1986 September 16

[STYLIANIDES, J.]

NATIONAL LINE OF CYPRUS S. A.,

Plaintiffs.

v.

THE SHIP "SUNSET",

Defendant.

(Admiralty Action No. 167/86).

Admiralty—Jurisdiction of Supreme Court as an Admiralty Court—Law applicable by the Court—The Courts of Justice Law 14/60, sections 19(a) and 29(2)(a)—Action in rem for damages for breach of a charterparty—In this case the Jurisdiction is governed by sections 1(1)(h) and 3(4) of the English Administration of Justice Act, 1956—The three prerequisites for the exercise of the Jurisdiction under the said provisions.

Admiralty—Arrest of ship—Practice—The Admiralty Jurisdiction Order, 1893, Rules 237 and 50—The old English Rules, paragraph (b) of Order 5, r. 16—Not applicable as our rules (Rule 50) make ample provision on the matter—Jurisdiction—Facts prerequisite to its exercise not disclosed in the affidavit in support of the application for the arrest of the ship—As on the facts now before the Court there is no doubt as to its Jurisdiction, the Court will not disclaim jurisdiction on account of such failure.

Arbitration—Arbitration Clause—It does not oust the jurisdiction of the Court—It is not a bar or defence to proceedings—It does not preclude a plaintiff from arresting a ship—Section 8 of the Arbitration Law, Cap. 4—Discretionary power of the Court to stay proceedings—How the discretion should be exercised.

Admiralty—Arrest of ship—Arbitration clause—It does not preclude a plaintiff from arresting the ship.

Constitutional Law—Arbitration clause—Constitution, Article 30.2—Nothing in it expressly prohibits such a clause.

The European Convention of Human Rights—Article 6.1.

Practice—Ex parte applications—Uberrima fides required—Power of Court, if the relevant affidavit is not candid or does not fairly disclose the facts—Admiralty—Arrest of ship—Upon ex parte application—Failure to disclose existence of an arbitration clause—In the circumstances of this case such failure did not amount to fraud or to such a breach of the duty of disclosure as to justify the discharge of the order of arrest.

On the 1.8.86 the Court, as a result of an ex parte application by the plaintiff, ordered the arrest of the defendant ship. On the 7.8.86 the ship was released as in accordance with the terms of the said order the defendant filed a letter of guarantee by the Bank of Cyprus L'd. in the sum of C£13,500. On the 11.8.86 the defendant filed the present application, praying for an order discharging the warrant of arrest and/or the guarantee and/or security given as aforesaid on the 7.8.86.

The grounds on which the discharge of the order of arrest and the bail in lieu of arrest are: (a) That the Court lacks jurisdiction to issue the warrant of arrest, (b) That the plaintiffs had failed to disclose to the Court material facts, i.e. the existence of an Arbitration Clause in the charterparty, and (c) That in view of such clause any security should be discharged.

Held, dismissing the application: (A) (1) By virtue of sections 19(a) and 29(2)(a) of Law 14/60 this Court as a Court of Admiralty is vested with and exercises the same powers as those vested in or exercised by the High Court of Justice in England in its Admiralty Jurisdiction on the day immediately preceding the 16.8.86, the day of Independence. In the exercise of such jurisdiction it applies the Law as applied in England on the day in question, subject to the overriding provisions of the Constitution and save in so far as other provision has been or shall be made by any Law.

(2) As no statutory provision was made in this country, the Jurisdiction of the Court is governed in this case by section 1(1)(h) and 3(4) of the English Administration of Justice Act, 1956. The prerequisites for the exercise of this Jurisdiction are that the claim arose out of any agreement relating to the carriage of the goods in a ship or to the use or hire of a ship, that the person who would be liable in an action in personam was when the cause of action arose the owner or charterer of or in possession or in control of the ship and that the ship is beneficially owned as respects all the shares therein by that person.

(3) Though counsel for the defendant did not dispute that all the shares in the ship were beneficially owned by the same person, she argued, relying on the English Rules, i.e. on paragraph (b) of Order 5, r. 16 as set out in the Annual Practice 1958 that since such fact was not contained in the affidavit in support of the application for the arrest of the ship, the prerequisites of the said subsection 3(4) were not established.

(4) It is well established that the English Rules applicable by virtue of rule 237 of the Admiralty Jurisdiction Order, 1893 are those in force on the day prior to the 16.8.60. The English rule on which the defendant relied is not applicable, because our rules (Rule 50 of the Admiralty Jurisdiction Order, 1893) make ample provision on the matter at hand.

(5) As on the facts before the Court to-day it is obvious that this Court does not lack jurisdiction in the matter, it would be wrong to disclaim jurisdiction on the ground that the facts prerequisite for the exercise of the jurisdiction were not placed in the affidavit in support of the application for the arrest of the ship.

(B) (1) Though an Arbitration Clause amounts to a partial renunciation of the rights safeguarded by Article 30.2 of the Constitution and the corresponding Article 6.1 of the European Convention for Human Rights, there is nothing in the said Articles expressly prohibiting such renunciation.

(2) Section 8 of Cap. 4 empowers the Court to stay

any legal proceedings commenced in any Court in breach of an Arbitration Clause. This power is discretionary and the Court does not exercise it, unless satisfied that there is sufficient reason why the matter should not be referred to arbitration. An Arbitration Clause does not oust the jurisdiction of the Court and it is not a bar or defence to the proceedings. It merely gives the right to any other party to such proceedings to apply for stay and reference to arbitration.

(3) The existence of an Arbitration Clause does not preclude the plaintiff from arresting the ship. If the Court, upon proper application, stay the proceedings, the ship will still remain under arrest. The facts of the present case are distinguishable from the facts in *The "Vasso"* [1984] 1 Lloyd's Law Reports, 235.

(4) By definition on "an ex parte application" the party against whom the order is sought is absent. It is the duty of the applicant to inform the Court of any facts which he knows might turn in favour of such person. On an ex parte application uberrima fides is required. If the affidavit in support of such application was not candid and did not fairly state the facts, the Court has inherent power, which should only be used in cases which bring conviction to the mind of the Court that it has been deceived, to refuse to hear anything further from the applicant.

(5) In the circumstances of this case and though it would have been the best course for the plaintiffs to have disclosed, in applying for the warrant of arrest, the existence of an arbitration clause and their contention as to forum conveniens, the Court has not been satisfied that such failure amounted to fraud or such breach of the duty of disclosure as to justify the Court in discharging the Order.

Application dismissed.
No order as to costs.

Cases referred to:

Attorney-General and Another (No. 2) v. *Savvides* (1979) 1 C.L.R. 349;

Asimenos and Another v. *Chrysostomou and Another* (1982) 1 C.L.R. 145;

Ship "Gloriana" and Another v. *Breidi* (1982) 1 C.L.R. 409;

Heyman and Another v. *Darwins Ltd.* [1942] 1 All E. R. 337;

George S. Galatariotis and Sons Ltd. v. *The Scandinavian Baltic and Mediterranean Shipping Corporation of Monrovia* (1968) 1 C.L.R. 385;

The "Vasso" [1984] 1 Ll. L. Rep. 235;

Re a Debtor [1983] 3 All E.R. 545;

The "Hagen" [1908] P. 189;

Boyce v. *Gill* [1891] 64 L.T. 824;

R. v. *The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington— Ex parte Princess Edmond de Polignac* [1917] 1 K. B. 486;

Negocios del Mar S.A. v. *Doric Shipping Corporation S.A. (The Assios)* [1979] 1 Ll. L. Rep. 331.

Application.

Application for an order of the Court discharging the warrant of arrest of the defendant ship issued on 1.8.86 and/or discharging the guarantee and/or security of the amount of C£13,500.- given on behalf of the defendant ship in order to procure her release from arrest.

M. Montanios, for the applicants.

St. Mc Bride, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following ruling: The plaintiffs by this action, filed on 1.8.86, claim against the defendant ship, lying at anchorage, Limassol:-

"(a) U. S. $25,477.26 damages for breach of a charter-party dated 25.4.86;

(b) The same amount received as over-payment and/or as unjustified enrichment;

(c) Such further and other relief as to which the Court shall find the plaintiffs justified;

(d) Interest and costs".

On the same day by an ex-parte application they applied for the issue of a warrant of arrest for the arrest of the defendant ship "SUNSET". The material before the Court was the writ of summons and an affidavit sworn by advocate Mr. McBride. A copy of a telex received on 31.7.86 was attached to this affidavit in order to support the allegation that they are entitled to their prayer in the action.

The dispute arose out of a charterparty dated 25.4.86 whereby the owners of the defendant ship chartered the defendant ship to the plaintiffs through their agents at the time, Nielsen Shipping Limited, London.

The Court on the same day ordered the issue of a warrant for the arrest of the ship "SUNSET" on the terms and conditions appearing in the said order. The Marshal should release the ship upon directions of the Registrar of this Court on the filing of a security bond by or on behalf of the ship in the sum of C£13,500.- for the satisfaction of any order or judgment for the payment of money made against the ship or her owners in this action.

On 5th August, 1986, the date appointed in the order "for aynone to appear and if he so decides to move the Court against the continuance in force of the order of the Court made today ex-parte", Miss Panayi appeared for the defendants and stated that she would file a proper application for the discharge of the warrant.

On 7.8.86 a letter of guarantee was filed, given by the Bank of Cyprus Ltd., as directed by the Court for the release of the ship.

On 11.8.86 the application under consideration was made whereby the applicant prays "for an order discharging

the warrant of arrest of the defendant ship issued in this action on 1.8.86 by order of the Court and/or discharging the guarantee and/or security upto the amount of C£13,500-. given on behalf of the defendant ship on 7.8.86 in order to procure her release from arrest".

The facts relied upon are set out in an affidavit sworn by Helen Georghiades, an advocate's clerk.

The plaintiffs respondents opposed this application. The facts relied upon are contained in affidavits of Joseph Christou and Stuart McBride dated 25th and 26th August, 1986, respectively.

On 30th August, 1986, on the date of the hearing, a supplementary affidavit, sworn by Miss Panayi, was filed on behalf of the applicant ship.

The grounds on which the discharge of the order of arrest and the bail in lieu of arrest are claimed are:-

(a) That this Court lacks jurisdiction to issue the warrant of arrest;

(b) That the plaintiffs-applicants failed to disclose to the Court material facts, i.e. the existence of the Arbitration Clause, and that they were in breach of the Charter Party by reason of not paying the hire in advance and that the ship had been withdrawn by the shipowners on the ground of the plaintiffs' breach of the Charter Party;

(c) That in view of the Arbitration Clause any security should be discharged.

By virtue of sections 19(a) and 29(2)(a) of the Courts of Justice Law, 1960, (Law No. 14/60), this Court as a Court of Admiralty is vested with and exercises the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty Jurisdiction on the day immediately preceding the 16th August, 1960, the day of Independence. In the exercise of such jurisdiction it applies the Law as applied in England on the day in question subject to the overriding provisions

of the Constitution and saved in so far as other provision has been or shall be made by any Law.

By the Cyprus Admiralty Jurisdiction Order, 1893, the Colonial Courts of Admiralty Act, 1890, was made applicable to Cyprus and the Rules of the Supreme Court in its Admiralty Jurisdiction were enacted as a schedule to such Order and they have remained in force ever since.

Rule 50 provides that in an action *in rem* any party may at the time of, or at any time after, the issue of the writ of summons, apply to the Court or a Judge for the issue of a warrant for the arrest of property.

The arrest of property is governed by rules 50-59 and the release of arrested property by rules 60-64. There is a separate chapter on applications; it comprises Rules 203-212.

As no statutory provision was made in this country, the Administration of Justice Act, 1956, and in particular section 1(1)(h) and section 3(4) govern the matter of jurisdiction in this case. Section 1(1)(h) reads:-

> "The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:
>
> (h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship".

Under Section 3(4) of the English Act of 1956, in the case of any claim, as is mentioned in paragraphs (d) to (r) of subsection (1) of Section 1 of the Act, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction may be invoked by an action in rem against that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person.

Three things have to be established before this jurisdiction can properly be exercised. The first is that the claim arose out of any agreement relating to the carriage of the goods in a ship or to the use or hire of a ship. The second matter which has to be shown is that the person who would be liable on the claim in an action in personam was when the cause of action arose the owner or charterer of or in possession or in control of the ship. It is therefore necessary to ascertain who was, when the cause of action arose, either the owner or charterer or the person in possession or control of the ship and whether that person would be liable on the claim in an action in personam for damages arising out of the carriage of goods or the use or hire of the ship. The third matter is that the ship is beneficially owned as respects all the shares therein by that person. In other words, at the time the writ is issued all the shares in the ship must be beneficially owned by the same person who was the owner or charterer or in possession or in control of the ship at the time when the cause of action arose—(See *The Attorney-General of the Republic and Another (No. 2)* v. *George Savvides*, (1979) 1 C.L.R. 349).

It was strenuously submitted by counsel for the applicant ship that on the material placed before the Court for the issue of the warrant of arrest, the prerequisites of Subsection (4) of Section 3 above were not established. She did not dispute that at all material times appointed by the said statutory provision the owner of the ship and all the shares therein were beneficially owned by the same person. Her sole argument was that this undisputed fact was not contained in the affidavit in support of the application for the issue of the warrant of arrest and, therefore, the Court should not have assumed jurisdiction in rem. She relied on paragraph (b) of Order 5, r. 16, of the English Rules as set out in the Annual Practice of 1958.

Rule 237 of the Admiralty Jurisdiction Rules provides that in all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice of England, so far as the same shall appear to be applicable, shall be followed.

It is well settled that the English Rules applicable by virtue of r. 237 are those that were in force on the day prior to Independence in 1960—(*Asimenos and Another* v. *Chrysostomou and Another*, (1982) 1 C.L.R. 145; *Ship "Gloriana" and Another* v. *Breidi*, (1982) 1 C.L.R. 409).

The English rules apply only when no provision is made in our rules. Our rules make ample provision on the matter. Rule 50 provides that the party so applying for the issue of a warrant of arrest shall file in Court an affidavit containing the particulars prescribed by the following rules and even a specimen of affidavit is set out in form "C" in Schedule I thereto.

The English Order on which Miss Panayi relied is not applicable. The plaintiffs complied with our rules.

The case for the applicants is the failure of the respondents to state in the original affidavit the ownership as required by subsection (4) of Section 3. The Court is determining the present application on the facts before it today and it is obvious that this Court does not lack jurisdiction. It would be wrong to disclaim jurisdiction on the ground that the facts prerequisite for the exercise of the jurisdiction were not placed in the original affidavit for the plaintiffs. If the jurisdiction in rem of this Court could not be invoked by the plaintiffs, the order for arrest would have been discharged, but this is not the case.

ARBITRATION CLAUSE

According to Clause 17 of the Charterparty attached to the affidavit in support of this application, should any dispute arise between the owners and the charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

Under Article 30.2 of the Constitution, which corresponds to Article 6.1 of the Eurepean Convention on Human Rights, ... every person has the right of determination of his civil rights by an independent, impartial, competent

Court, established by law. The inclusion of an arbitration clause in an agreement between individuals amounts legally to partial renunciation of the exercise of those rights defined in the said Articles but nothing in the said Articles explicitly prohibits such renunciation and they are not intended to prevent persons coming under their jurisdiction from entrusting the settlement of certain matters to arbitrators—(See Report of the Commission of the European Convention on Human Rights in *Application 1197/61:* 5 Yearbook 88—Fawcett, the Application of the European Convention on Human Rights, 1969).

Section 8 of the Arbitration Law, Cap. 4. empowers the Court to stay any legal proceedings commenced in any Court if any party to an arbitration agreement or any person claiming through or under him, commences legal proceedings in any Court against a party to the arbitration agreement. This power is discretionary and the Court does not exercise this power if satisfied that there is sufficient reason why the matter should not be referred in accordance with the arbitration agreement to arbitration.

In *Heyman and Another* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337, Lord Wright said at page 349:-

> "It is clear that as the arbitration clause is a matter of agreement, the first thing is to ascertain according the ordinary principles of construction what the parties have actually agreed. Under the Arbitration Act. 1889. s. 4, however, the Court is given a discretionary power to stay an action brought in breach of an arbitration clause. Such a clause, therefore, though absolute in terms, is qualified in the sense that it is subject to this overriding discretion of the Court".

And further down:-

> "In *Joseph Constantine S.S. Line* v. *Imperial Smelting Corporation, Ltd.*, [1941] 2 All E.R. 165, decided by the House of Lords, there was a specific submission of the difference whether the charterparty in question had been frustrated, the charterers claiming damages because the vessel had not been tendered to load her cargo, the shipowners defending

the claim on the ground of frustration. That illustrates clearly one aspect of an arbitration agreement, namely, that it is collateral to the substantial stipulations of the contract; it is merely procedural and ancillary; it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract. It may also be noted that the agreement to arbitrate depends on there being a dispute or difference in respect of the substative stipulations. It appertains to the stage of pleadings or allegations. It is in regard to these that it has to be decided whether the submission applies or should receive effect."

An arbitration clause in a contract does not oust the jurisdiction of the Court and such clause is not a bar or defence to proceedings brought in respect of a dispute agreed to be referred to arbitration; it merely gives the right to any other party to such proceedings, subject to certain formalities and conditions, to apply for a stay of proceedings and reference of such dispute to arbitration—(*George S. Galatariotis & Sons Ltd.* v. *The Scandinavian Baltic and Mediterranean Shipping Corporation of Monrovia*, (1968) 1 C.L.R. 385).

I shall not embark any further on the issue of the arbitration clause as the issue to be determined is a more limited one, whether in view of the arbitration clause this Court could have issued a warrant of arrest. If a contract of carriage contains an arbitration clause, this does not preclude a plaintiff from arresting a ship. As said, the Court's power is to stay and not to set aside the action. Consequently, if the Court exercises its discretion in case of a stay in a proper application, the plaintiff still gets the benefit of security, in that the vessel will remain under arrest but the merits of the dispute will have to be decided by an arbitrator and not by the Court—(See British Shipping Laws, Volume 1, Admiralty Practice, 1964, p. 18, para. 30).

In *The "VASSO" (formerly "ANDRIA")*, [1984] 1 Lloyd's Law Reports, 235, it was held provided that a writ is issued upon which there is endorsed a claim falling within one of those lettered sub-paragraphs of s. 1(1) of the 1956 Act which are specified in s. 3(4) of the 1956 Act as justifying the invocation of the Admiralty jurisdiction by an action in rem, the Court has jurisdiction to issue a warrant for the arrest of the relevant ship, and to execute that warrant. The Court has jurisdiction to arrest, or to maintain an arrest of, a ship even if the purpose of the plaintiff is simply to obtain security for an award in arbitration proceedings. However, the matter does not stop there. The mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action in rem) procuring the arrest of the ship, or otherwise proceeding with the action. If a party actively pursues proceedings in respect of the same claim both in the Court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the Court.

In *The "Vasso"* case there was precisely an abuse of the process. To quote from the judgment of Robert Goff, L.J.:-

> "The affidavit sworn to lead the warrant of arrest was in the usual form. But nothing was said in it about the facts that, after the dispute had arisen, the parties had entered into an ad hoc arbitration agreement with the plain intention that the dispute should be dealt with by arbitration, and that the parties were, at the time when the affidavit was sworn, actively pursuing proceedings under that arbitration agreement. The form of the club undertaking confirms all too clearly the fact that the purpose of the appellant was to obtain security for an award in arbitration proceedings. It follows, in our judgment, that the invocation by the appellants of the Court's jurisdiction to arrest the ship amounted in the circumstances of

the case to an abuse of the process of the Court".

And further down on page 243:-

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

The existence of the Arbitration Clause does not preclude by itself the plaintiffs from filing an action and securing arrest of the defendant ship.

In the present case the facts are distinguishable from the facts in *The "Vasso"* case. No arbitration proceedings commenced. There was only a general arbitration clause in the charter-party which was not brought before the Court.

NON-DISCLOSURE:

A Court in determining a dispute or in granting a remedy by virtue of the power vested in it, normally hears both parties. The rule audi alteram partem is well rooted in the system of our administration of justice. For the proper administration of justice, however, and the issue of prompt and effective orders, there is the deviation from this rule and orders nisi are made ex-parte, without the Court having the opportunity to hear the other party. By definition on "an ex-parte" application the party against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the Court of any facts which he knows which might turn in that person's favour —*(Re a debtor,* [1983] 3 All E.R. 545, at p. 551).

The general proposition has been established by weighty authority that on an ex-parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say "We will not listen to your application because of what you have done".

Where an ex-parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicants affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.

In *The Hagen*, [1908] P. 189, at p. 201, Farwell, L.J., said:-

> "Inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application".

In *Boyce* v. *Gill*, [1891] 64 L.T. 824, Kekewich, J., stated (at p. 825):-

> "What the Court would have done if all the facts had been known I cannot say. In such a case I should not think of doing so; but possibly the Court would have come to a different conclusion, and said that the interim order was not necessary. If I had had the knowledge I now have that no serious practical inconvenience was likely to arise, I might have come to that conclusion. But, according to my view, on ex parte motions the Court should be in a position to

weigh all matters which might influence it, so as to decide whether it is a case to give notice of motion rather than that an injunction should be granted. At best the Court runs the risk of making an order which may do harm, and the undertaking in damages given by a plaintiff is not satisfactory. It is of the utmost importance that the Court should be able to rely upon the statement of counsel, and the affidavits. It is of the utmost importance that there should be a full disclosure of the facts".

In *R.* v. *The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington—Ex parte Princess Edmond de Polignac.* [1917] 1 K.B. 486, Lord Cozens-Hardy, M.R., said (at pp. 504-505):-

"It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, *Dalglish* v. *Jarvie,* 2 Mac. & G. 231, 238, which was decided by Lord Langdale and Rolfe B. The headnote, which I think states the rule quite accurately, is this. 'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward'. Then there is an observation in the course of the argument by Lord Langdale: 'It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved'. That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application.

Then there is a passage in Lord Langdale's judgment, Mac. & G. 241, 243, which is referred to in the head-note. It is this: 'There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved'. They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted. Rolfe B. says this: 'I have nothing to add to what Lord Langdale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides'. In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground'. That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there

is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say 'We will not listen to your application because of what you have done'."

Also, in the same case, Scrutton, L.J., stated (at pp. 513-515):-

"Now that rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—facts, not law. He must not misstate the law if he can help it—the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure. One of the commonest cases is an ex parte injunction obtained either in the Chancery or the Kings Bench Division. I find in 1849 Wigram V. C. in the case of *Castelli* v. *Cook*, (1849) 7 Hare, 89, 94, stating the rule in this way: 'A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go'. The same thing is said in the case to which the Master of the Rolls has referred of *Dalglish* v. *Jarvie*. A similar point arises in applications made ex parte to serve writs out of the jurisdiction, and I find in the case of *Republic of Peru* v. *Dreyfus Brothers*

& *Co.* Kay, J., stating the law in this way: 'I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made' ".

(See, also, *Re a debtor* (supra); *Negocios del Mar S.A.* v. *Doric Shipping Corporation S.A. (The Assios),* (C.A.), [1979] 1 Lloyd's Rep. 331).

In the present case the plaintiffs did not disclose that there was an arbitration clause. It is further stated in the affidavit of Helen Georghiades that the owners of the defendant ship had appointed an arbitrator and have repeatedly called upon the plaintiffs to appoint their arbitrator but they failed and/or neglected to do so and they have instituted the present proceedings.

Mr. McBride for the plaintiffs in his affidavit deposed that the owners of the defendant ship have never notified the name of any arbitrator to the plaintiffs, that there are no points at issue in this action that call for determination by specialists arbitrators and there is nothing that calls for arbitration in New York, with which place neither the owners of the defendant ship nor the plaintiffs have any connection nor indeed does any element of the dispute have any connection therewith and the claims of the plaintiffs are such that the same result would be obtained wherever they were to be decided on their merits but to deprive the plaintiffs of their Cyprus forum would result in additional delay and in possibly depriving them of their security.

These are matters which were not fully argued before me in these proceedings in view of the pendency of another application for an order setting aside the issue and/or the service of the writ of summons and/or for an order staying

all proceedings against it which is based, inter alia, on the Arbitration Law, Cap. 4, s. 4.

I have come to the conclusion that though it would have been the best course for the plaintiffs to have disclosed, in applying for the warrant of arrest, the existence of the arbitration clause and their contentions about the forum conveniens, nevertheless I am not satisfied that they failed to make such full and fair disclosure that amounts to fraud or such breach of the duty of full disclosure as to justify the Court in discharging the order.

No sufficient cause has been shown entitling me to order the discharge of the warrant of arrest. Therefore, the warrant remains in force as ordered. Though the non-disclosure was not such as to deprive the plaintiffs-respondents of the security, it was, however, such as to disentitle them, though successful, to the costs of this application.

Application dismissed with no order as to costs.

Application dismissed.
No order as to costs.