

**Dr. Nabil Argoubi**

**Appellant/ Plaintiff**

AND

**Interhill Industries Sdn. Bhd.**

**Respondent/ Defendant**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 11 of 2023)**

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Before: Steven Chong, C.J., Lunn and Sir Peter Gross, JJA

**Date of Hearing: 29 October, 2024.**

**Date of Judgment: 7<sup>th</sup> January, 2025.**

*Headnote.*

*Civil-personal injuries. Appellant-international consultant marine engineer. Appeal from Judge's dismissal with costs of Appellant's claim for damages for injuries suffered from fall to ground from Respondent's vessel in dry dock in third-party's shipyard, dismissed with costs, to be taxed if not agreed.*

*Vessel in care, custody and control of third-party shipyard. Respondent required third-party's consent to enter shipyard and access vessel; facilitated Appellant's entry.*

*Relationship between Appellant and Respondent. Judge's findings upheld: Appellant was not employee and/or independent contractor of Respondent; Appellant inspecting vessel in hope his resulting report/quotation would secure acceptance of his future services by Respondent.*

*Respondent's duty of care to Appellant. Even if Respondent owed a duty of care to Appellant and third-party shipyard was in breach of its own duty of care to Appellant, Respondent not in breach of its duty of care to Appellant: (i) third-party shipyard was competent and experienced, of which Respondent had personal knowledge; (ii) Appellant was experienced international consultant marine engineer; Respondent entitled to expect Appellant would recognise circumstances of compromised safety and act accordingly.*

Mr. Harif Bin Ibrahim of Lt. Col. (Rtd.) Harif Bin Ibrahim for the Appellant/Plaintiff.

Mr. Eric Siow and Mr. Jonathan Cheok of J. Cheok Eric for the Respondent/Defendant.

**Lunn, J.A.:**

1. The Appellant/Plaintiff, Dr. Nabil Argoubi, appeals against the dismissal of his claim, by Judge Pg Masni Binti Pg Hj Bahar in the Intermediate Court on 14 October 2023, for damages against the Respondent/Defendant Interhill Industries Sdn. Bhd. arising from serious injuries that he suffered in a fall. He sustained the injuries on 11 February 2017, in a fall to the ground from the deck of a ferry, the *Seri Anna*, whilst she was in dry dock in Labuan in Malaysia ("the worksite"). The vessel was owned by the Respondent. The dry dock was owned by Preston Shipyard Sdn. Bhd.

*The Appellant's case*

2. It was the Appellant's pleaded claim that at the time of the fall he was performing work, pursuant to his engagement as a consultant for the Respondent, including to provide consultancy services in respect of maintenance and repair work on the *Seri Anna*. Having been engaged to provide consultancy services, the Appellant was lawfully present on the vessel at the invitation and with the leave of the Respondent. It was the Respondent's duty, and an implied term of the engagement agreement, to take all necessary steps for the safety of the Appellant whilst he was working at the worksite.<sup>1</sup> The accident and the resulting injuries, losses and damages had been caused by the negligence and or breach of duty by the Respondent and/or its employees, servants or agents and/or authorised personnel.<sup>2</sup> Although encompassed in multiple separate particulars, in broad terms the Appellant alleged that the Respondent had failed to take any or adequate precautions for the safety of the Appellant whilst he was performing his work on board the *Seri Anna*.

3. In his affidavit of evidence-in chief, the Appellant testified that, by an oral agreement with Mr. Koh Han Kiong, a director of the Respondent, on 3 January 2017, he had been employed to perform those duties as a consultant for a monthly salary of B\$10,000. He was instructed to inspect, supervise and manage the repair and maintenance works of the *Seri Anna* at Preston Shipyard in Labuan.<sup>3</sup>

*Business Terms and Cover Letter*

4. In support of his evidence of discussions with Mr. Koh, the Appellant adduced into evidence two documents he had signed, one headed '*Business Terms*'<sup>4</sup> and the other, '*Cover Letter*'.<sup>5</sup> Both of them were undated. He testified that he had handed the former to Mr. Koh on 3 January 2017. It set out the Pricing basis on which the Appellant was prepared to work, namely: A. Time (by hour); B. Work (by salary during project); and C. Project (package amount). Fees and disbursements were billed in US Dollars, but it quoted no hourly rates or salary. Five examples were given of the total fees charged on a Project basis.

5. The Cover Letter was stated to be from Nabil Argoubi, International Consultant, to Mr. Koh Kiang Han-Owner of Interhill Industries & Sinar Hijau Companies Kiulap. It stated that it was, "*In response to your request from our last meeting*", in particular "*to what you propose to me and selecting me as an international consultant. I am very interested for this proposal.*" The letter concluded, "*Waiting for your response to discuss your specific goals. My best regards and thank you for your consideration.*" The Appellant testified that he handed the letter to Mr. Koh on 4 January 2017. There was no acknowledgement of receipt of either document.

*Inspections of the Seri Anna*

6. The Appellant testified that, on the instructions of Mr. Koh, he had visited the Preston Shipyard in Labuan and inspected the *Seri Anna* in dry dock on 6 February 2017 and again on 11 February 2017. On each occasion he had been accompanied in entering the Shipyard by

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<sup>1</sup> ROA; page 12, paragraphs 5 and 7.

<sup>2</sup> ROA, pages 13-16, paragraphs 9 and 10.

<sup>3</sup> ROA; page 201, paragraphs 3 and 4.

<sup>4</sup> ROA, pages 87-91

<sup>5</sup> ROA, page 82.

Mr. Md Safiyullah Bin Sahari, an employee of the Respondent. He had boarded the vessel on each occasion. On the first occasion, the vessel was protected by scaffolding at the front and rear decks, by a safety rail on the side of the vessel and netting which surrounded the vessel. He had inspected the engine room. Following his return from the first visit, he had prepared and submitted reports to Mr. Koh.

*Reports on the Seri Anna*

7. The Appellant testified that he had prepared several signed, but undated reports, on the *Seri Anna*:

- Condition Assessment Report<sup>6</sup>;
- Untitled report on the vessel<sup>7</sup>; and
- Inspection and Consulting Report<sup>8</sup>.

8. The Condition Assessment Report described the different surveys that could be performed on the *Seri Anna's* Hull, Machinery and Control System. The Inspection and Consulting Report repeated much of the text of the Untitled document and, under the heading, '*Specification and Description of work*', addressed work needed to be done on the vessel, including its Hull, Main Propulsion and MTU Engine, Electrical Power and the rest of the equipment. Beneath the title '*Consultant Signature*', The Condition Assessment Report and the Inspection and Consulting Report bore the Appellant's signature over a stamp impression in his name as an International Consultant. The Appellant testified that, having prepared the Condition Assessment Report and the Inspection and Consulting Report on 8 February 2017, he had forwarded them to Mr. Koh.

*11 February 2017*

9. The Appellant testified that, following his arrival at the Preston Shipyard on 11 February 2017, he had met Preston Shipyard's Chief Engineer, Azahari. They discussed the time that the *Seri Anna* would be on the down slip, on which slip the vessel was to be manoeuvred from the dry dock to the water. In an exchange of emails, dated 9 February 2017, Irwan Rustang, Preston Shipyard's Project Engineer had informed the Appellant that the next "*milestone*" for the *Seri Anna* was "*down slip the ship on the 11<sup>th</sup> Feb*".<sup>9</sup> The scaffolding at the front of the vessel was in place, but that at the side and the netting was not there. He said that Azahari expressed surprise.<sup>10</sup>

10. In a written report that he had made to the Police in Labuan, dated 11 April 2018, the Appellant said that on 11 February 2017, first of all he had a meeting with Azahari in the Company's meeting room, after which they had inspected the *Seri Anna's* engines in the workshop. Then, they went to the vessel. En route, Azahari received and answered a telephone call. The Appellant boarded the vessel first.<sup>11</sup>

11. In testifying of his movements on 11 February 2017 that led up to his fall from the deck of the vessel, the Appellant marked a photograph of the vessel to illustrate his journey from the deck, which he had boarded using a ladder close to the port side hull at the bow where

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<sup>6</sup> ROA, pages 83-86.

<sup>7</sup> ROA, pages 92-98.

<sup>8</sup> ROA, pages 99-106

<sup>9</sup> ROA, page 116.

<sup>10</sup> ROA, page 441.

<sup>11</sup> ROA, page 111.

there was scaffolding. Then, he had walked along the deck to the superstructure on the starboard side, beyond which there was a door into the vessel.<sup>12</sup> He had intended to go to the navigation bridge. However, there, he fell to the ground. He did not know why he fell, “*maybe it is oily.*” At that place there was no rail, scaffolding or safety netting. He was wearing a helmet and clad in safety shoes.

#### *Invoice*

12. The Appellant acknowledged that he had submitted an Invoice, dated 12 June 2017, to the Respondent in which he had claimed USD \$46,800 as fees for a, ‘*Consultation Project Location: Preston Shipyard in Labuan*’. He did so on a Time Basis Pricing/by hour’, at USD \$600 per hour, for 72 hours for his work performed over 30 days, together with 72 hours of travelling fees at USD \$50 per hour. 3 days of the 30 days were described as, ‘*Duration visit work ground*’.

13. At the time that the Invoice was issued the Appellant was receiving treatment for his injuries in hospital. There, he was told by employees of the Respondent that the Respondent would not pay him his salary, but was willing to pay his consultation fees. Mr. Koh visited him in hospital and invited him to issue an invoice for his fees. He did so.

#### *The Respondent’s case*

14. In its pleaded case the Respondent admitted approaching the Appellant, through his Brunei company, for the purpose of conducting a report on repairs and maintenance by Preston Shipyard in their dry dock in Labuan on the *Seri Anna*, but denied having entered into any agreement or contract with the Appellant or his Brunei company. As a consultant, the Appellant was to view the vessel in order to provide a quotation to provide his services. The Respondent denied that the Appellant had been engaged to provide consultancy services or employed to do so.

15. In his evidence, Mr. Koh Han Kiong testified that, having been approached by the Appellant, who had promoted and offered his services as a consultant, he had asked the Appellant to view the vessel and prepare a report, in order to quote him a price for the provision of his consultancy services. In order to do so, the Appellant viewed the vessel on 7 February 2017 and 11 February 2017. He did so in his own capacity as a consultant. Mr. Koh explained that on the afternoon of 6 February 2017 the Shipyard had been closed, so that the party had returned and inspected the vessel on 7 February 2017. The Appellant required the permission of Preston Shipyard to enter the dry dock and to board the vessel. To facilitate that access, Mr. Mohammed Saifullah, an employee of the Respondent, had accompanied the Appellant to the Preston Shipyard and the Appellant had been permitted to enter the dockyard and board the vessel on each of 7 February 2017 and 11 February 2017.

16. Mr. Koh denied that he had received from the Appellant various documents that the Appellant had asserted he had given him: the Cover Letter, the Terms of Business, the Condition Assessment Report the untitled report on the *Seri Anna*, the Inspection and Consulting Report. Further, he denied that he had received an Invoice, dated 12 June 2017, on the letterhead of the Appellant which claimed fees for the Appellant on a ‘*Consulting time basis*’ for a total of 30 days on the basis of USD \$600 per consulting hour and USD \$50 per travelling hour, to a total of USD \$46,800. He denied that he had told the Appellant to issue the invoice.<sup>13</sup>

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<sup>12</sup> ROA, page 206.

<sup>13</sup> ROA; page 216, paragraph 9.

### *Judgment*

17. In her judgment, the judge addressed the issue of the employment relationship between the Appellant and the Respondent. She said that, having regard to the overall evidence, she was “*not convinced that the Plaintiff was employed by the Defendant.*”<sup>14</sup>

18. In making that finding, the judge said she had regard to the Invoice, dated 12 June 2017, presented by the Appellant to the Respondent, in which fees to a total of \$46,800 USD were claimed on a time basis over a period of 30 days. She said that the invoice showed that the Appellant was working as an independent consultant and contradicted the Appellant’s claim that he was employed on a monthly salary.<sup>15</sup>

19. Also, the judge said that the document headed ‘*COVER LETTER*’, in the name of the Appellant addressed to the Respondent, was merely a proposal never agreed upon by the Respondent. As noted earlier, it stated, “*I am writing this letter to you for what you propose to me and selecting me as an international consultant. I am very interested for this proposal.*” And concluded, “*Waiting for your response to discuss your specific goals.*” In addition, she said that she took into consideration the absence of supporting evidence of the existence of a contract of employment between the parties.<sup>16</sup>

### *Independent contractor*

20. Of the issue of whether or not the relationship that the Appellant enjoyed with the Respondent was that of an independent contractor, the judge said that there was no contract of engagement when the Appellant inspected the vessel and that she was satisfied that any future engagement depended on the Appellant producing to the Respondent a report of his visit. That was never done. The Appellant’s offer to inspect the vessel was made in the hope that the production of a report would persuade the Respondent to accept his services. In the result, she concluded that the Appellant was not hired as an independent contractor by the Respondent.<sup>17</sup>

### *Duty of care*

21. Of the issue of the existence of a duty of care in the Respondent towards the Appellant, the judge said that she accepted that Preston Shipyard had full control over the vessel at the time of its inspection by the Appellant on 11 February 2017. Further, that the presence of Mohammed Safiyullah Bin Sahari, an employee of the Respondent, was merely to obtain permission for the Appellant to view the vessel. That did not give rise to a duty of care in the Respondent to the Appellant.<sup>18</sup>

### *Conclusion*

22. In the result, the judge dismissed the Appellant’s claim with costs, having found that the Appellant had failed to prove that he was the Respondent’s employee or that he had been

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<sup>14</sup> Judgement, paragraph 47.

<sup>15</sup> Judgment, paragraph 51.

<sup>16</sup> Judgment, paragraphs 58-61.

<sup>17</sup> Judgment, paragraph 72.

<sup>18</sup> Judgment, paragraph 72.

hired as an independent contractor.<sup>19</sup> Further, the Appellant had failed to prove that the Respondent was negligent in providing him safety tools when he inspected the vessel.<sup>20</sup>

*Petition of Appeal*

23. In inviting this court to reverse and/or set aside the judgment, it was contended in the Grounds of Appeal that the judge had erred in law and fact:

- first, in placing too greater emphasis on the absence of a written contract and failing to appreciate that the Respondent was the employer of the Appellant; and/or the Respondent's independent contractor; and/or the Respondent's independent consultant;
- secondly, in failing to appreciate that, as the Appellant's employer, the Respondent had a non-delegable duty to the Appellant;
- thirdly, applying the law of tort that the Respondent was negligent; that there was a relationship of proximity; that there was a duty of care; that harm was foreseeable to the Appellant; and that, thereby, the Respondent was liable to the Appellant;
- fourthly, in determining that the duty of care and liability for the Appellant's injuries and damages lay solely with Preston Shipyard;
- fifthly, in determining that the Appellant had inspected the vessel with and/or under the Respondent's instruction, authority and permission, but failing to consider that he had done so as the Respondent's independent contractor; and/or consultant; and/or agent; and/or representative.
- sixthly, in failing to consider that the Respondent was liable to the Appellant for his injuries, losses and damages resulting from the accident. *Appellant's submissions*

*The Appellant's submissions*

24. In his written submissions, Mr. Harif contended that, in determining that the Appellant was not an employee of the Respondent, the judge had erred in placing too much emphasis on the absence of a written contract, in particular in noting that, "*There is no such employment contract issued by the defendant to the plaintiff.*"

25. Mr. Harif submitted that the question to be determined was whether or not the Respondent owed a duty of care to the Appellant. That was to be answered by addressing the three issues identified in *Caparo*<sup>21</sup>, namely: Was there a close proximity of relationship between the parties? Was there a foreseeability of harm to the Respondent? Was it fair to impose a duty of care?

26. The questions were to be answered in the affirmative. The Appellant had visited the dockyard and inspected the *Seri Anna* on the Respondent's instructions. The latter controlled the work that the Appellant was to do and to provide a report to the Respondent. Therefore, the Respondent owed a duty of care to the Appellant. The Appellant was injured in complying with those instructions. The Respondent was negligent and therefore liable to the Appellant.

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<sup>19</sup> Judgment, paragraph 64.

<sup>20</sup> Judgment, paragraph 73.

<sup>21</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

*The Respondent's submissions*

27. In the Respondent's submissions, Mr. Siow contended that the Appellant had failed to identify the negligent act of which the Respondent was culpable. That was a pre-condition before determining the issues of duty of care and foreseeability of harm. The *Seri Anna* was in the care, custody and control of Preston Shipyard, which was an establishment of good repute. It was not within the Respondent's care, custody and control and there was nothing that the Respondent could have done with regard to the condition of the vessel. The Appellant was an experienced international consultant well able to decide whether it was safe to board the vessel.

*A consideration of the submissions*

28. It is clear that, in determining that the Appellant was not an employee of the Respondent nor was he engaged as an independent contractor by the Respondent at the time of the accident, the judge had regard to the wide range of evidence adduced at trial, not only to the undisputed fact that there was no written contract.

29. Although the Appellant testified that he had entered into a contract of employment with Mr. Koh, on behalf of the Respondent, on 3 January 2017, the judge was entitled to observe and take into account, as she did, that the Cover Letter, which the Appellant testified he had given to Mr. Koh on 4 January 2017 was couched in the language of, "*a mere proposal*" in which the Appellant presented his expertise. It made no reference, to an agreement of the previous day to be employed for a salary of B\$10,000 per month. Rather, it spoke of being selected as an international consultant and waiting to discuss specific goals.

30. Further, it is to be noted that the, '*Inspection and Consultation Report*' said of Mr. Koh and the Respondent that they were, "*seeking submittals from technical consultant to provide the professional services in terms of consulting/engineering and services for Seri Anna ferry.*" The report concluded with a paragraph describing the Appellant's "*consulting services*". That is not the language of an employee reporting to his employer.

31. Similarly, the judge was entitled to conclude of the Invoice, dated 12 June 2017, issued by the Appellant to Mr. Koh and the Respondent, in which the Appellant claimed for the time he said he had spent working, including inspecting the *Seri Anna*, on an hourly basis that it, "*shows that the Plaintiff is working as an independent consultant, who offers his specialist expertise or service on a temporary basis.*"<sup>22</sup>

32. Having said that she was inclined to accept that the Appellant represented himself to the Respondent as being an independent consultant, the judge said of his offer to inspect the *Seri Anna* that it was made in the hope that the report that he offered to produce would convince the Respondent to engage him. She noted in particular that, "*any future engagement depends on the Plaintiff's report of the Vessel.*" None was submitted. Clearly, in those circumstances the judge was entitled to conclude that the Appellant was not "*hired as an independent contractor by the Plaintiff.*"<sup>23</sup>

33. The judge was entitled to find, as she did, that at the time of the accident the Appellant was not employed by the Respondent nor was he engaged as an independent contractor on behalf of the Respondent.

34. The remaining issue is: what duty of care, if any, was owed to the Appellant by the Respondent, as someone whose offer to inspect the *Seri Anna* in Preston Shipyard, prepare a

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<sup>22</sup> Judgment, paragraph 51.

<sup>23</sup> Judgment, paragraph 64.

report and quote a price for his future services had been accepted and whose entry to the Shipyard and the *Seri Anna* was facilitated by the attendance of the Respondent's employee at Preston Shipyard?

35. With respect, we do not accept the judge's finding that in those circumstances, in which the *Seri Anna* was in the care, custody and control of Preston Shipyard, the Respondent did not owe any duty of care to the Appellant.<sup>24</sup> Clearly, there was a relationship of proximity between the parties and it was not in dispute that the dockyard was a place where there was a foreseeable risk of injury. Mr. Koh admitted as much.<sup>25</sup> At the very least, we are prepared to proceed on the working assumption that there was such a duty of care. The real and live issue was whether the Respondent was in breach of such duty of care as was owed to the Appellant.

36. In oral submissions, in the context of the evidence that the Respondent had surrendered care, custody and control of the *Seri Anna* to Preston Shipyard, such that the latter's consent was necessary to enter the dockyard and board the vessel, in response to the enquiry of the Court, Mr. Harif did not identify any specific act of negligence of which the Appellant said the Respondent was culpable. The three pages of particulars of negligence set out in the pleadings did not address specifically the issue of what more the Respondent could have done to ensure the safety of the Appellant, given that it had surrendered care and control of the vessel to Preston Shipyard.

37. No issue was taken with Mr. Koh's oral evidence as to the reputation of Preston Shipyard namely as a Shipyard that repaired Government vessels for the Army and the Police. He testified that he had been provided with their Company Profile and knew their standards. He had accompanied consultants to the Shipyard and seen that they wear full safety gear.<sup>26</sup>

38. The Appellant testified that he was familiar with safety procedures on board vessels undergoing repair and had boarded vessels in dry dock. On his first visit to Preston Shipyard, prior to boarding the *Seri Anna*, he had been given a 'safety briefing'. On that occasion he had used a staircase made from scaffolding at the bow to board the vessel. There was also scaffolding at the stern. There was a safety rail on the side of the vessel and netting around the whole hull. Clearly, the requisite and appropriate safety measures were in place.

39. Moreover, the Appellant was experienced in the safety protocols of boarding and inspecting a vessel in dry dock. On 11 February 2017 he was wearing a helmet and clad in safety footwear. He was relatively familiar with the vessel and whereabouts on the vessel he needed to move to inspect her. He was well able to determine whether the changed circumstances he encountered on 11 February 2017, compared with those in place on his first visit, compromised safety. He knew prior to going to Labuan that Preston Shipyard intended to return the vessel from the dry dock to the water that day. Indeed, he had discussed that very issue with Azahari that day. Obviously, before the vessel could be returned to the water from the dry dock, scaffolding and netting on the sides of the vessel would have to be removed. Clearly, that process had been begun and was partially completed before he approached the vessel.

### *Conclusion*

40. Clearly, the Respondent and Mr. Koh, were not only aware of the reputation enjoyed by Preston Shipyard but also had personal experience of their operation of safety standards. They were entitled to be satisfied that the care, custody and control of the *Seri Anna* had been entrusted to a competent and experienced dockyard. Even if the dockyard was in breach of

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<sup>24</sup> Judgment, paragraph 72.

<sup>25</sup> ROA, pages 474-475.

<sup>26</sup> ROA, page 483.

any duty of care *it* might have owed to the Appellant (a matter on which we express no opinion), that, without more, would not disclose a breach of duty on the Respondent's part. Further, the Appellant had held himself out to be an international consultant experienced in maritime engineering. The Respondent was entitled to expect that he would recognise circumstances that compromised safety and make the appropriate judgement. In those circumstances, we are satisfied that the Respondent was not in breach of such duty of care as was owed by the Respondent to the Appellant.

41. Accordingly, we dismiss the appeal.

*Costs*

42. Having had the benefit of the submissions of the parties as to the orders for costs at the hearing, we order that the Appellant is to pay the Respondent's costs of the appeal, to be taxed if not agreed. We do not disturb the judge's order that the Appellant pay the costs below of the Respondent, to be taxed if not agreed.



**STEVEN CHONG, C.J.**



**LUNN, J.A.**



**SIR PETER GROSS, J.A.**