# The 'Rainbow Spring'
# [2003] SGCA 31

**Case Number** : CA 119/2002

**Decision Date** : 29 July 2003

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

**Counsel Name(s)** : Kenneth Lie, Tan Hui Tsing (Joseph Tan Jude Benny) for the Appellants; Tan Kian Sing, Loh Wai Yue (Rajah & Tann) for the Respondents

**Parties** : —

*Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Whether defendant liable in personam for claim – Whether s 4(4) of the High Court (Admiralty Jurisdiction) Act satisfied – ss 3(1)(h), 4(4) High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed)*

*Admiralty and Shipping – Practice and procedure of action in rem – Duty of disclosure – Whether discretion exists to set aside warrant of arrest on independent ground of breach of duty to disclose – Whether plaintiff has power to issue warrant of arrest under O 70 r 4 Rules of Court (Cap 322, R 5, 1997 Rev Ed)*

*Agency – Principal – Undisclosed – Relevant principles in determining whether defendant is undisclosed principal*

*Contract – Formation – When charterparty concluded – Meaning of "clean fixed" in shipping practice – Whether plaintiffs concluded charterparty with shipowners or another party*

***Delivered by Judith Prakash J***

**Introduction**

1 The respondents in this appeal are Rainbow Spring Shipping Ltd Inc ('RS Shipping'), the eponymous owners of the vessel *Rainbow Spring*. The appellants are Admiral Chartering Ltd ('Admiral') who time chartered the vessel in January 1998. One of the main issues in the appeal was whether Admiral had chartered the vessel from RS Shipping or from another company called Oriental Shipway Inc ('Oriental').

2 The issue arose in this way. In May 2000, pursuant to a voyage charter between Admiral as disponent owner and a sub-charterer, the vessel carried fertiliser from Chile to ports in South America. The cargo was discharged in a damaged condition and the sub-charterer subsequently made claims against Admiral. In October 2001, Admiral filed an *in rem* writ in the High Court against the vessel claiming that it was entitled to be indemnified by the owners of the vessel against the sub-charterer's claim as this had arisen from the owners' breach of the main time charter. Shortly thereafter, Admiral applied for the arrest of the vessel. The vessel was arrested on 31 December 2001.

3 On 14 January 2002, RS Shipping applied for an order dismissing this action and for a further order that the warrant of arrest be set aside. The common ground of both applications was that the requirements for *in rem* jurisdiction over the vessel as set out in s 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap 123) ('the Act') had not been complied with. This was because RS Shipping was not the party who would be liable in personam for the damage sustained by Admiral since it was not the party with whom Admiral had contracted under the time charterparty. As an alternative it was asserted that the warrant of arrest at least should be set aside because Admiral had failed to disclose material facts in the affidavit that it had filed in support of the issue of the warrant of arrest.

4 The assistant registrar who heard the application found in favour of Admiral on the jurisdiction point. She, however, set aside the warrant of arrest on the ground of material non-disclosure. In addition, she ordered Admiral to pay damages for wrongful arrest. Both parties appealed against her decision.

5 The appeal was heard by Belinda Ang, JC. The judge decided that Admiral had failed to demonstrate an arguable case that RS Shipping was the party who would be liable in personam for Admiral's claim. In her view, the evidence established that the time charter in respect of the *Rainbow Spring* had been made between Oriental as owners of the vessel and Admiral as charterers. Accordingly, Admiral was not able to invoke the court's admiralty jurisdiction against the vessel under s 4(4) of the Act. On this basis, the judge upheld the setting aside of the warrant and, additionally, set aside the writ. The judge considered the alternative ground of non-disclosure and found that it had not been made out. Finally, she held that it could not be said that the arrest of the vessel was so obviously groundless as to amount to mala fides or crassa negligentia implying malice. Accordingly, the decision of the assistant registrar on wrongful arrest was reversed.

6 Admiral appealed. We dismissed the appeal and now give our reasons.

**Background facts**

7 RS Shipping is a company incorporated in Panama. At the time of its arrest, the vessel was registered at the Port of Hong Kong and RS Shipping was its registered owner. Oriental is a company incorporated in Liberia. Kingstar Shipping Limited ('Kingstar') is a Hong Kong company which acted as the agent of RS Shipping and Oriental in relation to operational matters arising in connection with the vessel including the fixing of charters for the vessel. The person who tied these disparate corporate entities together was one Mr Tam Kwong Lim who was simultaneously a director of RS Shipping, a director and shareholder of Kingstar, and also a director and shareholder of Oriental.

8 By way of a charterparty made on 25 November 1997, RS Shipping bareboat chartered the vessel to Emerald Shipping Corporation, a Filipino company that appeared not to be related to RS Shipping. The purpose of this bareboat charterparty was to enable the vessel to fly the Filipino flag and be manned by a Filipino crew. On 5 January 1998, the vessel was entered in the Register of Philippines Vessels at the Port of Manila and the certificate of vessel registry issued by the Government of the Philippines named Emerald Shipping Corporation as its 'owner/operator'.

9 In the meantime, negotiations for the charter of the vessel had been going on between Kingstar and a company called Rodskog Shipbrokers Ltd ('Rodskog'), charter brokers acting on Admiral's behalf. These negotiations started in November 1997 and were carried on by fax and telex. By January 1998, the negotiations were almost complete. In a fax dated 8 January 1998, Kingstar informed Rodskog that the owners agreed on various outstanding terms subject to certain proposed additional wording and that contracting owners in respect of the charterparty would be Oriental. The fax stated:

> …
>
> Above is our best improvement after a lot of hard work internally and with our banker. Pls urge chtrs to confirm so we can go ahead making all final preparations.
>
> Pls note owrs on c/p shall be "Oriental Shipway Inc."
>
> Hope this will conclude 2 months of hard negotiation.

On 9 January 1998, Rodskog replied by telex stating:

> Very pleased we are now clean fixed
>
> Charterers looking forward to a pleasant co-operation with owners and vessel
>
> We have noted owners style for c/p being "Oriental Shipway Inc" (where registered pse) but please full style/address of managers to whom hire statements etc shall be mailed …

10 A time charter contract in the New York Produce Exchange ('NYPE') form was thereafter executed in respect of the charter of the vessel to Admiral. This document is dated 8 January 1998 and on the first page it is expressed to be made between 'ORIENTAL SHIPWAY INC., LIBERIA, Owners of the good Panama/ Philippines flag Motorship "*Rainbow Spring*" … and ADMIRAL CHARTERING LTD., Charterers of the City of Monrovia …'. The charter was to be for a period of three years with the charterers having an option to extend it for a further year. Delivery was to take place about the end of January 1998. The execution portion was found at the bottom of the third page of the NYPE form. Appearing there is a stamp stating 'For and on behalf of RAINBOW SPRING SHIPPING LIMITED INC by ….…..' and on this appears the signature of Mr Tam. Beside that appears the signature of the party executing the charter for and on behalf of Admiral.

11 By affidavit Mr Tam explained that the presence of RS Shipping's stamp on the charterparty was a clerical error. He said that the document was sent to Kingstar on 16 January 1998 and he signed it on 19 January 1998 as authorised signatory of Oriental. He did not notice when he did so that the wrong stamp had been affixed to the document by a member of his secretarial staff.

12 Finally, for completeness, it should be said that on 20 January 1998, Emerald Shipping entered into a time charter with Oriental, also on the NYPE form. The terms of this charter were substantially the same as those of the time charter with Admiral. The charter period was three years with an extension, at charterer's option of a further year, and delivery was to take place at the end of January 1998.

**The issues**

13 The main issue argued in the appeal by Admiral was whether RS Shipping was the party who would be liable in personam under the charterparty dated 8 January 1998. The questions that had to be considered were:

(1) whether the charter contract had been concluded by the exchange of correspondence on 8/9 January; and

(2) whether at all material times Oriental was acting as agent for RS Shipping who was the undisclosed principal.

The second question was one that was not argued before the judge and Admiral sought, and obtained, our leave to introduce this new argument at the appeal stage.

14 We also had to consider the issue of non-disclosure and the effect that such non-disclosure if established would have on the warrant of arrest. This was because in its respondent's case, RS Shipping contended that, in the alternative, the arrest should be set aside on the ground of non-disclosure of material facts on the part of Admiral when applying for the arrest.

***First issue – when was the charter contract made?***

15 On the first issue, the relevant findings made by Belinda Ang JC were as follows. Noting the established position that the burden was on Admiral to establish that RS Shipping was the person who was likely to be liable in personam on the claim, she followed *The Opal 3* [2002] 1 SLR 585 in stating that this burden would be discharged if Admiral showed that it had an arguable case. She then held that the charter contract was concluded by the exchange of correspondence between the agents of the respective parties before the formal charter document was drawn up and signed. In this connection, she was satisfied that by its telex of 9 January 1998, Rodskog had confirmed conclusion of the charter on behalf of Admiral by using the phrase 'VERY PLEASED WE ARE NOW CLEAN FIXED'. The judge noted that 'The expression "clean fixed" in chartering parlance is used to signify a binding charterparty contract or concluded fixture'. At that stage, Oriental had been named as the contracting party and this had been accepted by Admiral. RS Shipping's stamp and signature on the contract document could not change that position.

16 On appeal, Admiral accepted that it had the burden of showing there was an arguable case that RS Shipping would be liable. It argued that the finding that the contract had been concluded by the exchange of correspondence on 8 and 9 January 1998 was erroneous for four reasons:

(1) the expression 'clean fixed' did not mean that there was a binding charterparty;

(2) in its telex, Rodskog stated that there would be a 'recap later today' and as by this it meant that later that day there would be a review of the terms agreed up till then, there was no binding agreement at that time;

(3) the parties had not agreed on all the terms at the time; and

(4) the parties contemplated the contract would only be completed by the formal charterparty which was the reason why such a document was drawn up.

17 The first argument put forward by Admiral, that the expression 'clean fixed' does not signify a concluded charterparty, would come as a shock to most people in the ship chartering business. More than that, however, it is not supported by the authorities. *Bes' Chartering and Shipping Terms,* 1992, [11th Ed] at p 66 defines fixture in the following terms:

> Fixture: To "fix" a ship is to determine or settle a contract (the Charterparty) for its employment. "Fixture" is the word that indicates the contract has been made and the negotiations to charter the ship have been concluded.

In *Shipping Practice* [11th Ed] by Stevens and Butterfield at p 39, it is stated that:

> The arrangement of a charterparty is known as "fixing" a charter, and when completed the vessel is termed "fixed".

Therefore, if a charterparty is 'fixed', it is concluded. The word 'clean' simply means that the relevant document has no detrimental effect on those directly and indirectly concerned in the business contents: see Sullivan, *The Marine Encyclopaedic Dictionary*, 1996 [5th Ed] at p 92. These texts and the cases of *Granit S.A. v Benship* [ 1994] 1 LLR 526 and *The Mexico 1* [1998] 2 LLR 149 amply supported the judge's conclusion that 'The expression "clean fixed" in chartering parlance is used to signify a binding charterparty contract or concluded fixture'. There was no substance in this point.

18 The second argument ie that there was no agreement at the time of Rodskog's telex because it stipulated that there would be a 'recap' (recapitulation) following the telex, was also weak. No authority was cited for the proposition that a recapitulation of terms is an essential precondition to the conclusion of a contract. In shipping parlance in fact the opposite appears to be the case in that the recapitulation only takes place after the contract has been concluded. This appears also from *Bes' Chartering and Shipping Terms* which states (at p 66) that once the negotiations about the chartering of a vessel have resulted in the fixture of the ship, a letter may be drawn up containing a summary of the main terms and conditions of the charterparty. Such a letter may be sent out electronically as a 'recap message' by telex or facsimile. It is clear from the commentary that such a document is a record of the contract only rather than the document that brings the contract into existence. The process of recapitulation is, strictly, unnecessary when the terms of the charterparty have already been agreed but is often undertaken as a formality. It cannot change terms already agreed upon. Therefore, even if the recapitulation is not done, the charterparty remains concluded.

19 Admiral's third and fourth points can be considered together. The third point was that not all the contractual terms had been agreed on by the exchanges on 8 and 9 January 1998. In particular, the following matters were outstanding:

(1) Kingstar had indicated that the proposed cl 45 was acceptable to shipowners subject to the approval of their P&I club;

(2) Rodskog had stated that regarding cl 29, they were awaiting owners' confirmation that they could deliver the vessel with sufficient bunkers to enable it to reach Vancouver and also regarding the price of the bunkers; and

(3) there was an outstanding issue on line 99 of the NYPE charter form relating to the cessation of hire in relation to time lost for various reasons.

Admiral submitted that since these matters remained outstanding there could not have been a 'clean fixed' agreement as at 9 January 1998. The fourth point was related in that it was contended that the parties' intention was not to be bound until a formal charter contract had been drawn up and signed.

20 It is established law that negotiating parties may conclude a contract that binds each of them even though there are some terms that are yet to be agreed. The important question is whether the parties by their words and conduct have made it clear, objectively, that they intend to be bound despite the unsettled terms. See *Chitty On Contracts* (1999, 28th Ed, p 135) and *Pagnan v Feed Products*[ 1987] 2 LLR 601 at p 611 per Bingham J and at p 169 per Lloyd LJ. In that case, the court concluded that a contract of sale had been reached even though issues such as the loading port, rate of loading and method of payment were still undecided because the essential terms of the product to be sold, quantity, price and period of shipment had already been agreed upon.

21 In the present case, the terms that were left to be decided were, essentially, minor terms. The main terms, chief among which were the vessel to be chartered, the period of charter, the charter hire and the time of delivery, as well as many less important terms, had been agreed. The objective intentions of the parties as the same could be gleaned from the correspondence on the two days in question were that they would be bound. Kingstar wanted a confirmation from charterers so that the owners could go ahead to make final preparations for the charter. They were ready to be bound. As for Admiral, apart from employing the words 'clean fixed' and 'recap', Rodskog had also used other forms of expression indicating that Admiral's objective intention was to enter into a binding charterparty. Rodskog stated that Admiral was 'looking forward to a pleasant co-operation with

owners and vessel' and that they had noted that owners were Oriental. There was nothing in that telex to indicate that the contract was subject to the drawing up and signature of a formal charterparty. Conversely, when the working copy of the charterparty drawn up by Rodskog was sent to Kingstar on 19 January 1998, the heading of Rodskog's cover fax stated 'M.V. "Rainbow Spring – C/P dated 8/1/1998' (emphasis added). The fact that the charterparty was to be dated 8 January 1998 showed that Admiral and its brokers themselves recognised that the contract had come into existence prior to the drawing up of the formal document which was to be executed by the parties. It was Rodskog who inserted in that document the name of Oriental as the owners, thus showing that it was quite clear as to which entity was contracting as the owners giving the vessel on charter to Admiral.

22 The circumstances stated above made it plain that the parties had agreed to be bound on 9 January 1998 notwithstanding the minor terms relating to bunkers and deduction of expenses which remained to be settled. The parties were not fazed by the absence of a document to be signed. They were quite prepared to have the charterparty drawn up and signed subsequently to record the terms that had already been accepted, a procedure that is common in the chartering business. On 9 January 1998, there was a contract between Oriental and Admiral for the charter of the vessel by the former to the latter and this contract could not be altered by the placing of the RS Shipping stamp on the charterparty that was executed later. Accordingly, the judge's finding on this issue was plainly right and could not be faulted.

***Second issue – was RS Shipping the undisclosed principal of Oriental?***

23 Recognising that we might uphold the judge's decision on when the charterparty came into effect, Admiral made the alternative argument that if it was concluded on about 8 or 9 January 1998, then Admiral had concluded the charter with RS Shipping as the undisclosed principal of Oriental.

24 The legal principles relating to the existence and liabilities of undisclosed principals were not in dispute. These principles, as restated by the Privy Council in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 WLR 370 were adopted by this court in *Hongkong Banking Corp v San's Rent A-Car Pte Ltd* [1994] 3 SLR 593. For present purposes, the following points were the relevant ones:

(1) an undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority;

(2) in entering into the contract, the agent must intend to act on behalf of the principal; and

(3) in any case, the contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

Applying these principles to the facts of this case, we saw no merit in Admiral's contention that at all material times Oriental was acting as the undisclosed agent of RS Shipping.

25 Admiral submitted that the fact that Oriental was named as the owners on 8 January 1998 did not mean that Oriental was acting on its own accord and that there was no undisclosed principal. There was nothing wrong in that submission as far as it went. The problem was that it did not go far enough to discharge the burden on Admiral in this respect. To show that there was an undisclosed principal, Admiral had to show that Oriental was acting as an agent and further, that it was acting as an agent within the scope of its actual authority. Admiral tried to show that Oriental was acting as an agent by pointing to various terms of the charterparty which it stated raised issues as to the

identity of the contracting party, in particular, a term which provided for the owners' right to sell the vessel (a term that could only be utilised by RS Shipping) and the fact that the P&I Club named in the charterparty was the P&I Club that RS Shipping belonged to and not the P&I Club that Oriental belonged to. Those discrepancies might have been some indication of Oriental acting as an agent but even if it had acted as an agent, that would not be sufficient to make RS Shipping an undisclosed principal unless Oriental had had actual authority to enter the charter on behalf of RS Shipping. It was incumbent on Admiral to show an arguable case of actual authority being vested in Oriental to contract on behalf of RS Shipping. Yet, no submissions on this requirement were made by Admiral nor was there any evidence that Oriental had intended to act on behalf of RS Shipping.

26 Further, the undisclosed agency argument ignored the inferences that had to be drawn from the existence of two other charter contracts relating to the vessel at the material time. The evidence established a chain of charter contracts. The head charter was between RS Shipping as owner and Emerald as demise charterer. The next charter in the chain (though signed only on 20 January 1998) was that between Emerald and Oriental who thereby became a sub-charterer of the vessel. The third charter was that between Oriental and Admiral since, because of Oriental's position in the chain, Admiral became a sub-sub-charterer, although chronologically its charter preceded the Emerald/Oriental contract.

27 Once RS Shipping demise chartered the vessel to Emerald, it had no power to charter the vessel to anyone else unless it had in turn taken a time or voyage charter from Emerald. This did not happen. Instead, Emerald gave a time charter to Oriental. So there was no way that RS Shipping could be a disponent owner vis-à-vis Admiral. Both of these other charterparties were, on the evidence, genuine contracts. The charter between RS Shipping and Emerald enabled the vessel to be registered in the Philippines and such registration was effected at, no doubt, some expense to either RS Shipping or Emerald. The charter between Emerald and Oriental was a way of putting the vessel back under the management of Kingstar and no evidence was presented to impugn the validity of that contract.

28 Oriental's role as charterer vis-à-vis Emerald was incompatible with any notion of it also being an agent for RS Shipping when it entered the sub-charter with Admiral. If on 8/9 January 1998, Oriental had been playing the part of RS Shipping's undisclosed agent, it would not subsequently have signed the charterparty with Emerald. The signing of that charterparty makes sense only if Oriental was serious about being the disponent owner under the charter with Admiral. This fact showed that Oriental could not have intended to act as RS Shipping's agent when it contracted with Admiral. In the circumstances, the only logical inference was that Oriental acted throughout as a principal.

***Material non-disclosure***

29 We dismissed the appeal since, for the reasons given above, we were of the view that Admiral was unable to establish an arguable case that RS Shipping would be the party liable in personam to it for breach of the charter. The decision of the judge to set aside both the writ and the warrant of arrest was therefore upheld. Strictly speaking, this means that we need not deal with the alternative ground for setting aside the warrant of arrest put forward by RS Shipping, that of material non-disclosure by Admiral. Since the judge did comment on the court's powers in such instances and since arguments on this have been addressed to us by RS Shipping, it may be helpful, however, to set out our views on this issue.

30 The issue of non-disclosure arose mainly because the affidavit that Admiral filed in support of the application to arrest did not exhibit or mention the correspondence exchanged between Kingstar and Rodskog on 8 and 9 January 1998. The only contractual document referred to was the NYPE form

charterparty signed by Mr Tam against the RS Shipping stamp. RS Shipping asserted that this omission, together with some others which we need not go into, constituted a material non-disclosure and that the warrant should be set aside because Admiral had failed in its duty to make full and frank disclosure of all material facts.

31 On this issue, the arguments canvassed below were, first, whether there was a duty of disclosure on applicants for an arrest warrant and, secondly, if such a duty existed whether it had been breached. On the first issue, the judge held that under Singapore law, such a duty does exist. She rejected an argument that amendments made to the Rules of Supreme Court in 1997 had done away with the duty because by reason of these amendments a warrant when issued would be issued by the plaintiff rather than the court. This argument was based on the decision of the English Court of Appeal in *The Varna* [1993] 2 LLR 253 that under O 75 r 5(1) of the English Rules of the Supreme Court it was the plaintiff in an action, not the court, which had the power to issue a warrant of arrest. The argument was that the 1997 amendments brought our O 70 r 4 into line with the English rule.

32 The judge did not accept that argument and decided that although the language of O 70 r 4(1) is similar to the English O 75 r 5(1), our amendments did not go so far as to confer on the plaintiff the right to issue a warrant. She said (at ¶ 30):

> 30. Even though the language of our Order 70 r 4(1) is similar to Order 75 r5(1) of the English Rules, the phrase "the plaintiff may issue a warrant in Form 156" in Order 70 r 4(1) when read in conjunction with Form 156 and r 4(2)(a) does not confer a power on the plaintiff to issue the warrant of arrest. It is the court that issues the warrant of arrest (Form 156) following the filing of a Praecipe for Warrant of Arrest (see Order 70 r 4(2)(a)). A sensible reading of Order 70 r (4)(1) is that it is only after the writ is issued that the plaintiff may initiate issuance of a warrant of arrest. By Order 70 r 4(3), the warrant of arrest will not be issued unless there is an affidavit complying with the particulars required by r 4(6) and (7). Order 70 r 4(3) provides that even if there is non-compliance with r 4(6) and (7), the court may in its discretion issue the warrant. Conversely, a failure to comply with the rules could render the warrant of arrest a nullity as Kulesekaram J so held in the *"Courageous Colocotronis"* [1978-1979] SLR 337.

We agree that *The Varna* is not applicable to our O 70 r4. Apart from the differences between our Rules and the English Rules pointed out by the judge, O 75 r 5(6) of the amended English rules states that, in certain circumstances a warrant of arrest 'may not be issued as of right'. This sub-rule was used by Scott LJ in *The Varna* to support his conclusion that the general rule in England is that a warrant of arrest is issued as of right. That sub-rule was not adopted when our Rules were amended. The position in Singapore that a warrant of arrest is issued by the court at its discretion was not changed by the 1997 amendments.

33 Accordingly, Admiral had a duty to disclose all material facts when it applied for the warrant. In this connection it is helpful to reiterate the test of whether a fact is material as set out by this court in *The Damavand* [1993] 2 SLR 717 which 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 be properly 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.

This test of materiality, ie, how relevant the fact is, is well established. The same test has been adopted in other areas where full and frank disclosure is required and the expression should have the

same meaning across the board for consistency. Bearing that test in mind, we must respectfully disagree with the conclusion of the judge that the failure on the part of Admiral to disclose the exchange of correspondence was not a material non-disclosure. What the assistant registrar had to decide when considering whether to issue the warrant was whether RS Shipping would be liable on personam on the charter and in that connection, it was, at the least, relevant (if not critical) that there were documents that suggested that another party, Oriental, was the party to whom in personam liability attached under the charter. Those documents should have been drawn to the attention of the assistant registrar. If they had been the assistant registrar could well have sought clarification or other evidence from Admiral to substantiate its position on the liability of RS Shipping before deciding whether to issue the warrant.

34 Further, whilst the test in *The Damavand* is based purely on relevance, the judge took into account other factors such as whether it was reasonable for Admiral to disclose the documents because its case was based on the formal charterparty, and the facts that Admiral acted on legal advice and what it perceived as the ambiguity in the relationship between Oriental and RS Shipping. This should not have been done. In our view, such factors cannot impact the materiality of the information that has not been disclosed although they might influence the way in which the judge's discretion is exercised subsequently.

35 There is one other matter that we should mention in this connection. The judge made the following observation as to what would follow a finding of material non-disclosure:

> Ordinarily, where the very existence of jurisdiction cannot be challenged or survives an attack in that the jurisdiction requirements of the Act are satisfied and the writ not set aside and, there being at the same time no complaint that rules 4(6) and (7) have not been complied with, non-disclosure should seldom be the sole ground for setting aside the warrant of arrest. In such a situation, assuming that the matters in question are material and ought to have been disclosed, the court in exercise of its discretion ought not to set aside the warrant of arrest purely on the basis that the claimant had failed to disclose matters in obtaining the warrant of arrest. (at ¶ 36)

To the extent that that observation suggests that non-disclosure may not always be an independent ground upon which the arrest may be set aside it is inconsistent with previous local and foreign cases. See *The AA V* [2001] 1 SLR 207, *The Evmar* [1989] SLR 474, *The J Faster* [2000] 1 HKC 642, *The Dong Nai* [1996] 4 MLJ 454, *The Vasso* [1984] 1 QB 477.

36 In the decisions of *The AA V* and *The J Faster*, the courts in Singapore and Hong Kong acknowledged that there can be setting aside of an arrest because either there was non-disclosure of material facts or there was a lack of in personam liability. In *The Dong Nai*, a Malaysian case, the arrest was set aside on the sole ground of material non-disclosure. In *The Evmar* although the argument the arrest should be set aside for material non-disclosure failed, that failure was due to the facts of the case and the court saw nothing objectionable in principle in setting aside the arrest on the ground of non-disclosure only.

37 In our view, there are good reasons of policy to adopt the position taken by the decisions cited in ¶ 35 and 36. It would be wrong to institute a strict rule to the effect that a warrant of arrest ought not to be set aside simply because of material non-disclosure. It would be inimical to the observance of the duty of full disclosure in relation to applications for the arrest of vessels if such a rule represented the legal position. 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 approach taken below would in effect lead to the eradication of the duty of disclosure and it would also overly favour

the interests of plaintiffs at the expense of those of shipowners. 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.