Federal Court of Australia

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

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| File number: |  |
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| Judgment of: | **STEWART J** |
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| Date of judgment: | 10 September 2021 |
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| Catchwords: | **PRIVATE INTERNATIONAL LAW** – application for stay of sub-group members’ claims in representative proceeding alleging contraventions of Australian Consumer Law (ACL) ss 18, 29, 60 and 61 – where exclusive jurisdiction clause requires claims to be brought in the US District Courts for the Central District of California in Los Angeles – whether there are “strong reasons” to refuse the grant of stay – where proceedings commenced as a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (FCA Act) – where not all members of class subject to exclusive jurisdiction clause – where clause appears in consumer contract of adhesion – whether US District Courts have and would exercise jurisdiction over ACL claims – if the exclusive jurisdiction clause does not apply, whether the Federal Court is a clearly inappropriate forum**CONTRACTS** – incorporation of terms – whether carrier’s terms and conditions were incorporated into contract of carriage – where link provided in booking email to webpage that displayed multiple different sets of terms – where booking email received over one month after booking was concluded – whether there was reasonable notice of unusual terms **CONSUMER LAW** – unfair terms – whether exclusive jurisdiction clause and class action waiver clause in a consumer contract of adhesion are unfair terms – whether reliance on class action waiver clause is unconscionable**PRACTICE AND PROCEDURE** – representative proceedings – application for stay of proceedings on basis of class action waiver clause – whether unenforceable by reason of being contrary to Pt IVA of the FCA Act – consideration of whether a stay would be an appropriate remedy**PRACTICE AND PROCEDURE** – representative proceedings – whether interlocutory application raises common questions **SHIPPING AND NAVIGATION** – consideration of applicable law for torts occurring on the high seas**STATUTORY INTERPRETATION** – whether s 138 of the *Competition and Consumer Act 2010* (Cth) requires the Federal Court to exercise jurisdiction properly invoked in respect of ACL claims |
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| Legislation: | *Carriage of Goods by Sea Act 1991* (Cth) ss 8, 11, 20, Sch 1A Art 3 r 8*Competition and Consumer Act 2010* (Cth) Pt IV, ss 4, 5, 86, 138, 138A, 138B, 138E ; Sch 2 (Australian Consumer Law) ss 18, 21, 23, 24, 25, 29, 60, 61, 67, 236, 237*Corporations Act 2001* (Cth) ss 58AA, 232, 233, 1317H*Evidence Act 1995* (Cth) s 75*Federal Court of Australia Act 1976* (Cth) ss 23, 33C, 33E, 33H, 33J, 33K, 33L, 33M, 33N, 33P, 33Q, 33R, 33S, 33ZB, 33ZF, Pt IVA*Federal Court Rules 2011* (Cth) rr 9.34, 30.01*Insurance Contracts Act 1984* (Cth) ss 8, 52, 54*Sea-Carriage of Goods Act 1924* (Cth) (repealed) s 9(2)*Trade Practices Act 1974* (Cth) (repealed) ss 51AC, 52, 67, 68, 86, 87*Trans-Tasman Proceedings Act 2010* (Cth) s 19*Contracts Review Act 1980* (NSW) ss 7, 17*Fair Trading Act 1987* (NSW) Pts 3, 6A*Supreme Court Act 1986* (Vic) s 33KA*Package Travel and Linked Travel Arrangements Regulations 2018* (UK)*United States Code*, Title 28 §§1333, 1367*Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974* done at Athens on 13 December 1974, as amended by the Protocol amending it done at London on 1 November 2002*International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* done at Brussels on 25 August 1924 and the Protocol amending it done at Brussels on 23 February 1968 |
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| Cases cited: | *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd (Stay Application)* [2021] FCA 754*ACCC v Chrisco Hampers Australia Ltd* [2015] FCA 1204; 239 FCR 33*ACCC v CLA Trading Pty Ltd* [2016] FCA 377; ATPR 42‑517*ACCC v Valve Corp (No 3)* [2016] FCA 196; 337 ALR 647*Agro Co of Canada Ltd v The Ship “Regal Scout”* (1983) 148 DLR (3d) 412*Akai Pty Ltd v People’s Insurance Co Ltd* (1995) 126 FLR 204 at 227; 8 ANZ Ins Cas 61-254*Akai Pty Ltd v The People’s Insurance Co Ltd* [1996] HCA 39; 188 CLR 418*Amaca Pty Ltd v Frost* [2006] NSWCA 173; 67 NSWLR 635*Archer v Carnival Corporation and PLC* WL 6260003 (CD Cal, 2020)*Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355; 148 ACSR 14*AT&T Mobility LLC v Concepcion* 563 US 333 (2011)*Australia Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2018] NSWSC 1236*Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61; 99 NSWLR 419*Bahrampour v Lambert* 356 F 3d 969 (9th Cir 2004)*Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1*BMW Australia Ltd v Brewster* [2019] HCA 45; 374 ALR 627*Bonython v Commonwealth* [1950] UKPCHCA 3; 81 CLR 486*Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; 118 FCR 1*The Bremen v Zapata Off-Shore Co* 407 US 1 (1972)*Burke v LFOT Pty Ltd* [2002] HCA 17; 209 CLR 282*BVT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 222; 385 ALR 286*Carnegie-Mellon University v Cohill, Judge, United States District Court for the Western District of Pennsylvania* 484 US 343 (1988)*Carnival Cruise Lines, Inc v Shute* 499 US 585 (1991)*Carter v Rent-A-Center, Inc* 718 F App 502 (9th Cir, 2017)*Clarke Equipment Australia Ltd v Covcat Pty Ltd* [1987] FCA 96; 71 ALR 367*Commonwealth Bank of Australia v White* [1999] VSC 262; [1999] 2 VR 681*Compagnie des Messageries Maritimes v Wilson* [1954] HCA 62; 94 CLR 577 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* [1975] HCA 49; 133 CLR 72*CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345*DA Technology Australia Pty Ltd v Discrete Logic Inc* [1994] FCA 101*DA Technology Australia Pty Ltd v Discreet Logic Inc* (1994) 28 IPR 578 *Deiro v American Airlines, Inc* 816 F 2d 1360 (9th Cir, 1987)*DeLuca v Royal Caribbean Cruises, Ltd* 244 F Supp 3d 1342 (SD Fla, 2017)*Dialogue Consulting**Pty Ltd v Instagram, Inc* [2020] FCA 1846*Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896; 252 FCR 150*Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544; 291 FLR 173*Douez v Facebook Inc* 2017 SCC 33; [2017] 1 SCR 751*Dyzcynski v Gibson* [2020] FCA 120; 381 ALR 1*East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda)* [2019] UKPC 30; [2020] 2 All ER 294*eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768; 170 FCR 450*The Eleftheria* [1970] P 94*Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338*Epic Games, Inc v Apple Inc* [2021] FCAFC 122*Ethicon Sàrl v Gill* [2018] FCAFC 137; 264 FCR 394*Executive Software North America, Inc v United States District Court for Central District of California* 24 F 3d 1545 (9th Cir 1994)*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89*Faxtech Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320*The Fehmarn* [1958] 1 WLR 159*Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383*Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133*Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* [1988] FCA 42; 39 FCR 546*Henry v Henry* [1996] HCA 51; 185 CLR 571*Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757*The Hollandia* [1983] 1 AC 565*Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd’s Rep 70*Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033*Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093*Hope v Bathurst City Council* [1980] HCA 16; 144 CLR 1*Huddart Parker Ltd v The Ship “Mill Hill”* [1950] HCA 43; 81 CLR 502*Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698; 138 FCR 496*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433*Jetstar Airways Pty Ltd v Free* [2008] VSC 539*John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503*Liberty Mutual Insurance Company v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126*Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1*Nicola v Ideal Image Development Corporation Inc* [2009] FCA 1177; 215 FCR 76*Oltman v Holland America Line, Inc* 538 F 3d 1271 (9th Cir, 2008)*Perera v GetSwift Ltd* [2018] FCAFC 202; 263 FCR 92*Pompey Industrie v ECU-Line NV* 2003 SCC 27; [2003] 1 SCR 450*Price v Spoor* [2021] HCA 20*Public Service Association of South Australia v Federated Clerks’ Union of Australia* [1991] HCA 33; 173 CLR 132*Puttick v Tenon* [2008] HCA 54; 238 CLR 265*Quinlan v Safe International Försäkrings AB* [2005] FCA 1362*P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176*Pioneer Concrete Services Ltd v Galli* [1985] VR 675*Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10; 210 CLR 491*Royal Caribbean Cruises Ltd v Browitt* [2021] FCA 653*Smith, Valentino & Smith, Inc v Superior Court of Los Angeles County* 17 Cal 3d 491 (1976)*Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871*Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd’s Rep 588*Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460*Thiel v Federal Commissioner of Taxation* [1990] HCA 37; 171 CLR 338*Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163*Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; 259 CLR 212*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165*Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6; 247 FCR 1*Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] HCA 32; 165 CLR 197*Uber Technologies Inc v Heller* 2020 SCC 16*Valve Corporation v ACCC* [2017] FCAFC 224; 258 FCR 190*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538*Wallis v Princess Cruises, Inc* 306 F 3d 827 (9th Cir, 2002)*Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54; 247 CLR 129Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988)Davies M, Bell AS, Brereton PLG and Douglas M, *Nygh’s Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, 2020) |
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| Solicitor for the Respondents: | Clyde & Co |

ORDERS

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|  | NSD 806 of 2020 |
|   |
| BETWEEN: | SUSAN KARPIKApplicant |
| AND: | CARNIVAL PLC (ARBN 107 998 443 / ABN 23107998443)First RespondentPRINCESS CRUISE LINES LTD (A COMPANY REGISTERED IN BERMUDA)Second Respondent |

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| order made by: | STEWART J |
| DATE OF ORDER: | 10 September 2021 |

THE COURT ORDERS THAT:

1. The parties liaise with the associate to Stewart J to arrange a date for a hearing to consider the form of orders to be made on the respondents’ amended interlocutory application filed on 28 June 2021 to reflect the reasons for judgment published today.
2. The parties confer with a view to agreeing the form of orders to be considered by the Court at the hearing referred to in Order 1.
3. Failing agreement as referred to in Order 2, at least two full days before the hearing referred to in Order 1 the parties file and serve the form of orders they each contend for and written submissions (of no more than three pages) in support of such orders.

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

REASONS FOR JUDGMENT

|  |  |
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| A. INTRODUCTION | [1] |
| B. THE PRESENT INTERLOCUTORY APPLICATION | [17] |
| C. INCORPORATION OF THE RELEVANT CLAUSES | [25] |
| C.1 The applicable principles | [31] |
| C.2 The Princess booking arrangements | [33] |
| C.3 Mr Ho’s contract | [41] |
| C.4 The Princess “Cruise Personalizer” webpage | [53] |
| C.5 Whose agent was the travel agent? | [61] |
| C.6 Analysis and conclusion | [68] |
| D. IS INCORPORATION OF THE U.S. CLAUSES A COMMON QUESTION? | [90] |
| E. Are the relevant U.S. clauses enforceable? | [98] |
| E.1 Is the class action waiver clause contrary to Pt IVA of the FCA Act? | [102] |
| E.2 Are the clauses unfair under Pt 2-3 of the ACL? | [122] |
| E.2.1 The exclusive jurisdiction clause | [134] |
| E.2.2 The class action waiver clause | [138] |
| E.3 Is reliance on the class action waiver clause unconscionable? | [146] |
| E.4 Are the clauses unjust under s 7 of the CRA? | [155] |
| F. THE BASES ON WHICH THE RESPONDENTS SEEK A STAY OF THE U.S. AND U.K. SUB-GROUPS’ CLAIMS | [159] |
| F.1 Introduction | [159] |
| F.2 Exclusive jurisdiction clause: applicable principles | [165] |
| F.2.1 The rule in Akai | [165] |
| F.2.2 The effect of Australian Health v Hive | [175] |
| F.3 Class action waiver clause | [195] |
| F.4 Clearly inappropriate forum | [196] |
| G. IS A STAY PROHIBITED BY SECTION 138 OF THE COMPETITION AND CONSUMER ACT? | [208] |
| G.1 Introduction | [208] |
| G.2 Public Service Association (1991) | [220] |
| G.3 DA Technology (1994) | [223] |
| G.4 Akai (1996) | [226] |
| G.5 Nicola (2009) | [239] |
| G.6 Faxtech (2011) | [243] |
| G.7 Douglas Webber (2014) | [246] |
| G.8 Home Ice Cream (2018) | [251] |
| G.9 Epic v Apple (2021) | [261] |
| G.10 Analysis and conclusion | [270] |
| H. APPLICABLE LAW FOR THE NEGLIGENCE CLAIMS | [278] |
| I. CONSIDERATION OF A STAY IF THE RELEVANT U.S. CLAUSES WERE INCORPORATED AND ENFORCEABLE | [289] |
| I.1 The exclusive jurisdiction clause | [290] |
| I.1.1 Are the claims available in the US Court? | [291] |
| The experts | [291] |
| The choice of law mechanism | [297] |
| The jurisdiction of US federal courts | [299] |
| The same case or controversy (28 USC §1367(a)) | [304] |
| Novel or complex issues of law (28 USC §1367(c)(1)) | [308] |
| Substantially predominate over claims in the original jurisdiction (28 USC §1367(c)(2)) | [316] |
| Compelling reasons for declining jurisdiction (28 USC §1367(c)(4)) | [320] |
| Summary of conclusions on US law | [326] |
| I.1.2 Should the US sub-group claims be stayed on Akai grounds? | [331] |
| I.2 The class action waiver clause | [339] |
| J. CLEARLY INAPPROPRIATE FORUM | [349] |
| J.1 The US sub-group | [353] |
| J.2 The UK sub-group | [360] |
| K. DISPOSITION | [370] |

STEWART J:

# A. INTRODUCTION

1. On 8 March 2020, at a time when the current COVID-19 global pandemic was at its relative infancy, the passenger ship *Ruby Princess* departed from Sydney on its ill-fated voyage RU2007 with some 2,600 passengers on board. During the voyage there was an outbreak of disease on board. After having visited a number of scheduled ports in New Zealand, the cruise was cut short and the ship returned to Sydney, arriving on 19 March 2020. A substantial number of passengers contracted the disease and some died.
2. By way of representative proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the applicant, Susan Karpik, asserts claims against **Carnival** plc, the first respondent and time charterer of the vessel, and **Princess** Cruise Lines Ltd, the second respondent and owner and operator of the vessel. Mrs Karpik and her husband were passengers on the voyage. Mrs Karpik says that she and her husband contracted COVID-19 on the voyage. Her husband, in particular, became gravely ill which resulted in him spending nearly two months in hospital including a long time in intensive care where he was ventilated, intubated and unconscious for about four weeks.
3. In summary, the group members in the proceeding are the following:
4. Passenger Group Members who were passengers on board the vessel during the voyage;
5. Executor Group Members who are the executors and administrators of the deceased estates of persons who contracted COVID-19 during or as a result of the voyage and subsequently died as a consequence; and
6. Close Family Group Members who are the close family members or loved ones of a passenger who travelled on the voyage who suffered a recognised psychiatric injury, mental harm or nervous shock as a result of the passenger contracting COVID-19 during or as a result of the voyage and the passenger subsequently died or became severely ill.
7. The claims advanced on behalf of the group members in the proceeding are, first, claims at common law alleging the tort of negligence and, secondly, statutory claims under the Australian Consumer Law (**ACL**) (*Competition and Consumer Act 2010* (Cth) (**CCA**), Sch 2).
8. The first tort claim alleges that the respondents breached their duties of care by allowing the voyage to proceed at all. The second tort claim alleges that the respondents breached their duties of care by failing to take adequate measures during the cruise to protect passengers from the risk of contracting COVID-19. The third tort claim alleges that the respondents breached their duties of care by failing to warn passengers of the risk of contracting COVID-19 and that adequate measures could or would not be implemented during the cruise to protect passengers from the risk of contracting COVID-19.
9. The first ACL claim alleges breaches of guarantees imposed by ACL ss 60 and 61. In reliance on ACL s 61(1), it is alleged that the respondents guaranteed that the services of supplying the voyage and necessary information about the voyage would be reasonably fit for the purpose of providing a safe, relaxing and pleasurable 13-day cruise holiday and to “come back new” from that holiday. In reliance on ACL s 61(2) it is alleged that the services supplied by the respondents were not of such a nature, quality, state or condition that they might reasonably be expected to achieve the result of passengers having a safe, relaxing and pleasurable cruise, and to “come back new”. “Come back new” is said to be a registered trademark of Princess and to have been used to advertise and promote the voyage. In reliance on ACL s 60 it is alleged that in supplying the services the respondents breached a guarantee that the services would be rendered with due care and skill.
10. The second ACL claim alleges false, misleading or deceptive conduct by the respondents contrary to ACL ss 18 and 29(1)(b). In that regard it is said that the respondents made a number of representations with respect to the voyage which were false, misleading or deceptive. Those representations are:
11. a “safety representation”, namely that it was safe to board the vessel for the voyage;
12. a “protection representation”, namely that the health of the passengers on the voyage would be adequately protected;
13. a “best practices representation”, namely that the respondents had implemented adequate protocols to protect the health of their passengers that were designed to be flexible to adapt to changing conditions and recommended best practices; and
14. a “pleasurable cruise representation”, namely that the passengers would have a relaxing, pleasurable and enjoyable time on the vessel and would come back feeling new.
15. As a result of the alleged breaches of the duties of care and the guarantees, and the false, misleading or deceptive representations, it is alleged that the applicant and group members have suffered various loss and damage. For the applicant, that includes non-economic loss damages for “distress and disappointment”. Although it is said that the loss and damages for other group members is still to be provided, on the applicant’s approach to the case all passengers would have claims for loss and disappointment. That means that on the face of it, the proceeding includes claims in respect of all the passengers on the voyage except those who commenced separate proceedings before the statement of claim was filed or who had died other than from COVID-19 acquired on the voyage.
16. Early in the case management of the proceeding, the respondents contended that all of the passengers on the voyage were subject to one or other of three different contractual terms and conditions that were said to apply to their bookings. The different terms and conditions are referred to as the US terms and conditions, UK terms and conditions and Australian terms and conditions; how those terms and conditions arose is dealt with below. In that regard, the respondents say that there were 2,651 people who travelled as revenue passengers on the voyage of whom:
17. 696 contracted on the US terms and conditions;
18. 159 contracted on the UK terms and conditions; and
19. 1,796 contracted on the Australian terms and conditions.

(There were apparently four additional revenue passengers who are recorded as having booked under agency base code “CN” meaning that the contract is said to have been on the US terms and conditions but in a Chinese language.)

1. As dealt with in more detail below, the US terms and conditions include an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles (the **US Court**) and courts located in Los Angeles County or, failing that, an arbitration clause providing for arbitration under the United States Federal Arbitration Act, a choice of law clause applying the general maritime law of the United States or the laws of the State of California, and a class action waiver clause.
2. The UK terms and conditions include a non-exclusive jurisdiction clause in favour of English Courts and a choice of law clause applying EU Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents and the ***Athens Convention*** *relating to the Carriage of Passengers and their Luggage by Sea, 1974* done at Athens on 13 December 1974, as amended by the Protocol amending it done at London on 1 November 2002.
3. As a result of the respondents indicating during case management that they wished to rely on the US and UK terms and conditions in respect of the passengers whom they contend are subject to those terms and conditions, and to apply for the stay of the proceeding insofar as those passengers are concerned, orders were made requiring the representative proceeding groups to be further divided into appropriate sub-groups.
4. The applicant then filed points of claim for Patrick Ho as a US sub-group representative and Julia Wright as a UK sub-group representative. Mr Ho and Mrs Wright have not been formally appointed as sub-group representatives as envisaged by s 33Q(2) of the FCA Act. One of the issues that arises for consideration is whether they should be so appointed.
5. Mr Ho’s points of claim identify him as a sub-group representative of passenger group members “who the respondents allege” are party to a relevant passage contract with one or other of the respondents that contains the relevant clauses in the US terms and conditions. The reason why the sub-group is defined on the basis of who the respondents allege are subject to the US terms and conditions, rather than on the basis of passengers actually subject to such terms and conditions, is that Mr Ho denies that he is subject to those terms and the applicant’s solicitors say that they have not been able to find anyone who accepts that they are so subject. The respondents, on the other hand, identify 696 passengers whom they say are subject to the US terms and conditions.
6. Mrs Wright’s points of claim identify her as a sub-group representative of passenger group members who are also a party to a relevant passage contract with one or other of the respondents that contains the relevant clauses in the UK terms and conditions.
7. With that introduction, I can now turn to the specifics of the present interlocutory application.

# B. THE PRESENT INTERLOCUTORY APPLICATION

1. By amended interlocutory application, the respondents seek an order pursuant to r 30.01 of the *Federal Court* ***Rules*** *2011* (Cth) or s 33ZF of the FCA Act that the following questions be heard and determined separately, and the determination of those questions:

***US sub-group members***

(a) Should the claims advanced by Patrick Ho be stayed on the grounds that:

(i) his claim is an abuse of process;

(ii) he is bound by an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles and courts located in Los Angeles County, California;

(iii) this Court is a clearly inappropriate forum for the hearing and determination of his claims; and/or

(iv) a stay is otherwise in the interests of justice?

(b) Should the claims of the US sub-group members be stayed on the grounds that:

(i) their claims are an abuse of process;

(ii) they are bound by an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles and courts located in Los Angeles County, California;

(iii) the Court is a clearly inappropriate forum for the hearing and determination of these claims; and/or

(iv) a stay is otherwise in the interests of justice?

(c) Should the Court’s judgment answering questions (a) and (b) above bind all US sub-group members save for those who have opted out of the proceedings under s 33J of the [FCA Act]?

(d) What is the system of law governing the claims in negligence brought by Patrick Ho?

(e) What is the system of law governing the claims in negligence brought on behalf of the of the US sub-group members?

***UK sub-group members***

(f) Should the claims advanced by Julia Wright be stayed on the grounds that:

(i) her claim is an abuse of process;

(ii) this Court is a clearly inappropriate forum for the hearing and determination of his claims; and/or

(iii) a stay is otherwise in the interests of justice?

(g) Should the claims advanced by the UK sub-group representative, on behalf of UK sub-group members, be stayed on the grounds that:

(i) the claims advanced on behalf of the UK sub-group members are an abuse of process;

(ii) the Court is a clearly inappropriate forum for the hearing and determination of these claims; and/or

(iii) a stay is otherwise in the interests of justice?

(h) Should the Court’s judgment answering questions (f) and (g) above bind all UK sub-group members save for those who have opted out of the proceedings under s 33J of the [FCA Act]?

(i) What is the system of law governing the claims in negligence brought by Julia Wright?

(j) What is the system of law governing the claims in negligence brought on behalf of the UK sub-group members?

1. The respondents also seek the following relief with regard to appointing Mr Ho and Mrs Wright as sub-group representatives:

2. An order pursuant to s 33Q(2) of the [FCA Act]:

(a) establishing a sub-group consisting of those Passenger Group Members who are party to a relevant passage contract with the first and/or second respondent that contains:

(i) a choice of law clause selecting the general maritime law of the United States or the laws of the State of California;

(ii) an exclusive jurisdiction clause selecting the courts of the United States or the State of California for claims of injury, illness or death;

(iii) an arbitration clause providing for arbitration pursuant to, inter alia, the United States Federal Arbitration Act, of all other claims; and

(iv) a class action waiver clause;

(**US sub-group members**)

(b) appointing Patrick Ho to be the sub-group representative party on behalf of the US sub-group members.

3. Further or alternatively, an order pursuant to r 9.05(1)(b)(ii) joining Patrick Ho as a party to the proceeding.

4. An order pursuant to s 33Q(2) of the [FCA Act]:

(a) establishing a sub-group consisting of those Passenger Group Members who are party to a relevant passage contract with the first and/or second respondent that contains:

(i) a choice of law clause selecting English law;

(ii) a non-exclusive jurisdiction clause selecting English courts; and

(iii) a clause providing for the application of the Athens Convention for liability for death or personal injury arising out of international carriage by sea;

(**UK sub-group members**)

(b) appointing Julia Wright to be the sub-group representative party on behalf of the UK sub-group members.

5. Further or alternatively, an order pursuant to r 9.05(1)(b)(ii) joining Julia Wright as a party to the proceeding.

6. An order staying the claims in the proceedings brought by Patrick Ho.

7. An order staying the claims in the proceedings brought by Julia Wright.

8. Costs

9. Such further or other orders as the Court thinks fit.

1. The applicant raises a number of contentions against the relief that the respondents seek. In particular, she denies that the clauses on which the respondents rely in respect of Mr Ho – namely, an exclusive jurisdiction clause and a class action waiver clause – are incorporated into his contract. The applicant also says that if either or both of these clauses are incorporated, they are void or otherwise unenforceable. The result is that the interlocutory application throws up the following additional issues for determination in order to decide on the relief sought by the respondents:
2. Is Mr Ho’s claim subject to the US terms and conditions?
3. Is it possible or appropriate to make any finding with regard to whether the rest of the US sub-group is subject to the US terms and conditions?
4. If either Mr Ho’s claim or the rest of the US sub-group’s claims are subject to the US terms and conditions, is it possible or appropriate to make a finding with regard to the following questions and, if so, what finding should be made:
	1. Is the exclusive jurisdiction clause unenforceable on account of:
		1. ACL Pt 2-3, i.e., unfair contract terms; and/or
		2. the *Contracts Review Act 1980* (NSW) (**CRA**), i.e., unjust in the circumstances relating to the contract at the time that it was made?
	2. Is the class action waiver clause unenforceable on account of:
		1. ACL Pt 2-3, i.e., unfair contract terms;
		2. the CRA, i.e., unjust in the circumstances relating to the contract at the time that it was made;
		3. FCA Act Pt IVA, i.e., representative proceedings legislation being mandatory law of the forum; and/or
		4. ACL s 21, i.e., unconscionable conduct?
5. Is the Court prohibited from staying any of the claims on account of CCA s 138 having the effect that once jurisdiction under that section is invoked it cannot be declined?
6. For the reasons which follow, I have decided to refuse the respondents’ application for a stay in respect of the claims of Mr Ho, the US sub-group, Mrs Wright and the UK sub-group. In summary, the application in respect of Mr Ho fails because the US terms and conditions are not incorporated into his contract and the issue of incorporation is not appropriate for me to determine as a common question in respect of the remainder of the US sub-group. I have also determined that this Court is not a clearly inappropriate forum in which to determine the claims of the US and UK sub-groups.
7. I have also reached the conclusion that if the exclusive jurisdiction clause and the class action waiver clause were incorporated, except for one, the applicant’s challenges to the enforceability of the clauses fail. The exception is that in my view the class action waiver clause would be void as an unfair contract term under ACL s 23.
8. I have also decided that it is not possible or appropriate to decide at this stage what system of law governs the claims in negligence of the US and UK sub-group members.
9. One result of the conclusions I have reached as identified above, is that there is no issue identified by the respondents that I have decided to determine separately in the present application. I have therefore not had to deal with the complexities with regard to different requirements of proof that arises where, in one application, some matters are dealt with on an interlocutory basis and others on a final basis.
10. On whether Mr Ho and Mrs Wright should be appointed sub-group representatives and the other relief identified in [18] above, I will require further submissions from the parties based on the conclusions that I have otherwise reached as reflected in these reasons.

# C. INCORPORATION OF THE RELEVANT CLAUSES

1. As previously mentioned, the relevant clauses that the respondents contend Mr Ho and the members of the US sub-group are subject to are an exclusive jurisdiction clause and a class action waiver clause, which are found in the US terms and conditions.
2. The exclusive jurisdiction clause is found at cl 15(B)(i) of the US terms and conditions and provides:

Claims for Injury, Illness or Death: All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated 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, USA, 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 clause is found at cl 15(C) and provides:

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. IF YOUR CLAIM IS SUBJECT TO ARBITRATION UNDER SECTION 15(B)(ii) ABOVE, THE ARBITRATOR SHALL HAVE NO AUTHORITY TO ARBITRATE CLAIMS ON A CLASS ACTION BASIS. YOU AGREE THAT THIS CLASS ACTION WAIVER SHALL NOT BE SEVERABLE UNDER ANY CIRCUMSTANCES FROM THE ARBITRATION CLAUSE SET FORTH IN SECTION 15(B)(ii) ABOVE, AND IF FOR ANY REASON THIS CLASS ACTION WAIVER IS UNENFORCEABLE AS TO ANY PARTICULAR CLAIM, THEN AND ONLY THEN SUCH CLAIM SHALL NOT BE SUBJECT TO ARBITRATION.

1. As will be seen, it is not contended that Mr Ho or any member of the US sub-group signed any contractual terms. The respondents principally rely on the various passengers having been given notice that particular terms and conditions apply to their booking. Cases in which such a method of incorporation of terms and conditions into a contract is employed are generally referred to as “ticket cases”. How it is said that Mr Ho was given notice is dealt with in sections C.2 – C.5 below.
2. In the case of Mrs Wright, it is common ground that her passage contract, and the passage contracts of the other members of the UK sub-group, contained the following clauses:

2 The Contract shall be between Princess and the Passenger on the basis of these Conditions and the information contained in the brochure or website, and shall be governed by English law and the non-exclusive jurisdiction of the English courts.

…

51 International Carriage of Passengers and their luggage by sea, including the Cruise, is governed by EU Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents … and the Athens Convention 2002 … The Athens Convention 2002 and EU Regulation 392/2009 are expressly incorporated into these Conditions and any liability of Princess for death or personal injury or for loss or damage to luggage arising out of international carriage by sea shall be solely brought and determined in accordance with the Athens Convention 2002 and EU Regulation 392/2009 which limit the carrier’s liability for death or personal injury or loss of or damage to luggage and make special provision for valuables. …

1. Given that there is no issue with regard to the incorporation of the UK terms and conditions in Mrs Wright’s contract, the remainder of this section of the judgment deals with whether the US terms and conditions were incorporated into Mr Ho’s passage contract. It is convenient to commence with the identification of the principles that apply to such cases.

## C.1 The applicable principles

1. Having recently undertaken the task of identifying the principles applicable to incorporation of contractual terms in ticket cases in *Royal Caribbean Cruises Ltd v* ***Browitt*** [2021] FCA 653, and leaving aside the first circumstance dealt with there which is where there is a signed document, I can do no better than set out the principles that I identified on that occasion:

79 Dealing *secondly* with the case where the person who is sought to be held to a contractual term did not sign the contractual document, this being the so-called “ticket cases”, the issuer of the document cannot rely on the terms unless it gave reasonable notice to the other party that the document contains contractual terms. Notice involves notice that there is writing of a contractual nature and it is not necessary for the precise terms to be communicated. Also, if the document can reasonably be expected to contain contractual terms that is sufficient even if in the particular case the person sought to be held to those terms was not actually aware of them. See *Parker v Eastern Railway Co* (1877) 2 CPD 416 at 421-423; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837 at 843 (Lord Finlay LC), 845 (Viscount Haldane) and 848-849 (Lord Parmoor); *Sydney City Council v West* [1965] HCA 68; 114 CLR 481 at 485-486 (Barwick CJ and Taylor J), 491-492 (Kitto J) and 503 (Windeyer J); *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* [1975] HCA 55; 133 CLR 125 at 138 (Stephen J) and 143 (Jacobs J); ***Toll v Alphapharm***[*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165] at [54].

80 In the case of unusual or onerous terms, the notice requirement is more exacting and will generally require that attention is drawn to the nature of the particular term in question. It was held in ***Oceanic Sun Line***[*Oceanic Sun Line Special Shipping Co Inc v Fay* [1988] HCA 32; 165 CLR 197] by Brennan J (at 228-229) as ratio that where an exemption clause is contained in a ticket or other documents 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.

81 In *Toll v Alphapharm*, with reference to that principle, it was said (at [53]-[54]) that there is no reason why it should apply only to exclusion clauses, that case being about an exclusion clause, and that the criterion by which a court might declare a contractual provision to be unusual or onerous is not always easy to identify. The principle applies to cases, such as ticket cases, in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document. That is when it is necessary that the party has done what is reasonably sufficient to give notice of such terms. See also ***Baltic Shipping*** *Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1 at 8 (Gleeson CJ) and 25 (Kirby P) (reversed on appeal but not on this point on which special leave to appeal had been granted but was rescinded, with Mason CJ for the Court stating that “there is no sufficient reason to doubt the correctness of the conclusion of the majority of the Court of Appeal on that point”: see “Damages for Disappointed Tourist: Applying the Contract Review Act” (1992) 13(2) Leg Rep 15; *Baltic Shipping Co v Dillon* [1993] HCA 4; 176 CLR 344 at 347); *National Australia Bank Ltd v Dionys* [2016] NSWCA 242 at [88]-[89] (Sackville AJA, with whom Macfarlan JA agreed) and [183]-[184] (White J).

82 *Thirdly*, where a party authorises an agent to contract on their behalf that party is bound by the terms on which the agent contracts: *Toll v Alphapharm* at [80]-[82].

(The bold typeface is added for shorthand reference in these reasons.)

1. To those principles can be added another, namely that once the contract is concluded it is too late to add terms and conditions to it by giving notice at some later stage of such terms and conditions that are said to apply to the contract: *Oceanic Sun Line* at 206-7 per Toohey and Wilson JJ, 228-9 per Brennan J (citing *The Dragon* [1979] 1 Lloyd’s Rep at 262), 256 per Deane J and 261 per Gaudron J; *Baltic Shipping* at 25B per Kirby P; *Browitt* at [54].

## C.2 The Princess booking arrangements

1. During the period when the passengers made bookings for voyage RU2007, there were three ways by which bookings could be made. First, bookings could be made by prospective passengers directly by telephone by calling a contact centre operated by Princess. Secondly, bookings could be made by prospective passengers directly by them visiting the Princess website and making an online booking. Thirdly, prospective passengers could make bookings through travel agents.
2. When a booking was made through any one of those methods, a booking was created in Princess’s computer booking system known as “POLAR”.
3. Evidence was given of the process that was expected to be followed when bookings were sought to be made at one of Princess’s contact centres, of which there are 10 located in different cities around the world. That evidence included what the contact centre employees are expected to communicate to customers who wish to make bookings, but just what any particular customer was told or how their booking was handled is a matter of speculation. Nevertheless, the mechanics of the booking system itself can be taken as common across all prospective customers making bookings by calling a contact centre. As one would expect, the contact centre staff member is the interface between the customer and the POLAR booking system.
4. Similarly, when a customer seeks to make a booking through a travel agent, the travel agent is the interface between the customer and the POLAR booking system. Authorised travel agents have direct access to POLAR. The travel agent (or the contact centre employee) generates the booking on the system by inputting necessary personal details of the prospective passenger if they are not already there from a previous booking, selecting the voyage for which the booking is sought and selecting other options such as the cabin. One of the personal details that must be provided is the passenger’s country of residence.
5. A booking number is then generated. The system provides an option for paying the deposit at that time, or paying the deposit later in accordance with the terms of the relevant booking.
6. Upon the generation of the booking number, the POLAR system automatically generates a booking confirmation document and a corresponding booking confirmation email, which are in all relevant respects identical. The terms of the document and the terms of the email will depend upon the “agency base code” automatically assigned to the booking. In that regard, all bookings have agency base codes designating one of three possible geographic areas, namely:
7. Australia and New Zealand, to which the Australian terms and conditions are said to automatically apply;
8. Great Britain, to which the UK terms and conditions are said to automatically apply; and
9. all other countries (i.e., excluding Australia, New Zealand and Great Britain) to which the US terms and conditions are said to automatically apply.
10. The particular agency base code assigned to a passenger’s booking depends on how the booking was made. If the prospective passenger made the booking through the Princess website, the agency base code would be determined by the designated location of the IP address of the device from which they made the booking or, if they had previously generated a princess.com login profile or account and had the status of being “authenticated” (i.e., they had logged in to their account on the princess.com website), then the country of residence that they had recorded in their profile would determine the agency base code.
11. If the booking was made by calling a contact centre operated by Princess, the agency base code would be determined with reference to the country in which the relevant contact centre is located. If the booking was made by a travel agent using the POLAR system, the agency base code would be determined with reference to the travel agent’s profile already recorded in POLAR.

## C.3 Mr Ho’s contract

1. Mr Ho did not give evidence himself. Rather, his solicitor, Ms Antzoulatos, gave evidence on the basis of instructions given to her by Mr Ho. Initially this raised a question about the admissibility of that evidence in the interlocutory application because, on one view, the application seeks final relief in relation to Mr Ho even though it is interlocutory in form. On that view, s 75 of the *Evidence Act 1995* (Cth) would not render the hearsay evidence admissible. The applicant, however, offered Mr Ho for cross-examination and, as I understand it, on that basis Ms Antzoulatos’s evidence of what Mr Ho told her was not objected to. Mr Ho was not cross-examined.
2. Mr Ho and his wife, Angela Ho, are residents of Calgary, Canada. On 25 September 2018, Mr Ho made a booking for him and his wife as passengers on voyage RU2007 with a travel agent, Rosanna Ho. Meaning no disrespect to her, but in an effort to avoid confusion, I will refer to Ms Rosanna Ho as Rosanna. Neither side of the case adduced any evidence from Rosanna.
3. Rosanna worked as a “Cruise Specialist” and “Consultant” for an organisation variously described as Expedia CruiseShipCenters and Paradise CruiseShipCenters. Those were apparently trading names or divisions of **CruiseShipCenters** International Inc of Vancouver.
4. It is not apparent whether Mr Ho met Rosanna face-to-face, or whether he dealt with her in some other way. It is said that he “contacted Cruise Ship Centers, based in Canada, and booked tickets on the Voyage” with Rosanna. At the time of booking he paid a deposit of CAD260 using a credit card and authorised Rosanna to use the same card for payment of the balance when required. At that time, Mr Ho was not provided with a passage contract or a link to a passage contract.
5. Upon Rosanna creating the booking in the POLAR system on 25 September 2018, a booking confirmation email with a booking confirmation document attached were automatically generated and sent by email from Princess to a general (i.e., not personal or personalised) email address for “princesscruises” at CruiseShipCenters. Because CruiseShipCenters is based in Vancouver, the bookings that its agents create are automatically assigned the agency base code for all other countries (i.e., referred to in [38(3)] above). As such, the booking documents that POLAR would have created and sent would have been those that were intended to incorporate the US terms and conditions.
6. The evidence does not reveal who at CruiseShipCenters receives such automatically generated booking confirmations addressed to that general email address. It may have gone directly to Rosanna, or it may have gone to someone else and then been forwarded to Rosanna, or it may never have been received by Rosanna. One simply does not know. It was not at that time sent to Mr Ho.
7. Three days later, on 28 September 2018, a booking confirmation email with a booking confirmation document attached was sent by email to Rosanna at her personal work email address at CruiseShipCenters. That was also not sent to Mr Ho.
8. On 30 October 2018, Mr Ho received two booking confirmation emails, both from Rosanna. The first was identified as being from her as a Cruise Specialist at CruiseShipCenters. The second, which was received by Mr Ho moments after the first, was a third Princess booking confirmation email with a booking confirmation document attached that Princess had sent to Rosanna at her email address. This time she did forward it to Mr Ho.
9. The CruiseShipCenters email to Mr Ho had the following relevant features:
10. It recorded the booking date as 25 September 2018 and recorded Princess’s booking number.
11. It recorded salient details of the cruise including the departure date from Sydney and identified the operating vessel.
12. It recorded that the booking was for Mr and Mrs Ho and specified their booked cabin and the fare, namely CAD1,796.17 each amounting to a total of CAD3,592.34.
13. It recorded that CAD510 had already been paid, CAD260 on 25 September 2018 as detailed above and a further CAD250 on 30 October 2018. The balance due was accordingly reflected as CAD3,082.34 which was said to be due on 2 December 2019.
14. A “CANCEL FEE SCHEDULE (PER PERSON)” was set out as follows:

10DEC19 10.0%

12JAN20 50.0%

09FEB20 75.0%

23FEB20 100.0%

1. Under a heading “Disclaimer” in bold, some terms and conditions were set out including the following:

Expedia CruiseShipCenters is acting as intermediary and agent for suppliers (“principals” identified in 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…

**Note Expedia CruiseShipCenters reserves the right to charge a cancellation fee of $100 per stateroom on all cruise travel or $100 for air or other travel arrangements. All bookings are subject to the applicable Terms and Conditions of the individual travel provider (air line, cruise line, hotel, etc.) including any applicable cancellation penalties.**

(Original emphasis.)

1. The Princess booking confirmation email forwarded to Mr Ho had the following relevant features:
2. As with the CruiseShipCenters email, it recorded the relevant details of the booking – ship, departure port, date, cabin, passengers’ names, etc.
3. It recorded the fare in exactly the same amounts as recorded in the CruiseShipCenters email, including the payment of the deposit, and the balance due on 2 December 2019.
4. It set out a cancellation schedule with the same dates and percentages as those reflected in the CruiseShipCenters email.
5. Under the heading “NOTICES” in bold, some terms and conditions are set out including:

Passports are required for international travel … See brochure for other terms and conditions, including the cancellation policy.

VISIT THE CRUISE PERSONALIZER AT PRINCESS.COM FOR FULL DETAILS, TO PROVIDE THE REQUIRED IMMIGRATION INFORMATION AND TO PR NT [sic] A BOARDING PASS AND LUGGAGE TAGS.

**GENERAL INFORMATION**

…

**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.

(Original emphasis.)

1. Mr Ho did not click on the link to the passage contract in the Princess booking confirmation email forwarded by Rosanna.
2. I should mention that neither the CruiseShipCenters booking confirmation nor the Princess booking confirmation identify the contracting carrier, i.e., Mr Ho’s contractual counterparty to the passage contract. The Princess booking confirmation has a logo for “Princess Cruises” which is both the name of Princess and a trading name of Carnival, so that it is unhelpful. However, Mr Ho’s points of claim allege that his contractual counterparty was Princess, and the defence to the points of claim admit that allegation. I accordingly accept that Princess was the contractual carrier.

## C.4 The Princess “Cruise Personalizer” webpage

1. The evidence on behalf of the respondents is that prior to departure, passengers (or travel agents on their behalf) should log on to the Cruise Personalizer portal on the Princess website. Between the date of booking and the cruise departure date, passengers are sent a series of POLAR generated emails containing information about their upcoming cruise and encouraging them to log on to the Cruise Personalizer.
2. When a passenger clicks on the link to Cruise Personalizer on the website or in one of the emails, they are taken to a login page where they are required to input certain personal information and their booking number. Once having done that, they are taken to a copy of the Princess website terms and conditions. They must affirmatively select the box accepting those terms and conditions before proceeding, at which stage the passage contract terms and conditions appear in a window. Only a small portion of the terms and conditions is visible in the window at any one time, but all the terms and conditions can be seen by scrolling through the window. A checkbox for each passenger on the booking must be checked indicating acceptance of the passage contract on behalf of each passenger, and then a button labelled “proceed” can be clicked in order to proceed to the next stage of the Cruise Personalizer.
3. The records reveal that on 22 July 2019, Mr Ho logged on to the Cruise Personalizer webpage with a view to reviewing the details of his booking.
4. Mr Ho says that he recalls seeing a window containing the passage contract with a button with the word “agree”. He says that he clicked the button as he was unable to proceed to the next part of the Cruise Personalizer without doing so. I infer that it was the “proceed” button that he clicked. The evidence is that he first checked the checkboxes for him and his wife, which he must have done in order to be able to proceed.
5. Mr Ho says that he did not read the terms of the passage contract prior to clicking the button.
6. On 4 December 2019, Mr Ho’s credit card was charged the balance of the fare in accordance with the authority he provided to Rosanna at the time of the booking.
7. Also on 4 December 2019, Mr Ho received an email from Rosanna confirming that his “cruise aboard the Ruby Princess had been paid in full” and setting out the details of the booking. Attached to the email was also a booking confirmation from Princess. Rosanna’s email contained the same “Disclaimer” terms as the email of 30 October 2019, and the Princess booking confirmation contained the same “NOTICES” terms as its booking confirmation email of 30 October 2019 including a link to the passage contract.
8. One of the questions that arises in considering whether Mr Ho’s booking was subject to the US terms and conditions, and in particular to the terms on which the respondents rely in their stay application, is the capacity in which Rosanna acted. That is to say, did she act as Mr Ho’s agent, as contended by the respondents, or as Princess’s agent, as contended by the applicant, or in some form of dual agency? That is the question to which I now turn.

## C.5 Whose agent was the travel agent?

1. I have already identified that CruiseShipCenters’ booking confirmation email to Mr Ho on 30 October 2018 stated that CruiseShipCenters acted “as intermediary and agents for suppliers (‘principals’ identified in the attached or accompanying documents)”. The accompanying booking confirmation email from Princess identified “Princess Cruises” (i.e., Princess) as the supplier. It is thus apparent that as between Mr Ho and CruiseShipCenters the arrangement or understanding was that CruiseShipCenters was Princess’s agent and not Mr Ho’s agent. That can be relevant to the question whether CruiseShipCenters was Mr Ho’s agent, amounting to a strong indication that it was not, but it cannot answer the question whether CruiseShipCenters was Princess’s agent because what a purported agent says or represents about their status as agent without the knowledge or endorsement of the purported principal cannot create the agency relationship or bind the purported principal: *East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda)* [2019] UKPC 30; [2020] 2 All ER 294 at [61] per Lord Kitchin, delivering the advice of the Board; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Company Pty Ltd* [1975] HCA 49; 133 CLR 72 at 78 per Gibbs, Mason and Jacobs JJ.
2. The relationship between Princess and CruiseShipCenters for the 2018 calendar year, which is when Mr Ho’s booking was made, was governed by a “Strategic Sales Agreement”. There are two such agreements in evidence, it not being clear which one applied. They are tabs 1 and 4 of Confidential Exhibit EMR-1 that is exhibited to the affidavit of Elena Maria Rodriguez. It does not seem to matter which is the applicable agreement because they both included the following provisions:
3. Princess would pay CruiseShipCenters a commission on sales (cl 1(a) and Addendum A).
4. All of Princess’s then-current advertising policies, sales policies and general terms and conditions of sale and OneSource terms and conditions found at www.onesourcecruises.com would apply to sales made under the agreement (cl 5).
5. CruiseShipCenters agreed to market all Princess products in a competent and professional manner to the best of its ability and deal fairly and in good faith with its passenger clients and Princess. Nothing contained in the agreement should be construed to affect or defeat the agency relationship between CruiseShipCenters and its passenger clients (cl 6).
6. The relationship of Princess and CruiseShipCenters to one another under the agreement is that of independent contractors and neither should be deemed the agent, partner or employer, or joint venturer with, the other for any purpose (cl 19).
7. In order for a travel agent to sell cruises for Princess in the US, Canada, Mexico or Puerto Rico they must first register to use something referred to as OneSource and accept its terms and conditions. OneSource is an online platform used across various brands operated by Carnival. Once a travel agent has registered to use the OneSource platform, the travel agent is able to access the POLAR online booking system.
8. The evidence is that in July 2018 the OneSource terms and conditions were updated and the updated version was then published to travel agents who were required to accept the updated terms and conditions. On 7 August 2018, Rosanna’s registration status on OneSource changed from “inactive” to “active” showing her acceptance of the revised terms and conditions on that date.
9. The OneSource terms and conditions to which Rosanna apparently agreed include the following:
10. The relationship between Princess and the travel agent would be that of independent contractors, and neither Princess nor its respective officers, agents or employees would be held or construed to be the travel agent’s partners, joint venturers, fiduciaries, employees or agents.
11. The travel agent agreed that it acts as an agent of all those persons booking, purchasing, or embarking on the cruise, and that it acts solely as an agent for the passenger(s) and not as an agent for Princess. Further, receipt by the travel agent of the passage contract or any other communications, notices or information from Princess shall constitute receipt of such materials by the travel agent’s passenger(s).
12. The travel agent agreed that it is their 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 of them by the travel agent.
13. The terms and conditions which govern the cruise bookings for Princess were set forth in the passage contract and incorporated in the travel agent contract by reference. There was a link to the passage contract terms and conditions. The travel agent was responsible to familiarise itself 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, Princess’s liability, and the passenger’s right to sue or arbitrate.
14. The travel agent consented to receipt of an electronic passage contract or cruise contract, and acknowledged such receipt on behalf of each passenger for whom a booking was made. The travel agent represented and warranted that it was authorised to accept and agree to all terms and conditions set forth in the passage contract on behalf of each passenger for whom a booking had been made, including any minor, heirs, relatives and personal representatives.
15. The respondents accept that what is stipulated between CruiseShipCenters and Princess cannot determine that CruiseShipCenters acted as agent for Mr Ho, but submit that the stipulations between CruiseShipCenters and Princess that the former was not the latter’s agent is a strong basis to infer that CruiseShipCenters was Mr Ho’s agent. I reject that submission for two reasons. The first is that it is illogical. There is nothing that could have been said or agreed between CruiseShipCenters and Princess of which Mr Ho was unaware that could have a positive bearing on the nature of the contractual relationship between CruiseShipCenters and Mr Ho. Secondly, and decisively, there is the conflicting stipulation between CruiseShipCenters and Mr Ho that CruiseShipCenters acted as Princess’s agent (see [49(6)] above).
16. The onus is on the respondents to prove agreement to the contractual terms upon which they rely in the defence and as a basis for their stay application. To the extent that they rely on CruiseShipCenters being the agent of Mr Ho for that purpose, which they do, that is part of the onus that they must discharge. 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.

## C.6 Analysis and conclusion

1. Mr Ho made a booking for himself and his wife on 25 September 2018 and he paid a deposit. Rosanna made that booking on Princess’s POLAR booking system which caused a booking confirmation email to be generated by Princess and immediately emailed to CruiseShipCenters. Looked at objectively, Princess is to be understood as having considered itself booked for the cruise; aside from anything else, “confirmation” must be understood to mean that the booking was firm and binding. It does not affect the analysis as to the conclusion of the booking that that confirmation was not provided to Mr Ho at that time. There was a firm booking upon which he could undoubtedly have relied in the event that there was subsequently a dispute about it.
2. At that time he was told nothing about the terms and conditions of the booking other than the principal details. I infer that that was the fare, deposit, payment of the balance, date and port of departure, ship, voyage, and cabin – those are details he would have had to have known at that time for Rosanna to make the booking on POLAR. On the facts as I have found them, there does not appear to be any room for the analysis urged by the respondents which has it that the booking confirmation was an offer by the carrier and that it was open to Mr Ho to accept or reject it. By the time Princess sent the booking confirmation to Rosanna, Mr Ho had already paid the deposit; he had accepted the offer of the cruise on the basis of all the material details as conveyed to him by Rosanna.
3. Analysing the contract formation on the basis of offer and acceptance, the offer was made by Princess displaying to Rosanna in POLAR the availability of the cruise with the particular cabin at the particular price. That was then accepted by Rosanna making the booking and causing Mr Ho’s credit card to be debited in favour of Princess. To the same effect, Rosanna can be regarded as having conveyed the offer appearing on her screen to Mr Ho, and he accepted by conveying such acceptance to Rosanna.
4. On that basis, none of the clauses set out in Princess’s US terms and conditions was incorporated. To the extent that he was given notice of those, that came only more than a month later when on 30 October 2018 he was sent Princess’s booking confirmation email. With reference to the principles identified above, that was too late. Since Rosanna did not act as Mr Ho’s agent, any knowledge of hers or notification to her cannot be ascribed to Mr Ho.
5. The respondents’ reliance on Mr Ho apparently accepting the US terms and conditions when in July 2019 he clicked on the “proceed” button after logging on to the Cruise Personalizer is also misplaced; that came too late. The contract had long since been concluded. The confirmation email told Mr Ho that he should visit the Cruise Personalizer “for full details, to provide the required immigration information and to print a boarding pass and luggage tags.” The reference to “full details” would appear to be a reference back to “other terms and conditions, including the cancellation policy” in the preceding sentence, but there is no suggestion in the booking confirmation that there were still further contractual terms to be agreed.
6. When Mr Ho logged on to the Cruise Personalizer in order to do what he had been told to do, namely to provide immigration information and to print a boarding pass and luggage tags, he could not proceed beyond the “proceed” button attached to the window that displayed the US terms and conditions. It was in order to proceed, to achieve what he had been told to do, that he pressed proceed, not to retrospectively agree to and apply terms and conditions to the booking that he had made some nine months previously. It is doubtful that such an ex post facto agreement would in any event have been effective given the want of consideration flowing from Princess.
7. I therefore conclude that the US terms and conditions were not incorporated into Mr Ho’s contract.
8. An alternative analysis is that the booking confirmation that was sent to Mr Ho on 30 October 2018 forms part of the contract. That could be on the basis that the booking was only concluded then, which in my view is clearly wrong for the reasons already given, or because the booking on 25 September 2018 was impliedly on the basis of the terms of a booking confirmation to be provided and because on 30 October 2018 the deposit was still refundable. That is to say, at that time if Mr Ho had disagreed with or disapproved of the terms of the booking confirmation he could have cancelled the booking without cost. Nevertheless, that language of “cancellation” is indicative of there having already been a firm booking at that time which supports my primary analysis. Also, in *Oceanic Sun Line* (at 229), *Hollingworth v Southern Ferries Ltd (The Eagle)* [1977] 2 Lloyd’s Rep 70 was cited as authority for the proposition that a mere statement in a carrier’s brochure that the carrier contracted on its conditions of carriage was not enough to make those conditions terms of a contract of carriage subsequently made with an intending passenger who had read the brochure. If that is so, there would seem to be less of a basis to conclude that a booking which makes no mention of conditions of carriage would nevertheless be regarded as impliedly subject to conditions of carriage to be advised.
9. In any event, on the alternative analysis that the 30 October 2018 booking confirmation formed part of the passage contract the question arises whether the US terms and conditions were incorporated. In my view, the US terms and conditions were not generally incorporated.
10. As mentioned, the booking confirmation provided a link to what was said to be to the passage contract at a URL which was displayed as https://www.princess.com/legal/passage\_contract/. The respondents’ witness Ms Santiago explained (at [35]-[36] and [45] of her affidavit) that clicking on that link would open a page which she reproduced (at tab 9 of LFS-1). That page contained links to three different possible passage contracts as follows (the underlining reflecting links to other pages containing the applicable terms):

**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. Such a situation is similar to that identified in *Browitt* at [88]-[89]. 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”.
2. The respondents submit that Mr Ho would nonetheless have been able to view the US terms and conditions which they claim applied because of the invitation on the webpage to booked passengers to sign in to the Cruise Personalizer portal to view the particular passage contract comprising the US terms and conditions said to apply.
3. Aside from that 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, the real question for the purposes of the stay application is whether the exclusive jurisdiction clause and the class action waiver clause were incorporated. There is nothing in the booking confirmation emails that draws particular attention to them or gives any warning about them other than the wording that the terms of the passage contract could “affect the passenger’s legal rights”. That says no more than that the passage contract was a contract; clearly, the terms of a contract can affect legal rights. Thus, to say that much draws no particular attention to onerous or unusual clauses.
4. As indicated, in *Oceanic Sun Line* (at 228-229) it was held that in a ticket case the carrier must do all that is reasonably necessary to bring an “exemption clause” to the passenger’s attention at the time of contracting in order for the clause to be incorporated. The same analysis was applied to an exclusive jurisdiction clause in favour of “the courts of Athens Greece”.
5. In *Baltic Shipping* there were terms and conditions of carriage limiting the liability of the carrier. Gleeson CJ held (at 8G) that a booking form which stated that the booking would be subject to the conditions and regulations printed on the tickets that would be issued in the future may have been sufficient notice of many of the terms and conditions of carriage, but it was inadequate notice of the existence of clauses significantly limiting the passenger’s common law liability. The Chief Justice held (at 9A) that it was the fact and extent, rather than the precise mechanics, of the limitation that were of primary importance. Thus, the limitation clauses did not form part of the contract of carriage.
6. Kirby P, with reference to the specifics of the limitation of liability being with reference to special drawing rights of the International Monetary Fund, held (at 24-25) that the limitation of liability was “unusual” such that the passenger was entitled to take the view that she would be issued with a ticket which would contain no such terms that would limit the carrier’s liability to her.
7. In *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768; 170 FCR 450, Rares J (at [19]) explained:

Where a ticket or other document is intended by the issuer to contain terms of the contract such as an exemption clause or a foreign jurisdiction clause or other special condition, the issuer cannot rely on those terms unless, at the time of contract, it did all that was reasonably necessary to bring the terms to the other party’s attention.

1. The relevant term in that case provided that tickets to Big Day Out would be cancelled and the holder refused entry if they were re-sold for profit. The term was not brought to a purchaser’s attention or indeed at all (at [52]) because it was printed on the back of a physical ticket, which was sent out weeks after purchase.
2. At [53], Rares J referred to *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, where at 170D, Lord Denning MR said that “[i]n order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it – or something equally startling.” The term in that case appeared on a ticket issued upon driving into a car park and purported to exclude liability for personal injury.
3. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, the plaintiff delivered to the defendant 47 transparencies with a delivery note containing a number of conditions. By condition 2, all transparencies had to be returned within 14 days otherwise a holding fee of GBP5 per transparency per day plus VAT would be charged. That note was not read by the defendant and the transparencies were returned four weeks later. The defendant refused to pay the GBP3,783.50 that was invoiced. On the defendant’s appeal to the Court of Appeal of England and Wales, the primary judge’s award to the plaintiff was reduced to a quantum meruit, being GBP3.50 per transparency per week. Dillon LJ (at 438) said that the clause was “very onerous” because the defendant could not conceivably have known, without having their attention drawn to it, that the plaintiff proposed to charge a holding fee at such an exorbitant rate. And at 445, Bingham LJ said:

Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge for each day of delay of £235 plus value added tax. The result would be that a venial period of delay, as here, would lead to an inordinate liability. The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.

1. On the basis of *Oceanic Sun Line,* *Baltic Shipping* and the other authorities referred to, the exclusive jurisdiction clause – including its complexity with regard to the different systems of law to apply and the distinction between types of claims subject to determination in nominated courts and others in arbitration – and the class action waiver clause, are onerous and unusual and serve to limit the passenger’s rights. In those circumstances, reasonable steps were required to bring them to the attention of Mr Ho. In my assessment, the generality of the statement in the booking confirmation that the terms of the passage contract “affect the passenger’s legal rights” was insufficient for that purpose.
2. In the circumstances, if the US terms and conditions were otherwise generally incorporated, I would hold that on the authorities the exclusive jurisdiction clause and the class action waiver clause were in any event not incorporated.

# D. IS INCORPORATION OF THE U.S. CLAUSES A COMMON QUESTION?

1. On the basis of evidence which they submit supports the conclusion that all the passengers whom they identify as being subject to the US terms and conditions were as a matter of fact and law so subject, the respondents urge me to declare that all the US sub-group members are subject to the US terms and conditions. They do so on the basis that the question of incorporation of the US terms and conditions is a common question to all the US sub-group members.
2. The terminology of “common question” comes from s 33C(1)(c) of the FCA Act, which refers to claims that give rise to “a substantial common issue of law or fact”, and s 33H(1)(c), which refers to “the questions of law or fact common to the claims of the group members”. See ***Dillon*** *v RBS Group (Australia) Pty Ltd* [2017] FCA 896; 252 FCR 150 at [63] per Lee J. Also, s 33Q, which provides for the appointment of a sub-group, refers to “the issue or issues common to all group members” and “issues common to the claims of some only of the group members”.
3. As explained in *Dillon* (at [63]-[66]), the Court’s extensive case management powers give flexibility to the efficient management of class actions. That can include the determination of questions of fact and law that have a “degree of commonality”, and it can involve “sample” group members rather than formally appointed sub-group representatives. See *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355; 148 ACSR 14.
4. I am, however, not satisfied that there is sufficient commonality to decide even integers of the question of incorporation of the US terms and conditions to the US sub-group members’ passage contracts at this stage. The case of Mr Ho illustrates the idiosyncratic nature of the question of incorporation; it turns in part on the individual passenger’s method of booking, the passenger’s interactions with the travel agent or Princess employee at a contact centre, the contractual relationship between the passenger and the travel agent, the complex contractual relationship between a particular travel agent and Princess, the sequence of the passenger’s receipt of documents and the payment of the deposit, and their logging on to the Cruise Personalizer. For each member of the US sub-group, one or more of those variables may be different.
5. The applicant also raises an objection of principle which is that she represents the group members, including the US sub-group members, only with respect to the claims that are the subject of the proceeding but not with respect to their individual claims: ***Timbercorp*** *Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; 259 CLR 212 at [53]. That raises a question with regard to the applicant’s authority to represent other group members in relation to defences that are raised that are peculiar to their claims but inapplicable to hers, such as the respondents’ reliance on the US terms and conditions in this case.
6. The applicant’s solicitor, Ms Antzoulatos, gave evidence that her firm had been able to contact approximately 46 passengers in the US and Canada for the purposes of identifying a US sub-group representative. The majority of those passengers did not wish to be appointed the US sub-group representative or did not provide sufficient instructions. In addition to Mr Ho, there were eight passengers based in Canada and six passengers based in the US who provided instructions about the process that they undertook to book their tickets for the voyage. The summaries of those processes set out in Ms Antzoulatos’s affidavit reveal the number of differences which could lead to different conclusions with regard to incorporation, and also in respect of all of them there is at least some doubt that the US terms and conditions were incorporated.
7. In the circumstances, it is neither appropriate that the question of incorporation of the US terms and conditions to the passage contracts of all US sub-group members is determined as a separate issue, nor that it is determined as a common question.
8. Having said that, on the evidence of Ms Santiago referred to earlier, at least in respect of passengers whom the respondents regard as having contracted on the US terms and conditions, whatever route they took for the bookings and whether as authenticated or unauthenticated passengers, the passage contract link in their booking confirmation would have taken them to a selection of three further links to different contracts without guidance as to which was applicable. On that basis it is difficult to see how any of the US sub-group members’ passage contracts were subject to the US terms and conditions.

# E. Are the relevant U.S. clauses enforceable?

1. In view of the conclusion that I have reached that the US terms and conditions were not incorporated in Mr Ho’s contract, and even if they were the exclusive jurisdiction clause and the class action waiver clause were nevertheless not incorporated, it is not strictly necessary for me to deal with the applicant’s reliance on various grounds to contend that those clauses are in any event void or unenforceable.
2. Nevertheless, I consider that it is incumbent on me to consider whether I would have concluded that the terms are unenforceable in case I am wrong on the non-incorporation of those clauses in Mr Ho’s passage contract and because the defining feature of the US sub-group is the respondents’ contention that its members are all subject to those clauses. In doing so, I pause to note that the submissions on these issues were not fully developed, or in some cases developed at all, in writing or orally. That may be because the parties’ submissions were substantially side-tracked by the applicant’s CCA s 138 point that I will come to in section G below – including the changing the way in which the point was put over time and a constitutional argument that it provoked from the respondents.
3. Further, in respect of the class action waiver clause, it appears that there are no Australian authorities that have considered whether, and if so the extent to which, such a clause is effective. That falls therefore to be considered from first principles. In circumstances where there is a lacuna of authority and because I am mindful that my reasons on the interlocutory application should be published sooner rather than later, I intend dealing with many of the points raised by this novel issue only briefly. I reiterate that I am considering these issues only for the purposes of the respondents’ interlocutory stay application; on different evidence and more developed arguments I may come to different conclusions.
4. I turn first to consider whether the class action waiver clause is void or unenforceable by reason of being contrary to Pt IVA of the FCA Act. I then consider the common bases relied upon by the applicant in challenging the enforceability of both clauses. As mentioned, those bases are that the terms are unfair under ACL Pt 2-3 and that they are unjust within the meaning of s 7(1) of the CRA. The applicant also contends that reliance on the class action waiver is unconscionable contrary to ACL s 21.

## E.1 Is the class action waiver clause contrary to Pt IVA of the FCA Act?

1. The respondents contend that the enforceability of the waiver is to be determined according to the laws of the US, that being the chosen proper law of the contract. They say that under the laws of the US, a contractual clause (including a class action waiver) is enforceable where the provision was reasonably communicated to passengers and its enforcement would not be fundamentally unfair: ***Oltman*** *v Holland America Line, Inc* 538 F 3d 1271 (9th Cir, 2008); *Carnival Cruise Lines, Inc v* ***Shute***499 US 585 (1991).
2. In determining whether a clause was reasonably communicated, the 9th Circuit (being the relevant Circuit) employs a two-pronged “reasonable communicativeness test”, the first prong of which focuses on the physical characteristics of the ticket, including features such as “size of type, conspicuousness and clarity of notice … and the ease with which a passenger can read the provisions in question”: *Oltman* at 1276, citing ***Wallis*** *v Princess Cruises, Inc* 306 F 3d 827 (9th Cir, 2002) at 835. The second prong of the test requires evaluation of “the circumstances surrounding the passenger’s purchase and subsequent retention of the ticket/contract”, including “the passenger’s familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket”: *Wallis* at 836. See *Deiro v American Airlines, Inc* 816 F 2d 1360 (9th Cir, 1987) at 1364.
3. Even if a clause passes the reasonable communicativeness test, it is nonetheless subject to judicial scrutiny for fundamental fairness: *Shute* at 595. This requires consideration of whether “the clause was included because of ‘bad-faith motive’ and whether the clause was ‘a means of discouraging cruise passengers from pursuing legitimate claims’”, as well as whether agreement to the clause was obtained by “fraud or overreaching”: *Oltman* at 1277, citing *Shute* at 595.
4. In the application of those principles to class action waiver clauses, US courts have held that such clauses are not fundamentally unfair because they do not affect a passenger’s substantive right to bring a claim but rather limit the procedural vehicles available for bringing a suit: see, e.g., *AT&T Mobility LLC v Concepcion* 563 US 333 (2011); *Carter v Rent-A-Center, Inc* 718 F App 502 (9th Cir, 2017); ***DeLuca*** *v Royal Caribbean Cruises, Ltd* 244 F Supp 3d 1342 (SD Fla, 2017). Because the plaintiff does not have a fundamental right to bring a class action lawsuit, the waiver clauses are not unfair, unreasonable, or contrary to public policy. Consistently with that reasoning, the particular clause in the present case was upheld as enforceable in ***Archer*** *v Carnival Corporation and PLC* WL 6260003 (CD Cal, 2020), where the US Court in which Mr Ho would have to bring his claim denied the plaintiffs’ motion to certify a class consisting of passengers on board the *Grand Princess* where an outbreak of COVID-19 occurred.
5. Because the class action waiver, in the form in which it appears in this case, has been enforced in the US Court, the respondents submit that that is the course this Court should adopt.
6. The first basis upon which the applicant contends that the class action waiver clause is void or unenforceable is that it is contrary to the policy of Pt IVA as a mandatory law of the forum. In *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54; 247 CLR 129, in a passage cited with approval in *Price v Spoor* [2021] HCA 20 (at [12] per Kiefel CJ and Edelman J and [76] per Steward J), French CJ, Crennan, Kiefel and Bell JJ said (at [46]):

[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 …

1. The applicant submits that the clause is void or unenforceable because it would operate to defeat or circumvent the statutory purpose or policy of Pt IVA of the FCA Act. In *BMW Australia Ltd v* ***Brewster*** [2019] HCA 45; 374 ALR 627, Kiefel CJ, Bell and Keane JJ observed (at [82]) that the objectives of Pt IVA of the FCA Act were identified by the Australian Law Reform Commission in *Grouped Proceedings in the Federal Court* (Report No 46, 1988) (**ALRC Report**) prior to its enactment. Those objectives are two-fold: first, to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and, secondly, 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. Those objectives are reflected in what is described as “one of the fundamental tenants of Pt IVA”, which is that s 33J requires a group member to “opt out” rather than to “opt in” to the representative proceedings.
2. In order to determine whether the clause is contrary to Pt IVA of the FCA Act, it is necessary first to consider the construction of the clause, the full text of which is set out at [27]. Relevantly, it provides that:

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.

1. At the very least, the clause obliges those who are bound by it not to commence representative proceedings. Where an applicant bound by such a clause commences a representative proceeding, it may be that an order under s 33N(1)(d) of the FCA Act would be made in order to give effect to the contractual arrangement: see *Perera v GetSwift Ltd* [2018] FCAFC 202; 263 FCR 92 at [59]-[60] per Middleton, Murphy and Beach JJ. The consequence of such an order appears to be quite dissimilar to orders in the US where class actions have been dismissed (as in *DeLuca*) or refused certification (as in *Archer*). That is because, by s 33P, the applicant may nonetheless continue the proceeding in his or her name and the court can order that any person who was a group member be joined as an applicant.
2. The difficulty that arises in relation to whether the clause is contrary to Pt IVA is what else it obliges because, on its face, it obliges those who are bound by it not to be a member of any class proceeding. It seems that it is in respect of that aspect of the clause that the applicant relies on the “opt out” nature of Pt IVA proceedings as reflecting its “primary object” being to “avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together”: *Mobil Oil Australia Pty Ltd v Victoria* [2002] HCA 27; 211 CLR 1 at [12] per Gleeson CJ.
3. The starting point is s 33C(1) of the FCA Act, which identifies the circumstances in which a representative action can be commenced. It provides:

**33C Commencement of proceeding**

(1) Subject to this Part, where:

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

1. Another important provision is s 33H which, among other things, provides for the identification of group members. It provides:

**33H Originating process**

(1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:

(a) describe or otherwise identify the group members to whom the proceeding relates; and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and

(c) specify the questions of law or fact common to the claims of the group members.

(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

1. Sections 33C and 33H have been described as “gateway” provisions: ***Ethicon*** *Sàrl v Gill* [2018] FCAFC 137; 264 FCR 394 at [7] per Allsop CJ, Murphy and Lee JJ. Together, these provisions determine the membership of the class the subject of the proceeding; group members are those “persons whose claims meet the description in s 33C and they are identified as such in accordance with … s 33H”: *Dillon* at [46] per Lee J. Save for certain persons presently irrelevant, consent to be a group member is not required: s 33E. In this respect, “opt out” can be understood as signifying that there is no requirement for persons to “opt in” to representative proceedings.
2. A group member may opt out of a representative proceeding in accordance with s 33J. That section relevantly provides:

**33J Right of group member to opt out**

(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.

1. By r 9.34 of the Rules, an opt out notice must be in accordance with Form 21. Save for those who have opted out of the proceeding, group members are bound by a judgment given in the proceeding that determines common questions: s 33ZB; see also *Timbercorp* at [52] per French CJ, Kiefel, Keane and Nettle JJ.
2. It is to be observed that there is no requirement in any proceeding under Pt IVA that group members be identified. Group members are not required to identify themselves and the representative applicant has no obligation to seek them out: *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 at [31] per Finkelstein J, cited with approval in *Brewster* at [73] per Kiefel CJ, Bell and Keane JJ. The only requirement, so far as the description of the class is concerned, is that group members be identifiable: *Ethicon* at [37] per Allsop CJ, Murphy and Lee JJ. As the High Court has noted, it is a consequence of the scheme that “a representative proceeding may continue even if group members are unaware of it”: *Brewster* at [73] per Kiefel CJ, Bell and Keane JJ.
3. In the present case, the description of group members is provided in the amended originating application and pleaded in the further amended statement of claim (**FASOC**). That is how Mr Ho and members of the US sub-group came to become group members. If the class action waiver clause is incorporated, valid and enforceable then, on one view, by the mere filing of documents which validly commenced this proceeding, those who are bound by the clause immediately breached their obligations not to be a member of the class proceeding in circumstances where they might have been completely unaware of its commencement. That is because it follows from the scheme of the Act that any pre-existing contractual arrangement not to be a member would not of itself be effective to preclude a person being a member. Because a defining feature of the scheme is that a proceeding may be brought on behalf of a person without their consent and indeed without their knowledge, a contractual arrangement that purports to require persons not to be a member of a class proceeding, where the mere commencement of proceeding by a third party would thereby put the promisor in breach of that arrangement, would in my view be inconsistent with the provisions of Pt IVA such that it would be unenforceable.
4. However, that is not the only construction of the clause that is open. An alternative construction of the clause is that it requires anyone bound by it to opt out of representative proceedings. Presumably, that would require that the group member opt out within a reasonable time of learning that they were a group member or at least by the opt out date set under s 33J(1). On such a construction, it is difficult to see how the clause would be inconsistent with Pt IVA. Because s 33J 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.
5. As between these two constructions, I am of the view that the second is what a reasonable person would have understood the words of the clause to mean: *Toll v Alphapharm* at [40]. That is to say, a reasonable person would have understood the clause to require persons to not themselves commence or initiate class action proceedings, not consent to membership of a class action and to opt out of class membership where consent to opt in is not required. That is the most natural understanding of the clause and what the intended effect of the words are.
6. It follows that if the class action waiver clause is incorporated, I would not have found it to be void or unenforceable by reason of being contrary to Pt IVA of the FCA Act.

## E.2 Are the clauses unfair under Pt 2-3 of the ACL?

1. The applicant contends that both the exclusive jurisdiction clause and the class action waiver clause are unfair terms within the meaning of s 24 of the ACL and, as such, are void under s 23 of the ACL. As a preliminary matter, the respondents contend that s 23 of the ACL is inapplicable because by cl 1 of the US terms and conditions the proper law of Mr Ho’s contract (if those terms are incorporated) is the general maritime law of the US. With reference to *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6; 247 FCR 1 at [128] per Beach J, the respondents submit that when assessing the validity and interpretation of the contract, the proper law to apply is the chosen law.
2. 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.
3. Section 131(1) of the CCA provides that the ACL applies as a law of the Commonwealth “to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of [the ACL] by corporations”. That section applies to conduct that occurs within Australia: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243; 118 FCR 1 at [50]-[55] per Merkel J; *ACCC v* ***Valve*** *Corp (No 3)* [2016] FCA 196; 337 ALR 647 at [159] per Edelman J. There is then a note that directs one to sections 5 and 6 of the CCA. Relevantly, s 5 of the CCA 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. As Edelman J observed in *Valve* (at [104]), s 5 of the CCA is of considerable breadth. It extends the operation of the ACL (except for Pt 5-3) to the engaging in conduct outside Australia by bodies corporate carrying on business within Australia. That raises the question whether the making of the impugned contract alleged by the applicant to contain unfair terms falls within that extended operation.
2. In my view, CCA s 5(1)(g) extends the operation of ACL s 23 to contracts made outside Australia by bodies corporate incorporated or carrying on business within Australia. That is because by s 4(2)(a) of the CCA, “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 ACL s 23 concerns whether a term in a contract is unfair.
3. As mentioned, it is common ground between Mr Ho’s points of claim and the respondents’ defence to those points of claim that Mr Ho’s passage contract was with Princess. The question is thus whether Princess carried on business in Australia. In *Valve* at [197], Edelman J held that the ordinary meaning of “carrying on business” usually involves (by the words “carrying on”) a series of repetition of acts. Those acts will commonly involve “activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis”, referring to *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; 171 CLR 338 at 350 per Dawson J; *Pioneer Concrete Services Ltd v Galli* [1985] VR 675 at 705 per Crockett, Murphy and Ormiston JJ; *Hope v Bathurst City Council* [1980] HCA 16; 144 CLR 1 at 8-9 per Mason J (Gibbs, Stephen and Aickin JJ agreeing). The approach of Edelman J was confirmed on appeal in *Valve Corporation v ACCC* [2017] FCAFC 224; 258 FCR 190 at [140]-[152] per Dowsett, McKerracher and Moshinsky JJ.
4. Not only does the applicant not identify on what basis it is said that Princess carries on business in Australia, she adduced no evidence on the point. It is pleaded in the FASOC that Princess carries on business in Australia, but that allegation is denied in the defence. From the evidence adduced by the respondents it is established that Princess is incorporated in Bermuda and has its principal place of business in California. It was the owner of the *Ruby Princess* and it time-chartered the vessel to Carnival. It is also apparent from the Australian passage contract terms and conditions that Princess is the contractual counterparty to the passengers who contracted on those terms, from which it can be inferred that Princess sold or marketed the cruise in Australia. Moreover, it is apparent from the explanation by several of the respondents’ witnesses as to the usual method of incorporation of the standard terms and conditions, that Princess regularly sells or markets cruises in Australia. That is why it has standard Australian terms and conditions and standardised booking procedures designed to incorporate them into any passage contract booked through an Australian travel agent or call centre or from an Australian based IP address.
5. On the basis of that evidence, notwithstanding the shortcomings in the way in which the applicant has put her case on this issue, I am satisfied that Princess carried on business in Australia with the result that ACL s 23 applies to its passage contract with Mr Ho.
6. Sections 23 and 24 of the ACL relevantly provide:

**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. As the contract with Mr Ho is clearly a “consumer contract” that the respondents have accepted is a “standard form contract”, the only issue in relation to each clause is whether it is unfair with the meaning of s 24 of the ACL.
2. In *ACCC v* ***Chrisco Hampers*** *Australia Ltd* [2015] FCA 1204; 239 FCR 33, Edelman J accepted (at [43]) that:
3. for a term to be unfair it must satisfy the requirements of all of s 24(1)(a) to (c);
4. the onus is upon the applicant to prove the matters in ss 24(1)(a) and 24(1)(c) but it is upon the respondents in relation to s 24(1)(b);
5. section 24(2)(a) only requires the court to consider transparency in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);
6. similarly, the assessment of the contract as a whole in s 24(1)(c) only requires the court to consider the contract as a whole in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c);
7. as the *Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) provided at [5.39], “if a term is not transparent it does not mean that it is unfair and if a term is transparent it does not mean that it is not unfair”; and
8. guidance can be had to s 25 which provides examples of unfair terms.
9. In *ACCC v CLA Trading Pty Ltd* [2016] FCA 377; ATPR 42-517 at [54], with reference to several authorities, Gilmour J summarised the relevant principles of unfair terms in consumer contracts as follows:
10. 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;
11. the requirement of a “significant imbalance” directs attention to the substantive unfairness of the contract;
12. 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;
13. 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;
14. significant in this context means “significant in magnitude”, or “sufficiently large to be important”, “being a meaning not too distant from substantial”;
15. 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; and
16. 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.

### E.2.1 The exclusive jurisdiction clause

1. There are two problems standing in the way of accepting the applicant’s contention that the exclusive jurisdiction clause is unfair. The first is that the applicant bears the onus of establishing that the clause causes a significant imbalance in the parties’ rights and obligations arising under the contract. In ***Dialogue Consulting*** *Pty Ltd v Instagram, Inc* [2020] FCA 1846, Beach J observed (at [344]):

Significant imbalance relates to the substantive unfairness of the contract, and requires consideration of the relevant term, together with the parties’ other rights and obligations arising under the contract. Whether a term causes significant imbalance is a question of fact. The word “significant” means significant in magnitude or sufficiently large to be important. A significant imbalance may exist if the term is so weighted in favour of one party as to tilt that parties’ rights and obligations significantly in its favour. This may be by granting to that party a beneficial option or discretion or power. But a term does not cause a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting.

1. In my view, the applicant has failed to discharge her burden of establishing that the clause causes a significant imbalance in the parties’ rights and obligations arising under the contract. Those rights and obligations are, primarily, in respect of the supply of the service of a holiday cruise. It is against those rights and obligations, which arise under the contract, considered as a whole that any alleged imbalance is to be assessed: s 24(2)(b); *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [127] per Cavanough J; *Chrisco Hampers* at [51] per Edelman J. The existence of the exclusive jurisdiction clause does not cause an imbalance, let alone a “significant” imbalance, in those rights because it does not prevent a passenger’s right to sue to enforce those rights; it only seeks to restrict the fora in which a passenger may bring an action to enforce those rights. I say “seeks” because, as the authorities on exclusive jurisdiction clauses (that are discussed in section F.2 below) make clear, parties cannot by their agreement oust the jurisdiction of courts; rather, where an action is brought in breach of an exclusive jurisdiction clause, the courts retain a discretion not to enforce the clause. Further, the forum chosen is not one that is inapt to give effect to the parties’ rights arising under the contract.
2. Secondly, and in relation to s 24(1)(b), it has been recognised that the avoidance by an international corporation of litigation in multiple jurisdictions is a legitimate interest worthy of protection: *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133 at [126] per Button J. The applicant contends that this justification rings hollow in circumstances where the UK terms and conditions contain a non-exclusive jurisdiction clause in favour of English courts and the Australian terms and conditions contain an exclusive jurisdiction clause in favour of NSW. The effect of that submission, if taken to its logical conclusion, would be that in order for the respondents’ interest to be legitimate, only one jurisdiction can be chosen. I do not accept that that is so. It is well to remember that the impugned clause appears in the context of a contract intended to apply to passengers all over the world. There is nothing illegitimate about the respondents selecting NSW as the jurisdiction in which Australian and New Zealand residents bring their claims, England as the jurisdiction in which UK residents bring their claims and California as the jurisdiction in which residents from everywhere else in the world bring their claims – including, relevantly, Mr Ho who resides in Canada.
3. If the exclusive jurisdiction clause were incorporated into Mr Ho’s contract, on the evidence before me I would not find it to be unfair.

### E.2.2 The class action waiver clause

1. In relation to the class action waiver clause, the applicant submits, first, that Princess does not have any legitimate interest in the 969 passengers whom it says contracted on the US terms and conditions commencing individual proceedings against it.
2. Secondly, it is said that Princess has an illegitimate interest in the class action waiver in two respects: to prevent individual passengers from accessing justice and vindicating their legal rights where the cost to do so individually will exceed the value of their claims and where they would not have the resources to do so pursuant to individual proceedings.
3. Thirdly, it is said that the class action waiver causes a significant imbalance in the parties’ rights and obligations and detriment to Mr Ho as it prevents him from taking the benefit of funded representative proceedings and forces him to commence his own individual proceeding where the cost of doing so is likely to exceed the value of his claim.
4. Fourthly, it is said that the class action waiver is not “transparent” in the sense that it does not use reasonably plain language and was not readily available to Mr Ho.
5. I accept 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. I also accept, for substantially the same reasons as why I have found the term not to be incorporated, that the waiver is not “transparent”.
6. It is noteworthy that although the time at which to assess whether a term is unfair is the time at which the contract was formed (*Dialogue Consulting* at [340] per Beach J), the examples of the kinds of terms that may be unfair in ACL s 25(k)-(m) include terms that have the effect of limiting one party’s right to sue another party or the evidence that one party can adduce in proceedings relating to the contract, or that have the effect of imposing the evidential burden on one party in proceedings relating to the contract. The significance of these examples is that they are of terms that have effect only at a much later stage which may never be reached, which is to say the stage at which there is a dispute between the contracting parties which, aside from the term or terms in question, is susceptible to resolution by the processes of the law.
7. In my assessment, having regard to the nature of the contract in question, being one of thousands of consumer contracts for a particular cruise on board a vessel in respect of whom the non-consumer party is common, the class action waiver clause does cause a significant imbalance in the parties’ rights and obligations arising under the contract. At the time of contracting it could be assessed that if a claim arose for Mr Ho of the nature that made it economically unviable or at least questionable to pursue on his own and in circumstances where other passengers had claims raising common questions or issues, a combination of circumstances that is readily foreseeable as a reasonable possibility, the effect of the clause would be to limit Mr Ho’s practical ability to pursue such a claim; it would adversely affect, and in some cases even remove, his access to justice. The imbalance is that the clause would have the effect of preventing Mr Ho from vindicating rights available to him under the contract. That is precisely the interest that Princess had in including such a clause in its US terms and conditions. That is to say, Princess’s interest in the clause is the very imbalance that it creates. If it was not for that imbalance, Princess would have no interest in the clause. In the circumstances, the clause creates a significant imbalance in the parties’ rights and obligations arising under the contract.
8. On that basis, if the class action waiver clause were incorporated in Mr Ho’s contract, I would have found it to be unfair and therefore void under ACL s 23.

## E.3 Is reliance on the class action waiver clause unconscionable?

1. The applicant contends that the respondents’ reliance on the class action waiver clause is unconscionable as contrary to s 21 of the ACL and relies on the same grounds as those advanced in respect of the term being unfair. Section 21 of the ACL relevantly provides:

**21 Unconscionable conduct in connection with goods or services**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person; or

(b) the acquisition or possible acquisition of goods or services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

1. The respondent submits that reliance on the class action waiver clause could not contravene s 21 of the ACL in circumstances where s 21(2)(b) provides that s 21 does not apply to conduct that is engaged in only because the person engaging in the conduct “refers to arbitration a dispute or claim”. They submit it would be anomalous to hold that s 21 would render reliance on a class action waiver clause unconscionable where reliance on an arbitration clause cannot be unconscionable. That submission has force because, as the respondents submit, an arbitration clause necessarily precludes recourse to any court where a class action waiver clause does not. Further, class action waiver clauses and arbitration clauses appear to me to be legally cognate in the same way as Spigelman CJ observed that arbitration clauses and exclusive jurisdiction clauses are: see *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196; 79 ACSR 383 at [60].
2. However, the assumption underlying the respondents’ submission is that s 21(2)(b) provides that *no* reference to arbitration can constitute unconscionable conduct contrary to s 21. That is not what the subsection provides. Rather, sub-s (2) provides that s 21 “does not apply to conduct that is engaged in *only* because the person engaging in the conduct … refers to arbitration a dispute or claim”. In my view, the word *only* is intended to leave open the possibility that a referral to arbitration, in conjunction with other factors, may yet amount to unconscionable conduct.
3. An example of when reliance on an arbitration clause may amount to unconscionable conduct contrary to s 21 is the case of ***Uber*** *Technologies Inc v Heller* 2020 SCC 16 in the Supreme Court of Canada. The facts were as follows.
4. The plaintiff, a resident of Ontario, provided food delivery services in Toronto using Uber’s apps. As must now be well known, Uber operates a global business that arranges, through its apps on various smartphone platforms, personal transportation and food delivery. In order to become a driver for Uber, the plaintiff had to accept, without negotiation, the terms of Uber’s standard form agreement, the terms of which required that any disputes were to be resolved through mediation and arbitration in the Netherlands. The contract further provided that that arbitration was to occur in accordance with the rules of the International Chamber of Commerce, pursuant to which the upfront cost of beginning an arbitration was about USD14,500. See *Uber* at [5]-[10] per Abella and Rowe JJ (delivering judgment for Wagner CJ, Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ).
5. The plaintiff commenced a class proceeding against Uber for alleged breaches of Ontario’s *Employment Standards Act 2000* SO 2000 c 41. At first instance, Uber successfully sought a stay of the proceeding in favour of arbitration in the Netherlands. On Uber’s appeal to the Supreme Court of Canada following the plaintiff’s successful appeal to the Court of Appeal for Ontario, the Supreme Court held that the clause was invalid by reason of it being unconscionable within the meaning of the equitable doctrine (at [98]). That unconscionability was made out on the basis, first, that there was a clear inequality of bargaining power between Uber and the plaintiff and, secondly, that the agreement to arbitrate was improvident (at [93]-[94]). In respect of the improvidence of the agreement, the plurality observed at [94] that the upfront cost to arbitrate was close to the plaintiff’s annual income, and that it was “disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into”. The Court further held the clause in effect modified all other substantive rights under the contract such that they were illusory (at [95] and [97]). Brown J, in a concurring judgment, held that the clause was invalid because it denied access to justice and, accordingly, was contrary to public policy (at [101]).
6. It seems to me that in a case such as *Uber*, reliance on an arbitration clause would constitute unconscionable conduct contrary to s 21 of the ACL, notwithstanding s 21(2)(b). That is because it is not *merely* a referral to arbitration but rather the referral would, in addition, operate to render the substantive contractual rights illusory and deny access to justice. That conduct would in my view be unconscionable. That reasoningwould apply equally to the reliance by the respondent on the class action waiver clause in this case. That is to say, it would be unconscionable for the respondents to rely on the class action waiver clause if that would effectively deny Mr Ho or members of the US sub-group access to justice such that their rights in contract or otherwise would be illusory. Accordingly, the respondents’ submission must be rejected.
7. It does not, however, follow from what I have said that it is in this case unconscionable for the respondents to rely on the class action waiver clause. That is because the applicant has merely asserted that the cost to Mr Ho and the US sub-group of pursuing their claims individually will exceed or is likely to exceed the value of their claims. There is no evidence before the Court that allows for an assessment of whether the respondents’ reliance on the class action waiver clause would effectively deny group members access to justice. In particular, there is no evidence of Mr Ho’s financial circumstances, the value of his claim against the respondents, the cost of instructing lawyers in the US and the cost of commencing proceedings in the US District Court.
8. I therefore conclude that, although s 21 can in principle apply, the applicant has failed to discharge her burden of proving that the respondents’ reliance on the class action waiver would, in the circumstances, be unconscionable.

## E.4 Are the clauses unjust under s 7 of the CRA?

1. The applicant contends that both the exclusive jurisdiction clause and the class action waiver clause are “unjust” within the meaning of s 7(1) of the CRA. The respondents complain that, save for a bare assertion that the contract was one of passage from and to New South Wales, the applicant fails to explain why the CRA applies. That complaint directs attention to s 17(3) of the CRA, which 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. Clause 1 of the US terms and conditions contains a choice of law clause selecting the “general maritime law of the United States”. The issue with respect to the application of the CRA is whether, but for the choice of law clause, the proper law of Mr Ho’s contract would be that of NSW. That question directs attention to whether NSW law is “the system of law … with which the transaction has its closest and most real connection”: *Bonython v Commonwealth* [1950] UKPCHCA 3; 81 CLR 486 at 498 per Lord Simonds.
2. The respondents submit that absent the express choice of law clause, the proper law of Mr Ho’s contract would not be NSW. That submission should be accepted. The contract is between a resident of Canada and a Bermudan company based in California. The contract was concluded in Canada and the consideration for performance was provided in Canadian dollars. Importantly, there is an exclusive jurisdiction clause in favour of certain US courts, which clause is, under the hypothesis now under consideration, incorporated into Mr Ho’s contract and is not, by the terms of s 17(3), required to be disregarded. That is yet another indication that the proper law of the contract is not that of NSW: *Oceanic Sun Line* at 224-5 per Brennan J. Finally, although the performance of the contract consisted of passage on a cruise from and to NSW which is a consideration that weighs in favour of NSW being the proper law of contract, the relative weight of that connection must be discounted when one considers that the overwhelming majority of time spent on the voyage was spent outside NSW – 1.5% within Australia’s territorial sea, 37.1% within New Zealand’s territorial sea, and 61.4% on the high seas or in the Contiguous Zone or Exclusive Economic Zone of either Australia or New Zealand. Perhaps more to the point than the time actually spent, the cruise for which Mr Ho contracted would likely have had an even smaller percentage of time in Australia and would have visited even more ports in New Zealand than the truncated voyage that in fact eventuated.
3. These factors point to a conclusion that, if the US terms and conditions are incorporated, NSW law would not be the proper law of Mr Ho’s contract. The CRA would therefore not apply.

# F. THE BASES ON WHICH THE RESPONDENTS SEEK A STAY OF THE U.S. AND U.K. SUB-GROUPS’ CLAIMS

## F.1 Introduction

1. As mentioned, the respondents put the case for the stay of Mr Ho’s claim on three bases, two of which rely on the incorporation of clauses contained in the US terms and conditions – specifically, the exclusive jurisdiction clause and the class action waiver clause. I have already found that those clauses were not incorporated into Mr Ho’s contract, and that it is neither appropriate nor possible to determine at this stage whether those clauses were incorporated into the contracts of all the other US sub-group members. The result is that the respondents’ reliance on these clauses gives no basis to stay either Mr Ho’s claim or the claims of all the other US sub-group members.
2. Nevertheless, for the same reasons as why I considered whether the clauses, if incorporated, are enforceable, I consider that it is incumbent on me to consider whether I would have granted a stay in reliance of one or other of those clauses if they were incorporated and are enforceable.
3. The third basis to the stay application in relation to Mr Ho, which does not depend upon incorporation of the US terms and conditions, is that this Court is a “clearly inappropriate forum” to determine the claim. This basis is also relied on in respect of the stay sought of Mrs Wright’s and the UK sub-group’s claims.
4. The applicant raises a preliminary objection to the respondents’ application that is relevant to all bases on which the stay is sought. That objection is that s 138 of the CCA prohibits this Court from granting the relief sought by the respondents, which prohibition is said to operate prior to the consideration of any discretion.
5. The applicant further contends that there are strong reasons to refuse a stay in reliance on the exclusive jurisdiction clause, that the class action waiver clause is void, and that this Court is not a clearly inappropriate forum.
6. It is convenient to first identify the principles that are applicable to the respondents’ application for a stay before turning to the CCA s 138 point which I deal with in section G below.

## F.2 Exclusive jurisdiction clause: applicable principles

### F.2.1 The rule in Akai

1. In ***Huddart Parker*** *Ltd v The Ship “Mill Hill”* [1950] HCA 43; 81 CLR 502, Dixon J (at 508) held that the court has the power to stay a suit within its jurisdiction if, upon a proper exercise of the court’s discretion, it appears that it is a course which should be taken. Where there is a contract between the parties by which they exclusively submitted to the jurisdiction of some other court or forum, “the courts begin with the fact that there is a special contract between the parties to refer, and therefore … consider the circumstances of a case with a strong bias in favour of maintaining the special bargain” (at 508-509).
2. The dicta of Dixon J in *Huddart Parker* were picked up in the two judgments in ***Akai*** *Pty Ltd v The People’s Insurance Co Ltd* [1996] HCA 39; 188 CLR 418. In the dissenting judgment of Dawson and McHugh JJ it was held (at 427) that “the law has always been solicitous that when parties do contract to submit their disputes to the exclusive jurisdiction of the courts of another country they should be held to their bargain.” *Huddart Parker* was then cited, followed (at 428) by observations from *Oceanic Sun Line* of, first, Brennan J that in the absence of “countervailing reasons” proceedings will be stayed in the face of an exclusive jurisdiction clause (at 224) and, secondly, Gaudron J that a stay will be granted in such circumstances unless “the plaintiff adduces strong reasons against doing so” (at 259).
3. In *Akai*, Dawson and McHugh JJ (at 428-429) also cited with approval the judgment of Brandon J in *The Eleftheria* [1970] P 94 at 99-100 with regard to the relevant principles:

(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 for clarity.)

1. It is to be noted that matter 5(b) identified by Brandon J raises the question of the applicable law. This is a matter to which I will return.
2. The majority judgment of Toohey, Gaudron and Gummow JJ in *Akai* also cited (at 445) the dicta of Dixon J in *Huddart Parker* and held that where there is a foreign jurisdiction clause “the courts begin with a firm disposition in favour of maintaining that bargain unless strong reasons be adduced against a stay, it being a policy of the law that the parties who have made such a contract should be kept to it.” The majority then used that identified requirement of “strong reasons” to dismiss the application for a stay in that case, notwithstanding the exclusive foreign jurisdiction clause (at 447).
3. The requirement of “strong reasons” to refuse a stay in the face of an exclusive jurisdiction clause, as expressed in *Akai*, remains the law: *Epic Games, Inc v Apple Inc* [2021] FCAFC 122 at [21] (***Epic v Apple* (FCAFC)**).
4. Other than in the dissenting judgment in *Akai*, the principles identified in *The Eleftheria* have not been applied by the High Court or by a Full Court of this Court. They have, however, been applied by the NSW Court of Appeal (in *Akai Pty Ltd v People’s Insurance Co Ltd* (1995) 126 FLR 204 at 227; 8 ANZ Ins Cas 61-254 at 75,855 per Sheller JA, Meagher JA agreeing, the judgment that was overturned by the High Court on appeal in *Akai*) and on several occasions by single judges in this Court: see ***Incitec*** *Ltd v Alkimos Shipping Corporation* [2004] FCA 698; 138 FCR 496 at [42]-[43] per Allsop J; ***Quinlan*** *v Safe International Försäkrings AB* [2005] FCA 1362 at [48]-[49] per Nicholson J; ***Nicola*** *v Ideal Image Development Corporation Inc* [2009] FCA 1177; 215 FCR 76 at [63] per Perram J. Insofar as they might supplement what is otherwise applicable, I consider that the considerations identified by Brandon J in *The Eleftheria* as quoted above to be relevant in considering whether there are “strong reasons” to refuse a stay.
5. On the question of onus, as identified above, in *Akai* both the majority and dissenting judgments stated that where an exclusive jurisdiction clause was concerned, it was for the party seeking to resist the stay to show strong reasons why it should not be enforced. However, the majority went on to reason that the party that was in that case seeking to enforce the exclusive jurisdiction clause had failed to prove that the foreign court would apply the relevant Australian statute as a result of which the stay was refused. That apparently conflicting position on onus has given rise to some difficulty. See the discussion in *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338 at [37]-[40] per Perram J (***Epic v Apple* (FCA)**).
6. In the appeal from that judgment, the Full Court recently in *Epic v Apple* (FCAFC) at [80]-[82] per Middleton, Jagot and Moshinsky JJ held that Perram J was correct to proceed on the basis that the party resisting the stay in the face of the exclusive jurisdiction clause bears the onus. It was held as follows (at [83]):

Provided the exclusive jurisdiction clause appears to bind the party resisting the stay and the commencement of the proceedings involves a prima facie contravention of the exclusive jurisdiction clause, it is for the party resisting the stay to prove the existence of the strong reasons not to enforce the clause.

1. Whatever my reading of *Akai* might be, and I do not suggest that it is any different, that is accordingly the approach that I must take: *Liberty Mutual Insurance Company v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [45] per Allsop CJ, Besanko and Middleton JJ.

### F.2.2 The effect of Australian Health v Hive

1. There is an additional matter of principle to be dealt with. It is the applicant’s submission that where, as in this case, “not all the parties to the proceeding are party to an exclusive jurisdiction clause, the court should not … start with a prima facie disposition in favour of a stay of proceedings”. In support of that proposition, the applicants cite ***Australian Health*** *& Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61; 99 NSWLR 419 at [90] per Bell P, Bathurst CJ and Leeming JA agreeing. The applicant submits that the ordinary rule, i.e., that in the face of an exclusive jurisdiction clause the proceeding be stayed unless strong reasons are shown against a stay, was stated in commercial cases where “respect for party autonomy and holding parties to their bargain” (*Australian Health* at [77]) has real weight, and not in cases of consumer contracts of adhesion. The applicant refers also to *Quinlan* at [45] and the Canadian case of ***Douez*** *v Facebook Inc* 2017 SCC 33; [2017] 1 SCR 751.
2. It is to be observed that the applicant’s submission is that there is a different rule for each of two different circumstances. The first is where not all the parties to the litigation are parties to the clause and the second is where the clause is in a consumer contract of adhesion rather than in a commercial contract between arms-length commercial parties with matching bargaining strengths. It is convenient to consider the consumer contract point first.
3. The submission with regard to consumer contracts of adhesion misses the mark, it seems to me, because considerations relevant to the circumstances of the making of the contract and its nature will be taken into account at the stage of deciding whether the relevant clause was incorporated and became binding (e.g., *Toll v Alphapharm* at [53]) and also in considering whether it is unenforceable because of the application of, for example, the unfair contracts provisions in Pt 2-3 of the ACL and the CRA. They might conceivably also be taken into account as part of considering whether there are “strong reasons” to refuse a stay, but there does not seem to be any basis to say that a different test for a stay applies where the exclusive jurisdiction clause is in such a contract.
4. It is nevertheless necessary to consider the authorities.
5. In *Australian Health*, Bell P observed (at [76]) that common law courts have traditionally supported parties’ exclusive jurisdiction agreements by manifesting a strong disposition towards their enforcement although never accepting that private parties can “oust” the court’s jurisdiction by such agreements. After citing *Huddart Parker*, *Compagnie des* ***Messageries Maritimes*** *v Wilson* [1954] HCA 62; 94 CLR 577 and *Akai*, the President observed that “a similar robust approach to the enforcement of such clauses is readily discernible in other jurisdictions, at least where such clauses are between commercial parties dealing with each other at arm’s length.” Appellate level authorities in England, Singapore, Canada, the United States and New Zealand are then cited before the following is said: “(A somewhat less robust approach to the enforcement of such clauses in the context of consumer contracts has developed in Canada: *Douez v Facebook Inc* [2017] 1 SCR 751.)”
6. Given the parenthetic singling out of Canada, that paragraph is not authority for the proposition that in Australia consumer contracts are to be treated any differently on the question of the rule to be applied for a stay.
7. Insofar as Canada is concerned, the plurality in *Douez* (at [17] per Karakatsanis, Wagner and Gascon JJ), affirmed the “strong cause” analysis that had previously been established in *Pompey Industrie v ECU-Line NV* 2003 SCC 27; [2003] 1 SCR 450 as being applicable to consumer contracts. It entails a two-step process. At the first step, the party seeking a stay based on an exclusive jurisdiction clause (a forum selection clause in Canadian nomenclature) must establish that the clause is “valid, clear and enforceable and that it applies to the cause of action before the court” (at [28]). At the second step, the plaintiff must show “strong reasons” why the court should not enforce the exclusive jurisdiction clause (at [29]). The “strong cause” analysis is consistent with the position established in *The Eleftheria* (at [29]-[30]), and with the position in *Akai*.
8. The Court nevertheless recognised (at [35]) that “different concerns animate the consumer context” than the context of a sophisticated commercial transaction. On that basis it held (at [38]) that, in the consumer context, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. Thus, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain did not render the contract unconscionable at the first step (at [39]). Taking into account the fact that the parties did not negotiate on an even playing field recognises that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause, which is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause (at [39]).
9. The position in Canada is accordingly *not* that a different test is to be applied in a consumer context, but that relevant circumstances of that context can be taken into account in considering whether strong reasons have been shown not to enforce the foreign exclusive jurisdiction clause.
10. *Quinlan* is to similar effect. There, after acknowledging that in *Akai* the exclusive jurisdiction clause was the subject of negotiation and compromise between the insured and the insurer, the following was stated (at [46]):

In the present case the applicant had to either “take it or leave it”. There is authority to suggest that in a consumer situation the Court should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where there was negotiation between business people. See ***Sohio Supply*** *Co v Gatoil (USA) Inc* [1989] 1 Lloyd’s Rep 588 at 591-592 and *Incitec* *Ltd* at [50].

(The bold typeface is added for shorthand reference in these reasons.)

1. Notwithstanding that, Nicholson J went on to apply the considerations identified by Brandon J in *The Eleftheria* consistently with the rule in *Akai*.
2. In *Sohio Supply*, the first of the cases identified in *Quinlan*, in the context of construing a jurisdiction clause to decide whether it provided that the English courts should have exclusive jurisdiction, or merely provided that they should have non-exclusive jurisdiction, Staughton LJ (with whom Sir Denys Buckley agreed) took it as part of the “matrix background” or surrounding circumstances that the contract was made between sophisticated business people who specifically chose the words as to English jurisdiction for the purpose of the contract and that it was not “a consumer contract on a printed form, or anything like that” (at 591-2). There is nothing that is said there that supports the proposition that any different rule should be applied to the resolution of the question whether or not proceedings should be stayed in circumstances where there is an exclusive jurisdiction clause in a consumer contract.
3. The other case referred to on this point in *Quinlan* is *Incitec*. There, Allsop J (at [50]) observed that the clause at issue in *The Fehmarn* [1958] 1 WLR 159, which was in a bill of lading and hence not necessarily a consumer contract, “was a standard form, not, as here, a clause negotiated and amended between equal parties.” Nothing seems to have been made of this in the reasoning, and nothing further was said about it. Once again, this case is no support for the proposition that a different rule applies in the case of a standard form contract.
4. Incidentally, *The Fehmarn* is known for the statement by Lord Denning (at 162) that if parties have stipulated that all disputes should be judged by the tribunals of a particular country, that “is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.”
5. Returning now to *Australian Health* for the purpose of considering the other basis to the proposition that a different rule applies, i.e., that not all parties are party to the jurisdiction clause, the President identified (at [81]), consistently with *Incitec* at [47], that there are two very powerful policy considerations at play that may, depending on the facts, be in tension. They are, “on the one hand, the desire to and importance of holding commercial parties to their bargain, and, on the other hand, trying to ensure that all aspects of a dispute between all parties (including, relevantly, non-contracting parties) be resolved in one place at the one time”. That is because of the high desirability of minimising the possibility or prospect of different courts reaching different decisions, whether as to the facts or the law or both, in relation to the same dispute. High authority for that profound concern was cited, namely *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, *Henry v Henry* [1996] HCA 51; 185 CLR 571 at 591, and *CSR Ltd v Cigna Insurance Australia Ltd* [1997] HCA 33; 189 CLR 345 at 399-401 (***CSR v Cigna***).
6. It was in that context that the following was then said (at [90]) on which the applicant in this case principally relies:

In cases such as the present, when not all parties to the proceedings are party to an exclusive jurisdiction clause, the court should not, in my view, start with a prima facie disposition in favour of a stay of proceedings, which is the default starting point where the litigation only involves parties who are bound by the exclusive jurisdiction clause … The importance of holding parties to their bargain is a very powerful consideration but is not one that should be elevated or given some special status in the hierarchy of factors where not all parties to the dispute are parties to the exclusive jurisdiction clause.

1. Thus far, that passage has only been considered on two occasions, both in *Epic v Apple* – at first instance and on appeal. There, there were two Apple companies, one of which was a party to the exclusive jurisdiction clause with Epic and the other was not, but both sought the stay. A stay would therefore have resulted in the whole case being litigated in the Northern District of California. Thus, the caution in *Australian Health* against the fragmentation of litigation did not apply. See *Epic v Apple* (FCA) at [47]-[48] and *Epic v Apple* (FCAFC) at [77].
2. It seems to me that the debate raised by the applicant about whether in a case, such as the present, where not all the parties to the litigation are parties to the exclusive jurisdiction clause, there is a different test or rule than in a case where all the parties to the litigation are parties to the relevant clause, is ultimately sterile. That is because the very factors that might be said to lead to the application of a different rule or test are factors that will be weighed, and may well be decisive, in the consideration of “strong reasons” to refuse the stay: *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd (Stay Application)* [2021] FCA 754 at [10]-[12] and [25] per Perram J.
3. It follows that I do not think that whether I apply the rule as identified in *Australian Health* at [90] or in *Akai* the result is likely to be any different. On one view, I should apply the rule in *Australian Health* on the basis that as a trial judge I should not depart from a decision on a point of common law of an intermediate appellate court, albeit in a different judicial hierarchy. See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ. That would be on the basis that *Akai* is distinguishable on the same basis that it was distinguished in *Australian Health*, namely because in *Akai* the parties to the litigation were parties to the exclusive jurisdiction clause such that if the matter was stayed there would not have been a fragmentation of the litigation. The same is true of *Huddart Parker* and *Oceanic Sun Line*.
4. However, in my view *Australian Health* does not, as ratio, establish a different rule to the rule in *Akai*. That is because the trial judge decided the case on the basis of the rule in *Akai* (*Australia Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2018] NSWSC 1236 at [16]-[18]) and on appeal it was held (at [98]) that the trial judge had not made any error in principle. The result is that the Court of Appeal decided the case on the basis of *Akai* and not on the basis of a new or independent principle.

## F.3 Class action waiver clause

1. The second basis on which the respondents put the case for a stay is that Mr Ho and the US sub-group have by the class action waiver clause waived their rights to bring a claim as part of a representative class. As mentioned, this is a novel issue in Australia and there is no case establishing any principles with regard to the grant of a stay of a representative proceeding in reliance on such a clause. In any event, and as I explain below in section I.2, I consider that a stay is an inappropriate remedy.

## F.4 Clearly inappropriate forum

1. The respondents contend that even if the exclusive jurisdiction clause does not apply to Mr Ho or the US sub-group members, and in any event in respect of the UK sub-group members, the proceeding should be stayed in respect of those claims on the basis that this Court is a clearly inappropriate forum for the adjudication of those claims. The terminology of “clearly inappropriate forum” is drawn from a line of cases in the High Court that can conveniently be summarised as follows.
2. In *Oceanic Sun Line*, Deane J (at 247-248) summarised the principles governing the power of a court to order that proceedings which have been regularly instituted within jurisdiction should be dismissed or stayed on inappropriate forum grounds. The power is a discretionary one in the sense that its exercise involves a subjective balancing process in which the relevant factors will vary and in which both the question of the comparative weight to be given to particular factors in the circumstances of a particular case and the decision whether the power should be exercised are matters for individual judgment and, to a significant extent, matters of impression. His Honour concluded that:

[t]he power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to [them].

1. Gaudron J (at 265-266) agreed with Deane J with regard to the explanation of the clearly inappropriate forum test. Her Honour added (at 266):

[T]he selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law the forum is applicable in the determination of the rights and liabilities (including the extent of liability) of the parties.

1. Brennan J, who was in the majority with Deane and Gaudron JJ with regard to the overall result, took a different approach on the question of staying the proceeding. The rationes decidendi on this question are accordingly to be found in the judgment of Deane J.
2. The question was then taken up in ***Voth*** *v Manildra Flour Mills Pty Ltd* [1990] HCA 55; 171 CLR 538. The majority of the Court (Mason CJ, Deane, Dawson and Gaudron JJ) endorsed (at 564) what Deane J said in *Oceanic Sun Line* at 247-248 with regard to the correct test being whether the domestic forum is a “clearly inappropriate forum” and the explanation of the application of that test. Brennan J, who was in dissent as to the result of the case, accepted the test proposed by the majority (at 572). His Honour therefore joined in the decision that the “clearly inappropriate” test be adopted for the determination of applications for, relevantly, staying proceedings.
3. In *Oceanic Sun Line*, and confirmed in *Voth*, it was decided not to follow the English approach as set out in the speech of Lord Goff of Chievely in the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 477 – i.e., that the domestic proceeding will be stayed if it is shown that the domestic forum is not the natural or appropriate forum for the trial, and also that there is another available forum which is clearly or distinctly more appropriate than the domestic forum where the “natural forum” is “that with which the action had the most real and substantial connection” (*Voth* at 548-549). It was nevertheless held in *Voth* (at 564-565) that the discussion by Lord Goff of the relevant “connecting factors” and “a legitimate personal or juridical advantage” provides valuable assistance.
4. In *Voth*, it was also said (at 566) that:

the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration … the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties.

1. The majority (at 566) agreed with Gaudron J in *Oceanic Sun Line* that “the substantive law of the forum is a very significant factor in the exercise of the court’s discretion, but the court should not focus upon that factor to the exclusion of all others.”
2. In *CSR v Cigna,* the following was said by Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ (at 391):

It is clear from the rationale for the exercise of the power to stay proceedings and, also, from the words “oppressive”, “vexatious” and “abuse of process” in *Voth*, in *Oceanic Sun* and in the earlier cases considered in *Oceanic Sun*, … that the power to stay proceedings on grounds of forum non conveniens is an aspect of the inherent or implied power which, in the absence of some statutory provision to the same effect, every court must have to prevent its own processes being used to bring about injustice.

(References omitted.)

1. In ***John Pfeiffer*** *Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503, it was observed by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (at [25]) that the law to be applied in deciding the rights and duties of the parties might, in some cases, affect whether the court should decline to exercise its jurisdiction and stay the proceedings.
2. In *Regie Nationale des Usines Renault SA v* ***Zhang*** [2002] HCA 10; 210 CLR 491 the role of the applicable law in considering a stay of proceedings arose squarely for decision (see [10]). The proceeding in the NSW Supreme Court concerned a motor vehicle accident in New Caledonia. The claim was in tort. It was held by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (at [78]), citing *Voth*, that it was the task of the defendant parties who sought the stay of the proceeding:

to demonstrate that a trial in New South Wales would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustifiable trouble and harassment.

1. Insofar as the applicable law is concerned, it was held (at [81]) that an Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the lex causae.

# G. IS A STAY PROHIBITED BY SECTION 138 OF THE COMPETITION AND CONSUMER ACT?

## G.1 Introduction

1. The applicant submits that one of the things standing in the way of the stay relief that the respondents seek (in respect of both the US and UK sub-groups) is s 138 of the CCA. That provision is in Div 8 of Pt XI, that part dealing with the application of the ACL as a law of the Commonwealth and Div 8 dealing with “Jurisdictional matters”. Section 138 is in the following terms:

**138 Conferring jurisdiction on the Federal Court**

(1) Jurisdiction is conferred on the Federal Court in relation to any matter arising under this Part or the Australian Consumer Law in respect of which a civil proceeding has been instituted under this Part or the Australian Consumer Law.

(2) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:

(a) the jurisdiction of the Federal Circuit Court under section 138A; and

(b) the jurisdiction of the several courts of the States and Territories under section 138B; and

(c) the jurisdiction of the High Court under section 75 of the Constitution.

1. Also relevant to the discussion of the purpose and effect of s 138 of the CCA is s 86 of the CCA because, on one view at least, it is to similar effect although with respect to a different part of the CCA. Section 86 is in Pt VI which is headed “Enforcement and remedies” and deals with the enforcement of Pt IV and associated parts of the CCA that deal with restrictive trade practices. Section 86 includes, relevantly, the following provisions:

**86 Jurisdiction of courts**

(1AA) A reference in this section to this Act, or to a Part, Division or section of this Act, is a reference to this Act, or to that Part, Division or section, as it has effect as a law of the Commonwealth.

1. Jurisdiction is conferred on the Federal Court in any matter arising under this Act or the consumer data rules in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.

…

(4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than:

(a) the jurisdiction of the Federal Circuit Court under subsection (1A); and

(b) the jurisdiction of the several courts of the States and Territories under subsection (2); and

(ba) the jurisdiction of the Supreme Courts of the States under subsection (3A); and

(bb) the jurisdiction of the Supreme Courts of the Territories under subsection (3B); and

(c) the jurisdiction of the High Court under section 75 of the Constitution.

1. The applicant relies on s 138 in different ways.
2. First, she submits that the section, in conferring jurisdiction on named courts, reflects a legislative choice that jurisdiction is to be “limited to such ‘Courts’” and “not given to other courts, including foreign courts.” She refers to *Re* ***Douglas Webber*** *Events Pty Ltd* [2014] NSWSC 1544; 291 FLR 173 at [35] per Brereton J.
3. In that regard, the applicant submits that an “Australian forum is the only forum in which the claims under [the ACL] can be heard and determined”. She relies on ***DA Technology*** *Australia Pty Ltd v Discrete Logic Inc* [1994] FCA 101 at 19 per Gummow J, *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 (***Home Ice Cream No 1***) at [19] and *Home Ice Cream Pty Ltd v McNabb Technologies LLC (No 2)* [2018] FCA 1093 (***Home Ice Cream No 2***)at [24] per Greenwood ACJ, and ***Faxtech*** *Pty Ltd v ITL Optronics Ltd* [2011] FCA 1320 at [18] per Middleton J. On that basis, the applicant submits that even if the US Court, applying its own choice of law rules, would hear and determine such claims by Mr Ho and the US sub-group members, the stay would be contrary to Australian federal law and must be refused.
4. The applicant also relies on *Akai* at 447 per Toohey, Gaudron and Gummow JJ to submit that whether or not the US Court could and would exercise jurisdiction over the claims by Mr Ho and the US sub-group members, this Court can and must do so.
5. Secondly, notwithstanding the reliance on *Akai*, the applicant submits that s 138 operates prior to the exercise of the discretion, i.e., it mandates that a stay of an ACL claim cannot be ordered because once seized of jurisdiction this Court must exercise it.
6. Thirdly, the applicant submits that s 138 should be construed as a broad conferral of jurisdiction on the named courts and, with reference to ***Public Service Association*** *of South Australia v Federated Clerks’ Union of Australia* [1991] HCA 33; 173 CLR 132 at 160, that it is to be presumed that the legislature does not intend to deprive the citizen of access to the courts other than to the extent expressly stated or necessarily implied. From that it is submitted that there should be no presumption that the Parliament intended to safeguard the capacity of the parties to select their forum, be it internationally or domestically, or, put differently, that the conferral of jurisdiction under this section must be given effect even in the face of the parties’ attempts by way of private agreement to outsource that jurisdiction to courts overseas.
7. The applicant expressly disavows any point to the effect that s 138 purports to tell foreign courts what they can or cannot do in terms of the exercise of their jurisdiction.
8. It is immediately to be observed that there is nothing express in s 138 about the capacity of parties to agree to submit any dispute between them to a foreign court or an arbitral tribunal even where that dispute is properly characterised as a matter arising under Pt XI of the CCA or under the ACL. It is also to be observed that there is nothing apparent in the text of s 138 that restricts the power or discretion of a designated court to decline to exercise jurisdiction by staying proceedings within its jurisdiction. The applicant accordingly relies on implications from the text.
9. The respondents refer to *Nicola*, *Epic v Apple* (FCA) and *Epic v Apple* (FCAFC) (together, ***Epic v Apple***).
10. It is convenient to consider the cases referred to by the parties in chronological order.

## G.2 Public Service Association (1991)

1. The *Public Service Association* case considered the extent of judicial review of a decision of the Industrial Commission of Australia allowed by s 95 of the *Industrial Conciliation and Arbitration Act 1972* (SA). That section provided that every award of the Commission is final and cannot be “challenged, appealed against, reviewed, quashed or called in question except on the ground of excess or want of jurisdiction.” It was in that context that Dawson and Gaudron JJ (at 160) reasoned that privative clauses such as the section in question “are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.”
2. It is immediately apparent that the context of the dictum on which the applicant relies is far removed from the context of construing s 138 of the CCA. The Court in *Public Service Association* was dealing with a statutory provision expressly ousting the jurisdiction of the courts, whereas s 138 is a statutory provision expressly conferring jurisdiction on particular courts. In seeking to construe that provision, there is no cause to apply the uncontentious proposition that it is to be presumed that the legislature does not intend to deprive the citizen of access to the courts. No question of s 138 depriving anyone of access to courts arises. The question is whether the provision restricts the court from giving effect to the parties’ agreement to submit any disputes between them to some other forum.
3. In the circumstances, the applicant’s reliance on *Public Service Association* is misplaced.

## G.3 DA Technology (1994)

1. In *DA Technology,* there was concurrent and overlapping litigation in a number of different jurisdictions and in an arbitration concerning the copyright in a work of software. In the proceeding in this Court, which was instituted several weeks after one of the respondents had instituted proceedings in the Federal Court of Canada, the applicants sought, amongst others, orders under s 87 of the *Trade Practices Act 1974* (Cth) (**TPA**) for alleged breaches of s 52 of that Act. (Those provisions are now, respectively, s 87 of the CCA and s 18 of the ACL.) The respondents moved for an order that the proceeding in this Court be permanently stayed or, alternatively, stayed until judgment in the Canadian court.
2. In the course of deciding that motion, Gummow J referred to s 86 of the TPA, which conferred jurisdiction on this Court and on State courts for such claims in much the same way as it still does as quoted at [209] above, and observed as follows (at 18-19 [36]):

The jurisdiction of this Court is conferred by s 86 of the TP Act. Whilst there are claims in the accrued jurisdiction, the claims of contravention of Part V of the TP Act and to relief under Part VI thus are significant aspects of the proceeding. There is also an Australian public interest in the application of a statute of this nature by a court selected by the Parliament.

1. Whilst that observation acknowledges the public interest in such claims being litigated in the courts selected by the Parliament, it says nothing about the provision that conferred jurisdiction, namely s 86, having the effect that such claims cannot be stayed. Ultimately his Honour decided not to stay the proceeding but to stand the motion over to await the outcome of the foreign proceeding: *DA Technology Australia Pty Ltd v Discreet Logic Inc* (1994) 28 IPR 578 at 579.

## G.4 Akai (1996)

1. In *Akai,* a New South Wales corporation sued a Singaporean insurer for indemnity under an insurance policy. The policy included an English law choice of law clause and an exclusive jurisdiction clause in favour of “the Courts of England”. The insurer sought a stay of the proceeding in the NSW Supreme Court in reliance on the exclusive jurisdiction clause. The insured wished to rely on the *Insurance Contracts Act 1984* (Cth) (**ICA**) and opposed the stay on the basis that it would lose that advantage if forced to pursue proceedings in England instead.
2. Critical provisions of the ICA were ss 8 and 52. Section 8 provided, in effect, that the ICA applied to contracts of insurance the proper law of which is or would be, but for a choice of law clause to the contrary, the law of a State or Territory and that an express choice of law clause to the contrary must be disregarded for that purpose. Section 52 provided that where a provision of a contract of insurance purports to exclude, restrict or modify, to the prejudice of a person other than the insurer, the operation of the ICA, the provision is void. It was held by the majority, Toohey, Gaudron and Gummow JJ (at 433), that:

Taken together, ss 52 and 8 manifest a legislative intention not only that there should be no power to contract out of the provisions of the [ICA], but also that the regime established by the [ICA] should be respected as regards contracts the proper law of which is, or but for the selection of another law would be, that of a State or Territory.

1. In respect of an exclusive jurisdiction clause, it was recognised (at 444), with reference to *Messageries Maritimes* at 587, that such a clause is in effect the parties saying that, if a dispute arises between them, the claimant will seek a determination of it by the designated tribunal, and that the other party will not object to the jurisdiction of that tribunal. They are also saying that, as between them, no other tribunal shall have jurisdiction to determine disputes. However, a foreign jurisdiction clause does not operate to exclude the jurisdiction of the Australian court which otherwise has jurisdiction, although it may constitute a ground for that court to refuse to exercise its jurisdiction.
2. Following *Huddart Parker* at 508-509, it was held (at 445) that where the parties have agreed to a foreign exclusive jurisdiction clause, “the courts begin with a firm disposition in favour of maintaining that bargain unless strong reasons be adduced against a stay, it being the policy of the law that the parties have made a contract should be kept to it.” It was also held (at 445) that a stay may be refused where the foreign jurisdiction clause offends “the public policy of the forum whether evinced by statute or declared by judicial decision.”
3. The majority went on to consider examples of statutory provisions which have the effect of requiring the domestic court to exercise its jurisdiction and not to stay proceedings in favour of a foreign tribunal even in the face of an exclusive jurisdiction clause. That is to say, statutory examples were identified that have the effect that the applicant in this case contends that s 138 of the CCA has.
4. The first example (considered at 445) was s 9(2) of the *Sea-Carriage of Goods Act 1924* (Cth) which provided:

Any stipulation or agreement … purporting to oust or lessen the jurisdiction of [an Australian court] in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

1. Section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**), which by s 20 repealed the 1924 Act, is to like effect. An example of a case where the operation of s 9(2) of the 1924 Act invalidated a foreign jurisdiction clause and thereby defeated a stay is *Messageries Maritimes*, also discussed in *Akai*.
2. The next example (considered at 446) was Art 3 r 8 of the Hague Rules (being the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* done at Brussels on 25 August 1924) as it was contained in a Schedule to the *Carriage of Goods by Water Act*, RSC 1970, c C-15 (Canada) and the *Carriage of Goods by Sea Act 1971* (UK), which provided that any clause “relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, default or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.” Art 3 r 8 of the Hague-Visby Rules (being the Hague Rules as amended by the Protocol amending them done at Brussels on 23 February 1968) as amended and set out in Sch 1A to COGSA and given the force of law in Australia by s 8 of COGSA is to like effect. In *Akai* examples are given of cases where that rule was held to invalidate or render ineffective foreign jurisdiction clauses upon proof that the foreign court chosen by the parties’ clause would apply a law of the forum to limit the carrier’s liability, namely *Agro Co of Canada Ltd v The Ship “Regal Scout”* (1983) 148 DLR (3d) 412 and *The Hollandia* [1983] 1 AC 565.
3. In respect of the policy behind such provisions, the majority observed (at 447) that:

considerations of public policy present in an Australian court 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 [forum]” as discerned from a consideration of the scope and purpose of the particular statute. 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 [ICA] has no application.

(Citations omitted.)

1. It was thus held (at 447) that to grant a stay in the present case would be to prefer the private engagement to the binding effect upon the State court of the law of the Parliament. That was held to indicate a “strong reason” against the exercise of the discretion in favour of a stay – the policy of the law militated against a stay.
2. Ultimately, however, it was held (at 447-448) that it was unnecessary to decide the case solely upon the basis of “strong reasons” because the exclusive jurisdiction clause in favour of “the Courts of England” was rendered void because it would have the effect of excluding, to the prejudice of the insured and thus contrary to s 52, the operation of a particular provision of the ICA, namely s 54.
3. Thus, the following points emerge from *Akai* insofar as the present question is concerned:
4. Even the strong public policy of the mandatory application of the ICA to contracts of insurance that have their closest connection with Australia evidenced by ss 9 and 52 did not mean that the court had no discretion not to exercise its jurisdiction. Rather, that public policy amounted to the requisite “strong reason” not to exercise that discretion.
5. Statutory provisions expressly nullifying a contractually agreed exclusive jurisdiction clause were well-known and were distinguished from the case where the legislation manifested only a strong public policy in favour of the mandatory application of the statute which might therefore constitute “strong reason” not to exercise that discretion.
6. Thus, in the context of statutory provisions far stronger than CCA s 138 in their preference for litigation in Australia, the High Court still applied the “strong reasons” test. *Akai* is therefore not authority for the inapplicability of that test on account of CCA s 138.

## G.5 Nicola (2009)

1. In *Nicola*, the applicants were franchisees of an American franchisor. They claimed entitlements to restitution of franchise fees paid to the franchisor and for damages for breach of contract pursuant to s 52 of the TPA and for unconscionable conduct contrary to s 51AC of the TPA. They also contended that the franchisor had infringed the *Franchising Code of Conduct* contrary to the requirements of the TPA, and they sought to vary the franchise agreement pursuant to the ***Independent Contractors Act*** *2006* (Cth). The franchise agreement contained an exclusive jurisdiction clause in favour of the courts of Florida. An issue accordingly arose as to whether the proceeding should be stayed in favour of proceedings in Florida.
2. The applicants argued that both the TPA and the Independent Contractors Act contained an overriding choice of law rule which meant that no Australian court could proceed on any other basis but that the claims under those Acts had to be determined by Australian courts (at [71]). Perram J (at [72]) rejected that argument. His Honour reasoned that there can be cases where a statute contains an overriding choice of law clause such that a forum court can proceed on no other basis but than in accordance with its terms. However, s 86 of the TPA conferred jurisdiction on a number of courts in respect of claims under it. His Honour agreed with the submission that the language of s 86 stands in stark contrast to the language of ss 67 and 68 of the TPA “which constitute a clear example of an overriding choice of law clause.”
3. At that time, s 86 was materially the same as it now is in the CCA as quoted at [209] above. Sections 67 and 68, since repealed, were in Pt V, “Consumer protection”. Specifically, they were in Div 2, “Conditions and warranties in consumer transactions”, and now find their closest equivalent in s 67 of the ACL which is applicable to Div 1 of Pt 2-3, i.e., the consumer guarantees. In substance, ss 67 and 68 of the TPA made Div 2 applicable to any contract for the supply by a corporation of goods or services to a consumer the proper law of which, but for a term that it should be the law of some other country, would be the law of any part of Australia and that any term that restricted the application of Div 2 would be void. Sections 67 and 68 were thus similar to ss 8 and 52 of the ICA dealt with in *Akai*.
4. Perram J held (at [73]) that s 86 of the TPA did not operate as an overriding choice of law clause. Thus, in the face of a foreign exclusive jurisdiction clause, the applicants who wished to proceed in an Australian court had to establish “strong cause” why the proceeding should not be stayed (at [74]).

## G.6 Faxtech (2011)

1. In *Faxtech,* the applicant sought relief on the basis that the respondents had engaged in misleading or deceptive conduct contrary to s 18 of the ACL, and the respondents applied to stay the proceeding in favour of a proceeding in England. Although the respondents relied on what they contended was an exclusive jurisdiction clause in favour of courts in England, Middleton J held (at [8]) that the clause in question was not an exclusive jurisdiction clause.
2. His Honour held (at [18]) that “there is no doubt that the claim for misleading or deceptive conduct can only be dealt with in this Court, and not by an English court. The relief sought under the Australian Consumer Law can only be obtained in this Court.” His Honour accordingly held (at [21]) that even if there was an exclusive jurisdiction clause, as the “only forum able to deal with all the causes of action is this Court”, there was an “overwhelmingly powerful reason” for not ordering a stay.
3. It is apparent that the reasoning proceeds on the assumption that the ACL claim could not have been advanced in the English court. That is a different question to the present, namely whether once an ACL claim is raised in this Court the Court must proceed to hear and determine it and cannot stay the proceeding in favour of a foreign court in accordance with an exclusive jurisdiction clause even if the ACL claims could be made in the foreign court. Indeed, Middleton J applied the test of “strong reasons” as mandated by *Akai* which demonstrates that his Honour was not proceeding on the basis that he could not stay the proceeding. There is no mention in the judgment of s 138 of the CCA.

## G.7 Douglas Webber (2014)

1. In *Douglas Webber*, the plaintiff claimed:
2. leave pursuant to ss 236 and 237 of the ***Corporations Act*** *2001* (Cth) to bring proceedings in the name of the third defendant, an Australian company, against the first defendant for compensation pursuant to s 1317H of the Corporations Act for alleged breaches of his duties as a director of the company under ss 181, 182 and 183 of the Corporations Act;
3. a compulsory purchase order in respect of his shareholding in the company pursuant to s 233 of the Corporations Act for alleged oppression within s 232; and
4. damages for breach of a “non-compete” clause in a Limited Partnership Agreement between the plaintiff, the first defendant and the third defendant company.
5. Since both the plaintiff and the first defendant were New Zealanders, the first defendant applied pursuant to the *Trans-Tasman Proceedings Act 2010* (Cth) for an order staying the proceeding on the grounds that the High Court of New Zealand is the more appropriate court to determine the matters in issue. Section 19 of that Act provided that the Australian court may stay the proceeding if it is satisfied that a New Zealand court has jurisdiction to determine the matters in issue between the parties to the proceeding and is the more appropriate court to determine those matters. The question of jurisdiction arose in that context, i.e., did the New Zealand court have jurisdiction to determine the plaintiff’s claims?
6. After doubting that the New Zealand court would under its own choice of law rules apply an Australian statute to the Australian company and its directors, Brereton J went on (at [34]) to consider “an additional obstacle”, namely “where the statute confers jurisdiction only on a specified court or courts, not including a foreign court.” His Honour observed that s 237 of the Corporations Act confers jurisdiction on “the Court”, s 1317H confers jurisdiction on “a Court” and ss 232 and 233 confer jurisdiction on “the Court”.
7. Section 58AA(1) of the Corporations Act defines “court” to mean any court and “Court” to mean any one of the Federal Court, the Supreme Court of a State or Territory or the Family Court. Section 58AA(2) provides that except where there is a clear expression of a contrary intention (for example, by use of the expression “the Court”), proceedings in relation to a matter under the Act may be brought in any court. Brereton J held (at [35]) that while that section does not itself confer jurisdiction, it has the effect, particularly in the light of s 58AA(2), that when read in conjunction with the provisions that do confer jurisdiction on a “Court”, that such jurisdiction is limited to the Courts so defined. In other words, where a function under the Act is given to a “Court” (as distinct from a “court”), only a Court as so defined can exercise that jurisdiction. His Honour held (at [34]) that this necessarily means that no foreign court may exercise jurisdiction that is conferred on a “Court”. (The judgment as reported in the FLR and as published on caselaw.nsw.gov.au refers to s 58FF(2) rather than s 58AA(2) but since there is no s 58FF in the Act, and as is apparent from the context, that must be an error.)
8. On that basis, his Honour concluded (at [38]) that the New Zealand court does not have jurisdiction to grant the principal relief sought by the plaintiff in the proceeding, being relief that can be granted only by a “Court” within the meaning of the Corporations Act. On that basis the application for a stay in favour of proceedings in New Zealand was refused.

## G.8 Home Ice Cream (2018)

1. In *Home Ice Cream No 1*, the Australian applicant brought a proceeding against an American corporation in which it contended that the respondent had engaged in misleading or deceptive conduct in Australia in contravention of s 18 of the ACL. It sought relief pursuant to ss 237 and 243 of the ACL.
2. In a “Master Services Agreement”, or MSA, between the parties they had agreed that the laws of the State of Illinois would govern the legal relationship between them and that any legal proceeding would be brought only in a court of competent jurisdiction sitting in Cook County, Illinois.
3. In support of interlocutory relief for an anti-anti-suit injunction to prevent the respondent from obtaining an anti-suit injunction in Illinois to prevent the applicant from continuing with its proceeding in Australia, the applicant adduced expert evidence on Illinois law. That was to the effect that “an Illinois Court is not likely to apply or decide any claim under the Australian [Act] likely finding instead that the parties had agreed, in the MSA, to exclude the law of any other jurisdiction.”
4. After an urgent ex parte hearing, Greenwood ACJ ordered an anti-anti-suit injunction against the respondent. His Honour reasoned (at [19]) that the causes of action and remedies pursued by the applicant were not available in the State of Illinois and that the “only court which is capable of determining the questions which [the applicant] seeks to litigate (other than the High Court of Australia in exercising its appellate jurisdiction) is the Federal Court of Australia or a court invested with the judicial power of the Commonwealth”.
5. His Honour referred to *Faxtech* at [18] and two other cases in support of his conclusion. It is worth briefly considering each of those.
6. In *Commonwealth Bank of Australia v White* [1999] VSC 262; [1999] 2 VR 681, Byrne J held (at [89]) that a countervailing consideration against giving effect to a foreign exclusive jurisdiction clause was “the non-availability in the selected forum of the relief sought in this court based on misleading and deceptive conduct and on breaches of the companies legislation.” His Honour reasoned as follows:

It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests. Put more positively, the statutes creating these standards of commercial behaviour for persons doing business in this jurisdiction do not exempt foreign corporations. Moreover, the policy behind them would not be served if exemption might be achieved by inserting stipulations as to foreign law or forum.

1. The result was that it was held (at [91]) that there was “good reason”, applying *Akai*, not to stay the Australian proceeding in favour of the forum chosen by the parties in their exclusive jurisdiction clause. That was not on the basis that once the jurisdiction of the court had been properly invoked it must be exercised, but rather on the basis that the court would not exercise its discretion not to exercise jurisdiction on the basis that “good reason” had been established.
2. In *Clarke Equipment Australia Ltd v Covcat Pty Ltd* [1987] FCA 96; 71 ALR 367 at 371 it was held by Sheppard J, Jackson J agreeing, that the remedy conferred by s 52 of the TPA would not be lost whatever the parties may provide in their agreement. That is to say, parties cannot contract out of the protection offered by the provision.
3. In *Home Ice Cream No 2*, Greenwood ACJ came to consider final relief on the anti-suit injunction. His Honour made similar observations (at [24]-[25]) that the Illinois court would not determine the ACL claim and that the Australian court was the only court that would do so.
4. The judgments are accordingly not authority for the proposition that there is no discretion to stay the domestic proceeding in which an ACL claim is brought in circumstances where the claim might be brought in the foreign court to which the parties agreed to submit their dispute.

## G.9 Epic v Apple (2021)

1. In *Epic v Apple*, two Epic companies commenced proceedings against two Apple companies, one American (Apple Inc) and the other its Australian subsidiary (Apple Pty Ltd), seeking declarations in respect of and injunctions restraining alleged contraventions by Apple of Pt IV of the CCA, namely those prohibiting the abuse of market power (s 46), exclusive dealing (s 47) and lessening competition (s 45). Epic also alleged that Apple had contravened s 21 of the ACL by engaging in unconscionable conduct.
2. The Apple companies applied for a permanent stay of the proceeding on the basis that Apple Inc (but not Apple Pty Ltd) and the Epic companies had contractually agreed that any disputes between them would be heard by courts in the Northern District of California and, therefore, not by the Federal Court of Australia.
3. At first instance, Perram J (at [19] and [21]) accepted that Pt IV of the CCA and s 21 of the ACL are mandatory laws of the forum in the sense that parties cannot contract out of their application.
4. For present purposes, the relevant part of the reasoning is where Perram J asked whether there is something about the nature of proceedings under Pt IV which means that they should generally be heard in this Court (at [55]). His Honour had in mind the statement of the majority in *Akai* at 445 that a stay “may be refused where the foreign jurisdiction clause offends the public policy of the forum whether evinced by statute or by judicial decision”. His Honour identified a number of “facets” to the question, one of which was expressed as follows (at [58]):

Thirdly, Parliament has indicated by CCA s 86(4) (subject to immaterial exceptions) that only this Court may hear a case of the present kind and the jurisdiction of the several courts of the States is expressly excluded. If cl 14.10 had selected the courts of New South Wales as the forum, it would therefore be ineffective because those courts lack jurisdiction under Part IV. It is perhaps slightly surprising that cl 14.10 may select the courts of the Northern District of California instead. On the other hand, s 86(4) is a rule concerned with the distribution of jurisdiction and it is unlikely that it speaks to the position of foreign courts.

1. His Honour stated (at [64]) “for completeness” that he had not included s 21 of the ACL in the discussion but that “no such issues appear … to arise in relation to it.”
2. In short, Perram J considered s 86(4) of the CCA to be “concerned with the distribution of jurisdiction” and not to say anything about “the position of foreign courts” or whether the relevant Australian court can stay domestic proceedings in favour of foreign proceedings. Given his Honour’s conclusion with regard to s 21, the effect of s 138 with regard to the question of staying domestic ACL proceedings must be regarded as being, at best for the applicant, the same.
3. On appeal from the judgment of Perram J, Epic submitted that the Federal Court is the mandatory forum for the dispute as, on the proper construction of ss 86 and 138, the Court is vested with exclusive jurisdiction to hear, determine and grant remedies in respect of cases under Pt IV and Pt XI (i.e., the ACL). Epic submitted that s 86(4) (and, presumably, by analogy, s 138(2)) “vests” jurisdiction specifically in the Federal Court to the exclusion of all courts including foreign courts. See the Full Court judgment at [90]-[93].
4. The Full Court, per Middleton, Jagot and Moshinsky JJ, after citing *Douglas Webber*, found it unnecessary to decide the point, reasoning as follows (at [95]):

Despite Epic’s submission, it can be accepted that two or more interpretations of s 86 are open, one functioning as a distribution of jurisdiction domestically, and one having the effect contended for by Epic. In view of our approach to the public policy considerations, and our decision that there are “strong reasons” to refuse a stay, we do not need to further address the issue of the proper construction of s 86 (or s 138) of the CCA. We will proceed to consider Epic’s submission that even if s 86 is solely dealing with the domestic distribution of jurisdiction, the reasoning which underpins that distribution applies with even greater force in respect of foreign courts, and in this regard forms part of the indicia in the CCA that public policy requires the Federal Court to hear the proceeding.

1. The Court concluded that there were compelling public policy considerations which amounted to strong reasons for refusing the stay in that case. Those considerations related principally to Pt IV of the CCA, rather than to provisions of the ACL that are at issue in the present case.

## G.10 Analysis and conclusion

1. It is apparent from the analysis of authorities above that save for *Douglas Webber* none of the authorities is good authority in support of the applicant’s submissions on the effect of s 138 of the CCA. Indeed, the judgments of Perram J in *Nicola* and *Epic v Apple* are against the applicant’s submissions, and the Full Court in *Epic v Apple* left the point open. Since I do not regard *Nicola* and *Epic v Apple* on this point to be clearly wrong, for reasons of judicial comity I ought to follow them: *BVT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 222; 385 ALR 286 at [62] per Allsop CJ, Moshinsky and O’Callaghan JJ citing *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757 at [74]-[76] per French J.
2. Insofar as *Douglas Webber* is concerned, the provisions of the Corporations Act and the whole statutory context considered by Brereton J are far removed from s 138 of the CCA and the provisions of the ACL relied on by the applicant in the present case. The Corporations Act provisions apply specifically to Australian incorporated companies, which are themselves a statutory creation and subject to the supervision of Australian courts. The provisions regarded as conferring jurisdiction on particular “Courts” as defined in s 58AA, rather than “courts”, are, in one sense, to be understood as giving to those “Courts” specified powers – they are empowering provisions.
3. Section 138 of the CCA is not an empowering provision; it is, in my view, in the words of Perram J, “concerned with the distribution of jurisdiction.” It does not speak to the position of foreign courts. More particularly, there is nothing in the text of the provision to justify the implication which the applicant seeks to draw, namely that a court whose jurisdiction is engaged under s 138 is compelled then to exercise that jurisdiction; there is nothing in the text to suggest that the provision makes any inroads into the power of the Federal Court, in relation to matters in which it has jurisdiction, “to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate” – necessarily including stay orders – conferred by s 23 of the *Federal Court of Australia Act 1976* (Cth).
4. Moreover, as demonstrated in *Akai*, there are many examples of statutory provisions that expressly override the parties’ choice of forum in favour of named Australian courts. Those examples date back to before the TPA, and the discussion of them in *Akai* was long before the ACL. There is nothing in s 138 to suppose that notwithstanding that history the Parliament intended that it have the effect of such overriding forum provisions.
5. The provisions of the ACL which the applicant in her FASOC says that the respondents breached, namely s 18 (misleading and deceptive conduct), s 29 (false or misleading representations about goods or services), s 60 (guarantee as to due care and skill) and s 61 (guarantees as to fitness for a particular purpose), prescribe normative standards of conduct and statutory guarantees by providers of goods and services in Australia and the consumers of those goods and services. The remedial provisions relied on, namely ss 236 and 237, provide for damages or compensation for breach of the statutory norms or guarantees. None of those provisions is about power or jurisdiction, and there is nothing to suggest that they are inapplicable or unavailable as between private parties other than in a proceeding in this Court as designated by s 138 of the CCA. In that regard, s 138A confers jurisdiction in such claims on the Federal Circuit Court other than in a civil proceeding instituted by the Commonwealth Minister, and s 138B does the same in respect of the several courts of the States and Territories save in respect of a civil proceeding instituted by the Commonwealth Minister or the Commission. Section 138E provides for the transfer of ACL claims from the Federal Court to the Family Court. It is also to be observed that the ACL is enacted as a law in each Australian State and internal Territory, and each Australian State and internal Territory has conferred jurisdiction on their respective tribunals to determine such claims: see, e.g., Pt 3 and Pt 6A of the *Fair Trading Act 1987* (NSW).
6. Thus, the whole range of Australian courts and tribunals has or can have jurisdiction in respect of ACL claims between private litigants (i.e., excluding the Commonwealth Minister and the Commission). There is nothing in that scheme to prevent such claims being brought in arbitration proceedings or in foreign courts. If that is correct, there is no reason to suppose that once a claim is brought in one of the designated courts, that court is by an implied statutory rule prevented or prohibited from staying its proceeding in favour of some other forum.
7. That said, clearly the decision of the Full Court in *Epic v Apple* is binding authority for the proposition that there is a strong public interest in claims under the CCA, including those under the ACL, being litigated in Australia and in an appropriate case that may constitute “strong reason” as required by *Akai* for a domestic proceeding not to be stayed even though it is otherwise subject to a foreign exclusive jurisdiction clause.
8. For those reasons, I reject the applicant’s CCA s 138 point.

# H. APPLICABLE LAW FOR THE NEGLIGENCE CLAIMS

1. Before turning to consider the respondents’ application for a stay, it is convenient to first canvass the question of the applicable law for the applicant’s claims in negligence. That is not only because the respondents seek declarations that the US sub-group members’ negligence claims are governed by US maritime law and that the UK sub-group members’ negligence claims are governed by “UK law” including the Athens Convention, as already identified, but also because the applicable law may be a relevant factor to consider when exercising the discretion whether or not to stay the claims. That is so whether the contemplated stay is on the basis of an exclusive jurisdiction clause or on the basis that this Court is a clearly inappropriate forum.
2. It is uncontroversial that to the extent that it is found that particular claims, such as those of the members of the US and UK sub-groups, are subject to contractual terms and conditions that include a choice of law clause, any contractual claims will be governed in accordance with that choice. There are, however, no such claims asserted by the applicant. The respondents nevertheless submit that the claims in negligence are also to be governed by the systems of law chosen by the parties in their contracts. The applicant contests those submissions, although she does not at this stage identify what system of law should govern those claims aside from an implication from her FASOC that it is the law applicable in NSW.
3. Determining the applicable law at the stage of a stay application may not be possible. For example, in ***Puttick*** *v Tenon* [2008] HCA 54; 238 CLR 265 the appeal from the Court of Appeal of Victoria was upheld on the basis that the trial judge and the Court of Appeal had erred in deciding that the material available was sufficient to decide what system of law governed the rights and duties of the parties (at [2], [24] and [32] per French CJ, Gummow, Hayne and Kiefel JJ). The lower courts should have held only that it was arguable that the law of New Zealand was the law that governed the determination of those rights and duties, and even on the assumption that the parties’ rights and duties were governed by the law of New Zealand, the respondents did not establish that Victoria is a clearly inappropriate forum.
4. It was observed (at [18]) that the statement of claim in the proceeding made no express allegation that the claim was governed by any foreign law and that no defence had been filed at the time of the stay application. Neither the pleadings nor the evidence adduced on the stay application provided a sufficient basis for any positive finding on the applicable law; not even a provisional finding could be made about what the place of commission of the alleged tort was (at [21]). Quoting *Amaca Pty Ltd v Frost* [2006] NSWCA 173; 67 NSWLR 635 at [20] per Spigelman CJ, it was said that “each case in which it is necessary to decide where a tort occurred ‘turns on its facts and it will rarely be appropriate to try to reason on the basis of factual analogies’” (at [23]).
5. It was held (at [31]) that if the alleged tort was shown not to be a foreign tort, the defendant’s claim to a stay of proceedings would have been greatly weakened. Nonetheless, the Court observed that:

it by no means follows that showing that the tort which alleged is, or may be, governed by a law other than the law of the forum demonstrates that the chosen forum is clearly inappropriate to try the action. The very existence of choice of law rules denies that the identification of foreign law as the lex causae is reason enough for an Australian court to decline to exercise jurisdiction.

1. Heydon and Crennan JJ, in a concurring judgment, agreed (at [36]) that for the reasons given in the plurality judgment, it was not possible to decide at that stage of the proceeding whether the lex causae was New Zealand law, and added the following:

A conclusion reached on a stay application about what the proper law of a tort is will normally only be a provisional conclusion: it will be a conclusion open to alteration in the light of further evidence called at the trial. A judge considering a stay application may be able to determine the location of the alleged tort despite somewhat unreal or artificial contentions in the pleadings. However, in the present proceedings it is not possible, on the state of the pleadings and the evidence called before the primary judge, to reach even a provisional view on that subject.

(Citations omitted.)

1. On that authority, it is necessary for me to decide whether it is possible at this stage of the proceeding to make a finding on the proper law of the applicant’s tort claims. In that regard, she pleads that the respondents owed the various group members “a duty of care at common law to exercise due care and skill in supplying the Services to passengers”. That is to say, she pleads in effect that the law to be applied is NSW law. The respondents in their defence to the FASOC and to the points of claim of Mr Ho and Mrs Wright rely on the *Civil Liability Act 2002* (NSW) “to the extent that New South Wales law applies”, but rely on US statutory law and the general maritime law of the US as applying to the US sub-group’s claims and the Athens Convention and the substantive law of England as applying to the UK sub-group’s claims.
2. In *John Pfeiffer,* with respect to torts committed in Australia with an interstate element (at [80] and [87]), and *Zhang*, with respect to foreign torts (at [75]), the High Court adopted the law of the place of the wrong (lex loci delicti) choice of law rule. In both cases, the rule is without the addition of any “flexible exception”. However, in *Zhang* (at [76]) the position of maritime torts and “aerial” torts was expressly put to one side because of “special considerations” that apply to them. There is thus at present no authority of the High Court on the applicable choice of law rule in a case such as the present.
3. The discussion of the problem by Professor Martin Davies in Davies M, Bell AS, Brereton PLG and Douglas M, *Nygh’s Conflict of Laws in Australia* (10th ed, LexisNexis Butterworths, 2020) at 544-548 [20.71]-[20.77] demonstrates the variety of choice of law rules available and the many distinctions that have been made in the cases to justify the application of one rule or another. It is not necessary for present purposes to canvass those cases. The point is that what rule should be applied, for example: the law of the flag of the ship, the proper law of the tort, the lex loci delicti, the law of the forum, the law of the littoral state, the law chosen by the parties in a parallel contract; or what combination of rules, is both a complex question and one ultimately depending on very specific allegations of conduct (including omissions) and where it took place (or should have taken place), and indeed on what allegations are proved.
4. The present proceeding is at a relatively early stage. Discovery has not been completed and evidence has not been filed. It is possible that the pleadings will be amended and the case will evolve. It may be that existing claims are later deleted, or other claims are added. In those circumstances, with *Puttick* in mind, it is not possible, and even if it is possible it is certainly not desirable, at this stage to decide what system of law should govern the negligence claims. It is also not necessary to do so for the purposes of deciding the stay application. I accordingly decline to do so.
5. For the purpose of the stay application I will assume in the respondents’ favour that it may be shown in due course that the US and UK sub-group members’ negligence claims will be governed by foreign law.

# I. CONSIDERATION OF A STAY IF THE RELEVANT U.S. CLAUSES WERE INCORPORATED AND ENFORCEABLE

1. I turn now to consider the respondents’ application for a stay of Mr Ho’s claim in reliance on the exclusive jurisdiction clause and the class action waiver clause. That is against the event that I am wrong in my conclusion that the US terms and conditions, including exclusive jurisdiction and class action waiver, were not incorporated into Mr Ho’s contract (see section C).

## I.1 The exclusive jurisdiction clause

1. Consideration of whether the relevant sub-group members have a legitimate personal or juridical advantage in pursuing their claims in this Court is required for both the stay sought on the exclusive jurisdiction clause basis and the clearly inappropriate forum basis. On the former basis the question is whether loss of such an advantage amounts to, or contributes to, there being “strong reason” to refuse the stay, and on the latter it is an important factor to add to the balance in considering whether the Court is a clearly inappropriate forum. In both cases it requires consideration of whether the US sub-group members could bring their ACL claims in the US. It is accordingly to that question that I now turn.

### I.1.1 Are the claims available in the US Court?

#### The experts

1. As previously identified (at [26]), the jurisdiction clause that the respondents rely on provides for claims to be brought in the United States District Courts for the Central District of California in Los Angeles (which I have referred to as the US Court) or, as to those lawsuits over which the federal courts of the US lack jurisdiction, courts located in Los Angeles County, California. The experts address the position in respect of the US Court rather than the state courts.
2. The applicant and the respondents each rely on two experts on US law. The applicant’s experts are Professor Michael F Sturley and Judge Stephen G Larson. The respondents’ experts are Ms Pamela L Shultz and Judge Vaughan R Walker. Each of the expert witnesses produced reports for the Court. Ms Schultz and Judges Larson and Walker also produced a joint report and gave concurrent expert evidence.
3. Professor Sturley is a Professor of Law at the University of Texas at Austin. He has been a member of the Law School faculty there since 1984 where he teaches, amongst other subjects, US admiralty and maritime law. Professor Sturley is a co-author of *Admiralty and Maritime Law in the United States* (Carolina Academic Press), now in its fourth edition. Professor Sturley has law degrees from Yale University and Oxford University.
4. Judge Larson graduated from the University of Southern California Gould School of Law in 1989. He served as an Assistant US Attorney for the Central District of California, i.e., as a federal prosecutor. In 2000, Judge Larson was appointed to the federal bench as a US Magistrate Judge in the Central District of California. Five years later, Judge Larson was appointed a US District Judge in the Central District of California. He retired from the federal bench in 2009 and returned to private practice.
5. Ms Shultz is a partner of the global law firm Kennedys CMK LLP. She is a licensed practising attorney in six US states, 13 US federal district courts, two US Circuit Courts of Appeal and the Court of International Trade. She holds a Juris Doctor degree from Louisiana State University. She has practised maritime law since 2000, first in New Orleans then in New York and since 2010 in California.
6. Judge Walker is an attorney admitted to practice before the US Supreme Court and all courts in California, and various federal courts in the US. In 2011, Judge Walker retired as a US District Judge for the Northern District of California, having served on that court from 1990 and as Chief Judge of that court from 2004 through 2010. Judge Walker also sat by designation as an appellate judge on the US Courts of Appeals for the Ninth Circuit and the Federal Circuit.

#### The choice of law mechanism

1. There is no choice of law rule which would cause the US Court to choose to apply the ACL if the US sub-group members brought their claims in that Court. The respondents have sought to overcome that by proffering an undertaking in the following terms:

The respondents undertake that they will not oppose the United States District Courts for the Central District in California hearing and determining the claims advanced by the US sub-group representative (Mr Ho) and the US sub-group members under the Australian Consumer Law (ACL) as presently pleaded in the Amended Points of Claim filed for Mr Ho dated 23 March 2021 and the Further Amended Statement of Claim dated 23 March 2021. , [sic] and will not raise as an issue in any proceedings before that Court or otherwise rely on the Choice of Law Clause (being cl 15(B)(i) of the US Terms and Conditions) as having the effect of excluding claims by the US sub-group representative (Mr Ho) and the US sub-group members under the ACL.

1. The hypothesis upon which the debate about US law accordingly takes place is that if a US sub-group member brings a proceeding in the US Court substantially in accordance with Mr Ho’s points of claim, which expressly relies on provisions of the ACL, then, contrary to what they would otherwise be entitled to do, the respondents will not take the point that the ACL does not apply under the applicable choice of law rules and/or the contractual choice of law. They will, in effect, accede to the application of the ACL by the US Court at the suit of the passenger.

#### The jurisdiction of US federal courts

1. The federal courts in the US are courts of limited jurisdiction. In other words, they have only so much jurisdiction as the *US Constitution* or the laws enacted by Congress confer. The experts agree that the respondents’ business activities in California and the forum selection clause are likely sufficient to establish personal jurisdiction in the Central District of California. Because the US Court’s admiralty jurisdiction under Title 28 of the *US Code*, §1333(1), (i.e., 28 USC §1333(1)) extends to torts committed upon the high seas or on navigable waters, if there is a cognisable negligence claim that arises from a cruise ship voyage, it would likely arise under the federal admiralty and maritime jurisdiction.
2. The experts agree that to the extent a cognisable tort claim can be asserted and were to be filed in a complaint in the US Court, that court would have the power to exercise original jurisdiction over the tort claim under 28 USC §1333. It is at that point that 28 USC §1367, which confers “supplemental jurisdiction”, comes into play. It provides, relevantly, as follows:

**§1367 Supplemental jurisdiction**

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. …

(b) …

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

1. From that provision it is apparent that in order for the US Court to have and exercise jurisdiction in respect of the ACL claims (on the hypothesis identified above) those claims would have to be within the court’s supplemental jurisdiction and the US Court would have to not exercise its discretion to decline to exercise supplemental jurisdiction. That raises the following questions:
2. Are the ACL claims so related to the tort claims that they form part of the same case or controversy? (§1367(a))
3. If the answer to that is ‘yes’, would the US Court nevertheless decline to exercise supplemental jurisdiction under §1367(c)? That gives rise to the following further questions:
	1. Would the ACL claims raise novel or complex issues of State (but here, foreign) law? (§1367(c)(1))
	2. Would the ACL claims substantially predominate over the tort claims? (§1367(c)(2))
	3. Are there other compelling reasons for declining jurisdiction? (§1367(c)(4))
4. It was common ground between the experts that not all of the US sub-group members would necessarily be able to assert a cognisable tort claim within federal maritime jurisdiction. Those who themselves contracted COVID-19 and, in that sense, suffered physical injury would be able to assert such a claim. But those claiming emotional distress without having suffered physical injury may not be able to assert such a claim unless they were within what is described as the “zone of danger”. Those within that “zone” would be individuals who were placed in immediate risk of physical harm by the negligent conduct that is complained of. It would appear that the authorities on this point in the context of cruise ship passengers being exposed to the risk of contracting a disease or illness but not actually contracting it are in a state of flux and development. Further, those passengers who can only claim for disappointment and distress are unlikely to be able to assert a cognisable tort claim.
5. It is not apparent on the currently available information about the US sub-group members whether any of them, and if so, how many, may not be able to plead a cognisable claim within the US Court’s original jurisdiction. The discussion that follows applies only to those who could plead such a claim.

#### The same case or controversy (28 USC §1367(a))

1. The experts acknowledge that a state (or foreign) law claim is “part of the same case or controversy” when it shares “a common nucleus of operative fact with the federal claims and the state and federal claims would normally be tried together”: *Bahrampour v Lambert* 356 F 3d 969 (9th Cir 2004) at 978. The experts accepted that references under the provision to “state” claims can be substituted by references to foreign law claims.
2. Judge Walker and Ms Shultz agree that if the ACL claims were brought in the US Court with the tort claims, all of which arise out of the same cruise ship voyage, they would form “part of the same case or controversy” such that that Court would have the authority to exercise supplemental jurisdiction over the ACL claims pursuant to 28 USC §1367(a). In the joint report, Judge Larson prevaricates on that issue, maintaining that the ACL and negligence claims diverge significantly. On that basis, he says that if it is assumed that the ACL and negligence claims form part of the “same case or controversy” then the US Court could exercise supplemental jurisdiction over the ACL claims, which is unhelpfully circular.
3. I am unconvinced by Judge Larson’s reservation on this issue and I prefer the evidence of Judge Walker and Ms Shultz. The fact that by their juridical nature including their essential elements the tort and ACL claims diverge is not to the point. The question is whether they arise from a common nucleus of operative fact, which they undoubtedly do. In my view there is therefore little controversy to the question whether the US Court *could* exercise supplemental jurisdiction in respect of the ACL claims. Judge Larson ultimately conceded this in oral evidence. The more difficult question is whether it *would*.
4. In that regard, Judge Walker and Ms Shultz agree that there is no apparent basis for the US Court to decline to exercise supplemental jurisdiction under 28 USC §1367(c). Judge Larson disagrees. He says that the Court would decline to exercise supplemental jurisdiction on three independently sufficient grounds, namely “novel and complex issues of Australian law” (with reference to 28 USC §1367(c)(1)), “the ACL claims substantially predominate” (28 USC §1367(c)(2)) and “exceptional circumstances” (28 USC §1367(c)(4)). It is therefore necessary to consider each of these.

#### Novel or complex issues of law (28 USC §1367(c)(1))

1. Judge Walker considers that the ACL claims do not raise “novel or complex issue[s] of State law” because:
2. the US Court’s discretion to decline supplemental jurisdiction is not unbounded;
3. if parties do not raise §1367(c) the Court is under no obligation to raise the declining of supplemental jurisdiction *sua sponte* and therefore an issue under §1367(c) would not arise since the respondents have undertaken that they will not object to the US Court’s exercise of supplemental jurisdiction over the ACL claims;
4. misleading conduct and similar tort claims are well recognised in US law and Judge Larson has failed to identify any true novelty, but rather only the novelty of the ACL to a US court or “within the context of US law” which is not the appropriate legal standard; and
5. Judge Larson has failed to identify any complex issue of state (or foreign) law, but rather that the “US Court would need to consult in-depth with Australian legal authorities to determine whether particular representations at issue here … fall within the scope of [ACL] section 18,” which is fully within the capability of federal courts.
6. Ms Schultz agrees with Judge Walker that the ACL claims at issue do not appear to raise novel or complex issues of Australian law which a US federal court is incapable of addressing.
7. Judge Larson however considers that while the Court is not obligated to consider declining supplemental jurisdiction *sua sponte*, it would do so here where three independently sufficient statutory bases exist that strongly merit the declination of supplemental jurisdiction. Judge Larson further disagrees with the characterisation of “true novelty”, which appears to suggest that an issue must be one of first impression worldwide in order to quality. Judge Larson further disagrees with Judge Walker’s contention that there has been no identification of “any complex issue” of foreign law. Judge Larson’s report discusses at length what he says are several complex issues that a US Court would need to adjudicate as to the actionable scope of ACL ss 18 and 61, which issues are magnified in complexity by the unique factual circumstances created by the pandemic.
8. In the joint report, Judge Larson bases his opinion that application of ACL ss 18 and 61 would be regarded as giving rise to “novel or complex” issues in the US Court on his contention that the claim presented under s 18 has no analogue in US consumer protection law, which gives rise to a significant risk that the US Court would incorrectly transpose domestic legal principles onto those novel aspects of the foreign law claim. However, in his oral evidence Judge Larson accepted that there are numerous statutory provisions in the US prohibiting misleading conduct in commerce. He nevertheless maintained that although the statutes may be analogous, there is a substantial variance in the context in which they were passed and are to be interpreted.
9. Judge Walker and Ms Shultz observe that the Ninth Circuit has repeatedly stated that federal courts are fully competent to decide matters of foreign law. Judge Larson, however, observes that numerous courts have declined to do so where novel or complex issues are presented.
10. Having read their reports and heard the experts’ evidence, I am not satisfied that the ACL claims that are asserted in this case are likely to be regarded as novel or complex within the meaning of 28 USC §1367(c)(1) such as to give rise to the US Court declining to exercise supplemental jurisdiction where neither side of the case of seeks that outcome. 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. Whilst Judge Larson may be correct that the US Court is likely to ask the parties whether it should exercise its discretion to decline to exercise supplemental jurisdiction, Judge Larson was not able to identify any case where that discretion had been exercised *sua sponte* or against the wishes of the parties. There does not seem to be any reason why the US Court would exercise that discretion in this case.
11. Indeed, as Judge Walker points out, on the assumptions that there is a cognisable claim within the original jurisdiction of the Court and that the defendants will not resist the ACL claims being asserted, there are strong legal policy reasons for not splitting the claims and for allowing them to be run together in the same proceeding. Ms Schultz expresses the point by saying that courts do not generally favour litigants having to pursue their cases “piecemeal in multiple jurisdictions”.
12. It follows that in my view the US Court would not likely decline supplemental jurisdiction on the basis that the ACL claims raise novel or complex issues of Australian law.

#### Substantially predominate over claims in the original jurisdiction (28 USC §1367(c)(2))

1. The joint report reflects the experts to be in sharp disagreement on whether the US Court would regard the ACL claims to substantially predominate over the tort claims. They agree that some aspects of the legal issues implicated by the tort claims share commonalities with the ACL s 60 claims. On that basis Judge Larson appears to accept that the ACL s 60 claim, being the guarantee as to due care and skill, will not predominate over the tort claims. That seems to me to be inevitably correct. At the heart of both those sets of claims are the safety measures which the respondents took or should have taken. The claims are ultimately similar and give rise to few factual or evidential differences.
2. The question is then whether the ACL ss 18 and 29 misleading and deceptive conduct claims and the ACL s 60 guarantee as to fitness for purpose claims would be regarded as substantially predominating over the tort claims. The differences between those claims and the tort claims lie most particularly in the representations. The conduct, being the safety measures undertaken or that should have been undertaken, remains the same in both sets of claims. As explained by Ms Shultz and Judge Walker, the claims arise from “the same set of operative facts and would require substantially the same evidentiary proof.”
3. Judge Larson bases his opinion that the ACL claims would substantially predominate over the tort claims in part on his view that “the more than 700 US sub-group members’ ACL claims would substantially predominating over the claims of the 11 individual actions that are presently pending in the Central District of California.” That seems to me to be an irrelevant consideration. First, if the sub-group members’ actions are all run independently then the question of substantial predominance would be assessed within each action. Secondly, if the actions are run together in some way, then although there will be 700 sub-group members running ACL claims, each of them will also be running tort claims, so there will be no predominance over the tort claims.
4. In my view it is unlikely that the US Court would decline to exercise supplemental jurisdiction on the basis that the ACL claims would substantially predominating over the tort claims.

#### Compelling reasons for declining jurisdiction (28 USC §1367(c)(4))

1. Ms Shultz and Judge Walker refer to *Executive Software North America, Inc v United States District Court for the Central District of California* 24 F 3d 1545 (9th Cir 1994) as being binding authority on the US Court on the application of §1367. With reference to sub-s (c)(4), the Court held (at 1557) that Congress’s use of the word “other” to modify “compelling reasons” for declining jurisdiction means that the “other compelling reasons” should be of the same nature as the reasons that gave rise to the categories listed in sub-s (c)(1)-(3). Thus, “compelling reasons” should be those that lead a court to conclude that declining jurisdiction “best accommodates the values of economy, convenience, fairness, and comity” (citing *Carnegie-Mellon University v Cohill, Judge, United States District Court for the Western District of Pennsylvania* 484 US 343 (1988) at 351). The Court held (at 1558) that Congress sounded a note of caution that the basis for declining jurisdiction should be extended beyond the circumstances identified in sub-s (c)(1)-(3) “only if the circumstances are quite unusual”, and that declining jurisdiction outside of sub-s (c)(1)-(3) “should be the exception, rather than the rule.”
2. The exceptional circumstances Judge Larson refers to are that the interests of judicial economy, convenience, fairness and comity would be best served by having the ACL claims proceed in an Australian court.
3. Judge Larson’s reasons that exceptional circumstances for declining jurisdiction exist in this case include that none of the 11 currently pending actions in the US Court asserts ACL or otherwise analogous claims. Thus, he says, if upon declination of supplemental jurisdiction, the US sub-group members were permitted to re-join the action in Australia upon a lift of the stay, then the interests of judicial economy would be best served by that outcome. That is because having a single court adjudicate the unique issues posed by the ACL claims, rather than multiple courts in different countries, will be both most efficient and least likely to result in disparate interpretations of Australian law. Judge Larson also says that the parties’ forum selection clause in favour of the US Court would not be given particular weight because the Australian proceeding will proceed for the non-US sub-group members regardless of where the US sub-group members’ claims are heard.
4. It seems to me that Judge Larson’s considerations of why the ACL claims would best be heard in the proceeding in Australia – namely, that that course would best serve the interests of judicial “economy, convenience, fairness and comity” – are compelling. However, the underlying assumption needs to be that the US sub-group claims are stayed in Australia in favour of being pursued in the US Court in accordance with the parties’ choice of venue. It cannot be assumed in those circumstances that if the US Court declined to exercise jurisdiction the sub-group members could simply re-join the Australian proceeding. Also, since there are already 11 actions in the US Court based on the same underlying factual circumstances and the US sub-group members can assert claims within the US Court’s original jurisdiction, there is no particularly compelling, or exceptional, reason to decline to exercise jurisdiction in the US Court in favour of the Australian proceeding.
5. But more significantly, it seems to me that Judge Larson gives too little recognition to the exclusive jurisdiction clause. In that regard, the US generally and California in particular, like Australia, has a strong public policy favouring enforcement of forum selection clauses, which are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances”: *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972) at 10; *Smith, Valentino & Smith, Inc v Superior Court of Los Angeles County* 17 Cal 3d 491 (1976) at 495-496 (California Supreme Court’s enforcement of such a clause said to be “in accord with the modern trend which favors enforceability of such forum selection clauses”).
6. Of the various questions to answer under §1367, this one seems to me to be the most evenly balanced. Nevertheless, once supplemental jurisdiction is established under sub-s (a) and if no ground for declining to exercise that jurisdiction under sub-s (c)(1)-(3) is established, then it is unlikely that the exercise of jurisdiction will be declined under sub-s (c)(4).

#### Summary of conclusions on US law

1. To summarise, in my view the US Court would have supplemental jurisdiction in respect of the ACL claims brought by those of the US sub-group members who can assert cognisable tort claims within the US Court’s original jurisdiction. As explained above, it may be that some US sub-group members do not have cognisable tort claims within the US Court’s original jurisdiction, but on the information currently available it is not possible to identify who they are or how many of them there may be.
2. Further, whilst predicting how another court, in particular a foreign court, will exercise a discretion is a difficult exercise with questionable success, in my view it is unlikely that the US Court would exercise its discretion to decline supplemental jurisdiction over the identified ACL claims that are brought with cognisable tort claims within its original jurisdiction. Assumptions underlying that conclusion are that the respondents give and adhere to the undertaking that they have proffered not to raise any choice of law point against the ACL claims being heard and determined by the US Court and that this Court had stayed the US sub-group members’ claims.
3. In the result, and leaving aside for the present the advantage that the US sub-group members have in being able to pursue their claims in Australia as part of a representative proceeding, there is no particular personal or juridical advantage that they enjoy in Australia.
4. If the respondents could not rely on the class action waiver clause in this Court, whether on the basis that it was not incorporated (as I have found) or, if incorporated, it was unenforceable (as I have also found, albeit tentatively), Mr Ho would have a clear juridical advantage in proceeding in this Court rather than in the US Court. That is because, as I have explained above, class action waiver clauses have long been recognised and enforced in the US.
5. I turn now to consider the question whether there are “strong reasons” to refuse a stay if the exclusive jurisdiction clause had been incorporated.

### I.1.2 Should the US sub-group claims be stayed on Akai grounds?

1. In my view there are strong reasons for not enforcing the exclusive jurisdiction clause even if it was incorporated and enforceable. They are the following, and are in essence the same whether one is considering only Mr Ho’s claim or the claims of all the US sub-group members.
2. First, whether or not the US sub-group claims are stayed in this Court, and also leaving the UK sub-group claims to one side for the moment, the representative proceeding in this Court will continue. It will continue in respect of the vast majority of the affected passengers on the voyage in question. Moreover, the claims asserted by or in relation to those passengers and the facts and evidence underlying those claims, apart from variations peculiar to individual claimants most notably with regard to the assessment of their damages, are identical to the US sub-group members’ claims. Staying the US sub-group claims would accordingly result in the fracturing of the litigation with essentially identical claims being brought in this Court in a representative proceeding and in the US Court in individual proceedings, albeit presumably case managed together.
3. 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.
4. The respondents point to the 11 existing proceedings in the US Court brought by passengers arising out of their experience on the same voyage. They say that the litigation is therefore already fractured so this point, if it carries any weight at all, should carry very little weight. I am not persuaded by that submission. The 11 existing proceedings do not include any ACL claims. The ACL claims would therefore be fractured across different litigation if I was to accede to the respondents’ application for a stay. But further, at present there are 12 independent proceedings, 11 in the US Court and the one representative proceeding in this Court. If the US sub-group members’ claims were stayed, there could be an additional nearly 700 individual proceedings – although one does not know how many US sub-group members there are or how many would elect to sue individually in the US. Nevertheless, that level of potential fracturing is not easily to be justified or tolerated.
5. The weighty concern about the fracturing of the litigation, and hence the consideration of the strong gravitational pull of the continuing representative proceeding in respect of the non-US sub-group passengers, is not particularly affected even if one were to assume that the US sub-group members’ claims were governed by US maritime law. That is because the ACL claims, the relevant facts and even the principal integers of liability in negligence would all still be common.
6. Secondly, as explained in *Epic v Apple* (FCAFC) (at [110]), 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. One of the difficulties and uncertainties involved in proving foreign law is the risk that important aspects of the foreign law will be lost in translation. Matters of meaning and context may be overlooked or misconstrued. Also, a judgment of the foreign court is unlikely to make a contribution to the body of Australian law.
7. Whilst not to the same extent as those in respect of CCA Pt IV proceedings as explained in *Epic v Apple* (FCAFC) (at [95]-[122]), I consider that there are public policy considerations in favour of ACL claims being heard in Australian courts. They are not such as to by themselves constitute “strong reasons” to refuse the stay application, but they are to be considered cumulatively with other considerations which together can amount to “strong reasons”. The policy considerations include that the various provisions of the ACL articulate standards of commercial behaviour that are expected of corporations undertaking trade and commerce in Australia and they offer protections and remedies to consumers in Australia. The ACL thus sets normative standards for commercial conduct in Australia, and it provides remedies and protections when those standards are not observed. It is desirable, although not mandatory, that the ACL’s normative standards and remedies are interpreted and applied by an Australian court.
8. Thirdly, whilst on my analysis of the expert evidence on US law, and on the basis of the undertaking proffered by the respondents, the ACL claims could be brought in the US Court with the result that the US sub-group members have no juridical advantage in proceeding in this Court, that depends on the respondents being able to rely on the class action waiver clause in this Court. However, if, as I have found, the respondents cannot rely on the class action waiver clause, then the US sub-group members have a very significant juridical advantage in proceeding as part of the representative proceeding in this Court because they would not be able to participate in a representative proceeding in the US Court.
9. Of course, if the respondents could rely on the class action waiver clause as against the US sub-group members, the clause itself would provide a substantial basis to either stay the proceeding in respect of the US sub-group members or to de-class them pursuant to an order under s 33ZF of the FCA Act – which I explain in the next section, section I.2. So consideration of the effect of the class action waiver clause in the context of there being “strong reasons” not to stay the proceeding in the face of the exclusive jurisdiction clause must be on the assumption that the class action waiver clause is not available to the respondents in this Court.
10. In the result, the respondents’ application for a stay of the claims of the US sub-group members in reliance on the exclusive jurisdiction clause fails.

## I.2 The class action waiver clause

1. As mentioned, the class action waiver clause was not incorporated in Mr Ho’s contract (section C). If it was, the applicant contends that it is void or unenforceable. I have also concluded that if it was incorporated, it would be void, by reason of s 23 of the ACL (section E). I therefore consider whether the clause might provide a proper basis for a stay of the proceeding by Mr Ho on the assumption that I am wrong about the clause not being incorporated and about it being void.
2. The class action waiver clause includes a contractual commitment by the passenger to bring any claim “individually and not as a member of any class or as part of a class or representative action” and an express agreement to waive “any law entitling [them] to participate in a class action”. In those circumstances, if the class action waiver clause was incorporated and it was enforceable, it seems to me that it would provide an unanswerable basis for some form of relief that would give effect to that obligation. The question is what relief would be appropriate.
3. The primary relief sought by the respondents is a stay of proceedings in respect of those group members subject to the clause. I am, however, unconvinced that that would be appropriate. That is because the claims have been properly commenced in this Court and enforcement of the class action waiver clause does not require that those claims be stayed. Rather, enforcement requires only that those subject to the clause no longer be a part of the group membership.
4. Support for the inappropriateness of a stay in such circumstances can be found in the provisions of Pt IVA of the FCA Act. For example, s 33P of the Act provides:

**33P Consequences of order that proceeding not continue under this Part**

Where the Court makes an order under section 33L, 33M or 33N that a proceeding no longer continue under this Part:

(a) the proceeding may be continued as a proceeding by the representative party on his or her own behalf against the respondent; and

(b) on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding.

1. And s 33S of the Act provides:

**33S Directions relating to commencement of further proceedings**

Where an issue cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may:

(a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of a separate proceeding by that member; or

(b) if the issue is common to the claims of all members of a sub‑group—give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

1. These provisions contemplate that where a representative proceeding is declassed (s 33P) or where a sub-group or individual issue cannot be conveniently dealt with under s 33Q or s 33R (s 33S), the claims of group members may yet continue in this Court either as separate proceedings or, more importantly, former group members may be joined as applicants to the same proceeding. The grant of a stay, which would prevent an individual continuing proceedings on an individual basis in this Court, is inconsistent with those possibilities. As such, I do not consider that a stay would be an appropriate order.
2. How then can the Court enforce the class action waiver clause? In *Dyzcynski v Gibson* [2020] FCA 120; 381 ALR 1, Lee J (at [336]) set out the ways in which a group member can cease to be a group member:

(1) by opting out before the date fixed by the Court for opting out under s 33J (or later pursuant to leave granted by the Court);

(2) when the claim of the group member is no longer able to be advanced because the relevant dispute has been quelled by a settlement binding group members: see ss 33V and 33ZB;

(3) by a “declassing” order made by the exercise of the Court’s discretion under either s 33L (where there are fewer than seven members), s 33M (excessive costs of distribution) or, more commonly, s 33N (where, for identified reasons, the Court is satisfied it is in the interests of justice to “declass”, including after an initial trial of common issues to provide for group member claims to be advanced individually and determined);

(4) when the claim of the group member is no longer able to be advanced because the relevant individual dispute has been quelled by the claim of the group member being determined prior to, or at the same time, as the determination of the applicant’s claim and common issues (this occurs, for example, when a “sample” group member claim is determined at the initial trial, although, outside this circumstance, such an occurrence would be unusual);

(5) by being excluded following an application by the applicant “to amend the application commencing the representative proceeding so as to alter the description of the group” pursuant to s 33K(1);

(6) by being excluded following an order being made by the Court, including following application by the applicant to amend the group description if the group definition was not included in the application (as required by s 33K(1)), but was rather contained in the statement of claim, relying on the power in s 33ZF to make the amendment, which power allows the Court to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding: see *Ethicon Sàrl v Gill* (at [14]–[17]);

(7) if the group member becomes a “sub-group representative party” pursuant to an order made under s 33Q;

(8) when the Court gives a direction under s 33S for a separate proceeding to be commenced by a group member (or a direction that another representative proceeding be commenced);

(9) if the group member is substituted as the representative party pursuant to an order under s 33T or s 33W; and

(10) by the dismissal of an otherwise properly commenced representative proceeding without consideration of the substance of any claims, for example, when it constitutes an abuse of process (for completeness, it is worth noting that this is not the same situation as where a proceeding that *purports* to be a Pt IVA proceeding is dismissed by reason of a failure to be properly constituted — such a proceeding, of course, was never a valid class action and hence there never were group members).

1. His Honour added (at [337]) that “[o]ther than by one of these means, or by some unusual bespoke order, a group member at the commencement of a class action remains a group member during the currency of the class action.”
2. It appears that there is no circumstance in those enumerated by Lee J and no provision in Pt IVA that is directly on point to the circumstances contemplated here. In particular, there is no provision that is equivalent to s 33KA of the *Supreme Court Act 1986* (Vic), which provides:

**33KA Court powers concerning group membership**

(1) On the application of a party to a group proceeding or of its own motion, the Court may at any time, whether before or after judgment, order—

(a) that a person cease to be a group member;

(b) that a person not become a group member.

(2) The Court may make an order under subsection (1) if of the opinion that—

(a) the person does not have sufficient connection with Australia to justify inclusion as a group member; or

(b) for any other reason it is just or expedient that the person should not be or should not become a group member.

(3) If the Court orders that a person cease to be a group member, then, if the Court so orders, the person must be taken never to have been a group member.

1. Accordingly, the Court might have to fashion an appropriate “bespoke” order under s 33ZF, being the general “gap filler” provision in Pt IVA: see *Ethicon* at [17] per Allsop CJ, Murphy and Lee JJ. That may be in the form of amending the group definition or by excluding certain members from the group. For the present, none of these issues require determination because of my primary findings.

# J. CLEARLY INAPPROPRIATE FORUM

1. This section of the judgment deals with the respondents’ basis for a stay of the US sub-group members’ claims if, as I have found, the exclusive jurisdiction clause is not incorporated and therefore cannot be relied on by the respondents. It also deals with the stay application in respect of the UK sub-group members’ claims. The reasoning in respect of the sub-group members applies equally to Mr Ho’s and Mrs Wright’s individual claims. The relevant principles have been identified in section F.4 above.
2. The respondents identify the following factors in support of their contention that this Court is a clearly inappropriate forum to hear and determine the US and UK sub-group members’ claims:
3. The location of the evidence: The bulk of the relevant medical evidence, including medical records and witnesses, as well as the sub-group members themselves, is likely to be located abroad.
4. The proper law of the contract: The proper law of the contract of passengers subject to the US terms and conditions is US law and the proper law of the contract of passengers subject to the UK terms and conditions is English law. Thus, the respondents submit, any question of liability on the part of the respondents to any claims “tethered to contractual terms and conditions” will fall to be determined by reference to those systems of law rather than to the law applicable in NSW.
5. The applicable law: The respondents submit that the law applicable to the resolution of the claims in tort will not be that of NSW, or any other Australian state.
6. In addition, in respect of the US sub-group members’ claims, the respondents submit that because there are already 11 proceedings by *Ruby Princess* passengers in the US Court, to allow the US sub-group members to pursue their claims in the present proceeding would lead to the risk of simultaneous proceedings with overlapping issues in multiple jurisdictions.
7. In respect of the UK sub-group members’ claims, the respondents raise the following additional factors:
8. The effect of UK law: The respondents submit that in respect of the tort claims, the law of the UK will be dispositive for the UK sub-group members’ claims. It is said that the Athens Convention will apply to those claims as a result of English law being the law to be applied to the determination of the claims, for the reasons expressed by their expert witness, Mr Kimbell QC.
9. The jurisdiction clauses: The respondents submit that the UK sub-group members agreed to a non-exclusive foreign jurisdiction clause in favour of the courts nominated by the Athens Convention and EU Regulation 392/2009 in respect of claims for death or personal injury arising out of international carriage by sea, and a non-exclusive jurisdiction clause in favour of the English courts for claims relating to the contract between the parties. These clauses are said to be relevant because they ensure that the UK sub-group members will not face any jurisdictional arguments seeking to restrain any proceedings brought by them in the UK or the courts listed in the Athens Convention and EU Regulation 392/2009.
10. Equivalent causes of action under English law: The respondents submit that claims for economic losses that may be made by passengers under English common law and/or statute are substantially similar to those advanced under the ACL in the present proceeding.
11. Simultaneous proceedings in multiple jurisdictions: The respondents submit that the UK sub-group members are eligible to benefit from EU rights relating to travel packages (pursuant to clause 2 of the agreement) and juridical advantages conferred by the Athens Convention and EU Regulation 392/2009, whereas other group members are not. Thus, they submit that individual UK group-members may institute their own proceedings at the conclusion of the present representative proceeding which will create a plethora of proceedings in multiple jurisdictions.
12. It is convenient to consider the position of the US sub-group first.

## J.1 The US sub-group

1. Since I have already concluded that even if the respondents could rely on the exclusive jurisdiction clause in favour of the US Court there would nonetheless be strong reasons not to enforce the exclusive jurisdiction clause, a fortiori this Court is not a clearly inappropriate forum; if there are “strong reasons” not to enforce a foreign exclusive jurisdiction clause and to allow claims to proceed in this Court it is not possible that this Court might be regarded as a clearly inappropriate forum for the claims to be litigated. All the factors identified in section I.1.2 above count against the stay on a clearly inappropriate forum basis. I will nevertheless consider the factors raised by the respondents.
2. It is hard to be sure that most of the medical evidence will not be in NSW, or in Australia, because there is no evidence before me about where the US sub-group members who contracted COVID-19, or other passengers who contracted COVID-19 in relation to whom the US sub-group members claim, were treated after disembarking from the *Ruby Princess*. But even assuming that most of that evidence will be abroad, this is a weak consideration. The reason is that the medical evidence will not be relevant to the common issues which will be decided in the representative proceeding. Thereafter, assuming liability and no settlement of quantum, there will be independent enquiries into factors relevant to quantum. There are many ways that that may be done which will not necessarily mean that passengers who contracted COVID-19 or those who treated them will have to give evidence in Australia; by its nature much or possibly all of the evidence will be documentary, and that which is not may be able to be given remotely (which has become common).
3. Insofar as the proper law of the contract is concerned, that is also a weak consideration. First, on my findings on incorporation the choice of law clause was not incorporated. Secondly, even if it was incorporated, the ACL claims will be determined in accordance with the law of the forum and it is too early to determine what system of law will cover the tort claims. The role of the proper law of the contract is therefore likely to be somewhat limited.
4. I have already dealt with the question of the applicable law to the tort claims, which at this stage must be regarded as a neutral factor.
5. Finally in relation to the matters raised by the respondents, the fact that there are 11 individual proceedings in the US Court by *Ruby Princess* passengers does not counterbalance the powerful gravitational pull of the representative proceeding in this Court in respect of all the non-US sub-group members (even if one also excludes the UK sub-group members). The representative proceeding will proceed in this Court in respect of some 1,800 passengers (reduced by those who opt out, if any) on the same issues as are common to the US sub-group members, including the ACL claims. As indicated, those claims fall be decided in accordance with Australian law and there is a significant public policy reason for them to be litigated in an Australian court.
6. To those matters must be added the consideration that the US sub-group claims, as with the other claims in the representative proceeding, have a substantial connection with NSW. The voyage commenced and ended in Sydney. Some of the allegations of negligence concern conduct in Sydney, or conduct it is said should have occurred but did not, but had it occurred it would have been in Sydney. The lengthy particulars include that the respondents, in breach of their duties of care, failed to cancel the voyage, failed to ensure the vessel was thoroughly sanitised, failed to ask each passenger and crew member prior to boarding if they had any symptoms of COVID-19, failed to take each passenger’s and crew member’s temperature prior to boarding, failed to warn passengers prior to boarding of the risk of contracting COVID-19 on board, or alternatively failed to warn passengers prior to boarding that the respondents would not implement reasonable precautions to minimise the risk and presence of COVID-19 on board.
7. There is simply no respect in which the continuation of the US sub-group claims in the representative proceeding in this Court is oppressive, vexatious or an abuse of process in the sense used in the authorities. The claim that this Court is a clearly inappropriate forum for the US sub-group claims must fail.

## J.2 The UK sub-group

1. Insofar as the UK sub-group members’ claims are concerned, the analysis of the role of several of the factors is the same as it is in relation to the US sub-group members’ claims. That is to say, medical evidence being in the UK is a weak connecting factor, the proper law of the contract being English law is also a weak connecting factor, the system of law governing the tort claims is at this stage a neutral factor, and the fact of the claims relating to some 1,800 passengers will proceed in the representative proceeding in this Court is a very strong connecting factor to this Court which weighs strongly against any conclusion that this Court is a clearly inappropriate forum for the UK sub-group members’ claims. Save in respect of considerations relating to the class action waiver clause, the reasoning as to why there are strong reasons not to enforce the US exclusive jurisdiction clause for the most part also counts against the UK sub-group claims being stayed.
2. Dealing with the other factors raised by the respondents, I am prepared to assume for present purposes that the UK sub-group members’ tort claims will all be fully answered by the provisions of the Athens Convention. It is not suggested that this Court will have any particular difficulty applying the provisions of the Athens Convention. There is therefore little apparent reason why the issues in relation to the Athens Convention should not be decided as common issues to the UK sub-group members in the representative proceeding. Nevertheless, given that the application of the Athens Convention would be by operation of the parties’ choice of English law as the proper law of the contract, I accept that it is a connecting factor to England, but it is a weak factor.
3. The non-exclusive jurisdiction clauses are essentially neutral. The fact that they are non-exclusive demonstrates that it is left open to the parties to litigate other than in the UK.
4. There is some debate between the experts on English law as to the extent to which causes of action are available in England that are equivalent to, or at least very similar to, the ACL causes of action that are asserted in the proceeding in this Court. But even assuming in the respondents’ favour that there are equivalent causes of action in England, there is no relevant oppression, or injustice, in the UK sub-group members pursuing ACL claims in this Court. Moreover, the fact that they can do that by means of representative proceedings in concert with, as I have said, the claims relating to some 1,800 other passengers (excluding the US sub-group members), is a legitimate juridical advantage that they enjoy in this Court. The denial of the convenience, if there be any, to the respondents for the UK sub-group members to proceed in England is not such as to amount to any relevant oppression or injustice.
5. I turn now to the factor raised by the respondents of simultaneous proceedings in multiple jurisdictions on the basis that the UK sub-group members are eligible to benefit from EU rights relating to travel packages. The only evidence on this point is that of Mr Kimbell QC for the respondents. He was asked, on the assumption that the law of England and Wales is the applicable law, what claims a plaintiff could bring in the courts of England and Wales for loss arising out of a voyage on a cruise ship. Mr Kimbell QC identified four main potential types of claim, one of which is a claim under the Athens Convention and another of which is a claim under the *Package Travel and Linked Travel Arrangements Regulations 2018* (UK) (**PTR 2018**). I have already explained above that this Court is able to determine the issues arising under the Athens Convention as common issues to the UK sub-group. Determination of those issues in this Court would foreclose any additional proceedings brought in the UK on the basis of that Convention.
6. As for PTR 2018, those regulations are the latest version of regulations introduced first in 1992 (**PTR 1992**). The PTR 1992 originated in a European Directive the aim of which was the harmonisation of consumer protection in relation to package holidays. The PTR 1992 and 2018 create a framework of rights for the consumer who enters into a package travel contract. Almost all of the rights and remedies provided directly to consumers in the PTR 1992/2018 are implied into the holiday contract by the regulations.
7. The applicant’s expert witness on English law, Mr Passmore QC, expressed no disagreement with Mr Kimbell QC’s identification of the PTR 2018 as the source of a possible claim or his characterisation of such a claim. There is nothing in that evidence to suggest the UK sub-group members could pursue their presently asserted claims in the representative proceeding in this Court and simultaneously or subsequently make claims under the PTR 2018 in England (or elsewhere in Europe). Presumably they would be met with an Anshun estoppel, or the English equivalent thereof, in response: *Henderson v Henderson* (1843) 3 Hare 100 at 115; 67 ER 313 at 319 per Sir James Wigram VC.
8. In any event, it seems to me to be doubtful that the respondents would have any vulnerability to claims made under PTR 2018, there being no evidence before the Court showing that either or both of them meet the definition of an “organiser” within the meaning of the regulations. Importantly, that requires that the respondents offer “packages” for sale.
9. In the circumstances, I do not consider that there is any foundation in the evidence to the submission that the possibility of claims under the PTR 2018 leads to a risk of simultaneous proceedings in multiple jurisdictions, at least in respect of these respondents. The same must be true of the other causes of action available in English law. If those claims are going to asserted on behalf of UK sub-group members, that can be done as common questions in this proceeding, which has not thus far been done – Mrs Wright’s points of claim place no reliance on them. It is not realistic that they might be able to assert them independently in other proceedings when they arise out of the same facts. I therefore do not see the risk of multiple simultaneous proceedings that the respondents advert to.
10. In the circumstances, the respondents’ claim that this Court is a clearly inappropriate forum for the UK sub-group members’ claims is not established and must be rejected.

# K. DISPOSITION

1. With reference to the relief sought by the respondents in their interlocutory application, I have concluded as follows:
2. The claims advanced by Mr Ho should not be stayed on any of the identified grounds, although if the class action waiver clause was incorporated (contrary to what I have found) and it is enforceable in Australia (also contrary to what I have concluded), it would form a proper basis to either exclude Mr Ho’s claim from the proceeding or to amend the group definition to exclude those bound by the clause under s 33ZF of the FCA Act.
3. The claims of the US sub-group members should not be stayed, in particular because it is not possible or appropriate to decide that question as a common question. That is because whether or not the relevant clauses from the US terms and conditions are incorporated depends on the circumstances of contract formation in each case, although on the evidence thus far it seems unlikely that the US terms and conditions formed part of any passage contracts. But even if they did, for the same reasons as in relation to Mr Ho, there would be strong reasons not to stay the claims.
4. The decision on questions (1) and (2) should not bind all US sub-group members.
5. It is not appropriate at this stage to decide which system of law governs the claims in negligence brought by Mr Ho or by the rest of the US sub-group members.
6. The claims advanced by Mrs Wright should not be stayed on any of the identified grounds.
7. The claims of the other UK sub-group members should also not be stayed on any of the identified grounds.
8. Since there is no controversy about whether the other UK sub-group members are bound by the UK terms and conditions and my conclusion on refusing a stay assumes the incorporation of the UK terms and conditions in the passage contracts of the UK sub-group members, the refusal of the application to stay the UK sub-group members’ claims should be binding on all UK sub-group members (subject to what I say below about the appointment of Mrs Wright as the UK sub-group representative).
9. It is not appropriate at this stage to decide what system of law governs the claims in negligence brought by Mrs Wright or the other UK sub-group members.
10. The remaining relief sought by the respondents is whether the US and UK sub-groups should be formally established and whether Mr Ho and Mrs Wright should be appointed as their respective representative parties. I did not receive submissions on these issues which turn, at least to some extent, on the conclusions reached on the other relief that the respondents have sought. In the circumstances, I propose to hear from the parties on the relief that should be ordered.

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| I certify that the preceding three hundred and seventy-four (374) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 10 September 2021