

NOTICE OF FILING

Details of Filing

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File Title: DEBRAH JACKSON v CARNIVAL PLC (ARBN 23 107 998 443)
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Defence

No. QUD 183 of 2023

Federal Court of Australia
District Registry: Queensland
Division: General

DEBRAH JACKSON

Applicant

CARNIVAL PLC ABN 23 107 998 443 t/as P&O Cruises Australia

Respondent

In this Defence, the Respondent is not required to and does not plead to the particulars in the Amended Statement of Claim filed 9 August 2023 (**Statement of Claim**).

The Parties

1. As to paragraph 1 of the Statement of Claim, the Respondent:
 - (a) admits that the Applicant commences this action in her own right;
 - (b) says that the Statement of Claim does not plead the claims of group members or contain allegations that satisfy the requirements of s 33C of the *Federal Court of Australia Act 1976* (Cth); and
 - (c) otherwise denies paragraph 1 of the Statement of Claim.
2. The Respondent admits paragraph 2 of the Statement of Claim.
3. The Respondent admits paragraph 3 of the Statement of Claim and further says its ARBN is 107 998 443 and that in respect of the Cruise it traded under the name "P&O Cruises Australia ABN 23 107 998 443".
4. The Respondent admits paragraph 4 of the Statement of Claim.

Filed on behalf of (name & role of party)	Carnival plc ARBN 23 107 998 443, Respondent		
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The Cruise

5. As to paragraph 5 of the Statement of Claim, the Respondent:

- (a) admits paragraph 5;
- (b) says that the Applicant and Respondent were parties to a contract of carriage, the terms of which included P&O's standard "*Booking & Travel Conditions*" (**T&C**), including:

- (i) by clause 1:

"1. INTRODUCTION

These are the Terms and Conditions under which you book your cruise holiday and travel on any P&O Cruises product we sell you. Once you make a payment towards your cruise, you become bound by these Booking and Travel Conditions, so it is important that you read them carefully. P&O Cruises / We / Our / Us means Carnival plc. You are entering into this contract with Carnival plc trading as P&O Cruises, ARBN 107 998 443.

Certain laws such as the Competition and Consumer Act 2010 (Cth) and any applicable state based consumer legislation (from here known as 'consumer laws'), are in place for your protection. They are designed to ensure our services are provided with due care and skill and are reasonably fit for a cruise holiday. These Booking and Travel Conditions do not alter any protection given to you by consumer laws.

All prices are correct at the time of publication and are quoted in Australian dollars, unless otherwise noted."

- (ii) by clause 2:

"2. CRUISE ITINERARIES ARE NOT GUARANTEED

Many factors may affect our ability to provide any particular itinerary. These include weather, mechanical difficulties, civil unrest or other unforeseen circumstances. We agree to use reasonable endeavours to provide a cruise in accordance with our published schedules and itineraries. However, we do not guarantee itineraries and they do not form part of your contract with us. If we are unable to operate in accordance with our published itinerary, we may in

some circumstances offer you assistance or compensation in accordance with clause [28].”

(iii) by clause 5:

“5. YOUR FARE

... The cruise fare includes onboard accommodation, main meals, entertainment and some activities onboard, gym and some fitness classes, as well as taxes, fees and port expenses. Additional charges may apply to some entertainment and activities, and main meals at onboard specialty restaurants and The Grill. Entertainment and activities may vary by cruise and ship.

A number of optional extras are also available that are not included in the cruise fare including drink purchases, some onboard activities and entertainment, shore tours, shopping, wifi internet, laundry services, day spa services, fitness classes and additional dining options.”

(iv) by clause 28:

“28. SHIP & ITINERARY CHANGES

We will do everything we reasonably can to make sure everything goes according to plan; however, sometimes changes can happen that may affect your holiday experience. This could include weather, mechanical difficulties, civil unrest or any other unforeseen circumstances.

In addition, we may charter all or part of the ship, or remove the ship from service where this becomes necessary. We may change the itinerary, ship or cancel the cruise due to operational or commercial requirements. We will notify you of these changes as soon as we can. If we are forced to cancel your cruise for any reason prior to departure we will provide a full refund. Since your itinerary is not guaranteed, please do not make any important arrangements or meetings based on the proposed itinerary.

Changes within our control

Where we make a significant change to the ports in your itinerary prior to departure and this is due to a circumstance within our control, for example for operational or commercial requirements you will have the choice of:

1. the new itinerary;

2. *an alternative cruise of comparable standard, if available; or*
3. *cancelling the cruise for a full refund of your fare paid.*

For the purposes of this clause, 'significant change' means a change to the city of departure or disembarkation, or to the majority (by number) of the other ports in your itinerary.

Changes outside our control

If it is necessary to change the itinerary due to safety, maritime law, severe weather, to protect human life or health or other factors outside our control, we will attempt to offer a revised itinerary as close as possible to the original itinerary. We will not provide any compensation in connection with the revised itinerary unless consumer laws require otherwise."

- (v) by clause 33:

"33. CHOICE OF LAW AND JURISDICTION

This contract is governed by the laws in force in New South Wales. You agree that any action you bring against us will be brought in Australia. If you have a claim against us, you agree only to bring action against us and not any of our related bodies corporate as defined in the Corporations."

6. Save that the Respondent does not admit that the exact dates of particular stops were advertised, it admits paragraph 6 of the Statement of Claim and further says that it was not a term of the contract of carriage between the Applicant and Respondent that the Cruise would operate in accordance with any advertised itinerary.

Particulars

T&C, cll 2, 5 and 28.

Alleged Group Members

7. As to paragraph 7 of the Statement of Claim, the Respondent:
 - (a) refers to and repeats paragraph 1 above; and
 - (b) otherwise denies paragraph 7 of the Statement of Claim.
8. As to paragraph 8 of the Statement of Claim, the Respondent:

- (a) admits that the Applicant was a passenger on the Cruise and was a “*consumer*” within the meaning of the *Australian Consumer Law*;
- (b) refers to and repeats paragraph 1 above; and
- (c) otherwise denies paragraph 8 of the Statement of Claim.

Supply of Services

9. As to paragraph 9 of the Statement of Claim, the Respondent:
- (a) says that it supplied services to passengers during the Cruise that were, subject to the T&C, reasonably fit for enabling them to have a safe and enjoyable cruise and were of such a nature and quality, state or condition, that a passenger on the cruise might reasonably be expected to have a safe and enjoyable cruise;
 - (b) says that such services included supplying or making available, subject to the T&C and to the safety, applicable laws, weather and sea conditions, the protection of human health and life and/or other matters beyond the control of the Respondent:
 - (i) a cruise; and
 - (ii) one or more of the facilities or amenities listed in sub-paragraphs 9(a)(ii), (iii), (iv) (but not an open-air cinema), (v) (but not any party described as “*the biggest night on the ship*”) and (vi) of the Statement of Claim;
 - (c) says that the Respondent supplied the services described above to the Applicant; and
 - (d) otherwise denies paragraph 9 of the Statement of Claim.
10. Save that the Respondent refers to and repeats paragraph 9 above, the Respondent otherwise admits paragraph 10 of the Statement of Claim.
11. Save that the Respondent refers to and repeats paragraph 9 above, the Respondent admits paragraph 11 of the Statement of Claim.
12. As to paragraph 12 of the Statement of Claim, the Respondent:
- (a) admits that it marketed the Cruise by means of brochures, its website and other media advertisements;
 - (b) refers to and repeats paragraph 9 above; and
 - (c) otherwise denies paragraph 12 of the Statement of Claim.

13. As to paragraph 13 of the Statement of Claim, the Respondent:
 - (a) admits that it guaranteed to the Applicant, in respect of the supply of the services referred to in paragraph 9 above, that such services, to the extent supplied, would be rendered with due care and skill; and
 - (b) otherwise denies paragraph 13 of the Statement of Claim.
14. The Respondent denies paragraph 14 of the Statement of Claim, repeats paragraph 9 above and says that the T&C did not refer to, nor promise, a “pleasurable” cruise.
15. The Respondent denies paragraph 15 of the Statement of Claim, repeats paragraph 9 above and says that the T&C did not refer to, nor promise, a “pleasurable” cruise.
16. As to paragraph 16 of the Statement of Claim, the Respondent:
 - (a) admits that it guaranteed to the Applicant, in respect of the supply of the services referred to in paragraph 9 above, that such services, to the extent supplied, would be:
 - (i) reasonably fit for enabling the Applicant to have a safe and enjoyable cruise; and
 - (ii) of such a nature and quality, state or condition, that the Applicant might reasonably be expected to have a safe and enjoyable cruise;
 - (b) says that a “safe and enjoyable cruise” is materially different to a “pleasurable and enjoyable holiday experience”; and
 - (c) otherwise denies paragraph 16 of the Statement of Claim.
- 16A. The Respondent denies paragraph 16A of the Statement of Claim and further says that if, which is denied, the Applicant made known the particular purpose or result as alleged in paragraphs 14 and 15 of the Statement of Claim respectively, it was unreasonable for the Applicant to have relied upon the skill or judgment of the Respondent within the meaning of s 61(3) of the *Australian Consumer Law*.

Cyclone Donna - Strength

17. The Respondent does not admit paragraph 17 of the Statement of Claim.
18. As to paragraph 18 of the Statement of Claim, the Respondent:

- (a) says that the JTWC is not an official source for weather forecasts, observations or tropical cyclone reporting in the seas around Australia and the South Pacific; and
 - (b) otherwise denies paragraph 18 of the Statement of Claim.
- 19. The Respondent denies paragraph 19 of the Statement of Claim and refers to and repeats paragraph 18 above.
- 20. The Respondent denies paragraph 20 of the Statement of Claim.
- 21. Save that the Respondent admits that, on 3 May 2017 the FMS issued a warning describing Cyclone Donna as a category 1 cyclone on the Australian Tropical Cyclone Scale, it otherwise does not admit paragraph 21 of the Statement of Claim.
- 22. As to paragraph 22 of the Statement of Claim, the Respondent:
 - (a) admits that the FMS issued warnings on the dates set out in sub-paragraphs (a) and (c) and in which the FMS described Cyclone Donna with the categories set out therein;
 - (b) says that the FMS issued a warning at 0114 UTC on 5 May 2017 describing Cyclone Donna as a category 3 cyclone on the Australian Tropical Cyclone Scale; and
 - (c) otherwise does not admit paragraph 22 of the Statement of Claim.
- 23. The Respondent denies paragraph 23 of the Statement of Claim and:
 - (a) refers to and repeats paragraph 18 above;
 - (b) further says that the Saffir-Simpson scale is not an official scale used for the seas of Australia or the South Pacific.
- 24. The Respondent denies paragraph 24 of the Statement of Claim and refers to and repeats paragraph 18 above.
- 25. The Respondent denies paragraph 25 of the Statement of Claim and refers to and repeats paragraph 23 above.
- 26. The Respondent denies paragraph 26 of the Statement of Claim and further says that the FMS issued a warning in which it described Cyclone Donna as a category 4 cyclone at 1903 UTC on 7 May 2017.
- 27. The Respondent denies paragraph 27 of the Statement of Claim and refers to and repeats paragraph 23 above.

28. The Respondent denies paragraph 28 of the Statement of Claim and says that the FMS issued a warning at 0118 UTC on 8 May 2017 describing Cyclone Donna as a category 5 cyclone, and issued a further warning at 1919 UTC on 8 May 2017 describing Cyclone Donna as a category 4 cyclone.
29. The Respondent denies paragraph 29 of the Statement of Claim and says that at 2152 UTC on 9 May 2017 the FMS issued a warning entitled "Gale Warning" describing Cyclone Donna as a category 1 cyclone.
30. The Respondent denies paragraph 30 of the Statement of Claim and says that at 0840 UTC on 10 May 2017 the FMS issued a gale warning that referred to "Ex Tropical Cyclone Donna".

Cyclone Donna – Path

31. Save that the Respondent says that Cyclone Donna formed north of Port Vila, initially tracked eastwards then westwards past the northern islands of Vanuatu, turned northerly, and then turned south to south-east, passing to the north-east of Noumea, New Caledonia and then following a southerly direction, it otherwise does not admit paragraph 31 of the Statement of Claim.
32. Save that the Respondent refers to and repeats paragraph 31 above, it otherwise does not admit paragraph 32 of the Statement of Claim.

Alleged Knowledge of the Cyclone

33. Save that the Respondent says that information concerning the categorisation, strength and projected path of Cyclone Donna was published through warnings issued by the FMS and the Bureau of Meteorology and that the Respondent's marine managers ashore and the master and officers onboard the Ship had access to various weather records recording the same, it otherwise does not admit paragraph 33 of the Statement of Claim.
34. Save that the Respondent says that the advice was published on 6 May 2017, it otherwise admits paragraph 34 of the Statement of Claim.

The Cruise

35. As to paragraph 35 of the Statement of Claim, the Respondent:
 - (a) admits that the Ship departed Brisbane at about 2pm on 5 May 2017;
 - (b) refers to and repeats paragraphs 20 to 24 above;

- (c) otherwise denies paragraph 35 of the Statement of Claim; and
 - (d) further says that:
 - (i) the Respondent was aware of the development of Cyclone Donna prior to the departure of the Ship from Brisbane on 5 May 2017;
 - (ii) the Respondent monitored the strength and path of Cyclone Donna:
 - (1) prior to departure of the Ship; and
 - (2) throughout the duration of the Cruise; and
 - (iii) at the time of the Ship's departure from Brisbane for Noumea, New Caledonia on 5 May 2017:
 - (1) Cyclone Donna was not in the path of the Ship on its passage to Noumea, New Caledonia;
 - (2) Cyclone Donna was not affecting Noumea, New Caledonia; and
 - (3) Cyclone Donna was not expected to affect the Ship's passage to Noumea, New Caledonia or its call at Noumea, New Caledonia.
36. As to paragraph 36 of the Statement of Claim, the Respondent:
- (a) says that the Ship arrived in Noumea, New Caledonia at approximately 4pm; and
 - (b) otherwise admits paragraph 36.
37. Save that the Respondent refers to and repeats paragraphs 20 to 27 above, it otherwise does not admit paragraph 37 of the Statement of Claim.
38. The Respondent denies paragraph 38 of the Statement of Claim.
39. The Respondent admits paragraph 39 of the Statement of Claim and further says that, in lieu of calling to Lifou and Port Vila, the Respondent organised an additional full day shore program in Noumea, New Caledonia on 8 May 2017, which took place.
40. As to paragraph 40 of the Statement of Claim, the Respondent:
- (a) admits that passengers could disembark from the Ship at Noumea, New Caledonia; and

- (b) otherwise denies paragraph 40 of the Statement of Claim.
- 41. The Respondent denies paragraph 41 of the Statement of Claim.
- 42. The Respondent admits paragraph 42 of the Statement of Claim.
- 43. The Respondent admits paragraph 43 of the Statement of Claim and further says that, in accordance with the T&C, an alternative itinerary was arranged as described in paragraph 39 above, in light of the prevailing weather conditions.
- 44. The Respondent denies paragraph 44 of the Statement of Claim and further says that:
 - (a) on or about 5pm on 10 May 2017, during part of the voyage from Noumea, New Caledonia to Brisbane, the Ship passed through a local weather system with more severe weather than forecasted (**Other Weather System**);

Particulars

South, south-easterly winds in excess of 50 knots (gusting to 60 knots) with swell of up to seven metres.

- (b) the Other Weather System was different to Cyclone Donna; and
- (c) the master of the Ship took appropriate measures to respond to the Other Weather System.
- 45. The Respondent does not know and cannot admit paragraph 45 of the Statement of Claim.
- 46. The Respondent denies paragraph 46 of the Statement of Claim and:
 - (a) further says that on 10 May 2017, one live scheduled performance was substituted with an alternative live performance;

Particulars

The show "*A Night at the Musicals*" was substituted for "*The Velvet Rope Show*" on 10 May 2023.

- (b) further says that elevators were unable to be used onboard the Ship for a period of 12 hours during the voyage from Noumea, New Caledonia to Brisbane;
- (c) refers to and repeats paragraph 44 above.

47. The Respondent denies paragraph 47 of the Statement of Claim and says that the Ship arrived back in Brisbane on 12 May 2017.
48. As to paragraph 48 of the Statement of Claim, the Respondent:
- (a) does not admit paragraph 48;
 - (b) says that clauses 2 and 28 of the “*Booking and Travel Conditions*” pleaded in paragraph 5(b) contemplated that scheduled itineraries were not guaranteed and that changes in a scheduled cruise itinerary may need to occur due to weather;
 - (c) says that prior to departure the Respondent:
 - (i) did not know that there would need to be changes to the itinerary because of Cyclone Donna;
 - (ii) further or alternatively, did not know the extent of the changes to the itinerary that would be required because of Cyclone Donna; and
 - (d) further refers to and repeats paragraph 44 above.

Alleged Breach of Due Care and Skill Guarantee

49. The Respondent denies paragraph 49 of the Statement of Claim.
50. The Respondent denies paragraph 50 of the Statement of Claim.
51. Save that the Respondent refers to and repeats paragraph 35 above, it otherwise denies paragraph 51 of the Statement of Claim.
52. The Respondent denies paragraph 52 of the Statement of Claim and further says that it did alter the route of the Cruise so as to avoid or limit the effects of Cyclone Donna on the Cruise.
- 52A. As to paragraph 52A of the Statement of Claim, and save that the Respondent refers to and repeats paragraphs 9, 13, 20 to 33, 35, 44 and 52 above, the Respondent:
- (a) admits paragraph 52A(e) and (f); and
 - (b) otherwise denies paragraph 52A of the Statement of Claim.
53. The Respondent denies paragraph 53 of the Statement of Claim.
54. The Respondent denies paragraph 54 of the Statement of Claim.

55. The Respondent denies paragraph 55 of the Statement of Claim.

Alleged Breach of the Purpose Guarantee

56. The Respondent denies paragraph 56 of the Statement of Claim.

Alleged Breach of the Result Guarantee

57. The Respondent denies paragraph 57 of the Statement of Claim.

Alleged Damages

58. The Respondent denies paragraph 58 of the Statement of Claim.

59. The Respondent denies paragraph 59 of the Statement of Claim.

60. The Respondent denies paragraph 60 of the Statement of Claim.

61. The Respondent does not admit paragraph 61 of the Statement of Claim.

62. The Respondent denies paragraph 62 of the Statement of Claim and further says in relation to paragraph 62(a) that distress and disappointment in the circumstances alleged was not reasonably foreseeable in circumstances in which:

- (a) the Ship is a 219.30 metre long passenger ship with a gross tonnage of 55,877 tons and net tonnage of 26,345;
- (b) the Ship is of a kind designed for passenger safety and comfort;
- (c) the Ship was certified as safe for the carriage of passengers;
- (d) the Ship was seaworthy;
- (e) the Ship was under the control of a master and crew of appropriate qualification and experience and who acted with appropriate skill and diligence.

63. As to paragraph 63 of the Statement of Claim, the Respondent:

- (a) does not know and cannot admit paragraph 63(a);
- (b) denies paragraph 63(b) and further says that the Applicant incurred expenses while onboard the Ship of \$618.73.

64. The Respondent denies paragraph 64 of the Statement of Claim.

65. In further answer to the Applicant's claims, if (which is denied) the Respondent failed to comply with any guarantee under s 61 of the *Australian Consumer Law*, such failure occurred only because of:

- (a) the acts, defaults or omissions of the Applicant within the meaning of s 267(1)(c)(i) of the *Australian Consumer Law*, if (which is not known and therefore not admitted) the Applicant found parts of the Cruise to be frightening or unpleasant; or
- (b) a cause independent of human control within the meaning of s 267(1)(c)(ii) of the *Australian Consumer Law*.

Particulars

- (i) As to the Applicant's acts, defaults or omissions, the facilities and amenities available throughout the Cruise were of a kind that might reasonably have been expected to have given a passenger a safe and enjoyable cruise, such that any perception by the Applicant to the contrary were for reasons or causes specific to the Applicant.
- (ii) As to a cause independent of human control, any failure to comply with a guarantee (which failure is denied) was a result of the itinerary having to change after the services of embarkation and passage to Noumea, New Caledonia had been supplied by reason of Cyclone Donna and/or conditions encountered due to the Other Weather System encountered upon the return passage to Brisbane.

Date: 6 October 2023



Signed by Ernest van Buuren
Lawyer for the Respondent

This pleading was prepared by Edward Goodwin KC, Jesse Kennedy and Samuel Walpole of counsel.

Certificate of lawyer

I, Ernest van Buuren, certify to the Court that, in relation to the Defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 6 October 2023



Signed by Ernest van Buuren
Lawyer for the Respondent