Extraterritorial application of the prohibition on unfair contract terms

Karpik v Carnival plc [2023] HCA 39

Cheyne Clarke
Eight Selborne Chambers

In a unanimous judgment, the High Court has held that the prohibition on unfair contract terms in s 23 of the *Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law* or *'ACL'*) applied to standard form contracts entered into in the United States with a body corporate carrying on business in Australia. As a result, the court refused an application brought by the respondent to stay representative proceedings in the Federal Court in respect of 696 group members whose contract with the respondent incorporated a set of terms and conditions known as the 'US Terms and Conditions', which included a class action waiver clause ('US subgroup').

Background

The appellant, Ms Karpik, commenced proceedings as a representative of 2,600 passengers of the passenger ship *Ruby Princess*, which experienced an outbreak of COVID-19 in March 2020. In the proceedings, Ms Karpik asserted claims in tort and under the *ACL* for loss or damage allegedly suffered by passengers who were on the voyage or relatives of those passengers.

The matter before the High Court concerned an interlocutory application brought by the respondent for a stay of the claims of the 696 members of the US subgroup. The respondent sought to rely on a class action waiver clause contained in the US Terms and Conditions. The US Terms and Conditions also included an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles.

The US subgroup was represented by Mr Ho, a Canadian passenger, whose contract with the respondent incorporated the US Terms and Conditions. He resisted the application on the grounds that the class action waiver clause was void under s 23 of the *ACL* as an unfair contract term and that, in those circumstances, there were strong reasons why the court should not stay the proceedings notwithstanding the exclusive jurisdiction clause.

The issues on the interlocutory application were: at [6]:

- Whether s 23 of the *ACL* applied to Mr Ho's contract.
- If so, was the class action waiver clause void under s 23 because it was an unfair contract term or otherwise unenforceable by reason of pt IVA of the *Federal Court of Australia Act 1976* (Cth) (*'FCA'*)?
- Whether there were 'strong' reasons for not enforcing the exclusive jurisdiction clause.

Proceedings below

The primary judge, Stewart J, refused the stay application because his Honour held that the US Terms and Conditions were not incorporated into Mr Ho's contract. He held, further, that s 23 of the *ACL* applied to the contract, that the class action waiver clause was an unfair term and void under s 23, although the class action waiver clause was not separately unenforceable by reason of pt IVA of the *FCA*, and that there were strong reasons to not enforce the exclusive jurisdiction clause: at [7].

The Full Court allowed the respondent's appeal. The Full Court unanimously found that the US Terms and Conditions had been incorporated into Mr Ho's contract. By majority (Allsop CJ and Derrington J, Rares J dissenting) the Full Court held that the class action waiver clause was not an unfair term under s 23 of the *ACL* and was not unenforceable by reason of pt IVA of the *FCA*. The majority enforced the exclusive jurisdiction clause and stayed the Federal Court proceedings in respect of Mr Ho's claims against the respondent: at [8].

High Court

The High Court (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ) unanimously allowed Ms Karpik's appeal.

Determining the extraterritorial application of the *ACL*

The first issue dealt with by the High Court was the approach to determining whether s 23 of the *ACL* applied to Mr Ho's contract.

The court held that the starting point is to consider whether, as a matter of statutory interpretation of an Australian provision, the relevant statute expressly or impliedly addresses the territorial reach of its subject matter: at [19], [21], [24]. In so doing, the High Court rejected the respondent's submission that the correct approach was to start by applying choice of law rules to determine what law governs the issue, the *lex causae*, and then, if the *lex causae* is a foreign law, to consider whether the local statute demands application irrespective of the *lex causae*: at [20], [23]. The court also found that the 'presumption' against extraterritoriality is an interpretive principle only, which cannot precede the question of interpretation: at [19].

Section 23 applied to Mr Ho's contract

Taking that approach, the court then found that, properly construed, s 23 of the *ACL*, in conjunction with ss 5(1)(c), 5(1)(g) and 131 of the *Competition and Consumer Act 2010* (Cth) (*'CCA'*) applied to Mr Ho's contract: at [35]–[38].

In interpreting those provisions, the court stated that '[i]f a corporation carries on business in Australia, then a price of doing so is that the corporation is subject to and complies with statutes intended to provide protection for consumers': at [38].

The court continued that such a construction was consistent with the specific object and policy of s 23 of the *ACL*, that there is nothing irrational in that norm extending to foreign corporations that choose to carry on business in Australia, and that it is consistent with the *CCA* being beneficial consumer legislation: at [40]–[41].

As it was common ground that the respondent was carrying on business in Australia and that it engaged in conduct outside Australia as that is defined in s 4(2)(a) of the *CCA*, the court found that s 23 applied to the class action waiver clause in Mr Ho's contract: at [42].

In reaching that conclusion, the court rejected the respondent's submission that it was necessary to impose a further limitation on the extraterritorial scope of s 23 on the basis that, when read in context, s 23 is not at large, concluding that s 5(1) is intended to operate with s 23 and thus 'extends and defines the boundaries of the operation of s 23': at [43]. The court also found that the respondent's proposed limitations had 'no textual or other basis' or were 'contrary to the text of s 3 of the ACL': at [47]–[48].

The class action waiver clause was an unfair contract term

In finding that the class action waiver clause was an unfair contract term, the court addressed each of the relevant factors prescribed by s 24(1) of the *ACL*.

First, the court found that the class action waiver clause caused a significant imbalance in the parties' rights under the contract because, in addition to being contained in a provision that was stated to be for the benefit of the respondent, it had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually was or may be uneconomical: at [54].

Secondly, it found that the clause was not necessary to protect the respondent's legitimate interest because: (i) there was no legitimate interest in seeking to prevent people from participating in a class action; so that (ii) the respondent had not displaced the presumption in s 24(4) of the *ACL* that the term was not necessary to protect its legitimate interest: at [55]–[56].

Thirdly, the court found that denying Mr Ho the benefit of pt IVA of the *FCA* constituted a relevant detriment for the purposes of s 24(1)(c): at [57].

Finally, the court found that relevant clause was not transparent for the purposes of s 24(2)(a) of the *CCA* having regard to the degree of imbalance and detriment inherent in the term: at [58].

The class action waiver clause was not inconsistent with pt IVA of the *FCA*

While it was not necessary to decide, the court found that the class action waiver clause was not inconsistent with pt IVA of the *FCA*. That was in circumstances where pt IVA provides numerous opportunities for group members to opt out of proceedings, and where not all of the steps taken in accordance with an opt-out scheme are administered by the court: at [63]-[64]. The court also rejected a submission from the Attorney-General (intervening) that it is not possible for group members to waive their rights to participate in pt IVA proceedings before the commencement of proceedings: at [64].

There were strong reasons for refusing to enforce the exclusive jurisdiction clause

The court noted there was no dispute that the exclusive jurisdiction clause was valid and not unfair. However, their Honours stated that the court retains a discretion whether to stay a proceeding the subject of a foreign exclusive jurisdiction clause, noting that proceedings will be stayed in the absence of 'strong countervailing reasons': at [65]–[66].

The court found that such strong reasons were present for two reasons. Firstly, the class action waiver clause was void under s 23 of the *ACL* as an unfair contract term, which was relevant both because the respondent relied on the class action waiver in support of its stay application and because the existence of the clause provided Mr Ho with a 'strong juridical advantage in remaining part of the class action in the Federal Court of Australia as he may not be able to participate in a class action in the United States': at [68]. Secondly, enforcement of the clause would fracture the proceedings, creating a risk of conflicting outcomes in different courts, which may bring the administration of justice into disrepute: at [69]. BN