HIGH COURT OF AUSTRALIA

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### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY REGISTRY**

**BETWEEN:** **SUSAN KARPIK**

Appellant

and

**CARNIVAL PLC (ARBN 107 998 443)**

First Respondent

**PRINCESS CRUISE LINES LIMITED**

**(A COMPANY REGISTERED IN BERMUDA)**

Second Respondent

## APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

**Part I: Certification.**

These submissions are in a form suitable for publication on the internet.

**Part II: Propositions to be advanced in oral argument**

**Appeal Ground 1 / Contention Grounds 1 and 2: Extraterritorial application of s 23**

1. **Correct approach.** The question of whether a forum statute applies to a cause in the face of any foreign element, such as a contract being governed by foreign law, is one of statutory construction. It does not require: (a) the anterior application of choice of law principles; (b) that the forum statute applies only if the statute "demands" application irrespective of a foreign *lex causae*; or (c) any resort to the principle of legality: AR [2]-[5].

2. **Section 5(1) extends s 23.** The text, legislative history, context and purpose confirm that s 5(1) CCA extends the operation of s 23 ACL to contracts entered into outside of Australia by bodies corporate carrying on business in Australia. The scheme of enforcement of the norm includes ss 250, 232 and 237 ACL: AS [19]; AR [6].

3. **No additional nexus.** Like other ACL provisions, s 23 does not contain any express further territorial limitation. There is no scope to read in such a limitation because the statute has expressly addressed its territorial reach: AS [20]-[22]; AR [7]-[8].

4. **Presumption.** The presumption that a statute does not apply to a matter governed by foreign law has no role to play because: (a) the presumption is but an aspect of

the more general presumption in favour of international comity or against extra-territorial operation of statues which may have little role to play in a given case; (b) there is no offence to comity or international law in giving ss 5 and 23 full reach; (c) the central focus of the statute evinces a territorial connection rendering any further limitation unnecessary and inapt in the context of the policy of the statute addressed to a consumer contract of adhesion; (d) the suggested limitation would create an easy means for evasion of the statute through a foreign choice of law clause: AR [10].

5. **Place of performance.** Alternatively, if a further territorial connection is required, either in addition to or instead of s 5(1), it is sufficient if the contract is not wholly performed outside of Australia: AR [11].

**Appeal Ground 2(a): Class action waiver clause an unfair term**

6. **Australian norms.** Whether a term is unfair must be assessed by Australian norms, not the norms of the place of the consumer's residence or the parties' choice of law or jurisdiction: AS [29], [31]-[32].

7. **Significant imbalance.** The class action waiver clause created a significant imbalance in the parties' rights under the contract because it had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually was uneconomical: AS [30]-[33].

8. **Legitimate interest.** Princess has not discharged its onus of establishing that the clause was reasonably necessary to protect a legitimate interest: AS [34]-[35].

9. **Detriment.** The clause would cause detriment if relied upon. Mr Ho will lose the benefit of common findings on fact and law as well as losing the ready means of avoiding the risk of adverse costs exposure and the outlay of expenses: AS [36].

10. **Transparency.** The class action waiver clause was not presented clearly or reasonably available to Mr Ho: AS [37]; appellant's chronology.

**Appeal Ground 2(b): Class action waiver clause contrary to Part IVA**

11. **Contracting out.** In addition to an express prohibition, a contract will not be enforceable if: (a) the provisions of a statute read as a whole are inconsistent with a power to forgo its benefits or (b) the policy and purpose of the statue show that the rights which it confers on individuals are given not for their benefit alone, but also

in the public interest, and are therefore not capable of being renounced: *Price v Spoor* (2021) 270 CLR 450, [39]: AS [38].

12. **Policy of Part IVA.** The purpose of Part IVA is to enhance access to justice for claimants and increase the efficiency in the administration of justice. Those twin public policy objectives are achieved by an 'opt out' regime under which the court controls the information on which group members will make their choice whether to opt out: AS [39]; ALRC Report JBA 11 / tab 66, [2], [15], [103], [107], [127], [195].

13. **Inconsistency.** Part IVA is inconsistent with a power in group members to forgo its benefits, let alone a power to bind themselves by contract to do so, save in accordance with the opt out scheme administered by the court: AS [40]-[46].

**Appeal Ground 3: Strong reasons not to enforce the exclusive jurisdiction clause**

14. **Juridical advantage.** The class action waiver clause being void or unenforceable, the majority erred in interfering with Stewart J's discretion: AS [48]. The unenforceability of the clause here is no mere procedural advantage: AR [22].

15. **Fracturing of the litigation.** Stewart J correctly held that enforcement of the exclusive jurisdiction clause would fracture the litigation: the representative proceeding continuing in the Federal Court of Australia and individual proceeding(s) being commenced in the US District Court. This risks inconsistent outcomes in respect of identical claims which may bring the administration of justice into disrepute as well as being wasteful of the parties' and judicial resources: AS [50]-[51]. That the proceedings are representative proceedings does not detract from the fracturing principle: AS [51]; AR [23].

16. **Public policy of the ACL.** The desirability of the ACL being interpreted and applied by Australian Courts rather than through the prism of expert evidence in a foreign court was not an irrelevant factor in the discretion. In any event, it was given only limited weight. With or without it, Stewart J correctly rejected the stay: AS [49].

Justin Gleeson

**3 August 2023**

**Justin Gleeson SC**

**Counsel for the Appellant**