A TALE OF TWO CITIES

ACTIONS IN REM AND SHIP ARREST IN SINGAPORE AND LONDON

Peter S K Koh

Licensed to practice law in Singapore, British Columbia (Canada) and England/Wales

Accedited Arbitrator, China Maritime Arbitration Commission

Author of coming bi-lingual publication entitled "Major Issues in Shipping Law (with PRC and English Comparative Notes)" to be published by Sweet & Maxwell.

Former director, Vancouver Maritime Arbitrators Association

PREAMBLE:

The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment. Even the briefest of delays can sometimes cause significant losses. It can also in certain instances prejudice the livelihood of the ship's crew and the commercial fortunes of the ship-owner.

The Vasiliy Golovnin [2008] 1 SLR (R) 994, at 1013 (per VK Rajah JA).

GENERAL PRINCIPLES

Arrest is for the purpose of getting security for a maritime claim. At the same time, there can be no international trade without shipping. Ships are required to carry goods all over the world. Ship arrest has to be used sparingly otherwise international trade and shipping will be hampered.

Brandon J said in *The Moschanthy* [1971] 1 Lloyd's Rep. 37.

> *The power to exact security in support of a claim in rem is a very strong power and it must not be used oppressively.*

It used to be the case some 20 years ago that Singapore was a very popular place for ship arrest. The arrest procedure was open to abuse and a vessel could be arrested for an amount less than S$1000. The admiralty jurisdiction of the Singapore High Court could be invoked without the ceiling of S$100,000 required for non-maritime cases. The procedure for any ship arrest could be carried out within 30 minutes, 7 days a week (including public holidays) and for as little as S$5000.

ADMIRALTY JURISDICTION

Under English law, unless a claim comes within one of the grounds in s 20(2) of the Senior Courts Act 1981 (formerly the Supreme Courts Act 1981)[1], the court has no jurisdiction. The rationale is best summarized by Lord Brandon in *Samick Lines Co. Ltd v. Owners of the Antonis P Lemos* [1983] AC 711 at 924:

> *…the admiralty jurisdiction of the High Court is assigned, has no admiralty jurisdiction, as distinct from any other jurisdiction which it may have, to hear and determine it and accordingly, no power to arrest the ship as security for such claim.*

[1] Amended by the Constitutional Reform Act 2005.

To invoke the admiralty jurisdiction in England, a claimant has to satisfy one of the statutory grounds in s 20 (2) of the English Senior Courts Act 1981. In Singapore, it is s 3 of the High Court (Admiralty Jurisdiction) Act 2001 (Cap 123).

Jurisdiction is statutory in nature and it is created and limited by statute. Parties cannot by themselves waive or agree by mutual consent to jurisdiction.[2]

When jurisdiction is challenged, the plaintiff only has to establish that he has a "good arguable case" on a balance of probabilities based on the existence of particular facts or existence of particular state of affairs. At this stage of proceedings, the plaintiff does not have to establish that he has a substantial cause of action at law.[3]

One of the major grounds of admiralty jurisdiction which is often invoked relates to carriage of goods by sea. It will involve contracts involving shipment of goods evidenced or contained in bills of lading. Hire of ships will involve charter-parties. S 20 (2) (h) of the English Senior Courts Act 1981 provides:

> *…arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.*

---

[2] See *The Ohm Marianna* (1992) 1 SLR 556 (GP Selvam JC) and *The Alexandria* (2002] 3 SLR 56 at 59 (Belinda Ang J).

[3] *The Jarguh Sawit* [1995] 3 SLR 840, *The Vasiliy Golovin* [2008] 4 SLR 994 (CA), *The St Elefterio* [1957] P.179 and *The Eagle Prestige* [2010] 3 SLR 294.

For a long time, this ground covered matters arising in both contract and tort. This was endorsed by Nigel Meeson in his book *Admiralty Jurisdiction and Practice* [4] and the governing case was *The St Elefterio*.[5]

The House of Lords in *The Antonis P Lemos* [1985] AC 711 held that the phrase "arising out of" must be given the wider definition of "connected with". The case of *The St Elefterio*, decided 30 years earlier, was followed.[6]

The wording "*arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship"* is wide enough to embrace claims in both tort and contract connected with any agreement relating to the carriage of goods in a vessel. It was not necessary that the claim in question be directly connected with some agreement of the kinds referred to or that the agreement be made between the two parties to the action themselves.

A salvage agreement was an agreement relating to the use of a ship. In *The Eschersheim*, [1976] WLR 430, the salvage tug *Totesand*, was used for the purpose of salving the vessel *Erkowit* and her cargo and bringing them to a place of safety. The House of Lords held that the claims of both ship-owners and cargo owners fell within this ground.

---

[4] At p. 35, [1993] edition.
[5] [1957] P 179. See also *The Alexandrea* [2002] 3 SLR 56.

[6] [1957] P 179.

What is the test for "an agreement" It has to be an agreement relating to the use or hire of a ship and such agreement must have some "reasonably direct connection" with such activities. In *The Sandrina* [1985] AC 295, the House of Lords held that it must be an agreement "intrinsically" related to the use or hire of a vessel.[7]

INVOCATION OF AN ACTION IN REM

After the plaintiff has satisfied one of the statutory grounds in s 20 (2) of the English Senior Courts Act 1981, he can invoke the admiralty jurisdiction under s 21(4) of the same Act. [8] S 21 (4) provides[9]:

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

(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against

[7] See also *The Catur Samudra* [2010] 2 SLR 518 at 530 per Steven Chong J. A contrary decision was reached in *Re National Bank Leasing v Merlac Marine Inc* (1992) 52 FTR 15.

[8] S 3(1) of the High Court (Admiralty Jurisdiction) Act (Act (Revised 2001).
[9] S 4(4), *ibid.*

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

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

It is easy to satisfy s 21(4) (a) in "connection with a ship". The ship has to be the same ship mentioned in s 20 (2) and it embraces every description of vessel used in navigation and not propelled by oars.[10]

The relevant person, however, has to be the owner or charterer of the ship named in the writ at the time of the cause of action. The "Owner" can be the registered or legal owner and it was decided in this manner by the English Court of Appeal in *The Evpo Agnic*.[11] Lord Donaldson in this case said:

"Owner" in para (b) of s 21(4) thus falls to be contacted with "beneficial owner" in sub-paras (1) and (ii)….all maritime nations maintain registers of shipping which record the names of the owners….the Convention clearly looks to ownership and registered ownership as one and the same.[12]

---

[10] S 742 of the Merchant Shipping Act 1894. See *Steedman v. Scofield* [1992] 2 Lloyd's Rep 163, per Sheen J at p 165.
[11] [1988] 1 WLR 1090, See *also I Congreso del Partido* [1978] QB 500, per Robert Goff J at p. 541.
[12] *Ibid* per Donaldson MR at p 1096

This was not followed in Singapore. The Singapore Court of Appeal in *The Ohm Mariana* decided that "owner could cover beneficial owner who was vested with the rights to sell or dispose the vessel".[13] The Singapore position was soon followed by courts in other common law jurisdictions.[14] Also, the definition of "charterer" in s 21(4) (b) was given a literal meaning and not restricted to demise charterer in *The Pertamina 108* [1977] 1 MLJ 49 and this Singapore definition was later adopted not only in England but in other common law jurisdictions as well.[15]

S 21(4) (b) (i) refers to the ship named in the writ. At the time when the writ is issued, the relevant person has to be either the beneficial owner or demise charterer of the same vessel. S 21(4) (b) (ii) provides for the arrest of a sister ship under either the beneficial ownership or demise chartered by the relevant person.

The two words "beneficial owner" under s 21(4) (b) (i) and (ii) generated some judicial interest for more than 50 years. A registered owner is a legal owner. He is *prima facie* deemed to be the beneficial owner.

Goff J (as he then was) in *The Ursula Andrea* gave a natural and ordinary construction of the words "beneficial owners" to embrace both legal and equitable owners.[16] In

[13] [1993] 2 SLR 698.
[14] For example in *Malaysia Shipyard v The Iron Shortland* (1996) 131 ALR 738.
[15] See *The Span Terza* [1982] 1 Lloyd's Rep 225, See also *The Sextum* [1982] HKLR 356.
[16] [1978] 1 QB 500, See also *The Father Thames* [1979] 2 Lloyd's Rep 364.

Singapore, beneficial owners would include both legal and equitable owners and they would be able to "sell, dispose of or alienate all the shares in that ship".[17]

After the invocation of the admiralty jurisdiction with the filing of the writ of summons for an action in rem, the plaintiff has to decide whether to couple it with a warrant of arrest. The only pre-requisite to the court's jurisdiction to issue a warrant of arrest is to have a writ for an action in rem filed. In Singapore, this is provided under Order 70 r 4 (1) of Singapore Civil Procedure 2007.

If the action in rem is set aside for lack of admiralty jurisdiction, then the warrant of arrest has to be set aside.[18]

SHIP ARREST

The *Rena K* principle laid down by Lord Brandon was part of common law for many years.[19] In this case, it was held that where the plaintiff showed that an arbitration award in his favour was unlikely to be satisfied by the defendant, the security available in the action in rem could be ordered to stand or alternative security could be ordered in substitution. It was subsequently upheld by the Court of Appeal in *The Teyuti* [1984] 2 Lloyd's Rep. 51.

This principle is now superseded by s 26 of the Civil Jurisdiction and Judgments Act 1982.

---

[17] *The Pangkalan Susu/Permina 3001* [1977] 2 MLJ 129.
[18] See *The Rainbow Spring* [2002] SGHC 255.
[19] See *The Rena K* [1978]1 Lloyd's Rep. 545.

PROCEDURE FOR AN ARREST

The procedure in Singapore is provided under Order 70 r. 4 (1) to (3). The arresting party has to issue a writ for an action in rem and file a request for the issue of a warrant of arrest after procuring a search at the court registry for caveats against arrest. The warrant of arrest will not be issued unless an affidavit has been filed. The court has the discretion to issue a warrant of arrest after reading the affidavit and hearing the *ex parte* application.

Ownership of the vessel named in the in rem action and to be arrested can be ascertained from Lloyd's Register of Ships and the online services provided by Lloyd's Intelligence. There is also a need to maintain a ship watch on the vessel named in the writ in order to serve it on her when she enters the territorial waters of the jurisdiction. A writ is valid for one year and a renewal may not be given if there is a failure to serve it on her.

This was the same position as in England. A good authority used to be *The Vasso* [1984] 1 Lloyd's Rep. 235 (CA). The 1986 amendments to The Rules of the Supreme Court amended Order 75 r.5 whereby the issue of a warrant of arrest was not a discretionary remedy but a right for the plaintiff.[20] The arresting party had to demonstrate that there was compliance with Order 75 r.5. It was decided in this manner in *The Varna* [1993] 2 Lloyd's Rep. 253.

[20] Rules of the Supreme Court (Amendment No 3) Order 1986.

The present English position is summarized by Nigel Meeson in his book *Admiralty Jurisdiction and Practice*[21]:

> *….the duty of disclosure in relation to an application for arrest is not as extensive as it is in relation to an application for a Mareva injunction or Anton Pillar order….although in form discretionary, in practice arrest is granted as of right where the provisions of Order 75, rule 5, have been followed*.

Order 75 rule 5 is now replaced by Part 61 (Admiralty Claims) of Civil Procedure Rules commonly referred to as "CPR". The arrest jurisdiction and practice are now governed by Part 61 and the Practice Direction 61. The wording in Part 61 and the Practice Direction may be different, but in substance it is the same as under the old Order 75.

Could there be an abuse?

The English position provides an easier forum for an arrest based on one of right with no discretion on the part of the court to review the affidavit to ensure that there is full and frank disclosure of all the material facts. It is a dangerous weapon given to claimants against the vessel, especially cargo owners for either damage to or short delivery of goods. There is still no cheaper substitute for international trade other than by carriage of goods by sea.

The Singapore position is different. Belinda Ang J in *The Rainbow Spring* [2002] SGHC 255, said at para 31:

---

[21] At p 121, (1993 Edition).

In Singapore, the issue of a warrant of arrest is a discretionary remedy and as on any ex parte application for a discretionary remedy, full disclosure of material facts is required.

The court has full discretion to issue a warrant of arrest under Order 70 r 4(3) even if there has not been statutory compliance under r 4(6) and (7) or uphold a warrant of arrest even if there has not been full material disclosure.[22]

The learned admiralty judge, Clarke J, (as he then was) in *The Tjaskemolen* [1997] 2 Lloyd's Rep. 465 said that the details required in an affidavit would have to depend on the facts of the case. The affidavit to lead the warrant of arrest must comply with Order 75 r 5 (9) which must specify the nature of the claim. The facts disclosed would have to be sufficient for the court to assess its in rem jurisdiction and at the same time, to enable the defendants or prospective defendants plus interveners to know the "basis upon which and the claim in respect of which the property has been arrested".[23] Based on the facts of this case, it is submitted that the English court does retain some discretion not to issue a warrant of arrest if there is non compliance with Order 75 r 5(9).

Further, Rule 61.5 (1) of the CPR does provide the English Admiralty Court with the discretion not to issue the warrant of arrest if there has been a change in the beneficial ownership of the ship pursuant to a judicial sale even after the issuance of the in rem

---

[22] See *The Fierbinti* [1994] 3 SLR 574 at [41]. Repeated in *The Rainbow Spring* [2002] SGHC 255 at [32].

[23] *The Tjaskemolen* [1997] 2 Lloyd's Rep. 465 at p 468.

claim form. Rule 61.5 (2) provides more discretion to the court not to proceed with the warrant of arrest if it is for the purpose of arresting a ship owned by a State "where by convention or treaty, the United Kingdom has undertaken to minimize the possibility of arrest of ships of that State until (a) notice in the form set out in Practice Direction 61 has been served on a consular officer at the consular office of the State in London or the port at which it is intended to arrest the ship".

DISCLOSURE OF MATERIAL FACTS

In *The Evmar,* [1989] 1 SLR (R) 433, Chao Hick Tin JA ruled that there was no material non disclosure in the following circumstances:

> *There was no material non-disclosure even though the affidavit leading to the warrant did not disclose the existence of an arbitration clause in the bill of lading.*[24]

In Singapore, there is a need to establish a good arguable case before an arrest warrant will be issued.

Hence, V K Rajah JA in *The Vasiliy Golovnin*[25] said:

> *A plaintiff must always remain cautious and rigorously ascertain the material facts before applying for a warrant of arrest. While there is no need to establish*

[24] [1989] 1 SLR (R) 433 at [10] and [13].

[25] [2008] 1 SLR (R) 994 at 1013.

a conclusive case at the outset, there is certainly a need to establish a good arguable case before an arrest warrant can be issued. This determination plainly requires a preliminary assessment of the merits of the claim.

The plaintiff's duty to make full disclosure includes the following:

1. All matters within his knowledge which might be material even if they are prejudicial to the applicant's claim.
2. The test of materiality is also the same as that required in other *ex parte* civil remedies. The underlying rationale is that these are all remedies that may potentially cause enormous and sometimes irreparable damage to a defendant or other connected parties.[26]

Elements of "materiality" include not only "know", but "ought to know". They will also include such additional facts which the plaintiff ought to have known with proper inquiries. The extent of the additional facts required has to be dependent on the facts and circumstances prevailing in the case.[27] Also, facts which are matters that the court will take into consideration in making its decision are considered material.

---

[26] *The Vasiliy Golovnin* [2008] 1 SLR 994 at 1025. See also *The Damavand* [1993] 2 SLR at 136.

[27] *Tay Long Kee Impex Pte Ltd v. Tan Beng Huwah* [2000] 1 SLR 786 at [21]

In *The Vasiliy Golovnin* [2008] 1 SLR (R) 994 at 1026 VK Rajah JA said:

> *The duty imposed on the applicant requires him to ask what might be relevant to the court in its assessment of whether or not the remedy should be granted and not what the applicant alone might think is relevant. This inevitably embraces matters, both factual and legal, which may be prejudicial or disadvantageous to the successful outcome of the applicant's application.*

MANNER OF DISCLOSURE

The materials facts have to be disclosed in a manner to ensure that the judge has receipt of the most complete and undistorted picture of them. The material facts must be sufficient for the purpose of making an informed and fair decision on the outcome of the application. If there is compliance with these cardinal rules, the threshold of full and frank disclosure is fulfilled. This Singapore standard is based on the decision of the Singapore Court of Appeal in *The Vasiliy Golovnin*.[28]

Often an *ex parte* application is made on an urgent basis and the judge hearing the application has only limited time to go through the supporting affidavit. In essence, to present any judge with voluminous pages in any affidavit does amount to abuse of the court process.[29] It is advisable to have only a few key exhibits in an affidavit and the

[28] *The Vasiliy Golovnin [2008] 1 SLR (R) 994 at 1029 per VK Rajah JA.*

[29] *Intergraph Corporation v. Solid Systems CAD Services Limited* [1993] FSR 617 at 625.

facts, favorable and adverse, have to be disclosed in the affidavit and not the exhibits.[30] It is prudent to make specific references of the few key exhibits and, where necessary, explain them.

DAMAGES FOR WRONGFUL ARREST

Gross negligence or *crassa negligentia*

For any wrongful arrest, the plaintiff will definitely be liable for costs and "those costs will include the cost of furnishing bail in order to secure the release of the ship". This is the same as any other *ex parte* actions as costs are payable by the losing party. [31]

Damages for wrongful arrest is a totally different matter altogether. The cardinal principles were elucidated by Dr Lushington in *The Volant* (1864) 22 Br MC 321:

> *It is a well established rule in this court that damages for arresting a ship are not given, except in cases where the arrest has been made in bad faith or with crass negligence.*

The words of Dr Lushington were aptly described in plain English in a Privy Council decision more than 100 years ago by Pemberton Leigh PC:

---

[30] *National Bank of Sharjah v. Dellborg* [1993] 2 Bank LR 109, per Lloyd LJ at 112.

[31] *The St Elefterio* [1957] P 179.

> *Is there or is there not, reason to say that the action was so unwarrantably brought, or brought with so little colour, so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?*[32]

The decision to award damages for wrongful damages should never be lightly made. In *The Inai Selasih*, Chao Hick Tin JA had quite rightly cautioned the defendants that just because a plaintiff had been wrong in its interpretation or perception of events, it did not follow as a matter of fact that there was a lack of an honest belief and that the court should award damages.[33]

Getting legal advice before proceeding to an arrest is no defence to a case of wrongful arrest. This was in fact the case in the Hong Kong case of *The Maule*.[34] In this case the plaintiff was the mortgagee who arrested the vessel when the right to enforce his security had not accrued.

In *The Maule* [1995] 2 HKC 769 Bokhary JA said:

> *If a plaintiff wrongfully arrested a ship which he knew he could not legitimately arrest, then he would be acting in bad faith. And, short of that, if he wrongfully arrested a ship without applying his mind to whether that was a legitimate course; proceeding in that cavalier fashion because he was bent on harming the ship-*

[32] (1859) 12 Moo Pc 352; 14 ER 945 at 948.
[33] [2006] 2 SLR (R) 181.
[34] [1995] 2 HKC 769 at 774.

owner or putting pressure on him to accede to a demand, then his conduct could, in m view be, described as malicious negligence.[35]

Further reformulation of the *Evagelismos* test was provided by Colman J in *The Kommunar (No 3)*:

> *Two types of cases are thus envisaged. Firstly, there are cases of mala fides, which must be taken to mean those cases where on the primary evidence, the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel.* [36]

Colman J's reformulation of *The Evagelismos* test was given a sterling approval by Karthigesu JA in *The Kiku Pacific*.[37] It is submitted that this is now the standard test for damages for wrongful arrest where there is gross negligence or *crassa negligentia*.

Other instances in England and Singapore where damages were awarded for wrongful arrest include the following:

(1) Vessel was arrested for non payment arising from a mortgage. The contractual document showed that a payment was not due to the plaintiffs.[38]

---

[35] *Ibid*, at 773.
[36] [1997] 1 Lloyd's Rep. 22.
[37] [1999] 2 SLR (R) 91.
[38] *The Cheshire Witch* (1864) Br & Lush 362; 167 ER 402.

(2) Vessel was arrested for an alleged claim of US$17m arising from lost cargo. The court adjudicated and decided that the loss was only US$1m. Security was provided by the vessel's P & I club for US$1m. Vessel remained under arrest for close to two years despite provision of security.[39]

(3) Vessel was arrested due to unpaid repair charges. There was in fact an agreement concluded between the ship-owner and the shipyard that there could be payment by instalments.[40]

(4) Charterer arrested the vessel arising from an indemnity in respect of crane and port charges and also for possible damages to be paid to shippers for late delivery. There was an agreement with the ship-owner that the charterer was in fact liable for such charges. Also, there was no claim for late delivery by any shippers.[41]

(5) Vessel was arrested notwithstanding willingness on the part of the defendant ship-owner to provide P & I club's letter of undertaking with reservations. The ship was arrested. The defendant ship-owner did accede to the plaintiff's insistence on the wording of the security and provided it "under protest". Vessel continued to be in detention and was ordered to be released only on appeal.[42]

---

[39] *Gulf Azov Shipping Co Ltd v. Idisi* [2001] 1 Lloyd's Rep. 737.
[40] *The Dilmun Fulmar* [2004] 2 SLR 181.
[41] *The Dong Nai* [1996] 4 MLJ 454.
[42] *The Evmar* [1989] 1 SLR 433.

Damages will not be awarded or nominal damages only will be awarded for wrongful arrest if there is objective evidence to show that the arrest is due to a genuine mistake supported by an honest belief. This was in fact the case in *The Evangelismos.*[43]

There is unlikely to be any award of damages as long as the arresting party acts with an honest belief even if there is some negligence. This seems to be the English position. The Singaporean position is similar to the English position but it does come with a caveat. According to the Singapore courts it is not in the public interest that solicitors pursue an action coupled with a warrant of an arrest on a vessel unless they "*honestly believe with good reason that they have plausible claims".*[44]

Without reasonable or probable cause

Ship arrest can bring about draconian consequences for the ship-owner as the claimant only has to pay the legal cost of affecting an arrest which ranges from US$5000 to US$10,000 depending on the location of the port forum. Often, an arrest of its vessel can put a small ship owning company in a financial quagmire. It is difficult to recover damages for wrongful arrest on the ground of gross negligence.

There had been judicial attempts to lower the threshold by introducing "without reasonable or probable cause" to replace gross negligence.

Selvam JC (as he then was) used a common law approach in *The Ohm Mariana*. He said:

[43] (1858) 12 Moo PC 352; 14 ER 945.
[44] *The Vasiliy Golovnin*, [2008] 4 SLR at 1045, per VK Rajah JA.

> *It is evident that the cause of action for wrongful arrest in admiralty law is akin to the tort of abuse of legal process in general and wrongful seizure of goods or wrongful arrest of person in particular.*[45]

His finding was over-ruled by the the Court of Appeal. The judgment of the Court of Appeal was read by the late M Karthigesu JA:

> *The term reasonable or probable cause is not appropriate in the context of the wrongful arrest of a vessel as it would cause confusion and more importantly dilute the threshold required for an action in wrongful arrest to succeed.* [46]

A subsequent decision of the Court of Appeal gave a different interpretation. VK Rajah, JA, in *The Vasiliy Golovnin* said that there was no lowering of the threshold of gross negligence, but part of legal nomenclature to include "*crassa negligentia* in the admiralty context as part of "without reasonable or probable cause".[47] With due respect to both judges of the Court of Appeal, it is to be submitted that the learned judge said that the standard of gross negligence would be the same as the common law tort of abuse in general and wrongful seizure of goods or wrongful arrest of an individual.

However, the Canadian Federal Court of Appeal in *Armada Lines Ltd v. Chaleur Fertilizers Ltd* did attempt to equate damages for ship arrest with mareva injunctions.[48] Heald JA ruled that it was a "necessary inference" that the arresting party must shoulder

---

[45] [1992] 1 SLR 556 at 571.
[46] *The Kiku Pacific* [1999] SGCA 96 at 102.
[47] [2008] 4 SLR (R) at p 1044.
[48] [1995] 1 FC 3 at 20.

"the risk and burden of an illegal arrest and the consequence flowing there from".[49] The Federal Court of Appeal was reversed on appeal to the Supreme Court of Canada, which held that there could be no liability for damages for the wrongful arrest without malice.[50] To replace the *Evangelismo* rule with "without reasonable cause or probable cause" requires legislative surgery. Iacobucci J said this in the Supreme Court of Canada:

> *Any such change in the law falls not to the courts, but rather to the legislature to carry out. As noted above, the rule in The Evangelismos is of long standing. Whether it does or does not operate harshly upon defendants is a question best resolved by the legislature.*[51]

Iacobucci J's sentiments were echoed in several common law jurisdictions which followed the English system based on some archaic principles of maritime law and commerce.[52]

Australia, South Africa and Nigeria have legislated to replace *The Evagelismos* rule based on gross negligence with "unreasonably and without good cause" concepts. S 34(1) of the Admiralty Act of Australia provides as follows:

(a) A party unreasonably and without good cause:

(i) Demands excessive security in relation to the proceedings or,

---

[49] *Ibid*, at 19 and 20.
[50] [1997] 2 SCR 617.
[51] *Ibid*, [26] to [27].
[52] *Mobil Oil New Zealand Ltd v The Ship "Rangiora"* [2000] 1 NZLR 49.

(ii) Obtains the arrest of a ship or other property under this Act; or

(b) A party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property.

CONCLUSION

In England, the plaintiff has the right to arrest a vessel as long as Part 61 of the Civil Procedure Rules and Practice Direction 61 are complied with. Under English law the defendant ship-owner faces a daunting task of claiming damages for any wrongful arrest of its vessel.

It is common knowledge that the rule in *The Evagelismos* is archaic and impractical. It is simply too difficult if not expensive to recover damages for wrongful arrest based on gross negligence or *crassa negligentia*. Singapore ameliorates the situation for the shipping community as the court has the discretion whether or not to issue a warrant of arrest. Further, the more recent cases over the last decade in Singapore do bring relief to ship-owners as non-disclosure of material facts leading to wrongful arrest may tantamount to gross negligence.

Both London and Singapore are major ports and shipping is important to both cities. Inevitably, England and Singapore may have to follow the path of countries like Australia, South Africa and Nigeria where damages for wrongful arrest can be awarded if it takes place in an unreasonable manner and without good cause. This may be a win-win situation for both ship-owners and mainly cargo claimants. In the meantime, Singapore has the following antidote:

It is clearly not desirable in the wider public interest that really implausible claims be allowed to be indiscriminately amounted with impunity.. Litigants and their solicitors have an overriding responsibility to the courts not to pursue draconian remedies like Anton Pillar orders, mareva injunctions and ship arrests unless they honestly believe with good reason that they have plausible claims"[53]

PETER S K KOH [54]

[53] *The Vasiliy Golovnin*, [2008] 4 SLR at 1045, per V K Rajah JA.

[54] The writer wishes to thank his former pupil master, Mr. Richard Siberry QC (a former deputy judge of the High Court in London) and Mr. Robert Margolis, an admiralty lawyer in Vancouver and a former lecturer at the National University of Singapore for reading this article and his comments. The writer further expresses his gratitude to Mr. Andrew Lee, a Singapore-based English shipping lawyer, for his remarks and advice. The writer taught International Shipping Law to LLM students from the National University of Singapore and New York University. He is also a Visiting Professor at Dalian Maritime University and Shanghai Maritime University.