Federal Court of Australia

Carnival plc v Karpik (The Ruby Princess) [2022] FCAFC 149

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| Appeal from: | *Karpik v Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082 |
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| File number: |  |
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| Judgment of: | **ALLSOP CJ, RARES AND DERRINGTON JJ** |
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| Date of judgment: | 2 September 2022 |
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| Catchwords: | **CONTRACTS** – contract formation – nature of agency relationship – extent of agent’s authority – imputation of agent’s knowledge – incorporation of terms – relevance of so-called ticket cases – offer and acceptance – whether there was reasonable notice of terms of contract of passage including the exclusive jurisdiction clause – whether exclusive jurisdiction clause was onerous or unusual  **CONSUMER LAW** – whether exclusive jurisdiction clause or class action waiver clause are unfair terms within the meaning of s 23 of the *Australian Consumer Law* – extraterritorial application of s 23 – whether s 23 is a mandatory law of the forum  **REPRESENTATIVE PROCEEDINGS** – whether class action waiver clause unenforceable – whether class action waiver clause is contrary to Pt IVA of the *Federal Court of Australia Act* *1976* (Cth)  **PRIVATE INTERNATIONAL LAW** – enforcement of exclusive jurisdiction clause – whether class action waiver clause is contrary to public policy – whether there are any discretionary reasons to grant a stay of the proceedings |
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| Legislation: | *Constitution* (Commonwealth of Australia) ss 51(i), 51(xx), 76(iii)  *Acts Interpretation Act 1901* (Cth) ss 15A, 15AA, 21(1)(b)  *Admiralty Act 1988* (Cth) s 4(3)  *Australian Securities and Investments Commission Act 2001* (Cth) s 12BF  *Carriage of Goods by Sea Act 1991* (Cth) s 11(1)  *Competition and Consumer Act 2010* (Cth) ss 2, 4, 5(1)(g)  *Competition and Consumer Act 2010* (Cth) Schedule 2 (*Australian Consumer Law)* ss 18, 20, 21, 23–25, 29, 30, 32–37, 44, 51–53, 67  *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33C, 33E, 33H, 33J, 33K, 33N–33S, 33X, 33Y  *Federal Court of Australia Amendment Bill 1991* (Cth)  *Federal Court Rules 2011* (Cth) r 30.01  *Insurance Contracts Act 1984* (Cth) s 8  *Judiciary Act 1903* (Cth) s 78B  *Trade Practices Act 1974* (Cth) ss 4, 52  *Trade Practices Amendment Bill 1977* (Cth)  *Contracts Review Act 1980* (NSW) ss 7(1), 17(3)  *Fair Trading Act 1999* (Vic)  *Interpretation Act 1987* (NSW) s 12(1)(b)  *Business Practices and Consumer Protection Act 2004* (BC)  *Class Proceedings Act 1996* (BC) s 4  *Constitution* (United States of America) Art 3(2) |
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| Cases cited: | *A v Hayden* (1984) 156 CLR 532  *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470  *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418  *American and Ocean Insurance Co v 356 Bales of Cotton* 26 US 511 (1828)  *Archer v Carnival Corporation* 2020 WL 6260003  *AT&T Mobility LLC v Concepcion* 563 U.S. 333 (2011); 131 S Ct 1740  *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377  *Australian Competition and Consumer Commission v Facebook Inc* [2021] FCA 244  *Australian Competition and Consumer Commission v Valve Corp (No 3)* (2016) 337 ALR 647  *Auxil Pty Ltd v Terranova* (2009) 260 ALR 164  *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1  *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215  *Bonython v Commonwealth* (1950) 81 CLR 486  *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1  *Carnival Cruise Lines, Inc. v Shute*, 499 U.S. 585  *Causer v Browne* [1952] VLR 1  *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd’s Rep 450  *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390  *Commonwealth v Verwayen* [1990] HCA 39; 170 CLR 394  *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89  *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297  *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd’s Rep 257  *De Lovio* *v Boit* 7 FCas 418 (1815)  *Detroit Trust Co v The Thomas Barlum* 293 US 21 (1934)  *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846  *Dillon v Baltic Shipping Co* (1989) 21 NSWLR 614  *Dresser v Norwood* (1864) 17 CB(NS) 466  *DRJ v Commissioner of Victims Rights (No 2)* [2020] NSWCA 242; 103 NSWLR 692  *Dyczynski v Gibson* (2020)280 FCR 583  *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450  *El Ajou v Dollar Land Holdings Plc* (1994) BCC 143  *Epic Games Inc v Apple Inc* [2021] FCAFC 122; 286 FCR 105; 392 ALR 66  *Epic Games Inc v Apple Inc* (2021) 151 ACSR 444  *Erie Railroad v Tomkins* 304 US 64 (1938)  *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95  *Ethicon Sàrl v Gill* (2021) 387 ALR 494  *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1978] AC 1  *Federal Commissioner of Taxation v McGrouther* (2015) 229 FCR 466  *Flexirent Capital Pty Ltd v EBS Consulting Pty Ltd* [2007] VSC 158  *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414  *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133  *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546  *Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd’s Rep 70  *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837  *House v R* (1936) 55 CLR 499  *Incitec Ltd v Alkimos Shipping Co* (2004) 138 FCR 496  *Insight Vacations Pty Ltd v Young* [2011] HCA 16; 243 CLR 149  *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433  *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2020] FCA 1018  *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* [1908] HCA 95; 6 CLR 309  *Kay’s Leasing Corporation Pty Ltd v Fletcher* [1964] HCA 79; 116 CLR 124  *King v GIO Australia Holdings Ltd* [2001] FCA 270  *L’Estrange v F Graucob Ltd* [1934] 2 KB 394  *Lauritzen v Larsen* 345 US 571 (1953)  *MacRobertson Miller Airline Services v Commissioner of State Taxation (Western Australia)* (1975) 133 CLR 125  *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559  *McIntosh v Royal Caribbean* 2018 WL 1732177  *Medtel Pty Ltd v Courtney* (2003) 130 FCR 18  *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10  *Moragne v States Marine Lines Inc.* 398 US 375 (1970)  *National Australian Bank Ltd v Dionys* [2016] NSWCA 242  *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232  *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197  *Old UGC Inc v Industrial Relations Commission of New South Wales* [2006] HCA 24; 225 CLR 274  *Oltman v Holland Am. Line, Inc*., 538 F.3d 1271 (9th Cir. 2008)  *Panama Railroad v Johnson* 264 US 375 (1924)  *Parker v South Eastern Railway Company* (1877) 2 CPD 416  *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 D.L.R. (4th) 205  *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679  *Price v Spoor* [2021] HCA 20; 270 CLR 450  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8; 256 CLR 459  *Re Maritime Union of Australia; Ex Parte CSL Pacific Shipping* [2003] HCA 43; 214 CLR 397  *Richardson v Mellish* (1824) 2 Bing 229  *RMS Titanic Inc v Haver* 171 F3d 943 (1999)  *Schiffahartsgesellschaft Leonhardt & Co v A Botacchi SA De Navegacion* 773 F2d 1528 (1985)  *Southern Pacific Co v Jensen* 244 US 205 (1917)  *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* [2015] QSC 290  *Swift v Tyson* 41 US 1 (1842)  *The Belgenland* 114 US 355 (1885)  *The Eleftheria* [1970] P 94  *The Lottawana* 88 US 558 (1874)  *The Scotia* 81 US 170 (1871)  *The Tolten* [1946] P 135  *The Western Maid* 257 US 419 (1922)  *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150  *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163  *Tjungarrayi**v Western Australia* [2019] HCA 12; 269 CLR 150  *Toll (FGCT) v Alphapharm Pty Ltd* (2004) 219 CLR 165  *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1  *Turton v London and North-Western Railway Co* (1850) 15 LT(OS) 92  *Uber Technologies Inc. v Heller* (2020), 2020 SCC 16  *Valve Corporation v Australian Consumer and Competition Commission* (2017) 258 FCR 190  *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; 171 CLR 538  *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* [1934] HCA 3; 50 CLR 581  *Westfield Management Ltd v AMP Capital* *Property Nominees Ltd* [2012] HCA 54; 247 CLR 129  *Wigmans v AMP Ltd* (2010) 388 ALR 272  *Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd* (2019) 285 IR 390  *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345  Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988)  *Bowstead & Reynolds On Agency* (22nd ed, Sweet & Maxwell, 2021)  Briggs A, *The Conflict of Laws* (3rd ed, Oxford University Press, 2013)  Carter JW, *Carter on Contract* (LexisNexis, 2021)  Davis, *Contract: General Principles – The Laws of Australia* (Thomson, 2006)  Freilich A & Webb E, ‘The Incorporation of Contractual Terms in Unsigned Documents - Is it Time for a Realistic, Consumer - Friendly Approach?’ (2009) 34(2) *University of Western Australia Law Review* 261  Herzfeld and Prince, *Interpretation* (2nd ed, Thomson Reuters, 2020)  Horne J and Lewis C, *Fitting Pigs into Pokes — the Incorporation of Terms in Contract* (1998) 12 JCL 237  Macdonald E, ‘Incorporation of Standard Terms in Website Contracting – Clicking “I Agree”’, (2011) *Journal of Contract Law*, 198  *Miller’s Australian Competition and Consumer Act Annotated* (43rd ed, Thomson Reuters, 2021)  *Nygh’s Conflict of Laws in Australia* (10th ed, LexisNexis, 2019)  Seddon NC, Bigwood RA and Ellinghaus MP, *Cheshire and Fifoot’s Law of Contract* (10th ed, LexisNexis, 2012) |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Other Federal Jurisdiction |
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| Number of paragraphs: | 397 |
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| Date of hearing: | 14–15 February 2022 |
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| Counsel for the Appellants | Mr D McLure SC with Mr T Prince and Ms A Reid  (written submissions also by Mr H Cooper) |
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| Solicitor for the Appellants | Clyde & Co |
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| Counsel for the Respondent | Mr I Pike SC with Mr R May and Mr D Farinha |
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| Solicitor for the Respondent | Shine Lawyers Pty Ltd |

ORDERS

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|  | | NSD 1033 of 2021 |
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| BETWEEN: | CARNIVAL PLC ARBN 107 998 443  First Appellant  PRINCESS CRUISE LINES LIMITED (A COMPANY REGISTERED IN BERMUDA)  Second Appellant | |
| AND: | SUSAN KARPIK  Respondent | |

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| order made by: | ALLSOP CJ, RARES and DERRINGTON JJ |
| DATE OF ORDER: | 2 september 2022 |

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. Order 1 of the orders of the Federal Court of Australia made on 20 September 2021 in this matter be set aside and, in lieu thereof, it is ordered that:
   1. It is declared that the passage contract as between Mr Patrick Ho and the respondents pursuant to which Mr Ho undertook a voyage on the vessel, *Ruby Princess*, departing Sydney on 8 March 2020, was subject to the terms of the US Terms and Conditions as that expression is used in the reasons for judgment of this Court.
   2. The proceedings in respect of the claims of Mr Patrick Ho as against the respondents be stayed.
   3. The matter be remitted to the primary judge for determination of the extent to which the reasons for decision of this Court affect the claims of other members of the class action.
3. Order 7 of the orders of the Federal Court of Australia made on 21 October 2021 in this matter be set aside and, in lieu thereof, it is ordered that the applicant pay the respondents costs of the application.
4. The respondent pay the appellants’ costs of the appeal.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I have had the advantage of reading the reasons for judgment of Derrington J. I agree with the orders proposed by his Honour. Subject to the following I agree with his Honour’s reasons. What follows assumes a familiarity with the reasons of Derrington J.

## Was the class action waiver clause “unfair”?

1. The question of the applicability of s 23 of the *Australian Consumer Law* (**ACL**) is not without its difficulty, to which I will come.
2. Section 23 of the ACL is directed to the character of terms of a consumer contract. Whether or not a term of a consumer contract is “unfair” is not left to the unconstrained moral or social judgment of the Court. Rather, s 24 is directed to the meaning of “unfair”. It is the judgments and evaluations to be made within the consideration of s 24(1)(a) and (b) that limit the definition to the broader task of evaluative characterisation. As Gilmour J stated in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377, it is contractual fairness, rooted in the importance of the contractual bargain, that is at work in the statute. True freedom of contract in a consumer context marked by the use of (entirely commercially useful and efficacious: cf in a non-consumer context, *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1978] AC 1 at 8 per Lord Diplock) standard form contracts, or contracts of adhesion, is protected and strengthened, not undermined, by the protection of the consumer from abuse of position or power or substantive unfairness, by reference to the legitimate commercial interests of the stronger party. It is within this frame of reference that the balance of the practical and reasonable commercial interests are to be assessed. Importantly, the evaluation must have regard to the contract as a whole, thus including the whole bargain and necessarily, its commercial context. Notions of “significant imbalance” and the “legitimate interests” of the benefitting party must also be assessed by reference to the clarity and availability of understanding found within the transparency of the term: s 24(3). Viewed thus, the importance of the upholding of a *fair* bargainassists in the application of the provision.
3. Within that framework, assuming s 23 to be applicable as a statute of the forum, it is necessary to consider whether the class action waiver clause is unfair. The primary judge rejected the contention that the exclusive jurisdiction clause was unfair, either by reference to s 23 or the *Contracts Review Act 1980* (NSW). The challenge to that rejection in paragraphs 4 and 5 of the Notice of Contention was abandoned on appeal.
4. Thus, the question of unfairness of the class action waiver clause under s 24 is to be examined by reference to the whole of the contract. That contract includes a not unfair and enforceable foreign exclusive jurisdiction clause. Unless the class action waiver clause is to be seen as contrary to the operation and policy within Pt IVA of the *Federal Court of Australia Act 1976* (Cth) or considered contrary to some public policy of Australia, it is difficult to see why the evaluative task required by s 23 should not be at least informed by the approach of courts in the United States. This is particularly so in respect of any significant imbalance and the legitimate interests of Carnival.
5. This perhaps throws up the question of how, if at all, the question of there being any reason not to enforce the not unfairbargain as to exclusive jurisdiction should be approached. From one perspective, even though being examined through the lens of a statute of the forum, the exclusive jurisdiction clause tends to bring into focus that this is a “United States problem”, as it were. Why should the loss of a capacity to participate in an Australian class action, by the class action waiver clause, cause any significant imbalance when the exclusive jurisdiction clause requires, if enforced, the claim to be stayed anyway? This, it seems to me, rather throws up the inappropriateness of using the loss of the capacity to participate in an Australian class action as a reason not to enforce the exclusive jurisdiction clause. When the whole contract is looked at, the parties bargained in a transparent way for the United States courts to have exclusive jurisdiction (by a clause that is not unfair under s 23) and also agreed that there would be a waiver of class action participation (a clause which, if effectively communicated, as it was, at least by the standard of transparency for s 24(3)), would be enforced in the United States.
6. It is difficult to see (especially in the light of s 24(2)(b)), how one can divorce or segregate the consideration of the class action waiver clause, from the consideration of the enforceability of the exclusive jurisdiction clause, as the primary judge did. Even more so, it is difficult to see why a conclusion that the class action waiver clause was unfair in causing a significant imbalance in the parties’ rights or that it was not reasonably necessary in order to protect the legitimate rights of Carnival, should mitigate against the enforcement of the fairly-bargained for exclusive jurisdiction clause. That clause is not unfair by Australian law. By the proper law of the contract it is also enforceable, as is the class action waiver clause. The loss of the procedural advantage to Mr Ho of the Australian class action is no more than that for which he freely bargained under the proper law of the contract by the exclusive jurisdiction clause. Not to enforce the exclusive jurisdiction clause is to impose an equivalent procedural disadvantage on Carnival in circumstances where the freely-bargained for exclusive jurisdiction clause is fair and enforceable under the law of the forum and the proper law of the contract.
7. There was nothing contrived about the choice of law in the circumstances. Mr Ho is not an Australian consumer. There was no apparent attempt in the making of the contract, or in the choice of the proper law or in the exclusive jurisdiction clause, to circumvent the operation of Pt IVA. The proper law clause, the exclusive jurisdiction clause and the class action waiver clause, in the context of the North American residence of Mr Ho, and in the context of the approach of the proper law to class action waiver clauses, and in the context of the clarity of the term in the conditions (being relevant both to the operation of the proper law and s 24) make it difficult to see why the contractual obligation on Mr Ho regarding his participation in an Australian class action is in any way unfair to him.
8. The above conclusion says nothing about another contract with an Australian consumer whereby it might be sought in a standard form contract to deprive a person of access to Pt IVA.
9. In any event, here, Mr Ho did not prove that he is disadvantaged by suffering detriment for the purposes of s 24(1)(c).

## The question of Pt IVA

1. I have read the reasons of Rares J on this question. I prefer, with respect, the approach of the primary judge and Derrington J. There is no defeat or circumvention of a statutory purpose of Pt IVA by permitting parties in the free and fair exercise of the right to contract to agree not to participate in class actions. The scheme of Pt IVA was permissive. Construed as the primary judge did, correctly in my view, the clause places an obligation upon the contracting party to opt out of the action which by its definition has included him or her. If that is a fair contractual provision by reference to any applicable law or statute, it is difficult to see the policy, purpose or provision of Pt IVA that is offended. It may be difficult in point of analysis to distinguish the foreign contracting party in Mr Ho’s position, as described above, from the Australian consumer the subject of such a clause in an Australian standard form contract. Nevertheless, the view that *any* such waiver clause is unenforceable or void irrespective of the circumstances of its entry requires the statute to be such as to reveal a policy of the statute or a relevant statutory purpose not to allow people to agree not to participate in a class action under Pt IVA, irrespective of their bargaining positions or their circumstances, and irrespective of the relationship of the parties to Australia. The foregoing of such statutory rights must be contrary to the statute: *Price v Spoor* [2021] HCA 20; 270 CLR 450 at 460–461 [12]–[16], 466 [39] and 478–479 [76]–[78]; *Westfield Management Ltd v AMP Capital* *Property Nominees Ltd* [2012] HCA 54; 247 CLR 129 at 143–145 [46]–[52]; *Commonwealth v Verwayen* [1990] HCA 39; 170 CLR 394 at 404–407.
2. Parties are freely able to opt out of any action under Pt IVA. Section 33J(2) gives that right. I do not see any policy or purpose of Pt IVA infringed by a party freely and fairly agreeing in advance of receipt of the notice from the Court setting the date by which the opt out is to occur, as part of a contractual relationship, to oblige itself, herself or himself not to participate in a class action, and thereby become obliged to exercise that power to opt out.
3. There might be little doubt that in many cases of Australian consumer contracts it would be unfair and unjust for standard form contracts, as contracts of adhesion, to seek to impose a waiver of the operation of Pt IVA or any other statute of a State or Territory of similar character. Here, Mr Ho, who is not an Australian consumer, has entered a contract with an exclusive jurisdiction clause, a proper law clause, and a class action waiver clause valid and enforceable under the proper law. I see no aspect of the terms of Pt IVA that are offended.
4. If the permissive and beneficial procedure of Pt IVA is not to be capable of being waived in a free and fair bargain in advance of proceedings being brought such should be stated by Parliament. I do not discern the necessary intendment of such from Pt IVA.

## The governing law of the contract

1. Though not the subject of argument, the nature of the contract and its proper law (the general maritime law of the United States) should not be ignored in the consideration of any discretion attending the enforcement of the exclusive jurisdiction clause. The general maritime law is federal general law of a maritime character, established and adopted not by legislation of Congress but by the operation of Article 3 section 2 of the United States *Constitution* (relevantly in identical terms to s 76(iii) of the *Constitution*) through the exercise of power by the United States federal judiciary exercising jurisdiction to apply, to use the words of Chief Justice Marshall in 1828: “the law, admiralty and maritime, as it has existed for ages”: *American and Ocean Insurance Co v 356 Bales of Cotton* 26 US 511 (1828) at 545–546. See also *De Lovio* *v Boit* 7 FCas 418 (1815) at 443 (Story J); *The Lottawana* 88 US 558 (1874); *The Scotia* 81 US 170 (1871) at 187–188; *The Belgenland* 114 US 355 (1885) at 362–363; ***Southern Pacific Co v Jensen*** 244 US 205 (1917); *Panama Railroad v Johnson* 264 US 375 (1924) at 385–386; *Detroit Trust Co v The Thomas Barlum* 293 US 21 (1934) at 43; *Moragne v States Marine Lines Inc.* 398 US 375 (1970) at 402; *Schiffahartsgesellschaft Leonhardt & Co v A Botacchi SA De Navegacion* 773 F2d 1528 (1985) at 1531–1532; *RMS Titanic Inc v Haver* 171 F3d 943 (1999) at 960–961.
2. The general maritime law stands, and has always stood, separate from the common law and was not any aspect of the effort by Story J on behalf of the Supreme Court in *Swift v Tyson* 41 US 1 (1842) to create a federal common law from the resolution of diversity cases, which attempt was struck down as unconstitutional in *Erie Railroad v Tomkins* 304 US 64 (1938).
3. The international character of maritime laws in different nations is not a statement of a supra-sovereign binding law, or as Holmes J put it in *The Western Maid* 257 US 419 (1922) at 432 “a mystic over-law” or with greater metaphor in *Southern Pacific Co v Jensen* “a brooding omnipresence in the sky”: at 222. Rather, it is to recognise the common source of the maritime laws of different nations recognised by Lord Justice Scott in *The Tolten* [1946] P 135 at 142 as the “general law of the sea” and by Justice Jackson on behalf of the Supreme Court in ***Lauritzen v Larsen*** 345 US 571 (1953) at 581–582 as “a non-national or international maritime law of impressive maturity and universality” having “the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign power by any nations, but from acceptance by common consent of civilised communities of rules designed to foster amicable and workable relations”.
4. Justice Jackson recognised that the aims of such law in international commerce were stability, comity, forbearance, reciprocity, and long range national interests: *Lauritzen v Larsen* at 582. The relevance here might be seen to be a reluctance in a court not to enforce an exclusive jurisdiction clause providing for the jurisdiction of a federal court exercising the jurisdiction of the general maritime law of the United States, by favouring a competing local law (s 23) if it found a provision (the class action waiver clause) unfair, when not only is there a fairly-bargained for exclusive jurisdiction clause, but also the class action waiver clause would be valid by the governing law, the general maritime law of the United States. The aims to which Justice Jackson spoke of the general maritime law, in particular, comity, forbearance and reciprocity, might be seen to be just as applicable in this country in dealing with international maritime commerce, albeit international maritime consumer commerce, in a general maritime claim under s 4(3) of the *Admiralty Act 1988* (Cth), in reinforcing a reluctance to disturb the effect of the freely-bargained for exclusive jurisdiction clause in a maritime contract governed by the general maritime law of the United States.
5. These matters were not argued and because of that, play no part in my view held otherwise that the exclusive jurisdiction clause should be enforced.

## The extra-territorial application of s 23

1. Like Derrington J, given my view that the class action waiver clause is not unfair within the meaning of ss 23 and 24, and also given my view that s 15A of the ***Acts Interpretation Act*** *1901* (Cth) may be relevant, I wish to reserve any final view as to scope of the extra-territorial application of s 23 of the ACL, and the applicability of s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to claims under s 23 of the ACL, for the resolution of a more testing, practical legal problem.
2. For example, consider a situation where an Australian resident consumer has entered into a contract of adhesion via the internet for carriage on a cruise solely within Australian waters. The contract, however, contained a provision which expressly chose the proper law of the contract to be the law of a foreign jurisdiction. On an analysis that limits the operation of s 23 to contracts the proper law of which is the law of Australia (or an Australian State or Territory), s 23 would not apply. The present case concerns a Canadian consumer who entered into a contract in Canada or the United States with a foreign corporation and which contract is governed by the general maritime law of the United States. The posited construction, however, could apply to Australian consumers. If so, it may be seen to derogate from the overarching purpose of the CCA “to enhance the welfare of Australians through … consumer protection”: s 2. Such a construction has the potential to create a significant carve-out from the applicability of s 23, which ought not to be lightly adopted, particularly in beneficial legislation where other legitimate constructional choices are available: s 15AA of the *Acts Interpretation Act*; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232 at 255–256 [32]–[33] and 270–271 [92] and ***Tjungarrayi*** *v Western Australia* [2019] HCA 12; 269 CLR 150 at 166 [44]. Thus, I wish to express some reservations as to Derrington J’s observations in this regard.
3. First, it may be thought that s 5(1)(g) is applicable to extend the operation of s 23 of the ACL to contracts that are governed by foreign law. Section 5(1)(g) of the CCA expressly extends the operation of the whole of the ACL (other than Part 5-3) in relation to “engaging in conduct” outside Australia by bodies corporate “carrying on business within Australia”. Section 4(2) of the CCA provides that “engaging in conduct” shall be read as including “the making of … a provision of a contract”. It appears open to construe s 5(1)(g) as applying to s 23 of the ACL, as dealing with a subject (the contract) the making of which is subject to the extra-territorial extension in s 5(1)(g) read with s 4(2). It might be thought to be difficult or at least unnecessary to divorce the making of the contract from the contract as made. The contract as made is the product of the “engaging in conduct”: the making of the contract. The contractual provisions to which s 23 is directedcannot exist without the act of the making of those provisions in standard form contracts to which s 23 applies and their offer to and acceptance by consumers. In the context of beneficial consumer legislation (which must be construed beneficially in accordance with the legislation’s purpose: *Tjungarrayi* at [44]), it may appear contrary to the purpose of the ACL to limit the operation of s 5(1)(g) to the conduct of the making of contract, but not its product. It appears at least a valid and an open constructional choice on the text of s 5(1)(g) of the CCA that it applies to s 23 of the ACL.
4. The applicability of 5(1)(g) of the CCA to s 23 of the ACL does not, however, resolve the question whether there is any further limitation on the application of s 23 by circumstances of necessary connection to Australia. On either view (that is 5(1)(g) of the CCA applying or not), there may necessarily be, by reason of statutory construction or constitutional limits on the Parliament’s legislative competence, further implied limitations on the extra-territorial effect of s 23. As summarised by Derrington J, the parties’ submissions canvassed a number of alternatives as to an appropriate construction of or reading down of s 23 (with or without s 5(1)(g) of the CCA). These suggested limitations included either or both: contracts entered into with Australian consumers or small business operators, and/or contracts that are to be wholly or partly performed in Australia.
5. On the assumption that s 5(1)(g) of the CCA does apply to s 23 of the ACL, I have reservations as to the scope of application of the presumption expressed in cases such as ***Wanganui-Rangitikei*** *Electric Power Board v Australian Mutual Provident Society* [1934] HCA 3; 50 CLR 581 at 600–601and ***Old UGC*** *Inc v Industrial Relations Commission of New South Wales* [2006] HCA 24; 225 CLR 274 at 283 [23] against the extra-territorial application of statutory provisions to contracts governed by foreign law. As the High Court has stressed, this presumption (as a narrower subset of the presumption against extra-territorial application of statutes) may operate to read down “general words” in statutes which would otherwise give rise to issues of legislative competence and may affront principles of international comity. The presumption, however, is rarely applied in circumstances where the statute itself, in this case s 5(1)(g) of the CCA, expressly provides for the circumstances in which the legislation is to have extra-territorial application: see *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* [1908] HCA 95; 6 CLR 309 at 363; *Wanganui-Rangitikei* at 601; *Re Maritime Union of Australia; Ex Parte* ***CSL Pacific Shipping***[2003] HCA 43; 214 CLR 397 at 415–416 [41]–[43] and 418–419 [52]–[54].
6. Reference to *CSL Pacific Shipping* assists. In that case, the Full Bench of the Australian Industrial Relations Commission (**AIRC**) held that it had jurisdiction in relation to an application by three unions to add as a party to an industrial award a foreign company not carrying on business in Australia and whose only connection with Australia was as the grantor as disponent owner of a time charter over a vessel operating in Australian waters. The AIRC had jurisdiction in relation to “industrial issues” under s 5 of the *Workplace Relations Act 1996* (Cth). The appellant argued that the territorial scope of the *Workplace Relations Act* should be read down to not apply to an employer who has no presence in Australia and whose employees are foreign non-residents by operation of s 21(1)(b) of the *Acts Interpretation Act* and/or the common law presumption against extra-territorial effect of legislation, citing *Meyer Heine Pty Ltd v China Navigation Co Ltd* [1966] HCA 11; 115 CLR 10 at 31 and the authorities collected therein. (As to the interaction of s 21(1)(b) of the *Acts Interpretation Act* and the common law presumption, see Leeming JA’s discussion in ***DRJ*** *v Commissioner of Victims Rights (No 2)* [2020] NSWCA 242; 103 NSWLR 692 at 716 [91] ff concerning the analogous s 12(1)(b) of the *Interpretation Act 1987* (NSW)).
7. The High Court unanimously rejected both arguments, stating that the express terms of s 5(3)(b) of the *Workplace Relations Act* provided that an “industrial issue” included matters pertaining to the relationship between employers and maritime employees, so far as those matters relate to trade or commerce between “Australia and a place outside Australia”. As the terms of the *Workplace Relations Act* “were not at large”, s 21(1)(b) of the *Acts Interpretation Act* had no operation: 415–416 [41]–[43]. Nor was this construction of s 5(3), being within “interstate and territories and overseas commerce power”, seen to be inconsistent with the common law principle of construction that Parliament “is not readily to be taken as intending to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or State”: at 416 [45] and 418–419 [52]–[54].
8. A similar approach appears open to be adopted with the ACL. The Parliament has provided for the express circumstances when s 23 can apply to conduct occurring outside Australia in s 5 of the CCA, including the engaging in conduct outside of Australia by “bodies corporate incorporated or carrying on business within Australia”: s 5(1)(g). If s 5(1)(g) of the CCA applies to s 23 of the ACL, the ACL (within the CCA) is arguably not a provision of an Act expressed in general terms lacking guidance as to its territorial reach, within which the presumption against extra-territorial effect has room to operate. Even if the presumption did have room to operate on s 5(1)(g), it is not, in my view, the necessary “starting point”. Presumptions are merely an aid to interpretation which must give way to the meaning of the text properly understood in context and taking into account statutory purpose: *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8; 256 CLR 459 at 481 [77]; and *DRJ* at 732 [157].
9. On the assumption that s 5(1)(g) does not apply and the extra-territorial application of s 23 must be construed independently, it may be accepted that the presumption against extra-territorial effect (expressed in its various forms) may be applicable to read down s 23. But as the observations of Derrington J demonstrate, this leaves a difficult question: How should it be read down?
10. My hesitation with the reading down or construction of s 23 that it applies only when some Australian law is the proper law of the contract, can principally be explained by reference to Kitto J’s reasons in ***Kay’s Leasing*** *Corporation Pty Ltd v Fletcher* [1964] HCA 79; 116 CLR 124. In that case, the *Hire-purchase Agreements Act 1941* (NSW) rendered void hire-purchase agreements entered into in New South Wales which contravened provisions of the statute. The Act sought to regulate the rights and duties of persons who entered into hire-purchase agreements in New South Wales. Justice Kitto considered whether the principle in *Wanganui-Rangitkei* meant that contracts whose proper law was not New South Wales were not governed by the statute, even if entered into within New South Wales. At 142–143, Kitto J firmly rejected this conclusion:

The necessary restriction of the operation of ss 26c and 31 is therefore to be implied or imported upon a consideration of the context and the subject matter. In the Supreme Court it was considered that the principle to be applied was that by which this Court determined cases such as *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual* *Provident Society*. Such cases have dealt with legislation modifying or making void contractual rights and obligations of specified descriptions; but in each instance the modification or avoidance was enacted as an end in itself and not as a sanction for contravention of statutory requirements. It was held that in order to restrain the seeming universality of the relevant enactment it should be presumed that the intention was to affect only those rights and obligations the discharge of which was governed by the law of the enacting country according to the rules of private international law. The logical appropriateness of the presumption in a case of the kind can hardly be denied. **But it was made clear, particularly in the judgment of Dixon J. in the *Wanganui-Rangitikei Case*, that the Court was applying a rule which was one of construction only, and that the context or subject matter of legislation might supply a different restriction upon the generality of the language.**

**Where a provision renders an agreement void for non-compliance by the parties or one of them with statutory requirements, especially where the requirements can be seen to embody a specific policy directed against practices which the legislature has deemed oppressive or unjust, a presumption that the agreements in contemplation are only those of which the law of the country is the proper law according to the rules of private international law has no apparent appropriateness to recommend it, and indeed, for a reason of special relevance here, it would produce a result which the legislature is not in the least likely to have intended. It would mean that provisions enacted as salutory reforms might be set at nought by the simple expedient adopted in the present case of inserting in an agreement a stipulation that validity should be a matter for the law of some other country.**

(Emphasis added.)

1. By reference to *Vita Food Products Inc v Unus Shipping Company Ltd (in liq)* [1939] AC 277, Kitto J continued at 143:

In the *Vita Food Case* the proposition was laid down that the parties to a contract may conclusively determine for themselves what the proper law of the contract shall be, provided that their expressed intention is “bona fide or legal”, and provided there is no reason for avoiding their choice on the ground of public policy. That seems to me the strongest possible reason for rejecting the proper law of the contract as the test for determining to what agreements enactments such as ss. 26c and 31 of the New South Wales *Hire-purchase Agreements Act* should be understood as intended to apply.

(Footnotes omitted.)

1. Similar views were expressed by six members of the High Court in *Old UGC,* in relation to the territorial reach of s 106 of the *Industrial Relations Act 1996* (NSW), a provision dealing with unfair contract terms. In circumstances where the “central conception upon which the relevant provisions fasten [was] the performance of work in an industry and the work in question was performed within jurisdiction”, it was held that the fact that the proper law of the contract was not New South Wales was irrelevant and the *Wanganui-Rangtikei* principle could not be used to read down the operation of s 106: at 282–283 [22]–[23] (Gummow, Hayne, Callinan and Crennan JJ, with whom Gleeson CJ and Kirby J agreed); see also *Insight Vacations Pty Ltd v Young* [2011] HCA 16; 243 CLR 149. Justice Kirby in *Old UGC* at 291–292 [56] stated that “it would be astonishing if the opposite were the case”, given the beneficial purpose and context of the *Industrial Relations Act*:

A contrary rule would leave the statutory provisions open, in many cases, to easy evasion by the simple nomination of a governing law other than that of New South Wales. In many cases, in the new economy, such a device could not be easily impugned. From the earliest days of the consideration of the predecessors to s 106, both in the Commission itself and in this Court, judges have resisted the notion that, by “clever drafting” or otherwise, the legislation could be rendered ineffective by such verbal devices. It is unlikely in the extreme that evasion of this kind would have been contemplated by the New South Wales Parliament. This is an obvious reason why the common law rule of construction, limiting legislation addressed to contracts as normally applicable only to those whose proper law is that of the jurisdiction, does not apply in the case of s 106 of the IR Act.

1. The observations in *Kay’s Leasing* and *Old UGC* could be seen to be applicable to s 23 of the ACL. It can hardly be presumed that the Commonwealth Parliament intended, except with express words of necessary intendment, that bodies corporate could, by a choice of law clause in standard form contracts entered into with Australian consumers, avoid or circumvent the protection offered to Australian consumers from “unfair” contract terms for goods and services provided wholly or partly in Australia under standard form contracts. The protection of the Australian consumer is the very context and subject matter to which the ACL is primarily directed. The specific policy of s 23, making void certain provisions in standard form contracts, is directed towards practices which the legislature has deemed “unfair” (in the sense defined in s 24) and which should not be enforced as part of a *fair* bargain. The unlikelihood of Parliament intending the construction limiting its operation to contracts the proper law of which is Australia or some law area therein, is perhaps highlighted by the fact that a choice of law clause, which mandated the governing law of another forum (such as a law area of the United States) for a standard form contract offered to Australian consumers for goods provided and/or services performed wholly or partly in Australia could, depending on the facts and circumstances of the case, be the very type of clause to which ss 23 and 24 could be seen to be directed. As Gageler J stated in *R v Independent Broad-Based Anti-Corruption Commission* [2016] HCA 8; 256 CLR 459 at 481 [77]:

…any common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical.

(Footnotes omitted.)

1. Whilst an analysis as discussed by Derrington J that is referable to the proper law of the contract has its clarity and simplicity and may promote harmony with conflict of laws principles, it may be seen as a construction inimical to the purpose of s 23 and the ACL as a whole, which ought not be preferred unless it is the only possible interpretation available on a plain reading of the text used: s 15AA of the *Acts Interpretation Act*; *Kay’s Leasing* at 143.
2. That being said, the alternatives posited by the parties for the resolution of the extra-territorial effect of s 23 of the ACL do not provide an easy solution. It would appear intuitively correct that some connecting factor or factors with Australia is required. It may be that regard must be had to read down s 5(1)(g) as applicable to s 23 by reference to some further constitutional limits of the power of the Commonwealth Parliament to legislate under s 51(i) or (xx) of the *Constitution* or otherwise. It may require close attention to the necessary link between a foreign corporation “carrying on business in Australia” and the conduct or transactions sought to be regulated. Section 15A of the *Acts Interpretation Act* may be engaged. Such arguments or considerations may require notices under s 78B of the *Judiciary Act 1903* (Cth) on this point. I would also favour inviting the ACCC to address the point as an interested intervener.
3. Given that a final decision on these questions is not necessary for the resolution of the controversy, there is no call to reach a final view, which in any event may require the further argument to which I have referred.

## The enforcement of the exclusive jurisdiction clause

1. In *Epic Games Inc v Apple Inc* [2021] FCAFC 122; 286 FCR 105 at 127 [110] (***Epic v Apple***), the Full Court considered that a foreign court having to apply Australian law “through the prism of expert evidence” is a factor which may weigh in favour of non-enforcement of an exclusive jurisdiction clause, including “the risk that important aspects of foreign law will be lost in translation” and “matters of meaning and context may be overlooked or misconstrued”. In matters such as *Epic* *v Apple* that involve complex questions of law and which may have precedential value for Australian courts, it may be accepted that this is a public policy reason (the weight of which will depend on the circumstances of the case) against enforcing an exclusive jurisdiction clause. Care is necessary, however, in engaging in such an evaluation. In ***Voth*** *v Manildra Flour Mills Pty Ltd* [1990] HCA 55; 171 CLR 538 at 559, Mason CJ, Deane, Dawson and Gaudron JJ expressed the view that there were “powerful policy considerations”, particularly international comity, “which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case”. That public policy consideration underpinned the choice by the High Court in *Voth* to favour the “clearly inappropriate forum” test over the “more appropriate forum” test for *forum non conveniens* analysis. Application of this factor illustrated in *Epic v Apple* should be focused clearly on the public policy benefits for Australia of the potential of a particular case to contribute to Australian jurisprudence on complex or unsettled questions of law, thereby informing the question whether there are strong reasons not to enforce the exclusive jurisdiction clause. It should not be based on notions of the comparative ability or inability of a foreign court to occasion justice in a particular case.
2. In this case, the primary judge concluded at J[313] that the “Australian law on the ACL provisions that are relied on is reasonably well established and settled” and that the “factual issues rather than the legal issues [will be] the principal debate”. In these circumstances, I agree with Derrington J’s conclusion that the public policy underlying the Full Court’s conclusion in *Epic v Apple* has little, if any, weight. A court applying foreign law through expert evidence in matters governed by foreign law is a well-established and fundamental tenet of private international law.

## Orders

1. The combination of the terms of the class action waiver clause and the operation of Pt IVA does not lend itself to easy remedial solution. The construction of the clause leads to an obligation upon the contracting party to take steps to opt out. A stay of Mr Ho’s action is framed in terms of vindication of the appellants’ rights under the contract that was entered into with Mr Ho. Any difficulty otherwise in framing relief does not, however, conjure forth some policy preventing the enforceability or validity of the class action waiver clause. Any other relief in relation to group members may depend on their knowledge of the action, whether the terms and conditions were incorporated into their contracts, and possibly the operation of the proper law of the contract if there be breach of the obligations found within the class action waiver clause. These matters were not debated and so it is not appropriate to say anything further.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop. |

Associate:

Dated: 2 September 2022

REASONS FOR JUDGMENT

RARES J:

1. I have had the advantage of reading the reasons of Allsop CJ and Derrington J. I am unable to agree with the orders that Derrington J proposes for the following reasons. I have used the defined terms that Derrington J used in his reasons in what follows. Subject to the following, I agree with much, but not all, of what Allsop CJ has written on matters other than the enforceability of the class action and exclusive jurisdiction clauses.

## Incorporation of the US Terms and Conditions

1. I am of opinion that it is not necessary to decide whether Rosanna was Mr Ho’s or Princess’ agent or was, as the primary judge found, an intermediary. As Derrington J explains, the contract between Rosanna’s employer, CruiseShipCenters, and Princess provided that, despite Princess being bound to pay CruiseShipCenters a commission on its sales of Princess’ tickets, CruiseShipCenters was not Princess’ agent but was, instead, independent of it.
2. However, Mr Ho knew nothing of that contract. Indeed, Princess sought and obtained suppression and non-publication orders about the contents, or on appeal some of the contents, of its contract with CruiseShipCenters on the basis that many of its terms were commercially confidential. That means that the relationship of Rosanna and CruiseShipCenters to each of Mr Ho and Princess, being the parties to the contract of carriage on *Ruby Princess*, must be ascertained by what a reasonable person in the position of Mr Ho and Princess would infer based on the mutually known facts, the surrounding circumstances and the genesis of their dealings, including what CruiseShipCenters printed at the foot of its emails to Mr Ho about it being the carrier’s agent: cf *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 223 per Brennan J with whom Gaudron J agreed, at 261, on the contractual formation issue.
3. I agree with Derrington J’s conclusion that the contract for carriage on the voyage was not made on 25 September 2018 when Mr Ho paid the deposit or on 30 October 2018 when Rosanna sent him either or both the CruiseShipCenters’ booking confirmation at 8:16 pm or Princess’ at 8:18 pm. However, in my opinion, this case is an instance calling for what Gleeson CJ described in *Baltic Shipping Company v Dillon* *(Mikhail Lermontov)* (1991) 22 NSWLR 1 at 7F–8E as the “conventional analysis” of when and how a contract is made between an ocean carrier and a passenger, exemplified in *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837.
4. The “conventional analysis” for long distance rail or passenger liner travel is that if the passenger purchases a ticket some time in advance of the commencement of the journey, the ticket is treated as an offer by the carrier to carry on the terms in, or expressly incorporated by, the ticket which is open to the passenger for acceptance: *MacRobertson Miller Airline Services v Commissioner of State Taxation (Western Australia)* (1975) 133 CLR 125 at 137–139 per Stephen J, 142–144 per Jacobs J and see too at 133–135 per Barwick CJ. In this scenario, in the “conventional analysis”, the passenger must have a reasonable opportunity to examine the ticket and to ascertain the terms which the carrier wishes to impose for the proposed journey. If the passenger bothers to read the terms of the ticket, he or she can decline the offer or refuse to travel if those terms are unacceptable. Ordinarily, it can be expected that he or she will not read, but simply accept, the terms, and so enter into the contract of carriage for the journey, because, realistically, there is no choice for a passenger to avoid imposed terms of that kind on offer either from the carrier proffering the ticket or its competitors. The imposed terms reflect the reality that contracts for air or sea carriage are usually contracts of adhesion to whatever the carrier stipulates.
5. Thus, when the proposing passenger for sea travel pays a deposit and makes a booking with a travel agent or carrier, he or she has not then made a contract for carriage on the voyage, even if, as here, the booking confirmation refers to cancellation by the passenger and the loss of the deposit or a fee. The parties are taken in such a relational situation to expect that, subsequently to receiving the booking confirmation, either the passenger will accept the offer that it conveys or the carrier will issue a ticket to the passenger for the voyage, which is an offer to carry at a later time on the terms in the contract that will come into force after the passenger has had a reasonable opportunity to consider the proffered terms of carriage. The acceptance of the carrier’s offer is signified by the passenger’s conduct, after a reasonable time, in proceeding with the voyage or arrangements for it even if he or she has not read the proffered terms and conditions, because he or she must be taken to have done so.
6. Here, the cancellation terms and other conditions in both booking confirmations were new and amounted to a counter-offer. Mr Ho must have understood that Princess’ booking confirmation, that Rosanna sent to him on 30 October 2018, was a communication by the cruise operator itself, as opposed to that of the travel agent, CruiseShipCenters, and that it provided new terms and important information about the voyage. As Derrington J explains in his reasons, the booking confirmation provided Mr Ho with the ability to read all the terms and conditions on which Princess offered to carry him (and his wife) and by using the Cruise Personaliser, as Princess advised him to do in its booking confirmation, he would have learnt of them. Accordingly, Princess did all that was reasonable or necessary to bring the US Terms and Conditions, including those which Mr Ho impugned, to his attention before the contract of carriage was formed.
7. Again, it is not necessary to decide exactly when, before the voyage, those terms and conditions became the contract of carriage for his voyage on *Ruby Princess* because this could have been no later than when Mr Ho accepted them at the time he first used the Cruise Personaliser.
8. For these reasons, I agree with Derrington J that Mr Ho was contractually bound by the US Terms and Conditions.

## Enforceability of the class action waiver clause

1. Ordinarily, if he had made the contract in the United States, Mr Ho would expect to litigate, as he contracted to, in accordance with the exclusive jurisdiction clause; ie, in the United States **District Court** for the Central District of California in Los Angeles. If Mr Ho had brought a proceeding in British Columbia, there is a real question as to whether the Canadian courts would have enforced it, as will appear below. That is because of the decision of the Court of Appeal for British Columbia in *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 DLR (4th) 205 to which the primary judge had not been referred.
2. Because of the conclusion to which I have come concerning the inability of parties to contract out of or waive in advance the application of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (the ***Federal Court Act***), it is not necessary for me to deal with the parties’ arguments about whether the exclusive jurisdiction and class action waiver clauses are unfair within the meaning of ss 23 and 24 of the *Australian Consumer Law* (**ACL**) in Sch 2 of the *Competition and Consumer Act 2010* (Cth).

### Is the class action waiver clause unenforceable?

1. The Chief Justice and Derrington J conclude that the class action waiver clause is not unfair by Australian law and is enforceable. With respect, I am unable to agree. That is because Princess could not seek to contract out of Pt IVA of the *Federal Court Act* for the reasons below.
2. A judicial exegesis on public policy runs the risk of mounting an unruly horse (as Burrough J cautioned in *Richardson v Mellish* (1824) 2 Bing 229 at 252). However, courts may, and sometimes must, have regard to the policy of a legislature in enacting a statute. Dixon CJ explained in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (in a passage that McHugh, Gummow, Kirby and Hayne JJ adopted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]) that “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”.
3. Even when a statute does not contain an express prohibition against contracting out of its application to the relationships of the parties to the contract, the court may find that the legislative intention for the enactment was to prohibit such a contractual term having legal effect. Mason J said in *A v Hayden* (1984) 156 CLR 532 at 557 (and see too at 545–546 per Gibbs CJ, 571 per Wilson and Dawson JJ, 589 per Brennan J and 595 per Deane J):

some contracts are void whereas others are valid, though the court will decline to enforce the particular provision in a valid contract when enforcement of that provision would have an adverse effect on the administration of justice.

1. In *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 143–144 [46], French CJ, Crennan, Kiefel and Bell JJ explained the principles of statutory construction that are apposite to determine whether a person can contract out of, or waive, so as to be legally bound, a right that an Act appears to confer on that person, or a person in his, her or its position. They said, in relation to provisions of the *Corporations Act 2001* (Cth):

The fact that Ch 5C does not contain any express prohibition against a unitholder contracting not to exercise the right given by s 601NB (44) does not conclude the question as to the enforceability of such an agreement between scheme members and a responsible entity. Windeyer J observed in *Brooks v Burns Philp Trustee Co Ltd* ((1969) 121 CLR 432 at 456) that **a person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so**. It will be contrary to the statute where the statute contains an express prohibition against “contracting out” of rights. In addition, **the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text** (*Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 179 [71]; *Miller v Miller* (2011) 242 CLR 446 at 457–458 [25]; *Equuscorp Pty Ltd v* *Haxton* (2012) 246 CLR 498 at 513 [23]).

(emphasis added)

1. When moving the second reading of the *Federal Court of Australia Amendment Bill 1991* (Cth), the Attorney-General, the Hon Michael Duffy MP, said (Hansard: House of Representatives, 14 November 1991 at 3175):

The area of concern to business appears to be whether persons having relevant claims against the respondent should be included in the group covered by the proceedings unless they choose to opt out or whether all such persons should have to take a positive step to be included, that is, to opt in.

**The Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings.** It also achieves the goals of obtaining a common, binding decision while **leaving a person who wishes to do so free to leave the group and pursue his or her claim separately**.

(emphasis added)

1. The Attorney-General identified the dual purposes of equity and efficiency as underpinning the legislative choice of an opt out procedure to enable persons to obtain redress. The purpose of efficiency in the administration of justice is apparent in the structure of Pt IVA. The achievement of the efficiency in the administration of justice that a representative proceeding is calculated to achieve cannot be gainsaid. Rather than the judicial system being burdened by multiple individual actions that involve the common issues of fact or law referred to in ss 33C(1) and 33H, in which there may be different evidence and findings of fact or law, a representative proceeding will resolve, once for all, those common issues and allow the individual claims to be pursued or settled with the benefit of the common findings.
2. It is fundamental to the scheme of Pt IVA that, as ss 33C(1) and 33H require, the applicant identify the existence of at least 6 other persons who have claims against a proposed respondent that are in respect, or arise out, of the same, similar or related circumstances and give rise to one or more substantial issues of fact or law (common issues). The applicant can commence a representative proceeding under Pt IVA, even though those other persons may know nothing of what the applicant is doing, including ascertaining their existence, for example, where the proposed group is large.
3. Importantly, s 33E(1) provides that, other than the presently irrelevant exceptions in s 33E(2), an applicant is not required to obtain the consent of any person before that person is included as a group member. It follows that the statutory scheme includes, as group members, all persons (other than those excepted in s 33E(2)) who have claims that the applicant describes in an originating application under s 33H in Pt IVA, regardless of their consent. Moreover, s 33J(2) expressly provides that a group member has a right, before the date fixed by the Court under s 33J(1), to opt out of the proceeding by written notice given under the Rules, that is to be exercised after its commencement.
4. The Court has power to alter the description of the group only on the application of the representative party (ie, the applicant) by force of s 33K(1). If the Court makes such an order, s 33K(4) gives the Court discretionary powers that include making “an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding”. Group members must be given notice under s 33X(1), the form and content of which the Court has approved under ss 33X and 33Y(2), of each of the commencement of the proceeding “and the right of group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1)”.
5. In *King v GIO Australia Holdings Ltd* [2001] FCA 270 at [15], Sackville, Hely and Stone JJ explained the importance of an opt out notice as:

This misleading impression might well affect the decision of a group member whether or not to opt out of the proceedings. **The principal purpose of the notice given under ss 33X(1)(a) and 33Y(2) is to ensure that group members can make an informed decision concerning their rights**: see Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988), pars 188, 190; *Femcare Ltd v Bright* (2000) 100 FCR 331, at 336–337, 349. We do not think it is an answer, as Mr Burnside QC (who appeared with Ms Hanscombe for the applicant) suggested it was, that a group member who is misled by the form of notice approved by the Court could apply for and expect to receive an extension of the period during which he or she can opt out of the representative proceeding: s 33J(3). **The represented group is large and group members are likely to have widely varying degrees of understanding of the claims made on their behalf and the possible outcomes of representative proceedings. It is important that any decision they make concerning opting out of the proceedings not be based on a notice that is apt to mislead them.**

(emphasis added)

1. Usually, an opt out notice will inform group members that they have the choice to remain passive, and that they will not be exposed to any possible liability for costs or other obligations until the common issues are decided by the Court or settled by agreement, or they can opt out. Common sense and long experience of representative proceedings in this Court suggest that few group members opt out as opposed to enjoying the benefit of a free carried interest in what is usually the riskiest part of the litigation. However, most persons who become group members when a representative proceeding is filed in the Court would have no idea about the rights that any uninformed pre-proceeding agreement to a class action waiver clause would deny them.
2. Because the Court must approve the form and content of an opt out notice, a person cannot make a fully informed decision whether or not to exercise his, her or its right to opt out of a representative proceeding under Pt IVA in which he, she or it has been included before receiving the notice under ss 33X and 33Y and has the opportunity to consider and obtain legal advice on whether or not it is in the person’s interests to opt out. If the person could make a legally binding decision to opt out before receiving a notice under ss 33X and 33Y informing him or her of the existence of the right to remain in or opt out of a representative proceeding under ss 33J(2) or 33K(4) and the matters that the Court has determined should be in an opt out notice, the person would not be fully informed of the matters that the Parliament intended that the Court ensure would be communicated in the notice before the person opted out.
3. When he entered into the contract of carriage with Princess, Mr Ho did not have any information that ss 33J, 33X and 33Y of the *Federal Court Act* contemplate a group member must be given in a notice that the Court has approved, in order to decide, on a proper understanding of his, her or its rights, whether to opt out of this representative proceeding, which, of course, was not then in contemplation.
4. Just as a complete agreement clause in a contract does not operate prospectively to preclude a party to it from alleging that the other party engaged in conduct that was misleading or deceptive or likely to mislead or deceive (in contravention of s 18 of the ACL) so that he, she or it was induced to enter into the contract, a party to a contract cannot preclude the other party from being included as, or remaining, a group member in a representative proceeding under Pt IVA of the *Federal Court Act*. That is because Pt IVA confers a right on an applicant to commence a group or representative proceeding, such as the present, where there are common questions of fact or law affecting seven or more persons in their relationship to a respondent without needing any group member’s consent.
5. The Parliament intended to confer the right of a group member to opt out in the public interest so that no one can contract prospectively out of Pt IVA of the *Federal Court Act*: *Westfield* 247 CLR at 143–144 [76]. The purpose of ss 33J, 33K(4), 33X and 33Y is for the Court to give a group member the opportunity to make an informed decision to opt out of a representative proceeding.
6. Ordinarily, group members become so involuntarily because of the way in which the applicant frames the group definition in the originating application and statement of claim or by an amendment under s 33K. It is not apposite to describe group membership as a “right”, when s 33E(1) negates any need for a person’s consent to becoming a group member. Rather, a representative proceeding, in which group members are included, initially regardless of their consent, are justiciable in this Court provided they meet the procedural requirements in ss 33C–33H. While a person does not have to consent to being included as a group member, by force of s 33E(1), he, she or it has a right conferred by s 33J(2), exercisable at a later time, to opt out of the representative proceeding.
7. On a literal reading, s 33J(2) may be thought to allow a group member to opt out at any time, prospectively by agreeing to do so, before or after, a representative proceeding has been filed. However, the Parliament intended that only after the commencement of a representative proceeding under Pt IVA, would a group member, involuntarily included in the group, be able to exercise a right to opt out, and then, only after receiving an opt out notice that the Court had approved.
8. A group member’s right to opt out under s 33J(2), after the Court has approved the form and content of an opt out notice pursuant to ss 33X(1) and 33Y(2), is clearly a right for the group member’s benefit, not for the benefit of the respondent in a representative proceeding. A group member’s opportunity on receipt of the opt out notice to consider whether to exercise the right to opt out is direct, simple, inexpensive and entirely in the discretion of the group member’s perception of his, her or its best interests on the basis of the information in the opt out notice: cf *Westfield* 247 CLR at 143–144 [46].
9. A class action waiver clause does not have the effect of denying that the claim to which it relates exists. Rather, the clause assumes that the person has a justiciable claim but seeks to proscribe the right of that person, if Pt IVA or an analogue in another jurisdiction, applies to the claim, to choose whether or not to opt out of the proceeding before the time that the Court fixes under s 33J.
10. It would be odd that, if Mr Ho’s claim is one to which Pt IVA applies, because it raises common issues of fact and law arising from each of his and each of the other group members’ contracts of carriage on *Ruby Princess* and his and their voyage on her in March 2020, some mechanism (such as the class action waiver clause) other than the statutory procedure for opting out under s 33J can control whether he or any of them remains a group member. Mr Ho’s contract of carriage did not negate that he would have any claim at all. Rather, the class action waiver clause sought to preclude him from litigating such a claim in any representative proceeding, including one brought in this Court.

### Lack of power to enforce a class action waiver clause

1. The text of Pt IVA does not suggest that it envisages that persons can contract out of its provisions or that the Court can order their exclusion as a group member if they did. Indeed, such a construction would undermine the Parliament’s choice of an opt out, rather than opt in, model for representative proceedings under Pt IVA. As the Attorney-General’s second reading speech showed, business interests were concerned about the impact on them of an opt out procedure. It is unlikely that the ability of a business to contract out of Pt IVA, by using the quick fix of inserting a class action waiver clause in contracts, was part of the legislative intention.
2. It is not difficult to envisage that, if persons can contract out of representative proceedings, businesses in Australia that would otherwise be amenable to being sued in such a proceeding will seize on that opportunity to include a class action waiver clause in standard form contracts. If such a contractual term is enforceable, then, as here, questions concerning its fairness under ss 23 and 24 of the ACL may arise.
3. If a respondent could rely on a pre-existing waiver or agreement to opt out of any proceeding that a potential group member could bring, so that he, she or it could not adopt the passive role of a group member during the phase of representative proceedings that resolves the common issues, then the jurisdiction that the Parliament intended to confer on the Court in Pt IVA would be neutered. A representative proceeding under Pt IVA would be rendered incapable of achieving either efficiency or equity if it could be stymied by a pre-commencement agreement to opt out or waive the right to continue as a group member, even though that person was unaware of the information that, in the future, the Court would require a group member to have in an opt out notice when considering the exercise of the right to opt out of it.
4. The issue concerning the relevance of the class action waiver clause (and also the exclusive jurisdiction clause) to Mr Ho and the nearly 700 other persons who are group members bound by the US Terms and Conditions, should not obscure the question of principle as to whether Pt IVA allows a respondent to enforce a term of a contract made before a representative proceeding has commenced that, in substance, requires a group member to opt out of that proceeding.
5. It is unlikely that the Parliament intended that persons, particularly businesses, could circumvent the operation of Pt IVA by causing persons, whom the Attorney-General described as “poor or less educated”, to sign or agree to contracts containing a class action waiver clause that, if enforceable, would set the reform at nought. A construction of Pt IVA that permitted enforcement of a class action waiver clause would negate, *first*, the legislative intention to enhance access to justice and the efficiency of the exercise of the judicial power of the Commonwealth, and *secondly*, the right of a group member to decide whether to exercise the right to opt out of a representative proceeding *after* it has commenced.
6. If the class action waiver clause were to be enforced by the Court in a proceeding under Pt IVA, it would have to compel the group member either to give a legally effectual notice under the *Federal Court Rules 2011*, in accordance with s 33J(2), opting out of the representative proceeding, or impose a stay on his, her or its further participation, somehow removing the group member from the group. That order would be based on a contract made before the representative action was filed under Pt IVA, despite the person not then having the information that the Act requires a group member to have before he, she or it may exercise the right to opt out of it. Yet, in the statutory context, it is difficult to see how a respondent in a representative proceeding could obtain an order in this Court for specific performance or a stay against a group member to give effect to a class action waiver clause.
7. There is nothing in Pt IVA of the *Federal Court Act* that suggests that the Court has power to compel a group member to decide one way or another whether to exercise the right to opt out relating to the exercise of that right as opposed to giving the person information. Indeed, s 33K(1) limits the powers of the Court to alter the description of the group. That is because only the representative party may apply under s 33K(1) to do so.
8. Here, Princess seeks enforcement of the class action waiver clause by a court order. That order would have the substantive effect of altering the description of the group by excluding persons who were bound contractually by the clause from being group members without this occurring under s 33K.
9. The primary judge considered that the remedy of a stay would be inappropriate because of ss 33N–33S. Those sections provide specific powers to the Court to order that a proceeding cease to continue as a representative proceeding (s 33N), then deal with the refashioned action (s 33P), and give directions for the determination of non-common issues or issues common to one or more subgroups (see 33Q–33S). His Honour reasoned, in *obiter dicta*, that enforcement of the class action waiver clause would require removal from group membership of persons, in Mr Ho’s position, bound by the US Terms and Conditions using what Lee J described in *Dyczynski v Gibson* (2020)280 FCR 583 at 665 [337] (J343) as “some unusual bespoke order”.
10. In *Dyczynski* 280 FCR at 664–665 [336]–[337], Lee J, with whom Murphy and Colvin JJ agreed on this point (at 629 [175]), set out the ways in which a person can cease to be a group member, none of which involved the Court enforcing a respondent’s reliance on a class action waiver clause or its equivalent. While Lee J noted that the Court might be able to achieve the removal of a person as a group member “by some unusual bespoke order” (at 665 [337]), his Honour did not discuss how, on what basis or in what circumstances such an order might be made.
11. In my opinion, any such order would have to rely on a power that the Court has as a superior court of record under s 5(2) of the *Federal Court Act* or otherwise under that Act or another Act. However, the absence of any express power authorising such an order leads to the conclusion that a stay order based on the class action waiver clause would be inconsistent with the public policy considerations in Pt IVA to which I have adverted.

### The position in British Columbia

1. As Derrington J notes, prior to the hearing of the appeal, the Full Court asked the parties for submissions about *Pearce* 461 DLR (4th) 205. Of course, the statutory context of Pt IVA of the *Federal Court Act* is different to that in both British Columbia and the United States. The *ratio decidendi* of Griffin JA (with whom Goepel and Abrioux JJA agreed) was that the class action waiver clause there was, *first*, unconscionable in the particular circumstances and, *secondly*, contrary to the public policy of British Columbia (at 259 [184], 260 [193]). As here, but unlike in the United States, the *Class Proceedings Act 1996* (BC) provided that class members can opt out of a class action. Thus, under that Act, class members have a statutory right to opt out after the Court has certified that the matter should proceed as a class action. Griffin JA rejected the defendants’ argument that a prospective class member had the freedom to contract out of a class action before the time which the court later, after certification, sets for class members to opt out, saying (at 274 [265]–[266]):

265 What this argument blurs is the difference between an informed choice between two viable options, and an uninformed choice that leaves the consumer with no options. **The choice to opt out is made after a class proceeding has been certified and the consumer has received court–approved notice. At that time, the consumer is informed of the alleged wrongs by the defendants and can make an informed choice between the benefits of continuing as part of the class or opting out to simply not pursue a claim or, less likely, to pursue a claim on their own.**

266 **The choice to agree not to pursue class proceedings at the time the person enters the contract is before there has been any alleged wrong.** In the present context of a consumer standard–form contract, it is made in the context of a stark inequality of bargaining power where the person has no right to negotiate the terms and nothing in the contract informs them as to the negative implications this clause will have on their practical ability to sue to vindicate their rights. **When later the person does realize they have been wronged and they have a potential claim, if the clause is enforceable it will be too late for them to make a choice as to how they will pursue their claim. As noted above, they will be practically precluded from advancing any claim.**

(emphasis added)

1. Her Honor also rejected the defendants’ argument that the absence of a legislative prohibition against contracting out of the *Class Proceedings Act* supported a construction of that Act that a person was free to contract out of a class action before it commenced (at 274–276 [267]–[278]). She concluded that the standard form class action waiver clause in that appeal “so functionally interferes with access to the courts that it is contrary to public policy and unenforceable” (at 276 [279]).
2. In my opinion, the public policy of Pt IVA leads to a similar result.
3. As *Pearce* 461 DLR (4th) 205 shows, Mr Ho could not have been bound under the laws of British Columbia, where he lives, to adhere to any class action waiver clause, at least if that were the proper law of the contract and he was a group member in a proceeding there.

### Conclusion on the class action waiver clause

1. I am of opinion that, because Mr Ho has a claim, as a group member, that is properly the subject of the representative proceeding brought by Ms Karpik, it would be against the public policy of Pt IVA of the *Federal Court Act* for this Court to stay that claim or to order him not to pursue it.
2. For the reasons I have given, Pt IVA does not enable persons to contract out of being group members before the commencement of a representative proceeding. There is no power for the Court to order a person to opt out of a representative proceeding or, other than under s 33K, to remove a person as a group member. It follows that the class action waiver clause is unenforceable in this proceeding.

## The exclusive jurisdiction clause

1. The primary judge correctly, in my opinion, considered that there were strong reasons for not enforcing the exclusive jurisdiction clause. That is so even though I agree with Allsop CJ and Derrington J that the primary judge erred, in his qualified reliance on *Epic Games Inc v Apple Inc* (2021) 286 FCR 105, when giving weight to public policy considerations that the ACL claims should be heard by an Australian court, rather than decided in the District Court based on expert evidence of Australian law. However, the primary judge did not weigh that consideration independently as providing a strong reason for a stay, but treated it as a factor in his overall evaluation.
2. More importantly, his Honour regarded as a strong ground for not granting a stay that to do so would fracture the fora for determining the common issues, in particular those under the ACL and in negligence, and the fact that, if the exclusive jurisdiction clause were enforced, the sub-group of nearly 700 passengers who contracted on the US Terms and Conditions would have to litigate their claims individually in the District Court. His Honour pointed to the fact that, in this scenario, this proceeding still would continue in this Court with the vast majority of group members’ claims being resolved here. He found, and I agree, that (J333):

There is a firm legal policy against fracturing litigation in that way. It is wasteful of the parties’ resources and it is wasteful of judicial resources. But more particularly, it runs the risk of producing conflicting outcomes in different courts. That is undesirable for a number of reasons, including that it brings the administration of justice into disrepute.

1. Indeed in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161, Gibbs CJ, Stephen, Mason and Wilson JJ said of the Court’s power to give effect to the policy to which the primary judge referred:

Section 22 of the *Federal Court of Australia Act* is a “Judicature Act” provision, designed to ensure that the Court can grant relief which is appropriate to both legal and equitable claims and **to avoid multiplicity of proceedings**. Its effect is to enable the Court to dispose of all rights, legal and equitable, in the one action, so far as that is possible …

(emphasis added)

1. A foreign jurisdiction clause in a contract does not operate to exclude or oust the jurisdiction of a court, but, of course, it may be a ground, often a strong one, for the court to refuse to exercise its jurisdiction: *Akai Pty Ltd v The People’s Insurance Company Ltd* (1996) 188 CLR 418 at 444–445 per Toohey, Gaudron and Gummow JJ. However, their Honours held (at 447) that the court may refuse to enforce such a clause after having regard to considerations of public policy that:

may flow from, **even if not expressly mandated by the terms of**,the Constitution or **statute in force in the Australian forum. Thus, the courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravene “the policy of the law” as discerned from a consideration of the scope and purpose of the particular statute** (*Nelson v Nelson* (1995) 184 CLR 538 at 552, 611). The Parliament has made particular legislative provision in the case of certain contracts of insurance and, to that extent, there may be curtailed or qualified in an Australian court what otherwise would be the freedom to choose a forum in which the Act has no application.

(emphasis added)

1. A Court may refuse to grant a stay based on the existence of a foreign jurisdiction clause where its enforcement would oust or prevent the exercise of its jurisdiction. If a stay were granted under the exclusive jurisdiction clause in favour of the District Court resolving the claims of the US subgroup members, these persons would not be able to remain involved in the class action there. The grant of a stay based on the foreign jurisdiction clause would prefer the private contractual obligations assumed by the US subgroup members to Princess to the binding effect of the jurisdiction conferred on this Court by Pt IVA of the *Federal Court Act* to resolve the existing controversy in a properly constituted representative proceeding in respect of those persons: cf: *Akai* 188 CLR at 447. A stay would have the effect of negating the public policy that I consider Pt IVA to reflect against the capacity of persons, before the institution of a representative proceeding, to enter an enforceable contract that requires one of the parties to opt out of any such proceeding were it to be commenced.
2. Of course, if parties contract to resolve a dispute or controversy so as to create an accord and satisfaction of their differences, ordinarily, they could not be parties to any subsequent representative proceeding based on common issues in respect, or arising out, of that resolved dispute or controversy.
3. Moreover, this Court is not a clearly inappropriate forum: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. As the primary judge found, Mr Ho would have a clear juridical advantage in remaining as a group member with a justiciable claim in this proceeding.
4. Because a person cannot contract prospectively out of being group member, in a representative proceeding under Pt IVA of the *Federal Court Act*, enforcement of the exclusive jurisdiction clause would also be contrary to the public policy of that Act. That is because Mr Ho would be forced to litigate personally rather than participate in the current proceeding as a group member.
5. For these reasons, the exclusive jurisdiction clause is both unenforceable and should not be enforced in this proceeding.

## Conclusion

1. Accordingly, I am of opinion that the appeal should be dismissed.

|  |
| --- |
| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 2 September 2022

REASONS FOR JUDGMENT

DERRINGTON J:

# Introduction

1. This appeal arises in the context of class action proceedings brought against Carnival plc (Carnival) and its subsidiary, Princess Cruise Lines Ltd (Princess), in respect of loss or damage allegedly suffered by passengers and relatives of passengers who were aboard the vessel “*Ruby Princess*” on its voyage from Sydney to Sydney via New Zealand which departed on 8 March 2020 (the voyage). During the course of the voyage an outbreak of COVID-19 occurred as a result of which, it is alleged, a number of passengers contracted the disease and fell ill or died, whilst others sustained distress, disappointment or psychiatric injury. The particular issues on this appeal concern the determination by the primary judge pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) of certain separate questions relating to the terms of the contract of passage pursuant to which a Mr Patrick Ho (Mr Ho) undertook the voyage. Carnival and Princess submitted that his agreement with the former, as the time charterer, included what became known as the “US Terms and Conditions” which contained an exclusive jurisdiction clause in favour of the United States District Courts in California, Los Angeles, as well as a clause pursuant to which Mr Ho waived any entitlement to participate in any class action (the class action waiver). It is claimed that some 695 other passengers contracted on those terms and they, together with Mr Ho, are referred to as the “US subgroup members”. The lead applicant of the class action (Ms Karpik) and Mr Ho, the latter of whom has been identified as the representative of the US subgroup members, deny that the US Terms and Conditions formed part of Mr Ho’s passage contract. Alternatively, they assert that if those terms and conditions applied, they were, in part, unenforceable. These issues were the focus of the separate questions determined by the primary judge and were couched in terms of whether Mr Ho’s claim or those of the US subgroup members should be stayed as an abuse of process because they are being advanced contrary to an exclusive jurisdiction clause, because this Court is not an appropriate forum for the determination of those claims, or because it is otherwise in the interests of justice to do so.
2. The learned primary judge refused the stay application principally on his determination that the US Terms and Conditions were not incorporated into Mr Ho’s contract of carriage. His Honour held that the travel agent through whom Mr Ho had booked his passage was not his agent for any purpose and that the manner in which his ticket was booked did not involve the incorporation of those terms. In effect, he concluded that the contractual relationship encompassed only an agreement to carry Mr Ho on the voyage leaving on 8 March 2020, in return for the payment of the purchase price, and that no terms or conditions of carriage were incorporated as part of that agreement. Alternatively, his Honour held that, if the US Terms and Conditions were part of the passage contract, the exclusive jurisdiction clause and the class action waiver were either unenforceable or would not be given effect.
3. For the reasons which follow the terms of carriage between Carnival / Princess and Mr Ho were governed by the US Terms and Conditions incorporating the exclusive jurisdiction clause and the class action waiver. Those clauses ought to be given effect and Mr Ho’s claim should be stayed.

# GROUNDS 1 and 2 – Formation of the passage contract

1. The ascertainment of the terms and conditions to which Mr Ho’s passage on the *Ruby Princess* were subject, if any, is dependent upon an analysis of the manner in which his passage was booked and any agency relationships between the several parties.
2. It should be mentioned that there was no distinction drawn in this case between Carnival, as the time charterer and operator of the *Ruby Princess*,on the one hand, and Princess as its owner on the other. In the course of the appeal they were collectively referred to as “Princess” without distinction and that nomenclature is adopted in these reasons save where it is appropriate to distinguish between them.

## The relationship between Princess and CruiseShipCenters

1. The primary judge’s determination turned, in part, on his conclusion as to the relationship between Mr Ho, his travel agent, Ms Rosanna Ho, and Princess. For convenience, and intending no disrespect to Ms Ho, she will be referred to in these reasons by her first name only.
2. Rosanna was employed as a “Cruise Specialist” and consultant for CruiseShipCenters International Inc of Vancouver (CruiseShipCenters) which variously traded under the names of Expedia CruiseShipCenters and Paradise CruiseShipCenters. Whilst the primary judge concluded (PJ [67]) that, for the purposes of the formation of the passage contract, Rosanna and CruiseShipCenters did not act as the agent of either Mr Ho or Princess, in his reasoning process (PJ [70]), it is apparent that he effectively relied upon Rosanna as having Mr Ho’s authority to bring him into contractual relations with Princess. Both before the primary judge and this Court, Mr Ho submitted that Rosanna and CruiseShipCenters acted as Princess’s agent for the purpose of the booking of the cruise.
3. It was accepted that the actual legal relationship between Princess and CruiseShipCenters was controlled by an agreement styled, “Princess Cruises Strategic Sales Agreement” (the Strategic Sales Agreement), which regulated all cruises booked by the latter with Princess. Notably, it provided that CruiseShipCenters would be paid a commission in respect of cruises booked by it, would be entitled to use Princess’s POLAR direct online booking system, would comply with Princess’s advertising policy, and would keep certain information relating to the Strategic Sales Agreement confidential.
4. Critically relevant to the issues presently under consideration is cl 5 of the Strategic Sales Agreement which specified the terms on which bookings of passage on Princess’s cruises could be made. It provided:

**5.** All of Princess’ then-current advertising policies, sales policies and general terms and conditions of sale including deposit, final payment, and cancellation policies, as well as all elements of Princess’ then current Group Sales Policy for group business and Princess’ then current OneSource terms and conditions found at www.onesourcecruises.com, will apply to sales made under this Agreement. A copy of the OneSource terms and conditions current as of the Effective Date of this Agreement is attached hereto as Exhibit A.

1. By cl 6 CruiseShipCenters (which is referred to as an “Agency”) was obliged to market Princess’s cruises in an appropriate manner:

**6.** Agency agrees to market all Princess products in a competent and professional manner to the best of its ability and to deal fairly and in good faith with its passenger clients and Princess. Nothing contained in this Agreement shall be construed to affect or defeat the agency relationship between Agency and its passenger clients and, notwithstanding anything that is or may be construed to the contrary herein or in the OneSource terms and conditions, Agency shall not be liable for payment obligations of its customers.

1. Clause 19 expressed agreement between Princess and CruiseShipCenters as to their relationship under the agreement:

**19.** The relationship of the parties to one another hereunder is that of independent contractors and no party shall be deemed the agent, partner or employer of, or joint venturer with, any other party for any purpose.

1. The reference to “OneSource” in cl 5 above was to a website platform which enabled authorised travel agents to utilise Princess’s POLAR booking system and thereby make passage bookings for clients directly with it. Each travel agent was required to register to use the platform so as to access the POLAR system, and that required agreement with the OneSource terms and conditions contained in Exhibit A to the Strategic Sales Agreement. The following OneSource terms and conditions are of particular relevance to the matters in issue:

ACCEPTANCE OF TERMS:

You acknowledge that you have read and agree to be bound by these Terms and Conditions and the Privacy Policy and to comply with all applicable laws and regulations, including without limitation, export and re-export control laws and regulations regarding the transmission of data exported from and to the United States to and from any other country. …

…

RELATIONSHIP:

The relationship between Cruise Line and you will be that of independent contractors, and neither Cruise Line nor its respective officers, agents or employees will be held or construed to be your partners, joint ventures, fiduciaries, employees or agents.

…

TA Agent of Passenger

In making the arrangements and booking the scheduled voyage with Cruise Line, from the port of embarkation to the port of disembarkation, and any related travel, air, rail, road, or sea transport and/or any land accommodation components or lodging of any land-sea package sold, taken with or included in the price of the voyage; and/or any activities, shore excursions, tours, or shore side facilities related to or offered in connection with the voyage, (hereinafter, collectively, “Cruise”), **TA [being the travel agent] agrees that it acts as an agent of all those persons booking, purchasing, or embarking on the Cruise, and/or persons in their care, including any minor and their heirs, relatives, and personal representatives (“Passenger(s)”), through or with the assistance of TA**. … **TA agrees that TA acts solely as an agent for the Passenger(s) and not as an agent for Cruise Line**. Further, receipt by TA of the Passage Contract or any other communications, notices, or information from Cruise Line shall constitute receipt of such materials by TA’s Passenger(s). …

TA represents, warrants, and agrees that TA will conduct all aspects of TA marketing and advertising efforts in accordance with applicable federal, state, local, or provincial laws and regulations and the terms and conditions stated herein. TA further represents, warrants, and agrees that TA will ensure that all marketing, advertising, and other communication materials (collectively, “Materials”) shall make it clear that Cruise Line is not a partner with TA and that TA is selling Cruise Line’s products independently.

(emphasis added)

…

XI. Cruise Documents

TA agrees it is his/her responsibility to forward all Cruise Documents in any media format, including hard copy and electronic copy, to the Passenger in a timely manner following receipt by TA. TA further agrees it is TA’s responsibility to ensure that the Passenger obtains his/her electronic boarding pass.

…

XVIII. General Passage Contract

The terms and conditions which govern the booking and the Cruise are set forth in the Passage Contract and are incorporated herein by reference. View the entire Passage Contract at <http://www.princess.com/legal/passage_contract/index.jsp>. TAs are responsible to familiarize themselves (sic) all sections of the Passage Contract as they govern the Passenger’s legal rights, particularly with respect to cancellation, the provision of medical care, privacy rights, Cruise Line’s liability, and the Passenger’s right to sue or arbitrate.

In the event of any conflict between any brochures or other communication or information published in any media format or on the Internet concerning any booking and the Passage Contract, the Passage Contract shall govern all bookings made for any Passenger.

…

TA acknowledges receipt of the Passage Contract and Travel Plan on behalf of each Passenger for whom a booking has been made or a Travel Plan has been purchased. Further TA represents and warrants that TA is authorized by all such person(s) and any persons in their care, including any minor, and their heirs, relatives, and personal representatives, to accept and agree to all terms and conditions set forth in the Passage Contract, on their behalf.

1. The evidence before the primary judge established that, as at September and October 2018, Rosanna’s status on OneSource was “active”, thereby indicating that she had accepted the then current terms and conditions of its use. It was not disputed that she was aware, or could be taken to have been aware, that any bookings she made as agent for her customers with Princess would be subject to the terms and conditions of the “General Passage Contract”. At the very least, she was aware that her use of POLAR carried with it the consequence that any bookings made were subject to those terms and conditions.

## The making of Mr Ho’s booking in September 2018

1. As both parties submitted that the contractual relationship pursuant to which Mr Ho undertook the voyage was formed in September or October 2018 when the initial booking of the cruise took place, it is appropriate to determine the appeal on that basis. Nevertheless, as is identified below, it may be that an alternative and preferable conclusion is that the relationship was formed at a later time.
2. The evidence of the circumstances of the making of Mr Ho’s booking was substantially contained in an affidavit of Ms Antzoulatos, an employee of the applicant’s solicitors, who gave hearsay evidence of the content of a conversation with Mr Ho. The relevant parts are replicated as follows:
3. On or about 25 September 2018, Mr Ho contacted CruiseShipCenters, based in Canada, and booked tickets on the Voyage with a travel agent named Rosanna Ho.
4. At this time, he paid a deposit of CAD260.00 using his Visa Credit Card and authorised Rosanna Ho to use the same Visa card for payment of the balance when required.
5. On or about 30 October 2018, Mr Ho received an email from Rosanna Ho attaching a copy of an invoice issued by Expedia [CruiseShipCenters] a copy of which is at pages 1 to 2 of Exhibit VA-1.
6. That invoice, which is recorded as having been received at 8:16 pm on 30 October 2018, warrants some consideration. It is not in doubt that its entire contents were produced by CruiseShipCenters. It was sent by Rosanna with the subject heading being, “03/08/2020 Cruise – Ruby Princess (booking # WQ4HHX)”. It recorded the payment of a deposit of CAD510.00 by Mr Ho constituted by Rosanna using Mr Ho’s credit card details to pay CAD260.00 pursuant to his authority and the transferring of a deposit of CAD250.00 which Mr Ho had previously paid in respect of a cancelled cruise booking for a voyage which had been scheduled to take place on 30 October 2018. An amount of CAD3,082.34 was shown as the cost of the fares which remained outstanding. The reference to, “fares”, is deliberate as Mr Ho booked for both his wife and himself.
7. The invoice also recorded general details of the cruise identifying the dates and ports of embarkation and debarkation as well as the ports which were to be visited in the course of the voyage. It also provided details of the dates by which the booking could be cancelled by Mr Ho and the amounts which would be forfeited if he did so. The parties accepted that he was entitled to cancel at any time up until 10 December 2019, without suffering the loss of any amount of the fares but, thereafter, a penalty was imposed which increased as the date of the cruise approached. Somewhat inconsistently with its obligations under its Strategic Sales Agreement with Princess, the invoice issued by CruiseShipCenters to Mr Ho contained the following statement:

Disclaimer:

Expedia CruiseShipCenters is acting as intermediary and agent for suppliers (“principals” identified on the attached or accompanying documents) in selling services, or in accepting reservations or bookings for services which are not directly supplied by this agency (such as cruises, air carriage, hotel accommodations, ground transportation, meals, tours, etc.). This agency, therefore, shall not be responsible for breach of contract or any intentional or careless actions or omissions on the part of such suppliers, which result in any loss, damage, delay, or injury to you of your travel companions or group members.

1. It also contained a statement to the effect that CruiseShipCenters was entitled to charge a cancellation fee in respect of cancelled cruises and air travel.
2. Ms Antzoulatos’s affidavit further stated that, shortly after receiving the invoice, Mr Ho received another email from Rosanna attaching a copy of a document identified as a “Booking Confirmation” which, it was said, appeared to be from Princess. Apparently Mr Ho read neither of these documents other than noting the booking details.
3. The terms of that Booking Confirmation were also identified as being central to the terms on which the parties contracted and they too warrant consideration. The evidence before the primary judge established that Rosanna made the booking on the POLAR platform on 25 September 2018 and the Booking Confirmation PDF was sent to her by email that day, although it was not forwarded to Mr Ho by Rosanna until 30 October 2018 (ts 6). It is recorded as having been received by Mr Ho at 8:18pm on 30 October 2018 and it is possible that it was re-sent to him at about 9:08pm that day. It had the heading, “Booking Confirmation – Passenger Copy”, along with Princess’s logo, and its contents identified Mr Ho’s booking reference, WQ4HHX. Beneath the heading, details of the cruise were provided as well as the amounts which had been paid, the amounts payable and when they were due, and it reiterated the dates on which penalties arose for cancellation. In that latter respect it provided that the booking could be cancelled without any penalty until 10 December 2019 after which a fee of 10% of total charges would apply. Again, the amount of the cancellation fee increased as the date for the cruise approached.
4. Toward the end of the document was a section headed, “Notices”, which included the following statements:

VISIT THE CRUISE PERSONALIZER AT PRINCESS.COM FOR FULL DETAILS, TO PROVIDE THE REQUIRED IMMIGRATION INFORMATION AND TO PRINT A BOARDING PASS AND LUGGAGE TAGS.

and

**IMPORTANT NOTICE**: Upon booking the Cruise, each Passenger explicitly agrees to the terms of the Passage Contract (https//www.princess.com/legal/passage\_ contract/). Please read all sections carefully as they affect the passenger's legal rights.

1. Had Mr Ho clicked upon the link provided, he would have been taken to a page on the Princess website which had the heading, “Passage Contract”, in large lettering. It included several alternative links to be followed but, specifically in relation to a person who had already made a booking, it provided:

Our passage contract includes the details which govern all dealings between you and Princess Cruises.

The following passage contract versions apply based on the voyage departure port. If you are a booked passenger please sign in to Cruise Personaliser to access the applicable Passage Contract that pertains to your specific booking.

…

**Already booked?**

Sign in to Cruise Personaliser to access the Passage Contract that applies to your booking.

1. Mr Ho did not seek to access the terms of Princess’s Passage Contract shortly after receiving the Booking Confirmation in October 2018. Ms Antzoulatos deposed that in about July 2019, Mr Ho visited Princess’s website and logged into the Cruise Personaliser web page where he viewed a copy of the terms of the Passage Contract and that he clicked on a proximately located button with the word, “Agree”, on it. He was unable to proceed further on the Cruise Personaliser without doing so.
2. The operation of the Princess Cruise Personaliser web page was as follows. When a party was taken to it they were confronted with two boxes which offered alternative ways of accessing the site, each of which required the provision of information. On the provision of the relevant information the user was then taken to a page advising of the terms and conditions of the use of the Princess website. In order to progress further the user was required to click a box so as to put a tick against the words, “I accept the above Terms and Conditions and Privacy Policy”. Having done so the user was taken to the Passage Contract terms and conditions. It appears that the form of the conditions provided to a particular customer would be determined by information provided from the “log-in” stage. In this case Mr Ho or a person in his position would have been taken to a page headed, “Passage Contract”, on which were displayed the US Terms and Conditions in a box or pane through which he was able to scroll. Those terms and conditions were headed, “Princess Cruise Lines, Ltd Passage Contract”, after which were the following words in bold type:

**IMPORTANT NOTICE TO GUESTS: PLEASE CAREFULLY READ THE FOLLOWING PASSAGE CONTRACT TERMS THAT GOVERN ALL DEALINGS BETWEEN YOU AND CARRIER, AFFECT YOUR LEGAL RIGHTS AND ARE BINDING ON YOU, TO THE FULL EXTENT PERMITTED BY LAW; PARTICULARLY SECTION 12 GOVERNING THE PROVISION OF MEDICAL AND OTHER PERSONAL SERVICES, SECTIONS 13 AND 14 LIMITING CARRIER’S LIABILITY FOR YOUR DEATH, ILLNESS, INJURY, OR DAMAGE CLAIMS RELATING TO BAGGAGE OR PERSONAL PROPERTY, AND SECTION 15 LIMITING YOUR RIGHT TO SUE, REQUIRING ARBITRATION AND WAIVER OF JURY TRIALS FOR CERTAIN CLAIMS, AND WAIVER OF YOUR RIGHT TO ARREST OR ATTACH CARRIER’S SHIPS.**

1. Thereafter, followed the substantive terms and conditions beginning with the statement that upon booking the guest agreed with the terms of the Passage Contract and that the resolution of disputes was to be in accordance with the General Maritime law of the United States without regard to choice of law principles.
2. Beneath the box containing the Passage Contract were the words, “I accept the Passage Contract on behalf of: (check all that apply)”, and below that was a box which when “clicked” would highlight a tick. It seems undoubted that when Mr Ho reached this part, his name and his wife’s name would have appeared in lieu of the words in parenthesis. There followed two boxes, one marked “Cancel” and the other “Proceed”. By clicking on the latter the user would be taken to the functional part of the Cruise Personaliser.

### The substance of the US Terms and Conditions

1. Whilst it is true that the US Terms and Conditions were lengthy, that is not unexpected given that they were to regulate the parties’ rights for the duration of the 13 day voyage.
2. By the definition of the expression, “Cruise Fare”, the terms identified that meals and accommodation were covered by the amount paid, but that drinks, personal services, excursions and transportation were not. By cl 2 the passenger’s obligations were set out including those relating to the requirements to bring appropriate travel documents and to pay all charges made to their stateroom account. Clauses 3 and 7 reserved the carrier’s right to alter or vary the cruise or activities related to the cruise as circumstances arose. Other clauses regulated the drinking of alcohol and smoking of tobacco products as well as the cancellation fees payable. It is relevant that the terms relating to cancellation of the passage contract, including the fees which were payable, were different from those set out in the Booking Confirmation. The Passage Contract also included terms imposing limitations on liability for the loss of goods and baggage (cl 13), as well as limitations on liability for personal injury (cl 14).
3. For the purposes of this appeal, cl 15, headed, “Notice of claims and actions; time limitation; arbitration; forum; waiver of class action”, contained the exclusive jurisdiction clause and class action waiver. The former was in the following terms:

(B) Forum and Jurisdiction for Legal Action:

* (i) 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 before the United States District Courts for the Central District of California in Los Angeles, or as to those lawsuits over which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Los Angeles County, California, U.S.A., 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 may be available to any such action being brought in such courts.

1. The class action waiver was in the following terms:

(C) 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. …

(Formatting as per original).

1. Mr Ho made the final payment for his and his wife’s passage and, on 4 December 2019, received a further email from Rosanna. It was, in effect, a combination of the substance of the first and second emails Rosanna had sent to Mr Ho in October 2018, albeit updated to identify that the fares had been fully paid.

## The primary judge’s conclusion

1. The learned primary judge identified (PJ [61]) that, by reason of the statement in the CruiseShipCenters’ email to Mr Ho of 30 October 2018 that it acted “as intermediary and agents for suppliers (‘principals’ identified in the attached or accompanying documents)” and that Princess was identified as the supplier, as between Mr Ho and CruiseShipCenters, the latter was Princess’s agent and not Mr Ho’s. However, his Honour also observed that CruiseShipCenters’s statements were not conclusive as to the actual relationship between it and Princess. He considered the provisions of the Strategic Sales Agreement, including the OneSource terms and conditions but observed that these could not affect the true nature of the relationship between Mr Ho and Rosanna.
2. In relation to Rosanna’s authority to enter into a binding agreement as Mr Ho’s agent in September or October 2018, his Honour concluded (PJ [67]):

On the evidence before me there is nothing to support the inference that CruiseShipCenters acted as Mr Ho’s agent. CruiseShipCenters appears to have acted as an intermediary, being the agent of neither party between whom the principal contract was concluded, namely Mr Ho, on the one hand, and Princess, on the other.

1. On that basis, he held (PJ [68]) that Mr Ho made a booking for himself and his wife on 25 September 2018 when he paid the deposit and Rosanna put his information “on Princess’s POLAR booking system which caused a Booking Confirmation email to be generated by Princess and immediately emailed to CruiseShipCenters”. He further held that, objectively, Princess is to be taken to have considered itself booked for the cruise and that the confirmation meant that the booking was firm and binding. It was irrelevant that Mr Ho had not been told of the booking at that time and he could have relied upon it if there was any subsequent dispute.
2. The primary judge inferred (PJ [69]) that on making the booking through Rosanna on 25 September, Mr Ho informed Princess of the fare, deposit, payment of the balance, date and port of departure, ship, voyage, and cabin. Those were the necessary details for Rosanna to effect the booking on the POLAR system. He rejected Princess’s submission that the Booking Confirmation was an offer open to acceptance by Mr Ho as, by the time it was sent, the deposit had been paid and he had accepted the offer of the cruise on the basis of the all of the material details provided by Rosanna. His Honour held (PJ [70]) that Princess had made an offer by displaying to Rosanna on POLAR the availability of the cruise with the particular cabin at the particular price, and it was accepted by Rosanna making the booking and causing Mr Ho’s credit card to be debited in favour of Princess. He further held that Rosanna can be regarded as having conveyed the offer appearing on her screen to Mr Ho who accepted it by conveying such acceptance to Rosanna. The consequence was that the US Terms and Conditions were not incorporated into any contract for passage and that the notice given to Mr Ho of them on 30 October 2018 came too late. His Honour regarded Mr Ho’s actions in purportedly accepting those terms in July 2019 when he went into the Cruise Personaliser website as being incapable of altering the terms of his previously concluded agreement with Princess. It followed, according to his Honour, that the agreement between Mr Ho and Princess was that, in return for the payment of the fares, Mr Ho would be a passenger on the voyage and be entitled to occupy the identified stateroom.
3. The primary judge considered the alternative scenario in which Princess’s Booking Confirmation formed part of the contractual agreement. He nevertheless concluded that (PJ [75] – [89]) the US Terms and Conditions were not incorporated because the directions given to the customer as to which terms applied to the passage contract did not adequately identify the appropriate form of terms or, if they did, the terms did not include the exclusive jurisdiction clause or the class action waiver.

## The effecting of the passage contract by Rosanna for Mr Ho

### The constraints within which Rosanna could have acted

1. There are a number of difficulties with the primary judge’s conclusions as to the formation of the passage contract arising from the booking made by Rosanna, though all have their origin in the conclusion that Rosanna was not Mr Ho’s agent for that purpose. As was submitted by Mr McLure SC for Princess, if Rosanna was not Mr Ho’s agent, but merely some form of intermediary, the only offer which she was authorised to convey to Mr Ho from Princess in the process of making a booking on POLAR was of a cruise on the terms of Princess’s passage contract. She had no legal ability to make or convey an offer from Princess capable of acceptance confined to the fare, the deposit, the payment of the balance, the date and port of departure, ship voyage and cabin. If that was the offer purportedly accepted by Mr Ho, as the primary judge found, no actual contract came into existence. Similarly, if she was not Mr Ho’s agent then she could have no authority to receive an offer on his behalf when she entered into the POLAR system and the information concerning the cruise was presented to her, and nor could she bind him by accepting it through the act of making the booking with his credit card. Rosanna was only entitled to use POLAR in accordance with the OneSource terms and conditions.
2. A similar point can be made in relation to the covenant in the Strategic Sales Agreement that Rosanna acted solely as the agent of the passenger and consented to receive the electronic passage contract on their behalf. If, as the primary judge concluded, Rosanna was merely an intermediary to pass on Princess’s offer, that offer was encumbered by those obligations of which there was no apparent acceptance, with the result that no contract could have materialised.
3. In addition, regardless of whether Rosanna was or was not Princess’s agent, she did not have any authority or legal ability to bind Princess to terms other than those identified in the Strategic Sales Agreement. Specifically, she was not authorised to offer a potential passenger carriage on a vessel limited to the price of the fare, the dates of departure and return, identity of stateroom, and length of voyage. Nor did the terms and conditions pursuant to which she used the POLAR booking system permit her to make a booking of that nature.

### The formation of the passage contract

1. In any analysis of the manner in which Mr Ho came into contractual relations with Princess, it is necessary to keep in mind that Rosanna was the employee of CruiseShipCenters which, acting through Rosanna, provided services to Mr Ho. In the following discussion the references to Rosanna are to her in that capacity and, effectively, the personification of her employer.
2. On the evidence from which the facts can be derived, it is apparent that Mr Ho spoke to Rosanna for the purposes of effecting the booking of the cruise. It is unclear whether that was in person or by the telephone (Mr Pike SC, Counsel for Mr Ho, informed the Court that it was the latter), although that is not relevant for present purposes. Importantly, however, Mr Ho had no ability or authority to access POLAR, either by himself or through an intermediary, so as to book his own passage. Therefore, in order to effect the booking, he engaged the services of Rosanna. He provided her with personal information as to the relevant passengers, the specific cruise which they desired to take, as well as financial information concerning his credit cards. He authorised Rosanna to use that information to make the booking for himself and his wife. His request for her to do so was, in effect, for her to use whatever facilities, systems or methods that were available to her and to use the information and authority he had provided to cause the booking to be made. There is nothing in the evidence to suggest that he was concerned to know the terms and conditions to which Rosanna was subject in utilising any of those avenues for effectuating the booking on his behalf.
3. When then, Rosanna entered the POLAR platform and inserted Mr Ho’s details, she could only have done so as his agent. Necessarily, if the entering of the necessary data into POLAR and paying a deposit had the consequence of effecting a binding agreement between Princess and Mr Ho, Rosanna must have held his authority to do those acts. Were it otherwise, no agreement would materialise. For instance, were someone to gain access to POLAR and make an unauthorised booking in the name of a person using a credit card stolen from that person, no valid booking or passage contract could be effected. Without the authority of the putative passenger, the entry of information and purported payment could have no binding consequences.
4. Within the paradigm of an offer and acceptance analysis, it is irrelevant which of the parties was the offeror or offeree. However, the preferable analysis would be that Princess offered its several cruises at certain advertised prices and on the terms of which Rosanna was aware, and the agreement came into effect when Rosanna accepted the offer in respect of the voyage on Mr Ho’s behalf by entering his details into POLAR and paying the deposit so as to generate the booking. Nevertheless, the alternative analysis relied upon by Mr McLure SC reaches the same conclusion. That is, that Mr Ho made the offer through Rosanna entering his details into POLAR on 25 September 2018, which offer was on the terms and conditions of the passage contract which Rosanna knew were those on which Princess was prepared to contract. It was, so the submission went, accepted that day by the automatic issuing of Princess’s Booking Confirmation to Rosanna. On either analysis, if the passage contract was entered into on the making of the booking, it could only have been on the basis that Rosanna acted on Mr Ho’s behalf in effecting it.

#### The terms and conditions on CruiseShipCenters’ email did not affect Rosanna’s agency

1. The primary judge held that any agency as between Mr Ho and CruiseShipCenters was excluded by the terms of the latter’s invoice which stated that it acted as the agent for the supplier of the services. The difficulty here is twofold. First, on the available material the invoice was delivered to Mr Ho only subsequent to him having asked Rosanna to make the booking and, indeed, after she had done so. If the passage contract had been entered into when the booking was made, the subsequent notification that Rosanna was not acting as Mr Ho’s agent would be ineffectual. The second point is that, the nomenclature which the parties ascribe to their relationship is irrelevant if the substance of the relationship dictates otherwise. Here, Mr Ho effectively requested that Rosanna use whatever authorisation she held to enter his information and data into Princess’s POLAR website and authorised her to use his credit card to effect a booking on his behalf. By giving her the authority to do so, she became his agent to that extent.

#### Other grounds on which it was submitted that Rosanna was not Mr Ho’s agent

1. In the course of the appeal, Mr Pike SC sought to submit that Rosanna was the agent of Princess for the purposes of effecting the transaction with Mr Ho. No Notice of Contention had been filed to raise that issue although leave to do so was sought during the appeal and no objection taken. The submissions were founded upon the terms of the Strategic Sales Agreement, including the OneSource terms and conditions, although, as appears from the recitation of its terms, both went to great lengths to eschew the existence of such a relationship.
2. In support of the Notice of Contention, reliance was placed (ts 83) on the terms and conditions of agreements between Princess and other travel agents in Australia and the United Kingdom in which the latter were expressly identified as acting as the former’s agent. Reference was made to emails sent by those travel agents to their customers in which they expressly stated that they acted as Princess’s agent in the transaction. So the submission went, as those travel agents presumably accessed the POLAR system in the same manner as Rosanna, it followed that Rosanna must also have acted as Princess’s agent. However, it was not immediately self-evident how the relationship of Princess with third parties was capable of influencing the construction of a different agreement, being the Strategic Sales Agreement, between Princess and Rosanna or the relationship between Mr Ho and Rosanna. Moreover, there was no evidence of the manner in which those agents otherwise acted in relation to Princess’s business.
3. Relevantly, it was accepted by all parties that the labels which the parties might give to their relationship are not conclusive, and their actual relationship *inter se* is a matter to be determined by a consideration of the rights and obligations on which they have agreed: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89 at 109 [63] – [64] *per* Kiefel CJ, Keane and Edelman JJ, 133 [184] *per* Gordon J. In the present case, to the extent to which they were able to do so, CruiseShipCenters and Princess agreed that their relationship was not one of principal and agent. Specifically, by the Strategic Sales Agreement the parties agreed that in dealing with one another, Rosanna (CruiseShipCenters) would act on behalf of the potential passenger, do so exclusively, and would make it clear to potential passengers that such was the case. Such an obligation strikes directly at the relationship between the parties. Where one party assumes a substantive obligation to inform third parties that they are not the agent of another, it is difficult to accept that any agency could nevertheless be implied. Further by cl 8 of the OneSource terms and conditions the travel agent was not authorised to suggest on its website that it was an “Official Cruise Line website”, that it was an official Cruise Line agency, or that it was associated with or has been endorsed by Cruise Line. “Cruise Line” being a reference to Princess. It was further agreed that, whilst the travel agent could download material from Princess for promotional use, it was unable to alter it or use it in a manner which suggests that Princess has sponsored, or endorsed the travel agent, the travel agent’s business, products or activities. Further, by cl XVIII of the agreement the travel agent was required to familiarise themselves with all of the terms of the passage contract and acknowledge that it receives the passage contract on behalf of each passenger for whom a booking is made and warranted to Princess that it was authorised by its customers to accept and agree to the terms and conditions on their behalf.
4. The effect of these parts of the Strategic Sales Agreement was that Rosanna and CruiseShipCenters were obliged to act as and in the capacity of the agent of the potential passengers and were contractually required to inform them that was the case. Whilst they were able to access Princess’s booking system, POLAR, the substance of their obligations imposed on them a duty to act as the potential passenger’s agent and their access to POLAR was solely to enable them to carry out their clients’ instructions.
5. It was submitted by Mr Pike SC that the obligations in the OneSource terms and conditions requiring the travel agents to comply with Princess’s advertising policy was indicative of an agency relationship. However, those obligations were proscriptive in nature and were directed to preventing the advertising of cruises below Princess’s approved prices. They had the effect of ensuring that travel agents accurately advertised the cruise prices and in a way that did not mislead consumers. It is obvious that Princess had a specific interest in that issue and in regulating the way in which others might advertise its products. It was not suggested that Princess could not regulate or control the manner in which the travel agents advertised, the amount of advertising, the amount of money spent on it, or its frequency, save at the risk of making them its agents. The restrictions imposed on the way in which travel agents advertised the prices of Princess’s cruises is not indicative of an agency relationship. The similar clauses in the Strategic Sales Agreement were to the same effect.
6. The Court was also taken to cl XI of the OneSource terms and conditions by which the travel agent agreed that it was their responsibility to communicate with the passenger in relation to cruise documents and boarding passes. This is a further substantive obligation indicating, in a real way, that the travel agent acted for the passenger.
7. Reliance was also placed on cl XVIII, by which the travel agent consented to receive the passage contract, as somehow indicating a relationship of principal and agent with Princess, although it is not immediately clear why that would be so. The fact that the travel agent agrees that it might receive the passage contract from Princess for the passenger suggests the contrary. That conclusion is supported by the following terms of cl XVIII in which the travel agent acknowledges that it receives the documents on behalf of the passengers for which it makes a booking and represents that it has authority to do so.
8. There is, with respect, nothing in the OneSource terms and conditions or those in the Strategic Sales Agreement which supports the conclusion of any agency relationship with Princess. On the contrary, the substantive terms disclose that CruiseShipCenters was the agent of the passengers whose bookings it made and that accorded with the parties’ expressly stated intention.

#### Ostensible authority

1. A faint attempt was made in the course of the appeal to rely upon ostensible authority as the foundation of the alleged agency between Rosanna and Princess. That, however, could not succeed in the absence of any holding out by Princess that Rosanna had some actual authority, as well as some evidence of reliance by Mr Ho on that holding out. These are essential elements given that estoppel provides the underlying rationale for ostensible authority: *Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd* (2019) 285 IR 390, 403 – 406 [74] – [87]. Neither were present in this case.
2. In support of the ostensible agency submission, Mr Pike SC relied upon the observations of Newnes JA (Buss and Miller JJA agreeing) in the Western Australian Court of Appeal in *Auxil Pty Ltd v Terranova* (2009) 260 ALR 164 (*Auxil Pty Ltd v Terranova*), 196 [176]:

[176] A representation creating an apparent authority of an agent may be made in a number of ways but the most common form of representation by a principal is by conduct, that is, by permitting the agent to act in the management or conduct of the principal’s business. By permitting the agent to act in the management or conduct of the business, the principal thereby represents to anyone dealing with the agent that he or she has authority to do those acts on behalf of the company which an agent authorised to do acts of the kind which he or she is in fact permitted to do normally does in the ordinary course of such business.

1. Whilst the accuracy of that statement might not be doubted, the difficulty here is that there was no holding out or representation by Princess that Rosanna had authority to act in the management of its business. The mere fact that Rosanna was able to make a booking for Mr Ho is not a representation by Princess of anything. Importantly, it does not suggest that Rosanna had any particular authority from Princess to effect that booking on its behalf. In the ordinary course, the engagement of the assistance of a travel agent to make travel arrangements suggests that the agent is acting for the intending traveller and, in doing so, is providing a service for them. Such an inference might be stronger where the travel agent makes multiple arrangements such as air travel, connecting transport, and accommodation. It is an unlikely suggestion that the travel agent is the agent of each business providing a service. In any event, the making of bookings with Princess is not conduct in the management or operation of Princess’s business any more than the making of bookings with airlines, transport companies or hotels would be conduct in the management of the businesses which provided those services. The decision in *Auxil Pty Ltd v Terranova* has no application on the present facts.
2. Mr Pike SC also relied upon Princess paying Rosanna a commission under the Strategic Sales Agreement in respect of the booking of Mr Ho’s cruise. However, the identity of the payer of commission is far from decisive and, in the present era, an expectation exists that the travel agent will receive their commission from the provider of the service rather than the customer regardless of on whose behalf they act.
3. In support of the claim based on ostensible authority, reliance was placed upon the terms of the emails received by Mr Ho from Rosanna on 30 October 2018 and, in particular, the statement on them that “Expedia CruiseShipCenters is acting as intermediary and agent for suppliers … in selling services, or in accepting reservations or bookings for services which are not directly supplied by this agency (such as cruises …)”. However, to the extent to which that amounted to a representation, it was not made by Princess but by Rosanna or CruiseShipCenters who were unable to make any effective representation on which an ostensible authority might arise: *Flexirent Capital Pty Ltd v EBS Consulting Pty Ltd* [2007] VSC 158 [203]. Further, even if it could be said to have derived from Princess, there was no evidence that Mr Ho either saw it or relied upon it, either before the booking was made or after it.
4. A further ground on which a claim founded upon ostensible authority fails is that it was not pleaded and, therefore, it was not an issue on which the parties called relevant evidence.
5. No claim of agency based on ostensible authority can be sustained in the circumstances of this case.

### The US Terms and Conditions were incorporated into the agreement

1. The identification of the terms of the passage contract is dependent upon the analysis of the circumstances of acceptance of the offer by Mr Ho and the objective ascertainment of that to which the parties agreed. As with all aspects of contractual formation and construction, the subjectively held opinions or beliefs of the parties are irrelevant to whether a term or terms have been agreed upon: see generally *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95, 105 – 106 [25].

#### The incorporation of the US Terms and Conditions by the Strategic Sales Agreement

1. Once the agency relationship between Rosanna and Mr Ho is accepted, the incorporation of the US Terms and Conditions into Mr Ho’s passage contract follows as a matter of course.
2. In the first instance, in the performance of her agency for Mr Ho, Rosanna utilised her and CruiseShipCenters’ contractual entitlements vis-a-vis Princess to access POLAR for the purposes of making the booking. Those entitlements were regulated by the Strategic Sales Agreement which provided that any sales made by her were governed by Princess’s then current terms of sale. Exhibit A to that agreement, which is referenced above, specifically provided by cl XVIII that the terms and conditions which governed the booking and cruise were set forth in the Passage Contract and were incorporated by reference. That agreement also provided that the agent, CruiseShipCenters, acknowledged receipt of the Passage Contract on behalf of each passenger and that it had authority to accept all of those terms and conditions. In relation to knowledge of the terms, cl XVIII also provided that the travel agent accepted responsibility to be familiar “with all sections of the Passage Contract as they govern the Passenger’s legal rights, particularly with respect to cancellation, the provision of medical care, privacy rights, Cruise Line’s liability, and the Passenger’s right to sue or arbitrate”.
3. When, therefore, Rosanna effected the booking by exercising her / CruiseShipCenters’ contractual rights to access POLAR, providing the relevant details, and making the necessary payment, she thereby created a contractual arrangement between Princess and Mr Ho on the terms and conditions offered; namely the US Terms and Conditions. There was no relevant dispute in these proceedings as to the efficacy of the Strategic Sales Agreement in relation to the consequences of CruiseShipCenters making a booking. In these circumstances it was irrelevant whether Rosanna or anyone at CruiseShipCenters was aware of those terms and conditions, even though they had contracted on the basis that they were so aware and would be familiar with them as they changed from time to time. By reason of the Strategic Sales Agreement the contract brought into existence for Mr Ho by CruiseShipCenters through the POLAR system could only be on the terms agreed upon. Nor is it relevant that Mr Ho was not aware of those terms of the passage contract. The effect of his engagement of Rosanna / CruiseShipCenters was that the latter would exercise its contractual rights to generate his booking regardless of the terms and conditions to which that exercise was subject. On these facts, this case is far from those where the terms of carriage are unknown before the parties seek to enter into the contractual arrangement, and the carrier then seeks to impose them by including them in a receipt or ticket.
4. To the extent to which the formation of the passage contract arose by the making of the booking, the analysis of the objective facts is merely that CruiseShipCenters, within the scope of its pre-existing contractual arrangements with Princess, utilised the POLAR system by entering the required details for the purposes of its making. The context of the existing terms and conditions of the Strategic Sales Agreement provided the relevant facts from which it is apparent that the parties objectively intended that the booking / passage contract was on the terms of the relevant Princess’s Passage Contract; namely the US Terms and Conditions.

#### Mr Ho was fixed with Rosanna’s knowledge

1. Even if there was a requirement that Mr Ho be aware of the passage contract terms, it was satisfied here where Rosanna’s knowledge of the existence of the terms and conditions and of their content was imputed or attributed to Mr Ho. In this respect the general principle articulated in *Bowstead & Reynolds On Agency*, (22nd ed), Sweet & Maxwell, 2021, London p 563 [8-208] is applicable. It provides:

Where an agent is authorised to enter into a transaction in which the agent’s own knowledge is material, knowledge which the agent acquired before appointment or outside the scope of his or her authority may also be imputed to the principal.

1. In support of that principle the learned authors referred to the decision of Hoffman LJ in *El Ajou v Dollar Land Holdings Plc* (1994) BCC 143 (*El Ajou v Land Holdings*). As his Lordship recognised, insurance brokers (at common law) act as the insured’s agent and that, when placing insurance for their clients, they are as bound as the insured to communicate all relevant facts within their knowledge. In the course of his reasons his Lordship observed that the decision in *Turton v London and North-Western Railway Co* (1850) 15 LT(OS) 92 had held that similar principles applied in respect of other agents who conclude contracts of carriage on behalf of their principals. In that case the plaintiff, Mr Turton, had purchased goods from a Mr Higgs and requested that the latter send them by rail to him at Liverpool. Mr Higgs agreed and, on Mr Turton’s behalf, delivered the goods to the defendant railway company for carriage to Liverpool. Mr Higgs had previously dealt with that company and was aware that its terms of carriage excluded liability for damage to certain classes of goods. The goods sold to Mr Turton were within one of the excluded classes. The goods arrived in a damaged condition in respect of which Mr Turton sought damages from the railway company. Pollock CB, delivering the judgment of the Court, held that Mr Higgs had made the contract for carriage as agent for Mr Turton and did so as if he made it for himself with the consequence that there was notice of the terms and conditions of carriage which relieved the railway company of liability. To similar effect was the decision in *Dresser v Norwood* (1864) 17 CB(NS) 466 where the plaintiff’s agent had purchased goods from the factory of the seller knowing that to be the case. It was held that the knowledge, however acquired by the agent, was that of the plaintiff. In *El Ajou v Land Holdings* Hoffman LJ observed that these examples were not cases of imputation of knowledge but rather that the agent’s knowledge affected the terms or performance of the contract which he had concluded on his principal’s behalf.
2. The decision of Hoffman LJ in *El Ajou v Land Holdings* was considered by Handley JA in *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 (this point not being considered by the High Court on the subsequent appeal) where his Honour expressed disquiet as to whether the authorities referred to by his Lordship were not truly cases involving the imputed knowledge of the agent. There was no need for Handley JA to reach any conclusion on this issue in that case, which was more directly concerned with whether the knowledge of insurance brokers was imputed to their insureds for the purposes of claims of non-disclosure. However, his Honour’s decision does identify (at 696 – 697 [88] – [89]) that where an agent has active duties to perform in the process of committing the principal to a transaction, and the agent’s state of mind is relevant to that transaction, the agent’s state of mind is attributed to the principal. As his Honour said:

Where the agent acts within his authority with the knowledge in question present to his mind, the principal should be bound by that knowledge, however acquired. I see no basis for ignoring any part of the agent’s knowledge, present to his mind, when he is doing the authorised act. The source of the knowledge seems irrelevant. What must matter is the agent’s state of mind when doing the authorised act.

1. In the assumed scenario in this case the issue is whether Mr Ho knew that the Strategic Sales Agreement provided that all bookings made by Rosanna / CruiseShipCenters through the POLAR system were subject to the General Passage Contract terms such that they became terms of the booking. That information, which was known by Rosanna / CruiseShipCenters, was material to the transaction which Mr Ho requested Rosanna / CruiseShipCenters to effect on his behalf, with the consequence that their knowledge was imputed to him. It follows that, on the objective analysis of the circumstances, all parties were aware that any booking made by Rosanna with Princess would be subject to the General Passage Contract terms. It was not submitted by Mr Ho that if Rosanna was his agent he was somehow not fixed with her knowledge.

### A “conventional analysis” of the formation of the passage contract – ticket cases

1. In the course of submissions, both parties made reference to the “ticket cases”, the history of which, from *Parker v South Eastern Railway Company* (1877) 2 CPD 416 (*Parker v South Eastern Railway*), was traced by White JA in *National Australian Bank Ltd v Dionys* [2016] NSWCA 242 [171] – [183] (*NAB v Dionys*). Such cases stand apart from those where the party to be bound has indicated their assent to the terms by signing the document in question which is then ordinarily conclusive: *L’Estrange v F Graucob Ltd* [1934] 2 KB 394 (*L’Estrange v Graucob*); *Toll (FGCT) v Alphapharm Pty Ltd* (2004) 219 CLR 165 (*Toll v Alphapharm*). They also stand apart from cases where the contracting party knows, either directly or through an agent, that the other intends to only contract on its hitherto disclosed terms.

#### The context in which the ticket cases is sought to be applied

1. The ticket cases are concerned with contractual formation and the scope of the terms to which the parties have agreed where an agreement has arisen orally or by conduct, and in the course of which one party seeks to introduce written terms contained on or referred to in a document passing between them. In general terms, they constitute a particular application of the broader principle that the question of whether a contract has been formed and on what terms is to be ascertained by reference to what a reasonable person would infer or deduce from the interactions between the parties. Such an analysis includes identifying the parties’ objective intention to enter into the agreement from what they have said or done. At a more granular level, it also involves the application of a presumption consequent upon one party having been given a reasonable opportunity to inspect a document containing terms and conditions prior to the point of the contract’s formation, and that presumption applying to incorporate those terms and conditions regardless of whether the party has availed themselves of that opportunity.
2. At the intersection of the issues of when a contract is formed and the giving of reasonable notice of terms, is the question of whether notice was given prior to the contract coming into existence. It is undoubted that terms cannot be unilaterally imposed upon a party once the agreement has been concluded. In many cases the consequence of notice of the terms coming “too late” is that a term or terms limiting liability are excluded from the agreement between the parties, but otherwise the agreement can be adequately performed on a basic or skeletal agreement supplemented by implied terms. Simple contractual arrangements which are to be immediately performed such as the parking of a vehicle in a garage, the storage of items in a cloak room, travel by ferry, bus or other public conveyance, or the dry-cleaning of garments can be adequately regulated by a minimum of agreed and implied terms. In such cases it is possible to discern an objective intention to contract where agreement is reached or inferred as to only the most basic terms. However, different considerations necessarily intrude into the objective assessment of whether parties intended to enter into more complex or sophisticated agreements. In the present case, for instance, the agreement pursuant to which Mr Ho and his wife were to travel on a cruise was neither to be performed immediately nor could it reasonably have been intended to have been regulated by a simple agreement as to the cruise, the vessel, the stateroom, the voyage duration and the price. A 13 day voyage which includes traversing the high seas together with some 3,000 other passengers and crew requires myriad reciprocal rights and obligations as between the passenger and the cruise operator. Non-exhaustively they would include the passenger’s rights and entitlements to food, beverages, accommodation, medical attention, activities, use of facilities, and ability to engage in on-shore activities at ports visited. Similarly, the cruise operator must have corresponding rights and obligations in relation to such matters as well as agreement from the passenger as to their conduct and behaviour whilst aboard the vessel.
3. As the following discussion reveals, there is some not inconsiderable difficulty in attempting to apply the “ticket cases” principles derived from elementary contracts to the circumstances of the present case, in that they might suggest a conclusion that the passage contract was reached after the parties had agreed to but a few basic terms. On the other hand, it is necessary to accept that this apparent difficulty has not been seen as a hurdle in a number of authorities concerned with contracts of passenger carriage on cruise liners: see *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (*Oceanic Sun Line v Fay*).

#### The principles found in the ticket cases

1. Identification of the occasion of the formation of the relevant contract is pivotal in the ticket cases. It is axiomatic that if one party purports to give the other notice of the terms on which they intend to contract *after* the agreement has been formed, those terms do not form part of the contract: *Oceanic Sun Line v Fay*. This was made clear by Brandon J in *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd’s Rep 257, 262 (“*The Dragon*”) where his Honour noted that if the carrier’s conditions are not incorporated into the contract when it is made, the carrier cannot subsequently, “by issuing a ticket containing the conditions concerned, however clearly referred to in it, introduce such conditions into the contract when it was not subject to them originally”. A unilateral attempt to include conditions, even if only a short time after a contract is concluded, does not change this outcome: *NAB v Dionys* at [53].
2. Where the terms and conditions are made available prior to the contract’s formation, a second question arises as to the sufficiency of the notice given of them. Indeed, it arises in two ways. First, in relation to whether, prior to the contract’s formation, the customer was given “reasonable notice” of the terms said to form part of the agreement. Second, in relation to so-called “unusual” or “onerous” terms (such as exemption clauses), whether the party relying on them had done all that was reasonably necessary to bring them to the customer’s attention. As a review of the cases disclose, the distinction between these two issues is not always maintained. Regularly, the issue at hand is whether an exclusion clause or other limitation of liability clause has been brought to the customer’s attention and thereby incorporated into the agreements. Often, those questions are determined without reference to whether, if those clauses are not incorporated, the remaining terms on the ticket or which are otherwise displayed are part of the agreement. Nevertheless, common to each is that what amounts to satisfactory notice is very much fact specific, with the result that drawing guiding principles as to this issue is difficult if not impossible. This has, perhaps, led to some scepticism as to whether any principled approach exists or that the courts, “while relying ostensibly on conventional techniques, are fundamentally concerned not with reasonable notice, but with the appropriateness of the term in question in the context of the relationship between the parties”: Horne J and Lewis C, *Fitting Pigs into Pokes — the Incorporation of Terms in Contract* (1998) 12 JCL 237. Such criticism may be unjustified. The process of ascertaining whether particular terms are part of a concluded agreement requires the objective assessment of the circumstances with the relevant question being “whether a contracting party can be reasonably taken to have assented to a particular term, not whether a contracting party should be subject to an unreasonable term”: *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559, 569 (Buchanan JA) (*Maxitherm Boilers v Pacific Dunlop*).
3. A useful starting point in relation to the incorporation of terms generally is the seminal case of *Parker v South Eastern Railway*. It involved a customer who received a ticket on the deposit of articles in a cloakroom. On the reverse of the ticket was a notice stating that the company would not be responsible for any package exceeding the value of £10. A placard containing the same condition was displayed in the cloakroom. In considering whether the exclusionary provision formed part of the contract, Mellish LJ (at 421) observed that:

If in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the party does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them and does not know what they are.

1. His Lordship (at 423) then noted that the proper direction to give a jury for it to determine whether the condition was a term of the contract was (emphasis added):

That if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, *reasonable notice* that the writing contained conditions.

1. As appears from his Lordship’s observations, the touchstone of incorporation is the timely giving of notice of the terms to the contracting party who, with the opportunity to consider them, proceeds to enter into the contractual relationship. The contracting party’s objective conduct indicates their acceptance of the terms. Drawing on the above passages in *Parker v South Eastern Railways*, Professor JW Carter in *Carter on Contract* (LexisNexis, 2021, 10-170) suggests that the following three questions can be posed in considering the application of the ticket cases:
2. Did the person who received the ticket know that there was writing on the ticket?
3. Did that person know that the ticket referred to terms?
4. Did the party relying on the terms do what was reasonable to bring notice of the existence of the terms sought to be incorporated to the other party’s attention?
5. Whilst the first and second are legally uncontentious and require no elaboration, the concept of “reasonable notice” raised in the third requires further analysis.
6. In that latter regard, in *Hood v Anchor Line (Henderson Bros)* [1918] AC 837 (*Hood v Anchor Line*), the House of Lords considered this issue in the context of a customer who had purchased a ticket with a condition limiting the liability of the steamship proprietor for loss occasioned to the passenger or their property to £10. An envelope containing the purchased ticket, had a printed notice on it stating that it was subject to conditions and that “passengers are particularly requested to carefully read the above contract”. In approving the approach in *Parker v South East Railway*, the House of Lords held that reasonable steps had been taken to bring the condition to the plaintiff’s knowledge. Viscount Haldane (at 844) framed the question as being whether the company had done all that was reasonably necessary as a matter of ordinary practice to give the customer notice of the particular condition. The issue of reasonable notice (at 844) was a question of fact which required consideration of all the circumstances and the situation of the parties. Lord Dunedin (at 847) held that the answer depended on both the circumstances of the particular case as well as the class of case, and ultimately concluded that the carrier had done what was reasonably sufficient to bring to the customer’s notice the existence of the restriction on which it relied. Importantly, his Lordship implicitly differentiated between a clause which was usual and one that was not. His comments about doing that which was reasonable to bring the customer’s attention to the clause was confined to “usual” clauses (at 846 – 847). Lord Finlay LC and Lord Parmoor considered the question in terms of whether the defendant had taken steps that were reasonably sufficient to give the customer notice that the carriage was subject to the conditions set out. In the reasons of the latter can be found the origins of the principles of the ticket cases as to when the contract in question is formed. At 848 – 849 Lord Parmoor said:

If an intending passenger; either personally or through his agent, has reasonable notice that the ticket or document handed to him by a carrier contains certain conditions, and accepts the document or ticket as handed to him without objection, and without taking the trouble to make himself acquainted with such conditions, he must be taken to have assented to them, and they thereupon become evidence of the contract of carriage made between such passenger and the carrier.

1. The reference to the “acceptance” of the ticket without objection necessarily connotes the opportunity to consider the ticket’s terms in order to ascertain whether they are acceptable and the entitlement and ability to then accept or reject them. Similar reasoning was adopted in the deliberations of the High Court in *MacRobertson Miller Airline Services v Commissioner of State Taxation* (WA) (1975) 133 CLR 125 (*MacRobertson Miller Airline*) where the issue under consideration was whether an airline ticket was chargeable with stamp duty as an agreement or memorandum of agreement. The terms printed on the airline ticket, which had been issued on payment of the fare, reserved to the carrier the right to abandon any flight, to cancel any booking, and to refuse to carry the passenger without having to incur any liability. The High Court held that the ticket did not record the terms of an agreement, but instead constituted an offer which could subsequently be accepted by conduct. Each member of the Court, however, adopted different reasons in reaching their conclusion.
2. Barwick CJ held (at 133) that the exemption, being the right to cancel any flight, “fully occupies the whole area of possible obligation, leaving no room for the existence of a contract of carriage”. His Honour ultimately concluded that there was no contract until the airline provided the passenger with a seat on the airplane. Stephen J (at 137) identified that the “conventional analysis” “in transactions involving the issue of a ticket in return for payment of a fare and the subsequent performance of the contract by the act of transportation, is to regard the ticket as an offer, the contract being made upon acceptance of that offer by the passenger, usually by conduct”. Thus, acceptance will normally be by either an overt act consistent only with acceptance, or alternatively, through the passenger’s failure to reject the offer after having an opportunity to consider the conditions of carriage. Jacobs J agreed with Stephen J that formation of the contract could not precede the notification of special conditions, and the ticket simply recorded the terms of an offer made by an airline. Stephen J highlighted the difficulty of applying the offer and acceptance model to this type of transaction at 136–137:

This doctrine, of the formation of contracts by offer and acceptance, encounters difficulties when sought to be applied, outside the realms of commerce and conveyancing, to the everyday contractual situations which are a feature of life in modern urban communities. Contracts for the carriage of passengers, one of the most common classes of contract in a commuter society and one which ordinarily involves the attempted imposition of contractual restrictions upon the passenger’s rights should he suffer loss or injury, provide an instance of these difficulties … .the contract being “inferred from the acquiescence of the carrier in the presence of the passenger on the conveyance” — Lord Dunedin in *Hood v Anchor Line* [1918] AC 837 at 846, and see *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, per Lord Greene MR, at 259.

1. The consequence of this analysis was that the proffering of a ticket amounted to the making of an offer such that the contract was not formed at that time. That offer remained open, affording the customer a reasonable opportunity to consider its terms and conditions, and it might subsequently be accepted by conduct. It followed that despite the issuing of a ticket “there was no agreement or memorandum of agreement in writing, hence nothing that was chargeable with stamp duty”: *Oceanic Sun Line v Fay* at 207 (Wilson and Toohey JJ).
2. The mention by Stephen J in his reasons that the opportunity for a passenger to ascertain the condition which the carrier seeks to impose would be “rarely availed of”, is not unimportant. The view is sometimes expressed that the law relevant to the ticket cases is based on the fiction that where a ticket is retained without objection, the non-drafting party has read and agrees with all its contents; or the fiction that where the ticket is retained the non-drafting party is prepared to accept, even without reading it, whatever is in it: Freilich A & Webb E, *The Incorporation of Contractual Terms in Unsigned Documents - Is it Time for a Realistic, Consumer - Friendly Approach?* (2009) 34(2) University of Western Australia Law Review 261 at 263. Similar concerns were expressed by Lord Denning MR in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169 where his Lordship said:

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. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

1. With respect, notions that the formation of contracts in the area roughly described as the ticket cases involves a fiction are somewhat misplaced. Based on the objective theory of contract the question of whether a particular term or condition formed part of a contract is not answered by asking “whether the person affected by the clause actually knew of it (a subjective test) but rather whether he or she had the means of actually knowing about it (an objective test)”: Davis, *Contract: General Principles – The Laws of Australia* (Thomson, 2006) at 416 (Davis). To similar effect are the comments in *Toll v Alphapharm* at 179 [40] that:

This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.

(Citations omitted).

1. It follows that when, in the course of transactional dealings leading to the formation of a contract, one party is given appropriate notice of the terms on which the other is prepared to contract and then proceeds to enter into the contract, by their conduct they have objectively indicated acceptance of those terms. On the other hand, matters of policy and pragmatics are involved in the conclusion that the agreement so formed does not include so called “unusual” or “onerous” terms which by the same conduct, the parties have indicated their intention to include in their contract, but are excluded because insufficient notice of them was given.
2. Subsequent cases have sought to distinguish the reasoning in *MacRobertson Miller Airline*. In *Oceanic Sun Line v Fay*, a case also involving the creation of a passage contract for a cruise on an ocean liner, the High Court was required to ascertain the occasion on which the passage contract was formed. Resolution of that issue would determine the scope of its terms. On the occasion of the payment of the fare the passenger was handed an “exchange order” which stated that a ticket would be provided to the holder on the boarding of the vessel. It included a term permitting the carrier to cancel the cruise. The passenger obtained his ticket when he arrived in Greece for the purpose of boarding the vessel. Upon the ticket were printed conditions which included both a Greek choice of law and a Greek exclusive jurisdiction clause. The High Court noted (at 207) that the ratio in *MacRobertson Miller Airline* “does not determine the question whether, in the present case, there was a contract once the exchange order issued allocating a particular cabin to the respondent and with all remaining to be done being the exchange of the order for a ticket in Athens”. Wilson and Toohey JJ (at 207) concluded that the contract was formed when the exchange order was issued to the passenger and held that:

Once it is accepted that there was a contract of carriage concluded between the parties in Sydney, there are formidable obstacles in the path of the appellant’s argument that the conditions on the ticket and in particular the submission to Greek jurisdiction formed part of that contract. Yeldham J. was surely right in his view “that the brochure was not contractual in nature and did not enter into or form any part of the relevant contract of carriage”.

1. Brennan J (at 226) rejected the defendant’s submission that the exemption clause in the exchange order was comparable with the clauses in the ticket in *MacRobertson Miller Airline*:

As the exemption clause in the exchange order is significantly different from the exemption clauses in the ticket in *MacRobertson* *Miller*, it is not necessary to analyse the construction which Barwick C.J. and Jacobs J. placed on those clauses in that case. The exemption indorsed on the exchange order is not so wide as to preclude the existence of any contractual obligation on the part of the defendant when the exchange order was issued. To the contrary, the exchange order contains promises to refund the fare if the cruise is cancelled and to exchange the exchange order for a “Sun Line ticket when boarding vessel” if the cruise is to proceed. So far as appears from the terms of the exchange order, if the cruise proceeds, the passenger is contractually entitled on presentation of the exchange order to a ticket entitling him to be carried. The defendant reserves no right to cancel any ticket or booking or to refuse to carry the passenger named in the exchange order if the booked cruise proceeds.

1. His Honour then went on (at 227) to reject the application of the “conventional analysis” in the following terms:

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. The arrangements contemplated at the time of the issue of the exchange order for exchanging that document for a ticket cannot reasonably support the hypothesis that when issued the ticket might be a mere offer containing exemption clauses which should bind the plaintiff only upon subsequent acceptance.

1. The fact that the exchange order included a term entitling Oceanic Sun to cancel the cruise at any time was found not to have the same significance which Barwick CJ had given to the cognate clause in *MacRobertson Miller Airline*. Had its effect been that no agreement was entered into because the carrier’s obligations were illusory, it would have followed that the agreement was only entered into once the ticket was issued and the passenger had presented themselves for boarding.
2. Although the result in *Oceanic Sun Line v Fay* had the consequence that the choice of law and exclusive jurisdiction clauses formed no part of the contract between the parties, neither were any of the other terms and conditions contained in the ticket. If the agreement were confined to the terms of the exchange order, its scope would be limited to those matters being the ship on which the cruise was to occur, the sailing date, time of sailing and of embarkation, the ports of departure and arrival, cabin number, and the fare charged and other amounts payable by the passengers. It seems to have been assumed that a reasonable person would have regarded the parties as having intended to contract on those bare terms at the time of the issue of the exchange order. That is with respect somewhat improbable and it calls to mind the observations of Lord Parmoor in *Hood v Anchor Line* (at 849):

It is, however, an extravagant assumption that a passenger by an ocean-going steamship from New York to Glasgow would expect to be carried without a contract containing some conditions, or that he would regard the ticket issued to him merely as a voucher or receipt for payment.

1. A similar question as to the timing of the formation of a passage contract arose in *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1 (*Baltic Shipping*). There, the passenger responded to an advertisement for an ocean cruise appearing in a travel brochure, paid a deposit through a travel agent, and received a booking acknowledgement. She subsequently received a booking form which contained the statement that the document was not a travel document and that a contract of carriage was made “only at the time of issuing of tickets” and would be subject to the terms and conditions on the ticket. It advised that the terms and regulations of travel were available at the offices of the travel agent. The booking form also contained details of penalties for cancellation of the booking. The plaintiff paid the balance of the fare approximately one month later and subsequently received her ticket approximately two weeks prior to the departure of the cruise. The ticket contained certain exclusions limiting the liability of the cruise line for personal injury and damage to personal effects. The plaintiff sustained physical injury and shock when the cruise liner sank on the tenth day of the cruise and her belongings were lost. Relevant to the appeal was her claim for personal injuries, the outcome of which turned on the occasion of the formation of the contract of passage and its terms. Gleeson CJ held (at 7) that there was no reason to disregard the statement in the booking form that the contract of carriage would only arise when the ticket was issued. This had the consequence of displacing the analysis exemplified by *Hood v Anchor Line* as well as the analysis in *Oceanic Sun Line v Fay* that the contract came into effect on the issuing of the booking form, or when the balance of the fare was paid. However, it also had the consequence that the plaintiff was not bound by the terms and conditions on the ticket which were neither drawn to her notice nor, in respect of which, she was not given an opportunity to decline. The point here is that, although the notice on the booking form deferred the occasion on which the contract came into effect, the carrier was only entitled to rely upon the terms and conditions in the ticket if reasonable notice of them had to be given prior to the contract’s formation. On the Chief Justice’s reasoning, the payment of the fare by the passenger was an offer which was accepted by the issuing of the ticket. On that analysis, the passenger did not have any opportunity to consider the terms and conditions contained in that ticket which, therefore, did not form part of the passage contract.
2. It is relevant that Gleeson CJ identified the twin levels of notice required in circumstances where terms and conditions are sought to be incorporated by notice. He noted (at 8) that the statement on the booking form that the terms and conditions were available at the travel agent may have been sufficient notice of many of the terms of carriage and may have informed the passenger that there were detailed conditions of carriage which were available for inspection if she were interested. However, in view of the nature and extent of the limitation clauses, his Honour (at 8 – 9) did not “regard such a statement as adequate notice of the existence of clauses significantly limiting the appellant’s common law liability in events such as those which occurred in the present case”.
3. Kirby P also addressed the submission that the “conventional analysis” applied such that the contract of passage occurred when the ticket was ultimately issued or after the passenger had been given a reasonable opportunity to consider its terms and conditions and opted to commence the carriage. Whilst his Honour noted that the approach adopted in *Hood v Anchor Line*, being the possible origin of the conventional analysis, was of some antiquity and possibly overtaken by more modern concepts of contractual formation: *The Dragon*: in the circumstances of the notice on the booking form, he was prepared to accept that the contract of carriage did not come into effect until the ticket was issued. However, he concluded (at 25) that Baltic Shipping had not brought the unusual terms and conditions of travel, including the limitations for liability in relation to personal injury, to the plaintiff’s knowledge. That being so, the plaintiff had not been given a reasonable opportunity to consider and agree to them and that, once the contract was made, it was not possible to unilaterally impose additional conditions of travel. His Honour appears to have reached this conclusion on the basis that the terms on which the carrier sought to rely were unusual provisions although no differentiation was made between them and other terms of carriage.
4. Mahoney JA (dissenting) adopted a different view. His Honour accepted that a contract was entered into on the making of the reservation and the payment of a deposit. He held, however, that it was not the contract of carriage on which the plaintiff sued and pursuant to which Baltic Shipping agreed to carry her on the vessel. Like Kirby P his Honour (at 44 – 45) was prepared to give full force and effect to the booking form which eschewed the existence of any contract of carriage until the ticket was issued. He was also prepared to give effect to the statements on the booking form that when a contract of carriage came into existence it would be in accordance with the terms and conditions printed on the ticket actually issued. It followed that when the ticket was issued and Baltic Shipping came under the obligation to carry the plaintiff, it was subject to the terms and conditions of that ticket. His Honour distinguished the analysis of Brennan J in *Oceanic Sun Line v Fay* because the passenger in that case was contractually entitled on the presentation of the exchange order to be issued with a ticket entitling him to be carried. There was no such entitlement in the matter before his Honour.
5. His Honour identified that there was no special principle in the approach taken by the Courts in relation to the incorporation of terms and conditions in ticket contracts. It is one of merely applying the ordinary principles concerning the construction of contractual negotiations where an agreement is not wholly in writing. One such principle is that where the contract is to be discerned from what the parties have said and done and the writing they have used, terms proffered by the carrier may not be incorporated into the contract where it has not done all that was reasonably necessary to bring them to the passenger’s notice. Without being explicit, his Honour recognised (at 46 – 47) this principle as being possibly anomalous in that, whilst the carrier has expressly identified that it is only prepared to carry the passenger on its terms and conditions, the Courts have refused to conclude that the terms or, at least, all of them are part of the contract if reasonable notice of them had not been given. That has the consequence of permitting the passenger to accept an offer which the carrier did not make, and hold the carrier to a contract which it did not intend to enter into. Nevertheless, this was the result of the application of the objective theory of contract. On the facts of the matter his Honour concluded that the carrier had made it expressly clear that it would only provide passage on the terms and conditions identified and there was no basis, being either as to the time of the formation of the carriage contract or as to what a reasonable person would perceive the terms of booking were, which would alter that.
6. The authorities have developed to the stage where “the requirement for notice is stricter in the case of particularly stringent limiting or excluding terms than in the case of other types of terms”: Davis at 412. If a court concludes that the document is one in which special conditions would not usually be expected, then “merely proffering or displaying the document is not sufficient to satisfy the reasonable notice test”: Davis at 414: with the consequence that those special conditions would not form part of the agreement. For example, Lord Denning in *Thornton* suggested that “an unexpectedly stringent or harsh exclusion clause would have to be presented in red writing with a red hand pointing to it for sufficient notice to be given to the customer”. The courts may require more, such as the positive act of drawing attention to a particular term. In *Oceanic Sun Line v Fay*, Brennan J (at 229) stated that “in differing circumstances, different steps may be needed to bring an exemption clause to a passenger’s notice, especially if the clause is an unusual one”. Buchanan JA echoed similar sentiments in *Maxitherm Boilers* at 569, but recognised that the focus should not be on whether a party should be subject to an unreasonable term:

As I have said, in my opinion the inclusion of an unusual term, at least in an unsigned document, may require its proponent to take special steps to bring it to the attention of the other party, for otherwise it may not be reasonable to assume consent to the term. Whether special steps are required, and what those steps must be, will depend upon the circumstances of each case. Further, I think that a term may be unusual because it is more than ordinarily onerous. However, I do not consider that the mere fact that a provision is onerous entitles a court applying the common law to reject it as a term unless special steps have been taken to draw attention to it. The relevant question is whether a contracting party can be reasonably taken to have assented to a particular term, not whether a contracting party should be subject to an unreasonable term.

1. The concern expressed by his Honour in the latter part of that passage is not consistent with what appears to be now well accepted; namely that in order to incorporate onerous terms, more than mere reasonable notice is required. The party proffering the term must do all that is reasonably necessary to bring it to the other’s attention. On the other hand, his Honour’s observations highlight that the principle is not justifiable by reference to the standard concepts of the objective theory of contract but is based on pragmatics and a crudely formed public policy of consumer protection.
2. The extent to which one party is to prove that reasonable notice of limiting or unusual clauses was provided to the other party is not without limit. The learned authors of Cheshire and Fifoot (at 10.70) recognise this point and provide the following explanation (citations omitted):

In none of the cases, however, has the court required that the limiting term must have been read (let alone understood) for a party to be bound by it. Such a requirement would have been unrealistic. But more than acceptance or receipt of the document may be required. In general an effort should be made to bring it to the attention of the other party that the document contains limiting terms. Limiting terms may not be hidden away or slipped in underhand. But if a reasonable effort has been made to give notice of their existence, there is no objection to their incorporation, whether they have been read or not.

1. This is consistent with questions of onus in contractual disputes. In the ordinary course the onus rests on the plaintiff alleging a breach of contract to prove all elements necessary to establish the defendant’s liability. However, a special rule applies in relation to certain terms that “would defeat the legitimate transactional expectations of the parties”: NC Seddon, RA Bigwood and MP Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (10th ed, 2012) at [10.66] (Cheshire and Fifoot). In such cases where a limiting or unusual term is sought to be enforced, the defendant will bear the onus of proving that it was incorporated into the contract: *Causer v Browne* [1952] VLR 1 at 5 – 7; *NAB v Dionys* [56] – [59], [165].
2. The decision in that last-mentioned case provides a further instance of where an attempted incorporation of an unsigned document into a contractual arrangement failed due to a lack of reasonable notice. Ms Dionys had opened an account with the defendant bank. She had met with an officer at the bank’s Marrickville branch and signed an authority card for the account to be opened in her name. It recorded her as being the only authorised signatory on the account. The card was also signed by an officer on the bank’s behalf. Whilst the bank officer who had attended on Ms Dionys gave evidence of his regular practice of handing to the customer opening an account a pamphlet copy of the NAB Business Products Terms and Conditions (NAB Conditions), it was determined that his evidence was insufficient to establish that he had done so on this occasion. One important issue was whether cl 5.18 of those conditions formed part of the agreement between the bank and Ms Dionys as its customer. That clause read as follows:

**You must check your statements**

Without limiting any part of these terms and conditions for your account, you must promptly review your statement of account to check for and tell NAB of any transaction recorded on your statement that you suspect for any reason that you did not authorise or for which the information recorded is incorrect. If you do not, then subject to any applicable law, you do not have any right to make a claim against NAB in respect of such a matter (for example, a forged cheque).

1. This was held to be an “unusual condition” because it went beyond the general law by imposing substantially more onerous duties on customers and limiting their rights to claim compensation in respect of unauthorised transactions facilitated by the bank. It followed that the bank bore the onus of establishing that it was incorporated into the agreement. Sackville AJA (with whom Macfarlan JA and White J agreed) held that the agreement was concluded when Ms Dionys signed the authority card, which on the evidence, could not be said to be before she received the booklet containing the terms and conditions. The authority card made no express reference to the NAB conditions such that they were not incorporated into the agreement. His Honour concluded at [84] that there was no indication to a “hypothetical reasonable observer that the agreement between NAB and Ms Dionys would not be finalised until she received the Booklet and had an opportunity to consider whether she would accept the NAB Conditions”. However, he also held that, in the event this conclusion was incorrect, it would be necessary to determine whether the steps taken by NAB were sufficient to incorporate cl 5.18 into the agreement. As Ms Dionys was never asked to sign the booklet or to acknowledge its terms in writing, that clause could only form part of the agreement if she accepted, or at least had the opportunity of accepting it. His Honour observed that if it were assumed that Ms Dionys was given the pamphlet, “NAB would have to show that it had done all that was reasonably necessary to bring any “unusual conditions” in the NAB Conditions to Ms Dionys’ attention”. He held that this had not occurred where the clause was one contained in a booklet of some 71 pages, and the customer’s attention was not drawn to it. His Honour said (at [88]):

88 In my view, NAB did not take the steps reasonably necessary to bring cl 5.18 to Ms Dionys’ attention so as to incorporate the provision into the agreement. On Mr Ahmad’s evidence, he did no more than hand the Booklet to Ms Dionys and inform her that she could also access the terms and conditions on NAB’s website. The Booklet comprises 71 pages and deals with many different topics. The terms imposing duties on customers or limiting NAB’s liability are not highlighted. It would take a considerable effort for a lay person to read and comprehend the contents of the Booklet in order to ascertain his or her responsibilities towards NAB. This case is different, for example, from one where a straightforward exemption clause is prominently displayed on a notice or ticket. It is also not a case where NAB can rely on a course of dealing to establish that a limitation clause has been brought to the attention of a customer.

(Citations omitted).

1. White J agreed that even if the pamphlet had been provided to Ms Dionys, cl 5.18 would not have been incorporated into the banker/customer contract because the former had not taken any step to bring to it or its effect to her attention. It would have been insufficient to merely hand her the terms and conditions. In support of this conclusion reference was made to the summary by Lyons J of the relevant legal principles in *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* [2015] QSC 290 [70]:

[70] My examination of these authorities leads me to adopt the following propositions for determining whether a party (the acceptor) is bound by a term set out or incorporated in an unsigned document which the other party (the offeror) has provided to the acceptor in circumstances which show the offeror intends the document to identify terms of the contract. It is not always the case that the acceptor is not bound by an exemption clause, unless the offeror directs attention to the clause. The fundamental question is whether the offeror is reasonably entitled to conclude that the acceptor has accepted the terms in the document, including the exemption clause. That conclusion should be reached where the second party has had a reasonable opportunity to consider the terms, including the exemption clause, and has behaved in a way which manifests acceptance of the document as recording contractual terms. In other cases, where the clause is one reasonably to be expected in contracts of the kind in question, acceptance of the document makes the clause binding, even if the acceptor does not know its terms, or even that it is contained in the document. If the clause is not one reasonably to be expected, then something more is required by way of provision of information about the clause to the acceptor before the contract is formed. What information will be required will depend on the circumstances, but particularly on the terms of the clause.

1. In *NAB v Dionys* the issue was effectively obiter and there was little discussion as to the nature of the notice which would have been required to incorporate the NAB Conditions into the contract between the bank and Ms Dionys. It is possible to discern an assumption that if they were provided to her prior to her signing the authority card, they would generally have been taken as part of the agreement. However, that process would not have incorporated any limiting terms in respect of which more substantial notice would have been required.

#### The Eagle and The Dragon

1. For Mr Ho reliance was placed upon two decisions directly dealing with passage contracts on ocean liners: *Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd’s Rep 70 (*The Eagle*) and *The Dragon*. In the former, the passenger had booked a ticket on steamer from England to Lisbon which travelled in February 1974. Her friend, who had arranged the travel (and was her agent), had been aware from the brochures that the passage was subject to the liner company’s terms and conditions and, indeed, expected that to be so. He was also aware that those conditions were set out on the ticket which would be provided. However, they had not been made available at the time of the booking of the travel and were first made available when the tickets were delivered. Although the plaintiff then became aware of them, including those excluding liability, she nevertheless persisted with the voyage during which she was injured. The issue in the Queen’s Bench Division was whether the exclusion clauses had been incorporated into the passage contract. Deputy Judge Ogden held that the contract was effected when the booking was made rather than when the ticket was delivered. It is apparent that he considered that an ordinary reasonable person would not expect that the terms and conditions to which a passage contract would be subject would contain more than might be implied into any such agreement: (at 74 – 75). In doing so he rejected the observations of Streatfeild J in *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd’s Rep 450, 460 that anyone booking a ticket for passage on an ocean liner would expect there to be a wide range of matters in respect of which there would be terms and conditions. He also held that the notice in the brochure to the effect that the voyage would be on the carrier’s terms and conditions was insufficient to bring the actual terms to the plaintiff’s attention and so incorporate them into the passage contract. There is some difficulty with this decision in *The Eagle* and, in particular, the failure to accord significance to the relevance of Ms Hollingworth’s agent’s knowledge that the liner company had indicated that it would only carry passengers on its advertised terms and conditions.
2. In *The Dragon* the plaintiff’s husband made a booking on a roll-on roll-off ferry for transportation from Rosslare, Ireland to Le Havre, France. Neither at the time of booking in-person nor when later paying the remaining amount owing was any ticket provided and no conditions of carriage were given or displayed. The ticket was subsequently delivered through the post together with the terms and conditions which included an exclusion of liability in relation to the suffering of physical injury. The plaintiff sustained injuries when on the vessel during its departure from Rosslare. Brandon J held that the contract of passage came into existence when the booking was made, or on payment of full amount of the fares. He relied on the impracticality of accepting that the contract only arose when the ticket was issued as it would have the consequence that the carrier could pull out of the arrangement at any time until then and leave the plaintiff to attempt to arrange other passage.
3. As a result of the conclusions reached in each of these cases that the passage contract was entered into on the making of the booking, there was no need to consider the sufficiency of any notice of the terms and conditions on which the carrier sought to rely or, in relation to exclusion clauses, whether everything was done to bring them to the passenger’s attention. Further, in neither case was any great attention given to what were the operative terms and conditions given that all of the carrier’s terms were excluded. Brandon J did not deal with the issue at all although Deputy Judge Ogden considered that suitable terms and conditions could be implied. However, that was a rather inadequate answer to the wide range of issues in respect of which such implications would be required. They were identified by Streatfeild J in *Cockerton v Naviera Aznar SA* as including the right to be conveyed, the right to occupy a certain cabin, the right to enjoy food, drink, recreation and the activities provided, the entitlement of the carrier to impose conditions for the safety of the vessel, discipline, deviations, immigration, and trips ashore. As Streatfeild J had held, everybody booking sea passage would know or expect such terms and conditions to exist and that they would include exemptions and the like. Judge Ogden disagreed that this would be the expectations of the parties. This point of difference has relevance, if not importance, to the objective assessment of the parties’ conduct. It is, with respect, most unlikely that the parties could intend to be bound by any agreement which does not touch upon those matters which they would expect to be the subject of agreed rights and obligations.
4. Whatever may have been the view of the ordinary reasonable person seeking passage on an ocean going vessel approximately half a century ago, it is unlikely that in the 21st century, persons who outlay considerable sums on an extended ocean cruise would not suppose that their agreement with the carrier would contain extensive terms and conditions regulating their rights and obligations for the duration of the voyage. Cruises are far from mere passages on the sea. As the passenger is catered for by the carrier for the duration of the cruise, their relevant rights and entitlements could extend to the provision of accommodation at varying degrees of luxury, the provision of food at a variety of different standards from restaurants and other venues, the provision of drinks including alcohol, the availability of on-board and on-shore activities, and the provision of services and entertainment on the vessel. It would also seem improbable that the ordinary passenger would not expect the passage contract to contain terms and conditions affording the carrier rights to control passengers, regulate activities on board, or control all aspects of the undertaking of the voyage, including cancelling it or deviating from planned courses.
5. The decisions in *The Eagle* and *The Dragon* are distinguishable. They were not concerned with the undertaking of ocean cruises of the type under consideration nor the myriad issues associated with them. The expectations of persons undertaking a cruise are substantively different from those who merely seek ocean passage from one port to another. Somewhat more importantly, the factual matrix of the present matter is substantially different to that in either *The Eagle* or *The Dragon*. Here, putting aside Rosanna’s agency, the Booking Confirmation provided Mr Ho with access to the full terms and conditions of the passage contract in a manner that emphasised the more onerous terms.
6. Before passing from this topic it should be observed that in *Dillon v Baltic Shipping Co* (1989) 21 NSWLR 614, Carruthers J followed the approach in *The Eagle* and *The Dragon* as opposed to that in *Cockerton v Naviera Aznar SA*. Again, however, the issue of what might be the objective expectations of the parties as to the nature and extent of agreement required for an ocean cruise was not considered. Rather, it was accepted that the contract was made when the booking was effected.

### Conclusion on the ticket cases

1. From the foregoing review the following observations can be made of the ticket cases:
2. They form a particular category of cases concerned with the objective assessment of the circumstances in which parties have entered into a contractual relationship in the absence of a signed agreement.
3. Specifically, they concern whether contractual relations have been created and on what terms, where the transactional conduct is concerned with what the parties have said or done, and the documents they have sought to introduce.
4. The objective determination of whether a contract has been entered into includes the application of norms of reasonable conduct. Where a party is given reasonable notice of the terms on which the other is prepared to contract it is assumed that, if they thereafter enter into a contract, they have accepted the terms as part of the binding agreement. By proceeding to act in a manner consistent with an intention to enter into the contract they are objectively assumed to have agreed to them, regardless of whether they had taken the opportunity to read them.
5. The developed principles surrounding “unusual” or “more onerous” terms involve elements of consumer protection policy and pragmatics. It is not sufficient that a party is given reasonable notice of such terms and the implication that they have availed themselves of the opportunity to read them does not similarly arise. The established principles require that the party relying on the onerous terms must do all that is reasonably necessary to bring them to the other’s notice. That, of course, is not logically consistent with the rules in relation to “standard” or “usual” terms and conditions, but it is a consequence of the policy developed by the courts from the perception of the unequal bargaining position of the parties.
6. The nature of “unusual” or “more onerous” terms is not static. Terms that may have been unusual or uncommon in the 19th century may now be commonplace or ubiquitous. Moreover, as industries develop so too will the usual or ordinary terms and conditions on which participants are known to be prepared to contract. Necessarily, whether a term is “unusual” or “onerous” is a matter which must be determined in the context in which the contractual relationship exists.
7. Care must be taken when applying the principles from the “ticket cases” to complex contractual circumstances. It is possible in the case of simple contractual relationships that the exclusion of a contractor’s standard terms and conditions due to a lack of reasonable notice might nevertheless permit the recognition of an agreement between the parties on the most basic terms. The bare agreement that one party may park their car in the other’s garage in return for a fee together with any implied terms, may be sufficiently consistent with the parties’ objective intention to enter into the contract. However, that is not necessarily so in more complex scenarios involving an extended contractual relationship during which the parties’ rights and obligations traverse numerous issues. In such cases it is difficult to identify any objective intention to enter into a contractual relationship consisting of mere skeletal terms.
8. Necessarily, the application of these principles is intensely fact dependant. Minor differences in factual scenarios can produce significantly different results. For that reason caution must be exercised in seeking to apply the outcomes of some of the authorities to superficially similar cases.

### The conventional analysis and the facts of the present case

#### The conventional analysis applied to the Booking Confirmation

1. Mr McLure SC for Princess submitted that the application of the conventional analysis was appropriate in this case and resulted in Mr Ho being bound by the US Terms and Conditions. On this analysis the Booking Confirmation email of 30 October 2018 constituted an offer by Princess on those terms, which Mr Ho accepted through his conduct of neither rejecting it nor seeking the return of his deposit. Alternatively, it was submitted that Mr Ho accepted the offer after logging into the Cruise Personaliser on the Princess website in July 2019 and expressly accepting the US Terms and Conditions by clicking on the word, “Accept”, where it appeared adjacent to that portion of the screen in which the terms were displayed.

#### The primary judge’s analysis

1. This was rejected by the primary judge who, as has been mentioned, held that the Booking Confirmation did not sufficiently bring the terms and conditions, including the exclusive jurisdiction clause and the class action waiver, to Mr Ho’s attention. His Honour held (PJ [88]) that those clauses were “onerous and unusual” and inadequate notice was provided of their existence. On his analysis, once Rosanna logged into POLAR and entered the details for Mr and Mrs Ho so as to reserve their place for the voyage, and an automatic response in the nature of the Booking Confirmation was sent to her, a passage contract was created with the terms and conditions to be ascertained from that document. The effect of this was the contract between the parties contained minimal terms which effectively allowed Mr Ho to go on the cruise and occupy the selected stateroom on payment of the fares. There was no explanation of how these terms might appropriately provide to Mr Ho all of the benefits he might reasonably seek to obtain from the voyage.

#### The incorporation of the US Terms and Conditions by reasonable notice

1. His Honour’s conclusion that the US Terms and Conditions did not form part of the passage contract was based on his finding that had Mr Ho followed the instructions on the Booking Confirmation he would not have been taken to the correct terms and conditions. His Honour said, “There is no reasonable basis on which Mr Ho could have been in a position to identify which of the three different contract options was said to be applicable to his booking”. (PJ [78]). The result of this conclusion was that reasonable notice had not been given of the US Terms and Conditions.
2. Princess challenged that conclusion and, with respect, it was correct to do so. At the conclusion of the Booking Confirmation the following appeared:

**IMPORTANT NOTICE**: Upon booking the Cruise, each Passenger explicitly agrees to the terms of the Passage Contract (https//www.princess.com/legal/passage\_ contract/). Please read all sections carefully as they affect the passenger’s legal rights.

1. An important question is whether this notice was sufficient for the purposes of informing a prospective passenger of the terms on which Princess was offering passage on the voyage. The statement does not expressly inform the passenger that it is making an offer to carry them or identifying terms which they might accept or reject. Instead, it informs them that, on the making of the booking, the terms identified are those to which the passenger agrees. That wording assumed the efficacy of the contractual arrangements that Princess had put in place to ensure that any booking made through POLAR by a travel agent would be by them acting as the passenger’s agent, and that any booking be upon the terms of its passage contract. However, on the assumption that those arrangements were ineffective, the wording of the Important Notice must be taken as an indication that Princess was only prepared to undertake any carriage on those terms. It could hardly be said that the statement was devoid of meaning. Indeed, by it the passenger is implored to read the terms carefully because they affect their legal rights. To the extent to which the Booking Confirmation seeks to introduce terms into the passage contract, it could not be regarded as an acceptance of any offer made by Mr Ho. Rather, it could only be regarded by the objective bystander as the making of a counter-offer.
2. It matters not whether that URL contained under the words “**IMPORTANT NOTICE**” was hyperlinked. The evidence disclosed that, had Mr Ho followed it, he would have been taken to a webpage on the Princess website where the following appeared:

**Princess Cruise Lines, Ltd Passage Contract**

This contract generally applies to most voyages except select itineraries departing from Australia, Japan, Singapore, China, and Korea.

**Passage Contract**

This contract applies to select voyages from ports within Australia, Japan, Singapore, China, and Korea.

**Princess Cruise Lines, Ltd. Passage Contract for Chartered Voyages**

This contract generally applies to most chartered voyages except select itineraries departing from Australia, Japan, Singapore, China, Korea and Taiwan.

**Already booked?**

Sign in to Cruise Personalizer to access the Passage Contract that applies to your booking.

1. By the above wording, Mr Ho was provided with the path which was applicable to him; namely as a person who had already booked their passage. The primary judge appeared to reject this as a reasonable bringing of the terms and conditions to Mr Ho’s notice because he characterised it at [80] as being, “yet another step required of Mr Ho before he could see the contract terms said to apply to a contract he had already made”. With respect, the latter proposition fails to appreciate that the relevant question was whether the US Terms and Conditions were incorporated into the agreement between the parties by reason of the “Important Notice” at the foot of the Booking Confirmation. It is not clear why the requirement for Mr Ho to follow the instruction for persons who had already booked might diminish the efficacy of the notice. The circumstances are important and it is not to be forgotten that the intended agreement concerned the undertaking of a cruise some 18 months in the future. This has no connection with the circumstances of a person who has entered into a parking station and been confronted with terms and conditions written on the back of a ticket or posted on a wall and who had no real opportunity to consider them. It was not suggested that Mr Ho was somehow unable or prevented from following the instructions to the relevant conditions in a timely manner.
2. Had Mr Ho followed them he would have reached the Princess Cruise Personaliser web page at which point he would have inserted his details, including his booking number, and agreed to the terms and conditions for the use of that platform. Having elected to so proceed he would have been taken to the next page containing a document called, “Passage Contract”. There he would have been presented with the terms of carriage in a box through which he could scroll. They commenced with the words, “**IMPORTANT NOTICE TO GUESTS**”,in that format and they then requested the passenger to read the Passage Contract terms, explaining that they governed all dealings between them and the carrier and affected their legal rights. Special reference was made to, inter alia, sections 13 and 14 limiting the carrier’s liability for personal injury and property damage and section 15 limiting the passenger’s rights to sue.
3. On the conventional analysis the US Terms and Conditions were incorporated into the Booking Confirmation even if that was achieved by electronic means. By the Booking Confirmation Princess indicated that it was prepared to carry Mr Ho on the terms of the Passage Contract and it provided the location at which Mr Ho might almost immediately consider them. On any objective assessment the reader was directed to Princess’s indication of the incorporation of its terms and their location by the heading, “**IMPORTANT NOTICE**” and the following wording. Whilst it is true that the terms and conditions were not printed on or annexed to the document itself, that does not necessarily mean that reasonable notice of them had not been given. The prominent statement by using the stylised words, “important notice”, was sufficient to draw the passenger’s attention to the fact that there were terms to be considered. The following words informed the passenger that they were available for inspection and it was not submitted that Mr Ho would have encountered any difficulty in utilising the URL which provided access to them. Within the paradigm of the ticket cases the words used are of similar effect to words on the face of a ticket informing a customer that the terms and conditions were obtained on the reverse side of the ticket or displayed in some particular and readily accessible place.
4. It is also apt to keep in mind that Mr Ho sought to make his booking by use of the internet and electronic communication and it must have been within the parties’ reasonable contemplation that not only would Princess respond via electronic means but may utilise the same systems for providing details and information to Mr Ho, including the terms on which it would engage with customers. By providing the URL through which Mr Ho could access the terms and conditions, Princess was merely adopting modern usage for the communication and provision of information. Whilst the primary judge appeared to consider that requiring Mr Ho (or Rosanna) to follow the electronic links to the terms and conditions imposed some form of barrier to incorporation, it is unclear why that would be so. In the circumstances it is not a failure to provide reasonable notice of those terms merely because the potential passenger might be required to take a brief period of time to access them.
5. The learned primary judge was also of the opinion that the first page to which Mr Ho would have been taken (as set out at [116] above) was insufficient to reasonably bring the correct terms and conditions to Mr Ho’s attention. His Honour said (PJ [78]):

There is no reasonable basis on which Mr Ho could have been in a position to identify which of the three different contract options was said to be applicable to his booking. It is not objectively discernible what voyages or itineraries are the “select” ones referred to, or what voyages are “chartered voyages”.

1. With respect that conclusion cannot be sustained. As appears from the terms of that web page, Mr Ho would have been presented with the words, “**Already booked?**”, which were emboldened for emphasis. Under them were the words, “Sign in to Cruise Personalizer to access the Passage Contract that applies to your booking”, and a hyperlink was provided in the words underlined to take the reader to the page where they could enter that platform. It is difficult to understand why a reasonable person who had already booked their cruise would not, when presented with this information, follow the relevantly identified hyperlink and access the Cruise Personaliser in order to ascertain the terms of passage. Even though there were a number of options, it is not apparent why Mr Ho would have concluded that clicking on the link under the heading, “Already Booked” would not be appropriate.
2. There is no difficulty in reaching the factual conclusion that the provision of the electronic path to the US Terms and Conditions was reasonable in the circumstances. A not dissimilar result was reached by Button J in *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133 [123] – [125], although the contract in that case for hotel accommodation in France was effected wholly on the internet. Nevertheless, there is general equivalence with the present circumstances where the customer was provided with a link to a page containing the terms and conditions. Whilst it is apparent that the customer in that case did not follow the link, she clicked the button “Book Now” in order to effect the contract. Button J held that the link provided on the webpage was sufficient to bring the terms and conditions to the customer’s attention. However, it can be added that as the contract was regarded as one which was executed electronically, it may be doubtful whether reasonable notice was required.
3. This decision was considered by Beach J in *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846 at [219] (*Dialogue Consulting Pty Ltd v Instagram*) after which his Honour correctly observed (at [223]) that “A website satisfies the reasonable notice standard if it provides a person with a legitimate opportunity to learn that his or her use is subject to terms of use, even if the person does not take the opportunity”.
4. In this context Mr McLure SC referred to the decision of the United States District Court, California, in *Archer v Carnival Corporation* 2020 WL 6260003 (Westlaw citation) (*Archer v Carnival Corporation*). There, Judge Klausner considered whether, in accordance with the US law principle of “reasonable communicativeness”, Princess’s US Terms and Conditions had been reasonably brought to the passenger’s attention. That test had two limbs. The first considered the physical characteristics of the documents presented and required the court to assess its features such as “size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question”. The second limb required the court to consider the circumstances surrounding the passenger’s purchase and retention of the terms and conditions as well as the time and incentive to study and evaluate them. The circumstances before his Honour were the same as exist in the present case in that, after reserving their cruise, the passenger was sent a Booking Confirmation which, at its foot, had the same “Important Notice” statement as appears on the Booking Confirmation in this case. It too included the hyperlink to the Princess website. The passenger would then follow the same process as has been identified above, in that they would reach the passage contract terms and click to accept them before proceeding to the Cruise Personaliser. The terms of the passage contract, including their type face and font were identified by his Honour and are the same as in the present case. It was held that the class action waiver clause passed the reasonable communicativeness test because (a) the terms generally were available to the passenger by following the hyperlink on the Booking Confirmation (although they could also be accessed otherwise through the Princess website); and (b) the opening line of the terms begins with the statement **IMPORTANT NOTICE TO GUESTS** and exhorts them to read the terms carefully and, in particular, section 15 containing the class action waiver and that clause is, itself, prominent and unambiguous. In response to the suggestion that the passenger was required to “navigate an electronic labyrinth of attachments and links to view [the Passage Contract]” his Honour held:

This is not true. Plaintiffs were emailed the Booking Confirmation PDF. From there, plaintiffs need only click on the link at the bottom of the Confirmation to find the Passage Contract. This is no more a labyrinth as was opening a separate booklet in [*Loving v. Princess Cruise Lines, Ltd*., No. CV 08-2898-JFW(AJWx), 2009 WL 7236419, at 4].

1. Similar comments in relation to the factual analysis of whether the notice was reasonable apply in the present case. The US Terms and Conditions were easily located by following the link provided and the passenger was able to print them out, read them at their leisure, and accept or reject them as they saw fit. Whilst the terms were not written on the back of the Booking Confirmation, their accessibility was not substantially different and it is not possible to avoid the conclusion that reasonable notice of them was given to Mr Ho.
2. The above conclusion is bolstered by the fact that the agreement between the parties was for a 13 day cruise between two countries and in respect of which the parties must have anticipated and expected there would be extensive terms and conditions to regulate their rights *inter se*. This is a circumstance far from lodging goods with a dry cleaner or other short-term bailment, leaving a car in a parking garage, or other brief and temporary arrangement. The performance of the contractual terms by Princess would extend over a period of days during which it would provide accommodation, food, entertainment and the like as well as carriage upon the high seas with all of the contingencies that may entail. It must have been within the parties’ contemplation that this would necessitate a detailed articulation of their respective rights and obligations during that time and in respect of all of the potential exigencies and vicissitudes which might occur. Necessarily, the parties would have expected that the terms and conditions on which Princess was prepared to carry would be extensive and specifically provided in a substantial document. In the light of such expectations the provision of an electronic link to another document where it is said the terms are to be found does not transgress the bounds of reasonableness. In the context of electronic commerce, the manner in which those terms and conditions were made available in the circumstances amounted to a reasonable notice and Mr Ho was able to consider them well prior to the crystallisation of any agreement.

#### Notice of important terms

1. The primary judge also held (PJ [80]) that there was nothing in the Booking Confirmation that drew particular attention to the exclusive jurisdiction clause or the class action waiver other than the indication under the heading “Important Notice” that the customer was implored to read the terms and conditions carefully as they affect the passenger’s legal rights. He held that this provided no more than that the terms and conditions were in the nature of a contract. In support of this he relied upon the observations of Brennan J in *Oceanic Sun Line v Fay* at 228 – 229, where his Honour held:

But where an exemption clause is contained in a ticket or other document intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice …

1. See also *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.
2. In this part of his reasons, the primary judge was considering the alternative case which relied upon the conventional analysis as described in *MacRobertson Miller Airline*. On that analysis the issuing of the Booking Confirmation was the ticket which incorporated by reference the terms and conditions accessible on the internet. In that context, it is not appropriate to address only that which appears on the face of the Booking Confirmation. It is necessary to consider the associated terms and conditions which had been incorporated by the provision of the electronic link and from there ascertain whether the carrier had done all that was necessary to bring any unusual or onerous terms to the passenger’s attention. It is, with respect, not correct to conclude that because the terms and conditions were not visible on the face of the Booking Confirmation, insufficient notice was drawn to them. That would amount to saying that insufficient notice was given to the terms of a contract if the other party is informed that they are displayed on the reverse side of a ticket or on a nearby poster.
3. The question here is reduced to whether, by the Booking Confirmation and the Passage Contract terms taken together, Princess had done all that was reasonable to bring the exclusive jurisdiction clause and the class action waiver to Mr Ho’s attention. As mentioned earlier, when Mr Ho reached the Passage Contract page via the Cruise Personaliser, the words, “Passage Contract”, were displayed to him in large letters. Below that was a paragraph written in bold capitals which commenced with the words “Important Notice to Guests” and again implored the passenger to carefully read the terms. Specific reference was made to those sections limiting Princess’s liability for personal injury and to “SECTION 15 LIMITING YOUR RIGHT TO SUE, REQUIRING ARBITRATION AND WAIVER OF JURY TRIALS FOR CERTAIN CLAIMS, AND WAIVER OF YOUR RIGHT TO ARREST OR ATTACH CARRIER’S SHIPS”. That section contains subclause B, headed “Forum for Injury, Illness or Death”, which includes both the exclusive jurisdiction clause and subclause C which commences with the words “WAIVER OF CLASS ACTION” and sets out the terms of the class action waiver.
4. The emphasis provided by the statements and structure of the Passage Contract terms to the important terms and conditions, including the exclusive jurisdiction clause and the class action waiver, satisfies the test of doing all that was reasonably necessary to bring them to the attention of the passenger. The statement that the document in question is the passage contract between Princess and the passenger contextualises that which follows. Its formatting in bold capitals gives it substantive emphasis, and the statement that the document contains an important notice to guests should heighten the passenger’s awareness that it contains critical and significant terms and conditions. Finally, the specific reference to the significant sections with a brief description of their content reinforces the imperative that they should be considered.
5. On the conventional analysis the Booking Confirmation, together with the Passage Contract to which the passenger is taken by the electronic links, constituted the ticket with the incorporated terms and conditions. The manner in which the terms and conditions are expressed and identified satisfies the requirement identified by Brennan J in *Oceanic Sun Line v Fay* of doing all that was reasonably necessary to bring the relevant clauses to the passenger’s notice.

#### Were the clauses onerous or unusual?

1. As an alternative, Princess submitted that neither the exclusive jurisdiction clause nor the class-action waiver were unusual or onerous. In the light of the conclusions reached above there is no need to determine this issue. However, there is force in the submission that neither clause denied the passenger a right to enforce their claim nor limited the amount which they might recover. Their entitlement to ventilate their claim to the full extent of the available recovery is unaffected by either.
2. Certainly in the case of the exclusive jurisdiction clause it would be an odd conclusion to say that Mr Ho is unusually burdened by being prevented from litigating in Australia and is required to litigate in California, being substantially closer to his residence in Calgary, Canada. Nor could it be said on the evidence that it would be onerous for him to litigate in the District Court of California, Los Angeles, rather than as part of a class action in Australia.

### Acceptance of the terms of which Mr Ho had notice

1. On the above analysis, on receipt of the Booking Confirmation on 30 October 2018, Mr Ho had almost immediate access to the terms and conditions on which Princess was prepared to carry him on the voyage. All “unusual” clauses were highlighted and specifically drawn to his attention. His omission to reject the US Terms and Conditions by cancelling his booking within a reasonable time or prior to formally accepting them or, perhaps, before joining the cruise amounted to their acceptance by him. Therefore, the application of the conventional analysis would result in Mr Ho being bound by the US Terms and Conditions including the exclusive jurisdiction clause and the class action waiver.

### A L’Estrange v F Graucob Ltd analysis

1. Although not advanced by the parties, the contractual arrangement between Princess and Mr Ho might be more accurately identified as one involving a signed or executed agreement. This analysis accords presumptive weight to the parties’ objective intention that any relationship of passenger and carrier would involve substantive terms and conditions regulating their rights *inter se*. By it, the agreement was formed when, in July 2019, Mr Ho entered his details into the relevant page on Princess’s website, logged into the Cruise Personaliser web page and signified his acceptance of the terms of the Passage Contract.
2. The evidence of the acceptance of those terms was uncontroversial and contained in the affidavit of Mr van Duin. In order for Mr Ho to progress through the Cruise Personaliser part of the website as he did, the terms of the Passage Contract would have been presented to him and he then would have clicked on the button illustrated with a tick, ie “✓”, adjacent to the words, “I accept the Passage Contract on behalf of: [Mr and Mrs Ho]”. He then clicked on the green button labelled with the word “Proceed”, which would have taken him to the functional part of the webpage. He could have chosen not to proceed further by clicking the button marked “Cancel”. As at this time, had he changed his mind about the cruise he could have recovered his deposit in full.
3. On this analysis the arrangements between the parties involved two related agreements in a manner similar to the analysis preferred by Mahoney JA in *Baltic Shipping*. The first, which could be referred to as the “booking contract”, concerned only the booking or reservation made by Rosanna on behalf of Mr Ho. It is not necessary to identify the precise terms of such an arrangement but it involved, at least, an agreement by which Princess would reserve or keep available for Mr and Mrs Ho a stateroom of the selected type on the nominated cruise aboard the *Ruby Princess* until such time as the parties entered into a passage contract or Mr Ho decided to cancel. As his consideration, Mr Ho paid a deposit and agreed to pay a cancellation payment in accordance with the cancellation schedule. That schedule provided for the payment of certain percentages of the total amount of the charges payable for the cruise on cancellation, which increased as the departure date neared, although no amount was payable and the deposit would be fully refunded if the cancellation occurred prior to 10 December 2019.
4. The second agreement, being the passage contract, came into effect when Mr Ho accepted its terms and conditions on behalf of himself and Mrs Ho. The determination of whether the action of Mr Ho clicking the button adjacent to the words, “I accept the Passage Contract …”, followed by the clicking on the “Proceed” button evidenced his contractual intention to be bound by the terms is ascertained by asking what would that conduct have led a reasonable person in the position of the other party to believe: *Toll v Alphapharm* at 179 [40]. In the circumstances it is difficult to describe it as other than having the same effect as the signing of a physical document, being an indication of an intention to be bound by the terms and conditions of that passage contract regardless of whether they have been read and considered: *Oceanic Sun Line v Fay* at 228. The affixing of a signature objectively conveys that the party signing “either has read and approved the contents of the document or is willing to take the chance of being bound by those contents … whatever they might be”: *L’Estrange v Graucob*; *Toll v Alphapharm* at 184 – 186 [54] – [59]: and no question of the reasonableness of the notice of any onerous or unusual terms arises. Although doubts might exist in relation to the effect of a signature on documents where no provision is made for execution, here the words, “I accept the Passage Contract …”, render it unarguable that the act of clicking was not intended to convey acceptance of the terms in as much as any execution of an agreement by signature would: *Dialogue Consulting Pty Ltd v Instagram* at [214] – [254]; *Gonzalez v Agoda Company* at [123] – [125]. See also the compelling discussion by E Macdonald in *Incorporation of Standard Terms in Website Contracting – Clicking “I Agree”*, (2011) Journal of Contract Law, 198, 199 – 208 and *Cheshire and Fifoot’s Law of Contract* para [3:44].
5. On this analysis, the passage contract on the US Terms and Conditions governed the relationship between Mr and Mrs Ho and Princess in relation to the numerous aspects of the intended voyage upon the *Ruby Princess*. Although during the course of the appeal Mr Pike SC submitted that those terms of the passage contract did not concern the regulation of the rights of the passenger to accommodation food, drink, activities and the like, as the above discussion discloses, that was not correct. To a very large extent they regulated all of the relevant rights and obligations needed for the purposes of the voyage, including in relation to the liability of Princess for injury suffered by Mr and Mrs Ho.
6. The necessary consequence of this analysis is that the exclusive jurisdiction clause and the class action waiver were both terms of the passage contract and the learned primary judge erred in his conclusion to the contrary.

# Grounds 3 to 5

1. Grounds 3 to 5 of the appeal, which are generally concerned with the enforceability of the exclusive jurisdiction clause and class action waiver in the US Terms and Conditions, can be conveniently dealt with together.

## Unfairness under s 23 of the ACL

1. Although it had been submitted on behalf of Mr Ho that the clauses were unenforceable for several reasons, the primary judge concluded that invalidity of the class action waiver arose only from the operation of s 23 of the *Australian Consumer Law* (ACL) on the basis that it was an “unfair term”. That section, and s 24 which provides a definition of “unfair” are, relevantly, as follows:

**23 Unfair terms of consumer contracts and small business contracts**

(1) A term of a consumer contract or small business contract is void if:

(a) the term is unfair; and

(b) the contract is a standard form contract.

(2) …

(3) A ***consumer contract*** is a contract for:

(a) a supply of goods or services …

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

…

**24 Meaning of *unfair***

1. A term of a consumer contract or small business 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.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) A term is ***transparent*** if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a 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.

1. By s 25 of the ACL some examples of what may be “unfair terms” are given. Relevantly, that section provides:

**25 Examples of unfair terms**

Without limiting section 24, the following are examples of the kinds of terms of a consumer contract or small business contract that may be unfair:

…

(k) a term that limits, or has the effect of limiting, one party’s right to sue another party;

1. In the remainder of these reasons s 23 of the ACL is referred to simply as “s 23” and without reference to the *Australian Consumer Law.*
2. At this point it is useful to note that s 23 does not contain any apparent territorial limitation in relation to the contracts to which it might apply. In particular, it is not said that the contract in question must have been entered into in the course of “trade or commerce”. That latter expression is defined in s 4 of the *Competition and Consumer Act 2010* (Cth) (CCA) as:

***trade and commerce*** means trade or commerce within Australia or between Australia and places outside of Australia

In these reasons the definition will be compendiously referred to as “Australian trade or commerce”.

## Ground 5 – the class action waiver is not an “unfair term”

1. Substantial submissions were made to this Court as to the extent of s 23’s extraterritorial operation and consideration of the matters raised are dealt with below in relation to Ground 4 of the appeal. As appears from that discussion an important and, perhaps, critical issue is whether s 5(1)(g) of the CCA (referred to hereinafter simply as “s 5(1)(g)”) applies at all to s 23 so as to extend its scope. However, that topic was not addressed in the course of submissions. In the circumstances, if it is possible, it is appropriate not to reach any final conclusion with respect to that issue given the absence of specific submissions and, possibly, the receipt of submissions by the Australian Competition and Consumer Commission as the regulator responsible for the enforcement of the ACL.
2. For the reasons which follow, if it is assumed that s 23 applied to the passage contract between Mr Ho and Princess, the class action waiver was not an “unfair term” within the meaning of that section. For that reason it is not necessary to determine whether the section did apply to the contract which was entered into in the United States between a Canadian resident in Canada and a Bermudan registered company which conducted its business in California, merely because the company incidentally carried on business in Australia.
3. In these circumstances it is appropriate to address the issues raised in Ground 5 of the appeal concerning the alleged unfairness of the class action waiver.

#### The primary judge’s conclusion that the class action waiver was “unfair”

1. The primary judge determined (PJ [142]) that Princess had “no legitimate interest in passengers contracting on the US Terms and Conditions commencing individual proceedings against it and that reliance on the clause would cause detriment to those individuals”. For the same reason that he had concluded that the US Terms and Conditions were not incorporated into the passage contract, he further concluded that the class action waiver was not transparent. His Honour also held that, although the unfairness of a term had to be considered at the time that the relevant agreement was entered into, a clause which limited the right of redress by one party could nevertheless be regarded as unfair. In reaching this conclusion he relied upon the examples of unfair terms in s 25 of the ACL which specifically referred to terms that limited the rights of one party to sue another. He accepted the submissions on behalf of Mr Ho (PJ [144]) that the class action waiver caused a significant imbalance in the parties’ rights and obligations under the contract. In particular, he observed that, as at the time of contracting it could be ascertained that a cause of action might accrue in favour of Mr Ho which was “economically unviable or at least questionable to pursue on his own” but which might be pursued in class action proceedings, such that the effect of the clause would be to limit his practical ability to pursue it and this would potentially impede his access to justice.

#### Principles

1. It is useful here to repeat the elements of s 24 of the ACL, which provide that a term 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.

1. It was accepted that Mr Ho bore the onus of establishing that the class action waiver would cause a significant imbalance in the parties rights and obligations arising under the contract (s 24(1)(a)); and that it would cause detriment to him if it were to be relied upon (s 24(1)(c)); but that Princess bore the onus of establishing that it was reasonably necessary in order to protect its legitimate interests (s 24(1)(a) and s 24(4)).
2. Some assistance can be gained in relation to the application of s 24 from the decision in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 (*ACCC v CLA Trading*). It concerned whether certain terms and conditions in the respondent’s standard form contract for the short-term hire of cars were “unfair” within the meaning of s 12BF of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*). The relevant statutory provisions in the *ASIC Act* are coordinate with those in the ACL. At [54] of his reasons Gilmour J identified the following principles which assist in ascertaining whether a particular contractual term meets the meaning of “unfair”:

54 There are some differences between these regimes. Nonetheless, some of the principles found in those cases are of assistance in the interpretation and application of Pt 2, Div 2, Subdiv BA of the ASIC Act:

(a) the underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [112];

(b) the requirement of a “significant imbalance” directs attention to the substantive unfairness of the contract: *Director-General of Fair Trading v First National Bank plc* [2002] 1 AC 481 at [37];

(c) it is useful to assess the impact of an impugned term on the parties’ rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director-General of Fair Trading v First National Bank plc* at [54];

(d) the “significant imbalance” requirement is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director-General of Fair Trading v First National Bank* at 494 [17] per Lord Bingham, applied in *ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [950];

(e) significant in this context means “significant in magnitude”, or “sufficiently large to be important”, “being a meaning not too distant from substantial”: *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J: Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [32]-[33];

(f) the legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer’s attention: *Jetstar Airways Pty Ltd v Free* at [115]; and

(g) in considering “the contract as a whole”, not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

1. In the application of these principles Gilmour J observed (at [57]) that the correct approach was to first compare the hirer’s rights and liabilities as a result of the impugned term with those of the customer as a result of the term and see whether there is a significant imbalance between the two. That analysis is undertaken in the context of the contract as a whole. If the imbalance existed, the next question is whether there was a reasonable justification for the disparity. Later (at [66]) his Honour accepted that it is useful to assess the impact of an impugned term by comparing the effect of the contract including that term and the effect it would have without it.

#### Limitations on the right to sue are not prima facie “unfair”

1. It was initially submitted by Mr Pike SC that the conclusion that the class action waiver was an “unfair term” was supported by the reference in s 25(k) of the ACL to the example of an unfair term as one which limits or has the effect of limiting one party’s right to sue another party. However, s 25 does not provide that the examples contained in it are unfair terms. It simply provides that they “may” be. Whether such a clause is, in fact, unfair in the circumstances of the relevant contract is to be ascertained by the application of s 24 and the principles referred to by Gilmour J in *ACCC v CLA Trading*. Were it otherwise, myriad clauses regularly found in commercial contracts, such as arbitration or mediation clauses and expert determination clauses, would necessarily all be void.

#### No significant imbalance in the parties rights – s 24(1)(a)

1. Whether a particular clause will “cause a significant imbalance” necessarily depends on its operative effect in the context of the contract as a whole. Here, the passage contract constituted by the US Terms and Conditions contained an exclusive jurisdiction clause requiring the parties to litigate their disputes in the United States District Courts for the Central Division of California in Los Angeles and in accordance with the General Maritime Law of the United States without regard to its choice of law principles. It also contains numerous limitations on Princess’s liability to the passenger and obligations of indemnity. It was not suggested that these clauses were not enforceable according to their terms. Therefore, the question becomes one of whether Mr Ho’s waiver of his rights to participate in class actions, including those which might occur in California, created a significant imbalance.
2. The class action waiver does not impede Mr Ho’s substantive right to bring proceedings against Princess in relation to any damages suffered. It merely requires that, if such a claim is brought, it must be brought by himself individually. Similarly, it does not limit Princess’s liability to him in respect of any wrong committed against him: *McIntosh v Royal Caribbean* 2018 WL 1732177. In this respect, it was not suggested that the damages which might be recoverable in a class action in this Court would be greater than those recoverable in the District Court of California. Ultimately, the effect of the restriction imposed by the waiver is only as to the manner in which Mr Ho might enforce his claim and there is no restriction on the historically orthodox manner of enforcing rights by a civil action. Rather, the limitation is directed to the alternative litigious path created by the modern phenomena of class actions. Therefore, to the extent that there is any limit imposed on Mr Ho’s right to sue Princess, it is only as to the method by which a claim can be brought as opposed to whether it can be brought at all.
3. A second ground on which the primary judge determined that the class action waiver would impose a significant imbalance in the parties’ rights and obligations was that it rendered it economically unviable, or at least questionable, for Mr Ho to bring proceedings against Princess in California in respect of his claim and this thereby removed his access to justice. Mr McLure SC challenged that finding and submitted that there was no evidence to support it. That submission should be accepted. Mr Ho led no evidence as to his current financial position or as to the circumstances which he might encounter were he to commence litigation in the District Court of California, Los Angeles. He may have sufficient financial resources to pursue any action, but whether that was so or not is simply not known. There was also no evidence of the difficulty or cost of commencing proceedings in California. It may well be that there are lawyers in that jurisdiction who are prepared to take on such matters on a speculative basis and, indeed, they may have an expertise in such litigation. That latter point would not be surprising as it seems that many of Princess’s passage contracts require disputes to be resolved in the US District Court of California, Los Angeles and, from that, it might be expected that there exist lawyers who have developed skills in the litigation of issues arising from unforeseen events in the course of cruises. Indeed, it is apt to observe that at the time of the hearing before the primary judge there existed 11 individual proceedings in the US courts for claims arising from the voyage on the *Ruby Princess*. That undermines the suggestion that the costs of pursuing Princess in the US would be unsustainable and, consequentially, negates the conclusion that the class action waiver caused an imbalance by depriving Mr Ho of his ability to pursue his claim.
4. Further, as is well known, there exist general restrictions in the United States on one party to litigation recovering costs from the other and it is axiomatic that the “no costs” regime results in the less costly enforcement of rights for plaintiffs. This potentially reduces any perceived imbalance arising from the class action waiver as the risk to Mr Ho of conducting the litigation in California might be limited to his own costs should he not succeed.
5. It was also submitted on behalf of Princess that any perceived imbalance was reduced by reason of the limited value of the entitlement to participate in a class action and, particularly, in circumstances involving personal injury. Mr McLure SC submitted that the common domain of class actions is generally the causing of property damage or economic loss and the benefits of class actions in relation to personal injury claims is undermined by the requirement for individualised assessments of loss and damage. Whilst that may be generally true, it is far from universal: see for example *Ethicon Sàrl v Gill* (2021) 387 ALR 494 (relating to defective pelvic mesh implants) and *Medtel Pty Ltd v Courtney* (2003) 130 FCR 18 (concerning faulty pacemakers). This point does not greatly advance the issue either way. On the other hand, it may be that, overall, a plaintiff could secure a better outcome by pursuing a personal action than by being a member of a class action where recovery is often significantly eroded by the entitlements of both the litigation funder and the class action lawyers. Additionally, it might be accepted that the benefits of a class action in circumstances such as the present where the class members are spread around the world might be more chimerical than real. The cost of liaising with group members across the globe will invariably lead to substantially greater costs and expenses which will increase the fees charged by the lawyers and deducted from any proceeds paid by Princess.
6. It was submitted by Mr Pike SC that, if the protection afforded by the class action process were denied to Mr Ho, the result would be that a wealthy and powerful litigant, such as Princess, would overwhelm him in the conduct of any litigation. With respect, that submission should be rejected. It is a hallmark of the courts of this country that litigation between parties of substantially unequal financial standing regularly occurs, and even more so in the current century where the rules of the several courts, and particularly of this Court, include active case-management techniques which produce the expeditious and efficient resolution of litigation. It is likely that the same pertains in the United States where there is additional protection offered by the jury system. Wherever the litigation is conducted, it is more than likely that the curial processes will offer a substantial bulwark against any “deep pocketing” tactics in the course of a proceeding. The suggestion that Mr Ho would be financially disadvantaged is further diminished by the evidence of the 11 individual actions in the courts in California arising out of the voyage which is indicative that the processes of the United States District Courts also permit effective litigation between parties of unequal financial standing.
7. On this analysis there is nothing to suggest that the class action waiver tilted the parties’ rights and obligations under the contract significantly in Princess’s favour. It merely limits the manner in which Mr Ho might pursue his claim which remains intact and capable of enforcement by action in the ordinary course. There was no evidence that, at the time the passage contract was entered into, it was foreseeable that the class action waiver would have the consequence that Mr Ho would not be able to pursue any such claim. It follows that the primary judge erred in concluding that the class action waiver resulted in a significant imbalance in the parties’ rights and obligations.

#### Was the class action wavier reasonably necessary in order to protect Princess’s legitimate interests - s 24(1)(b)

1. Nor was the primary judge correct to conclude (at [142]) that Princess, “has no legitimate interest in passengers contracting on the US terms and conditions commencing individual proceedings against it and that reliance on the clause would cause detriment to those individuals”.
2. In seeking to overturn that finding Mr McLure SC referred to the discussion of the relative benefits of class actions to plaintiffs and defendants undertaken by the United States Supreme Court in *AT&T Mobility v Concepcion* 131 S Ct 1740 (2011). That matter, however, was concerned with, *inter alia*, whether class action arbitration waivers were unconscionable in consumer contracts. There, the Court recognised (at 1752) that class actions (including arbitrations) have the potential to prejudice defendants in that they may well entrench an error in relation to the defence of the claims which occurs at the first instance hearing and which cannot be remedied in subsequent proceedings, and that this imposes substantial pressure to settle. Whilst the danger of an entrenched error is necessarily greater in relation to arbitral proceedings, the risk nevertheless remains real for class action proceedings conducted in the courts. There is usually only one opportunity for the defendant to establish their lack of liability and any error in the trial process will have significant consequences. Where claims are brought individually, an error in one action may be remedied in the next. The US Supreme Court also recognised that class actions in general have the potential to impose *in terrorem* settlements on defendants. Such risks also exist in the Australian jurisdiction. The enormity of the claim sought to be imposed on a defendant by a single action together with the costs of defending it provide a significant incentive for a defendant or its insurer, to attempt to settle rather than face the ruinous sequelae of an adverse judgment.
3. Whilst the above considerations apply in the present case, here, Princess’s legitimate interests in having a class action waiver in its terms and conditions are substantially more idiosyncratic. It had a legitimate interest, as an international corporation engaged in business across multiple jurisdictions, in requiring actions brought against it to be conducted in the jurisdiction from which it carried on its business and that the actions be brought on an individual rather than a group basis. By including such a term in its passage contracts it is able to secure economies of scale by responding to similar claims in the same forum, utilising the same lawyers, experts and processes. This point has even greater weight given that Princess carries on a substantial international business with a fleet of owned or chartered vessels and it must necessarily be of substantial benefit to it to rationalise all litigation against it in the location from which it carries on business, in highly experienced Courts with which it is likely to be familiar, and in a manner which excludes the bringing of class actions.
4. Mr Pike SC submitted (ts 106) that whatever benefits Princess might obtain by being sued individually by passengers, it was outweighed by the fact that more orderly litigation could take place by the commencement of a class action in which common questions could be determined in an efficient manner. This was said to be preferable to each passenger being required to make the decision whether to commence proceedings or not. In substance, however, his submissions were directed to what might be the considerable benefits which a passenger might have over the cruise operator in the class action process, rather than any legitimate interest which the cruise operator might have by avoiding class actions.
5. He further submitted (ts 99) that reference to authorities from the United States was of no assistance given that the question for determination concerns the preservation of Australian norms of conduct. That submission was somewhat nebulous and it might be thought to convey that the application of Australian values which might render a clause “unfair” may not result in the same conclusion if American values were applied. Whilst that might possibly be so, the import of the US authorities referred to is the identification of the nature of the benefits and impacts of the clauses of the nature under discussion rather than the ultimate conclusions reached in relation to them. In this respect the benefits of the clauses to defendants recognised by the US Courts are relevant to whether or not s 24(1)(b) is satisfied in the sense of whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by it. As mentioned, the usual adverse effects of class actions on defendants are present in this case.
6. Mr Pike SC submitted (ts 102) that those benefits could not be taken into account because the matter had to be considered in the circumstances of the contract and that 80% of the passengers were not subject to the US Terms and Conditions. However, that submission cannot be accepted. Firstly, it is unsustainable in the absence of evidence as to the number of tickets which had been sold as at the date on which Mr Ho acquired his ticket. That being the relevant date on which to assess any unfairness. If, at that time, tickets had been sold only to passengers in the US, the point raised by Mr Pike SC would be irrelevant. Additionally, even if only 20% of tickets sold incorporated the US Terms and Conditions, Princess would still derive the benefits identified by defending individual claims made by those passengers in the US District Court in Los Angeles.
7. It was also submitted (ts 100) that the absence of any class action waiver in Princess’s Australian Terms or the UK Terms undermined its claims to any legitimate interest in having one in the US Terms and Conditions. Again, that faces significant difficulties in the absence of any evidence of the spread of the tickets sold with different terms when Mr Ho entered into the passage contract. Further, given Princess’s legitimate interest in seeking to avoid the negative sequelae of class actions in the United States, being the forum where any litigation under the US Terms and Conditions would be conducted, a comparison with the other terms on which tickets were issued might be somewhat misplaced. Further, it is apparent that the undertaking of an international cruise with a vessel capable of carrying 2,600 passengers is most likely to be an international as opposed to a parochial venture, and it would be most unlikely that passengers from diverse places would be issued with tickets containing identical terms. That is merely a consequence of marketing the cruise on an international basis.
8. As a complementary submission (ts 107) it was suggested that Princess might well have had a legitimate interest in avoiding the travails of class actions in the United States, but that would not apply in respect of class actions in Australia. With respect, this Court ought not to engage in a qualitative comparison of the level of abuses of the class action procedures across particular jurisdictions. That is especially so in circumstances where there was no evidence as to the alleged difficulties for defendants in class actions in the United States or, in particular, California and no evidence as to the underlying concerns which have prompted the numerous reviews of class actions in this country. It suffices to observe that the class action procedure can be abused to oppress defendants by reason of the enormous costs which tend to be billed by the claimants’ legal practitioners and the large portion of recoveries required by funders, each of which necessarily increases the amount for which the action might be resolved.
9. Princess had a legitimate interest in avoiding the burden of class actions being brought against it, whether in Australia or in the United States. Apart from the risks associated with the single determination of the core issues of liability which might not be capable of correction on appeal and the substantial weight of the cost and risk of an adverse judgment effectively forcing a settlement, it had an interest in dealing with the claims made against it in the one forum of which it was familiar, with its regularly engaged legal representatives and on an individual basis.

#### Does the class action waiver cause detriment to Mr Ho - s 24(1)(c)

1. The extent of any detriment which Mr Ho might suffer from being required to enforce his claim individually has been referred to above. It is not doubted that he will be denied the benefits of the protection of the class action process through which he can avoid risk and the outlay of expenses and the like. However, in the absence of any evidence of his means or his ability to bring proceedings in California the weight of these matters is not ascertainable.
2. It was submitted, and accepted below by the primary judge (PJ [143]), that at the time of contracting it was possible that, if a claim arose which was not economically worthwhile for Mr Ho to pursue individually, but might be pursued in a class action, the effect of the clause would be to limit Mr Ho’s practical ability to pursue the claim. This, the primary judge concluded, was indicative of unfairness. Even if that were so, it does not carry much weight in the present case where the quantum of Mr Ho’s claim is unknown. His claim was not merely for the cost of the fares, but included claims for personal injury including for disappointment and distress. It was not shown to be a claim which was not worth pursing in bilateral litigation. In addition, if this issue were a significant factor in determining unfairness, it would follow that all class action waivers would be void under s 23. When any contract containing a class action waiver is entered into it might always be hypothesised that claims may arise which are uneconomic to pursue otherwise than by a class action. On the primary judge’s assumption this would indicate unfairness and result in the clause’s invalidity.
3. Even if Mr Ho does suffer some detriment, for the reasons which have been referred to above, Princess did everything that was reasonably necessary to bring the class action waiver and the other significant clauses of the US Terms and Conditions to his attention. Moreover, the notice at the commencement of those terms and the wording of the clause itself were clearly articulated as was the clause’s effect. Whilst there were numerous terms relating to the carriage, that is not to be unexpected, but the fact that the class action waiver was given such prominence and explication indicates that it was identified by Princess as being an important part of the contract as a whole. In this sense it was “transparent” within the meaning of s 24(2) of the ACL.

#### The class action waiver was not “unfair”

1. There is no basis on which it could be concluded that the class action waiver was “unfair” within the meaning of ss 23 and 24 of the ACL. It does not cause any significant imbalance in the parties’ rights and obligations under the passenger contract: s 24(1)(a). In particular, it does not affect the parties’ substantive rights *inter se* in relation to the obligations to be performed under the passage contract. Although it affects the passenger’s rights to pursue claims against Princess, including claims for breach of the contract, it does not do so arbitrarily or substantially. The passenger’s right to seek redress remains unaffected, albeit they are required to do so individually and in the place from where Princess mainly carries on its business and that is a legitimate interest which it is entitled to protect. Mr Ho did not establish, in the circumstances of this case, that his obligation to pursue Princess individually would cause him any significant detriment.
2. It follows that the class action waiver in the passage contract consisting of the US Terms and Conditions is not an “unfair term” within the meaning of ss 23 and 24 of the ACL. The learned primary judge erred in his conclusion to the contrary.

## Ground 4 – The extraterritorial operation of s 23

1. By reason of the above conclusion, it is not strictly necessary to address the question of the extraterritorial operation of s 23. However, as the topic was given some attention in the submissions to this Court and there were express findings by the primary judge in relation to it, it is not inappropriate to consider those submissions even if it is ultimately not appropriate to reach any definitive conclusions.
2. As the following discussion perhaps discloses, a number of constructional difficulties arise at the legislative intersection of s 5(1)(g) and s 23. Firstly, the drafting device used in s 5(1)(g) to extend the scope of the CCA by attaching consequences to conduct occurring outside of Australia is inapposite to interact with s 23 which, itself, incorporates no element of conduct and is purely declaratory in nature. Second, accepting that s 5(1)(g) applied to s 23 in the manner found by the primary judge would necessarily require acknowledging a legislative intention to interfere in the contractual relationship between foreign entities in respect of contracts entered into overseas in relation to matters which have no connection to Australia, merely because one of the entities carried on business in Australia. Third, recognising that incongruous result, both parties proffered several implied limitations on the otherwise illogical consequences of the combined effect of s 5(1)(g) and s 23, however, none accommodated the accepted principles of construction in reaching the suggested outcome. To these concerns it can be added that, on a proper analysis of the constructional issue, a question may arise as to the operation of s 15A of the *Acts Interpretation Act 1901* (Cth) and that will require appropriate attention.
3. In the light of these difficulties in construction it would be inappropriate to reach any definitive conclusions as to the extraterritorial operation of s 23. It is preferable that such an important matter await an occasion where its resolution is necessary and the Court receives submissions covering the full ambit of the issues which are raised.

### The conclusion of the primary judge

1. Prior to considering whether the class action waiver was an “unfair term”, the primary judge addressed the antecedent issue of whether the ACL applied to the contractual relationship between Mr Ho and Princess. Princess denied that it did because the proper law of the passage contract was agreed to be the general maritime law of the United States and in order to assess the validity of the agreement it was necessary to apply that chosen law: *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 28 [128] *per* Beach J. In response, on behalf of Mr Ho, it was submitted that the ACL was a “mandatory law” of the forum which cannot be displaced by the parties’ agreement.
2. Whether the ACL generally, or s 23, can be considered a mandatory law is discussed more fully below. Presently, it suffices to observe that, in concluding that the ACL could be so described, the primary judge relied upon the extended extraterritorial application of the Act for which specific provision had been made.
3. His Honour first observed (PJ [124]) that by s 131 of the CCA, the ACL applied “to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of [the ACL] by corporations”. Whilst that refers to conduct which occurs in Australia, the primary judge relied upon s 5 of the CCA which provides:

**5 Extended application of this Act to conduct outside Australia**

(1) Each of the following provisions:

…

(c) the Australian Consumer Law (other than Part 5-3);

…

extends to the engaging in conduct outside Australia by:

(g) bodies corporate incorporated or carrying on business within Australia …

1. His Honour held (PJ [125] – [129]) that these provisions had the effect that the relevant Chapters of the ACL applied to corporations which entered into contracts outside of Australia, if they also carried on business within it. He also held that Princess carried on business here because it engaged in a series of repetitive acts in relation to a commercial enterprise as an on-going concern for the purposes of profit. Despite the corporate domiciles of Carnival and Princess and that their main business activities occurred overseas, it could be inferred that they sold and marketed the cruise on the *Ruby Princess* in Australia and that they regularly marketed similar cruises here. On that basis, he held s 23 applied to contracts entered into by each of Princess and Carnival. Although not expressly articulated, the effect of his Honour’s construction was that s 23 applies to any relevant contract entered into by a corporation that carries on business in Australia.

### Does s 5(1)(g) apply to s 23 at all?

1. Although only obliquely suggested by Princess, it might be that s 5(1)(g) has no operative effect on s 23. The former is concerned with “engaging in conduct outside Australia” and, whilst the definition of “conduct” is extended by s 4(2) of the CCA to the making or giving effect to a provision of a contract or arrangement, s 23 is neither enlivened by nor conditioned upon either of those activities. It is solely declaratory of the validity of specific contractual terms *per se*. It is neither concerned with the actions of entering into the contract nor attempting to give effect to its terms.
2. There are numerous provisions in the ACL to which s 5(1)(g) might attach by extending their operation to “engaging in conduct outside of Australia”. For example ss 18, 20, 21, 33, 34, 35, 36 and 37 of the ACL, to name but a few, all proscribe “conduct” of the type described in them and which is, in fact, described as “conduct”. For instance, s 18 identifies that a person must not “in trade or commerce, *engage in conduct* that is misleading or deceptive”. Other myriad sections, such as ss 29, 30, 32, 35, 37 and 44, and many more, proscribe specifically identified actions or activities such as the making of false or misleading representations, the offering of incentives without the intention to provide them, engaging in bait advertising, asserting rights to payment of unsolicited goods, or participating in pyramid schemes, all of which are self-evidently “conduct”, although the prohibition does not use that word. By contrast no conduct, action or activity is mentioned in s 23 as the source of any obligation or right.
3. Much of the ACL and its progenitor legislation, the *Trade Practices Act 1974* (Cth), is concerned with proscribing certain forms of conduct and it is no accident that they were framed on the assumption that the conduct which might contravene their sections was that which occurred in Australia: *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 16 [50]. Section 5(1) specifically expands that legislative territorial reach by extending the operation of certain provisions to conduct engaged in, outside of Australia by, *inter alia*, bodies corporate carrying on business in Australia. As is discussed below, that may not remove all other relevant territorial restrictions as many provisions expressly require that the offending conduct occur “in trade or commerce” which imports the Australian trade or commerce requirement. Nevertheless, it is by reference to the element of the “engagement in conduct” outside of Australia that s 5(1) extends the Act’s operation. It does so by attaching to that extraterritorial conduct the prohibitions which the Act imposes with the consequence that the relief provided by the Act is made available if a contravention occurs. In this respect there is no difficulty in applying s 5(1)(g) to those provisions which are expressly conditioned on the “engaging in conduct” of a specified type or on specified actions or activities. Such provisions then simply incorporate within the scope of their prohibition on actions or conduct, the relevant conduct which has been engaged in outside of Australia.
4. This stands in stark contrast to a provision such as s 23. It proscribes neither the “engaging in conduct” of an identified nature nor the doing of specified actions. It merely declares that certain types of terms in specific types of contracts are void. There is no obvious element of it to which s 5(1)(g) might attach in that it has no element of “engaging in conduct” which can be extended to that occurring overseas. Its concern is solely with the efficacy of specific terms. The primary judge concluded (PJ [126]) that s 23 was within the scope of the operation of s 5(1)(g) because “‘engaging in conduct’, being that in respect of which s 5 extends the operation of the ACL, includes ‘the making of, or the giving effect to a provision of, a contract’ and that s 23 concerns whether a term in a contract is unfair”. However, there was, with respect, no identification of the relevant “conduct” in which Princess engaged and in respect of which s 5(1)(g) might apply. Section 23 does not depend on, nor have as one of its elements, conduct or activity involving “the making of, or the giving effect to a provision of, a contract”. With great respect to the learned primary judge, the preferable construction is that whilst s 5(1)(g) may extend the operation of the Act to “conduct” engaged in outside Australia, there is none identified in s 23 on which that section might operate.
5. There is some authority which might suggest that s 4(2) of the CCA is inapplicable to s 23. Relevantly, s 4(2)(a) provides:

In this Act:

(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the engaging in of a concerted practice;

1. The precise nature of this section has escaped much attention since its insertion into s 4 of the *Trade Practices Act 1974* (Cth) by the *Trade Practices Amendment Bill 1977*. It was, however, considered in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 (Northrop, Lockhart and Gummow JJ). There, Northrop J (at 490 – 491), after an examination of the history of the definition in s 4(2)(a) of the *Trade Practices Act* and its coherence with other sections and parts of that act, concluded that its operation was confined to Part IV concerning restrictive trade practices and was inapplicable to other parts such as s 52, the progenitor of s 18 of the ACL. Although Lockhart and Gummow JJ were not prepared to confine the definition’s operation in that manner, they recognised (at 505) that the linchpin of its operation was its attachment to provisions which specifically used the expression “conduct” or at least referred to actions. For the purposes of the matter before them they held that the making of contractual warranties could, by reason of s 4(2)(a), amount to “conduct” which was misleading or deceptive. *Miller’s Australian Competition and Consumer Act Annotated* at [CCA.4.160] adopts, to some extent, part of Northrop J’s reasoning noting that the extended definition is *primarily* referable to those parts of the Act dealing with restrictive trade practices, but also embraces the majority view that it operates in relation to s 18 by bringing contractual warranties within the expression “conduct”.
2. It is also unclear how s 4(2)(a) might, together with s 5(1)(g), extend the operation of s 23. Whilst s 5(1)(g) might extend the Act’s operation to conduct which is the entering into an agreement, s 23 is not concerned with such conduct but only the terms of the contract itself. Section 5(1)(g) might extend the Act to engaging in conduct outside of Australia but, again, the entering into of the contract in question is irrelevant to s 23. In order for s 23 to have the effect identified by the learned primary judge it is necessary to read into it additional words to the effect that it extends the operation of the Act to conduct engaged in outside of Australia as well as the subject matter which may result from that conduct. There was no submission advanced which would justify such a construction.
3. As the following discussion reveals, it is not irrelevant that the attempted application of s 5(1)(g) to s 23, as occurred in the course of the appeal, provides not insignificant constructional difficulties. On the assumption that the former operates upon the latter, it is apparent that the consequential illogicality necessitates a departure from the ordinary meaning of the words in s 5(1)(g) and this tends to support the conclusion that it was not intended to apply at all to s 23.

#### Does s 23 have any territorial limitation?

1. If s 23 is unaffected by s 5(1)(g), a question remains as to the scope of contracts to which it applies. Here, the starting point is the presumption that the Australian legislature does not intend to regulate matters within the legitimate geographical or jurisprudential authority of other nations. This is not a reflection of some legal “cultural cringe” consequent upon a lack of self-assuredness in this country’s jurisprudence. Rather, as was explained by Ryan and Kiefel JJ in *Worldplay Services Pty Ltd v Australian Competition and Consumer Commission* (2005) 143 FCR 345 (*Worldplay Services v ACCC*), 350 [17] in the following manner:

… It is to be understood and implied that the Australian Parliament does not intend to deal with persons or matters over which, according to the comity of nations, jurisdiction belongs to some other sovereign or state: *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 at 23, 31; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 600-601; *Re Maritime Union of Australia; Ex parte CSL Pacific* (2003) 214 CLR 397 at 416. The rule is one of construction and may be displaced by appropriate provisions in an Australian statute otherwise within power: *Trade Practices Commission v Australian Iron and Steel Pty Ltd* (1990) 22 FCR 305 at 319.

In other words, the rule of construction is one which shows respect for the legal sovereignty of other nations and their entitlement to regulate, as they see fit, the norms of behaviour in relation to matters obviously within their borders and in respect of which they have the most real and genuine interest. Some countries might, quite reasonably, regard it as an affront were the Australian Parliament to attempt to regulate the contractual rights between its citizens merely because one was a corporate entity which incidentally carried on business in Australia.

1. There is nothing in s 23 which suggests that the usual rules of construction should be displaced. It does not evince an intention to apply to any contract no matter where made or regardless of its governing law. However, the application of the above principles suggest that there must exist some relevant territorial connection between Australia and the contracts which are affected by it. For Princess, Mr McLure SC submitted that recourse ought to be had to the common law presumption that statutory provisions should only apply to contracts which, in accordance with the rules of private international law, are governed by the law of the enacting jurisdiction: *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274, 283 [23]; *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600 – 601. In that latter case Dixon J stated the principle in the following terms:

The case is one for applying what I believe to be the well settled rule of construction. The rule is 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 recognized in our Courts, it is within the province of our law to affect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law. …

1. The application of these rules of private international law has the consequence that s 23 only applies to those contracts in respect of which Australian law is the system of law with which they had their closest and most real connection; that is, the proper law of which is Australian law. In the present case, even if the choice of law clause which applies general maritime law of the United States was put to one side, the proper law of the passage contract between Mr Ho and Princess would not be the law of Australia. It is not necessary to identify what the proper law would be. It suffices to observe that it is not the law of Australia or of any Australian state.
2. On this, which appears to be the preferable and more orthodox construction, s 5(1)(g) does not extend the operation of s 23, the scope of which is limited to contracts, the proper law of which is the law of Australia or one of its states. The consequence is that the primary judge erred in concluding that s 23 applied to the passage contract between Mr Ho and Princess and the latter’s appeal on this ground should be upheld for this reason alone.
3. It can be accepted, as the Chief Justice addresses in his reasons, that there may be reason for not applying the rules of construction referred to above to the circumstances of the present case and on a more fulsome analysis the observations of Kitto J in *Kay’s Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 (*Kay’s Leaving v Fletcher*), 142 – 143 will outweigh the demands of comity. However, different considerations may apply in the construction of the legislation of plenary State bodies politic which are not relevant to the residual and constitutionally defined legislative authority of the Commonwealth. In *Kay’s Leasing v Fletcher*, the issue was whether a law of New South Wales relating to the validity of hire purchase agreements applied only to an agreement of which the proper law was the law of that State, or extended to any such agreement made in that State. In considering the question of whether the subject matter and context of legislation rendered the application of the above principles of construction inapplicable Kitto J observed:

Where a provision renders an agreement void for non-compliance by the parties or one of them with statutory requirements, especially where the requirements can be seen to embody a specific policy directed against practices which the legislature has deemed oppressive or unjust, a presumption that the agreements in contemplation are only those of which the law of the country is the proper law according to the rules of private international law has no apparent appropriateness to recommend it, and indeed, for a reason of special relevance here, it would produce a result which the legislature is not in the least likely to have intended. It would mean that provisions enacted as salutory reforms might be set at nought by the simple expedient adopted in the present case of inserting in an agreement a stipulation that validity should be a matter for the law of some other country.

1. Those comments have force where, as in that case, there existed an available construction which limited the section’s scope of operation to an area which conformed with the state legislature’s area of responsibility. However, here there is nothing in the CCA or the ACL which suggests that the circumstances which render an unfair clause void arises from the fact that it was entered into in a part of Australia: cf the observations of Kitto J at 144, and to similar effect is the decision in *Old UGC Inc v Industrial Relations Commission (NSW).*  Had it been intended that s 23 should apply to all contracts entered into in Australia that might have easily been specified. Had the legislature done so, it may have rebutted the presumption arising from the principles of private international law relating to comity between bodies politic. Alternatively, some other nexus, so long as constitutionally valid, may have been specified with the same result. However, the legislature did not take that course. Rather, on its face, s 23 purports to apply to all contracts and, as a matter of construction, the somewhat binary question is whether it applies accordingly (or as far as s 5(1)(g) permits) or is limited by established rules of construction.
2. In addition, the extent to which a legislature seeks to introduce reforms, salutary or otherwise, might be determined by ascertaining the extent to which it expressly or impliedly seeks to prevent their circumvention. In this respect, it might be thought that Kitto J’s observations are inapt to modern legislation given that legislatures not irregularly make use of the simple expedient of including provisions preventing the contracting out of an Act’s operation by the device of a foreign choice of law clause. Indeed, as is discussed below, on one view the legislature has adopted that strategy in Part 3-2 of the ACL by the insertion of s 67 and has deliberately not used it in Part 2-3 where s 23 is located. An interesting constructional issue might arise as to whether, because the legislature expressly sought to prevent the avoidance of Part 3-2 by negating any attempt to contract out of its provisions, it was not concerned to do so in relation to Part 2-3.
3. At all events, whether the principles of construction which incorporate notions of private international law will prevail is a matter which necessarily must await a suitable vehicle for its determination.

### The relevant territorial nexus required if s 5(1)(g) applies to s 23

1. It is appropriate now to consider what the position would be on the assumption that s 5(1)(g) does apply to s 23.
2. Princess did not cavil with the primary judge’s determination that the two companies (Princess and Carnival) carried on business in Australia, in the sense that they marketed cruises here. However, it submitted that the application of the extraterritorial provisions required some connection between Australia and the conduct giving rise to the claim which was more than merely the incidental carrying on of business here. It further submitted that the primary judge erred by effectively concluding that any contract entered into by a company that does business in Australia is subject to s 23 regardless of where it was entered into, what its subject matter is, or what its proper law is. The necessity to accord the presumed effect of s 5(1)(g) on s 23 some limitation was based upon the absurdity of s 23 imposing restraints on the contractual freedom of entities engaged in business overseas, perhaps between two other countries, merely because one was a company which incidentally carried on business in Australia. It was submitted that such a result was contrary to both common law and statutory presumptions against the extraterritorial operation of Acts, and that the construction adopted by the primary judge resulted in these improbable or irrational consequences: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 304 – 305, 320 – 322.
3. Whilst the principle and authority relied upon by Mr McLure SC was entirely correct, there might be doubt about the extent of their application to s 5(1)(g) which is a provision by which the operation of the CCA and ACL are expressly extended to conduct occurring beyond the shores of Australia. The clear intention is to extend the operation of the CCA / ACL beyond the usually accepted territorial limitations. That, however, is not to deny that a question may remain whether it should be read down in some way.

#### The consequences of the expansive interpretation of s 5(1)(g)

1. Mr McLure SC was correct to submit that the expansive interpretation given to s 5(1)(g) by the primary judge would have anomalous consequences. On his Honour’s reasoning, the CCA (and ACL) and especially s 23, applied to a contract subject to American law, entered into in America by Princess, being a company incorporated in Bermuda and having its principal place of business in California, with Mr Ho, a Canadian living in Canada and present there at the time of contracting. This conclusion was reached merely because Princess also carried on business in Australia. The logical consequence of the primary judge’s conclusion would be 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. That anomalous result is even more pronounced when it is understood that such a company would not be subject to the myriad prescriptions in the Act in relation to conduct in the course of that trade or commerce. Such a construction does not promote the object of the Act and, in relation to the present case, it is unlikely that the Commonwealth Parliament intended to regulate conduct wholly occurring overseas merely because Princess otherwise engaged in business in Australia. Nor, obviously, does such a construction promote comity between Australia and other national bodies politic.
2. Considerations such as these underpin the presumptions against the extraterritorial application of Commonwealth legislation which are found both in statute: *Acts Interpretation Act 1901* (Cth), s 21(1)(b): and at common law: *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 23, 30 – 31. They also support a contextual construction of s 5(1)(g) which displaces its literal meaning when applied to s 23 on the basis that the outcomes could not have been intended by the legislature because they are “absurd”, “extraordinary”, “capricious”, “irrational or “obscure”: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* at 304 – 305, 320 – 322. In the absence of any explanation as to why the Australian legislature might be interested to regulate the contractual relationship of non-Australian parties engaged in business wholly beyond Australia’s territorial limits, there is difficulty in accepting that s 5(1)(g) was intended to have the reach which the primary judge identified. Necessarily, an interpretation other than that which arises from the ordinary meaning of the words needs to be found.

#### Authorities relied upon for the expansive operation of s 5(1)(g)

1. Before considering other potential constructions, it should be observed that there exists some support for the expansive view of the operation of s 5(1)(g). In *Australian Competition and Consumer Commission v Facebook Inc* [2021] FCA 244 (*ACCC v Facebook*) the observations of Griffiths J might be taken as accepting it. His Honour said at [43]:

The question posed by s 5(1)(g) of the *Competition and Consumer Act* is whether the entity carries on business in Australia *simpliciter*. It is not whether it carries on business in Australia in undertaking the conduct the subject of the proceeding.

1. However, his Honour was there dealing with an *ex parte* application for leave to serve out of the jurisdiction and was not favoured with a contradictor on this point. Importantly, in the circumstances of that application, his Honour was only required to reach a *prima facie* level of satisfaction on the issues before him. Moreover, the claims being advanced in that action were founded upon alleged breaches of ss 18, 29(1)(g) and 33 of the ACL, and each of those sections required that the impugned conduct be in Australian trade or commerce. On the facts, there was little doubt that the conduct of which complaint was made occurred in the course of the carrying on of business by the respondent in Australia and in the course of trade or commerce between Australia and a place outside of Australia. It follows that Griffiths J’s observations do not assist in the present case.
2. Reference was also made to the decision of the Full Court in *Valve Corporation v Australian Consumer and Competition Commission* (2017) 258 FCR 190 (*Valve Corporation v ACCC*) in which a number of statements were made as to the application of s 5(1)(g). In that case, the application of the section arose in two different ways. First, it was alleged that Valve, an overseas company selling computer programs via the internet to customers in Australia, had made misrepresentations to the effect that the terms of its supply excluded the consumer guarantees in Division 1 of Part 3-2 of the ACL. Valve’s statements would have been misleading if the provisions of Part 3-2 of the ACL did, in fact, apply. The Court held that the several divisions of Part 3-2 were concerned with the conduct of the supply of goods and services in various circumstances, and that the consumer guarantees attached to those supplies regardless of whether they occurred pursuant to a contract. It was held (at 226 [116]) that although the CCA /ACL was generally concerned with acts occurring in Australia, as Valve “carried on business” here within the meaning of s 5(1)(g), the consumer guarantees in Part 3-2 applied to its conduct in supplying computer programs. The necessary consequence was that Valve’s representations that the Part did not apply were misleading. However, in that conclusion it was not determined that s 5(1)(g) would apply to conduct occurring outside of Australia that was not connected to the business being carried on in Australia. Indeed, it seems patently clear that Valve’s conduct in supplying computer programs was part of, or in the course of, its carrying on business here. The second way in which s 5(1)(g) arose was in relation to whether Valve’s statements on its website as to the existence, exclusion or effect of the consumer guarantees in Part 3-2 of the ACL contravened ss 18 and 29(1)(m) of the Act. Although the primary judge concluded that the misleading conduct (the making of representations) occurred in Australia, he determined, in the alternative, that even if the conduct had occurred outside of Australia, it was nevertheless subject to the ACL because Valve carried on business here. This was also upheld on appeal. Again, it is clear that the conduct alleged to have been in contravention of ss 18 and 29(1)(m) was part of Valve’s business of selling computer programs in Australia. It follows that there is nothing in the reasons of the Court which might suggest that conduct unconnected with the carrying on of business in Australia could be subject to the provisions of the ACL.
3. Neither the decision in *ACCC v Facebook Inc* nor that in *Valve Corporation v ACCC* provide any significant assistance in the present case. Each are consistent with the proposition that s 5(1)(g) extends to conduct which occurs overseas and is in the course of the business being carried on in Australia which triggers the section’s operation. Additionally, each was concerned with actions by the respondent which amounted to “engaging in conduct” outside Australia and to which s 5(1)(g) could attach. Neither suggest that the section could apply to an overseas contract where the entering into of it was not the gravamen of the claim under the ACL.

#### Should s 5(1)(g) be confined to contracts entered into in Australian trade and commerce?

1. In an attempt to avoid the unacceptable results of the expansive interpretation of s 5(1)(g), Mr McLure SC submitted that s 23 should be read consistently with other provisions proscribing various forms of conduct. He identified that many of the ACL’s provisions, such as ss 18, 20, 21, 29, 30, 32, 33, 34, 35, 36 and 37, included as an element of the proscribed conduct that it occur in “trade or commerce”, such that the inherent territorial requirement in the concept of Australian trade or commerce would limit their application. In relation to these provisions it is insufficient that the alleged contravenor had merely incidentally engaged in some business in Australia. No claim could be brought in reliance of, say, s 18 of the ACL against a company which incidentally carried on business here, for engaging in misleading or deceptive conduct in the course of trade and commerce which occurred wholly outside Australia. For s 18 and the other “conduct” based provisions to apply, the CCA not only requires the territorial connection that the company engaging in the offending conduct carry on business here, but that the conduct itself be in the course of Australian trade or commerce. Mr Pike SC appeared to accept that was so and it is appropriate to deal with this issue on that basis. From this Mr McLure SC submitted that, if the operation of s 23 is extended by s 5(1)(g), it should be similarly construed despite the fact that it does not expressly require any connection with “trade and commerce” and the concomitant territorial connection.
2. There is substance to these submissions, and the evident inconsistency between the array of provisions which require that the impugned conduct occur in Australian trade and commerce and the extraterritorial operation of s 23 as allegedly supplied by s 5(1)(g), is significant. No rationale or explanation was offered as to why conduct which is misleading or deceptive (s 18), unconscionable (ss 20 and 21), false or misleading in relation to goods or services, the attributes of land, the availability of rebates, prizes etc, or as to the nature of goods (ss 29, 30, 32 and 33), was actionable only if there was a territorial connection involving Australian trade or commerce, but that none was required in relation to a term of a contract which was “unfair”. That dissonance or lack of coherence in the operation of the ACL in this respect raises important implications for the construction issues under consideration. However, it is necessary to observe that ss 51, 52 and 53 of the ACL, which affix consumer guarantees to the supply of goods, also have no requirement that the supply occur in Australian trade or commerce despite it being an element of many other sections of Division 1 of Part 3-2.
3. In support of reading into s 23 an additional territorial limitation, Mr McLure SC submitted that the evident anomalous operation of s 23 was the product of its legislative history. The absence of any obvious territorial connection by, for instance, a requirement that a contract had been entered into in the course of Australian trade or commerce, allegedly arose because s 23 had been lately derived from the *Fair Trading Act 1999* (Vic) and inserted into the ACL. The inference being that an error occurred in the process of incorporating s 23 into the CCA/ACL, in that the draftsman failed to anchor it to some conduct occurring in Australian trade or commerce in a manner consistent with other proscriptive provisions. Those other provisions, by themselves require that the impugned conduct occur in the course of Australian trade or commerce and, therefore, the expanded operation by s 5(1)(g) does not extend them beyond what might be expected by international comity or into Constitutional invalidity. So the submission went, the Court should assume that an error has occurred in the drafting of s 23 and the Court should supply the omitted necessary limitation in a manner consistent with those other provisions.

#### Constructional difficulties

1. Mr Pike SC submitted that such a process was effectively one of implying or reading words into the ACL so as to confine its operation and, before that could occur, it would be necessary to apply the accepted principles relating to the implication of words into statues, being those referred to be Edelman J in *Australian Competition and Consumer Commission v Valve Corp (No 3)* (2016) 337 ALR 647, 667 – 668 [96] (*ACCC v Valve (No 3)*):

[96] The joint judgment in *Taylor* referred to the three matters identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105–6; [1979] 1 All ER 286 at 289 (*Wentworth Securities*) (as reformulated in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592 (Lord Nicholls). Those matters may be more in the nature of guidelines, which might not be sufficient even if they are established ([39]–[40]). Specifically:

(1) the court must be able to identify the precise purpose of the provision(s) in question;

(2) the court must be satisfied that the drafter and Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose; and

(3) the court must be abundantly sure of the substance of the words that Parliament would have used had the deficiency been detected before enactment.

See also the careful analysis in Herzfeld and Prince, *Interpretation*, 2nd ed, 2020, Thomson Reuters, pp 129 – 133 [5.300] – [5.340] in which the learned authors assayed the several authorities which, taken together, impose a high bar for the implication by courts of missing words into statutes.

1. There is substance in Mr Pike SC’s submissions on this issue. Princess’s submission as to the manner in which s 5(1)(g) and s 23 should operate does necessitate reading into s 23 words which require that the contract in question was entered into in Australian trade or commerce so as to conform with those provisions where the requirement is express. If that construction is to be adopted it should, as Mr Pike SC correctly submitted, be shown to satisfy each of the three matters identified by Edelman J.
2. For the reasons which have been given above to the effect that s 5(1)(g) does not apply to s 23, it necessarily follows that none of those requirements could be satisfied. However, putting that to one side, the process would otherwise falter on the first requirement. Whilst it might be accepted that the legislature did not intend the provisions to have their literal meaning, it is far from apparent that it was intended that the appropriate limit was to be that the contract was entered into in the course of Australian trade or commerce. It might be equally assumed that the provision was to have some other limit and, indeed, in the course of the appeal a number of equally valid alternatives were suggested. It is, therefore, not possible to reach the required level of assurance as to the substance of the words that Parliament would have used had the deficiency been detected. One need go no further to reject Princess’s posited construction that s 23 contained an element that the contract in question was entered into in Australian trade or commerce.
3. The process might also falter at the second requirement identified in *ACCC v Valve (No 3)*. As ss 51, 52 and 53 also do not require that the relevant conduct be in Australian trade or commerce, there is difficulty in accepting that the Parliament had inadvertently overlooked imposing such a condition on s 23.

#### Alternatively suggested territorial connections

1. It was alternatively submitted that a suitable connection might exist if the contract was entered into “while” the relevant company was engaged in business in Australia. However, that is not a relevant connection between the contract and Australia, but merely an incidental temporal coincidence which neither promotes the object of the Act nor comity with other nations. Moreover, such a construction would also require satisfaction of the matters referred to in *ACCC v Valve Corp (No 3)* and likewise they cannot be met in the circumstances of this case.
2. Mr Pike SC submitted (ts 93) that the relevant territorial connection may be that the contract must be one in which some services are to be performed in Australia. He submitted that the real issue was whether the conduct outside of Australia related to what was happening in the carrying on of business in Australia (ts 94) and that here, the carrying on of business consisted of the undertaking of a cruise which commenced and ended in Sydney, such that services were provided in Australia and that was a sufficient “territorial hook” on which s 5 could operate. These submissions carry some weight and importantly focus upon the connection between the performance of the contract and the protection of the members of the Australian community and fair dealing. However, it too requires substantial rewriting of the section and, as mentioned, the circumstances do not justify taking that step. It is also a construction that is not without difficulties. It would necessarily mean that s 23 would apply to any contract where only a very small portion of the services are to be provided in Australia. For instance, a passage contract for a round-the-world cruise entered into in the United States, between entities domiciled there would be subject to s 23 merely because one part of the voyage is in Australia. The mere fact that under a contract a service is to be provided in Australia does not provide a justifiable limitation to s 23.
3. An attempt was also made to confine s 23 by the stated objects of the CCA and thereby limit it to contracts to which an “Australian consumer” was a party. There is no definition of the expression “Australian consumers” in the CCA. That implication is also not without its difficulties. For instance, it would then apply to a contract with a foreign company entered into by an Australian who, at the time of contracting, is travelling overseas. Necessarily, some additional limitation would be required although that was not specified by the parties.

#### No submission in reliance on s 15A of the Acts Interpretation Act 1901 (Cth)

1. It should be recorded that no express submission was made in reliance upon s 15A of the *Acts Interpretation Act 1901* (Cth) to the effect that s 5(1)(g) should be construed so as not to exceed the legislative power of the Commonwealth. The primary judge’s interpretation assumes that the Commonwealth might legitimately legislate with respect to the validity of contracts between overseas nationals merely because one of them incidentally carried on business in Australia, even though there are arguments that this might be insufficiently anchored within the Constitutional power of the Commonwealth: *The Constitution* s 51(i) and (xx).

#### The usual rules concerning extraterritorial operation

1. The deficit in the literal meaning of the words of s 5(1)(g) and s 23 creates difficulties which are too great and too uncertain to be remediated by any interpretative or constructional analysis which involves the not-insignificant step of reading additional words into those sections or either of them. The correct approach is to construe the sections in accordance with the usual and established rules of construction concerning the extraterritorial operation of legislative provisions. Parliament must be taken to have been aware of these rules and, if it intended that the legislation was to have any different scope of operation, it would have so indicated.
2. Some assistance in the application of these rules can be derived from the decision of the Court of Appeal in New South Wales in  *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692. In the course of his reasons Leeming JA (at 720 [111] – [112]) recognised the rule that general words in a statute are read down so as not to have extraterritorial effect, but observed that this principle provided insufficient guidance in many cases. At 720 [113] his Honour observed:

The solution to the issues posed by the plaintiffs’ summons is to recognise two things. The first is that the rules of construction are more nuanced. In the case of statutes which create offences, then the rule of construction is that every physical element is prima facie required to be in New South Wales. In the case of other statutes, then the question is to identify by reference to the statute’s context and subject matter the manner by which the generality of the statute is confined to New South Wales, which is normally by a *single* integer. … .

1. Later (at 732 [157]) his Honour added:

… Putting to one side the different considerations applicable to legislation creating an offence, in cases where no express provision has been made connecting the statute to New South Wales, the task is to identify the central focus or central conception of the legislation, and require that to bear a connection with New South Wales. One does so as a matter of construction, based on subject matter and scope, and with a regard to internal indications and to avoiding improbable and absurd outcomes. It will be relevant to have regard to the purpose of the statute, the likelihood that the statutory purpose will be evaded if made to depend upon something readily altered at the instance of the parties, and the need to avoid an unduly restrictive approach whereby more than one factum is required to bear a connection.

1. Mr McLure SC submitted (ts 143) that the central conception or concern of s 23 was not the contract and the place where it is being performed through the supply of goods or services, but rather the protection of consumers and small businesses, as defined by s 23, present in Australia. In this respect he relied upon the stated object of the CCA (including the ACL) as articulated in s 2 which is, “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”. From this it was suggested that an appropriately consistent limitation to the operation of ss 5(1)(g) and 23 is that they only apply to contracts entered into between corporations which engage in trade and commerce in Australia on the one hand, and consumers or small business operators in Australia on the other. The obvious difficulty here is that the requirement that the citizen or small business be in Australia when entering into the contract provides an artificial limitation which is likely to lead to uncommercial results. It would mean that s 23 would apply to a passenger on the *Ruby Princess* if they were in Australia when they entered into the passage contract, but not to an Australian citizen who was overseas when they contracted to go on the cruise. That would result in s 23 applying to one contract but not to another in precisely the same terms in respect of the same voyage.
2. In the present case, little can be gained by seeking to apply the broadly worded express object of the legislation. It is not a sufficiently precise statement of intent from which to draw a conception which might be used to delimit the operation of ss 5(1)(g) and 23. Rather, resort should again be had to the established rules of construction referred to above in *Worldplay Services v ACCC* and *Old UGC Inc v Industrial Relations Commission (NSW)*. The application of these principles has the consequence that the principles of private international law can provide a limitation to the otherwise general provision which accords with the accepted norms of international comity. On that basis, assuming that s 5(1)(g) applied and extended s 23 to contracts entered into by corporations which carried on business in Australia, it would nevertheless only affect contracts which have their closest and most real connection with the law of Australia as opposed to the law of any other jurisdiction. This construction results in an acceptable operation. By its terms s 23 is limited to consumer contracts and contracts with small business, thereby satisfying the requirements of the express objects of the ACL. The requirement that it apply only to contracts the proper law of which is Australian law provides a sufficient and internationally acceptable nexus with Australia. Without limiting the infinite variety of contracts which might satisfy this latter requirement, contracts for the supply of goods in Australia or for the supply of services which are provided substantially in Australia are likely to do so. Whilst it should be recognised that this construction has the consequence that s 23 might be deliberately circumvented by the inclusion in contracts of some alternative choice of law clause, that is a consequence of the words used or, perhaps, not used by the legislature and does not provide a rationale for some alternative construction.
3. Although it has been suggested that this process involves the reading of words into s 5(1)(g) or s 23, that is not the case. It is merely reading the otherwise expansive words in a manner consistent with the well-established common law rules of construction informed, as they are, by the rules of private international law that, unless a contrary intention appears, the Parliament did not intend to legislate beyond the bounds of international comity.
4. On the application of this interpretation, even if s 5(1)(g) applied, as the proper law of the passage contract between Mr Ho and Princess is not the law of Australia, s 23 has no application in the present circumstances.

### Whether s 23 is a “mandatory law”?

1. Before leaving this topic it is necessary to return to the issue of whether s 23 somehow applied to the passage contract because it was a “mandatory law” of the forum in the private international law sense. This was touched upon in the course of the parties’ submissions although not accorded significant attention. That may well be due to the manner in which the primary judge dealt with it. At paragraph [123] of his reasons the primary judge, after noting that the parties had agreed that the general maritime law of the US was to govern the application of their contractual rights, said:

In order to circumnavigate this issue, the applicant contends that the ACL is a mandatory law of the forum. I accept that the ACL is a mandatory law of the forum which the parties cannot by their contract displace: *Epic v Apple* (FCA) at [18]-[19] per Perram J; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* [1988] FCA 42; 39 FCR 546 at 561 per Lockhart J (Burchett J and Foster J agreeing); *Burke v LFOT Pty Ltd* [2002] HCA 17; 209 CLR 282 at [143] per Callinan J. However, the question is whether s 23 of the ACL is made applicable to the contract in question by the relevant terms of the CCA and the ACL.

1. The primary judge determined that the ACL was mandatory only in the sense that it applied in those circumstances where it expressly indicated an intention to do so. This was made clear by his consideration of whether s 5(1)(g) had the effect of extending s 23’s operation and his ultimate conclusion that it did. For the reasons given above that conclusion should not be accepted and that is sufficient of itself to displace his Honour’s description of the ACL as a mandatory law.
2. However, for the sake of completeness it should be observed that it may not be appropriate to characterise the whole of the ACL as being a “mandatory” law. In general terms a “mandatory law” of the forum describes laws, “the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organisation) that they are applicable to any contract falling within scope, regardless of the law which might otherwise be applied” *per* Briggs A, *The Conflict of Laws*, 3rd ed, Oxford University Press, Oxford, 2013, p 248 cited in *Nygh’s Conflict of Laws in Australia* p 484, [19.39]. Not irregularly, mandatory laws are established by provisions which expressly exclude operation of the otherwise applicable choice of laws rules, whether that be in relation to contracts or tortious conduct. However, that is not to say that a law may be held to be a mandatory law of the forum where, in the absence of such a provision, its overriding application is required as a matter of inference from the terms of the statute. Examples of the former are:
3. s 11(1) of the *Carriage of Goods by Sea Act 1991* (Cth) which provides that a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia and other specific documents are taken to have been intended to contract according to the laws of the place of shipment; namely that place inside Australia;
4. s 8 of the *Insurance Contracts Act 1984* (Cth) which applies the provisions of the Act to all contracts of insurance the proper law of which would be the law of Australia or a place within Australia regardless of the parties’ choice of law.
5. In both of these examples the legislature has seen fit to prevent the avoidance of the substantive legislation by ensuring that the effective choice of law in relation to the relevant contracts is that of the forum.
6. In this case the primary judge did not identify any express statement by the legislature that the ACL was a mandatory law nor any provision which sought to override foreign choice of law clauses in agreements. Rather, he appears to have assumed that there existed some implication that the ACL applied regardless of either any attempt to oust it or the operation of the principles of private international law to the contrary. He specifically referenced Perram J in *Epic Games, Inc v Apple Inc* (2021) 151 ACSR 444, 449 – 450 at [18] – [19] where his Honour had said:

***Mandatory law of the forum***

[18] Next Epic submitted that Pt IV and s 21 of the ACL were ‘mandatory laws of the forum’. In simple terms a mandatory law of the forum is a law operating in the jurisdiction where the court is sitting which the parties are not at liberty by contract to displace. An example of such a law is s 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth), which negates the effect of either a choice of foreign law or a foreign exclusive jurisdiction clause in an agreement for the shipment of goods from within Australia to a place outside of it.

[19] I accept that Pt IV and s 21 of the ACL are mandatory laws in the sense that parties cannot contract out of their application. There is actually no decision which holds directly that parties may not by contract agree that they are not bound by the competition laws contained in Pt IV, although there are statements that at the very least it is not possible to contract out of what is now the ACL: see *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 561; 79 ALR 83 at 99 per Lockhart J, Burchett J and Foster J agreeing at FCR 568; ALR 106; *IOOF Australia Trustees (NSW) Ltd v Tantipech* (1998) 156 ALR 470 at 479 per Lee, Nicholson and Sundberg JJ; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; 187 ALR 612; [2002] HCA 17 (Burke) at [143] per Callinan J.

1. It may be accepted that s 21 of the ACL and the correlative penal provisions in Part IV apply to the conduct of persons and companies within the territorial scope of the CCA and ACL, in the sense that the provisions cannot be avoided by agreement between parties to the relevant activity: *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 561. However, the only consequence of that is that those provisions are mandatory in a limited sense. They are not mandatory in the sense that they will be applied in any case that comes before the courts of the *lex fori* regardless of where the events in question occurred. There are clear territorial limitations to the operation of the CCA and ACL.
2. Here the question of whether s 23 is a mandatory law is more appropriately addressed in the wider private international law sense by asking whether there is a legislative intention that it apply to contracts the proper law of which is not the law of Australia or place within Australia. Given the structure of the ACL it is difficult to reach the conclusion that it is. There is certainly no express statement that such is the case and, apart from the breadth of its words, there is a paucity of any other indication that it was intended to so apply.
3. In the course of submissions reference was made to s 67 of the ACL which is an express provision applying the provisions of Division 1 of Part 3-2 of the ACL to contracts the proper law of which would be the law of part of Australia but for a term that provides otherwise. It reads:

**67 Conflict of laws**

If:

(a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or

(b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:

(i) the provisions of the law of a country other than Australia;

(ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

1. The relevant impact of this section on the discussion is difficult to assess in the absence of any substantive submissions from the parties. However, the following might be observed:
2. The words of the section’s title, “Conflict of laws”, is an indication that it deals with issues concerned with the principles of private international law.
3. The statement in the closing words of the section that the Division applies “despite” the term referred to in (a) or (b) strongly implies that, but for the provision, the Division would not otherwise apply.
4. It might be assumed that the purpose of s 67(a) was to ensure that Division 1 applied in relation to contracts for the supply of goods or services the proper law of which was the law of any part of Australia, but that the application of the Division was sought to be displaced by an agreement that it be governed by the law of another place.
5. Similarly, s 67(b) appears to assume that, in a contract for the supply of goods or services, a term that the laws of a place other than Australia should apply would be effective to displace the operation of the Division. By negating the effect of such a term despite its existence, the provisions of the Division nevertheless apply.
6. Section 67(a) appears to have a similar operation to the cognate provisions in the *Carriage of Goods by Sea Act* and the *Insurance Contracts Act* which have the effect of preventing the avoidance of the provisions of those Acts by effectively negating the operation the parties’ choice of law clauses.
7. It follows that, *prima facie*, it is difficult to appreciate the relevance of s 67(a) unless Division 1 applied only to agreements the proper law of which was the law of Australia. If that were not the case, it would appear to be redundant.

#### The decision in Valve Corporation v ACCC

1. Submissions relying on the above matters arising from the natural meaning of the words of s 67 were advanced by Valve in *Valve Corporation v ACCC* but were not accepted. The Full Court rejected the proposition that Division 1 of Part 3-2 was limited in its operation to contracts the proper law of which was the law of part of Australia, and therefore did not apply to contracts for the supply of goods or services the proper law of which was a country other than Australia. That was important to the outcome in that case where the proper law of the contract of supply was that of Washington State in America. However, it must be remembered that the Court had accepted that s 5(1)(g) applied to the provisions in Division 1 which extended its operation to the engaging in conduct outside of Australia by companies which carried on business in Australia. There was little difficulty in so concluding because the sections of Division 1 applied to or operated on the relevant conduct being the act of supplying goods or services.
2. The Full Court identified (at 225 [108]) that “s 67 appears to be another provision designed to ensure that the operation of the consumer guarantees cannot be avoided”. That statement may be correct, but it suggests that the section is directed to *effective* methods of avoiding the operation of the consumer guarantees. That is, without the section, the attempted method of avoidance would be successful. That would suggest that the Division did not apply to contracts the proper law of which (excluding foreign choice of law clauses) was other than the law of part of Australia.
3. Reference was made by the Court to s 67(a) as applying in circumstances where the proper law of the contract was the law of part of Australia but for a term of the contract. Their Honours then said:

In the situation to which para (a) is directed, s 67 makes clear that the provisions of Div 1 of Pt 3-2 apply in relation to the supply under the contract despite the term.

1. The meaning of the words, “makes clear”, is ambiguous. Based on a natural reading of s 67(a), the Full Court appeared to have concluded that the subsection is a clear statement that the provisions of Division 1 are to apply despite a contractual term by which an alternative law has been chosen to govern the contract. The Court (at 225 [109]) then identified that s 67(b) applied when a term sought to substitute a consumer guarantee regime from another country and again it was said that s 67 “makes clear” that Division 1 applied despite that term.
2. After identifying that there was no provision in the ACL which expressly limited the operation of Division 1 to those contracts the proper law of which was the law of a part of Australia, it concluded that, if such a limitation existed, it would have to arise by way of implication. This was said to be excluded because Division 1 was not limited to supply by way of contract and it would be odd if the limitation applied in relation to the supply by contract but not otherwise. It was also said (at 226 [112]) that Valve’s contention would have the effect of elevating s 67 to one that specified the scope of Division 1 and it should not be so construed. It was then held that the operation of s 67 was more limited and it is “designed to prevent certain attempts by parties to ‘contract out’ of, or otherwise avoid, the consumer guarantees”.
3. This latter statement, taken together with that at 225 [108] referred to above, suggest that s 67 is effective to prevent avoidance of the consumer guarantees. If that were so, the converse position is that the attempted avoidance would be effective because the law of the contract would not be the law of part of Australia and, therefore, not subject to Division 1. However, their Honours rejected that proposition. At 226 [113] – [114] they said:

[113] We do not accept that, in the context of Div 1 of Pt 3-2 as a whole, the premise of s 67(a) is that the consumer guarantee provisions apply only where the objective proper law of a contract of supply is the law of Australia or part of Australia. Granted, s 67(a) is directed to this particular situation. That may be explained in part by the legislative history of the provision. But in the context of the Division as it now stands, s 67(a) should be seen as being directed to a particular attempt to avoid the operation of the consumer guarantees, rather than resting on the premise suggested by Valve.

[114] In summary, s 67 is designed to ensure the full reach of Div 1 of Pt 3-2. It would be inconsistent with the statutory scheme and the statutory purpose to read s 67 as limiting the scope of operation of the Division such that a supply of goods or services is not covered where the supply is pursuant to a contract the objective proper law of which is the law of another country.

1. There is, with respect, some difficulty in these observations. If, as it appears, s 67(a) does have the effect of preventing a particular type of attempt to avoid the operation of the consumer guarantees, it is only because they will be avoided if the proper law of the contract by which the goods or services are provided is the law of another jurisdiction. It may well be that Division 1 extends to the supply of goods and services otherwise than pursuant to a contract such that s 67(a) will be irrelevant to such supplies, however, it is difficult to avoid the conclusion that, where the supply is pursuant to a contract, the implicit limitation exists. However, in the matter before the Full Court the proper law of the contract of supply was not that of part of Australia. On that basis, if the meaning given to the reasons of the Court was correct, the result would have been reversed.
2. It would seem therefore, and despite the wording of the Full Court’s reasons, what it actually determined, albeit without clear expression, was that s 67 has no operative effect at all. Rather, the effect of the Court’s conclusion is that the proper law of a contract for the supply of goods or services or its terms are irrelevant to the application and operation of Division 1 of Part 3-2. All s 67 does is to state, albeit implicitly, that any attempt to alter the proper law or terms of a contract of supply will be ineffective because the Division’s operation depends on neither of them. That characterisation diminishes s 67 to the status of an explanatory footnote rather than a provision with any operative effect and it is a conclusion which is inconsistent with the accepted interpretative imperative to strive to give operative effect to all provisions of a statute where possible. It also reads words into the provision so as to give it the identified declaratory effect, despite the fact that, if that had been parliament’s intention, it would not have been difficult to express it in clear words.
3. Ultimately, there is no need to reach any final view on the decision in *Valve Corporation v ACCC* for the purposes of this matter. The Full Court made it clear that it was only concerned with the application of Division 1 of Part 3-2 which related to the supply, by contract or otherwise, of goods or services. As the above discussion reveals, it was the operation of Division 1 beyond the supply by contract that favoured a construction which rejected a requirement that the supply be pursuant to a contract the proper law of which was the law of part of Australia. In comparison, s 23 is only concerned with contracts.
4. A further aspect of *Valve Corporation v ACCC* is that no question arose in that case as to whether some limitation was required other than that the defendant carried on business in Australia. The dispute was confined to whether the alleged representations giving rise to claims under ss 18 and 29(m) were made in Australia *or* that Valve carried on business in Australia and thereby was subject to the extended operation of the Act: see the reasons of the Court at 227 [117]. That being so, the issue which arose on this appeal was not considered. Further, as the Court concluded that the representations in question were made in Australia, it was not strictly necessary to consider the question of whether Valve carried on business here. Although it concluded that Valve did do so and was, therefore, subject to the extended operation of the CCA by s 5(1)(g), given the manner in which the issues were disputed there was no requirement for the Court to go further. That relieved the Court of the difficulty of dealing with the logical consequence of its conclusion; being that those consumer guarantees in Division 1 of Part 3-2 which do not include a requirement that the supply take place in trade or commerce (such as ss 51, 52 and 53) are imposed into any contract of supply Valve enters into anywhere in the world merely because it carries on business in Australia. It may be that this was not specifically addressed because the contract of supply in that case was in the course of the carrying on of business which attracted that extended operation. It is, nevertheless, the necessary consequence of the decision.

#### Conclusion as to whether s 23 is a mandatory law

1. The primary judge’s conclusion that the whole of the ACL and s 23 in particular was a mandatory law of the forum by the operation of s 5(1)(g) should be rejected. Were it necessary to decide it should be concluded that s 5(1)(g) has no operative effect in relation to s 23 for the reasons given. Even if it did, there is nothing to suggest that it operated to render s 23 a mandatory law in the private international law sense so as to apply to contracts the proper law of which is the law of a place outside of Australia.
2. The decision in *Valve Corporation v ACCC* was only concerned with Division 1 of Part 3-2 and turned on the peculiarities of the consumer guarantee scheme and the individual provisions which applied to supplies of goods and services as well as contracts for supply. It has no direct application to the scope of s 23 and the associated provisions of Part 2-3.
3. Had the legislature been so inclined it could have made Part 2-3 a mandatory law of the forum by including a provision in terms similar to s 67 (or s 8 of the *Insurance Contracts Act*) which would have had the consequence that it applied to all contracts regardless of their proper law and in spite of the accepted norms of international comity as articulated in the rules of private international law: *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* at 601. Such a provision would necessarily have had a different effect in Part 2-3 from that which the decision in *Valve Corporation v ACCC* permitted s 67 to have in Division 1 of Part 3-2.

### Conclusion as to the construction of s 23

1. From the foregoing it is evident that, were it necessary to decide, it should be concluded that s 23 is unaffected by s 5(1)(g). The latter extends the operation of certain sections of the ACL by reference to the “engaging in conduct” by, relevantly, bodies corporate and s 23 contains no element of “conduct” on which it might operate. The preferable view appears to be that the extraterritorial limitation to s 23 is provided by the common law principles of private international law and the concomitant common law rules of construction which limit its operation to contracts of which the proper law is the law of Australia. Necessarily, that would exclude its operation in relation to the passage contract between Mr Ho and Princess.
2. Even if it were assumed that s 5(1)(g) did somehow apply, it would not be possible to give the words of that section their literal or natural meaning and both parties seemed to recognise to some extent that a limitation could be required. However, no interpretation was advanced by which the legislative lacuna could be adequately filled by reading appropriate words of limitation into s 23 in accordance with the accepted rules of construction. It is, therefore, necessary to resort to the common law rule of construction which adopts the principles of private international law and assumes that the legislature only intended to legislate in accordance with the norms of international comity. On that basis, it would not apply to the circumstances of the present case where the law of Australia was not the proper law of the passage contract.
3. This ground of the appeal therefore fails.

### Was the class action waiver contrary to Part IVA of the Federal Court of Australia Act?

1. By Ground 1 of his Notice of Contention, Mr Ho contended that the learned primary judge erred by failing to hold that the class action waiver was contrary to the operation of Part IVA of the *Federal Court of Australia Act* *1976* (Cth) (the FCA Act). His Honour had concluded that as a class member was entitled to opt out of any proceedings once they were commenced, they were entitled to do so in advance. At PJ [119] his Honour construed the class action waiver as requiring anyone bound by it to opt out of any representative proceedings in respect of which they fell within the defined class of members when they become aware of its commencement. He said:

… Because s 33J [of the FCA Act] expressly provides that a group member may opt out, on what basis can it be said that the implication from the statutory scheme is that if a prospective group member agrees to opt out of any representative proceedings prior to the dispute arising then that prior agreement will be regarded as invalid and unenforceable as circumventing the statutory purpose? As set out at [108] and [126] of the ALRC Report, the purpose of allowing members to opt out is to preserve a group member’s freedom of choice whether to participate in proceedings. It is consistent with that freedom of choice that a person may undertake, in advance, not to participate in someone else’s representative proceeding.

1. Mr Pike SC for Mr Ho submitted that the primary judge’s conclusion was founded upon an incorrect interpretation of the class action waiver in the US Terms and Conditions. Relevantly it provided:

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. … YOU AGREE THAT ANY … 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.

(Formatting in original).

1. It was submitted that his Honour had construed this clause by reference to the provisions of Part IVA of the FCA Act which provides for an opt-out regime but that, as the US Terms and Conditions contained a US choice of law clause, it ought to have been construed by reference to US laws. It was submitted that as the US law has an opt-in regime, the clause required a different construction.
2. The primary judge committed no error in his identification of the manner in which the class action waiver operated in relation to the provisions of Part IVA of the FCA Act. Although he used the language of construction, it is clear that he was merely identifying what the clause would require of the passenger were a class action, of which the passenger was a member, to be commenced. That conclusion as to the clause’s operation was open to the primary judge. By it the passenger covenanted not to litigate any claim individually or to litigate any claim as a member or part of any class. Necessarily, the negative aspect of the clause requires that the passenger not take any action by which they prosecute their claim against Princess as part of a class action. That obligation would encompass within it not remaining part of an action into which they have been drawn by its being commenced by a third party. If that occurred, compliance with the clause would require them to do that which is necessary to opt-out. Remaining in an action once there was an opportunity to leave would fall within the description of litigation by the passenger of the class action. There was, with respect, no error in the primary judge’s identification of the operative effect of the class action waiver and, it follows that there was no inconsistency between the clause and Part IVA.
3. In the context of this issue it is useful to observe the presumption that a person may renounce or waive a benefit conferred upon them by statute. As was said by Allsop CJ in *Federal Commissioner of Taxation v McGrouther* (2015) 229 FCR 466, 467 – 468 [4] – [5]:

Whilst s 14ZYA(3) is clear, the words of that subsection, and the section as a whole, should be read in the context of accepted maxims or canons of construction of statutes. One such maxim (*quilibet potest renunciare juri pro se introducto*) is that “[a]ny one may, at [her or] his pleasure, renounce the benefit of a stipulation or other right introduced entirely in [her or] his own favour”: Broom H, A Selection of Legal Maxims (10th ed, Sweet & Maxwell Ltd, 1939) p 477.

The form and context in which the maxim operates are various. They include the proposition that everyone may renounce a benefit or waive a privilege which the law has conferred on her or him: *Rumsey v North-Eastern Railway Company* (1863) 14 CB (NS) 641 at 649; 143 ER 596 at 600 per Erle CJ. See also *Brown v The Queen* (1986) 160 CLR 171 at 178 and the cases there cited.

See also the observations of Pagone and Davies JJ at 472 – 473 [23].

1. The effect of the submissions made on behalf of Mr Ho was that any purported waiver of the “benefit” of participating in the class action would not be enforced because it was inconsistent with the purpose of Part IVA which confers rights in the public interest. In this respect, Mr Pike SC sought to bring the circumstances of the present case within the observations of French CJ, Crennan, Kiefel and Bell JJ in *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 144 – 145, [46] to the effect that:

[A] person upon whom a statute confers a right may waive or renounce his or her rights unless it would be contrary to the statute to do so. It will be contrary to the statute where the statute contains an express prohibition against “contracting out” of rights. In addition, the provisions of a statute, read as a whole, might be inconsistent with a power, on the part of a person, to forego statutory rights. It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

(Footnotes omitted).

1. Mr Pike SC submitted that it was a matter of public interest that a person should be precluded from exercising the right to opt out of a class action before the time prescribed by a court under Part IVA. This, so the submission went, was supported by the report of the Australian Law Reform Commission entitled *Grouped Proceedings in the Federal Court* (Report No 46, 1988), in which it was observed that the twin objectives of the grouped proceeding provisions were to enhance access to justice by allowing for the collectivisation of claims that might not be economically viable as individual claims, and to increase the efficacy of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits. Whilst Mr Pike SC sought to emphasise the latter over the former, it would be wrong to ignore the ALRC’s recommendation that the proposed scheme intended to permit the collectivisation of individual claims as opposed to mandating it. It is apparent that the benefit being conferred was upon the individual who might secure what they might perceive to be a more economically viable course to the enforcement of their rights other than by pursuing litigation by themselves. In this sense the right to be part of the class action has the appearance of an individual right.
2. The substance of Mr Ho’s contention was that, if the class action waiver given by Mr Ho was enforced, the system under Part IVA would be brought into disrepute as a consequence of the existence of concurrent parallel actions. However, there is no public policy in Part IVA which is inconsistent with a person’s right to agree not to pursue a claim as a member of a class action. The primary judge was correct to observe that the optional nature of participation in class actions under Part IVA preserves freedom of choice and strongly suggests that an agreement not to be part of any proceedings under it gives rise to no inconsistency. If a party is entitled to agree not to take advantage of a statutory provision which has accrued to them, there is no immediately obvious reason why they are unable to agree in advance not to exercise it if and when it becomes available. As the submissions made on behalf of Princess observed, no specific provision in Part IVA was identified by the respondent as being inconsistent with the passenger’s agreement to opt-out if the circumstances arose. Although reference had been made to the alleged safeguards in ss 33J, 33X and 33Y, and, in particular, that the class members must receive notice of their ability to opt-out of the proceedings, there is nothing in those sections which indicated inconsistency with a party entering into an agreement to opt-out in advance. Section 33J which provides for the right of persons to opt-out of class actions requires the Court to fix a date by which they may do so, and further provides the means for that to occur. Importantly, by s 33J(2) a group member is given an entitlement to opt out prior to the date fixed by the Court and before receiving the notice. That is consistent, rather than inconsistent, with a person being entitled to agree in advance to exercise that right when it subsequently becomes available. Similarly, ss 33X and 33Y facilitate the process by which a person is, *inter alia*, informed of their entitlement to exercise the right under s 33J. Although they were referred to as “safeguards” by the respondent, to the extent to which they fit that nomenclature it is because they safeguard a party being involuntarily kept in an action in respect of which they had no or insufficient knowledge. They are not safeguards against a party obtaining a benefit or bargaining for one by surrendering in advance the right to participate in a class action.
3. It was submitted by Mr Pike SC that the provisions referred to facilitate the provision of information to people who become class members and informs them of the circumstances which might influence their decision to opt-out. It was then submitted that it would be inconsistent with the conferral of those benefits for a person to forego in advance the right to choose whether to remain a member of the class. Unfortunately, no basis for that submission was provided. Many rights are bestowed by statute upon individuals who may agree in advance not to rely upon them despite not then having full knowledge of what their future value may be. There is no self-evident reason why a person who might elect to forego the enjoyment of a right when it arises cannot do so in advance of it being available. Similarly, there is no underlying public policy basis for preventing individuals from bargaining away their private rights which might vest in them under statute in the future despite not being as fully informed as they may become subsequently. Indeed, as was submitted by Mr McLure SC, if it were otherwise it would follow that choice of law clauses, agreements to arbitrate and the like would all be offensive to Part IVA.
4. In addition, here the right in question is procedural rather than substantive. The agreement not to litigate against Princess in a class action has no impact on the passenger’s substantive entitlement to damages. If Mr Pike SC’s submissions were correct it would have the consequence that in no circumstance could a party enter into a valid agreement which included a covenant not to sue or limited that right, because that might infringe the alleged policy of Part IVA. If any such restriction on an individual’s right to deal with their interests were intended, one might have expected it to appear in clear language. It might be added that it was not suggested that the nature of the cruise industry was such that Mr Ho was unable to secure passage on another liner for a similar cruise on terms which did not include a class action waiver.
5. It was also submitted that if representative proceedings arose where an aspect of membership of the relevant group was having entered into a contract and that contract contains a class action waiver, there could never be any class action in relation to a common breach of the agreement. However, that consequential argument is not to the point. The scheme of Part IVA is not mandatory but permissive, both as to whether it is availed of and of who participates. The mere fact that there are common questions amongst potential claimants does not mandate that a class action must be pursued. Indeed, there are probably many claims with common issues which are not pursued under Part IVA or other cognate schemes. That may be because of the lack of a willing funder, insufficient prospects, or some other reason. Further, even if the circumstance arose that no class action could be pursued, that occurs only because the plaintiffs have, in accordance with the principles of contract law, agreed to waive their entitlement to do so as consideration for the benefits which they otherwise receive.
6. It was suggested in the course of the appeal that the determination as to what is or is not contrary to public policy might depend on the number of potential group members. It was submitted that, regardless of what might be the case in relation to smaller groups of potential common litigants, a class action waiver in a passage contract for a cruise on which there are thousands of people would necessarily be contrary to public policy. Again, however, nothing was identified to justify the differential application of public policy or to even identify how it arose from the words of Part IVA. With respect, it is far from self-evident that a submission based on public policy becomes stronger where there is an increase in the number of persons who are deprived of the right to choose the course of action which best suits their interests.
7. There was no substance to the submissions on behalf of Mr Ho in relation to this issue. It was merely asserted that the foregoing of the right to participate in a class action was inconsistent with Part IVA but no foundation for that submission exists. This ground of the Notice of Contention should be rejected.
8. The primary judge’s conclusion as to the operative scope of the class action waiver was that it was not confined to class actions commenced in the United States. That construction was correct. There is nothing in the words of the clause which operate to limit its scope. The words, “any lawsuit whatsoever”, and, “waive any law”, are broad and unambiguous such that they would apply to proceedings in any jurisdiction. It was not seriously contended to the contrary. Whilst it can be accepted that the contract is to be read as a whole and that the intention of the parties is that any proceedings be prosecuted in California, there is nothing to suggest that if Princess waived its entitlement to rely upon the exclusive jurisdiction clause, the other clauses of the contract were not enforceable.

#### Is the class action waiver contrary to public policy?

1. Although by the Reply filed in these proceedings, several bases were advanced as to why the class action waiver was unenforceable, there were none suggesting that it was contrary to some overarching public policy which would render it void or unenforceable. Nevertheless, prior to the hearing of the appeal the Court invited the parties to make submissions on a recent decision of the Court of Appeal of British Columbia in *Pearce v 4 Pillars Consulting Group Inc* (2021) 461 D.L.R. (4th) 205. That concerned a class action in which the group members sought to recover fees paid to 4 Pillars Consulting Group Inc in respect of insolvency restructuring advice which that company had provided. The decision in question related to some interlocutory applications, one of which concerned whether 4 Pillars was entitled to rely upon a class action waiver in its standard form agreement. Griffin J (with whom Goepel and Abrioux JJ agreed) identified that the essence of the plaintiffs’ claims was that 4 Pillars had provided debt restructuring advice to its clients in violation of the *Business Practices and Consumer Protection Act 2004* (BC). The contravention occurred because 4 Pillars did not hold a relevant licence. The standard form agreement between 4 Pillars and its clients contained a class action waiver which the claimants asserted was invalid. The primary judge had held that the class action waiver was contrary to s 4 of the *Class Proceedings Act 1996* (BC) and was therefore inoperative. He also held that there was strong cause not to enforce it on the grounds of public policy, largely on the basis that the claims involved were so small that, absent the class proceedings, they would not be ventilated. On the appeal, Griffin J first held that the clause was unenforceable because it was unconscionable. Her Honour then proceeded to consider whether the Courts would otherwise have refused to enforce it on what were regarded as public policy grounds because it might oust the court’s supervisory jurisdiction or undermine the administration of justice. In doing so she referred (at 264 – 266 [217] – [220]) to the principle that “a clause that effectively prohibits a party’s ability to have recourse to a justice system to enforce their agreement undermines the administration of justice, the rule of law, democracy and commercial certainty”: *Uber Technologies Inc. v Heller* (2020), 2020 SCC 16: and that the principle extended to where one party would suffer undue hardship in seeking redress. In the circumstances of the case before the Court, her Honour held that the clause was contrary to public policy. At 217 [248] it was said that:

Although it is unnecessary to determine the issue given the above conclusion, I am of the view that the class action waiver clause is also unenforceable as being contrary to public policy. I reach this conclusion because I am of the opinion that the class action waiver significantly interferes with the administration of justice. It has the practical effect of precluding the respondent, and class members, from having access to a dispute resolution process in accordance with the law for claims arising from the relationship between these parties.

1. In elucidating this point her Honour observed (at 272 [256]) that the clause would have the effect of requiring the individual claimants to bring their own action in support of their claims which would result in a waste of judicial resources, involve a duplication of fact finding, and raise the potential for inconsistent judgments. If separate hearings were required for all claimants, damage would be inflicted on all Canadians by soaking up judicial resources. It was also said (at 273 [259]) that the class action waiver would limit access to the Courts by preventing the class members from sharing costs and that, in the circumstances of the case, the participating members would not pursue an action given the low monetary value of the claim and the complexity of issues. The consequence was that the clause functionally prohibited access to the Courts. The third reason relied upon was that the class action would be frustrated, with the result that any behavioural modification in relation to the defendant’s conduct would be defeated. Griffin J also considered that the right to waive an entitlement to participate in a class action in the future was not the same as the right to waive it after being fully informed of the benefits of participating after the events in question have arisen and a claim is made. She considered this more important in the case before her where there was a substantial inequality of bargaining power.
2. There are a number of reasons why reliance on this decision does not assist Mr Ho. Firstly, there is no pleaded claim that the class action waiver is contrary to some amorphous overriding public policy. Second, there is nothing in the circumstances of this case to suggest that the claims are of such a low monetary value that individual claims would not be worth pursuing. On the contrary, each claim was not merely in respect of the cost of the cruise but also sought substantial damages for personal injury, distress and loss of enjoyment. Third, there was nothing to suggest that Mr Ho or any other passenger whose ticket was subject to the US Terms and Conditions would not be able to pursue his claim if they were unable to join the class action. The passengers who were engaged on a 13 day cruise for a holiday are unlike the purported class members in *Pearce v 4 Pillars Consulting Group Inc*, being individuals on the verge of bankruptcy. In the present case the evidence before the Court was that there are 11 separate proceedings by passengers whose ticket incorporated the US Terms and Conditions in the US District Court in California which indicates that the class action waiver does not inhibit the bringing of claims. Fourth, in the matter before the British Columbian Court of Appeal the class participants were in a vulnerable position and, in relation to the respondent, a position of significant bargaining inequality from which they were unable to negotiate. None of that exists in the present matter where if Mr Ho, who had ample opportunity to consider the terms of the passage contract, might have rejected them and sought a different 13 day cruise with another cruise company. Each of these reasons or any combination of them are sufficient to reject any claim based on the type of public policy referred to in *Pearce v 4 Pillars Consulting Group Inc*. That, however, should not be taken to suggest any acceptance that the very broad Canadian principles of public policy through which the courts there exercise socio-political as opposed to legal power, have any relevance in Australia.

### The exclusive jurisdiction clause does not offend the Contracts Review Act

1. By a further ground of the Notice of Contention it was alleged that both the exclusive jurisdiction clause and the class action waiver were unfair contract terms within the meaning of s 7(1) of the *Contracts Review Act 1980* (NSW). It was submitted that, by reason of s 17(3) of that Act, it applied regardless of the choice of law clause contained in the passenger contract prescribing the application of the general maritime law of the United States. That section provides:

(3) This Act applies to and in relation to a contract only if:

(a) the law of the State is the proper law of the contract,

(b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State, or

(c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.

1. It was submitted on behalf of Mr Ho, and apparently seriously, that s 17(3)(b) applied in this case and that, but for the choice of law clause in the passenger contract, the law of New South Wales would be the contract’s proper law. In order to establish that, it would have to be shown that the law of New South Wales was “the system of law … with which the transaction has its closest and most real connection”: *Bonython v Commonwealth* (1950) 81 CLR 486, 498 *per* Lord Simonds. At first instance, the primary judge had no difficulty in disposing of this submission. His Honour correctly concluded that, absent the choice of law clause, the proper law of the contract would not be that of New South Wales. He observed that the contract was between a resident of Canada and a Bermudan company based in California, and it was concluded in Canada with the consideration for performance being paid in Canadian dollars. His Honour accepted that on the basis that the US Terms and Conditions were part of the contract there existed an exclusive jurisdiction clause in favour of courts in the United States. As to the performance of the contract his Honour held (PJ [157]), and it is not challenged, that although the voyage commenced and ended in New South Wales, only 1.5% of it was within Australian territorial waters. 37.1% of the voyage’s duration was spent within New Zealand’s territorial sea, whilst 61.4% was spent on the high seas or in the Contiguous Zone or Exclusive Economic Zone of either Australia or New Zealand. His Honour also recognised that, had the cruise proceeded according to its original schedule even less time would have been spent in Australian territorial waters.
2. The fact that the voyage commenced and ended in New South Wales did not elevate the law of that State as the contract’s proper law. At best, the law of New South Wales had only a passing connection with the transaction. Whilst it is true that the primary judge did not identify the law with which the passenger contract did have its closest and most real connection, he was appropriately satisfied that it was not the law of New South Wales: (PJ [158]). No error has been shown to exist in his Honour’s reasoning in this respect.
3. It should be added that even if the *Contracts Review Act* applied to the passenger contract, the class action waiver was not an “unfair term” for the same reasons that it could not be so described under s 23.

## Ground 3 – enforceability of the class action waiver under the general maritime law

1. It remains to determine whether the class action waiver is enforceable in accordance with the proper law of the contract, being the general maritime law of the United States. Under that law, the terms of a passenger ticket will be enforceable where (i) the provision is reasonably communicated to the passenger; and (ii) enforcement of the provision would not be fundamentally unfair: *Oltman v Holland Am. Line, Inc*., 538 F.3d 1271, 1276 (9th Cir. 2008); *Carnival Cruise Lines, Inc. v Shute*, 499 U.S. 585, 590, 595. There was no dispute in these proceedings as to the content of this part of the US general maritime law. It is apparent that the issue of the efficacy of class action waivers under the general maritime law has come before the Courts on several occasions and it is well accepted in the United States that they are valid and enforceable: See esp *AT&T Mobility LLC v Concepcion* 563 U.S. 333 (2011). There was no dispute as to this issue on the appeal.
2. It is of assistance in this case that the particular wording of the passenger contract in the form of the US Terms and Conditions was the subject of consideration in *Archer v Carnival Corporation*. It is to be recalled that, in that case, the passenger’s attention was brought to the US Terms and Conditions and the class action waiver by the Booking Confirmation and the link to the Cruise Personaliser in the same manner as they were in this case. The United States District Court, C.D. California, held that the clause was valid and should be enforced as a result of it satisfying the “reasonable communicativeness” test (as discussed above) and because it passed the fundamental fairness test. In the latter respect, it was held that there was no evidence of bad-faith, fraud, overreaching, or an attempt to discourage the pursuit of legitimate claims by Princess including the term in its standard US Terms and Conditions. It was accepted that class action waivers were common in many industries and their validity had been regularly upheld. Nor was the class action waiver an unconscionable term. Similar terms had previously been upheld in passage contracts for cruising and, they were not procedurally unfair because, although they were secured by the result of unequal bargaining power, there had been reasonable communication of them.
3. In the present case, the primary judge failed to apply the general maritime law of the United States to ascertain the validity of the class action waiver. Had he done so however, the inevitable result would have been to uphold the validity and enforceability of the class action waiver.

# Ground 6 – Should a stay be denied on discretionary grounds

1. On the assumption that the US Terms and Conditions applied, the primary judge determined that the exclusive jurisdiction clause was not an unfair term under s 23. In the ordinary course, Princess would, *prima facie*, have been entitled to a stay of the proceedings commenced in contravention of the agreement to resolve disputes in Los Angeles. However, the primary judge recognised that it was well established that the Court retained a discretion whether to stay the proceedings and that the principles on which it might be exercised had been formulated by Brandon J in *The Eleftheria* [1970] P 94 at 99 – 100, and had been approved and cited by Dawson and McHugh JJ in  *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418, 428 – 429 (*Akai v The People’s Insurance*):

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising the discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

(Line breaks added).

1. Although Mr Ho bore the onus of establishing “strong grounds” or “strong reasons” to refuse Princess’s application for a stay of the proceedings: *Oceanic Sun Line v Fay* at 224 *per* Brennan J and 259 *per* Gaudron J; *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [21]: his Honour determined that they existed and would have exercised the discretion to refuse to enforce the exclusive jurisdiction clause. This conclusion is challenged by Princess on a number of grounds.
2. The first was that the primary judge considered the issue on the basis that Princess was unable to rely upon the class action waiver as against those passengers whose passage contracts were subject to the US Terms and Conditions. On that conclusion, the members of the US subgroup would, if the action was not stayed, have had the significant advantage of being able to remain members of the class action in Australia. For the reasons which have been given above in relation to the class action waiver, the primary judge’s reliance on this factor was in error. Princess is entitled to enforce it such that, even if the claims by the US subgroup are not stayed by reason of the exclusive jurisdiction clause, the members of that group would nevertheless be required to abandon their participation in the current proceedings. It follows that the learned primary judge’s exercise of the discretion was vitiated by his reliance on the existence of “strong grounds” when the foundation for that reliance was misplaced: *House v R* (1936) 55 CLR 499, 504 – 505.
3. The second challenge concerned his Honour’s conclusion that the granting of a stay would have the consequence of fracturing the litigation. His Honour had held (PJ [332]) that if a stay was granted the current proceedings would continue in relation to those whose passage contract was subject to the UK terms or the Australian terms, which represented the vast majority of passengers on the voyage. The claims, evidence and facts in relation to the claims of those passengers would generally be identical to the US subgroup members’ claims. This, so the primary judge held, had the consequence that there would a fracturing of the litigation with essentially the same claims being brought in this Court and a Court in the United States. His Honour concluded (at PJ [333]):

There is a firm legal policy against fracturing litigation in that way. It is wasteful of the parties’ resources and it is wasteful of judicial resources. But more particularly, it runs the risk of producing conflicting outcomes in different courts. That is undesirable for a number of reasons, including that it brings the administration of justice into disrepute.

1. Whilst the general principle in relation to the fracturing of litigation can be accepted, it generally applies when litigation is threatened in another court between identical parties. Here, that is not the case. The parties to the different proceedings will not be the same with the result that, although the conclusions reached in the separate pieces of litigation may be different, they would not be conflicting and nor would they bring the administration of justice into disrepute. It would merely mean that different results were reached in different litigation between different parties.
2. The primary judge’s heavy reliance on the alleged fracturing of the litigation was misplaced. In truth, the litigation, being the claims between Princess and the individual passengers, is not fractured. Whilst the form of a class action facilitates the determination of common questions and issues, the proceedings are the accumulation of the separate individual claims. It is only the combined process of the class action which would be affected by the granting of a stay and not the individual claims. Moreover, even if it might be said that the granting of the stay would result in a fracturing of the litigation, giving that factor such substantial influence denies the presumptive weight which ought to be accorded to the parties’ bargain. The effect of the primary judge’s methodology allowed the interests of third parties to displace the balancing of rights as between the contracting parties and it would have the unsatisfactory consequence that class actions will nearly always defeat an exclusive jurisdiction clause between the defendant and some of the class members.
3. Mr Pike SC relied upon *Incitec Ltd v Alkimos Shipping Co* (2004) 138 FCR 496 (*The Alkimos*) to support the proposition that the unnecessary duplication of litigation is a powerful reason for not enforcing an exclusive jurisdiction clause. In that case the Australian Quarantine and Inspection Service had refused to permit the discharge of a cargo of fertilizer from the vessel, “The Alkimos”. A cargo interest, Incitec Ltd, commenced proceedings against both the vessel’s owner, Alkimos Shipping, and the time charterer, Hyundai Merchant Marine. Pursuant to cl 17 of the time charter, the London Maritime Arbitrators Association arbitration clause was incorporated and it provided that any dispute arising out of or in connection with the time charter be referred to arbitration in London. After Incitec commenced proceedings in the Federal Court of Australia, Alkimos Shipping and Hyundai Merchant Marine varied the exclusive jurisdiction clause in the time charter to replace London arbitration with proceedings in the High Court of Justice. Alkimos Shipping sought leave to cross-claim against Hyundai Merchant Marine in the Federal Court action. The Court was required to determine whether that claim should be stayed by reason of the exclusive jurisdiction clause. Allsop J (as the Chief Justice then was) refused the stay placing particular weight on the potential difficulties arising from the fragmentation of the litigation which might lead to inconsistent determinations on the same issues as between the same parties. His Honour said (at [62]):

The very existence of the possibility, if not probability, of duplicated litigation is, on modern authority of the highest persuasive stature a cogent consideration in assessing the effect of an exclusive jurisdiction clause. This is for good and powerful reasons based on the cost and inconvenience of litigation and the desire not to foster the circumstances of courts coming to different conclusions about the same facts on perhaps different, or even the same, evidence.

1. However, the circumstances encountered there are quite different from those of the present case. There, the cross-claim was inextricably connected with the cargo interest’s action for loss of the cargo such that the possibility of different determinations related to the same question as between the same parties. In the present matter Mr Ho’s claim for loss is distinct from that of the other claimants. His claim is based on his contractual, common law and statutory rights as against Princess in relation to the circumstances in which he suffered loss or damage, and in respect of which no other party has an interest. If the stay is granted there is no possibility of different determinations being made in relation to the same issue as between the same parties. There is nothing in *The Alkimos* which assists the respondent in the present matter.
2. In refusing the stay the primary judge also relied (PJ [336] – [337]) upon the assumption that Australian law concerning misleading or deceptive conduct could not be adequately applied by the US District Court. He purported to apply the decision in *Epic Games v Apple Inc* at 88, [110], to the effect that the process of determining claims in the US Court through the prism of expert evidence about the content of Australian law is not the same as ascertaining and applying the law directly. This, his Honour held, weighed in favour of refusing a stay. With respect, that reliance on *Epic Games v Apple Inc* was misplaced. Whilst the ability of a foreign court to apply Australian law to a dispute is a factor to be considered, necessarily the weight given to it will depend upon the centrality of Australian law to the real issues in dispute. In *Epic Games v Apple Inc* the claims under Part IV of the CCA and s 21 of the ACL were pivotal to Epic Games’ proceedings. They were also identified by the Full Court as being provisions of great economic significance to Australia because anti-competitive practices threaten the Australian market. The inference from the Full Court’s decision is that foreign courts ought not to determine matters relating to the proper conduct of Australian markets. Whilst the primary judge recognised that the public policy considerations were not the same in this case, he considered (at PJ [337]) there were public policy considerations which favoured ACL claims being heard by Australian courts. They were that some of the ACL’s provisions establish normative standards of commercial behaviour expected of corporations undertaking trade and commerce in Australia and that they offer protections and remedies to consumers in Australia. Whilst that might be accepted, nearly all laws impose standards of behaviour which offer protection to those whose rights have been affected and they are usually enforced by the courts of the jurisdiction in which they apply. If this were a factor of any significance it would have the result of substantially undermining the principle that the party opposing a stay in the face of an exclusive jurisdiction clause is required to establish strong grounds.
3. The alleged contraventions of the ACL in this matter are principally concerned with factual matters relating to express and implied representations as to the quality of the care which Princess would take in relation to the protection of the passengers boarding the *Ruby Princess*. Necessarily, the strength of those representations is dependent upon the knowledge of the relevant parties at the time and, in this respect, it is not unfair to observe that some of the representations pleaded in paragraphs 269 – 272 of the statement of claim are, to a degree, somewhat speculative. Moreover, the damages claim in paragraph 285 does not plead the facts necessary to establish any relevant causal nexus between the alleged representations and the losses sustained: See the line of cases commencing with the observations of French J in *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215, 222 which are set out in *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2020] FCA 1018 [82]. Overall, despite the claim being poorly pleaded, it is neither complex nor does it appear to raise any difficult question of principle. There was no submission to the contrary.
4. The primary judge held that the claims arising under the ACL were neither novel nor complex and nor was it likely that Courts in the United States would decline to exercise their “supplemental jurisdiction” to deal with them were they to be part of proceedings pursued there. In relation to the claims under the ACL his Honour held (at PJ [313]):

… The claims have analogues in US law but, more importantly, Australian law on the ACL provisions that are relied on is reasonably well established and settled. It is on the factual issues rather than the legal issues that the principal debate is going to be in determining the claims. That seems to me to be well within what the US Court, like Australian courts, regularly does in applying foreign law. …

1. On the primary judge’s conclusions that the Courts of the United States would accept jurisdiction to deal with the ACL claims which turned on factual rather than legal issues, it is most unlikely that the US subgroup members would suffer any prejudice were the exclusive jurisdiction clause to be enforced. There was nothing which suggested that the foreign courts would face any difficulty in dealing with these claims. Further, there was nothing to suggest that any determination by a court in the United States would be other than purely dispositive, in the sense that there are no novel or unique legal issues which arise for consideration. Regardless of where the matter is heard there was no apparent point of principle to be resolved. That ought to have negated the primary judge’s concern (at PJ [336]) that the judgment of the US court would not contribute to the body of Australian law.
2. Neither is there anything unique or special about the prohibition on misleading or deceptive conduct as provided for by the ACL. Before the learned primary judge there was evidence, which he appears to have accepted, that misleading and deceptive conduct and similar tort actions are well recognised in the United States and that the issues raised by such claims would not be novel to those courts.
3. In these circumstances, the primary judge erred by according the ACL claims advanced in the class action some special or unique status which weighed in favour of the existence of strong grounds not to enforce the exclusive jurisdiction clause. The particular claims advanced are quite distinct from those pursued in *Epic Games v Apple Inc* and they are not of the type which could reasonably be accorded substantial weight in the context of the exercise of the discretion.
4. It was submitted on behalf of Mr Ho that, if the action is stayed and he is required to litigate in California, the class action waiver would be enforced there and he would lose the entitlement to participate in any form of group proceedings. For the reasons previously given, the class action waiver is not unfair and is enforceable in Australia and that has the consequence that he would suffer no prejudice by litigating in California. However, on the assumption that it would not be enforced here, an issue arose as to whether it could be said that the ability to avoid the clause’s operation was a legitimate juridical advantage which might generate “strong reasons” not to grant a stay based on the exclusive jurisdiction clause. Mr McLure SC submitted that there was no case where a mere procedural advantage in the local forum was sufficient to support the exercise of the discretion and that what was required was some form of substantive legal benefit such as entitlement to pursue a particular cause of action. Mr Pike SC did not identify any authority to the contrary. There is, with respect, some substance to the obvious distinction between substantive and procedural rights in this context. Whilst the entitlement to pursue a substantive claim in one jurisdiction but not in another obviously impacts the balance of the parties’ rights and obligations and is therefore inherently important, the same does not apply in relation to procedural rights. Matters of procedure are usually concerned only with the method by which substantive rights are enforced and, in any particular jurisdiction, they are the framework for the resolution of the substantive rights. Whilst the procedural scheme of courts may differ, they are generally not directed to altering the outcome of the dispute as between the parties. On that basis, whether a supposed procedural advantage is obtained in one jurisdiction or the other should be significantly less important than any variation in the parties’ substantive rights. As the guidelines articulated in *Akai v The People’s Insurance* indicate, the discretion to grant a stay is generally concerned with substantive rather than procedural rights. Further, to the extent to which a perceived procedural advantage might be available in this jurisdiction, the exercise of the court’s discretion not to stay proceedings brought in contravention of an exclusive jurisdiction clause will necessarily impose an equivalent detriment on the party seeking to maintain the obligation.
5. Mr Pike SC relied upon the observations of Kirby P in *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414, 438 – 439, as giving some guidance as to the matters which might be taken into account in exercising a discretion not to stay a matter commenced in breach of an exclusive jurisdiction clause. However, the issue in that case was whether the proceedings in the Dust Diseases Tribunal of New South Wales should be stayed on *forum non conveniens* grounds and not whether a stay should be granted because the proceedings were brought in contravention of an exclusive jurisdiction clause. A further important point of distinction is that the advantage sought to be obtained in that case was the avoidance of certain limitation periods in the jurisdiction in which the torts were allegedly committed and where the causes of action accrued. Although the limitation period in the jurisdiction chosen by the plaintiff might be described as a “procedural right”, it had the effect of permitting him to advance his substantive claim whereas in the *loci delicti* his substantive claim was effectively nullified. In the context of the present case the denial of the right to participate in the class action does not deny Mr Ho any right to enforce his claim. He is entitled to pursue it as others have in the US District Court in Los Angeles, California. That being so, the circumstances being considered by Kirby P were far from those of the present case.
6. Mr Pike SC also relied upon the observations of Kiefel CJ and Keane J in *Wigmans v AMP Ltd* (2010) 388 ALR 272, 284 where their Honours said:

[42] In *Moore v Inglis*, Mason J approved the statement of Lord Esher MR in *The Christiansborg* that where an action is prima facie vexatious “it would lie on the party who brings the second action to [show] that it was not so”. As explained in *Voth*, that may be done by showing that the second action offers some “legitimate … juridical advantage” over the first. By “legitimate juridical advantages”, one refers to the advantages arising from the processes and remedies available in the courts. In *Spiliada Maritime Corporation v Cansulex Ltd*, Lord Goff of Chieveley instanced as examples of such advantage cases where “damages [are] awarded on a higher scale; a more complete procedure of discovery [is available]; a power to award interest [is available]; [or] a more generous limitation period [applies]”. Lord Goff qualified the relevance of such factors with the statement that “the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice”.

1. It can be accepted that the concept of legitimate juridical advantage does extend to procedural advantages where the issue is whether or not proceedings should be stayed on *forum non conveniens* grounds. However, again, that is not the issue in this case which involves circumstances where the parties have agreed upon an exclusive jurisdiction clause and one seeks to avoid its effect.
2. Even if it were appropriate to take into account the comparative procedural advantages between the forum agreed upon and that in which the litigation has been commenced, the question must surely be whether the procedural advantage to the party who has commenced the litigation in breach of the exclusive jurisdiction clause amounts to “strong cause” for not holding that party to their agreement. In that evaluation it must be kept in mind that refusal of a stay may well have the effect of exposing the party seeking to enforce the clause to procedural obligations or requirements which they had sought to avoid and may deprive them of procedural advantages in the forum on which the parties had agreed. Save from a parochial point of view, it is not self-evident that imposing on a party the more onerous procedural obligations of the forum in which the party acting in breach of the exclusive jurisdiction clause has chosen provides support for concluding that “strong reason” has been shown not to grant a stay.
3. It is not necessary to decide in this case whether a court should take into account a procedural advantage of the forum to the party commencing the action which has the effect of permitting them to pursue a claim which is not available to them in the chosen jurisdiction. Here, there was no question that Mr Ho could have commenced proceedings in California as had other passengers.
4. The necessary conclusion is that the learned primary judge’s discretion miscarried. Mr Ho had failed to establish “strong reasons” or “strong grounds” for effectively relieving him from the effect of the exclusive jurisdiction clause to which he had agreed such that Princess should not have been denied its *prima facie* entitlement to a stay. The stay sought by Princess in its interlocutory application filed 28 June 2021 should be granted.

# RELIEF

1. The nature of the relief which should be granted given Princess’s success on appeal was the matter of some debate before the Court. It was submitted that whilst Princess may be entitled to declarations as between it and Mr Ho, as the primary judge had held that there was no common question as to whether the US subgroup members entered into a contract with Princess on the passage contract terms, no other orders could be made which affect the rights of those other parties. Mr McLure SC submitted that although there was no explicit appeal from that finding, the relief which was sought by the Notice of Appeal made it clear that such was in issue. He submitted that orders should be made that Mr Ho be made the representative party of a US subgroup and that part of the proceedings should be stayed. Were it otherwise, others in the same position as Mr Ho might assert their entitlement to remain part of the class action and further proceedings would have to be pursued by Princess seeking stays in relation to those parties.
2. Whilst there is force to these submissions, it is preferable that the matter be remitted to the primary judge for determination as to the extent to which Mr Ho’s circumstances are replicated amongst other passengers. That is particularly so in circumstances where the issue on which the parties were joined was fact sensitive and dependent upon the agency of Rosanna when acting for Mr Ho in the booking of his ticket and the extent to which those circumstances are representative of the bookings made by other passengers is not known.
3. The orders of the Court should be as follows:
4. The appeal is allowed.
5. Order 1 of the orders of the Federal Court of Australia made on 20 September 2021 in this matter be set aside and, in lieu thereof, it is ordered that:
   1. It is declared that the passage contract as between Mr Patrick Ho and the respondents pursuant to which Mr Ho undertook a voyage on the vessel, *Ruby Princess*, departing Sydney on 8 March 2020, was subject to the terms of the US Terms and Conditions as that expression is used in the reasons for judgment of this Court.
   2. The proceedings in respect of the claims of Mr Patrick Ho as against the respondents be stayed.
   3. The matter be remitted to the primary judge for determination of the extent to which the reasons for decision of this Court affect the claims of other members of the class action.
6. Order 7 of the orders of the Federal Court of Australia made on 21 October 2021 in this matter be set aside and, in lieu thereof, it is ordered that the applicant pay the respondents costs of the application.
7. The respondent pay the appellants’ costs of the appeal.

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| I certify that the preceding three hundred and one (301) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 2 September 2022