

CASE NOTES

*DILLON & ORS v CHARTER TRAVEL CO LIMITED & ORS** *The "Mikhail Lermontov"*

In a judgment delivered on 20 November 1989 Carruthers J awarded damages to one of the passengers who travelled on the "Mikhail Lermontov" which was wrecked off the New Zealand coast on 16 February 1986. The judgment is of interest not because the owners were found liable (since, during the course of a lengthy hearing the owners had admitted liability) but because Carruthers J did not permit the owners to rely upon a Deed of Release which had been entered into by the plaintiff in settlement of her claim prior to the commencement of proceedings.

When was the contract of carriage made?

The first matter which Carruthers J deals with at some length in his judgment relates to the question which he posed "When was the contract of carriage made?" This is a matter which has exercised courts both in the United Kingdom and Australia for many years. Mr Justice Carruthers referred to the English decisions in *Hood v Anchor Line (Henderson Bros) Ltd*¹; *Hollingworth v Southern Ferries Limited* (the "Eagle")²; and *Daly v General Steam Navigation Co Limited* (the "Dragon")³. His Honour then turned to the two leading Australian cases, which are both cases decided in the High Court. The first was *MacRobertson Miller Airline Services v Commissioner of State Taxation (Western Australia)*⁴ and the more recent decision of *Oceanic SunLine Special Shipping Co Inc v Fay*⁵.

Mr Justice Carruthers referred to the *Hood v Anchor Line* decision as exemplifying the "conventional analysis", namely that the issue of a ticket is to be regarded as an offer by the carrying company, the opportunity being given to the passenger to consider its terms and the passenger is then taken to have accepted them upon undertaking the journey. Mr Justice Carruthers commented that there is nothing in that case which "inhibits a finding in an appropriate situation that there

* Provided by Ebsworth & Ebsworth, Solicitors, Sydney.

¹ [1918] AC 837.

² [1977] 2 Lloyd's Rep 70.

³ [1979] 1 Lloyd's Rep 257.

⁴ [1975] 133 CLR 125.

⁵ [1988] 62 ALJR 389.

was a contract of carriage effected before the issue of the ticket". He referred to the decision in the *Hollingworth* case in support of that suggestion. In that case Deputy Judge Ogden had concluded that the contract was made before the ticket had been delivered. That approach was also followed by Brandon J as he then was in the *Daly* case.

Carruthers J referred to the judgments in the High Court in the *MacRobertson* case, and said that Barwick CJ and Jacobs J:

based their decision on the ground that the conditions of the ticket were such that the exemption occupied the whole area of possible obligation, so that the airline did not assume or offer to assume an obligation to carry a passenger from which a contract would result. Stephen and Jacobs JJ held that the completed ticket was merely an offer by the airline to carry the passenger which was accepted by the passenger's subsequent conduct, and an offer in writing which was accepted orally or by conduct was not an agreement or a memorandum of agreement within the Act; Barwick CJ also expressed the view that apart from the conditions of the ticket, in the absence of an express provision to carry, an airline ticket did not constitute an agreement or memorandum of an agreement within the meaning of the Act.

Mr Justice Carruthers then went on to consider the recent decision in the *Oceanic Sunline* case in which the Greek shipowner had sought to strike out the statement of claim, or to stay the proceedings for want of jurisdiction, in reliance on the exclusive foreign jurisdiction clause contained in the passenger ticket. In the words of Carruthers J their Honours Wilson and Toohy JJ, in the High Court, distinguished the *MacRobertson Miller* case: "on the basis that the ratio decidendi of that case lies in the proposition that there was no agreement or memorandum of agreement in writing hence nothing that was chargeable with stamp duty". His Honour also quoted Wilson and Toohy JJ as saying:

That does not determine the question whether in the present case, there was a contract once the exchange order issued allocating a particular cabin to the respondent and with all remaining to be done being the exchange of the order for a ticket in Athens.

They found that there was nothing said on the exchange order which operated to include as part of the contract any terms and conditions on a ticket which was not going to be provided to the plaintiff until after he had paid his fare in Sydney and had arrived in Greece to begin the cruise. Carruthers J described the judgment of Dean J as being "in general agreement with the decision of Wilson and Toohy JJ". He also referred to the decision of Brennan J who had also "distinguished *MacRobertson Miller* and held that the contract of carriage was made when the exchange order was issued".

The plaintiff submitted that there were various periods of time, prior to the issue of the ticket, which could be regarded as being the time when the contract of carriage was concluded. One alternative

was at the time when the deposit was paid on 30 October 1985. Another was 9 November when the booking form was provided to the plaintiff's travel agent and owners sought the balance of the passage money. The reason for that was the fact that the booking form set out cancellation penalties and contained a good deal of information concerning the cruise. His Honour did not find it necessary to say that the contract did come into existence at either of those times but found that there was a "firm contract of carriage when the plaintiff paid the balance of the passage money on 6 December 1985". The plaintiff did not receive her ticket until 24 January, two weeks before sailing day. Carruthers J relied heavily for his finding that the contract came into existence prior to the issue of the ticket on the fact that she was liable to have the whole fare forfeited by reason of the cancellation provisions in the booking form if she declined to undertake the cruise. Mr Justice Carruthers referred to the fact that the plaintiff's plans for a cruising holiday could have been unilaterally terminated by the carrier, although she had paid the full passage money, if there was no concluded contract entered into prior to the issue of the ticket.

His Honour then went on to consider whether or not the contract made on 6 December 1985 contained the ticket terms and conditions. The booking form had stated that "contract of carriage for travel as set out herein will be made only at the time of the issuing of tickets and will be subject to the conditions and regulations printed on the tickets". Carruthers J held that "insufficient was done to bring to the notice of the plaintiff, before the fare was paid, the limitation clauses contained in the ticket terms and conditions". This is notwithstanding the fact that there was a statement in the booking form to the effect that "these conditions and regulations are available to all passengers at any CTC Cruises offices".

Accordingly the defendant was held not to be entitled to rely on the ticket conditions. It then sought to rely on the Deed of Release which had been signed by the plaintiff. In response to that defence the plaintiff relied on the provisions of the Trade Practices Act and the Contracts Review Act.

The plaintiff argued that the owners had been in breach of implied warranties which were incorporated into the contract of carriage by reason of the provisions of the Trade Practices Act. Particular reliance was placed upon section 74 which implies a warranty in relation to the contract for the supply of services:

That the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are applied.

Until its amendment in June 1986 there was a definition of "services" in section 74 which, inter alia, defined "services" as meaning

“services by way of . . . (c) the transportation of goods”. Since its amendment in 1986 the definition of “services” in section 74(3) has been amended to provide as follows:

A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under —

- (a) a contract for or in relation to transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or
- (b) a contract of insurance.

For the purposes of this decision Carruthers J was not concerned with the amendments made in 1986. Mr Justice Carruthers held that the implied warranty in section 74 did not apply to the contract of carriage entered into by the owner pursuant to which it agreed to carry the plaintiff “personally”. Mr Justice Carruthers did however hold that section 74 could apply to the transportation of the plaintiff’s personal luggage and thus as there was a breach of the implied warranty, by reason of the admission of liability made by the owners, there could be no limitation of liability relied upon in the ticket conditions, in so far as the luggage was concerned even if they otherwise applied.

The next question which arose under the Trade Practices Act, and which Carruthers J decided, related to the allegation made by the plaintiff that the owners had been guilty of misleading or deceptive conduct within the meaning of section 52 of the Trade Practices Act. Accordingly she sought an order pursuant to section 87(2)(a) of the Trade Practices Act 1974 declaring the whole of the releases which had been signed by her on 19 June 1986 to be void ab initio.

Mr Justice Carruthers then dealt in detail with the correspondence which had been entered into by the owners with the plaintiff after the shipwreck which made offers of reimbursement to her for the loss of her luggage and the loss of benefit of the passage fare which she had paid. Passengers had been requested to complete a form described as “Particulars of Losses”. There was also correspondence from the defendant and a solicitor who was representing the plaintiff prior to the commencement of the proceedings which indicated that the plaintiff may pursue a claim for personal injuries. It appears that the solicitor had requested a copy of the passage ticket from the owners but this was not provided. When making the offers of settlement which were made by the owners Carruthers J held that in referring to the “settlement of your claim” the owners were referring back to the “Particulars of Losses” form which the defendant had submitted, and which had not referred to her claim for personal injuries.

In one letter reference had been made to the limitation of liability under the ticket conditions which had purported to incorporate the Athens Convention limitation but that inadvertently omitted the word

“cabin” before the word “luggage” thus making the limitation provisions “incomprehensible” in the description of Carruthers J. The letter made reference to 833 units of account as the appropriate luggage liability. Mr Justice Carruthers regarded the unqualified assertion that that was the correct number of the units of account as being misleading in view of the fact that the relevant date for conversion of units of account is the date of judgment. The offer of settlement made no reference to the fact that the limitation of liability provisions in the ticket conditions might be struck down. Carruthers J was also critical of the fact that the owners had no material before them which would have enabled them to place an estimate upon the possible range of verdicts which the plaintiff might obtain if she were to litigate her personal injury claim and thus the settlement offer of \$4,786 made suggested to Carruthers J “a lack of bona fides on the part of the defendant”.

Carruthers J also found that there had been misleading and deceptive conduct by the owners in seeking to persuade the plaintiff to make her claim for loss of luggage on her own insurers and take that fact into account in determining whether to accept the offer which had been made by the owners to compensate her. Carruthers J summed up the defendant’s conduct in that regard as follows:

In other words, the plaintiff was led step by step into a position where she was (to the defendant’s benefit) clearly (without her knowledge) in breach of her contract of insurance.

Another matter concerning the owners’ conduct which Carruthers J found to be deceptive was their failure to reply to a letter which had been sent by the plaintiff’s solicitor, but instead to respond directly to the plaintiff. In concluding his remarks on the defendant’s conduct and whether or not there had been a breach of section 52 Carruthers J said —

In my opinion, the defendant pursued the course of conduct which I have outlined above with the intention of inducing the plaintiff to believe erroneously that her rights under the contract of carriage were confined to those heads of loss contained in the “Particulars of Losses” form. In that context the amount offered in consideration for the execution of the release and indemnity appeared reasonable.

To my mind, such course of conduct must be categorised as misleading or deceptive within the meaning of Section 52.

Carruthers J then went on to consider whether he should grant relief under section 87 of the Trade Practices Act. He referred to the fact that the plaintiff needed to establish that she was “influenced” by the conduct contravening section 52 before she could obtain such relief.

Although the plaintiff had been given legal advice by her former solicitor to the effect that she should not sign any document without having referred it to her, Carruthers J found that in all the circum-

stances the plaintiff had been so influenced. He reached this decision on the basis that the defendant had "created a sense of futility in the plaintiff's mind at a time when she was emotionally very vulnerable. She felt that the only reasonable course open to her was to acquiesce fully in the course proposed by the defendant, which, viewed objectively, could not be considered to be in her best interests".

Section 7 of the New South Wales legislation permits a court, where it finds a provision in a contract to have been unjust in the circumstances relating to the contract at the time it was made to decide to refuse to enforce any or all of the provisions of the contract. Section 9 of the Act sets out a number of matters to which the court is required to have regard in order to consider whether the contract is unjust. Mr Justice Carruthers found that most of the matters which he was required to consider had been made out in favour of the plaintiff. Accordingly she was entitled to relief both under the Contracts Review Act and the Trade Practices Act from the release and indemnity which she had executed and his Honour declared it to be void *ad initio*.

In relation to the question of damages Carruthers J ordered a complete restitution of the fare. The owners had argued that she had benefited to the extent of 8 days of the cruise and thus only a *pro rata* restitution, which had already been made, was necessary. Carruthers J took the view that the benefits which she had obtained over the eight days of the cruise had been "entirely negated by the catastrophe which had occurred upon departure from Picton".

Another head of damages claimed was "compensation for disappointment and stress at the loss of the entertainment and facilities for enjoyment which had been promised". This head of damage was based upon the decisions in the United Kingdom in *Jarvis v Swan Tours Limited*⁴ and *Jackson v Horizon Holidays Limited*⁵. The judge awarded a sum of \$5,000 under this head of claim. He also awarded her \$4,235 in respect of her loss of money, jewellery and baggage which was in accordance with the "Particulars of Losses" claim form she had completed. She also recovered damages for personal injuries — these were essentially the exacerbation of neck and shoulder pains which Carruthers J found had affected her capacity to enjoy life and perform household chores. Her propensity to suffer headaches had also been exacerbated and she had been left with serious emotional scars following the casualty, additional to those inflicted upon her by the death of her second husband prior to the casualty. \$35,000 was awarded for this head of damage.

⁴ [1973] 1 QB 233.

⁵ [1975] 3 All ER 92.