

NOTICE OF FILING

Details of Filing

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Sia Lagos

Registrar

Important Information

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Form 17
Rule 8.06(1)(a)

Statement of claim

No. **of 2023**

Federal Court of Australia
District Registry: Queensland
Division: General

DEBRAH JACKSON

Applicant

CARNIVAL PLC (ARBN 23 107 998 443)

Respondent

The Parties

1. The Applicant commences this action in her own right and as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1974* (Cth) (the **Act**).
2. At all material times the Applicant;
 - (a) was a natural person over the age of 18 years old; and
 - (b) was and remains a person capable of suing in her own right.
3. At all material times the Respondent:
 - (a) was registered as a foreign company carrying on business in Australia pursuant to Division 2 of Part 5B.2 the *Corporations Act 2001* (Cth) (the **Corporations Act**) and is able to be sued;

Filed on behalf of (name & role of party)	Debrah Jackson, the Lead Applicant		
Prepared by (name of person/lawyer)	Peter Carter		
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(b) operated under the name "*P&O Cruises*".

4. In May 2017, the Respondent operated a number of cruises on ships which departed from Australia.

The Fateful Cruise

5. The Applicant booked and paid for a 7-day cruise operated by the Respondent which departed Brisbane on 5 May 2017 (the **Cruise**) on a ship called "Pacific Aria" (the **ship**).

Particulars

- A. The Applicant booked the Cruise and made payment for the Cruise through at Travel Agent called "Tripaway Cruise & Travel" located in Tweed Heads in the State of New South Wales.
6. The Cruise had the following advertised itinerary:
- (a) 05 May 2011 depart Brisbane;
 - (b) 06 May 2011 at sea;
 - (c) 07 May 2011 Noumea;
 - (d) 08 May 2011 Lifou Island;
 - (e) 09 May 2011 Port Villa;
 - (f) 10 May 2011 at sea;
 - (g) 11 May 2011 at sea;
 - (h) 12 May 2011 return Brisbane.

Group Members

7. A Group Member in these proceedings is a person who:
 - (a) was a passenger on the Cruise;
 - (b) was a “*consumer*” as that term is defined in s. 3 of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the **ACL**).
8. For the sake of clarity, the Applicant is a group member.

Application of Statute

9. By operating the Cruise, the Respondent:
 - (a) supplied passengers with the rights, benefits, facilities and privileges associated with traveling on a cruise ship in the South Pacific including the use, amusement, entertainment, recreation and instruction found on the Ship and permitting passengers to disembark and visit various foreign ports;
 - (b) supplied the Applicant and other group members with a “*service*” as that term is defined in s. 3 of the *ACL* (the **Services**).
10. At all material times the Applicant was a “*consumer*” as that term is defined in s. 3 of the *ACL* as:
 - (i) the value of the Services supplied by the Respondent to the Applicant did not exceed \$40,000;
 - (j) the Services were acquired by the Applicant for personal use.
11. At all material times the Respondent supplied the Services in “*trade or commerce*” as that term is defined in s. 2 of the *ACL*.
12. The Respondent marketed the Cruise by means of brochures and television and other media advertisements and thereby:

- (a) represented that the Cruise had pleasurable and recreational attributes in that it would involve relaxation, fun, the use of the Ship's facilities and visits to foreign ports of interest;
 - (b) indicated that the Cruise would be a "stress less" experience;
 - (c) indicated that the Curies would involve an "escape to a remote island or local hideaway";
 - (d) indicated that the Cruise would be a "dream holiday" which could be made an "event";
 - (e) said that the Cruise would result in the "floating away" of her "troubles";
 - (f) indicated that the Cruise was the "fastest way to slow down";
 - (g) indicated that as soon as she took a step onboard there would be "no stress";
 - (h) invited travellers to make bookings on the Cruise.
13. In supplying the Services to the Applicant, the Respondent guaranteed that the services would be rendered with due care and skill (the ***due care and skill guarantee***).

Particulars of implication

- A. The due care and skill guarantee is implied as a matter of law by s 60 of the ACL
14. Further, the Applicant made known to the Respondent that the particular purpose for the acquisition of the Services was to acquire the experience of enjoying travel and accommodation on a Ship in the South Pacific, the use of the facilities provided onboard the ship and to be able to visit a number of foreign ports (the ***Purpose***).

Particulars of implication

- A. The Purpose was made know by the Applicant to the Respondent by implication which arose from:

- (i) the marketing of the Cruise by the Respondent as pleaded in paragraph 12 herein;
 - (ii) the fact that the Respondent held itself out as supplying recreation services; and
 - (iii) the purpose and nature of the transaction entered into by way of the Applicant booking and paying for a cruise holiday on the Ship in the South Pacific.
15. Further or in the alternative, the Applicant made known to the Respondent that the desired result that she wished to achieve from the acquisition of the Services was the experience of enjoying travel and accommodation on a Ship in the South Pacific, the use of the facilities provided onboard the ship and visits to a number of foreign ports (the **Result**).

Particulars of implication

- A. The Result was made know by the Applicant to the Respondent by implication which arose from:
- (i) the marketing of the Cruise by the Respondent as pleaded in paragraph 12 herein;
 - (ii) the fact that the Respondent held itself out as supplying recreation services and nature; and
 - (iii) the purpose of the transaction entered into by way of the Applicant booking and paying the Respondent for a cruise holiday on the Ship in the South Pacific.
16. In the premises, in supplying the Services to the Applicant, the Respondent guaranteed that:
- (a) the Services would be reasonable fit for the Purpose (the **Purpose Guarantee**);

Particulars of implication

- A. The Purpose Guarantee is implied as a matter of law by s 61(1) of the ACL
- (b) the Services might reasonably be expected to achieve the Result (the **Result Guarantee**).

Particulars of implication

- A. The Result Guarantee is implied as a matter of law by s61(2) of the ACL.

Cyclone Donna - strength

17. On 1 May 2017 a severe tropical cyclone began to form about 1,455 km west-northwest of Nadi (Fiji) (the **Storm**).
18. The Storm was issued with a tropical cyclone formation alert by the Joint Typhoon Warning Centre (**JTWC**) at 21:00 CUT (Coordinated Universal Time) on 1 May 2017 (which was 9am 2 May 2017, Brisbane time, Queensland).
19. On 2 May 2017, the JTWC designated the Storm as a tropical depression.
20. The Australian Tropical Cyclone Scale sets the following wind measurements for cyclones under the following categories:

Category	Sustained wind speed (km/h)	Wind gusts (km/h)
1	63-88	<125
2	89-117	125-169
3	118-159	170-224
4	160-169	225-279
5	>200	>280

21. On 3 May 2017, the Fiji Meteorological Service (**FMS**) indicated that the Storm had intensified into a category 1 cyclone on the Australian Tropical Cyclone scale and was named tropical cyclone Donna (**Cyclone Donna**).
22. Cyclone Donna intensified and was progressively reclassified by the FMS as follows:
 - (a) on 3 May 2017, a category 2 cyclone by 1800 UTC on 3 May 2017 (4am 4 May 2017 Brisbane time);
 - (b) on 4 May 2017, a category 3 cyclone; and
 - (c) on 6 May 2017, a category 4 cyclone.
23. On 3 May 2018, the JTWC classified Cyclone Donna as being equivalent to a Category 1 hurricane on the Saffir-Simpson scale.
24. On 4 May 2017, the JTWC increased the classification of Cyclone Donna to a Category 3.
25. Late on 6 May 2017 the JTWC altered the classification of Cyclone Donna back to a category 1 equivalent on the Saffir-Simpson scale, with the FMS indicating the same day that Cyclone Donna had weakened to a category 3 cyclone on the Australian Tropical Cyclone scale.
26. Early on 7 May 2017 Cyclone Donna was upgrade by the FMS to a category 4 cyclone for the second time.
27. Shortly afterward the JTWC estimated that Cyclone Donna had intensified to a category 4 equivalent (completely skipping the category 3 status) on the Saffir-Simpson scale.
28. On 8 May the FWS upgraded Donna to a Category 5 cyclone estimating that the Storm possessed 10-minute sustained winds of 205 km/h.
29. On 9 May Donna was reduced to a category 4 cyclone.
30. On 10 May Cyclone Donna was reduced a category 1 cyclone.

Cyclone Donna - Path

31. Cyclone Donna initially formed about 1455 km west-northwest of Nandi and tracked eastwards through the northern island of Vanuatu.
32. Cyclone Donna turned west and by 6 May tracked back through Vanuatu and turned south towards Noumea, New Caledonia and then followed a southerly direction approximately parallel to the Australian coastline.

Knowledge of the Cyclone

33. Information regarding the categorisation, strength and projected path of Cyclone Donna was publicly and contemporaneously published:
 - (a) on the internet by the FWS, JTWC and the Bureau of Meteorology;
 - (b) on the internet when a search was made for the weather in the South Pacific basin, Noumea, Lifou Island or Port Villa.
34. On or about 5 May 2017, the Australian Government through the DFA internet site warned holiday makers to reconsider their travel plans to Vanuatu because of Cyclone Donna stating: "*we advise Australians to reconsider travel to Vanuatu due to the likely impact of the cyclone*".

The Cruise

35. At about 2pm on 5 May 2017, the Ship departed Brisbane at which time:
 - (a) Cyclone Donna had been classified by the FWS as a category 3 cyclone under the Australian Tropical Cyclone scale which meant that the cyclone could have sustained winds of up to 159 km/h with gusts of wind up to 224 km/h;
 - (b) the route of the Ship took it directly into the path of the cyclone.
36. At about 2pm on 7 May 2017, the Ship arrived in Noumea.

37. On 7 May 2011, Cyclone Donna was upgraded to a category 4 cyclone which mean that it could have sustained winds of up to 169 km/h with gusts of wind up to 279 km/h.
38. The trip between Brisbane and Noumea was rough, with the last 24 hours before arrival at Noumea the sea being very rough and:
 - (a) no activities were open onboard the Ship;
 - (b) it was difficult to move around; and
 - (c) the environment was unpleasant.
39. Shortly before arriving in Noumea, passengers were informed by general broadcast that the Ship would be staying in Noumea about 24 hours and then departing for the return voyage to Brisbane and that no other ports would be visited.
40. At Noumea, passengers could disembark from the Ship. Most businesses were closed and were locked down because of Cyclone Donna.
41. While in Noumea as a result of Cyclone Donna, the weather got worse becoming gloomier and the winds increased.
42. At about 4pm on 8 May 2017, the Ship departed Noumea for Brisbane.
43. The Ship did not call at Lifou Island or Port Villa or any other port on its return voyage.
44. The seas were very rough for the entire return voyage back to Brisbane with the result that:
 - (a) the severity of the seas caused furniture to move, tables to overturn and the Ship to list and to stay in a listing position for about an hour; and
 - (b) water ingressed down corridors and into some cabins.
45. Passengers including the Applicant found the experience caused by the listing of the ship to be very frightening and she was fearful for his own safety.

46. Because of the weather, during the trip from Noumea to Brisbane:
- (a) most of the facilities including the pools and spas were closed;
 - (b) live performances were cancelled;
 - (c) lifts were unable to operate which meant that the stairs had to be used when travelling between decks;
 - (d) the smoking deck was closed;
 - (e) the environment was unpleasant.
47. On 12 May 2012, the Ship arrived back in Brisbane.
48. Prior to departure neither the Applicant or any other Group Member was informed by the Respondent that there would to be any impact on the Cruise or the advertised route that the Cruise was to take caused by the weather.

Breach of Due Care and Skill Guarantee

49. At the time the Services were provided there was a risk which was reasonably foreseeable to the Respondent, or would have been reasonably foreseeable to a reasonable cruise operator in the position of the Respondent, that:
- (a) the marketed benefits of the Cruise, namely that it would be pleasurable and for recreation and would involve relaxation, fun, the use of the ship's extensive facilities and the visit to foreign ports could not be provided because of the existence of Cyclone Donna in the area into which the Ship proposed to travel;
 - (b) the rights, benefits, facilities and privileges associated with traveling on a ship in the South Pacific including the use, amusement, entertainment, recreation and instruction found on the Ship and permitting passengers to disembark and visit various foreign ports could not be provided because of the existence of Cyclone Donna in the area into which the ship proposed to travel;

50. The risks referred to in paragraph 49 herein was not insignificant because of:
- (a) the existence of Cyclone Donna;
 - (b) the strength of Cyclone Donna;
 - (c) the projected path of Cyclone Donna.
51. At the time the Ship departed from Brisbane the Respondent knew, or a reasonable and prudent cruise operator in the position of the Respondent would to have known, of the existence of Cyclone Donna and that:
- (a) it had been classified as a category 3 cyclone under the Australian Tropical Cyclone scale which meant that the cyclone could have sustained winds of up to 159 km/h with gusts of wind up to 224 km/h;
 - (b) the cyclone was active in the area into which the Ship intended to travel;
 - (c) the effect of the cyclone on the Cruise meant that the voyage would be very rough with the facilities onboard the Ship being either closed or limited by the weather;
 - (d) passengers enjoyment of the Cruise would be reduced because of the weather;
 - (e) the Cruise would not be pleasurable, recreational, relaxing or fun for passengers;
 - (f) that it would not be possible to visit the ports advertised on the itinerary because of the weather;
52. The risk referred to in paragraph 51 herein could have been avoided by the Respondent either by:
- (a) cancelling the Cruise; or

- (b) altering the route of the Cruise so as to avoid or limit the impact of Cyclone Donna.
53. In the premises of the facts pleaded in paragraphs 49 to 52 herein, the Services were supplied by the Respondent to the Applicant without due care and skill and in breach of the due care and skill guarantee.
54. The Respondent failed to exercise due care and skill in supplying the Services by:
- (a) failing to make any or any proper enquiry prior to the departure of the Cruise into the weather conditions pertaining in the area into which the Cruise was to travel;
 - (b) failing to make any or any proper enquiry prior to the departure of the Cruise into the nature and extent of Cyclone Donna and its projected path;
 - (c) failing to cancel or delay the Cruise so that it could be undertaken when the weather was more favourable and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
 - (d) prior to his embarkation failing to offer the Applicant an alternative cruise in lieu of the Cruise departing on 5 March 2017;
 - (e) at or prior to departure, failing to alter the proposed route of the Cruise so as to avoid the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
 - (f) during the course of the Cruise, failing to choose a route which would avoid (as much as possible) the impact of Cyclone Donna and thereby make it more likely that the Applicant could enjoy the benefits of the Cruise;
 - (g) at or prior to departure of the Cruise, failing to offer the Applicant the opportunity to cancel the Cruise;
 - (h) failing to warn the Applicant and other group members prior to their departure that the weather conditions were such that they would be unable to enjoy or substantially enjoy the benefit of the Cruise

55. The provision of the Services by the Respondent pleaded in paragraph 53 herein constituted a “*major failure*” as that term is defined in s 268 of the *ACL* as:

- (a) if a reasonable consumer had been acquainted with both the facts pleaded in paragraphs [insert] herein and the Respondents failures with regard to the provision of the Services referred to in paragraph 53 then that consumer would not have acquired the Services;

or alternatively

- (b) the Services were not reasonably fit for the particular purpose for which they were acquire in that that Applicant did not enjoy or substantially enjoy travel and accommodation on a ship in the South Pacific, the use of the facilities provided onboard the ship and the ability to visit a number of foreign ports.

Breach of the Purpose Guarantee.

56. In the premises of the facts pleaded in paragraphs 50 to 54 herein the Services were not reasonably fit for the Purpose and were in breach of the Purpose Guarantee.

Breach of the Result Guarantee

57. In the premises of the facts pleaded in paragraphs 50 to 54 herein the Services did not achieve the Result and were in breach of the Result Guarantee.

Damages

58. As a result of the Respondent’s breach of its statutory duty and statutory warranties as described herein, the Applicant has suffered loss and damage.

59. In the premises, the Respondent is liable to provide compensation to the Applicant pursuant to section 267 and/or 268 of the *ACL* in such sum as determined by the Court for breach of statutory warranties.

Date: 4 May 2023



Signed by Peter Barton Carter
Lawyer for the Lead Applicant

This pleading was prepared by Douglas J Campbell KC and Blair A Hall of Counsel.

Certificate of lawyer

I, Peter Barton Carter, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 4 May 2023



Signed by Peter Carter
Lawyer for the Lead Applicant