FEDERAL COURT OF AUSTRALIA

Advanced Energy Resources Pty Ltd v Bremer Lloyd Marine Logistics GmbH & Co KG [2017] FCA 1487

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| File number(s): |  |
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| Judge(s): | **SIOPIS J** |
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| Date of judgment: | 28 November 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for service of court process out of the jurisdiction – claim for damage to goods whilst on a voyage from Germany to Australia – service upon a corporate entity in Germany under the *Convention between the United Kingdom and Germany regarding Legal Proceedings in Civil and Commercial Matters*. |
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| Legislation: | *Carriage of Goods by Sea Act 1991* (Cth) s 10  *Admiralty Act 1988* (Cth) ss 4(3)(e), 4(3)(f)  *Federal Court Rules 2011* (Cth) rr 10.42, 10.43 |
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| Date of hearing: | 28 November 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 24 |
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| Counsel for the Plaintiff: | Mr P Graham |
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| Solicitor for the Plaintiff: | Clyde & Co |

ORDERS

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|  | | WAD 540 of 2017 |
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| BETWEEN: | ADVANCED ENERGY RESOURCES PTY LTD  Plaintiff | |
| AND: | BREMER LLOYD MARINE LOGISTICS GMBH & CO KG  First Defendant  ANABUKI WORKS CO LTD  Second Defendant | |

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| JUDGE: | SIOPIS J |
| DATE OF ORDER: | 28 NOVEMBER 2017 |

THE COURT ORDERS THAT:

1. The plaintiff has leave to serve the Originating Application dated 1 November 2017, the Statement of Claim dated 1 November 2017 and the Genuine Steps Statement dated 1 November 2017 in this matter on the first defendant in Germany by either of the following methods:
   1. in accordance with Article 6 of the *Convention between the United Kingdom and Germany regarding Legal Proceedings in Civil and Commercial Matters* done at London on 20 March 1928, by posting it to the first defendant’s registered address at Rembertistr. 28, 28203 Bremen, Bremen, Germany by Express Post; alternatively
   2. in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at The Hague on 15 November 1965, as acceded to by Germany.
2. There be no order as to costs.

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

REASONS FOR JUDGMENT

SIOPIS J:

1. This is an application for leave to servethe first defendant out of the jurisdiction. The first defendant is a corporate partnership registered in Germany.
2. The plaintiff’s application is to serve the originating application dated 1 November 2017, the statement of claim dated 1 November 2017, and the genuine steps statement dated 1 November 2017 (the Court papers) on the first defendant in Germany by one of two alternative methods.
3. The first method is by posting the Court papers to the first defendant’s registered address in Bremen, Germany, by express post in accordance with Art 6 of the *Convention between the United Kingdom and Germany regarding Legal Proceedings in Civil and Commercial Matters* done at London on 20 March 1928.
4. The alternative method of service is to serve the Court papers in accordance with the *Convention on the* *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at The Hague on 15 November 1965, normally referred to as the “Hague Convention”.
5. The plaintiff’s claim against the first and second defendants in this proceeding arises out of the damage done to four of the five wind turbines owned by the plaintiff which the plaintiff shipped from Germany to Australia. The damage was caused to the wind turbines during the course of the voyage of the ship, *Thorco Ranger of Hong Kong* from Germany to Australia.
6. The plaintiff alleges that the damage to the wind turbines was caused by the breach of the contract of carriage between the plaintiff and the first defendant. That contract is evidenced by the booking note dated 22 July 2016 issued by the first defendant which is annexed to the affidavit dated 16 November 2017 by Mr Trent O’Neill of the instructing solicitors for the plaintiff.
7. The plaintiff also alleges that the first defendant contravened Art 3 r 2 of the amended Hague Rules which the plaintiff alleges applied to the carriage of the wind turbines pursuant to s 10 of the *Carriage of Goods by Sea Act 1991* (Cth) and pursuant to the terms of the booking note.
8. The second defendant is the owner of the ship. The plaintiff’s claim in respect of the damage to the wind turbines against the second defendant is founded on an allegation of a breach of the second defendant’s duties as a bailee and its duty of care in negligence.
9. Under r 10.43 of the *Federal Court Rules 2011* (Cth) (the Rules), the Court has to be satisfied of a number of matters before granting a party leave to serve originating process out of the jurisdiction.
10. First, the Court must be satisfied that the Court has jurisdiction in the proceeding.
11. The *Admiralty Act 1988* (Cth) gives this Court jurisdiction in respect of a proceeding commenced as an action *in personam* on a “maritime claim”. A “maritime claim” includes a “claim for loss of, or damage to, goods carried by a ship” (s 4(3)(e)). It also includes a “claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise” (s 4(3)(f)).
12. Therefore, the claims made by the plaintiff against the first defendant fall within the ambit of a “maritime claim” and so I am satisfied that the Court has jurisdiction in the proceeding.
13. The second matter of which the Court must be satisfied is that the proceeding must be of a kind which is mentioned in r 10.42 of the Rules.
14. The plaintiff’s proceeding against the first defendant, in my view, falls within item 5 of r 10.42 which refers to a proceeding seeking to recover damage suffered wholly or partly in Australia caused by a tortious act or omission, wherever occurring.
15. In this proceeding, the plaintiff seeks a remedy against the first defendant arising under the *Carriage of Goods by Sea Act* and so the plaintiff can also call in aid item 15 of r 10.42 of the Rules.
16. Further, the plaintiff contends that it can rely upon item 20 of r 10.42 of the Rules. The plaintiff submits that the proceeding has been served on the second defendant, which has already entered an appearance, and that the first defendant is properly joined in respect of the proceeding. In my view, that is another basis by which the plaintiff satisfies the second requirement.
17. The third matter of which the Court must be satisfied is that the plaintiff is able to demonstrate that it has a prima facie case.
18. In that respect, Mr O’Neill’s affidavit includes among its annexures, documents which refer to the wind turbines being in sound condition at the time of loading, and also, a damage report which refers to the lashings securing the wind turbine bases failing and the bases becoming dislodged and damaged during the voyage when the ship encountered bad weather in the Bay of Biscay.
19. I am satisfied from this evidence that the plaintiff has demonstrated a prima facie case, in the sense that that term is used in an application for leave to serve out of the jurisdiction. That is, the plaintiff has demonstrated that there is evidence from which inferences are open which, if translated into findings of fact, would support the relief claimed.
20. On the materials before the Court on this ex parte application, there is no discretionary reason why the Court should not give leave to serve out of the jurisdiction.
21. As to the method of service, this case has an unusual aspect, namely, the plaintiff’s reliance on Art 6 of the *Convention between the United Kingdom and Germany regarding Legal Proceedings in Civil and Commercial Matters*, as the basis for effecting service on the first defendant in Germany by posting the Court papers by express post to the address of the first defendant in Germany.
22. There is evidence from Mr O’Neill that this long standing Convention is still in force and that Australia remains a party to that Convention. Further, there is evidence from a German lawyer who is a partner in the plaintiff’s firm of solicitors in Germany, which states that Art 6 of that Convention permits service by post on the first defendant on the basis that service on corporations by that method is permitted in Australia. So in the absence of any indications to the contrary, it seems as if this Convention is still in force, and may be used as the basis upon which to serve the Court papers upon the first defendant in Germany.
23. Mr Graham, who has appeared for the plaintiff today, has also asked that an order be made permitting an alternative means of service, namely, pursuant to the Hague Convention.
24. I am content to make the orders sought by the plaintiff.

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| I certify that the preceding twenty‑four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis. |

Associate:

Dated: 7 December 2017