JUDGMENT : Mr Justice Flaux: Commercial Court. 15th July 2008

Introduction and background

1. There are before the Court two related applications, the application of the Claimant for the continuation of a freezing injunction which I granted ex parte against the Defendant on 2 May 2008 and the Defendant's application to set aside the injunction on various grounds. I heard these applications on 4 an 7 July 2008 and at the conclusion of the hearing stated that, whilst I could not deliver judgment immediately (the applications having substantially exceeded their time estimate) my conclusion was that the injunction had been properly obtained and that it should not be set aside. I indicated that I would hand down a reasoned judgment as soon as I could thereafter.

2. The Defendant (to which I will refer as "the owners") is the owner of the vessel NICHOLAS M. The Claimant (to which I will refer as "the charterers") chartered the vessel under a time charter trip dated 10 October 2007. The charter contains a London arbitration clause and is expressly governed by English law. The dispute between the parties which is currently before a tribunal consisting of Mr Mark Hamsher, Mr Christopher Moss and Mr Alec Kazantsis, concerns the circumstances of the vessel's call to discharge cargo at St Petersburg in December 2007. Because the dispute is subject to arbitration, the Court is only concerned with the threshold question whether for the purposes of obtaining a freezing injunction the charterers can show a good arguable case. However, given the nature of the issues before the Court it is necessary to set out the dispute in some detail. The basic facts (as to which there is not much dispute although ultimately all issues of fact are for the arbitrators) are as follows.

3. A cargo of soyabean meal was carried on the vessel from Argentina to St Petersburg. Upon arrival, a proportion of the cargo was found to be wet and mouldy. There is a dispute as to the cause of the damage, the owners maintaining that it was damaged by fresh water pre-shipment and the charterers that it was caused by water ingress through defective hatch covers. The vessel completed discharge on 28 December 2007 but was detained in St Petersburg until 11 January 2008 apparently as a consequence of a combination of repairs and maintenance required by the vessel's Classification Society Bureau Veritas ("BV") and by the Port State Control ("PSC").

4. On 25 December 2007, Mr Zavyalov, the BV surveyor, attended on board during discharge and noticed that the right hydraulic support of the number 6 hatch cover was damaged and needed repair. At that stage, he was content that the repairs be undertaken by the vessel's own fitters. However, on 28 December Mr Zavyalov returned to the vessel. The charterers' case is that he issued a notice that the vessel's Class certificates were withdrawn and that the repairs had to be undertaken by Class certified welders. Mr Zavyalov took possession of the vessel's certificates. The owners admit that he took possession of the certificates but they contend that he did not formally withdraw the vessel's Class status. They also contend that it was not until the following day, 29 December, that he decided that the repairs would have to be undertaken by Class certified welders.

5. On 29 December 2007, PSC went on board the vessel and detained her apparently on finding a number of deficiencies, including the damage to the steelwork under repair and the fact that there was a hole in the bilge tank. The repairs were carried out by Class certified welders and completed on 8 January 2008, the vessel's certificates having been returned on 6 January. The vessel was eventually released by PSC on 11 January 2008. However by that time the owners had lost the vessel's next fixture to Britannia Bulkers to whom the vessel was to be delivered by 31 December 2007. Britannia cancelled that charter on 10 January 2008.

6. The owners contend that this loss occurred as a consequence of a conspiracy between the charterers and various entities. The owners commenced the arbitration on 7 February 2008. On 8 February 2008 the owners issued a Verified Complaint in the United States District Court for the Southern District of New York seeking a maritime attachment of the charterers' assets under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("*the Admiralty Rules*"). That attachment was sought in support of the claim in arbitration. The sum claimed was US$5,260,000. By an Amended Verified Complaint filed on 20 February 2008, the sum claimed was reduced to US$4,141,118.32. The allegations in the Amended Verified Complaint were in essence that the charterers and two other entities, Euroweg, the consignees of the cargo and Anteks, sought to delay the vessel's discharge in bad faith by refusing to segregate and discharge sound and damaged cargo. On 29 December 2007 they sought to delay the vessel further by requesting ultrasonic tests of the holds and at about that time, they found out that BV had temporarily withdrawn the vessel's certificate of class pending repairs to the hydraulic support. They then "persuaded" the PSC to go on board and detain the vessel. It was contended by the owners that the repairs to the damaged steelwork were completed before 31 December 2007 and that the vessel's certificates were returned before 2 January 2008 by which date it had been determined that the vessel had no problems justifying her detention by the PSC. However she continued to be detained until after the date when Britannia cancelled the next fixture. These matters were said to amount to breach of charter by the charterers or wrongful interference with the owners' business or conspiracy with Euroweg and Anteks.

7. On the basis of the allegations in the Amended Verified Complaint, the owners obtained an Attachment Order against the charterers at an ex parte hearing before Judge McKenna in New York on 20 February 2008. On 4 March 2008, the charterers issued a Motion to Vacate that Order under Rule E(4)(f) of the Admiralty Rules. Although the grounds upon which a defendant to such an Attachment Order can successfully challenge and vacate such an Order are extremely limited and technical (and do not include contending that the plaintiff does not have a good arguable claim) as I shall discuss in more detail below, the charterers did seek to contend in their Motion that the underlying claim by the owners is wholly without foundation.

8. The owners served their Claim Submissions in the arbitration on 20 March 2008. In these Submissions, their case is put in a somewhat different manner from what was in the Amended Verified Complaint. What is now alleged is a conspiracy between the charterers, Anteks, BV and PSC to injure the owners' business in order to punish them for refusing to permit ultrasonic testing in the holds. The conspiracy is said to have been set in motion by a threatening telephone call between Mr Priymak of the charterers and Captain Bourdis, operations manager of the vessel's managers, Chian Spirit, on 28 December 2007. The owners allege that this took place at 1600 hours Greek time and that during it, Mr Priymak made menacing threats that he would create problems for the owners and for the vessel if the owners did not allow the charterers to send a surveyor on board the vessel, which the owners were refusing to do. It is contended that it was after this threatening conversation that Mr Zavyalov went back on board the vessel, took possession of the vessel's class certificates and insisted that the repairs be conducted by class approved welders. The owners allege that this change of stance and the confiscation of the certificates were induced by the charterers. It is then said, as in the New York Complaint that it was the charterers who persuaded PSC to come on board the vessel.

9. The charterers' case is that the telephone conversation in fact took place at 20.51 hours after Mr Zavylov had been on board. Unbeknownst to Captain Bourdis, Mr Priymak recorded the conversation and that recording shows that no threats were made by Mr Priymak at all. The charterers accordingly contended in the Motion to Vacate that there had been no factual basis for the Complaint. Both Mr Priymak and Captain Bourdis served declarations under oath in the United States District Court supporting their respective versions of the telephone conversations. At the oral hearing of the Motion before Judge Baer, both gave evidence and were cross-examined, each maintaining his position. The owners alleged before Judge Baer that the recording had been edited to omit the threatening words of Mr Priymak. A ruling from Judge Baer is still awaited.

10. The charterers served Defence and Counterclaim Submissions on 22 April 2008. The counterclaim is for damages for the tort of wrongful attachment which the charterers contend is analogous to wrongful arrest. They contend that the attachment in New York was obtained by the owners in bad faith or with malice or gross negligence (*crassa negligentia*) being the test for wrongful arrest in English law. In particular they contend that (i) the owners have changed their case from that advanced before the New York Court now alleging that the predominant purpose of the conspiracy was to injure the owners' business and that the collection of evidence was only a subsidiary purpose; (ii) the recording was demonstrably not edited since the telephone company records show a call of the same length except for two seconds (accounted for by "rounding") as the recording; (iii) Captain Bourdis therefore perjured himself in his evidence in New York; (iii) the reason for the change of position by the BV surveyor was that he realised that the vessel's fitters were not succeeding in carrying out the steelwork repairs; (iv) the statements to the New York Court as to when the repairs were completed and the certificates returned were made without any regard to the contemporaneous correspondence to which the vessel's master was a party which shows that the certificates were not returned until 6 January and that repairs were expected to complete and did complete on 8 January; (v) the real reason why the PSC went on board was a complaint by the third engineer and third officer to the seamen's union in Russia about the safety of the vessel passed on to the Harbour Master and in turn by him to the PSC; (vi) the statements to the New York Court about the PSC having no basis for detaining the vessel were inaccurate, the PSC having detained the vessel pending rectification of 28 deficiencies they identified and only released the vessel on 11 January 2008 when the deficiencies had been rectified; (vii) the Britannia fixture would have been lost in any event because the repairs were not completed until 8 January 2008 and the vessel could not have been delivered to Britannia without valid class certificates or with the hatch cover in an unrepaired state. It is said that by that date cancellation by Britannia was inevitable.

11. It was on the basis of the same allegations, as set out in the First Affidavit of Mr Lloyd-Lewis of the charterers' solicitors, that the charterers applied to me on an ex parte basis on 2 May 2008 for a freezing injunction. The matter was said to be urgent because of the risk of dissipation of assets by the owners, justifying the Court in intervening to grant a freezing injunction pursuant to section 44(3) of the Arbitration Act 1996.

12. Mr Swaroop for the owners contends that the freezing injunction should be set aside on a number of grounds: (1) that the charterers do not have a good arguable case either because there is no cause of action for wrongful attachment of assets at all or because any cause of action there might otherwise be would not accrue unless and until the attachment was set aside by Judge Baer in New York; (2) that the charterers have not shown a good arguable case for the recovery of substantial damages; (3) that there was and is no real risk of dissipation or urgency and (4) that the charterers misrepresented the position to the Court or made material non-disclosures on the ex parte application. I will consider these grounds in turn.

No cause of action

13. The prior question which arises in considering whether there is a cause of action for wrongful attachment is what the governing law of any such tort is. There are three candidates, New York state law, United States federal maritime law and English law, although ultimately the choice is between federal maritime law and English law. Mr Waller for the charterers submits that the Court need not decide which the governing law is for present purpose since he has a good arguable case under each of them. Mr Swaroop on the other hand submits that the governing law is English law, I suspect for tactical reasons because his case is that there is no tort of wrongful attachment known to English law, whereas it is clear that both federal law and New York state law recognise such a tort.

14. The starting point for consideration of the governing law of a tort is section 11 (1) of the Private International Law (Miscellaneous Provisions) act 1995 which provides:

Choice of applicable law: the general rule.

11 (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur."

15. That general rule may be displaced under section 12 of the Act which provides as follows:

"Choice of applicable law: displacement of general rule.

12 (1) If it appears, in all the circumstances, from a comparison of—

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

16. Mr Swaroop submits that there are factors which connect the wrongful attachment with England which make it substantially more appropriate for the applicable law to be English law. Specifically he relies upon the fact that the charterparty is governed by English law and contains a London arbitration clause and that the charterers' counterclaim for wrongful attachment, being a "*dispute arising out of or in connection with*" the charterparty, is being advanced in that arbitration. In that context he relies on the judgment of Aikens J in ***Trafigura Beheer BV v Kookmin Bank*** [2006] 2 Lloyd's Rep 455.

17. That case concerned a claim by the Defendant Korean bank that it had a security interest in cargo in respect of which it had issued letters of credit in favour of the Claimant sellers and that the failure of the Claimant to protect that security interest because the cargo had been discharged without production of the original bills of lading and released to the buyers, amounted to a tort in Korean law. In proceedings in England in which the sellers were seeking a declaration of non-liability and the bank challenged the jurisdiction of the English Courts, a preliminary issue was ordered as to which law governed the bank's claim. Aikens J held that the general rule under section 11 of the Act would probably have pointed to Singapore law, that being the place where the cargo was discharged and thus the tort was committed. However he concluded that the general rule was displaced under section 12. There were factors which made it substantially more appropriate for English law to apply to the tort, specifically that the pre-existing contractual relationship under the letter of credit was governed by English law. At paragraph 116 the learned judge said:

"In the terminology of ***section 12*** *of* ***PILA****, the most significant factor that relates to the two parties is the pre – existing relationship of the L/C. Without that pre – existing contractual relationship, Kookmin cannot create the necessary connection between itself, as issuing bank, and Trafigura, as beneficiary under the L/C, so as to give rise to the duties that Kookmin says are owed to it by Trafigura under Korean law. That factor connects the alleged tort to England because English law is the governing law of the pre – existing contractual relationship between the parties."*

18. By parity of reasoning Mr Swaroop argues that the most significant factor relating to the present parties is their pre-existing contractual relationship namely the charterparty which is governed by English law. Without the charterparty the dispute as to what occurred at St Petersburg could not have arisen and the owners could not have advanced their claim in conspiracy and sought the attachment in New York. However, I agree with Mr Waller that it does not necessarily follow that this factor connects the relevant tort with English law sufficiently to make it "*substantially more appropriate*" for the applicable law to be English law rather than federal maritime law pursuant to the *"general principle"* under section 11(2) (c). As Aikens J recognised at paragraph 119 of his judgment this must involve the Court in a value judgment as to the significance of particular factors. In exercising that value judgment here, it seems to me that it is important to have in mind that, although the attachment was obtained as security for the owners' claim in London arbitration, the attachment itself was obtained in New York pursuant to federal maritime law. The governing law of the attachment is thus federal maritime law and, in my judgment, that is the most significant factor of all in determining with which law the claim that the attachment was wrongful is connected.

19. Of course the ultimate decision as to what is the governing law of the charterers' counterclaim will be for the arbitrators. For present purposes, all that I need determine is that there is a good arguable case that that governing law is federal maritime law. It is common ground between the US law experts whose reports have been put before the Court for each party that federal maritime law recognises the tort of wrongful attachment: see for example the decision of the Court of Appeals for the Second Circuit in ***Result Shipping v Ferruzzi Trading*** 56 F 3d 394 (1995) at 402 n5 which states the principle as *"A plaintiff in a maritime case may be liable in damages for the wrongful attachment of the defendant's property but only on a showing of bad faith, malice or gross negligence"*, demonstrating that the ingredients of the tort are not far removed from those of wrongful arrest in English law: see ***The Evangelismos*** (1858) 12 Moore's PC Cases 352 at 359. The owners' two US law experts Mr Unger (who was their attorney in the attachment proceedings) and Mr Leroy Lambert are not, as I read their reports, contending that there is no cause of action for wrongful attachment here. Rather they contend that any cause of action will not accrue unless and until there has been a "prior favourable determination" by Judge Baer vacating the attachment, a matter to which I return below.

20. In the circumstances, given my conclusion that the charterers have a good arguable case that there is a cause of action for wrongful attachment under the governing law, US federal maritime law, it is strictly unnecessary to consider what the position would be under English law. However, since the point was fully argued, I will deal with it. The foundation of Mr Swaroop's argument that English law does not recognise a tort of wrongful attachment is the decision of the House of Lords in ***Gregory v Portsmouth City Council*** [2000] 1 AC 419 that the tort of malicious prosecution is not generally available in respect of civil proceedings. He relies particularly on a passage in the speech of Lord Steyn at 427:

*"In English law the tort of malicious proceedings is not at present generally available in respect of civil proceedings. It has only been admitted in a civil context a few special cases of abuse of legal process. Sometimes these cases are described as constituting a separate tort of abuse, but in my view Fleming, The Law of Torts, 9th ed. (1998), p. 687 is correct in observing that they **"resemble the parent action too much to warrant separate treatment."** The most important is malicious presentation of a winding up order or petition in bankruptcy: **Johnson v. Emerson** (1871) L.R. 6 Ex. 674; **Quartz Hill Consolidated Gold Mining Co. v. Eyre** (1883) 11 Q.B.D. 674. In Quartz Brett L.J. justified the rationale of this special case on the ground that the defendant is **"injured before he can show that the accusation made against him is false; he is injured in his fair name, even though he does not suffer a pecuniary loss"**: at 684. He drew a contrast: **"it is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely at trial":** at 684-685. It has long been recognised to be an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice: **Gibbs v. Rea** [1998] A.C. 786. In **Roy v. Prior** [1971] A.C. 470 the House of Lords allowed an action by a plaintiff to proceed where the plaintiff alleged that the obtaining ex parte of a bench warrant, and his arrest, was an abuse of process inasmuch as the solicitor responsible acted without reasonable cause and maliciously. An action in tort will also be available for setting in train execution against property without reasonable cause and maliciously: **Clissold v. Cratchley** [1910] 2 K.B. 244. These instances may at first glance appear disparate but in a broad sense there is a common feature, namely the initial ex parte abuse of legal process with arguably immediate and perhaps irreversible damage to the reputation of the victim. There is another instance of a recognised head of actionable abuse of process, namely the malicious arrest of a ship: **The Walter D Wallet** [1893] P. 202. In such a case the loss is merely financial. Moreover, the arrest can be lifted almost immediately upon giving of security for the claim. Such claims are a rarity. The traditional explanation for not extending the tort to civil proceedings generally is that in a civil case there is no damage: the fair name of the defendant is protected by the trial and judgment of the Court. The theory that even a wholly unwarranted allegation of fraud in a civil case can be remedied entirely at trial may have had some validity in Victorian times when there was little publicity before the trial: see **Little v. Law Institute of Victoria** [1990] V.R. 257. However realistic this view may have been in its own time, it is no longer plausible. In modern times wide dissemination in the media of allegations in litigation deprive this particular reason for a restricting the tort to a closed category of special cases of the support of logic or good sense. It is, however, a matter for consideration whether the restriction upon the availability of the tort in respect of civil proceedings may be justified for other reasons."*

21. The effect of Mr Swaroop's submission based on this passage is that the law only recognises these closed and anomalous categories of "*civil malicious prosecution*" and that since wrongful arrest does not encompass wrongful attachment, there was no cause of action recognised by English law in the present case. In my judgment, this is an unduly restrictive approach. Lord Steyn was giving instances of cases where the English Courts had recognised *"malicious prosecution"* as a tort in the civil context. It was not intended to be an exhaustive list, nor was he excluding the possibility that English law might develop incrementally beyond these instances. This is made quite clear later in his speech. He analyses the way in which the tort of malicious prosecution has developed in the United States and explains that the reason why there is a general tort of malicious prosecution in the civil context recognised in the United States is that, in contrast to England, the remedy of costs is generally not available to a successful party to civil proceedings. At 432-3 he then states:

"Nevertheless, for essentially practical reasons I am not persuaded that the general extension of the tort to civil proceedings has been shown to be necessary if one takes into account the protection afforded by other related torts. I am tolerably confident that any manifest injustices arising from groundless and damaging civil proceedings are either already adequately protected under other torts or are capable of being addressed by any necessary and desirable extensions of other torts. Instead of embarking on a radical extension of the tort of malicious prosecution I would rely on the capacity of our tort law for pragmatic growth in response to true necessities demonstrated by experience."

22. This seems to me to be an express recognition that there may be scope for incremental growth and extension of the existing torts, including wrongful arrest. I consider that recognising a tort of wrongful attachment of assets in maritime proceedings is no more than an incremental and limited extension of the existing tort of wrongful arrest. In any event, a careful reading of Sir Francis Jeune P's judgment in ***The Walter D Wallet*** [1893] P 202 at 206 demonstrates that it is arguable that wrongful attachment of a person's assets is within the scope of the existing tort of wrongful arrest. I have in mind the following passage:

"It was long ago held that an action on the case would lie for malicious prosecution, ending in imprisonment under the writ de excommunicato capiendo in the spiritual Court: Hocking v Matthews 1 Ventris 86. It can, therefore, hardly be denied that it would have lain for malicious arrest of a person by Admiralty process in the days when Admiralty suits so commenced just as for malicious arrest on mesne process at common law. But if for arrest of a person by Admiralty process, why not for arrest of a person's property? I can imagine no answer… "

23. Although the learned judge goes on to cite the decisions of the Privy Council in ***The Evangelismos*** (1858) 12 Moore's PC Cases 352 and ***The Strathnaver*** (1875) 1 App Cas 58, both cases concerned with allegations of

wrongful arrest of ships, the principle stated would seem to cover the facts of the present case which effectively alleges wrongful arrest of the charterers' property. Thus, in my judgment, even if English law applies and even if Mr Swaroop's restrictive interpretation of Lord Steyn's speech in *Gregory* were right, the charterers have a good arguable case that this case falls within the scope of the recognised tort of wrongful arrest and is an example of its application in a modern context.

Cause of action not yet accrued

24. Mr Swaroop submits that, whether the governing law is federal maritime law or English law, no cause of action will accrue unless and until Judge Baer makes a determination favourable to the charterers vacating the attachment. The starting point, whichever system of law governs, must be to examine the circumstances in which a party can challenge and seek to vacate a maritime attachment under Rule E(4) (f) of the Admiralty Rules. The law on this question has recently been clarified by the decision of the Court of Appeals for the Second Circuit in ***Aqua Stoli v Gardner Smith Pty Ltd*** 460 F3d 434 (2006). The Court of Appeals held at 444-5:

*"Following **Integrated** and the other pre-Rule E(4)(f) cases, we believe that an attachment may be vacated only in certain limited circumstances…. We therefore hold that, in addition to having to meet the filing and service requirements of Rules B and E, an attachment should issue if the plaintiff shows that 1) it has a valid prima facie admiralty claim against the defendant; 2) the defendant cannot be found within the district; 3) the defendant's property may be found within the district; and 4) there is no statutory or maritime law bar to the attachment. Conversely, a district court must vacate an attachment if the plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rules B and E. We also believe vacatur is appropriate in other limited circumstances. While, as we have noted, the exact scope of a district Court's vacatur power is not before us, we believe that a district Court may vacate the attachment if the defendant shows at the Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain **in personam** jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise.* "

25. In so ruling the Court of Appeals confirmed that the enquiry on a Rule E(4)(f) application is a narrow one. They rejected the approach of recent decisions of District Courts at first instance which had engaged in a broader fact-intensive enquiry, concluding at 447 that *"Rule B specifies the sum total of what must be shown for a valid maritime attachment"*. In the subsequent decision of Judge Wood in the District Court for the Southern District of New York in ***Tide Line Inc v Eastrade Commodities and Transclear SA*** 2007 AMC 252, the judge considered what a plaintiff had to show as "*a valid prima facie maritime claim against the defendant*". She concluded at paragraphs [14] to [17] that the Court of Appeals, although it had not explicitly addressed the point, had implicitly concluded that the approach adopted previously by certain District Courts of requiring a plaintiff to show that there were reasonable grounds for issuing the warrant (the so called "*reasonable grounds*" or "*probable cause"* standard) was improper in so far as it went beyond the limited enquiry required. Accordingly she held that all that a plaintiff had to show was that its Complaint was verified and disclosed a valid prima facie claim. This did not need to be supported by evidence demonstrating that it had reasonable grounds or probable cause.

26. That decision was followed even more recently by Judge Preska in the District Court for the Southern District of New York in ***Transportes Navieros y Terrestes SA v Fairmount Heavy Transport*** *NV* 2007 AMC 1933. Judge Preska stated the correct approach succinctly as follows:

*"Using the less burdensome **prima facie** standard, Judge Wood explained that a proper Verified Complaint is all that is required to satisfy Rule B and to prevail against a Rule E(4) motion to vacate… Thus maritime plaintiffs are not required to prove their cases at this stage of a Rule E(4) hearing….TNT submitted a Verified Complaint in which it alleged a proper admiralty claim against FHT and fulfilled all of the other filing and service requirements of Rules B and E. Based on the prima facie standard approved by the Court of Appeals and employed by other District Courts, TNT's maritime attachment satisfies the requirements of the admiralty rules that govern maritime attachment matters and is thus sufficient.* "

27. In other words, the Court is concerned only with formal technical requirements such as that the Complaint is verified and discloses on its face a valid maritime claim. The Court is not concerned with any factual enquiry as to whether or not there is in fact any basis for the claim being advanced. Thus, although the charterers presented their case before Judge Baer on the basis of a much broader approach, seeking to demonstrate that there was no foundation in fact for the claim, it seems to be common ground that the prospects of his vacating the attachment are remote. This is presumably because, if he follows the approach laid down by the Court of Appeals and adopted by other judges in the District Court for the Southern District of New York, he will decline to engage in such a fact-intensive enquiry and look to see whether the formal requirements of Rule B have been satisfied (which it would appear they have).

28. Notwithstanding the narrowness of the enquiry permitted on a Motion to Vacate, the owners contend that before any cause of action for wrongful attachment can accrue, the charterers must have successfully vacated the attachment. As I pointed out during the course of argument, the effect of that contention must be that if Judge Baer concludes (as he probably will) that the technical requirements of Rule B have been satisfied and declines to enter into any fact based enquiry at this stage, although federal maritime law recognises the tort of wrongful attachment and even if the charterers could show bad faith, malice or gross negligence on the part of the owners in obtaining the attachment, the charterers will be precluded from pursuing a claim for wrongful attachment anywhere in the world because they will never have had the attachment set aside and thus will never have had

an accrued cause of action. Mr Swaroop did not shrink from submitting that this was federal maritime law, but with respect it would be a startling and unjust result and I very much doubt whether this is in truth the relevant law.

29. The charterers' New York law expert Mr van Praag refers to the overall position in the United States as regards the tort of malicious prosecution. There (as in England) the general rule is that a claim for malicious prosecution cannot be brought until the plaintiff wishing to bring the claim has obtained a prior favourable determination i.e. the proceedings which are alleged to have been maliciously prosecuted against him have been dismissed on the merits. There is an exception to that general rule in the case of ex parte proceedings where the party in question does not have an opportunity to contest the underlying facts. Although he cannot point to any New York case directly on the point, Mr van Praag expresses the opinion that a New York Court or a federal Court would apply the exception to a case such as the present, where Judge Baer is likely to rule that the attachment cannot be set aside and will not look at the underlying facts in reaching that conclusion (indeed on the basis of ***Aqua Stoli***, it would be improper for him to do so).

30. The argument to the contrary by Mr Lambert that the "*ex parte exception*" would not apply here, is largely based upon the decision of the Court of Appeals for the Second Circuit in ***Solomon v Honorable Walter Bruchhausen*** 305 F 2d 941 (1962). In that case seamen on Isbrandtsen vessels brought libels (actions) in rem for unpaid wages against those vessels which were arrested. Isbrandtsen put up security and the vessels were released. Isbrandtsen then brought cross-libels in the actions alleging abuse of process by the seamen in arresting the vessels. The trial judge ordered the actions stayed until the seamen had provided security for the cross-libels. The Court of Appeals concluded that the Admiralty Rules then in force (before the introduction of the present Supplemental Rules in 1966) only permitted the bringing of cross-libels which arose under the same contract or cause of action as the original claim and this cross-libel did not. They stated at 943 in the passage particularly relied upon by the owners:

"It is difficult to find a claim for abuse of process in bringing an original libel as arising out of the original 'cause of action' under the restricted approach here stated, for the claim for abuse of process depends upon the outcome of the original proceeding. Even under the Civil Rules, which permit counterclaims arising out of wholly unrelated transactions, FR 13 (b) a claim for abuse of process in initiating an action is held premature and not available even as a permissive counterclaim to that action....Hence it would seem clear a fortiori that such a claim may not be brought in admiralty by cross-libel. "

31. Mr Lambert also relies on the decision of the Court of Appeals for the Fifth Circuit in ***Incas and Monterey Printing v M/V SANG JIN*** 747 F 2d. 958 (1984) as being a decision to like effect. However, the Court of Appeals in that case were careful to limit their decision to the specific point in hand, namely that under the Admiralty Rules, counter-security may not be required for a cross-claim for wrongful seizure, abuse of process or malicious prosecution. At footnote 19 on 965 they said this:

*"While **the Solomon** court held that a claim of wrongful seizure would not lie at all as a cross-claim in admiralty, we do not decide that question. We merely hold that counter-security may not be required under Rule E(7) for such a claim.* "

32. This is hardly a ringing endorsement for the approach of the Court in *Solomon* although it is right to point out that the Court did refer to the fact that other Courts had reached the same conclusion as *Solomon*. In a later decision of the Court of Appeals for the Second Circuit in ***Result Shipping v Ferruzzi Trading Inc*** 56 F 3d 394 at 402 footnote 5, the Court stated

*"It is not clear, moreover, whether a claim for wrongful attachment may be asserted as a counterclaim in the same suit that was initiated by such attachment. Compare Solomon ...(claim for abuse of process may not be asserted as a cross-libel under old Admiralty Rules).. with **Incas & Monterey**... (suggesting that **Solomon** rule against joinder of wrongful attachment counterclaim might no longer be valid under Supplemental Rules)*."

33. Taking ***Result Shipping*** and ***Incas*** (at least as interpreted in ***Result Shipping***) together, it seems to me that matters may have moved on from ***Solomon*** which was decided under the old Admiralty Rules, and that under the current Rules it is at least arguable that a claim for wrongful attachment may be asserted as a counterclaim in the same action as that commenced by the attachment. If that is right then, by definition, there cannot be an immutable rule applicable in maritime cases that no cause of action for wrongful attachment accrues until the attachment has been declared wrongful. Furthermore, even if *Solomon* stood unaffected by subsequent developments, I do not consider that it supports Mr Lambert's thesis that Mr van Praag is wrong in his opinion that federal maritime law would apply the ex parte exception to the prior favourable determination rule applicable under state laws in cases of malicious prosecution. On the contrary the fact that, in the passage I have quoted above, the Court of Appeals drew the analogy with abuse of process claims at common law indicates that they regarded federal maritime law as involving the application of essentially the same principles as the common law. This suggests very strongly that Mr van Praag's opinion is correct.

34. Finally on this part of the case, in a very telling passage in his second report Mr Lambert says this:

*"Surely, it cannot be the law that the exercise of a right to an attachment under Rule B, which is then upheld by a federal district court judge after a defendant avails itself of its right to contest the propriety of the attachment, can be thereafter said to be "wrongful", **at least not in so far as the requirements for the attachment have been met."*** (my emphasis)

35. Whether or not Mr Waller is right that this betrays an ignorance on Mr Lambert's part as to the true nature of the counterclaim being advanced in the London arbitration (namely that it challenges the factual basis of the attachment, not whether the procedural requirements of Rule B have been met) the underlined words do not support Mr Swaroop's submission as to the effect of federal maritime law referred to in paragraph 27 above

and do not suggest that, if Judge Baer rules against the charterers that the owners have satisfied the procedural requirements of Rule B, that would preclude for all time an attack on the factual basis for the attachment, such as is advanced by the counterclaim in the arbitration. That in turn supports the charterers' case that it is not an immutable rule under federal maritime law that no cause of action for wrongful attachment accrues until there is a prior favourable determination.

36. Turning to the position if English law is the governing law of the tort, the owners rely first on paragraph 498 of volume 45(2) of Halsbury's Laws of England. This provides (including the footnote):

"498. Maliciously procuring arrest of ship.

A claim may be brought against a person who maliciously and without reasonable and probable cause procures, by means of Admiralty proceedings, the arrest of a ship, if the ship has been released and the proceedings have terminated in favour of the person aggrieved by the arrest[1].

37. The owners rely on the words "*if the ship has been released and the proceedings have been terminated in favour of the person aggrieved"* in support of their submission that no cause of action will accrue unless and until Judge Baer vacates the attachment. More careful analysis reveals that this is not correct. First, the cases cited on wrongful arrest do not state that no cause of action will accrue until the arrest is set aside. They are simply concerned with the procedural convenience of having the claim for wrongful arrest determined at the same time and in the same proceedings as the substantive claim which was initiated in the Admiralty Court by the arrest of the ship. When, in ***The Walter D Wallet*** at 206 the President says that the setting aside of the arrest by the Admiralty Court would be "*the preliminary to a common law action*" it does not seem to me that he is concerned with the accrual of a cause of action. Rather he is making the practical point that a common law action for damages for wrongful arrest if such were ever pursued (and as he says no such action is to be found because of the superior convenience of dealing with all matters in the Admiralty Court) would be pursued after the Admiralty Court had set aside the arrest. I do not consider that more can be read into his judgment.

38. Second, the reference in the footnote to proceedings terminating in favour of the claimant is a reference to the position under the tort of malicious prosecution. This tallies with Lord Steyn's speech in **Gregor**y to the effect that what is involved here is a species of malicious prosecution. Whilst Mr Waller accepts that as a general rule a cause of action for malicious prosecution will not accrue until there has been a prior determination in favour of the claimant, he submits that the rationale for that general rule is that it avoids the risks of inconsistent findings by two different Courts and of a collateral attack on the Court before which the *"prosecution"* is being pursued. Where those risks do not exist, for example where the relevant "*prosecution*" is an ex parte application or some other application which does not involve any examination of the factual merits of the claim, then there is no reason why the general rule has to apply.

39. I agree with Mr Waller that the general rule does not apply in cases where the "*prosecution"* is ancillary to the main proceedings and there is no risk of inconsistent findings or collateral attack. Perhaps the clearest example of the general rule not applying is ***Gilding v Eyre*** (1861) CB NS 592, a case relied upon by the owners, but which on analysis seems to me to support the charterers' case. There the defendants had recovered judgment against the plaintiff who paid the amount adjudged due apart from a balance. The defendants then issued a writ of ca. sa. for the whole of the debt and endorsed it with directions to the sheriff to levy a larger amount than was due. The plaintiff then tendered the amount actually outstanding, but the defendants procured his arrest and imprisonment. To procure his release the plaintiff had to pay the defendants the larger sum demanded. The plaintiff then sued the defendants for malicious prosecution, alleging that the defendants had acted wrongfully and maliciously and without any reasonable cause. The defendants sought a demurrer (i.e. sought to strike out the claim) on the ground that the plaintiff had not shown that the proceeding alleged to be malicious had terminated in the plaintiff's favour. In other words, the defendants were advancing the same argument as the owners do here, that no cause of action for malicious prosecution lies unless the claimant has obtained a ruling in its favour in the proceedings complained of.

40. In their judgment the Court of Common Pleas rejected this argument. They concluded as follows:

"Since the cases of ***Churchill v Siggers****, 3 Ellis. & B. 929,* ***Jennings v Florence****, ante, vol. ii., p. 467, and other similar cases, it could not be denied that indorsement of a ca. sa. for a larger amount than due, and an arrest under it, if malicious and without any reasonable or probable cause, would be actionable; nor did the learned counsel for the defendants for a moment dispute it: but he contended that the plaintiff in the present case, before bringing his action, should have obtained his discharge from custody by an order of the Court or a judge, as in the cases referred to; and that his omission to shew such discharge on the face of his declaration rendered it bad, as being inconsistent with a want of reasonable and probable cause, and as shewing that the former proceedings had not terminated in his, the plaintiff's, favour.*

We are, however, of opinion that the declaration in this case discloses a good cause of action.

It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged: see ***Waterer v Freeman****, Hob. 267;* ***Parker v Langley,*** *18 Mod.*

[1] ***Munce v Black*** (1858) 7 ICLR 475; ***Castrique v Behrens*** (1861) 3 E & E 709; ***Redway v McAndrew*** (1873) LR 9 QB 74; ***The Strathnaver*** (1875) 1 App Cas 58 at 67, PC; ***The Collingrove, The Numida*** (1885) 10 PD 158; ***The Walter D Wallet*** [1893] P 202. As to proceedings terminating in favour of the claimant cf paras 468–469 ante. As to the practice in Admiralty see admiralty vol 1(1) (2001 Reissue) para 373 et seq."

209, 210; ***Whitworth v Hall,*** *2 B. & Ad. 695, 698, per Parke, B. But, in the present case, the complaint is not that any undetermined proceeding was unjustly instituted. The alleged cause of action is, that the defendant had maliciously employed the process of the court in a terminated suit, in having by means of a regular writ of execution extorted money which he knew had been already paid and was no longer due on the judgment.*

The whole force of the argument so aptly put forward on the part of the defendants rests upon the assumption that the order of a court or judge for the plaintiff's discharge from custody was the only mode of legally determining the former proceedings, by ascertaining the illegality of the arrest complained of: whereas, in truth, that illegality altogether depends on the amount for which the arrest was made being greater than the sum due, - a fact which could only be decided conclusively between the parties by the verdict of a jury.

The court, on an application for discharge from custody, will no doubt look at affidavits of the facts, for the purpose of informing its conscience in the exercise of its equitable jurisdiction: but the court, by its order either discharging or refusing to discharge a party from custody, does not necessarily decide or affect to decide any disputed question of fact, so as to precludes the parties from having that fact subsequently ascertained by the verdict of a jury. No conflict of decision, therefore, could occur in the present case: nor could the want of probable cause be affected by an order not necessarily decisive of any question involved in it.

The plaintiff in this action, upon the facts stated in his declaration, might doubtless have obtained his discharge from custody by an order of the court; but he was not bound to do so; and his yielding (in order to obtain his liberty) to the extortion practised upon him, not by the act of the court, but by the act of the defendant, cannot deprive him of his legal remedy for the wrong he has sustained."(my emphasis)

41. The words underlined in the penultimate paragraph of the quote seem apt to describe the procedure on a Motion to Vacate an attachment under Rule E(4) (f) of the Admiralty Rules, where the District Court will examine the Complaint to check it is verified and discloses a cause of action falling within the Admiralty jurisdiction, but will not otherwise investigate the facts. The whole passage I have quoted demonstrates that where the proceedings complained of (whether because they are interlocutory or ancillary in nature or otherwise) are such that the Court will not be making a determination of the facts underlying the arrest or "*prosecution"*, then even if the aggrieved claimant were to apply to set aside the arrest or *"prosecution*", the prior favourable determination rule does not apply, because there is no risk of inconsistent findings.

42. The judgment in ***Gilding v Eyre*** is perhaps the clearest formulation of the exception to the prior favourable determination rule and the rationale for it. However, the exception is alluded to in other cases, specifically in the context of wrongful arrest in ***Castrique v Behrens*** (1861) 3 E & E 709, decided a few months before ***Gilding v Eyre.*** In that case it was alleged that by a fraudulent conspiracy between the defendants and others the plaintiff's ship had been wrongfully arrested in proceedings in rem in France. On a demurrer in proceedings in England for fraudulent misrepresentation and conspiracy amounting to an abuse of process of the French Court, the Court of Queen's Bench held that the same principles applied to malicious prosecution of proceedings in a foreign Court as in an English Court. Crompton J stated:

"But, in such an action, it is essential to show that the proceeding alleged to have been instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceedings complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause……..

It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment in rem can only be obtained if the holder of the bill of exchange be a French subject, and a bona fide holder for value, and we must take it as admitted on this demurrer that Troteux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants falsely represented to the French courts that he was holder for value when he was not. It is not necessary to say what would be the effect if it were stated that by the contrivance of the defendants the proceedings were such that the plaintiff had no opportunity to appear in the French courts and dispute the allegation. In the present case it is quite consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French court, intervened and was heard, and that the very question whether Troteux was a holder for value was there decided against him. We think, on the principle laid down in **Bank of Australasia v Nias** *(1851), 16 QB 717, that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained."*

43. It seems to me that this passage demonstrates that the Court considered that the prior determination rule would not apply if the proceedings complained of were not capable of determination, by which it seems to me they meant capable of determination <u>on the facts</u>. This is consistent with the exception identified in ***Gilding v Eyre***. To like effect is ***Basebe v Matthews*** (1867) 2 CP 684 in which both ***Castrique v Behrens*** and ***Gilding v Eyre*** were cited with apparent approval by the Court of Common Pleas. There is nothing in the more recent unreported decision of the Court of Appeal in ***Dunlop v HM Cuctoms & Excise*** [1998] EWCA Civ 444 (which Mr Waller very fairly drew to my attention) which casts doubt upon the existence of the exception. Indeed both ***Castrique v Behrens*** and ***Basebe v Matthews*** were cited with approval.

44. In my judgment, there is an exception to the prior determination rule where the proceedings complained of (*whether because they are interlocutory or ancillary in nature* or *otherwise*) are such that even if the aggrieved claimant were to apply to set aside the arrest or "*prosecution"*, the Court will not be making a determination of

the facts underlying the arrest or *"prosecution*". Because the Motion to Vacate under Rule E(4) (f) is concerned with procedural or technical issues of compliance with Rule B and will not involve a determination of whether on the underlying facts the attachment was wrongful (*that being a matter in any event for the arbitrators in London*) the charterers have a good arguable case that they fall within the exception and that their cause of action has therefore accrued.

45. In the circumstances, it is not necessary to deal with the charterers' alternative case that they have an accrued cause of action for abuse of process by the owners in maintaining the attachment. Given that permission has yet to be given by the arbitrators to amend the Defence and Counterclaim Submissions to raise that alternative case (and I understand the amendments will be resisted by the owners), it seems to me better to say no more about what the position would be if and when permission is granted.

No good arguable case on quantum

46. The owners also contended that the charterers could not demonstrate a good arguable case on the quantum of their claim. This contention raised two points. First, the owners attacked the charterers' case based on exchange rate losses. As presented to the Court at the ex parte hearing on 2 May 2008, the claim was that as a consequence of the attachment in New York, because the charterers' contracts of sale were in US dollars, they had had to amend those contracts into Euros in order to carry on trading. In their evidence for the inter partes hearing, the owners pointed to the fact that on various charters entered by the charterers, the charterers had managed to carry on trading in dollars by employing paying agents through whom hire payments were made. The owners submitted that this casts sufficient doubt on whether the charterers had really suffered the exchange rate losses claimed, alternatively had mitigated their losses, that the court should conclude they had not shown a good arguable case on quantum.

47. It seems to me that submission would always have been unrealistic, but by the time of the hearing the charterers had provided a more detailed explanation of the position in Mr Lloyd-Lewis' Second and Third Affidavits. They accepted that they had persuaded some shipowners and indeed some counterparties on commodity transactions to agree to payment of sums due to or from the charterers in dollars through paying or receiving agents. However, the majority of the counterparties were not prepared to agree this, so that contracts could only proceed if converted into Euros which (as one might expect) the counterparties (appreciating the charterers' difficulties) were only prepared to agree at a price. On the basis of the material before the Court, I consider that the charterers have demonstrated a good arguable case on quantum and realistically Mr Swaroop did not press the point in his oral submissions.

48. The other point taken by owners was the absence of documentary evidence from charterers supporting their case on quantum. In circumstances where a detailed explanation of the quantum has been put forward on instructions on oath by Mr Lloyd-Lewis, the suggestion that the absence of documents means that no good arguable case is shown is quite hopeless and, again, this point was not pressed by Mr Swaroop in his oral submissions. In any event, the charterers have had some concern about disclosure that owners would seek to use documentation disclosed to attach other assets of the charterers. They sought and obtained from the arbitrators an order dated 4 June 2008 that before the quantum documentation was disclosed, the owners should give undertakings not to use the documents for the collateral purpose of obtaining additional security. The owners have yet to give those undertakings so to the extent that they are complaining about the absence of quantum documentation, to an extent they have only themselves to blame.

No risk of dissipation

49. The relevant legal principle in determining whether for the purposes of granting or maintaining a freezing order a claimant has shown a sufficient "*risk of dissipation*" is that the claimant will satisfy that burden if it can show that:
    (i) there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business: ***The Niedersachsen*** [1983] 2 Lloyd's Rep 600 per Mustill J as interpreted by Christopher Clarke J in ***TTMI v ASM Shipping*** [2006] 1 Lloyd's Rep 401 at 406 (paragraphs 24-27) or
    (ii) that unless the defendant is restrained by injunction, assets are likely to be dealt with in such a way as to make enforcement of any award or judgment more difficult, unless those dealings can be justified for normal and proper business purposes: ***Stronghold Insurance v Overseas Union*** [1996] LRLR 13 at 18-19 per Potter J and ***Motorola Credit Corporation v Uzan (No 2)*** [2004] 1 WLR 113 at 153 (paragraphs 142-146) where the Court of Appeal was applying the same principle in the context of disclosure of assets by the defendant.

50. At the ex parte hearing the charterers relied upon the fact that the owners were a one ship company whose only known asset was the ship. They also contended that there was a real risk of dissipation because the owners' conduct in New York (where the charterers contend the owners were advancing a case they knew to be unsustainable and Captain Bourdis was prepared to perjure himself) was described as an "*unacceptably low standard of commercial morality"*. This demonstrated a real risk that the owners would take steps to dispose of their assets to avoid satisfying any award in the charterers' favour. I considered that the charterers had satisfied the burden which was on them.

51. Since the ex parte hearing things have moved on in the sense that pursuant to the Order I made, the owners made disclosure of their assets. As at the time of the inter partes hearing, the position is as follows:

i) The charterers accept the vessel's present value is in the region of US$15.5 million, that there is a mortgage in place but that the unencumbered equity is about $11 million. There is a prohibition on sale in the mortgage. The charterers did have a lien on the vessel but that has now been discharged.

ii) There is a bank account at First Business Bank SA ("FBB") in Piraeus. As at 9 May 2008, the balance was $279. By 28 May 2008, the balance had increased to $1,227,000 evidently as a consequence of the receipt of hire payments from the current charterers of the vessel. A further payment of some $632,000 was paid into the account on 12 June 2008.

iii) There is another bank account at Marfin Egnatia Bank in Piraeus. As at 9 May 2008, the balance stood at $581. It does not seem to have increased since.

iv) Hire payments are being received at a gross daily rate of $43,000.

v) There is a management account with Chian Spirit, the managers of the vessel. As at 9 May 2008, that showed a negative balance of $1,056,566, evidently because the managers had made advances to a Far East shipyard for forthcoming repairs.

52. The owners submit that the charterers have not shown a real risk of dissipation. First, they make the point that even if their conduct in New York was dishonest which they do not accept, the mere fact of an allegation of fraud is not sufficient without more to justify the grant or maintenance of a freezing injunction. This is undoubtedly correct, as is clear from paragraph 28 of the judgment of Peter Gibson LJ in ***Thane Investments v Tomlinson*** [2003] EWCA Civ 1272:

"In my judgment Neuberger J's reasons for finding Judge Thompson's order one which should not be discharged are insufficient to justify the order which he made. First, Neuberger J said that the matters which were relied on for the good and arguable case applied in demonstrating that there was a real danger of the defendants dissipating their assets to defeat the judgment. I regret that I do not see that the judgment does support a conclusion that in the particular circumstances of Mr Tomlinson and Reyall there was a real risk of assets being dissipated. Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted."

53. However, I agree with Mr Waller that there is more here. The charterers have shown a good arguable case of wrongful attachment by the owners in New York in support of an unsustainable case, involving either bad faith, malice or at the very least gross negligence on the part of the owners. The charterers have also shown a good arguable case that the owners have engaged in what at its lowest is discreditable conduct in relation to the maintenance of the attachment, involving perjury on the part of Captain Bourdis. Of course whether any of these matters are made out will be for the arbitrators in due course. For the present it is sufficient that the charterers have a good arguable case on those matters raised. Nonetheless those matters are significant in the context of assessing the risk of dissipation. In my judgment the charterers can show a good arguable case for the purposes of discharging the burden of showing a real risk of dissipation that what has happened in New York reveals that these owners are the sort of people who will stop at nothing to frustrate the charterers from making any substantial recovery by dissipating their assets, unless restrained by the freezing order.

54. So far as the bank accounts and management account with a negative balance are concerned, Mr Waller submits that it would appear that prior to the injunction coming into force, the net proceeds of hire were being paid out, presumably to the shareholders or those individuals who lie behind the one-ship company and that at least one effect of the injunction is that moneys are staying in the FBB account and only being expended for legitimate purposes in the ordinary course of business, such as running costs. I agree with this analysis, which was not really challenged by Mr Swaroop on behalf of the owners.

55. Rather Mr Swaroop focused on the other principal asset of the owners, namely the vessel. He pointed out that the owners (when an enquiry was made by charterers via brokers in February 2008) had said that they had no current intention of selling the vessel although they were always open to offers. This is no more than many shipowners would say if asked in the current market. He submits that even if the owners wanted to sell the vessel quickly to frustrate the charterers by disposing of their assets, the prohibition on sale in the mortgage deed meant that the mortgagee bank (which I take to be FBB) could block any sale. There would have to be negotiations which might take some time and charterers would be able to take steps to prevent sale at that stage.

56. Mr Waller's riposte to that is to say who knows what might happen if no freezing injunction were in place? The owners might effect a sale to a connected party or remortgage the vessel or take other steps to strip the equity out of the vessel. I agree with him about this. Despite the owners' protestations to the contrary, I consider that the charterers have demonstrated a sufficiently arguable case that the owners' conduct makes them the sort of people who might very well take such steps unless restrained by an Order of the Court. The charterers have therefore amply satisfied the burden of showing a real risk of dissipation.

57. Mr Swaroop next relies on the fact that, if I am against the owners on all their other arguments, his clients are prepared to offer an undertaking (in a form attached to his Skeleton Argument) not to sell the vessel until any award in the charterers' favour had been satisfied. On this basis he submits that there is no longer any risk of dissipation and, upon the owners giving such an undertaking, the injunction should be discharged, since the value of the vessel will provide more than adequate protection for the charterers' counterclaim.

58. As I see it there are a number of problems with this proposal. First and foremost, there is nothing in the proposed undertaking which would prevent the owners from remortgaging the vessel, which would potentially reduce, possibly almost to extinction, the unencumbered equity in the vessel. Next, as Mr Waller points out this vessel is 28 years old and has probably only continued trading for as long as she has because the time charter and freight markets are buoyant at present. It is impossible to predict whether the markets will still be as buoyant in 9 months to a year's time when any award came to be enforced and if they are not, the value of the vessel might be substantially reduced.

59. Mr Waller also relies on the far greater difficulty of enforcing any award against the vessel as opposed to the other assets of the bank accounts. The vessel's movements would have to be tracked with a view to arresting her in an appropriate jurisdiction, where before arrest the award would have to be converted into a judgment. All of this might prove expensive and time consuming. By contrast, enforcement against monies in the bank accounts would be relatively straightforward. It is in this context particularly that Mr Waller relies upon the judgment of the Court of Appeal in ***Motorola Credit Corporation v Uzan (No 2)*** [2004] 1 WLR 113 at 153 (paragraph 146):

"The purpose of disclosure is to make the freezing order effective. In the ordinary way a defendant is required to disclose all his assets above a certain value. This is because, if he can choose which assets to disclose he is likely to choose those which are the least available or accessible to the claimant for the purposes of execution. That is what the claimant says the defendants have done in this case. If there are assets which are more readily available, a claimant is entitled to be told what they are. In such circumstances a freezing order may be varied, so that particular assets are attached and others are released and, in this way, the order may be made more effective."

60. Accordingly he submits that the owners should not be entitled to have the freezing order discharged simply by proffering an undertaking not to dispose of their least accessible asset. That seems to me to be right in principle. It is against the background of what is said in that case that Mr Waller proposes a variation to the Order which would entitle the owners to dispose of their assets as they wish, provided that the combined net value free of charges in the bank accounts and management account exceeds $2,982,659.40 (the amount frozen by the Freezing Order as varied by my Order of 9 June 2008). I will hear the parties in due course as to the form any variation of the Order should take.

Failure to make full and frank disclosure

61. The owners allege that the charterers made a number of misrepresentations to the Court on the ex parte application, alternatively failed to make full and frank disclosure to the Court on that occasion. The importance of making full and frank disclosure to the Court of all matters material to the Court's decision on an ex parte application for relief cannot be emphasised too strongly, particularly in the case of an application for a freezing order which may cause substantial prejudice to the defendant. The matters which are *"material"* are all matters relevant to the Court's assessment of the application, including matters which may be adverse to the application.

62. As the Court of Appeal stated in ***Brink's Mat Ltd v Elcombe*** [1988] 1 WLR 1350 and as has been repeated in subsequent cases, the purpose of this rule is to deprive a wrongdoer of an advantage improperly obtained and to serve as a deterrent to others to ensure that they comply with their duty to make full and frank disclosure on ex parte applications. However, even if there has been material non-disclosure, the Court has a discretion whether or not to discharge an order obtained *ex parte* and whether or not to grant fresh injunctive relief. Discharge of the order is not automatic on any non-disclosure being established of any fact known to the applicant which is found by the Court to have been material, although it would only be in exceptional circumstances that a Court would not discharge an order where there had been deliberate non-disclosure or misrepresentation. It is not alleged in the present case that any of the alleged non-disclosures or misrepresentations was deliberate. Whilst it is no answer to a complaint of non-disclosure to say that even if the relevant matters had been placed before the Court, the result would have been the same, that is a relevant consideration in the exercise of the Court's discretion.

63. In exercising that discretion, the overriding question for the Court is what is in the interests of justice. This is very clear from all three judgments in the Court of Appeal in ***Brink's Mat***. Ralph Gibson LJ was prepared to continue the order on the basis that he had no doubt that even if the additional information had been disclosed, the judge at the ex parte hearing would have made the same order on the same terms. Balcombe LJ at 1358E said this:

"Nevertheless, this judge made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained."

64. Slade LJ at 1359C made the point that in heavy commercial cases, the borderline between material facts and non-material facts may be an uncertain one. He continued:

"In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the ***R v Kensington Income Tax Comrs*** *principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.*

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986."

65. Turning to the matters of which the owners complain, their main complaint relates to what was and what was not said at the ex parte application about the exchange rate losses. They refer to the fact that Mr Waller's skeleton argument seemed to suggest that the charterers could not trade at all in US dollars, whereas Mr Lloyd-Lewis' first Affidavit said the conversion into Euros related to contracts of sale. To the extent that the owners rely on the apparent difference, I am unimpressed and do not consider there is any question of my having been misled. The counterclaim related only to losses on contracts of sale and it was that to which the trading problem related.

66. Then it is said by the owners that Mr Lloyd-Lewis' Affidavit failed to disclose the true position, namely that the charterers had in fact been able to carry on trading with other shipowners in dollars though paying agents and had persuaded some counterparties to commodity trades to continue to trade in dollars by being paid or paying through paying agents or receiving agents. I remain unclear as to what the materiality of this non-disclosure is said to have been, although as I understand Mr Swaroop's submissions, he was contending that full disclosure might have cast doubt on whether the charterers had suffered a loss at all or might have suggested that they had failed to mitigate their loss. Any such contention is misconceived. Now that a fuller picture is before the Court it is quite clear that the charterers were unable to persuade the majority of their trading counterparties to agree to the use of paying agents and receiving agents and that the only way the charterers could continue with those contracts was by converting into Euros as a loss. The claim relates only to those contracts and to the consequences of that situation. In those circumstances, it does not seem to me that it was material to disclose to the Court that there were other contracts of sale (let alone unrelated charterparties) in respect of which no claim was being advanced where the charterers had been lucky enough to get their counterparties to agree to trade in dollars through agents. I was left with the distinct impression that what really lay behind this point was the suggestion that the use of paying agents and receiving agents was a contempt of the District Court in New York. The charterers strenuously deny this but submit that any such question is a matter for the New York Court. I agree and consider that this question was wholly irrelevant to the assessment of the application I had to make at the ex parte hearing.

67. The only other non-disclosures pursued (or at least pursued with any vigour by the owners) concerned two matters. First it is alleged that the charterers failed to disclose that it was arguable that they did not have an existing cause of action. The fallacy in this contention is that if, as I have held, they do have an arguable case that there is an accrued cause of action, it is difficult to see what they should have disclosed. Equally if I had held that there was no arguable case in this regards, I would have discharged the injunction on that ground. In other words it is difficult to see what this alleged non-disclosure (as with others about failure to mitigate and the like no longer pursued) adds to the owners' case on good arguable case. This seems to me to be a good example of the approach deprecated by Slade LJ in *Brink's Mat* more than 20 years ago. In any event, Mr Waller told me frankly that his team had simply not anticipated the point about no cause of action having accrued until it was raised by owners. That is a complete answer to an allegation of non-disclosure since the charterers can hardly be criticised for failing to disclose what they did not know.

68. Second, it is contended by the owners that the charterers failed to disclose that it was extremely unlikely that the Motion to Vacate the attachment would succeed, even though at the ex parte hearing I raised the question of the status of the motion and the owners say that it is to be inferred that the charterers knew at that time that it was unlikely to succeed from the fact that in a witness statement in the arbitration dated 19 May 2008 Mr Lloyd-Lewis stated that it was "extremely rare" for the District Court to set aside such an Order. Even on the assumption all this is correct, I fail to see how the likelihood of success in New York had any bearing on the application for a freezing order in London.

69. It follows that in my judgment, there was no material non-disclosure or misrepresentation to the Court at the ex parte hearing. Even if I had thought that there was any merit in the owners' allegations of misrepresentation or non-disclosure, such misrepresentation or non-disclosure would have been completely inadvertent on the charterers' part. In the circumstances, I would have had no hesitation in the interests of justice in continuing the freezing Order notwithstanding any such misrepresentation or non-disclosure.

Urgency

70. As a postscript to this judgment, I should say a brief word about a point raised in Mr Swaroop's skeleton argument though not pursued at the hearing. As I have said, the application ex parte was made under section 44(3) of the Arbitration Act 1996, on the basis that the matter was urgent and that if alerted to the application, the owners might take steps to dissipate their assets, all of which seemed to me at the time and still seems to me entirely correct. By the time of the extended return date of 4 July 2008, the charterers were concerned that the matter might no longer be urgent and applied to the tribunal for permission under section 44(4) to make their application to continue the freezing order.

71. At the time that Mr Swaroop's skeleton argument was served, the tribunal had not responded. On that basis, Mr Swaroop submitted in his skeleton argument that, since the matter was, on the charterers' own admission, no longer one of urgency and the arbitrators had not given permission, the Court had no power to act. In the event the point was not pursued because, in a fax sent on the afternoon of 3 July 2008, the arbitrators gave their permission. However, although full argument was not addressed to me on the point, my very firm preliminary view as expressed at the hearing was that the argument was misconceived.

72. On the basis that the matter was urgent on 2 May 2008 (which it clearly was) the Court had jurisdiction under section 44(3) to grant the freezing Order. Once clothed with jurisdiction and seized of the matter, the Court clearly had jurisdiction to continue or vary the injunction at the return date which was set out in the Order made

on 2 May 2008. It does not seem to me that section 44(4) is concerned with the continuation or variation of Orders already made by the Court. Rather it is focusing on the initiation of applications to the Court. To that extent, it seems to me that the views expressed by the tribunal in their fax of 3 July 2008 are correct.

Conclusion

73. For all the above reasons, the owners' application to set aside the freezing injunction is dismissed. The charterers' application to continue the injunction is allowed. I will hear the parties as to the precise terms of the Order going forward.

Mr R. Waller (instructed by Barlow Lyde & Gilbert) for the Claimant
Mr S. Swaroop (instructed by Messrs KLaw) for the Defendant