

SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2023

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**REAL ESTATE TOOL BOX PTY LTD & ORS v
CAMPAIGNTRACK PTY LTD & ANOR (S16/2023)**

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 112

Date of judgment: 6 July 2022

Special leave granted: 17 February 2023

Between 2006 and 2009, and from 2013 until 2015, Biggin & Scott Corporate Pty Ltd (“BSC”) used the software system “Campaigntrack” for online marketing in BCL’s real estate franchising business. It did so under licence from the first respondent (“CPL”).

In August 2015, BSC switched from Campaigntrack to a system called “DreamDesk”, which it used under licence from Dream Desk Pty Ltd (“DDPL”), the sole director of which was Mr Jonathan Meissner. The work to develop DreamDesk had been led by a contractor of DDPL’s, Mr David Semmens. In that development, Mr Semmens copied a third party’s software, “Process 55”, without licence or other authorisation.

In mid-2016, CPL and another company acquired ownership of the copyright in DreamDesk (and in Process 55), so as to shut down the DreamDesk system. Prior to the completion of CPL’s acquisition of DreamDesk, Mr Semmens commenced development of a new system. Mr Semmens told Mr Paul Stoner, a director of BSC, that the new system would have similar functionality to DreamDesk. By letter on 3 August 2016, Mr Stoner instructed Mr Semmens to develop a system that would not breach the intellectual property of CPL. DDPL premises and personnel were involved in the development work undertaken.

The first appellant (“RETB”) was incorporated in September 2016 as a corporate vehicle for the development and provision of the new system, called “Real Estate Toolbox” (“Toolbox”). The officeholders of RETB were Mr Stoner (as director) and Ms Michelle Bartels (company secretary). Ms Bartels was also a director of BSC. Toolbox went live in October 2016 and was used by BSC until April 2018.

On 29 September 2016, CPL alleged that there had been improper duplication of code that was the intellectual property of CPL, involving RETB. At CPL’s request, RETB, BSC, Mr Stoner and Ms Bartels (together, “the BSC parties”), DDPL and Mr Meissner all gave undertakings to the effect that they would not facilitate the development of any system by making use of intellectual property relating to DreamDesk. A similar undertaking was sought from, but was not given by, Mr Semmens.

In May 2017, CPL commenced Federal Court proceedings against Mr Semmens, the BSC parties, Mr Meissner and DDPL. CPL alleged infringement of the copyright it held in the source code of DreamDesk, breach of contract, breach of undertakings and breach of confidence.

Thawley J dismissed CPL’s claim as against the companies and officeholders, but found that Mr Semmens had infringed copyright in DreamDesk source code and other works, both by his unlicensed reproduction of them and by allowing others to reproduce substantial parts of them in the development and use of Toolbox.

His Honour found it not established however that any of the BSC parties knew or ought to have known that relevant works had been reproduced in DreamDesk, or that any of them had authorised infringement of CPL's copyright. Thawley J found that the circumstances known to Mr Meissner did not call for any investigation on his part during the development of Toolbox, nor had he participated in that development in a way that infringed the recently transferred intellectual property rights of CPL.

An appeal by Campaigntrack was allowed by the Full Court (Greenwood and McIlwaine JJ; Cheeseman J dissenting). Greenwood and McIlwaine JJ found that Mr Meissner, DDPL and the BSC parties, being on notice as of 29 September 2016 of (potentially) infringing conduct, should have taken reasonable steps of making specific inquiries of Mr Semmens and 'getting to the bottom' of CPL's allegation before giving the undertakings and letting Toolbox go live. Those parties also were on notice of potential infringement due to a report that was furnished to them (and to CPL) by an independent expert in January 2017. Their Honours in the majority held that those parties had, by their indifference, impliedly authorised the breach of CPL's copyright.

Cheeseman J however would have dismissed the appeal. Her Honour held that Thawley J had not erred, in view of his Honour's findings that the BSC parties and Mr Meissner had trusted Mr Semmens and had a continuing belief that he was acting in accordance with the directive given by Mr Stoner on 3 August 2016.

The grounds of appeal (the first of which the appellants seek leave to amend) are:

- The Full Court erred in finding that, between 29 September 2016 and June 2018, [RETB, BSC, Mr Stoner and Ms Bartels] infringed the copyright in the:
 - a) "*DreamDesk Source Code Works*" (as defined in the orders) by authorising the infringements of [Mr Semmens] and other developers in developing the "*Toolbox system*" (as defined);
 - b) "*DreamDesk Database and Table Works*" (as defined) by authorising the infringements of users in using the "*Toolbox system*".
- The Full Court erred in finding that, between 29 September 2016 and June 2018, [DDL and Mr Meissner] infringed the copyright in the "*DreamDesk Database and Table Works*" and the "*PDF Works*" (as defined) by authorising the infringements of [Mr Semmens].

MITSUBISHI MOTORS AUSTRALIA LTD & ANOR v BEGOVIC (M17/2023)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2022] VSCA 155

Date of judgment: 5 August 2022

Special leave granted: 17 February 2023

In early 2017, Mr Zelko Begovic purchased a 2016 Mitsubishi Triton motor vehicle from a dealership operated by Northpark Berwick Investments Pty Ltd (“Northpark”). The vehicle had been imported by Mitsubishi Motors Australia Ltd (“MMA”), which is its manufacturer within the meaning of the *Australian Consumer Law* (“ACL”). In compliance with a requirement under the *Motor Vehicles Standards Act 1989* (Cth) (“the MVSA”), a label attached to the vehicle’s windscreen (“the Label”) prominently displayed fuel consumption figures. Shortly after purchasing the vehicle however, Mr Begovic noticed that the vehicle consumed more fuel than was indicated on the Label.

Mr Begovic commenced proceedings in the Victorian Civil and Administrative Tribunal (“the Tribunal”) against MMA and Northpark (together, “the appellants”), seeking a refund of the purchase price on the basis that his vehicle’s excessive fuel consumption constituted breaches of section 18 (misleading or deceptive conduct), s 54 (guarantee that goods comply with their description) and s 56 (guarantee of acceptable quality) of the ACL. The Tribunal found that the appellants had breached all three provisions and ordered Northpark to refund the purchase price and take back the vehicle.

An appeal by the appellants to the Supreme Court of Victoria was allowed in part by Ginnane J, who remitted the matter to the Tribunal for the determination of the quantum of loss or damage suffered by Mr Begovic. This was after his Honour had affirmed the Tribunal’s finding that the appellants had engaged in misleading or deceptive conduct. Ginnane J also held however that the Tribunal had erred by finding breach of ss 54 and 56 of the ACL, and that the Tribunal’s orders for termination of the contract and refund of the purchase price could not be upheld under s 259(3) of the ACL.

An appeal by the appellants was unanimously dismissed by the Court of Appeal (Emerton P, McLeish and Macaulay JJA). Their Honours found that the Label conveyed a misleading and deceptive representation regarding the specific vehicle’s fuel consumption. While the Label accurately represented the results of testing conducted on a representative vehicle, it was interpreted by consumers as applying to the actual vehicle being offered for sale. The Court of Appeal found that the appellants were not absolved from having made a misleading representation by their having been legally compelled to place the Label. They were accountable for the testing and conduct that had led to the figures in the Label, as they were not legally obligated to offer any specific vehicle for sale.

The grounds of appeal are:

- The Court of Appeal erred in finding that the appellants had engaged in misleading or deceptive conduct, contrary to s 18 of the ACL, by affixing a fuel consumption label to Mr Begovic's vehicle and presenting and selling that vehicle with the label affixed in full compliance with the MVSA and the *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth). The Court of Appeal ought to have found that:
 - (a) The relevant conduct was mandatory and s 18 of the ACL does not prohibit mandatory conduct; and
 - (b) The appellants did not, by that conduct, make the representation(s) conveyed by the Label.
- The Court of Appeal erred in finding that the Label made the "testing replicability representation". The Court of Appeal ought to have found that the only representation made by the Label was the "test accuracy representation".

A notice of a constitutional matter was filed by the appellants. No Attorney-General is intervening in the proceeding.

KARPIK v CARNIVAL PLC ARBN 107 998 443 & ANOR
(S25/2023)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 149

Date of judgment: 2 September 2022

Special leave granted: 17 March 2023

Ms Susan Karpik is the lead claimant in representative proceedings (proceedings of a kind also known as a “class action”) under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (“the FCA Act”), brought against the UK company Carnival plc and its Bermuda-registered subsidiary Princess Cruise Lines Ltd (both companies together, “Princess”) in relation to a cruise undertaken by the ship “*Ruby Princess*” in March 2020, during which many passengers contracted COVID-19 (“the Proceedings”). The claims are in negligence, and for alleged breaches of statutory guarantees under the *Australian Consumer Law* (“ACL”) in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (“the CC Act”), and alleged misleading or deceptive conduct under the ACL.

The cruise at the centre of the case commenced and ended in Sydney, but most of the journey was outside of Australia’s territorial waters. Depending on where and how their booking for the cruise was made, passengers ostensibly were subject to a contract of carriage involving either Australian, US or UK terms and conditions. The US terms and conditions (“US T&C”) included that any legal action must be taken individually and not through a class action (“the class action waiver clause”), that claims must be litigated in certain courts in California (“the exclusive jurisdiction clause”), and that the governing law would be the general maritime law of the USA.

In the Proceedings, the claim of Mr Patrick Ho was considered for the determination of separate questions, the focus of which was whether the US T&C formed part of Mr Ho’s contract and, if so, whether they were unenforceable. That was upon an application by Princess, which sought the determination of which system of law governed Mr Ho’s claim in negligence and whether his claims in the Federal Court of Australia, if subject to the US T&C, should be stayed because Mr Ho was bound by the class action waiver clause and/or by the exclusive jurisdiction clause.

Mr Ho had booked his cruise in October 2018 through a Canadian travel agent, whereupon he received an email attaching a “Booking Confirmation” which stated that the passenger agreed to the terms found at a certain internet page. On that page (which Mr Ho did not access until July 2019), passengers were required to log in to a “Cruise Personalizer” before then viewing a “Passage Contract” page that contained (depending on information provided by the passenger when logging in) the US T&C. The US T&C were displayed below an “IMPORTANT NOTICE TO GUESTS”, which advised the careful reading of the terms below because they affected legal rights, including a passenger’s right to sue. The passenger could then click on either of two boxes: “Cancel” or “Proceed”.

Stewart J held that Mr Ho’s claims ought not be stayed, having found, in view of the manner in which Mr Ho’s cruise was booked, that the US T&C were not incorporated into Mr Ho’s contract of carriage. His Honour found that the travel agent had acted as an intermediary between Princess and Mr Ho, Mr Ho having accepted Princess’ offer of a cruise in a certain type of cabin at a certain price when he paid a deposit

via the travel agent. The US T&C were not incorporated into the contract for passage because they came too late. Stewart J considered it premature to decide which system of law governed Mr Ho's claim in negligence.

An appeal by Princess was allowed by the Full Court (Allsop CJ and Derrington J; Rares J dissenting). The majority found that reasonable notice of the US T&C was given to Mr Ho via a modern means of communication. The US T&C were incorporated into the contract for carriage, as Mr Ho had almost immediate access to them upon his receipt by email of the Booking Confirmation and he did not subsequently cancel his booking (in which event the US T&C would have been rejected). The travel agent, although acting partly pursuant to separate contractual arrangements with Princess, acted as Mr Ho's agent in his acceptance of the particular cruise offered by Princess, and the travel agent's knowledge of the existence of the US T&C was imputed to Mr Ho, regardless of his delayed accessing of the terms via the Cruise Personalizer.

The majority of the Full Court held that the class action waiver would not be void under s 23 of the ACL as an unfair contractual term, as it was transparent, it was reasonably necessary to protect Princess' legitimate interests, it did not significantly imbalance Mr Ho's and Princess' respective rights and obligations, and reliance on it did not cause detriment to Mr Ho. Derrington J also held that s 23 of the ACL could not apply, however, as its operation was limited to contracts the proper law of which was the law of Australia (Allsop CJ finding it unnecessary to decide the question of s 23's extraterritorial operation). Allsop CJ and Derrington J found the class action waiver not inconsistent with the regime provided by Part IVA of the FCA Act, as participation in proceedings under Part IVA was optional. A person therefore was free to agree in advance not to exercise the procedural right prescribed by Part IVA. Mr Ho also was unable to establish the requisite strong reasons for being relieved from the effect of the exclusive jurisdiction clause, the option of pursuing a claim in individual proceedings in California being open to him.

Rares J however would have dismissed the appeal. His Honour held that the class action waiver clause was unenforceable, as seeking to contract out of the opt-out class action model provided by Part IVA of the FCA Act was contrary to public policy considerations. This was because the waiver clause undermined a claimant's statutory entitlement to opt out of proceedings under Part IVA after receiving, and then considering his or her rights in view of, a judicially approved notice. Rares J also held that the exclusive jurisdiction clause was unenforceable as contrary to public policy, as its enforcement would similarly deprive Mr Ho of an opportunity to make an informed choice as to whether to participate in or opt out of the Proceedings under Part IVA.

The grounds of appeal are:

- The Full Court ought to have found that the extraterritorial scope of s 23 of the ACL in Sch 2 to the CC Act applied to Mr Ho's contract with the second respondent.
- The Full Court ought to have found that the class action waiver clause in Mr Ho's contract with the second respondent was void or unenforceable under s 23 of the ACL and/or for being contrary to Pt IVA of the FCA Act.
- The Full Court erred in staying Mr Ho's claim pursuant to the exclusive jurisdiction clause in his contract with the second respondent.

The respondents (Princess) have filed a notice of contention, to raise grounds that include:

- The provisions of Part 2-3 of the ACL, including as read with the CC Act as a whole, do not manifest a clear intention to override or abrogate the fundamental principle that the substantive rights and obligations of parties are to be determined in accordance with the system of law to be applied under choice of law rules. Accordingly, the provisions of Part 2-3 of the ACL do not apply to issues concerning the validity, performance or enforcement of terms in a contract, the proper law, alternatively putative proper law, of which is the law of a place outside Australia.

A notice of a constitutional matter was filed by the appellant (Ms Karpik). The Commonwealth Attorney-General is intervening in the appeal.