

Contract formation — cruise ticket — forum conveniens

OCEANIC SUN LINE SPECIAL SHIPPING COMPANY v FAY
New South Wales Court of Appeal 31 March 1987.

The Court of Appeal has upheld the judgment¹ of Yeldham J who held that the plaintiff was entitled to bring proceedings in Sydney seeking damages against the defendant cruise company, incorporated in Greece, for serious injuries incurred in a trap shooting accident while travelling as a passenger on board the defendant's vessel.

The majority judgment was given by McHugh J, with whom Glass J agreed. The shipowner contended that the plaintiff, through the contractual terms contained in the ticket, had agreed to the exclusive jurisdiction of the Greek courts. However the booking had been made by the plaintiff's mother-in-law, the proprietor of a travel agency in Sydney, as part of a group booking. The cruise brochure had contained a statement that the transportation was governed by terms and conditions printed on the passenger ticket which could be inspected at any of the owner's offices. No passenger ticket was available in Australia for inspection. After payment of the final balance of the cruise price, the travel agency issued an exchange order to the group leader which entitled the passenger to obtain a ticket from the owner "when boarding the vessel". The ticket was issued to the tour leader in Athens, and never given to the plaintiff.

McHugh J considered that the booking and the deposit constituted an offer to the shipowner on the terms and conditions of the brochure, and the reservation became firm on payment of the deposit. Furthermore, he considered that, by reason of the brochure, the terms and conditions printed on the passenger ticket were incorporated into the contract. He rejected the shipowner's argument that no contract existed before the plaintiff boarded the ship. He distinguished the decision of the High Court in *MacRobertson Miller Airline Services v The Commissioner of State Taxation (WA)*² (concerning whether the issue of an aircraft ticket constituted a contract for the purposes of stamp duty legislation) on the basis that domestic or international flights were different to travel by sea. He rejected Yeldham J's finding that the brochure did not become part of the contract. As the Court of Appeal pointed out, since the law of New South Wales gave the plaintiff the right to challenge the imposition of the conditions pursuant to the

¹ Reported in *E & E Rev* Vol I No 2.

² (1975) 133 CLR 125.

Contracts Review Act 1980 (NSW), the plaintiff's case was even stronger than Yeldham J had thought.

Because the Contracts Review Act gives the New South Wales Court the power to strike down any provision of a contract that is unjust, the Court of Appeal thought it became almost inevitable that the action must be heard in New South Wales.

In considering the shipowner's application to stay the action based on the doctrine of *forum non conveniens*, the majority of the Court of Appeal considered that in order to justify a stay the shipowner must be able to show that the stay would not deprive the plaintiff of a legitimate personal or juridical advantage that is available to him in the New South Wales Court. As the plaintiff would probably not be able to invoke the Contracts Review Act if the matter was heard in Greece, where the exclusive Greek jurisdiction clause would be upheld (and no doubt a Greek court would hold that the proper law of contract was Greek) the plaintiff would, if the stay were granted, have been deprived of the advantage of being able to invoke the Contracts Review Act.

Accordingly the appeal was dismissed.

In a forty page dissenting judgment Kirby J rejected the argument that the legal principles governing air transport should be distinguished from those governing sea transport. He considered that the shipowner did take all reasonable steps to bring its terms and conditions to the attention of a passenger. He thought the brochure clearly stated that there was a passage contract, as did the exchange order which referred to the passage contract. He considered that the contract had to be construed in accordance with its language and not be subject to a strained construction in order to reduce the ambit of terms which may be considered unfair.

Kirby J considered the contract was made when the ticket was exchanged for the order in Greece or by the subsequent conduct of the passenger in starting the journey, thereby by inference, accepting the carrier's conditions. Alternatively, he thought that the ticket contained such express and extensive limitations and exclusions as to preclude the existence of an antecedent contract of carriage. Thus the ticket did not amount to an agreement at all and the agreement was not formed until the passenger boarded the vessel, thereby accepting the conditions of the ticket of which he had notice and a copy of which was by that time with his agent. In the third alternative, he thought that there may have been an executory agreement so that the exchange voucher was an offer capable of acceptance upon its exchange for the ticket of carriage, that the actual agreement was not made until the exchange took place when the order was exchanged for the ticket in Athens. Thus he concluded, on any of these alternatives, the binding contract was made in Greece.

He refused to exercise his residual discretion to decline the stay of proceedings, on the basis that the parties had agreed by the ticket to submit

to the jurisdiction of the Greek courts. He also considered that Yeldham J had wrongfully exercised his discretion concerning the most convenient forum for the action. Firstly, Greece was the place to which the contract had the closest and most real connection. Secondly, the proceedings could be futile as there was no prospect of recovering the judgment against the defendant. Thirdly, the Greek shipowner should not be put to the inconvenience and annoyance of having to submit to the New South Wales Court having no residence or presence in the country. Accordingly His Honour refused to grant the stay.

The shipowner's appeal was dismissed by majority.

The shipowner has obtained special leave to appeal to the High Court and the appeal will be heard in December.