

FEDERAL COURT OF AUSTRALIA

Royal Caribbean Cruises Ltd v Reed [2021] FCA 51

File number: NSD 1359 of 2020

Judgment of: **STEWART J**

Date of judgment: 1 February 2021

Date of publication of reasons: 2 February 2021

Catchwords: **PRACTICE AND PROCEDURE** – application to serve originating process on a person in a foreign country pursuant to r 10.43(2) of the *Federal Court Rules 2011* (Cth) – whether the Court has jurisdiction by reason of the claim arising out of an agreement that relates to the carriage of persons by a ship within the meaning of s 4(3)(f) of the *Admiralty Act 1988* (Cth) – whether the requirement that the proceeding is of a kind mentioned in r 10.42 is satisfied – whether a prima facie case for relief is made out – leave granted

Legislation: *Admiralty Act 1988* (Cth) ss 4(1), 4(3)(f), 9(1)
Federal Court Rules 2011 (Cth) rr 10.42, 10.43

Cases cited: *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376
Heilbrunn v Lightwood plc [2007] FCA 1518; 164 FCR 1
Ho v Akai Pty Ltd (in liq) [2006] FCAFC 159; 247 FCR 205
Neville’s Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd [2016] FCA 859
Sino Iron Pty Ltd v Mineralogy Pty Ltd [2019] FCA 675
Western Australia v Vetter Trittler Pty Ltd (in liq) (1991) 30 FCR 102

Division: General Division

Registry: New South Wales

National Practice Area: Admiralty and Maritime

Number of paragraphs: 25

Date of hearing: 29 January 2021

Counsel for the Applicants: C O Gleeson

Solicitor for the Applicants: HFW Australia

Counsel for the Respondents: The respondents did not appear

ORDERS

NSD 1359 of 2020

BETWEEN: **ROYAL CARIBBEAN CRUISES LTD**
First Applicant

**RCL CRUISES T/AS ROYAL CARIBBEAN CRUISES ABN 54
150 263 086**
Second Applicant

AND: **PAUL REED**
First Respondent

IVY REED
Second Respondent

ORDER MADE BY: STEWART J

DATE OF ORDER: 1 FEBRUARY 2021

THE COURT ORDERS THAT:

1. Pursuant to the slip rule, the orders made on 29 January 2021 are vacated.
2. The applicants be granted leave to file an amended originating process in the form annexed to these orders.
3. The applicants be granted leave pursuant to rule 10.43(2) of the *Federal Court Rules 2011* (Cth) to serve the first and second respondents with the amended originating process and the amended statement of claim in accordance with the requirements for service under the laws of the United States of America.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 The applicants apply for leave under r 10.43 of the *Federal Court Rules 2011* (Cth) to serve the amended originating process and amended statement of claim on the respondents in the State of Maryland, USA, where they reside. In order to qualify for such leave, r 10.43(4) requires that the applicants satisfy the court that:

- (a) the court has jurisdiction in the proceeding;
- (b) the proceeding is of a kind referred to in r 10.42; and
- (c) they have a prima facie case for all or any of the relief claimed in the proceeding.

2 I will return to each of these requirements, but first it is convenient to identify some relevant background.

Background

3 The respondents suffered injuries while on a shore excursion to Whakaari (White Island) in New Zealand on 9 December 2019 when the volcano on the island erupted. The respondents say that the eruption and resulting emissions of volcanic gas, rock and ash heated to between 200° and 390°C caused them immediate fear for their lives, severe, life-threatening burns over large portions of their bodies, permanent and disfiguring scarring, reduced use of their limbs and extremities, and immediate, ongoing and future needs for medical and psychological treatment, ongoing pain and suffering and emotional distress.

4 At the time of suffering their injuries, the respondents were passengers on a cruise that departed from Sydney, called and was due to call at a number of ports in New Zealand, and which was scheduled to end back in Sydney. The cruise was on the motor vessel *Ovation of the Seas* which, on the evidence before me at this stage, was bareboat chartered and operated by the second applicant, RCL Cruises Ltd (**RCL**). RCL is incorporated in the United Kingdom and registered as a foreign company in Australia with a registered office in New South Wales.

5 The respondents commenced a proceeding in the United States District Court, District of Florida, Miami Division, on 7 December 2020 by way of a “Complaint and Demand for Jury Trial” dated 4 December 2020. The proceeding is against the first applicant in the proceeding before me, Royal Caribbean Cruises Ltd (**RCCL**), a corporation incorporated in Liberia with

its principal place of business in Florida. Material allegations in the complaint include the following:

- (1) RCCL does business under the name Royal Caribbean International (**RCI**) under which it operates numerous cruise vessels in its fleet. RCCL and RCI are collectively referred to as the defendants – this is notwithstanding that (in Australian law, at least) they are not separate entities.
- (2) RCCL, personally or through an agent, operated, conducted, engaged in or carried on a business venture in Florida and operated vessels in the waters of the State of Florida, and was engaged in the business of providing to the public and to the respondents, for compensation, vacation cruises aboard its vessels.
- (3) RCCL organised the excursion to Whakaari, the island on which the respondents suffered injuries, for passengers on the ship *Ovation of the Seas* which is registered to RCI.
- (4) The respondents purchased tickets from RCCL during the cruise of the ship for the shore excursion to Whakaari.
- (5) In respect of a cause of action described as “negligence/failure to warn”:
 - (a) United States federal maritime law applies to actions arising from alleged torts committed aboard a vessel sailing in navigable waters.
 - (b) As the owner of a vessel in navigable waters, RCCL and its apparent agents owed to all who were on board the ship, including the respondents, the duty of exercising reasonable care under the circumstances in all matters related to the incident at Whakaari.
 - (c) The duty owed to passengers by RCCL extends to advising about potential dangers beyond the point of debarkation, specifically including excursions beyond the point of debarkation in places where passengers are invited or reasonably expected to visit, such as the shore excursion to Whakaari.
 - (d) RCCL breached its duty to warn the respondents of the risks and dangers associated with the Whakaari shore excursion.
- (6) In respect of a cause of action described as “negligence based upon apparent agency”, a relationship of apparent agency existed between RCCL as principal and White Island Tours, which conducted the excursion to Whakaari, and RCCL is liable for the negligence of White Island Tours.

- (7) In respect of a cause of action described as “negligent misrepresentation”, RCCL never qualified its representations about the excursion, which included that it would be the “adventure of a lifetime” and an “unforgettable” opportunity to see one of New Zealand’s “epic” adventures, by noting any risk of serious and disfiguring injuries.
- (8) In respect of a cause of action described as “negligent selection of tour operator”, RCCL owes a duty to its passengers to select its excursion operators with due care for its passengers and their safety, which it breached by failing to enquire as to the fitness of White Island Tours to conduct the excursion to Whakaari.

6 It is apparent from the above summation that the causes of action alleged in the Florida proceeding are all causes of action in tort or negligence. Moreover, each cause of action is based on, amongst other things, RCCL’s alleged position as owner and operator of the *Ovation of the Seas*.

7 In their amended statement of claim in the proceeding in this Court, the applicants make the following material allegations:

- (1) RCCL engaged in the business of marketing and operating international passenger cruises and is incorporated in the State of Florida in the USA.
- (2) RCL is a wholly owned subsidiary of RCCL, is the disponent owner and operator of the *Ovation of the Seas*, is registered in the United Kingdom and is registered as a foreign company in Australia.
- (3) The respondents purchased tickets for the cruise in question from RCL as the operator of the cruise holiday.
- (4) The respondents’ tickets incorporated RCL’s Australian terms and conditions which included, relevantly, that the terms and conditions are to be construed under and are governed by the laws of New South Wales and the parties submitted to the exclusive jurisdiction of the courts of New South Wales in the event of a dispute.
- (5) The respondents’ Florida proceeding is brought against the wrong party in that the operator of the cruise was RCL, is brought in breach of the exclusive jurisdiction clause, and in so far as it seeks relief by reference to the law of the USA is contrary to the choice of law clause.

- (6) The action by the respondents in bringing the Florida proceeding deprives RCL of the benefit of the contractual promises made between the parties at the time of the respondents booking for the cruise.
- (7) Further or alternatively, commencement of the Florida proceeding is vexatious and oppressive given that:
 - (a) RCL operates its business in the United Kingdom and North Sydney, NSW;
 - (b) RCL made an express contractual choice to litigate disputes arising from the cruise in NSW;
 - (c) the contract of carriage between the respondents and RCL was made in NSW through travel agents located in Australia;
 - (d) the contract of carriage between the respondents and RCL was governed by NSW law and RCL has the benefit of, and seeks to rely on, exclusions and limitations of liability in its Australian terms and conditions that are to be construed by reference to NSW law;
 - (e) the respondents are residents of Maryland in the USA and not of Florida;
 - (f) the cruise departed from, and returned to, ports in NSW;
 - (g) the incident occurred in New Zealand and the proper law of any tort relied on by the respondents is the law of New Zealand; and
 - (h) there is no connection between the subject matter of the dispute and the State of Florida where the respondents' Florida proceeding has been commenced.

8 On the basis of the allegations set out in the amended statement of claim, the applicants seek the following relief in the amended originating application:

- (1) a declaration that it was a term of the contract of carriage between RCL and each of the respondents in relation to the voyage aboard the *Ovation of the Seas* that the applicable law of the contract was the law of NSW;
- (2) a declaration that it was a term of the contract that any disputes between the parties would be subject to the exclusive jurisdiction of the courts of NSW; and
- (3) an order restraining the respondents, whether by themselves, their servants, agents or otherwise, from taking any step, either directly or indirectly, in relation to the Florida proceeding other than such steps as may be required to have the proceeding dismissed or withdrawn.

9 It is thus apparent that the principal relief sought by the applicants against the respondents in the proceeding is an anti-suit injunction based on an alleged breach of the exclusive jurisdiction clause that they contend for, or alternatively on the basis that the Florida proceeding is vexatious and oppressive. Save as a foundation to the injunctive relief, the declaratory relief would appear to be of no consequence and hence of no independent merit.

Requirement 1: jurisdiction

10 The applicants' claim is a claim in personam arising out of a contract of carriage between RCL and the respondents. Such a claim is "a claim arising out of an agreement that relates to the carriage of ... persons by a ship" within the meaning of s 4(3)(f) of the *Admiralty Act 1988* (Cth). It is thus a "general maritime claim" which is one of two species of "maritime claim": Admiralty Act, s 4(1). The court has jurisdiction in respect of a proceeding commenced as an action in personam on such a claim: Admiralty Act, s 9(1). The phrase "arising out of" in s 4(3)(f) is to be given a wide and liberal, not narrow, construction and would include claims in tort and bailment: *Heilbrunn v Lightwood plc* [2007] FCA 1518; 164 FCR 1 at [38]-[42] per Allsop J.

11 I am thus satisfied that the Court has jurisdiction in respect of the applicants' claims.

Requirement 2: a proceeding within r 10.42

12 The applicants' claims rely on the contract of carriage between the respondents as passengers and RCL as the disponent owner and operator of the vessel. The contract of carriage is said by the applicants to have been made on behalf of the respondents by or through an agent which carries on business or is resident in Australia. The proceeding is thus a proceeding in relation to a contract that "is made on behalf of the person to be served by or through an agent who carries on business, or is resident, in Australia" within the meaning of item 3(b) of the schedule in r 10.42.

13 Also, as the contract is said to be governed by the law of NSW, the proceeding is in relation to a contract that "is governed by the law of the Commonwealth or of a State or Territory" within the meaning of item 3(c) of the schedule in r 10.42.

14 With reference to items 3(b) and (c), the proceeding is one in which the applicants seek enforcement of the contract for the purposes of item 3(d) and "relief in relation to a breach of the contract" as referred to in item 3(f) of r 10.42.

15 In those circumstances, the requirement that “the proceeding is of a kind mentioned in rule 10.42” is satisfied.

Requirement 3: prima facie case

16 A prima facie case for relief is made out if, on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed: *Western Australia v Vetter Trittler Pty Ltd (in liq)* (1991) 30 FCR 102 at 110 per French J. Or to put the matter differently, the case on the material presented must show that a controversy exists between the parties that warrants the use of the court’s processes to resolve it and that it is justified to cause a proposed respondent to be involved in litigation in the court in Australia: *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376 per Lee J. Both these formulations were adopted by the Full Court in *Ho v Akai Pty Ltd (in liq)* [2006] FCAFC 159; 247 FCR 205 at [10] per Finn, Weinberg and Rares JJ.

17 In support of their prima facie case for relief, the applicants rely on an affidavit made on the basis of information and belief by their local solicitor, Mr Thompson, and a number of tendered documents. Before turning to that evidence, it is useful to identify that my principal concern in relation to the applicants’ case which I raised with counsel at the outset is the following paradox: RCCL would appear not to be able to rely on the contract of carriage, and in particular the exclusive jurisdiction clause, because on the applicants’ case it is not a party to that contract, and RCL, which is said to be the carrier-party to that contract, would appear not be able to rely on any breach of the contract of carriage, and in particular the exclusive jurisdiction clause, because the Florida proceeding is not brought against RCL.

18 The passenger ticket by which the respondents booked and thus contracted for the ocean voyage was, on the face of it, concluded between the respondents, represented by an agent referred to as CruiseFusion which is a trading name used by Cruise1st Australia Pty Ltd, and RCL at its booking office in North Sydney. That is apparent from an email dated 22 or 23 February 2019 which sets out the terms of a “cruise offer summary” and records that “this holiday is provided by RCL Cruises Ltd”. Mr Thompson’s affidavit states that the email included a hyperlink to “AU Terms”, to which I will return. The offer was apparently accepted by the respondents by them paying, first, the deposit and, then, the balance of the fare.

19 The Australia terms and conditions relevantly include the following:

1. Overview

... The parties to [your] contract are yourself and either Royal Caribbean Cruises Ltd or RCL Cruises Ltd, depending on which of those entities will be operating the cruise ship on which you sail (the ‘Ship Operator’). The Ship Operator shall accept legal responsibility for the proper performance of this contract as set out below. You will be advised of the relevant Ship Operator at the time of booking and/or on your confirmation invoice. In these booking conditions, ‘you’ and ‘your’ means all persons named on a booking and ‘we’, ‘us’, ‘ourselves’ and ‘Royal Caribbean International®’ means either Royal Caribbean Cruises Ltd or RCL Cruises Ltd. Your local booking office is RCL Cruises Ltd Australia with address at Level 12, 157 Walker Street, North Sydney, NSW 2060.

... 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.

...

39. Liability

...

This contract and the terms and conditions of it are governed by NSW law.

20 Given that the offer email referred to above specifically records that the “holiday is provided by RCL Cruises Ltd”, it would appear that the respondents were informed that the “Ship Operator” as referred to in the terms and conditions, and thus their contractual counterparty, was RCL and not RCCL. However, in the Florida proceeding the respondents allege that their contractual counterparty and the owner and operator of the vessel was RCCL. If the respondents are correct, then it would appear, at least prima facie, that that contract incorporated the Australia terms and conditions including the choice of law and exclusive jurisdiction clauses. There is the same result if the applicants are correct in their case that RCL was the contractual carrier and the ship operator, i.e., RCL would enjoy the benefit of the exclusive jurisdiction and choice of law clauses.

21 On that basis, there is at least a prima facie case that the Florida proceeding is brought by the respondents in breach of the contract that the respondents say that they have with RCCL and that there is therefore a prima facie case for the anti-suit injunctive relief sought by RCCL. There is certainly a live controversy between the parties as to who the respondents’ contractual counterparty is for the provision of the cruise and operation of the vessel, and if it is RCCL then the Florida proceeding would appear to be brought in breach of the exclusive jurisdiction clause.

22 The position is more complicated with respect to RCL as it is not a defendant to the Florida proceeding. Counsel submits that the proceeding is nevertheless a breach of the contract with RCL on the basis that cl 1 of the Australia terms and conditions is to be construed as a promise

by the respondents to RCL not to sue either RCL or RCCL other than in accordance with the exclusive jurisdiction clause. That is said to be on the basis that the clause is said to apply “in the event of a dispute between you and Royal Caribbean International”, and Royal Caribbean International is defined as meaning either RCCL or RCL. I find the submission difficult to accept because of the use of “either ... or” rather than “and”. The more linguistically consistent, natural and commercial construction seems to me that it is either RCCL or RCL, whichever was advised to the respondents to be the relevant “Ship Operator” at the time of the booking, that is the counterparty to the contract and which enjoys the benefit of the exclusive jurisdiction promise.

23 However, whatever the proper construction of the clause is, once it is justified that there be service of the originating papers for RCCL it is equally justified that those papers be served for RCL because they are the same papers and set out a common basis for the same relief – it is only necessary that there be a prima facie case for “any” rather than all of the relief claimed in the proceeding: r 10.43(4)(c). It is not necessary or appropriate for me to finally construe the clause at this stage, particularly since the exercise of construction will necessarily take into account the broader contractual context which is at this stage incomplete.

24 One issue remains, which is whether the wording of the exclusive jurisdiction clause is in favour of a proceeding in this court, which is to say a proceeding issued in the NSW District Registry of the Federal Court. It will be recalled that the relevant wording is “the court of that state”, the latter being NSW. There is no single court of the State of New South Wales, so which court is, or which courts are, being referred to? There are a number of authorities which have dealt with the question whether similar wording, such as “the Courts of Victoria” and “a Victorian Court”, includes the Federal Court in the relevant state. There is discussion of these authorities by Gleeson J in *Neville’s Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd* [2016] FCA 859 at [17]-[20] and Banks-Smith J in *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675 at [95]. It is sufficient for present purposes to acknowledge that there are a number of cases in which such wording has been interpreted so as to include proceedings in the Federal Court in the relevant state. It is certainly eminently arguable that that is also the case in respect of the clause in question in this proceeding such that the prima facie standard is satisfied.

Conclusion

25 For the above reasons, I am satisfied that the applicants should have leave to serve the originating papers on the respondents in the State of Maryland in accordance with a method of service permitted by the law applicable there, as contemplated by r 10.43(3)(c)(iii) of the Rules.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 2 February 2021