HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

SUSAN KARPIK
Appellant

and

CARNIVAL PLC (ARBN 107 998 443)
First Respondent

PRINCESS CRUISE LINES LIMITED
(A COMPANY REGISTERED IN BERMUDA)
Second Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions

2. ***Ground 1 / NOC 2****:* Section 5 of the CCA does not provide the territorial "*hinge*" on which s 23 of the ACL operates. This is supported by: ***Text***, both because s 5 seeks to extend territorial reach, not limit it, and because it extends provisions concerned with conduct as it is being engaged in, whereas s 23 operates after conduct (the making of a contract) has occurred and whether or not other conduct (relying on the term) takes place: see, e.g., s 24(1)(c); ***Context***, where s 23 is fundamentally different to other provisions that clearly regulate conduct as it occurs (e.g., ACL ss 29, 30, 23, 35-37, 39, 40, 43, 44, 47 and 48) or which expressly refer to the engaging in of conduct (e.g., ACL ss 18, 20, 21, 31, 33 and 34). Further, s 23 has its own remedial provision (s 250), which was necessary because s 23 is not a term that concerns engaging in conduct on which the other remedies operate: see ACL ss 232 and 237-39. That these conduct remedies apply to seeking to rely on an unfair term only once ss 23 and 250 have operated further divorces s 23 from any engaging in conduct; and ***Purpose***, because if s 5 of the CCA applied to s 23 of the ACL it leads to absurd and capricious results, capturing all relevant contracts with foreign corporations, even if they have no connection with Australia, on the happenstance that the corporation does some other business in Australia. It was not the legislature's purpose to appoint Australian courts as the global arbiter of fairness or the global centre of class actions concerning consumer contracts across the world.

3. That s 5 was amended in the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* is irrelevant, because the extension of s 5 to the ACL was directed to remedial provisions that were also amended and operated on conduct: see sched 2, items 41, 43, 58, 59 and 74. There is also no difficulty with s 131, because its definition of "*conduct*" is not the same as "*engaging in conduct*" in s 5 (see s 4KA), and "*conduct of corporations*" in s 131 captures provisions that are predicates to those that operate on conduct (ss 23 and 250 of the ACL read with ss 232 and 237-39) or that affect future conduct: cf ss 104-106.

4. If s 5 of the Act does not apply to s 23 of the ACL, there is no other territorial limitation but for the "*well-settled*" limitation to contracts governed by Australian law.[1]

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[1] See FC [306]-[322]; *Wanganui* (1934) 50 CLR 581 at 600-01; *Kay's Leasing* (1964) 116 CLR 124 at 142-43.

5. Even if s 5 applies, it does not provide the sole territorial operation. The contrary leads to absurd and capricious results, and ignores that s 5 does not apply the sole territorial limitation for almost every other provision, which are limited to "*trade or commerce*". The history of the consumer guarantees (ss 54 ff of the ACL) also demonstrates that for statutory provisions operating on contracts (e.g, s 71 of the *Trade Practices Act*), no express territorial limits were prescribed as they were already limited by the "*well-settled*" limitation. When the guarantees became *sui generis* statutory rights,[2] Parliament then included an express limitation of "*trade or commerce*" recognising that the proper law limit no longer applied. No express limit is in s 23, because it is already implicitly limited to contracts governed by Australian law. This does not raise concerns of contracting out through selection of a foreign proper law, as the legislature had means to address this if it was of concern (e.g., ACL ss 64 and 67), and choice of law rules already address the issue.[3]

6. ***NOC 1***: Further, s 23 of the ACL does not apply to contracts governed by a foreign law unless a clear intention is manifest to override choice of law rules. There is a difference between the extraterritorial operation of a statute and the question as to whether it is to apply by abrogating choice of law rules.[4] For statutes operating on an existing body of law for which long-standing choice of law rules exist, Parliament would not lightly intend to undermine the fundamental principles of comity and the administration of justice which underlie those rules.[5] The position may be different for statutes that regulate conduct or which create *sui generis* statutory rights and which expressly state the territory in which they operate, but that is not s 23.[6] Here, for the same reasons as [2]-[5] above, s 23 does not evince any clear intention to override the fundamental choice of law rule that the validity of a contractual term is determined under the proper law of the contract.

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2 See Explanatory Memorandum for Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), Respondents' Further Authorities, tab 13 at pp 214 [7.7], 213-14, 215 [7.10]-[7.11], 217-18, 220 [25.37]-[25.38], 222 [25.42] and 223 [25.75]-[25.76].

3 See *Vita Food Products, Inc v Unus Shipping Co* [1939] AC 277 at 290; *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378 at 384-85; *The Hollandia* [1983] 1 AC 565 at 576; *Oceanic Sun Line v Fay* (1988) 165 CLR 197 at 225 and 260.

4 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [18]; *Hartford Fire Insurance Co v California*, 509 US 764 at 814-17 (1993).

5 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [27], [58] and [79]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [66]-[67]; *Neilson v Overseas Projects Corporation (Vic) Ltd* (2005) 223 CLR 331 at [90]-[91]; *Sweedman* (2006) 226 CLR 362.

6 *Mynott v Barnard* (1939) 62 CLR 68 at 79; *Kay's Leasing* (1964) 116 CLR 124 at 142-43; *Old UGC Inc v Industrial Relations Commission* (2006) 225 CLR 274 at [23]; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956; *Brown v New Zealand Basing Ltd* [2018] 1 NZLR 255 at [50], [54]-[57], [66]-[68], [77] and [86].

7. ***Ground 2(a)***: The appellant must establish that the Full Court erred in finding that all of the three necessary elements of unfairness in s 24(1) had been established. The Full Court was correct to find that the appellant failed to establish both that the class action waiver term would cause significant imbalance in the parties' rights and obligations under the contract (s 24(1)(a)) and that the term would cause him detriment if it were to be applied or relied upon (s 24(1)(c)) essentially because: **(i)** it was the not unfair exclusive jurisdiction clause by which the appellant gave up any procedural advantage to participate in an Australian class action; and **(ii)** the appellant failed to lead any evidence comparing the relative advantages and disadvantages of individual actions vs class actions.

8. The Full Court was also correct to find that the clause was reasonably necessary to protect the respondents' legitimate interest in: **(i)** avoiding class actions in the United States, by reference to US authorities; and **(ii)** ensuring that the not unfair exclusive jurisdiction agreement was not frustrated by class actions instituted outside the agreed forum.

9. ***Ground 2(b) / NOC 3***: on the appellant's case a class action waiver clause in a contract anywhere in the world will necessary be void as being contrary to Part IVA of the *Federal Court of Australia Act 1976* (Cth), even if the contract contains an exclusive jurisdiction clause in favour of another forum, because representative proceedings ***might*** be brought in the Federal Court of Australia (as opposed to elsewhere in Australia or overseas) that ***might*** capture the contracting party as a group member. That cannot be right. Group members have an unfettered right to opt-out of class action proceedings, and they may agree to exercise that right, in advance, conformably with Part IVA.

10. ***Ground 3***: even if the appellant succeeds in appeal ground 2, this Court would re-exercise the discretion to stay the proceedings as the appellant has failed to demonstrate "strong grounds" since: **(i)** the ability to proceed by class action is a mere procedural advantage which is not a strong ground; **(ii)** there is no relevant fracturing of a dispute because a class action is a collection of individual claims; and **(iii)** the factual application, by US Courts, of the ACL is an ordinary incident of the operation of private international law, not a strong ground to refuse a stay.

Dated: 3 August 2023

N C Hutley