's admiralty jurisdiction would be material, as they would have an effect on the decision whether or not to issue the warrant of arrest. As Belinda Ang J explained in *The "Eagle Prestige"* [2010] 3 SLR 294 (at [74]):

> *The concerns of the court at the application stage are firstly, with considerations of jurisdiction* in rem *(and generally not the merits of the claim) and secondly, disclosure of material facts which are germane to considerations of jurisdiction* in rem *and overlaying that is the absence of facts and circumstances suggesting an abuse of the arrest process.*
>
> [emphasis in original]

42 The merits of the plaintiff's claim are not generally relevant, and there is no onus on the plaintiff to go further to show that its claim is likely to succeed "*so long as it cannot be said that the action is an abuse of process or that it is so obviously frivolous and vexatious as to be open to summary dismissal"* [emphasis in original] (*The "Eagle Prestige*" at [74]). Put another way, it is not the role of the court to determine the sustainability of the plaintiff's action at the warrant of arrest stage. The court should only refuse to grant the warrant of arrest in cases where it is clear that the application amounts to an abuse of process: see *The "Bunga Melati 5"* [2012] 4 SLR 546 at [117].

43 It follows from the above that there is generally no duty to disclose defences which only affect the merits of the underlying claim and do not touch on the admiralty jurisdiction of the court (see *The "Xin Chang Shu"* [2016] 1 SLR 1096 at [49]). Unless there are defences which are of such weight to deliver

a "knock-out blow", the existence of plausible defences that may be raised at trial (whether of a factual or legal nature) do not need to be disclosed (see *The "Eagle Prestige"* at [73] and *The "Xin Chang Shu"* at [48]-[50]).

Application to Facts

44 With the above principles in mind, I now consider whether the alleged non-disclosures by Natixis are material facts. It is important to bear in mind that Petrobras is not arguing that these matters go towards the existence of the court's admiralty jurisdiction. Instead, Petrobras' core submission is that Natixis failed to disclose merits-based defences that are of such weight as to deliver a "knock-out blow" to Natixis' claim.[38]

(1) Consent to Delivery without Production of Bills of Lading

45 According to Petrobras, Natixis failed to disclose the defence that Natixis had consented to the Owners delivering the Cargo to Hontop without production of the Bills of Lading. This defence was evidenced by, among other things, the following facts: (a) Natixis knew or ought to have known, that the Cargo was delivered to Hontop under the Sale Contract,[39] (b) Hontop was authorised by Natixis to accept delivery of the Cargo,[40] (c) the Letter of Credit and the Letter of Indemnity both permitted delivery of the Cargo without the production of the Bills of Lading,[41] and (d) Natixis had provided financing to Hontop on a trust receipt arrangement.[42]

46 It is undisputed that Natixis did not inform AR Lee of any of the above

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38 PWS at para 26.

39 *Ibid* at paras 33-49.

40 *Ibid* at paras 55-56.

matters. However, I find that none of these matters are material facts.

47 The Bills of Lading were "to order" bills that were endorsed to Natixis, which was also in possession of the Bills of Lading at the material time. This makes Natixis the holder of the Bills of Lading and, as such, it was entitled to call for delivery of the goods specified therein. It is settled law that an order bill entitles the holder to call for delivery of the goods covered by that bill (see *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR(R) 611 ("*BNP Paribas*") at [24]-[26]). Delivery without production of the bill of lading constitutes a breach of contract, and a shipowner who delivers the goods to a person other than the holder of the bill of lading is exposed to risk of liability to the holder (see *ibid* at [24]). A bill of lading remains effective until the goods are delivered to the person entitled to them, and a holder is entitled to sue for breach of contract committed prior to the time it became holder (see *BNP Paribas* at [30] and *The "Pacific Vigorous"* [2006] 3 SLR(R) 374 at [5]).

48 Given that the Owners delivered the Cargo to Hontop without production of the Bills of Lading, there can be little doubt that Natixis has a *prima facie* claim for breach of the contract of carriage.

49 The defence of consent is hard to prove as it requires a shipowner to show that there was prior consent by the holder of the bill of lading. The courts have rejected attempts by shipowners to infer consent on the part of the holder from trade financing arrangements (such as a trust receipt) or knowledge that the cargo was discharged.

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41 *Ibid* at paras 50-60.

42 *Ibid* at para 69.

(a) In *The "Pacific Vigorous"*, Belinda Ang J rejected the defence of consent, as the cargo was discharged against letters of indemnity issued by the head time charterer and the sub-charterer, and not on the basis of any prior consent from the holder (at [2] and [7]).

(b) In *BNP Paribas*, Ang J similarly rejected the defence of consent. Her Honour explained (at [59], [60] and [64]:

> 59 … It is plainly wrong to construe the trust receipt as authority to Shweta to take delivery at Kandla against letters of indemnity issued by Lanyard without production of the bills of lading… The trust receipt in this case was not intended to operate in an unrestricted way… In the circumstances, there cannot arise by virtue of the trust receipt any consent, authority or ratification argued for.
>
> 60 In reality, the cargo arrived earlier than the bills of lading because of the duration of the voyage. *The fact of and in itself, even with the knowledge of BNP, cannot give rise to any actual implied authority to Shweta to instruct the shipowner to discharge cargo without the relevant bills of lading.*… It is clear … that the bank looked to the document of title as security and it made no sense for the bank to destroy its own security if it were to consent to release of cargo against a letter of indemnity.
>
> …
>
> 64 [The shipowner] has not on the evidence established that the instructions to discharge or release the cargo against letters of indemnity were with the consent or authority of BNP so much so that the bank cannot complain about the breach. *[The shipowner] knew that it was delivering not to a bill of lading holder but to Lanyard who had issued the letters of indemnity to it.* In doing so, [the shipowner] acted in the full knowledge that Shweta or Lanyard was in no position to produce the bills of lading at the time of discharge. Accordingly, I find [the shipowner] to be in breach of contracts evidenced by the relevant bills of lading.
>
> [emphasis added in italics]

(c) In *The "Yue You 902"* [2020] 3 SLR 573, Pang Khang Chau J also did not accept the defence of consent (at [122]-[123]):

> 122 In the present case, *the Defendant was not able to point*

> *to anything said or done by OCBC which could have induced the Defendant to conclude that OCBC had consented to delivery of the cargo without the bill of lading. In fact, the Defendant accepts that there were no communications between OCBC and the Defendant prior to the discharge of the cargo.* More importantly, the Defendant's submission is that OCBC's consent was expressed through the grant of the loan. Since it is common ground that the loan was granted only after the discharge of the cargo was completed, there could have been no *prior consent* by OCBC to the discharge of the cargo.
>
> 123 Nor could OCBC's grant of the trust receipt loan be construed as *ex post facto* consent to, or ratification of, the misdelivery. OCBC's decision to grant a trust receipt loan (as opposed to other types of loan) and take the bills of lading as security is clearly inconsistent with any intention to waive its contractual rights of suit against the Defendant under the bills of lading… When Aavanti defaulted on the loan, OCBC promptly claimed against the Defendant under the bills of lading. *Instead of telling OCBC that it had no claim because it had consented to the misdelivery and therefore waived its rights of suit, the Defendant's reaction to OCBC's claim on 14 June 2016 was to immediately institute its own claim on 17 June 2016 against FGV under the [letter of indemnity]. Quite clearly, the Defendant discharged the cargo because it believed that its potential liability under the bills of lading for misdelivery was covered by the [letter of indemnity]* and not because it believed that it no longer had liabilities under the bills of lading due to any perceived consent on OCBC's part.
>
> [emphasis added in italics]

50 Given that the weight of the authorities incline against a finding of prior consent for the delivery of cargo on the presentation of a letter of indemnity instead of the bill of lading, I cannot see why the failure to raise this as a defence is so grave as to show Natixis' claim to be frivolous, vexatious, and liable to summary dismissal. This, in my view, is sufficient to find that the matters complained of are not material facts. The furthest that can be said of the defence of consent is that it is a plausible one that may be raised by the Owners and/or Petrobras.

51 In any event, the defence of consent requires further proof of facts in

issue. The Owners and Hoptop have not filed affidavits to support Petrobras' allegations. There is not even evidence showing communications between the Owners and Natixis at the material time. In the absence of any evidence from the Owners or Hontop on the trade financing arrangements, the Sale Contract, and the Bills of Lading so as to provide factual substantiation for the defence of consent, Natixis cannot be faulted for not having raised this to the court at the time it applied for the warrant of arrest.

(2) Spent Bill

52 Petrobras alleged that the Bills of Lading were spent by the time Natixis came into possession of them, and contended that this defence should have been disclosed to AR Lee.[43]

53 A bill of lading is only spent when delivery is effected to the person entitled to the goods (see *The "Yue You 902"* at [69]). As explained earlier, a bill of lading is not spent by delivery to persons not so entitled, and a holder is entitled to sue for breach of contract for misdelivery if this has been done (see [47] above). The defence of a spent bill was also raised in *The "Yue You 902"*, and summarily dismissed by Pang J on the facts (at [86]).

54 Like the defence of consent, I find that the defence of spent bill is not a "knock-out" blow to Natixis' claim. Petrobras relies on largely the same factual allegations as the defence of consent, and I repeat my earlier observations at [51] above. Even if Petrobras can show that the Bills of Lading were spent, that is not the end of the matter. Natixis has pleaded,[44] and can argue, that it can sue

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43 *Ibid* at paras 88-96.

44 Reply and Defence to Counterclaim dated 14 May 2020 at para 4(x).

on the Bills of Lading by virtue of a prior transaction, *ie*, the Facility Agreement between Natixis and Hoptop (see [8(a)] above, and *The "Yue You 902"* at [94] and [96] and s 2(2) read with s 5 of the Bills of Lading Act (Cap 384, 1994 Rev Ed)).

55 Accordingly, I find that the failure to disclose the potential spent bill defence does not amount to material non-disclosure.

(3) Failure to Disclose the Master Security Agreement

56 Petrobras submitted that Natixis failed to disclose the Master Security Agreement and other banking documents for AR Lee to confirm that Natixis was in fact the assignee of Hontop's rights under the Letter of Indemnity as it had alleged in its affidavit supporting the arrest.[45] I do not find that this amounts to material non-disclosure.

57 As I explained at [42]-[43] above, at the time it applies for a warrant of arrest, Natixis is not required to show that its claim is likely to succeed. It follows from this that AR Lee was not required to confirm the sustainability of Natixis' averment that it was assigned the rights under the Letter of Indemnity (see *The "Bunga Melati 5"* at [117]) nor, as a corollary, may Natixis be automatically faulted for not having shown her these documents. Insofar as the allegation is couched as a failure to disclose relevant documents, the duty of full and frank disclosure does not require Natixis to disclose every relevant document, as it must during discovery (see *The "Vasiliy Golovnin"* at [88]).

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45 PWS at paras 62-87.

(4) Gap of Time

58 The final alleged non-disclosure is the "large" gap of time between the delivery of the Cargo in November 2019 and Natixis' demand to PGT on 3 March 2020 for the Bills of Lading.[46] This argument may be swiftly dealt with.

59 It is clear from the Notes of Evidence recorded by AR Lee that the time gap between the delivery of the Cargo and Natixis' demand was disclosed and brought to her attention during the hearing.[47] Quite apart from the fact that disclosure had been made, I do not understand how the lapse in time is even relevant to the merits of the claim, or a matter that will suggest an abuse of arrest. I repeat the Court of Appeal's exhortation in *The "Vasiliy Golovnin"* that parties must be circumspect in identifying purportedly material facts (at [88]):

> That said, we think it necessary to add, *that parties should not meticulously attempt to dissect the factual matrix in painstaking efforts to "invent" material facts*. We note that, unfortunately, all too often, in setting aside applications, such unnecessary time is unhelpfully expended in dubiously making out a case of the alleged failure of a claimant to place all the material facts before the court. *In many places, these complaints amount to no more than factual peccadilloes that have no material bearing on the decision-making process or the outcome of the original application. This should be discouraged.*
>
> [emphasis added in italics]

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46 *Ibid* at 111-113.

47 Lee's 4th Affidavit at pp139 and 142.

Conclusion

60 For the foregoing reasons, I find that Natixis did not breach its duty to give full and frank disclosure to the court when it applied for the warrant of arrest. Petrobras' application to set aside the warrant of arrest is therefore dismissed, and I will hear parties on the issue of costs.

61 In closing, I would like to thank counsel for their helpful submissions, from which I have derived much assistance in the preparation of this judgment.

Navin Anand
Assistant Registrar

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