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Article Information

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The Full Federal Court allows consumers to waive their right to be a group member in class actions through standard terms and conditions.

A recent appeal in the Full Federal Court has provided clarification on the enforceability of class action waivers, allowing consumers to waive their right to be a group member through standard terms and conditions.

Background

In 2020, the Ruby Princess and Princess Cruises came under scrutiny due to the COVID-19 outbreak that occurred on the vessel. Following a number of investigations in Australia and New Zealand, including a Special Commission of Inquiry headed by Bret Walker AO SC, this case is the latest probe into Princess Cruises' responsibility (if any).

On 23 July 2020, Mrs Susan Karpik, the lead plaintiff commenced proceedings against Carnival Plc and Princess Cruise Lines Ltd (collectively, the **Respondents**) in the Federal Court of Australia for negligence and various breaches of the Australian Consumer Law.[1] That proceeding was funded by litigation funder Balance Legal Capital.

On 28 June 2021, the Respondents filed an interlocutory application, in part, to stay the claims brought by Patrick Ho (the US sub-group representative) and Mrs Wright (the UK sub-group representative).

In response, the plaintiff requested further issues for determination, including whether the class action waiver clause was unenforceable. Relevantly, Justice Stewart found that the class action waiver clause was unenforceable and void as an unfair contract term under section 23 of the Australian Consumer Law.

A class action waiver clause is frequently in consumer contracts formed with companies based in the US and other overseas jurisdictions, and may now become a more frequent feature in Australian based contracts. The clause operates to preclude a potential group member from participating in class action proceedings against the other party to the contract.

Prior to the primary decision, there was relative uncertainty around the enforceability of class action waivers in Australian jurisprudence. What was apparent was that his Honour's decision stood in contrast with jurisprudence in the United States.

Carnival plc v Karpik (The Ruby Princess) [2022] FCAFC 149 concerns an appeal from Justice Stewart's decision.

Findings

Heard before Allsop CJ, Rares and Derrington JJ, their Honours, by way of 2:1 majority (Rares J dissenting) overturned Stewart J's determination that the class action waiver was void under section 23 of the Australian Consumer Law.

Derrington J (Allsop CJ mostly agreeing) found that:

1. Limitations on the right to sue are not prima facie "unfair" at [252];

2. The class action waiver clause does not cause a significant imbalance in the parties rights and [253] – [259] because:

    2.1 the class action waiver clause does not impede on Mr Ho's substantive right to bring proceedings

against Princess in relation to any damages suffered;

2.2 the class action waiver clause does not create any economically inviable conditions for Mr Ho to bring proceedings against Princess;

2.3 the class action waiver clause does not provide an opportunity for Princess to exploit the unequal financial standing of the parties;

3. The class action waiver clause is reasonably necessary to protect Princess' legitimate interests at [260] – [271]; and

4. The class action waiver clause was not unfair at [272]-[273].

However, Justice Rares disagreed and determined that parties are not able to seek to contract out of class action proceedings. His Honour found that:

1. The legislative intent behind Part IVA of the Federal Court Act (relevant to Class Actions) would be undermined if the Court allowed parties to contract out of the right to commence representative proceedings at [50] – [69]; and

2. The Full Federal Court lacked the power to enforce a class action waiver [70] – [80].

Implications

The finding that class action waiver clauses are not inconsistent with Part IVA of the *Federal Court Act 1976* (Cth) poses implications for plaintiff lawyers and litigation funders as well as general public policy concerns.

A closely related issue concerns the enforcement of exclusive jurisdiction clauses requiring litigation or arbitration to be conducted in a foreign jurisdiction. The exclusive jurisdiction clause in The Ruby Princess, which nominated California as the jurisdiction, was also found by the majority to be enforceable. (That decision can be contrasted with the Full Court's decision *Epic Games v Apple Inc* [2021] FCAFC 122 in which a jurisdiction clause was not enforced, but involved claims under part IV Competition and Consumer Act 2010 (Cth) as opposed to the Australian Consumer Law.)

While it is not uncommon to see liability limiting or excluding clauses in standard form contracts, there is usually a live issue as to the extent those provisions can be enforced in the context of claims under the Australian Consumer Law. The decision in The Ruby Princess may herald a rise in alternative contractual means of indirectly achieving the same objective.

[1] *Karpik v Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082.