



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY, MALAYSIA
[COMMERCIAL DIVISION]
[ADMIRALTY IN REM NO. WA-27NCC-68-11/2016]**

**Admiralty Action In Rem Against The Vessel: “SEMUA
BAHAGIA” (Official No.: 332461 / IMO NO.: 9396880) from Port
Klang, Malaysia**

BETWEEN

MAJOROLE SHIPPING SDN BHD

(Company No.: 578955-M)

... PLAINTIFF

AND

**Owners and / or other persons having interest in
ship or vessel “SEMUA BAHAGIA”**

(Official No.: 332461 / IMO No.: 9396880) **... DEFENDANT**

AND

M & G TANKERS (L) PTE LTD

(Company No.: LL14368)

... INTERVENER

BEFORE

YA KHADIJAH BINTI IDRIS

JUDGE

FOUNDATIONS OF JUDGMENT



[1] This is an admiralty action in rem. The plaintiff filed this in rem writ (“Writ”) against the defendant, being the owners and / or other persons having interest in the ship or vessel “Semua Bahagia” (“Vessel”) in relation to services as a shipping agent and supplier to the Vessel and its sister vessels. The Vessel and its sister vessel were owned by Semua Shipping Sdn Bhd (“Semua Shipping”). The plaintiff claims RM 875,293.35 being the total sum outstanding arising from a total of 70 invoices issued by the Plaintiff.

[2] On 10 January 2017 judgment in default of appearance was entered against the defendant.

[3] On 9 November 2018 via enclosure 32, the plaintiff filed an application seeking, among others, for a declaration that the transfer of ownership or title of the Vessel to M&G Tankers (L) Pte. Ltd (“the Intervener”) is invalid and ineffective.

[4] On 1 November 2018 the Intervener obtained leave from this court to intervene and it entered appearance on the same day. On 29 November 2018 the Intervener filed enclosure 35, seeking among others, for a declaration that the Plaintiff has no right to enforce the Judgment against the Vessel and the Intervener is free to employ the Vessel unencumbered by the Judgment.

[5] This court dismissed enclosure 32 and allowed enclosure 35. The Plaintiff appealed.

Background Facts

[6] The Plaintiff is a company in the business of providing shipping agency services. It has rendered services in respect of shipping agent and supplies to vessels owned by the Defendant. The vessels and the invoices issued in respect of the vessels and the total sum outstanding is as follows –

VESSEL	INVOICES ISSUED	INVOICE TOTAL SUM
Semua Bahagia (the subject vessel)	16	RM 172,392.51
Semua Berjaya	10	RM 140,013.06
Semua Sejati	13	RM 185,241.00
Semua Selamat	17	RM 181,582.11
Semua Gembira	9	RM 125, 996.10
Semua Gemilang	5	RM 70,068.47
TOTAL SUM OUTSTANDING		RM 875,293.25

[7] Due to the defendant’s failure to settle the outstanding sum, the plaintiff invoked section 21 (4) of the UK Supreme Court Act 1981 to initiate this in rem suit, in particular Section 20 (2) (m) of the same. Subsequently on 4 November 2016 the Plaintiff obtained a warrant of arrest (enclosure 5) against Semua Bahagia. The warrant of arrest (“Warrant”) was executed on 8 November 2016 off the waters of Johor Port. On 23 November 2016 the Plaintiff applied and obtained an Omnibus Order for the purpose of maintaining and preserving the value of the arrested Semua Bahagia.

[8] As a result of the Defendant’s failure to enter appearance, the Plaintiff obtained judgment in default of appearance for the sum of RM 875,293.25 on 10 January 2017.

[9] In September 2018, the Plaintiff had been made aware that the arrested Semua Bahagia was moved from its anchored position. The Plaintiff discovered from the search it has done that there was a change of ownership from Semua Shipping to the Intervener and that Semua Bahagia was renamed JM Sutera. The Marine Department had denied the Intervener’s request for Semua Bahagia to sail away as the said vessel was under arrest. The Intervener’s solicitor then issued a Letter of Undertaking dated 1 October 2018 (“Letter of Undertaking”)

whereby the Plaintiff's solicitor was notified that a sum of RM 975,293.25 (being the judgment sum RM 875,293.25 and legal costs of RM 100,000.00) was deposited in a bank account in the name of the Intervener's solicitor as stakeholder as security for the release of the Semua Bahagia. The Semua Bahagia was subsequently released in the evening of 1 October 2018.

Enclosure 32

[10] Via the said enclosure, the Plaintiff sought for the following orders and declarations –

- (a) that the Plaintiff's claim is guaranteed as a claim in Rem after the Writ in Rem dated 3 November 2016 and the Warrant of Arrest dated 4 November 2016 have been duly served on 8 November 2016;
- (b) that the Plaintiff's claim against ship / vessel Semua Bahagia (now registered as JM Sutera 5) has crystallised as a judgment in Rem after the Judgment in default of appearance had been granted on 10 January 2017 and is an In Rem claim which is protected and prioritised;
- (c) that the transfer of ownership or title of ship / vessel Semua Bahagia (now registered as JM Sutera 5) to the Intervener, M&G Tankers (L) Pte. Ltd (Company No. LL14368), without the consent and / or approval of the Admiralty Court Sheriff and whilst the vessel is still under the Admiralty in Rem action No. WA-27NCC-68-11/2016, is invalid and ineffective;
- (d) that the Plaintiff's claim as in the Judgment together with cost and interest is valid against the ship / vessel Semua Bahagia (now registered as JM Sutera 5) and shall be



enforced and be paid out from the stakeholder fund established by the solicitors for the Intervener, Messrs Christopher & Lee Ong, through the Letter of Undertaking dated 1 October 2018 for the Plaintiff;

- (e) cost; and
- (f) any other further reliefs and / or orders that this Honourable Court may deem just and expedient.

[11] The Plaintiff's enclosure 32 is premised on the following grounds –

- (a) upon service of the Writ in Rem and Arrest of the Vessel, the Plaintiff's claim was fully crystallised and secured in rem against the Vessel, cementing the Plaintiff's claim against the Vessel against the whole world;
- (b) having obtained the Judgment, the vessel Semua Bahagia was secured by a crystallised sum. This Judgment has never been challenged and cannot now be challenged by the Intervener in any way. The Intervener cannot now choose to ignore the Plaintiff's secured in rem claim and the sum secured; and
- (c) when the Intervener purchased Semua Bahagia, the arrest of the said vessel by the Admiralty Court was still in place. The Intervener failed to conduct any diligent searches or required any confirmation that Semua Bahagia is free of encumbrances. Accordingly the said vessel was fully encumbered by the in rem claim and secured in rem by the in rem judgment of the Plaintiff. Any dealing with the said vessel whether physical or otherwise without the consent of the Sheriff would be contempt of Court.



[12] Whereas via enclosure 35 the Intervener sought for the following declaratory reliefs –

- (a) a declaration that the Plaintiff’s arrest and or continuing arrest after the judgment in default on 10 January 2017 (“the Judgment”) of the vessel “Semua Bahagia” (Official No. 332361/IMO No. 9396880) now known as “JM Sutera 5” (“the Vessel”) is wrongful and is set aside;
- (b) a declaration that the Plaintiff has no rights to enforce the Judgment against the Vessel and / or the Intervener and that the Intervener is free to employ the Vessel unencumbered by the Judgment;
- (c) a declaration that the Plaintiff is stopped by its conduct from enforcing its right of arrest of the Vessel against the Intervener;
- (d) that the Vessel is ordered to be released from the arrest under the Warrant of Arrest issued on 4 November 2016;
- (e) that the Letter of Undertaking dated 1 October 2018 issued by Messrs Christopher & Lee Ong to the Plaintiff’s solicitors be returned to Messrs Christopher & Lee Ong for cancellation and Messrs Christopher & Lee Ong be released from the undertakings therein;
- (f) that the Plaintiff to pay the Intervener damages for the wrongful arrest of the Vessel and the determination of such damages to be referred to the Registrar for assessment;
- (g) that the Intervener be awarded costs pursuant to Order 59 Rules 5 and 6 of the Rules of Court 2012 and or



alternatively that the costs of, and incidental to, this application be paid by the Plaintiff to the Intervener; and

- (h) such further and / or other relief as this Honourable Court Deems fit and proper.

[13] In support of its enclosure 35, the Intervener contentions as contained in its written submission is reproduced below –

- (a) firstly, after arresting the Vessel and obtaining the Judgment in Default and for 19 months after obtaining the judgment, the Plaintiff did nothing to realise the security provided by the arrest of the vessel Semua Bahagia (the “Vessel”). The Plaintiff sat on its rights. The decision not to seek an order for the sale of the Vessel not only defeats the sole purpose of arresting the Vessel but the continuing arrest of the same constitutes an abuse of the court process and rendering the arrest unlawful, especially after the Plaintiff had obtained judgment as the Plaintiff’s claim had then merged with the judgment. The Plaintiff did not proceed to seek the sale of the Vessel because the Plaintiff knew that there were 3 mortgages taken out over the Vessel which debts would take priority over its claims. The Plaintiff obviously did not want to incur costs and expenses of the arrest and sale knowing that any proceeds that might be realised will be used to pay-off the mortgagee banks without any balance left to meet its claims;
- (b) secondly, the Plaintiff was lackadaisical throughout its arrest of the Vessel. The Plaintiff – in breach of the Omnibus Order – failed to provide reports on the status of the Vessel, failed to appoint security guards over the Vessel, failed to give notice of the arrest of the Vessel to

her registered owner, failed to know of inspection made by third parties of the Vessel with the view to purchase the Vessel, failed to know of the sale of the Vessel by the liquidator of its registered owner and failed to keep track of the Vessel's movements. The extent of the Plaintiff's disregard of the requirements of the laws and / or the Sheriff's directions was such that the Plaintiff failed to realise that the Vessel had been moved out of Johore Port (where she was arrested), failed to take notice of the Vessel's change of name in May 2018 and failed to track the movement of the Vessel in and out of Malaysian waters until September 2018, some 22 months after the Vessel was arrested. It can be surmised that the Plaintiff had no intention of enforcing its arrest at all. The arrest was a clear abuse of process;

- (c) thirdly, the Plaintiff failed to take sufficient measures in its service of the Writ and Warrant of Arrest to give notice to then owners of the Vessel of the arrest. No effort was made to warn the then owners of the arrest. The Plaintiff merely paid lip service to the requirements in the Rules of Court 2012 and did nothing to adhere to the spirit of the law. The warrant of arrest was not properly affixed as required under the Rules. This resulted in the Liquidator and / or the subsequent chain of purchasers of the Vessel – including the Intervener – having no notice of the Vessel's arrest; and
- (d) the Intervener on the other hand is a bona fide purchaser of the Vessel and had no notice that the Vessel was under arrest. Nothing in the Malaysian court system provides a channel for parties to check if a vessel is in fact under arrest in court proceedings. There is nothing to show that

the Warrant of Arrest, if properly affixed on the Vessel at the time of arrest (which is not admitted), had remained affixed on her at all material times to give due notice to third parties of her arrest. Neither is there any evidence that the Plaintiff had given due notice of the arrest to the registered owner of the Vessel.

[14] Both the Plaintiff and Intervener agreed that their applications should be heard together as their applications are substantially premised on the same facts and essentially relate to the same issues. At the outset this court note the Intervener's enclosure 35 is not seeking to set aside the Judgment as this court has no power to set aside judgment in rem that was granted prior to the Intervener's intervention (*Hock Hua Bank Bhd v. Sahari bin Murid* [1981]1 MLJ 143, *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors (The Brihope)* [1997] 1 MLJ 452).

Findings of the court

Service of the Writ and Warrant

[15] The Plaintiff contends the Writ was lawfully served and Warrant was lawfully granted and properly executed. The Intervener's stand is that the said warrant was an abuse of the process of the court and the service is irregular and therefore ought to be set aside.

[16] Order 70 rule 10 of the RoC 2012 provides as follows –

10. Service on ships: How effected (O. 70 r. 10)

(1) Subject to paragraph (2), service of a warrant of arrest or writ in an action in rem against a ship, freight or cargo shall be effected by –

- (a) *affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and*
- (b) *on removing the warrant or writ, leaving a copy of it affixed (in the case of the warrant) in its place or (in the case of the writ) on a sheltered, conspicuous part of the ship.*

[17] Under Order 70 rule 9 (2) of the RoC 2012, a warrant of arrest may only be executed by the Sheriff or his officer. In this instant case, the Warrant was executed by the bailiff of the High Court, one Yahya bin Madon. Pursuant to the definition of "officer" in Order 1 rule 4 of the same, a bailiff is construed as an officer. An affidavit of service was filed by the bailiff who averred as follows –

Saya YAHYA BIN MADON K/p. No 650127-01-5329 Bailif Mahkamah Tinggi di Kuala Lumpur yang beralamat No. Lot 3084-8, Kampong Padang Balang Hilir, 51100 Sentul, Kuala Lumpur dengan sesungguhnya bersumpah/berikrar dan menyatakan seperti berikut:-

1. *Bahawa pada hari Sabtu 08haribulan November, 2016 kira-kira jam 05.00 petang telah **menyerahkan Waran Penahanan** keatas Jabatan Laut Wilayah Selatan di Pasir Gudang Johor.*

2. *Kapal tersebut berada di laut Pelabuhan Johor dan **tiada krew berada di kapal tersebut**. Hanya terdapat dua orang penjaga kapal bersebelahan dengan kapal Semua Mutiara. Saya menampalkan salinan **Waran Penahan bertarikh 4.11.2016 dan Writ Saman Dalam Rem bertarikh 3.11.2016** di pintu utama kapal tersebut kira-kira jam 04.15 petang, keatas pendaftaran No. **WA-27 NCC-68-11/2016** yang dengan sempurnanya telah*

meteri dengan meteri Mahkamah Tinggi Kuala Lumpur Secara sendiri pada kapal “SEMUA BAHAGIA”.

3. *Sewaktu kami menyerahkan Waran Penahanan Serta Writ Saman Saya bersama Bailif En. Zainudin bin Ismail, dua (2) wakil Peguam Plaintiff serta satu (1) orang wakil plaintiff. Sewaktu pelaksanaan dijalankan tiada sebarang kejadian yang tidak diingini dan semua berjalan lancar.*

4. *Salinan termeteri Waran Penahanan, Writ Saman Dalam Tindakan In Rem serta Notis Penahanan Oleh Sherif bertanda “A “ dilampirkan bersama ini.*

The bailiff then made the following 3 endorsements on the Writ –

The first endorsement (“Endorsement-Service of Warrant”) which read as follows –

PENGINDORSAN SYERIF TENTANG PENYAMPAIAN

*Pada 8.11.2016, Jam 4.15 ptg dalam kapal “SEMUA BAHAGIA” (No Rasmi: 332461 / No. IMO: 9396880) yang dinamakan terletak di Pelabuhan Laut Johor Malaysia telah **ditahan** (dengan **meletak Waran** untuk satu tempoh yang singkat pada tiang kapal / vessel / bahagian luar superstruktur kapal, nyatakan mana-mana yang berkenaan) dan semasa meninggalkan proses itu **dengan meninggalkan sesalinan tetap pada tempatnya.***

Diindorskan 8 November 2016.

t.t.

.....

Penghantar Saman

The second endorsement read as follows –

PENGINDORSAN TENTANG PENYAMPAIAN

Writ ini telah disampaikan oleh saya YAHYA MADON Bailif bagi Mahkamah Tinggi Malaya di Kuala Lumpur ke atas kapal “SEMUA BAHAGIA” (No Rasmi: 332461 / No. IMO: 9396880) dari Pelabuhan Kelang, Malaysia, yang berlabuh di Pelabuhan Laut Johor pada 8.11.2016 2016 pada pukul 04.15 pagi/petang dengan melekatkan Writ Saman bagi suatu jangka waktu yang pendek di anjung vessel dan apabila writ itu ditanggalkan, ia dilekatkan pada tempatnya, di bahagian terlindung vessel tersebut.

Diindorskan pada 8 November 2016.

t.t.

.....

Bailif

Mahkamah Tinggi

Kuala Lumpur

The third endorsement read as follows –

PENGINDORSAN TENTANG PENYAMPAIAN

Writ ini telah disampaikan oleh saya YAHYA MADON Bailif bagi Mahkamah Tinggi Malaya di Kuala Lumpur ke atas kapal “SEMUA BAHAGIA” (No Rasmi: 332461 / No. IMO: 9396880) dari Pelabuhan Kelang, Malaysia, yang berlabuh di Pelabuhan Laut Johor pada 8.11.2016 2016



*pada pukul 04.15 pagi/petang dengan melekatkan Writ Saman bagi suatu jangka waktu yang pendek di anjung vessel dan apabila writ itu ditanggalkan, ia dilekatkan pada tempatnya, **di bahagian terlindung vessel tersebut.***

Diindorskan pada 8 November 2016.

t.t.

.....

Bailif

Mahkamah Tinggi

Kuala Lumpur

The Endorsement-Service of Warrant relate to the execution of the Warrant. The second and third endorsement relate to the service of the Writ and the contents of both the said endorsement are identical. Both the second and third endorsement will be collectively referred to as the “Endorsement-Service of Writ”.

[18] Based on the bailiff’s affidavit, it was averred that a copy of the Warrant was affixed at the main door of the vessel Semua Bahagia. No averment that the Warrant was affixed for a short time on any mast of the said vessel or on the outside of any suitable part of the said vessel’s superstructure. There was no averment to the effect that the original Warrant was subsequently removed and a copy of it was left affixed in its place. Based on the Endorsement-Service of Warrant, it is also not clear on which part of the said vessel (whether on the mast or outside of the said vessel’s superstructure) the original Warrant was affixed for a short while. It is also not stated by the bailiff that on removing the original Warrant a copy of the same was left affixed at

the same place.

[19] As to the service of the Writ, it was averred by the bailiff that a copy of the same was affixed on the main door of Semua Bahagia. It is not stated that the main door of the Semua Bahagia is the outside of the said vessel's superstructure or that it was affixed for a short time. There was no averment that the original writ was affixed for a short time on any mast of the said vessel or on the outside of any suitable part of the said vessel's superstructure. There was also no averment made that the original writ was subsequently removed and a copy of it was left affixed on a sheltered, conspicuous part of the Semua Bahagia. However in the Endorsement-Service of Writ, it was stated that the Writ was affixed for a short time on the bridge (*anjung kapal*) and upon removal of the Writ, the same was affixed at its place on a sheltered part of the said vessel. It did not however indicate that the Writ was affixed on a conspicuous part of the Semua Bahagia.

[20] Based on the Endorsement-Service of Writ, it is not known whether the Writ was left affixed on a conspicuous part of the Semua Bahagia. Assuming the bridge is considered as a sheltered and conspicuous part of the Semua Bahagia, there is clear inconsistency between the averments in the affidavit and the Endorsement-Service of Writ. As the affidavit serves as evidence of the facts in respect of service of the Writ, this court is compelled to conclude that the manner service of the Writ was effected (as averred by the bailiff) was not in accordance with the requirements under Order 70 rule 10 (a) and (b) RoC 2012.

[21] The purpose of arresting a ship in an action in rem is to obtain security for the satisfaction of any judgment which a plaintiff may obtain in such an action. Upon arrest the ship falls under the care and custody of the sheriff and it remain so unless the arrest is set aside or the ship is released upon provision of security or the ship is judicially



sold. Any interference with the custody of the arrested without leave of court amounts to contempt of court. Based on the requirement for service, the underlying objective is to give notice to the whole world of the Writ and Warrant. This is especially so in the case of the Warrant as unauthorized interference may amount to contempt of court which may result in penal sanction. In fact service of the Writ and execution of the Warrant may only be conducted by the Sheriff or his officer (see Order 70 rules 7 (3) and 9 (2)). Thus it is of utmost importance that the service of the Writ and execution of the Warrant is effected in accordance with Order 70 RoC 2012. It follows that strict compliance is required. As such this court is duty bound to scrutinize the affidavit of service filed by the bailiff. It is not, as counsel for the Plaintiff put it, questioning the truth of the affidavit and the judicial act of the bailiff. Merely filing an affidavit of service or that the service was carried out by the Sheriff or bailiff does not necessarily mean service was effected in accordance with the procedural requirements as stipulated in the RoC 2012.

[22] Taking into account the manner service of the Writ and execution of the Warrant was effected and the underlying objective as envisaged by Order 70 rule 10 (a) and (b) Roc 2012, this court is of the view service of the Writ and Warrant was not carried out in accordance with the manner as prescribed under the said provisions rendering the service irregular. This court is of the view the irregularity and non-compliance has adversely prejudice the Intervener as an interested party. Under the circumstances, this court is compelled to set aside the Writ and Warrant. As the Warrant is set aside it follows that the Plaintiff's hold (through the arrest) on the Semua Bahagia as security is no longer lawful and valid. It thus follow the security in the form of the Letter of Undertaking must be returned to the Intervener. Accordingly the Plaintiff's contentions that its claim is guaranteed as a claim in rem after the Writ and Warrant of



Arrest was duly served must fail.

[23] It must also be noted that there were no crew on board the vessel Semua Bahagia at the time the Writ was served and Warrant executed (as averred by the bailiff in its affidavit of service of the Writ and Warrant). Subsequent events that transpired after the vessel Semua Bahagia was arrested (which will be discussed later), shows that the said vessel was not manned at all material time. It is argued on behalf of the Intervener that in cases where the vessel is not manned, mere affixing of the Writ was a meaningless exercise and cannot in law amounts to a proper service. It is further argued that the Plaintiff has a further duty to ensure that the registered owner of the Vessel is given notice of the Writ and the arrest.

[24] In the case *Textill Basquit (Tebasa) v. The Owners and Charterers of the Vessel "Global Natali"* [1997] SLR 164, the in rem action originated under Order 75 rule 3 of the Rules of the Supreme Court (UK). Order 75 r. 11 of the said rules requires service of a warrant of arrest or a writ in an action in rem against a ship shall be affected by affixing the warrant or writ for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure, and on returning the warrant or writ, leaving a copy of it affixed (in the case of a warrant) in its place or (in the case of a writ) on a sheltered, conspicuous part of the ship. The court said it is clear that Rules of Supreme Court Order 75 Rule II applies to situations where a warrant or writ is served on a "manned" ship. It was averred by the process server that the warrant of arrest was executed on the vessel by affixation and on the harbour master. The court in that case found at the time when the process officer of the court served the warrant and the writ by affixing the same on the ship, the ship was unmanned. The court took the stand that even though service was consistent with the rules (Order 75 rule 11 which is

similar to Order 70 rule 9 (a) and (b) RoC 2012), it was a meaningless exercise. The court said this –

Thus when the process officer of this Court served the warrant and the writ of summons on 28 February 1997 by affixing them on the ship, it was “unmanned”, and hence although consistent with the rules was a meaningless exercise. The “res” in the instant matter was a “res derelicta” as Christopher Hill states in Maritime Law (4th Edition 1995) at page 114 –

The modern writ in rem has become a piece of legal machinery directed against the ship alleged to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. A judgment in rem is a judgment against “all the world”.

This does not mean that the vessel itself is the wrongdoer but that it is the means by which the wrongdoer (its owner) has done wrong to some other party. It is also logically the means by which the wrongdoer is brought before the court as a defendant to what may thereafter turn into an action in personam...

English legal theory has accepted that an action in rem is procedural, the purpose being to secure the defendant owner’s personal appearance.

*If that is the ultimate purpose of serving the warrant and writ by affixing them to the mast and a conspicuous part of the ship’s superstructure, it must be taken that such procedure was meant to ensure that notice was not merely given to the “birds” but to those who were in privity with the owners. Hence as was done in *The Prins Bernhard* (supra), **the circumstances under which***

the res in the instant matter was arrested and the writ was served necessitates this Court to consider any default in acknowledgement with circumspection. (emphasis added)

[25] The court in *Textill Basquit (Tebasa)* case referred to the case of *The Prins Bernhard* [1964] P 117 where the writ was served on the Master of the ship but was not affixed on the mast of the ship or on any other conspicuous part of the ship. In its judgment the court noted the following –

The learned Judge [in The Prins Bernhard's case] setting aside the service of the writ of summons, further stated

I have great sympathy for the process server, but the courts must be vigilant towards the rights and interests of third parties who might conceivably be affected by the writ or the consequences of its service. I must do what I can to safeguard the interest of those who have had no proper notice of the existence of this writ, and I am not disposed to save the service of this writ. The degree of irregularity in the service of the writ in rem was not such that I can feel disposed to overlook it.

(emphasis added)

The court in *Textill Basquit (Tebasa)* in granting the defendant's application for leave to file defence out of time took into consideration, among others, that the defendants' counsel discovered the warrant of arrest and writ in rem not from the ship but from the plaintiff's counsel.

[26] Based on the case of *Textill Basquit (Tebasa)*, it is justified for this court to demand strict compliance with the procedural



requirement in relation to service of the Writ and Warrant. As action in rem against a vessel is essentially to secure a plaintiff's claim against all the world, proper and due service of the Writ and Warrant is a prerequisite for the Plaintiff to assert its right against the said vessel.

[27] The next question to be determined is whether the arrest made against the vessel Semua Bahagia was unlawful and / or wrongful. In this respect the Plaintiff referred to the case of *The Evamar* [1989] 2 MLJ 460 where it was held to succeed in a claim for wrongful arrest the Intervener must show there were malicious negligence or mala fide on the part of the Plaintiff. It is argued on behalf of the Plaintiff that the Intervener has failed to do so.

[28] Having considered the affidavit evidence adduced in the instant case, this court is of the view the Plaintiff had acted mala fide when they arrested the Semua Bahagia. The reasons are stated below.

Failure to comply with the Omnibus Order

[29] The said vessel was under arrest for a period of almost 2 years, namely, from 8 November 2016 until 1 October 2018 the date on which the Semua Bahagia was released upon the issuance of Letter of Undertaking by the Intervener. Whether there is mala fide on the part of the Plaintiff is a question fact. The crucial facts which transpired during such period is as follows –

- (a) the Plaintiff obtained an Omnibus Order on 23 November 2016 (“Omnibus Order”). The purpose of the Omnibus Order is for the preservation, management or control of the said vessel while under arrest. The Plaintiff in its affidavit in support (enclosure 11) of the application for the Omnibus Order has averred that the said order is

imperative and necessary to protect and preserve the value of the vessel *Semua Bahagia* as well as the rights and interest of all parties who may have an interest in the said vessel;

(b) the terms of the Omnibus Order is as follows –

1. *Bahawa Plaintiff, MAJOROLE SHIPPING SDN. BHD. (No. Syarikat: 578955-M) diberi kuasa dan melantik bagi pihak dan dengan kelulusan terdahulu Sherif, MAJOROLE AGENCIES SDN BHD sebagai kapal pengurus untuk “SEMUA BAHAGIA” (No. Rasmi: 332461 / No. IMO: 9396880) untuk menjalankan semua perkhidmatan kepada Vesel seperti yang diperlukan; dan semua kos dan perbelanjaan yang berkaitan atau bersampingan dengannya bermula dari tarikh penangkapan dianggap sebagai sebahagian daripada kos dan perbelanjaan Sherif.*
2. *Bahawa mana-mana dokumen kapal asli dan sijil yang diperolehi semasa menjalankan penangkapan itu, disimpan dalam jagaan Sherif dan / atau Plaintiff untuk penyimpanan selamat sementara menunggu keputusan oleh Mahkamah Yang Mulia ini atas jumlah terhutang sebanyak RM 875,293.25 berdasarkan invois- invois bagi perkhidmatan yang telah dibekalkan kepada vesel Defendan.*
3. *Bahawa MAJOROLE AGENCIES SDN BHD dalam kapasiti sebagai pengurus kapal, dengan kebenaran Sherif jika perlu, melantik satu Master dan anak-anak kapal, atas dasar kesemua bayaran yang dibuat dan perbelanjaan yang terbit daripadanya akan dijadikan sebahagian daripada kos dan perbelanjaan*

Sherif yang akan dibayar melalui hasil jualan yang diletakkan dalam Mahkamah.

4. *Bahawa vesel SEMUA BAHAGIA diberi kebenaran untuk digerakkan sekiranya perlu, oleh Sherif dan / atau Plaintiff dari lokasi asal iaitu di Kg. Pasir Putih, Pelabuhan Pasir Gudang, Johor kepada mana-mana lokasi yang ditetapkan oleh Jabatan Laut (Bahagian Selatan) dan / atau mana-mana lokasi lain dalam perairan Malaysia sekiranya keadaan memerlukan suatu penempatan semula dan / atau apa-apa alasan yang dibenarkan Sherif di atas permohonan Plaintiff, dan kesemua bayaran dan perbelanjaan yang terbit daripadanya hendaklah dijadikan daripada kos dan perbelanjaan Sherif dan akan dibayar melalui hasil jualan yang diletakkan dalam Mahkamah.*
 5. *Bahawa pengurus kapal yang dilantik, MAJOROLE AGENCIES SDN BHD dan / atau Peguamcara Plaintiff membuat laporan mengenai status vesel SEMUA BAHAGIA secara mingguan, yang mana akan e-failkan pada setiap hari Jumaat bagi minggu yang sama sehingga pelupusan penangkapan Vesel tersebut.*
- (c) thus the Plaintiff was allowed to appoint a ship manager Majorole Agencies Sdn Bhd (“Ship Manager”) to carry out all necessary services to the said vessel. The Ship Manager was also given the mandate to appoint a new master and skeletal crew to man the Semua Bahagia and to supply to the said vessel minimum victuals, domestic fuel and water necessary for the skeletal crew on board. It was further

ordered by the court that the Ship Manager or the Plaintiff's solicitor submit a weekly report in relation to the status of the vessel Semua Bahagia until the arrest of the said vessel is released;

- (d) based on the court's record, there were no weekly report submitted by the Ship Manager or the Plaintiff's solicitor. Importantly there is no evidence a Ship Manager was appointed to take care of the Semua Bahagia while it is under arrest. Neither were there evidence to show a new master and skeletal crew were appointed. In short the Plaintiff simply failed to comply with the Omnibus Order and the said vessel was left unmanned for the period from 8 November 2016 until 1 October 2018 when the Intervener provided Letter of Undertaking in favour of the Plaintiff.

Hence in defiance of the Omnibus Order, the Plaintiff failed to preserve and maintain the value of the vessel Semua Bahagia which it had arrested, for the interest of all parties who may have an interest in the said vessel;

- (e) in this respect this court is in agreement with the Intervener's position that had the Plaintiff complied with the Omnibus Order in particular the appointment of a new master and skeletal crew to man the Semua Bahagia, the present dispute would have been avoided;
- (f) in particular, the Intervener could not have gone so far to deal with the Semua Bahagia in the following manner –
- (1) after being absolutely assigned all of the rights, title, interest and benefits of Ton Supply International Co. Ltd (to whom Liquidator of Semua Shipping Sdn Bhd



sold the vessel Semua Bahagia) in consideration for the Intervener's payment of USD 2,742,300.00 (via Deed of Assignment dated 22 March 2018, see Exhibit MNI-12 of enclosure 38), the Intervener was granted permission by the Sheriff to pass through 2 other vessels (namely Semua Muhibbah and Semua Mutiara) which were tied to the Semua Bahagia in order for the Intervener's representatives to access and board the Semua Bahagia. The said vessel was then crewed by the Intervener (see Exhibit MNI-16 enclosure 38) who then had disengaged Semua Bahagia from Semua Muhibbah and Semua Mutiara. The Intervener subsequently re-activated Semua Bahagia by applying gasoil, repainting and obtain insurance for the said vessel (see Exhibit MNI-17 enclosure 38 for the breakdown of the re-activation expenses);

- (2) the Semua Bahagia was surveyed by Bureaus Veritas on 14 April 2018 to determine its general condition (see Bureau Veritas Certificate Exhibit MNI-23 enclosure 38) prior to a towed voyage from Johor River Anchorage to the shipyard of Malaysia Marine Heavy Engineering ("MMHE") in Pasir Gudang Johor;
- (3) on 15 April 2018, Northsea Inspection & Survey Sdn Bhd then performed a pre-towing survey of Semua Bahagia and certified that the said vessel were in fit condition for towage from Johor River Anchorage to the MMHE Shipyard in Pasir Gudang Johor (see Fit To Tow Certificate dated 15 April 2018 at Exhibit MNI-24 enclosure 38);

- (4) the Intervener took full delivery of the vessel Semua Bahagia on 16 April 2018 via the Protocol of Delivery and Acceptance (see Exhibit MNI-18 enclosure 38). It acquired the said vessel via Bill of Sale No. 01456 dated 3 May 2018 (see Exhibit MNI-19 enclosure 36). The Intervener became the registered owner of the Semua Bahagia on 8 May 2018 (see Exhibit MNI-28 enclosure 38). Via Certificate of Approved Name dated 14 May 2018, the Marine Department approved the Intervener's application to change the name Semua Bahagia to JM Sutera 5 (see Exhibit MNI-29 enclosure 38). Advertisement were posted in the Berita Harian and New Straits Time (see Exhibit MNI-30 enclosure 38) notifying the public of the change of name and inviting objection to the proposition of the said change in name to be addressed to the Registrar of Malaysian Ships of the Marine Department;
- (5) having obtained clearance for it to be towed, Semua Bahagia was moved to MMHE's shipyard. The said vessel was subsequently moved to berth Q 1 at MMHE Shipyard on 23 April 2018 (see email issued from the said vessel at Exhibit MNI-26 enclosure 38);
- (6) drydocking and repair works were carried out by MMHE on the Semua Bahagia at MMHE West Yard from 16 April 2018 – 12 July 2018. Invoice for the sum RM 1,760,000.00 in respect of the said works was issued by MMHE (see MNI-33 of enclosure 36);

- (7) in August 2018 the Intervener employed the Semua Bahagia on a voyage between Port of Pengerang, Johore Port, Tanjung Langsat Port, Tanjung Pelepas Port and the Port of Samarinda, Indonesia (see Fixture Recap at Exhibit MNI-34 of enclosure 36 and the respective Port Clearance issued by the Royal Malaysian Customs at Johore Port, Tanjung Pelepas Port and the Republic of Indonesia's Port Clearance issued by the Harbour Master at the Port of Samarinda on 31 August 2018 at Exhibit MNI-35 of Enclosure 36). In the said voyages, the Semua Bahagia did not encounter any restrictions from any authority in particular the Marine Department;
- (8) however on or about 28 September 2018 while performing a charter voyage carrying gasoil from the loadport of Port of Tanjung Langsat to the discharge port of the Port of Samarinda Indonesia, the Semua Bahagia was denied port clearance at the Port of Tanjung Langsat on the ground that the Vessel was under arrest by the Plaintiff. As such the Intervener was unable to commence the said vessel's voyage to Indonesia as scheduled. Semua Bahagia was only able to commence its voyage on Monday, 1 October 2018 after the Intervener's solicitor the Letter of Undertaking was issued.

[30] Had the Plaintiff appointed a master and skeletal crew to man the Semua Bahagia, the Intervener would have been alerted of the status of the arrested Semua Bahagia and the Intervener would have been denied access to the Semua Bahagia, what more to place its crew on board the said vessel. The said vessel could not have been towed from Johor River Anchorage to the MMHE Shipyard in Pasir Gudang

Johor or even performed voyages from Johore Port all the way to Indonesia and back to Johore Port.

Failure to seek for judicial sale

[31] The Plaintiff after having obtained Judgment on 10 July 2017, has not taken any steps to seek for an order for the vessel Semua Bahagia to be judicially sold. In actual fact the Plaintiff could have easily include a prayer in their application for the Judgment for an order for the sale of the Semua Bahagia. The Plaintiff's inaction defeat the primary object of an action in rem which is an action against the res (*The Kusu Island* [1989] MLJ 257) and intended to provide pre-judgment security to satisfy any judgment which the Plaintiff may obtained (*The Rena K* [1979] QB 377; *Kuo Fen Ching v. Dauphin Offshore Engineering & Trading Pte Ltd* [1999] SLR 721; *The Al Dhabiyah* [1999] 4 HKC 414) and ensures the Plaintiff's prospect of recovery are not hampered by any transfer of ownership in the said vessel. Had the arrested Semua Bahagia sold judicially, this will wiped clean of all her encumbrances and the proceeds will be retained in court for all claims against the arrested Semua Bahagia.

[32] No explanation or reason was given by the Plaintiff as to the reason why Plaintiff failed to obtain an order to dispose of the vessel Semua Bahagia subsequent to the Judgment. Learned counsel for the Plaintiff in his oral submission informed the court that there was no instruction from their client to pursue the matter further even though instruction was sought. This reason is unacceptable and inexcusable.

[33] It is disclosed by the Intervener that at the time the vessel Semua Bahagia was arrested, the said vessel was subject to 3 mortgages by Malayan Banking Berhad, as evident in the following documents –



- (a) Form N. : 11a (serial No. : 00540 dated 30 May 2008) for the term loan of RM 43.5 million (“Form 11a dated 30 May 2008”);
- (b) Form N. : 11a (serial No. : 01017 dated 22 April 2011) for an overdraft facility of RM 10 million (“Form 11a dated 22 April 2011”); and
- (c) Form N. : 11a (serial No. : 01012 dated 5 October 2012) for additional overdraft facility of RM 10 million (“Form 11a dated 5 October 2012”).

The 3 mortgages is shown in Exhibit MNI-5 enclosure 38.

[34] The Intervener had paid off the mortgagee the sum due under the 3 mortgages and the said mortgages were accordingly discharged on 22 April 2018 (see the reverse of Form 11a dated 30 May 2008, Form 11a dated 22 April 2011, Form 11a dated 5 October 2012 at Exhibit MNI-5 and the mortgagee covering letters informing the Registrar of Malaysian Ship the discharge of the 3 mortgages at Exhibit MNI-27).

[35] It is the Intervener’s position that the Plaintiff did not applied for an order for sale because the Plaintiff knew that the proceeds from the sale would be insufficient to meet the Plaintiff’s claim after paying the 3 mortgages and all other costs and expenses which takes priority over the Plaintiff’s claim. The Plaintiff did not in their affidavits deny the existence of the 3 mortgages over the Semua Muhibbah at the time said vessel was arrested. The Plaintiff also did not challenged the Intervener’s positive averment in relation to the proceeds of sale would not be sufficient to pay for the Plaintiff’s claim. Thus the positive assertion remain uncontroverted. See *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; *Keng Kien Hock v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia &*

Ors [2007] 5 CLJ 171; *Kok Kol v. Chong Kui Seng & Ors and another Appeal* [2010] 2 CLJ 481).

[36] Taking into account the Plaintiff's failure to comply with the Omnibus Order and subsequently its inaction of enforcing the Judgment in Default by judicial sale, it is not unreasonable for this court to infer that the Plaintiff has no intention to enforce the pre-judgment security it has obtained. Right from the very beginning the Plaintiff knew the Semua Bahagia was encumbered with the 3 mortgages which is to take priority over its claim. The Plaintiff knew in all probability there would not be sufficient fund from the proceed to satisfy the Judgment. Under the circumstances the Plaintiff has acted in bad faith when they failed to apply for judicial sale of the arrested Semua Bahagia, obtained Omnibus Order and the Judgment but refused to pursue the matter further. Thus this court is of the view the arrest of the Semua Bahagia is wrongful and it is accordingly set aside. The Plaintiff is therefore liable for damages arising out of the wrongful arrest of the Semua Bahagia.

[37] Obviously at the time the arrest was made the value of the security, as contended by the Intervener, was almost zero and it would not be to the interest of the Plaintiff to enforce the Judgment then. That would reasonably explain the Plaintiff's total inaction for almost 2 years. But now the Plaintiff contends that they are entitled to enforce the said judgment in the form of the arrest on Semua Bahagia because their claim against Semua Bahagia has crystallised as a judgment in rem after the Judgment had been granted and therefore protected and prioritised. In other words, the Plaintiff now insist to enforce the arrest when previously, for 19 months they did nothing of that sort. The reason for such insistence is obvious – the Semua Bahagia is now free from encumbrances and the Plaintiff's security as in the value of Semua Bahagia is certainly now of substantial value.

[38] This court is of the view the Plaintiff's stand is untenable as this would run foul of Order 70 rule 9 (12) RoC 2012. Under the said provision, in cases where security had been given to obtain release of property under arrest or to prevent the same from arrest, the total amount of security to be provided ought not to be more than the value of the property at the time of the original arrest or at the time the security was first given (if property was not arrested). Thus the security should not exceed the value of the arrested ship at the time the ship was arrested. The learned author Toh Kian Seng, SC in his book Admiralty Law and Practice, Second Edition when discussing the various form of security in particular bail, said this at page 193 –

... Even if bail [a form of security] has been given for the full amount of the claim, it is limited by the value of the property against which the action is brought. The reason for this is not clearly articulated in the older authorities. In the Duchesse de Brobant [[1857] Swab 1129] Dr Lushington explained it as a matter of practice, justice and equity. It could well be that if the claim is greater than the value of the property arrested, the owners would be inclined to abandon it rather than put up security. Alternatively it might be argued that bail, being a personal security put up in substitution of the res, represent the res, and as such should not be posted for an amount larger than the res. This principle has been applied to other forms of security, like P & I club letter of undertaking on the basis that security is furnished in exchange for the res and unless there are sound reasons, it should only be of equivalent value [The Arktis Fighter [2001] 3 SLR 394, 397]. The value of the vessel for the purposes of determining quantum of security is her market value and not her forced sale value ...

[39] As stated above the Plaintiff did not dispute that the value of the encumbered Semua Bahagia at the time it was arrested would not be



sufficient to pay of the Plaintiff's claim. Hence the Plaintiff chose to keep quiet, disregard the Omnibus Order and importantly refuse to enforce the arrest. All this for obvious reason – to avoid incurring cost in relation to the preservation and maintenance of the Semua Bahagia and cost of the sale of the said vessel since they knew this cost, being Sheriff's cost would take priority over their claim when there is no guarantee they can recover their claim from the value of the encumbered Semua Bahagia at the time of arrest. It is apparent based on the facts that took place after the arrest against Semua Bahagia and the facts which transpired, Plaintiff has acted mala fide and has abused the process of the court.

[40] In the case *"The Italy II"* [1987] 2 Lloyd's Law Reports 162, where the vessel remained under arrest for 2½ years without steps taken by the plaintiff to prosecute the action, the court set aside the arrest and the vessel was released to the defendant. It is to be noted that the facts in *The Italy II* shows that after the arrest of the vessel, the defendant owner acknowledged service of the writ and served defence and counterclaim on the plaintiff. The plaintiff had also served a list of documents on the defendant. Thereafter no action was taken by the plaintiff and the vessel remained under arrest. The plaintiff had not applied for an omnibus order. In the instant case after the arrest of Semua Muhibbah, the Plaintiff obtained the Omnibus Order followed by the Judgment. It would be relatively easy (compared to *The Italy II* where the defendant entered appearance and served defence) with no hindrance whatsoever for the Plaintiff in the instant case to proceed to realise its Judgment by way of judicial sale as no appearance was entered by the owner of the Semua Bahagia or any other party with interest on the said vessel. Yet the Plaintiff failed to act expeditiously and reasonably.

[41] In the case *The Rellim* [1921] 9 Lloyd's Law Report 266, the court ordered for the released of the arrested vessel due to the failure



by the plaintiff to seek for a judicial sale after judgment obtained, like the facts in the instant case.

[42] It is without doubt the Plaintiff has acted mala fide and abused the process of the court when it failed to exercise reasonable diligence to prosecute the arrest by seeking an order for sale of the Semua Bahagia under the in rem Judgment. The Plaintiff's contentions that principles of equity cannot be invoked to invoke admiralty orders is misconceived. There were no authorities cited by the Plaintiff to support the said contentions.

[43] It is argued by the Plaintiff equity cannot be invoked to invalidate admiralty orders. On the contrary, the court in *The Alletta* has considered the principle of equity, namely, laches and the relevant authorities thereto. On the facts, the court held since the second defendant were entitled to indemnity from the first defendant, the second defendant's objection to the plaintiff's entitlement to arrest the vessel *Alletta* based on laches failed.

[44] On the facts of the instant case, this court view the Plaintiff's inaction and conduct tantamount to laches and the Plaintiff therefore is estopped from enforcing its rights under the in rem Judgment. To allow the Plaintiff to benefit from its own laches is just simply not right. Besides that, it would adversely prejudice the Intervener who has no notice of the Writ and Warrant.

[45] It is contended by the Plaintiff that the Intervener does not have the locus standi to dispute the Plaintiff's purported failure to comply with the terms of the Omnibus Order. Such contention is clearly unfounded. Via enclosure 20 the Intervener applied under Order 70 rule 16 RoC 2012 and was granted leave to intervene in this proceedings. It is obvious the Intervener who purchased the Semua Muhibbah without notice to the Writ and Warrant has a direct interest in the Semua Muhibbah which is the subject matter of the arrest. As



such the Intervener has the locus to challenge the Plaintiff in respect of matters in relation to service of the Writ and Warrant and the enforceability of the Judgment. Assuming the Intervener has no locus to raise issues in relation to the Omnibus Order, this does not stop this court from taking issue with the Plaintiff of its non-compliance of the Omnibus Order.

[46] Considering the Plaintiff's conduct in managing this in rem suit which it has initiated, this court is justified to agree with the Intervener's stand that the Plaintiff has no intention to enforce the pre-judgment security and the arrest. The Plaintiff's lackadaisical attitude is evident from the court record which shows the Plaintiff had only filed in court the draft order in respect of the Omnibus Order (obtained on 23 November 2016) on 24 October 2018, which is almost 2 years after obtaining such order. The draft order in respect of the Judgment obtained in January 2017 was only filed on 26 September 2018, which is about 19 months after obtaining the judgment. If the Plaintiff is serious of enforcing the security and the Judgment, the Plaintiff would have taken prompt steps to have both the Omnibus Order and Judgment perfected as the perfection of such order and judgment is important for purpose of enforcement or execution. It is apparent the Plaintiff has choose to sleep on this writ in rem and was only rudely awaken when it came to know the Semua Bahagia was moved from its position in September 2018. The Plaintiff's inaction is simply inexcusable.

[47] If at all, the Plaintiff argued, it is for the Sheriff to raise the said issue but the Sheriff did not do so even though empowered under Order 70 rule 11 RoC 2012. It must be noted when the Plaintiff filed their application enclosure 10 for the Omnibus Order the said application was made on behalf of the Sheriff. In fact the Plaintiff was authorised, among others, to appoint on behalf of the Sheriff a ship manager (to carry out the necessary services to the Semua Bahagia) a

master and crew. Thus the Plaintiff was obliged to comply with the Omnibus Order and the fact that the Sheriff did not apply for the directions from the court under Order 70 rule 11 (1) RoC 2012 did not absolve the Plaintiff from its obligations under the Omnibus Order. Failure by the Sheriff to apply for direction from the court does not preclude this admiralty court from considering the said issue. In fact this would be the opportunity for this admiralty court to consider the same and the related consequences.

[48] It is argued by the Plaintiff since the Intervener failed to conduct due diligence to ascertain status of the Semua Bahagia it cannot now claim to be a bona fide purchaser. It is further argued the Intervener could have just easily picked up the phone and made queries from the Registry of the Admiralty Court in relation to the status of the Semua Bahagia. In support of such contention, the Plaintiff referred to paragraph 14 of the Practice Direction No. 2/2007 Admiralty Actions which reads as follows –

14. The file maintained by the Court and copies of all papers filed in an admiralty action in rem, subject to Order 70 rule 17 (2) of the Rules of the High Court 1980 [now Rules of Court 2012], shall be made available on an immediate and urgent basis to persons requesting to conduct a search thereon, upon payment of the prescribed fee.

[49] Pursuant to Practice Direction No. 1 of 2012 Admiralty and Maritime Claims, a Webpage of Caveats and Warrants (located at <http://efiling.kehakiman.gov.my>) was establish for the purpose of maintaining all information on admiralty warrants of arrest, release and caveat against arrest or caveats against release lodged with Admiralty Court Kuala Lumpur and any other High Court. Thus there is a venue ready and available for the Intervener to check whether there was a warrant against the Semua Bahagia when they decided to

purchase the Semua Bahagia.

[50] It is an undisputed fact that the Intervener failed to carry out search at the Registry of the Admiralty Court Kuala Lumpur. The issue here – whether failure by the Intervener to conduct such search precluded them from being a bona fide purchaser and as such the transfer of ownership from Semua Shipping to the Intervener is void and unlawful or alternatively the Intervener is liable to the Plaintiff for the debt under the Judgment.

[51] Although the Intervener failed to conduct the said search, it ought not to be considered as a total and complete failure on the part of the Intervener to conduct due diligence on the status of the Semua Muhibbah. The issue here is – whether on the facts, the Intervener ought to have known or that there were sufficient evidence to indicate that the Semua Bahagia was under arrest in the care and custody of the Sheriff.

[52] Having considered the affidavit evidence, this court is of the view the Intervener could not have known that the Semua Bahagia was under arrest from the time prior to the purchase of the Semua Bahagia. This is based on the following crucial facts which transpired prior to the transfer of ownership of the Semua Bahagia on 8 May 2018 to the Intervener –

- (a) as discussed above, the Writ and Warrant were not duly served and executed on the Semua Bahagia. Of significance the affixation of the Writ and Warrant was not done in accordance with Order 70 rule 9 (1) (a) and (b) RoC 2012. Had the Writ and Warrant been affixed on a sheltered and conspicuous part of the superstructure of the Semua Bahagia, the Intervener and its representative would have had notice of the Writ and Warrant when they

boarded the Semua Bahagia for purpose of, among others, placing crew members;

- (b) when the Intervener boarded the Semua Bahagia, there were no master and skeletal crew which is supposed to be appointed by the Plaintiff for purpose of manning, preserving and maintaining the Semua Bahagia, as directed by the terms of the Omnibus Order. The Plaintiff's disregard of the Omnibus Order contributed significantly to negate any suspicion that the Semua Bahagia was a subject matter in an in rem action, what more under arrest. Evidence of the Semua Bahagia found to be vandalised and in a state of disarray (see Exhibits MNI-20 and MNI-21 of enclosure 36) would be the least indication that the said vessel was under arrest;
- (c) the Intervener, in order to board the Semua Bahagia, had sought for and accordingly granted permission by the Sheriff on 21 December 2017 to pass through its 2 sister vessels Semua Bahagia and Semua Mutiara, both vessels also under arrest; and
- (d) the crew appointed by the Intervener disengaged the Semua Bahagia from its 2 sister vessels and re-activated it. In fact the said vessel was moved and towed from the Johore River Anchorage to the shipyard of MMHE in Pasir Gudang Johor at the Pasir Gudang Port without any restrictions from the Marine Department at the Pasir Gudang Port which was served with a copy of the Warrant on 8 November 2018 (see the Bailiff's affidavit at enclosure 9). It was only in September 2018 (about 4 months after the transfer of the ownership of Semua Bahagia and after performing voyages between Port of

Pengerang, Johore Port, Tanjung Langsat Port, Tanjung Pelepas Port and the Port of Samarinda, Indonesia), the said vessel was denied clearance at Tanjung Langsat Port and detained on the ground the said vessel is under arrest.

[53] Based on the above, it would not be equitable for the Intervener to be penalised simply because it did not conduct the necessary search at the Wbpage of Caveats and Warrants. The information in the said webpage would indeed be official and true in relation to whether a ship is under arrest. However such mechanism is not the one and only way for one to find out about the status of a ship. This is because affixation of a writ and warrant in the manner prescribed by the RoC 2012 is also intended to notify the status of a ship to the whole world, which was not duly done in this case. This is not a case where the Intervener's purchase of the *Semua Muhibbah* was conducted in a hurry without any physical inspection or examination of the *Semua Bahagia*, its condition or the encumbrances attached on the same. In fact the Intervener had taken steps to pay of the 3 mortgages and outstanding salaries of the crew of the *Semua Bahagia*, Johore Port Berhad, Johore Ship Care Sdn Bhd and the insurers of the said vessel.

[54] The Plaintiff cited the case *Wei Hsing Food (S) Pte Ltd v. The Owners Or Demise Charterers Of The Ship Or Vessel 'The Neptune' And Another Action* [2005] 5 MLJ 702. In that case the issue was whether the defendant (who entered conditional appearance to challenge the service of the writ on them) has the necessary legal capacity to assume the status of a defendant in the admiralty in rem action. The court found that at the time the cause of action arose and the writ was served, the defendant was not the registered owner of the vessel. The fact that the vessel was registered in the name of the defendant does not affect the plaintiff's claim because at the time the writ was issued, the vessel (was then owned by the previous owner) was attached with a statutory lien which ought to continue and survive

the change of ownership. The court ruled since the plaintiff's claim was premised on a contract between the plaintiff and the previous owner, the defendant could never be personally liable on the claim in the event the plaintiff is successful. The defendant's position is merely that of an interested party who is entitled to intervene. Thus had the defendant intervened as an interested party and challenged the service of the writ (like the Intervener in this instant case) the position might be different.

[55] Taking into consideration the evidence in totality, it is this court's finding that the intervener is a bona fide purchaser of the Semua Bahagia without notice to the arrest. As such there is no justifiable reason for this court to invalidate their purchase of the Semua Bahagia.

The merger principle

[56] The Intervener contended that when the Plaintiff obtained the Judgment, the Plaintiff's cause of action has merged with the said judgment in rem and therefore the Plaintiff is no longer entitled to enforce the Warrant. Thus the Plaintiff has lost its right to enforce the arrest upon judgment entered. The Intervener placed heavy reliance on an English case *The Alletta* [1974] Llyod's Law Report 40.

[57] In *The Alletta (supra)* the first defendant's vessel, Alletta, collided with the plaintiff's vessel, England, in the River Thames on 20 December 1963. On 21 April 1964 the plaintiff took out a writ in rem against the first defendant, who were then the owners of the Alletta and the writ was served on their solicitors who undertook to accept service and entered an appearance. After trial, the court held on 21 October 1965 that the plaintiff one-fifth to be blamed and the first defendants four-fifths to be blamed. Plaintiff's appeal against that judgment was dismissed. Then on 20 June 1973 (about 10 years

after the collision and 9 years after the issue of the writ in rem) the first defendants sold the Alletta to the second defendants, who at that time had no knowledge of any actual or potential claim by the plaintiff against the owners of the Alletta. The second defendant later renamed her Tarmac 1. On 9 July 1973 on an ex parte application by the plaintiff, an order that a warrant of arrest be issued against the Alletta was made. The warrant, however, was not executed on the Alletta upon certain undertakings or security procured by underwriters of the first defendants, who were under an obligation to indemnify the second defendants. The second defendants as the then owners applied for, inter alia, an order that the warrant of arrest be discharged and / or a declaration that plaintiffs were not at the date of the issue of the warrant entitled to arrest the vessel. The second defendant's application was premised on the ground that the plaintiff's right to arrest the vessel had been lost by laches and by the fact that the plaintiff had obtained judgment on liability against the first defendant as owners of the Alletta.

[58] The second defendant's argument on laches was not accepted. On the second point, the court discussed the earlier authorities on merger, in particular and of relevance – *The Kalamazoo* [1851] 15 Jur 885, *The Wild Ranger* [1863] B. & L. 84, *The Hero* [1865] B. & L. 447 and *The Point Breeze* [1928] 30 Ll. L. Rep 229. After considering the cases, the court through Mocatta J concluded as follows –

... . So far as the cases go to the balance of authority in my judgment strongly favours the second defendants and I am content to follow and apply the reasoning in The Point Breeze with which I respectfully agree, based as that decision was on the principles laid down by Dr. Lushington in The Kalamazoo, The Wild Ranger and The Hero.

Authority apart, however, there are considerations of broad principle which deserve to be stated, particularly as the first defendants, on whose behalf the second defendants have successfully argued this issue, are without merits.

*If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third party who had brought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully have contested the issue of liability. Despite Mr. Sheen's efforts to answer these supposed circumstances by saying that the Court would find some method of reopening the issue of liability so as to enable the third party to contest it properly and anew, I cannot see how such an end could be achieved. I refer again to what was said in *The Point Breeze* at p. 142. The position would be quite different from that obtaining when an arrest is affected after transfer of the res to such a third party, but before there had been judgment on liability. The third party can then intervene; see O. 75, r. 17. Similar circumstances, *mutatis mutandis*, can readily and perhaps more realistically be envisaged in relation to the rights of a mortgagee, who can intervene to protect his interest, if this be possible on the facts, against the claim of a holder of an alleged maritime lien provided the vessel mortgaged be arrested before judgment on liability; aliter, if the arrest be subsequent to such judgment.*

[59] Thus where a ship was released after security provided and judgment was obtained against the ship, the cause of action has merged with the judgment and the ship cannot be re-arrested again on



the same cause of action. It thus follow the plaintiff's remedy would be execution of the Judgment which for reasons discussed later could only be carried out if there is no change in ownership of the vessel.

[60] On the other hand, the Plaintiff relied on a Singapore case *The "Daien Maru No. 18" Kenny Franco & 5 Ors v. MV Daien Maru No. 18" Owners of & Ors Interested* [1985] 2 MLJ 90 (*The Daein Maru* case). In *The Daein Maru* case, the court dealt with the same issue – whether right of arrest lost because of judgment. The court refused to follow *The Alletta*. The facts of *The Daien Maru* is summarised below.

[61] The plaintiffs were crew members on board the vessel *Daien Maru No. 18*. The defendants were owners of the said vessel. They commenced an in rem action against the charterers of the vessel claiming possession and arrested the said vessel on 20 March 1984. The plaintiffs filed a caveat against release of the said vessel on 26 March 1984. On 30 March 1984 the plaintiffs commenced the in rem action against the defendants claiming wages, certain subsistence money and expenses. The plaintiffs subsequently obtained summary judgment against the defendants for the amount claimed. In the in rem action against the charterers, the defendants eventually obtained an order for the release of the said vessel. After the release the plaintiffs arrested the said vessel. The defendants applied for the warrant of arrest to be discharged. The defendants relied on the decision in *The Alletta* and contended that the plaintiffs, having obtained final judgment against the defendants for the full amount claimed had lost the right of arrest, as the plaintiffs' cause of action had merged in the judgment.

[62] The court in *The Daien Maru* held the merger principle, namely, that once a judgment has been obtained in an action the claim therein is merged in the judgment is correct and beyond dispute. However the



court said this does not follow and there was no authority supporting the view that the right to security in the ship is lost or extinguished by such merger. It was held that a plaintiff who has instituted an action in rem against a ship to enforce a maritime lien thereon must be entitled to arrest the ship in the same action even after he has obtained judgment, provided always that in such a case no bail has been previously put up for the ship in that action.

[63] Based on the facts, both cases can be distinguished. In *The Daein Maru* case, the crew members did not, after obtaining judgment against the defendant, arrest the vessel Daein Maru No. 18. As such there were no security provided to represent the said vessel and the issue of the said vessel being released wholly did not arise. Under the circumstances it is only just that the plaintiff be allowed to enforce the arrest against the said vessel as admiralty in rem action is an action against the res (*The Henrich Bjorn* [1886] LR II PC 270). Whereas in *The Alletta*, after securing judgment the plaintiff applied and a warrant of arrest was issued against the Alletta. However the warrant was not executed as security was provided by underwriters of the first defendants. As such there was security which represent the Alletta for purpose of satisfying the plaintiff's judgment. Thus the judgment and the plaintiff's claim has merged and the plaintiff is estopped from arresting the Alletta. As it turned out the security was not sufficient to satisfy the judgment and the plaintiff's recourse is to execute the judgment by way of in personam action against the defendant.

[64] In the instant case, there was no security provided. However the Plaintiff had obtained Judgment against the Semua Bahagia and as such his cause of action has merged with the Judgment. Plaintiff therefore can no longer enforce the Warrant on Semua Bahagia but to execute the Judgment.

[65] The other crucial aspect which distinguished the 2 cases is this. In *The Alletta*, when warrant of arrest was issued against the vessel at the instance of the plaintiff, the vessel by then was owned by a new owner as in the second defendant. Whereas in *The Daein Maru*, the owner of the vessel remain the same at all material time. The court in *The Alletta* said it would cause grave injustice if a ship which is arrested after judgment and at the time of the arrest the ship belongs to a third party who has no knowledge of the judgment against the ship. This is what happened in the instant case.

[66] It is apparent if the Plaintiff is allowed to now enforce the arrest the Plaintiff will stand to gain when in actual fact there was nothing that the Plaintiff did towards enforcing the Judgment via judicial sale. It would be inequitable if the Plaintiff is rewarded for his inaction which is the root of the present dispute between the parties. On the other hand the Intervener will be greatly prejudiced if its ownership of the *Semua Bahagia* is declared unlawful when they had, diligently taken all the reasonable and necessary steps to get the *Semua Bahagia* up and running, in particular to free the *Semua Bahagia* from encumbrances in order to purchase the said vessel without notice of the Writ, Warrant and the Judgement.

Conclusion

[67] Premised on the grounds stated aforesaid, this court allowed the Intervener's application and granted order in terms of enclosure 35 with costs including damages for wrongful arrest. The Plaintiff's application in enclosure 32 was accordingly dismissed with costs.

(KHADIJAH IDRIS)

Judge

High Court



(Commercial Division)

Dated: 27 NOVEMBER 2019

COUNSEL:

For the plaintiff - Teoh Oon Teong; M/s Azmi & Associates

*For the intervener - Clive Navin Selvapandian & Eunice Quay,
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