The "Reecon Wolf"
[2012] SGHC 22

Case Number : Admiralty in Rem No. 157 of 2010 (Registrar's Appeal No. 94 of 2011)

Decision Date : 31 January 2012

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : S Mohan and Bernard Yee (Incisive Law LLC) for the Defendant; John Seow and Vellayappan Bala (Rajah & Tann LLP) for the Plaintiff.

Parties : The "Reecon Wolf"

Admiralty

Conflict of Laws – Forum non conveniens

31 January 2012

Belinda Ang Saw Ean J:

Introduction

1 This Registrar's Appeal No 94 of 2011 ("RA 94") was from the decision of the Assistant Registrar refusing to stay an admiralty action between foreigners arising from a collision between foreign vessels of different nationalities in the Straits of Malacca.

In Rem Proceedings: A Chronology

2 The plaintiff's vessel, the *Capt Stefanos*, was in collision with the defendant's vessel, the *Reecon Wolf*, on 21st August 2010 at 1748 hours in the Straits of Malacca. The defendant commenced an *in rem* action in the High Court of Malaya at Malacca and arrested the plaintiff's vessel, the *Capt Stefanos*, on 24 August 2010. The plaintiff secured her release by providing security in the form of a letter of undertaking furnished by North of England P&I Club Association Ltd. The *Capt Stefanos* was released from arrest in Malacca on 30 August 2010. For ease of reference, the short title of the defendant's *in rem* action against the *Capt Stefanos* is Admiralty in Rem No. 27-1-2010 ("the Malaysian Action"),

3 The plaintiff wishing to found jurisdiction in Singapore arrested the *Reecon Wolf* whilst she was here. Admiralty in Rem No 157 of 2010 was commenced on 26 August 2010 ("the Singapore Action"). On the same day, the *in rem* writ was served and the *Reecon Wolf* was arrested in Singapore. The defendant secured her release by providing security in the form of a letter of undertaking furnished by Gard P&I (Bermuda) Ltd. The R*eecon Wolf* was released from arrest on 28 August 2010.

4 The claim in the Singapore Action is a maritime claim within the admiralty jurisdiction of the High Court of Singapore. Likewise, the claim against the *Capt Stefanos* in Malacca (the Malaysian Action) is a maritime claim within the admiralty jurisdiction of the High Court of Malaya, at Malacca. Notably, the parties would be the same even if, procedurally, their positions were reversed in the two actions so that the present plaintiff in the Singapore Action was the defendant in the Malaysian Action, and *vice versa*. The substantive issues in both proceedings were the same, namely, which vessel was

responsible for the collision? If both vessels were negligent, what should the apportionment of liability be? Simply put, each party would be liable for the damage in proportion to the degree in which its ship was at fault.

5 The defendant filed its Preliminary Act in the Malaysian Action on 8 September 2010. The plaintiff filed its Preliminary Act in the Singapore Action on 26 October 2010. On the same date, the plaintiff applied to stay the Malaysian Action in favour of Singapore ("the Malaysian Stay Application"), and on 3 November 2010, the defendant followed suit and applied, *vide* Summons No 5218 of 2010 ("SUM No 5218"), for an order that the Singapore Action be stayed in favour of Malaysia.

6 SUM No 5218 was dismissed by the Assistant Registrar on 18 March 2011. The defendant duly filed RA 94 on 31 March 2011. On 8 July 2011, I allowed the appeal in RA 94 and ordered, *inter alia*, a stay of the Singapore Action and directed that security be furnished by the defendant to secure the plaintiff's intended claims in Malaysia. The plaintiff has appealed against my decision.

7 I should mention that even though the Malaysian Stay Application was filed earlier, SUM No 5218 was coincidentally heard first on 18 March 2011. In the course of the hearing of RA 94, counsel for the plaintiff, Mr John Seow ("Mr Seow"), informed me of the dismissal of the Malaysian Stay Application, and that an appeal would be lodged on 6 July 2011.

8 When deciding on this appeal, I had to bear in mind the latest development: that the High Court of Malaya at Malacca had ruled on the appropriateness of Malaysia as the forum for the resolution of the issues between the parties; that the Malaysian Action would go on whatever might happen in Singapore; and that the plaintiff would appeal against the ruling.

Events leading to and after the collision

9 The *Capt Stefanos* is a Bahamian registered vessel and the *Reecon Wolf* is registered in the Marshall Islands. The owner of the *Capt Stefanos* is Osmium Shipping Corporation, a Liberian company, and the vessel appears to be managed and operated by entities based in Greece or the Bahamas. [note: 1] The owner of the *Reecon Wolf* is Daimon Shipping Ltd, a company incorporated in the Marshall Islands. Its shipmanagers, Furtrans Ship Management GmbH, have their headquarters in Germany but operate from Turkey. The officers and crew members of the *Reecon Wolf* were from the People's Republic of China. The Master and Second Mate of the *Capt Stefanos* were Greek whilst the Chief Mate was Ukrainian. Her crew members were mainly Filipinos with the exception of an AB (able-bodied seaman) who was a citizen of the People's Republic of China.

10 Both vessels laden with cargo were bound for China and were transiting the Straits of Malacca *en route* to Singapore for bunkers when the collision occurred. Prior to the collision, the *Reecon Wolf* was seen overtaking on the port side of the *Capt Stefanos.* Shortly after she reached a position just forward of the port beam of the *Capt Stefanos*, the *Reecon Wolf* suddenly veered to starboard. The *Capt Stefanos* immediately put her wheel hard-to-starboard to turn away from the *Reecon Wolf*. However, the starboard bow of the *Reecon Wolf* collided with the aft port quarter of the *Capt Stefanos*. Both vessels sustained collision damage from the incident.

11 After the collision, the Masters of the *Capt Stefanos* and the *Reecon Wolf* communicated over VHF. From the VHF communication, it appears that the *Reecon Wolf* experienced power loss and steering gear failure shortly before the collision. This VHF communication after the collision was not disputed by either party. The plaintiff has therefore alleged that the collision happened when the *Reecon Wolf* experienced a loss of engine power whilst attempting to overtake the *Capt Stefanos*.

12 The Malaysian Marine Department ("MMD") intervened shortly after the incident and directed the vessels to anchor at the port of Malacca for investigations. The crew of both vessels were interviewed and some documentation onboard the vessels were provided to the MMD officers. Nothing further appeared to have ensued since the vessels left Malacca.

13 Whilst the *Reecon Wolf* was under arrest in Singapore, the plaintiff filed Summons No 4061 of 2010 for the inspection of the *Reecon Wolf* pursuant to O 70 r 28 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). An Inspection Order was granted and the plaintiff's appointed experts, who were from the firm of BMT Marine & Offshore Surveys ("BMT Singapore"), inspected and conducted tests on the steering gear and equipment onboard the *Reecon Wolf* for over two days on 27 and 28 August 2010. It appears that the defendant had given an undertaking to preserve all relevant documents in its custody, possession and power pending the determination of the dispute either in Singapore or Malaysia.

The Law

14 There was little dispute as to the principles the court must apply when considering an application to stay proceedings on grounds of *forum non conveniens.* The principles are enunciated in the *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*"). *The Spiliada* has been approved and followed by the Court of Appeal in Singapore and the most recent decisions are: *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*"), *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*"). It is settled law that the court has a general discretion applying *The Spiliada* principles to stay proceedings on the ground of *forum non conveniens* when this is required in the interests of justice.

1 5 *The Spiliada* principles encompass a 2-stage process. Stage 1 involves identifying the existence of an available forum that is clearly or distinctly more appropriate than Singapore for the action to be tried in, *ie*, the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. At Stage 1, the burden is on the defendant to show *both* that Singapore is not the natural or appropriate forum for the trial of the action, and that there is another available forum which is clearly or distinctly more appropriate than Singapore (see *The Spilidia* (at 477) and *JIO Minerals* (at [53]).

16 The natural or appropriate forum for the trial of the action is the forum with which the action has the most real and substantial connection, and it is identified by its connections to various factors. The list of factors is not exhaustive. The usual factors taken into consideration are the residence and place of business of the parties, matters affecting the convenience and expense of the parties of litigating in either of the competing fora (such as the location and availability of witnesses), and the law applicable to the substance of the dispute. The place where the tort is committed is *prima facie* the natural forum in the sense that it is the forum that is clearly or distinctly the more appropriate forum for the action to be tried in. However, as this is only a *prima facie* position, the court will consider if the *prima facie* natural forum is either displaced by other factors or, if taken with other factors, they all clearly point to the natural forum as the more appropriate forum (see *JIO Minerals* at [106]; *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*") at [31]).

17 Multiplicity of proceedings is also a relevant factor in evaluating the more appropriate forum (see *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Ltd* [1989] 1 Lloyd's Rep 181 at 189 (the Court of Appeal refused to interfere in the judge's exercise of discretion, see [1989] 2 Lloyd's Rep 298); *The Varna No 2* [1994] 2 Lloyd's Rep 41 at 47; *Chan Chin Cheung* at [44]). In cases

of *lis alibi pendens*, considerations for a stay of one set of proceedings are the undesirability of the same issues between the same parties being litigated concurrently in two jurisdictions, and the risk of conflicting decisions emanating from the two proceedings. The development of this aspect of *The Spilidia* considerations in a *forum non conveniens* setting is helpfully summarised in Dicey, Morris & Collins on *The Conflict of Laws*,Vol 1 *(*Sweet & Maxwell, 14th Ed, 2006) at para 12-036:

> Although it was once thought that there were special factors in cases of *lis alibi pendens*, it is now clear that the existence of simultaneous proceedings is no more than a factor relevant to the determination of the appropriate forum. In *The Abidin Daver*, Lord Diplock said that, where proceedings were pending in a foreign court between the parties, and the defendant in the foreign proceedings commenced proceedings as plaintiff in England, then the additional inconvenience or expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different jurisdictions, where the same facts would be in issue and the testimony of the same witnesses required, could only be justified if the would-be plaintiff in England could establish objectively by cogent evidence that there was some personal or juridical advantage that would be available to him only in the English action and which was of such importance that it would cause injustice to deprive him of it. This was an application of his formula in *MacShannon v Rockware Glass Ltd* to cases of *lis alibi pendens*. It was confirmed that the principles enunciated in *Spiliada Maritime Corp v Cansulex Ltd* apply whether or not there are other proceedings already pending in the alternative forum: the foreign proceedings may be of no relevance at all, for example, if one party has commenced them for the purpose of demonstrating the existence of a competing jurisdiction, or if the proceedings have not passed beyond the stage of initiating process. But if genuine proceedings have been started and have had some impact on the dispute between the parties, especially if it is likely to have a continuing effect, then this may be a relevant (but not necessarily decisive) factor when considering whether the foreign jurisdiction provides the appropriate forum.

Put simply, the two sets of proceedings are merely one of the circumstances to be considered by this court (see also Lord Goff in *De Dampierre v De Dampierre* [1988] AC 92 at 108). Hence, the nature and existence of multiple or concurrent proceedings and the weight to be given to this factor will depend on all the circumstances of the case, including the state of advance of the other foreign action, consequences of ongoing proceedings in terms of inconvenience, expenses, and other matters such as risk of conflicting judgments.

18 If the court concludes that *prima facie* there is a clearly or distinctly more appropriate forum, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted. At Stage 2, all the circumstances of the case will be considered. The burden of proof at Stage 2 is on the plaintiff. On the evidential standard of proof, I note that Lord Diplock in *The Abidin Daver* [1984] 1 Lloyd's Rep 339 at 344 required the plaintiff to establish "objectively by cogent evidence" that there is some personal or juridical advantage available to the plaintiff in the Singapore proceedings, and that it is of such importance that it would cause injustice to the plaintiff to deprive the plaintiff of it.

19 *The Spiliada* principles and the court's discretion are not affected by the fact that proceedings are *in rem.* Therefore, even though the plaintiff has founded jurisdiction as of right, there is no presumption or extra weight in the balance in favour of the plaintiff; the approach is the "more appropriate forum" test. As D.C. Jackson observed in *Enforcement of Maritime Claims* (LLP London, 4th Ed, 2005) at para 12.99:

> The burden of proof on the defendant takes into account, without emphasising, the establishment of jurisdiction in this country by the claimant, particularly where the basis of the

jurisdiction is relatively a slight connection.

20 I make one additional observation. The *in rem* nature of the suit confirms the existence of jurisdiction over the subject matter of the dispute and the provision of adequate security for the maritime claim in one jurisdiction (*ie*, Singapore). In the present case, the plaintiff's maritime lien attaching at the moment of collision was a right against the particular ship and, the arrest in Singapore was a proper course to pursue. At the other end of the balance in a *forum non conveniens* analysis is the concern for finding an alternative forum in terms of both availability of jurisdiction and adequate security. To overcome any personal or juridical advantage derived from the *in rem* factor as described, the defendant is usually prepared, as was the case here, to submit to the jurisdiction of the alternative forum and to post adequate security there. In doing so, the court when addressing the issue of stay can with ease embark upon a consideration of whether or not the alternative forum (*ie*, Malaysia) is a more appropriate forum.

21 Finally, the manifest concern for international comity in *forum non conveniens* principles. The Singapore courts have acknowledged the importance of international comity, and in a proper case have given the doctrine due regard. In *Q&M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 ("*Q&M Enterprises*"), Andrew Phang JC said (at [18]):

> ...[C]omity is to be observed in deed, and not merely in word.

22 In giving regard to both international comity and convenience, Phang JC stated (at [66]):

> ..[w]here there is a direct clash between international comity on the one hand and mere inconvenience to one of the parties on the other, the former must surely prevail...

However, if giving accord to international comity offends the public policy of the domestic legal system (for example, Singapore), naturally the interest of the latter will prevail (per Phang JC at [25]).

23 "Comity" is defined in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at p 1096 (and subsequently approved in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897) ("*Amchem Products*") in the following terms:

> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...".

24 Multiplicity of proceedings here and abroad in respect of the same controversy and parties is a concern. The possibility of friction caused by conflicting decisions from different jurisdictions has found expression in judicial acknowledgment of the concept of comity, and in the judicial exercise of discretionary powers. This brings me to *The Abidin Daver*. In that case, there were concurrent proceedings in England and Turkey and the court had to decide whether to stay the English proceedings. Lord Diplock was concerned that if concurrent proceedings were allowed to continue in England and Turkey, there might well be "an unseemly race to be the first to obtain judgment", and opined that "comity demands that such a situation should not be permitted to occur as between court of two civilised and friendly states" (at 344). In short, the risk of inconsistent judgments can be avoided if one court gives way to the other in the interest of international comity. A similar risk of inconsistent findings and conflicting decisions also arises where there are two related or parallel

actions, one here and abroad and the court is asked to stay one of the actions. To illustrate, in *Chan Chin Cheung*, there were parallel proceedings in Singapore and Malaysia and the Singapore proceedings were stayed in the interest of international comity.

No Agreement on jurisdiction

25 The issue of an agreement on jurisdiction that the Assistant Registrar took time to consider was not pursued at this appeal. For completeness, a brief recount of Mr Seow's clarification of the matter (and without deciding on the correctness of his explanation) is as follows. It was not the plaintiff's case that there was in existence an agreement on jurisdiction to resolve disputes arising from the collision. Mr Ioannis Botonakis ("Mr Botonakis"), the manager of the plaintiff's vessel, did not make any assertion of an agreement on jurisdiction. It was the defendant who had misunderstood his affidavit evidence which made reference to an agreement to confer in Singapore on matters such as jurisdiction to resolve liability for the collision, and security for the collision claims.

The Arguments

26 Counsel for the defendant, Mr S Mohan ("Mr Mohan") explained that the parties and the subject matter of the Singapore Action have no connections with Singapore. In those circumstances, it was argued, that this court, in its discretion, should stay the Singapore Action so as to allow the matters in issue between the parties to be dealt with in the Malaysian Action which involved the same parties and the same cause of action as the Singapore Action. Compared to Singapore, Malaysia was clearly or distinctly a more appropriate forum having competent jurisdiction for the just resolution of the dispute for several reasons. Malaysia was the natural, or at any rate, a natural forum for the resolution of the collision damage between the parties. He emphasised that the collision occurred in Malaysian territorial waters and that arising out of the collision the defendant had commenced *in rem* proceedings against the *Capt Stefanos* and arrested her in Malacca. The governing law of the tort was Malaysian law. Furthermore, Mr Mohan confirmed that if the plaintiff sued in Malaysia on the same collision, the defendant would submit to the jurisdiction as well as furnish security for the plaintiff's claims. In addition, the defendant would agree to the use of documents and evidence obtained pursuant to the Inspection Order made against the *Reecon Wolf* in the Singapore Action. I noted that such promises in the nature of undertakings given in support of the defendant's application for a stay are permissible, appropriate and effective (see *The Lanka Athula* [1991] 1 HKC 101; *The Polessk* [1996] 2 Lloyd's Rep 40 at 51-52 on inspection of vessel by an undertaking or to be imposed on the grant of stay).

27 Mr Mohan identified eight factors which, as it appeared to him, pointed to Malaysia as clearly or distinctly the more appropriate forum for the trial of the plaintiff's claims against the defendant. They may be summarised as follows:

(a) The collision occurred in Malaysian territorial waters and the tort occurred in Malaysia.

(b) The governing law of the tort was Malaysian law.

(c) After the collision, both vessels were surveyed in Malaysia by surveyors based in Malaysia. The damage surveys were for the speed and angle of blow reports and were, hence, relevant to the liability issue.

(d) The investigations by MMD. After the collision both vessels were ordered by MMD to anchor in Malaysian waters. The crew of both vessels were interviewed by MMD officers who also obtained copies of some documents onboard the vessels. The contemporaneous statements of

the crew of both vessels on the circumstances leading up to the collision as well as MMD's investigation report would be relevant. MMD officers could be compelled to testify by subpoena in Malaysia under the Malaysian Rules of the High Court 1980.

(e) The VHF exchange between the Masters of the vessels shortly after the collision was recorded on the *Reecon Wolf's* Voyage Data Recorder ("VDR"). The *Reecon Wolf's* VDR data was downloaded from the vessel in Malaysia by Racom Electronics (M) Sdn Bhd ("Racom") who is the VDR manufacturer's representative in Malaysia.

(f) Malaysian VTIS (*ie*, Vessel Traffic Information System) would have tracked the vessels' movements. Hence, radar data from a shore based VTIS station would contain useful information to aid reconstruction of the collision. [note: 2]

(g) Temporary collision damage repairs were done in Malaysia. Temporary repairs were carried out by the crew of the *Reecon Wolf*, and in the case of the *Capt Stefanos*, temporary repairs in Malaysia were carried out under the supervision of Greek technicians flown in for the assignment.

(h) The existence of concurrent proceedings in Malaysia and Singapore in respect of the same collision and between the same parties.

28 Building on the eight factors, Mr Mohan went on to argue that the arrest of the *Reecon Wolf* in Singapore and evidence gathered from the inspection and test of the equipment onboard the *Reecon Wolf* in Singapore pursuant to an Inspection Order granted by the Singapore court were not weighty factors to suggest that Singapore was the more appropriate forum. In fact, the lack of substantial connections with Singapore supported the defendant's assertion that the plaintiff was forum shopping in Singapore in order to take advantage of higher limits of liability under Singapore law.

29 Mr Seow rejected the defendant's contention that Malaysia was the more appropriate forum based on the eight factors mentioned. He claimed that the plaintiff had invoked the Admiralty jurisdiction of the High Court of Singapore as of right and the plaintiff's right should not be lightly disturbed. He submitted that Malaysia was not the natural forum for this dispute based solely on the fact that the collision occurred in Malaysian territorial waters, and that this court should not exercise its discretion to stay the Singapore Action so that the dispute could be transferred to Malaysia. His point was that in most collision cases, the place of collision was fortuitous and this fact (*ie*, the place of collision) standing by itself was too tenuous and not a sufficient reason for staying the Singapore Action. Quite apart from the place of the tort, this court would have to examine whether there were other real and substantial connections to Malaysia. In support of his argument, Mr Seow cited *The Peng Yan* [2009] 1 HKLRD 144 ("*The Peng Yan*") at [28], a decision of the Hong Kong Court of Appeal (see [49] below).

30 Mr Seow identified various connecting factors to Singapore. They may be summarised as follows:

(a) The Singapore Action was commenced as of right.

(b) The *Reecon Wolf* was inspected in Singapore pursuant to an Inspection Order and the plaintiff's expert, William Alan Lyons, who carried out the inspection and tests on the steering gear and equipment on board the *Reecon Wolf* was based in Singapore.

(c) Convenience of a trial in Singapore because foreign witnesses (from both sides) could testify via video-link, a facility that is not available if trial is held in Malaysia, a view that was

also confirmed by the defendant's expert on Malaysian law, Mr Arun A/L Krishnalingam. [note: 3] In the case of surveyors based in Malaysia, their survey reports could easily be made available for a trial in Singapore. If their testimony was required, the surveyors could easily travel to Singapore given the geographical proximity between Singapore and Malaysia.

(d) The place of collision was fortuitous. The tort was committed as both vessels navigated through Malaysian territorial waters *en route* to Singapore for bunkers. But for the collision the vessels would have left Malaysian territorial waters for Singapore.

(e) The laws of Malaysia in relation to the collision were substantially the same as the corresponding areas of Singapore law. Thus, the identity of the governing law was a neutral factor.

(f) Uncertainty as to the availability of VTIS evidence tracking the movements of the vessels at the material times. Even if radar data existed, the data would not be available to the parties without first obtaining a court order in Malaysia. It was explained by the plaintiff's expert on Malaysian law that the data was protected from disclosure under the Malaysian Official Secrets Act 1972, and that the Malaysian courts would not order its disclosure if MMD withheld consent for its disclosure. [note: 4] Mr Seow argued that compared to the VTIS evidence, the VDR data that was already disclosed was more relevant in resolving the collision liability issue. The VDR data would have information on the vessels' relative positions, course and speed before and in the moments leading up the collision.

(g) MMD's investigations were routine marine safety investigations and the relevance of evidence of the MMD officers and the MMD's investigations were not explained by the defendant.

(h) The Malaysian Action was commenced for the sole purpose of founding jurisdiction to take advantage of lower limits of liability under Malaysian law.

Discussion and Decision

Admiralty jurisdiction and forum shopping

31 Before I turn to consider the application of the *forum non conveniens* principles to the facts of this case, I should first say a few words about the classic *in rem* proceedings and forum shopping, and the close association between the two.

32 The lack of substantive connection to any particular jurisdiction is not an unusual feature of ships engaged in international maritime commerce. Often, the only connection with a country is the ship's presence there and where *in rem* proceedings are served or the ship arrested. The significant point about *in rem* jurisdiction is that it is invoked *in rem* in accordance with a procedure recognised by international convention *ie*, the International Convention on Arrest of Seagoing Ships, 1952 ("the Arrest Convention").

33 Frequently allied to admiralty jurisdiction is the notion of forum shopping. Lord Simon in *The Atlantic Star* [1974] AC 436 explained "forum shopping" in the context of ocean going vessels in these vivid words (at 473):

> "Forum shopping" is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. ....

34 Sixteen years later, in more sombre and legalistic tones, Russell LJ in *First National Bank of Boston v Union Bank of Switzerland and others* [1990] 1 Lloyd's Rep 32 at 38 explained his understanding of "forum shopping" in a *forum non conveniens* context:

> The expression "forum shopping" is commonly used to describe the institution of proceedings whereby plaintiffs seek to compel defendants to litigate issues in one jurisdiction when these are already being or about to be litigated in another jurisdiction which is suitable for their resolution. It also frequently involves an attempt to persuade the Courts of one country to arrogate to themselves a jurisdiction which belongs more properly to the Courts of another country, so that the grant of the plaintiff's application in one jurisdiction may involve a breach of comity towards the Courts of another country.

35 As ships ply worldwide in trade, there are opportunities for a foreign claimant with a maritime claim to arrest the ship or sister ship in a foreign jurisdiction so long as the foreign ship or sister ship is found in a country whose domestic laws have adopted the Arrest Convention. From this perspective, the claimant would be seen to be forum shopping in "an admiralty emporium". Another aspect of forum shopping has to do with limitation of liability for maritime claims. There are two international conventions for limitation of liability for maritime claims: the International Convention relating to Limitation of Liability of Owners of Sea-going Ships 1957 ("the 1957 Convention") and the Convention on Limitation of Liability for Maritime Claims, 1976 ("the 1976 Convention"). The former provides for lower limits of liability while the latter provides for higher limits. However, it is easier to break limits to establish unlimited liability under the 1957 Convention than under the 1976 Convention. The motivation is self-evident in the present case: Singapore applies the 1976 Convention and Malaysia the 1957 Convention. Whilst understandable, the plaintiff's suggestion that Singapore was a more appropriate forum was really based entirely on its desire to choose a forum with higher limits under the 1976 Convention. In fact, according to Mr Seow's calculations, the limitation fund of the *Reecon Wolf* under the 1957 Convention is approximately US$550,940 as compared to a limitation fund of approximately US$2.91m under the 1976 Convention. Since the statutory limits in Singapore are higher than the plaintiff's claims, the potential to recover its full claims is an obvious advantage to the plaintiff litigating in Singapore.

36 The different limitation regimes bring me back to forum shopping and *in rem* actions. Nigel Meeson and John Kimbell in *Admiralty Jurisdiction and Practice* (Informa, 4th Ed, 2011) rightly observed at para 7.30:

> This dichotomy of [limitation of liability] regimes has not surprisingly provided fertile ground for forum shopping in collision cases, and given rise to a line of cases grappling with the problem of what effect to give an argument that a stay should or should not be granted by reason of the other forum applying the 1957 Convention, England is applying the 1976 Convention.

37 With judicial chauvinism firmly replaced by judicial comity, the dichotomy of the limitation regimes that used to be fought out as a loss of juridical advantage is now gone. It would be contrary to *The Spiliada* principles to look favourably upon a party who selected a forum based solely upon the level of damages that could be awarded or higher limits of liability.

38 Russell LJ's definition of forum shopping is applicable to admiralty actions but, in my view, with a caveat: the definition is to be used in a setting with reference to the principles and reality in which admiralty jurisdiction operates (*ie*, [32] above) and to the *in rem* factor described in [20] above. Through *forum non conveniens* principles, harmony is achieved in the exercise of the court's discretion in which due regard is given to international comity.

39 I will discuss international comity in more detail later. Suffice it to say at this juncture that, this court was concerned with comity amongst other considerations in the exercise of discretion, and more so, with the decision by the Malaysian court on the place of trial.

Spilidia: Stage 1

40 I now turn to consider the factors identified by the parties in relation to the two sets of proceedings (*ie*, the Singapore Action and the Malaysian Action) and, without a doubt, they overlap considerably. The overlap is not surprising because the two sets of proceedings were based on the same collision, the same facts and the same parties. Whilst the existence of the Malaysian Action is not a decisive factor, its relevance in the inquiry whether Malaysia is clearly a more appropriate forum is by no means marginal. By the same token, the Singapore Action is one of the circumstances to be considered by this court.

41 Taking the factors identified by the parties as a whole because of the overlap, I was satisfied that insofar as convenience of witnesses as a factor was concerned, there was no balance of advantage for witnesses in a trial in either Singapore or Malaysia.

42 It was common ground that the vessels, owners, officers and crew were foreign. For this litigation, the foreign officers and crew on duty at the material time would be likely witnesses to the events immediately prior to the collision itself. They would have to travel to give evidence whether the trial was in Singapore or Malaysia. Furthermore, I did not think there was anything in the parties' respective concerns about witness compellability. In collision cases, the common experience is that officers and crew members required as witnesses of fact continue to be in the employment of the shipowners in order to ensure their attendance at the trial to give evidence. If necessary, evidence by deposition of witnesses is available whether the trial is in Singapore or Malaysia. As to expert evidence, the parties would be able to deploy appropriate experts whether the matter was determined in Malaysia or here. There is much truth in Sheen J's observations in *The Wellamo* [1980] 2 Lloyd's Rep 229, which I gratefully adopt, that "the convenience of those who are professionally interested in litigation should carry little weight in comparison with the convenience of those whose normal occupation in life will be interrupted by attendance in court to give evidence". Equally, there should be no difficulty with surveyors who examined the damage to both vessels. As for surveyors who made reports in which they recorded what they saw, it would be unrealistic to think that they would be able to remember the condition of the damage to be different and depart from facts set out in their reports which would be tendered in evidence at any trial. Whether the reports or other documents were originally from Singapore or Malaysia, disclosure of documents would take place either here or in Malaysia. Technical and maintenance records of the vessels would largely be a matter of documentary record and would be available in both Singapore and Malaysia.

43 There were arguments on the uncertainties in terms of availability and relevance of VTIS evidence, and the MMD's formal investigation report. Notwithstanding the uncertainties surrounding the matters, I found them to be of little significance. Neither would temporary repairs in Malaysia lend any support to the defendant's stay application.

44 In relation to Mr Mohan's reliance on *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 ("*Goh Suan Hee*") as authority for the proposition that Malaysian law would apply to issues of liability and quantum of damages, I disagreed with Mr Mohan's reading of that case. It is still an open question whether the Singapore court will treat quantification of damages as substantive rather than procedural so as to apply the *lex loci delicti* to this issue (see *Goh Suan Hee* at [24]). In the circumstances, the governing law was a neutral factor as Mr Seow contended.

45 More importantly on the facts, this court should be concerned with comity amongst other considerations in the exercise of its discretion to stay proceedings. Taking the point on witnesses' testimony above, it would be no doubt unsatisfactory for witnesses both in terms of convenience and expense to have to testify twice in two different courts in two countries because of the concurrent proceedings. This brings me back to the views of Lord Diplock in *The Abidin Daver* at [344] which I had referred to at [17] above:

> Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is the plaintiff in the foreign suit is made defendant, then additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or [juridical] advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.
>
> Quite apart from the additional inconvenience and expense, if the two actions are allowed to proceed concurrently in the two jurisdictions the courts of the two countries may reach conflicting decisions. ...

46 With the above comments in mind, in my view, the main factors in the circumstances of this case were: (a) the concurrent proceedings; (b) the place of the commission of the tort, and (c) international comity. I would add that the plaintiff's failure to obtain a stay of the Malaysian Action constituted a further consideration against Singapore being the more appropriate forum.

(a) Concurrent proceedings

47 Earlier, I mentioned matters relating to convenience of witnesses in the light of litigation between the two parties in two separate jurisdictions and where the roles of plaintiff and defendant in one jurisdiction were reversed in the other jurisdiction. Further, the *in rem* jurisdiction was invoked as of right in the Singapore Action as was the case in the Malaysian Action. I had already described the status of both proceedings as being the same and not very advanced. Nevertheless, the existence of both proceedings was compelling in themselves bearing in mind that each litigation was founded on the same cause of action between the same parties and that questions such as the failure of the *Reecon Wolf's* steering gear, the reasons for such failure, whether the defendant were negligent or at fault and the degree of such fault, including contributory negligence on the part of those on board the *Capt Stafanos* had to be resolved in both proceedings. There were obvious overlaps between such issues in each jurisdiction and the undisputed application of substantially the same principles of law and the Convention for the International Regulations for Preventing Collisions at Sea 1972 on the liability issue by each to determine who was to be blamed is dependent on findings of fact that could turn out to be inconsistent and irreconcilable. It is to me self-evident that a risk of conflicting judgments was indeed real, being satisfied that Malaysia was a natural forum as opposed to this court which had no substantial connections with the collision or the parties. A further consideration for present purposes was the plaintiff's failure to stay the Malaysian Action. In the course of the hearing of RA 94, the High Court of Malaya at Malacca concluded (following dismissal of the Malaysian Stay Application) that it could and should deal with the Malaysian Action. Not only was there a real risk of conflicting judgments if the two actions were pursued in different jurisdictions, the court in the jurisdiction where the tort was committed had decreed it proper and appropriate to continue to exercise jurisdiction. The Malaysian Action would continue despite the Singapore Action, and one

solution would be to stay the Singapore Action. This approach is in keeping with the reasoning of Adrian Briggs in *Civil Jurisdiction and Judgments* (Informa, London, 5th Ed, 2009) at 455:

> If the foreign proceedings will continue despite the existence of the English proceedings, it may be more appropriate to allow the parties' rights to be determined by the foreign court than to create the conditions for a conflict of judgments by permitting the English proceedings to continue.

(b) Place of the tort

48 The place of commission of the tort is a factor in favour of Malaysia. The alleged tort was committed within the territorial waters of Malaysia, and the place of the tort is *prima facie* the natural and appropriate forum for the trial of the action, *ie*, one in which the action could be tried more suitably for the interests of both parties and the ends of justice (see *The Spiliada* at 476).

49 I agreed with Mr Seow that there would be no natural forum if the collision was in the high seas. The collision occurred in Malaysian territorial waters, and the place of the tort would not change simply because the vessels' activities prior to the collision were transient in nature. In this case, the focus should be on where the cause of action arose – physical damage, a constituent of the cause of action, was sustained when the vessels collided in Malaysian territorial waters. Whilst the jurisdiction in which the tort was committed is normally the forum in which it is just and reasonable for the wrongdoer to answer for his wrongdoing, this is only a *prima facie* position. *The Peng Yan* cited by Mr Seow adopted the same approach. Ma CJHC said at [28]:

> It is therefore important when applying *The Albaforth* principle in the context of *forum non conveniens* applications, to examine just how close a connection there really exists with any given *forum*. In some cases, the place of the commission of the tort may be decisive; in others, perhaps not weighty at all. The underlying principle to be firmly borne in mind is the basic test in *The Spiliada* and *The Adhiguna Meranti*. *The place of the commission of the tort may in some cases be quite fortuitous and may provide no more than a convenient starting point or prima facie position. The court is required to look into more substantial factors in the application of the basic test.* The present case involved a collision where, quite often, there is no obvious or natural forum: see *The Spiliada* at p. 477C-D.
>
> [emphasis added]

50 In this case, the *prima facie* position was not displaced by the factors identified by the plaintiff. The decision of the Malaysia's court to exercise jurisdiction constituted a further consideration against Singapore being the more appropriate forum. In other words, the outcome of the Malaysian Stay Application (and until the decision is reversed on appeal), was a factor which I had to bear in mind when exercising the court's discretion whether to stay the Singapore Action.

(c) Considerations of Comity

51 Considerations of comity have been applied in our local cases (see [21]-[22] above). I also found the decision of the Canadian Supreme Court in *Amchem Products* instructive. Although *Amchem Products* is concerned with the granting of anti-suit injunctions, it has been cited frequently in Canada for its enunciation of the principles of *forum non conveniens* in stay of proceedings and pronouncements on the role of international comity. In particular, I found persuasive the Canadian Supreme Court's holding to respect the decision by the foreign court, applying the same *forum non conveniens* principles (this was common ground), on the place of trial (at 931-932):

> ... the domestic court as a matter of comity must take cogni[s]ance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. ...

52 It is common ground that *The Spiliada* principles are applicable in Malaysia. That the Malaysian court, applying *forum non conveniens* principles, refused to stay the Malaysian Action and decided that Malaysia would be the more appropriate forum to resolve the dispute between the parties is a weighty consideration. Added to this is my own view that Malaysia was a natural forum. Therefore, a stay of the Singapore Action would avoid the inconvenience and expenses of two trials and the risk of conflicting judgments.

Spilidia: Stage 2

53 At the end of Stage 1, I was left with no doubt that Malaysia was clearly a more appropriate forum than this court. This brings me to Stage 2.

54 Mr Seow was unable to point to any personal or juridical advantage in which the plaintiff would be deprived of if this court granted a stay of the Singapore Action. In written submissions, Mr Seow argued that the dichotomy between the two limitation regimes would leave the plaintiff disadvantaged if the Singapore Action was stayed for Malaysia's domestic law gave effect to the 1957 Convention. In other words, the plaintiff's claim would be subject to the lower 1957 limits of liability. This line of argument would invariably draw this court to make comparisons between the merit of the statutory limits in Singapore and Malaysian. I cannot be drawn into making comparisons between the laws of this country and that of another friendly state to do justice in such cases.

55 Second, the fact that the law in the alternative forum may be less favourable to the plaintiff does not necessarily justify a dismissal of the stay application on ground of *forum non conveniens.* As stated, the existence of different limitation regimes is not considered a personal or juridical advantage under Stage 2.

56 Mr Mohan referred me to my decision in *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR (R) 457 ("*Evergreen International*") which was upheld on appeal. Although it is a case on anti-suit injunction, it is instructive both in terms of admiralty action *in rem* and international comity. It is convenient and expedient to refer to some paragraphs of the judgment:

> 62 [A]s Rix J in *Caspian Basin* acknowledged, the 1957 Convention is not an unjust regime and jurisdictions which adhere to that system are not less civilised for doing so. The fact that s 136 Merchant Shipping Act provides for 1957 limit may well be a disadvantage to the defendants in Singapore, but it cannot be properly termed an injustice. Selvam J in *The Owners of the Ship or Vessel Ming Galaxy v The Owners of the Ship or Vessel or Property Herceg Novi* [1998] SGHC 303 9 [("*The Herceg Novi*")], when asked to stay a Singapore action for London where a higher limit is available in England, made the following observations which are similarly relevant to the present case on anti-suit injunction:
>
> > Then comes the question of substantial justice. This is based on the high limitation fund under English law. The defendants say that if the Singapore action continues they will be deprived of the higher limitation fund under English legislation. ...
> >
> > *The true meaning and effect of the defendants' submission based on the question of*

substantial justice is that something is lacking in the system of justice of Singapore as regards limitation of liability. I am not aware of a decision anywhere whereby a court has stayed an action legitimately brought before it on the ground that there is something wanting in its system of justice and that better justice will be done in another jurisdiction. For my part it would be wrong in principle to do so because I cannot accept that the law of Singapore is unjust to either party. As the Singapore legislature had deemed it just [to] retain the lower limitation when there is no actual fault or privity this Court must give effect to that legislation and the merits of that legislation are not justiciable before this Court. ...

[emphasis added]

63 Arising out of the incident in Singapore, the owners of *Herceg Novi* separately commenced proceedings in England. A sister ship of the *Ming Galaxy* was arrested in England. The English Court of Appeal in [*The Herceg Novi* (UK)] stayed the English proceedings for Singapore. It did not accept that there was juridical advantage for three reasons. Firstly, the 1976 Convention was not universally accepted. Secondly, the International Maritime Organisation, which commended the 1976 Convention to the international community, was not a legislature and thirdly, it was quite impossible to say that substantial justice was not available in Singapore. The plaintiffs' preference (like the defendants here) for 1976 limit had no greater justification than for the 1957 regime. The Court of Appeal held that whilst the 1976 Convention provided a greater degree of certainty, in terms of abstract justice, neither Convention was objectively more just that the other.

57 At the time Selvam J decided *The Herceg Novi*, Singapore applied the 1957 Convention, and this was the position under Singapore law until the law was amended to pass into domestic legislation the 1976 Convention with effect from 1 May 2005. Even though the situation is now reversed, it would be a strange result if this court did not arrive at the same conclusion.

Conclusion

58 Since I formed the view that the litigation between the parties to this action arising out of the collision could be more appropriately tried in Malaysia and that the plaintiff would suffer no juridical disadvantage from a trial in Malaysia, the justice of the case therefore demanded that the Singapore Action be stayed.

59 I accordingly ordered a stay of the Singapore Action. The following orders were made:

(a) Appeal allowed on condition that defendant provides the plaintiff with equivalent security to answer any judgment which the plaintiff may obtain against the defendant in Malaysia. For avoidance of doubt equivalent security means the same security that the plaintiff had secured by way of arrest of the *Reecon Wolf* in Singapore.

(b) Liberty to apply to both parties.

(c) Costs of appeal and below to be taxed if not agreed.

[note: 1] Esinduy's 1st affidavit at para 13(iii) & (iv)

[note: 2] Paul Martin's 2nd Affidavit at para 34

[note: 3] 3rd Affidavit of Arun A/L Krishnalingam at para 6.1

[note: 4] Ms Selvaratnam's 1stAffidavit at paras 11-13