ROYAL CARIBBEAN CRUISES LTD v BROWITT [2021] FCA 653

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Introduction

Although not strictly in the realm of maritime law, this case revolved around various issues, particularly private international law issues, which are pertinent to the area. These included: incorporation of the carrier's standard terms and conditions into the contract of carriage, the scope of an exclusive jurisdiction clause, and the Court's decision whether to grant an anti-suit injunction to restrain foreign proceedings.

Facts

This case followed from the volcanic eruption on Whakaari (also known as White Island) off the coast of New Zealand in December 2019. Due to the eruption, three members of the Browitt family, who were Australian tourists, were horrifically injured. They were part of a tour party from the cruise liner *Ovation of the Seas*. Krystal Browitt died of her injuries on the same day as the eruption, and Paul Browitt a month later. Stephanie Browitt survived, but suffered third-degree burns to more than 70% of her body. Krystal and Stephanie's mother and Paul's wife, Maria (Marie) Browitt, remained on board the cruise liner on the day of the eruption rather than join the tour party to Whakaari. Following the disaster, Marie became Stephanie's full-time carer.

On 4 December 2020, Marie Browitt (Mrs Browitt), for herself and as representative of the deceased estates of Paul and Krystal Browitt, and Stephanie Browitt (Ms Browitt) commenced proceedings in the Circuit Court of the Eleventh Judicial Circuit, Florida. The action was for loss and damages suffered on account of the eruption. The defendant was Royal Caribbean Cruises Ltd (RCCL). RCCL had contracted with White Island Tours to arrange for the excursion from the *Ovation of the Seas* on 9 December 2019, and had sold tickets to Paul, Krystal, and Stephanie Browitt pursuant to that arrangement. The plaintiffs alleged various causes of action in tort against RCCL, arguing that RCCL's acts and omissions, committed from its headquarters in Miami, caused the aforementioned loss and damage.

On 18 December 2020, RCCL alongside RCL Cruises Ltd (RCL) - as first and second applicant, respectively - commenced this proceeding against Mrs Browitt and Ms Browitt, as first and second respondent respectively. Their argument was that the Browitt family had been passengers on the cruise liner under a contract of carriage between the family and RCL, which was the disponent owner and operator of the *Ovation of the Seas*. RCCL and RCL sought a declaration that under this contract, any dispute between the parties would be subject to the jurisdiction of the courts of NSW, due to an exclusive jurisdiction clause they claimed was incorporated in the terms and conditions of the contract of carriage. The applicants argued that the contract of carriage was concluded when Mrs Browitt made a booking for each member of the family at a Flight Centre Travel Group Ltd (Flight Centre) office.

The applicants also sought an anti-suit injunction to prevent the respondents from continuing the Florida proceedings.

Evidence

RCCL is a Liberian corporation registered in Florida as a foreign profit corporation, which manages its business primarily out of its head office in Miami. It is the owner of the brand Royal Caribbean International (RCI). RCCL operates internationally through its subsidiaries, including RCL. RCL is registered in Australia as a foreign corporation under the *Corporations Act 2001* (Cth).

RCCL's Global Tour Operations department is located at its head office in Miami. This department is responsible for developing, operating, and setting policy for RCI's shore excursion program. The department approved the onboard promotion and sale of the excursion to Whakaari on 9 December 2019.

In 2019, RCCL was engaged by RCL under a series of contracts in respect of matters such as the marketing and selling of shore excursions to guests. There was an Onboard Service Agreement between RCCL and RCL, under which RCCL performed onboard services for RCL. In Australia, RCL performed other services including the

development of local terms and conditions to be applied to Australian residents booking on RCI-branded cruises from any port internationally.

RCL occasionally published standard terms and conditions of carriage of passengers for the Australian market, which were updated in October 2018 (the 'RCL AU terms').

From 1 January 2019, RCL had an agreement with Flight Centre to facilitate the sale of cruise tickets, marketed under the RCI brand. Under this agreement, Flight Centre sold cruise packages, trading as an entity called 'Infinity Cruising'. Under cl 7.1 of that agreement, both Flight Centre and Infinity Cruising were obliged to inform all customers about the requirements and booking conditions applicable to the Product (cruise packages).

Mrs Browitt was shown an RCI-branded cruise brochure (which contained terms and conditions materially the same as the RCL AU terms, which were also available on the RCL AU website) during an appointment with Ms Alisha Clarke at the Flight Centre in Craigieburn on 14 February 2019. Mrs Browitt attended this appointment to book the 12-night cruise for herself and her family. Mrs Browitt had access to the RCL AU terms in the brochure, although she did not look at them during the appointment. She had also consulted the RCL AU website before.

During the February 14 appointment with Ms Clarke, Mrs Browitt received a quote for her chosen cruise and was made aware of the key details relating to the quote. Ms Clarke later printed an invoice for the cruise for Mrs Browitt. The invoice included three pages of terms and conditions.

Stewart J accepted while Mrs Browitt was not explicitly told to read the terms and conditions, she had been shown the terms, some of which had been briefly explained to her. Mrs Browitt could have read the terms and conditions at the time of signing the invoice had she desired, and the terms and conditions were readily available both in the brochure and on the RCL AU website. When Mrs Browitt signed and dated the invoice, she formally acknowledged that she understood and agreed to the booking terms and conditions.

Federal Court Judgment

There were five core issues in the proceeding, although the third, fourth, and fifth issues were the most important to the outcome of this case.

First, was Flight Centre the agent of Mrs Browitt, RCL, or both?

Second, how were the RCL terms – including the exclusive jurisdiction clause – incorporated into the contract of carriage?

Third, regarding the construction of the RCL AU terms: a) was RCL entitled to invoke the exclusive jurisdiction clause to restrain the Florida proceedings; b) was RCCL entitled to rely on the exclusive jurisdiction clause; c) did the purchase of insurance exclude the operation of the terms (cl 1); d) did the contract of carriage apply to shore excursions (cl 25) and, if not, did the exclusive jurisdiction clause nonetheless operate to restrain the Florida proceedings; e) did the exclusive jurisdiction clause permit a proceeding to be brought in the Federal Court of Australia sitting in NSW and, if not, what consequence followed from the commencement of this proceeding (cl 1, cl 37-38); and f) did the exclusive jurisdiction clause cover the Florida proceeding?

Of these, issues 3(c)-(f) were disregarded, either from the outset or following further discussion (see Issue 3).

Fourth, was RCCL entitled to relief on the basis of the RCL AU terms?

Finally, was the Florida proceeding vexatious and oppressive such that RCL and RCCL were entitled to an anti-suit injunction?

The parties were satisfied to resolve each of these questions in accordance with Australian law. The contract formation issue would be resolved with reference to the municipal law of the forum.[1] The parties also accepted that when she concluded the booking, Mrs Browitt acted not only for herself but for each of her family members. The relevant parts of the RCL AU terms were cls 1 (which provided an overview of the customer contract), and 38 (including the process of making a complaint on board, and the exclusive jurisdiction clause).

[1] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 225 (Brennan J) ('*Oceanic Sun Line*').

Issue 1

The first issue was whether, in concluding the booking, Flight Centre had acted as the Browitts' agent or RCL's agent, or, possibly, as agent for both parties. In the alternative, RCL argued that the RCL AU terms had been incorporated into the contract through Flight Centre acting as the Browitts' agent, and Flight Centre's knowledge of the RCL AU terms could thus be attributed to Mrs Browitt.

In general, however, this first issue was of relatively little significance to the Court's conclusion and need only be briefly summarised.

Flight Centre was found to have been acting as agent for both the Browitts and RCL. The agreement between Flight Centre and RCL expressly appointed Flight Centre as RCL's agent, creating no ambiguity in that regard. Mrs Browitt had also permitted Flight Centre to make a booking on her behalf, which was governed by the RCL AU terms. The agency agreement between the Browitts and Flight Centre was restricted to Flight Centre making travel bookings with RCL on the Browitts' behalf.

Could Flight Centre's knowledge of the RCL AU terms be attributed to Mrs Browitt? The court concluded that it could. As against third parties, the law assumes principals have the same material knowledge as their agents about transactions in which the agent is involved on the principal's behalf, and the agent has a duty to keep the principal informed about such matters.[2] Under the agency agreement between Flight Centre and the Browitts, Flight Centre was obligated to provide accessible copies of the service provider's terms and conditions to Mrs Browitt if asked, which was demonstrably done (the RCL AU terms were always accessible, both online and in the brochure).

Issue 2

The second issue was whether the RCL AU terms had been incorporated into the contract of carriage.

The Court emphasised the point made in *Oceanic Sun Line* that where an exemption clause is included in a ticket (or other documents intended by the carrier to contain the terms of carriage), but the other party was not aware when concluding the contract that the exemption clause was a term of that contract, the carrier cannot rely on the exemption clause unless they did all that was reasonably necessary to bring attention to the exemption clause.[3]

This principle was explained further in *Toll (FGCT) Pty Ltd v Alphapharm,*[4] where it was suggested that not only exemption clauses, but other terms also may be 'unusual or onerous'.[5] This case also affirmed that principals are bound by the terms on which their agents have contracted in their name.[6]

Mrs Browitt had every opportunity to access the RCL AU terms, through several means, including at the meeting with Ms Clarke where she signed the Flight Centre invoice. She did not take the time to read through those terms in depth. Regardless, she agreed to the booking terms and conditions included in the invoice, and thus was bound. The cruise offer summary, which was effectively the offer, was accepted when she paid the requisite deposit. Ms Clarke concluded the booking contract on Mrs Browitt's behalf, through Infinity Cruising. Under the contract, Flight Centre was authorised to bind Mrs Browitt to the service provider's terms and conditions. RCL and Flight Centre (trading as Infinity Cruising) had a signed agreement stating that bookings made through Flight Centre would be impacted by the RCL AU terms.

The Browitts were therefore bound by the RCL AU terms when the booking was concluded.

It was unnecessary to discuss alternative modes of incorporating the RCL AU terms into the contract. The terms were already incorporated when Flight Centre acted as agent for Mrs Browitt.

Issue 3

The third issue was whether RCL was the carrier party to the exclusion of RCCL. To answer this question, it was necessary to determine whether RCCL was a party to the RCL AU terms.

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[2] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 658.
[3] *Oceanic Sun Line* (n 1) 228–9.
[4] (2004) 219 CLR 165 [54], [57] ('*Alphapharm*').
[5] Ibid [53]–[54].
[6] Ibid [80]–[82].

Clause 1 of the RCL AU terms stated that the contract was between *either* the passenger and RCCL, *or* the passenger and RCL, depending on which entity was the Ship Operator for the cruise. Although the wording seemed to imply that only one of these entities could be a party to the contract with the passenger, the terms were also littered with words such as 'we', 'us', and 'ourselves', and explained that 'Royal Caribbean International' could refer to *either* RCL or RCCL.

However, references to the term 'Royal Caribbean International' appeared to mean RCL, not RCCL, and the language of 'either … or' was not inclusive of both parties at once. As the terms stated, only one of the two parties could be the Ship Operator for the relevant cruise, because the booking contract would be made between that Ship Operator and the passenger. Here, the Ship Operator was RCL, factually and by way of notice. Further, although the contract was drafted in the first person, it would be extremely unusual for corporations to refer to themselves using the singular first-person pronoun 'I'. Therefore, the use of 'we', 'ourselves', and so forth was not misleading. The applicants argued that various sections of the same terms appeared to apply only to RCCL *or* to RCL, as with the provisions about the legal drinking age in the US and Australia respectively, and this meant that the contract applied to both RCCL and RCL in different aspects. This was quickly dismissed as it was not the case that only RCCL sailed from North America and RCL from Australia, and if this were the case, the entity in question would always be the Ship Operator and therefore the contractual carrier for that region, and the provision referring to the other carrier would be inoperative.

Stewart J likewise rejected the applicants' submission that some terms of the contract had to refer to both RCCL and RCL simultaneously, as those terms were operative prior to the Ship Operator being confirmed. Only one of either RCCL or RCL could be the Ship Operator, which would subsequently be clarified during booking and/or on the passenger's confirmation invoice, meaning the relevant carrier was identified only from the time of contract formation. Clause 2 of the RCL AU terms stated that a binding contract would be formed when the Confirmation Invoice was issued. The only parts of the RCL AU terms which applied before the conclusion of the contract consisted of information and not of substantive contractual stipulations. The terms and conditions, in fact, were divided between non-operative terms relaying information relevant to the consumer, and contractual terms applying to the voyage.

The passenger's contract was between themselves and whoever was the Ship Operator, whether RCCL or RCL, and it was a mutually exclusive arrangement.

In the current case, the Ship Operator was RCL.

The suggestion that RCCL, as a subcontractor of RCL, could rely on the exclusive jurisdiction clause contained in the RCL AU terms was quickly disposed of; this would contradict settled law regarding Himalaya clauses. In this instance the exclusive jurisdiction clause was not worded in such a way as to extend it to RCCL, nor did it state that RCL was contracting as RCCL's agent.

This brought the Court to its consideration of the exclusive jurisdiction clause. There were, in essence, two exclusive jurisdiction clauses in this case, both in cl 1 and in cl 38 of the RCL AU terms. The relevant parts of those clauses contained the following:

> INFORMATION, TERMS AND CONDITIONS
> (Effective October 2018)
> **1. Overview**
> …
> **Please Note:** If you book a Royal Caribbean International cruise-only holiday in conjunction with other services … which are arranged or provided by a travel agent or tour operator ('travel organiser') with whom you book (and not us), your contract for your entire holiday including the cruise and all other such services and arrangements will be with your travel organiser and not with us … Please note: we do not have any liability to you in these circumstances. In any event, if we are found liable to you on any basis, our liability and/or obligations to you or your organiser will be no greater or different to the liability and obligations we have under these booking conditions to consumers who have a contract with us. In any such situation we will be fully entitled to rely on all defences, exclusions and limitations contained in the booking conditions set out below…These terms and conditions are to be construed under the laws of NSW and you agree to submit to the exclusive jurisdiction of the court of that state in the event of dispute between you and Royal Caribbean International.
> …
> **38. Making a complaint**
> In the unlikely event you have a reason to complain whilst away, you must immediately notify the Guest

> Relations Desk onboard ship and the supplier of the service(s) in question (if not us) … If a problem cannot be resolved to your satisfaction and you wish to follow this up you must write to us on your return to the following address: …
> You must provide your booking reference number and full details of your complaint within 28 days of your return from holiday unless a different time limit applies to your claim - see clauses 33 and 34.
> …
> We both agree that any dispute or claim will be dealt with by a court located in New South Wales, Australia to the exclusion of the courts of any other state, territory or country.
> If asked to do so, the person(s) affected must transfer to us any rights they have against the supplier or whoever else is responsible for your claim and complaint.
>
> - The person(s) affected must agree to cooperate fully with us and our insurers if we or our insurers want to enforce any rights transferred to us.

There were three major differences between the jurisdiction clause aspect in cl 1 and the one in cl 38. First, cl 1 was written to apply in the context of an RCI cruise-only holiday, booked alongside other services as arranged or provided by a travel agent or tour operator. Within this context, cl 1 operated to exclude the carrier's liability to the passenger, and if the carrier was found liable, then its liability and obligations were rendered identical to those toward consumers with whom it had a direct contract. In contrast, the cl 38 exclusive jurisdiction clause applied where the passenger had a direct contract with the carrier.

Second, under cl 1, only the passenger (and not the carrier) submitted to the exclusive jurisdiction of the chosen court. Clause 38 specified that both parties to the contract (that is, the passenger and either RCCL or RCL) would submit to the selected jurisdiction.

Third, cl 1 used the phrase 'the court of that state', referring to New South Wales. Clause 38 elaborated further, identifying the chosen court as 'a court located in New South Wales, Australia', to the exclusion of any other court.

In comparing these two clauses, the Court concluded that, because of the unique context in which cl 1 was designed to apply, it was not relevant for present purposes. Mrs Browitt booked only the cruise holiday and did not arrange for any other services, such as flights.

Having excluded cl 1, RCL would have to rely on the cl 38 exclusive jurisdiction clause.

Both parties to the contract (RCL and the Browitts) submitted to the jurisdiction named under cl 38 through use of the phrase 'we both', in respect of any dispute or claim arising between them. RCCL, evidently not being a party to the contract, could not rely on the clause.

Could RCL rely on the cl 38 exclusive jurisdiction clause, in respect of the Florida proceedings brought against RCCL? The applicants submitted that RCL's performance of the contract of carriage was dependent on the performance by RCCL of its arrangements with RCL, concerning services such as crew management. Because of this, the applicants argued, it would make commercial sense for the RCL AU terms to cover both RCL and RCCL in the exclusive jurisdiction clause (for the resolution of any disputes). They argued that the clause should not be read narrowly, and the parties' preferred court should determine disputes arising from that contract.[7]

The applicants further submitted that the exclusive jurisdiction clause should be read as binding RCCL, a non-party to the contract between RCL and the Browitts, because RCCL was closely involved in the performance of the carriage and therefore was familiar with the RCL AU terms.[8]

Jurisdiction clauses are often widely construed so that parties may avoid the inconvenience of disputes happening across multiple jurisdictions.[9] This principle is useful when deciphering what disputes are covered by the jurisdiction clause in question, and whether the clause applies to non-parties to the agreement.

The Court examined the facts of *Global Partners*, from which the principle originated, and identified two facets of that case which had permitted the relevant exclusive jurisdiction clause to be extended to non-parties. The first was that the clause was stated to apply to disputes 'arising out of or in connection with' the relevant agreement, which encompassed the disputes being brought against non-parties. The second reason was that the non-parties

[7] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [164]–[165] ('*Comandate*').
[8] *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 ('*Global Partners*').
[9] *Comandate* (n 7) [165].

were closely connected to the subject matter of the agreement, suggesting that the objective intention of the contracting parties was that the exclusive jurisdiction clause would cover claims against non-parties also.

Applying this to the facts of the current case, it became clear that neither element was present. Clause 38, the only applicable jurisdiction clause in this scenario, used the phrase 'any dispute or claim' against RCL, and the constant use of the self-referential 'we' and 'us' pronouns made it apparent that the contract was intended to apply to RCL only. Other parties were made strangers to the clause through the stipulation that the relevant person 'must transfer to us any rights they have against the supplier or whoever else is responsible'. To compare the case with *Global Partners*, the exclusive jurisdiction clause in this case was obviously not drafted in a sweeping, general manner. The claim being brought against RCCL regarding the Whakaari excursion could not be said to fall within the subject matter of the jurisdiction clause.

It was also noted that although RCCL played a role in the facilitation of the cruise through its many agreements with RCL, this role was not obvious and did not arise from the booking contract, thus the non-party (RCCL) was not closely intertwined with the subject matter of the agreement, as in *Global Partners*. Nor could it be said that if the Browitts were successful against RCCL in the Florida litigation, RCL would accrue a consequential liability to RCCL.[10]

Taking each of these factors into account, it was concluded that neither cl 38 nor cl 1 of the RCL AU terms extended to the proceedings brought by the Browitts against RCCL, so as to grant RCL a right to enforce it.

The Florida proceeding was also not in breach of the exclusive jurisdiction clause because, as shown, RCCL (the defendant in those proceedings) was not a party to that agreement and did not enjoy the benefits of it.

Issue 4

The fourth issue concerned RCL's right to an anti-suit injunction based on a breach of the RCL AU terms. Because the proceedings in Florida were not in breach of either cl 38 or cl 1 of those terms, RCL was not entitled to an anti-suit injunction.

Issue 5

The final issue was whether the Florida proceeding was vexatious and oppressive.

In this case, Mrs and Ms Browitt were abiding by the *actor sequitur forum rei* rule in that they were suing RCCL where it had its principal place of business.[11] RCCL was subject to the Florida court's jurisdiction at the time due to that factor.

Because, as established, RCCL was neither party to nor covered by the exclusive jurisdiction clause in the booking contract, and the Florida proceeding was not in breach of that clause, it was difficult to argue that the Florida suit was vexatious or oppressive. An Australian court can grant an anti-suit injunction restraining proceedings by a party (within its jurisdiction) in a foreign court, but only on two bases.[12] The first basis arises when the foreign proceeding would interfere with the Australian court's pending proceedings or processes. The other potential basis for an anti-suit injunction arises when a court decides to exercise its equitable jurisdiction by making orders in restraint of legal proceedings involving unconscionable conduct, or which involve the unconscientious exercise of legal rights.

The applicants sought to invoke the equitable jurisdiction of the Court to stop the Florida proceeding, on the basis it was vexatious or oppressive. This equitable power, however, existed to serve equity and good conscience. The power did not rely on a decision that foreign proceedings are vexatious or oppressive in that they are an abuse of the Court's processes, or that such proceedings should be stayed on *forum non conveniens* grounds.[13]

Mrs and Ms Browitt clearly based their decision to sue in Florida on several considerations, including the legitimate juridical elements in their favour such as higher damages and the assessment of damages by a jury.

[10] *Donohue v Armco Inc* [2002] 1 Lloyd's Eep 425 [60]–[61]; *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch) [28]–[29].
[11] *City Finance Co Ltd v Matthew Harvey & Co Ltd* (1915) 21 CLR 55, 64.
[12] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 391–2 ('*Cigna'*).
[13] Ibid 394.

Florida was also the location of RCCL's head office and place of business, and was where many acts and omissions on RCCL's part, and on which the proceeding was based, were said to occur. Further, there was no proceeding happening in Australia, either current or planned, which required protection. The combination of these factors militated against the conclusion that the Florida proceeding was in any way vexatious or oppressive, or for that matter, unconscionable.

There was therefore no basis for an exercise of the Court's equitable jurisdiction in this instance.

Conclusion

The proceeding was dismissed. Although the Browitts were bound by the RCL AU terms, the Florida proceeding was not in breach of the exclusive jurisdiction clause contained in those terms, because RCCL was not a party to the agreement and did not enjoy the benefits of it. Further, the Florida proceeding was not vexatious or oppressive in such a way as to justify an order restraining the respondents from pursuing their claims in Florida.

This case serves as a reminder of the difficulties of not only arguing that protections available under a contract should be extended to non-parties, but of successfully obtaining an anti-suit injunction by invoking the court's discretionary equitable jurisdiction. Context is incredibly important in both instances, and here operated against the interests of the applicants.