Federal Court of Australia

Royal Caribbean Cruises Ltd v Browitt [2021] FCA 653

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **STEWART J** |
|  |  |
| Date of judgment: | 18 June 2021 |
|  |  |
| Catchwords: | **PRIVATE INTERNATIONAL LAW** – anti-suit injunction – whether proceeding against the first applicant in Florida is in breach of an exclusive jurisdiction clause – whether the first applicant is a party to or has rights under the exclusive jurisdiction clause – whether the second applicant can enforce the exclusive jurisdiction clause with respect to a proceeding against the first applicant – whether Florida proceeding is vexatious and oppressive**CONTRACTS** – whether carrier’s standard terms and conditions were incorporated into the contract of carriage – whether signature by customer of the travel agent’s terms and conditions which provided for bookings on the carrier’s terms and conditions was sufficient to incorporate the latter – whether reasonable notice of the carrier’s standard terms and conditions was given to the customer**AGENCY** – whether travel agent was agent for the customer in making the booking – whether notice of the carrier’s standard terms and conditions to the travel agent constituted notice to the customer – whether dual agency |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) Pt 5B.2 Div 2 |
|  |  |
| Cases cited: | *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51; [2002] 1 Lloyd’s Rep 157*Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49; 261 CLR 203*Baltic Shipping Co v Dillon* [1993] HCA 4; 176 CLR 344*Baltic Shipping Co v Dillon* *(The Mikhail Lermontov)* (1991) 22 NSWLR 1*City Finance Co Ltd v Matthew Harvey & Co Ltd* [1915] HCA 75; 21 CLR 55*Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* [1931] HCA 53; 46 CLR 41*Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45*CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345*Currie v Glen* [1936] HCA 1; 54 CLR 445*Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 425; [2001] UKHL 64*Federation Insurance Ltd v Wasson* [1987] HCA 34; 163 CLR 303*Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383*Homburg Houtimport BV and others v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715*Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837*Hospital Products Ltd v United States Surgical Corp* [1984] HCA 64; 156 CLR 41*International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* [1958] HCA 16; 100 CLR 644*Jones v Canavan* [1972] 2 NSWLR 236*Kelly v Cooper* [1993] AC 205*Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2020] NSWCA 155; 102 NSWLR 627*MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* [1975] HCA 55; 133 CLR 125*National Australia Bank Ltd v Dionys* [2016] NSWCA 242*New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 *Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] HCA 32; 165 CLR 197*Parker v Eastern Railway* *Co* (1877) 2 CPD 416*Petersen v Moloney* [1951] HCA 57; 84 CLR 91*Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (The New York Star)* (1980) 144 CLR 300*Qantas Airways Ltd v Rohrlach* [2021] NSWCA 48*Sargent v ASL Developments Ltd* [1974] HCA 40; 131 CLR 634*Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446*Sydney City Council v West* [1965] HCA 68; 114 CLR 481*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165*Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch); [2009] 2 All ER (Comm) 735“Damages for Disappointed Tourist: Applying the Contract Review Act” (1992) 13(2) Leg Rep 15Dal Pont GE, *Law of Agency* (4th ed, LexisNexis, 2020) |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 125 |
|  |  |
| Date of hearing: | 7–9 June 2021  |
|  |  |
| Counsel for the Applicants: | D Villa SC, C O Gleeson and W Liu |
|  |  |
| Solicitor for the Applicants: | HFW Australia |
|  |  |
| Counsel for the Respondents: | M Costello and D Porteous |
|  |  |
| Solicitor for the Respondents: | Gordon Legal |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1360 of 2020 |
|   |
| BETWEEN: | ROYAL CARIBBEAN CRUISES LTDFirst ApplicantRCL CRUISES LTD T/AS ROYAL CARIBBEAN CRUISES ABN 54 150 263 086Second Applicant |
| AND: | MARIE BROWITTFirst RespondentSTEPHANIE BROWITTSecond Respondent |

|  |  |
| --- | --- |
| order made by: | STEWART J |
| DATE OF ORDER: | 18 June 2021 |

THE COURT ORDERS THAT:

1. The proceeding be dismissed.
2. Subject to order 3, the applicants pay the respondents’ costs of the proceeding.
3. The parties have leave to apply for a different costs order to that in order 2 by filing submissions (of no more than 3 pages) in support of the costs order they seek within 7 days of these orders, in which event any party opposing such different costs order is to file submissions (of no more than 3 pages) in support of such opposition within 7 days thereafter.

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

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1. On 9 December 2019, Whakaari (also known as White Island) suffered a volcanic eruption that killed and injured a large number of people who were visiting the island that day as tourists. Whakaari is the peak of a submarine volcano in the Bay of Plenty about 48 km from the east coast of the North Island of New Zealand.
2. Amongst the people on the island when it erupted were three members of the Browitt family from Melbourne, namely Paul Browitt and his two daughters, Stephanie and Krystal. Stephanie and Krystal were both university students at that time. Stephanie was 23 years of age and Krystal had recently celebrated her twenty-first birthday. Their mother, Paul’s wife, Maria (Marie) Browitt, was not part of the tour party to the island. She had stayed on board the cruise liner, *Ovation of the Seas*, at Tauranga when her family undertook the day excursion to Whakaari.
3. Paul, Stephanie and Krystal suffered horrific injuries from the molten ash and rock that spewed from the erupting volcano. Krystal died that day from her injuries. Paul died from his injuries in hospital a month later. Stephanie suffered third-degree burns to more than 70% of her body and remained in a coma for over two weeks. She was in hospital for six months. Since then, she has had more than 20 surgeries, including the amputation of all her fingers and is still receiving intensive hospital outpatient treatment for her injuries. Marie has suffered unbearable loss and psychological injury. She is now Stephanie’s full-time carer.
4. The Browitts had sailed on the *Ovation of the Seas* on a cruise that departed from Sydney on 4 December 2019 and was due to return to Sydney about 12 days later after sailing around New Zealand in a clockwise direction calling at various ports there.
5. On 4 December 2020, Marie Browitt (**Mrs Browitt**), for herself and as representative of the deceased estates of Paul and Krystal, and Stephanie (**Ms Browitt**) commenced a proceeding in the Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, USA, for loss and damages suffered by them as a consequence of the volcano eruption. The defendant in the proceeding is Royal Caribbean Cruises Ltd (**RCCL**), a Liberian registered company headquartered and operating in Miami, Florida.
6. The Florida lawsuit alleges that RCCL contracted with White Island Tours for the provision of a shore excursion to Whakaari for passengers on board the *Ovation of the Seas* and that it sold tickets to Paul, Krystal and Stephanie for their excursion that day. A number of causes of action in tort are alleged against RCCL with respect to acts and omissions by it at its headquarters in Miami which are said to have caused the loss and damage that was suffered.
7. On 18 December 2020, RCCL and RCL Cruises Ltd (**RCL**), as first and second applicant respectively, commenced the current proceeding in this Court against Mrs Browitt and Ms Browitt, as first and second respondent respectively. The applicants say that the Browitts were passengers on the *Ovation of the Seas* pursuant to a contract of carriage between the Browitts, on the one hand, and RCL, on the other, as the disponent owner and operator of the vessel. They seek 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 New South Wales and an anti-suit injunction restraining Mrs Browitt and Ms Browitt from pursuing the Florida proceeding.
8. In short, the applicants seek to hold Mrs Browitt and Ms Browitt to the exclusive jurisdiction clause which they say governs the relevant relationship, and thereby force them to sue for their loss and damage in New South Wales. The applicants say that the exclusive jurisdiction clause was amongst the terms and conditions of the contract of carriage, referred to as the RCL AU terms (see [26] and [55] below), which they say was concluded when Mrs Browitt made the booking for the cruise for each of the Browitt family members at a **Flight Centre** Travel Group Ltd office.
9. Mrs Browitt and Ms Browitt, in contrast, wish to pursue their claims in the Florida proceeding. In that regard, it is agreed between the parties that if the claims pleaded in the Florida proceeding are proved, and irrespective of whether US Federal maritime law or Florida state law applies, the damages likely to be recovered in the Florida proceeding are significantly higher than could be expected to be awarded by an Australian court. Also, there are procedural advantages available to the respondents as of right (subject to disallowance by the Florida court) in the Florida proceeding, including the right to depose witnesses before trial, discovery rights, the right to trial by jury and the right to have damages assessed by a jury.

## The issues

1. The parties are agreed that the following issues call for determination:
2. Was Flight Centre the agent of Mrs Browitt, RCL or both?
3. Were the RCL AU terms, including the exclusive jurisdiction clause, incorporated into the contract of carriage by:
	1. reference in the Flight Centre terms and conditions signed by Mrs Browitt on 14 February 2019?
	2. the text of a Royal Caribbean brochure?
	3. links on the RCL AU website?
	4. links in emails?
	5. links in the electronic guestbook?
4. As to the construction of the RCL AU terms:
	1. is RCL entitled to invoke the exclusive jurisdiction clause to restrain the Florida proceedings?
	2. is RCCL entitled to rely on the exclusive jurisdiction clause?
	3. did the purchase of insurance exclude the operation of the terms (cl 1)? (The respondents later dropped reliance on the purchase of insurance as excluding the operation of the exclusive jurisdiction clause, so this issue fell away.)
	4. does the contract of carriage apply to shore excursions (cl 25)? If not, does the exclusive jurisdiction clause nonetheless operate to restrain the Florida proceedings?
	5. does the exclusive jurisdiction clause permit a proceeding to be brought in the Federal Court of Australia sitting in New South Wales, and if not, what consequence follows from the commencement of this proceeding (cl 1, cl 37/38)?
	6. does the exclusive jurisdiction clause cover the Florida proceeding?
5. Is RCCL entitled to relief on the basis of the RCL AU terms?
6. Is the Florida proceeding vexatious and oppressive such that RCL and RCCL are entitled to an anti-suit injunction?
7. Neither side of the case contended that any of the issues is to be decided other than with reference to Australian law. The principal issue, which is one of contract formation, is correctly to be decided in this case with reference to the municipal law of the forum: ***Oceanic Sun Line*** *Special Shipping Co Inc v Fay* [1988] HCA 32; 165 CLR 197 at 225 per Brennan J.
8. It was accepted that in concluding the booking, Mrs Browitt acted for herself and each member of her family for whom she made the booking.
9. As will be seen, I have concluded that although the Browitts were bound by the RCL AU terms, the Florida proceeding is not in breach of the exclusive jurisdiction agreement in those terms because RCCL is not a party to the agreement and RCCL does not enjoy the benefit of it. Also, there is no basis for the alternative case that the Florida proceeding is in any event vexatious and oppressive such as to justify an order restraining Mrs Browitt and Ms Browitt from pursuing it. Because of those findings, there is no need to address issues 3(d)-(f).

## The witnesses

1. There was evidence from nine witnesses called by the applicants, none of whom was required for cross-examination. For the most part their evidence went to proving the contractual relationships between RCCL and RCL and between them and other entities involved in providing cruise packages to consumers. It also went to the development and publication of their contractual terms and conditions, brochures and websites, and to some tracking of internet activity by devices said to be associated with the respondents.
2. The respondents relied on the evidence of Mrs Browitt, Ms Browitt and Alisha Clarke. Mrs Browitt and Ms Clarke were required for cross-examination. Their evidence concerned the circumstances of Mrs Browitt booking the cruise in question for her family. Ms Clarke was a travel consultant employed by Flight Centre who assisted Mrs Browitt in choosing an appropriate cruise and making the booking.
3. I am satisfied that both Mrs Browitt and Ms Clarke were truthful witnesses and attempted to do their best to truthfully answer the questions that were put to them. That said, Ms Clarke did not have a clear independent recollection of her interactions with Mrs Browitt and understandably relied to a significant extent in answering questions about those interactions on the documentary record and on her usual practice when dealing with customers, and possibly with reference to what her usual practice should have been.
4. Mrs Browitt explained in her affidavit that as a result of what has happened to her and her family since the volcano eruption, she does not have a strong recollection of the events of booking the cruise. That is not only understandable, but also to be expected. She has suffered unspeakable loss and consequent trauma which explains not only her weak memory of the events of the booking but also the frustration that she evidently experienced with the fine detail of some of the questioning. That may have led her on occasion to express matters more emphatically than the facts would otherwise support. I approach her evidence bearing that in mind.

## The material facts

### The applicants

1. As indicated, RCCL is a Liberian incorporated corporation that is registered in the State of Florida as a foreign profit corporation. RCCL is the owner of the international brand, Royal Caribbean International, as well as other international cruising brands. Its business is primarily managed from Miami, Florida. It operates internationally through various subsidiary companies, one of which is RCL.
2. At all material times, RCCL’s head office was located in Miami, Florida. Also, RCCL’s Global Tour Operations department was located at its head office. That department was responsible for developing, operating and setting policy for Royal Caribbean International’s shore excursion program, and had approved the onboard promotion and sale of the excursion to Whakaari undertaken by members of the Browitt family on 9 December 2019.
3. RCL is a company incorporated in the United Kingdom with branch offices in Australia and New Zealand, as well as in a number of other countries. The Australian branch operates as a local booking office from premises in North Sydney. It is a foreign company registered in Australia under Pt 5B.2 Div 2 of the *Corporations Act 2001* (Cth). RCL is involved in the sales and marketing of cruises operating under the Royal Caribbean International brand in Australia and New Zealand.
4. The cruise ship, MV *Ovation of the Seas,* is owned by Ovation of the Seas Inc, a Liberian registered company. The vessel is flagged in the Bahamas. The vessel has a gross tonnage of 168,666 gt, length overall of 347 m, width of 41 m, a passenger capacity of 4,180, and was launched in February 2016. In short, the vessel is a modern, large and luxurious cruise liner.
5. In 2019, RCL was the operator and bareboat charterer of the vessel. During that time, the vessel operated primarily between Australia and New Zealand.
6. RCCL was engaged by RCL under a series of contracts to discharge functions on board the vessel. These included contracts in respect of crewing services and marketing and selling shore excursions to guests on board the vessel.
7. Gavin Smith, RCL’s Vice President and Managing Director for Australian and New Zealand markets, gave evidence that under an Onboard Services Agreement RCCL was engaged by RCL to perform various onboard services for RCL in connection with RCL’s operation of the vessel. He referred to a copy of an agreement which does not list the *Ovation of the Seas* in the list of vessels covered by the agreement and is incomplete in respect of the services that it is said to cover, some pages of Exhibit B to the agreement apparently having been omitted. However, since there is no other evidence on this question and it was not challenged, I infer from Mr Smith’s evidence that at some time subsequent to the execution of the agreement it was made to apply to the *Ovation of the Seas* as well as the various other vessels listed in Exhibit A to the agreement. From the part of Exhibit B in evidence, I infer that the onboard services covered by the agreement were hospitality-related services.
8. The responsibilities of RCL in Australia included local provisioning of the vessel, immigration and customs services, boarding of customers and port management, local pricing, the development of local terms and conditions to be applied to Australian residents booking on Royal Caribbean International branded cruises from any port internationally as well as any guests wherever located who book cruises marketed by RCL in Australia, a local sales team and a local marketing team.
9. From time to time, RCL developed and published standard terms and conditions of carriage of passengers for the Australian market. During 2018 the terms and conditions were reviewed and updated. It is common ground that the terms and conditions so updated and published from October 2018 were the terms and conditions that RCL intended by various means to make applicable to passenger cruises thereafter. I will refer to them as the **RCL AU terms**. The principally relevant terms are extracted at [55] below. The dispute in the case is whether the RCL AU terms applied, not which version of RCL’s terms and conditions applied.
10. From RCL’s perspective, all bookings for Royal Caribbean International cruises which depart from Australia are required to be made through RCL’s Australian booking office which is responsible for the commercial performance of cruises from Australia. For the purposes of marketing and efficiency of booking a cruise, a separate website (or uniform resource locator – URL) exists for each market in which Royal Caribbean International cruises operate. There is thus a separate URL for Australia, www.royalcaribbean.com.au (the **RCL AU website**).
11. In the period 28 November 2018 to 14 February 2019, the homepage of the RCL AU website contained a link labelled “AUS T&Cs” in the footer of the page. The document accessible at that link was in that period the RCL AU terms.
12. With effect from 1 January 2019, RCL had an agreement with Flight Centre and Australian OpCo Pty Ltd (whose participation is not relevant to this case) to facilitate the sale of cruise tickets marketed under the Royal Caribbean International brand. Material terms of that agreement are the following:
13. Flight Centre appointed RCL as a supplier to make “the Product” (i.e., cruise packages provided by, amongst others, Royal Caribbean International) and RCL appointed Flight Centre as its retail sales agent to sell the Product and to perform “the FCL Services” (i.e., various services relating to cruise packages including promoting Cruise Packages, fielding enquiries made to Flight Centre by customers regarding Cruise Packages and “executing Cruise Packages customer terms and conditions as agent on behalf of RCL” where “Cruise Packages” was defined as a reservation by Flight Centre for cabin accommodation with RCL on various cruises) (cl 3.1 read with Sch 1 item 6 and Sch 2).
14. Flight Centre trading as, relevantly, **Infinity** Cruising (referred to in the agreement as “the Wholesaler”), appointed RCL as a supplier to make the Product available for sale and RCL appointed Infinity as its wholesale agent to sell the Product and to perform “the Wholesaler Services” (i.e., services to be provided by Infinity for RCL relating to the Product including preparation and distribution of Product flyers, promoting the Product to retail prospects and fielding enquiries made to Infinity by customers regarding the Product) (cl 3.2 read with Sch 1 item 6 and Sch 3).
15. Flight Centre and Infinity would be entitled to commission on sales as set out in the agreement (cl 4).
16. Flight Centre and Infinity would inform all customers about the existence of the requirements and booking conditions applicable to the Product (cl 7.1).
17. Each party undertook to keep the contents of the agreement strictly confidential and to ensure the security of any “Confidential Information” which was defined to include the agreement and “all discussions and negotiations between the parties in relation to this Agreement” (cl 11).
18. As at February 2019, there were two Royal Caribbean International branded brochures published, one or both of which were available at the Flight Centre branch in Craigieburn. One was a brochure for cruises only in the Asia and South Pacific regions (the 2018-2020 Asia – South Pacific brochure) and the other was for various regions around the world including Asia and the South Pacific (the 2019-2020 worldwide brochure). Both brochures contained certain details of the available cruises in the periods indicated in the Australia / New Zealand region. The details for each cruise included the name of the ship, a small indicative map showing the planned route including planned ports of call, a list of ports of call and pricing.
19. Adjacent to the pricing of the cruises was a symbol, a tilde (~) in one case and a superscript triangle (∆) in the other, and elsewhere on the page or the facing page next to the symbol was script saying:

Prices are per person (twin share) and conditions apply. See page 66 [or 93] for details.

1. At the page number referred to, being page 66 in the one case and page 93 in the other, began several pages of terms and conditions in very small print. The terms and conditions in both brochures were the same, and they were materially the same as the RCL AU terms.

### Booking the cruise

1. Prior to booking the cruise in question, Mrs Browitt had previously undertaken three cruise holidays, all of them with her children but only two also including her husband. The most recent two cruise holidays had been booked by her with Alisha Clarke at the Flight Centre travel agency office in Craigieburn, Victoria, near where the Browitts live. The previous cruises had not included New Zealand, having been to Vanuatu and New Caledonia, and had not been on a ship as big as the *Ovation of the Seas*, so in making enquiries about booking the cruise in question Mrs Browitt knew that she wanted a cruise to New Zealand and that it should be on board the *Ovation of the Seas*. Also, she needed it to be at the end of the year during the university holidays. That was because the cruise was to celebrate Krystal’s twenty-first birthday at the end of November and both her daughters were students.
2. Prior to 4 January 2019, Mrs Browitt spoke to Ms Clarke about her needs which caused Ms Clarke to send to her an email on that day which outlined various options. On 8 February 2019, Mrs Browitt attended an appointment with Ms Clarke where the options were further discussed. As a result of that, on 13 February 2019 Ms Clarke emailed revised options to Mrs Browitt, all of which were for cruises on the *Ovation of the Seas* to New Zealand in or close to the window period available to the Browitts. From those options, Mrs Browitt and her family decided that the 12-night cruise departing on 4 December 2019 from Sydney was the one that they wished to take. That cruise was the subject of a special promotion, or sale, price associated with a travel expo.
3. In evidence, Mrs Browitt said that she had looked at the RCL AU website, possibly on a number of occasions, from which she got some of the details that she was interested in. That included looking to see what ships were bigger than *Explorer of the Seas*, the ship on which the family had undertaken its previous cruise, the ports of call on the cruise she was interested in, and what onboard amenities were available on the *Ovation of the Seas* including restaurants, cabin sizes and activities for the children.
4. On 14 February 2019, Mrs Browitt attended another appointment with Ms Clarke at Flight Centre in Craigieburn. It was the evidence of both Mrs Browitt and Ms Clarke that at that appointment, and on Mrs Browitt’s evidence possibly also the previous one on 8 February 2019, Mrs Browitt was shown by Ms Clarke a Royal Caribbean International glossy brochure which gave the details of various cruises. It is not clear which of the two possible brochures that were at that time available at Flight Centre at Craigieburn was shown to Mrs Browitt, but it does not matter as they are materially the same for present purposes.
5. Both Ms Clarke and Mrs Browitt say that all that Mrs Browitt was shown in the brochure was the itinerary and small map for the cruise in which she was interested, i.e., on the *Ovation of the Seas* to New Zealand during the university vacations at the end 2019, and that she was not shown and did not go to the terms and conditions. I accept that evidence which is inherently probable. Nevertheless, it is indisputable that the terms and conditions were available to Mrs Browitt in the brochure in the event that she was interested in them.
6. During the appointment on 14 February 2019, Mrs Browitt communicated her family’s choice of cruise to Ms Clarke who then captured the various details that were required on the booking system on her computer and printed a quote for the cruise. The document shows that it was printed on that day at 1:40 pm. Highlighting on the document, confirmed by Ms Clarke’s evidence, shows that Ms Clarke drew the principal details on the quotation to the attention of Mrs Browitt.
7. On Mrs Browitt’s confirmation of acceptance of the quote, Ms Clarke printed an invoice. That is recorded as having been issued and printed at 1:54 pm (there being separate recordings for the time of issue and the time of printing). I infer that printing the invoice required Ms Clarke to again access the booking system. The invoice is highlighted showing that Ms Clarke took Mrs Browitt through the principal details of what she was booking. Unlike the quote, the invoice included as part of the document three pages of booking terms and conditions. Some of those are highlighted, showing that Ms Clarke drew Mrs Browitt’s attention to those clauses.
8. The evidence of exactly what was done by Ms Clarke in taking Mrs Browitt through the terms and conditions is inconsistent. That is unsurprising for the reasons I have already referred to. Moreover, on the view that I take of the case, as will become apparent, it is irrelevant. Nevertheless, in case it should be relevant at some stage I will make findings on it.
9. Mrs Browitt’s evidence was that Ms Clarke highlighted the major parts of the invoice in taking her through it which was “a very quick thing”. She says that she was not told to read the terms and conditions and she did not read the terms and conditions. She also said that she did not have an opportunity to read the document because of the limited appointment time. There was no other evidence to support the contention that the available time for the appointment was constrained. There was also no evidence to suggest that even if there had been insufficient time in the appointment for Mrs Browitt to read the terms and conditions, there was a need for the booking to be concluded during the appointment rather than later after time had been taken to read the terms and conditions.
10. Ms Clarke’s evidence was that she and Mrs Browitt went through the terms and conditions together. She said that Mrs Browitt could have read the terms and conditions if she had wanted to. She said that she was trained to “go through the terms and conditions with clients” which meant “to point out particular parts of those terms and conditions and then get the customer to sign the invoice.” She accepted that it was part of her training and her practice to tell customers to read through terms and conditions before they signed them, but she was not asked and did not say that she had followed that practice with Mrs Browitt.
11. Ms Clarke said that she did not “go over” supplier terms and conditions with customers, only the Flight Centre terms and conditions. She accepted, however, that she endeavoured to disclose to her customers what the supplier terms and conditions were at the time of booking. She was not asked and did not say that she had done that with Mrs Browitt.
12. On the basis of that evidence I find that:
13. Ms Clarke took Mrs Browitt through the Flight Centre terms and conditions printed on the Flight Centre invoice by highlighting particular terms and explaining them, possibly explaining some of the other terms, but not telling Mrs Browitt that she must or should read them.
14. Had Mrs Browitt wished to read the terms and conditions, there was nothing stopping her from doing so before she signed the invoice.
15. Mrs Browitt’s attention was not drawn specifically to RCL’s terms and conditions, but had Mrs Browitt asked to see them they were readily available – both in the brochure and on the website – and she would have had the opportunity to read them before signing the Flight Centre invoice.
16. After that process of going through the invoice including the terms and conditions, Mrs Browitt dated and signed the invoice immediately below an acknowledgement as follows:

You acknowledge that you are 18 years of age or older and that you understand and agree with the above Booking Terms and Conditions and our Privacy Policy.

1. On that day and the next, Mrs Browitt paid a $200 deposit for each of the family members booked on the cruise, amounting to $800 in total. Under the terms in the Flight Centre invoice, the deposit once paid was non-refundable. The RCL AU terms (cl 30) provided that the deposit was non-refundable in respect of “non-refundable deposit promotions”, which I infer this booking was.
2. The booking by Ms Clarke for Mrs Browitt on the computer booking system on Ms Clarke’s computer terminal generated further documentation as between Flight Centre, Infinity and RCL as follows.
3. On 14 February 2019, a cover email and booking office summary generated by RCL for the booking was sent to Infinity. The cover email contained a hyperlink in the footer of the email labelled “AU Terms” which, if clicked on, took one to the RCL AU terms. Attached to the email was a “Cruise Offer Summary – Travel Partner Copy” and a “Cruise Offer Summary – Guest Copy”, both of which recorded “This holiday is provided by RCL Cruises Ltd” (i.e., RCL). The documents record an offer with an expiry date of 23 February 2019 by which date a minimum non-refundable deposit of $800 had to be paid in order to “avoid automatic cancellation”.
4. Timed at 2:50 pm on 14 February 2019, a cover email and Flight Centre invoice was sent by Infinity to Ms Clarke. The email is in the language of a concluded booking. For example, it opens with “Thank you for your booking” and closes with “Thank you for booking via i-cruise”. It stipulates for payment of the deposit and says that an invoice is attached. The attached document, obviously generated electronically for the purposes of preparing evidence for the case, reflects that although it was issued on 14 February 2019 at 1:54 pm (i.e., exactly the same time that the invoice that Mrs Browitt signed was issued and printed), it is recorded as having been printed on 14 December 2020 at 12:56 pm. Clearly because of that, it has information recorded which could only have been included in the invoice after the time of the email to which it was purportedly attached. That includes, for example, information and warnings about COVID-19 which in February 2019 was still unknown and that it was last updated on 8 December 2020. It also includes a record of the deposit having been paid in four payments of $200, two on 14 February 2019 and two on 15 February 2019. That accords with invoices that were tendered separately.
5. Nothing in either version of the invoice, i.e., that which was printed for and signed by Mrs Browitt and that which was emailed by Infinity to Ms Clarke, identifies which of RCCL and RCL was offering the cruise or operating the vessel.
6. The complete payment of the deposit of $800 for the booking triggered the generation of further documentation as follows.
7. A cover email, booking confirmation and cruise invoice summary generated by RCL for the booking was sent to Infinity on 20 February 2019. As with the offer email on 14 February 2019, it contained in its footer a hyperlink labelled “AU Terms” that I infer was linked to the RCL AU terms. Attached to the email was a “Cruise Invoice Summary – Guest Copy” and a “Cruise Invoice Summary – Travel Partner Copy”. Both those documents are dated 18 February 2019 and recorded that “This holiday is provided by RCL Cruises Ltd” (i.e., RCL).
8. Also, a booking confirmation invoice was generated and sent from Infinity to Ms Clarke at Flight Centre. It is dated 18 February 2019 and recorded the relevant details of the booking. As with the earlier Infinity invoice, it did not identify which of RCCL and RCL was providing the cruise or operating the vessel.
9. Later in October 2019, RCL or Infinity emailed Mrs Browitt further details of the booking including a ticket booklet and in November Mrs Browitt checked-in online with the assistance of Ms Clarke at Flight Centre in Craigieburn. As the contract for the cruise holiday had long-since been concluded, these events are not relevant to the question of what the terms of the booking were: *Oceanic Sun Line* at 228.

## RCL’s AU terms

1. RCL’s AU terms relevantly included the following:

INFORMATION, TERMS AND CONDITIONS

(Effective October 2018)

**1. Overview**

The following Booking Conditions together with our General Information and Guest Conduct Policy form the basis of your contract. All bookings are subject to these Booking Conditions. The parties to that 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.

**Please Note:** If you book a Royal Caribbean International cruise-only holiday in conjunction with other services such as flights, on-shore accommodation and/or ground transfers 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. The travel organiser’s own booking conditions will apply to your contract with your travel organiser. Please ensure you obtain a copy of these from your travel organiser before or at the time of booking to ensure that those terms are acceptable to you. 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. Please read these conditions carefully. 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). This is to ensure that we are given the opportunity to address and to attempt to resolve any issue you raise. Any verbal complaint must be put in writing and given to the supplier and us as soon as possible. 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 will only accept complaints from the lead name of a booking. If your complaint is written on behalf of other members of your travelling party, their full names and booking reference numbers must be clearly stated in the correspondence together with their authority for you to handle the complaint on their behalf. If you fail to follow this complaints procedure, your right to claim compensation may be affected or even lost as a result. If your booking is with an agency then all communication must go via them.

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.

## Issue 1: whose agent was Flight Centre?

1. The question that arises here is whether in concluding the booking Flight Centre acted as the agent of the Browitts or of RCL, or of both the Browitts and RCL. The answer to that question is significant with regard to the manner in which the Browitts were bound to a contract of carriage with RCL and hence what documents formed part of that contract, and also to an alternative basis of incorporation of the RCL AU terms relied on by RCL. That alternative basis relies on the submission that as the agent of the Browitts, the knowledge of Flight Centre with regard to the RCL AU terms is to be ascribed to Mrs Browitt.
2. The term “agency” is “used in the law to connote an authority or capacity in one person to create legal relations between the person occupying the position of principal and third parties”: *International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* [1958] HCA 16; 100 CLR 644 at 652 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ. An agent is “a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties”: *Petersen v Moloney* [1951] HCA 57; 84 CLR 91 at 94 per Dixon, Fullagar and Kitto JJ. See *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49; 261 CLR 203 (***ACCC v Flight Centre***) at [76] per Kiefel and Gageler JJ.
3. There is no question that Flight Centre was appointed as agent of RCL for the purpose of selling cruise packages on RCL’s customer terms and conditions. That is provided for expressly in the agreement between them as described at [29] above.
4. As to the question whether Flight Centre acted also as the Browitts’ agent, the following clause of the Flight Centre terms and conditions that Mrs Browitt signed on 14 February 2019 is relevant:

**Agency:**

We act as an agent for, and sell various travel related products as agent on behalf of, numerous transport, accommodation and other service providers, such as airlines, coach, rail and cruise line operators, as well as all of our wholesalers. Any services we provide to you are collateral to that agency relationship. *Our obligation to you is to (and you expressly authorise us to) make travel bookings on your behalf and to arrange relevant contracts between you and travel service providers. … All bookings are made on your behalf subject to the terms and conditions, including conditions of carriage and limitations of liability, imposed by these providers.* We can provide you with copies of the relevant service provider terms and conditions on request.

[Emphasis added.]

1. The respondents rely in particular on the sentences that I have underlined, and the applicants on the sentences that I have italicised.
2. On the plain wording of what was agreed between Flight Centre and Mrs Browitt, Flight Centre was authorised by Mrs Browitt to make the booking on her behalf subject to RCL’s terms and conditions, “including conditions of carriage and limitations of liability”. There can be no real question about that, and whether one characterises that as a relationship of agency or not is not to the point insofar as that question of authority is concerned.
3. Thus, the way I see it, the agency question is only really relevant to the applicants’ alternative basis for incorporation of the RCL AU terms relying on attributing Flight Centre’s knowledge of the RCL AU terms to Mrs Browitt. For reasons that will become apparent (under “Issue 2” below), my decision in this case does not turn on that alternative basis for incorporation. I will therefore address it only briefly.
4. The law recognises that an intermediary between two principals can act as agent of both, but that situation is fraught with special problems and cannot occur where acceptance of the appointment by the second principal would be inconsistent with the agent’s duty to the first, unless the agent makes the fullest disclosure to each principal of the agent’s interest and obtains the consent of each to the double appointment. See *Jones v Canavan* [1972] 2 NSWLR 236 at 242F per Jacobs JA; Dal Pont GE, *Law of Agency* (4th ed, LexisNexis, 2020) 280 [12.42].
5. The respondents submit, with particular reference to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* [1931] HCA 53; 46 CLR 41 at 50 per Dixon J, that even the language of “authorise” does not in this instance convey agency. That case was about vicarious liability and the “agent” did not have authority to conclude contracts on behalf of his “principal”; all he could do was solicit and obtain proposals and accept premiums: at 49. It is therefore of limited assistance in analysing the contractual relationship between the Browitts and Flight Centre.
6. The respondents also submit that Flight Centre could not have acted as agent for the Browitts because that would have put it in an impossible position of conflict of interests by owing conflicting fiduciary duties to both its principals.
7. In that regard, the fact of Flight Centre agreeing with RCL to keep various matters confidential and not to disclose them, including the details of their agency agreement which included the commission that Flight Centre would earn on the sale, put Flight Centre in a difficult position with regard to any agency for the Browitts, but it does not mean that the relationship is not one of agency – any problem for Flight Centre arising from the performance of its dual functions would be a problem entirely of its own making: *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51; [2002] 1 Lloyd’s Rep 157 at 187 [42] per Lord Steyn.
8. Not only would the fact of competing obligations not necessarily mean that there could be no dual agency, the agency contracts could have the result that there are no competing obligations:

In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

See *Hospital Products Ltd v United States Surgical Corp* [1984] HCA 64; 156 CLR 41 at 97 per Mason J.

1. In *ACCC v Flight Centre* at [78] per Kiefel and Gageler JJ, citing *Kelly v Cooper* [1993] AC 205 at 213-214 , it was said that the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether expressed or implied, as a consequence of which it is not possible to say that all agents owe the same duties to the principals: it is always necessary to have regard to the express or implied terms of the contract.
2. It is beyond dispute that there was a contract between the Browitts and Flight Centre. Since Flight Centre was RCL’s agent, that is an unusual situation – the usual circumstance is that the agent as intermediary has a contract with their principal, being the agency agreement, and concludes a contract between the third party and the principal but has no contract themselves with the third party.
3. The applicants rely on *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 (***Toll v Alphapharm***) at [78]-[80] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in support of the proposition that Flight Centre was a dual agent, but the analysis there is inapplicable because the duality under consideration was of the agent (Richard Thomson) acting for two principals (Ebos and Alphapharm) to conclude contracts for each of them with a third party (Finemores), not to conclude a contract between them.
4. In any event, in my view the wording of the Flight Centre invoice leads ineluctably to the conclusion that Flight Centre was appointed to act as agent for the Browitts in concluding the booking with RCL. The agency was very limited in scope, namely to make the agreed (i.e., as per the details set out in Flight Centre’s invoice) travel bookings for the Browitts with RCL “subject to the terms and conditions, including conditions of carriage and limitations of liability, imposed by [RCL]”.
5. As indicated, the real question here is whether, independently of the conclusion of the booking through the process of Mrs Browitt signing Flight Centre’s booking terms and conditions and paying the deposit and Flight Centre making the booking on RCL’s booking system, Flight Centre’s knowledge of the RCL AU terms can be attributed to Mrs Browitt. The point of law relied on by the applicants, with reference to *Sargent v ASL Developments Ltd* [1974] HCA 40; 131 CLR 634 at 658 per Mason J, is that as against a third party, the law imputes to a principal knowledge gained by their agent in the course of, and which is material to, a transaction in which the agent is employed on behalf the principal, under such circumstances that it is the duty of the agent to communicate it to the principal.
6. Ms Clarke’s evidence was that she knew that RCL’s terms and conditions were in the back of the glossy brochure which she showed to Mrs Browitt, she was aware that those were the terms and conditions on which the cruise line was offering to carry passengers on its cruises and that it was important that Flight Centre drew the terms and conditions to the attention of customers. Also, by the agency agreement between Flight Centre and the Browitts (i.e., the “Agency” clause in the Flight Centre invoice), Flight Centre was obliged to provide Mrs Browitt with copies of the relevant service provider terms and conditions on Mrs Browitt’s request – Flight Centre in effect offered the RCL AU terms to Mrs Browitt if she wanted them. Flight Centre therefore had notice of the RCL AU terms in the course of doing the booking for the Browitts and it was obliged to give that information to the Browitts if requested. The information was material to the transaction. In my view, notice of the RCL AU terms to Flight Centre is therefore to be imputed to the Browitts.

## Issue 2: were the RCL AU terms incorporated?

1. It is convenient to commence with the identification of some principles.
2. Dealing *first* with the case of the person sought to be held to a contractual term having signed a contractual document, in *Oceanic Sun Line* at 228-229, Brennan J said that if a passenger signs and thereby binds themselves to the terms of a contract of carriage containing a clause exempting the carrier from liability for loss arising out of the carriage, it is immaterial that the passenger did not trouble to discover the contents of the contract.
3. As an aside, it was suggested in argument that the contractual analysis of Wilson and Toohey JJ is to be preferred to that of Brennan J because Deane J (at 256) agreed with their Honours’ analysis thereby forming a majority of the five-member bench. However, Wilson and Toohey JJ were in dissent in the result in the case meaning that no ratio is to be found with reference to their judgment: *Federation Insurance Ltd v Wasson* [1987] HCA 34; 163 CLR 303 at 314 per Mason CJ, Wilson, Dawson and Toohey JJ. As Gaudron J (at 261) agreed with the contractual analysis of Brennan J, it is to Brennan J’s judgment that one must look to find the ratio on the contractual point. Gaudron J (at 266) agreed with the “clearly inappropriate forum” test as expressed by Deane J (at 247-248), so it is hence to the judgment of Deane J that one looks for the ratio on that point.
4. In *Toll v Alphapharm* there was a signed document, a credit application form. One of the points in the case was whether the contractual terms on the reverse of the signed form were incorporated. It was held that where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms: at [54]. The general rule was also expressed slightly differently, namely where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document: at [57].
5. There may be cases where the circumstances in which a document is presented for signature, or the presence in it of unusual terms, could involve a misrepresentation. There could also be circumstances in which one party would not reasonably understand another party’s signature to a document as a manifestation of intent to enter into legal relations, or of assent to its terms. See *Toll v Alphapharm* at [63]. No such circumstances are said to exist in the present case.
6. Dealing *secondly* with the case where the person who is sought to be held to a contractual term did not sign the contractual document, this being the so-called “ticket cases”, the issuer of the document cannot rely on the terms unless it gave reasonable notice to the other party that the document contains contractual terms. Notice involves notice that there is writing of a contractual nature and it is not necessary for the precise terms to be communicated. Also, if the document can reasonably be expected to contain contractual terms that is sufficient even if in the particular case the person sought to be held to those terms was not actually aware of them. See *Parker v Eastern Railway* *Co* (1877) 2 CPD 416 at 421-423; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837 at 843 (Lord Finlay LC), 845 (Viscount Haldane) and 848-849 (Lord Parmoor); *Sydney City Council v West* [1965] HCA 68; 114 CLR 481 at 485-486 (Barwick CJ and Taylor J), 491-492 (Kitto J) and 503 (Windeyer J); *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* [1975] HCA 55; 133 CLR 125 at 138 (Stephen J) and 143 (Jacobs J); *Toll v Alphapharm* at [54].
7. In the case of unusual or onerous terms, the notice requirement is more exacting and will generally require that attention is drawn to the nature of the particular term in question. It was held in *Oceanic Sun Line* by Brennan J (at 228-229) as ratio that where an exemption clause is contained in a ticket or other documents intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger’s notice.
8. In *Toll v Alphapharm*, with reference to that principle, it was said (at [53]-[54]) that there is no reason why it should apply only to exclusion clauses, that case being about an exclusion clause, and that the criterion by which a court might declare a contractual provision to be unusual or onerous is not always easy to identify. The principle applies to cases, such as ticket cases, in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document. That is when it is necessary that the party has done what is reasonably sufficient to give notice of such terms. See also *Baltic Shipping Co v Dillon* *(The Mikhail Lermontov)* (1991) 22 NSWLR 1 at 8 (Gleeson CJ) and 25 (Kirby P) (reversed on appeal but not on this point on which special leave to appeal had been granted but was rescinded, with Mason CJ for the Court stating that “there is no sufficient reason to doubt the correctness of the conclusion of the majority of the Court of Appeal on that point”: see “Damages for Disappointed Tourist: Applying the Contract Review Act” (1992) 13(2) Leg Rep 15; *Baltic Shipping Co v Dillon* [1993] HCA 4; 176 CLR 344 at 347); *National Australia Bank Ltd v Dionys* [2016] NSWCA 242 at [88]-[89] (Sackville AJA, with whom Macfarlan JA agreed) and [183]-[184] (White J).
9. *Thirdly*, where a party authorises an agent to contract on their behalf that party is bound by the terms on which the agent contracts: *Toll v Alphapharm* at [80]-[82].

### Issue 2(a): with reference to the Flight Centre terms and conditions

1. Mrs Browitt signed the Flight Centre invoice and acknowledged that she understood and agreed to the booking terms and conditions recorded in it. There was therefore a contract between Flight Centre and Mrs Browitt on the terms and conditions that formed part of the invoice regardless of whether Mrs Browitt was aware of particular terms or whether she had read the document.
2. The terms of the contract included authorising Flight Centre to bind Mrs Browitt to the relevant service provider’s “terms and conditions, including conditions of carriage and limitations of liability”. Ms Clarke concluded the booking contract on Mrs Browitt’s behalf through Infinity. RCL’s cruise offer summary sent on 14 February 2019 (see [48] above) was in effect the offer, and its cruise invoice summary on 18 February 2019 was in effect confirmation of the booking, the offer having been accepted by payment of the deposit. The signed agreement between RCL and Flight Centre / Infinity provided expressly that bookings would be on RCL’s “customer terms and conditions”, i.e., the RCL AU terms.
3. On that basis, Mrs Browitt’s booking was on the RCL AU terms and she and each member of her family for whom she made the booking became bound to them.

### Issues 2(b)-(e): other modes of incorporation

1. In view of my conclusion with regard to the incorporation of the RCL AU terms through the agency or representation of Mrs Browitt by Flight Centre, it is not necessary to deal in any detail with the other modes of incorporation relied on by the applicants. Had it been necessary, I would have concluded that RCL had given Mrs Browitt reasonable notice of its terms and conditions as forming part of the cruise booking through the agency of Flight Centre such as to cause them to be incorporated.
2. There are a number of factors which in combination lead to that conclusion:
3. It is reasonably to be expected that an ocean cruise booking will be subject to the cruise line’s terms and conditions, the contrary proposition lacking any plausibility and being contrary to experience as shown by the cases.
4. RCL had included reference to its terms and conditions adjacent to the prices of each cruise, including the cruise in question, in the glossy brochures that it published and distributed to travel agents, which references directed the reader to the back of the brochures where the terms and conditions were set out.
5. Ms Clarke showed Mrs Browitt one of the brochures and pointed out the itinerary for the particular cruise in question, which would have taken Mrs Browitt to the terms and conditions at the back of the brochure in the event that she had been interested in them.
6. Flight Centre included reference to the service provider’s “terms and conditions, including conditions of carriage and limitations of liability” and a statement that copies of the relevant service provider terms and conditions could be provided on request in the invoice that Ms Clarke had Mrs Browitt sign.
7. The reference to “conditions of carriage and limitations of liability” is sufficient to draw attention to a condition of carriage such as the exclusive jurisdiction clause.
8. Ms Clarke had easy access to such terms and conditions in the event that Mrs Browitt asked to see them, that being in the brochure, and she knew that they were there.
9. Mrs Browitt had a reasonable opportunity to read the terms and conditions prior to committing to the booking in the event that she was interested in doing so.
10. I would not have found that the inclusion of links on RCL’s website to the RCL AU terms resulted in their incorporation. The problem is that RCL’s website included links to “AUS T&Cs”, “NZ T&Cs” and “Cruise Contract” and it is not made clear to passengers or potential passengers which of those would apply. It might have been thought that the latter was the most obvious source of the applicable contract terms, but in fact it was not intended by RCL that it would be. Indeed, it is not clear what that document is intended to cover, but it could plausibly cover Mrs Browitt’s booking. It provides for different terms to the RCL AU terms, including Florida jurisdiction and, in certain instances, arbitration.
11. In those circumstances, RCL’s submission that Mrs Browitt was given reasonable notice of its terms and conditions through the link in its website must be rejected. Even an experienced contract lawyer would have difficulty identifying which terms and conditions that were accessible by link on the website were applicable.
12. RCL also relied on the hyperlinks in the emails from it to Infinity and an inscription “You are bound by the terms and conditions in the Royal Caribbean International Worldwide Cruises brochure” in the ticket booklet sent to Ms Clarke on 18 October 2019. I do not consider that the hyperlinks in the emails were sufficient to incorporate the terms and conditions because the emails were not sent to Mrs Browitt, or even to Ms Clarke, they contained links to “AU Terms” and “NZ Terms” without identifying which applied, and even though certain knowledge of Flight Centre could be attributed to Mrs Browitt, there is no basis to ascribe the knowledge of Infinity of a link in emails to it to Mrs Browitt. Insofar as the ticket booklet is concerned, as indicated already, it came long after the contract had been formed and could not alter its terms.

## Issue 3: the construction of the RCL AU terms

### Is RCL the carrier party to the exclusion of RCCL?

1. Logically, the first construction issue is whether RCCL is a party to the RCL AU terms. In that regard, it will be recalled that the overview in cl 1 of the terms provides that the parties to the booking contract are “yourself and either [RCCL] or [RCL], depending on which of those entities will be operating the cruise ship on which you sail (the ‘Ship Operator’)” (underlining added). The terms went on to provide that “‘we’, ‘us’, ‘ourselves’ and ‘Royal Caribbean International®’ means either [RCCL] or [RCL]” (underlining added).
2. Ordinarily, the construction “either … or” means one or the other, and not one, or the other, or both depending on context. I acknowledge that there are contexts in which “either” can mean “both”, as explained in *Currie v Glen* [1936] HCA 1; 54 CLR 445 at 453 per Starke J. There the example given was of a river overflowing “on either side”. However, in circumstances where “either” is used in conjunction with “or”, in ordinary usage a necessary or unavoidable choice between alternatives is presented.
3. In my view, the following factors lead to the conclusion that references in the terms and conditions to “Royal Caribbean International®” mean RCL to the exclusion of RCCL and that there is no place to interpret “either … or” as meaning RCCL and RCL:
4. only one of RCCL and RCL was contemplated as being, and could be, the Ship Operator;
5. the booking contract was envisaged to be between the passenger and the Ship Operator; and
6. the Ship Operator was as a matter of fact and by way of notice only RCL.
7. I do not accept, as submitted by the applicants, that the references to “we”, “us” and “ourselves” is indicative of more than one entity being included in the definition. Of the two possible entities, RCL and RCCL, both are corporations. Since the terms and conditions were drafted to refer to the parties in the first person, only the first person plural was available for use with reference to a corporation. That is to say, the terms and conditions could not have been drafted using “I”, “me” and “myself” with reference to a corporation. Thus, use of the first person plural does not indicate that more than one corporation was intended to be referred to.
8. It is also submitted by the applicants that some parts of the terms and conditions can only sensibly be read as referring to RCCL and not RCL, and others as referring to RCL and not RCCL, and on that basis they are both parties to the contract or can enjoy the benefit of it. The examples given include a provision relating to the minimum age of consumption of alcohol on sailings originating in North America, which is said to be applicable only to RCCL, and a similar provision relating to the minimum age of consumption of alcohol on sailings originating in Australia, which is said to be applicable only to RCL. I do not accept that submission for two reasons.
9. First, it is not apparent from the terms and conditions or context that only RCCL sails from North America and only RCL from Australia. Secondly, even if that were so, then in the case of sailings from North America RCCL would be the Ship Operator and hence the contractual carrier, and in the case of sailings from Australia RCL would be the Ship Operator and hence the contractual carrier. In either case, the provision referring to the other sailing would simply be inoperative and it therefore fails to support the applicants’ construction.
10. The applicants also submitted that some terms of the contract have effect or operate prior to the Ship Operator being identified and that they must therefore be taken to be referring to both RCL and RCCL. It do not accept that submission for two reasons.
11. First, it is provided in cl 2 that “[a] binding contract between us only comes into existence when we send out our Confirmation Invoice”. It will be recalled that in cl 1 it is said that the carrier party is either RCCL or RCL, depending on which of those entities will be operating the cruise ship, and that the passenger will be advised of which it is “at the time of booking and/or on your confirmation invoice”. There is thus no time after the point of contract formation in which the carrier party is not already identified.
12. Secondly, insofar as there are provisions within the terms and conditions which speak to a time prior to contract formation, for example the three listed ways to book a cruise holiday, those amount to merely the provision of information and not contractual terms. The terms and conditions as a whole perform two functions. One is to give information, which is indicated in their heading as “INFORMATION, TERMS AND CONDITIONS”, and the other is to set out operative contractual terms. The information provisions are just that; they are not contractual terms and cannot drive the construction of the contractual terms.
13. It follows that in my view the passenger’s contractual counterparty is only the Ship Operator, whichever of the Royal Caribbean entities that happens to be in respect of the particular cruise, to the exclusion of the other. In this case it is common ground that it was RCL.
14. Insofar as there was any suggestion that RCCL as a subcontractor of RCL for delivery of aspects of the cruise could rely on the exclusive jurisdiction clause itself, that approach is contrary to the long-settled law on Himalaya clauses. In order for a subcontractor to enjoy the protection of the principal contract the relevant clause in the principal contract must be worded sufficiently broadly to extend to the subcontractor, it must state that the contractor is contracting as agent for the subcontractor, the subcontractor must have authorised the contractor to agree to the clause for its benefit, and the third party must provide some form of consideration. See *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 474 (Lord Reid); *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (The New York Star)* (1980) 144 CLR 300; *Homburg Houtimport BV and others v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715. At least the first two of those elements is missing in this case.

### Which exclusive jurisdiction clause is applicable?

1. Turning now to the exclusive jurisdiction clause, there are really two exclusive jurisdiction clauses, one in the “Please Note” part of cl 1 and the other in cl 38 as quoted at [55] above. Although the applicants initially relied on only cl 1, on the basis that there was no relevant prejudice to the respondents in the applicants relying independently on cl 38, I was content to grant leave to the applicants to do so.
2. There are three relevant features to the jurisdiction clause in cl 1 which distinguish it from the jurisdiction clause in cl 38. First, it is in a “Please Note” provision which deals with the circumstances of a Royal Caribbean International cruise-only holiday having been booked in conjunction with other services such as flights, on-shore accommodation and/or ground transfers which are arranged or provided by a travel agent or tour operator. In those circumstances, it is provided that the carrier does not have any liability to the passenger but that if it is found liable on any basis, its liability and/or obligations to the passenger “will be no greater or different to the liability and obligations [it has] under these booking conditions to consumers who have a contract with [it].” It is in that context that the cl 1 exclusive jurisdiction clause is found whereas the cl 38 clause appears in the alternative circumstance of the passenger having a direct booking with the carrier.
3. Secondly, in cl 1 it is only the passenger who agrees to submit to the exclusive jurisdiction of the identified court, not the carrier. In contrast, the cl 38 clause states that “We both agree that …”. The language of “we both” most naturally means that both the carrier and the passenger agreed to the exclusive jurisdiction of the identified court. “We both” cannot mean both RCCL and RCL as it is not their agreement to the clause that is required; it is the passenger’s agreement that is required in order to be able to hold the passenger to the clause. There is also not another single instance of “both” being used anywhere in the 20 pages of RCL AU terms where it could be a reference to both RCL and RCCL.
4. Thirdly, the court is identified in cl 1 as “the court of that state”, i.e., New South Wales. In cl 38 the court is identified as “a court located in New South Wales, Australia to the exclusion of the courts of any other state, territory or country.” This could have had significance for issue 3(e), but, as explained, that issue falls away in view of other findings that I have reached.
5. The point for present purposes is that the exclusive jurisdiction clauses in each of cll 1 and 38 are materially different. Moreover, the clause in cl 1 appears in a context which makes it clear enough that it does not apply in the present case because Mrs Browitt did not book her cruise holiday in conjunction with other services such as flights, on-shore accommodation and/or ground transfers. It follows in my view that the exclusive jurisdiction clause in cl 38 is the only one available to RCL to rely on as against the respondents.
6. As I have indicated, under cl 38 both RCL and the Browitts agreed to the exclusive jurisdiction of “a court located in” NSW in respect of “any dispute or claim” between them about the cruise. RCCL was not a party to that agreement and it does not purport to confer any benefit on RCCL. There is simply no basis on which RCCL can rely on the clause.

### Can RCL rely on the clause in respect of the Florida proceeding against RCCL?

1. The applicants submit that although RCL was the operator of the vessel, fulfilment of its obligations to passengers pursuant to the contract of carriage was almost entirely delegated to RCCL. They refer to the crew management services agreement, the onboard services agreement and the excursions agreement which I have outlined at [23]-[24] above. They submit that RCCL’s functions under these agreements are essential to RCL’s performance of the contract of carriage. On that basis, they submit that “it makes objectively sound commercial sense for the terms and conditions providing for the resolution of disputes to refer to both RCL and RCCL.” They say that that construction is consistent with the principle that exclusive jurisdiction clauses in commercial contracts are not be narrowly construed because the courts to which the parties have agreed to submit the dispute should determine the disputes arising from the contractual relationship: ***Comandate******Marine*** *Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45 at [164]-[165] per Allsop J (Finn and Finkelstein JJ agreeing). See *Qantas Airways Ltd v Rohrlach* [2021] NSWCA 48 at [64]-[65] per Bell P (Bathurst CJ and Brereton JA agreeing) and *Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2020] NSWCA 155; 102 NSWLR 627 at [78]-[94] per Bell P (Payne and McCullum JJA agreeing) on the proper approach to the construction of exclusive jurisdiction clauses.
2. The applicants, with reference to ***Global Partners*** *Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383, submit that the jurisdiction clause should be interpreted to bind a non-party, namely RCCL, because RCCL was so closely involved in the performance of the carriage that it can be said that it is not a stranger to the terms and conditions.
3. The motivating idea behind the principle that jurisdiction clauses should not be narrowly construed is that parties are not likely to have intended “the inconvenience of having possible disputes from their transaction being heard in two places”: *Comandate Marine* at [165]. Several authorities to this effect are discussed in *Global Partners* at [60]-[65] per Spigelman CJ (Giles and Tobias JJA agreeing). The principle has a particular role to play with regard to interpreting what manner of dispute falls within the clause, i.e., subject-matter scope. It may also have a role to play in determining whether the clause responds to claims made against non-parties to the agreement, i.e., party scope. Even so, each contract must be interpreted in its context: *Global Partners* at [72].
4. In *Global Partners* a party to the exclusive jurisdiction agreement, which was in a partnership agreement, was held to be entitled to enforce it in relation to proceedings brought against non-parties. That was because the claims against the non-parties were relevantly identical to the claim brought against a party to the agreement, the counter-party who was being sought to be held to the agreement had agreed to conduct litigation “arising out of or in connection with” the agreement in the agreed forum, and the non-parties had a close involvement in the affairs of the partnership, as envisaged by the partnership agreement itself, and they had rights conferred upon them as indemnified persons under the partnership agreement. See *Global Partners* at [73]. It was held that the non-parties were not “strangers” to the partnership agreement: at [74]. On that basis, it was held that the obligation imposed upon the party that was sought to be held to the jurisdiction clause “should be interpreted to extend, at least, to the participants in the decision making processes envisaged by the [partnership agreement]”: at [75].
5. It is apparent that in *Global Partners* there were two particular features that led to the conclusion that the exclusive jurisdiction clause applied to disputes against non-parties to it. First, the clause in question was expressed to apply to disputes “arising out of or in connection with” the agreement and the disputes against the non-parties were such disputes. Secondly, the non-parties and the subject matter of the agreement were so closely intertwined as to indicate that the parties’ objective intention was for the exclusive jurisdiction clause to apply to claims against the non-parties.
6. Neither of those features is present in this case. First, cl 38 uses the wording of “any dispute or claim” against RCL. There are several indications in cl 38 that it is “any dispute” with RCL or “any claim” against RCL in relation to the cruise that is covered by the clause. These include that “We will only accept complaints…”, “We can only pay…”, and that there must be cooperation with “us” and “our insurers”, where, for reasons already given, “we”, “us” and “our” refer to RCL to the exclusion of RCCL. Also, if asked to do so, the relevant person “must transfer to us any rights they have against the supplier or whoever else is responsible” for the claim, i.e., other suppliers are strangers to the clause. The clause is thus not expressed in the broad language of “any dispute arising out of or in connection with” the cruise booking such that the claims against RCCL in connection with the shore excursion to Whakaari are not readily within the subject matter of the clause.
7. Secondly, the role of RCCL in relation to the cruise as expressed in the agreements between RCL and RCCL on which the applicants rely is not apparent from and does not arise from the booking contract. None of the “intertwining” present and decisive in *Global Partners* exists in the present case.
8. There is an additional feature of the cases cited in *Global Partners* as supporting the approach adopted there, namely ***Donohue*** *v Armco Inc* [2002] 1 Lloyd’s Rep 425; [2001] UKHL 64 at [60]-[61] per Lord Scott of Foscote and *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch); [2009] 2 All ER (Comm) 735 at [28]-[29] per Norris J. That feature, as expressed by Lord Scott in *Donohue*, is that it is necessary for the party wishing to rely on the clause to show that the claim being prosecuted in the foreign jurisdiction was one which if it succeeded would involve that party in some consequential liability. There is no suggestion in the present case that should the Browitts be successful against RCCL in Florida, that might lead to a liability of RCL to RCCL.
9. In those circumstances, cl 38 (or cl 1) does not extend to proceedings brought against RCCL so as to give RCL a right to enforce it.

## Issue 4: is RCL entitled to an anti-suit injunction based on breach of the RCL AU terms?

1. In view of the conclusion that I have reached above, namely that the Florida proceeding is not in breach of cl 38 (or cl 1) of the RCL AU terms, RCL is not entitled to an anti-suit injunction on the basis that the Florida proceeding is a breach by Mrs Browitt and Ms Browitt of the RCL AU terms.

## Issue 5: is the Florida proceeding vexatious and oppressive?

1. Mrs Browitt and Ms Browitt have elected to sue RCCL where it has its principal place of business and centre of control, namely Miami, Florida. That is in accordance with the maxim actor sequitur forum rei, i.e., the general rule that the plaintiff must sue in the court to which the defendant is subject at the time of the suit: *City Finance Co Ltd v Matthew Harvey & Co Ltd* [1915] HCA 75; 21 CLR 55 at 64 per Isaacs J. In the absence of RCCL being party to or covered by the exclusive jurisdiction clause in favour of NSW, and thus in the absence of the suit in Florida being in breach of that clause, it is hard to see any basis on which this Court might conclude that the Florida suit is vexatious or oppressive.
2. In *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345 (***CSR v Cigna***) at 391-392 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, it was recognised that there are two bases on which an Australian court might by anti-suit injunction prevent a party subject to its jurisdiction commencing or continuing a suit in a foreign forum. One basis is if the foreign proceeding interferes with or has a tendency to interfere with a proceeding pending in the Australian court. Thus, an anti-suit injunction may be granted when it is necessary for the protection of the court’s own proceedings or processes.
3. The other basis, which is quite apart from the inherent power of a court to protect its own processes, is that a court may in the exercise of its equitable jurisdiction make orders in restraint of unconscionable conduct or the unconscientious exercise of legal rights. Thus, if the bringing of legal proceedings involves unconscionable conduct or the unconscientious exercise of a legal right, an injunction may be granted by a court in the exercise of its equitable jurisdiction in restraint of those proceedings no matter where they are brought.
4. As there is no process or proceeding in this Court to be protected, the applicants rely on the equitable jurisdiction of the court. In particular, they rely on the “one well established category of case in which an injunction may be granted in the exercise of equitable jurisdiction”, namely that the proceeding in the foreign court is, according to the principles of equity, vexatious or oppressive. See *CSR v Cigna* at 393. In that regard, the equitable power to grant injunctions in restraint of litigation exists to serve equity and good conscience; it is not a power which involves a determination that proceedings instituted in a foreign court are vexatious or oppressive in the sense that they are an abuse of that court’s processes or, even, in the sense that they should be stayed by the foreign court on forum non conveniens grounds: *CSR v Cigna* at 394.
5. Given that there are no parallel proceedings on foot or contemplated in Australia, the Florida proceeding is where RCCL’s head office is located and where various acts and omissions by RCCL which are relied on in the Florida proceeding as giving rise to the liability of RCCL are alleged to have occurred, and Mrs Browitt and Ms Browitt enjoy certain legitimate juridical advantages in Florida (i.e., higher damages, assessment of damages by a jury, and certain procedural advantages already identified), the pursuit of the Florida proceeding is entirely legitimate and in no sense unconscionable.
6. In the circumstances, the applicants’ alternative basis for relief on the ground that the Florida proceeding is vexatious and oppressive must fail.

## Conclusion

1. For the above reasons, the applicants’ proceeding falls to be dismissed. I will give the parties the opportunity to make submissions on why the ordinary rule that costs should follow the event should not apply.
2. Finally, I acknowledge the constructive way in which the parties cooperated to limit the issues and the evidence and bring the matter to hearing efficiently and, I hope, cost effectively.

|  |
| --- |
| I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 18 June 2021