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Form 7A/B
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2015/00254964

TITLE OF PROCEEDINGS

First Plaintiff	Lucretia De Jong
First Defendant	Carnival PLC trading as Carnival Australia ACN 107998443

FILING DETAILS

Filed for	Carnival PLC trading as Carnival Australia, Defendant 1
Legal representative	Timothy Robert Castle
Legal representative reference	
Telephone	

NOTICE OF LISTING

This matter has been listed for Directions (Common Law Registrar) at Supreme Court Sydney on 5 April 2016 at 09:00 AM

AFFIDAVIT

Deponent Name	Lauren Miller
Sworn/Affirmed on	23 Dec 2015

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Defence (e-Services), along with any other documents listed below, were filed by the Court.

Defence (UCPR 7A/7B) (De Jong v Carnival - Defence, 23 December 2015 - signed.pdf)

[attach.]

Form 7 A (version 5)
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General List
Registry	Sydney
Case number	2015/254964

TITLE OF PROCEEDINGS

Plaintiff	Lucretia De Jong
Defendant	Carnival plc trading as Carnival Cruise Line

RUNG DETAILS

Filed for	Carnival plc , defendant
Legal representative	Tim Castle, Sparke Helmore
Legal representative reference	TRC/NVC/CAR79-7
Contact name and telephone	Nick Christiansen, 02 9260 2443
Contact email	tim.castle@sparke.com.au & nick.christiansen@sparke.com.au

HEARING DETAILS

These proceedings are listed for directions before Pembroke J on 29 February 2015.

PLEADINGS AND PARTICULARS

1 The defendant notes paragraph 1 of the Statement of Claim but does not plead to it as it is an allegation of law.

The group members

- 2 In answer to paragraph 2, the defendant:
- a. Denies that it engaged in conduct in contravention of chapter 2 or chapter 3 of the Australian Consumer Law;
 - b. Denies that the plaintiff or any group member has suffered loss or damage because of the conduct of the defendant, or at all; and
 - c. Otherwise does not admit paragraph 2.

The defendant

- 3 The defendant admits paragraph 3 and says further:
- a. That it is a public limited company incorporated under the laws of the United Kingdom of Great Britain and Northern Ireland;
 - b. That it is a foreign company registered under Part 5B.2 of the *Corporations Act 2001* and
 - c. That it carries on business in Australia under various trading names.
- 4 In answer to paragraph 4, the defendant:
- a. Says that, it operates cruises from Australia to the Pacific Islands, amongst other places, using the vessels *Carnival Spirit* and *Carnival Legend*;
 - b. Says that it offered an eight night cruise aboard the *Carnival Spirit* departing from Sydney on 10 March 2015 and returning to Sydney on 18 March 2015 **(Cruise)**;
 - c. Says that the published itinerary for the Cruise included calls at Mare, Isle of Pines, and Noumea, all of which are located in New Caledonia **(Published Itinerary)**; and
 - d. Otherwise denies paragraph 4.
- 5 In answer to paragraph 5, the defendant:
- a. Repeats what it says at paragraphs 33 to 36 below;
 - b. Relies on the full terms of the Contract (as defined in paragraph 33 below) as if set out in full herein for their full force and effect;
 - c. Admits that clause 26 of the Contract included the words quoted in paragraph 5; and
 - d. Otherwise denies paragraph 5.
- 6 In answer to paragraph 6, the defendant:
- a. Repeats its answer to paragraph 4 above;
 - b. Admits paragraph 6 as if it were an allegation in respect of the Cruise as defined in paragraph 4(b) above; and
 - c. Otherwise denies the paragraph.

Cyclone Pam

7 The defendant does not admit paragraph 7.

The cruise

8 In answer to paragraph 8, the defendant:

- a. Admits that the plaintiff and group members boarded the *Carnival Spirit* in Sydney on 10 March 2015; and
- b. Says that the plaintiff and group members boarded the *Carnival Spirit* between about 11.00am AEDT and about 5.00pm AEDT on 10 March 2015; and
- c. Otherwise denies paragraph 8.

9 The defendant admits paragraph 9.

10 In answer to paragraph 10, the defendant:

- a. Says that at about 10.30pm AEDT on 10 March 2015, the Captain of the *Carnival Spirit* on behalf of the defendant issued to the passengers aboard the ship, including the plaintiff and group members, a letter containing the following words:

We hope you are enjoying your holiday aboard the beautiful Carnival Spirit! I just need to take a moment of your time to provide you some information regarding our scheduled itinerary.

As you know, we've been keeping a close eye on Tropical Cyclone Pam located in the South Pacific. Based on the latest forecast, the storm is predicted to intensify to a category 4 cyclone with winds over 200 kilometers within the next 36 hours.

In order to ensure your comfort and safety, it is now evident we must change our course and proceed south in order to avoid the storm's path. We are working on an alternate itinerary and will have confirmation by tomorrow morning.

We apologise for this unexpected change in plans. I know how much you were looking forward to our scheduled itinerary and regret Mother Nature is not cooperating with us. Please know your safety and that of my crew is my number one priority.

Thank you for your understanding and enjoy the rest of your evening.

and

- b. Otherwise does not admit paragraph 10.

11 The defendant admits paragraph 11.

The Claim

12 In answer to paragraph 12, the defendant:

- a. Says that at all material times it had available to it weather warnings and information;
- b. Admits that it has experience of tropical cyclones and their effect;
- c. Says that it became aware of, and commenced actively monitoring, the storm in the south west Pacific that became known as Tropical Cyclone Pam (**Pam**) on 6 March 2015;
- d. Says that it received and reviewed weather updates concerning Pam at approximately four to six-hourly intervals;
- e. Says that at or about 2.30pm AEDT on 9 March 2015 it modified the Published Itinerary for the Cruise by changing the order at which the *Carnival Spirit* would call at ports in New Caledonia (**Revised Itinerary**);
- f. Says that at or about 7.00am AEDT on 10 March 2015, Pam was tracking in a **east-south-east** direction;
- g. Says that at or about 4.30pm AEDT on 10 March 2015, Pam was tracking in a south-south-east direction;
- h. Says that at or about 4.30pm AEDT on 10 March 2015 it became aware of the change in the track of Pam towards the south;
- i. Says that at or about 10.30pm AEDT on 10 March 2015, the defendant informed the plaintiff and group members that the Revised Itinerary for the Cruise would need to be altered;
- j. Says that on the morning of 11 March 2015, the defendant informed the plaintiff and group members that the Revised Itinerary would be modified by changing the ports of call to the Port of Melbourne and the Port of Hobart; and
- k. Otherwise denies paragraph 12.

Chapter 2, section 18 of the Australian Consumer Law

13 In answer to paragraph 13, the defendant:

- a. Repeats paragraph 12 above;

- b. Says that the cruise itinerary was not significantly changed before departure from Sydney;
- c. Says that the only change to the published cruise itinerary before departure from Sydney was from the Published Itinerary to the Revised Itinerary; and
- d. Otherwise denies paragraph 13.

14 In answer to paragraph 14, the defendant:

- a. Repeats its answer to paragraph 13 above; and
- b. Otherwise denies paragraph 14.

15 In answer to paragraph 15, the defendant:

- a. Repeats its answer to paragraph 13 above;
- b. Repeats paragraphs 37 to 44 below; and
- c. Otherwise denies paragraph 15.

Consumer guarantees

16 The defendant does not admit paragraph 16.

17 In answer to paragraph 17, the defendant:

- a. Says that the paragraph does not properly or at all plead the alleged "services";
- b. Repeats paragraphs 33 and 34 below;
- c. Will rely on the terms of the Contract (as defined at paragraph 33 below) with each of the plaintiff and group members at any hearing; and
- d. Otherwise does not admit paragraph 17.

18 In answer to paragraph 18, the defendant:

- a. Repeats paragraph 17 above;
- b. Says that the paragraph does not properly or at all plead the alleged "services" that the defendant allegedly ought to have provided to the plaintiff and the group members pursuant to the "care and skill guarantee"; and
- c. Otherwise does not admit paragraph 18.

19 In answer to paragraph 19, the defendant:

- a. Repeats paragraph 17 above; and

b. Otherwise does not admit paragraph 19.

20 In answer to paragraph 20, the defendant:

- a. Repeats paragraph 17 above; and
- b. Otherwise does not admit paragraph 20.

21 In answer to paragraph 21, the defendant:

- a. Repeats paragraph 17 above;
- b. Says that the paragraph does not properly or at all plead the alleged "services" that the defendant allegedly ought to have provided to the plaintiff and the group members pursuant to the "purpose guarantee"; and
- c. Otherwise does not admit paragraph 21.

22 In answer to paragraph 22, the defendant:

- a. Repeats paragraph 17 above;
- b. Says that the paragraph does not properly or at all plead the alleged "services" that the defendant allegedly ought to have provided to the plaintiff and the group members pursuant to the "result guarantee"; and
- c. Otherwise does not admit paragraph 22.

23 In answer to paragraph 23, the defendant:

- a. Repeats paragraphs 12 and 17 to 22 above; and
- b. Otherwise denies paragraph 23.

Alleged contravention of consumer guarantees

24 In answer to paragraph 24, the defendant:

- a. Repeats paragraphs 12 and 17 above;
- b. Repeats paragraphs 40 and 41 below; and
- c. Otherwise denies paragraph 24.

25 In answer to paragraph 25, the defendant:

- a. Repeats paragraphs 15, 17, 19, 21, and 24 above;
- b. Says that the defendant did not cancel the Cruise or offer the plaintiff and group member refunds;
- c. Repeats paragraphs 40 to 42 below;

- d. Says that the services provided to the plaintiff and group members by the defendant were reasonably fit for purpose;
- e. Says that the plaintiff and group members were offered on-board credit and a credit towards a future cruise booking; and
- f. Otherwise denies paragraph 25.

Particulars

- i. On 11 March 2015, the defendant applied a credit of AU\$150 per person to the on-board account of each booking, which sum was available to purchase goods and services on board *Carnival Spirit* during the Cruise.
- ii. On or about 31 March 2015, the defendant applied a credit to the Carnival Cruise Line account of the plaintiff and each of the group members in the amount equal to 50% of the cruise ticket price paid per guest for the Cruise minus taxes and fees, which credit could be redeemed towards any new booking of a cruise of any length on *Carnival Spirit* or *Carnival Legend* sailing to or from Australia departing prior to 31 March 2017.

26 In answer to paragraph 26, the defendant:

- a. Repeats paragraphs 15, 17, 20, 22, and 24 above; and
- b. Otherwise denies paragraph 26.

Alleged loss and damage

27 In answer to paragraph 27, the defendant:

- a. Repeats paragraph 13 to 15 above;
- b. Repeats paragraphs 40 to 42 below; and
- c. Otherwise denies paragraph 27.

28 In answer to paragraph 28, the defendant:

- a. Repeats paragraph 16 to 23 above;
- b. Repeats paragraphs 40 to 42 below; and
- c. Otherwise denies paragraph 28.

29 In answer to paragraph 29, the defendant:

- a. Repeats paragraphs 17, and 24 to 26 above;
- b. Says that the services provided to the plaintiff and group members by the defendant were fit for purpose; and
- c. Otherwise denies paragraph 29.

30 In answer to paragraph 30, the defendant:

- a. Repeats paragraph 29 above; and
- b. Otherwise denies paragraph 30.

Particulars of loss

31 The defendant denies paragraph 31.

Common questions

32 The defendant says that the following common questions are likely to arise:

- a. The nature and character of the services acquired by the group members;
- b. The nature and character of the services provided by the defendant;
- c. Whether the defendant varied the itinerary in accordance with clause 26 of the Contract (as defined at paragraph 33 below);
- d. Whether and to what extent clause 26 of the Contract limits the defendant's liability to the group members; and
- e. Whether the group members would have suffered the claimed loss and damage in any event if the defendant had cancelled the Cruise.

Contract

33 In respect of the Cruise, each of the plaintiff and group members entered into a contract with the defendant (**Contract**).

Particulars

- i. The Cruise was offered by the defendant to the plaintiff and each of the group members on the terms and conditions set out in the document "Cruise Ticket Contract" (the **Terms**).
- ii. Each of the plaintiff and the group members, by themselves or through a travel agent, booked the Cruise with notice of the Terms.
- iii. Each of the plaintiff and group members made one or more payments to pay for the Cruise.

34 It was a term of the Contract, at clause 4 that:

4. YOUR AGREEMENT WITH US

When you first make a payment towards your cruise holiday, you represent that you have the authority from all passengers on your booking(s), to accept our 'Terms & Conditions' on their behalf. ... Once we have received a payment on a booking, an agreement on these Terms & Conditions' becomes effective between all passengers on the booking(s) and Carnival plc.

35 It was a term and condition of the Contract, at clause 2 (**No Guarantee Clause**) that:

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 26.

36 It was a term and condition of the Contract, at clause 26 (**Change of Itinerary Clause**) that:

26. 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.***

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.

- 37 The loss and damage alleged by the plaintiff and the group members, which is denied, was a result of severe weather conditions making it necessary to change the itinerary to ensure the safety and protect human life or health of the passengers and crew.

Particulars

- i. As to the severe weather, the defendant repeats paragraph 12 above.
- 38 The severe weather conditions were outside the control of the defendant.
- 39 Due to the matters pleaded at paragraphs 37 and 38 above:
- a. The change to the itinerary for the Cruise was a change outside of the defendant's control for the purposes of the Change of Itinerary Clause; and
 - b. Additionally or in the alternative to sub-paragraph (a), due to safety considerations and to protect the life and health of the passengers and crew on the Cruise, the change to the itinerary for the Cruise was a change outside of the defendant's control for the purposes of the Change of Itinerary Clause.
- 40 In the premises, the plaintiff and the group members would not have been, and are not, entitled to a replacement cruise or a full refund under the terms of the Change of Itinerary Clause.
- 41 Even if the defendant had made a major change to the itinerary for the Cruise prior to departure from Sydney, which is denied, and had notified the plaintiff and the

group members of this change prior to departure from Sydney, some or all of the plaintiff and the group members already would have incurred losses of the type pleaded at paragraph 31 of the Statement of Claim.

42 The plaintiff and the group members received the benefit of the cruise provided by the defendant, including calls at Melbourne and Hobart, accommodation aboard the *Carnival Spirit*, food and beverages, and on-board facilities and entertainment, or the same services were otherwise made available to them by the defendant

43 Pursuant to the Change of Itinerary Clause, the defendant changed or varied the itinerary for the Cruise and provided a revised itinerary.

44 Pursuant to the No Guarantee Clause and the Change of Itinerary Clause, the defendant is not liable to the plaintiff and the group members where it made a change or variation to the itinerary for the Cruise that was necessary due to safety, severe weather, to protect human life or health, or due to other factors outside the defendant's control.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



T R Castle, by his employed solicitor N J Christiansen

Capacity

Solicitor for the defendant

Date of signature

23 December 2015

AFFIDAVIT VERIFYING

Name Lauren Miller
 Address 15 Mount Street
 North Sydney NSW 2060
 Occupation Assistant General Counsel
 Date 23 December 2015

I affirm:

I am the Assistant General Counsel of Carnival plc (trading as Carnival Australia) and am duly authorised to verify this defence on behalf of the defendant Carnival plc (trading as Carnival Cruise Lines).

- 1 I believe that the allegations of fact contained in the defence are **true**.
- 2 I believe that the allegations of fact that are denied in the defence are untrue.
- 3 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at North Sydney

Signature of deponent



Name of witness Jacqui Mitchell


Address of witness 15 Mount Street
 North Sydney NSW 2060

Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least **12** months.

Signature of witness



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Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.