JUDGMENT REISSUED AT 11 AM ON 24 NOVEMBER 2026 PURSUANT TO RULE 8 OF THE COURT OF APPEAL (CIVIL) RULES 2005, AND DELIVERED ON A PARTIES ONLY BASIS UNTIL 2 PM ON 24 NOVEMBER 2026.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA268/2024
[2026] NZCA 576

BETWEEN	VIAGOGO GMBH Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	14 and 15 October 2025
Court:	Courtney, Mallon and Palmer JJ
Counsel:	A J Lloyd, O M de Pont and K L Davidson for Appellant N F Flanagan and A D Luck for Respondent
Judgment:	23 November 2026 at 2 pm
Reissued:	24 November 2026 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed.

C The parties are invited to provide a joint memorandum on the terms of the declaration, to replace the declaration granted by the High Court, in light of this Court's judgment. If they are unable to agree the terms of a joint memorandum within 28 days of the date of this judgment, they are to provide their respective positions on the appropriate wording within the same timeframe.

D The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] The appellant (viagogo) operates an online platform for the resale of event tickets. The respondent (the Commerce Commission) brought an application in the High Court alleging that viagogo engaged in misleading or deceptive conduct and made false or misleading representations in breach of the Fair Trading Act 1986. It also alleged that viagogo's terms and conditions contained an unfair contract term under that Act in requiring all disputes to be governed by Swiss law and determined in the courts of Geneva.

[2] The Commission was largely successful in the High Court.[1] Peters J found viagogo breached the Fair Trading Act in respect of:

(a) inadequate and misleading disclosure to consumers that viagogo is a resale platform rather than an authorised or official ticketing agent (the Resale Platform Disclosure);[2]

(b) misleading statements that tickets were protected, valid and guaranteed (the Guaranteed Tickets Representations);[3]

(c) misleading statements to the effect that tickets for the event selected by a consumer are scarce and in demand (the Scarcity Representations);[4]

(d) displaying the initial price for a ticket without including the additional delivery and booking fees until close to the end of the purchasing process (the Price Representations);[5] and

(e) advertising viagogo on Google with the words "Buy Now, viagogo Official Site" (the Official Seller Representation).[6]

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1 *Commerce Commission v viagogo AG* [2024] NZHC 713, [2024] NZCCLR 143 [judgment under appeal].
2 Breaches of ss 9 and 11 of the Fair Trading Act 1986.
3 Breaches of ss 9, 11, 13(e) and 13(i) of the Fair Trading Act.
4 Breaches of ss 9 and 13(e) of the Fair Trading Act, but not of ss 11, 13(b) or 13(i).
5 Breaches of ss 9, 11 and 13(g) of the Fair Trading Act.
6 Breaches of ss 9, 11 and 13(e) of the Fair Trading Act.

[3] Additionally, the Judge found that cl 7.4 of viagogo's terms and conditions was unfair in requiring disputes to be brought in Geneva but was not unfair in requiring that Swiss law govern the dispute.[7]

[4] The four issues raised on appeal are whether:

(a) the Judge relied on inadmissible hearsay "consumer complaint" evidence;

(b) the Judge relied on expert evidence from Professor Robert Slonim that was not substantially helpful and therefore inadmissible, while ignoring substantially helpful evidence from its experts;

(c) the Judge gave inadequate reasons for her conclusions on the Resale Platform Disclosure, the Guaranteed Tickets Representations, and the Price Representations;[8] and

(d) the Judge erred in finding that it was unfair to require disputes to be brought in Geneva or in finding that it was not unfair for viagogo to require that Swiss law apply.[9]

Proving misleading conduct/misrepresentation

[5] Several of viagogo's grounds of appeal concern evidential issues. We therefore begin by outlining in general terms the kind of evidence that may be relevant to whether there has been misleading conduct or misleading representations under the Fair Trading Act. The kind of relevant evidence depends of course on what is required to be proved.

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7 Fair Trading Act, s 46L.

8 We discuss these issues later as Issue 3(a), Issue 3(b) and Issue 3(c) respectively. Viagogo does not challenge the Judge's conclusions on the Scarcity Representations and the Official Seller Representation.

9 The Commission has cross-appealed the Judge's finding that the choice of Swiss law was not unfair.

Objective test

[6] As the Supreme Court in *Red Eagle Corporation Ltd v Ellis* emphasised, the test under s 9 of the Fair Trading Act is objective but the circumstances of a situation under scrutiny are variable and what must be proved will depend on the context:[10]

> [28] … Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties. …

[7] The case involved a claim for loss by a businessman for misleading and deceptive conduct under s 9 of the Fair Trading Act by another businessman. In such a case:[11]

> [28] … The question to be answered … in a case of this kind is accordingly whether a reasonable person in the claimant's situation — that is, with characteristics known to the defendant or of which the defendant ought to have been aware — would likely have been misled or deceived … It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[8] Where the alleged misleading conduct is aimed at consumers, the consumer is all consumers in the targeted class, except outliers. Outliers are consumers whose personal characteristics or faculties make them ill-equipped to comprehend what is conveyed by the conduct or whose reactions are extreme or fanciful. While the education, experience and characteristics of the targeted class may vary widely, it is the reasonable consumers in the targeted class that the conduct is assessed in relation

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10 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 (footnote omitted). In the present case the claims were upheld under ss 9, 11, 13(e), 13(g) and 13(i). Section 11 prohibits engaging "in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services". Section 13 prohibits, in connection with, or with the promotion of, the supply of services, making a false or misleading representation as to: any approval, endorsement, characteristics, uses or benefits of the services (et cetera) (para (e)); the price of the services (para (g)); and the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (para (i)). These are also objective tests.

11 Footnote omitted.

to.[12] Consumers are required to exercise the degree of care that is reasonable in the circumstances.[13]

[9] In the present case, we note the characteristics of the consumer as accepted by the Federal Court of Australia in *Australian Competition and Consumer Commission v viagogo AG*, in the similar proceeding brought by the Australian Competition and Consumer Commission (the ACCC) against viagogo under the comparable legislation:[14]

> [109] I have noted above the considerations that must be taken into account when there is a class of consumers to whom a representation is addressed. The viagogo ad and the viagogo website are directed to members of the public at large who have an interest in acquiring tickets online for live events. The representations contained within them must be judged by their effect on ordinary or reasonable members of that class of prospective purchasers. Consideration of these matters is to be as at the date of the alleged representations, which is during the relevant period.
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> [110] The parties were in broad agreement as to characteristics of the ordinary class of consumers likely to read and respond to the alleged representations. Such persons would reasonably be expected to possess knowledge and familiarity with the internet and conducting searches online and navigating web pages. They would have an understanding of purchasing items on the internet, although not necessarily any specialised knowledge of the online acquisition of tickets for live events. In my view, such persons would know that they can purchase tickets online, but not necessarily have great (or indeed any) familiarity with the process.

[10] In claims where the affected class are consumers, evidence that consumers were misled or deceived "is admissible and may be persuasive" but is not essential.[15] The position is the same in relation to the similar legislation in Australia. For example, the full Federal Court in *Taco Company of Australia Inc v Taco Bell Pty Ltd* said:[16]

> [I]t is sufficient to enliven [the statute] that the conduct, in the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or is likely to mislead or deceive. It is unnecessary to go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception. That is not to say that evidence of actual misleading or deception at the point of sale and

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12 *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* [2012] NZCA 357 at [45]; and *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at [20], [50] and [53].

13 *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, above n 12, at [51].

14 *Australian Competition and Consumer Commission v viagogo AG* [2019] FCA 544.

15 *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd*, above n 12, at [39]. To similar effect is *Commerce Commission v Vodafone New Zealand Ltd* [2023] NZHC 2149 at [140].

16 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (FCA) at 199.

> of steps taken in consequence thereof is not likely to be both relevant and important on the question whether the relevant conduct in fact answers the statutory description and as to the relief, if any, which should be granted.

[11] In this case Peters J referred to the comments of Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* which were to similar effect, but also emphasised that ultimately it is for the court to evaluate "the objective character and meaning of the language in the minds of reasonable members of the public" and this was "not necessarily … assisted in any cost-effective manner by calling members of the public".[17]

Adducing evidence from consumers

[12] If evidence that consumers were misled is to be adduced, there are several ways this may be done. One way is by calling some consumers to give evidence. That was the approach taken in the similar proceeding brought by the ACCC against viagogo. As recorded in the judgment at first instance:[18]

> [115] Each of the ACCC lay witnesses gives evidence about how they accessed the viagogo website, what they did to purchase tickets, and what they thought about it. Their evidence is not determinative, but may be of assistance in identifying and assessing the characteristics of the ordinary consumer and, as the authorities above indicate, potentially his or her response to the alleged representations.

[13] Viagogo says the Commission could have done that here. The Commission says this kind of evidence inevitably faces challenges that those called are not representative. The Commission notes that this is what happened in the ACCC case against viagogo. The Judge in that case recorded this as follows:

> [116] Viagogo submits that the evidence of these witnesses should be disregarded because they made "extreme and fanciful assumptions", which representatives of the reasonable member of the representative class would not make. It submits that four of the five consumers had pressing factors at the forefront of their minds in purchasing tickets and that one ought to have known that viagogo was not an authorised seller. Viagogo submits that all were persons who failed to take reasonable care of their own interests, for whom the prohibitions in [the statute] were not enacted …

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17 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634, (2014) 317 ALR 73 at [45].

18 *Australian Competition and Consumer Commission v viagogo AG*, above n 14.

[14] The Judge in that case rejected the submission, finding that the "pressing factors" relied on by viagogo were "hardly likely to lead a consumer to abandon his or her own interests or to be so distracted from the task of acquiring the tickets that they [would] fail to give proper attention" to that task.[19] The Judge considered that, "subject to the application of the appropriate limits to which the evidence of individual witnesses may be of assistance" in this kind of case, the evidence of these witnesses had "the potential to strengthen the inference that the conduct [was] misleading and deceptive".[20] On appeal, viagogo's criticism of the Judge's reliance on this evidence was rejected.[21]

Survey evidence

[15] Another way this evidence can be adduced is by survey evidence, that is, where a party is contracted to survey consumers as to their understanding of representations made by businesses. The Commission says that just as calling evidence from individuals who say they were misled is likely to be challenged on the basis that the individuals are not representative, so too is survey evidence likely to be challenged on the basis of how the survey was conducted. A hearsay objection may also be raised depending on the purpose for which the evidence is offered.

[16] Most of the New Zealand cases where survey evidence has been considered have been in the context of passing off or trademark disputes or sometimes in relation to Commerce Act 1986 cases. Prior to the Evidence Act 2006, whether survey evidence was hearsay depended on the purpose for which the evidence was offered. If it was offered to show a public state of mind, or that a designated opinion was held by the public or a class of the public, and that state of mind or opinion was relevant, then the evidence was not hearsay. However, whether the evidence was admissible depended on its reliability and this in turn depended on the method and procedures of the survey.[22]

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19 At [117].
20 At [120].
21 *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 at [172].
22 See *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] 1 NZLR 36 (SC); *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC); and *Taylor Bros Ltd v Taylors Group Ltd* [1990] 1 NZLR 19 (CA) at 24. Similarly in Australia see *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; and *State Government Insurance Corp v Government Insurance Office of New South Wales* (1991) 28 FCR 511.

[17] Following the Evidence Act, when survey evidence is adduced for the truth of the responses from those surveyed, the evidence will be hearsay and inadmissible except pursuant to exceptions provided in the Act. If the evidence is not adduced for the truth of the responses from those surveyed it will be admissible provided it is relevant and not unfairly prejudicial and the weight will be a matter for the court.[23]

Expert evidence

[18] Expert opinion evidence is a third way that evidence may be adduced to prove that conduct is misleading. Expert evidence is admissible providing the fact finder is "likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence" in the proceeding.[24] The Commission relied on expert evidence in this case. Viagogo called expert evidence taking issue with aspects of the Commission's evidence.

Issue 1: Consumer complaint evidence

The issue

[19] Viagogo objected to the "consumer complaint" evidence included in the Commission's briefs of evidence on the grounds it was hearsay under the Evidence Act, and inadmissible. The Judge ruled that the evidence was not hearsay or, if it was hearsay, it was admissible under s 18 of the Evidence Act. Viagogo submits the Judge erred in doing so.

Industry participant evidence

[20] One category of consumer complaint evidence was evidence from ticketing agencies, hosts and promoters giving general evidence about the number of complaints they received about viagogo from consumers. For example, the Commission called evidence from Cameron Hoy, who was the managing director of a global company

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23 Survey evidence was admissible as not hearsay in *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* [2015] NZCA 602, [2016] 3 NZLR 145 at [254], and *Red Bull New Zealand Ltd v Drink Red Ltd* [2016] NZCA 373.

24 Evidence Act 2006, s 25(1).

that operates subsidiary businesses including Ticketek.[25] Mr Hoy said that on "a relatively frequent basis" Ticketek received complaints from customers who had bought tickets on viagogo, including complaints that they received invalid tickets or had been refused entry at an event. Ticketek did not retain records of these complaints but Mr Hoy expected the number was "substantial".

[21] Some of the Commission's evidence was about the kinds of complaints received.[26] For example, Terri Cumiskey, the director of marketing and development at New Zealand Opera (NZ Opera), said that NZ Opera was informed of issues with viagogo about two to three times per event. She said a primary issue was the sale of invalid tickets, that is where a ticket had been duplicated to be sold multiple times. She said "[m]any" customers told NZ Opera that they believed they had purchased them from the official NZ Opera website. Additionally, a "number of customers" had complained to NZ Opera after they purchased tickets on viagogo which were priced well above their face value. NZ Opera did not keep records of the complaints it received.

[22] The evidence of Michelle Campbell, legal counsel for the New Zealand Rugby Union Inc (NZRU), mainly discussed the issues the NZRU has had with the unauthorised resale of tickets to New Zealand rugby games through viagogo and the steps the NZRU has taken in relation to this. Problems have included resellers selling the same tickets more than once, selling children's tickets to adults and speculative selling of tickets for upcoming test matches before the NZRU has put those tickets on sale.

[23] In relation to consumer complaints, Ms Campbell said a "significant number of consumers" had contacted the NZRU about viagogo. She said the two main issues

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25 Ticketek has contractual rights with some event organisers to exclusively sell tickets to their events.

26 This evidence included evidence from: Reece Preston, the managing director of another online ticketing agent, who described the types of complaints it has received from viagogo customers; Dion Brant, an event promoter, who said that he had received "a significant amount of correspondence" mostly from people "concerned with whether the tickets they have purchased from Viagogo will be valid for entry at the event"; and Megan Bloomfield, the ticketing and events coordinator at the Napier Municipal Theatre, who said: "Many of the patrons who present invalid tickets do not appear to realise they have purchased tickets from Viagogo until they have been denied entry to the venue."

were: consumers who had purchased tickets from viagogo thinking they were purchasing from an official ticketing agent; and consumers with duplicated or altered tickets who were "usually unaware of any issues with their tickets until they [were] denied entry to a match". She also said consumers had contacted the NZRU after being charged prices that were significantly higher than their face value and sometimes in foreign currency.

[24] Other evidence was about misleading representations on viagogo's website. Susannah Lees-Jeffries, the marketing and development director for the Royal New Zealand Ballet (RNZB) gave specific examples from viagogo's website of statements that tickets for events were "sold out" or were "in demand" which contrasted with the fact that a large number of tickets were still available through the authorised ticketing platforms. Ms Lees-Jeffries also discussed the commonly raised issues when the RNZB received complaints relating to viagogo.

[25] The Judge noted that the evidence from these industry participants covered various topics, such as the ticket selling process, the circumstances in which a host instructs that ticketholders presenting "resold" tickets would be refused entry, and "of their experiences dealing with unhappy ticket holders, who said they had purchased on the website, but were refused entry to the event, for instance because the ticket had been presented more than once".[27] The Judge described the industry participant evidence as "useful background", but said it was "unnecessary to discuss it in any detail as it [had] not affected [her] decision".[28]

[26] As the Judge said, much of the evidence from these witnesses provided useful background. It explained how hosts sold tickets and how other ticket operators operated. It also explained how the NZRU has responded to scalpers and the circumstances in which a person would be denied entry (a scanner does not usually detect when a ticket has been sold via viagogo but will detect a ticket that has been fraudulently duplicated and sold multiple times). Some of the evidence, Ms Lees-Jeffries' in particular, provided specific factual examples that were relevant to the Commission's claims.

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27 Judgment under appeal, above n 1, at [48].
28 At [49].

[27] But insofar as the evidence was of the witness' experiences of complaints from unhappy viagogo ticket holders, described in a general way and unsupported by business records, it was of limited probative value. At best it was simply evidence that industry participants have frequently received complaints about viagogo on matters that the Commission alleges give rise to misrepresentations. It was inadmissible hearsay evidence if it was to be relied on as evidence that each complainant had been misled by viagogo in the ways alleged by the Commission. For example, if a customer was concerned they may be denied entry to an event, this was not evidence they were misled as to viagogo being a reseller site. That said, it is clear that the Judge did not rely on evidence of this kind in finding the Fair Trading Act claims were established and therefore no appeal issue arises in respect of this evidence.[29]

Evidence of complaints to viagogo

[28] A second category of consumer complaint evidence was in the form of a schedule of communications between consumers and viagogo. The information in these schedules came from tailored discovery orders made against viagogo.

[29] The evidence was that consumers could contact viagogo by making an enquiry through a form available on viagogo's website or by phone or email. The majority of enquiries were through the website and the form prompted the enquirer to provide a reason for contacting viagogo from a number of options. For example, one option was "Can I cancel – I was charged a final price different to what I saw before purchasing". Viagogo discovered spreadsheets with each schedule containing all communications under a single enquiry source topic.

[30] Using the discovered information, a Meredith Connell solicitor categorised the matters according to what was said in the enquiry. The Meredith Connell solicitor gave evidence about the process adopted.[30] He explained the topics under which the communication from a consumer was categorised and the review process involved in that. For example, these included: "Customer did not realise Viagogo was a Resale

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29 At [44].

30 Meredith Connell are the solicitors acting for the Commission in this proceeding. Another Meredith Connell solicitor prepared another schedule from updated discovery provided by viagogo.

Platform", "Customer misled re Viagogo not being able to guarantee valid tickets/entry to event",[31] "Customer misled re risk of being denied entry",[32] and "Customer misled re tickets being available to purchase at Initial Price".

[31] The Commission produced at trial a master spreadsheet that combined the individual spreadsheets from viagogo and showed the categorisation adopted for each enquiry. It is a lengthy document containing 25,192 rows of communications to and from consumers and viagogo. By way of illustration only, we set out below just two examples. The first example is from row nine:

> I felt from the moment I was on your website that the pressure was on to buy the tickets. It was flashing up that only a few tickets were remaining, then it flashed up that a large number of people were also looking at the same tickets. Then it also said something along the lines of only a few tickets remaining. The whole time I felt pressured. Then I mucked up, not realising that I was going to be charged a huge fee per ticket $90 for a service charge or something. I feel extremely disappointed that I've been charged well above the rate these tickets went on sale for. I thought I was on the official sellers site. Now you have taken my money but you have not issued me any tickets yet. Surely this is against the law? I just want all my money returned. I need the money back, my family is suffering because of this. Please consider my situation carefully, I just want my money back so I can buy clothes for my children. We cannot even afford to go to Auckland for this concert any longer. I have no job, this is a very stressful time for my family.

[32] The second example is of communications from rows 19 to 22:

> Hi there, I purchased a ticket from your website [for] going [to] Womad Festival for 3 days and my ticket doesn't work because it's a fake one ! I've been [there] this morning scanning my tickets at the venue to have my bracelet and they told me it's a fake one because the bar code is wrong. Just a little remind … This [is what] you pretend to be: "We're the world's largest secondary marketplace for tickets to live events. All tickets are fully protected by our guarantee. Prices are set by sellers and may be below or above face value". So check your ticket and stop selling fake one ! I want to be refund[ed] now [I can't] go anymore to this Festival. Thanks Viagogo. Hope [I] will [hear] from you very shortly. Thanks ...
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> …
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> [The customer received a communication from viagogo identifying her order and email address and giving instructions for logging on to view her ticket.

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31 This category included customers who asserted that they believed they were guaranteed to receive valid tickets that would enable them to attend the event, or who expressed a concern about the validity of the tickets they had received.

32 This category included complaints relevant to the risk of customers being denied entry due to tickets being fraudulently listed by the seller, or because resale of tickets for that event was forbidden by the original terms of sale.

> She replied querying whether this was intended to be an answer about her fake ticket to which viagogo then replied as below.]
>
> …
>
> Dear [customer], Thank you for contacting us. We are so sorry to hear that you were denied entry at the venue. We take situations such as this very seriously and will commence investigating this issue immediately. In order to help us with our investigation, we need you email us from [email address referred to] and with your reference order [number] which is related to WOMAD 2018. Once we have reviewed your case, we will contact you. We apologise for any inconvenience this may cause, but rest assured that we will investigate this issue in full and we look forward to hearing from you. Kind regards …

[33] In closing submissions in the High Court, the Commission referred to viagogo having received a "substantial volume of complaints" since entering the New Zealand market. It referred to the number of complaints in each of the guarantee representations, the additional fees, and reseller categories using Professor Slonim's analysis of this (which we discuss below). It said this showed that the Commission's concerns were not theoretical but were "very real".

[34] The Commission submitted this evidence was not hearsay. It said the complaints were before the Court not for the truth of their contents but for the fact they were made. It said it was "relevant and probative … that hundreds or in some instances thousands of New Zealand consumers reacted to viagogo's website in similar ways" and that they did so "in reaction to particular aspects of it that the Commission says are liable to mislead". It submitted that, if the evidence was hearsay, it would be admissible under s 18 of the Evidence Act.

[35] In her judgment, the Judge said she did not rely on the evidence as proof that a particular person was misled as that would be hearsay. Rather the "relevance of the evidence lies in the sheer number of complaints made regarding the issues the Commission has raised".[33] The Judge went on to say that, if she was wrong and the evidence was hearsay, it would be admissible under s 18 of the Evidence Act. This was because undue expense and delay would be caused if those who had made

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[33] Judgment under appeal, above n 1, at [44].

complaints were required to be witnesses and the circumstances provided reasonable assurance that their statements were reliable.[34]

[36] In the Judge's view, the circumstances that provided the reasonable assurance of reliability were that: viagogo did not identify any complaint it considered to be unfair or unreliable; the Judge's own "cursory look" at viagogo's responses to complaints suggested a genuine exchange with the consumer;[35] Professor Slonim's evidence was that studies showed that, because complaints require time and effort, most consumers who have a "negative" experience simply elect not to make a repeat purchase;[36] and this evidence made it "safe to assume that a substantial proportion of the complaints [were] genuine, at least from the consumer's perspective even if not from viagogo's".[37] Further, while the way complaints were allocated to an issue was subjective, and some of the complaints will have been untruthful or unfair, the evidence was "sufficiently reliable" for the Judge's "limited purposes".[38]

[37] On appeal, viagogo submits the Judge erred both as to whether the evidence was hearsay and whether it was admissible under s 18. The appellant submits that the sheer number of consumer complaints can only be relevant in this proceeding if the Court also accepted the underlying truth of their contents. The evidence was therefore hearsay and could not be relied on by the Court to support a conclusion that a particular alleged representation was misleading.

[38] The Judge relied on the sheer number of complaints as providing some support for the Judge's objective assessment of the website statements said to give rise to the representations. This approach was similar to the way that survey evidence was used in *State Government Insurance Corp v Government Insurance Office of New South Wales*.[39] That was a case alleging passing off and misleading and deceptive conduct in relation to trading and advertising using the initials "GIO". It was the type of case where survey evidence could be admissible to show that a designated opinion was held

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34 At [45].
35 At [45].
36 At [46].
37 At [46].
38 At [47].
39 *State Government Insurance Corp v Government Insurance Office of New South Wales*, above n 22.

by the public or a class of the public about the associations they made with those initials.

[39] The trial Judge (French J) considered there were limitations to the way that the survey had been conducted which meant that he could not draw any useful inferences about actual consumer reactions and decision-making. As a result, he approached this evidence in this way:[40]

> I do not propose to rely upon the September survey results as an independent source of any inferences. I consider, however, that I can use them, to the extent that they may be relevant, as a check upon my own findings about the effect of the GIO and the GIO Australia logos in the West Australian market.

[40] In the present case, relied on in the way they were, the complaints provided some support for the conclusions the Judge drew from her own assessment of the website. The use in this way was unobjectionable and had some probative value. In other words, the fact that so many people complained about the matters that were the subject of the claim was evidence suggesting that the website was causing issues for many consumers on those matters and provided some corroboration for the Judge's objective assessment.

[41] The Judge accepted the evidence would be hearsay if any particular out of court statement was relied upon as evidence that individual complainants were misled in the way they said they were, but said she did not rely on the evidence for this purpose.[41] The Judge accepted that individual complainants were not necessarily to be treated as telling the truth or as giving a fair account of their experience.[42] The Judge also accepted that the process by which complaints were allocated to one or other of the causes of action was subjective, and that cross-examination of the Meredith Connell witnesses revealed errors in this.[43] The Judge was therefore alive to the limitations of the evidence.

[42] We agree with the Judge that, if the evidence was to be relied on as evidence that individual complainants were misled as they alleged, then it would be hearsay.

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40 At 544.
41 Judgment under appeal, above n 1, at [44].
42 At [40].
43 At [41].

For example, to rely on a complaint that a person felt pressured to buy a ticket because of the statements on the website about how many tickets were left, in order to conclude that this person was misled by those statements, would mean the evidence of the complaint was hearsay. The nature of the evidence here varies from the cases where public perception of a trademark or the way goods or services were sold was relevant to whether the way a competitor was advertising its goods or services in a manner that infringed a trademark or was passing off its goods or services for those of another.[44]

[43] Viagogo says the Commission ought to have called a selection of witnesses to verify the complaints they made. We agree that it would have been open to the Commission to have called a selection of complainants to give evidence that they were misled in the way they claimed to have been misled. This would then have been direct evidence that members of the relevant category of the public (namely, those who buy tickets to events online) were misled in one or more of the particular ways alleged by the Commission. However, the Commission was not under any obligation to do so.

[44] Moreover, there were downsides to taking that approach as the Commission's submissions in the High Court pointed out. Specifically, the evidence would have been open to the objection that the selected complainants were not representative of the class to whom viagogo's website is directed. It may therefore have led to the Commission calling "a parade" of such witnesses to ensure the objection did not succeed. The cases involving survey evidence understandably have said this is undesirable.[45] Additionally, if just a few witnesses were called, it would not have given the Court an indication of the apparent scale of the complaints viagogo received by persons who said they had been misled by its website in the manner alleged by the Commission.

[45] The Judge considered that, if the contents of the master spreadsheet were to be relied on for the truth of the contents of the complaints, the complaints were admissible under s 18 of the Evidence Act. We agree with the Judge that "undue expense or delay

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44 See for example *Red Bull New Zealand Ltd v Drink Red Ltd*, above n 23; *State Government Insurance Corp v Government Insurance Office of New South Wales*, above n 22; and *Taylor Bros Ltd v Taylors Group Ltd*, above n 22.

45 See for example *Customglass Boats Ltd v Salthouse Brothers Ltd*, above n 22.

would be caused if the maker[s] of the statement", that is all those who complained to viagogo via its website enquiry process, were required to be a witness.[46]

[46] The other requirement under s 18 was that "circumstances relating to the statement provide reasonable assurance" of reliability.[47] Those "circumstances" include "the nature of the statement", "the contents of the statement", "the circumstances that relate to the making of the statement", "any circumstances that relate to the veracity of the person" and "any circumstances that relate to the accuracy of the observation of the person".[48] We consider the factors relied on by the Judge were capable of providing a reasonable assurance of reliability but, in relation to each and any complaint relied on for its truth, it was necessary to consider the contents of the statement. For example, some were complaining that they had been turned away from a venue but it is unclear from the contents of their statement whether they were aware that viagogo was a resale platform and understood and took the risk of this outcome or whether they were in truth misled.

[47] We consider the master spreadsheet was admissible as a business record under s 19 of the Evidence Act and this was probably the more straightforward route to admissibility.[49] As presently relevant it provides:

> **19 Admissibility of hearsay statements contained in business records**
>
> (1) A hearsay statement contained in a business record is admissible if—
>
> (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
>
> (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or

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46 Evidence Act, s 18(1)(b)(ii).
47 Section 18(1)(a).
48 Section 16(1) definition of "circumstances".
49 At the hearing we raised this with counsel. The Commission thought it may have made this submission to the High Court although we do not have details of this and the Judge did not discuss this in her judgment.

(c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.

…

[48] A "business" is defined widely as follows:[50]

business –

(a) means any business, profession, trade, manufacture, occupation, or calling of any kind; and

(b) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society.

[49] A "business record" (as presently relevant) is defined as follows:[51]

business record—

(a) means a document—

(i) that is made—

…

(B) in the course of a business, and as a record or part of a record of that business; and

(ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; …

…

[50] In our view the complaints in the master spreadsheet, which were copied from the viagogo schedules, qualified as a "business record". That content came from viagogo's discovered business records. That content was made in the course of viagogo's business and as a record of that business. When making the complaint the consumer had personal knowledge of the matters dealt with in the information (the complaint) that he or she supplied. Viagogo recorded that information and its responses to the consumer in its business systems, enabling it to provide the information to the Commission pursuant to the discovery order.

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50 Evidence Act, s 16(1) definition of "business".

51 Section 16(1) definition of "business record".

[51] As a business record, pursuant to s 19(1)(c), the hearsay statements made by the consumer to viagogo were admissible because undue expense or delay would be caused if each of the makers of the statements were required to be a witness. This meant that the Judge could have relied on the content of particular complaints for the truth of their contents. The weight the Judge placed on this evidence would have needed to take into account that the consumers had not been subject to cross-examination. Where the Judge was able to identify a pattern of similar complaints, this would bolster the weight that could be given to it. However, the Judge was not asked to or required to consider the evidence in this way.

[52] We conclude that the Judge was entitled to rely on the viagogo schedule as evidence of the sheer number of complaints about viagogo on matters covered by the Commission's claim to support her objective conclusions. In short, it could be inferred from the sheer number of complaints that viagogo's website gave rise to substantial concerns for consumers on the topics they referred to, which in turn supported the Judge's objective assessment that the website was misleading in the ways alleged by the Commission.

Complaints to the Commission

[53] The Commission witnesses also gave evidence of consumer complaints. One of those witnesses was Veronika Andreeva who was the Commission's lead investigator in relation to viagogo.[52] She said the Commission's investigation into viagogo was opened in June 2017. The Commission received a total of 1,382 "complaints and enquiries" about viagogo between 18 July 2016 and 29 April 2022.[53]

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52 Ms Andreeva said the Commission receives thousands of complaints and enquiries a year and they are all uploaded on to the Commission's "Streamline" application. Evidence of the process followed for this system was given. She said the history and number of complaints against a trader is a significant consideration in whether the Commission will investigate the complaints (it not having the resources to investigate every one of the thousands of complaints it receives every year).

53 Ms Andreeva described them as "complaints" because "the large majority" that she was familiar with were "complaints".

The number of complaints was small in 2014 and 2015 but noticeably increased after this and tended to go up when viagogo was in the media.[54]

[54] Ms Andreeva produced a schedule from the Commission's records which set out how the complaint was received (by phone, email or the Commission's website), the date it was received and the text of the complaint. By way of example, the schedule included the following text of a complaint made on 9 June 2017:

> C purchased Lionel Richie tickets online from T on 9 June 2017. She believed it was an official website. However, it was not. The tickets were priced at NZ 351.78, but on the next screen came up at AUD 900 at the checkout. C has an invoice and screenshot of the page she will send in.

[55] By way of further example, this one made on 1 December 2017:

> C states: Pricing was very misleading on this website, it seems they have seen under fire before. We were misled in several ways:
>
> 1. Only showing NZD throughout the entire transaction but then taking the payment in US
>
> 2. Placing like pop-ups and flashing text saying tickets are running out etc, when they are not there's hundreds left, also giving a reservation time of tickets for 5 minutes adding additional pressure, making the website very busy and this caused us to go ahead with the final cost in NZD - the fine print was obviously not clear.
>
> 3. Saying it's the cheapest price, it is not, ticket master has them cheaper - again misleading
>
> 4. They even provided an email saying the total cost with no actual currency stipulated We ended up paying $180 on top of the total cost, this included postage and admin fees … Is there any current case going ahead to block this site or pres[s] charges on them? [I]t's very misleading and they will not even work with me to find a fair resolution or justify the costs. I can define the experience and provide screen shots etc How can the owner of this website be formally approached

[56] Again, this evidence was admissible as a business record if the Commission intended to rely on the evidence for the truth of the contents of the complaints. The

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[54] The Commission received four complaints about viagogo in 2014 and 2015, 146 complaints in 2017, 581 complaints in 2018 and 449 complaints throughout 2019 until the March 2020 lockdown, with the Commission continuing to receive complaints after this. The Commission received 63 complaints in the week following the Commission's media release on 15 August 2018 that it was intending to file proceedings against viagogo and 29 complaints in the five days following an article published in the *New Zealand Herald* on 29 November 2018 about a consumer's experience of dealing with viagogo. Ms Andreeva described these responses as "exceptionally high" by the Commission's standards.

weight to be given to any particular complaint would depend on its contents and any other relevant matters such as whether it had been made following a Commission media release.

[57] The Judge dealt with viagogo's hearsay challenge to this evidence together with the challenge to the viagogo schedules. The Judge made it clear she did not rely on the evidence for proof that a particular customer was misled. Rather, it was relevant as evidence of the sheer number of complaints the Commission, as a public enforcement agency, had received regarding the issues the Commission had raised. We agree with the Commission that it was relevant evidence in the limited way in which the Judge relied upon it. There was no error in this respect.

[58] Lastly on this topic, Jessica Chapman, a senior legal counsel employed by the Commission, also gave evidence and was cross-examined about the consumer complainants.[55] She was tasked with collating the data held by the Commission to provide to Professor Slonim for the purposes of his expert evidence.[56] She created a spreadsheet for Professor Slonim listing the number of complaints that engaged each issue, with some complaints falling into more than one category. She produced this spreadsheet at trial.[57] This evidence was not relied on for the truth of the contents of individual complaints but as a cross check for Professor Slonim's analysis in the way we discuss below.[58]

[59] The first ground of appeal therefore fails.

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55 This was one aspect of her evidence. Ms Chapman also assisted Professor Slonim in gathering the "Experience Data" that was discussed in his evidence.

56 This included arranging a process for reviewing the complaints to categorise them according to the issues they raised. Reviewers were given a number of options with tickboxes to select. Ms Chapman conducted a "spot check" on reviewers' categorisation.

57 By way of example, this spreadsheet categorised 504 complaints under "Did not realise Viagogo was a resale platform", 393 as "Misled re Viagogo not being able to guarantee valid tickets/entry to event", 382 as "Misled re tickets being available to purchase at Initial Price", and 233 as "Misled re tickets being in short supply/about to run out (from any source)".

58 At [61] and [70].

Issue 2: Expert evidence

The issue

[60] The Commission called expert evidence from Professor Slonim. He is a professor of economics, whose research focuses on how people make choices in the fields of economics and behavioural economics. He has significant experience and credentials for the opinion evidence he gave.

[61] His evidence was primarily based on economic and behavioural economic theories to explain how consumers could be expected to respond to various features of viagogo's website. His analysis was supplemented by a spreadsheet containing factual information from recordings of the viagogo website (described as the "Experience Data"), the master spreadsheet of the complaints to viagogo, and a schedule from Ms Chapman of the complaint numbers by category.

[62] Viagogo objected to Professor Slonim's evidence before it was led. These objections included that his evidence contained unsubstantiated opinions, speculation, evidence outside his expertise and, in relation to the consumer complaint evidence, that it was hearsay.[59] The Judge did not rule on these objections but in her judgment described Professor Slonim's evidence as useful.

[63] Viagogo says it is evident the Judge was influenced by Professor Slonim's evidence on the Resale Platform Disclosure, the Guaranteed Tickets Representations, and the Price Representations causes of action. Viagogo submits the Judge erred in doing so, because he did not comply with the code of conduct for expert witnesses (the Code),[60] was not impartial, gave inadequate reasons for his opinions, and refused to engage in an expert conference, all of which meant his evidence was inherently unreliable and could not be of substantial assistance to the Court.

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[59] We have discussed the hearsay evidence aspect earlier in relation to the evidence of complaints to viagogo and the complaints to the Commission. Viagogo did not raise any additional points about the hearsay nature of the evidence in relation to Professor Slonim's evidence.

[60] High Court Rules 2016, r 9.43 and sch 4.

Professor Slonim's evidence

[64] We begin by setting out Professor Slonim's evidence in a little more detail. The Commission provided Professor Slonim with 126 video recordings of Commission staff navigating viagogo's website. He viewed two of those recordings. Having done so, he instructed the Commission to put them in chronological order and, using every fifth video (as a random sample of the 126 recordings), to "code" the videos based on aspects of the webpage navigation he considered to be relevant to a consumer's experience of navigating the website as they related to the Commission's case.[61]

[65] For example:[62]

(a) Relating to the Resale Platform Disclosure, the codes included whether a banner at the top of the page stating that viagogo is a secondary marketplace (the Resale Statement) was present, the wording of the Resale Statement, and which screen the Resale Statement was present on.

(b) Relating to the Guaranteed Tickets Representations, the codes included the wording of any guarantee provided in relation to the tickets, the cumulative number of guarantee representations, and the first screen where a guarantee representation was displayed.

(c) Relating to the Price Representations, the codes included the original price shown, when the first price shown for the selected tickets incorporated GST, the amount of the GST and booking fee, when that was first shown and the number of screens it was shown on, the amount of the delivery/handling fee, the screen on which these fees were first shown and the number of screens on which it was shown, the final price

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61 Ms Chapman assisted with this Commission work.

62 By way of further example, in relation to the Scarcity Representations (the Judge's findings on which are not appealed) the "codes" included (amongst other things) how many seconds elapsed for each of the first, second and third loading screens, the time that was first displayed on the countdown time, the screen the countdown timer appeared on, the number of relevant events accompanied by the Scarcity Representations, and the content of the Scarcity Representations shown.

displayed, the screen on which this final price was first shown, and the increase in price per ticket from the first price to the final price.

[66] Applying economic theories and research, and analysing factual information provided by the Experience Data, he set out his conclusions about what consumers were likely to assume. This was the main part of his evidence. Specifically, he drew the following conclusions as relevant to the Resale Platform Disclosure, the Guaranteed Tickets Representations and the Price Representations:

> …
>
> (b) Consumers who visited the [viagogo website] will unlikely have become aware that Viagogo is a ticket resale platform from the information available to them on the Website, because:
>
> (i) Viagogo's Website provides very little information about its status as a resale platform, and that information is unlikely to be noticed at all, or given any meaningful attention to, by consumers;
>
> (ii) consumers who are not made aware that Viagogo is a resale platform will likely assume that Viagogo is a primary source of event tickets; and
>
> (iii) of those few consumers who do see the statement on the Website that Viagogo is a "secondary marketplace", it is likely that some will not understand that statement at all, while others will not apply enough time and effort to it to fully understand its implications.
>
> …
>
> (d) Consumers are unlikely to have been aware that the tickets they purchase on Viagogo's Website are not guaranteed to provide them entrance to the event, because:
>
> (i) they are unlikely to notice information indicating that Viagogo is a resale platform;
>
> (ii) even if they become aware that Viagogo is a resale platform, they are unlikely to understand that this implies that Viagogo is not guaranteeing entrance; and
>
> (iii) they are likely to notice the various guarantee statements on the Viagogo webpages and understand these statements to mean that tickets are guaranteed to provide entry to the event.
>
> (e) Consumers will likely become willing to pay (potentially substantially) more for tickets on the final Viagogo purchase confirmation webpage than prior to landing on the Viagogo site as a

result of representations on the Viagogo Website indicating, in addition to (a), (b) and (c):

(i) available ticket scarcity;

(ii) limited time to purchase tickets; and

(iii) that tickets are guaranteed.

[67] In addition, Professor Slonim explored some "additional hypotheses" on consumer understanding and experiences of the viagogo website based on the complaints data provided to him from the Commission.[63]

[68] Professor Slonim referred to research that indicated the "vast majority" of individuals (one study indicating less than four per cent) do not raise complaints even if they have a negative experience with a product or service. He explained why this was.[64] Further, as there were many ways a consumer might complain (for example to friends of family or on social media), the data provided by the Commission represented "only a narrow range of the outlets of all possible responses and complaints". Furthermore, economic literature suggested that consumers may have a range of motivations for making a complaint and this was relevant to the outlet to which they made their complaint. For example, if they were complaining to get compensation, they would likely complain to viagogo or an authoritative body such as the Commission.

[69] From the schedules provided by Meredith Connell, Professor Slonim identified that over the 39-month period up to the end of August 2019: the single largest category of complaints received by viagogo was regarding the Guaranteed Tickets Representations (almost 4,000 complaints); the second largest category concerned the additional fees charged (over 1,500 complaints); and the third most common complaint was about the consumer not realising viagogo was a reseller platform (over 1,100 complaints). This was consistent with complaining to viagogo because

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63 This comprised the information that Ms Chapman prepared of the complaints to the Commission about viagogo, information from the Commission about complaints regarding other ticket sellers, and the spreadsheet of 25,193 rows of the communications between customers and viagogo prepared from viagogo's discovered information.

64 This was primarily because the cost of complaining (the time, effort and discomfort of confrontation) outweighed the benefits of complaining. This meant that for each complaint, "there could be many more consumers who have had an adverse experience, but who will not have complained".

something had gone wrong, whereas if consumers were misled about the Scarcity Representations (there were 279 in this category) it was not clear they would have felt they had lost something for which they would be seeking compensation.

[70] Professor Slonim also considered how the complaint numbers about viagogo compared with complaints about other ticket sellers. He did so by comparing the number of complaints to the Commission about viagogo in the categories as supplied by the Commission, with complaints across the ticket industry again as provided by the Commission. Compared with a total of 192 complaints received about Ticketmaster (including 59 about Ticketmaster Resale) for the same period, the Commission received 649 complaints about viagogo's reseller status, 861 complaints about its guarantee, 467 complaints about customers paying more than they intended, 278 complaints about customers feeling time pressured due to scarcity issues, and 671 complaints about feeling tricked about additional fees. Professor Slonim said the evidence was consistent with his analysis of viagogo's website representations "having the effects" he had discussed.

[71] Lastly, in relation to complaint evidence, he analysed the decline in complaints to the Commission following viagogo removing its Official Seller Representation from its Google advertisement and saw this as consistent with his hypothesised effect.

High Court

[72] As mentioned earlier, the Judge relied on Professor Slonim's evidence in support of her conclusion that the circumstances of the evidence of complaints to the Commission and viagogo provided a reasonable assurance they were reliable. Additionally, when summarising the evidence (prior to analysing what had to be proved and whether it had been) the Judge said:[65]

> [51] viagogo called evidence from several of its senior employees, and from Professors Ali Hortaçsu and Ananish Chaudhuri, both experts in behavioural economics.
>
> [52] As the Commission submits, expert evidence is not required to determine this case. That said, Professor Slonim and Professor Chaudhuri's evidence was useful. Each gave evidence on matters such as how consumers

[65] Judgment under appeal, above n 1.

are (or are not) understood to navigate websites, and the general rules of thumb or "heuristics" they employ to overcome limitations of time.

[53] With respect to Professor Hortaçsu, I did not find his evidence as useful. In much of his evidence, the Professor expressed an unwillingness to comment on any matter not proved by empirical evidence, thereby limiting the assistance he was able to give.

[54] Ultimately, however, as both parties accepted, this is not a case that turns on the expert evidence. The facts — what was said, how many times, when and so on — are not in dispute. The issue is whether what was said and how it was said breached the [Fair Trading Act].

[73] Later in her judgment, the Judge referred to the expert evidence as follows:[66]

(a) Regarding the Guaranteed Tickets Representations:

(i) the Judge noted Professor Slonim's evidence, based on Meredith Connell's work in the viagogo complaints, that these statements were the "subject of the most consumer complaints to viagogo, and by some margin";[67] and

(ii) in response to viagogo's submission that, to the extent the Commission relied on Professor Slonim's evidence it was countered by Professor Hortaçsu's evidence, the Judge said that "[w]ith respect to both parties, I do not require expert evidence to determine this cause of action".[68]

(b) Regarding the Price Representations, the Judge referred to Professor Slonim's evidence that the fees were disclosed at a point in time where the consumer could be expected to feel more committed to the purchase, and the gist of the evidence was that by the time consumers were informed of the amount of the fees, they were more likely to be willing to pay a substantially higher price than they would have done had the true cost been disclosed at the outset.[69] The Judge

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66 The Judge also referred to Professor Slonim's evidence in relation to the Scarcity Representations and the Official Seller Representations but the Judge's findings that these representations breached the Fair Trading Act are not appealed.

67 Judgment under appeal, above n 1, at [91].

68 At [113].

69 At [158].

accepted this evidence, which she regarded as being consistent with case law, in finding that the Price Representations breached the Fair Trading Act.[70]

Viagogo's challenge to the evidence

[74] In oral submissions, senior counsel for viagogo said that Professor Slonim had used the Experience Data rather than looking at the website himself partly because he had difficulties with his eyesight. We have noted earlier that Professor Slonim did in fact view two videos of the website for the purposes of determining the factual information he wanted coded. While Professor Slonim did have eyesight difficulties due to a genetic condition, he was able to see the screen by using a very large monitor. This submission was therefore incorrect and unfair to Professor Slonim.

[75] Viagogo submits Professor Slonim breached the Code by failing to act impartially in his evidence about how he would expect consumers to respond to the Resale Platform Disclosure on viagogo's website. It says he lacked objectivity and his approach involved confirmation bias because he did not take into account: the "Sell Tickets" button in the top right-hand corner of several pages in the buy process on viagogo's website; the listing of events in multiple different countries on the same page; and the price disparity between tickets of the same category or in the same sections of the venue for the same event.

[76] The first two matters were put to Professor Slonim in cross-examination but the third of these was not. As to the first two:

(a) Professor Slonim accepted that he had not asked the Commission to code for the "Sell Tickets" button that was present on the first two pages. He accepted that it could be described as an oversight in that he did not actually see the "Sell Tickets" when he reviewed the first two videos for the purposes of providing the coding instructions to the Commission. He said that, if he had seen it or it had been pointed out

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[70] At [169], referring to *Australian Competition and Consumer Commission v AirAsia Berhad Co* [2012] FCA 1413, and *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd*, above n 12.

to him, it would have been important to have coded. He also went back to the current website to see what this button looked like and considered that it would not have changed the conclusions he reached in any fundamental way.

(b) Professor Slonim could not remember if he had coded for the fact that the website includes tickets for events outside of New Zealand. However, he accepted that he did not use any such data for his analysis because his focus was on data for New Zealand events. He said his feeling was that somebody would not be looking at irrelevant events and, in the videos he looked at, the irrelevant events (being events out of the country) always appeared below the relevant events. He accepted that if a person using the website "had noticed [this] and gave it, you know, the time to think, g[a]ve it a little thought" then the person would understand it was a secondary website.

[77] In short, Professor Slonim accepted he had not taken these matters into account but explained why they would not alter his conclusions. These matters fall far short of showing a lack of impartiality. Indeed, viagogo's senior counsel accepted, when it was put to him by this Court at the hearing, that this point was better framed as affecting the weight that might be put on Professor Slonim's evidence because of the matters he had not taken into account.

[78] Next viagogo submits that Professor Slonim breached the Code because he failed to give reasons for his opinions. It is said that he presented nothing more than a series of untested, unsupported, hypotheses. This submission was not developed except with reference to pages (not specific paragraphs) from the briefs of evidence of viagogo's expert which, it appears, discuss matters the Professor was said not to have taken into account. In any event, the submission is wholly without merit. In a brief that ran to 96 pages, the Professor set out in detail the behavioural economic theories and the sources he relied upon, his observations and analysis in respect of each of the misleading statements alleged by the Commission, and how he tested his hypothesis with the complaint information from viagogo and the Commission.

[79] Lastly, viagogo submits that, in breach of the Code, Professor Slonim failed to confer with viagogo's experts. In a minute dated 22 November 2022 (the trial took place in February and March 2023), the High Court had directed that a conference of experts take place. Viagogo says its experts were willing and available to confer with Professor Slonim but this never took place. It is said that a conference ensures the evidence is subject to the rigour of a peer review and, in its absence, Professor Slonim's evidence was not helpful.

[80] This submission too is wholly without merit. It is clear that the expert conferencing did not take place because of substantial delays by viagogo in completing necessary steps and the late discovery of relevant information.[71] The Court was informed of this and did not require that the conference proceed.

[81] The challenge to Professor Slonim's evidence therefore fails. His evidence was relevant and admissible. It was open to the Judge to find it useful evidence in the ways that she did.

[82] The second ground of appeal therefore fails.

Issue 3(a): Inadequate reasoning regarding Resale Platform Disclosure

Commission's claim

[83] The Commission's claim alleged that from at least 18 July 2016 until 9 November 2017 viagogo did not disclose at any point in the purchasing process that it was a resale platform and was not an official ticketing agent for events in New Zealand. From 9 November 2017 towards the top of the homepage and event page there was the following Resale Statement: "We're the world's largest secondary marketplace for tickets to live events. Prices are set by sellers and may be below or above face value".

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[71] Professor Slonim provided his brief of evidence on 12 May 2022. Viagogo's experts did not provide their briefs until 12 December 2022 (we are told this was months late and less than an hour before unless orders were to take effect). Because of this delay, expert conferencing was to occur, very close to trial, in the week of 30 January 2023. That did not occur because on 24 January 2023 viagogo disclosed a large number of viagogo and consumer communications which Professor Slonim needed to analyse (and was still doing so when the trial began), and because viagogo failed to answer interrogatories in time for Professor Slonim to consider them for the expert conference.

[84] The Commission alleged that the Resale Statement did not adequately disclose viagogo's status as a resale platform because consumers were not likely to understand from its terms that viagogo only offers tickets for resale. Further, the Resale Statement was not likely to come to consumers' attention. It was in small, lightly coloured text towards the top of the homepage and event page; there was other more prominent and functional information on those pages (such as links to purchasing tickets further down the page); it could not be seen if a consumer scrolled further down those pages; and it disappeared after the consumer had progressed beyond the event pages.

[85] The Commission submitted that, if viagogo had made it known that it was a reseller, consumers would inevitably bring the context to bear when they were told on the website that a certain number of tickets were left for the event, that viagogo can guarantee "valid tickets in time for the event", and that viagogo was an "Official Site" for tickets to a searched event. Moreover, as a reseller viagogo was selling intrinsically risk-laden tickets, because some sellers might resell the same ticket multiple times which would mean that only the first person who went to the event would gain entry with that ticket. It took limited steps to ensure that tickets would be valid and its typical position was to do nothing in response to consumers being let down by the site.

[86] The Commission contended that because of these matters the Resale Platform Disclosure was conduct that was: misleading or deceptive or likely to mislead or deceive in breach of s 9 of the Fair Trading Act; and was liable to mislead the public as to the nature, characteristics and suitability for purpose of the tickets supplied through the website in breach of s 11 of the Fair Trading Act.

High Court

[87] Before addressing each cause of action, the Judge set out her views of the evidence and the legal approach to Fair Trading Act claims. We have addressed viagogo's criticisms of the Judge's approach to the evidence above and no criticism is made of the Judge's summary of the relevant law.

[88] The Judge then identified the parties' respective positions: the Commission alleged there was insufficient disclosure that viagogo was a resale platform whereas viagogo contended its level of disclosure meant there was no breach of the Fair

Trading Act.[72] The Judge rejected viagogo's submission that an omission could only give rise to a breach if there was a reasonable expectation of disclosure. This was because the approach endorsed in recent cases of this Court was "whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive".[73]

[89] The Judge:

(a) set out the Resale Statement and how it appears on the homepage and event page, noting that it disappeared when the consumer scrolled down the page and it was not displayed on subsequent pages;[74]

(b) set out the features that viagogo relied on to inform consumers it was a resale site in addition to the resale banner:[75]

(i) the "Sell Tickets" button that appears on the homepage, the event page and on subsequent pages which viagogo submitted made it obvious it was a resale platform;

(ii) the website showing tickets for forthcoming events all over the world;

(iii) tickets in the same section for the same event being priced differently from one another which was not to be expected on the website of an authorised ticketing agent; and

(iv) viagogo's "guarantee" which was said to only make sense if viagogo was a resale platform; and

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72 Judgment under appeal, above n 1, at [63]–[64].

73 At [67]–[68], quoting *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41, and referring to *McAlister v Lai* [2018] NZCA 141, (2018) 14 TCLR 765; and *James Hardie Plc v White* [2018] NZCA 580, [2019] 2 NZLR 49.

74 Judgment under appeal, above n 1, at [69]–[73].

75 At [78]–[81]

(c) referred to viagogo's submission that it was reasonable to expect that consumers accessing its website would be familiar with other resale websites, such as TradeMe or eBay, and other third-party websites.[76]

[90] The Judge considered the website inadequately disclosed it was a reseller and breached ss 9 and 11 of the Fair Trading Act because:

> [85] First, consumers may not see the "secondary marketplace" statement given its location, the size of the font, and its lack of prominence.
>
> [86] Secondly, consumers who do see the statement would need to understand that, by referring to itself as a "secondary marketplace", viagogo is informing them that the tickets for sale are resales. I am not persuaded that follows. viagogo did not call any evidence to establish that is how consumers would understand what is meant by "secondary marketplace". It was for viagogo to do so if it was going to rely on the statement.
>
> [87] Nor am I persuaded that the other features of the website, referred to … above, identify the website as one for resales. I accept that the listing of events and tickets in the manner referred to … above is different to what one would expect to see on the website of a recognised agent. However, those matters on their own are insufficient to bring the level of disclosure to a satisfactory standard.
>
> [88] I am not persuaded that it is reasonable to assume that consumers will be familiar with the other websites viagogo identified, let alone that such would stand them in good stead for recognising that viagogo's website is one for resales. The website presents similarly to those of the recognised agents. That is more likely to lead a consumer to assume viagogo is similarly authorised. Nor did viagogo identify how being familiar with Booking.com or Expedia.com would assist consumers to recognise that viagogo is a resale platform.
>
> [89] Taking into account all the relevant circumstances, viagogo's existing level of disclosure is likely to mislead, and liable to mislead as to the nature of the services it offers.

Viagogo's appeal

[91] Viagogo submits that a fundamental problem with the High Court judgment is its "paucity of reasoning". It says the Judge's reasons were a statement of conclusions without explanation. It says that, in reaching her conclusions, the Judge relied on inadmissible hearsay evidence from the consumer complaint evidence and from Professor Slonim or gave this evidence too much weight and ignored relevant admissible evidence led by viagogo from Professor Ananish Chaudhuri.

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[76] At [82].

[92] We have already rejected the hearsay submission and the submission that Professor Slonim's evidence was inadmissible. We therefore consider the adequacy of the Judge's reasons and whether the evidence of Professor Slonim was given too much weight while relevant evidence of Professor Chaudhuri was ignored. We do so noting that viagogo emphasises that, in addition to the "secondary marketplace" wording, there are other indicators that viagogo is a reseller, namely the "Sell Tickets" button, the listing of events in multiple jurisdictions and the price disparity of tickets for the same events and that Professor Slonim's evidence initially did not take these other indicators into account.

[93] Professor Chaudhuri is a professor of experimental economics at the University of Auckland with substantial experience and academic credentials. He provided his opinion on what would or would not be seen on the website. Viagogo points to the following aspects of Professor Chaudhuri's evidence:

(a) Professor Slonim's evidence was based only on accessing the viagogo website on a desktop computer. However, when accessing viagogo's website on a mobile phone, the Resale Statement appears prominently at the top of each page and "it seems hard for anyone to miss this statement given the proportion of the page that it occupies".

(b) Contrary to Professor Slonim's assertions, "studies of human behaviour suggest that statements and graphics do not need to be especially prominent to have an impact on decision making". It was therefore "quite possible" that consumers "would see the secondary market statement" even though it appears in smaller font on the desktop site than on the mobile site.

(c) Other aspects of viagogo's website give "cues regarding viagogo's status as a resale platform". Professor Chaudhuri said the "Sell Tickets" button in the top right-hand corner on the homepage and event page meant there were two cues on these pages. Further, on the homepage, when a customer selects the category of event they want

tickets for, that category is highlighted which draws the customer's eye to the selection and the Resale Statement is immediately above that.

(d) Even if the customer had not first tried to secure tickets on the primary market and they do arrive at the viagogo website "de novo", Professor Slonim's analysis failed to consider customers' prior knowledge and experience, and "[a]lmost all of us have experience with resale platforms or other intermediaries such as eBay, TradeMe, booking.com or Expedia.com, for example".

(e) It is "hard to believe that a vast majority of respondents do not have experience interacting with resale platforms and if they do, that they do not bring that experience to apply to the act of buying tickets". And "people have significant exposure to third party resale sites and … even in the event ticket sales arena, there are multiple third-party resellers".

(f) It is "my opinion that, given the ubiquity of electronic commerce in our day-to-day lives where we routinely buy all sorts of things including bric-a-bracs or plane tickets and make hotel bookings via third-party platforms whose only role is to bring buyers and sellers together, it is hard to argue that people do not understand the implications of their purchases on such platforms and do not bring their experience with other resellers to bear on the viagogo experience".

[94] Viagogo submits the Judge's failure to engage with this evidence was surprising when she had earlier said she had found his evidence "useful".

[95] We do not accept these submissions. In the first place, we agree with the Commission's submission that the trial was not a contest between experts. It was not a case requiring the Judge to decide whether she accepted Professor Slonim's or Professor Chaudhuri's evidence about whether consumers would or would not see and understand the Resale Statement. It was ultimately for the Court to make its own assessment of whether the Resale Statement was misleading.

[96] Secondly, we accept that the Resale Statement is more prominent on a mobile device. But that does not address the issue of whether consumers who access the website on a desktop will notice the wording given its location, font size and lack of prominence on what is a busy website where a consumer is looking to buy tickets for an event and potentially under time pressure (whether because of the Scarcity Representations or otherwise). The fact that some consumers may see the "secondary marketplace" wording is not an answer because it is also likely that many reasonable consumers will not.

[97] Thirdly, the "secondary marketplace" wording is somewhat obscure. It does not indicate whether it is a secondary marketplace authorised and/or operated by the event promoter. As Professor Slonim concluded, of those who see the statement (and many will not), some will not understand it and others will not apply enough time and effort to do so. Further, as the Commission submits, the website does not include viagogo branding after the homepage. This might have alerted consumers who had heard of viagogo that they were on a reseller's website rather than that of an authorised seller for the event.

[98] Fourthly, Professor Chaudhuri's evidence did not rely on empirical evidence, nor advance an opinion as to whether the Resale Statement was misleading. Rather Professor Chaudhuri advanced arguments as to why Professor Slonim's arguments had flaws based on his own observations, but also accepted that it was quite possible that consumers would not see the Resale Statement and that "Professor Slonim may be right". It was his view that Professor Slonim needed to "back up some of his assertions with a bit more evidence than he has done". Professor Chaudhuri's evidence was not therefore a complete rebuttal of Professor Slonim's evidence.

[99] Lastly, Professor Chaudhuri also accepted that the Resale Statement and the "Sell Tickets" button were not prominently displayed on the website using a computer desktop. He also accepted that some of the other resellers' sites that consumers might be familiar with possibly provided information about who supplies the service in a way that viagogo did not.

[100] These were matters on which the Judge was well placed to form her own view without recounting the experts' evidence on these points and explaining which aspects she found helpful and why she did or did not accept their evidence. The Judge's reasons were not inadequate. We consider the Judge's conclusion was sound for the reasons she gave.

[101] For completeness, and although the Judge did not and did not have to rely on this, we note the consumer complaint evidence supported the Judge's conclusion. For example, that evidence includes:

> Hello, I thought I was purchasing real tickets — not hawked tickets. I didnt know that these tickets were dodgy. I would like to cancel this order. I am not very happy about paying so much for cheap seats. I feel like I was tricked. Please cancel and reimburse me. Thanks, …
>
> …
>
> I thought I was on the official ticket site. I subsequently found out I've paid around double what the ticket value is. I want to cancel the purchase as I've been misled by your site.
>
> …
>
> I did not know these were second hand tickets. I don't want them. This is a rip. I want a full re[f]und
>
> …
>
> Hi there I am unsure as to why I paid so much for tickets when they are selling them for $35.50 on ticketek site? Did I do a mistake using you? I'm in new Zealand I thought I was using the right site

[102] This ground of appeal therefore fails.

Issue 3(b): Inadequate reasoning regarding Guaranteed Tickets Representations

Commission's claim

[103] The Commission's second cause of action concerned the Guaranteed Tickets Representations which comprised the following:

(a) From at least 18 July 2016 until 1 September 2019, viagogo stated on various pages of its website that: "All tickets are fully protected by our guarantee"; "All tickets are fully protected by our guarantee. Buy with

confidence"; "All Tickets Are 100% Guaranteed"; and "We guarantee that you'll get valid tickets in time for the event".

(b) From at least 18 July 2016, in a section under "frequently asked questions", the website stated:

> What is the viagogo Guarantee?
>
> Buyers are guaranteed to receive tickets in time for the event. If a problem arises, viagogo will step in to provide comparable replacement tickets or a refund.

(c) From at least November 2019, a statement appeared as a banner to some events that were subject to resale restrictions:

> You will be protected by our guarantee if you attempt entry and are refused. That's our promise – enjoy the Event!

[104] The Commission contended that the meaning conveyed by the Guaranteed Tickets Representations was that viagogo will provide tickets that will be valid for entry to the event. That is the only sense in which consumers could "[b]uy with confidence" or be guaranteed to "enjoy the Event". However, viagogo cannot guarantee that consumers will receive valid tickets in time for the event and reserves itself the right to provide a refund instead. The Commission contended the Guaranteed Tickets Representations were misleading on their face and as a matter of common sense. Further, viagogo permitted sellers with "high breakage rates" to continue to list tickets for sale.

[105] The Commission alleged that the Guaranteed Tickets Representations breached ss 9, 11, 13(e) and 13(i) of the Fair Trading Act.

High Court

[106] In addressing this aspect of the Commission's claim, the Judge set out each of the representations and included screenshots from the evidence of each of the representations.[77] The Judge also set out cl 1.3 of viagogo's terms and conditions

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[77] At [95]–[98].

which set out the terms of the guarantee actually provided.[78] Those terms said that in the "rare instance" that a seller does not provide the ticket "viagogo will, in its sole and absolute discretion" offer a replacement ticket at no additional cost or refund the cost of the ticket.

[107] The Judge referred to the Commission's submissions and viagogo's response. As to the latter, the Judge noted the following:

(a) Viagogo disputed the premise that consumers would understand the guarantee to be an absolute promise as alleged. At most consumers would understand the guarantee to be a promise of a remedy if an issue arose, and the need to look elsewhere to find what the remedy would be.[79] This was said to be supported by the approach in *Commerce Commission v Bunnings Ltd* that consumers would apply "robust realism" and should be given credit for the ability to "read between the lines",[80] as well as by the Consumer Guarantees Act 1993 which provided statutory guarantees that were not in the nature of an absolute promise but rather the provision of a remedy.

(b) Viagogo drew a distinction between the representations relied upon by the Commission at [103(a)] above.[81] The first three said nothing about valid tickets, the Commission led no evidence that to guarantee a ticket was to represent it was valid, and to the extent the Commission relied on Professor Slonim's evidence, viagogo submitted it was countered by Professor Hortaçsu's evidence.

[108] As noted earlier, the Judge said she did not require expert evidence to determine this cause of action. The Judge found the claimed breaches of the Fair Trading Act were established for the following reasons:

> [117] The impression created by the various representations must be assessed in the context in which they are made. In this case, the statements

78 At [99].
79 At [109]–[112].
80 *Commerce Commission v Bunnings Ltd* [2021] NZDC 8918, [2021] DCR 188 at [76].
81 Judgment under appeal, above n 1, at [113].

> are made to consumers who have accessed the website for one reason only, being to purchase a ticket to a live event. The situation is not comparable to [*Commerce Commission v Bunnings Ltd*] or the Consumer Guarantees Act. A breach of a guarantee of "lowest price" can be remedied. However, it is of the utmost importance to someone purchasing a ticket to a live event that they will be given entry. Moreover, the consumer may be incurring travel and accommodation costs to attend that event. The gist of viagogo's evidence at trial was that consumers should not care if they are refused at gate provided they get a refund. I do not accept that is so. viagogo's training materials acknowledge that being refused at gate is the "worst possible experience" a consumer can have.
>
> [118] No distinction of any consequence is to be drawn between the first three and the fourth of the Event and Checkout Guarantee Representations. As the Court of Appeal said in *Godfrey Hirst*, statements are to be considered collectively, and their overall impression ascertained. Aside from that, however, there is no difference between guaranteeing a ticket and guaranteeing receipt of a valid ticket. It is the ticket that is guaranteed, not the remedy.
>
> [119] The position is less clear cut in respect of the FAQ and Resale Banner Guarantee Representations which are those that viagogo continues to make. Ultimately, however, I am satisfied these too breach the relevant provisions of the [Fair Trading Act]. The first repeats that the consumer is guaranteed to receive a valid ticket in time for the event, although it does refer to the possibility of a refund. The second does not say what the guarantee is, but it does advise that the consumer should "enjoy the Event". As Mr Flanagan for the Commission submitted, a consumer who is refused at gate will not be enjoying the event.

Viagogo's appeal

[109] Viagogo submits that the Judge failed to engage with Professor Chaudhuri's evidence that identified what was said to be a key internal inconsistency in the Commission's case.[82] This was that a promise as to ticket validity would only be of interest to consumers who understood they were purchasing resold tickets on a resale platform and considered there to be risks associated with buying resold tickets. However, this does not respond to the fact that guarantees are designed to provide assurance to consumers and here, on its face, the guarantee is plainly misleading because viagogo cannot guarantee entry to an event which is the impression the statements give. As Professor Chaudhuri acknowledged in cross-examination, the guarantee was likely to be valued by consumers.

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[82] We have already dismissed viagogo's challenge to the admissibility of Professor Slonim's evidence and discussed that the Judge expressly did not rely on his evidence for this cause of action.

[110] Viagogo submits the Judge misstated viagogo's evidence in saying that "[t]he gist of viagogo's evidence at trial was that consumers should not care if they are refused at gate provided they get a refund".[83] Viagogo refers to:

(a) evidence in cross-examination from Prabhat Shah, a director of viagogo, that "as long as they get a valid ticket that's all, as a consumer, would care about";

(b) evidence from Georges Kai, the head of customer service, product and analytics for viagogo, that when viagogo is aware of an issue with a transaction that is covered by its guarantee "viagogo's policy is to first check whether it will still be possible for the buyer to receive the tickets they purchased". If that is not possible, "viagogo will try to source replacement tickets for the buyer" and, only if viagogo is not able to source "comparable" tickets, viagogo will propose alternative non-comparable tickets if available or a refund; and

(c) evidence from Tom Crawford, head of product and analytics for supply chain quality for viagogo, who gave evidence of the measures viagogo takes to avoid issues, namely that between 50 and 60 staff are dedicated to identifying issues with tickets and preventing breakage, and another 10 staff who are responsible for attempting to predict issues ahead of time and resolving them.

[111] However, this evidence does not engage with the fact that viagogo's statements mislead consumers into thinking they are guaranteed to receive valid tickets that will give them entry to an event and, despite viagogo's approach to issues that arise, they cannot guarantee a valid ticket will be provided.

[112] Next viagogo submits the Judge failed to engage with how *Bunnings* applied to the case. It says robust realism must be applied to viagogo's website. It says that the ordinary person reading between the lines would understand that viagogo's statements ("All tickets are fully protected by our guarantee" accompanied by "enjoy

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83 Judgment under appeal, above n 1, at [117].

the Event!") were not an absolute promise that consumers would receive valid tickets in time for the event.

[113] It says that, just as in *Bunnings* consumers would understand that Bunnings would "make it right" if there were particular instances where it did not provide the lowest price,[84] so too consumers would understand that viagogo would "make it right" if a consumer received an invalid ticket. It says that consumers would understand that, because viagogo is a secondary ticket site, it could not provide an absolute guarantee that consumers would receive valid tickets in time for an event. Rather, they would understand that, if valid tickets were not received, the guarantee would provide a remedy.

[114] This submission is without merit. The Judge did consider *Bunnings* and distinguished it because of the different context where a refund of a ticket was not equivalent to having a valid ticket for the event.[85] The secondary marketplace statement does not assist consumers because it may be missed. The statements made by viagogo were misleading on their face. The link to the terms and conditions which included the terms of the guarantee was at the bottom of website pages and would not necessarily be noticed or clicked on when a consumer was purchasing tickets.

[115] Viagogo also submits the Court erred by taking into account the personal and extraneous circumstances of the hypothetical customer, for example that the customer may have booked travel and accommodation in order to attend the event. Viagogo says such separate purchases are entirely outside viagogo's control and cannot have any bearing on the customer's understanding of the effect of the viagogo guarantee. This submission is also without merit. It is obvious that the class of consumers to whom viagogo makes its representations will likely include consumers who incur costs to attend the event for which they have purchased tickets in addition to the ticket price itself. It is incumbent on viagogo to be clear about what its guarantee covers so as not to mislead consumers that their entry to an event is guaranteed.

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84 *Commerce Commission v Bunnings Ltd*, above n 80, at [43].
85 Judgment under appeal, above n 1, at [117] and quoted above at [108].

[116] Finally on this cause of action, we note that the consumer complaint evidence provided support for the Judge's conclusions:

> Hi, Just stating this is on record and I have evidence of fraudulent tickets. If I have not been contacted within 48 hours I will be pursuing legal action. I had my tickets checked by the company that sells the original tickets for the concert I am going to, and they got back to me saying these tickets are not valid. As stated in the consumer guarantee act (NZ) this is fraudulent and can be applicable for a case action lawsuit in New Zealand. As stated in the Viagogo guarantee you are required to give valid tickets. Which i did not recieve. I will not carry this action out if i receive an appropriate refund within the time given (48 hours) Please contact me back ASAP on [contact details].
>
> …
>
> Hi, It was guaranteed that I will get the tickets in the week of the event. But the tickets were cancelled on the day of the event, leaving me nowhere. I had my hotel bookings and travelled to the destination, just to know that my Tickets were cancelled. This is wrong on the part of viagogo when they can not confirm the tickets from the seller even though it was e tickets. I want you to compensate me with atleast the money I have spent for my bookings and travel costs. It would be nice if you compensate otherwise I would like to take the matter forward. Best, …
>
> …
>
> Hey there, I went to The foo fighters concert in Mt smart Stadium, Auckland on Saturday Feb 3rd. When I went to get my ticket scanned they then informed me that I had been scammed, and that it was not valid and I couldn't be let in. My order ID is … I trusted your so called "guarantee"; and was quite frustrated to find out being denied at the gate. I had to break the bank purchasing another ticket to get into the concert. I have attached my ticket below, if you need any other information let me know. Thanks for your time, …

[117] This ground of appeal therefore fails.

Issue 3(c): Inadequate reasoning regarding Price Representations

Commission's claim

[118] The Commission's fourth cause of action concerned the Price Representations. The Commission alleged that viagogo represented that tickets were available at the

initial price shown on the ticket selection page of the website, with the existence of viagogo fees disclosed only at the bottom of that page. However:

(a) from the confirmation page to the personal details page, viagogo represented that the initial price was the ticket price, stated "Not included: Handling Fee, GST and Booking Fee", but did not disclose the amount of those fees;

(b) on the delivery method and payment method pages, viagogo disclosed the initial price and the amount of the delivery fee, stated "Not included: GST and Booking Fee", but did not disclose the amount of those fees; and

(c) viagogo usually disclosed the initial price and the full amount of viagogo's fees on the payment details (the third-to-last page) and details check pages (the last page), and until November 2017 (when accessing the website via a desktop or laptop) or 1 September 2019 (when accessing the website via a mobile device) viagogo disclosed the full amount of the viagogo fees on the details check page only.

[119] The Commission alleged the viagogo fees materially increased the overall price payable by consumers. It alleged that viagogo failed to adequately disclose that the price for tickets was given in a currency other than the New Zealand Dollar. It alleged that viagogo created the impression that tickets were available for purchase at the initial price, and the existence and amount of viagogo fees were not disclosed at a sufficiently early stage in the ticket purchasing process to correct the overall impression created by the Price Representations. It described the Price Representations as being a "particularly aggressive drip-pricing strategy". It said this breached ss 9, 11 and 13(g) of the Fair Trading Act.

High Court

[120] On this cause of action the Judge began by discussing the Commission's case, noting that the booking fee was substantial and the combined effect of the fees was generally to increase costs above the initial price by approximately 30 per cent. The

Judge provided two examples of this.[86] The Judge noted viagogo now disclosed the booking fee early on, and the delivery fee after the method of delivery was chosen, and no issue was taken with this current practice.[87] The Judge then set out and discussed the website pages.[88] The Judge noted that the fees were disclosed when the countdown timer ("These tickets will no longer be reserved in [time]") was well advanced. The Judge referred to Professor Slonim's evidence and the Commission's submission that the case was on all fours with *Australian Competition and Consumer Commission v AirAsia Berhad Co* and *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd.*[89]

[121] The Judge then discussed viagogo's submissions. The Judge set out viagogo's submission as to why the price and fees were sufficiently drawn to the consumer's attention.[90] The Judge next discussed viagogo's evidence that its approach prior to 1 September 2019 reflected its belief that the best customer experience would be achieved by confirming each pricing aspect when the quantum was certain. The Judge noted this was a reference to the fact the booking fee was calculated as a percentage of the ticket price. The Judge rejected this because viagogo now disclosed the amount of the fee at an early stage and there was no reason why it could not have done so prior to 1 September 2019.[91] Lastly, the Judge noted that "neither of viagogo's experts were willing to accept Professor Slonim's evidence as to the 'conditioning' effect of drip pricing on consumers".[92]

[122] The Judge then said:[93]

> [167] The Commission is correct in submitting that the overall impression created by the representations as to the price of the ticket was that it could be purchased for the initial price. The qualifying information viagogo referred to was not sufficiently prominent or proximate to nullify the risk that the consumer might be misled.

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86 At [145]–[146].
87 At [148].
88 At [149]–[156].
89 At [163], referring to *Australian Competition and Consumer Commission v AirAsia Berhad Co*, above n 70; and *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263.
90 Judgment under appeal, above n 1, at [164].
91 At [165].
92 At [166].
93 Footnotes omitted.

> [168] Given that, by displaying the price as it did, and only disclosing the fees late in the process, viagogo engaged in conduct that was likely to mislead, was liable to mislead the public as to the characteristics of the services it offered, and it also made a misleading representation in respect of the price of its services[.]
>
> [169] It is unnecessary to address the expert evidence about the effect of "drip pricing" on consumers. Suffice to say that the statements referred to above in the *AirAsia* case are apposite here and entirely consistent with Professor Slonim's evidence. In the words of *Godfrey Hirst*, consumers continued through the "marketing web", believing they were able to purchase the ticket for substantially less than was the case and, where applicable, in their local currency. That the true position was disclosed immediately before the consumer paid is irrelevant.
>
> [170] I am satisfied the Commission has established a breach of ss 9, 11, and 13(g).

Viagogo's appeal

[123] Viagogo submits that the Judge's findings erroneously failed to take into account relevant, admissible evidence led by viagogo. It says that Professor Chaudhuri raised several issues with Professor Slonim's evidence but, given the Judge's very limited reasoning, it appeared the Judge had failed to take this evidence into account.

[124] These issues with Professor Slonim's evidence were said to be that:

(a) Professor Slonim ignored the cost of searching which can have an effect on how much a customer is willing to pay for a ticket, especially customers who are short on time;

(b) Professor Slonim appeared to assume that people who stay in the buy process do so because of the sunk cost of time already invested, and there was no empirical evidence to support that view or even any kind of analysis of these potentially competing theories;

(c) faced with a purchase decision, a person is able to engage in a reasonable calculation of the benefits (the happiness the person will get) and the costs (the price the person has to pay) and the suggestion

that one can go on adding fees and that these will simply be accepted by customers assumes that the customer is not rational; and

(d) some customers may fall prey to a degree of irrationality especially where a customer may have failed to adequately assess their true willingness to pay at the outset but, at a time where customers have a large degree of experience in online transactions, it was a stretch to suggest that faced with such progressive price increases, no customer would get annoyed and simply close the browser window.

[125] Further viagogo refers to evidence that Professor Chaudhuri gave on studies carried out on customers' brain activity when paying for goods and how that would apply to customers who saw increasing prices. Viagogo says that it was improper to dismiss Professor Chaudhuri's evidence without giving any reasons for doing so. Moreover, it is said the Judge failed to take into account that the consumer was put on notice as to the existence of additional fees at every stage of the process, and determined it was irrelevant that the true position was disclosed immediately before the consumer paid for the ticket. Viagogo says that "a finding of this magnitude necessitates some explanation of why and how it has been reached".

[126] We do not accept these submissions. In the first place, it may well be that some consumers will act rationally and close the browser at the point at which they discover the final cost is more than they are willing to pay, but that does not address whether the Price Representations are misleading, or likely or liable to mislead because the full price is substantially more than the initial price and only disclosed late in the process, when the countdown timer is well advanced, and the consumer has chosen and secured a ticket subject to payment.

[127] Secondly, Professor Slonim's evidence addressed the effects of "multi-stage price increases" with reference to economic theories and analysis. This evidence included the following:

12.12 Under both a traditional economics analysis (through changing consumers' beliefs) as well as from a behavioural economics analysis (through changing consumers' beliefs, by the specific information provided, and by changing how consumers will frame the purchase

> decision), the webpages are likely to greatly increase the amount that consumers are willing to pay relative to the amount that they would have been willing to pay when they first landed on the initial Viagogo webpage.
>
> 12.13 In summary, in the Early Time Period, the initial ticket price will likely convince (or "hook") consumers (i.e. who do not anticipate significant additional fees) to start proceeding through the Viagogo webpages who would not have proceeded had they known the actual total price. By the time consumers reach the final ticket purchase confirmation webpage with all of the additional fees added, the representations throughout the Viagogo webpages will have caused consumers to be willing to pay substantially more than they would have initially.

[128] Professor Slonim went on to discuss why this was the case. Amongst other things, he discussed that the "most important behavioural economic theories that are relevant" were "the sense of ownership of the tickets increasingly becoming the status quo" and the "subsequent loss aversion of not buying the tickets". He explained the features of viagogo's webpages that shifted the consumer's initial status quo perception of not owning the tickets towards having a status quo perception of ownership of tickets as the consumer proceeded through the web pages.

[129] Professor Slonim's reply brief of evidence provided further support for his conclusions. Amongst other things, he noted the scenario where the price the consumer initially sees is materially less than the final ticket price at the end of the buying process is often called "drip pricing". He referred to:

(a) A published review that concluded that:

> Drip pricing has been shown in several experimental, theoretical and real-world contexts to lead consumers to buy more, overspend, underestimate the total price, make mistakes when searching, and be less happy with their purchases.

(b) A published paper reporting on a large-scale randomised control trial that compared the effects of a drip pricing strategy with the practice of upfront pricing that included all the fees. The author found that drip pricing caused consumers to spend about 21 per cent more and be 14 per cent more likely to complete the purchase.

[130] These papers were put to Professor Chaudhuri in cross-examination. He said he was not "that familiar" with the term drip pricing and had not read the review. He had read the paper on the large-scale trial and ultimately accepted that "people are more likely to buy with the back end feed scenario, compared with the front. That's what … these authors find, yes".

[131] The Judge had of course heard all this evidence. Indeed Professor Chaudhuri's ultimate acceptance of what the large-scale trial had found came from a question from the Judge after counsel for the Commission had attempted to have Professor Chaudhuri accept this. It is clear from the Judge's reasons that she was well aware of the difference in views of the experts about upfront pricing compared with drip pricing.[94] It is also clear that she accepted the effects of drip pricing, as discussed in the two cases she referred to which were consistent with Professor Slonim's evidence, and that these effects applied to the Price Representation.[95] The Judge's reasons were focussed on the key issues and were not inadequate for the findings she made.

[132] Lastly, we note the consumer complaint evidence provided support for the conclusion reached. Examples of that evidence included:

> Hi, Please note this is not the price we agreed to for these tickets, your website showed $ 135.36 per ticket and we have been charged $436.84 for two, We do not want these tickets please refund immediately. Bank is notified of this invalid transaction. Cheers …
>
> …
>
> Hi there I seemed to have been charged $307 dollars. The total charge should have been $218 including the booking fee?
>
> …
>
> When I purchased these tickets they were advertised in NZD at 119.00 - not n USD and not as resale tickets, I thought I was buying first allocation tickets at the 119.00 price per ticket ... you can see from my original receipt that the tickets were in NZD at 119.00 each ... I have received tickets in NZD at 89.00 ... this is bullshit and under the consumer guarantee act illegal. Never once did it mention when I purchased the tickets that one it was USD and two they were second hand tickets …

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94 See above at [122].
95 See above at [122].

…

> Hi there. The full price was not stipulated prior to purchase. There was a subsequent change in currency when I had entered NZ dollars. There was also an additional 45 dollars per ticket that was not stipulated earlier. This meant purchase price was about 50% more than when going through transaction. I would not have purchased at this price. Can I withdraw the purchase and prevent money going out please? Kind regards …

[133] This ground of appeal therefore fails.

Issue 4: Unfair contract

Commission's claim

[134] From at least 18 July 2016, at the bottom of each page on the website, it was stated that a person's use of the website constituted acceptance of viagogo's terms and conditions. A link to those terms and conditions was provided. Further, in some instances viagogo required consumers to click a tickbox confirming that they agreed to viagogo's terms and conditions. In circumstances where the tickbox did not appear, the consumer was deemed to have acknowledged and accepted viagogo's terms and conditions.

[135] Clause 1.1 of the terms and conditions applied to both buyers and sellers of tickets and "all other services" that viagogo provided.[96] The terms and conditions provided for matters such as the obligations of buyer and seller, how and when issues must be communicated to viagogo, how and when there may be a claim under viagogo's guarantee, and a clause purporting to limit viagogo's liability.

[136] The terms and conditions also included cl 7.4:

> **Governing Law**
>
> This Agreement shall be governed by and interpreted in accordance with the Swiss laws, with the exclusion of its conflict of laws rules and the provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG). All disputes arising out of or in connection with this Agreement, including disputes on conclusion, binding effect, amendment and termination, shall be resolved exclusively by the competent Courts of Geneva, Switzerland. We also have the option of taking legal action against You at Your domicile.

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[96] We do not have details of what those other services may be.

[137] The Commission contended that the "Governing Law" clause in viagogo's terms and conditions was an unfair contract term under s 46L of the Fair Trading Act. It sought a declaration to that effect.

High Court

[138] Viagogo's pleadings accepted that its terms and conditions were a "standard form contract" under s 46J of the Fair Trading Act so that s 46L applied to whether the contract was unfair.

[139] Under s 46L(1), a contract term is unfair if it:

> (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
>
> (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
>
> (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

[140] Section 46L(2) provides that in determining whether a term is unfair, the court must take into account "the extent to which the term is transparent" and "the contract as a whole".

[141] The Judge determined that the part of the Governing Law clause providing that any dispute raised by the consumer must be resolved exclusively by the courts of Geneva (the forum term) was unfair.[97] This was for the following reasons:

> (a) The term gave rise to a significant imbalance in the parties' rights and obligations and would cause detriment to the consumer if relied upon in that:[98]
>
> (i) the term gave rise to a lack of symmetry because viagogo could pursue the consumer in Geneva or the consumer's place of domicile, however the consumer could only pursue viagogo in

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97 Judgment under appeal, above n 1, at [209].
98 Fair Trading Act, s 46L(1)(a) and (c).

Geneva. But for the clause, a New Zealand consumer could seek relief in the Disputes Tribunal;[99] and

(ii) the term "tilt[ed] the parties' rights and obligations" markedly in viagogo's favour because it ruled out any prospect of litigation against it by a consumer.[100]

(b) The term was not reasonably necessary as viagogo claimed because the sum involved was likely to be modest for an event in New Zealand and any witness was likely to be local (for example, where the claim was because a consumer had been refused entry at a gate). There was no obvious reason that viagogo as a worldwide business which operated solely online could not participate whether by audiovisual link or by appointing a New Zealand representative to attend the hearing. The Disputes Tribunal could determine a dispute quickly.[101]

[142] As to the part of the Governing Law clause providing that the contract was governed by and to be in interpreted in accordance with Swiss law (the choice of law term), the Judge determined this was not an unfair term.[102] This was because there was no evidence that Swiss law was advantageous to viagogo nor disadvantageous in relation to a consumer. The starting point for a New Zealand court and tribunal would be that Swiss and New Zealand law were the same, and viagogo had the resources to adduce evidence of any material difference between Swiss and New Zealand. It was also not appropriate to declare the choice of law term unfair, because it was not clear what governing law provision would replace it.[103]

[143] The Judge granted a declaration as follows:[104]

> That the part of clause 7.4 of viagogo GmbH's terms and conditions providing that "*All disputes arising out of or in connection with this Agreement, including disputes on conclusion, binding effect, amendment and termination,*

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99 Judgment under appeal, above n 1, at [210].
100 At [211], referring to *Commerce Commission v Home Direct Ltd* [2019] NZHC 2943, [2019] 3 NZLR 904 at [37].
101 At [213]–[218].
102 At [220].
103 At [221]–[224].
104 *Commerce Commission v viagogo GmbH* [2024] NZHC 1666 at [6].

> *shall be resolved exclusively by the competent Courts of Geneva, Switzerland. We also have the option of taking legal action against You at Your domicile*" is an unfair contract term under the Fair Trading Act 1986 in so far as it applies to any contracts formed by viagogo with consumers while viagogo is carrying on business in New Zealand on the domain www.viagogo.com/nz.

Appeal and cross-appeal submissions

[144] Viagogo submits the Judge erred in finding that the forum term was unfair. The Commission cross-appeals submitting that the Judge erred in not finding the choice of law term was unfair.

[145] Viagogo says that the burden of proof under s 46L(a) and (c) of the Fair Trading Act was on the Commission to prove the forum and choice of law terms would cause a significant imbalance and detriment. It says the Commission did not adduce any evidence as to the difficulty or cost associated with commencing proceedings in Switzerland, nor as to whether it would be necessary for a consumer to engage Swiss counsel, and nor as to any material differences between New Zealand and Swiss law. It says it may well be the case that the Swiss legal system provides for quick and inexpensive resolution of small claims, and Swiss courts may be well-equipped to adjudicate disputes between international parties by hearing matters on the papers or using audiovisual conferencing. But this is unknown because there was no evidence on the point and this was not something about which the Judge could take judicial notice.[105]

[146] Viagogo accepts it has the burden under s 46L(1)(b) to show that the term is reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term. It refers to the evidence from Mr Shah, an employee of viagogo since 2006 and the appellant's director, as to viagogo's operations. This evidence was as to its international operation.[106] It does not have any physical operations or employees in New Zealand, nor does any other company associated with

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105 Referring to s 128 of the Evidence Act.

106 Viagogo was incorporated in Switzerland and has its head office in Geneva. Its sole shareholder is a company incorporated in Luxembourg, which in turn is a subsidiary of a company incorporated in the United States of America. Viagogo operates a global online platform for sporting, music and entertainment events around the world and tickets are listed in more than 49 countries. The viagogo group has offices in Ireland, Malta, New York and Los Angeles, and some of its customer services are outsourced to call centres in Nicaragua, the Philippines and Romania.

viagogo. In light of the international breadth of its operations, viagogo says it has legitimate interests in not having to conduct litigation across multiple jurisdictions with coordination and time zone difficulties, and different approaches to rules and procedures.

[147] However, in what was described by the Commission as a 180-degree turnaround from the way viagogo's position was advanced in the High Court, viagogo accepted in this Court that, as it has chosen to operate in New Zealand, it must comply with New Zealand legislation. It says the Governing Law clause cannot and does not have the effect of contracting out of either the Fair Trading Act or the Consumer Guarantees Act and nor could it contract out of the Disputes Tribunal Act 1988.[107] It says this means that Swiss law would not apply to claims under these Acts and New Zealand consumers were not required to bring their claim in Switzerland. It therefore submitted that in relation to both forum and choice of law there was no significant imbalance between the parties' rights nor detriment to New Zealand consumers.

[148] As a result of viagogo's new position, an issue now before us is whether the Governing Law clause is an unfair contract term because there is no mention in the clause that claims by New Zealand consumers under the Fair Trading Act or the Consumer Guarantees Act are not excluded by the clause, nor that the Disputes Tribunal's jurisdiction is not excluded for New Zealand consumers. The Commission submits that the clause, which makes no mention of these matters, would have a chilling effect on a consumer and it is not necessary to have evidence of this because it is obvious.

Assessment

[149] Although the Governing Law clause also applies to sellers and all other services provided by viagogo, for the purposes of whether it is an unfair contract term under s 46L our focus is on New Zealand consumers buying tickets on the New Zealand viagogo platform. We do not have any evidence from viagogo as to

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[107] Referring to Fair Trading Act, s 5C; Consumer Guarantees Act 1993, s 43; and Disputes Tribunal Act 1988, s 16.

which kinds of claims it receives from buyers, whether from New Zealand or elsewhere. However, potential claims consumers might make include a claim under the Fair Trading Act, the Consumer Guarantees Act or for breach of contract.[108] It is difficult to envisage a realistic tort claim given the clause in the terms and conditions limiting liability to "unlawful intent" or gross negligence and capping the loss.[109]

[150] We consider the Commission was not required to adduce evidence of the difficulties or cost associated with bringing a claim in Geneva subject to the law of Switzerland. This is supported by the decision of the High Court of Australia in *Karpik v Carnival plc* in respect of the comparable provision in Australian law on which the Fair Trading Act unfair contract terms are modelled.[110]

[151] *Karpik* concerned a class action over a cruise ship voyage from Sydney that was struck by an outbreak of COVID-19, as a result of which the voyage was cut short and some passengers died. The class claimed in tort for loss or damage suffered by passengers or their relatives. About a quarter of the passengers were bound by Princess Cruise Lines Ltd's "US Terms and Conditions". Those terms and conditions provided the agreement was governed by United States law under the exclusive jurisdiction of the Californian courts, and prohibited passengers from joining a class action. Princess Cruise Lines Ltd sought to rely on the class action prohibition in respect of those passengers.

[152] The Court found that the class action prohibition was an unfair contract term. In doing so, as to whether the term caused a significant imbalance in the parties' rights under the contract, it said:

> [54] It can be accepted that the class action waiver clause did *not* impede or affect the *existence* of Mr Ho's individual right to sue, or his *capacity* to

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108 We did not receive submissions on the kind of claim that might be made under the Consumer Guarantees Act but the guarantee as to fitness for a particular purpose under s 29 might possibly have application.

109 A clause in the terms and conditions limited viagogo's liability to "unlawful intent" or gross negligence and capped its liability to the lesser of the ticket value or CHF 300 (that is, around NZD 555 at the time of the High Court judgment).

110 *Karpik v Carnival Plc* [2023] HCA 39, (2023) 280 CLR 640 [*Karpik* (HCA)]. The comparable provisions are found in the Australian Consumer Law (ACL) at sch 2 to the Competition and Consumer Act 2010 (Cth). See the Consumer Law Reform Bill 2011 (287-2) at 4-5 where the select committee noted the provisions in the New Zealand legislation reflected the "essential features of the Australian Consumer Law provisions relating to unfair contract terms".

> exercise that right. But the class action waiver clause 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. Mr Ho paid a ticket price of CAD1,796.17 for the voyage. The cost of commencing and prosecuting a typical claim arising out of the 13-day cruise holiday, brought as an individual proceeding, may well not be economically viable. This is so regardless of the individual circumstances of Mr Ho and the nature of his particular claims. The relevant inquiry in s 24(1)(a) is whether the term "would cause a significant imbalance in the parties' rights and obligations arising under the contract" (being a standard form contract), not whether a particular party is personally able to cope with such an imbalance. And the answer is that it did.

[153] We accept the Commission's submission that the same point applies here. In theory a consumer could go to Geneva and sue viagogo under Swiss law. However, the clause has the effect of preventing or discouraging consumers from doing so because the cost would be uneconomical. That is a matter which does not require evidence, just as the High Court of Australia did not need evidence of this in Mr Ho's case. It is a matter of common sense given the cost of event tickets relative to the potential cost of pursuing a claim in Geneva under Swiss law. A potential claimant would not necessarily consider the possibility of remote attendance, let alone investigate its possibility nor incur the expense of investigating the protections under Swiss law for a claim. The substantial imbalance arises because New Zealand consumers will in effect have unenforceable rights against viagogo. It is difficult to envisage what claims viagogo might have against New Zealand consumers, but whatever they might be, it does not face the same practical barriers in enforcing its rights.

[154] Does it make a difference that New Zealand consumers may be able to bring their claim in New Zealand? This kind of clause is subject to a New Zealand court's discretion not to give effect to the choice of forum in an appropriate case.[111] It is also subject to whether a New Zealand court would find that the proper law of the contract

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[111] A court may refuse to give effect to a choice of forum clause where there is "strong cause" or "exceptional circumstances"; for example, where it can be shown that the clause is inconsistent with a public policy, the protection of which is so important that it must trump the parties' right to freedom of contract: see Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [2.399] and following.

is New Zealand law.[112] Indeed the Commission submits that it is hard to imagine the relevant law for consumers on the New Zealand viagogo website would be other than New Zealand law given the vast majority of sales were to New Zealand consumers for events in New Zealand. This kind of clause is also subject to the laws of New Zealand that have territorial reach to an international company which does business here. Viagogo correctly accepts that the Fair Trading Act and the Consumer Guarantees Act will apply in respect of its business in New Zealand.[113]

[155] A recent decision of the Full Court of the Federal Court of Australia is relevant on this point. In *Australian Securities and Investments Commission v HCF Life Insurance Co Pty Ltd*, the respondent's terms for life insurance adopted a definition of "pre-existing condition" that excluded cover where a medical practitioner was of the opinion that signs or symptoms of the relevant condition existed before the inception of the policy.[114] The terms did not refer to a provision in the Insurance Contracts Act 1984 (Cth) that prevented an insurer relying on a pre-existing condition exclusion where the insured was not aware, and a reasonable person could not be expected to have been aware of, the condition at the time the contract was entered into.

[156] At trial, Jackman J found the term was misleading because it purported to be an "an accurate, complete and unqualified statement of the circumstances in which benefits will not be payable to a consumer by reason of a pre-existing condition, whereas in fact s 47(2) of the [Insurance Contracts Act] renders the Pre-Existing Condition Terms partially unenforceable".[115] The Judge considered this Insurance

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112 Where the parties have selected the law governing the contract, it will usually be given effect by New Zealand courts. But the common law rules leave scope for a nuanced approach to party autonomy that may consider the justice and fairness of the choice. See Hook and Wass, above n 111, at [6.11] and following.

113 Fair Trading Act, ss 3 and 5C; Consumer Guarantees Act, s 43 and see *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647 at [64] stating: "Reading the [Consumer Guarantees Act] as a whole, the relevant territorial connecting factor is in our view the supply of goods in New Zealand. Where goods have been supplied in New Zealand, the Act attaches certain consequences to that supply, both for the immediate supplier and for certain other businesses. It is not accurate to describe the availability of relief in respect of a supply of goods to a consumer in New Zealand against a person outside New Zealand as an 'extraterritorial' application of the Act. Rather, the application of the Act turns on a relevant supply taking place in New Zealand."

114 *Australian Securities and Investments Commission v HCF Life Insurance Co Pty Ltd* [2026] FCAFC 81 [*HCF* Full Court judgment].

115 *Australian Securities and Investments Commission v HCF Life Insurance Co Pty Ltd* [2024] FCA 1240 [*HCF* first instance judgment] at [119].

Contracts Act provision ameliorated the imbalance under a statutory provision in the same terms as s 46L of the Fair Trading Act.

[157] On appeal, the Full Court accepted that the mismatch between the pre-existing condition term and the Insurance Contracts Act "does not bear on whether the [terms] would in fact put consumers at a 'practical, substantive disadvantage' in their potential decisions as to whether to make or persist with a claim".[116] The Court also noted that the burden was on the Australian Securities and Investments Commission to prove that the terms would cause a significant imbalance. In fact, the evidence was that at all times the insurance company complied with s 47 of the Insurance Contracts Act and that "policy holders tend to claim on policies" even when aware of policy conditions which say they are not eligible, and even when unaware of their eligibility to claim benefits.[117]

[158] The Court said:

> [40] It follows that while it may be accepted that a misleading term can, at a theoretical level, substantively impact the equilibrium of party rights and obligations and effect or exacerbate imbalance, this is not such a case. In this regard the observations in *Karpik* at [54][118] relied on by [the Australian Securities and Investments Commission (ASIC)] are not analogous. There, as the respondent submits, a real practical effect of the relevant clause was to discourage passengers from vindicating their legal rights where, compared to the cost of the cruise, commencing an individual prosecution would obviously be uneconomical. By contrast, in this case, while there was a theoretical possibility that the Pre-Existing Condition Terms might have dissuaded some consumers from making or persisting with claims that the respondent would have been obliged to pay, on the evidence that possibility did not rise so high as to tilt the parties' rights and obligations under the contract significantly in favour of the respondent.
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> …
>
> [43] … there is no "significant imbalance in the parties' rights and obligations arising under the contract" because the alleged "practical disadvantage" identified by ASIC rose no higher than a theoretical possibility.
> …

[159] We consider the present case is more similar to *Karpik* than to *HCF*. It is obvious without evidence on the point that the Governing Law clause would deter

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116 *HCF* Full Court judgment, above n 114, at [38].
117 At [39].
118 See *Karpik* (HCA), above n 110, at [54] as quoted above at [152].

New Zealand consumers, who have purchased a ticket to a New Zealand event, from bringing a claim against viagogo. There is nothing in the clause to alert a consumer to the law concerning when a Governing Law clause will be given effect, nor to the fact that the clause does not exclude a Fair Trading Act or Consumer Guarantees Act claim. Nor is there anything to alert them to the possibility that viagogo might submit to the jurisdiction of the Disputes Tribunal. There is no evidence from viagogo that it does submit to small claims courts in local jurisdictions. On its face, the clause gives rise to practical barriers that give rise to a significant imbalance of consumers' rights compared with viagogo's rights.

[160] In respect of the detriment requirement, the High Court of Australia said in *Karpik*:[119]

> [57] The third element requires the court to consider whether, if applied or relied upon, the clause would cause *detriment* to Mr Ho. It was for Mr Ho to establish whether the term would cause detriment to him if the term were to be applied or relied on. As has been noted, more than a hypothetical case is required, although proof of actual detriment or that a term has been enforced is not necessary. The detriment is not limited to financial detriment; it extends to other forms of detriment that would affect the party disadvantaged by the term's practical effect. In sum, there must be some detriment. …

[161] In that case, the effect of the class action waiver clause was to deny the claimant the benefits of pt IVA of the Federal Court of Australia Act 1976 (Cth) which provided for representative proceedings to be brought. In the present case, without the benefit of the "180-degree turnaround", the Judge considered the effect of viagogo's Governing Law clause was to deprive a consumer of access to the Disputes Tribunal for its claim. If Swiss law and the courts of Geneva provide for a small claims court similar to the Dispute Tribunal that enables remote appearance, there is nevertheless detriment in that the clause is likely to deter a consumer from bringing a claim because of the apparent costs of pursuing a claim in Geneva under Swiss law. That deterrence would not arise if the Governing Law clause was clear that mandatory local laws applied to claims and viagogo would submit to the local law's jurisdiction in respect of such claims.

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[119] Footnotes omitted.

[162] In respect of whether viagogo had proven that the Governing Law clause was reasonably necessary in order to protect its legitimate interests, viagogo relies on three Australian authorities in support of its position. The first of these is a first instance decision in *Gonzalez v Agoda Company Pte Ltd*.[120] It involved a claim for personal injury suffered by the plaintiff at her hotel accommodation in Paris, France. She had booked the accommodation through Agoda's website which enabled bookings to be made at hotel accommodation around the world. Agoda was incorporated in Singapore and all its staff were in Singapore.

[163] A clause in Agoda's terms and conditions provided that its services were governed by Singapore law and the courts of Singapore had exclusive jurisdiction over any dispute. The plaintiff filed her claim in New South Wales Supreme Court and Agoda applied to stay the claim on the basis of this clause. Although the Judge declined to make a conclusive decision about this, the Judge said:

> [126] Separately, I do not accept (on the evidence placed before me) that there is anything unfair about an international corporation seeking to protect itself from claims being litigated in the courts of countless countries applying countless different substantive and procedural laws. And I say that appreciating that there are shades of differences in the meaning of the concept of "unfairness" contained in the [Australian Consumer Law], and the Contracts Review Act. In other words, I do not believe that I should approach the question on the basis that the exclusive jurisdiction is void for unfairness.

[164] This was somewhat qualified by the Judge's later comment that, had he found that he did have jurisdiction, he would not have summarily dismissed the Australian Consumer Law claim on the basis it was doomed to fail.[121] Nevertheless the view expressed in the quoted paragraph above has been followed by the next two decisions relied on by viagogo.

[165] The next decision is a first instance decision of the Federal Court of Australia in *Dialogue Consulting Pty Ltd v Instagram Inc.*[122] Dialogue was an Australian company that provided to its clients a social media management tool for publishing a client's content on Instagram. It sought injunctive relief giving it access to Instagram. Instagram had denied access because it said Dialogue was "scraping" (accessing and

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120 *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133.
121 At [161].
122 *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846, (2020) 291 FCR 155.

collecting user data) in breach of Instagram's terms of use. Those terms of use included an agreement to arbitrate disputes although this was subject to several exclusions including a consumer's local "small claims" court. A consumer could also opt out of the arbitration agreement if they did so within a specified time period. Disputes were to be resolved exclusively in California and the terms of use were governed by the laws of California.

[166] The Court dismissed Dialogue's claim that the arbitration clause was an unfair term. Dialogue had not established that it caused a significant imbalance because the arbitration provision was symmetric (applying equally to both parties). Further, Instagram had satisfied its burden of showing a legitimate interest because:

> [353] In *Gonzalez* it was recognised that the avoidance of litigation in multiple jurisdictions is a legitimate business interest worthy of protection, and that inconvenience and cost alone are not likely to be sufficient to establish that submitting to a foreign jurisdiction would be unfair. …
>
> [354] In the present case Instagram has operated globally since its launch on 6 October 2010. The number of Instagram users has increased steadily to date. As at January 2014, only approximately 2% of Instagram's 199.4 million monthly active users were located in Australia. And Dialogue can be taken to have known all of this. As in *Gonzalez*, the avoidance of litigation in multiple jurisdictions around the world is a legitimate business interest worthy of protection. In my view and consistently with the protection of party autonomy and freedom of contract, the arbitration agreement here should be recognised and enforced.
>
> [355] Dialogue asserts that the arbitration agreement is not reasonably necessary to protect the legitimate interests of Instagram, LLC because the Facebook entities have officers in several jurisdictions and have had the resources to participate in the present litigation in Australia. But this is not the relevant test. At the time the arbitration agreement was formed, Instagram, LLC had a legitimate interest in avoiding litigation in multiple jurisdictions around the world, and enabling a more efficient way to manage disputes with users.

[167] The third case relied on by viagogo is the first instance decision in *Karpik v Carnival plc.*[123] Under the cruise line's agreements New South Wales was the exclusive jurisdiction for Australian and New Zealand residents, England was the non-exclusive jurisdiction for United Kingdom residents and California was the jurisdiction for everyone else, including Mr Ho who resided in Canada. The Judge referred to *Gonzalez* as recognising that avoiding litigation in multiple jurisdictions

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123 *Karpik v Carnival plc* [2021] FCA 1082, (2021) 157 ACSR 1.

was a legitimate interest worthy of protection for an international corporation. Further, there was nothing illegitimate in the fact that more than one jurisdiction was provided for in *Karpik* in the context of a contract intended to apply to passengers all over the world.[124] This conclusion was not appealed.

[168] In light of these authorities, we accept that an international company, such as viagogo, with worldwide operations can have legitimate interests in a forum and choice of law clause. However, for the clause to be "reasonably necessary" to protect those legitimate interests, it must be asked whether a less restrictive clause would sufficiently protect those legitimate interests without causing the significant imbalance and detriment that the Governing Law clause does.

[169] As was noted by the High Court in *Karpik*, the explanatory memorandum to the Bill introducing the provision stated that it requires:[125]

> … the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or class of consumers, and that therefore the term was "reasonably necessary".

[170] This has been described as a proportionality assessment.[126] In *HCF* it was argued that the impugned term was not necessary to protect the insurer's legitimate interests when other, non-misleading wording could have been used to the same end. The Full Court rejected this ground because other formulations, while equally practicable, "would not result in any significantly lesser burden on the consumer".[127] It said:[128]

> [W]here an impugned contractual term in this context has a purpose aligned with the protection of the legitimate interests of the party advantaged by the term, and is suitable for the achievement of that purpose as described, such a term is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the consumer.

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124 At [136].

125 *Karpik* (HCA), above n 110, at [30], citing Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (explanatory memorandum) at [5.28].

126 Peter Sise *Unfair Contract Term Laws of Australia* (LexisNexis, St Leonards, 2026) at [13.5].

127 *HCF* Full Court judgment, above n 114, at [54].

128 At [53].

[171] In this case, however, viagogo could have provided a transparent Governing Law clause providing that the enforceability of the clause was subject to mandatory laws that applied in a buyer's jurisdiction. As we have noted, viagogo now accepts, through its counsel's submissions, that it is subject to rights that New Zealand consumers have under statute.

[172] Viagogo says this is effectively stated in its terms and conditions, which can be accessed on its website's FAQ (frequently asked questions) page. This page is in turn accessed from the "Help Centre" page of its website. There are two references in those terms and conditions that specifically acknowledge other laws may apply.

[173] The first is in cl 6.1, under the heading "No Warranty", which provides:[129]

> Except for the express warranties stated in this Agreement, We provide the software, Site and Services on an "as is" basis and "as available" basis without any warranties of any kind. We make no warranty with respect to the software, tickets, events, and services provided on the Site, or that Sellers or Buyers will perform as promised, and We expressly disclaim all such warranties, whether express, statutory or implied, including without limitation any warranties of quality, title, non-infringement of third party rights or fitness for a particular purpose. *Some jurisdictions do not allow exclusions of implied warranties or limitations on how long an implied warranty lasts, so the above exclusion may not apply to you*.

[174] The second is under cl 6.2, headed "Waiver of Consequential Damages; Liability Limit", which provides:

> Our liability shall be limited to unlawful intent and gross negligence. Liability, irrespective of legal grounds for indirect damages or consequential damages (including without limitation loss of profit or unrealized anticipated savings, costs You incur if you purchase tickets from another Seller or other third party in replacement for tickets you were unable to purchase on the Site, or costs incurred to You as a result of the postponement of an event), or any damages whatsoever resulting from loss of data shall be excluded. *The exclusions and limitations of viagogo's liability shall not apply in the case of death, physical injury and impairment to health and in the case of mandatory statutory regulations*. In case the exclusion of liability for slight or ordinary negligence or for indirect damages or consequential damages were held invalid or unenforceable, Our liability shall be limited to the lesser of (a) CHF 300, and (b) the total value of all tickets and other items You bought and/or sold via the Site during the action allegedly giving rise to liability

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[129] Emphasis added.

[175] For completeness, we also note that cl 7.5, headed "Miscellaneous", provides that the terms and conditions constitute the entire agreement but that:

> … If any provision of this Agreement is held to be invalid or unenforceable under any circumstances, its application in any other circumstances and the remaining provisions of this Agreement shall not be affected. …

[176] While these provisions suggest viagogo understands that the laws of a local jurisdiction in which it operates may affect the enforceability of its terms and conditions, they are not directed to whether a consumer can bring a claim against viagogo under a statute that applies in the consumer's jurisdiction. Nor do they say that viagogo will submit to the jurisdiction where such statutory right arises. It is far from clear that viagogo would submit to a consumer's claim in the Disputes Tribunal in New Zealand, given the difficulties that arose when the Commission sought to serve viagogo with its statement of claim in this proceeding.[130]

[177] We conclude that the Governing Law clause (both as to its forum and choice of law terms) is an unfair contract term under s 46L. Its unfairness arises from its lack of transparency as to claims that New Zealand consumers have under New Zealand's local laws. That lack of transparency gives rise to the likely prospect that New Zealand consumers will not pursue any claim they would otherwise have under the Fair Trading Act in the Disputes Tribunal in New Zealand. This deterrence would not occur if the Governing Law clause was clear that mandatory local laws applied to claims and viagogo would submit to the local jurisdiction in respect of any such claim. This lack of transparency gives rise to a substantial imbalance in the parties' rights, causes detriment to consumers, and is not reasonably necessary to protect viagogo's legitimate interests.

Result

[178] The appeal is dismissed.

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[130] Viagogo declined to accept service through its New Zealand lawyers and insisted that the Commission serve the proceedings at its headquarters in Switzerland. The Commission had to translate the proceedings and arrange service through diplomatic channels: see *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [2]. Initially viagogo foreshadowed a protest to jurisdiction but ultimately abandoned that protest.

[179] The cross-appeal is allowed.

[180] The parties are invited to provide a joint memorandum on the terms of the declaration, to replace the declaration granted by the High Court, in light of this Court's judgment. If they are unable to agree the terms of a joint memorandum within **28 days** of the date of this judgment, they are to provide their respective positions on the appropriate wording within the same timeframe.

[181] The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

Solicitors:
MinterEllisonRuddWatts, Auckland for Appellant
Meredith Connell, Auckland for Respondent