



Neutral Citation Number: [2018] EWCA Civ 2760

Case No: 2018/2132

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**ADMIRALTY COURT (QBD)**  
**THE HONOURABLE MR JUSTICE TEARE**  
**[2018] EWHC 2033 (Admlty)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/12/2018

Before :

**MASTER OF THE ROLLS**  
**SIR TERENCE EHERTON**  
**LORD JUSTICE GROSS**  
and  
**LORD JUSTICE FLAUX**

Between :

**STALLION EIGHT SHIPPING CO. S.A.**  
- and -  
**NATWEST MARKETS PLC**  
(formerly known as The Royal Bank of Scotland plc)

**Appellant**

**Respondent**

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**Tim Lord QC and Geoffrey Kuehne (instructed by Hill Dickinson LLP) for the Appellant**  
**Robert Bright QC and Charles Holroyd (instructed by Watson, Farley & Williams LLP) for**  
**the Respondent**

Hearing date : 6 November 2018  
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**Approved Judgment**

**Sir Terence Etherton MR, Lord Justice Gross, Lord Justice Flaux :**

INTRODUCTION

1. This is the judgment of the Court, to which we have each substantially contributed.
2. The Appellant (“Owners”) appeals from the judgment and order of Teare J dated 31 July 2018 (“the judgment” and “the order” respectively) dismissing the application to release the ship, the *M.V. Alkyon* (“the vessel”) from arrest unless the Respondent (“the Bank”) provided a cross-undertaking in damages for the loss flowing from the arrest.
3. The central question on the appeal is whether the Judge erred in the exercise of his discretion under CPR r. 61.8(4)(b) in refusing to order the release of the vessel under arrest, thus maintaining the arrest, without requiring the Bank to provide a cross-undertaking in damages, akin to that provided by applicants for freezing injunctions (“the cross-undertaking”) – the cross-undertaking entailing in the present context that, if the Court later found the warrant of arrest had caused loss to Owners and decided that Owners should be compensated for such loss, the Bank would comply with any order the Court might make.
4. Although a number of grounds of appeal were advanced, the matter ultimately turns on that central question. Owners submit that the Judge erred in the exercise of his discretion; this Court should allow the appeal and vary the order by exercising the Court’s power under CPR r. 61.8(4)(b) to release the vessel from arrest unless the Bank provides the cross-undertaking. The Bank contends that the reasoning of Teare J was “impeccable”, his conclusions were justified and the appeal should be dismissed.
5. As will at once be appreciated and though neither is directly in issue, still less challenged on this appeal, Owners’ case necessarily impinges on: (1) the availability of a warrant of arrest *as of right* (rather than as a matter of discretion), under the CPR; (2) well-established authority, to the effect that no damages are recoverable for wrongful arrest, absent either (a) “*mala fides*” (i.e., malice or bad faith in modern parlance) or (b) “that *crassa negligentia* which implies malice” (i.e., gross negligence in modern parlance): see, *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945, at pp. 359/948. If Owners’ case is well-founded, there can be no doubt that both (1) and (2) would be undermined. By itself, that is not conclusive – but it is important to be clear as to the potential ramifications of success for Owners on this appeal, very likely extending beyond this jurisdiction given the international nature of the maritime industry and the interest there would be in the course adopted by English Law.

THE FACTS

6. The facts can be shortly summarised and are very largely and gratefully adopted from the judgment. The Bank, formerly known as The Royal Bank of Scotland plc, lent US\$15,700,000 to Owners, pursuant to the terms of a loan agreement, dated 30 January 2015 (“the Loan Agreement”). The loan was secured by, among other things, a First Preferred Mortgage over the vessel, dated 2 February 2015 (“the Mortgage”).

7. The underlying dispute between the parties is whether an “event of default” occurred under the Loan Agreement. As set out by the Judge (at [4]):

“On 22 March 2018 the Bank notified the Shipowner that the market value of the vessel was US\$15,250,000 which was 112% of the aggregate amount of the loan then outstanding and so less than the required VTL ratio of 125%. The amount of additional security required was US\$1,750,000. The Shipowner disputed that valuation and provided the Bank with higher valuations. The Bank warned the Shipowner that if the shortfall in security was not cured there would be an event of default. On 25 April 2018 the Bank notified the Shipowner of an alleged event of default, namely, the Shipowner’s failure to cure the alleged shortfall in the VTL ratio. Further time was given to cure the shortfall. On 15 June 2018, The Royal Bank of Scotland plc sent the Shipowner a Notice of Acceleration which declared the loan immediately due and payable....”

8. On the same day (i.e., 15 June 2018) the Bank issued an *in rem* claim form and applied for and obtained the issue of a warrant of arrest against the vessel. On 21 June 2018, the Bank informed Owners of the issue of the warrant and that it had requested the Admiralty Marshal to effect an arrest when the vessel berthed at Newcastle on 26 June 2018. On that date, the vessel was arrested by the Admiralty Marshal when she arrived at the port of Tyne.
9. To obtain the arrest, the Bank had, on 15 June 2018, duly completed Form **ADM4** (as provided by Practice Direction 61, see further below), requesting the Admiralty Marshal to execute the warrant accompanying it by arresting the vessel. This Form included the requisite undertaking on the part of the Bank to pay on demand the fees of the Marshal and all expenses incurred, or to be incurred by him, in respect of (broadly) the arrest, the care and custody of the vessel while under arrest and the release of the vessel.
10. Furthermore, also on 15 June 2018, the Bank had duly made the Declaration on Form **ADM5** (again as required by Practice Direction 61, see below), including the explanation that the Bank’s claim was for “outstanding indebtedness being due and payable by ...[Owners]...(as borrower)....” to the Bank as mortgagee, and giving outline particulars of the claim.
11. The Bank contends that the amount outstanding under the Loan Agreement is some US\$13,496,922.33. Owners deny that there was an event of default and that the Bank was entitled to accelerate the loan. Owners’ director, a Mr Triphyllis, has said that the claim will be defended on the basis that the Bank’s valuation was “very materially off-market” and not in compliance with the terms of the Loan Agreement; it is alleged that the Bank did not exercise its powers in good faith or in pursuit of legitimate commercial aims.
12. Owners apprehend a “potentially catastrophic loss as its only income producing asset is out of operation”. It is said that, whilst under arrest, the vessel will lose gross hire of US\$11,350 per day, a profit of some US\$3,500 – US\$4,000 per day. As recorded by the Judge (at [6]):

“The Shipowner says that it cannot obtain a P&I Club letter of undertaking to secure the release of the vessel from arrest in the normal way because P&I cover does not extend to a disputed claim under a loan agreement. It is also said that security in the form of a guarantee or a bond cannot be provided because the Shipowner’s only asset is the vessel and that is already mortgaged to the Bank. In addition it is said that the Shipowner does not have access to funds to effect a suitable security arrangement....”

Interposing there, the ability of Owners to obtain funds is a matter to which the Judge returned later in the judgment and to which we shall come in due course. The Judge continued as follows:

“...Mr Triphyllis believes that the Bank is only too aware of the position the Shipowner has been put in by the arrest and it appears clear to him that the Shipowner is being placed under commercial pressure to agree to sell the vessel in order to repay the loan which is precisely what the Bank intends to achieve.”

13. It is against this background that Owners’ application came before the Judge.

#### THE STATUTORY, CPR AND PRACTICE DIRECTION FRAMEWORK

14. The Admiralty jurisdiction of the High Court appears from the Senior Courts Act 1981 (“the SCA 1981”). S.20(1)(a) provides for jurisdiction to hear and determine “any of the questions and claims mentioned in subsection (2)”. Insofar as relevant for present purposes, those questions and claims include in s.20(2)(c) “any claim in respect of a mortgage of or charge on a ship or any share therein”.
15. S.21 of the SCA 1981 deals with the mode of exercise of Admiralty jurisdiction. S.21(2) provides, among other things, that in the case of any claim as is mentioned in s.20(2)(c) “an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises”.
16. Practice Direction 61 (“PD 61”), para. 3.6, provides that a claim form *in rem* may be served in the following ways:

“(1) on the property against which the claim is brought by fixing a copy of the claim form –

(a) on the outside of the property in a position which may reasonably be expected to be seen....

(2) if the property to be served is in the custody of a person who will not permit access to it, by leaving a copy of the claim form with that person;

(3) where the property has been sold by the Marshal, by filing the claim form at the court;

(4) where there is a notice against arrest, on the person named in the notice as being authorised to accept service;

(5) on any solicitor authorised to accept service;

(6) in accordance with any agreement providing for service of proceedings;

or

(7) in any other manner as the court may direct under rule 6.15 provided that the property against which the claim is brought or part of it is within the jurisdiction of the court.”

17. CPR r 61.5 deals with arrest and, insofar as here relevant, provides as follows:

“(1) In a claim in rem –

(a) a claimant...

may apply to have the property proceeded against arrested.

(2) Practice Direction 61 sets out the procedure for applying for arrest.

(3) A party making an application for arrest must –

(a) request a search to be made in the Register before the warrant is issued to determine whether there is a caution against arrest in force with respect to that property; and

(b) file a declaration in the form set out in Practice Direction 61.

....”

18. The General Note accompanying CPR r 61.5 in the White Book includes this passage:

“The issue of a warrant of arrest is not a discretionary remedy. If the statutory requirements set out in PD 61, para. 61.5.3 are complied with the claimant is entitled to issue the warrant of arrest and if there is such compliance there is no further scope for the application of any duty of full and frank disclosure, *The Varna* [1993] 2 Lloyd’s Rep 253.”

19. In turn, PD 61, para. 61.5, headed “Arrest”, is in these terms:

“5.1 An application for arrest must be –

(1) in Form **ADM4** (which must also contain an undertaking); and

(2) accompanied by a declaration in Form **ADM5**.

5.2 When it receives an application for arrest that complies with the rules and the practice direction the court will issue an arrest warrant.

5.3 The declaration required by rule 61.5(3)(b) must be verified by a statement of truth and must state –

(1) in every claim –

(a) the nature of the claim ....and that it has not been satisfied and if it arises in connection with a ship, the name of that ship;

(b) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(c) the amount of the security sought, if any.

...”

20. CPR r 61.7 contains the regime for “Cautions against arrest”. R.61.7(1) provides that any person may file a request for a caution against arrest. R.61.7 continues in these terms:

“(2) When a request under paragraph (1) is filed the court will enter the caution in the Register if the request is in the form set out in Practice Direction 61 and –

(a) the person filing the request undertakes –

(i) to file an acknowledgment of service; and

(ii) to give sufficient security to satisfy the claim with interest and costs; ...

.....

(5) Property may be arrested if a caution against arrest has been entered in the Register but the court may order:

(a) the arrest to be discharged; and

(b) the party procuring the arrest pays compensation to the owner of or other persons interested in the arrested property. ”

21. As already indicated, Owners’ application for release of the vessel was made pursuant to CPR r 61.8(4)(b), which provides as follows:

“(4) Property will be released from arrest if –

(b) the court orders release on an application made by any party;”

## THE JUDGMENT

22. It is necessary to refer to the impressive judgment of Teare J at some length.
23. At the outset (at [9]), Teare J observed that Owners' application for release of the vessel raised for decision "...the issue which has concerned Sir Bernard Eder for over 20 years, namely, the question whether a claimant who arrests a vessel, like a claimant who seeks a freezing order, should provide a cross-undertaking in damages in respect of the damage which an arrest can cause a shipowner". The Judge then referred to a number of contributions to that debate, to some at least of which we shall come.

24. The Judge immediately went on to say this (at [10]):

"It is accepted by counsel for the Shipowner that English Admiralty law does not require a claimant who wishes to arrest a vessel to provide a cross-undertaking in damages in order to obtain a warrant for the arrest of a vessel. Therefore, the only way in which the Shipowner can advance its claim for such a cross-undertaking in damages is to seek a release of the vessel from arrest in the event that the Bank fails to provide the requested undertaking...."

25. The Judge next turned to the Admiralty action *in rem* and the purpose of an arrest. He remarked (at [13]) on the ancient nature of the right *in rem*. The purpose of an arrest (at [14]) was to "enforce an admiralty action in rem". Thus (*ibid*):

"By arresting a ship the claimant establishes the jurisdiction of the Admiralty court to hear and determine the claim in the action notwithstanding that the ship is registered in a foreign country and that the claim has no connection with this country. By arresting the ship the claimant also obtains the means by which he can enforce his claim in the event that he establishes his claim. The ship may be sold by the Admiralty Marshal upon the order of the court and the claimant may recover his claim from the proceeds of sale. In that way an arrest provides security for the claim in rem.....the right to arrest is 'the unique feature of a claim in rem'; see *The Stolt Kestrel per Tomlinson LJ* at paragraph 21."

In practice, however, Teare J next observed (at [15]), an arrest was, more often than not, unnecessary.

"In the typical claim for lost or damaged cargo the contract of carriage or charterparty will provide for English jurisdiction and the shipowner's P&I Club will provide a letter of undertaking in order to avoid an arrest. In the typical claim for damage caused by collision the shipowners will have agreed to submit their dispute to the Admiralty Court and the respective hull underwriters or P&I Clubs will have provided guarantees to avoid an arrest. Thus in 2017 whilst 165 admiralty claims

were issued there were only 10 arrests. Where there is an arrest a vessel will usually be released on the provision of other security thus making a sale unnecessary. Thus in 2017 although there were 10 arrests there were only 3 sales. This snapshot of life in the Admiralty court is not a new phenomenon though the number of claims is lower than in the past.....Thus although the arrest is ‘the unique feature’ of the Admiralty action in rem it is not often necessary to be effected.”

26. Next, Teare J underlined (at [16] – [17]) that the issue of a warrant of arrest was as of right – and that (as was common ground) the Bank was entitled to obtain such a warrant without providing a cross-undertaking in damages.
27. The Judge then (at [18] – [19]) alluded to *The Evangelismos* and observed that a shipowner had no right to damages in circumstances where the arresting party had acted in good faith and without gross negligence – even if it was later found that the arresting party had in fact no claim *in rem*. There was no debate on this issue before the Judge, although Owners reserved the position should the matter go further. The Judge noted that the cross-undertaking in damages sought in the present case was expressly intended to apply if the Bank did not succeed in its claim without Owners being required to satisfy the established tests for the tort of wrongful arrest.
28. Turning to applications for release from arrest (at [20] – [38]), the Court’s power to order release was discretionary. The usual circumstances in which a vessel was released from arrest involved either the provision of alternative security or a second arrest amounting to an abuse of process. There were few other instances of a vessel being released from arrest. The Judge then furnished an invaluable survey of Admiralty practice and such authority as there was in this regard, dating back to 1862 - and encompassing the changes to Admiralty practice introduced by the Judicature Acts 1873 – 1875, which introduced the writ of summons, prior to which arrest of the vessel had been necessary to commence the action and found jurisdiction. At the conclusion of this survey, the Judge said this (at [38]):

“...the cases to which I have been referred, in so far as they required a cross-undertaking in damages, did so either in the context of section 26 of the Civil Jurisdiction and Judgments Act 1992 (*The Havhelt*) or in the context of an application based upon an alleged abuse of process (*The Tjaskemolen*). The only consideration given to the subject by the Court of Appeal (in *The Bazias 3* and *Bazias 4*) resulted in a refusal to require a cross-undertaking in damages expressly because ‘this has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far reaching a change in the practice for the first time.’ I do not consider that Lord Clarke’s comments [in *Willers v Joyce*, see below] can be regarded as having been expressed *per incuriam*.”
29. Pulling the threads together, the Judge observed (at [41]) that the Court’s discretion to release a vessel from arrest “must be exercised in a principled manner”. He continued as follows (at [42]):

“One of the principles in this area of the law is that a claimant in rem may obtain the issue of a warrant of arrest as of right. It is not dependent upon him providing a cross-undertaking in damages. If the court were to say, following an arrest, that in exercise of its discretion to order release, the vessel must be released from arrest unless a cross-undertaking in damages were provided, that exercise of its discretion would...cut across and negate the principle that a claimant may obtain the issue of a warrant of arrest without providing a cross-undertaking in damages. That would appear to me to be, in a relevant sense, an unprincipled exercise of its discretion or, at any rate, an exercise of discretion which pays insufficient regard to the principle underlying the issue of a warrant of arrest. If it were appropriate in this case to order release in the event that the Bank did not provide a cross-undertaking in damages it seems to me that it would be equally appropriate in a great many cases to make such an order. Thus a very substantial change as to the circumstances in which an arrest can be obtained and maintained would occur overnight. Sometimes such changes do occur overnight in the practice of the law, as happened when the *Mareva* injunction or freezing order was developed. But the suggested change in this field would mean that the entitlement of a claimant in rem to obtain the issue of a warrant of arrest upon making an application in accordance with the rules and practice direction would be nullified. That is significant step to take (not...a modest development or a ‘tweak’).”

30. Teare J then (at [44]) addressed the argument that, if a cross-undertaking in damages was a fair and just requirement in the context of an application for (among other things) a freezing order, it was likewise appropriate in the context of an Admiralty arrest. The assumption underpinning this argument was that a freezing order and an Admiralty arrest were comparable. They had completely different origins but were comparable, the Judge accepted, in the sense of seeking to ensure that the defendant’s assets were available to satisfy a judgment. The proceedings were not, however, of the same character, in particular because “...the arresting party is entitled to the issue of a warrant of arrest as of right and is not dependent upon a court order to that effect.”
31. There was (at [45]) also a “factual or contextual” difference between arrests and freezing orders, relating to the development of a procedure whereby arrest could be avoided by a shipowner – beginning with the *caveat* procedure in the 1855 Rules and now the modern practice of “undertakings being given privately to appear (now to acknowledge service) and provide security”. Thus:

“...in the shipping and marine insurance industry there are established means by which a shipowner can protect himself against the threat of an arrest. Indeed, whereas an arrest is usually effected after notice, as happened in the present case, a freezing injunction is usually ordered without notice to the defendant. This is a further reason for pausing before

concluding that what is appropriate in the context of a freezing order must necessarily be appropriate in the context of an admiralty arrest.”

The Judge was struck (at [46]) by the fact that “judges of great authority” had not been compelled by the comparison between a freezing order and an arrest to suggest that a cross-undertaking should be required in the latter context.

32. Accordingly (at [47]):

“In these circumstances it would be a particularly bold step for a first instance judge to say...that by comparison with the practice of the courts in relation to interim injunctions the current practice of this Court not to require a cross-undertaking in damages is anomalous and unjustifiable and should now be changed. Indeed, I do not consider that such a course is open to me at first instance.”

33. As to the particular circumstances of the present case, Teare J accepted (at [48]) that Owners would suffer loss whilst the vessel remained under arrest and was unable to trade; if the Bank failed to prove its claim that loss might never be recoverable. Those circumstances did not, however, make the case “unusual or exceptional”. There was nothing to justify a departure from the Court’s usual practice.

34. Owners had adduced some evidence that they were unable to provide security in order to obtain the release of the vessel; but (at [49]) that evidence was insufficiently particularised to establish an inability to provide such security. In the Judge’s view:

“Where a shipowner wishes to show that he is unable to avail himself of the remedy usually adopted to avoid loss caused by an arrest he ought...[to] condescend to particulars. Thus the evidence ought to deal, not merely with the shipowner’s own resources, but also with the Shipowner’s ability to provide security by calling upon the resources of its shareholders, direct and indirect. The Shipowner may be a one-ship owning company registered in the Marshall Islands but it appears to be part of a larger shipping group (though there is some uncertainty as to its size). It was submitted on behalf of the Shipowner that it was speculation to consider whether the Shipowner could provide security by means of its indirect shareholders. But the evidential burden lies upon the shipowner.”

Although the provision of security itself would cause loss (at [50]), the nature of that loss was not unusual. Nor (at [51]) was it right to say that the Bank already had security by way of the Mortgage; if the Bank arrested the vessel and sold it through the Court, the sale by the Admiralty Marshal would give the Bank a clean title free of encumbrances.

35. In an important passage (at [52]), the Judge said this:

“There is therefore nothing unusual about the present case. Indeed, because of that very circumstance, the requested release, in the absence of a cross-undertaking in damages, would (or may) have, as counsel for the Bank submitted, ‘significant implications for the shipping industry’.”

The Judge could envisage at least two.

“First, since there is nothing unusual about the present case claimants in other typical cases would be required to give a cross-undertaking in damages. Some, depending upon their means, may be discouraged from exercising the right of arrest which statute and the rules of court have given them. I have in mind the crew of a vessel or the supplier of necessaries to a vessel. Vessels are trading assets and an arrest will almost always cause loss. Claimants, even well-resourced claimants, may be unwilling to give an open-ended undertaking. Second, at present P&I Clubs and hull underwriters routinely give undertakings either to avoid arrest or to secure release from arrest. That they do so enables the Admiralty jurisdiction to be exercised by those with Admiralty rights in rem with relatively little dispute and with few arrests and sales actually being required. That may be thought to be a benefit to the shipping and marine insurance industry. If the court, following an arrest, routinely required a cross-undertaking in damages as the price of retaining the arrest, there might...be uncertainty as to whether an arrest would be maintained and so P&I Clubs and hull underwriters might not so readily provide security as they presently do and have done so for a great many years. Of course, these and any other issues which the suggested change in practice may throw up may be capable of being dealt with over time... But the shipping and marine insurance industry has worked for a very long time, it appears without complaint (save possibly by Sally Line in *The Bazias 3 and Bazias 4*), on the basis that cross-undertakings in damages are not required in the context of an Admiralty arrest.”

36. Despite the shortcomings in Owners’ evidence, the Judge was alert to the potential for injustice in the present case and that the cross-undertaking would serve to avoid that injustice. But, he went on (at [53]), there was:

“...much to be said for the view that the requested change in practice (assuming that a court at first instance were free to bring it about) is or may be so far-reaching in its consequences that it should be a matter either for Parliament to consider (if a change in primary legislation is required or desirable) or for the Rules Committee to consider (if all that is required is a change in the rules of court) having consulted with the Admiralty and Commercial Court Users’ Committee and the shipping and marine insurance industry.”

As Teare J pointed out, the 1952 Arrest Convention (which was the foundation of the SCA 1981 conferring jurisdiction *in rem*) did not contain a provision that arresting courts be empowered to order security; a proposal to such effect had been opposed by the United Kingdom (“UK”) and had been defeated. The 1999 Arrest Convention did contain such a provision but the UK had not ratified it and only 11 countries had done so – though there were others whose law contained a provision enabling security for damages for wrongful arrest to be ordered.

37. After alluding (at [54]) to a decision in the Supreme Court of Canada to which we shall come, the Judge ultimately (at [56]) reiterated his view that:

“Whether the balance between, on the one hand, the interests of the claimant *in rem* and, on the other hand, the interests of the shipowner, which has been struck by English Admiralty law and practice over the last 150 years or more remains appropriate and sufficiently ‘responsive to modern realities’ (the phrase used by the Supreme Court of Canada) is...not a matter for the court to judge but a matter for either the legislature or the Rules Committee to consider.”

38. The Judge’s conclusion (at [57]) was expressed in these terms:

“The court is unable to accede to the application that the vessel be released in the event that the Bank fails to provide a cross-undertaking in damages. To exercise the court’s discretion to release in that way would (i) run counter to the principle that a claimant *in rem* may arrest as of right, (ii) be inconsistent with the court’s long-standing practice that such a cross-undertaking is not required, and (iii) be contrary to the decision of the Court of Appeal in *Bazias 3 and Bazias 4* and to the dicta of Lord Clarke in *Willers v Joyce* which I, as a first instance judge, must respect. Finally, any change in Admiralty law and practice, given that the present position has prevailed for so long, is not a matter for the Court to change overnight (even assuming that it could do so) but for Parliament or the Rules Committee to consider after proper consultation.”

## THE RIVAL CASES

39. For Owners, the submissions of Mr Lord QC were elegantly formulated. In outline, the arrest of a vessel was no longer necessary as the foundation for an action *in rem* and thus for establishing jurisdiction. Once arrest and establishing jurisdiction were decoupled, it could be seen that the purpose of arrest was the provision of security for the claim. Viewed in this light, a ship arrest *was* analogous to other interim relief, in particular a freezing order. The jurisdiction of the English Court would be unaffected by the release of the vessel. The rule in *The Evangelismos* would not be subverted by the requirement to provide a cross-undertaking in damages as the price for maintaining the arrest – in the same way that the (routine) requirement for a cross-undertaking in damages in the context of freezing orders did not subvert the tort of malicious prosecution. Nor did Owners’ submissions subvert the right to arrest. A principled exercise of the Court’s discretion called for the provision of a cross-

undertaking here; on the one hand and absent such a cross-undertaking, there was a risk of injustice to Owners; on the other hand, the Bank would suffer no prejudice by reason of the provision of a cross-undertaking. Owners' counterclaim against the Bank did not render the provision of a cross-undertaking otiose. There was no need for the intervention of Parliament or the Rules Committee; Owners' case did not entail subverting Admiralty practice; as he had submitted before the Judge, Mr Lord spoke in terms of no more than a "tweak" to that practice. Mr Lord's essential focus was on doing justice in the individual case; he did not accept that the impact on the maritime industry would be as alleged. The Judge had gone wrong because his building blocks were wrong; he had "abdicated the discretionary power vested in him to determine the application" and/or he had mis-directed himself that it was not open to him (whether as a matter of authority or longstanding Admiralty practice) to accede to Owners' case.

40. Mr Lord did not dispute the Judge's finding (at [49]) that Owners' evidence did not make good the inability of "shareholders, direct and indirect" to put up security. That, however, had been the wrong question to ask. The Judge should have confined his inquiry to Stallion Eight Shipping Co. S.A. – i.e., the owning company in question. In any event, if funds could have been obtained to secure the release of the vessel, it would have been "bizarre" or "ludicrous" for Owners to have left her under arrest.
41. For the Bank, Mr Bright QC's excellent submissions emphasised that Owners' case would "out-flank" the CPR (giving a *right* to arrest) and the rule in *The Evangelismos*; such a course was "intellectually dishonest". That the Admiralty practice in this area raised serious questions for review in the 21<sup>st</sup> century was one thing; but this case was not the right vehicle for a radical departure from the very longstanding practice. Neither the right to arrest nor *The Evangelismos* had been challenged in these proceedings. Nor had it been shown that Owners could not raise the funds necessary to secure the release of the vessel. In Mr Bright's words, it would be odd for this Court to intervene on a discretionary matter when, on completely standard facts, the Judge had followed the usual practice. As to the decoupling of arrests from the foundation of an action *in rem*, that had been the case since 1883. Any change in the practice, as entailed by Owners' case, was for the Legislature or the Rules Committee, after proper consultation, or for the Supreme Court. It was to be kept in mind that judge-made law was retrospective and, here, would run contrary to commercial expectations premised on the existing law. Any review of the topic should not involve a binary choice; as could be seen from the writings and jurisprudence in this area, there were a range of possible responses and approaches. Even if it could be said that another Judge might have reached a different conclusion, it could not be said that the decision of Teare J was outwith the proper ambit of his discretion. Indeed, as already noted, the Judge's reasoning was impeccable and his conclusions were justified; the appeal should be dismissed.

#### DOMESTIC LAW AND PRACTICE

42. As set out in the judgment, domestic law and practice is clear and well-established. We confine ourselves to a brief outline.
43. First, as a matter of the CPR, provided only that the property is within the scope of an action *in rem* and there has been procedural compliance with the rules, arrest is as of right. No judicial discretion is involved - and no question arises of requiring a cross-

undertaking in damages from the arresting party as the price of issuing the warrant of arrest. All this was common ground before us.

44. Secondly, no damages can be claimed for wrongful arrest absent malice (bad faith) or (effectively) gross negligence on the part of the arresting party: *The Evangelismos (supra)*; *The Kommunar (No. 3)* [1997] 1 Lloyd's Rep. 22, at pp. 29 *et seq*; *Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477, *per* Lord Clarke of Stone-cum-Ebony, at [68] – [78]. It is recognised that this rule of English Law is capable of bearing harshly on a shipowner in circumstances where it subsequently transpires that the arrest was unjustified, but the shipowner is left without remedy for his loss: *The Kommunar (No. 3)*, at p.33. Nonetheless, that is the rule and it carries Privy Council authority (*The Evangelismos*). This too was common ground before us, although Owners again reserved their position should they at some point in the future advance a claim for wrongful arrest against the Bank.
45. Thirdly, once a vessel has been arrested, the settled, usual practice of the Admiralty Court is that the vessel will not be released unless the shipowner provides security for the underlying claim or in cases of abuse of process.
46. Accordingly, and with the rule in *The Evangelismos* very much in mind, in the *D.H. Peri* (1862) Lush 543 (Adm), Dr Lushington held that a foreign plaintiff suing *in rem* would be required to give security for costs but not security for damages; security for a wrongful arrest (at p.544) "...would be an innovation on the practice of the Court, and would form a serious bar to foreigners suing in this Court."
47. In *The Bazias 3 and Bazias 4* [1993] 1 Lloyd's Rep. 101, a vessel had been arrested as security for an arbitration claim. For present purposes, it is unnecessary to delve into the somewhat chequered procedural course which ensued, save to observe that the action was stayed pursuant to s.1 of the Arbitration Act 1975, so that the continuation of the arrest and the question of the vessel's release fell to be considered under s.26 of the Civil Jurisdiction and Judgments Act 1982, rather than under the Rules of the Supreme Court – albeit that in the light of the Court's decision on the interpretation of s.26, nothing turns on this distinction. With regard to the practice under the predecessor of CPR r.61.8(4)(b), Lloyd LJ (as he then was) said this, at p. 105:

"...on an application for release under O.75, r.13 the usual practice has always been that the vessel will only be released on the provision of sufficient security to cover the amount of the claim, plus interest and costs, on the basis of the plaintiffs' reasonably arguable best case..."

Later (*ibid*), Lloyd LJ dealt with the submission of counsel as follows:

"Mr Boyd argued that we should exercise our power under s.26(2) of the 1982 Act to order the plaintiffs to give a cross-undertaking in damages in case the arrest turns out to have been unjustified – by which he means if the plaintiffs' claim in the arbitration fails in toto. He put forward reasons why we should make that order in the present case. But, as he accepts, this has never been the practice in Admiralty actions and I do not regard

this case being one in which we can introduce so far reaching a change in the practice for the first time.”

48. All this said, the Court’s power under CPR r.61.8(4)(b) is a discretionary power. The usual practice is not invariable, as illustrated, for example (there are others), by the decision of Clarke J, as he then was, to require security from the plaintiffs for the maintenance of the arrest in this jurisdiction in *The Tjaskemolen* [1997] 2 Lloyd’s Rep 476 on the unusual facts of that case – so as to ensure that the position here was the same as that which would have prevailed had the arrest been maintained in Holland.
49. The existence of exceptional or unusual cases should not, however, be thought to weaken the strength of the usual Admiralty practice of not requiring a cross-undertaking in damages from the arresting party as the price of maintaining the arrest – a longstanding, settled practice dating back, as can be seen, for at least 150 years.

### THE LITERATURE AND THE POSITION INTERNATIONALLY

50. As the literature reveals, there has been something of a spirited debate amongst a relatively small number of commentators as to the justice of the rule in *The Evangelismos* and whether it should be changed.
51. A little over a month after the outcome of *The Bazias 3*, Mr Stewart Boyd QC (one of the counsel in that case) delivered the Tenth *Donald O’May Lecture in Maritime Law*, entitled “*Shipping Lawyers: Land Rats or Water Rats*” [1993] LMCLQ 317. At pp. 327-328, Mr Boyd raised the question of whether it was right any longer to treat arrest in Admiralty cases differently from *Mareva* injunctions, where cross-undertakings in damages were (routinely) required from the party seeking the injunction.
52. A notable contributor to the debate, over more than 20 years (as remarked upon by the Judge, at [9]), has been Sir Bernard Eder. He has consistently and forcefully articulated his concern as to the potential for injustice to shipowners flowing from the position in English law and practice (outlined above).
53. In his 1996 lecture, “*Wrongful Arrest of Ships*” (The London Shipping Law Centre, Public Lecture Papers, 12<sup>th</sup> December 1996), Mr Eder QC (as he then was) argued that the law as to damages for wrongful arrest needed to be changed “and the sooner the better”. In 2013, Eder J (as he then was) returned to the theme, in a lecture to the Tulane Maritime Law Center, “*Wrongful Arrest of Ships: A Time for Change*” (38 Tul. Mar. L.J. 115 (2013)). He helpfully defined “wrongful arrest” as meaning “an arrest founded on a claim which is ultimately rejected on its merits by the court or abandoned by the claimant”. He acknowledged that the position in many other jurisdictions, especially common law jurisdictions, was broadly similar to that in England. In both lectures, Sir Bernard emphasised in some detail the privileged position of the arresting party in Admiralty proceedings *in rem*. He expressed difficulty in understanding the rationale for the rule in *The Evangelismos*. He also suggested that there were cases both before and after *The Evangelismos* in which damages had been awarded, “even though it is at least sometimes difficult to say that the conduct involved actual *mala fides* or conduct from which *mala fides* might be implied”. Amongst a number of solutions canvassed would be, on an application for release as part of the Court’s general discretion, requiring the arresting party to furnish a cross-undertaking in damages as a condition of continuing the arrest, so

assimilating Admiralty practice to developments brought about by Equity. That a change in practice was required was not a bar to such a suggestion; after all, it had been possible for the Court to “invent” the *Mareva* injunction. Sir Bernard Eder recognised that such a change in practice might discourage plaintiffs from effecting arrests in this jurisdiction; that was an “economic reason”, though “none the worse for that”. It necessitated, however, further comparative study.

54. An impressively succinct response to Sir Bernard Eder’s 2013 lecture, entitled “*A Reply to Sir Bernard Eder*” 38 Tul. Mar. L.J. 137 (2013), followed from Prof. Martin Davies (Admiralty Law Institute Professor of Maritime Law, Tulane University Law School, New Orleans; Director Tulane Maritime Law Center). Prof. Davies found Sir Bernard Eder’s definition of “wrongful arrest” (set out above) “disquieting”. He said this:

“Is it really defensible to argue that any arrest is wrongful if the underlying claim turns out ultimately to be unsuccessful, whether because of the court’s resolution of disputed issues of fact that were not clearly apparent at the time of the arrest, or the court’s determination of legal issues that were not clearly settled when the claim was brought, or for any other reason? If so, the stakes in any in rem action would become vertiginously high: win, or be left with a bill for tens, perhaps hundreds, of thousands of dollars in damages for an arrest that ultimately proved wrongful, but which appeared at least plausible when made. To award damages against every plaintiff whose claim proves ultimately to be unsuccessful would be to tip the balance so far in favour of the defendant shipowner that only the very largest or most obvious of deserving claims would ever be brought.”

Prof. Davies called into question the suggested analogy between freezing injunctions and ship arrests:

“If no security is provided by the shipowner, a ship arrest immobilises only one of the shipowner’s assets, the ship itself, and only until such time as security is given to secure its release. The rest of the shipowner’s business continues untouched...

.....

...Ship arrest does not paralyse a shipowner’s whole business in the way that a freezing order can. In practice, few ships are actually arrested, and even fewer remain under arrest for any extended period of time....

The potentially high costs of actual arrest that Sir Bernard emphasises are usually borne only by shipowners who are, or are soon to be, insolvent. That is precisely the kind of case in which the plaintiff’s interests are most in need of protection.”

Prof. Davies went on to suggest that the torts of malicious prosecution and abuse of process provided a “closer analogy” than Sir Bernard’s suggestion of the freezing order. The prospect of a counterclaim for damages for wrongful arrest (as suggested by Sir Bernard) would have a “chilling effect”:

“Unless and until someone can suggest a plausible happy medium between awarding damages whenever the plaintiff’s claim was brought out of *mala fides* or *crassa negligentia*, and awarding damages whenever the plaintiff’s claim ultimately proves to be unsuccessful, however plausible it might have seemed when brought – and no one has been able to craft such a happy medium so far – the law properly rests (as it has long done) at the former end of the spectrum, rather than the latter.”

55. There followed “*A Rejoinder*” from Sir Bernard Eder, 38 Tul. Mar. L.J. 143 (2013). He suggested that the requirement of a cross-undertaking in damages as a precondition to the grant of a warrant of arrest constituted the “plausible happy medium” to which Prof. Davies had referred. The provision of a cross-undertaking did not mean that if the claim ultimately failed the arresting party would necessarily have to pay damages; the Court retained a discretion whether or not to enforce the cross-undertaking. Sir Bernard accepted that the analogy between freezing injunctions and ship arrests was “far from exact”, in particular “because, unlike the former, the latter is asset-specific...leaving the rest of the shipowner’s business untouched”. The standard cross-undertaking, however, was not only required in the context of freezing injunctions; such an undertaking was generally required whenever the Court granted an interlocutory injunction and that had been the position in England for over 150 years. Sir Bernard found “unpersuasive” the argument in support of the present law that “it has ever been thus”. The law did not (always) stand still, as demonstrated by the development of the *Mareva* injunction.
56. The literature includes other noteworthy contributions; we cannot either cite or even refer to them all, though we would make particular mention of the articles by Shane Nossal, “*Damages for the wrongful arrest of a vessel*” [1996] LMCLQ 368 and Michael Woodford, “*Damages for Wrongful Arrest: Section 34, Admiralty Act 1988*” (2005) 19 MLANZ Journal 115. Moreover, we add that there are shades of views amongst the commentators; it should not be thought, for instance, that there is a consensus in support of departing from *The Evangelismos*. By way of illustration, in the Case Note on *The Kommunar* litigation by D.J. Cremean, “*Mala Fides or Crassa Negligentia*” [1998] LMCLQ 9, the author said this (at p.10):

“...There is nothing inherently wrong in that test [i.e., that in *The Evangelismos*] – even though it is expressed in somewhat quaint terms – and it becomes only a question of policy whether the proper test should or should not be one which is a little wider. If the test is to be altered, however, it should be done by Parliament. There are a number of considerations involved on this question, not least of which is whether a reformulation of the test may unnecessarily restrict or hinder access to Admiralty arrest. The right to proceed, *in rem*, and arrest a vessel, has for many centuries been the chief distinguishing feature of Admiralty. Sir Robert Phillimore in

*The City of Mecca* described it as ‘one of the special advantages incident to the jurisdiction of the Court of Admiralty’.”

57. Turning to the case law internationally (and we cannot pretend to do so exhaustively), we begin with a brief reference to a decision of the Hong Kong Court of Appeal in *The Maule* (1994, No. 187), concerning an inquiry into damages for wrongful arrest. The Court held that the relevant test was furnished by *The Evangelismos*. Bokhary JA (at [18]) treated the analogy between the tort of malicious prosecution and a claim for damages for wrongful arrest as “well-established”. On the facts, *The Evangelismos* test presented no difficulty in interpretation and had not been satisfied. Accordingly, the appeal was allowed.
58. There is next a noteworthy decision of the Supreme Court of Canada in *Armada Lines Ltd v Chaleur Fertilizers Ltd*. [1997] 2 SCR 617. In this case, the Appellant shipowner had arrested the Respondent’s cargo, in support of a claim for breach of contract, relating to late production of the cargo for loading. The Respondent counterclaimed for damages arising out of the wrongful arrest. The Appellant succeeded before the trial Judge. The Federal Court of Appeal set aside the judgment, dismissed the breach of contract action and awarded the Respondent substantial damages for wrongful arrest of the cargo. The Supreme Court of Canada allowed the Appellant’s appeal in respect of the Federal Court of Appeal’s award of damages for wrongful arrest.
59. The judgment of the Supreme Court was given by Iacobucci J. The rule in *The Evangelismos* was central to the debate. As noted by Iacobucci J, the Respondent invited the Court to depart from it because of the similarity between a maritime arrest and a *Mareva* injunction. In substance, he held (at [23] *et seq*) that the two orders were “not dissimilar”; however, the rules surrounding the two remedies differed in certain important respects – in particular as to the requirement for a cross-undertaking in damages and the imposition of liability for damages. The Respondent’s case was that the disparity between the rules operated unfairly against defendants in Admiralty actions. To remedy this unfairness, the respondent had suggested “imposing a new rule on maritime law”. As recorded by Iacobucci J (at [25]):

“Under this proposed rule, a plaintiff who effects a maritime arrest and then has his or her claim dismissed will be liable for all damages caused by the arrest...”

60. While he had “some sympathy” with the argument, Iacobucci J rejected it, saying this (at [26] – [27]):

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

In this regard, I note that, apparently alone among the common law jurisdictions, Australia has departed from the rule in *The Evangelismos*. Section 34(1)(a)(ii) of the Australian *Admiralty*

*Act 1988*, No. 34 of 1988, provides that a party may recover damages arising out of the arrest of property if the arrest was obtained ‘unreasonably and without good cause’. As pointed out by counsel for the appellant, this change was effected not through judicial means, but rather by specific legislative enactment. In my opinion, any analogous change in Canadian law must originate in the legislative branch of government. For these reasons....the rule in *The Evangelismos* remains good law in Canada.”

61. The Court went on to underline that there was no evidence that the Appellant had acted with either bad faith or with gross negligence and concluded that the Federal Court of Appeal had erred in awarding damages for wrongful arrest.
62. Against the background that *The Evangelismos* had previously been authoritatively approved in that jurisdiction, the Singapore Court of Appeal has more recently given detailed consideration to the question of damages for wrongful arrest in *The Vasiliy Golovnin* [2008] SGCA 39; [2008] 4 SLR(R) 994, esp., at [113] and following, in the judgment of the Court delivered by Rajah JA. This is a most valuable judgment, both for its depth of analysis and the width of its comparative law survey. That, on the facts, *The Evangelismos* test was in any event held to be satisfied, does not at all detract from the helpfulness of the judgment.
63. The Court noted that, despite being decided some 150 years previously, *The Evangelismos* test continued to prevail in various other Commonwealth jurisdictions – but also recorded perceived (and, by now in this judgment, familiar) problems with regard to the test.
64. Here too, reference was made to the test introduced in Australia by way of legislation – unreasonableness and lack of good cause - following a comprehensive review by the Australian Law Reform Commission. So too, in South Africa and Nigeria, the test for wrongful arrest had also been specifically enacted in legislation and was tied to the concept of reasonableness and the existence of good cause. As Rajah JA observed (at [122]):

“The test for awarding damages now varies across the Commonwealth. It is perhaps pertinent to note here (in passing) that an even more liberal approach has been adopted by many civil law countries where the arrestor is simply held liable for damages once it is shown, without more, that the arrest was unjustified....”
65. Rajah JA remarked upon the paucity of discussion as to the rationale of *The Evangelismos* test in judgments applying it. He went on to observe:

“124. ...at the time when *The Evangelismos* was decided, *in rem* proceedings were begun by warrant of arrest and the jurisdiction of the admiralty court was properly invoked only upon the arrest of the ship...Since the arrest of the ship constituted the commencement of an action then, a high threshold was required for wrongful arrest so as to protect

plaintiffs who were unable to prove their claims on a balance of probabilities from liability for damages, and such liability would logically only arise in situations analogous to malicious prosecutions, where the action was commenced with malice and without reasonable or probable cause...It has thus been said that the origin of the admiralty action for wrongful arrest is that of the common law action for malicious prosecution...

125. However, it has often passed unnoticed that the enactment of the Supreme Court of Judicature Act 1873 (c66) (UK) and the Supreme Court of Judicature in England changed the practice of commencing admiralty proceedings with the introduction of the writ of summons. Since then, admiralty proceedings have been commenced by the issue of an admiralty writ *in rem*...and the jurisdiction of the admiralty court is invoked by the service of that writ....Given this fundamental change in circumstances, *ie*, that the historical reason for having a high threshold test for wrongful arrest is now no longer valid, it has been searchingly queried if the *Evangelismos* test should still prevail....”

66. Accordingly (at [128]), while “plausible claims should not be stifled” it was clearly not desirable in the public interest “that really implausible claims be allowed to be indiscriminately mounted with impunity”. The Court then traced the history of the *Armada Lines* litigation in Canada (discussed above) and remarked (at [130]) that while arrests and *Mareva* injunctions differed in some respects, they both:

“...serve the same ultimate purpose...of restraining a defendant from dealing with his or her property before judgment is given. It seems to us only logical that the law should incline in future towards a common test for damages arising from the wrongful solicitation of any *ex parte* peremptory remedy. For now, however, the ship arrest cases stand alone as a separate category.”

67. On the other hand (at [131]), *The Evangelismos* test could be said to “serve a wider economic or policy purpose”. Aggrieved claimants required friendly forums to bring actions. International comity was a further consideration, albeit that with the divergence of law and practice (already discussed) this reason might be increasingly harder to defend. Furthermore (*ibid*):

“Practically speaking, although the admiralty jurisdiction of the court now can be invoked without an arrest being made, the arrest of the ship provides security for the claim which cannot be defeated by insolvency and makes it exclusively available only to maritime claims....An unexpected arrest is undeniably the most effective means of requiring a shipowner to furnish some other type of security to ensure the swift release of its vessel. In today’s modern world, with the advent of marine insurance and P&I clubs, there is usually no difficulty furnishing some other form of security, such as a letter of

undertaking from a P&I club to secure the release of one's vessel. In fact, it seems more often than not in practice that the mere threat of an arrest will be sufficient to invoke the owners of the ship threatened with arrest into providing a voluntary security, and no actual arrest usually takes place after that....”

68. Ultimately (at [132]), “the formulation of an appropriate benchmark” boiled down to “trying to strike a fair balance between shipowners on the one hand, and the potential maritime claimants on the other”. The Court reiterated that where Commonwealth countries had departed from *The Evangelismos* test, the reforms had been brought about by legislation rather than by the Courts. Specific reference was made in this regard to the Supreme Court in Canada (as already discussed) declining to depart from *The Evangelismos* test and (at [133]) to the observations of Giles J in *Mobil Oil New Zealand Ltd* [2000] 1 NZLR 49, where he expressed the view that it would be “for the Legislature to rebalance the odds” which disproportionately favoured the plaintiffs.

69. In the event, Rajah JA's conclusion is of great interest: a reconsideration of *The Evangelismos* was open to the Court but on a properly informed basis, with the benefit of views from the maritime community. Rajah JA put it this way (at [134]):

“We would agree with the views of both Iacobucci J and Giles J to the extent that the *Evangelismos* test is long-standing, and should not be departed from lightly, without good reason and due consideration. However, it is always open to this court to depart from this judicially-created test if the day comes when it no longer serves any relevant purpose. Having examined the genesis of the *Evangelismos* test and its current application in Singapore, we shall for now leave this issue to be addressed more fully at a more appropriate juncture. We are prepared to reconsider the continuing relevance and applicability of the *Evangelismos* test when we have had the benefit of full argument from counsel as well as the submissions of other interested stakeholders in the maritime community in the form of Brandeis briefs.....”

70. The *Comite Maritime International* (CMI) is a not-for-profit international organisation established in Antwerp in 1897; its concern lies with the unification of maritime law and related activities. By a coincidence of timing, the CMI was due to meet on 9 November 2018 to discuss Liability for Wrongful Arrest. The upshot was, with respect, a most helpful survey (“the survey”) of the applicable laws and legal tests in this area internationally, conducted by Dr Aleka Sheppard, Chairman of the International Working Group (“IWG”) of the CMI (and also the Founder/Chairman of the London Shipping Law Centre).

71. The survey posed three broad questions:

“A. What is the applicable law by the various States in respect of ship arrest and liability for wrongful arrest at national level;

B. Whether counter-security is required to be provided by the arrestor when the application for the ship arrest is made, or thereafter, in the event of a potential wrongful arrest;

C. What is the legal test and the standard of proof for a defendant-arrestee to succeed in a wrongful ship arrest claim.”

72. Detailed answers were obtained from 38 National Maritime Law Associations. A selection from the responses follows. As to *Question A*, 17 out of the 38 countries applied the 1952 Arrest Convention, including the UK and Hong Kong; 2 applied the 1999 Arrest Convention; 17 applied purely domestic legislation, including Australia, Canada, New Zealand, Nigeria, South Africa and the USA.
73. As to *Question B*, 11 of the 38 required the applicant-arrestor to provide counter-security; 13 did not, including Australia, Canada, Hong Kong, New Zealand, the UK and the USA; 13 gave their Courts discretionary power in respect of ordering counter-security.
74. As to *Question C*, 9 of the 38 (none of them common law jurisdictions) applied strict liability; 10 required proof of negligence as applied in tort rules; 14 required proof of other culpable behaviour, including Canada, Hong Kong, New Zealand, South Africa, the UK and the USA.
75. In the accompanying commentary, Dr Sheppard noted that the remedy for wrongful arrest was approached differently by the various States. Some considered the issue of damages as a procedural law matter, whereas others treated it as one of substantive law. Plainly, complexities arose, among other things, as to governing law and whether there were any limits on recoverable damages. As Dr Sheppard concluded, the data showed a “sharp disparity” between national laws both on the liability for wrongful arrest and the remedy. The contrast was not only between the Common Law and Civil Law jurisdictions but also between the Civil Law jurisdictions. Accordingly, it “would appear to be a major challenge” to reach a definition of “wrongful arrest” and insert it in a future international instrument. Further work was required from the IWG whose goals should be to make concrete proposals as to:
- “(i) a definition of the test, (ii) counter-security provision, (iii) the type and extent of damages that may be claimed, and (iv) the method of unification, if any, whether by a Protocol or soft law, such as Guidelines, or Model provision(s).”
76. For completeness, we record the terms of Art. 6.1, the relevant provision of the 1999 Arrest Convention, ratified by only 11 States, with the UK not amongst them:
- “The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or

damage as may be incurred by that defendant in consequence of:

- (a) the arrest having been wrongful or unjustified; or
- (b) excessive security having been demanded and provided. ”

## DISCUSSION

77. At the outset, we can dispose of Mr Lord’s submission that the Judge erred in wrongly supposing himself bound to refuse Owners’ application. As appears from the judgment, the Judge was clear throughout that the Court’s power to release a vessel from arrest was discretionary; as he observed (at [41]), that discretion must be exercised in a principled manner. The remainder of the judgment was devoted to working out how that discretion should or should not be exercised. Properly read, Teare J thought it inappropriate, at first instance, to exercise his discretion to order release of the vessel, absent a cross-undertaking in damages, having regard to the law, Admiralty practice and industry arrangements in this area. That is a very different thing from a conclusion that he was bound to refuse the application, regardless of its intrinsic merits. Having thus cleared the decks, we turn to the essential issue on the appeal: namely, whether Teare J erred in the exercise of his discretion under CPR r. 61.8(4)(b) in refusing to order the release of the vessel, without requiring the Bank to provide a cross-undertaking in damages.
78. In approaching this question, we are satisfied that we are not bound by either *The Evangelismos* or *The Bazias 3* to dismiss the appeal.
79. First, the issue in *The Evangelismos* went to damages for wrongful arrest. By contrast, here the issue goes to the Court’s discretionary power to order the release of a vessel from arrest. Accordingly, it is difficult to see how we could be strictly bound by *The Evangelismos* to decide this appeal one way or another and we do not think we are.
80. Secondly, *The Bazias 3*, admittedly a decision squarely on the issue of the Court’s discretion to order release of a vessel from arrest, spoke in terms of the Court’s “usual practice” only to order such release on the provision of sufficient security. The Court did not suggest this was the Court’s invariable practice – and as a discretion is involved, it would have been surprising if it had. Moreover, authorities such as *The Tjaskemolen* (and some others to which it has been unnecessary to refer) stand as examples of the Court making a different order, so as to do justice on the unusual facts of those cases.
81. It follows, in our judgment, that neither legislation nor the intervention of the Rules Committee is necessary to permit any departure by a Judge at first instance or this Court from the usual practice of not ordering release of a vessel from arrest absent provision of sufficient security by shipowners. Nor, for that matter, do we take the view that such a course is only open to the Supreme Court. Doubtless, a Court at any level would think long and hard before departing from the usual practice with regard to the release of a vessel from a maritime arrest – but that is not the same thing as being precluded from doing so. It may be noted that *Armada Lines* (in Canada) and the changes introduced by legislation in Australia, South Africa and Nigeria, all concerned the rule in *The Evangelismos* itself.

82. Moreover, we understand the nature of the concerns expressed as to the rule in *The Evangelismos* in the authorities and literature discussed above – and well-recognised by Teare J in the judgment:
- i) The rule can work harshly, leaving a shipowner uncompensated for substantial losses flowing from an unfounded arrest even in circumstances where bad faith or gross negligence cannot be established. See: *The Kommunar (No. 3)*, at p.33.
  - ii) Secondly, the rule can no longer be defended by reliance on its original rationale: see, *The Vasily Golovnin*, at [124] – [125]. As has been seen, at the time *The Evangelismos* was decided, arrest was essential in order to establish the jurisdiction of the Admiralty Court. On this footing, it was eminently understandable that the threshold for damages for “wrongful” arrest was set high – similar to that in the common law tort of malicious prosecution; no more than any other litigant, a party effecting a maritime arrest ought not to be liable for damages simply because his claim ultimately failed. However, strictly speaking, that rationale for the rule disappeared with the reforms of 1873 – 1875 and the 1883 Rules. Provided of course that the *res* is within the jurisdiction (*The Stolt Kestrel* [2015] EWCA Civ 1035; [2016] 1 Lloyd’s Rep 125, at [17]), Admiralty proceedings are commenced by the issue of an Admiralty writ *in rem* and jurisdiction is established by service of the writ in accordance with any one of the various modes of service provided for by PD 61, para. 3.6 (set out above). Accordingly, arrest is no longer essential to the establishment of jurisdiction in an action *in rem*. Upon analysis, the key purpose of arrest ever since the late 19<sup>th</sup> century is to prompt or compel the provision of security pending judgment in the action.
  - iii) Viewed in this light, the question can be searchingly posed as to why the position of a party making a maritime arrest should continue to diverge from that of a claimant obtaining a freezing order, seeking security for the claim pending judgment (other than in the sense of conferring priority over other creditors) by preventing the defendant from dissipating his assets. The former is not (save exceptionally) required to provide a cross-undertaking in damages; the latter ordinarily is required to provide such a cross-undertaking. Yet the underlying objective of the maritime arrest and the freezing order is now at least very similar, even if their historical origins were very different – the rule in *The Evangelismos* relating to damages for wrongful maritime arrest is best seen as analogous to or an example of the common law tort of malicious prosecution, rather than having any relationship to the development of cross-undertakings in damages as the price for obtaining interlocutory injunctions. If the *Mareva* injunction could properly be introduced in the final quarter of the 20<sup>th</sup> century and developed by way of case law, as it was (despite previous law or practice suggesting otherwise), a like case could be and is advanced in the context of maritime arrests.
  - iv) Further, in some respects a maritime arrest may bear more harshly on a shipowner than a freezing order impacts on the defendant subject to it. Thus, a freezing order ordinarily (at least when the tracing of assets is not involved) has exceptions for ordinary business expenses; a maritime arrest does not contain any such exception. Additionally, though deprived of the use of a

profit-earning asset, the shipowner may well continue to be liable for various expenses relating to the vessel under arrest. Furthermore, though the security required to release a ship from arrest is limited to the amount of the claim, plus interest and costs, on the basis of the claimant's reasonably arguable best case (*The Moshcanthy* [1971] 1 Lloyd's Rep 37, at p. 44) the ship arrested may well be considerably more valuable than the claim – so potentially giving rise to a sense of unfairness where security cannot be provided. A freezing order, however, will be limited by the Court to the estimated amount of the claim, plus interest and costs.

83. All this said and as already observed, Owners' case, if well-founded, would undoubtedly undermine very longstanding domestic law, both as to maritime arrests as of right and the unavailability of damages for wrongful arrest save in cases of bad faith or gross negligence. Moreover, it would result in a far-reaching change to the equally longstanding, settled and usual practice of requiring security as the price for releasing a vessel from arrest, so undermining that practice; as Teare J observed (at [42]), if a cross-undertaking in damages is required here in order for the arrest to be continued, then such an order would be equally appropriate in a great many cases. With respect, Mr Lord's submission that no more than a "tweak" to the practice was involved is unreal and fails to grapple with the underlying issues. We have already indicated that there is or may be a case for revisiting existing law and practice as to the release of property from maritime arrests; but that case is not advanced by avoiding the issues to which any significant revision would give rise. In this sphere, where commercial and industry affairs have been legitimately ordered on a certain understanding of the law and practice, there is a need for circumspection before embarking on judicial law making: Lord Bingham, "*The Judge as Lawmaker*" in *The Business of Judging* (2000), at pp. 31-32. The significance of a far-reaching departure from the existing practice exemplified in *The Bazias 3*, and dating back 150 plus years to the *D.H. Peri*, should not be underestimated.
84. Furthermore, there are formidable considerations which can properly be said to support the *status quo* or, at the least, tell against departing from existing law and practice in the present case.
85. First, the availability of arrest provides the unique feature of the claim *in rem*; it is what makes the action *in rem* unique or distinctive: *The Stolt Kestrel*, at [12] and [21]. There is a clear need for caution before unnecessarily restricting or hindering access to an Admiralty arrest, "the chief distinguishing feature of Admiralty": D.J. Cremean, "*Mala Fides or Crassa Negligentia*", *supra*.
86. Secondly, should Owners' appeal succeed in this case, it is overwhelmingly likely that the requirement of a cross-undertaking would become routine; as Teare J explained (at [48] – [52] of the judgment), there is nothing unusual about the present case. If the requirement of a cross-undertaking in damages did routinely become the price of arresting or maintaining a maritime arrest, "...the stakes in any *in rem* action would become vertiginously high": Prof. Davies, "*A Reply to Sir Bernard Eder*", *supra*. That is bound to have a "chilling effect" (in the words of Prof. Davies) and to constitute a deterrent to the use or threatened use of the right of arrest, even in apparently meritorious cases. That damages would not necessarily be payable pursuant to the cross-undertaking, is to miss the point; it is the risk that the undertaking will be enforced that counts. Moreover, there would be an obvious and

particular need to address the position of arrests (for example) at the behest of the crew of a vessel or suppliers of necessities (as underlined by Teare J, at [52]).

87. Thirdly, resistance to altering the *status quo* as to arrests in no way rests simply on tradition or the distinctive feature of Admiralty; there can be no real doubt as to the efficacy of the remedy of arrest or even the threat of arrest, in compelling the provision of some other security: *The Vasily Golovnin*, per Rajah JA at [131], set out above. So much so that, in practice, as explained by both Teare J in the judgment and Rajah JA, relatively few arrests are necessary.
88. Fourthly, a ship arrest is asset specific; it does not “freeze” or paralyse the entirety of the shipowner’s business in the same manner as a freezing order might do. Admittedly, an arrest will paralyse the shipowner’s business, unless or until security is provided for the release of a vessel, where the business is structured by way of one-ship companies. It may be thought, however, that precisely some such measure is needed to incentivise the provision of other security in the case of one-ship companies where, otherwise, shipowners in a variety of situations might well be disposed to walk away from the claim. Moreover, as Prof. Davies observed (*supra*), the potentially high costs of actual arrest are usually borne only by shipowners “who are, or are soon to be, insolvent” – but that is the very kind of case where the claimant’s interests “are most in need of protection”.
89. Fifthly, the analogy between maritime arrests and interlocutory injunctions, in particular the freezing injunction, is neither exact nor compelling; as Teare J observed (at [46]), “judges of great authority” had not been compelled by the comparison to suggest that a cross-undertaking should be required in the context of maritime arrest. Plainly, it did not strike Lloyd LJ in *The Bazias 3* as a reason justifying a departure from the usual practice. Indeed, in *Willers v Joyce* (*supra*), Lord Clarke, albeit *obiter*, said this (at [68]):

“...Claims for damages for wrongful arrest of a ship are not limited to claims for security obtained on an *ex parte* basis. They are claims in tort for wrongful arrest in which, if the claimant is successful he or it will obtain damages calculated in accordance with the principles of the common law. A person who arrests a ship does not have to provide security to the defendant in respect of any loss which he might incur. It is thus not helpful (as I see it) to note that it is now commonplace for claimants to be required to give undertakings as a condition of obtaining a freezing order. I recognise that there are those who favour the introduction of such an approach in the case of the arrest of ships...However, so far as I am aware, no such approach has been adopted in any decided case.”

As Lord Clarke went on to observe (at [71] and following), there was support in authority for treating claims for damages for wrongful arrest as analogous to common law actions for malicious prosecution. Further, Lord Clarke underlined (at [77]) that maritime arrest was as of right, rather than discretionary. Teare J (at [38]) found these observations to be of “at the least, great persuasive authority”. We agree.

90. Sixthly, though (as discussed) an arrest is no longer a requirement for establishing Admiralty jurisdiction, this has been the case since as long ago as 1883: *The Burns* [1907] P 137, at pp. 149-150 (Fletcher Moulton LJ). Not only did this change not alter the nature of an action *in rem* but, it might be thought, there has been ample time to reconsider the law and practice relating to maritime arrests in this jurisdiction – yet no such reconsideration has taken place.
91. Seventhly, the powerful inference is that there is no, or no significant, pressure from the maritime industry for a change in the balance struck for so long between shipowners, on the one hand, and potential maritime claimants, on the other. It is further clear (from Dr Sheppard’s survey) that there is no consensus internationally on the approach to be adopted; it is noteworthy that the 1999 Arrest Convention has not been ratified by the UK or more widely internationally. Still further, as appears from the literature, the debate amongst the commentators does not disclose a consensus, nor is it all one way.
92. Eighthly, so far as the maritime industry and the CPR are concerned, arrangements and systems are in place – without as remarked, any apparent significant discontent – premised on the settled, existing state of the law and practice. As explained by Teare J (at [52]), P&I Clubs and hull underwriters routinely give undertakings either to avoid arrest or to secure release from arrest. Any disturbance of these practical, commercial arrangements should not lightly be embarked upon. Additionally, the current system of cautions contained in CPR r. 61.7 (dating back ultimately to the *caveat* procedure in the 1855 Rules, noted by Teare J (at [45])), provides a means by which arrest can be avoided by shipowners, over and above the giving of private undertakings.
93. Pausing there, we do not lose sight of the fact that, as we have been told, alternative security by way of a P&I letter of undertaking is not available in respect of a dispute under a loan agreement such as this, which is not covered by the relevant liability insurance. We also are quite unable to accept that Owners’ counterclaim (so far as it goes or may go) in some way renders the provision of the cross-undertaking otiose.
94. However, even taking these matters very much into account, for the reasons already set out, we conclude that the case against an “overnight” change (Teare J, at [57]) to the settled law and practice is overwhelming. We remind ourselves, in any event, that this is an appeal against a discretionary decision by the Judge; adapting Mr Bright’s powerful submission, there is no case for this Court to intervene on a discretionary matter when, on completely standard facts, the Judge had followed the usual practice. In full agreement with the Judge’s conclusion, we would dismiss the appeal.
95. We only part company from Teare J insofar as (at [57]) he considered that the intervention of Parliament or the Rules Committee was required to alter the present position. As already indicated, we do not share that view, at least with regard to the question of any requirement for a cross-undertaking as the price of maintaining an arrest, whatever the position might be in the case of a direct challenge to the rule in *The Evangelismos* itself, given the high authority of that decision. Instead, in the present context, particularly because it concerns the discretionary power of the Court to order the release of a vessel from arrest, we are respectfully much attracted to the approach adopted by the Singapore Court of Appeal in *The Vasilij Golovnin*, at [134] (set out above). As envisaged by that approach, it is open to the Court itself to

reconsider the position, but it should only do so if properly informed as to the views of the maritime community, including the practical ramifications of any proposed changes and the preferred route to be adopted if any such changes are decided upon. Moreover, the Court would wish to be informed of the likely consequences for this jurisdiction internationally if the *status quo* was to be altered. In short, the Court would wish and need to have a clear understanding of the industry implications of any proposed change before acceding to it. It is unnecessary to be prescriptive as to how the views of the maritime community should be obtained (whether by way of consultation or otherwise) or whether a consensus would need to be apparent – but, plainly, a case for change would be much strengthened if it could rely on significant support from the maritime community, extending much wider than the views of (even eminent) legal commentators. Additionally, it would be for the Court entertaining such a challenge to consider the impact on the rule in *The Evangelismos* of a departure from the existing practice.

96. Matters do not quite end there, as there is a separate, fact-specific and narrow ground upon which, again in agreement with the Judge, we would dismiss the appeal.
97. It will be recollected that central to Owners’ submissions was the contention that the present case involved balancing a risk of injustice to Owners, on the one hand (if no cross-undertaking was provided), with no prejudice to the Bank (if the cross-undertaking was ordered). The crucial risk of injustice to Owners flowed from the inability of the one-ship owning company in question to put up alternative security to obtain the release of the vessel.
98. Teare J’s findings (at [49], set out above) are fatal to Owners’ assertion of hardship. The Judge held that Owners had not made good the case that alternative security could not be provided by their direct and indirect shareholders. As already noted, Owners do not challenge the Judge’s conclusion in this regard; they submitted instead that the Judge should have confined his question to the one-ship owning company (i.e., Stallion Eight Shipping Co. S.A.).
99. For our part, we agree entirely with the Judge’s approach; on any view, it was an approach he was entitled to take. The risk of injustice upon which Owners sought to rely hinged on Owners “condescending to particulars”, dealing not only with their own resources but with the resources of their shareholders and demonstrating an inability to avail themselves of “the remedy usually adopted to avoid loss caused by an arrest” (judgment, at [49]). This Owners failed to do. The risk of injustice can only be demonstrated by an argument going to substance; an inquiry confined to the resources of a one-ship owning company with its one ship under arrest would be both arid and pointless - and would give rise to the most obvious perverse incentives.
100. Accordingly, the appeal must be dismissed on this narrow ground as well.
101. For the avoidance of doubt, we add that our judgment neither expresses nor implies any view as to the merits of the underlying dispute between Owners and the Bank.