

Federal Court of Australia
District Registry: Queensland
Division: General

No. QUD183 of 2023

DEBRAH JACKSON

Applicant

CARNIVAL PLC (ABRN 23 107 998 443)

Respondent

Applicant's Submissions for Approval of the Proposed Settlement

31 January 2025

Material

Originating Application filed 4 May 2023

Amended Statement of Claim filed 8 August 2023

Defence of the Respondent 6 October 2023

Reply filed 25 October 2023

Application filed 30 October 2024

Affidavit of Peter Barton Carter filed 31 October 2024 (*Carter's first affidavit*)

Order of Derrington J dated 1 November 2024

Order of Registrar Schmidt dated 19 December 2024

Affidavit of Peter Barton Carter filed 23 January 2025 (*Carter's second affidavit*)

The Application

1. By a deed of release and settlement¹ (the *settlement*), the Applicant and Respondent have agreed a settlement of this proceeding subject to the approval of the Court pursuant to s33V of the *Federal Court of Australia Act 1976* (Cth) (the *Act*)
2. The settlement sum is \$2,416,000.
3. The settlement provides that the Respondent will pay the settlement sum to the Applicant in full and final settlement of the proceeding. This amount is required to be applied to pay legal costs², interest and any other amounts payable under the settlement and to be distributed in accordance with the terms of a Settlement Distribution Scheme³.
4. The proposed Settlement Distribution Scheme requires the following approximate split of the settlement sum:
 - (a) \$1,000,000 for disbursements, and the Applicant's legal costs;
 - (b) \$1,416,000 to the Applicant and Group Members.
5. The only additional factors which may impact on the amount payable to Group Members are:
 - (a) the number of Group Members who register. The present calculations are based on an estimate that 750 Group Members will register. In fact to date only 713 Group Members have registered with the Applicant's solicitors⁴. If that figure does not increase then the percentage of the \$1,416,000 payable to an individual Group Member will increase;
 - (b) Mr Carter estimates that the cost of administration will be no more than \$100,000. This cost will be subject to consideration by the Court appointed cost assessor;
 - (c) costs incurred by the court appointed cost assessor.

¹ Exhibit 1 to Carter's first affidavit commencing at p6.

² capped as described below

³ para 9 Carter's second affidavit

⁴ para 7(c) Carter's second affidavit

6. Carter's first affidavit sets out how the settlement was fashioned⁵. A number of factors were taken into account. They were:
- (a) the fact that the number of Group Members was limited to 1,454 which was the number of passengers on board the cruise;
 - (b) the number of Group Members who have registered as wishing to participate in the proceedings. At the time of writing Carter's first affidavit these were about 500 but have since increase to 713;⁶
 - (c) the Respondent provided information that the median cost of a ticket on the cruise was \$944 per person;
 - (d) the settlement figure takes into account the vagrancies associated with litigation and the legal strength of the Applicant's case as advised by counsel;
 - (e) the settlement sum is calculated in the following manner:

750 (estimated number of registered Group Members) x \$944 (median ticket cost) x 2 = \$1,416,000. If legal costs of \$1,000,000 are added that reaches the proposed settlement figure of \$2,416,000. The object of the settlement is to provide a group member with a refund of their fare and an additional damages component which is approximately equal to the cost of their fare again.

Procedural matters

7. The opt-out process has been completed.
8. Group Members were notified of the proposed settlement and of the settlement distribution scheme and were told of the date and time of this application as required by the Court in its orders of 1 November 2024.⁷ The process set by the Court in those orders was implemented.

⁵ paras 6 to 10

⁶ para 7(c) Carter's second affidavit

⁷ paras 4 to 6 Carter's second affidavit

9. There are presently no adverse responses by Group Members to the proposed settlement that the Applicant is aware of.⁸

Relevant principles

10. This proceeding may only be settled with the approval of the Court⁹ and the parties are required to persuade the Court that the proposed settlement is fair and reasonable having regard to the claims made on behalf of Group Members who will be bound by the settlement, and that it has been undertaken in the interests of Group Members.¹⁰
11. A number of factors are required to be addressed in an application of this kind¹¹. These relevantly include:
- (a) the complexity and duration of the litigation;
 - (b) the stage of the proceedings;
 - (c) the risks of establishing liability, establishing damages, and maintaining the class action;
 - (d) the ability of the respondent to withstand a greater judgment than the prospective settlement sum;
 - (e) relatedly, the range of reasonableness of the settlement in light of the best recovery; and
 - (f) the range of reasonableness of the settlement in light of all the risks of litigation.

Reasonableness of the proposed settlement

Complexity and duration

12. The pleadings set out the matters in issue. In particular there are a number of issues which are complex, both legally and factually. These include:

⁸ para 8 Carter's second affidavit

⁹ s33V, *Federal Court of Australia Act 1976* (Cth)

¹⁰ Class Action Practice Note, paragraph 15.3

¹¹ Class Action Practice Note, paragraph 15.5 and see *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476 at [83] to [85]

- (a) whether there were overseas passengers who may have contracted outside Australia and, if so, whether they contracted on terms which would include an exclusive jurisdiction clause;
- (b) to what extent with reference to the publicly available weather reports, was the Respondent (by its Captain or otherwise) aware of the potential of Cyclone Donna impacting on the Cruise;
- (c) did the “services” to the Applicant by way of the Cruise require the provision of such things as a “stress less” experience and pleasant visits to other ports or was this subject to any prevailing weather conditions;
- (d) was there an obligation on the Respondent to monitor and assess, prior to and after the date of departure of the Cruise, the prevailing weather conditions and avoid the impact of Cyclone Donna;
- (e) was there an obligation on the part of the Respondent prior to the departure of the Cruise to warn passengers that the weather conditions would be such that they would be unable to enjoy or substantially enjoy the benefits of the Cruise and offer passengers the opportunity to cancel or defer the cruise;
- (f) whether, with reference to the prevailing climatic conditions and the development of Cyclone Donna, the Cruise ought to have departed at all and what a reasonable cruise operator complying with its statutory obligations and statutory guarantees with regard to the Cruise would have done;
- (g) whether on the voyage to Noumea the Cruise headed towards the path of the Cyclone and to what extent the Cyclone impacted the Cruise including:
 - (i) were onboard facilities closed and, if so, to what extent;
 - (ii) were the conditions so rough as to be unenjoyable;
- (h) whether and to what extent the Cyclone impacted the Cruise’s stop in Noumea;
- (i) whether and to what extent the Cyclone or another weather system impacted the Cruise’s return voyage, including:
 - (i) were onboard facilities closed and, if so, to what extent;
 - (ii) were cabins and facilities flooded and/or without electricity and, if so, to what extent;
 - (iii) did the sea become increasingly rough and did an increasing number of passengers become seasick;
 - (iv) did the Ship “list” one night such that it was tilted on its side for between 30 and 90 minutes;

- (v) was there a lack of communication from the Respondent to passengers such that many of them feared for their lives and telephoned loved ones to say goodbye;
 - (j) what was the scope of the statutory guarantees¹² provided by the Respondent to passengers in respect of the Cruise and, contingent on the factual findings made with regard to the above matters, were any of those guarantees breached;
 - (k) if such guarantees were breached, was this causative of loss and damage with specific consideration of:
 - (i) if passengers found the Cruise to be frightening or unpleasant, was this due instead to the particular vulnerabilities or frailties of those passengers;
 - (ii) were any failures to comply with the statutory guarantees resultant of causes independent of human control;
 - (l) if the statutory guarantees were breached and this was causative of loss and damage, what is the correct measure of that damage including consideration of:
 - (i) was there a “major failure” to provide the bargained for services such that the whole of the ticket price ought be refunded;
 - (ii) are damages for distress and disappointment warranted and, if so, in what measure (with reference to the factual findings above regarding the happenings on the Cruise and the impact of the Cyclone).
13. A hearing would necessarily involve expert opinion on the prevailing climatic conditions at the time the Cruise departed and the response that would have been expected of a reasonable cruise operator performing in accordance with the statutory guarantees. Further expert evidence would also be required regarding the ongoing impact of Cyclone Donna for the duration of the Cruise including consideration of the return voyage in particular and whether it was this cyclone or another weather system (as contended for by the Respondent) that impacted the Cruise at this time.
14. A preliminary expert report on these issues was obtained by the Applicant and was provided to the Respondent prior to the mediation. Although no contrary expert opinion

¹² ss. 60 (due care and skill guarantee), 61(1) (purpose guarantee) 61(2) (results guarantee) *Australian Consumer Law*

has to date been provided by the Respondent, the Applicant's expectation is that at trial expert evidence on these issues will be led and these issues will be controversial and hard fought. To this extent the proceedings are likely to be complex and we estimate that the trial would take no less than 5 days.

The stage of the proceedings

15. The pleadings in the matter have closed and, save for the finalisation of expert reports, the matter is ready to proceed to trial.

The risks of establishing liability, establishing damages, and maintaining the class action.

16. Establishing liability is not without risk. As identified above at paragraph 12, there are a range of factual issues to be determined by the Court as well as issues of causation to be resolved. The issue of damages is also contentious, particularly given the relatively low median ticket price and that the assessment of damages for distress and disappointment is an exercise that can be very fact rich and may require individual assessment.¹³
17. Because of the novelty of the action it is also difficult to determine exactly how damages will be calculated by the Court. In *Moore v Scenic Tours Pty Ltd (No 4)* [2022] NSWSC 270 (*Scenic 4*), Garling J, after refunding the whole of the applicant's ticket price notwithstanding that the applicant had a few days of uninterrupted cruising before the relevant disruptions, held that the assessment of damages for distress and disappointment enabled each of the applicant and the group members to have their damages assessed on an individual basis to reflect their particular experience, distress and disappointment but it was nevertheless appropriate to also have regard to the objectively determined facts about the extent to which each cruise taken failed to achieve the statutory guarantees. This required an individual assessment applying a sense of fairness and justice to the proven circumstances.¹⁴ While Garling J was willing to consider the aggregation of damages to be awarded to group members for distress and disappointment, the claims of the remaining group members (who numbered

¹³ *Moore v Scenic Tours Pty Ltd (No. 2)* [2017] NSWSC 733 (*Scenic 2*) per Garling J at [111]

¹⁴ *Ibid* at [94] and [111] to [117]

between 850 and 950) were referred to referees and ultimately settled between the parties¹⁵.

18. Maintaining the class action is also a real issue. It is unfunded. No “after the event” (“ATE”) or other type of litigation insurance has been obtained. As matters presently stand the Applicant’s solicitors solely bares the risk of any adverse cost order

The ability of the respondent to withstand a greater judgment the prospective settlement sum.

19. There is no indication that the Respondent would not be able to withstand a greater judgment.

The range of reasonableness of the settlement in light of the best recovery.

20. The proposed settlement would result in the payment by the Respondent of an amount which is anticipated to be no less than about \$1,754 to the Applicant and each of the Registered Group Members (based upon no more than 750 Group Members registering and noting that 713 have presently registered). In very broad terms this would result in the refund of the median ticket price (\$944) to each registered Group Member and, in addition, a payment of \$810.

The range of reasonableness of the settlement in light of all the risks of litigation.

21. The settlement sum takes into account a number of things identified by Garling J as relevant in Scenic No 6¹⁶:
- (a) the desirability of the final determination of the proceeding as a whole;
 - (b) the avoidance of further litigation risks to the Applicant and Group Members;
 - (c) having regard to the typical age range of passengers and Group Members, there is a real risk if settlement is not entered or should the matter proceed to be contested that a number of Group Members will die;

¹⁵ see *Moore v Scenic Tours Pty Ltd (No 5)* [2023] NSWSC 392 and *Moore v Scenic Tours Pty Ltd (No 6)* [2023] NSWSC 948

¹⁶ *Ibid* at [13]

- (d) the assessment of the damages suffered individually by Group Members (if the claim is successful) is likely to be a lengthy and expensive process.

Disbursements and legal costs

22. An independent costs assessor who has been appointed by the Court is considering the reasonableness of these costs. At the time of preparing these submissions, that material is not to hand.

Fair and reasonable

23. The risk of continuing the proceeding and the complications of the claim against the Respondent, we believe weigh in favour of approval of this settlement.
24. There is also a synergy to the settlement, as a Group Member will recoup the cost of the fare and be provided with compensation approximately equal to that cost again. In this respect the settlement is submitted to be very attractive.
25. While a higher amount might be obtained following a hearing of the proceeding, such an outcome is uncertain.
26. The proposed settlement was agreed in this context.
27. Working within the limits of the proposed settlement sum, the settlement distribution scheme has been put forward as a fair and reasonable allocation of the funds. It provides for payment of hard disbursements which were required to be expended in the proceeding, for a fair allocation of the settlement sum amongst the group and requires that the lawyers accept a significant discount on their reasonable costs.

28. The Applicant and Group Members have invested none of their own funds and taken no risk in the proceeding and from this settlement will receive a meaningful return in circumstances where they will otherwise receive nothing.
29. In the circumstances, it is submitted that the settlement is fair and reasonable and has been undertaken in the interests of the Applicant and Group Members.

Orders

30. The Applicant seeks orders in terms of the draft provided.

D J Campbell KC

B Hall

Counsel for the Applicant

31 January 2025