Federal Court of Australia

ANL Singapore Pte Ltd v Visy Paper Pty Ltd [2021] FCA 439

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| File number(s): | NSD 734 of 2020  NSD 735 of 2020 |
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| Judgment of: | **RARES J** |
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| Date of judgment: | 22 April 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for service out of the jurisdiction under r 10.43 of the Federal Court Rules – whether *prima facie* case for relief against defendants to be served in the Marshall Islands and Hong Kong – service in accordance with the laws of the Marshall Islands or *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* – *Held*: leave granted to serve out of jurisdiction |
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| Legislation: | *Federal Court Rules* *1979*  *Federal Court Rules 2011* rr 10.42, 10.43  *Business Corporations Act* (Marshall Islands) s 20  *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil on Commercial Matters* done at the Hague on 15 November 1965  *Marshall Islands Rules of Civil Procedure* (Marshall Islands) r 4(h) |
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| Cases cited: | *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376  *Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 24 |
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| Date of hearing: | 22 April 2021 |
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| Counsel for the Plaintiff: | Mr C. L. W. Street |
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| Solicitor for the Plaintiff: | Aus Ship Lawyers and Correspondents |

ORDERS

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|  | | NSD 734 of 2020 |
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| BETWEEN: | ANL SINGAPORE PTE LTD  Plaintiff | |
| AND: | VISY PAPER PTY LTD ACN 005 803 234  First Defendant | |
|  | VISY RECYCLING AUSTRALIA PTY LTD ACN 118 295 239  Second Defendant | |
|  | ANDPLASTIC TRADE LTD  Third Defendant | |

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| order made by: | RARES J |
| DATE OF ORDER: | 22 APRIL 2021 |

THE COURT ORDERS THAT:

1. The plaintiff have leave to file its Amended Originating Application dated 21 April 2021.
2. Leave be granted under r 10.43 of the *Federal Court Rules 2011* to the plaintiff to serve the third defendant, Andplastic Trade Ltd in the Republic of the Marshall Islands in accordance with the law of the Republic of the Marshall Islands with the following documents:
   1. Amended Originating Application dated 21 April 2021;
   2. Amended Statement of Claim dated 21 April 2021; and
   3. this order.
3. The plaintiff’s costs of the interlocutory application filed 8 September 2020 be the plaintiff’s costs in the cause.

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

ORDERS

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|  | | NSD 735 of 2020 |
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| BETWEEN: | ANL SINGAPORE PTE LTD  Plaintiff | |
| AND: | AUSINO COMMODITIES (HONG KONG)  First Defendant | |
|  | ANDPLASTIC TRADE LTD  Second Defendant | |

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| order made by: | RARES J |
| DATE OF ORDER: | 22 APRIL 2021 |

THE COURT ORDERS THAT:

1. The plaintiff have leave to file its Amended Originating Application dated 21 April 2021.
2. Leave be granted under r 10.43 of the *Federal Court Rules 2011* to the plaintiff to serve the first defendant, Ausino Commodities (Hong Kong) Limited in Hong Kong S.A.R. in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil on Commercial Matters* done at the Hague on 15 November 1965 with a copy of the following documents:
   1. Amended Originating Application dated 21 April 2021;
   2. Amended Statement of Claim dated 21 April 2021; and
   3. this order.
3. Leave be granted under r 10.43 of the *Federal Court Rules 2011* to the plaintiff to serve the second defendant, Andplastic Trade Ltd in the Republic of the Marshall Islands in accordance with the law of the Republic of the Marshall Islands with a copy of the following documents:
   1. Amended Originating Application dated 21 April 2021;
   2. Amended Statement of Claim dated 21 April 2021; and
   3. this order.
4. The plaintiff’s costs of the interlocutory application filed 8 September 2020 be the plaintiff’s costs in the cause.

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

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

RARES J:

1. These are two applications by the plaintiff, **ANL** Singapore Pte Ltd, for service out of the jurisdiction in respect of its claims for demurrage relating to containers loaded at Port Botany, Sydney and discharged at Jakarta, Indonesia. ANL supplied the containers to the shippers of cargos of waste plastic that were shipped on board vessels under contracts of carriage in which ANL was the carrier.
2. The basis on which ANL makes the claims is the same in each proceeding for the purpose of the present application, namely that they concern containers that ANL shipped on *MS Eagle* in the voyage that departed Port Botany on 13 June 2019. In both proceedings, ANL seeks to serve **Andplastic** Trade Ltd, a company incorporated in the Marshall Islands, in that country in accordance with its law. Andplastic is the third defendant in proceedings NSD734/2020 (the **Visy proceeding**) and the second defendant in proceeding NSD735/2020 (the **Ausino proceeding**). In the Visy proceeding, the first and second defendants are Australian companies, Visy Paper Pty Ltd, which has owned the business name “Visy Recycling” since 7 May 1991, and Visy Recycling Australia Pty Ltd (collectively, **Visy Recycling**). In the Ausino proceeding, ANL also seeks to serve the first defendant, **Ausino** Commodities (Hong Kong) Limited, in the Special Administrative Region of **Hong Kong**, in accordance with the *Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965 (the ***Hague Convention*)**.

## The principles for service out of the jurisdiction

1. The test for service out of the jurisdiction has been settled by the Full Court in *Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205 at 208 [10], where Finn, Weinberg and Rares JJ said:

As has been observed on many occasions, the prima facie case requirement has to be met at the outset, usually on an ex parte basis, and without the advantage of discovery and other procedural aids to the making out of a case: see eg *Merpro Montassa Ltd v Conoco Specialty Products Inc* (1991) 28 FCR 387 at 390. It “should not call for a substantial inquiry”: *WSGAL Pty Ltd v Trade Practices Commission* (1992) 39 FCR 472 at 476; see also *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549. For present purposes it is sufficient to say that a prima facie case for relief is made out if, on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed: *Western Australia v Vetter Trittler Pty Ltd (in liq)* (1991) 30 FCR 102 at 110. Or, to put the matter more prosaically as Lee J did in *Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd* [1996] FCA 376:

What the Court must determine is whether the case made out on the material presented shows that a controversy exists between the parties that warrants the use of the Court’s processes to resolve it and whether causing a proposed respondent to be involved in litigation in the Court in Australia is justified.

1. Although that was a case under the previous *Federal Court Rules* *1979*, the requirements in r 10.43 of the *Federal Court Rules 2011* are substantially the same. Relevantly, under r 10.43(4), it is necessary that ANL satisfy the Court that it has jurisdiction in each proceeding, the proceeding is of a kind mentioned in r 10.42 and the party has a *prima facie* case for all or any of the relief claimed in the proceeding.
2. Each proceeding falls within item 3 in the table in r 10.42, namely, it is in relation to a contract made in Australia, and ANL seeks, relevantly, an order for damages or other relief in relation to a breach of the contract.
3. For the purpose of r 10.43, I have acted on the evidence in the affidavits of ANL’s solicitor, Drew **James**. In the Visy proceeding, Mr James made affidavits on 7 September 2020, 27 October 2020, 19 April 2021 and 20 April 2021. In the Ausino proceeding, he made affidavits on 7 September 2020, 16 September 2020, 27 October 2020, 9 December 2020, 19 April 2021 and 20 April 2021.

## Service in the Marshall Islands

1. James **McCaffrey**, an attorney of the McCaffrey Firm Ltd in the Marshall Islands, wrote to ANL’s solicitors on 7 September 2020 about the law for service of process on corporations incorporated in that country. Mr McCaffrey said that r 4(h) of the *Marshall Islands Rules of Civil Procedure* requires a corporation to be served:

…by delivering a copy of the summons and of the complaint to the chief or head, or to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

1. Mr McCaffrey said that the *Business Corporations Act* (Marshall Islands) provides in s 20 that:

(2) The registered agent for a non-resident domestic or foreign corporation… shall be the Trust Company [of the Marshall Islands, Inc.].

…

(4) Service of process on a Registered agent may be made in the manner provided by law for the service of summons as if the registered agent were a defendant.

1. Mr McCaffrey opined that service on **Trust Company** of the Marshall Islands, Inc. would comply with the requirements of Marshall Islands law. Fortuitously, the address of Trust Company was the address given for Andplastic in all of the relevant documentation in both proceedings, including the waybills, namely, Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro, Republic of the Marshall Islands MH96960.

## Service in Hong Kong

1. Mr James’ evidence establishes that Ausino is incorporated in Hong Kong and that, as at 16 September 2020, it is recorded as a party to the *Hague Convention* on the Hague Conference on Private International Law’s website.

## The Visy proceeding – consideration

1. In the Visy proceeding, the contractual documents in evidence record that the contract was made by “Visy Recycling on behalf of Andplastic Trade Ltd”. No doubt out of an abundance of caution, ANL has sued both the owner of the business name “Visy Recycling” and the eponymous corporation together.
2. ANL is a wholly owned subsidiary of the French shipping company **CMA** CGM S.A. The two companies had made a container logistics **services agreement** on 22 December 2017, under which CMA provided containers to ANL for use in its business at rates set in the contract. On 19 June 2019, CMA invoiced ANL for, relevantly, the supply of 1000 containers during May 2019. In his affidavit of 20 April 2021, Mr James deposed that Nicholas **Slingsby**, ANL’s general counsel, had informed him that ANL had received from CMA under the services agreement and supplied to the shippers all the containers the subject of both proceedings
3. Based on Mr James’ evidence, ANL issued a booking confirmation on 11 June 2019 to “Visy Recycling” for carriage of a 40’ container CMAU7656680 (**container 680**) on *MS Eagle* from Port Botany to Jakarta with an estimated departure date of 13 June 2019. ANL’s standard form **booking confirmation** noted that 40’ containers containing plastic scrap or any other low value cargo would be accepted only on a freight prepaid basis, and when a shipper and or its agent booked containers, they accepted to be bound by the provisions of the carrier’s bill of lading.
4. Visy Recycling, on behalf of Andplastic, was named as shipper on the non-negotiable **waybill**, and the consignee was PT **New Harvestindo** International, Indonesia. The waybill recorded that container 680 had been shipped on board *MS Eagle* on 13 June 2019 filled with 81 bales of plastic scrap, and that there would be 14 days of free of use of the containers at the destination commencing from the official date of its availability at the terminal. The waybill also noted that, should the container remain in the terminal during that free time and incur storage costs, that cost would be to the consignee’s account.
5. The standard conditions on the reverse side of the waybill, as is usual, provided that the carrier was ANL, “**merchant**” was defined as including, among others, the shipper, consignee, receivers of the goods, any person owning or entitled to the possession of the goods and anyone acting on behalf of such person­, and “container” meant any container referred to on the face of the waybill in which goods may be unitised or otherwise packed.
6. Clause 11 of the waybill terms dealt with the consequences of the use of a container supplied by the carrier. The shipper was deemed to have accepted each container as suitable if the shipper packed the goods in a container covered by the waybill (cl 11.1). Under cl 11.4, the merchant was responsible for returning empty containers in the same order and condition as lent, leased or howsoever otherwise furnished to the shipper, and:

… the Merchant shall be liable for the payment of Container demurrage at the rates prescribed in the Carrier’s tariff rules or elsewhere until the Container(s) is returned to the Carrier.

1. Mr James said that ANL’s tariff for demurrage and detention in respect of imports into Indonesia applicable from 7 June 2019 provided, relevantly, for demurrage to accrue at the rate of USD92 per day. He said that ANL had calculated its claim on the basis that there had been an agreed extension of free time at Jakarta from 5 days to 21 days, and so it did not include any claim for the first 21 days. He said that, as at 31 May 2020, ANL claimed USD28,612 as demurrage during the 331 days after 5 July 2019 in which container 680 had either been not collected or not returned to ANL.
2. Mr Street of counsel for the plaintiff informed me that, in the Visy proceeding, there has been a conditional settlement between ANL, Visy Recycling and a third party, the details of which I told him did not need to be disclosed. He said that the third party involved in that settlement has yet not performed under it and that, unless and until that occurred, the Visy proceeding will not be resolved. Andplastic is not a party to that conditional settlement.

## The Ausino proceeding – consideration

1. The same demurrage rates and arrangements apply to ANL’s claims in respect of the 6 containers the subject of the Ausino proceeding, which were also shipped on board *MS Eagle* on 13 June 2019. The booking confirmation for the cargo is also dated 11 June 2019, and the waybill for the six containers also noted on its face that the shipper had accepted the terms and conditions, including the incorporation of the standard terms of its reverse and the applicable tariff on behalf of the consignee and owner of the goods.
2. Mr James’ affidavits in the Ausino proceeding revealed that Ausino claimed to have a defence. The defence was that the consignee, New Harvestindo, had received a delivery notice, and, as a result, Ausino contended that property in the goods within the 6 containers had passed. Ausino wished to contend that, whatever rights the waybill created in the consignee to receive the cargo, when New Harvestindo received the delivery notice, that event extinguished Ausino’s liability.
3. However, in my opinion, given the wording of cl 11.4 of the waybill, there is a *prima facie* case that Ausino will still remain liable for the performance of its obligations as “merchant” or shipper, regardless of any transfer of ownership. The validity of the proposed defence that Ausino foreshadowed will only be able to be determined if it establishes that its assertions are factually and legally correct.

## Conclusion

1. Accordingly, I am satisfied that, in each case, the requirements of r 10.43(4) have been established. There is a *prima facie* case that the containers either have not been collected at Jakarta, the port of destination, or returned to ANL since their arrival there, so that the demurrage claimed is owed. Whichever of the two Visy Recycling companies was the contracting party using the name “Visy Recycling”, together with Andplastic or Ausino, each was a person within the definition of “merchant” in the relevant waybill. If that waybill were presented at the port of destination, the person on whose behalf that was done also would assume contractual liabilities to ANL by that act.
2. I am satisfied that Andplastic can be served in the Marshall Islands in accordance with the law of that country, and that Ausino can be served in Hong Kong pursuant to the *Hague Convention*.
3. Accordingly I will make orders in both proceedings granting leave to effect service on Andplastic and Ausino.

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

Associate:

Dated: 29 April 2021