Treasure Valley Group Ltd v Saputra Teddy and Another (Ultramarine Holdings Ltd, intervener)
[2005] SGHC 217

Case Number : Adm in Rem 211/2004, RA 96/2005

Decision Date : 21 November 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Lim Tean and Kendall Tan (Rajah and Tann) for the plaintiff; Lawrence Teh, Andrea Chee and Sun Ru-Shi (Rodyk and Davidson) for the second defendants and intervener

Parties : Treasure Valley Group Ltd — Saputra Teddy; Hatcher Michael

Admiralty and Shipping – Admiralty jurisdiction and arrest – Application to set aside arrest of vessel – Defendants granted liberty to treat crew wages as part of Sheriff's expenses – Defendants not objecting to sale of ship pursuant to arrest but objecting to arrest of ship – Whether defendants' inconsistent conduct amounting to approbation and reprobation of arrest – Whether doctrine of approbation and reprobation applicable as grounds to dismiss defendants' application to set aside arrest

Admiralty and Shipping – Admiralty jurisdiction and arrest – Whether defendants allowed to claim for damages for wrongful arrest without setting aside arrest

21 November 2005 *Judgment reserved.*

Belinda Ang Saw Ean J:

1 The plaintiff in this *in rem* action for possession is Treasure Valley Group Limited. The claim is against persons having possession of the *Seeker I*, namely, the master of the *Seeker I* and/or Michael Hatcher ("Capt Hatcher"). Teddy Saputra entered an appearance as the master of the *Seeker I* and he is the first defendant. Capt Hatcher is the second defendant. Ultramarine Holdings Limited ("Ultramarine") is the intervener.

2 The *Seeker I* was arrested on 25 October 2004. An application to set aside the arrest was made on 15 December 2004 on behalf of Capt Hatcher and Ultramarine. The assistant registrar on 12 April 2005 refused to set aside the arrest based upon the alleged non-disclosure of material facts. An appeal against the assistant registrar's decision was filed on 21 April 2005.

3 The second defendant is none other than the well-known salvor of acclaimed recoveries such as the Nanking cargo and later the Teksing cargo. Capt Hatcher is a professional salvor of ancient wrecks, the contents of which are of great interest not only to salvors but also to marine archeologists and others. It is said that there are many ancient wrecks lying in South-East Asian waters. Modern methods of diving have made the recovery of artefacts and other articles of interest and value from long submerged wrecks a practical proposition.

4 United Sub-Sea Services International Limited ("USSSIL"), a New Zealand-incorporated company, entered into principally two marine salvage agreements with Capt Hatcher and PT United Sub-Sea Services Indonesia ("PTUSSI"), a company with which Capt Hatcher is associated. Borwick International Limited ("Borwick") is a British Virgin Islands company owned by Capt Hatcher and

through which the latter operates. The first marine salvage agreement was dated 13 September 2001 and it was between USSSIL, United Sub-Sea Services Limited ("USSL") and Capt Hatcher. USSL is a British Virgin Islands company in which Capt Hatcher was a director and shareholder. That agreement was varied twice. The second marine salvage agreement was dated 22 June 2002. According to Capt Hatcher, this latest agreement was intended to substitute USSL as a contracting party with PTUSSI. The involvement of USSL in 2001 and beyond in the marine salvage agreements is curious as Capt Hatcher had deposed that USSL ceased functioning sometime after 1998. Be that as it may, under the 22 June 2002 agreement, Capt Hatcher was to lead expeditions to locate wrecks and salvage their cargoes. PTUSSI was to obtain the necessary licences for the survey and salvage. It is to be noted that the *Seeker I* is a specialised survey and salvage support vessel. USSSIL was to secure financial funding for the expeditions. It was to raise US$2m and to contribute such sums to meet the costs of the expeditions. As between Capt Hatcher/PTUSSI and USSSIL, their respective share of the proceeds from the sale of successful recoveries was to be 30:70 respectively. It transpired that a Japanese investor, Masuo Saeki, through Ultramarine, acquired a 40% interest in the shareholdings of USSSIL for US$40m.

5 Counsel for Capt Hatcher and Ultramarine, Mr Lawrence Teh, assisted by Ms Andrea Chee, submits that the plaintiff's allegations in the affidavit leading the Warrant of Arrest were designed to procure the arrest of the *Seeker I* through the pretence that the plaintiff was the outright owner of the vessel and was keen to regain possession of the vessel that:

(a) was sailing under the command of an errant master, Capt Hatcher, who was countermanding the plaintiff's orders;

(b) was at one time sailing without a master; and

(c) was at risk of being seized by Indonesian authorities because of the illegal exploits of Capt Hatcher as the master of the *Seeker I*.

Had the duty registrar been fully apprised of the true state of affairs, Mr Teh contends, Capt Hatcher would have been viewed in a different light. It was possible in those circumstances that the duty registrar might have refused to issue the Warrant of Arrest of the *Seeker I*. Two broad propositions encompass the basis of the challenge. First, the arrest itself was entirely made on a false premise given the inaccurate statements which the plaintiff ought to have known were incorrect. The arrest was plainly actuated by malice. The second alternative proposition is that there had been material non-disclosure of facts. Some of those material facts could and should have been ascertained by the plaintiff through proper inquiry.

6 The issues of bad faith and, at the very least, non-disclosure of material facts were initially limited to three areas. One area of complaint was the plaintiff's allegation that Capt Hatcher was the master of the *Seeker I*. That assertion, Mr Teh argues, is false. The master of the vessel was at all material times Teddy Saputra, the first defendant. The plaintiff either knew that Capt Hatcher was not the master of the vessel or had failed to conduct a proper inquiry into the identity of the master of the vessel and was reckless in identifying Capt Hatcher as the master. Another area was the alleged use and deployment of the vessel in illegal activities, thereby putting her at risk of being seized by the Indonesian authorities. That allegation is again said to be false. The vessel, on the contrary, was covered by survey licences and was not being deployed illegally for surveys, nor was the vessel at risk of being seized by the Indonesian authorities. There is no evidence that the *Seeker I* was at risk of being seized by the Indonesian authorities. It was a case of Capt Hatcher's e-mail of 17 October 2004 being given a mischievous reading. The vessel was never deployed illegally. The vessel had permission from the Indonesian Navy to conduct surveys. The issue was simply a

matter of delay in securing salvage licences. Finally, as to the allegation that the plaintiff was the registered legal and beneficial owner of the *Seeker I*, that is again said to be untrue. At the time of the arrest, the *Seeker I* was only provisionally registered in the name of the plaintiff and this sort of registration, Mr Teh submits, is not testimony of legal and beneficial ownership of the vessel.

7 According to Capt Hatcher, the *Seeker I* was purchased using funds of or procured by USSSIL and, on his advice, ownership of the vessel was registered in the name of a single-purpose company, Delta Pacific Consultants Limited ("Delta"). As at 3 November 2004, Delta was still the registered owner of the *Seeker I*. The sole director and shareholder of Delta was one Victor Tan Kim Chye ("Victor Tan"), who held the single share in Delta on trust for USSSIL. Both Capt Hatcher and Ultramarine regard "USSSIL as the beneficial owner of the [*Seeker I*] or at the least a substantial part of the vessel". On that latter alternative stance, there is no mention as to who the other co-owner of the *Seeker I* might be. If it is the plaintiff, then this alternative stance runs counter to their other assertion that the *Seeker I* was only mortgaged to the plaintiff.

8 Counsel for the plaintiff, Mr Lim Tean, assisted by Mr Kendall Tan, submits that none of the matters raised by Mr Teh, whether considered in isolation or viewed together, demonstrated any bad faith or material non-disclosure. The matters complained about could not conceivably have affected the duty registrar's decision to issue the Warrant of Arrest.

9 Lawrence Phillips, a director of USSSIL, in his affidavit of 26 January 2005 deposed on behalf of USSSIL, denied that the company had any ownership rights in the *Seeker I*. He maintained that the purchase of the *Seeker I* was not funded by USSSIL. USSSIL was to provide working funds to meet the operational expenses for the salvage work.

10 It is the plaintiff's case that Delta executed a bill of sale and acceptance of sale for the vessel in the plaintiff's favour on or about 28 September 2004. On the same date, Victor Tan executed a declaration of trust whereby he confirmed that he was holding the single share in Delta on trust for the plaintiff. At the time of the arrest, the plaintiff was named in the Provisional Registration Certificate ("Provisional Patente") issued on 20 October 2004 as the owner of the *Seeker I*. Registration of the vessel with the Panamanian ship registry was finalised on 28 January 2005.

11 Both sides engaged Panamanian lawyers for an opinion on the ownership status of a holder of a Provisional Patente. The expert used by Mr Teh said that provisional registration of the vessel with the Panamanian ship registry permits the vessel to fly the Panamanian flag. That means the *Seeker I* could use the Provisional Patente, which named the plaintiff as owner, to sail in and out of ports like Singapore as a Panamanian-flagged vessel. Mr Lim relies on the crew list submitted by Teddy Saputra, to Singapore Immigration, naming the plaintiff as owner of the *Seeker I*. In contending that the plaintiff was the "*sole* registered" owner, the plaintiff was asserting that all 64 out of 64 shares in the vessel were registered in the name of the plaintiff, there being no registered part-owner unlike the facts in *The New Draper* (1802) 4 C Rob 287; 165 ER 615, an authority cited by Mr Lim in respect of a claim for possession.

12 Gray Clare filed two affidavits on behalf of the plaintiff. It appears from his first affidavit that Gibraltar Group Limited ("Gibraltar") and an entity which he identified as "Paramount" purchased some units in the Hatcher Unit Trust which he says was ostensibly to take up to 10% of the net proceeds realised from the exploitation of artefacts recovered from shipwrecks pursuant to the marine salvage agreements referred to in [4] above. The Hatcher Unit Trust is an unregistered managed investment scheme allegedly set up to raise money from the public to fund the recovery of sunken treasure from shipwrecks located in South-East Asia. The scheme allegedly promised returns of up to 1,365% to investors. In or about June 2003, Gibraltar and Paramount purchased shares in USSSIL. The two

companies sold some of the units in the Hatcher Unit Trust and shares in USSSIL to a Japanese investor, Masuo Saeki, and his company. The shares were held in Ultramarine's name.

13 Gray Clare claimed that the plaintiff had to rely on information provided, usually on a sporadic basis, by Capt Hatcher as to the vessel's status, her schedule and her whereabouts from time-to-time. Capt Hatcher was the person in charge of the expedition and the activities of the *Seeker I*. He was not keeping to the schedule of activities required of him. There was also a previous incident of a barge that had worked in tandem with the *Seeker I* being detained by the Indonesian authorities due to what Gray Clare described as licensing issues. Mr Lim argues that Capt Hatcher in his e-mail acknowledged that the vessel had worked without a licence. That, Mr Lim submits, was enough to bring to an end the bailment of the vessel. The plaintiff's view that the vessel "may have been engaged in unlicensed or illegal surveying or prospecting activities in Indonesian waters" and thus exposed to a distinct risk of seizure or forfeiture by the Indonesian authorities was not unreasonable and was honestly formed based on Capt Hatcher's correspondence at the material time. Mr Lim prepared a table based on information extracted from documents produced by the other side. He submits that the table revealed "obvious points of discrepancy between the alleged licences/permits said to be in place as compared against the vessel's alleged activities set out in the alleged Chief Officer Log Book summary".

14 Capt Hatcher denies having seen beforehand the schedule of activity exhibited in the arrest affidavit which he was supposed to follow. He had neither drafted nor signed it.

15 In the course of these proceedings, with more allegations and counter-allegations, the complaint was enlarged to include challenging the very existence of the plaintiff's right to claim possession. It was contended that the arrest was resorted to under some false plea (*ie*, the three areas identified in [6] above) to hide the truth that the plaintiff had no right to claim possession under the deed of agreement of 21 April 2004 ("the Deed"), which evidences a chattel mortgage in favour of the plaintiff.

16 It transpired that a loan of US$2m was obtained from Gray Clare through his company under the terms of the Deed. The parties to the Deed were USSSIL, Delta, Capt Hatcher, Borwick and PTUSSI. Gibraltar was nominated by Gray Clare as the entity to be read into the spaces left blank in the Deed. Capt Hatcher said he first met Gray Clare in Singapore. Lawrence Phillips told him that Gray Clare would extend a US$2m loan to USSSIL. The Deed records that PTUSSI and Capt Hatcher had located a Sung Dynasty shipwreck in Indonesian waters; that PTUSSI and Capt Hatcher were to salvage the wreck for the benefit of PTUSSI, Capt Hatcher and USSSIL in accordance with the various marine salvage agreements; that USSSIL was not in a financial position to fund the project and that an unnamed entity (which turned out to be Gibraltar) had agreed to loan up to US$2m to USSSIL as the working capital required to complete the salvage and recovery of the wreck; that the funds would not pass through USSSIL's banking facilities but would nevertheless create rights and obligations on the part of USSSIL to repay the moneys advanced and 25% per annum interest accrued.

17 The Deed records a condition subsequent whereby the ownership of the *Seeker I* would be transferred to the plaintiff for a nominal sum of US$1. Upon completion of the transfer, Capt Hatcher would be released from the personal guarantee for the loan repayment and any accrued interest. Capt Hatcher said in his first affidavit that he was told by Lawrence Phillips and Gray Clare to transfer the ownership of the *Seeker I* to the plaintiff. In his second affidavit, however, Capt Hatcher stated that the Deed evidenced a chattel mortgage as security for the loan. Contrary to the plaintiff's allegation, the transfer of the vessel was to provide security for repayment by USSSIL of the loan. It was in Capt Hatcher's view imprecise to use the phrase "outright transfer of ownership". From the

documentation before the court, a change of ownership did take place, whatever the intention was behind the exercise.

18 Pit Udo Wadenbach, the German attorney of Ultramarine, argues that there was no valid reason for the plaintiff to enforce the security in the vessel. USSSIL should have had funds of US$40m deposited with it and would therefore be in a position to pay any debt owed by USSSIL to Gray Clare or his nominee arising from the Deed. At any rate, the loan was not due for repayment and as such no debt had arisen. Capt Hatcher likewise agrees that the plaintiff had no valid reason to enforce the security in the vessel. It was understood that the parties undertaking the salvage of the wreck, namely, PTUSSI, Capt Hatcher and USSSIL (the parties to the marine salvage agreements) would have possession of the vessel. Capt Hatcher claims that Gray Clare and Lawrence Phillips had or have a dishonest design to obtain possession of the vessel unlawfully. He accuses them of collusion to further the dishonest intentions of the plaintiff.

19 Needless to say, to persuade the court to disbelieve the affidavit evidence of Lawrence Phillips, information from the Australian Securities and Investment Commission, that Lawrence Phillips was under investigations by the latter and the Australian Federal Police with the assistance of the New Zealand Serious Fraud Office in conjunction with the Hatcher Unit Trust, was exhibited. The directorship of Lawrence Phillips in USSSIL was also put into question. There was said to be a period of seven days (between 21 and 27 September 2004) during which there was no director at all for USSSIL. I am not entirely clear as to the significance of that revelation except to make the point and challenge as inaccurate or untrue the assertion made by Lawrence Phillips that he was at all material times a director of USSSIL.

20 It is not in dispute that the plaintiff's claim falls within s 3(1)(*a*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act"). Hence, there was no application to strike out the *in rem* writ, and what were left open until the action was decided were all questions of the right to possession of the *Seeker I.* However, subsequent affidavits filed by and on behalf of the second defendant and Ultramarine brought up the absence of even a *prima facie* case for the existence of the right based on which the plaintiff sued for possession. Indeed, since an underlying claim is a necessary condition of a right to an arrest without which the arrest could *ipso facto* be set aside, it was not an argument directly pressed by Mr Teh, no doubt realising that there was no application before the court to strike out the action. It was contended that the plaintiff had failed to disclose details of the Deed and that the details would have showed up the false plea in the arrest affidavit.

21 Even if an *in rem* writ is not being challenged based on the jurisdictional requirements of the Act, as was the case here, a Warrant of Arrest may be set aside for material non-disclosure: see *The Rainbow Spring* [2003] 3 SLR 362. The obligation of candour, which lies on the arresting party at the time of the initial *ex parte* hearing, relates only to facts which are material for the court to know in deciding whether to issue the Warrant of Arrest which is sought. Materiality is a matter for the court: see *The Damavand* [1993] 2 SLR 717 at 731, [30]. The duty to make full and frank disclosure also requires a further affidavit to be filed once a mistake is discovered or the circumstances upon which the court order was made have changed: see *The Nordglimt* [1988] 1 QB 183. Hobhouse J (as he then was) at 188 observed:

> It is of the greatest importance to the administration of justice that courts should be able to rely upon the truthfulness and accuracy of affidavits sworn by solicitors or their employees. It is accordingly essential that such affidavits should be prepared with proper care and that mistakes of the kind which I have described should not occur. It is also essential that lawyers acting for parties and in particular the deponents of such affidavits, should attach the greatest importance to their oath and that when they find that they have made a false statement on oath they

should be at pains to correct it.

22 Non-disclosure may be innocent, negligent or deliberate. In the case of the latter, *uberrima fides* on the part of an applicant for an *ex parte* application is not observed and hence abuse of process exists in that the deponent has deliberately misled the court: see *D C Jackson on Enforcement of Maritime Claims* (LLP, 3rd Ed, 2000) at para 15.79. Material non-disclosure and abuse of process are two distinct concepts, but there is some overlap in the factual material that is relevant to them.

23 The court has a discretion whether or not to set aside the warrant of arrest notwithstanding proof of material non-disclosure: *The Fierbinti* [1994] 3 SLR 864 at 879–880, [42]. When a court condemns material non-disclosure by setting aside the *ex parte* order, it does so in the public interest to discourage abuse of its procedure in an *ex parte* application. The condemnation is a reminder of the importance of dealing in good faith with the court when *ex parte* applications are made. The court retains a discretion not to set aside the arrest even though the non-disclosure is deliberate, but this discretion will only be exercised in a special case. Chao Hick Tin JA in *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 2 SLR 750, which is a case on whether to continue an injunction or grant a fresh injunction where there has been material non-disclosure, observed at [35] that "[w]here there is suppression [of material facts], instead of innocent omission, it must be a special case for the court to exercise its discretion not to discharge the ex parte injunction".

24 Ordinarily, the court must first decide whether the failure to mention something explicitly amounted to non-disclosure. It must then decide whether the non-disclosure was material, and if so, whether the court's discretion should be exercised for or against intervention.

25 On the occasion of this appeal, I am of the view that for the reasons given below, it is now too late for the court to embark on the three-stage inquiry in [24] above. Certain procedural steps were taken after the arrest, all of which depended for their viability upon the arrest and its effect. Since the steps taken have given rise to a situation which is irreversible and could impact upon the outcome of this appeal in a determinative way without going into the merits of the appeal, I asked counsel to submit on whether or not Capt Hatcher and Ultramarine had in these proceedings consciously taken inconsistent courses and were thus barred by the doctrine of approbation and reprobation from challenging the arrest. Separately, they are to consider whether the arrest had become moot with the sale of the *Seeker I*, and, if it had become moot, whether a claim for damages for wrongful arrest under the principle affirmed in *The Kiku Pacific* [1999] 2 SLR 595 could still be pursued in this appeal as a stand-alone right.

26 Upon the application of the plaintiff by way of Notice of Motion No 106 of 2005, the Sheriff on 29 October 2004 was granted, amongst other things, liberty to appoint agents to assist him in the exercise of his duty in the preservation and good management of the *Seeker I.* The Sheriff or the plaintiff was granted liberty to repatriate all or part of the officers and crew of the vessel and to engage a skeleton crew for the vessel. The repatriation expenses of the crew and the wages and disbursements for the skeleton crew were to be treated as part of the Sheriff's expenses.

27 By an Order of Court dated 12 November 2004, the defendants and the intervener were granted liberty either by themselves or through their servants or agents to make payments to all or some of the crew, including the first defendant, for wages and/or other emoluments earned by them while serving on board the *Seeker I*, with such payments to form part of the Sheriff's expenses. The order was granted upon the oral application of Mr Teh.

28 As mentioned, the challenge to the arrest was filed in December 2004. On 25 February 2005,

the plaintiff applied by way of Notice of Motion No 17 of 2005 for a sale of the vessel *pendente lite*. The sale application was adjourned on 11 March 2005 until after the hearing of the setting-aside application. On 12 April 2005, the assistant registrar dismissed the latter application. Consequently, the application for sale of the vessel came up for hearing on 9 May 2005. The second defendant and the intervener wanted the matter adjourned until after the appeal against the assistant registrar's decision had been disposed of. The court agreed to adjourn the application for sale *pendente lite* to 27 May 2005 (the date scheduled for hearing of the appeal), but in the interim period beginning 12 April 2005, the second defendant and the intervener were to bear the arrest expenses. Capt Hatcher and Ultramarine thought twice about holding back the sale until after the determination of the appeal, so much so that on 11 May 2005, Mr Teh informed the court that Capt Hatcher and Ultramarine were not objecting in principle to the sale. All he sought was for the "Mac Boats" on board and the diving and survey equipment to be separately valued and sold. A sale of the *Seeker I* was duly ordered.

29 To this end, now that the Sheriff has carried out the court-ordered sale and sold the *Seeker I*, the arrest itself is plainly moot. It is a moot question whether or not the degree of explanation and elucidation of the facts in the arrest affidavit of Kendall Tan placed before the duty registrar was so falsely misleading and deficient as to amount to bad faith or at least material non-disclosure. Significantly, the *Seeker I* was ordered to be sold with the knowledge and concurrence of Capt Hatcher and Ultramarine soon after the decision of the assistant registrar but before the appeal was heard. It is now too late to impugn the arrest. It is not possible to turn the clock back. Furthermore, the earlier order obtained by the defendants and the intervener on 12 November 2004 for liberty to pay the crew and for the payments to be treated as part of the Sheriff's expenses is equally important. Such an order is derivative in nature in that it was dependent upon the vessel being under arrest and in the care and custody of the Sheriff. It is evident from Mr Teh's letter to the Sheriff on 8 July 2005 that payment of crew wages for the months of October and November 2004 was made pursuant to the 12 November 2004 order. Having paid off the crew, those payments will be treated as part of the Sheriff's expenses and will be reimbursed from the sale proceeds of the vessel in priority to other competing claimants. The significance of this order of 12 November 2004 is that it relies on the earlier order of 29 October 2004 for liberty to repatriate the original crew. Mr Teh submits that no inconsistent stand was taken by seeking the order of 12 November 2004 because the order simply provided that the payments were to be treated as part of the Sheriff's expenses and not that the wages would invariably be paid out of the sale proceeds of the vessel. He argues that if the arrest had been set aside before the sale, the payment of crew wages would have been recoverable from the arresting party as part of the Sheriff's expenses pursuant to the solicitor's undertaking given for the arrest. Up to a point, I am prepared to accept that whilst a vessel is under arrest and there is pending litigation over the correctness of the arrest, action taken in the interim in connection with the vessel and crew whilst she is under arrest may not necessarily be construed as an inconsistent course. But on the facts of this case, at the time the order of 12 November 2004 was sought, there was no challenge to the arrest. Moreover, the distinction counsel seeks to make is flawed. It is generally accepted that an arrested vessel will have to be maintained, preserved and, if necessary, prepared for sale, and that such expenses are for the benefit of all interested in the proceeds of sale of the ship. This is essentially the doctrine of *in custodia legis*: see *ABC Shipbrokers v The ship "Offi Gloria"* [1993] 3 NZLR 576 at 585. Mr Teh's argument ignores the existence of the claims of the crew for unpaid wages furnished after arrest and the crew's corresponding interest in the proceeds of sale of the *Seeker I*. In seeking an order that crew wages be treated as part of the Sheriff's expenses, Capt Hatcher and Ultramarine are asking that they should receive priority and be reimbursed the money expended to pay crew wages over other claims as an expense *in custodia legis*. In other words, the court is being told that money expended to pay outstanding crew wages is an expenditure that is necessary not for the maintenance of the arrest or preservation of the *res*, but for the preparation for the sale of the vessel. It is to be borne in mind that payment of crew wages and the

expenses of crew repatriation is for the ease of an eventual sale of the vessel. The crew would otherwise remain on board as sitting tenants, and their presence on board could hamper or prevent the sale of the ship free of encumbrances. By agreeing to treat the money expended to pay off the crew in the nature of *in custodia legis* expenses, the court is also exercising its discretion to depart from the usual order of priority for maritime claims ahead of other claims which give rise to a maritime lien.

30 In my judgment, Capt Hatcher and Ultramarine had consciously adopted inconsistent attitudes. If the court were to allow Capt Hatcher and Ultramarine to set aside the arrest, it would, in my view, be seen to condone approbation and reprobation of the arrest. Both of them supported the arrest by seeking the order of 12 November 2004 and later on, by allowing the order for sale of the vessel to be made before the determination of the appeal. Evidently, Capt Hatcher and Ultramarine did not want to continue to bear the expenses of the arrest pending the appeal and thus made a conscious choice to allow the order for the sale of the vessel *pendente lite* to go through before the determination of the appeal. Mr Teh cited "practical reasons" for his clients' decision not to oppose the application for the sale of the *Seeker I*. Unfortunately, the rationale for the decision is immaterial. It is the decision itself that is being scrutinised. Conversely, by their challenge to the arrest of the vessel, Capt Hatcher and Ultramarine sought to reprobate the arrest. Plainly, the setting aside application was intended to impugn the basis of the very arrest on which the two aforementioned orders were founded. I should add that when Capt Hatcher first learnt of the arrest, he sent two e-mails on 27 October 2004 to Gray Clare and his wife. Whilst he expressed surprise at the arrest, his e-mails conveyed his willingness to hand over the *Seeker I* without any hint of resistance. In his second affidavit of 4 March 2005, Capt Hatcher tried to clarify his e-mails in a manner quite differently from how I have read them. Capt Hatcher explained that he was trying to say in his e-mails that he was shocked at the arrest and that if Gray Clare had valid reasons to enforce the security in the vessel for repayment of the loan of US$2m, he had only to give proper notice specifying those reasons and the vessel would be handed to him. I must say I found his clarification quite contrived. Furthermore, Capt Hatcher in his affidavit of 15 December 2004 declared in no uncertain terms that he had stopped the process of ownership transfer "because of the arrest and the matters that Ultramarine and [he] discovered when they met for the first time in September 2004". Yet his lawyers, M/s Ang Tan & Chang, completed the transfer process and permanent registration was finalised. The Statutory Certificate of Register, amongst two other documents, was forwarded to Mr Lim's firm under cover of a letter dated 21 February 2005. In context, the overall behaviour of the second defendant and Ultramarine as narrated had been such that their challenge to the arrest should be approached with some circumspection and scepticism.

31 The doctrine of approbation and reprobation precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised. It entails, for instance, that a person "having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit": see *Evans v Bartlam* [1937] AC 473 at 483 and *Halsbury's Laws of Australia* vol 12 (Butterworths, 1995) at para 190-35 where the doctrine of approbation and reprobation is conveniently summarised as follows:

> A person may not 'approbate and reprobate', meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course.

32 On the facts of this case, the doctrine is applicable. In the circumstances, a dismissal of the appeal on entirely different grounds from those argued before the assistant registrar is warranted and I so rule. Also, there is no legal basis for a claim for an inquiry for damages for wrongful arrest to be

assessed without the arrest being set aside. The principle is that there can be no award of damages even for what is ultimately shown to be an ill-founded arrest of a vessel unless there is proof of bad faith amounting to malice or what is termed *crassa negligentia.* The Court of Appeal in *The Ohm Mariana* [1993] 2 SLR 698 at 716, [55] held that even if the action *in rem* was instituted in error and the arrest wrongful, malice on the part of the arresting party must first be established before an order that damages be assessed can be made.

33 I should record that a dismissal of the appeal does not bar the defendants and Ultramarine (if so advised) from pleading and contending at the trial that there was malice in bringing this action for possession. It still leaves open, to the second defendant and the intervener, the prospect of reasserting and taking issue with what has been alleged to be an ill-founded and vexatious claim for possession (and as a corollary, the arrest) based on some false plea. From the affidavits filed by Capt Hatcher and on behalf of Ultramarine, the action is said to be premature in that the cause of action for possession had not crystallised under the Deed and this true state of affairs was distorted through falsehood to give a completely different story for the purpose of effecting the arrest of the *Seeker I* or of sustaining the arrest. There is also the schedule of activity which was relied upon by the plaintiff for the arrest but was never seen, agreed to or signed by Capt Hatcher until after the arrest.

34 Even if a different view is taken that there was no approbation and reprobation on the part of Capt Hatcher and Ultramarine, the subject matter of the appeal has become academic or moot because of the court-ordered sale. Faced with this situation, the correct way to go about the subject matter of the appeal must out of necessity be reserved for the trial of the main action itself. This view is not to be construed in general terms as leaving open the prospect that an *ex parte* order obtained as a result of material non-disclosure, when relied upon, is effectively unchallengeable. The facts in this case are special. All contenders were in favour of the vessel being sold before the determination of the appeal. There was, at this appeal, no question of having to balance the competing interests of the contenders that might turn entirely upon matters that occurred after the arrest and in particular that occurred in reliance upon that arrest. Notwithstanding the comprehensive attack which Mr Teh has mounted upon the conduct of the plaintiff in obtaining the Warrant of Arrest, and the many affidavits which have been placed before me in an effort to have that arrest set aside, I am firmly of the view that it is too late in the day to challenge the Warrant of Arrest which stands.

35 As an aside and assuming there was no intervening sale, the outcome of the appeal would still have been the same. I would have, as a matter of discretion, reserved for the trial itself the issues in the appeal. The real controversies in the present case relate to the substantive merits of the case rather than to the jurisdictional requirements of the Act that demand resolution at the interlocutory stage. In the context of an *in rem* action, the principle that the merits of a claim can be deferred to the trial stems from the ruling in the *The St Elefterio* [1957] P 179 at 186 where Wilmer J held that unless the action was frivolous or vexations, "the plaintiffs are entitled to bring [the action *in rem*] and have it tried, and that whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem". Brandon J in *The Moschanthy* [1971] 1 Lloyd 37 at 42 held that the question as to whether the court has jurisdiction to entertain the claim *in rem* must be answered "by reference to the nature of the plaintiff's claim as put forward, without reference to the further point whether it is likely to succeed or not". Applying the principle in the face of a non-disclosure challenge on matters so bound up with the merits of the claim, it is within the range of orders that the court can make in exercise of discretion to defer making findings (albeit provisionally) on issues which should be more properly reserved for the trial itself. It is accepted that Teddy Saputra and Capt Hatcher were the persons in possession of the *Seeker I*. The core issue is whether at the time the action for possession was instituted, a *prima facie* case based on the right on which

the plaintiff sued for possession existed. Here, a finding of bad faith or material non-disclosure depends upon proof of facts that are themselves in issue in the action and inextricably connected. Correspondingly, to establish whether a fact is material and hence ought to be disclosed, those particular contested facts would have to be resolved.

36 Earlier, in [32] above, I ruled that the appeal is dismissed. As for costs, in exercise of the court's discretion, I order costs of the appeal to be in the cause.