FEDERAL COURT OF AUSTRALIA

Karpik v Carnival plc (The Ruby Princess) (Common Questions and Costs) [2024] FCA 57

File number:	NSD 806 of 2020
Judgment of:	**STEWART J**
Date of judgment:	7 February 2024
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – formulation of common questions – whether answers to questions depend on particular circumstances of individual group members – whether what passengers impliedly made known to the service provider was their purpose and desired result depends on individual circumstances of the passengers – whether representations by conduct of the service provider depend on individual circumstances of the passengers **COSTS** – *Calderbank* offer made in representative proceeding – whether Court capable of being satisfied after initial trial of principal applicant's claim that the total combined value of the group members' claims will be more, or less, than the amount of the offer and as to the reasonableness of the applicant's rejection of the offer – costs reserved
Legislation:	*Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*) ss 18, 61, 236(1), 167(1)(b), 267(4) *Federal Court of Australia Act 1976* (Cth) ss 33V(1), 33ZB(b) *Federal Court Rules 2011* (Cth) Pt 25
Cases cited:	*ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* [2002] FCA 224; 190 ALR 121 *Belconnen Lakeview Pty Ltd v Lloyd* [2021] FCAFC 187; 156 ACSR 273 *Bradshaw v Emirates (Costs)* [2021] FCA 1613 *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333 *De Groot v Nominal Defendant* [2005] NSWCA 61 *Gill v Ethicon Sàrl (No 6)* [2020] FCA 279 *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)*

	[2023] FCA 1280 *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; 377 ALR 234 *McMullin v ICI Australia Operations Pty Ltd (No 6)* [1997] FCA 1426 *Seven Network Ltd v News Ltd* [2007] FCA 1489; 244 ALR 374 *Stack v AMP Financial Planning Pty Ltd (No 2)* [2021] FCA 1479; 401 ALR 113 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; 259 CLR 212 Dal Pont GE, *Law of Costs* (5th ed, LexisNexis, 2021)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	59
Date of hearing:	5 February 2024
Counsel for the Applicant:	R J May
Solicitor for the Applicant:	Shine Lawyers
Counsel for the Respondents:	D McLure SC and H Cooper
Solicitor for the Respondents:	Clyde & Co

ORDERS

NSD 806 of 2020

BETWEEN:	**SUSAN KARPIK** Applicant
AND:	**CARNIVAL PLC (ARBN 107 998 443 / ABN 23107998443)** First Respondent
	PRINCESS CRUISE LINES LTD (A COMPANY REGISTERED IN BERMUDA) Second Respondent

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **7 FEBRUARY 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 33Z of the *Federal Court of Australia Act 1976* (Cth) (**Act**), the common questions and answers from the initial trial of the applicant's claim are set out in Annexure A (**Common Questions**).
2. Pursuant to s 33ZB(a) of the Act, the Common Questions are binding on all group members as defined in the further amended statement of claim filed on 24 March 2021 other than on any person who has opted out of the proceeding under s 33J.
3. The costs of the initial trial from 5 October 2022 up to and including 5 February 2024 be reserved.
4. Orders 8 and 13 of the orders made on 24 November 2023 be vacated.
5. By 5 April 2024, the parties attend a mediation before a mediator to be agreed between the parties.
6. The matter be listed for case management at 9:30am on 12 April 2024.

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

ANNEXURE A

Capitalised terms have the same meaning as in the further amended statement of claim filed on 24 March 2021.

Application of state legislation in federal jurisdiction

1. Is s 16 of the *Civil Liability Act 2002* (NSW) (**CLA**) picked up and applied by s 275 of the *Australian Consumer Law* (**ACL**) to a failure to comply with s 61 of the ACL?

   Yes.

2. Is s 5R of the CLA and s 9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) picked up and applied by s 275 of the ACL to a failure to comply with s 61 of the ACL?

   Yes.

3. Is s 5H of the CLA picked up and applied by s 275 of the ACL to a failure to comply with s 61 of the ACL?

   No.

4. Is s 5I of the CLA picked up and applied by s 275 of the ACL to a failure to comply with s 61 of the ACL?

   No.

5. Is s 32(1) of the CLA picked up and applied by s 275 of the ACL to a failure to comply with s 61 of the ACL?

   No.

Purpose and Result Guarantees

6. What did the Passengers make known by implication to the respondents was the purpose for which they acquired the services?

   The Passengers made known to the respondents that the particular purpose in acquiring the cruising services was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary.

7. Was the Voyage reasonably fit within the meaning of s 61(1) of the ACL for the purpose identified in answer to Question 6 above?

   No.

8. What did the Passengers make known by implication to the respondents was the desired result for which they acquired the services?

The Passengers made known to the respondents that the desired result in acquiring the cruising services was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary.

9. Was the Voyage of such a nature, quality, state or condition within the meaning of s 61(2) of the ACL that it might reasonably be expected to achieve the result identified in answer to Question 8 above?

   No.

Negligence

10. Did the respondents owe Passengers a duty to exercise reasonable care under the laws of New South Wales?

    Yes.

11. Would a reasonable person in the position of the respondents, within the meaning of s 5B(1)(c) of the CLA, have taken the precaution of cancelling the Voyage prior to its scheduled departure?

    Yes.

Misleading or deceptive conduct

12. What representations did the respondents make to the Passengers?

    The respondents made the following representations to Passengers:

    (a) it was reasonably safe for the passengers to embark on the cruise;

    (b) the respondents would take reasonable care for the safety of passengers during the cruise; and

    (c) the respondents would supply the promised cruising services as set out in their advertising brochures and passenger contracts and in doing so would do all things reasonably within their ability to enable the passengers to have a safe, relaxing and pleasurable cruise.

13. Were the representations identified in answer to Question 12 above misleading or deceptive, or likely to mislead or deceive, within the meaning of s 18 of the ACL?

    Yes.

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 On 25 October 2023, I published reasons dealing with liability and quantum on the principal applicant's own claim in this representative proceeding: *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280 (**J**). Before me now are two issues not dealt with then, namely a question of reserved costs and the articulation of questions and answers that were determined in the initial trial which are common to all members of the group that are represented by the applicant as defined in the further amended statement of claim.

2 Before turning to those issues, it is prudent to set out what has occurred since the initial trial judgment. On that occasion, I made orders listing the matter for the making of final orders and further case management approximately two weeks later.

3 That listing was subsequently postponed for a further two weeks at the request of one of the parties in order to accommodate the availability of counsel. Ultimately, the matter came before me again on 24 November 2023. I entered judgment against the respondents on the applicant's own claim in the amount of $4,423.48 plus pre-judgment interest. Relevantly for present purposes, I also made orders dealing with the two matters that are now before me.

4 First, in relation to costs, I made orders by consent that the respondents pay the applicant's costs of the proceeding up to 5 October 2022 and that the question of the applicant's costs for the period thereafter be reserved.

5 Secondly, I listed the matter for hearing on what issues decided in my reasons of 25 October 2023 are common to the claims of all group members.

6 Unfortunately, a mutually convenient date for the listing on costs and common questions could not be found until now.

Costs after 5 October 2022

7 On 5 October 2022, the respondents made an offer to the applicant for the resolution of the proceeding (ie the whole of the representative proceeding) by the payment by them of $15 million inclusive of interest, costs, expenses and disbursements – but subject, of course, to approval by the Court. That offer was rejected by the applicant on 7 October 2022.

8 The offer by the respondents was made on a "without prejudice save as to costs" basis and was said to be in accordance with the principles in Pt 25 of the *Federal Court Rules 2011* (Cth) or, failing those being effective for the purpose of appropriate costs orders, the principles in *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333. The respondents now accept that the offer was not made in accordance with the requirements of the Pt 25 regime. However, it is uncontroversial that because the common law principles applicable to *Calderbank* offers survive that regime, they apply in the present case: *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd (No 2)* [2002] FCA 224; 190 ALR 121 at [18].

9 The relevant principles are as follows: where a rejected *Calderbank* offer proves to be more generous than the subsequent judgment, the court may award the offeree the costs up to the date of the offer (or shortly thereafter in recognition that some time was reasonably required to consider the offer), but then may, as a matter of discretion, order the offeree to pay the offeror's costs after that date. If the offer was unreasonably rejected, the costs may be awarded against the offeree on an indemnity basis. See *Bradshaw v Emirates (Costs)* [2021] FCA 1613 at [14]-[15].

10 There are thus two matters arising from the rejection by an applicant of a *Calderbank* offer that is more than a subsequent judgment that may be relevant to the exercise of the costs discretion: the rejection may result in the respondent being awarded costs despite the applicant obtaining a judgment in its favour, and if the rejection was unreasonable those costs might be made on an indemnity (or "special") basis.

11 The respondents submit that the costs of the proceeding from 5 October 2022 and thereafter should continue to be reserved. That is on the basis that at some future point in time when the evidence before the Court is such that the Court is able to be satisfied to the civil standard that the total combined value of the group members' claims will be more, or less, than the amount of the offer, the Court will be able to determine whether the rejection of the offer should have a bearing on the costs, including whether the applicant was unreasonable in rejecting it. The respondents submit that although the Court is not presently able to make a positive finding based on the evidence before it as to whether the total combined value of the group members' claims is greater than the amount of the offer, the applicant was (or, perhaps, ought to have been) in a position to properly assess the reasonableness of the offer when it was made. That is said to be on the basis that proper investigation had presumably been undertaken on behalf of the applicant, at least for the purpose of enabling her and her representatives to make and consider several settlement offers that preceded the offer in question.

12 In the latter regard, the respondents had made a "drop hands" offer on 1 September 2022. The applicant rejected that offer on 21 September 2022 and made a counteroffer of $69 million inclusive of costs. The respondents rejected that offer on 30 September 2022 and made a counteroffer of $12.25 million inclusive of costs. The applicant rejected that offer on 3 October 2022 and made a counteroffer of $59 million inclusive of costs.

13 The applicant submits that there is no justification for departing from the ordinary position that costs should follow the event. She accordingly seeks a party and party costs order in respect of the costs that have been reserved. She makes four principal submissions in support of her position.

14 First, the applicant submits that it was not unreasonable for her to reject the 5 October 2022 offer noting that it was made in a personal injury class action where the total quantum cannot be reliably determined. She refers to the ex tempore judgment of Wilcox J in ***McMullin*** *v ICI Australia Operations Pty Ltd (No 6)* [1997] FCA 1426.

15 In *McMullin*, judgment had been handed down dealing with the quantum of liability in relation to the claims by the two named applicants, on their own behalf and on behalf of six sample group members. The applicants then sought a costs order on an indemnity basis which was refused, Wilcox J being unpersuaded that he should make an order at that stage other than on a party/party basis. As in the present case, the respondents, however, submitted that no costs order should be made at that stage as it might turn out, when all of the damages claims were assessed, that they were less than an offer that had been made by the respondents.

16 His Honour recognised that the respondents' offer had been made in accordance with the familiar approach in civil litigation, namely that if in any case the applicants ultimately received a result less beneficial than the offer, the respondents may be able to resist an adverse costs order, or even obtain a favourable order, by establishing that the applicants had not succeeded in beating the offer. His Honour said that although that approach is familiar in "ordinary litigation", "it presents a major problem in relation to a representative proceeding … especially where there are unidentified group members".

17 The problem that his Honour identified was expressed as being that if the applicants had accepted the respondents' offer they would have had to apply for approval of the settlement or discontinuance of the proceeding in order to give effect to the terms of the offer: *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), s 33V(1). However, the Court would have been unable to deal with the application until it had information regarding the identity of the group members and the likely value of the claims. His Honour said that he would not have been prepared to

approve a monetary settlement without having some idea whether the settlement represented fair value, from the point of view of group members. In other words, the Court would have had to have been satisfied that the amount that individual group members would receive reasonably reflected the hazards of their claims.

18 With great respect to his Honour, I fail to see how the problem he identified prevents the operation of a *Calderbank* offer that is made to settle the whole of a representative proceeding – noting that his Honour identified other strategies that might protect a respondent in a representative proceeding from costs, namely conceding liability or offering to compromise on liability with a discount on the assessment of damages.

19 Returning to a respondent's offer to settle the whole of a representative proceeding, if the offer is accepted, as postulated by his Honour, then no occasion for consideration of the costs consequences of the offer arises – the costs consequences only arise if the offer is rejected. If the offer is rejected, as it was in the present case, and the quantum of the group members' claims is ultimately determined, either by way of court approved settlement or judgment, the court will on the occasion of approving the settlement or giving judgment know whether the offer was more or less than the ultimately determined amount. Also, the court may be in a position to assess whether the offer was unreasonably rejected which, as mentioned, would be relevant to whether costs should be awarded on an indemnity basis.

20 The settlement of representative proceedings is invariably, or almost invariably, on the basis of a global amount for all claims. To deny respondents the mechanism of putting the applicant (or their funder) at risk on costs by making a reasonable global offer of settlement would not serve to encourage the settlement of such proceedings. There is therefore good reason to allow *Calderbank* offers to operate in the context of representative proceedings.

21 In the circumstances, to the extent that *McMullin* stands for the principle that a *Calderbank* offer cannot operate in the context of a representative proceeding where the offer is made to settle all of the group members' claims in a global amount, it is in my view clearly wrong. In any event, I find the reasoning hard to discern and it may be that his Honour was exercising a discretion in the particular case, rather than intending to establish any rule.

22 In support of the contention that it was not unreasonable for her to reject the 5 October 2022 settlement offer, the applicant emphasises that the assessment of whether an offer was unreasonably rejected must be made with reference to the circumstances at the time the offer was made and not at some later time: *Seven Network Ltd v News Ltd* [2007] FCA 1489; 244 ALR 374 at [65] per Sackville J. On that basis, the applicant submits that no purpose will be

served in further delaying the determination of liability for costs after 5 October 2022 as the relevant circumstances are already known and cannot be any different in hindsight.

23 The principal difficulty with that submission, even if it were accepted that the Court will not be in a better position at some future time to assess the reasonableness of the rejection of the settlement offer, is that it ignores the relevance of the ultimate quantum of the claims relative to the settlement offer. That quantum can only be known at some future time. At that time it may be clear that the offer exceeds the proper quantum, which is a factor that would be highly relevant to the costs following rejection of the offer. It is unaffected by whether or not the rejection was unreasonable.

24 The same consideration nixes the applicant's submission that she was not unreasonable in rejecting the settlement offer because it included an unreasonable and prejudicial term that if the proposed settlement were not approved by the Court, then the applicant would pay for the respondents' costs thrown away by adjourning and rescheduling the trial. That is to say, even if that submission were to be accepted it would not lessen the considerable force of the argument that the costs should be reserved so that the impact of the ultimate proper quantum of the claims can be taken into account in determining the liability for costs postdating the offer.

25 Secondly, the applicant submits that there was and is no basis to think that the likely total combined value of the group members' claims is less than the amount of the offer. In my view, that cannot be determined on the information presently available. The applicant points to her party and party costs to date likely being of such a sum (ie $5.85 to $6.75 million) as to be nearly half the amount of the offer, leaving only a relatively modest amount for the group members' claims. She submits that there is no basis to think that the sum of the group members' claims might be less than that amount.

26 The difficulty is that I do not know anything about the other group members' claims, or even how many such claims there are – although I know the approximate number of passengers I do not know how many, if any, have opted out, or how many executor group members and close family group members there are (see J[3] for descriptions of these sub-groups). It is simply not possible at this stage to be confident that the offered sum is less than what the ultimate quantum may be.

27 Thirdly, the applicant submits that the 5 October 2022 offer was a last-minute tactic and not a genuine attempt to reach a settlement. In that regard, the applicant relies on Dal Pont GE, *Law of Costs* (5th ed, LexisNexis, 2021) (**Dal Pont**) at [13.91] where it is said that the law:

> should not encourage the use of a Calderbank offer delivered shortly before trial – when the offeree might be expected to have his or her mind on a number of matters and will already have incurred considerable costs – 'as an indiscriminately wielded tactical weapon'. This may be inferred where the case is complex and has been pending for considerable time, as explained by Bryson JA in ***De Groot*** *v Nominal Defendant* [[2005] NSWCA 61 at [261]].
>
> [Footnotes omitted, emphasis added.]

28 However, it is to be observed that in the cited passage in *De Groot*, Bryson JA explained that:

> It is one thing to bring settlement offers into account when exercising a discretion as to costs: it is another thing altogether to endorse a disruptive stratagem, which is how I class throwing down an offer of settlement not before but during the hearing, after years of time which could and should have been used to consider settlement had passed, and severely limiting the time available for its consideration.

29 The present case is nothing like that case. I do not see that there is any basis to conclude that the respondents' offer was not genuine and was merely a last-minute tactic aimed at distracting the applicant's preparation for trial. It is true that it was made on the eve of the trial – the trial had been listed to commence on 10 October 2022 although at the request of the applicant, on 4 October I put out the start of the trial to 12 October. However, the trial was scheduled to and did last for a number of weeks. Also, the trial was never going to determine the quantum of the sum of the group members' claims – it was listed to determine only the applicant's claim. It was therefore made very well in advance of any final determination. But perhaps most tellingly, as detailed above, the applicant had herself made settlement offers on 21 September 2022 and 3 October 2022, the latter being only two days before the respondents' offer in question. The respondents had also made a substantial offer on 30 September 2022. Just as there is no basis to suggest that the applicant's offers were other than genuine, I do not see any basis to conclude that the respondents' relevant offer was other than genuine.

30 The relevant offer was also in a substantial sum. It may be that that turns out to be well less than what the claims are truly worth, or it may not. None of that matters. The point is that the offer has the hallmarks of being genuinely intended as a means of trying to settle the dispute.

31 Fourthly, the applicant submits that to further reserve the costs would be contrary to the principal of the finality of litigation, ie it would not promote the finality of litigation but would rather fragment it. In that regard, the applicant relies on Dal Pont at [13.82] and submits that in the circumstances of an "all in" Calderbank offer, ie one that includes costs as in the present case, a determination of costs liability will not be put off following final judgment to enable the actual costs to be quantified on taxation. That may be so, but that is because other than the determination of costs liability there would in those circumstances be nothing left for the court

to decide; to delay that determination pending quantification of the costs would be to delay finalising the litigation.

32 The present case is very different. It is true that to further reserve the costs after the 5 October 2022 offer will prolong the determination of that issue, but it will not prolong the finalisation of the litigation. Only one group member's claim has been determined, and, as I will turn to shortly, only a limited number of common questions have been determined. Absent settlement, this case has a long way to go.

33 In response to that, the applicant submits that for Mrs Karpik, the principal applicant, the case has been finalised and that there is nothing more to decide. On that basis, she submits that she is entitled to her costs now and that to delay determination of that entitlement would be to delay the finality of *her* litigation. That, however, seems to me to be an artificial approach. It ignores that the very expensive trial was fought not only to determine her claim but to determine common questions. Indeed, those costs would not have been expended if it was only her claim that was in issue. To award her all of those costs in circumstances where, notionally, the ultimate benefit of that expensive exercise (being the combined sums awarded to all group members in due course) is less than the respondents' pre-trial settlement offer would be to give her (or at least her litigation funder) a potentially undeserved windfall.

34 In the circumstances, I am satisfied that the costs after 5 October 2022 up to and including the costs of the hearing on the costs and common questions issues a few days ago should be reserved.

Common questions

35 The parties are agreed on the formulation of and answers to a number of common questions arising from my reasons of 25 October 2023. Save for some minor amendments to use the statutory language of guarantees not being "complied with" rather than there being "contraventions" of the statutory guarantees (see ACL ss 267(1)(b) and 267(4), although cf s 236(1)), those are reflected in annexure A to the orders that I make today. The respondents, however, dispute that the following questions as formulated by the applicant are common questions:

(1) **Question 6:** What did the Passengers make known by implication to the respondents was the purpose for which they acquired the services?

Answer: The Passengers made known to the respondents that the particular purpose in acquiring the cruising services was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary.

(2) **Question 8:** What did the Passengers make known by implication to the respondents was the desired result for which they acquired the services?

Answer: The Passengers made known to the respondents that the desired result in acquiring the cruising services was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary.

(3) **Question 12:** What representations did the respondents make to the Passengers?

Answer: The respondents made the following representations to the Passengers:

(a) it was reasonably safe for the passengers to embark on the cruise;

(b) the respondents would take reasonable care for the safety of passengers during the cruise;

(c) the respondents had implemented, and would continue to implement, increased monitoring, screening and sanitation protocols to protect the health of passengers which measures were designed to be flexible to adapt to changing conditions and recommended best practice; and

(d) the respondents would supply the promised cruising services as set out in their advertising brochures and passenger contracts and in doing so would do all things reasonably within their ability to enable the passengers to have a safe, relaxing and pleasurable cruise.

36 Questions 6 and 8 concern the claims for failure to comply with the purpose and result guarantees in s 61 of the ACL, and question 12 concerns the claims for contravention of the prohibition against engaging in misleading or deceptive conduct in s 18 of the ACL.

37 There is a further question, question 13, which the parties agree falls away in the event that question 12 is not a common question. It is whether the representations identified in answer to question 12 were misleading or deceptive, or likely to mislead or deceive, within the meaning of s 18 of the ACL. If it is a common question, the accepted answer to question 13 based on the initial trial reasons is "yes".

38 A common question "is an issue which is not peculiar to the case of a representative party (an applicant) but is common to the representative party and the group or sub-groups of the group": *Gill v Ethicon Sàrl (No 6)* [2020] FCA 279 at [7] per Katzmann J. The fundamental importance

of properly identifying common questions arises from s 33ZB(b) of the FCA Act which provides that a judgment given in a representative proceeding "binds all persons other than any person who has opted out of the proceeding under section 33J". That creates what has been described as a form of statutory estoppel: *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; 259 CLR 212 at [52].

39 It has been observed that the "trick" in formulating common questions "is to ensure [they] are properly framed as to make factual findings and resolve legal questions which cannot be affected by different facts being found in the cases of group members, but to avoid either provisional statements of entitlements or disentitlement": *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; 377 ALR 234 at [384] per Lee J, noting that the judgment was overturned on appeal but not in relation to the issue at hand – *Belconnen Lakeview Pty Ltd v Lloyd* [2021] FCAFC 187; 156 ACSR 273.

40 The respondents submit, with reference to those authorities, that the three identified questions are not common because whether or not the answers given to them apply to other group members will depend on the individual circumstances of those group members. Those circumstances are said to include the particular communications which passed between the respondents and the passengers, and any other relevant contextual matters. It is said that by definition such questions are not common to all group members, and they require additional findings of fact beyond those contained in the initial trial judgment.

41 In my view it is necessary to look at what was pleaded in relation to the matters underlying the relevant common questions, as well as to what primary factual findings were made on which the conclusions with regard to those questions were based.

42 In relation to the purpose guarantee, the applicant pleaded that she and the passenger group members made it known to the respondents that the particular purpose for which they acquired the respondents' services was to have a safe, relaxing and pleasurable 13-day cruise holiday and to "come back new" from that holiday (FASOC [170]). The particulars given in relation to that pleading were that the purpose was impliedly made known to the respondents by the passengers booking the cruise and subsequently boarding the *Ruby Princess* for the cruise. The implication was pleaded to arise from four circumstances, each of which is a general circumstance applicable to all the passengers – the respondents' generalised advertising of the cruise, its use of the trade mark "come back new" in relation to the cruise, and the conduct of the passengers in booking the cruise. The result guarantee is pleaded in exactly the same way (FASOC [172]).

43 The respondents in their defence admitted that by going on the voyage, the passenger group members impliedly made it known that they were desirous of having a safe, relaxing and pleasurable cruise holiday, but otherwise denied the allegations. The issue between the parties was therefore as to the proper formulation of what was impliedly made known to the respondents by the passengers arising from common ground circumstances, and not what those circumstances were.

44 In relation to misleading and deceptive conduct, the applicant pleaded that each respondent, by its conduct, represented to the applicant and the passenger group members that it was safe to board the *Ruby Princess* for the voyage (FASOC [269]). The particulars given in relation to that pleading were as follows:

> The conduct was partly express and partly implied by conduct.
>
> - Insofar as it was express, it was contained in the e-mail authored by the [respondents] and sent on or about 5 or 6 March 2022 to the Applicant and most or all of the Passenger Group Members.
> - Insofar as it was implied, it was implied by the fact that each of the Respondents allowed the Applicant and the Passenger Group Members to board the *Ruby Princess*.

45 The respondents in their defence said that by allowing the passenger group members to board the ship, the respondents implicitly represented to the passenger group members that they would take reasonable care for their safety during the voyage, but otherwise denied the allegations.

46 At this stage it is to be observed that save for the allegations in the particulars that the email of 5 or 6 March 2022 was sent to "most or all" of the passengers which leaves open the possibility that it was not sent to all the passengers, all the applicant's allegations and particulars and the respondents' admissions in response are directed to generalised matters applicable to all passengers.

47 Turning now to the judgment, in relation to the purpose and result guarantees I found that by making the booking and going through with it, including by turning up to embark on the vessel, Mrs Karpik made known to the respondents that her particular purpose in acquiring the cruising services was to have a safe, relaxing and pleasurable cruise holiday substantially in accordance with the advertised and booked itinerary (J[469]). I found that exactly the same can be said for the desired result that was impliedly made known by Mrs Karpik to the respondents (J[469]). There is nothing in my primary factual findings and reasoning resulting in the conclusions with regard to the impliedly communicated purpose and result that is peculiar to Mrs Karpik and not

generalised across all passengers. Also, as identified, the respondents admitted in the defence that by going on the voyage the passenger group members impliedly made known their desired purpose and result.

48 In those circumstances, I consider that those conclusions are common to all passengers. Questions 6 and 8 are therefore properly characterised as common questions.

49 In relation to misleading or deceptive conduct, my conclusions with regard to the four representations embodied in question 12 were based on findings in relation to three categories of conduct by the respondents (J[710]). They are, first, promotional and marketing material that was distributed by the respondents advertising the cruise, secondly, the Dear Henry email sent to Mr Karpik on 5 March 2020 and, thirdly, the fact that passengers were permitted by the respondents to board the *Ruby Princess* on 8 March 2020. The first and third of those categories applies generally to all the passengers, but there was no finding that the 5 March 2020 email was sent to all passengers. As identified above, it was also not pleaded that that email was sent to all passengers.

50 There is evidence in the form of copies of the same email sent to other passengers and mention in an email chain at an executive level recording that the "announcement" be synchronised across different PCL brands that provides a strong basis to conclude that the 5 March 2020 email was a generalised email sent to all passengers (CAU.001.185.0182, SKA.005.001.0069, PCL.001.007.2237). However, that is not an issue that was tried at trial and no finding was made in relation to it. There therefore remains the possibility that it was not sent to (or received by) one or more passenger group members.

51 With reference to the reasoning in the judgment (at J[714]-[721]), it is only the Best Practices Representation, ie representation (c) identified in question 12, that is based in part on the 5 March 2020 email. The others, ie (a), (b) and (d), are based on factors common to all passengers.

52 The respondents nevertheless submit that whether or not particular conduct amounts to a particular representation depends on all the circumstances of the conduct, which circumstances may relevantly differ between different passengers. It is suggested, by way of example, that the respondents or their agents may have made individualised communications to some passengers and not others which would then have a bearing on how the generalised conduct to all passengers is to be understood in relation to those passengers.

53 In the latter regard, the respondents refer to ***Stack*** *v AMP Financial Planning Pty Ltd (No 2)* [2021] FCA 1479; 401 ALR 113 where Beach J held that whether certain representations referred to as the "commissions representations" which were said to have arisen by silence were made to all group members was not a common question. That was on the basis that there was a significant diversity in the circumstances which might have supported individual claims as to what representations were made with respect to commissions, and whether those representations were misleading or deceptive (at [193]).

54 His Honour reasoned as follows (at [200]):

> To determine whether there was misleading or deceptive conduct by silence requires an analysis of all of the circumstances, including the awareness of the persons to whom the commission representations were allegedly conveyed. To determine whether there was a reasonable expectation that the matters comprising the commissions representations ought to have been but were not disclosed to any group member requires analysis of the peculiar circumstances of each of those group members. It is insufficient to establish that those group members received personal advice from an AMP authorised representative and that commissions might have been paid in respect of any investment they made. Put another way, the quality of these commonalities identified by the applicants is de minimis to the extent they assist in determining the misleading or deceptive conduct allegations.

55 His Honour asked rhetorically (at [201]) how he could answer the question whether the representations were made by the silence of the AMP authorised representatives without considering what each of them in fact said, or did not say, to their clients? The respondents submit that similar considerations apply in the present case.

56 I consider that the circumstances of the decision in *Stack* are far removed from the present case. First, a representation by silence is very different from a representation by positive conduct – the individual circumstances of the representee to whom the representee was silent are compellingly relevant by comparison to the individual circumstances of the representee who receives a representation by positive conduct of the representor. Secondly, in *Stack* there were innumerable AMP authorised representatives who may have been saying different things, or saying nothing in the face of different factual circumstances. However, in the present case all the relevant conduct was by the respondents in a centralised and consistent way; aside from the possibility that the 5 March 2020 email did not go to all the passengers, there is nothing in the findings with regard to the representations that is peculiar to the Karpiks. Although the respondents submit that they or their agents may have said something different to individual passengers, there is no credible foundation to such speculation – there is no suggestion of that possibility in the pleadings or in any of the evidence thus far in the case. I consider that in the circumstances of the case the suggestion is so fanciful that it can be disregarded.

57 I am fortified in my conclusion by the decision of Allsop CJ in *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 in which it was found that conduct that included making particular statements about how bread was baked was misleading and deceptive contrary to ACL s 18 regardless of the peculiar circumstances of individual consumers. The conduct is to be objectively assessed as to what it conveyed, with the peculiar circumstances of individual consumers potentially going to the question of causation. See, for example, the judgment at [45].

58 In the circumstances, I am satisfied that the findings that the respondents made representations in the form of those identified in paragraphs (a), (b) and (d) of question 12 are indeed common questions. Because of the uncertainty about the 5 March 2020 email, I cannot make that same conclusion with regard to the representation in paragraph (c) which arises in part from that email.

Timetabling

59 At the request of the parties, I also make some changes to timetabling orders previously made.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 7 February 2024