Princess Cruises v. Nicolazzo et al.

[Indexed as: Princess Cruises v. Nicolazzo]

97 O.R. (3d) 630

Ontario Superior Court of Justice,
Divisional Court,
Ramsay J.
June 2, 2009

Conflict of laws -- Jurisdiction -- Ontario plaintiffs booking cruise with defendant -- Plaintiffs embarking in Italy and disembarking in England -- Plaintiffs suing defendant in Ontario for negligence after cash was allegedly stolen from their stateroom -- Defendant not having place of business in Canada -- Trial judge erring in piercing corporate veil and finding that defendant was owned by corporation which had places of business in Canada -- Paragraphs 1(c) and 1(d) of art. 17 of Athens Convention on liability for the carriage of passengers and their luggage by sea not applying. [page631]

The plaintiffs booked a cruise with the defendant through a travel agent in Ontario. They embarked in Italy and disembarked in England. They sued the defendant for negligence after cash was allegedly stolen from their stateroom. The defendant brought a motion for summary judgment dismissing the action on the basis that the court lacked territorial jurisdiction. The motion was dismissed. The defendant appealed.

Held, the appeal should be allowed.

The Marine Liability Act, S.C. 2001, c. 6 governed territorial jurisdiction over the dispute. Section 37 of the Act gives the force of law to arts. 1 to 22 of the Athens

Convention on liability for the carriage of passengers and their luggage at sea. The trial judge found that the action could be brought in Ontario under paras. (c) or (d) of art. 17(1) of the Convention as the defendant had a place of business in Canada. The defendant did not have a place of business in Canada, but the trial judge relied on the fact that it was owned by C Corp., which does have places of business in Canada. The trial judge erred in equating C Corp.'s business with the defendant's business. There was no reason to lift the corporate veil. It was plain and obvious that the defendant had no place of business in Canada and that paras. (c) and (d) of art. 17(1) had no application.

Cases referred to

M.J. Jones Inc. v. Kingsway General Insurance Co. (2003), 68 O.R. (3d) 131, [2003] O.J. No. 4388, 233 D.L.R. (4th) 285, 178 O.A.C. 351, 41 C.P.C. (5th) 52, 127 A.C.W.S. (3d) 9 (C.A.); R. v. Hamilton, 2004 CarswellOnt 3214 (C.A.); Wittenberg v. Fred Geisweiler, 1999 CarswellOnt 1888 (Div. Ct.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 21(2)(b) [as am.], 25, 31

Marine Liability Act, S.C. 2001, c. 6, ss. 37, 38

Treaties and conventions referred to

International Marine Organization, Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, entry into force April 28, 1987, arts. 1-22, 2(1), (b), 17(1), (c), (d)

APPEAL by the defendant from the order of Deputy Judge Marcel Mongeon dismissing a motion for summary judgment.

Danile Dion, for appellant.

Richard Skibinski, for respondents.

[1] Endorsement by RAMSAY J.: -- The defendant appeals the order of the Small Claims Court dismissing its motion for summary judgment. The defendant claimed that the court lacked territorial jurisdiction over the action. An appeal lies to the Divisional Court without leave from the final order of the Small Claims Court: Courts of Justice Act, R.S.O. 1990, c. C.43, s. 31. The decision in question is a final order: M.J. Jones Inc. v. Kingsway General Insurance Co. (2003), 68 O.R. (3d) 131, [2003] O.J. No. 4388 (C.A.). Under s. 21(2)(b) of the Courts of Justice Act, I heard the appeal sitting alone. [page632]

[2] The respondents booked a cruise with the appellant. The booking was made in Hamilton through the respondents' travel agent. The respondents embarked in Italy and disembarked in England. They plead that during the cruise, about $5,000 worth of foreign currency was stolen from the safe in their stateroom due to the negligence of the defendant.

[3] The Marine Liability Act, S.C. 2001, c. 6 governs territorial jurisdiction over the dispute. Section 37 of the Act gives the force of law to arts. 1 to 22 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Article 2 of the Convention provides as follows:

> 1. This Convention shall apply to any international carriage if:
>
> (a) the ship is flying the flag of or is registered in a State Party to this Convention, or
>
> (b) the contract of carriage has been made in a State Party to this Convention, or
>
> (c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

[4] Canada is a State Party to the Convention (Marine Liability Act, s. 38). The contract was made in Canada. Therefore, under art. 2, s. 1, para. (b) of the Convention, the Convention applies to this carriage. (The other two preconditions may exist as well.)

[5] Article 17 of the Convention provides:

> 1. An action arising under this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention:
>
> (a) the court of the place of permanent residence or principal place of business of the defendant, or
>
> (b) the court of the place of departure or that of the destination according to the contract of carriage, or
>
> (c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
>
> (d) a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

[6] The learned motion judge held that under the Convention, the action could be brought in Canada (and therefore in Ontario) under paras. (c) or (d) of art. 17, s. 1. It is common ground that Canada is the domicile of the claimant, and that the contract was made in Canada, so the judge was right if the defendant has [page633] a place of business and is subject to jurisdiction in that state (Canada).

[7] The respondents contracted through their agent with Princess Cruise Lines, whom they named as defendant. Princess Cruise Lines is owned and operated by Princess Cruise Lines Ltd., a corporation having its head office in California. There is no objection to allowing the respondent plaintiff to sue Princess Cruise Lines Ltd. as Princess Cruise Lines.

[8] The motion judge, however, discovered through his own research on the Internet that the appellant plaintiff is owned by Carnival Corporation. Carnival Corporation reports itself to be one of the biggest vacation companies in the world. Carnival publishes its financial statements, and in them it deals with Princess Cruises and its other businesses in a consolidated fashion. Carnival has places of business in the Yukon Territory

and British Columbia, in which it conducts motor coach tours and dry-dock work as Holland America Tours and Princess Tours. There is no suggestion that Princess Cruise Lines Ltd. is involved in these businesses.

[9] The appellant objects to the use of Internet research as a basis for the judge's ruling. Whether or not the material was properly noticed, the judge should have let counsel know about it before the conclusion of argument so that they could deal with it in argument or by calling further evidence: R. v. Hamilton, 2004 CarswellOnt 3214 (C.A.), at para. 77.

[10] The point is academic, because I am of the view that the judge erred in equating Carnival's business with Princess Cruise Lines's business. The finding that Princess Cruises is a cruise brand of Carnival (rather than a cruise brand of Princess Cruise Lines Ltd.) is not supported by the evidence. Princess Cruise Lines Ltd. is the corporate entity that contracted with the respondents. There was no reason to lift the corporate veil. Small Claims Rule 5.06 had no application.

[11] The motion judge adverted to s. 25 of the Courts of Justice Act. That enactment directs the judge to decide all questions of fact and law in a summary way and allows such orders as are considered just, and agreeable to good conscience. It does not abrogate basic principles of procedural fairness, jurisdiction or statutory interpretation: see, for instance, Wittenberg v. Fred Geisweiler, 1999 CarswellOnt 1888 (Div. Ct.).

[12] The judge also supported his finding that the appellant had a place of business in Canada by the evidence that Princess Cruise Lines had ships that landed at Canadian ports from time to time. With respect, I consider it to be an error of law to use that fact to support an inference that the appellant had a place [page634] of business in Canada. At most, it could show that the appellant does business in Canada from time to time.

[13] It is plain and obvious that the appellant has no place of business in Canada. No genuine issue for trial remains on that question. Paragraphs (c) and (d) of s. 1 of art. 17 do not

apply. The action cannot be brought in Canada if art. 17 of the Convention requires it to be brought elsewhere.

[14] Paragraph (a) of s. 1 of art. 17 does not apply. Article 17 by its terms applies only if the court mentioned in one of the four paragraphs is located in a state party. The permanent residence or principal place of business of the defendant, the U.S.A., is not a state party. But para. 1(b) of art. 17 does apply, because the destination, the United Kingdom, is a state party. The Convention, therefore, specifies where the action may be brought. [See Note 1 below]

[15] The appeal is allowed, the action is dismissed and the order for costs in the trial court is quashed. The parties may make written submissions to costs in the form of a factum not exceeding five pages in length, to which may be appended a bill of costs and an offer to settle, if any. The deadlines for receipt of written submissions are 4:00 p.m. on June 9, 2009 for the appellant, June 16 for the respondent.

Appeal allowed.

Notes

Note 1: I do not know whether Italy is a state party. If it is, the repsondent has two choices of venue.
