THE UNSINKABLE MRS DILLON

OR

MRS THOMPSON'S REVENGE

A comment on *Baltic Shipping Co* v *Dillon*:
'The Mikhail Lermontov' (1991) 22 NSWLR1

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Introduction

In the the complex law that surrounds the nature, scope and operation of exemption clauses[1] amidst the 19th century shadows looms the thicket of the ticket cases and their human appendages.

Amongst the cases, one can extract *Thompson* v *London and Midland Scottish Railway Company*[2]. The case is well known, but can be briefly outlined for purposes of context. Mrs Thompson, who could not read, had an excursion ticket purchased for her by her niece (as Mrs Thompson's agent). On the back of the ticket were printed the words: "Excursion: for conditions see back". On the reverse of the ticket was a statement that tickets were issued subject to the conditions shown in the company's current timetables. These could be obtained for sixpence each and stated "Excursions tickets... are issued subject to the general regulations and to the condition that the holders ... shall have no rights of action against the company ... in respect of ... injury (fatal or otherwise) ... howsoever caused." Mrs Thompson was injured on the journey and sued the railway company for damages on the grounds of negligence on its part. The initial trial, before a Commissioner sitting in Manchester with a special jury, found that the railway company had not taken reasonable steps to bring the conditions of carriage to the notice of the plaintiff and the jury accordingly awarded damages. Argument then followed as to whether the jury were entitled to bring in this finding and it was held that as a matter of law when the ticket was accepted the contract was complete so there was no evidence on which the jury could justify their finding. On appeal to the King's Bench Division the Court held[3] that the fact Mrs Thompson was illiterate did not alter the legal position. In Lord Hanworth's words "The plaintiff in this case cannot read; but having regard to the authorities, and the condition of education in this country, I do not think that avails her in any degree".[4]

Sixty years later, with a sufficiency of litigation during the interim on the matter of notice of exempting provisions in contracts of carriage where passenger tickets or other similar documents had been issued, Mrs Dillon commenced her litigation against the Baltic Shipping Company arising from the foundering of the 'Mikhail Lermontov' in Marlborough Sound on February 16 1986[5]. This paper will essentially consider the judgements of the New South Wales Supreme Court and the Court of Appeals[6], It will focus on the issues of the legal status of the passenger

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1 See generally Coote *Exception Clauses* (1964); Greig and Davis *The Law of Contract* (1987) pp 592 - 666 4th cum supp 1992; Carter and Harland *Contract Law in Australia* (2nd ed 1991) pp 229-320; Starke, Seddon, Ellinghaus *Cheshire and Fiifoot's Law of Contract* (6th Aust ed 1992) paras 442-445; Livermore *Exemption Clauses and Implied Terms in Contracts (1986)* Guest (ed) *Chitty on Contracts* (26th ed 1989) Ch 14; Yates and Hawkins *Standard Business Contracts Exclusions and Related Devices* (1986).

2 [1930] 1 KB 41

3 Lord Hanworth MR, Lawrence and Sankey LJJ.

4 At p.46

5 The issue of damages for breach of contract for mental distress and suffering, the principal matter of the High Court decision, *Baltic Shipping Co* v *Dillon* 111 ALR 289 will not be examined.

6 (1990-1991) 21 NSW LR 614; (1991) 22 NSWLR1.

ticket, the question of notice of exempting provisions, the *Contracts Review Act* 1980 (NSW) and the balance of bargaining power between the parties with comment on the ambit of s74 of the *Trade Practices Act* 1974 (Cth) in cases of passenger carriage.

The background to the Dillon litigation

The facts concerning *Dillon and Others v Baltic Shipping Co Ltd*[7] are essentially as follows. Mrs Dillon, a fifty two year old widow in October 1985 responded to a cruise advertisement in a travel brochure for Charter Travel Company (CTC). Mrs Dillon, who had then been recently widowed, discussed with her daughter the possibility of them both taking a cruise at Mrs Dillon's expense. As a result, Mrs Dillon's daughter called in at Jayes Travel Service in Gosford and collected a brochure entitled "CTC Cruises December 1985 - May 1986". On October 30 Mrs Dillon and her daughter visited Jayes Travel Service where they booked a cabin and a deposit of $200.00 was paid. A document headed 'Statement of Account' was filled in by a Jayes Travel Service staff member. This document had on the reverse side the following statement.

> "*Booking Acknowledgment:* I/we the undersigned hereby acknowledge that we understand that Jayes Travel Service Pty Limited acts only as agents for the principals actually providing the relevant services and that all booking conditions governing our reservation are indicated on relevant brochures, receipts and tickets are agreed to, [sic] and acknowledge that we have received a copy of the brochure concerned, or if unavailable at the time of booking, have sighted and read the necessary conditions in an office copy provided by Jayes.
>
> Further, I/We are aware that: -
> (1) Any monies paid are subject to the conditions of cancellation as set down by the principals and in addition, in the event of cancellation we understand that we acknowledge Jayes right to cancellation fees in addition to cover Jayes reservation costs and/or documentation fees in connection with passports, visas, etc..."

Although there was provision for the passenger's signature Mrs Dillon was not asked to sign the document, nor did she do so.

On November 9 a member of Jayes Travel Service staff provided Mrs Dillon with a document headed "Booking Form CTC Cruises", bearing the CTC logo. The form included a box with words above it starting: 'This is not a travel document". Within the box were the words:

> "Contract of Carriage for travel as set out herein will be made only at the time of the issuing of tickets and will be subject to the conditions and regulations printed on the tickets. These conditions

7 (1990 - 1991) 21 NSWLR 614 Supreme Court of New South Wales (Admiralty Division) (Carruthers J).

and regulations are available to all passengers at any CTC Cruises offices.

Cancellations: Passengers are advised that in the event of Cancellation the following charges will apply:
(a) If advice is received up to 60 days before sailing, a service charge of $20 per booking.
(b) If advice is received within 60 days of sailing the Company reserves the right to retain the whole amount collected against the above travel arrangements."

Of two copies of this form the passenger kept the white duplicate. The ticket for the cruise arrived on 24 January 1986 and Mrs Dillon and her daughter subsequently departed on the cruise aboard the vessel 'The Mikhail Lermontov'.

Up to the 16 February 1986 the cruise was uneventful. On that date the vessel left Picton with a local pilot on board at 15.00 hours and sailed north east towards Cook Strait. The vessel took a course inside an island at the northern tip of Cape Jackson in Marlborough Sound where the vessel struck a reef. After an apparent attempt to beach, the Mikhail Lermontov, having taken water quickly sank at 22.50 hours off Point Gove. Mrs Dillon, in common with other passengers was not able to evacuate the vessel until ten minutes before it sank. Between the grounding and eventual rescue, Mrs Dillon (again together with other cruise passengers) experienced great physical and emotional distress. She was evacuated by the tender vessel of the inter island ferry 'Arahura'. From Arahura she was taken to Wellington and then quickly returned to Australia. All of Mrs Dillon's personal possessions that she had taken on board, including letters from her deceased husband, and her copy of the passenger ticket, went down with the ship.

On February 28, 1986, CTC wrote a letter to Mrs Dillon offering their deepest regrets at the sinking of the Mikhail Lermontov and making a full refund of the unused portion of the passage money in the form of a cheque for $787.50.

With respect to personal effects CTC advised Mrs Dillon to make a claim to her insurers promptly.

Mrs Dillon sought legal advice from a Gosford Solicitor's firm in late February or early March and they sent a letter on her behalf to the CTC stating that Mrs Dillon accepted the cheque and requesting a copy of the ticket. Mrs Dillon claimed on a travel insurance policy with Sentry Insurance and subsequently received from them a cheque for $970 on March 7 1986.

On March 11 1986 American Home Assurance (AMA) which had earlier requested a passenger list from CTC in order to settle claims from Mikhail Lermontov passengers wrote to "the Captains and Owners, 'Mikhail Lermontov' Baltic Shipping Co "stating that it (the AMA) intended to settle the claims from its policy holders expediously.

On March 12 the CTC wrote to Mrs Dillon asking her to complete and return a Particulars of Loss form and to submit any claim to her insurer without delay. The Particulars of Loss form ended with the following words:

> "This form and the supporting documentation should be forwarded to CTC Cruises, 6th Floor, 35 - 43 Clarence Street, Sydney, NSW 2000, not later than Friday 4 April 1986. It will then be considered in the light of the terms and conditions of the passage contract."

Mrs Dillon completed the form and took it to her solicitor who sent it with a covering letter to CTC stating that Mrs Dillon was "making the claim for loss of property without prejudicing or forfeiting her rights in any way to make a claim for personal injuries and nervous shock."

On March 26 Cigna Insurance Ltd wrote to CTC on behalf of a number of passengers who had been issued with policies covering loss of their luggage on the Mikhail Lermontov. Cigna stated that the company would become subrogated to all or some of the claims against CTC. Cigna further noted:

> "We are concerned that your company and/or vessel's owner may purport to limit liability for loss of luggage by reference to clauses 3 and 26 of your Standard Passenger Ticket Terms and Conditions. We have obtained legal advice that such purported limitation of liability may be unenforceable by virtue of Section 74 of the Commonwealth Trade Practices Act and also by virtue of the New South Wales Contracts Review Act, Section 7, with result that your company and the owner of the vessel are not in fact entitled to limit liability at all.
>
> Before endeavouring to settle any passenger claims directly with passengers, would you please advise whether your company and/or the owner of the vessel proposes to rely on the above-mentioned clause 3 and 26 of the Standard Passenger Ticket Terms and Conditions. Our company reserves its rights directly against your company and/or the vessel owner in the event that its subrogated rights are prejudiced by inducing passengers to sign release forms for less than their full entitlement."

In respect of the Particulars of Loss forms sent out by CTC to Mikhail Lermontov passengers Cigna pointed out that CTC had not, by so doing and requiring the completion and return, cancelled Cigna's rights under subrogation by any release that CTC may have asked clients to sign in full settlement of any losses in respect of the ship's sinking.

On April 8 CTC's solicitors wrote back to Cigna claiming that CTC was entitled to limit its liability if it chose to do so. In respect of sugrogation the solicitor's advised that Cigna's 'rights' were merely subrogated to that of the passenger and that if a passenger signed a release then that would end any rights that could be subrogated to Cigna.

On May 16 the CTC wrote the following letter to Mrs Dillon (which also went out to at least 115 other Mikhail Lermontov passengers).

"WITHOUT PREJUDICE
We acknowledge receipt of your Particulars of Losses Form recently lodged with us.

We advise that on your signing of the attached release form, we are prepared to pay an 'ex gratia' amount of $2865.00 in settlement of your claim.

Should you have any questions, please do not hesitate to contact the writer."

Attached to the letter was the following form:

"I/We ... of ... agree to accept from CTC Cruises on behalf of Charter Travel Company Limited, London, Baltic Shipping Company, Leningrad, and the vessel 'Mikhail Lermontov', the sum of ... in full satisfaction and discharge of all claims which I/We have or may have for personal injury, damage or loss and loss or damage to property including but not limited to luggage, baggage, parcels, bundles, effects, personal effects, money, negotiable securities, jewellery, ornaments, works of art, or other valuables arising out of or in any way related to my/our passage or carriage on the vessel 'Mikhail Lermontov' Cruise 561.

I/We further agree that this release may be pleased in bar to an action, suit or proceedings taken by me/us against either CTC Cruises Charter Travel Company Limited, Baltic Shipping Company or the vessel "Mikhail Lermontov' Cruise 561.

I/We further agree at all times hereafter to indemnify CTC Cruises Charter Travel Company Limited, Baltic Shipping Company or the vessel 'Mikhail Lermontov', including its Master, Servants and agents against all actions, claims, suits, damages, claims for costs or expenses whatsoever which may be taken by or made by any part against CTC Cruises, Charter Travel Company Limited, Baltic Shipping Company and the vessel 'Mikhail Lermontov', including its Master, Servants and agents, relating in any way to the losses, damages, and claims made by me/us.

Dated at .... the .... day of .... 1986.

....
....

WITNESS:
NAME: ....
SIGNATURE: ...."

On June 16 CTC wrote further to Mrs Dillon acknowledging receipt of the Particulars of Losses form advising that on signing the release form (a copy identical to that above) Mrs Dillon would be paid an 'ex gratia' amount of $4786.00 in settlement of her claim; no liability in any respect being admitted by

CTC. Mrs Dillon then executed the release and returned it to CTC, subsequently receiving the agreed sum from CTC.

Mrs Dillon took no steps to bringing a claim against CTC until after September 30 1986 on receiving advice from her current solicitor, stating an action was to be commenced against CTC by them on behalf of the insurance companies that had paid out for lost baggage and personal effects. Mrs Dillon was invited to joint the second stage of the court proceedings to prove loss and damage to passengers, after the first, to establish fault on the part of CTC had been heard. Mrs Dillon in a subsequent affidavit stated that she had signed the release sent to her by CTC after concluding that the task of making a legal challenge to the amount CTC offered was too daunting.

Legal Issues: Supreme Court of New South Wales (Admiralty)

Carruthers J, as Judge in Admiralty in the Supreme Court of New South Wales gave judgement in the action then brought by Mrs Dillon as plaintiff in *Dillon and Others v Baltic Shipping Co the 'Mikhail Lermontov'*[8] in the initial hearing.

He held that the contract of carriage was made when the balance of passage money was paid, at which time the shipowner asserted the right to have the whole fare forfeited under the cancellation provisions in the booking form if the cruise were not undertaken. The terms and conditions printed on the ticket formed no part of the contract of carriage.[9]

Carruthers J stated (obiter) that the contract of carriage constituted a supply of 'services' by way of transport within the meaning of s 74 (subsequently amended) of the *Trade Practices Act* 1974 (Cth) and the warranties therein applied to the carriage of Mrs Dillon's baggage and personal belongings. To the extent that the terms and conditions of the ticket sought to exclude restrict or modify the liability of the shipping company for breach of the warranties in s74, they would, if not otherwise void, have been invalidated by s68 of the *Trade Practices Act* 1974 (Cth).

He also held that Mrs Dillon was entitled to a declaration that the release form she had signed was void ab intio. This was so firstly, on the basis that it had been obtained in breach of s52 (1) of the *Trade Practices Act* 1974 (Cth) by a misleading or deceptive course of conduct.[10] Secondly, the release was void as being unjust, in the circumstances, within the meaning of s7 of the *Contracts Review Act* 1980 (NSW). This was by reason of the material inequality of bargaining power between the parties the plaintiff's diminished capacity to protect her interests because of her physical and emotional condition, the relative economic circumstances of the

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8 (1990) 21 NSWLR 614.

9 Applying *McRobertson Miller Airline Services v Commissioner of State Taxation* (W.A.) 1975 133 CLR 125. *Oceanic Sun Line Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, *Daly v General Steamship Navigation Co Ltd (The 'Dragon')* [1979] 1 Lloyd's Rep 257, considered

10 *Hogarth Galleries Pty Ltd v City Automobile Holdings Pty Ltd* (1986) ATPR (Digest) 40 - 006; *Dibble v Aidan Nominees Pty Ltd* (1986) ATPR 40 - 693 referred to.

parties, conduct constituting unfair pressure or unfair tactics and the circumstances in which the release was executed.

Further, the plaintiff was held to be entitled to compensation for disappointment and distress caused by the loss of the entertainment and facilities for enjoyment which she had been promised[11] together with compensation for loss of money, jewellery and baggage and damages for personal injuries and nervous shock.

The particular issues highlighted at the beginning of this paper, as addressed by Carruthers J will now be examined.

(a) ***The time at which the contract of carriage was made and its terms.***

Charter Travel had contested, on their part, that the contract was not made until the plaintiff accepted the ticket and went on the cruise. On that argument the terms and conditions on the ticket were part of the terms and conditions of carriage. Mrs Dillon's counsel, on the other hand, argued that the contract came into existence at the time the deposit was paid, or alternatively, when the passage money was paid, or alternatively, when the booking form was delivered. As a result, on this contention, the terms and conditions on the ticket formed no part of the contract.

Carruthers J referred to a number of leading authorities on the issues of when the contract of carriage was made and its relevant terms. The House of Lords in *Hood v Anchor Line (Henderson Brothers) Ltd*[12] found in that case a shipping company's purser had done what was reasonable in giving notice of the terms of carriage printed on the ticket issued (including a condition purporting to limit the company's liability for injury to £10) although the purser or his clerk were not aware of the conditions. Carruthers J categorised the analysis in the *Anchor Line* case and subsequent cases as "the conventional analysis", Carruthers J, however, noted that there was nothing in the *Anchor Line* case which prevents a finding that in an appropriate situation that a contract of carriage had been formed prior to the issue of the ticket. To support this view his Honour cited *Hollingsworth v Southern Ferries Ltd (The 'Eagle')*.[13]

Here the plaintiff, injured aboard a vessel in the Bay of Biscay was held to have concluded the contract on payment of the deposit so that a condition on the ticket (which transported to exempt the ferry company from any liability whatsoever for personal injury or damage to passenger's baggage and personal effects) delivered after payment of the deposit was of no effect.

In the *Southern Ferries* case Ogden DJ rejected the argument that mere knowledge of what the ferry company stated in the brochure was not sufficient to make the terms in the ticket, conditions of carriage. In his view the mere reference in the ferry company's brochure to conditions of carriage being printed on the inside of

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11 Applying *Jarvis v Swan Tours Ltd* [1973] QB 233 and *Jackson v Horizon Holdings Ltd* [1975] 1 WLR 14 68.

12 [1918] AC 837.

13 [1971] 2 Lloyd's Rep 70.

the ticket cover, was not sufficient to bring home to an intending passenger that their common law and statutory rights in respect of compensation for death or bodily injury by virtue of the shipowner's fault were to be removed.

Similarly in *Daly v General Steam Navigation Co Ltd (The 'Dragon')*[14] Brandon J (as he then was) held the payment of a £5s deposit for the Rosslare - Le Havre roll-on roll off passenger ferry to conclude the contract between plaintiff and the ferry company and so exclude the terms of the ticket (containing exempting provisions) from the contract. Brandon J stated:[15]

> "It seems to me that it would be quite wrong, on the facts of the present case at any rate, to hold that there was no concluded contract until Mr Daly received and accepted the ticket sent to him by the defendants' agents after he had paid them the balance of £83 in June. A summer holiday for a family has to be booked well in advance these days, and it is in no way unusual for bookings on a ferry like the *Dragon* to be made six months in advance, as was done in this case. If the contention that there was no concluded contract until the ticket had been issued and accepted in June is correct, it would follow that the defendants could at any time before they issued the ticket have ended what on that view would have been no more than negotiations for a contract, by telling Mr Daly that the whole thing was off, and leaving him to try and book fresh passages for himself and his family with another carrier only one month before their holiday date.
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> I do not believe that such a situation would be in accord with the intention of the parties, and I decline to hold that the transactions which took place had that effect."

In Australia the High Court considered the issue of notice of exempting terms in a ticket in *MacRobertson Miller Airline Services v Commissioner for State Taxation* (Western Australia).[16] The High Court had the specific issue before it of whether a completed airline ticket was chargeable with duty under the *Stamp Duty Act* 1921 - 1971 (WA) as an "agreement or any memorandum of agreement". The facts of the case were that the airline had issued a Mr J C Knight with an airline ticket in a standard form. The ticket contained two flight coupons, one from the Perth - Port Headland leg and the other from Port Headland to Perth.

Mr Knight had make known his requirements and was informed that a passage was available and when and the cost, and had then agreed to travel. A ticket was then issued in duplicate printed form, and was received by Mr Knight in return for payment and the ticket was subsequently used by him in an ensuing flight.

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14 [1979] 1 Lloyd's Rep 257.

15 AR 262.

16 (1976) 8 ALR 131. See Greig and Davis *Laws of Contract* (1987) p 240.

In order to determine whether the ticket fell within the provisions of the *Stamp Duty Act* 1921 - 1971 (WA) it was essential for the High Court to determine whether the issue of the ticket was merely an offer to be later accepted or rejected, or whether the agreement was concluded at or before the time of the issue of the ticket. If the latter was the case then stamp duty would be payable. The High Court on this point was unanimous that the ticket was not chargeable with duty under the *Stamp Duty Act* 1921 - 1971 (WA). However, to arrive at this decision it was necessary for the High Court to fully consider the rules relating to the formation of such contracts and to give particular attention to the method of formation as the key issue.[17]

Although the differing views of the judges in the High Court were noted by Carruthers J in his own judgement, the analysis of the contract in the *MacRobertson Miller Airline Services* case deserves fuller attention for the purposes of this paper.

The ticket at issue contained, inter alia, the following terms:

> "2 The Companies reserve the right at any time to abandon any flight or, whether the scheduled flight on which the passenger or goods were booked takes place or not, to cancel any ticket or booking of any passenger or goods or to carry the passenger for portion only of any booked flight. In the event of a flight being abandoned or altered by the Companies wholly or in part or a ticket or booking being cancelled by the Companies wholly or in part, the passenger shall be entitled only to a refund of so much of the passage money as shall be proportionate to the part of his flight so cancelled or abandoned and the Companies shall not under any circumstances be under any further or other liability to the passenger for failure to carry him at the booked or scheduled time or at all."

> "5 The Companies are not common carriers, and reserve the right to refuse to carry any passenger, baggage or goods without assigning any reason therefore."

The three judges differed markedly in their analysis of the law which was on the essential issue of whether the airline ticket was:

(a) merely an offer to be accepted or rejected; or
(b) part of an agreement concluded at or before the issue of the ticket.

Barwick CJ considered the ticket to be merely a receipt for payment of the fare and that the airline operator was not in contractual relations with an intending passenger until it had provided him (or her) with a seat on the plane. However the Chief Justice inferred that it would be otherwise if the ticket contained an express

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17 These issues are usefully considered by Powell *Acceptance by silence in the Law of Contract* (1977) 6 ABLR 260, at pp 264 - 268.

undertaking to carry the passenger on a particular flight, a likelihood he regarded as incongruous in the light of known airline operations.[18]

Jacobs J concluded that the ticket was an offer made by MacRobertson Miller Airline Services which Mr Knight had accepted wither orally or by conduct in taking the ticket immediately after payment of his fare.[19]

Stephen J offered the most detailed analysis of the authorities. He accepted that the convictional analysis of the formation of contracts for the carriage of passengers is to regard the ticket as the offer, the contract being made on acceptance of that offer by the passenger, usually by conduct.[20]

In support of this his Honour cited with approval dicta of Lord Denning MR in *Thornton v Shoe Lane Parking Ltd*[21]

> "... ticket cases of former times ... were concerned with railways, steamships and cloakrooms where booking clerks issued tickets to customers who took them away without reading them. In those cases the issue of the ticket was regarded as an *offer* by the company. If the customer took it and retained it without objection, his act was regarded as an *acceptance* of the offer ... based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms."[22]

Lord Denning had then proceeded to add that such analysis was a fiction and inappropriate to modern conditions. Not one person in a thousand, he estimated, did read such conditions before accepting a ticket. Any attempt to do so would probably result in a passenger missing their train (or in other contexts we can note plane, or even cruise ship).

While Stephen J agreed with Lord Denning that such an analysis (which is essentially that of the *Thompson* case and the myriad ticket case surrounding it) was inappropriate where no opportunity existed to consider or even decline the terms he did not regard such inappropriateness existed in the case at issue. Rather he recorded it as "just such a case for which it was devised"[23] Stephen J added that the case was a simple one within established authorities including *Thompson v LMS Railway Co.*[24] Although his Honour conceded that the organisation of modern mass transport gave no real choice to a passenger as to acceptance or rejection of the carrier's conditions in his view the passenger still had the right to learn of the conditions of carriage and refuse to travel if they saw fit.[25]

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18 (1976) 8 ALR 131 at 137

19 *Ibid* at 144 - 145

20 (1976) 8 ALR 131 at 139.

21 [1971] 2 QB 163 at 169.

22 *Ibid.*

23 (1976) 8 ALR 131 at 139.

24 [1930] 1 KB 41 at 47; *Watkins v Rymill* (1883) 10 QBD 178 at 188; *Numan v Southern Railway Co* [1923] 703 at 707.

25 (1976) 8 ALR 131 at 140.

If the central question at issue related only to the inclusion or otherwise of the contractual terms, such argument would have disposed of the issue. However, in such cases as relied on by Stephen J.[26] the essential point related to the carrier's liability for injuries or damage occurring in transit. In these cases there was never doubt that the contract had been concluded or that acceptance had occurred. The question to be decided was whether or not notification of terms had been given at the time the offer was made so as to allow the incorporation of the terms at the uncertain time of acceptance. The issue for the court was to see that the contract had been clearly concluded, but it was not essential to determine when knowledge of the terms were to be implied.[27] In the *MacRobertson Airline Services* case the key point of issue was the actual time was when the contract was concluded. The High Court was therefore required to direct its attention outside the traditional boundaries set by the earlier decisions.

Stephen J concluded that the ticket, being an offer, was accepted by the passenger when they either by conduct intimated acceptance of the offer (by boarding the plane or other form of transport) or, allowed a reasonable time to elapse when there was an opportunity to read the conditions on the ticket and the passenger had not, by that time, rejected the offer by demanding the return of the fare.[28]

One can observe that if Stephen J was prepared to concede that the passenger had no real choice in accepting or rejecting the carrier's conditions, even though qualifying that by an assumption that the passenger had the right to acquaint themselves of the conditions of carriage, his view of a passenger assiduously sitting in an airport lounge or their domestic surroundings prior to departure seems, with respect, to be unrealistic.

The second judgement of the High Court of Australia referred to by Carruthers J in the *Dillon* judgement was *Oceanic Sun Line Shipping Co Inc v Fay*.[29] In that case the payment of a deposit for a holiday cruise aboard a Greek vessel was subsequently followed by payment of an "exchange order" nominating the cruise vessel, cabin and berth, then exchanged for a ticket. The ticker contained a clause purporting to limit actions against Oceanic Sun Line Shipping and requiring these to brought in jurisdiction of the Athen's Courts. Wilson and Toohey JJ analysed the situation in their joint judgement as follows:

> "When Mary Rossi Travel paid to JMA Tours [the defendant's agent] a deposit on behalf of the respondent, there was an offer by the latter to secure a passage on a particular Sun Line cruise. Whether a contract of carriage thereupon came into existence is doubtful, although the invoice of 7 April 1983 is headed 'Final Invoice and Confirmation'. But the parties did enter into such a contract once payment of the balance was made and an exchange order was issued. In the ordinary course a ticket would, at that

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26 See note 24.

27 See the criticism of Powell (1977) 6 ABLR 260 at 266 - 267.

28 (1976) 8 ALR 131 at 141.

29 (1988) 165 CLR 197.

> stage, have issued to the respondent. For reasons connected no doubt with the appellant's administration, no tickets were available in Sydney. Nevertheless the exchange order constituted a contract made between the parties whereby in consideration of money paid by the respondent the appellant allocated to him an identified cabin on an identified cruise."[30]

Their Honours distinguished the *MacRobertson Miller* case from that at issue on the basis that in the latter there was a contract once the exchange order issued allocating a particular cabin to the respondent and all remaining was the exchange of the order for a ticket in Athens.[31]

Their Honours also agreed with Yeldham J in the New South Wales Court of Appeal who held that the brochure was not contractual in nature and did not enter into or form any part of the relevant contract of carriage nor was the ticket part of the contract between the parties as it was issued after the conclusion of the contract.[32]

Brennan J also distinguished *MacRobertson Miller* and held that the contract of carriage was made when the exchange order was issued. In referring to the conventional analysis of the formation of contracts for the carriage of passengers his Honour said:

> "But the conventional analysis cannot be applied to a ticket which the defendant is obliged to issue in exchange for an exchange order when a passenger is boarding a vessel. It can hardly have been the parties' intention at the time when the passenger pays his fare that the ticket to be given him on boarding should be a mere offer of carriage. Much less could it have been their intention that the offer might contain exemption clauses which were unknown to the passenger when the original contract was made."[33]

No new conditions of carriage, his Honour held, could be introduced by printing them on the ticket. Brennan J stated that the two factors which led him to reject the application of the conventional analysis of the ticket cases to the instant case was that firstly, the ticket was issued in performance of an antecedent case. Secondly, if the ticket were a mere offer, a passenger's election to decline carriage subject to an exemption clause could be exercised only after travelling to Greece and if the fare were forfeited.

Carruthers J in the *Dillon* case regarded it as one that, similarly to the views of Brennan J in *Oceanic Sun Line*, did not fall within the conventional analysis and that the contract came into existence when the booking form was delivered by Jayes Travel Service's agent to Mrs Dillon inviting her to forward the balance of the

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30 At 205.

31 (1988) 165 CLR 197 at 207 - 208.

32 *Ibid* at 208; Deane J was in general agreement with the reasons of Wilson and Toohey JJ (at 256).

33 At 227 - 228.

passage money. Carruthers J cited with approval the statement of Brennan J in *Oceanic Sun Lines* that the carrier cannot rely on an exemption clause contained in a ticket or other document intended by the carrier to contain the terms carriage, unless the carrier has done all that is reasonably necessary to bring the exemption clause to the passenger's notice. In Carruthers J's view sufficient was done in the instant case to bring the limitation clauses to the notice of the plaintiffs, quoting with approval of Lord Denning MR in *Thornton v Shoe Lane Parking*[34]

> "... it is no use telling the customer that the ticket is issued subject to some 'conditions' or other, without more: for he may reasonably regard 'conditions' in general as merely regulatory, and not as taking away rights unless the exempting condition is drawn specifically to his attention."

(b) Trade Practices Act 1974 (Cth) s 74, 68 (1) (c)

In respect of s74 of the *Trade Practices Act* 1974 (Cth) Carruthers J did not regard construction of the section allowing it to apply to the carriage of the plaintiff personally. However, his Honour did not see why s74 could not apply to the carriage of the plaintiff's personal luggage. On that basis s74 applied to the luggage accompanying her on the cruise and that on the shipowner's own admission as to the cause of the vessel's sinking a breach of the warranties under s74 was established. Section 68(1) (c) of the *Trade Practices Act* 1974 (Cth), Carruthers J held, made void those clauses in the ticket that sought to limit the defendant's liability for the loss of the plaintiff's personal luggage arising from the breach of warranties under s74. So, his Honour, stated, even if he was in error in holding that the ticket terms and conditions did not form part of the contract, in his view these would be struck down by the Act, to the extent that they sought to exclude, restrict or modify the liability of the defendant for breach of warranty implied by s 74 as far as the loss of the plaintiff's personal luggage or baggage was concerned.

(c) Contracts Review Act 1980 (NSW) ss 7, 9

As an alternative to the relief sought under the *Trade Practices Act* 1974 (Cth) the plaintiff sought relief under s 7 of the *Contracts Review Act* 1980 (NSW) which gives jurisdiction to the court to refuse to enforce any or all of the provisions of a contract it finds unjust. Section 9 provides criteria, which are not exhaustive, for determining whether a contract or a provision of a contract is unjust in the circumstances of the case.

It is not intended to deal with this aspect of the case in detail. Suffice it to note that Carruthers J made reference to Mrs Dillon's limited financial resources and that she did not have the benefit of legal aid. Mrs Dillon's own perceptions of a long hard fight to secure her rights evidenced by a letter to her original solicitor was also duly noted. The relative economic circumstances of the parties his Honour regarded as needing no elucidation.[35]

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34 [1971] 2 QB 163 at 170.

35 See *Contracts Review Act* 1980 (NSW) ss 9 (2) (f)

Carruthers J held that even if the terms and conditions in the ticket were operative, "the contract of release was to a marked degree disproportionately favourable to the defendant. In my view the contract was unjust, both in the way it was made and also in the way in which it operated, that is, there was both procedural and substantive unfairness."

Dillon: The Court of Appeal, Supreme Court of New South Wales
The Baltic Shipping Company subsequently appealed to the New South Wales Court of Appeal.[36] The Court of Appeal affirmed[37] the decision of Carruthers J, although it did so on different grounds, in respect of the issue of the contract of carriage.

(a) The contract of carriage and its terms

Gleeson CJ noted that the question as to whether the limitation clauses formed part of the contract of carriage was not the same as the question of when, and by what means, the contract was made. However, his Honour regarded the two questions as related and resolving the former was normally assisted by the analysis of the latter.[38]

Gleeson CJ took a different approach to Carruthers J as to the point at which the contract was made. His Honour noted that the booking form expressly stated that it was not a travel document. He saw no justification for disregarding the stipulation in the booking form that the contract of carriage would be made only at the time of the issue of the ticket to Mrs Dillon. Two consequences, in his view flowed from that stipulation.

First, it made inapplicable what had been termed the "conventional analysis" exemplified by *Hood v Anchor Line (Henderson Bros Ltd)*[39] Gleeson CJ stated:

> "Upon that analysis the issue of the ticket is only an offer and the contract is formed when the passenger, having had the opportunity to consider the terms of the offer, accepts it. That analysis would be contrary to the terms of the appellant's own document. Equally, however, the stipulation removes the conclusion, similar to that arrived at in *Oceanic Sun Line Special Shipping Co Inc v Fay* (where there was no such stipulation), that the contract of carriage was made when the booking form issued on the balance of fare was paid."[40]

His Honour regarded it as significant that the contract was made when the ticket was issued and not after Mrs Dillon received it.

> "It is an important aspect of those ticket cases that yield to the conventional analysis that the corollary of the proposition that a contract of carriage comes into existence only when the passenger has received the ticket and been afforded an opportunity to consider its terms is that in such circumstances it is fair to treat the carrier as having done what was reasonably necessary to bring all the terms to the attention of the passenger and to treat the passenger as bound by those terms. The same does not apply, however, where it is the

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36 (1991) 22 NSWLR 1

37 Gleeson CJ, Kirby P, Mahoney JA dissenting

38 (1991) 22 NSWLR, at 7 citing Brennan J in *Oceanic Sun Line Special Shippng Co Ltd v Fay* (1988) 165 CLR 197 and the cases there discussed.

39 [1918] AC 837.

40 (1991) 22 NSWLR 1 at 7.

> issue of the ticket by the carrier, rather than the passenger's uncomplaining acceptance of it after having had an opportunity to read it, that brings the contract into existence."[41]

Gleeson CJ observed that the distinction was made in *Hood v Anchor Line:*

> "... It was argued on behalf of the appellant that the contract was complete as soon as the cheque had then been paid the ticket had reached the hands of Mr May, and that any knowledge subsequently acquired of the conditions could not vary the contract. It is quite true that, if the contract was complete, subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions he accepts it as it is."[42]

His Honour, noting that the documents issued by the shipping line contemplated full fare to be paid and the company then issuing a ticket, pointed out that this was the "reverse of the conventional analysis". If the transaction was to be described in terms of offer and acceptance, the payment of the full fare by the intending passenger makes (or completes) the offer, and the company's issuing of the ticket constitutes acceptance.

On the issue of whether the carrier had done all that was reasonably necessary to bring the limitation clauses to the passenger's notice Gleeson CJ held that the carrier had not done so. He found that the contract was made either when the ticket left the shipping line's office or when it was received by Mrs Dillon; of the two the latter interpretation was preferred by his Honour.[43] The only information given to Mrs Dillon up to that point concerned the conditions of carriage contained in the booking form.

In view of the subject matter the content of the limitation clauses his Honour did not regard that as adequate to bring those particular clauses to Mrs Dillon's notice.[44] It may have been sufficient notice of many of those terms and conditions of carriage to have informed Mrs Dillon in the booking form that there were detailed terms and conditions and, if she were interested, she could inspect a form of ticket at a CTC cruise office. Such a statement, however was not adequate notice, Gleeson CJ held, of the existence of clause significantly limiting the shipping line's common law liability in events such as occurred on the fateful Mikhail Lermontov cruise. Accordingly the limitation clauses did not form part of the contract.[45]

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41 AL p 8.

42 [1918] Ac 837, at 843 per Lord Finlay LC.

43 (1991) 22 NSWLR 1 at 8; citing *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 574.

44 *Ibid* referring to Lord Denning's statemetn in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 170.

45 (1991) 22 NSWLR 1 at 9.

Gleeson CJ awarded Mrs Dillon damages (apart from the matter of the release) of A$56,182.

Kirby P dealt with the shipping company's argument that the contract at issue came into existence at the time of the issue of the ticket, under the terms of the booking form. The alternative position was that the ticket represented the shipping company's 'offer' and by embarking on the cruise the passenger was deemed to have 'accepted' that offer and the terms and conditions contained in it.

Noting the 'conventional analysis' for contracts of carriage epitomised in the *Anchor Line* case Kirby P observed that there had been much development in law since 1918 in the analysis of contractual relations arising from shipping and airline contracts.

His Honour regarded CTC Cruises as not having done what was adequate to draw the passenger's attention to "The unusual provisions".[46] [47]

When the booking document was issued he regarded the passenger, unless she or he took certain initiatives of her own, would have no knowledge of, or opportunity to influence, the conditions and regulations printed on the ticket.[48] Kirby P stated:

> "The result is that, applying what I take to be the approach sanctioned by the High Court in *Oceanic Sun Line Special Shipping Inc v Fay*, the contract of carriage here came into force at the time appointed and notified in the booking form. Yet at that time the respondent had not had a reasonable opportunity to see and agree to the terms and conditions which the appellant sought subsequently to impose upon her by the delivery of the passenger ticker. Once the contract was made, it was not open, without fresh agreement, for further terms and conditions to be imposed by the unilateral action of one contracting party. Thus the mere presentation by the appellant to the respondent of the passenger ticket with its terms and conditions would not fix the respondent with acceptance of those terms and conditions, simply because thereafter she began the cruise. She was entitled, in law, to take the view that she would be issued with a ticket which would contain no unusual provisions, specifically no provisions of which she was not on notice limiting the appellant's liability to her. She was entitled to regard the subsequent purported imposition of such conditions upon her by unilateral acts of the appellant as wholly ineffective. Almost certainly, the respondent gave no thought to these matters. It is probably only bored lawyers or travel executives who, in the solitude of a ship or airline cabin, actually read the fine print of terms and conditions such as those relied upon by the appellant here."[49]

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46 At 23.
47 At 25.
48 At 24.
49 At 25.

On this analysis Kirby held that Mrs Dillon was not to be regarded in law as having accepted the terms and conditions contained in the passenger ticket, subsequently provided. Accordingly Mrs Dillon was not limited in her claim in respect of luggage to 833 units of account[50] and her entitlement to damages was to generally calculated, as Carruthers J had held, without limitation imposed by the contract of carriage.

Mahoney JA, in a dissenting judgement held that the question was not when the contract was made but whether the shipping company's terms and conditions had been incorporated. This, he adjudged to have occurred.[51]

(b) The Contracts Review Act and the release note.

Gleeson CJ upheld the finding by Carruthers J that the settlement agreement, including the release, was unjust in the circumstances under the *Contracts Review Act* 1980 (NSW), in particular on the basis that there was material inequality in bargaining power between the parties to the contract and that Mrs Dillon's capacity to protect her interests, due to her emotional and physical state, was diminished.[52]

Kirby P, similarly found in favour of Mrs Dillon on this issue. His Honour noted the radical nature of the Act, as emphasised by McHugh JA in *West v AGC (Advanced)Ltd*[53] Kirby P considered it a mistake to read into the language of s 9 of the Act an obligation to show that the contract was unjust because it was produced by unfair conduct or unjust conduct on the part of one of the parties to it. On his Honour's interpretation s9 addressed the resulting contract itself and that the checklist within s 9 was not exclusive and the court must decide whether in the circumstances the contract is unjust.[54]

Mahoney JA did not find that Mrs Dillon was entitled to relief under the *Contracts Review Act* 1980 (NSW). He held, in his dissenting judgement that, with respect to the opportunity for legal advice, he saw no relevant disparity in the parties' position.[55]

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(c) The Trade Practices Act

Kirby P questioned whether the *Trade Practices Act* 1974 Cth, s 74 applied to a contract of carriage for a person, in this case, Mrs Dillon. His Honour regarded the matter to be different in relation to a contract for the supply of services by way of transportation of goods, such a Mrs Dillon's luggage. It was doubtful, in his

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50 See *Limitation of Liability for Maritime Claims Act* 1989 (Cth) Sch 1.
51 (1991) 22 NSWLR 1 at 43 - 50.
52 (1991) 22 NSWLR 1 at 9.
53 (1986) 5 NSWLR 610 at 621.
54 (1991) 22 NSWLR 1 at 20.
55 (1991) 22 NSWLR 1 at 53.

view, that the contract between the parties could be divided artificially into two contracts; one within and one outside the Act.[56]

It should be noted that the current wording of s 74 of the *Trade Practices Act* is not wider than at the time of the 'Mikhail Lermontov's' sinking. In its present form s 74 would be capable, it is submitted, of applying to the personal carriage of Mrs Dillon.[57]

(d) The High Court judgement

The High Court of Australia held,[58] on appeal that Mrs Dillon was not entitled to recover the whole of the cruise fare on the grounds of total failure of consideration as she had enjoyed the benefits of the first eight full days of the cruise. It also held, affirming the decision of the New South Wales Court of Appeal, that Mrs Dillon was entitled to an award of damages for disappointment and distress flowing from the breach of contract, since the object of the contract was to provide enjoyment and relaxation. However, the High Court were not prepared to increase the award of damages under this head. The High Court was not required to address the issue of when the contract took place nor the issue of incorporation of limiting provisions.

Conclusion

Although it may be clear that Mrs Dillon succeeded where Mrs Thompson failed so that the somewhat theatrical title of this paper is justified a number of problems still remain.

Clearly there are differences of judicial approach to the time at which a contract of carriage is made where exempting provisions may or may not be incorporated. The division of judicial opinion in the High Court of Australia in the *MacRobertson Miller* case on this very issue is noteworthy and still remains unresolved.

Stephen J's belief that there existed a point at which a passenger could read through terms and conditions on a ticket issued by an airline and arrive at rational decision to reject, let alone negotiate any of its terms, strains rationality itself. Kirby P, with respect, appears much closer to the real life of the travelling public with his assertion that only bored lawyers would bother to spend time passing their eyes over a closely written set of clauses not too dissimilar from the terms in the ticket that was the subject of litigation in the *MacRobertson Miller* case.

Although Kirby P and Gleeson CJ arrived at the same conclusion in respect of the non-incorporation of the exempting provisions in the CTC contract of carriage the

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56 At 22; Mahoney JA agreeing, at 51. The Court of Appeal also, overuling Carruthers J on this poing, did not find that the shipping company's conduct was misleading or deceptive with s 52 of the *Trade Practices Act* 1974 (Cth).

57 See Latimer *Australian Business Law* (1993) p 367. The *Trade Practices Act* 1974 (Cth) was amended in June 1986.

58 (1993) 11 ALR 289.

Kirby P's citing of the requirement for reasonable notice laid down by Lord Denning MR in *Thornton v Shoe Lane Parking* contrasted with Gleeson CJ's observance of the "conventional analysis" of the *Anchor Line* case, even though his Honour distinguished it from the case at issue.

Mrs Dillon did win a famous victory after a hard legal battle and in doing so Mrs Thompson is avenged. However, the thicket of ticket cases referred to in the introduction is still there.

Whether it is put to the axe or only requires starvation of its roots remains for further judicial pronouncement to determine.[59]

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59 *Baltic Shipping Co v Dillon* (1993) III ALR 289.