

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NUMBER: GDAHAD 2017/0003

Admiralty Claim in Rem against the ship M.V “GLORIOUS”

BETWEEN:

ALSTON KENT

Claimant/Respondent

and

**THE OWNERS OF THE SHIP
M.V “GLORIOUS”**

Defendant

**KIM CEASAR
JOMO DE COTEAU**

Applicants

Appearances:

Anselm Clouden of counsel for the Claimant/Respondent

Derick Sylvester and Cathisha Williams of counsel for the Defendants/Applicants

2017: November 10
2018: January 10

JUDGMENT

[1] **GLASGOW, J:** On 30th October 2017, the Applicants filed an application supported by affidavit in which they seek the discharge of an arrest warrant issued against the vessel “Glorious” (“Glorious”). The grounds of the application are twofold – (1) that the claimant, Alston Kent (“Mr. Kent”) failed to disclose material

information to the court granting the arrest warrant. The arrest warrant must be discharged for the alleged material non-disclosure; and (2) the claim and the resulting arrest warrant is of no effect since the claim is one in personam and not a claim in rem.

[2] Mr. Kent obtained the arrest warrant following the filing of a claim against Glorious. The claim, as amended, sought relief in the form of –

- (1) A declaration that Mr. Kent is the owner of 32/64 shares in Glorious;
- (2) An order for possession of Glorious;
- (3) An order for an account to be taken of the vessel's earnings and disbursements;
- (4) Judgment against Glorious in the sum of \$120,000.00;
- (5) Interest;
- (6) An order for appraisal and sale of Glorious;
- (7) Further and other relief; and
- (8) Costs

[3] Mr. Kent's complaint on his claim is that he sent or gave money to his nephew, Jomo De Coteau to purchase Glorious further to a verbal agreement that he would be part owner of the vessel. His claim avers that the money that he gave to Mr. De Coteau was used to purchase and outfit Glorious. However, besides a few payments made by Mr. De Coteau, he has not received the benefit of his investment or an account of the profits earned from Glorious. Additionally, Mr. De Coteau has refused to hand over possession of the vessel to him.

[4] Initially, Mr. De Coteau applied to the court on 23rd October 2017 for the vessel to be admitted to bail. However, 7 days later on 30th October 2017, Mr. De Coteau and Mr. Kim Caesar ("the applicants") who are registered owners of Glorious, made the discharge application.

The Applicants' Arguments for the Discharge of the Arrest Warrant

Material Non-disclosure

[5] In respect of material non – disclosure, the applicants allege that Mr. Kent failed to disclose on his request for the arrest warrant that –

- (1) They are the registered owners of Glorious;
- (2) They obtained a loan from Republic Bank for the purchase of Glorious which loan was used to cover the full purchase price for the vessel. Lands belonging to the applicants' parents, a guarantee from their father and a life insurance over the life of Mr. Ceasar were given to the bank as the security for the loan; and
- (3) The sum of \$35,000.00 which Mr. Kent alleged to have been part of the sums given to Mr. De Coteau was in fact a deposit made by Mr. Kent to his bank account and not a withdrawal therefrom.

[6] The above stated facts are said to be in the knowledge of Mr. Kent and should have been disclosed to the court. The court ought to vacate the arrest warrant because of Mr. Kent's failure to make the necessary disclosure. In support of these contentions, the applicants rely on the **Rainbow Spring**¹ to make the point that the duty of disclosure applies to arrest warrants in admiralty proceedings. The applicants further argue that CPR 70.9 which specifies the procedure to be followed to obtain an arrest warrant for a vessel is identical in material parts to Order 70, rule 4 of the Singaporean rules of court. The **Rainbow Spring** is a decision of the courts of Singapore.

[7] The duty to make a full and frank disclosure of all material facts in cases of an application for a warrant of arrest of a ship is said to be underscored by the fact that the application is indeed one for an order made ex parte. In the circumstances, *'the ordinary rules of disclosure with regards to such applications*

¹ [2004] 3 LRC 276

apply.² The applicants rely on the pronouncements of Donaldson J in **Bank Mellat v Nikpour**³ to the effect that –

This principle that no injunction obtained ex parte shall stand if it had been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we shall know it; it is trite law. But happily we have been referred to a dictum of Warrington LJ in R (on the application of Princess Edmond de Polignac). v Kensington Income Tax Commissioners [1917] 1 KB 486 at 509. He said:

'It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. This is perfectly plain and requires no authority to justify it.'

[8] These views were echoed by Gibson LJ in **Brink's Mat Ltd v Elcombe**⁴ to the effect that

The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and

² Applicants' submissions filed on 24th November 2017 at para. 8

³ [1982] Com LR 158

⁴ [1988] 1 WLR 1350

Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

[9] The material facts said to be undisclosed on the application for the arrest warrant or falsehoods therein are –

(1) The allegedly false assertion that the claimant is the owner of 32 shares in Glorious and that he contributed US \$17,228.00 towards the purchase price of US \$53,000.00. The applicants say that the vessel is in fact registered in the name of the applicants and as such Mr. Kent is not the owner of 32 shares in Glorious;

(2) The purchase of the vessel was fully financed by a loan obtained by the applicants from Republic Bank. The loan was secured in the manner stated above in this ruling.

[10] The applicants submit that while the court retains the discretion to discharge the arrest warrant for non – disclosure, it is not every non – disclosure that may trigger an automatic discharge of the arrest warrant. The applicants again rely on the learning in the **Brink's Mat** case where their Lordships instructed that –

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the application or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the application to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': per Lord Denning MR in Bank Mellat v Nikpour [1985] FSR 87, 90. The court has discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on term:

'When the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed' per Glidewell LJ in Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc [1988] 1 WLR 1337, p 1343H-1344A.

[11] The applicants' further submit that⁵—

Whether the fact is relevant to the making of the decision whether or not to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to the different decision being made.

[12] Applying the recited dictum in **The Damavand** to the present facts, the applicants argue that the original claim filed before the arrest warrant was obtained should be scrutinised by the court as this was the material on which the court relied to issue the warrant of arrest. In this regard, the applicants present section 18 of the Shipping Act, Cap 303 (the Act) as the basis for their claim that Mr. Kent is not the owner or part owner of the Glorious. The applicants' submission is that section 18 of the Act⁶ -

⁵**The Damavand [1993] 2 SLR 717 at 731**

⁶ Supra, note 2 at para. 20

Provides for the registration of fishing vessels, like the subject ship and that the property in a registered ship shall be divided into sixty – four (64) shares. Thus only the registered owner can hold shares in the vessel. The inference to be drawn from the registration certificate in the name of Jomo De Coteau and Kim Caesar ... is that they are the joint owners and the holders of 64 shares in the ship.

- [13] The applicants ask the court to find that in the face of the state of the registration of Glorious, the statement on Mr. Kent's claim that he is the owner to the extent of 32/64 shares is materially false. The applicants' disclosure of the mortgage raised to purchase the vessel also serves to demonstrate that Mr. Kent's claim that he contributed to the purchase price is also a material falsehood. The argument is also made that in the original claim which would have been read by the registrar in order to grant the warrant of arrest, Mr. Kent did not seek relief for a declaration of ownership or beneficial ownership in or possession of the vessel. When the registrar read the original claim she would have formed the view that Mr. Kent *'was a registered owner of the ship, having shares in and having contributed to the purchase of the same, and that these facts were the bases for his action for an account of profits and for the sale of the ship.'*⁷ The registrar's belief would have been based on Mr. Kent's entirely false claim that he owns 32/64 shares of Glorious. The applicants' view is that if the registrar was informed that Mr. Kent was not a registered owner of Glorious then some clarification would have been sought as to the basis for the request for the arrest warrant since the claim is neither one for possession nor ownership of the vessel. Alternatively, the arrest warrant may not have been granted. The information as to the acquisition and ownership of Glorious was therefore crucial or extremely relevant to the grant of the arrest warrant. Mr. Kent could not be heard to say that he was unaware of this information and as such the failure to disclose the same is not innocent. The non-disclosure of this information is accordingly sufficient to justify a discharge of the arrest warrant.

⁷ Ibid at para. 23

[14] The applicants also posit that ‘even where with full disclosure, the warrant of arrest may have been granted, non-disclosure may still result in the setting aside of the said warrant.’⁸ The judgment of the court in **The Andria now renamed the Vasso**⁹ is presented as authority for this posture. In that case the applicant sought a warrant of arrest of a ship as security for an award in arbitration proceedings. Based on the state of the law at the time of the application, the arrest warrant could not be granted for such purposes. The applicant failed to disclose an arbitration agreement of sorts and active steps in furtherance of that agreement. The warrant of arrest led the defendants to give a letter of undertaking in exchange for the ship’s release. The court found that¹⁰ –

...Although the facts may have been there to support the obtaining of security in the action on The Rena K principle, they were not deposed to in the affidavit sworn to lead the warrant of arrest, which in due course led to the P. & I. club giving its letter of undertaking. It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified: see Reg. v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486. Examples of this principle are to be found in the case of ex parte injunctions (Dalglish v. Jarvie (1850) 2 Mac. & G. 231), ex parte orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court (The Hagen [1908] P. 189, 201, per Farwell L.J.), and Mareva injunctions (Negocios del Mar S.A. v. Doric Shipping Corporation S.A. (The Assios) [1979] 1 Lloyd's Rep. 331). In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship

⁸ Ibid at para. 26

⁹ [1984] QB 477 at 492

¹⁰ Supra, note 9 at pages 491 to 492

where, as here, there has not been full disclosure of the material facts to the court.

Accordingly, the court having in the present case issued the warrant of arrest on the basis of an affidavit which failed to disclose material facts, the appropriate course was to make an unconditional order for the discharge of the security obtained by reason of the arrest...

[15] The following observations found at page 276 of **The Rainbow Spring**¹¹ are also submitted by the applicants –

(iii) It would be wrong to institute a strict rule to the effect that a warrant of arrest ought not to be set aside simply because of material non-disclosure. It would be inimical to the observance of the duty of full disclosure in relation to applications for the arrest of vessels if such a rule represented the legal position. Arrest is a drastic remedy given on an ex parte basis. The duty to make full and frank disclosure is an important bulwark against the abuse of the process of arrest. There must be the possibility of a sanction for the failure to observe that duty. The suggestion that non-disclosure may not always be an independent ground upon which the arrest may be set aside would in effect lead to the eradication of the duty of disclosure and it would also overly favour the interests of plaintiffs at the expense of those of ship-owners. The courts must retain the discretion to set aside an arrest for non-disclosure if the facts warrant it, notwithstanding that otherwise they would have jurisdiction over the matter and that the procedure in the rules had been followed (see paras [35]-[37], below). The Andria (now renamed Vasso) [1984] 1 All ER 112, The Evmar [1989] SLR 474, The Dong Nai [1996] 4 MLJ 454, The J Faster [2000] 1 HKC 652 and The AA V [2001] 1 SLR 207 considered.

¹¹ [2004] 3 LRC 276 at 278

Claim in Personam and not in Rem

[16] The applicants invite the court to set aside both the warrant of arrest and the preceding claim on the basis that Mr. Kent has not established the jurisdictional basis for pursuing the claim and the arrest warrant. The argument is that the initial claim filed by Mr. Kent on which the arrest warrant was based was not one for ownership in or possession of the vessel. The initial claim was simply one for an account of the earnings of the vessel and for an order for its sale. The claim did not specify the provisions of the CPR pursuant to which it was brought. However it is conceded that Mr. Kent ‘purports’ to have brought the claim pursuant to CPR 70.2(q). The applicants say that he has failed to meet the stipulations of this rule and section 1 of the Administration of Justice Act 1956 which state respectively –

(q) Any claim to the possession or ownership of a ship or to the ownership of any share therein, including power –

(i) To settle any account outstanding and unsettled between the parties in relation to the ship; and

(ii) To direct that the ship, or any share thereof, must be sold, and to make such other order as the

Court thinks fit;¹²

1.(1) ¹³ The Admiralty jurisdiction of the High Court shall Admiralty be as follows, that is to say, jurisdiction to hear and determine jurisdiction any of the following questions or claims –

(a) Any claim to the possession or ownership of a ship or to the ownership of any share therein;

[17] The court is asked to consider the approach taken in the Singaporean case of **The Catur Samudra**¹⁴. The plaintiff in that case sought to invoke the admiralty

¹² CPR 70.2(q)

¹³ Section 1 of the Administration of Justice Act 1956

¹⁴ [2010] SGHC 18

jurisdiction of the court in a claim which was found to be one arising out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship. The claim and resulting arrest warrant were dismissed with costs to the defendant. In this case, the applicants assert that the claim could have been brought as a common law action in personam for breach of a loan agreement between Mr. Kent and the applicants¹⁵.

Mr. Kent's views on the Discharge Application

[18] I must confess immediately that the submissions on behalf of Mr. Kent were not as lucid as those supplied by the applicants. I have extracted the following as the substance of his response –

- (1) There was sufficient particularity in the material presented to the court to justify the issuance of the arrest warrant. Indeed there was material disclosure;
- (2) The arrest warrant is issued as of right to an applicant so long as the requisites of CPR 70.9 are satisfied. The grant of the arrest warrant is not a discretionary act and as such the strictures of full and frank disclosure are not cast on the applicant. See **The Varna**¹⁶. However, where there is an error or false statement a duty is cast on the applicant to promptly and frankly correct the same. See **The Nordglimt**¹⁷;
- (3) The action is clearly one in rem. See CPR 70.3(1) to (3). Mr. Kent has a right to arrest Glorious and there is no discretion in the registrar as to whether the vessel is arrested or not. See also CPR 70.2;

¹⁵ The judgment in **Glen Clement and Emmanuel Clement** GDAHCV 2013/0038 is presented as authority for this view

¹⁶ [1993] 2 Lloyd's Reports 253

¹⁷ [1987] 2 Lloyd's Report 470

- (4) The affidavit to lead to the arrest of the ship complied with CPR 70.2(m) which allows for '*any claim in respect of goods or materials supplied to a ship for her operation or maintenance*'. In this regard Mr. Kent has pleaded that he contributed money for the cost an engine and other equipment for the vessel's maintenance and operation;
- (5) The claim is well founded as it is one for the recovery of possession and sale of the ship. See CPR 70.3 and CPR 70.2(q). In particular, Mr. Kent's right to invoke the admiralty jurisdiction of the court is highlighted by CPR 70.2(q) (i) and (ii) and CPR 70.3(1) to (3) '*in that the person who would be liable in a claim in personam was when the cause of action arose, the owner or charterer or in possession or in control of the ship – that person was Jomo De Coteau*'¹⁸;

Ruling

Non – disclosure

- [19] Notwithstanding the cogent and forceful arguments presented by the applicants, I must disagree with the view that the arrest warrant must be discharged for material non – disclosure. The arrest warrant was granted pursuant to CPR 70.9 which reads –

70.9 (1) In a claim in rem the claimant or defendant who counterclaims may, after the issue of the claim form and subject to the provisions of this rule, issue a warrant in Form 27 for the arrest of the property against which the claim or counterclaim is brought.

(2) The party intending to issue the warrant must first cause a search to be made in the caveat book to see whether there is a caveat against arrest in force with respect to that property.

¹⁸ Kent's submissions filed on 24th November 2017 at para15

(3) The general rule is that a warrant of arrest may not be issued until the party intending to issue the same has filed an affidavit made by the party or its agent containing the following particulars –

(a) In every case –

(i) The nature of the claim or counterclaim and that it has not been satisfied;

(ii) If the claim arises in connection with a ship, the name of that ship;

(iii) The nature of the property to be arrested; and

(iv) If the property is a ship, the name of the ship and her port of registry;

(b) In the case of a claim against a ship under rule 70.2(c) to (g), (i) to (k),

(m) to (p), (r) and (u)

–

(i) The name of the person who would be liable on the claim in a claim in personam;

(ii) 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 in connection with which the claim arose;

and

(iii) That at the time of the issue of the claim form the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise;

and

(c) In the case of a claim for possession of a ship or for wages –

(i) The nationality of the ship in respect of which the warrant is required;

and

(ii) That the notice (if any) required by paragraph (7) has been sent.

(4) Where appropriate a copy of any notice sent to a consul under paragraph (7) must be exhibited to an affidavit required by paragraph (3).

(5) The court may, however, give permission to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(6) A warrant of arrest may not be issued without the permission of the court in the case of property whose beneficial ownership has, since the issue of the claim, changed as a result of a sale or disposal by the court.

(7) The general rule is that a warrant of arrest may not be issued in a claim in rem against a foreign ship registered at a port of a State having a consulate in the jurisdiction, being a claim for possession of the ship or for wages, until notice that the proceedings has been begun has been sent to the consul or the court gives permission.

(8) Issue of a warrant of arrest takes place upon its being sealed by the court office.

[20] The applicants have concluded that based on the reasoning in the **Rainbow Spring** case that the foregoing provisions of the CPR place an obligation on the applicant for a warrant to arrest a ship to make 'full and frank' disclosure of material facts. The argument is that the grant of the warrant is a discretionary act by the court. Candour of the nature and extent required in cases of ex parte applications is expected of the applicant. The applicants have not placed before me the provisions of Order 70, rule 4 of the Singapore rules of court as it may have stood at the time of the ruling in the **Rainbow Spring**. The present iteration of those provisions placed before the court require the applicant for a warrant of arrest of a ship to '*...apply for a warrant in Form 160...*'. That was not the language used in the Singapore rules of court at the time of the ruling in the **Rainbow Spring** as the report of court of appeal's decision indicates that the court of appeal agreed with the lower court's specific finding of a distinction between the rules of the Singapore courts and the English rules of court when the learned judge ruled that –

'Even though the language of our O 70, r 4(1) is similar to O 75, r 5(1) of the English Rules, the phrase "the plaintiff may issue a warrant in Form 156" in O 70, r 4(1) when read in conjunction with Form 156 and, r 4(2)(a) does not confer a power on the plaintiff to issue the warrant of arrest. It is

*the court that issues the warrant of arrest (Form 156) following the filing of a Praecipe for Warrant of Arrest (see O 70, r 4(2)(a)). A sensible reading of O 70, r (4)(1) is that it is only after the writ is issued that the plaintiff may initiate issuance of a warrant of arrest. By O 70, r 4(3), the warrant of arrest will not be issued unless there is an affidavit complying with the particulars required by rr 4(6) and 4(7). Order 70, r 4(3) provides that even if there is non-compliance with rr 4(6) and 4(7), the court may in its discretion issue the warrant. Conversely, a failure to comply with the rules could render the warrant of arrest a nullity as Kulasekaram J so held in *The Courageous Colocotronis* [1978-1979] SLR 337.'*

- [21] The foregoing analysis by the Singaporean courts is persuasive but I bear in mind that those courts were assessing several specific provisions and forms of the Singapore rules of court when that assessment was made. The assessment of the Singapore rules of court suggested that an applicant approaching the court for a warrant of arrest of a ship has a duty to make full and frank disclosure of all material facts on which the application rests. What is the position with our rules? The English courts also considered provisions similar to our CPR 70.9 in the **Varna**. I will also examine how those provisions were discussed by the court in England to ascertain whether the discussions aid this exercise.
- [22] The applicants in **The Varna** applied to have the warrant of arrest of their ship set aside. The grounds of their complaint included the fact that the applicants for the arrest warrant failed to disclose the details of other court proceedings involving the same parties. They contended that it was material to the application for the arrest warrant for the court to be informed of the fact of the other proceedings. They further contended that the court granting the arrest warrant should have also been informed that they were exercising a lien on the claimants' cargo pursuant to an order of the court in the other proceedings. The lower court agreed with the applicants that the failure to disclose this information amounted to material non-disclosure and the warrant was discharged. On appeal from the order discharging

the warrant, the court of appeal upheld the lower court's order on the basis that the grant of the warrant was a discretionary remedy requiring full disclosure of all the material facts.

[23] Interestingly, the rulings made by the court and court of appeal in **The Varna** at that point proceeded on the state of the UK Order 75, rule 5 prior to amendments made thereto in 1986. The relevant parts of the pre 1986 Order 75, rule 5 stated that '*after a writ has been issued in an action in rem a warrant ... for the arrest of the property against which the action ... is brought may, subject to the provisions of this Rule, be issued at the instance of the plaintiff...*'. It was found that this rule '*justified an application for the issue of a warrant of arrest being categorised as an application for a discretionary remedy which it lay in the power of the court to grant or refuse.*'¹⁹ The case was restored for further arguments shortly after the court of appeal's decision on the basis that the ruling of both courts were given without reference to the 1986 amendments made to Order 75, rule 5. The relevant parts of the 1986 amendments read –

(5) *In an action in rem the plaintiff ... may after the issue of the writ in the action ... issue a warrant ... for the arrest of the property against which the action is brought ...*

(6) *A warrant of arrest may not be issued as of right in the case of property whose beneficial ownership has, since the issue of the writ, changed as a result of the sale or disposal by any court exercising Admiralty jurisdiction.*

(8) *Issue of the warrant takes place upon its being sealed by an officer of the registry or district registry.*

[24] Scott LJ made the following comments on the effect of the 1986 changes –

¹⁹ Scott LJ in **The Varna** [1993] 2 Lloyd's Report 253 at 256 reciting the reasoning in **The Vasso** [1984] 1 Lloyd's Report 235

I would accept the submissions put before us this morning by Mr. Siberry, which I think following inexorably from the nature of the changes in r. 5. First, in par. (1), power to issue the arrest warrant is expressly bestowed on the plaintiffs. References to the plaintiffs applying for the issue of the warrant are removed. Previously, the role of the plaintiff had been merely that of applicant, the power of issuance in par. (6), to the circumstances in which a warrant “may not be issued as of right” suggests that in other cases the issuance of a warrant is intended to be “as of right”, provided, of course, that the other provisions of r. 5, and in particular par. (9), have been complied with. Finally, the addition of the new par. (8) is consistent with the other steps in relation to the issuance of the warrant being taken by a plaintiff as a matter of right, consequent upon the issuing of a writ in rem and upon compliance with the affidavit requirements of r. 5.

- [25] Notwithstanding the fact that our rules do not include the words ‘as of right’ as stated in Order 75 rule 6 at the time of **the Varna**, a cursory reading of CPR 70.9 reveals that CPR 70.9 is materially similar to the 1986 amendments to Order 75 of the UK rules of court. See especially 70.9(1),(3),(6),(8),(9). In particular, I have found that, as with Order 75, rule 5, there is a distinction between the instances where a party requires the court’s permission to issue the warrant and those instances where permission is not necessary. CPR 70.9 indicates the instances where the court’s permission may be necessary to issue the warrant –

- (1) CPR 70.9 (6) where the court’s permission is required before the issuance of a warrant ‘*in the case of property whose beneficial ownership has, since the issue of the claim, changed as a result of a sale or disposal by the court;*
- (2) CPR 70.9(7) where the warrant may be issued either after a notice to the consul or by the court’s permission.

[26] The language of the foregoing provisions suggests to me that the court's permission is not required in the instances not specifically stated. In the cases which do not explicitly entail an application for the court's permission, the arrest warrant is issued upon presentation of Form 27 along with compliance with CPR 70.9(2) and (3). Compliance with CPR 70.9 (4) may also be appropriate in cases where a notice has been sent to the consul pursuant to CPR 70.9(7). The arrest warrant is issued when it is sealed by the court office. What then is the impact of this understanding of our CPR 70.9? As Lord Justice Scott found in the **Varna**,²⁰

'The requirement of "full and frank disclosure" ..., has... no real substance except in the context of an application for a discretionary remedy in circumstances where an obligation of disclosure is cast upon the applicant... If the statutory requirements set out in r. 5 are complied with, if the requisite affidavit is filed complying with par. (9), a plaintiff is... entitled under r. 5 to issue the warrant of arrest. The warrant does not take effect, until the stamp is placed thereon in accordance with par.(8). The function of the stamping officer is ..., to ensure that the requirements of r.5 have been complied with. If the requirements have not been complied with, the warrant will not be stamped... If the affidavit has complied with the requirements of para (9) there is ... no further scope for a material non – disclosure attack upon the arrest warrant.' (Bold emphasis mine).

[27] In our CPR 70.9 the same reasoning applies. The warrant is issued at the instance of the applicant. So long as the applicant fulfils the conditions of CPR 70.9(2), (3) and where appropriate, CPR 70.9 (4), the arrest warrant is to be sealed by the court office. When it is sealed by the court office, it is thereafter deemed to have been issued. As Lord Scott emphatically reiterated in **the Varna**, the applicant is entitled to the issuance of the warrant in all cases where the procedural conditions have been met. The strictures of full and frank disclosure required in ex parte

²⁰ **The Varna**, [1992] Lloyd's Reports 253 at 257 - 258

applications where the court is exercising its discretionary jurisdiction is not necessitated as the issuance of the arrest warrant is at the instance of the applicant on compliance with the procedural conditions and the circumstance is not one of an application to the court for the exercise of its discretionary jurisdiction. Accordingly, this court will not consider the applicants' request to discharge the warrant on the basis that the applicant failed to disclose material information. The application fails on this ground. Before departing from this part of the ruling, I would hasten to indicate that this finding should not be read to suggest that it may not be appropriate for the court to be asked to discharge the arrest warrant on the basis that, among other things, the applicant failed to comply with CPR 70.9 at the time that the arrest warrant was sealed by the court office or that the issuance of the arrest warrant amounts to an abuse of the process of the court in certain circumstances. Equally, as was stated by Lord Scott in **the Varna**, it may be open to argue in a proper case that the court has a general discretionary power to discharge the arrest warrant on the basis '*that the continuance of the arrest would be unjust*.'²¹ I have not been presented with arguments on any of these matters and as such, I will refrain from any comment thereon.

The Jurisdiction Point

[28] Where jurisdiction is concerned, the applicants request that the claim and the resulting warrant be set aside because Mr. Kent has not shown that this is an admiralty claim. The full arguments in this regard have been recited above. The applicants ask the court to examine the original claim since these were the proceedings which were considered before the warrant was granted. The claim was filed on 11th August 2017 and thereafter amended on 1st November 2017. The warrant was issued on 16th August 2017. My short answer to this point is that the original claim could certainly have been much clearer on the basis on which the action is founded. A perusal of the various provisions dispersed throughout Mr. Kent's submissions suggests a lack of clarity on his part as to which provisions of

²¹ **The Varna** [1993] 2 Lloyd's Reports 253 at 258

the rules apply to his claim. Notwithstanding this unfortunate lack of specificity, it is clear to me that on both the original and amended pleadings an action in rem is made out. Indeed on the original claim, Mr, Kent complains that he is a part owner of the vessel. He details the basis for this assertion in an extended fashion as I have recited above. Shortly, his case is that he contributed to the purchase of the vessel and that he did not do so gratuitously or as a loan to his nephew. Rather, his claim is that he did so as part of an oral agreement that he would own shares in the vessel. He also complains that further to his investment to obtain a share in Glorious, he contributed to its repair and maintenance. At paragraph 9 of the original claim, he complains that Mr. De Coteau has failed and/ or refused to –

- (1) Give an account of the profits from the vessel;
- (2) Return the investment made; and
- (3) Hand over possession of Glorious.

[29] In the original claim, Mr. Kent did not articulate in his prayer for relief that he was seeking a declaration that he owned shares in Glorious or for an order for possession. This was made clear by the amendment filed on 1st November 2017. Notwithstanding, based on my assessment of the complaints made by Mr. Kent, I am of the view that at the time of reviewing the request for the warrant of arrest, the registrar would have no doubt that this claim is indeed one involving quarrels about the ownership of and investments in Glorious. I find that the claim falls squarely within the terms of CPR 70.2(l), (m) and (q) which state that -

70.2 The following claims, questions and proceedings, namely –

- (l) Any claim in respect of a mortgage of or charge on a ship or any share therein;*
- (m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;*

*(q) Any claim to the possession or ownership of a ship or to the ownership of any share therein,
including power –
(i) To settle any account outstanding and unsettled between the parties in relation to the ship; and
(ii) To direct that the ship, or any share thereof, must be sold, and to make such other order as the court thinks fit; are to be dealt with as Admiralty claims.*

[30] CPR 70.3(1) permits a claimant to bring a claim in rem against the ship or property in connection with which the claim or question arises where the claim is filed in respect of any of the matters enumerated in CPR 70.2(l) or (q). The application therefore fails on the grounds that the claim was properly filed in the admiralty jurisdiction of the court. I will hear on the parties on the bail application within 7 days of today's date. Mr. Kent is awarded costs of \$500.00 on the discharge application. I thank counsel for their assistance.

Raulston LA Glasgow

High Court Judge

By the Court

Registrar