The "Inai Selasih" (ex "Geopotes X")
[2006] SGCA 4

Case Number : CA 41/2005

Decision Date : 02 February 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Jude Benny and Adam Abdur Rahim (Joseph Tan Jude Benny) for the appellant; N K Pillai and Liew Teck Huat (Niru and Co) for the respondent

Parties : —

Admiralty and Shipping – Admiralty jurisdiction and arrest – Action in rem – External framework of agreement between parties for show – Whether appellant can rely on charterparty created under external framework to show respondent to be charterer, in possession or in control of vessel – Whether agreement itself can show respondent to be charterer, in possession or in control of vessel – Section 4(4) High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Appellant arresting vessel on basis of sham charterparty – Whether appellant disclosing unusual arrangements to court in obtaining warrant of arrest – Whether appellant acting mala fides or crassa negligentia

2 February 2006

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal by Jan De Nul NV, the plaintiff/appellant, against the decision of the High Court setting aside the *in rem* Writ of Summons filed by the appellant against Inai Kiara Sdn Bhd, the defendant/respondent, for damages for the non-payment of charter hire due under an agreement relating to the use or hire of the appellant's dredger. The High Court had also set aside the Warrant of Arrest issued at the instance of the appellant in the action in respect of the respondent's vessel, the *Inai Selasih*, and ordered that damages, to be assessed, be awarded to the respondent. We heard the appeal on 21 November 2005 and allowed it only to the extent that we set aside the order as to damages made in favour of the respondent in relation to the arrest of the *Inai Selasih*. We did not think that damages should be awarded against the appellant. However, we affirmed the decision to set aside the Writ and the Warrant of Arrest. We now give the reasons for our decision.

The background

2 The appellant, a Belgian company, ran a worldwide business in dredging and land reclamation. The respondent, a Malaysian company, was also involved in a similar business in its own country. From 2001, the respondent had chartered dredgers from the appellant to undertake its projects. In 2002, the respondent wanted to obtain a 15-year concession from the Malaysian authorities to carry out public dredging and reclamation works in the country. However, it was a requirement of the authorities that the dredgers to be used for the works should be Malaysian-registered and Malaysian-owned. In order to satisfy that requirement, the respondent entered into a special arrangement with the appellant which was set out in a memorandum of understanding ("MOU").

3 The preamble to the MOU and cl 3.1 stated that the parties were to associate themselves into "an unincorporated cooperation" ("the Co-operation") for the deployment of two dredgers, *ie*, the *JFJ De Nul* and the *Vesalius*. Each party would have an equal interest in the Co-operation. However, for the purpose of showing to the Malaysian authorities that the requirement as to local registration and ownership of the dredgers was satisfied, the MOU also provided an "external framework". In

short, this external framework was only for show. Therefore, cl 3.11 of the MOU had to provide that the Co-operation "shall be a silent and secret cooperation". However, it was provided under cl 13.2 that any dispute under the MOU should be resolved by arbitration in Zurich, Switzerland, under the International Chamber of Commerce Rules of Arbitration.

4 The external framework contemplated under the MOU was, in brief, as follows. First, a company was to be incorporated by the respondent and a fiduciary of the appellant in the British Virgin Islands. This was later changed to Luxemburg ("the Luxemburg company"). It was to be a bearer share company and 99% of the bearer shares in the Luxemburg company were to be held by the respondent and 1% by the fiduciary. Second, the respondent and the Luxemburg company were to jointly incorporate a company in the Federal Territory of Labuan under the Offshore Companies Act 1990 (Act No 441 of 1990) (M'sia) ("the Labuan Company"). The Labuan company was the entity which would, in name, own the two dredgers. The respondent would hold 51% of the shares of the Labuan company and the Luxemburg company, 49%. Third, through some documentary transactions, the Labuan company would become the legal owner of the dredgers. Fourth, the Labuan company would have the dredgers registered in Malaysia and charter the dredgers to the respondent pursuant to a charterparty.

5 This was broadly the external framework. However, eventually, only one dredger, the *JFJ De Nul*, was required by the respondent to carry out the works. *JFJ De Nul* was renamed *Inai Seroja* by the Labuan company.

6 What is described in [4] above, was the framework for the world to see. But the real arrangement under the MOU was that the appellant would retain ownership of the *Inai Seroja*. Through a series of instruments executed by the respondent and the Labuan company, and the handing over of the certificates in relation to the bearer shares of the Luxemburg company, the appellant, in fact, had the control and management of the Labuan company.

7 With the external arrangement in place, the respondent was able to obtain the concession from the Malaysian authorities to undertake public dredging and reclamation works. The appellant alleged that by early June 2004, substantial sums were overdue from the respondent in respect of the *Inai Seroja*. On 4 June 2004, the appellant gave notice to the respondent that it would terminate the MOU if a sum of approximately €9.5m was not paid within 14 days. On the same day, the Labuan company also gave notice of termination of the charterparty if the outstanding sum of €8m due under the charterparty was not paid. The respondent denied owing the appellant, or the Labuan company, the sums claimed by them and instead accepted their conduct in stopping the *Inai Seroja* from carrying on with the works as an act in repudiatory breach of the MOU and the charterparty respectively.

8 Consequently, on 13 July 2004, the appellant instituted the present admiralty action against the respondent claiming, *inter alia*, damages for breach of the MOU and/or for the outstanding sums due for the hire of the *Inai Seroja*. On the same day, the appellant arrested a vessel, the *Inai Selasih*, which was owned by the respondent, as security for an arbitration in Switzerland. The appellant contended that the admiralty jurisdiction of the High Court could be invoked pursuant to s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("the Act"). Furthermore, it claimed that it was entitled to arrest the *Inai Selasih* under s 4(4)(*b*) of the Act as the respondent was liable *in personam* to the appellant, being the charterer of (relying on the charterparty between the Labuan company and the respondent) or in possession of the *Inai Seroja.*

9 On 5 August 2004, the assistant registrar disallowed the respondent's application to have the action struck out/set aside and to set aside the Warrant of Arrest. The respondent successfully

appealed against the decision. Belinda Ang Saw Ean J held that the appellant had failed to prove that the respondent was the charterer of or was in possession of the *Inai Seroja* when the cause of action arose as required under s 4(4)(*b*) of the Act because the evidence in fact showed that the charterparty was a sham giving rise to no rights and obligations. Thus, she set aside the Writ and the Warrant of Arrest. She would also have set aside the Warrant of Arrest on the ground of non-disclosure of material facts. She further ordered that there be an order for damages against the appellant on the ground that the appellant had relied on a document, the charterparty, which was a sham. Thus, there was evidence of *mala fides* on the part of the appellant.

Issues

10 Before us, the appellant contended that the judge erred in setting aside the Writ and the Warrant of Arrest, and in ordering the payment of damages by the appellant to the respondent. At this juncture, we ought to clarify that there appeared to be a misunderstanding by the parties as to the order made by the judge. They thought that the judge had struck out the Writ when she intended only to set aside the Writ. This is apparent from a perusal of her Grounds of Decision (reported at [2005] 4 SLR 1).

11 The appellant submitted that at the time the cause of action arose the respondent was the charterer of, or was in possession or control of, the *Inai Seroja*. There was nothing bogus about the arrangement which the appellant and the respondent had entered into as reflected in the MOU. As regards the question of damages, the appellant argued that it had made full disclosures of the terms of the MOU to the court, including the internal and external arrangements, when it obtained the Warrant of Arrest against the *Inai Selasih*.

Nature of the arrangement

12 The relevant provisions of the Act read:

> **3** — (1) 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;
>
> …
>
> [**4** —] (4) In the case of any such claim as is mentioned in section 3(1)(*d*) to (*q*), where —
>
> …
>
> (*b*) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship

under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

13 It was not in dispute that the basis of the claim of the appellant was that the MOU related to the use or hire of the *Inai Seroja* and that the respondent was the charterer or in possession of the *Inai Seroja*. The judge quite rightly pointed out that for the appellant to bring the case under ss 3(1)(*h*) and 4(4)(*b*) of the Act, the appellant must satisfy the following:

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

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

(c) that the respondent was liable on the claim in the action *in personam*;

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

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

14 The judge found against the appellant on point (d). She laid emphasis on the fact that the entire external framework as set out in the MOU was only for appearance's sake. She said ([10] *supra* at [21]):

> [W]here 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 [the respondent]. Clearly, [the appellant] 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 [the respondent] or possession or control on the part of [the respondent], [the appellant] 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 [the respondent's] vessel, the *Inai Selasih*.

15 We agreed with the above views expressed by the judge. If we may put it quite bluntly, this was a case where the external framework was created wholly to conceal the true position from the Malaysian authorities. Several companies were created purely with a view to achieving the objective of giving an appearance of satisfying the requirement that the dredgers used for the works were Malaysian-registered and Malaysian-owned. It was not a true charterparty that was entered into between the Labuan company and the respondent. In this regard cl 2 of the MOU was of special significance. It provided that:

> 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.* [emphasis added]

This clause again reinforced the basic premise of the MOU that any agreement or document that came into being pursuant to the external arrangement was only for show. We could not see how, in the light of this clause, it could be argued that the charterparty was intended to have any real legal effect.

16 We noted that in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, Diplock LJ said that:

> [F]or acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

The terms of the MOU clearly showed the parties knew exactly what they were doing and intended.

17 In this appeal, the appellant sought to rely on what the respondent's Head of Division for Group Management, Mr Norazam bin Ramli ("Ramli"), said in his affidavit to the effect that all the arrangements under the MOU were "entirely above-board" and that there was "no dichotomy between 'external' and 'internal' positions". It did seem strange to us as to why Ramli should make that assertion when the MOU clearly provided for what was the real arrangement (set out in cl 3) and what was the external framework, which was only for show. However, the respondent's counsel did very strenuously argue before the assistant registrar and the judge that the charterparty was a sham. Perhaps Ramli was concerned about potential prosecution in Malaysia and wished to protect the respondent, and maybe, himself. Whatever might have been the reason behind Ramli's statement, the court was not obliged to accept it, and should, instead, reject it, when it was plainly wrong. The parties did not disguise anything in the MOU. They stated plainly what they had intended; nothing was left to imagination or interpretation.

18 In any event, even if we were to take the charterparty between the Labuan company and the respondent at its face value, the appellant could hardly have relied on it as, in form, the owner of the dredger, *Inai Seroja*, was not the appellant but the Labuan company. The appellant was also not a party to the charterparty.

19 We acknowledge that on the face of it, the appellant did not sue the respondent pursuant to the charterparty but the MOU. The indorsement to the Writ read:

> 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";
>
> …

20 But the position became somewhat garbled when we looked at what was stated in para 4 of its affidavit in support of the application for the issue of a warrant of arrest against the *Inai Selasih*:

> The Plaintiffs are the owners of the vessel "**INAI SEROJA**" which was bareboat chartered to the Defendants pursuant to a Charterparty entered into between Inai Kiara (L) Ltd and Inai Kiara Sdn. Bhd. ("IKSB") on or about 28 April 2003. A copy of the Charterparty is attached at "**AR-1**".

21 The judge found that the MOU related to the use or hire of the *Inai Seroja* under s 3(1)(*h*) of the Act. Because of this finding, the appellant contended that the judge should consequently have also found that an owner-charterer relationship was created by the MOU. This was the crux of the matter: what was the true nature of the arrangement set out in the MOU? Was it a document for the hire or charter of two dredgers from the appellant to the respondent or was it in truth a joint-venture arrangement involving the use of two dredgers?

22 The MOU provided for the creation of an unincorporated co-operation in which each party would have a 50% share. We will, at this juncture, set out the provisions in the MOU which described, in some detail, how the dredgers were to be used by the Co-operation and how payments were to be made by the respondent to the Co-operation as well as by the appellant to the Co-operation.

> 3.2 The primary object of the Cooperation shall be the deployment of the Dredgers on dredging and/or reclamation works carried out by [the respondent] - or by any holding, subsidiary or affiliated company of [the respondent] - in Malaysia and/or outside Malaysia under Malaysian government funding (hereinafter referred to as the "Work(s)"), and [the respondent] shall give first priority to the continuous and full deployment of both Dredgers on the Works.
>
> 3.3 …
>
> 3.4 If the 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 [the respondent] 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 [the respondent].
>
> In this event, [the respondent] shall charter the Dredger(s) from the Cooperation, and the charter rate due and payable by [the respondent] to the Cooperation, shall be the sum of (a) the compensation due and payable by the Cooperation to the Owner, to [the respondent] 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. [The respondent] 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, [the respondent] 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.
>
> The Cooperation and [the respondent] shall enter into a charter hire agreement on the basis of

IADC's General Conditions of Contract and such Special Conditions of Contract as mutually agreed upon. …

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, … 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 [the respondent] 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 [the appellant] shall, subject to [the respondent's] consent thereto, be entitled to use such Dredger(s) for the deployment on any dredging and/or reclamation works carried out by [the appellant] outside Malaysia, …

In this event, [the appellant] shall charter the Dredger(s) from the Cooperation, and the charter rate due and payable by [the appellant] to the Cooperation, shall be the sum of (a) the compensation due and payable by the Cooperation to the Owner, to [the respondent] and to Jan De Nul (Malaysia) Sdn. Bhd. as per Appendix 2, … [The appellant] 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.

The Cooperation and [the appellant] shall enter into a charter hire agreement on the basis of IADC's General Conditions of Contract and such Special Conditions of Contract as mutually agreed upon. …

23 In these clauses, the term "Owner" referred to the Labuan company and "Jan De Nul (Malaysia) Sdn Bhd", was the company incorporated by the appellant in Malaysia for the purpose of providing the following services to the Co-operation:

(a) provision of a production superintendent for each dredger; and

(b) recruitment of suitably qualified English-speaking expatriate key crew for each dredger and responsibility for payroll, social security, pension, insurance, and administration and travelling arrangements for such crew.

24 It would be seen that the arrangement established for the use of two dredgers was between the Co-operation on the one hand and the participating parties, namely, the appellant and the respondent, on the other. In the light of these rather detailed provisions relating to how each dredger was to be used and how payments were to be made by the respondent to the Co-operation, and bearing particularly in mind the fact that cl 3.7 also provided for the chartering of the dredger by the appellant from the Co-operation, the MOU could hardly be viewed as an agreement between the appellant and the respondent for the chartering or hiring of dredgers. In our judgment, the MOU was, in truth, a joint-venture agreement setting how the two parties should co-operate in the use of two dredgers (eventually only one was needed) and the breach of which by one party would entitle the other to sue for damages. Accordingly, the appellant could not proceed *in rem* against the *Inai*

Selasih. The judge below was correct to set aside the admiralty Writ as well as the Warrant of Arrest.

25 We should, at this juncture, add that the judge below also set aside the Warrant of Arrest, which was obtained *ex parte*, on the ground that there had been a failure on the part of the appellant to disclose a material fact. The judge said ([10] *supra* at [26]):

> The status of [the respondent] as charterer was a very necessary ingredient for an arrest. The external and internal arrangements, which had a bearing on [the appellant's] assertion that [the respondent] 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.

26 It seemed to us that the judge was in error in finding that there was a failure on the part of the appellant to disclose the "internal and external arrangements" in the body of the affidavit in support of the application for the issue of the Warrant of Arrest. It appeared to us that the judge had overlooked the fact that in para 10 of the affidavit of Adam Abdur Rahim, filed on 13 July 2004, the following was stated:

> 1 0 . *As the Defendants required that* it would appear and *be represented to the world at large that they are the owners of the Dredger, the MOU provided for an external and internal framework to govern the parties and to protect the Plaintiffs' [appellant's] interests.*
>
> (a) The Defendants and the Plaintiffs to incorporate a company under the Offshore Companies Act, 1990 in the Federal Territory of Labuan *in which the Defendants would appear to the world at large to hold:*
>
> *(i) through an intermediary, 49% of the shares; and*
>
> *(ii) in its own right 51% of the shares;*
>
> *however, the true purpose and intent, as expressly provided for in the MOU was that the Plaintiffs are to be the owners and/or beneficial owners of all shares in the newly incorporated company;*
>
> (b) The Plaintiffs to transfer the Dredger to the newly incorporated company);
>
> (c) The newly incorporated company (Inai Kiara (L) Ltd) would then charter the Dredger (provided by the Plaintiffs) to the Defendants under a bareboat charter.
>
> [emphasis added]

It would be seen that the external and internal frameworks described in the MOU were expressly referred to in the body of the appellant's affidavit. The opening sentence of the paragraph said it all, *ie*, "As the [respondent] required that it … be represented to the world at large that [it is the owner] of the Dredger, …".

Should damages be ordered against the appellant

27 The fact that we agreed with the judge below that the Writ should be set aside did not necessarily mean that damages should automatically be awarded against the appellant on account of

the arrest of the *Inai Selasih*. This is the question to which we now turn.

28 It was not in dispute that to succeed in a claim for damages for wrongful arrest, it must be shown that there was *mala fides* or malicious negligence, or *crassa negligentia*, on the part of the plaintiffs: see *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945; *Walter Turnbull v The Owners of the Ship "Strathnaver", The Strathnaver* (1875) 1 App Cas 58 and *The Kiku Pacific* [1999] 2 SLR 595 at [30]. The judge below had not applied the wrong principle. We differed from her in relation to the appreciation of the facts and the inferences drawn by her. She held that the appellant, in arresting the *Inai Selasih*, had acted in bad faith because ([10] *supra* at [27]):

> [The appellant] 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 [the respondent] was at the time the cause of action arose the charterer or person in possession or in control of the *Inai Seroja*.

29 It would be noted that the only ground upon which the judge found that the appellant had acted *mala fides* in arresting the vessel, *Inai Selasih*, was that it had relied upon a charterparty that was a sham. It was not in dispute that the appellant sought to arrest the *Inai Selasih* so as to obtain security for the arbitration in Switzerland.

30 In *The Maule* [1995] 2 HKC 769 at 772, Bokhary JA of the Hong Kong Court of Appeal, in considering the test to be applied, first quoted the following passage of the Privy Council in *The Evangelismos* ([28] *supra* at 359; at 948):

> [I]s there or is there not, reason to say, that the action was so unwarrantedly 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?

He also reviewed other authorities and came to the conclusion that (at 773):

> If a plaintiff wrongfully arrested a ship which he knew he could not legitimately arrest, then he would be acting in bad faith. And, short of that, if he wrongfully arrested a ship without applying his mind to whether that was a legitimate course: proceeding in that cavalier fashion because he was bent on harming the shipowner or putting pressure on him to accede to a demand, then his conduct could, in my view, be described as malicious negligence. And in either case, damages for wrongful arrest would be a proper remedy to grant the shipowner against him.

31 It seemed to us that the test propounded by Bokhary JA was largely adopted by this court in *The Kiku Pacific* ([28] *supra*) where it said at [30]:

> In the context of the appeal, the question would be this; in bringing the action against the owners, did Fal know or honestly belief [*sic*] that they could not legitimately arrest the ship so as to imply malice, or in arresting the vessel, did Fal fail to apply their mind as to whether they could legitimately arrest the vessel, and nevertheless proceeding to arrest the vessel because Fal was bent on putting pressure on the owners to accede to their demand, so as to imply gross negligence; and in refusing the security offered by the owners in March 1996, was Fal's refusal malicious or grossly negligent.

32 Applying this test to the instant case, could it be said that the appellant applied for the Warrant of Arrest knowing or honestly believing that it could not legitimately arrest the ship or failing to apply its mind as to whether it could legitimately arrest the vessel and nevertheless proceeding to

do so? We did not think that the appellant had committed either wrongdoing. On the evidence, we were satisfied that the appellant genuinely thought that it had a claim in admiralty. It had disclosed the terms of the MOU to the court, including the external framework which was created merely for appearance, just to show to third parties that the *Inai Seroja* was Malaysian-registered and owned by a Malaysian company. The fact that the court below held that the charterparty between the respondent and the Labuan company was, in the circumstances, a sham, a decision affirmed by us, did not mean that the appellant had acted with malice. It had disclosed the unusual arrangements to the court. All it meant was that the appellant was wrong in its interpretation or perception of the entire arrangement. Being shown to be wrong could not *per se* amount to being malicious. The parties had entered into a serious business arrangement as to how the appellant's dredgers could be made use of by the respondent. However, for reasons of which both parties were well aware, they had thought it best to make it by way of an "unincorporated cooperation" and to create the extra fictitious formalities in order to meet the requirement of the Malaysian authorities.

33 Accordingly, we were of the opinion that there was no evidence to suggest malice or *crassa negligentia* on the part of the appellant and set aside the order on damages made against the appellant.