The "Inai Selasih" (ex "Geopotes X")
[2005] SGHC 132

Case Number : Adm in Rem 149/2004, RA 231/2004

Decision Date : 25 July 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Gerald Yee and Adam Abdul Rahim (Joseph Tan Jude Benny) for the plaintiff; Niru Pillai and Liew Teck Huat (Niru and Co) for the defendant

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – Parties entering into agreement for dredging and reclamation works – Plaintiff agreeing to supply dredges – Whether agreement relating to use or hire of ship – Section 3(1)(h) High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Plaintiff relying on sham charterparty to assert defendant liable in personam – Whether plaintiff discharging burden of proof that defendant charterer of, in possession or in control of ship – Section 4(4) High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Wrongful arrest – Plaintiff knowingly mounting arrest of ship on basis of sham bareboat charter – Whether plaintiff acting mala fides or crassa negligentia

25 July 2005

Belinda Ang Saw Ean J:

1 This was an appeal by the defendant from the decision of the assistant registrar who refused its application to set aside the Writ of Summons and Warrant of Arrest of the *Inai Selasih* in respect of the plaintiff's claim against the defendant for, *inter alia,* breach of and moneys owed under the terms of a memorandum of understanding dated 29 November 2002 entered into by the plaintiff and the defendant ("the MOU"). The plaintiff is Jan De Nul NV ("JDN"), a Belgian company specialising in dredging operations around the world. In this action *in rem*, the defendant is named as the owner of the *Inai Selasih*. The defendant, Inai Kiara Sdn Bhd ("IK"), is in the business of carrying out dredging and land reclamation works in Malaysia.

2 In the Indorsement to the Writ of Summons, the claim was put in this way:

> The Plaintiffs' claim against the Defendants who are the owners of the ship or vessel M.V. "**INAI SELASIH" EX "GEOPOTES X**" (Port Klang Marine Registry Official No. 330407) is for:
>
> (1) Damages for breach of an agreement dated 29th November 2002 entitled "Memorandum of Understanding" ("MOU") relating to the use or hire of the Plaintiff's vessel(s) and/or for outstanding charter hire due and payable from the Defendants in respect of "INAI SEROJA";
>
> (2) Further and/or alternatively, for breach of fiduciary duty;
>
> (3) Interest; and
>
> (4) Costs

3 Prior to the arrest of the *Inai Selasih*, JDN on 4 June 2004 wrote to IK giving notice to terminate the MOU if the sum of €9,551,929.85 was not paid by 18 June 2004. In the same letter, JDN alluded to the purchase of two dredgers by IK as evincing its intention not to honour cl 3.2 of the MOU. On the same day, Inai Kiara (L) Ltd ("IK Labuan"), as owner of the *Inai Seroja*, demanded from IK payment within 14 days of €8,025,473.38 being moneys due under a bareboat charterparty dated 18 April 2003 and entered into between IK and IK Labuan ("the Charterparty") failing which the *Inai Seroja* would be withdrawn from the charter. On 12 June 2004, the *Inai Seroja* was sold to Port Louis Maritime, a subsidiary of JDN.

4 In the Affidavit leading the Warrant of Arrest, IK was said to have defaulted in its obligations under the MOU in that it had failed or refused to pay JDN moneys due under the MOU, which at 1 June 2004 totalled €9,551,929.85. The arrest affidavit was affirmed by Adam Abdur Rahim ("Rahim"), an associate in the firm of M/s Joseph Tan Jude Benny. It was not disputed that the arrest of the *Inai Selasih* was to obtain security for arbitration in Switzerland. In the Request for Arbitration dated 20 July 2004, the contents of which Bruno Van Den Eede ("Eede"), the financial administrator of JDN, adopted in his first affidavit of 26 July 2004, the amount owing as at 18 June 2004 was stated to be €9,428,962.17. The relief sought in the Request for Arbitration included payment of the sum of €9,428,962.17 together with interest for late payment as well as loss of income and profit arising from the termination of the MOU.

5 JDN arrested on 13 July 2004 the *Inai Selasih* on the basis that the MOU was an agreement relating to the use or hire of the *Inai Seroja* within the definition of s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act") and JDN was entitled to arrest the *Inai Selasih,* a vessel beneficially owned by IK at the time when this action was brought. At the time when the cause of action arose, IK was the charterer of or in possession or in control of the ship *Inai Seroja* and was the person who would be liable to JDN in an action *in personam.* Rahim deposed that the *Inai Seroja* was chartered on demise to IK pursuant to the Charterparty. Eede iterated in his Affidavit of 26 July 2004 that IK's status as charterer was as shown in the Charterparty.

6 It was not in dispute that under ss 3(1)(*h*) and 4(4)(*b*) of the Act, JDN must establish:

(a) that the claim arises out of an agreement relating to the use of the *Inai Seroja*;

(b) that the claim arises in connection with the *Inai Seroja* ;

(c) that IK would be liable on the claim in an action *in personam*;

(d) that when the cause of action arose IK was the charterer of the *Inai Seroja* ; and

(e) that at the time when the writ was issued, IK was the beneficial owner of the *Inai Selasih*.

7 JDN must establish all five conditions. Mr Liew Teck Huat, who appeared with Mr Niru Pillai for IK, submitted that the first, third and fourth conditions were not satisfied. The other conditions as listed were not in issue. For the reasons given below, I allowed IK's appeal as the fourth condition required by s 4(4) of the Act was not established. JDN has appealed against my decision.

8 I shall first consider the claim under s 3(1)(*h*) of the Act. Mr Gerald Yee for JDN contended that the court had jurisdiction under s 3(1)(*h*) in that the MOU was an agreement for the use of the *Inai Seroja*, an identified ship. IK argued that the court had no jurisdiction. Both sides cited *The*

Eschersheim [1976] 1 Lloyd's Rep 81 where the English Court of Appeal held that in deciding whether a particular agreement was an agreement relating to the use of a ship or not, the court should look at the substance of the matter.

9 Although it was not disputed that the *Inai Seroja* was the ship in connection with which the claims under the MOU arose, Mr Liew took the position that the MOU was plainly not an agreement to hire a ship. Nor was it an agreement relating to its use. The MOU evidenced a joint venture whereby IK was to secure contracts for dredging and land reclamation works in Malaysia, particularly in port projects, and JDN on the other hand was to provide the dredgers, equipment and technical assistance. The deployment of two dredgers by JDN was incidental to its participation in the aforementioned dredging and reclamation contracts. The MOU was not an agreement to charter the two dredgers identified in the MOU and no charter hire was payable to JDN. Profits, if, any, were to be shared equally from income from dredging and reclamation contracts secured by IK. Furthermore, JDN had the right not to participate in any dredging and reclamation contracts secured by IK if JDN was unwilling to agree to any of the terms of the dredging and reclamation contracts secured by IK. That right, so the argument went, reinforced IK's position that the MOU was not confined to the hire or use of JDN's dredgers. JDN, in one of the minutes of meeting with IK, proposed the setting up of a joint management team for the joint venture which was to be tasked with running the day-to-day business of "the Cooperation" as the unincorporated venture under the MOU was known by. Apart from integration of staff for "the Cooperation" within IK, a management committee was to be formed by staff of IK and JDN. Whenever staff or personnel were required for work to be carried out under "the Cooperation", the management committee would pool the resources of IK and JDN. To illustrate the point that the joint venture was for mutual benefits and profits and not limited to the use or hire of the *Inai Seroja*, Mr Liew referred to one of the *pro forma* invoices exhibited by JDN which showed that the joint venture included other services like the provision of services of a surveyor to carry out a preliminary inspection on the tug *Winstar Reliance* and the barge *Winstar 2308*.

10 JDN did not dispute IK's characterisation of the MOU as a joint venture but its argument was that the joint venture was in relation to the use of the *Inai Seroja* and thus within the scope of s 3(1)(*h*). In my view, a joint venture involving the use of an identifiable ship, in a proper case, is capable of coming within this head of jurisdiction. But not any involvement will suffice. The question is thus whether there is some reasonably direct connection with the use of the vessel and the joint venture. Each case will depend on its facts.

11 The expression "relating to" in s 3(1)(*h*) was given a narrower construction than the expression "arising out of" in *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co (The Sandrina)* [1985] 1 Lloyd's Rep 181. In that case the House of Lords held that a contract of insurance was not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of falling within para (*e*) of s 47(2) of the Administration of Justice Act 1956, the Scottish equivalent of our s 3(1)(*h*). Lord Keith of Kinkel stated at 187:

> It is necessary to attribute due significance to the circumstance that the words of the relevant paragraphs speak of an agreement "in relation to" not "for" the carriage of goods in a ship and the use or hire of a ship. The meaning must be wider than would be conveyed by the particle "for". It would, on the other hand, be unreasonable to infer from the expression actually used, "in relation to", that it is intended to be sufficient that the agreement in issue should be in some way connected, however remotely, with the carriage of goods in a ship or with the use or hire of a ship, and I think there is much force in the view expressed by Lord Wylie in *The Aifanourios*, 1980 S.C. 346 as to the inference to be drawn from the presence of certain other paragraphs in s 47(2). There must, in my opinion, be some reasonably direct connection with such activities. An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or

hire of a ship would, I think, show a sufficiently direct connection. It is unnecessary to speculate what other cases might be covered. Each case would require to be decided on its own facts. As regards the contract of insurance founded on in the instant appeal, I am of the opinion that it is not connected with the carriage of goods in a ship in a sufficiently direct sense to be capable of coming within par.(e).

12 I therefore turn to the MOU. The recital included the statements that JDN was desirous of providing two dredgers to "this Agreement for the execution of such dredging and reclamation works" and that the parties were "desirous of associating themselves into an unincorporated cooperation ["the Cooperation"]" for the deployment of both dredgers "on such dredging and reclamation works" in accordance with the terms of the MOU. The dredgers referred to in the recital were the *J F J De Nul* (later renamed *Inai Seroja*) and *Vesalius* ("the Dredgers"). It was common ground that only the *Inai Seroja* was provided under the MOU.

13 The relevant clauses provided as follows:

3.2 The primary object of the Cooperation shall be the deployment of the Dredgers on dredging and/or reclamation works carried out by IK – or by any holding, subsidiary or affiliated company of IK – in Malaysia and/or outside Malaysia under Malaysian government funding (hereinafter referred to as the "Works(s)"), and IK shall give first priority to the continuous and full deployment of both Dredgers on the Works.

3.3 The Parties shall participate in the Cooperation as follows:

JDN : fifty per cent (50%),

IK : fifty per cent (50%).

3.4 If any Parties agree on any and all terms and conditions of any contract for any Work on which either of the Dredgers or both (as the case may be) is/are to be deployed, then any and all rights interests liabilities obligations and risks and all net profits or net losses arising out of and/or in relation to such contract or such part thereof on which either of the Dredgers or both (as the case may be) is/are deployed, shall accrue to or be for the account of the Cooperation.

In this event, the compensation due and payable by the Cooperation to the Owner (as defined in Sub-Clause 4.1(i)), to IK and to Jan De Nul (Malaysia) Sdn. Bhd., shall be as set out in Appendix 2.

Any and all mutually agreed upon third party costs and expenses of the kind as set out in Sub-Clause 5.4 shall be for the account of the Cooperation.

3.5 If the Parties fail to agree on any and all terms and conditions of any contract for any Work on which either of the Dredgers or both (as the case may be) is/are to be deployed, then any and all rights interests liabilities obligations and risks and all net profits or net losses arising out of such contract shall accrue to or be for the account of IK.

In this event, IK shall charter the Dredger(s) from the Cooperation, and the charter rate due and payable by IK to the Cooperation, shall be the sum of (a) the compensation due and payable by the Cooperation to the Owner, to IK and to Jan De Nul (Malaysia) Sdn. Bhd. as per Appendix 2, and (b) any and all mutually agreed upon third party costs and expenses of the kind as set out in Sub-Clause 5.4. IK shall pay to the Cooperation, in Euro, such part of the charter rate which

represents the compensation due and payable by the Cooperation to the Owner and to Jan De Nul (Malaysia) Sdn. Bhd.

In addition, IK shall pay to the Cooperation, for the benefit of the Cooperation, a fee in the amount of ten per cent (10%) of the compensation due and payable by the Cooperation to the Owner as per Appendix 2 in respect of Depreciation and Interest.

…

3.6 If and when, at any time during the continuance of the Cooperation and for any reason whatsoever, either of the Dredgers or both (as the case may be) is/are idle, and provided the same does not occur whilst such Dredgers(s) is/are deployed in accordance with the provisions of Sub-Clause 3.5 or 3.7, then any and all costs and expenses arising out of and/or in relation thereto shall be for the account of the Cooperation.

In this event, the compensation due and payable by the Cooperation to the Owner, to IK and to Jan De Nul (Malaysia) Sdn. Bhd., shall be as set out in Appendix 2.

Any and all mutually agreed upon third party costs and expenses of the kind as set out in Sub-Clause 5.4 shall be for the account of the Cooperation.

3.7 If and when, at any time during the continuance of the Cooperation and for any reason whatsoever, either of the Dredgers or both (as the case may be) is/are idle, then JDN shall, subject to IK's consent thereto, be entitled to use such Dredger(s) for the deployment on any dredging and/or reclamation works carried out by JDN outside Malaysia, in which event any and all rights interests liabilities obligations and risks and all net profits or net losses arising out of such contract shall accrue to or be for the account of JDN.

In this event, JDN shall charter the Dredger(s) from the Cooperation …

3.8 Notwithstanding any contrary provision of this Agreement, the Cooperation throughout the continuance of the Cooperation, shall pay to the Owner and to Jan De Nul (Malaysia) Sdn. Bhd. the amounts as due and payable by the Cooperation to the Owner and to Jan De Nul (Malaysia) Sdn. Bhd. as per Appendix 2. These amounts shall be paid on a monthly basis, in arrears, on or before the fifth (5^{th}) day of each calendar month.

14 As can be seen from the provisions of the MOU, the business objective of the relationship involved the sharing of net profits or losses from dredging and public reclamation works in Malaysia undertaken by IK, its subsidiary or affiliated companies. It was not restricted to participating in reclamation works undertaken by IK but also concerned aspects like the operational functioning of the Dredgers both generally, and particularly, in the fulfilment of such dredging and reclamation works. To that end there were provisions under cl 5 of the MOU for, *inter alia*, maintenance and repairs of the Dredgers, and supply of spare parts and consumables to the Dredgers. Significantly, JDN, pursuant to the MOU, transferred ownership of the *J F J De Nul* to IK Labuan whereupon she was renamed and registered under the Malaysian flag. It was not disputed that eligibility for participation in all public dredging and reclamation works in Malaysia would require the deployment of one or more dredgers flying the Malaysian flag. Consequently, IK, as a Malaysian company, held in its name 51% of the shares in IK Labuan. The remaining 49% of the shares were held by an intermediary, Inai Kiara International SA, a company incorporated under the laws of Luxembourg. IK was represented as holding 99% of the bearer shares in the Luxembourg company. However, pursuant to the MOU which was to be kept secret and confidential, all 100% of the issued shares in IK Labuan were beneficially

owned by JDN. Clauses 4.2 and 4.3 called for documents to be executed as a means to protect JDN's ownership of the *Inai Seroja,* autonomy over IK Labuan and complete authority to conduct and manage the affairs of IK Labuan. The measures taken consisted of transfer of bearer shares and documentation like a trust deed, power of attorney and shareholder's agreement. All these matters pointed to a close connection between the MOU and the use of the *Inai Seroja*. In addition, Norazam bin Ramli ("Norazam"), Head of Division – Group Management of IK, in his Affidavit filed on 19 July 2004, admitted that pursuant to the MOU, the parties co-operated and worked on various projects in Malaysia. In all those projects, the *Inai Seroja* was the dredger used by "the Cooperation". In my judgment, the MOU had a reasonably direct connection with the use of the *Inai Seroja*, thereby satisfying the conditions of s 3(1)(*h*) of the Act.

15 The difficulties in the way of JDN were in satisfying the requirements of s 4(4) of the Act. It was JDN's case that IK was both the person who would be liable in an action *in personam* under the MOU and was also the charterer of or in control or possession of the *Inai Seroja* when the cause of action arose. Mr Liew submitted that IK was not the charterer of or in control or in possession of the *Inai Seroja*. The charterparty relied upon by JDN was a sham.

16 Throughout the parties' association of over 13.5 months under the MOU, the *Inai Seroja* was at all times in the possession and under the control of JDN. That part of the affidavit evidence of Norazam was not refuted in Eede's reply affidavit. JDN continued to use the Charterparty to assert IK's status as charterer of the *Inai Seroja*. Mr Yee's tentative suggestion that the charter was contained in the MOU fizzled out as it contradicted the affidavits deposed on behalf of JDN and the position taken earlier before the assistant registrar. Mr Liew promptly registered his objections.

17 The onus was on JDN to establish to the satisfaction of the court that on the balance of probabilities IK was the charterer of the *Inai Seroja* when the cause of action arose. That burden was not discharged. On JDN's own evidence, the Charterparty was created under the provisions of the external framework in the MOU. There are several clauses in the MOU that spelt out the common intention of both parties that the Charterparty was for appearance's sake. That was also the position taken by JDN in the Request for Arbitration. I shall come back to this later. First, the pertinent clauses under the MOU were as follows:

> **4. External Framework**
>
> 4.1 For external purposes only, IK shall be deemed to be the owner of both Dredgers and JDN's role and function shall be deemed to be limited to the provision of such services as are described in Sub-Clause 5.3
>
> To this effect, and for external purposes only:
>
> (i) IK and a company to be incorporated ... shall incorporate a company under the Offshore Companies Act 1990 in the Federal Territory of Labuan (the latter company is in this Agreement referred to as the "Owner").
>
> (ii) IK shall hold fifty-one per cent (51%), and the [company to be incorporated] shall hold forty-nine per cent (49%) of the ordinary shares in the capital of the Owner.
>
> (iii) … Any and all shares in the capital [of the company to be incorporated] shall be bearer shares. IK shall hold ninety-nine per cent (99 %), and a Fiduciary [appointed by JDN] shall hold one per cent (1%) of these bearer shares.

…

(vi) The Owner shall charter out the Dredgers to IK under a bareboat charter (in this Agreement referred to as the "Bareboat Charter").

Whenever, in order to substantiate the external framework as set out in this Sub-Clause 4.1, IK and/or the Owner must make any declaration and/or enter into any undertaking of any kind whatsoever vis-à-vis any third party [or parties], IK and/or the Owner shall only do so in mutual consent with JND as to the contents of any such declaration and/or undertaking.

Any and all costs and expenses arising out of and/or in relation to the implementation and running of the external framework shall be for the account of the Cooperation.

18 In the scheme of things, to accommodate documents generated in support of the façade, cl 2 was designed to close the loop, so to speak, to preserve the parties' relationship under the MOU and deal with documents inconsistent with the MOU. Clause 2 was drafted in language that ensured that the terms of the MOU took precedence over those documents. Clause 2 read as follows:

Save insofar as expressly provided for to the contrary, any and all provisions of this Agreement shall take precedence over any contrary provision(s) contained in any agreement(s) and/or document(s) of any kind whatsoever referred to in this Agreement, entered into and/or made up pursuant to or in relation to this Agreement and/or the object of the Cooperation.

In addition to cl 2, to safeguard JDN's proprietary interests in the *Inai Seroja*, there were the "internal framework" provisions in cll 4.2 and 4.3. I have already stated what they are in [14] above.

19 There is evidence that the master and key crew members were employed by JDN. Its own Swiss lawyers stated in the Request for Arbitration that legislation applicable to IK Labuan prevented it from entering into any charterparty other than a bareboat charterparty. JDN knew that under cl 5.2 of the MOU, IK was to provide an operations superintendent and local crew for the *Inai Seroja.* The provision of limited crewing needs was not consistent with the obligations of a bareboat charterer or any other form of charter.

20 JDN's Swiss lawyers clarified that a sum of €8,442,383.10 would purportedly be due under the Charterparty to IK Labuan. But because of the external arrangement, IK only "appeared to charter the vessel from IK Labuan" and so the amount due to IK Labuan under the Charterparty was "irrelevant". Consequently, JDN could properly claim in arbitration €9,428,962.17. That figure under the internal arrangement included the sum of €8,442,383.10.

21 In circumstances where the Charterparty was not intended to actually create a valid charter of the *Inai Seroja* as between the parties or be a basis for regulating their relationship which remained very much under the MOU, the Charterparty being a sham gave rise to no legal rights and obligations. That being the position, it could not have the effect of conferring the status of charterer on IK. Clearly, JDN could not use and rely on the written document as a basis for invoking s 4(4) of the Act for arresting the *Inai Selasih*. So in the absence of chartering on the part of IK or possession or control on the part of IK, JDN was not entitled to assert its claim by proceeding *in rem* against the *Inai Selasih.* I allowed the appeal and set aside the Writ of Summons and Warrant of Arrest since no *in rem* claim plainly lay against IK's vessel, the *Inai Selasih.*

22 Mr Liew's alternative argument was that even if JDN was allowed to rely on the Charterparty, IK was no longer the charterer of the *Inai Seroja* when the cause of action accrued on 18 June 2004.

This was because before 18 June 2004, JDN withdrew the *Inai Seroja* from the joint venture and sold her to a subsidiary of JDN. Mr Yee's response was that the cause(s) of action arose earlier than 18 June 2004. He mentioned 4 June 2004. Presumably, he had in mind the letter of demand and cl 3.8 of the MOU but he gave no details to substantiate his submission.

23 In any event, I did not accept Mr Liew's submissions. The same argument was raised in *The Tychy* [1999] 2 Lloyd's Rep 11 and was rightly rejected by the English Court of Appeal. In that case, Polish Ocean Line ("POL") chartered space on board the *Tychy* from the vessel operator, MSC Mediterranean Shipping Co SA ("MSC"). In considering the question whether POL were charterers when the cause of action arose, it was argued that they were not because POL were no longer charterers when the cause of action accrued. Counsel for POL submitted that by the time any money was due to MSC under the running account, POL could no longer be regarded as charterers because the containers would have been delivered and the vessel would have sailed. Clarke LJ, in rejecting counsel's submission, said (at 23) that the charterparty would remain on foot so long as obligations remained to be performed under it. Obligations under the charterparty included both MSC's obligation *qua* owner to carry and discharge the containers and POL's obligation to pay. He commented that it was wholly artificial to hold that POL retained their status as charterers only so long as the containers remained on board the vessel. The English Court of Appeal held that POL retained their status at least so long as primary obligations remained to be performed under the charterparty. In that case POL retained their status as charterers so long as moneys remained to be paid under the charterparty arrangements.

24 This brings me to Mr Pillai's point that there was no cause of action against the defendant at the date of commencement of the proceedings. The contention was that JDN had sued the wrong party in that nowhere in the MOU was IK required to make payment directly to JDN. The *pro forma* invoices relied upon to recover the unpaid moneys were addressed not to IK but to "Cooperation JDN-IK", an unincorporated venture. In addition the audit confirmation dated 20 April 2004 relied upon by JDN to confirm that the sum of €6,031,043.77 was receivable from IK showed that it was due to IK Labuan and not JDN. Also IK's confirmation was qualified in that it was subject to "other amounts owing to us and shares which have yet to be confirmed". None of these contentions advanced on behalf of IK was accepted as correct by JDN. Having allowed the appeal for the reasons given earlier, I need not deal with Mr Pillai's point. However, I would make some observations.

25 The proper law of the MOU was Swiss law. IK had not adduced any evidence of Swiss law. On the other hand, JDN's lawyer had opined that under the Swiss Federal Code of Obligations the unincorporated venture was a partnership. The complaint in essence was that IK had breached the MOU in failing to make payment to the partnership. IK had throughout the existence of the joint venture repeatedly delayed or defaulted in remitting moneys payable to the partnership resulting in JDN not receiving payment. It was said in the Request for Arbitration that "the Cooperation" was the vehicle for the flow of moneys meant for JDN. I read the Request to Arbitration to mean that under Swiss law, JDN could pursue its claims against IK. Thus, there was nothing in the specious argument that JDN had sued the wrong party.

26 IK also raised the argument that there was non-disclosure of material facts. Mr Pillai, who argued this point, contended that since JDN had injuncted IK's assets for the very same claims in a Malaysian action, that fact ought to have been disclosed to the duty registrar issuing the Warrant of Arrest. As it turned out, that fact was disclosed by counsel. The duty registrar's minutes recorded that the Mareva injunction obtained in Malaysia was in aid of arbitration in Switzerland. The duty registrar was also informed that the arrest was also to obtain security for the same arbitration in Switzerland. Any material non-disclosure in my view related to the alleged status of IK as charterer under the Charterparty. The status of IK as charterer was a very necessary ingredient for an arrest.

The external and internal arrangements, which had a bearing on JDN's assertion that IK was the charterer of the *Inai Seroja,* would have been something the duty registrar would have wanted to know in deciding whether or not a warrant of arrest should be issued. Those arrangements were not mentioned anywhere in the body of the affidavit. Simply exhibiting the MOU was not good enough and did not count as compliance with its duty to disclose material facts. The non-disclosure of the external and internal arrangements between the parties was a serious and significant breach of the duty to disclose material facts. In the circumstances, the Warrant of Arrest itself could have been set aside on this ground.

27 The last issue is damages for wrongful arrest. JDN's position was that there was no *mala fides* or *crassa negligentia* on its part in relation to the arrest. In my judgment it was appropriate in this case to order damages for wrongful arrest against JDN. It was clear to me that JDN had acted *mala fides* in seeking the arrest of the *Inai Selasih.* JDN mounted an arrest on the back of a bareboat charter which it knew was a sham. A sham document was used to mislead the court into issuing the Warrant of Arrest on the footing that IK was at the time the cause of action arose the charterer or person in possession or in control of the *Inai Seroja*. The test of wrongful arrest was satisfied in this case.

2 8 For all these reasons, the appeal was allowed with costs here and below fixed at $15,000 plus reasonable disbursements. I also ordered the security provided for the release of the *Inai Selasih* to be returned to IK for cancellation no later than 25 April 2005.