

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, GLEESON AND JAGOT JJ

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SUSAN KARPIK

APPELLANT

AND

CARNIVAL PLC & ANOR

RESPONDENTS

*Karpik v Carnival plc*  
[2023] HCA 39  
*Date of Hearing: 3 & 4 August 2023*  
*Date of Judgment: 6 December 2023*  
S25/2023

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside paragraphs 2(b), 3 and 4 of the orders made by the Full Court of the Federal Court of Australia on 2 September 2022 and, in their place, order that the respondents pay the appellant's costs of the appeal.*

On appeal from the Federal Court of Australia

## Representation

J T Gleeson SC with R J May for the appellant (instructed by Shine Lawyers)

N C Hutley SC with T E O'Brien and J K Kennedy for the respondents (instructed by Clyde & Co)



S P Donaghue KC, Solicitor-General of the Commonwealth, and R C A Higgins SC with S Zeleznikow and S N Rajanayagam for the Attorney-General of the Commonwealth and the Australian Competition and Consumer Commission, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Karpik v Carnival plc**

Trade practices – Consumer protection – Extraterritorial application of s 23 of *Australian Consumer Law* ("ACL") – Where company carrying on business in Australia selling and marketing cruises – Where contract of passage made outside Australia – Where contract was contract of adhesion incorporating set terms and conditions – Where terms and conditions included exclusive jurisdiction clause and class action waiver clause – Whether s 5(1)(g) of *Competition and Consumer Act 2010* (Cth) extended application of s 23 of ACL to contract – Whether any additional territorial connection required – Whether class action waiver clause constituted unfair term under s 23 of ACL and void.

Representative actions – Whether class action waiver clause contrary to Pt IVA of *Federal Court of Australia Act 1976* (Cth) – Whether class action waiver clause unenforceable.

Private international law – Forum – Exclusive jurisdiction clause – Whether strong reasons not to grant stay of proceedings.

Words and phrases – "carrying on business", "consumer contract", "detriment", "engaging in conduct", "exclusive jurisdiction clause", "extraterritoriality", "inappropriate forum", "legitimate interests", "representative proceedings", "significant imbalance", "standard form contract", "stay of claim", "transparent", "unfair".

*Competition and Consumer Act 2010* (Cth), s 5(1)(c) and (g).

*Competition and Consumer Act 2010* (Cth), Sch 2 (*Australian Consumer Law*), s 23.

*Federal Court of Australia Act 1976* (Cth), Pt IVA, ss 33J, 33X, 33Y.



1 GAGELER CJ, GORDON, EDELMAN, GLEESON AND JAGOT JJ.  
On 8 March 2020, the passenger ship *Ruby Princess* departed Sydney with some 2,600 passengers on board. During the voyage, there was an outbreak of COVID-19. The voyage was cut short and the ship returned to Sydney, arriving on 19 March 2020. A number of passengers contracted COVID-19 and some of those passengers died. The appellant, Ms Karpik, was a passenger on the voyage.

2 By way of representative proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act"), Ms Karpik asserts claims in tort and under the *Australian Consumer Law*<sup>1</sup> ("the ACL") against Carnival plc and its subsidiary, Princess Cruise Lines Limited (collectively, "Princess"<sup>2</sup>), for loss or damage allegedly suffered by passengers who were on the voyage, or relatives of those passengers.

3 This appeal concerns an interlocutory application, brought by Princess, for a stay of the claims in the representative proceedings as they related to Mr Ho, a Canadian who was a passenger on the voyage. Mr Ho's contract was made outside Australia. Before the primary judge, Princess contended that there were particular contractual terms and conditions, the "US Terms and Conditions", which formed part of the contract between itself and some 696 passengers on the voyage ("the US subgroup"). Mr Ho has been identified as the representative of the US subgroup in the representative proceedings. The US Terms and Conditions, relevantly, contain a choice of law clause applying the general maritime law of the United States, an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles and a class action waiver clause.

4 Princess sought to have determined, as a separate question, whether Mr Ho's claims against Princess in the Federal Court of Australia should be stayed by reason of the exclusive jurisdiction clause. There is now no dispute that Mr Ho's contract incorporated the US Terms and Conditions. In support of the application for the stay, Princess relied upon the class action waiver clause in Mr Ho's contract. In response, Ms Karpik asserted that s 23 in Pt 2-3 of Ch 2 of the

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1 *Competition and Consumer Act 2010* (Cth), Sch 2.

2 No distinction was drawn in this appeal between Carnival plc, a company incorporated in the United Kingdom, the time charterer and operator of the *Ruby Princess*, and Princess Cruise Lines Limited, a company registered in Bermuda, headquartered in Florida, that had California as its principal place of business and was the owner of the *Ruby Princess*.

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ACL, dealing with unfair contract terms, applied to Mr Ho's contract and that the class action waiver clause was unfair and therefore void.

5       Section 23(1) of the ACL relevantly provides that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. There was no dispute that *if* s 23 of the ACL applied to Mr Ho's contract, that contract was a consumer contract and a standard form contract. However, the anterior issue was whether s 23 *did* apply to Mr Ho's contract, given it was made outside Australia.

6       The issues in the courts below, and on appeal to this Court,<sup>3</sup> then, relevantly, were first, whether s 23 of the ACL applied to Mr Ho's contract (or put in different terms, the nature and extent, if any, of the extraterritorial application of s 23 of the ACL); second, if s 23 of the ACL applied to Mr Ho's contract, whether the class action waiver clause in Mr Ho's contract is void under s 23 of the ACL because it is unfair; third, whether the class action waiver clause is otherwise unenforceable by reason of Pt IVA of the FCA Act; and fourth, whether there are strong reasons for *not* enforcing the exclusive jurisdiction clause.

7       The primary judge refused the stay application principally because he held that the US Terms and Conditions were not incorporated into Mr Ho's contract. In the event that he was wrong, the primary judge held that s 23 of the ACL applied to Mr Ho's contract by reason of s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) ("the CC Act"). The primary judge held that the class action waiver clause was an unfair term and void under s 23 of the ACL but that the clause was not separately unenforceable by reason of being contrary to Pt IVA of the FCA Act. The primary judge, in the exercise of discretion, would have held that there were strong reasons for not enforcing the exclusive jurisdiction clause.

8       On appeal, a majority of the Full Court of the Federal Court (Allsop CJ and Derrington J, Rares J dissenting) allowed Princess' appeal. The Court unanimously found that the US Terms and Conditions had been incorporated into Mr Ho's contract. The majority did not decide the extraterritorial application of s 23 of the ACL. The majority held that the class action waiver clause was not an unfair term under s 23 of the ACL and was not unenforceable by reason of Pt IVA of the

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3     In this Court, the Attorney-General of the Commonwealth (intervening as of right) and the Australian Competition and Consumer Commission (intervening with leave) (collectively, "the Commonwealth") filed joint written submissions and made oral submissions directed to the first and third questions.



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FCA Act. The majority enforced the exclusive jurisdiction clause and stayed the Federal Court proceedings in respect of Mr Ho's claims against Princess.

9 For the reasons that follow, Ms Karpik's appeal should be allowed. Section 23 of the ACL does apply to Mr Ho's contract and Princess' notice of contention in this Court that s 23 of the ACL does not apply should be rejected. The class action waiver clause in Mr Ho's contract is void under s 23 of the ACL because it is unfair. The class action waiver clause is not separately unenforceable by reason of Pt IVA of the FCA Act. The stay of Mr Ho's claims against Princess, granted by the Full Court, should be set aside and, in the re-exercise of the discretion, a stay should be refused because there are strong reasons for not enforcing the exclusive jurisdiction clause.

10 It is appropriate to address Mr Ho's contract before turning to consider the questions on appeal.

#### **Mr Ho's contract with Princess**

11 Mr Ho is a resident of Calgary, Canada. On 25 September 2018, he contacted CruiseShipCenters, based in Canada, and booked tickets on the voyage with a travel agent. At the time of booking, Mr Ho was not provided with a copy of, or access to, the US Terms and Conditions. On 30 October 2018, Mr Ho received two emails from CruiseShipCenters, attaching an invoice and booking confirmation. There is now no dispute that Mr Ho became a party to the US Terms and Conditions after receiving the booking confirmation. Other than to check that the bookings were correct, Mr Ho did not read the details on either email. The booking confirmation contained an "IMPORTANT NOTICE" with a link to a webpage containing the terms of the "Passage Contract". The webpage had links to three different contracts and told booked passengers to "Sign in to Cruise Personalizer to access the Passage Contract that applies to your booking". It was not until about July 2019 that Mr Ho visited Princess' website and logged into the Cruise Personalizer webpage.

12 Upon logging into the Cruise Personalizer, Mr Ho was presented with the "Passage Contract" on which were displayed the US Terms and Conditions. After the heading "Princess Cruise Lines, Ltd Passage Contract", the following bolded words directed the user to carefully read the terms and specifically referred to limits on the passenger's right to sue:

**"IMPORTANT NOTICE TO GUESTS: PLEASE CAREFULLY  
READ THE FOLLOWING PASSAGE CONTRACT TERMS THAT  
GOVERN ALL DEALINGS BETWEEN YOU AND CARRIER,**

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**AFFECT YOUR LEGAL RIGHTS AND ARE BINDING ON YOU,  
TO THE FULL EXTENT PERMITTED BY LAW; PARTICULARLY  
... SECTION 15 LIMITING YOUR RIGHT TO SUE ..."**

Without reading the US Terms and Conditions, Mr Ho clicked on a button with the word "Proceed" on it.

- 13 As has been stated, the US Terms and Conditions contain a choice of law clause applying the general maritime law of the United States (cl 1). It relevantly provides:

*"[A]ny and all disputes between Carrier and any Guest shall be governed exclusively and in every respect by the general maritime law of the United States without regard to its choice of law principles ... To the extent such maritime law is not applicable, the laws of the State of California (U.S.A.) shall govern the contract, as well as any other claims or disputes arising out of that relationship. You agree this choice of law provision replaces, supersedes and preempts any provision of law of any state or nation to the contrary."* (emphasis added)

- 14 The two other clauses relevant to this appeal – an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles (cl 15(B)(i)) and a class action waiver clause (cl 15(C)) – form part of cl 15, headed "NOTICE OF CLAIMS AND ACTIONS; TIME LIMITATION; ARBITRATION; FORUM; WAIVER OF CLASS ACTION; WAIVER OF RIGHT TO IN REM PROCEDURES OF ARREST AND ATTACHMENT". The chapeau to cl 15 provides that those "provisions are for the benefit of the Carrier and certain third party beneficiaries as set forth above in Section 1". The third party beneficiaries, in general terms, include all persons and entities associated with Princess whether at sea or on shore.

- 15 Under the heading in cl 15(B), "Forum and Jurisdiction for Legal Action", the exclusive jurisdiction clause in cl 15(B)(i) relevantly provides:

*"Claims for Injury, Illness or Death: All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles ... to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that*

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*may be available to any such action being brought in such courts.*"  
 (emphasis added)

16 The class action waiver clause in cl 15(C) is in the following terms:

"WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN BEHALF INSTEAD OF THROUGH ANY CLASS OR REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, YOU AGREE THAT ANY ARBITRATION OR LAWSUIT AGAINST CARRIER WHATSOEVER SHALL BE LITIGATED BY YOU INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING YOU TO PARTICIPATE IN A CLASS ACTION ..."

17 It will be necessary to return to consider these clauses.

### **Extraterritorial application of s 23 of the ACL**

18 The first question may be simply stated: does s 23 in Pt 2-3 of Ch 2 of the ACL apply to Mr Ho's contract, a contract made outside Australia? That is a question of statutory construction.<sup>4</sup>

19 The so-called common law "presumption" against extraterritoriality – that subject to a contrary intent, words in a statute describing acts, matters or things in general words are to be read so as not to have extraterritorial effect – is an interpretive principle only.<sup>5</sup> The same can be said of the aspect of that presumption that statutes are not intended to apply to matters that, under the rules of private

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4 *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-143; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 435-436; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 159-160 [29], 161-162 [33]-[36]; *BHP Group Ltd v Impiombato* (2022) 96 ALJR 956 at 965 [38], 966 [43], 970-971 [59]-[62]; 405 ALR 402 at 410-411, 411-412, 417-418. cf Mann, "Statutes and the Conflict of Laws" (1972-1973) 46 *British Year Book of International Law* 117 at 123-124, 135.

5 *Impiombato* (2022) 96 ALJR 956 at 971 [61]; 405 ALR 402 at 418. See also *Insight Vacations* (2011) 243 CLR 149 at 159-160 [29], 161 [33], 162 [36].

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international law, are governed by foreign law.<sup>6</sup> Contrary to Princess' submissions, the presumption is not a fundamental common law right.<sup>7</sup> Rather, the application and force of the presumption depends upon the extent to which the provisions of a statute depart from common expectations that Parliament's concern with the subject matter is limited to matters within its territory.<sup>8</sup> It may have little or no role to play<sup>9</sup> where, as will be seen in relation to s 23 of the ACL read with s 5(1)(c) and (g) of the CC Act, the statute expressly departs from those common expectations. In sum, the application or consideration of the presumption cannot precede the question of interpretation – being whether the statute expressly or impliedly addresses the territorial reach of its subject matter.<sup>10</sup>

20 Princess' submissions, that (1) in considering whether statutory provisions of the forum are applicable to the substantive rights and obligations in dispute, a court must *first* apply its choice of law rules to ascertain what law governs the issue (the "*lex causae*"); or (2) whenever a substantive right or obligation is in dispute a court must *first* apply choice of laws *before* construing a forum statute

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6 *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601; *Kay's Leasing* (1964) 116 CLR 124 at 142-143; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 283 [23]; *Impiombato* (2022) 96 ALJR 956 at 963-964 [29]-[32], 973 [71]; 405 ALR 402 at 408-409, 420-421.

7 See *Coco v The Queen* (1994) 179 CLR 427 at 437. cf *Potter v Minahan* (1908) 7 CLR 277 at 304; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 375 [128]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58]-[59]. See also Douglas, "Choice of Law in the Age of Statutes – A Defence of Statutory Interpretation after *Valve*", in Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (2019) 201 at 212.

8 *Impiombato* (2022) 96 ALJR 956 at 971 [61]; 405 ALR 402 at 418.

9 *Impiombato* (2022) 96 ALJR 956 at 966 [43]; 405 ALR 402 at 411-412. See also *Wanganui* (1934) 50 CLR 581 at 601.

10 *Kay's Leasing* (1964) 116 CLR 124 at 142-143; *Akai* (1996) 188 CLR 418 at 443; *Impiombato* (2022) 96 ALJR 956 at 965 [37]-[38], 971 [61]; 405 ALR 402 at 410-411, 418.

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which is otherwise relevant; or (3) if the *lex causae* is foreign law, the local statute cannot apply unless it demands application irrespective of the *lex causae*, are all rejected.

21 First, the submissions are inconsistent with the fact, and fail to recognise, that in Australia the starting point is always the interpretation of local laws. That explains why the text, context or subject matter of the local law will ordinarily determine whether the presumption against extraterritoriality has any application.<sup>11</sup> Second, Princess' contentions are contrary to decisions of this Court,<sup>12</sup> as well as decisions of intermediate courts.<sup>13</sup> None of the authorities cited by Princess support its contentions.<sup>14</sup>

22 Princess' submissions incorrectly invert the inquiry. This Court has recognised that there is a rule "that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or

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11 See [19] above.

12 *Wanganui* (1934) 50 CLR 581 at 597, 600-601, 606-607, 611-613; *Kay's Leasing* (1964) 116 CLR 124 at 142-144; *Freehold Land Investments Ltd v Queensland Estates Pty Ltd* (1970) 123 CLR 418 at 421, 424-425, 435, 439-440; *Akai* (1996) 188 CLR 418 at 436, 442-443; *Old UGC* (2006) 225 CLR 274 at 282-283 [22]-[23], 291-292 [55]-[58]; *Insight Vacations* (2011) 243 CLR 149 at 159-162 [27]-[36]; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at 257 [4]; *Impiombato* (2022) 96 ALJR 956 at 963-964 [30]-[35], 965 [38], 966 [43], 970-972 [59]-[63]; 405 ALR 402 at 408-409, 410-411, 411-412, 417-419.

13 See, eg, *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101 at 142-144 [197]-[205]; *Australian Competition and Consumer Commission v Valve Corp [No 3]* (2016) 337 ALR 647 at 666-673 [90]-[125]; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 at 225-226 [110]-[115]; *Huntingdale Village Pty Ltd v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at 204-207 [162]-[173].

14 cf *Akai* (1996) 188 CLR 418 at 443; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 362 [84], 363 [90]-[91]; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 398-399 [19].

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recognized in our Courts, it is within the province of our law to affect or control".<sup>15</sup> However, that rule is "one of construction only" which "may have little or no place where some other restriction is supplied by context or subject matter".<sup>16</sup> Put in different terms, determining whether the text, context or subject matter of the statute supplies the territorial connection necessarily precedes the application or consideration of the so-called presumption, not the other way around.

23 Princess placed primary reliance on this Court's decision in *Akai Pty Ltd v People's Insurance Co Ltd*.<sup>17</sup> Contrary to Princess' submission, the decision in *Akai* is not authority for the general proposition that if the *lex causae* is foreign law, the local statute cannot apply unless it demands application irrespective of the *lex causae*. That case involved a specific provision, s 8 of the *Insurance Contracts Act 1984* (Cth), which provided, in effect, that the Act applied to contracts of insurance the proper law of which is or would be, but for a choice of law clause to the contrary, the law of a State or Territory and that an express choice of law clause to the contrary must be disregarded for that purpose. Put differently, the statutory provision in *Akai* chose as its particular connecting factor or criterion the proper law of the contract, being that of an Australian State or Territory, notwithstanding any choice of law clause that would override what would otherwise be the proper law. That the Parliament chose that criterion in the context of the particular statutory scheme in issue in *Akai* says nothing about the need for such a criterion in other legislative contexts. It was one of any number of criteria the Parliament could have chosen. And the conclusion that the statutory provision in *Akai* "demand[ed] application ... irrespective of the identity of the *lex causae*" was the result of the majority having first engaged in the process of statutory construction of the local law.<sup>18</sup> The majority did not articulate a new principle which would see choice of law rules elevated to a status of fundamental right. Princess' submission to the contrary is rejected.<sup>19</sup>

24 In determining the territorial reach of Pt 2-3 of the ACL, it is necessary to start with the proper construction of s 23 of the ACL, before turning to s 5(1) of the

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15 *Wanganui* (1934) 50 CLR 581 at 601.

16 *Wanganui* (1934) 50 CLR 581 at 601.

17 (1996) 188 CLR 418.

18 (1996) 188 CLR 418 at 436.

19 See [19] above.

CC Act, which, in its terms, is directed to extending certain parts of the CC Act and the ACL to the engaging in conduct outside Australia by certain bodies corporate and certain individuals. As will be explained, Princess' contention that s 23 of the ACL is neither enlivened by nor conditioned upon the "engaging in" any conduct to which s 5(1) of the CC Act is directed is rejected.

### *The ACL*

25       The ACL, as its name suggests, is a national consumer law. It relevantly creates and provides general protections (Ch 2), specific protections (Ch 3), offence provisions (Ch 4) and enforcement and remedies (Ch 5) for consumers. This appeal is concerned with one of the general protections in Ch 2, namely unfair contract terms in Pt 2-3. The unfair contract terms provisions apply to both "consumer contracts" and "small business contracts". The facts of this case focus attention on the former.

26       Part 2-3 prescribes a norm of conduct.<sup>20</sup> The unfair contract terms provisions in Pt 2-3 relevantly only apply to a consumer contract that is a standard form contract and in which at least one of the parties is an individual.<sup>21</sup> Under s 23(1) of the ACL "[a] term of a *consumer contract* ... is void if: (a) the term is *unfair*; and (b) the contract is a *standard form contract*" (emphasis added). Each italicised term is defined in Pt 2-3. "[C]onsumer contract" is relevantly defined as a contract for a supply of goods or services *to an individual* whose acquisition of the goods or services is wholly or predominantly for personal, domestic or household use or consumption.<sup>22</sup> A "standard form contract" is addressed in s 27(1) by way of a presumption. That section provides that if a party to a proceeding alleges that a contract is a standard form contract, it is

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20    See, eg, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 125-126 [50], quoting *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 526-527 [95].

21    ACL, s 23(3). See also Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 62 [5.15].

22    ACL, s 23(3)(a) (emphasis added).

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presumed to be such a contract unless another party to the proceeding proves otherwise.<sup>23</sup>

27 The meaning of "unfair" is addressed in s 24. Section 24(1) provides that *a term* of a consumer contract is *unfair* if:

- "(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on."

28 In determining whether a term of a contract is unfair under s 24(1), a court *may* take into account such matters as it thinks relevant but *must* take into account the extent to which the term is transparent, and the contract as a whole.<sup>24</sup> A term is "transparent" if the term is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.<sup>25</sup>

29 It is necessary to say something about the three elements in s 24(1) before turning to address the requirement to consider transparency. The first element requires the court to consider whether the identified term would cause a significant imbalance in the parties' rights and obligations arising under the contract. It is for the claimant to prove that the term would cause a significant imbalance.

30 The second element requires the court to consider whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. For the purposes of that element, a term of a consumer contract is presumed *not* to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, *unless that party proves otherwise*.<sup>26</sup> That is, it was for Princess to establish that the class

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23 ACL, s 27(1). Section 27(2) lists a number of mandatory factors for a court to take into account in determining whether a contract is a standard form contract.

24 ACL, s 24(2).

25 ACL, s 24(3).

26 ACL, s 24(4).



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action waiver clause is reasonably necessary to protect its legitimate interests. When the provision was introduced, the Explanatory Memorandum to the Bill stated that although ultimately it is a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interests of the respondent, s 24(4) requires "the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or a class of consumers, and that therefore the term was 'reasonably necessary'".<sup>27</sup>

31 In relation to the third element, it is for the claimant to establish whether the term would cause financial or non-financial detriment to a party if the term were to be applied or relied on. Aspects of this element should be noted. In requiring evidence of whether the detriment existed or would exist in the future, it requires more than a hypothetical case to be made out by the claimant. A claimant does not need proof of actual detriment or that a term has been enforced. And detriment is not limited to financial detriment; it extends to other forms of detriment that would affect the party disadvantaged by the term's practical effect.

32 The requirement to consider the transparency of an impugned term is relevant to, and may affect, the analysis of the extent to which the term is unfair as assessed against each of the elements in s 24(1)(a) to (c). That is, the inquiry as to transparency is not an independent and separate inquiry from whether a term is unfair pursuant to s 24(1). The greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly; and conversely, where a term has been readily available to an affected party, and is clearly presented and plainly expressed, the imbalance and detriment it creates may need to be of a greater magnitude.

33 Non-exhaustive examples of the kinds of terms of a consumer contract that may be unfair are set out in s 25. The scheme for enforcement of Pt 2-3 includes remedies in ss 250 (declarations relating to consumer contracts and small business contracts), 232 (injunctions) and 237 (compensation orders etc on application by an injured person or the regulator) of the ACL. As will be seen, the extent to which the norm of conduct in s 23 is capable of applying is expressly addressed in the ACL, read with the CC Act.

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27 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 64 [5.28].

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*CC Act*

34 The ACL, as a schedule to the CC Act, applies to the extent provided by Pt XI of the CC Act or an application law.<sup>28</sup>

35 Section 131(1) of the CC Act (in Pt XI of the CC Act) provides that the ACL "applies as a law of the Commonwealth to the *conduct* of corporations, *and in relation to* contraventions of Chapter 2, 3 or 4 of [the ACL] by corporations" (emphasis added). This appeal is concerned with the first aspect – conduct of corporations. The second aspect, contraventions of Ch 2, 3 or 4 of the ACL by corporations, and its intersection with s 15 of the ACL, which provides that conduct is not taken for the purposes of the ACL to *contravene* a provision of the ACL merely because of the application, among others, of s 23(1) of the ACL, may be put to one side. The "note" to s 131(1) explains that ss 5 and 6 of the CC Act "extend the application of this Part (and therefore extend the application of the [ACL] as a law of the Commonwealth)".

36 Section 5 of the CC Act extends the application of the ACL as a law of the Commonwealth "to conduct outside Australia" – that is, extraterritorially. Section 5(1) provides that:

"Each of the following provisions:

- (a) Part IV;
- (b) Part XI;
- (c) *the Australian Consumer Law (other than Part 5-3)*;
- (f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));

*extends to the engaging in conduct outside Australia by:*

- (g) *bodies corporate incorporated or carrying on business within Australia*; or

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28 ACL, s 1. See also s 140 (definition of "application law") in Pt XIAA (Application of the Australian Consumer Law as a law of a State or Territory) of the CC Act.

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- (h) Australian citizens; or
- (i) persons ordinarily resident within Australia." (emphasis added)

37 Section 5(1), in its terms, is directed to extending certain parts of the CC Act and the ACL to the engaging in conduct outside Australia by certain bodies corporate and certain individuals. It is to be read with s 6 of the CC Act, which, without prejudice to its effect apart from s 6, extends the application of the CC Act (other than specified parts) to persons who are *not* corporations.<sup>29</sup> It is evident that Parliament has addressed the question of the extraterritoriality of various parts of the CC Act and the ACL.

38 This appeal is focused on s 5(1)(c) and (g) of the CC Act. Relevantly, those provisions provide that the ACL (other than Pt 5-3) extends to the *engaging in conduct outside* Australia by bodies corporate incorporated or carrying on business within Australia. A reference in the CC Act to "engaging in conduct" relevantly is a "reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract".<sup>30</sup> That is, if a corporation is carrying on business in Australia, the ACL (other than Pt 5-3) applies to its conduct engaged in outside Australia regardless of whether that corporation is a domestic or foreign corporation. If a corporation carries on business in Australia, then a price of doing so is that the corporation is subject to and complies with statutes intended to provide protection for consumers.<sup>31</sup> That is unsurprising. The same norms of conduct in the ACL are to apply to the engaging in conduct outside Australia by Australian citizens, persons ordinarily resident in

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29 See Australia, House of Representatives, *Trade Practices Bill 1973*, Explanatory Memorandum at 3 [11], 12 [56] and Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 October 1973 at 2735, in relation to s 6 of the *Trade Practices Act 1974* (Cth), the predecessor to s 6 of the CC Act. Reference might also be made to s 4N of the CC Act, which addresses the extended application of Pt IIIA of the CC Act dealing with access to services provided by means of facilities that are or will be wholly or partly within an external Territory or specified offshore area.

30 CC Act, s 4(2)(a).

31 See, eg, *Office of Fair Trading v Lloyds TSB Bank plc* [2008] AC 316 at 319 [4], 321 [11], 325-326 [25]-[27]; *R (KBR Inc) v Director of the Serious Fraud Office* [2022] AC 519 at 529-530 [26].

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Australia and corporations incorporated in Australia.<sup>32</sup> The object of the legislature is readily apparent – the extension of the general and specific protections in the ACL to conduct outside Australia by those persons specified in s 5(1) but subject, of course, to any limit specified in the various and separate provisions in Chs 2 and 3 of the ACL.

39 That construction is consistent with the specific object and policy of the provision in issue in this appeal, s 23 of the ACL, which addresses contracts of adhesion. Section 23 addresses the relative imbalance in bargaining position between contracting parties to a consumer contract or small business contract.<sup>33</sup> As the factors relevant to determining whether a contract is a "standard form contract" demonstrate,<sup>34</sup> consumers and small businesses may not have an opportunity to negotiate the terms of a contract, to "explicitly consider and tailor the terms and conditions", or to "seek to eliminate any terms seen as unfair"<sup>35</sup> – contracts may be offered only on a "take it or leave it" basis. It cannot be assumed that consumers and small businesses are "sufficiently sophisticated to ensure acceptable contract outcomes", nor can they "reasonably be expected to have their 'eyes wide open'" in considering the full terms of such a contract.<sup>36</sup> The scope of the protection provided by s 23, however, is not at large. It is limited to consumer contracts and small business contracts that are standard form contracts.<sup>37</sup> The Parliament has left all other contracts unaffected by s 23. But where there is a standard form contract that is either a consumer contract or a small business contract, the norm of conduct in s 23 applies.

40 There is nothing irrational in that norm extending to foreign corporations that choose to carry on business in Australia so that they cannot seek to enforce unfair terms within a standard form consumer or small business contract, irrespective of whether that occurs inside or outside Australia. Parliament is

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32 CC Act, s 5(1)(g)-(i).

33 See ACL, s 27(2)(a).

34 ACL, s 27(2).

35 Commonwealth of Australia, Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008), vol 2 at 161.

36 Commonwealth of Australia, Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008), vol 2 at 161.

37 ACL, s 23(1), (3), (4).

prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas.

41 That construction is also consistent with the CC Act being beneficial consumer protection legislation,<sup>38</sup> as well as the legislative history. Section 5 was a provision of the *Trade Practices Act 1974* (Cth) ("the TP Act") at the time of the enactment of that Act. The *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) ("the ACL No 1 Act") introduced the ACL into the TP Act and expanded the category of provisions the operation of which was extended by s 5 to include the ACL.<sup>39</sup> Significantly, the version of the ACL inserted as Sch 2 to the TP Act by the ACL No 1 Act contained only one substantive Part: Pt 2, which was entitled "Unfair contract terms". The provisions in Pt 2 were relevantly identical to the unfair contract terms regime now contained in Pt 2-3 of the ACL. The main operative provision, s 2, was the predecessor to the current s 23 of the ACL. The ACL No 1 Act also enacted a new s 130 of the TP Act, which provided that the ACL "applies as a law of the Commonwealth to the conduct of corporations".<sup>40</sup> "[E]ngaging in conduct" and "conduct" were, at that time, defined in s 4(2)(a) and (b) of the TP Act in terms that were substantially identical to the definitions of "engaging in conduct" and "conduct" in s 4(2)(a) and (b) of the CC Act. It follows that unless s 2 of the ACL as originally enacted involved "conduct", s 130 of the TP Act would have had no operation because there would have been no "conduct" in respect of which the ACL would have applied. Similarly, when a reference to the ACL was inserted into s 5(1)(ea) by the ACL No 1 Act, s 5(1) extended the operation of the provisions listed in s 5(1)(a)-(f) to *conduct engaged in* outside Australia. In circumstances where the unfair contract terms regime was, at that time, the sole substantive Part of the ACL, to interpret s 2 of the ACL as not involving "engaging in conduct" would have deprived s 5(1)(ea) of the TPA, as enacted, of all operation.

42 For the purposes of this appeal, there was no dispute that Princess was carrying on business in Australia selling and marketing cruises, including the voyage the subject of these proceedings. There was also no dispute that Princess relevantly *engaged in conduct outside* Australia. Mr Ho's contract,

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38 CC Act, s 2.

39 ACL No 1 Act, item 6 in Pt 2 of Sch 1.

40 ACL No 1 Act, item 11 in Pt 2 of Sch 1.

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which contained the impugned class action waiver clause, was made outside Australia. The giving effect to that contract, by Princess seeking to rely on the exclusive jurisdiction clause and the class action waiver clause in support of its application for a stay, occurred in Australia. For present purposes, it is sufficient to point to the first of these, the making of Mr Ho's contract, as the relevant conduct triggering the operation of s 23 of the ACL as read with s 5(1)(c) and (g) of the CC Act. In their terms, s 5(1)(c) and (g) of the CC Act extend the norm of conduct in s 23 to "the *engaging in conduct outside Australia*" by a body corporate carrying on business within Australia and, more particularly, s 5(1)(c) and (g) of the ACL extend the application of s 23 of the ACL to the making of Mr Ho's contract, a contract made outside Australia by corporations carrying on business in Australia.

43 Contrary to Princess' submission, s 23 is not a generally worded provision that calls for the need to identify a statutory hinge.<sup>41</sup> Section 23, when read in context, is not at large. The specificity of s 5(1) of the CC Act as to the extraterritorial reach of Pt 2-3 of the ACL (which includes standard form contracts with consumers made outside Australia by those identified in s 5(1)(g) to (i)) cannot be ignored. Section 5(1) is intended to operate with s 23, and thus extends and defines the boundaries of the operation of s 23.

44 A specific concern raised by Princess – that s 23 of the ACL, read with s 5(1)(c) and (g) of the CC Act, lacks any *additional* territorial limit (unlike most of the other provisions in Ch 2)<sup>42</sup> – does not alter the proper construction of the operative provisions. Section 5(1)(c) and (g) having identified the requisite connection between Pt 2-3 and Australia, there is no basis for seeking to identify a further territorial connection, whether by implication or statutory presumption.<sup>43</sup> In this context, the "presumption" against extraterritoriality has no role to play in

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41 *Impiombato* (2022) 96 ALJR 956 at 965 [37], 970 [59], 971 [61]; 405 ALR 402 at 410, 417, 418; *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692 at 704 [34]-[35], 732 [157].

42 See ACL, ss 18, 20, 21, which require an additional territorial nexus, namely that the conduct proscribed be in "trade or commerce". "Trade or commerce" is defined in s 2(1) of the ACL to mean trade or commerce "within Australia" or "between Australia and places outside Australia".

43 *Impiombato* (2022) 96 ALJR 956 at 965 [38], 970-971 [59]-[62]; 405 ALR 402 at 410-411, 417-418. See also *Kay's Leasing* (1964) 116 CLR 124 at 142-143.

light of the express contrary words in the applicable statute.<sup>44</sup> That construction is reinforced by the fact that, on any application of the "presumption", the reading down of the statutory provision would also frustrate an object of the legislation.<sup>45</sup>

45 Thus, no additional territorial connections are necessary or appropriate. It is appropriate, nevertheless, to address some of the so-called "limitations" identified by Princess.

46 Princess' primary submission was that s 23 will only apply where the proper law of the contract is Australian law. Princess sought to rely on the absence, in Pt 2-3, of an equivalent provision to s 67 in Div 1 of Pt 3-2 of the ACL. Section 67 is headed "Conflict of laws". Section 67(a) provides that Div 1 of Pt 3-2 of the ACL (dealing with consumer guarantees) applies if the proper law of the contract would be the law of any part of Australia but for a term of the contract that provides otherwise. Princess submitted that the omission of an equivalent provision in Pt 2-3 does not support an intention for that Part to extend to foreign law governed contracts; it demonstrates that Parliament did not see the need to extend the Part contrary to ordinary choice of law rules. That submission should be rejected. In relation to Pt 3-2 of the ACL, the Parliament chose to apply Pt 3-2 where the proper law of the contract is Australian law, ignoring any express choice of law clause to the contrary. Section 67 applies Pt 3-2 by reference to the proper law of the contract but, importantly, with an anti-avoidance objective.

47 It may be accepted that there is no equivalent to s 67 in Pt 2-3. But that omission is not a basis for construing Pt 2-3 as only applying where the proper law of the contract is Australian law. Princess' construction is contrary to the express statutory provisions which extend the operation of Pt 2-3 to conduct of foreign corporations carrying on business in Australia and, no less significantly, it would mean that parties could contract out of Pt 2-3 by including a foreign choice of law clause in a contract of adhesion. In an attempt to limit the evasion consequences that would follow from the acceptance of their construction, Princess contended that s 23 could apply *only* to void an unfair choice of law clause (which, if voided, would then allow the court to consider whether the contract, without that term, was governed by Australian law under choice of law rules). Again, that contention

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44 *Impiombato* (2022) 96 ALJR 956 at 966 [43]; 405 ALR 402 at 411-412. See also *Wanganui* (1934) 50 CLR 581 at 601.

45 *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 481 [77].

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has no textual or other basis. These matters tell strongly against such a construction of s 5(1) of the CC Act and s 23 of the ACL.<sup>46</sup>

48 Two other proposed limitations should be addressed – that the contract must be entered into "while" the foreign company was engaged in business in Australia and that s 23 should be construed as applying only to a term of a contract that affects or is capable of affecting the acquisition of goods or services by a consumer in Australia. Both proposed limitations are contrary to the text of s 23 of the ACL, read with s 5(1) of the CC Act. The first seeks to impose a temporal and territorial limitation which has no basis in the text of the ACL and is directly contrary to the definition of "engaging in conduct" outside Australia, which extends to the making of a contract. The second proposed limitation is contrary to the text of s 3 of the ACL (which defines when a person is taken to have acquired particular goods or services as a consumer)<sup>47</sup> and s 23(3) of the ACL (which defines what is a consumer contract). That limitation would require reading into s 3 or s 23(3) of the ACL (or both) the words "in Australia", words which are not only not there but which ignore the express words of s 5(1) of the CC Act.

49 A further proposed limitation raised in the Full Court by Ms Karpik, and considered by Derrington J, was whether s 23 applies only to contracts for services "performed wholly or partially in" Australia. That same limitation was identified by Ms Karpik before this Court as the preferable form of limitation if, contrary to her primary position, a further territorial limitation was required. On the facts of this case, that limitation would be met, as the voyage both departed from and returned to Sydney. That may be why, in this Court, Princess posited that the limitation might be that s 23 does not apply to contracts that are performed or to be performed *predominately* outside Australia. However, as with the other proposed limitations identified, neither of these formulations has any basis in the text of the ACL or the CC Act. The Act is not concerned with conduct engaged in *predominately* inside or outside Australia – that is not the criterion adopted. The proposed limitation is also at odds with the object of the CC Act to "enhance the welfare of Australians through the promotion of ... provision for consumer protection",<sup>48</sup> because, if accepted, it would result in s 23 not applying

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46 cf *Kay's Leasing* (1964) 116 CLR 124 at 142-143; *Old UGC* (2006) 225 CLR 274 at 282-283 [22]-[23], 291-292 [55]-[56]; *Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 481 [77].

47 See also CC Act, s 4B.

48 CC Act, s 2.



to a contract between an Australian consumer and a corporation incorporated under the *Corporations Act 2001* (Cth) that has its principal place of business in Australia, where the contract was for services wholly or predominately performed overseas.

50 The "absurd and capricious results" that were said to result from s 23 applying to contracts made outside Australia where one of the parties carries on business in Australia are overstated. One example given was that "a company which manufactures cars in Europe and sells them in Australia is subject to the operation of s 23 in relation to its sales of cars in other European countries". But as the Commonwealth submitted, the possibility that a consumer who purchased a car in Europe *could* take action against a European car manufacturer under s 23 of the ACL in the Federal Court of Australia is a very different question to whether a consumer would take such action and whether such an action would progress to judgment. As the Commonwealth accepted, in the absence of a connection beyond the extraterritorial operation of s 23 of the ACL, it would be open to a respondent to seek a stay of such a proceeding on the basis that the Court is an "inappropriate forum" for the proceeding.<sup>49</sup> Whether Australia is an "inappropriate forum" for such a proceeding "depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved", including "the connection of the parties" to the relevant jurisdiction.<sup>50</sup> Similarly, the question of whether s 23, properly construed, applies in a particular situation is distinct from the separate question whether a foreign court would apply s 23 when adjudicating a dispute relating to that situation. Finally, whether Australian law, and Australian judgments, are recognised in other jurisdictions, and in what circumstances, is a matter for foreign law.<sup>51</sup>

### **Class action waiver clause is an unfair term**

51 As Pt 2-3 of the ACL is capable of applying to Mr Ho's contract, it is necessary to determine whether the class action waiver clause is void under s 23 for being an unfair term. As noted earlier, Princess relied on the class action waiver clause in the US Terms and Conditions in support of its application for a stay of

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49 See *Federal Court Rules 2011* (Cth), r 10.43A(2)(b).

50 *Henry v Henry* (1996) 185 CLR 571 at 592-593. See also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 503-504 [25].

51 *Impiombato* (2022) 96 ALJR 956 at 973 [70]; 405 ALR 402 at 420.

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Mr Ho's claims against Princess in the Federal Court of Australia. Ms Karpik successfully argued before the primary judge that the class action waiver clause was unfair. The majority of the Full Court of the Federal Court overturned that decision. As will be seen, the majority of the Full Court was wrong to do so – Princess' contention that the primary judge erred by finding that the class action waiver clause was unfair under Pt 2-3 of the ACL ought to have been rejected.

52 The class action waiver clause – cl 15(C) – in the context of the contract as a whole,<sup>52</sup> is to be assessed as at the date of the contract by reference to the mandatory matters identified in the ACL.<sup>53</sup>

53 The first element requires the court to consider whether the class action waiver clause would cause a *significant imbalance* in the parties' rights under the contract.<sup>54</sup> On its face, it did. The class action waiver clause was not for the benefit of Mr Ho. The class action waiver clause operated as one of a number of constraints in cl 15 on Mr Ho, not on Princess. The whole of cl 15, on its face, is stated to be "for the benefit of the Carrier and certain third party beneficiaries [defined] in Section 1". And the class action waiver clause (cl 15(C)) is particularly one-way in its terms because it operates to impose limitations on passengers but in no way restricts the options of the carrier. Put in different terms, without the class action waiver clause, there is already an imbalance as between Princess and Mr Ho concerning vindication of their respective rights under the contract, in that there are various other limits in cl 15 upon the consumer but not upon Princess.

54 It can be accepted that the class action waiver clause did *not* impede or affect the *existence* of Mr Ho's individual right to sue, or his *capacity* to exercise that right. But the class action waiver clause had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually was or may be uneconomical. Mr Ho paid a ticket price of CAD1,796.17 for the voyage. The cost of commencing and prosecuting a typical claim arising out of the 13-day cruise holiday, brought as an individual proceeding, may well not be economically viable. This is so regardless of the individual circumstances of Mr Ho and the nature of his particular claims. The relevant inquiry in s 24(1)(a) is whether the term "would cause a significant imbalance in the parties' rights and obligations arising under the contract" (being a standard form

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52 ACL, s 24(2)(b).

53 See [26]-[32] above.

54 ACL, s 24(1)(a).

contract), not whether a particular party is personally able to cope with such an imbalance. And the answer is that it did.

55 The second element requires the court to consider whether the term is reasonably necessary to protect the *legitimate interests* of the party who would be advantaged by the term.<sup>55</sup> For the purposes of this element, a term of a consumer contract is presumed *not* to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, *unless that party proves otherwise*.<sup>56</sup> That is, it was for Princess to identify its legitimate interest or interests and establish that the class action waiver clause was reasonably necessary to protect those interests.

56 In this Court, Princess identified its interests as facing a number of individual claims, rather than a class action, in particular on the basis that when claims are aggregated in a class action, faced with even a small chance of a devastating loss, defendants may be pressured into settling questionable claims. There are two difficulties with that contention. First, as the primary judge held, there is no legitimate interest in Princess seeking to prevent people from participating in a class action, thereby preventing a person vindicating their rights under the contract where the cost to do so individually may be uneconomical. Second, whether the clause was reasonably necessary to protect a legitimate interest of Princess was not explained or the subject of evidence.

57 The third element requires the court to consider whether, if applied or relied upon, the clause would cause *detriment* to Mr Ho.<sup>57</sup> It was for Mr Ho to establish whether the term would cause detriment to him if the term were to be applied or relied on. As has been noted, more than a hypothetical case is required, although proof of actual detriment or that a term has been enforced is not necessary.<sup>58</sup> The detriment is not limited to financial detriment; it extends to other forms of detriment that would affect the party disadvantaged by the term's practical effect. In sum, there must be some detriment. The test is not one of "significant detriment", although the nature and extent of the detriment is not irrelevant. Here, as Derrington J accepted, it is not to be doubted that by Princess

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55 ACL, s 24(1)(b).

56 ACL, s 24(4).

57 ACL, s 24(1)(c).

58 See [31] above.

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relying on the class action waiver clause, Mr Ho would be denied the benefits of Pt IVA of the FCA Act. That is a detriment.

58 Finally, on balance, the clause was also not *transparent*.<sup>59</sup> It may be accepted that the clause was plainly legible. But, as the facts record,<sup>60</sup> Mr Ho was only able to view the clause once he received the booking confirmation email, and only then if he clicked on the link in that email, navigated the resulting webpage – which had three different contracts on it – and signed into the Cruise Personalizer webpage to determine the applicable contract. The term was not presented clearly, nor was it readily available to Mr Ho. Given the imbalance and detriment inherent in the term, there should have been a greater degree of transparency.

59 For a term of a contract to be unfair, it must satisfy each of s 24(1)(a) to (c) of the ACL. Each of those paragraphs was satisfied.

60 Courts in the United States have held that class action waiver clauses (including a class action waiver clause in a cruise contract) are not fundamentally unfair.<sup>61</sup> These cases were referred to by the Full Court in the context of determining whether the class action waiver clause was reasonably necessary to protect Princess' legitimate interests.<sup>62</sup> Those authorities are to be approached with some caution. None of them dealt with Pt 2-3 of the ACL or with the class actions regime under Pt IVA of the FCA Act. Most of the authorities arose in the different context of class arbitrations.<sup>63</sup> And the tests adopted are different.<sup>64</sup>

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59 ACL, s 24(2)(a).

60 See [11]-[12] above.

61 See, eg, *AT&T Mobility LLC v Concepcion* (2011) 563 US 333; *Carter v Rent-A-Center Inc* (2017) 718 Fed Appx 502 (9th Cir) at 504; *DeLuca v Royal Caribbean Cruises Ltd* (2017) 244 F Supp 3d 1342 (SD Fla) at 1348. See also *Kohen v Pacific Investment Management Company LLC* (2009) 571 F 3d 672 (7th Cir) at 677-678.

62 See [56] above.

63 See, eg, *AT&T Mobility* (2011) 563 US 333 at 350.

64 See, eg, *AT&T Mobility* (2011) 563 US 333 at 339-340, 344-351.

### **Class action waiver clause not contrary to Pt IVA of the FCA Act**

61 A contract will not be enforceable if the provisions of a statute read as a whole are inconsistent with a power to forgo its benefits, or the policy and purpose of the statute show that the rights which it confers on individuals are given not for their benefit alone but also in the public interest and therefore are not capable of being renounced.<sup>65</sup>

62 Part IVA of the FCA Act, a procedural mechanism allowing for the grouping of existing claims,<sup>66</sup> is relevantly directed at avoiding a multiplicity of proceedings and promoting the efficient administration of justice.<sup>67</sup> It is an opt-out regime.

63 The class action waiver clause is not void or unenforceable by reason of anything in Pt IVA of the FCA Act. It is not inconsistent with the structure and policy of Pt IVA. That Part accommodates and, in some cases, expressly provides for a person to take a step or steps at multiple points of time in the life of a dispute that would "remove" themselves from the regime provided for in Pt IVA. Those steps include settling before an action, which may include contracting out of the right to participate in a class action; instituting an individual proceeding; settling after commencement of the class action but before the taking of the steps prescribed by s 33J; opting out of the class action under the mechanism provided for by s 33J, read with ss 33X(1) and 33Y(2); and a redefining of the class as a result of one or more of those steps. Those steps would not frustrate the purposes of Pt IVA.

64 Contrary to Ms Karpik's submissions, the clause does not destroy the utility of a prospective representative action; not all steps in accordance with an opt-out scheme are administered by the court. Contrary to the Attorney-General's submissions, ss 33J, 33X and 33Y do not compel the conclusion that a group member may only opt out of a representative proceeding after an opt-out notice is issued under s 33X(1)(a) but before the date fixed in the notice under s 33J(1). That is, the Attorney-General's submission that waiver is possible only to compromise a dispute once the dispute had begun and that the rights could not be

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65 *Price v Spoor* (2021) 270 CLR 450 at 466-467 [39], quoting *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 456.

66 *Impiombato* (2022) 96 ALJR 956 at 969 [56]; 405 ALR 402 at 416.

67 See, eg, *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 611 [82].

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waived by entry into a contract containing such a clause prior to a dispute is rejected. The compromise of a dispute is possible before the litigation has begun.

**Strong reasons not to enforce the exclusive jurisdiction clause in the US Terms and Conditions**

65        There is now no dispute that the exclusive jurisdiction clause in the US Terms and Conditions is valid and is not an unfair term under Pt 2-3 of the ACL. As has been noted earlier, Princess applied to stay Mr Ho's claims against it in the Federal Court on the basis of the exclusive jurisdiction clause, relying on the class action waiver clause.

66        The court retains a discretion whether to stay a proceeding the subject of a foreign exclusive jurisdiction clause.<sup>68</sup> In the absence of strong countervailing reasons, proceedings will be stayed in the face of such a clause.<sup>69</sup>

67        The primary judge held that, had he found that the US Terms and Conditions had been incorporated into Mr Ho's contract, he would have gone on to determine, in the exercise of his discretion, that there were "strong reasons" to refuse Princess' stay and so would not have enforced the exclusive jurisdiction clause. The reasons included that the class action waiver clause was an unfair term, that the enforcement of the exclusive jurisdiction clause would fracture the litigation, and that public policy favoured ACL claims being determined by Australian courts. The majority of the Full Court correctly overturned reliance on the last reason, but granted a stay of Mr Ho's claims against Princess in the Federal Court on the basis, among others, that the class action waiver clause was not unfair. The conclusion that the class action waiver clause was enforceable was an error.

68        It therefore becomes necessary for this Court to re-exercise the discretion. In the re-exercise of the discretion, a stay of Mr Ho's claims against Princess in the Federal Court should not be granted. The countervailing reasons for not granting the stay are strong. First, the class action waiver clause is an unfair term and is therefore void under s 23 of the ACL. It is to be recalled that Princess relied upon the class action waiver clause to support the stay, and the unfair term issue was raised by Ms Karpik in response to Princess' reliance on the clause. On the clause being found to be unfair, not only is Princess deprived of the ability to rely on that clause to support a stay, but there is a strong countervailing reason not to enforce

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68    See, eg, *Akai* (1996) 188 CLR 418 at 428-429, 445.

69    See, eg, *Akai* (1996) 188 CLR 418 at 427, 445.

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the exclusive jurisdiction clause. That is because Mr Ho has a strong juridical advantage in remaining as part of the class action in the Federal Court of Australia, as he may not be able to participate in a class action in the United States. Enforcement of the exclusive jurisdiction clause may reduce the potential for Mr Ho and others in his position to participate in litigation concerning the voyage by denying them access to justice as well as the associated benefits of a class action.

69           Second, enforcement of the exclusive jurisdiction clause would fracture the litigation. Whether or not Mr Ho's claims against Princess are stayed, the representative proceedings in the Federal Court would continue. And as the primary judge identified, if the parties to a contract containing the US Terms and Conditions are forced to commence individual proceedings in the United States when essentially identical claims for the vast majority of passengers will be heard in the class action in the Federal Court, this will have the undesirable consequence of wasting the parties' resources and will run the risk of producing conflicting outcomes in different courts with the attendant risk of bringing the administration of justice into disrepute.

70           For those reasons, Mr Ho's claims against Princess in the Federal Court of Australia should not be stayed.

### **Orders**

71           The appeal should be allowed with costs. Paragraphs 2(b), 3 and 4 of the orders made by the Full Court of the Federal Court should be set aside and, in their place, order that Princess pay Ms Karpik's costs of the appeal.