The "Rainbow Joy"
[2005] SGCA 36

Case Number : CA 116/2004

Decision Date : 20 July 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah J

Counsel Name(s) : Richard Kuek Chong Yeow and R Govintharasah (Gurbani and Co) for the appellant; Yap Yin Soon (Allen and Gledhill) for the respondent

Parties : —

Civil Procedure – Stay of proceedings – Forum non conveniens – Whether court should refuse to grant stay if party seeking stay having no real defence to claim

Civil Procedure – Stay of proceedings – Forum non conveniens – Whether court should refuse to grant stay on ground doctrine of forum non conveniens not applicable where foreign forum not court of law

20 July 2005

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

1 This was an appeal against the decision of Tan Lee Meng J who upheld the decision of the assistant registrar to stay the present action instituted by the appellant against the respondent arising out of personal injuries suffered by the appellant on board the vessel, "Rainbow Joy" on the ground of *forum non conveniens*. The respondent was the owner of the vessel. We heard and dismissed the appeal on 27 April 2005. We now give our reasons.

The background

2 The appellant is a Philippine national, who signed on board the vessel as a second engineer. The respondent is a one-vessel Panamanian company, and the vessel was flying the Hong Kong flag. The appellant was recruited by the respondent's manning agent in the Philippines, Cleene Maritime Corporation ("Cleene Maritime").

3 The appellant's contract of employment with the respondent was set out in two documents. The first was a standard contract for Philippine seafarers approved by the Philippine Overseas Employment Administration, a division of the Department of Labour and Employment of the Philippines ("The POEA contract"). The POEA contract incorporated the "Standard Terms and Conditions Governing the Employment of Filipino Seafarers On-Board Ocean Going Vessels" ("POEASTC"). It was clear that the POEA contract sought to protect Philippine seafarers as it provided, *inter alia*, for minimum compensation to seafarers for injuries or death arising out of their employment on board vessels. The appellant signed the POEA contract in the Philippines on 9 August 2002.

4 The second document was signed by the appellant in Singapore on 27 August 2002 when he came on board the vessel. This document was required by the laws of Hong Kong to be executed between the crew and the shipowner and was entitled "Agreement and Lists of the Crew".

5 On 3 September 2003, while the vessel was at sea, the master of the vessel instructed the appellant, the chief engineer and some other crew members to repair the starboard side accommodation ladder which was then damaged. While the chief engineer was hammering the ladder,

with the appellant holding onto it, a shard of metal was dislodged and it hit the appellant's right eye. As a result of the impact, there was bleeding from that eye. Eye drops were applied and apparently the appellant also took some medication.

6 The incident occurred when the vessel was about 50 nautical miles off the West coast of Myanmar. The master of the vessel, appreciating the injury caused to the appellant's eye, and on the advice of the Hong Kong Rescue Coordination Centre ("HKRCC") diverted the vessel to Yangon with a view to seeking medical help. The HKRCC is the centre which coordinates all maritime search and rescue missions in international waters off the South China Sea. The ophthalmologist in Yangon found that the appellant's right eye had a laceration over the right cornea. As the ophthalmologist had limited facilities, he advised the appellant to undergo surgery in the appellant's home country.

7 As to what happened thereafter, there was a divergence of evidence. The appellant said that he had asked the vessel's agent and P&I Club representative in Myanmar to send him to Singapore for the operation. On the other hand, the respondent averred that the appellant never requested to be treated in Singapore as he told the master of the vessel that he wished to return to the Philippines for treatment. The quickest way home was via Singapore. The vessel arrived in Singapore on 9 September 2003 and the appellant was put on a flight to Manila the next day. Upon arrival, he received immediate treatment at the Manila Metropolitan Hospital.

8 On 22 September 2003, an operation was carried out on the appellant's right eye. But that did not help much as the vision of the eye was still seriously impaired. In a hospital report of 10 December 2003 it was stated that "our specialist recommends corneal transplant with secondary intraocular lens implant for management". However, in April 2004, the appellant refused to undergo a corneal transplant operation for the apparent reason that he had not spoken to his wife about it. As a result, he had to wait for the next available corneal donor.

9 In the meantime, on 5 November 2003, the appellant instituted arbitration proceedings before the National Labour Relations Commission ("NLRC") in the Philippines, claiming US$80,000 as damages for the injury to his right eye. However, on 30 December 2003, the appellant commenced an admiralty action in Singapore against the respondent for negligence and/or breach of contract or duty resulting in the injury to his right eye. The appellant also alleged that the respondent had failed to treat his eye injury with due urgency. He asked for a total compensation of S$460,000. Later, on 15 January 2004, the appellant applied to withdraw his claim before the NLRC, which claim was consequently dismissed "without prejudice".

10 On 4 May 2004, the appellant filed his Statement of Claim in the admiralty action. On 17 May 2004, the respondent applied to have the action stayed on three grounds:

(a) Under the POEA contract, the appellant was required to resolve disputes through arbitration in the Philippines.

(b) Under the POEA contract, there was an exclusive jurisdiction clause prescribing that proceedings should commence in the Philippines.

(c) The action should be stayed in favour of the Philippines on the ground of *forum non conveniens*.

11 The assistant registrar granted a stay on the ground of *forum non conveniens* which decision was upheld by Tan Lee Meng J. Neither the assistant registrar, nor Tan J, considered the application

under the other two grounds. Being dissatisfied with Tan J's decision, the appellant took the matter on appeal before us.

12 The appellant basically made a two-pronged attack against the decision of the judge. First, on the general level, the appellant submitted that the doctrine of *forum non conveniens* was not applicable to the case because the proceedings which the appellant could institute in the Philippines were not in an ordinary court of law, but were before a special tribunal, the NLRC. Second, more specifically, the appellant averred that even if the doctrine of *forum non conveniens* could be applicable, in the circumstances of the present case, the judge should not have stayed the action here in favour of the Philippines, especially when the respondent had no real defence to the claim.

13 We will now proceed to examine each of these grounds in turn.

NLRC is not a court of law

14 The doctrine of *forum non conveniens* is the legal basis upon which the court, in exercise of its discretionary power, as reflected in para 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), may decline to exercise jurisdiction, after giving due consideration to the interests of the parties and the requirements of justice, that the case cannot suitably be tried in the courts here but only in another forum. In the words of the leading authority on the subject, namely, *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"), a stay will only be granted on this ground (at 476):

> [W]here the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, [*ie*,] in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

15 The doctrine as expounded in *Spiliada* has been accepted and applied by this court in several cases, *eg*, *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776, *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97, *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253 and *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 2 SLR 49 ("*Hutan Domas*").

16 In *Hutan Domas*, this court summarized the procedure which the court should adopt on considering such an application at [16]:

> The first stage is for the court to determine whether, *prima facie*, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, *eg* availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business. Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff [in *Spiliada*], 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' (hereinafter referred to as 'the unless question'

> or 'unless proviso' as may be appropriate in the context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasis[e] that in determining the 'unless question' all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

17 The argument of the appellant before us was that the doctrine could only come into play if the alternative forum in another country is a court of law and not when it is a special tribunal. In the present case, the stay was made not in favour of an ordinary Philippine court but the NLRC, or the labour arbitrators of the Philippines.

18 The appellant quite rightly pointed out that the doctrine of *forum non conveniens* is based on the principle of comity between nations. We would emphasise that, in this context, the comity is between nations, not between courts of law of nations. Each country has the sole prerogative of determining how all disputes, or particular disputes, should be resolved and it is within its sovereign rights to lay down the process by which disputes should be resolved. An ordinary court of law would normally be the forum. But each country is free to create special forums for all disputes, or a particular type of dispute, and it is not for any other country to question why the former country should prescribe such unusual dispute resolution mechanisms or procedures. Indeed, the notion of comity will be subverted if the forum of one country does not give credence to an alternative forum which has been created and accorded adjudication powers by another country.

19 In our opinion, the critical question is not so much the label attached to the forum but its competence. The question to ask is: is the forum competent to try the dispute in that country? It is pertinent to note that Lord Goff in *Spiliada* said that the court, when confronted with an application for a stay on the ground of *forum non conveniens* must determine whether (at 476) "there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action."

20 We would observe that no authority has been cited by the appellant in support of his assertion that the doctrine only applies where the alternative forum is a court of law. On the other hand, the respondent brought to our attention authorities from Canada and the United States, which held that an action could be stayed in favour of a foreign forum which was not an ordinary court of law.

21 In *Karin A Ruggeberg v Bancomer, SA* 1998 OTC Lexis 329 where the claim was for damages arising out of termination of employment, the Ontario Court of Justice (General Division) stayed a proceeding brought by a Mexican claimant in favour of the Mexican Federal Conciliation and Arbitration Board. On appeal ([1999] OAC Lexis 511), the Ontario Court of Appeal upheld the decision given by the court below.

22 The next case is *Larry McLaughlin v Bankers Trust Company of New York* 1998 US Dist Lexis 9703 ("*Larry McLaughlin*"), a decision of the United States District Court of New York. There, the plaintiff, a citizen and resident of England brought an action in New York against his former employer for breach of contract. Following a disciplinary hearing, the plaintiff was given the option of either resigning on his own volition or facing dismissal. He accordingly tendered his resignation and

thereafter sued in New York. In England, such a labour dispute would have to be taken up before the Industrial Tribunal. After considering all the pertinent factors, the district judge stayed the New York proceedings in favour of the Industrial Tribunal. It should be noted that one of the arguments advanced by the plaintiff to urge the New York court not to order a stay was that the remedies available before the Industrial Tribunal was limited. The judge ruled that "an adequate alternative forum need not provide for precisely the same remedies that [were] available in the chosen forum."

23 The third case cited to us is *Ivan Jones v Raytheon Aircraft Services Inc* 120 SW 3d 40 ("*Ivan Jones*"), a decision of the Court of Appeal of Texas, Fourth District. There, the plaintiffs, who were relatives of the victims of a plane crash in New Zealand sought to sue in the United States. The defendants were involved in the manufacture and modification of the private plane which crashed. What was then in operation in New Zealand was a no-fault accident insurance system, covering all accidental injuries and deaths sustained by any individual. A special tribunal called the Accident Compensation Commission was created and it would handle all such claims. No action in tort could be instituted in New Zealand for such injuries or death. Notwithstanding this restriction, by majority, the Texan Court of Appeal upheld the decision of the trial judge who ordered a stay of the US proceedings in favour of a claim being made in New Zealand before the Accident Compensation Commission.

24 Accordingly, as a matter of principle and on the basis of the authorities cited above, we were of the opinion that the first contention of the appellant must fail.

No defence

25 We now move to consider the appellant's other main argument, which involved several sub-points. The first point was that the court should not have ordered a stay as the respondent would not have any defence to the appellant's claim. The appellant averred that what remained to be decided was only the question of quantum of damages. In making this argument, the appellant relied on a number of cases involving foreign jurisdiction clauses where this court had refused a stay where the defendant has no defence to the claim *eg*, *The Jian He* [2000] 1 SLR 8; *The Hung Vuong-2* [2001] 3 SLR 146; *The Hyundai Fortune* [2004] 4 SLR 548. The appellant submitted that where an application for a stay was made on the ground of *forum non conveniens*, the court should more readily refuse a stay.

26 It is settled law that where a party seeks to bring an action in our courts in breach of an exclusive jurisdiction clause, he must show "strong cause" why the court should exercise its discretion in his favour and assist him in breaching his promise to bring the action in the contractual forum: see *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975–1977] SLR 258 ("*Amerco Timbers*"). What is "strong cause" and what are the circumstances the courts would take into account were set out in *The El Amria* [1981] 2 Lloyd's Rep 119 at 123–124, and adopted by this court and stated in *Amerco Timbers* at [11] as follows:

> The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more

readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

27 Admittedly, while the circumstances which the court should take into account in determining whether an action commenced in Singapore should not be stayed in spite of an exclusive jurisdiction clause are, to some extent, similar to those which the court would take into consideration in determining whether the action should be stayed on the ground of *forum non conveniens*, they are not the same. In weighing the balance of convenience under the doctrine of *forum non conveniens*, the issue of whether there is a defence to the claim is not a relevant consideration as the court should not be required to go into the merits. This is because the juridical basis of a stay based on *forum non conveniens* is different from that of a stay based on an exclusive jurisdiction clause. Under the doctrine of *forum non conveniens*, the object is in determining which forum is the more appropriate forum. On the other hand, for a party to be excused from his commitment to the exclusive jurisdiction clause he must show exceptional circumstances, and the averment that the defendant has no defence to the claim could constitute exceptional circumstances to enable the court to excuse the plaintiff from complying with the jurisdictional clause.

28 In any event, we could not see how the appellant could seriously contend that its common law claim in tort could be determined without a trial. Obviously, evidence would be required to show the scope and responsibility of the appellant's work on board the vessel, the training he received, the nature of the repair job, whether the appellant had been briefed on the repair to be undertaken and what were the standard safety measures which the appellant ought to have taken. Indeed, there was evidence to suggest that it was the appellant's duty to brief the workers under him on safety requirements. Moreover, there is a further claim in negligence based on the allegation that the respondent had failed to provide the appellant with urgent medical treatment. In addition, there is also the question as to whether the current state of his right eye was caused by his own default in refusing to go for a corneal transplant as recommended by the Philippine ophthalmologist. It is clear that if this case were to proceed in Singapore, the trial judge would have to address both the issues of liability and the appropriate quantum of damages. It would not be an "open and shut" case.

Governing law

29 The appellant's next point was that the judge was in error in considering some of the connecting factors. He submitted that the judge was wrong to hold that the governing law of the employment contract was that of the Philippines. The judge relied on s 31 of the POEASTC in making his determination. It reads:

> Any unresolved dispute, claim or grievance arising out of or in connection with this Contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory.

30 The appellant submitted that the governing law relating to his contract of employment was the law of the flag of the vessel, namely, Hong Kong law. Moreover, the instant claim could be framed either in contract or in tort and the tort having been committed on board the vessel, Hong Kong law should apply.

31 As a general proposition, it is probably correct to say that the law of the flag country should apply in relation to a tort committed on board a vessel which is then on the high seas. However, where in the contract of employment the parties have specified the governing law, the contract term should prevail. *Dicey and Morris on The Conflict of Laws* (Sweet & Maxwell, 13th Ed, 2000) ("*Dicey and Morris*") states at para 32-005:

> At common law, the starting point was that every contract was governed at its outset by its "proper law", a term coined by Westlake. When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was "bona fide and legal". Where there was no express selection of the governing law, an intention with regard to the law to govern the contract could be inferred from the terms and nature of the contract and from the general circumstances of the case. When the intention of the parties to a contract with regard to the law governing it was not expressed and could not be inferred from the circumstances, the contract was governed by the system of law with which the transaction had its closest and most real connection.

32 Notwithstanding this clear statement of principle in *Dicey and Morris* that where the contract provides for the governing law, that should be the applicable law, the appellant relied on the Canadian Federal Court of Appeal's decision in *The Ship "Mercury Bell" v Amosin* (1986) 27 DLR (4th) 641 ("*Mercury Bell*") to contend that the proper law of this contract of employment between the appellant and the respondent was the law of the flag. However, we do not understand *Mercury Bell* as having held that the flag state law should apply in any event, even in the face of an express governing law provision. This can be seen from the main judgment in the case delivered by Marceau J (at 644):

> There is no doubt that to determine the rights of seamen against the owners of the ship on which they are serving, which is the subject-matter of the action, the law of the ship's port of registry is to be looked at. This is required by "the well-established rule of international law that the law of the flag state *ordinarily* governs the international affairs of a ship" (*McCulloch v. Sociedad Nacional de Marineros de Honduras* (1962), 372 U.S. 10 at p. 21 (U.S. Sup. Ct., 1963)), a rule formally confirmed in s.274 of the *Canada Shipping Act*, R.S.C., 1970 c. S-9, as amended, which reads as follows:
>
> > 274. Where in any matter relating to a ship or to a person belonging to a ship there

> appears to be a conflict of laws, then, if there is in this Part any provision on the subject that is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.
>
> That this action must be disposed of on the basis of the law of Liberia is therefore without question.
>
> [emphasis added]

It did not appear to us that Marceau J was there considering a case where the contract had a forum selection clause.

33 A case which is somewhat similar to the instant is *Rizalyn Bautista v Star Cruises* 396 F 3d 1289, a decision of the Court of Appeal for the United States Eleventh Circuit which involved Philippine seamen and where there was a similar clause like our s 31 which provided for claims and disputes to be submitted to the NLRC or arbitrators. At first instance (286 F Supp 2d 1352), the judge noted that the POEA supervised, regulated, promoted and monitored overseas employment programs for the purpose of ensuring the best terms and conditions of employment for Filipino contract workers. In response to the further assertion that the claim in tort was distinct from the claim in contract, the judge said,

> Finally, Plaintiffs' assertion that their tort claims are not "claims and disputes arising from this employment," and thus are not subject to arbitration under Section 29, is without merit. The employment contract in question specifically obligates the shipowner to provide a seaworthy vessel, and further regulates the payment of sick pay, repatriation, and medical care. As Plaintiffs' Complaints seek damages for, *inter alia*, failure to use reasonable care to provide and maintain a safe workplace and failure to provide prompt and adequate medical care, the Court finds that the claims and disputes arise directly from their employment with NCL and from NCL's obligations to Plaintiffs under the Standard Terms of the employment contract.

34 In *Ernany De Joseph v Odfjell Tankers (USA), Inc* 196 F Supp 2d 476 ("*Ernany De Joseph*"), the plaintiff, a Filipino seaman working on board a Norwegian vessel, who had executed the POEA contract, fell and broke two vertebrae in his neck while doing cleaning work. He sued in the United States. The POEA contract incorporated the POEASTC standard terms for seafarers. There, the Texas District Court granted the defendant's motion for a stay. The court construed the relevant clauses of the POEA contract as follows:

> Section 28 provides that "the Philippine Overseas Employment Administration (POEA) or the National Labor Relations Commission (NLRC) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this Contract." Additionally, the MWOFA grants the Labor Arbiters of the NLRC the exclusive jurisdiction to hear "claims arising out of an employer-employee relationship or by virtue of any law or contract involving Philippine workers for overseas employment including claims for actual, moral, exemplary and other forms of damages." Because both of these provisions vest exclusive jurisdiction over seamen's disputes in the POEA and the NLRC, they lend further, and perhaps even more formidable, credence to the view that the "appropriate authority" mentioned in the last sentence of Paragraph 4 refers only to the POEA and the NLRC, *not* every permissible venue in the world.

35 An English case which is highly illustrative of the correct approach to viewing such a contract where Filipino seamen are involved is the case of *Dimskal Shipping Co SA v International Transport Workers Federation* [1989] 1 Lloyd's Rep 166 ("*The Evia Luck No 2*"). There the vessel, registered in Panama, had on board 20 Filipino nationals employed under the POEA contract. Also employed on board were ten Greek seamen. The owner of the vessel sued the International Transport Workers Federation ("ITWF") for moneys paid pursuant to a new contract of employment with the crew which the owner allegedly executed in Sweden under duress because of threat of industrial action. Each of the new contracts of employment with the Philippine crew contained no choice of law clause. The owner argued that the new contract was governed by the law of the flag, *ie*, Panama. ITWF contended that it was Philippine law. Phillips J agreed with ITWF and held (at 172):

> Under English principles of private international law those contracts are governed by the system of law with which the transactions have their closest connection. I am in no doubt that this is Philippine law. Filipino seamen are widely employed on foreign flag vessels and Philippine law has provisions that are designed to protect their welfare. In particular foreign shipping companies are required to engage Filipino crewmen only through authorized shipping or manning agents, who are required to submit employment contracts and salary scales to a regulatory body. That body was the National Seamen's Board and is now the Philippine Overseas Employment Agency. I shall refer to it as the NSB. Seamen's contracts have to be approved and registered by the NSB before they can be enforced in the Philippines. The old crew contracts were so registered.
>
> …
>
> The new contracts were intended to be registered with the NSB, and were so registered. In these circumstances I consider that Philippine law is clearly the system of law with which the contracts of employment of the crew had their closest connection.

36 The fact that the appellant has also sued in tort does not mean that the forum selection clause set out in the employment contract should no longer apply. Lord Scarman said in the Privy Council case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107 that:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.

Equally germane are the comments to the same effect of this court in *The Jian He* [2000] 1 SLR 8 at [25]–[27].

The respondent is not a party to the POEA contract

37 The appellant's next point was that the judge below should not have taken the POEA contract into consideration because the respondent was not a party to that contract. The parties to that contract were the appellant and Hang Woo Ship Management Ltd ("Hang Woo"). As clearly stated on the document, Cleene Maritime was signing on behalf of Hang Woo.

38 In our opinion, the appellant could not have been ignorant that Hang Woo was entering into the contract as the ship manager of the respondent. The appellant was then a seafarer of some years of experience. He was in his fifties. He would have known that Hang Woo was the ship manager. Thus, the appellant would also have known that Hang Woo could not be the principal. Moreover, under Philippine law, shipowners are required to appoint local manning agents to engage

Philippine seafarers. The purpose of this requirement is to ensure that there will be someone ready at hand in the Philippines who can be made accountable to the authorities should there be any non-compliance with Philippine law. The positions of the ship managers and the manning agents were explained in paras 6–8 of the second Affidavit of Cpt John Woo of Hang Woo as follows:

> 6. While the shipowning company and we as ship managers are technically separate legal entities, it is patently obvious from our designation as ship managers that we are merely agents for the shipowning company. As ship managers, we handle the Vessel's registration and crew matters, arrange for ship repairs and the procurement of class certification, the supply of stores and the necessary P&I and hull insurance for the Vessel. Needless to say, all of this is done for and on behalf of the shipowning company.
>
> 7. At paragraph 7, the Plaintiff alleges that when he signed the POEA Agreement, he was not aware and was not informed that we were the agents of the Defendants. I personally find this hard to believe. The Plaintiff was promoted to the rank of 2nd Engineer in 1989 and has had many years of sailing experience. As any seafarer would know, a ship manager is the agent for the shipowning company. As the title suggests, we manage the affairs and business of the vessel on behalf of the shipowners, including making the crewing arrangements for the vessel.
>
> 8. The POEA Agreement was executed in the Philippines. Our manning agents in the Philippines is Cleene Maritime. In the circumstances, it was Cleene Maritime who signed the contract on our behalf and we in turn act for the ultimate shipowning company in respect of the contract of employment with the Plaintiff. The Defendants' Philippine law expert, Mr Del Rosario, has confirmed this in his 1st affidavit at paragraph 41 to be the case as well.

39 The legal position of the shipowner in such an arrangement was alluded to by Mr Del Rosario (a Philippine law expert testifying on behalf of the respondent) in his first Affidavit as follows:

> The ship managers are the lawful representative of the shipowners, hence, there is no necessity for an execution of another employment contract between a seafarer and the shipowners. Thus, there is nothing irregular when the subject employment contract which was submitted to the POEA on 9 August 2002 was entered into between the Plaintiff and the ship managers, Hang Woo Ship Management Limited of Hong Kong who entered into the same on behalf of the shipowners/Defendants in this case.

40 As indicated by Mr Rosario, in the Philippines, as in Singapore, there is the principle of undisclosed principal who can sue and be sued on the contract even though not expressly named therein.

41 There is one other aspect worth noting. The appellant signed on to join the vessel on 27 August 2002 for a term of one year. Two months before the term expired, the appellant telexed to both Hang Woo and Cleene Maritime in these terms:

> I … 2/Engineer of the above … vessel join[ed] 27th of August 2002 at Singapore.
>
> In this regard I would like to inform your good office that I'm willing to extend my contract for another (1) one year of service.
>
> I hope that my request is highly appreciated.

42 The appellant repeated his request on 9 July 2003 to Cleene Maritime and copied to Hang Woo. It was Hang Woo, acting as agent for the respondent, who extended his service by six months.

43 In our judgment, the appellant was aware, when he signed the POEA contract, that Hang Woo, as ship manager, was acting as agent for the respondent.

Hong Kong law to apply

44 The final point made by the appellant was that on the day he came on board the vessel in Singapore, he signed an agreement pursuant to the Hong Kong Merchant Shipping (Seafarers) Ordinance ("the Hong Kong Agreement"). At the bottom of this document was this clause:

> Any terms and conditions of service annexed to this agreement should not be less favourable than those under the provisions of the laws of Hong Kong.

The appellant contended that by virtue of this clause, Hong Kong law should apply.

45 This clause could by no stretch of the imagination be construed to be a jurisdiction clause or an applicable law clause. The Hong Kong Agreement had no jurisdiction or governing law clause. All that this clause seems to say is that there is a separate agreement which is annexed thereto and its terms should not be less favourable than under the law of Hong Kong. As the respondent's Hong Kong legal expert, Mr Anthony Woo, deposed in his affidavit:

> If the claim is brought before a Hong Kong Court and if the Court looked at the standard form Agreement and List of Crew on the one hand, and the POEA Contract of Employment on the other, it will not regard the latter as null and void, but instead will scrutinize the contract to ensure the crew is afforded the minimum protection under Hong Kong statute.

46 This reference by Mr Woo to "minimum protection" refers to the no-fault compensation scheme under the Hong Kong Employees' Compensation Ordinance ("ECO") and there is no evidence that what is provided in the POEA contract is any worse off than under the ECO of Hong Kong. In any event, this would be an issue which the competent forum in Manila would be entitled to examine.

47 While this court recognised that there was a dispute as to whether the POEA contract was, in fact, physically annexed to the Hong Kong Agreement, this was clearly an issue of fact which the trial forum will eventually go into. In any case, it was not really a material point as it was not in dispute that the parties did enter into the POEA contract in Manila on 9 August 2002. Therefore, even assuming that the terms under the ECO were more favourable than the POEA terms, the Philippine law did not prohibit the incorporation of the ECO terms by agreement.

48 In *Ernany De Joseph* (see [34] above), which involved Philippine seamen and the POEA contract, the court said:

> [I]t is clear to this Court, that the Norwegian employment contract is regarded as a mere addendum to the POEA employment contract, such that the terms of the POEA employment contract control in cases of conflict. As such, the Court disagrees that Plaintiff can also pursue his cause of action in Norway, and therefore declines to deviate from the express language of the POEA employment contract, which requires Plaintiff to resolve his grievance exclusively in the Philippines.

In similar vein, in the present case, it would not be wrong to regard the Hong Kong Agreement as an addendum to the POEA contract.

49 In this regard, we would again refer to what the respondent's Hong Kong solicitor, Mr Woo, said in his affidavit, which we would point out is wholly consistent with the decision in *Ernany De Joseph*:

> By contrast, I note that the POEA Contract of Employment contains a jurisdiction clause (Section 29 of the POEASTC). Based on the affidavits filed in these proceedings which I have read, if the Plaintiff were to bring a claim in Hong Kong, there is a reasonable prospect that the Hong Kong Courts will grant a stay of the action if an application is made in view of the said clause contained in the POEASTC. If the Plaintiff were to commence proceedings in Hong Kong in disregard of an applicable arbitration agreement, the Hong Kong Court will have to stay those proceedings compulsorily without discretion. This is pursuant to Article 8, Fifth Schedule of the Arbitration Ordinance …

Limited jurisdiction of NLRC

50 The final point we would touch on is the assertion that the appellant would not be able to claim for common law damages in tort before the NLRC. The appellant's Philippine law expert has stated that under the POEA scheme, the NLRC would only have jurisdiction in money claims and not in tort. On the other hand, the respondent's Philippine law expert expressed a contrary view, stating that if a concurrent claim for common law damages were to be brought before NLRC, that claim and the claim on a no-fault basis would be heard together and decided by the tribunal.

51 However, we would be surprised if the position advanced by the appellant's legal expert is the correct one bearing in mind that the Filipino authorities had gone to great lengths in seeking to protect the interests of their seafarers. In any event, even if what the appellant's legal expert stated is the correct position, on the authority of *Larry McLaughlin* and *Ivan Jones* we did not think it mattered. Moreover, we do not think it is for this court to question why the authorities there had deemed it fit to so restrict the right of a seafarer to claim in common law.

Conclusion

52 In the circumstances of this case, it was quite clear to us that the judge was correct in holding that the Philippines would be the more appropriate forum to determine the claim. Nothing material in the case linked it to Singapore. The only link the appellant had with Singapore was the fact that he joined the vessel in Singapore and that he returned to the Philippines via Singapore. However, these circumstances were wholly irrelevant to the claim. Neither was the fact that the writ was served on the vessel in Singapore of any real relevance. Moreover, no security was obtained in Singapore. What is more material are these. First, the entire crew of the vessel, including the appellant, are Filipino and presumably reside in that country. Second, the medical witnesses will also be from the Philippines, other than the ophthalmologist from Yangon, whose evidence may or may not even be necessary. Third, the employment contract is governed by Philippine law. The Philippines has specifically enacted laws to protect its citizens who are serving on foreign vessels. Hong Kong law will only come into the picture if it is shown to be more advantageous to the appellant and this has not been shown as yet. Fourth, the hearing of the claim in the Philippines will also avoid the need for having interpretation, especially for those lower rank staff, if any, who may be able to speak only in Tagalog. Fifth, a performance bond has been furnished by Cleene Maritime to the Filipino authorities. Sixth, the respondent has also agreed to submit to the jurisdiction of the Philippines. To our mind, the

case has overwhelming connection with the Philippines. Thus the appeal had to be dismissed.