

Anchored by Malice: Why Most Unjustified Arrests Don't Lead to Damages for Wrongful Arrest



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Arresting a vessel is one of the most powerful tools in maritime law, but what happens when the arresting party gets it wrong? While a shipowner has the right to claim damages, succeeding is another matter entirely. The bar for a wrongful arrest claim is set exceptionally high, requiring proof not just of an error, but of bad faith or gross negligence implying malice. This article deconstructs the stringent legal test through the lens of a recent High Court decision, *The Divinegate*. It explores a case where a claimant, acting on misleading public records, made what the court called a "genuine but understandable mistake". Find out why, despite the arrest being unjustified, this mistake was not enough to unlock a claim for damages, and what this means for shipowners and claimants alike.

Generally, arresting a ship to secure a maritime claim, in respect of which Admiralty *in rem* jurisdiction is available within the scope of ss 20 and 21 of the Senior Courts Act 1981 against the ship sought to be arrested, is a matter of right of the claimant. That right is balanced by the right of the defendant – often the shipowner or a bareboat charterer – to claim damages for wrongful arrest, if the arrest or its continuance turns out to be “wrongful”. However, the bar for succeeding in such a claim is exceptionally high.

It is not sufficient for the defendant to merely prove that the arrest or its continuance was legally wrongful, but the defendant must prove either bad faith (first limb) or gross negligence implying malice (second limb) on the part of the claimant in arresting or continuing the arrest.

It is the second limb, rather than the first limb, that often shipowners or bareboat charterers would attempt to satisfy. Mere gross negligence or recklessness is unlikely to meet the standard required for the second limb. Likewise, a failure to exercise due diligence or to have a serious regard to the availability of the Admiralty *in rem* jurisdiction against the ship sought to be arrested might not meet the required standard. A shipowner or bareboat charterer cannot discharge the burden by merely proving that it should have been obvious to the claimant that the Admiralty *in rem* jurisdiction was not available against the ship.

A failure to obtain a transcript of the ship or relying on a publicly available record that turns out to be inaccurate does not meet the threshold. The fault lies with a shipowner who does not immediately correct an inaccurate public record of ownership.

The recent case of *The Divinegate* [2022] EWHC 2095 (Comm) demonstrates this exceptionally high threshold of the second limb. In this case, the disponent owners of the *Divinegate*, Eastern Pacific Chartering Inc (“Eastern Pacific”), time-chartered the vessel to Pola Maritime Ltd (“Pola Maritime”) by a charterparty dated 18 September 2019.

Upon completion of the charter, Eastern Pacific claimed there was outstanding hire to be paid. They obtained a Lloyd’s List Intelligence Report on 1 July 2020 which stated Pola Maritime were the beneficial owners of [another ship](#), *Pola Devora*. Additionally, Pola Maritime’s website included the *Pola Devora* in the list of vessels owned by them rather than in another list naming the vessels chartered by them. However, Eastern Pacific did not obtain any transcript from the registry in which the *Pola Devora* was registered. On the basis that Pola Maritime were the beneficial owners of the

Pola Devora, the owners arrested her on 2 July 2020 at Gibraltar to secure their claim.

Between 2 July 2020 and 6 July 2020, intense but courteous correspondence took place between Eastern Pacific's solicitors and *Pola Devora*'s solicitors. During the correspondence, *Pola Devora*'s solicitors contended that Pola Maritime were not the beneficial owners of the *Pola Devora*, while Eastern Pacific's solicitors were ready to release the vessel if satisfactory evidence was provided to support the contention.

On 3 July 2020, *Pola Devora*'s solicitors asked for the vessel to be released upon furnishing a SWIFT confirmation showing the remittance of the security amount into an escrow account. Eastern Pacific's solicitors refused the offer, but insisted on the funds to be cleared in the escrow account before the vessel is released. On the same day, *Pola Devora*'s solicitors provided the Eastern Pacific's solicitors with a Seaweb report which named Pola Rise as the registered owners for the relevant period, that raised a rebuttable presumption or inference that Pola Rise were the beneficial owners: *Tian Shen No. 8* [2000] 2 Lloyd's Rep 430 at 433 (Hong Kong Court of Appeal).

On 6 July 2020, *Pola Devora*'s solicitors furnished Eastern Pacific solicitors with the ship's transcript showing GTLK Malta to be the registered owners, a bareboat charter between GTLK Malta and Avonburg Finance Ltd, another bareboat charter between Avonburg Finance Ltd and Pola Rise, the Russian bareboat registration certificate in respect of the Pola Rise bareboat, and finally the time charter between Pola Rise and Pola Maritime. These documents established that Pola Maritime were not the beneficial owners of the *Pola Devora*, but were merely the time charterers of her. Within a

few hours after receipt of the documents, Eastern Pacific released the vessel.

After the vessel was released, Eastern Pacific sued Pola Maritime for the hire claim in London before the Commercial Court. Pola Maritime brought a counterclaim for wrongful arrest to recover the loss suffered due to the arrest. Although Pola Maritime were not the owners of the *Pola Devora*, they brought the counterclaim for losses they allegedly suffered as time charterers as a result of the arrest.

The first issue that arose as to the counterclaim was whether a claim for damages for wrongful arrest could be brought in a court other than the arresting court. Deputy Judge Patricia Robertson QC, upon a separate application, answered this question in the affirmative, holding that as this is a dispute between the parties to the charterparty, it must be determined as per their agreed dispute resolution mechanism.

The second and substantive issue, addressed by Deputy Judge Ms Ambrose, was whether the bar for the second limb was met. The starting point was *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945, where the Privy Council held that an award of damages for wrongful arrest would be available only where the arrest proceedings were commenced or continued in bad faith or with gross negligence implying malice. Rt Hon T Pemberton Leigh put the test as follows: *“Is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?”*.

In *The Kommunar* (No. 3) [1997] 1 Lloyd’s Rep 22, Coleman J interpreted the two limbs as follows. The first limb was bad faith of the claimant, that is, he had no honest belief in his entitlement to

arrest the vessel. The second limb was for cases where objectively there was so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel.

In *The Alkyon* [2018] EWCA Civ 2760, the Court of Appeal upheld *The Evangelismos* test, while acknowledging that it might have a harsh bearing on shipowners in leaving them without a remedy for an unjustified arrest and that only a statutory intervention could change that. The court also equated a claim for wrongful arrest with a common law action for malicious prosecution.

Ms Ambrose held that *The Kommunar* did not lower the bar of the second limb as there was no intention to change the law by removing the “implied malice” requirement for the second limb. In any event, the judge observed that in the subsequent case of *The Alkyon*, the Court of Appeal affirmed *The Evangelismos* test. However, the judge acknowledged that *The Kommunar* suggests that the first limb involves a subjective question as to the actual belief of the claimant, while the second limb involves an objective assessment of whether “malice” should be “implied” from gross negligence.

The judge held that Pola Maritime was at least named on some public records as the beneficial owners. Hence, it could not be said that Eastern Pacific did not pay any serious regard to the availability of the Admiralty *in rem* jurisdiction. The judge also considered that the fault can be attributed to the owners who did not have the errors in public records immediately corrected.

As for the refusal of Pola Maritime to release the vessel upon a SWIFT confirmation prior to clearance of the funds in the escrow account, the judge found the refusal was reasonable.



Accordingly, the judge concluded that the second limb was not met, and hence, the case for wrongful arrest was not made out.

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