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FULFILLING THE DUTY OF FULL AND FRANK DISCLOSURE IN ARREST OF SHIPS

Identifying, Consolidating and Presenting Material Facts

The development of Singapore's admiralty jurisprudence has given birth to a duty of full and frank disclosure in the application for a warrant of arrest against a ship. This duty of disclosure obliges an arresting party to identify and present material facts to the court, failing which, the arrest may be set aside and a finding of wrongful damages may be made against the arresting party. The identification, consolidation and presentation of material facts are therefore integral aspects to a successful arrest. This article seeks to provide an exposition on the above aspects, which are integral to the fulfilment of the duty of full and frank disclosure.

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I. Introduction

1 The law regarding the arrest of ships in Singapore is autochthonous and distinct from our English counterparts. The most significant schism lies in the Court of Appeal decisions of *The Vasiliy Golovnin*[1] and *The Rainbow Spring*,[2] which have cemented the requirement for a full and frank disclosure of material facts in the affidavit leading the warrant of arrest ("arrest affidavit"). Concomitantly, the considerations involved in carrying out an arrest locally would also differ from the conduct of an arrest in England. The primary difference would be the need to ensure that the duty of full and frank disclosure is fulfilled.

2 In doing so, it is submitted that the foremost component of fulfilling the duty of disclosure is the proper identification of material facts. In this regard, although there have been a slew of local authorities which have defined and shed light on the test of materiality, it is submitted that the factual matrices of disputes leading to an arrest are invariably limitless and it would take a large volume of case law to

1 [2008] 4 SLR(R) 994 at [83].
2 [2003] 3 SLR(R) 362 at [31]–[33]; the English position as represented in *The Varna* [1993] 2 Lloyd's Rep 253 is not applicable in Singapore.

properly explain and illustrate examples of material facts in all circumstances. Armed with limited case law, arresting parties who have documents at their disposal have to constantly question which are the material documents and facts that have to be included in the arrest affidavit. Failure to do so may result in the arrest being set aside and a finding of wrongful damages against the arresting party. The considerations and aspects involved in the identification of material facts are therefore key to ensuring that the duty of full and frank disclosure is met.

3 Apart from the proper identification of material facts, the consolidation and presentation of such facts are also crucial components of the duty of full and frank disclosure. The consolidation and presentation of material facts not only encompass the way in which the material facts are drafted and presented in the arrest affidavit, but also the manner in which the material facts are delivered at the hearing before the court. It is only when the material facts are conveyed to the court's attention that the duty of disclosure is truly fulfilled. However, as most arrests are conducted on an urgent basis, the arresting party may be pressured to cut corners or to omit certain facts when drafting the arrest affidavit. The processes of identifying and consolidating the material facts may therefore be affected if the arresting party is pressed for time. As such, to ensure that the duty of full and frank disclosure is met, an arresting party must not only make the effort to ensure that the material facts are properly consolidated and presented to the court but he must also be cognisant of the amount of time available to prepare for an arrest.

4 This article therefore serves to explore and shed light on the aspects pertaining to the identification, consolidation and presentation of material facts. In relation to the identification of material facts, the article shall endeavour to provide categories of facts which have been deemed to be material by the courts. It is humbly submitted that the development of such categories may assist an arresting party in identifying and sorting material facts. As for the consolidation and presentation of material facts, the article shall address the process of drafting the arrest affidavit and presenting the material facts at the *ex parte* hearing. Alongside this point, the article shall also discuss the challenges faced by arresting parties in fulfilling their duty of disclosure due to the scarcity of time.

II. Identification of material facts

5 In Singapore, the test of materiality in an application for a warrant of arrest is similar to the test of materiality in an application for an *ex parte* interlocutory injunction[3] or any other application where a duty of full and frank disclosure exists.[4] The failure to disclose material facts in the arrest affidavit may result in the arrest being set aside and a finding of wrongful damages made against the arresting party. A high threshold of disclosure is therefore imposed on prospective arresting parties. The duty falls upon the arresting party to identify and disclose material facts in order to obtain a warrant of arrest. However, the identification of material facts may not be that straightforward as the test of what is material is not prescribed by the Rules of Court[5] ("RoC") or any legislation.

6 The test of whether a fact is material or not was first laid down by the Singapore courts in *The Damavand*[6] and subsequently endorsed by the Singapore Court of Appeal in *The Rainbow Spring*[7] and *The Vasiliy Golovnin*.[8] According to these cases, a material fact is a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made. The apex court in *The Vasiliy Golovnin*[9] went on to expound on the test of materiality as follows:

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

3 This includes freezing injunctions (*Mareva* injunctions) and search orders (*Anton Piller* orders).

4 *The Rainbow Spring* [2003] 3 SLR(R) 362 at [33], where Judith Prakash J (as her Honour then was) observed that "the same test [of materiality] 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".

5 Order 70 rule 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) neither sets out the requirement of full and frank disclosure nor does it shed any light on the definition of "material". It is submitted that it is only logical that the duty of full and frank disclosure is not found in legislation because such a duty was a balancing factor specifically chosen by the Court of Appeal to militate against the drastic remedy of an arrest; see also *The Rainbow Spring* [2003] 3 SLR(R) 362 at [37], where the Court of Appeal selected such a duty because the same was an "important bulwark against the abuse of the process of arrest".

6 [1993] 2 SLR(R) 136 at [30].

7 [2003] 3 SLR(R) 362 at [31]–[33].

8 [2008] 4 SLR(R) 994 at [83].

9 [2008] 4 SLR(R) 994 at [87].

> that could be reasonably ascertained and defences that might be reasonably raised by the defendant …

7 Whilst the purpose of this article is not to provide a critique on the test of materiality, it is humbly submitted that the above test casts an extensive net which labels a wide range of facts as material. First, an arresting party is required to place himself in the objective position of the court to assess whether a particular fact is material. Second, the test is couched in very broad terms which include "relevant" facts and facts which would be "prejudicial or disadvantageous" to the arresting party's case. Third, reasonable defences are deemed material and have to be disclosed as well. Fourth, the test is encumbered by an expansive qualification that a material fact need not result in a different decision being made.

8 Although it is no surprise that the Singapore courts would hold that the test of materiality is general and broad,[10] it is humbly submitted that such a broad test would amplify the pressure faced by an arresting party as he, in preparing for an arrest, would have to consider an eclectic mix of facts to ensure that the threshold of materiality is made. Indeed, *The Vasiliy Golovnin* has ushered in a "pro-owner" era in Singapore[11] where solicitors representing arresting parties tend to tread carefully whilst preparing their arrest papers.

9 Although what is material will depend on the facts and circumstances prevailing in each case,[12] it is submitted that material facts relating to an arrest can be broadly grouped into several non-exhaustive categories. It is humbly submitted that such broad categorisations may provide assistance to an arresting party in sieving out and identifying the material facts in relation to his case. Based on a review of the local cases where the courts made a finding of material non-disclosure, it is submitted that categories of material facts include facts: (a) relating to the invocation of admiralty jurisdiction; (b) which give rise to plausible defences; and (c) the omission of which would mislead the court or misrepresent the circumstances surrounding the arresting party's claim.

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10 See *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [21], where the Singapore Court of Appeal observed that "[a]ny definition of 'materiality' has to be, by its very nature, general"; see also *Poon Kng Siang v Tan Ah Keng* [1991] 2 SLR(R) 621 at [40] where the court held that "'[m]aterial' … does not mean decisive or conclusive".

11 Kendall Tan & Janice Pui, "Key Developments in Singapore Ship Arrest Laws: A Practitioner's Perspective" (2015) 1 Tur Com L Rev 253 at 263.

12 *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [21]; *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [88].

A. Facts relating to invocation of admiralty jurisdiction

10 Before we delve into a discussion of what facts may be material for the purposes of the invocation of admiralty jurisdiction, it is useful to note that the standard of proof for an arresting party to invoke admiralty jurisdiction in Singapore as set out in *The Bunga Melati 5*[13] is not particularly onerous:[14]

> [A] plaintiff has to, when challenged
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> (a) prove, *on the balance of probabilities*, that the jurisdictional facts under the limb it is relying on in s 3(1)(*d*) to 3(1)(*q*) exist; and show *an arguable case* that its claim is of the type or nature required by the relevant statutory provision ('step 1');
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> (b) prove, *on the balance of probabilities*, that the claim arises in connection with a ship ('step 2');
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> (c) identify, *without having to show in argument*, the person who would be liable on the claim in an action *in personam* ('step 3');
>
> (d) prove *on the balance of probabilities*, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ('step 4'); and
>
> (e) prove on *the balance of probabilities*, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ('step 5').
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> [emphasis in original]

11 Notwithstanding the modest standard of proof and the fact that an arresting party need not show a good arguable case on the merits of its claim to establish admiralty jurisdiction, the Court of Appeal cautioned and reminded prospective arresting parties that their obligation to make a full and frank disclosure when applying for a warrant of arrest remains.[15] It is therefore submitted that despite the relatively low threshold of proof, arresting parties should still be cautious of the broad test of materiality as espoused above.

12 The arrest of a ship necessarily involves the invocation of admiralty jurisdiction against the said ship. Pursuant to the High Court

13 [2012] 4 SLR 546.
14 *The Bunga Melati 5* [2012] 4 SLR 546 at [112].
15 *The Bunga Melati 5* [2012] 4 SLR 546 at [113].

Admiralty Jurisdiction Act[16] ("HCAJA"), the invocation of admiralty jurisdiction in an action *in rem* requires a number of elements. First, the arresting party has to bring his claim within the heads of the subject-matter jurisdiction.[17] Second, the claim must arise in connection with a ship ("ship in connection"). Third, the person who would be liable *in personam* ("relevant person") has to be the owner or charterer of the ship in connection when the cause of action arises. Last but not least, the relevant person has to be the beneficial owner of the targeted ship to be arrested ("offending ship") as respects all the shares therein when the action *in rem* is brought.[18]

13 In light of the above, the proper identification of the relevant person,[19] the determination of the relationships between the relevant person, the ship in connection and the offending ship,[20] as well as the identification of the subject matter of the claim,[21] are of paramount importance as these factors decide whether admiralty jurisdiction is invoked.[22] It follows that any facts which would have a bearing on the above matters and which would affect the invocation of admiralty jurisdiction are material and would, for obvious reasons, have to be disclosed.

14 With regard to the proper identification of the relevant person, clear examples can be gleaned from the cases of *The Rainbow Spring*[23] and *The AA V*.[24] In *The Rainbow Spring*, the plaintiffs, who were the charterers of a ship (Rainbow Spring), arrested the said ship, claiming that it was entitled to be indemnified by the defendants, who were the owners of the Rainbow Spring, for damage to cargo carried on board by reason of the defendants' breach of an alleged charterparty between the plaintiffs and the defendants.[25] The court, in deciding whether to exercise admiralty jurisdiction and to issue an arrest warrant, had to consider the issue of who the relevant person was, that is, whether the defendants were a contracting party under the charterparty.[26] The plaintiffs failed to disclose a correspondence indicating that another party was in fact the disponent owner under the charterparty and that

16 Cap 123, 2001 Rev Ed.
17 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ss 3(1)(*a*)–3(1)(*r*).
18 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ss 4(3) and 4(4); see also *The Opal 3 ex Kuchino* [1992] 2 SLR(R) 231 at [10].
19 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) s 4(4).
20 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ss 4(3), 4(4), 4(4)(*a*) and 4(4)(*b*).
21 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ss 3(1)(*a*)–3(1)(*r*).
22 Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 105.
23 [2003] 3 SLR(R) 362.
24 [1999] 3 SLR(R) 664.
25 *The Rainbow Spring* [2003] 3 SLR(R) 362 at [1]–[3].
26 *The Rainbow Spring* [2003] 3 SLR(R) 362 at [33].

the defendants were, at all material times, not a contracting party under the charterparty. The Court of Appeal held that the conclusion of the charterparty was not between the plaintiffs and the defendants and that the failure to disclose the said correspondence constitutes material non-disclosure on the part of the plaintiffs.[27] It is submitted that the disclosure of such a correspondence would have casted serious doubts on the plaintiffs' ability to show the court that the defendants were the relevant person and whether admiralty jurisdiction could be invoked against the ship, Rainbow Spring, in the first place. Accordingly, it is submitted that matters affecting the invocation of admiralty jurisdiction, such as the identity of the relevant person, are material and have to be disclosed.

15 Likewise, in *The AA V*, the plaintiffs failed to disclose several documents which showed that their contract for supply of fuel was entered into with another party as opposed to the defendant shipowners.[28] Where there is clear evidence before the court that a party is not liable *in personam* because he is not a party to the contract sued on, admiralty jurisdiction cannot be invoked.[29] Concomitantly, it is submitted that any such facts or evidence which would have a bearing on the identification of the correct relevant person would be considered material.

16 Turning to the relationship of the relevant person with the ship in connection, s 4(4) of the HCAJA states that the relevant person has to be the owner or charterer of the ship in connection when the cause of action arises.[30] The word "charterer" has been given its ordinary meaning and is not confined to "demise charterer",[31] but encompasses all variants of charterers including time, voyage and slot charterers.[32] It is submitted that any facts or documents which determine, at the time the cause of action arises, whether the relevant person is or is not the owner or charterer of the ship in connection, are material and have to be disclosed. For example, to prove that the relevant person is a charterer of the ship in connection, the charterparty or the recap[33] has to be

27 *The Rainbow Spring* [2003] 3 SLR(R) 362 at [21]–[22].
28 *The AA V* [1999] 3 SLR(R) 664 at [39]–[43].
29 *The AA V* [1999] 3 SLR(R) 664 at [37].
30 See *The Skaw Prince* [1994] 3 SLR(R) 146 at [10]–[14]; see also *The Opal 3 ex Kuchino* [1992] 2 SLR(R) 231 at [10]; *The Permina 108* [1974–1976] SLR(R) 850 at [11].
31 *The Permina 108* [1974–1976] SLR(R) 850 at [16].
32 See Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 121; see also *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 149 ALR 675 and *The Tychy* [1999] 2 Lloyd's Rep 11.
33 See *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 at [20] and [22], where the Court of Appeal held that a charterparty does not have to be reduced into a single written document signed by both parties for it to be upheld as

(*cont'd on the next page*)

disclosed. If an arresting party alleges that the relevant person is a charterer of the ship in connection, but in actual fact the charterparty or any other document states otherwise, the failure to disclose such document will clearly amount to material non-disclosure as the invocation of admiralty jurisdiction is in question.

17 Further, the relevant person must, when the cause of action is brought,[34] be the beneficial owner with respects all the shares in the offending ship. It is trite law that beneficial ownership refers to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship.[35] This means that the relevant person has to be the registered owner of the offending ship[36] at the time the *in rem* writ is issued. The ship register at the port of registry and the Lloyd's Register of Shipping are, in most instances, conclusive proof of true ownership of a ship.[37] The fact that the registered ownership of the offending ship has changed prior to the issuance of the writ may be fatal to the invocation of admiralty jurisdiction. As such, any facts which affect or shed light on the registered ownership of the offending ship are material and will have to be disclosed.[38]

18 It is submitted that in determining whether the relevant person is the owner or charterer of the ship in connection, or in determining if

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a valid agreement and that a fixture concluded in e-mails can contain the terms of the charterparty.

34 The time the cause of action is brought is the time the writ *in rem* is issued, as opposed to the time the writ *in rem* is served or the time the offending ship is arrested; see *The Monica S* [1968] P 741.

35 *The Pangkalan Susu/Permina 3001* [1977–1978] SLR(R) 105 at [9]; *The Skaw Prince* [1994] 3 SLR(R) 146 at [13]; *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [8]; *The Andres Bonifacio* [1993] 3 SLR(R) 71 at [6].

36 See *The Spirit of the Ocean* (1865) 12 L T 239 (Adm) at 240, where Dr Lushington opined that the person who registers the title of a ship will be entitled to the whole benefits of ownership; see also *The Horlock* (1877) 2 P D 243 at 248; see also Graeme Bowtle & Kevin McGuinness, *The Law of Ship Mortgages* (Informa, 2nd Ed, 2001) at para 2.26, where the learned authors opined that until the buyer registers its legal title to the ship, it does not acquire absolute legal title to the ship as the seller can validly dispose of the ship to a third party.

37 *The Kapitan Temkin* [1998] 2 SLR(R) 537 at [7], [10] and [14].

38 In *The Min Rui* [2016] 5 SLR 667 at [37], the court was of the view that documents such as a memorandum of agreement, board of directors' meeting minutes and resolution, powers of attorney, commercial invoices, evidence of payment, executed bill of sale and an executed protocol of delivery and acceptance are evidence which supports the existence of a genuine contract for the sale and purchase of a ship where the registered ownership of a ship will be transferred. If an arresting party is aware and has possession of the above documents, the documents will have to be disclosed as such documents are relevant to the issue of whether the relevant person is the registered owner of the offending ship. The decision in *The Min Rui* has been appealed to the Court of Appeal. However, as at the time of writing, the Court of Appeal has yet to publish its decision.

the relevant person is the beneficial owner of the offending ship, it is useful for the arresting party to pay heed to the principle of separate legal entities.[39] In recent times, shipowners have prudently divided their ships to be owned by one-ship subsidiaries so as to limit liability.[40] Contemporary business models of modern shipping entities tend to encompass several one-ship companies bearing similar names.[41] Charterers may therefore utilise non-shipowning entities to charter ships, whilst keeping their other shipowning entities shielded from liability, thereby ensuring that their fleet is safe from potential arrests. For example, in an owner's claim for hire against a charterer under a charterparty, an owner must ensure that the charterer under the charterparty (the relevant person) and the beneficial owner of the offending ship are the identical legal entity. The uninitiated may overlook a titular difference between the relevant person and the beneficial owner of the offending ship and this may prove fatal to an arrest. As such, it is important for arresting parties to match the identities of the relevant person and the beneficial owner of the offending ship. Failure to do so may cast doubt on the invocation of admiralty jurisdiction and if a warrant of arrest is issued, may lead to a finding of material non-disclosure.

19 Finally, in relation to the subject matter of the claim, it is likewise submitted that any failure to disclose facts which would have a bearing on the invocation of admiralty jurisdiction may lead to a finding of material non-disclosure. For some of the heads of claim under s 3 of the HCAJA, case law has carved out specific criteria or requirements for such claims to succeed. Examples include: (a) the externality criterion in a s 3(1)(*d*) claim;[42] (b) the requirement for a specific ship to be named in a s 3(1)(*l*) claim;[43] and (c) the requirement for a reasonably direct

39 *Aron Salomon v A Salomon and Co Ltd* [1897] 1 AC 22.

40 This is a business practice recognised by the courts; see *The Skaw Prince* [1994] 3 SLR(R) 146 at [19]; see also *The Asean Promoter* [1981–1982] SLR(R) 289.

41 Although s 27(1) of the Companies Act (Cap 50, 2006 Rev Ed) states that the Registrar of Companies must refuse to register a company if the name is identical to the name of any other company or business entities, the courts have made it clear that companies with similar names or companies which share common words would be allowed to register. See *Angkasa Jurutera Perunding Sdn Bhd v Pendaftar Syarikat (Ketua Pegawai Eksekutif, Suruhanjaya Syarikat Malaysia)* [2004] 5 MLJ 421.

42 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) s 3(1)(*d*); see the externality criterion for claims for damage done by ship as set out in *The Rama* [1996] 2 Lloyd's Rep 281 and adopted locally in *The Vinalines Pioneer* [2016] 1 SLR 448.

43 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) s 3(1)(*l*); a contract with no references to a particular ship for the use of goods and materials but leave the shipowner with the choice deciding which of his ships to supply the said goods and materials would fall outside of this provision; see *The River Rama* [1988] 2 Lloyd's Rep 193.

connection between the agreement and the carriage of goods or the use or hire of a ship in a s 3(1)(*h*) claim.[44] It is submitted that if an arresting party is aware of facts which indicate that the above requirements and criteria are not met and that the merits of invoking admiralty jurisdiction under a s 3 claim are in doubt, such facts will be material and have to be disclosed.

20 Notwithstanding the above, facts which have a bearing on the invocation of admiralty jurisdiction are invariably facts which affect the merits of the case. Bearing in mind the relatively modest standard of proof espoused by *The Bunga Melati 5*[45] and that the purpose of disclosure is not to ensure that the arresting party's claim is proved proper at the *ex parte* stage, one can certainly argue that the duty to disclose facts which have a bearing on admiralty jurisdiction is somewhat conflicted with the modest standard of proof at the *ex parte* stage. This leads to a further discussion on the second identified category of material facts raised in this article – whether facts which give rise to defences have to be disclosed.

B. Facts which give rise to plausible defences

21 The aforementioned conflict between the duty to disclose material facts and the modest standard of proof is further complicated by *The Vasiliy Golovnin*'s holding that defences have to be disclosed. The apex court in *The Vasiliy Golovnin* held that an arresting party has a duty to disclose "defences that [may] be reasonably raised by the defendant", but that duty only extends to "plausible, and not all conceivable or theoretical, defences".[46] There was little elucidation on the scope of "plausible defences" and this has led to a rather uncertain state of affairs in a post-*Vasiliy Golovnin* era.[47]

22 Fortunately, the High Court has judiciously considered the scope of "plausible defences" in recent times. First, the court in *The Eagle Prestige*[48] held that the duty to disclose "plausible defences" is

44 High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) s 3(1)(*h*); there must be a reasonably direct connection between the agreement and the carriage of goods or the use or hire of a ship; see *Gatoil International Inc v Arkright-Boston Manufacturers Mutual Insurance Co* [1985] 1 AC 255 where claims for premium payable under a cargo insurance policy were held to not have the necessary connection; see also Toh Kian Sing SC, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2017) at p 69.

45 [2012] 4 SLR 546 at [112].

46 *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [87].

47 Toh Kian Sing SC, "Admiralty Law" (2008) 9 SAL Ann Rev 54 at 56–57 and 59–60, paras 2.13 and 2.21.

48 [2010] 3 SLR 294.

not generally directed at defences to the claim that may be raised at the trial to answer the plaintiff's claim but rather, in a broader perspective, to matters that constitute an abuse of arrest process. Additionally, plausible defences are matters of such weight which may deliver a "knock out blow" to the claim summarily and the omission of such matters at the application for a warrant of arrest would be tantamount to an abuse of process.[49] The court's interpretation is based on the fact that the plaintiff's claim in *The Vasiliy Golovnin* was "really implausible" and unsustainable to the point that the cause of action was frivolous, vexatious and such could be determined summarily on plainly cogent affidavit evidence.[50]

23 Second, the court in *The Xin Chang Shu*[51] astutely agreed with *The Eagle Prestige*'s interpretation of *The Vasiliy Golovnin* and held that an arresting party is not obliged to disclose all the defences which a defendant may reasonably raise at trial. He is only obliged to disclose, *inter alia*, defences of such weight as to deliver a "knock out blow".[52] For example, in *The Xin Chang Shu*, the plaintiff arrested the defendant's vessel on the premise that the defendant was contractually liable to the plaintiff for unpaid bunkers. The plaintiff was, however, two layers removed from the defendant. The plaintiff contracted to supply bunkers to a first bunker supplier who in turn contracted to supply the bunkers to a second bunker supplier, who then contracted to supply the bunkers to the defendant. The first bunker supplier who contracted with the plaintiff went insolvent.[53] In order to make a recovery, the plaintiff decided to claim against the defendant and arrested the defendant's vessel. The plaintiff attempted to rely on its own general terms and conditions to create an alleged agency relationship between the insolvent bunker supplier and the defendant. As it is trite law that a person cannot hold itself out as an agent on behalf of a principal, the plaintiff's sole reliance on its own general terms and conditions to create an alleged agency relationship was held to be legally unsustainable.[54] The court in *The Xin Chang Shu* held that the dismissal of the plaintiff's reliance on its own general terms and conditions to create an agency relationship would unequivocally constitute a "knock out blow" to the plaintiff's claim.[55] Concomitantly, the plaintiff failed to disclose certain facts which would have rendered the agency argument as being unsustainable. For example, the plaintiff knew that the insolvent bunker supplier contracted as a principal and not an agent because the plaintiff

49 *The Eagle Prestige* [2010] 3 SLR 294 at [73] and [84].
50 *The Eagle Prestige* [2010] 3 SLR 294 at [72].
51 [2016] 1 SLR 1096.
52 *The Xin Chang Shu* [2016] 1 SLR 1096 at [48].
53 *The Xin Chang Shu* [2016] 1 SLR 1096 at [7].
54 *The Xin Chang Shu* [2016] 1 SLR 1096 at [73].
55 *The Xin Chang Shu* [2016] 1 SLR 1096 at [82].

had filed a proof of debt against the insolvent bunker supplier and had not mentioned anything about an alleged agency in the said proof of debt. Further, at the *ex parte* hearing, the plaintiff also did not bring the court's attention to correspondences which showed that the defendant actually contracted with the second bunker supplier and not the insolvent bunker supplier.[56] If the plaintiff disclosed the above facts and defences, the unsustainability of the plaintiff's claim would have been apparent during the *ex parte* hearing. There was therefore a "knock out blow" defence to the plaintiff's claim.

24 Notwithstanding the above, the court in *The Xin Chang Shu* further explained that the merits of the arresting party's claim are not generally relevant when obtaining a warrant of arrest, and it must therefore follow that there is generally no duty to disclose defences which affect only the merits of the underlying claim, but not the admiralty jurisdiction of the court.[57] Indeed, this was alluded to by the Court of Appeal in *The Bunga Melati 5*, which confirmed that *The Vasiliy Golovnin* did not intend to introduce a new merits requirement for the invoking of admiralty jurisdiction.[58]

25 It is humbly submitted that the interpretation of a "plausible defence" as a matter which would constitute an abuse of process thereby affecting the admiralty jurisdiction of the court and delivering a "knock out blow" to the arresting party's claim ("knockout blow principle"), corroborates the author's aforementioned argument[59] that facts relating to the invocation of admiralty jurisdiction are material and have to be disclosed. It is submitted that the application of the knockout blow principle to the older cases such as *The Rainbow Spring* and *The AA V* would have resulted in the courts therein reaching the same conclusion, that is, there was material non-disclosure on the part of the arresting party. This is because in those cases, the arresting party failed to disclose matters which would have otherwise shown that the defendant was not the person liable *in personam*. This would have affected the invocation of admiralty jurisdiction and the defendants in those cases could have raised a knockout blow defence resulting in a summary dismissal of the arresting party's claim.

26 In fact, the advent of the knockout blow principle has paved the way for a clearer indication of what facts need to be disclosed in the arrest affidavit. For instance, the existence of an arbitration agreement, which is likely to be irrelevant to the court's discretion to issue a warrant

56 *The Xin Chang Shu* [2016] 1 SLR 1096 at [88].
57 *The Xin Chang Shu* [2016] 1 SLR 1096 at [49].
58 *The Bunga Melati 5* [2012] 4 SLR 546 at [94].
59 See paras 10–20 above.

of arrest, need not be disclosed.[60] This is especially so by reason of s 7(1) of the International Arbitration Act,[61] which specifically grants the court the power to order that a property arrested be retained as security for the satisfaction of any award made on the arbitration. As such, the existence of an arbitration agreement or arbitration proceedings commenced by the arresting party does not affect the invocation of admiralty jurisdiction and is therefore immaterial.

27 Further, pending negotiations for security need not be disclosed. The High Court in *The Evmar*[62] explained that nothing in the RoC requires that matters relating to pending negotiations for security should be stated in the arrest affidavit and that it was precisely because negotiations for security failed which led to the application for an arrest warrant.[63] Moreover, an arresting party is entitled to security to cover his reasonably best arguable case[64] and unless an agreement has been reached, the arresting party is at liberty to proceed with an arrest.[65]

28 In a similar vein, it is humbly submitted that negotiations regarding the settlement of the arresting party's claim need not be disclosed in the arrest affidavit. The arresting party does not have an obligation under the RoC to disclose such negotiations. Further, such negotiations aimed at settlement are likely to be deemed without prejudice and this would exclude such negotiations from being disclosed.[66]

29 Notwithstanding the above, it is imperative to remember that the extent of materiality depends on the facts and circumstances prevailing in the case.[67] As such, it is submitted that one should not assume that all negotiations aimed at settlement need not be disclosed. In the event the arresting party realises through the course of negotiations that certain facts which affect the invocation of admiralty jurisdiction exists (for example, the named defendant is not the relevant person or the registered owner of the ship),[68] such facts would obviously have to be disclosed during the court application. Further, if negotiations

60 See *The Evmar* [1989] 1 SLR(R) 433 at [13]–[14]; see also *The Xin Chang Shu* [2016] 1 SLR 1096 at [51]–[54].
61 Cap 143A, 2002 Rev Ed.
62 [1989] 1 SLR(R) 433.
63 *The Evmar* [1989] 1 SLR(R) 433 at [16].
64 See *The Moschanthy* [1971] 1 Lloyd's Rep 37; *The Polo II* [1977] 2 Lloyd's Rep 115 at 119; see also *The Arktis Fighter* [2001] 2 SLR(R) 157 at [7].
65 *The Evmar* [1989] 1 SLR(R) 433 at [16].
66 See *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739h–740d; see also *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 at [29]–[31].
67 See *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [21].
68 See *The Rainbow Spring* [2003] 3 SLR(R) 362.

had led to a conclusion of a settlement agreement which had compromised the claim, an arrest to enforce the settlement agreement would be an abuse of process[69] as there is no longer a live s 3(1) claim under the HCAJA.

C. Facts the omission of which would mislead the court or misrepresent circumstances surrounding the arresting party's claim

30 As discussed above, the knockout blow defence would invariably encompass matters relating to the invocation of admiralty jurisdiction. It would be, however, presumptuous to assume that the extent of the duty of full and frank disclosure ends at facts relating to the invocation of admiralty jurisdiction. In *The Eagle Prestige*,[70] the High Court made it clear that there were two distinct grounds for setting aside a warrant of arrest. One was due to the lack of *in personam* liability (that is, failure to invoke admiralty jurisdiction) whilst the other was by reason of the non-disclosure of material facts which may have no relation whatsoever to the invocation of admiralty jurisdiction.[71] Further, the Court of Appeal in *The Rainbow Spring* also held that the courts retain an inherent discretion to set aside an arrest for non-disclosure even if the courts have had jurisdiction of the matter and that the procedure in the RoC have been followed.[72]

31 In light of the above, facts relating to the invocation of admiralty jurisdiction are therefore not the be-all and end-all of the duty of full and frank disclosure. It is submitted that facts, the omission of which would mislead the court or misrepresent the circumstances surrounding the arresting party's claim, are also material and have to be disclosed. It is further submitted that the purpose of such a vigorous disclosure regime is to prevent an abuse of process,[73] especially at an *ex parte* arrest application where the presented facts would primarily stem from the applicant's perspective. Further, the danger of an *ex parte* arrest application is that the arresting party is able to mould and present

69 *The Dilmun Fulmar* [2004] 1 SLR(R) 140 at [7] and [9].

70 [2010] 3 SLR 294 at [66].

71 See *The Damavand* [1993] 2 SLR(R) 136 at [30], where it was held that whether a fact is material or not need not have the effect of leading to a different decision being made by the court at the *ex parte* hearing for the warrant of arrest to be issued.

72 *The Rainbow Spring* [2003] 3 SLR(R) 362 at [37].

73 See *The Rainbow Spring* [2003] 3 SLR(R) 362 at [37]; see also *The Genius Star II* [2013] SGHCR 23 at [32]–[33], where the court explained that to limit the ground of non-disclosure of material facts to only facts which go towards proving a lack of admiralty jurisdiction would be a restrictive view of the non-disclosure doctrine that would undermine its purpose as a bulwark against an abuse of process.

the facts in his favour without any objection from other parties. The arresting party is hypothetically in a prime position to colour the facts in his favour and to shade any prejudicial matters from the court's eyes. It is therefore submitted that the primary purpose of the strict disclosure regime has always been to ensure that the facts surrounding the arresting party's claim are presented accurately such that there is no misrepresentation to the court. In the words of the Court of Appeal, an arresting party's duty is to give the court the most complete and undistorted picture of the material facts sufficient for its purpose of making an informed and fair decision on the outcome of the application.[74] This is the reason why the courts have consistently exhorted that a plaintiff at an *ex parte* application should never cherry-pick the facts which are to be disclosed to the court and that the plaintiff must disclose facts which are not only in the defendant's favour but also those which are prejudicial to the plaintiff's case.[75]

32 A good example of how facts which have no bearing to the invocation of admiralty jurisdiction but are, at the same time, material because the omission of the same would mislead the court can be found in *The Genius Star II*.[76] In *The Genius Star II*, the plaintiff and the defendant were in negotiations to complete a purchase order wherein the plaintiff would supply goods and materials to the defendant's ship for her operation and maintenance. Prior to completing the order and upon the defendant's request, the plaintiff agreed that a 2% discount would be given. Based on the agreed 2% discount, the defendant sent a purchase order on 8 February 2013 to purchase the goods and materials at the pre-discounted price of $9,095.43. However, the plaintiff did not render an invoice for 98% of $9,095.43. Instead, the plaintiff rendered seven invoices for the erroneous sum of $9,586.73, which was subsequently reduced to $9,101.43. Such invoices were only sent by the plaintiff and received by the defendant in April 2013. Not only did the plaintiff fail to apply the 2% discount as agreed between the parties, the plaintiff began charging a 2% late payment interest. The defendant attempted to seek clarification on the 2% discount and the 2% late payment interest from the plaintiff and even stated that it would effect payment immediately if the 2% discount was given. However, the plaintiff merely replied that it was entitled to charge late payment interest and did not address the issue of the 2% discount.[77]

33 The above facts were not included in the plaintiff's arrest affidavit. Instead, the only correspondence exhibited in the arrest

74 *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [91].
75 *The Eagle Prestige* [2010] 3 SLR 294 at [65]; *The Genius Star II* [2013] SGHCR 23 at [24].
76 [2013] SGHCR 23.
77 *The Genius Star II* [2013] SGHCR 23 at [7]–[9].

affidavit was a single e-mail from the plaintiff to the defendant wherein the plaintiff demanded for payment, failing which the plaintiff's rights to take action against the owner of the ship would be reserved. The court found that the chain of e-mails between the plaintiff and the defendant concerning the discount and the wrongly incurred sums were material and should have been disclosed in the arrest affidavit. The court also found that merely exhibiting a single e-mail wherein the plaintiff made a demand for payment paints a picture that the defendant simply refused to pay the entire sum without offering any explanation, and that the defendant had never replied to any of the plaintiff's e-mails and reminders asking for payment.[78] The court explained that the plaintiff's duty is to disclose all material facts so that the court could have a full picture in mind when deciding whether or not to exercise its discretion.[79] The disclosure of the additional e-mails would have given the court a more balanced view of the plaintiff's claim and the court would have been aware that the defendant was still in the process of clarifying the terms of payment as the defendant wanted to ensure that it received what it was entitled to under the agreement.

34 In addition to the plaintiff's failure to disclose the e-mails, the court also found that there was a positive misstatement in the plaintiff's arrest affidavit. The plaintiff's arrest affidavit had stated that up to the date of the hearing, the defendant, its servants and agents had not given any indication on payment.[80] However, it was apparent from the e-mails between the parties that the defendant had clearly attempted to enquire about the late payment interest as well as the discount.[81] The court therefore found that the abovementioned statement in the plaintiff's arrest affidavit was not only untrue but was a positive misstatement which had misled the court.[82]

35 At this juncture, it would be useful to reiterate that although the arresting party has no obligation under the RoC to disclose negotiations in relation to the claim, the extent of materiality depends on the facts and circumstances prevailing in the case.[83] It is submitted that the case of *The Genius Star II* is a prime example of how negotiations between parties have to be adequately disclosed to ensure that the court obtains a complete and undistorted picture sufficient for its purpose of making an informed and fair decision.

78 *The Genius Star II* [2013] SGHCR 23 at [22].
79 *The Genius Star II* [2013] SGHCR 23 at [23].
80 *The Genius Star II* [2013] SGHCR 23 at [27].
81 *The Genius Star II* [2013] SGHCR 23 at [7]–[9].
82 *The Genius Star II* [2013] SGHCR 23 at [27]–[28].
83 See *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [21].

36 In light of the above, apart from paying attention to the facts which would affect the invocation of admiralty jurisdiction, an arresting party must be careful not to embellish the facts in his favour or to deliberately conceal any disadvantageous or prejudicial matters. Whilst the concept of disclosing prejudicial facts and providing the court with a balanced view may be surprising to arresting parties from foreign jurisdictions where the threshold of an arrest is lower, it falls upon the Singapore solicitors to advise and explain that the requirements for an arrest in Singapore are unique and different. More importantly, it is imperative to highlight that in Singapore, an arrest is not as of right[84] and that it is now trite law that the arresting party owes a duty of full and frank disclosure to the courts. It is submitted that in doing so, emphasis should be placed on: (a) facts relating to the invocation of admiralty jurisdiction; (b) plausible defences which may have a knockout blow effect on the arresting party's claim; as well as (c) any facts the omission of which will mislead the court or misrepresent the arresting party's claim. Notwithstanding the above, the analysis of what is material is not exhaustive and will invariably differ in each case. After all, the courts have consistently exhorted that the assessment of whether a fact is material or not must be made on a case-by-case basis.[85] That said, it is submitted that an approach consisting of common sense[86] and candidness is really all it takes to ensure that the duty of disclosure to the court is met. It is further submitted that such common sense would dictate that it is always preferable to err on the side of more disclosure rather than less.[87]

III. Consolidation and presentation of material facts

37 An arresting party, in correctly identifying the material facts, has only partially fulfilled his duty of disclosure. If the material facts are not properly consolidated and coherently presented to the court, the duty of disclosure will not be considered fully satisfied. In this regard, facts and evidence are presented to the court at interlocutory proceedings via affidavits. At the hearing, oral submissions can further draw the court's attention to the material facts which the court should take note of. As such, two integral components to the fulfilment of the duty of disclosure are the drafting of the arrest affidavit and the deliverance of the material facts via submissions at the *ex parte* hearing. These components require time and effort, albeit the former is usually a scarce resource as arrests are usually conducted on an urgent basis. It is

84 See *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [83]; see also *The Rainbow Spring* [2003] 3 SLR(R) 362 at [32].
85 *The Xin Chang Shu* [2016] 1 SLR 1096 at [54].
86 *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [88].
87 *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [88].

submitted that the preparation of the arrest affidavit, the submissions for the *ex parte* hearing and, ultimately, the duty of disclosure should never be compromised by the want of time.

38 This section of the article shall first elaborate on the process of drafting the arrest affidavit and presenting the material facts at the *ex parte* hearing. In this regard, emphasis shall be placed on the fact that material facts should not be merely buried in the exhibits of the arrest affidavit. Instead, the duty of disclosure is truly fulfilled only if the courts' attention has been appropriately drawn to such material facts. The article shall then move on to address the challenges faced by arresting parties in fulfilling the duty of disclosure due to the limited time available to consolidate the material facts. In particular, the article proposes that to fulfil the duty of disclosure, solicitors of arresting parties should be well cognisant of the amount of time available to prepare for an arrest so that they can take the necessary steps to seek clarification on any documents or issues in relation to the material facts. Finally, the article shall address the issue of whether the duty of disclosure will be compromised if solicitors depose the arrest affidavit under extraneous circumstances during an urgent arrest.

A. Preparation of the arrest affidavit and the ex parte *hearing*

39 The process of consolidating and presenting material facts include the drafting of the arrest affidavit and the deliverance of the material facts via oral submissions at the *ex parte* hearing. As for the drafting of the arrest affidavit, it goes without saying that court documents such as affidavits must be prepared with diligence and reasonable skill.[88] Such is the same for the drafting of the arrest affidavit.[89] The arrest affidavit also has to comply with the requirements under O 41 of the RoC and the Supreme Court Practice Directions.[90]

40 Most importantly, there has been judicial sentiment that the presentation of the material facts in the arrest affidavit must be in an organised form to enable the court to exercise its discretionary power on a legal and reasonable basis.[91] Should there be any false or incorrect

88 See Steven Chong SC, "Advocacy in Interlocutory Applications" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC, Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) at pp 40–48, regarding general techniques and strategies in drafting affidavits.

89 See O 70 rr 4(3) and 4(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) for the basic requirements of what the arrest affidavit is to entail.

90 See O 41 rr 1 and 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) as well as Pt VI of the Supreme Court Practice Directions (2013) regarding the necessary form and contents of an affidavit in general.

91 *The H156* [1999] 2 SLR(R) 419 at [20].

statements made in the arrest affidavit, it is the duty of the arresting party to correct it and to do so promptly and frankly.[92] Deponents of the arrest affidavit should attach the greatest importance to their oath and when they find that they have made a false statement on oath, where inadvertently or not, they should be at pains to correct it.[93] The mere acknowledgement of errors in a later affidavit after the *ex parte* hearing may be frowned upon by the court.[94]

41 The disclosure of material facts without more or devoid of the proper context is in itself plainly insufficient to constitute full and frank disclosure.[95] In particular, the material facts must be presented to the court so as to ensure that the court receives the most complete and undistorted picture of the material facts. It is inevitable that at times, the arrest affidavit would be voluminous due to the complexity of the matter and the sheer number of documents. However, the filing of a voluminous affidavit without bringing the court's attention to a particular document would mean that the document is not disclosed.[96] Similarly, if there is any materiality attached to a particular document, an exposition of the same should be stated in the arrest affidavit. The material facts which stem from that document therefore have to be stated in the text of the arrest affidavit. It is insufficient to merely disclose the document as an exhibit without stating the material facts in the arrest affidavit.[97] An arresting party cannot smuggle documents into the arrest affidavit via the exhibits and, subsequently, upon being challenged with material non-disclosure, cry foul and allege that all the material facts were in the exhibits.[98] It is submitted that the current authorities on the above matter are clear and that any such argument is

92 *The Nordglimt* [1988] 1 QB 183 at 187–188.

93 See *Myers v Elman* [1940] AC 282, where it was held that a solicitor who has innocently filed an affidavit which he discovers to be false owes a duty to the court, if he continues to act as solicitor, to put the matter right at the earliest moment.

94 *The Nordglimt* [1988] 1 QB 183 at 188.

95 *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [91].

96 See *Intergraph Corp v Solid Systems CAD Services Ltd* [1993] FSR 617 at 625, where Baker J observed that "to present a judge with 600 pages of material on an *ex parte* application is coming a bit near abuse" and "unless the document is presented to the eyes and/or the ears of the judge, it is not disclosed"; see also Mark S W Hoyle, *Freezing and Search Orders* (Informa, 4th Ed, 2006) at para 5.18; see also *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [92] and [94].

97 See *National Bank of Sharjah v Dellborg* [1993] 2 Bank LR 109 at 112, where Lloyd LJ observed that "the place to disclose the facts, both favourable and adverse, is in the affidavit and not in the exhibits"; see also *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437; see also *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [93] and [94].

98 See *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [95], where the Court of Appeal was clearly unimpressed by an arrest affidavit which had 400 pages of exhibits but only 11 pages of narrative text which was scant of any relevant facts.

not only doomed to fail but is likely to be met with opprobrium from the court.

42 Likewise, at the *ex parte* hearing, it is submitted that the deliverance of submissions should be focused on bringing the court's attention to the material facts identified. Many learned practitioners have opined that even in ordinary interlocutory applications, references to affidavits to introduce the facts to court should be done when appropriate and necessary. How this is done and the degree of detail that is required will depend on the particular cause of action and the particular facts involved.[99] As the nature of an application to obtain a warrant of arrest involves the duty of full and frank disclosure, it is therefore without doubt that solicitors have to make constant references to the affidavits to introduce the material facts and to draw the court's attention to them. In the event the arrest affidavit is voluminous and laden with exhibits, care must be taken to point out with precision the material facts.[100] It has been held that if there is any room for doubt as to whether the court at the *ex parte* hearing has only seen the body of the arrest affidavit and not the exhibits, the onus will be on the solicitor to seek clarification[101] and to ensure that the court is directed to the material facts in question. The courts have emphasised that in an *ex parte* application for a drastic remedy, the applicant must ensure that "all which should be seen by the court is in fact seen".[102]

43 Some learned practitioners have also opined that contrary to popular practice, effective advocacy does not consist of a recitation of the facts from the affidavits and conducting a mini-tutorial on the applicable legal principles from the authorities.[103] It has also been suggested that an advocate who does this will be nothing more than a "mouthpiece".[104] However, it is humbly submitted that as the law makes it clear that the onus is on the solicitor to ensure that the court is properly drawn to and apprised of the material facts,[105] solicitors should attempt to keep close to the words and exhibits of the arrest affidavit.

99 See Steven Chong SC, "Advocacy in Interlocutory Applications" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC, Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) at p 55.

100 See *Intergraph Corp v Solid Systems CAD Services Ltd* [1993] FSR 617 at 625.

101 *The Vasiliy Golovnin* [2006] SGHC 247 at [40].

102 *The Vasiliy Golovnin* [2006] SGHC 247 at [40]; the Singapore Court of Appeal endorsed this point in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [99].

103 See Steven Chong SC, "Advocacy in Interlocutory Applications" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC, Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) at p 57.

104 See Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis Butterworths, 2nd Ed, 2003) at p 504.

105 *The Vasiliy Golovnin* [2006] SGHC 247 at [40]; *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [99].

Paraphrasing words from the body and exhibits of the arrest affidavit may arguably lead the court to a wrong impression or understanding of the material facts. It is submitted that to ensure that the duty of disclosure is fulfilled, solicitors should always err on the side of caution.

44 Out of an abundance of caution, it is humbly suggested that a solicitor obtaining a warrant of arrest should be accompanied by an aide to take notes of evidence at the *ex parte* hearing. To evince contemporaneity, these notes of evidence should be affixed with a date and time stamp upon the solicitor's return to his office. Although the court's notes of evidence are available via e-Litigation upon filing a request and a payment of a small fee, it is submitted that it would be prudent to have two sets of notes of evidence. In the event the opponents challenge the arrest by raising an allegation of non-disclosure, the arresting party would be better protected as there would be sufficient material evidencing the matters disclosed at the *ex parte* hearing. It is submitted that the above suggestion would arguably assist the arresting party in maintaining his position that the duty of disclosure has been rightfully fulfilled at the *ex parte* hearing.

B. Challenges faced by arresting parties due to scarcity of time

45 Arrests and the preparations thereof usually occur on an urgent and unexpected basis.[106] Within such short time frames, arresting parties would not only need to urgently peruse documents and expeditiously identify material facts but also embark on the necessary preparations for the hearing. Time is likely to be a scarce resource when it comes to most arrests and in face of such a challenge, arresting parties may resort to cutting corners when identifying, consolidating or presenting the material facts. Notwithstanding the existence of such pressures, it is submitted that the standard of consolidating and presenting the material facts should never be compromised by any scarcity of time. An arresting party should never allow the rarity of time to prevent him from properly fulfilling his duty of disclosure to the court.

46 It is therefore submitted that it is vital for arresting parties to be cognisant of the amount of time available to prepare for an arrest. Such time arguably runs from the moment the solicitors are instructed, to the time when the ship calls in Singapore. Realistically, it cannot be said how long the preparations of an arrest will take place as this will greatly

106 See *The Chem Orchid* [2016] 2 SLR 50 at [48], where the Singapore Court of Appeal agreed that ship arrest can sometimes and, indeed, may often take place under urgent conditions, with the ship spending only a fleeting moment within the waters in Singapore.

differ on a case-by-case basis. However, it is submitted that arresting parties should at least be conscious of whether such time presents a reasonable opportunity available to arrest the ship. It is further submitted that arresting parties can take dressing from cases which considered an extension of the limitation period for collision claims under the Maritime Conventions Act 1911.[107] This is because one of the factors as to whether an extension of the limitation period will be granted is whether the plaintiff has reasonable opportunity of arresting the defendant ship.[108]

47 In *The Orinoco Star*,[109] one of the issues before the court was whether 16 hours was a sufficient duration to afford the plaintiff a reasonable opportunity to arrest a ship.[110] The evidence showed that the ship had arrived in Singapore at 6.59pm on a Monday evening and had left Singapore at 11.00am the next morning. Although there was no evidence as to when the plaintiff was aware of the ship's arrival on Monday evening, the court was prepared to accept that there was no reasonable opportunity for the plaintiff to arrest the ship.[111] On the other hand, in the case of *The Berny*,[112] the court found that a claimant had a reasonable opportunity to arrest one of the defendant's ships as the claimant would have learned of the said ship's calls to port between two and six days before the ship was scheduled to leave.

48 In view of the above authorities, having less than 16 hours' notice, especially when such notice was first known by the arresting party after office hours, may arguably be too little time to prepare for an arrest. It is humbly submitted that arresting parties should ensure that there is always enough buffer time available such that the preparations for the arrest can be completed. This is especially so in light of the strict disclosure regime in Singapore, which requires solicitors to obtain a full picture of the arresting party's claim. Practically speaking, preparations for an arrest are not as simple as the solicitors simply receiving instructions and documents from the arresting party. It is submitted that some leeway must be catered to allow for the clarification of facts and the request of any further documents. This is to ensure that the arresting party's claim is properly reviewed, prepared and presented to the court at the *ex parte* hearing. Only then can the duty of disclosure be properly fulfilled.

107 Maritime Conventions Act 1911 (Cap IA3, 2004 Rev Ed) s 8(3)(*b*).
108 Maritime Conventions Act 1911 (Cap IA3, 2004 Rev Ed) s 8(3)(*b*).
109 [2014] SGHCR 19 at [44].
110 *The Orinoco Star* [2014] SGHCR 19 at [40].
111 *The Orinoco Star* [2014] SGHCR 19 at [44].
112 [1977] 2 Lloyd's Rep 533 at 547–548.

49 The urgent nature of an arrest and the scarcity of time may also lead to further predicament. In the event the arresting party is based overseas and if an arrest takes place outside of office hours, the arresting party may be unavailable to depose the arrest affidavit. Further, a notary public may also be unavailable to administer oaths in testimony of the arrest affidavit. Under more pressing circumstances, especially when an arrest is to take place over the weekend, it may also be difficult to secure a notary public to administer oaths. Under the pressures of time, can and should the arresting party's solicitors depose the arrest affidavit? Would this have any bearing on the duty of disclosure?

50 Generally, the court frowns upon solicitors deposing affidavits on behalf of their clients for the following reasons. First, solicitors are officers of the court and if they identify themselves not with the case or the client, they can unconsciously or consciously shape the evidence to favour their case and client.[113] Further, by deposing the arrest affidavit, it is arguable that the solicitor is, to a certain extent, personally assuming the duty of full and frank disclosure on behalf of the applicant. This is because the Singapore court has warned that in an *ex parte* application, it is inevitable that the court will be relying on both the applicant and his solicitor to act in good faith and to present all material facts to the court. As such, if a solicitor deposes the arrest affidavit for the applicant, the solicitor is to a certain extent, assuming the mantle of an applicant and taking on the duty of disclosure.[114] In the event allegations of material non-disclosure are made, such allegations may be fired directly at the solicitor. Prudency dictates that solicitors should conduct themselves in a manner so as to avail themselves of such predicament.

51 Second, the evidence in the arrest affidavit, if deposed by a solicitor, may be deemed as hearsay because the solicitor may not have personal knowledge of the facts.[115] It is submitted that the court's aversion for affidavits deposed by solicitors is stronger in an *ex parte* application where the presentation of facts is a central feature to the hearing. For example, the court may not give any weight to an affidavit deposed by a solicitor in support of an *in rem* default judgment

113 *The Evpo Agsa* [1992] 1 SLR(R) 662 at [16].

114 See *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [21], where the Singapore Court of Appeal held that it is trite law that the duty of full and frank disclosure is on the part of the *applicant*; see also *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [1999] SGHC 253 at [20], where G P Selvam J stated that in an *ex parte* application, the court inevitably relies on *the applicant and his counsel* to act in good faith and state all points which can be fairly made against the application. It is submitted that if a supporting affidavit, which is supposed to be deposed by the applicant, is instead deposed by his solicitor, the solicitor to a certain extent will be personally assuming the duty of full and frank disclosure.

115 *The AA V* [1999] 3 SLR(R) 664 at [8].

application because under such an application, the facts have to be properly proved in accordance with the rules of evidence.[116] Similarly, the court in hearing an *ex parte* application for an arrest warrant may not give any weight to the facts in the arrest affidavit because it may appear doubtful whether the solicitor who deposed the arrest affidavit had personal knowledge of the facts. As such, it is arguable that the court may not deem that the duty of disclosure is properly fulfilled if the arrest affidavit is deposed by a solicitor instead of the arresting party.

52 Although there is great risk and aversion against solicitors deposing the arrest affidavit, it is submitted that there is no rule or authority which expressly prohibits such an act. In fact, there have been instances where a solicitor's arrest affidavit was accepted as evidence for the *ex parte* hearing which led to a warrant of arrest being issued and the ship being arrested.[117] In fact, the Singapore High Court has acknowledged that the conduct of the arrest of ships may carry an element of urgency especially when solicitors act for a foreign client.[118] The court also stressed that the solicitor, in deposing the arrest affidavit, had to explain why the applicant or someone with personal knowledge of the facts was unable to depose the arrest affidavit. The solicitor also had to satisfy the court of the urgency of the matter.[119] It is submitted that the above observations by the High Court implicitly endorses the act of solicitors deposing the arrest affidavit during pressing circumstances. It is further submitted that such pressing circumstances

116 *The Ocean Jade* [1991] 1 SLR(R) 354 at [82]–[85]; a plaintiff cannot be said to have properly proved his claim in default proceedings by way of an affidavit filed by a person other than himself or by a person who has no personal knowledge of the facts in the affidavit. By reason thereof, affidavits deposed by solicitors would be given little weight in such proceedings; see also O 70 r 20 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

117 See *The AA V* [1999] 3 SLR(R) 664 at [6], where the arrest affidavit was affirmed by the solicitor having conduct of the action on behalf of the plaintiff; see also *The Inai Selasih* [2005] 4 SLR(R) 1 at [4]–[5], where the arrest affidavit was affirmed by a legal associate of the plaintiff's law firm. Although there was a finding of material non-disclosure and wrongful damages in both *The AA V* and *The Inai Selasih*, it does not follow that both cases stand for authorities which bar solicitors from deposing an arrest affidavit. Both *The AA V* and *The Inai Selasih* did not make any ruling on the above issue. Indeed, in both cases, the very fact that an application for wrongful damages and an application to set aside the warrant of arrest were made shows that the court was satisfied with the solicitor's arrest affidavit at the *ex parte* stage and that warrants of arrest were issued so that the respective ships could be arrested.

118 See *The AA V* [1999] 3 SLR(R) 664 at [8], where Judith Prakash J (as her Honour then was) acknowledged the urgency in arrests by stating, "[w]hilst in some applications for arrest the urgency of the situation and the fact of acting for a foreign client might leave the solicitor concerned no choice, this was not the situation here. There was no good reason why the affidavit leading to the warrant could not have been affirmed by someone with personal knowledge of the facts".

119 *The AA V* [1999] 3 SLR(R) 664 at [8].

would include *inter alia*, when the: (a) arrest is conducted outside of office hours or during weekends and public holidays; (b) window period between the time of receipt of instructions and the time the ship calls at Singapore is short; (c) ship unexpectedly registers to call at Singapore under short notice (within 24 hours);[120] and (d) solicitor is acting for a foreign client and a notary public cannot be sourced. In light of the above, whilst there is no rule or authority barring solicitors from deposing the arrest affidavit, prudency dictates that in order to ensure that the duty of disclosure is properly fulfilled, the extraneous circumstances which warrant the solicitor to depose the arrest affidavit in lieu of the arresting party must not only be included inside the text of the arrest affidavit but must also be relayed to the court at the *ex parte* hearing.

IV. Conclusion

53 The robust expansion of Singapore's jurisprudence has driven the law in relation to the arrest of ships in a fresh direction. Whilst we should be proud that admiralty law in Singapore has successfully sailed to new horizons, we should, nonetheless, be mindful of any freshly arisen intricacies in relation to the duty of disclosure. This is especially so because the duty of disclosure is an integral component to any arrest of ships in Singapore.

54 In conclusion, it is submitted that in the fulfilment of one's duty of disclosure, an arresting party's focus should be primarily fixed on the proper identification of material facts. The failure to identify material facts properly might lead to a setting aside of the arrest. Not only would the arresting party's efforts come to naught, the arresting party might also be made to answer a claim for wrongful damages. In identifying material facts, it is also submitted that emphasis should be placed on: (a) facts relating to the invocation of admiralty jurisdiction; (b) plausible

120 Generally, ships calling within the port limits of Singapore have to provide early notice to the Maritime Port Authority of Singapore ("MPA"). Marinet, which is an online database maintained by MPA, provides a ship arrival list based on 6, 12, 24, 48 and 72 hours' intervals. However, in practice, it is possible for ships to call in Singapore by giving less than six hours' notice. See, *eg*, PSA Marine Ltd's (which is a wholly owned subsidiary of PSA International Pte Ltd) General Operating Conditions at https://www.psamarine.com/wp-content/uploads/2017/07/PSAM-General-Operating-Conditions-Updated-1-Jul-2017-1.pdf (accessed 14 July 2017), which provides that pilotage services for a ship calling in Singapore can be confirmed four hours before the ship arrives. As such, it is possible for a ship to call unexpectedly at Singapore under short notice; see also *The Berny* [1977] 2 Lloyd's Rep 533 at 547–548, where the English court found that the plaintiff could only learn of the ship's call into port one day before the ship was scheduled to leave notwithstanding that the ship was placed on shipwatch on the Lloyd's List.

defences which might have a knockout blow effect on the arresting party's claim; as well as (c) any facts the omission of which would mislead or misrepresent the arresting party's claim to the court. Further, whilst there is no perfect recipe to ensure that the duty of disclosure is fulfilled, it is submitted that the essential ingredients to the fulfilment of such a duty include *inter alia* the use of common sense and adopting a candid attitude before the court. Such candidness not only consists of presenting the claim to the court in a complete and undistorted manner but also to ensure that the material facts are sufficiently alluded to in the text of the arrest affidavit and that the court's attention is drawn to them at the *ex parte* hearing.

55 In addition, an arresting party should be mindful of the time available to prepare for the arrest. If time is limited, a solicitor may depose the arrest affidavit. However, such an option should generally not be adopted unless there are truly pressing circumstances such as the urgent arrival of the vessel or if the arrest has to be conducted outside office hours. These extraneous circumstances should also be properly communicated to the court via the text of the arrest affidavit and at the *ex parte* hearing to ensure that the duty of disclosure is fulfilled.