



Court of Appeal  
Supreme Court

New South Wales

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Case Name: Scenic Tours Pty Ltd v Moore

Medium Neutral Citation: [2018] NSWCA 238

Hearing Date(s): 14, 15, 16, 17 May 2018

Decision Date: 24 October 2018

Before: Payne JA at [1];  
Sackville AJA at [2];  
Barrett AJA at [410]

Decision:

1. Grant the appellant (Scenic) leave to appeal.
2. Direct Scenic to file a notice of appeal in the form of the draft amended notice of appeal within seven days.
3. Allow the appeal in part.
4. Set aside Order 1 made by the primary Judge on 15 November 2017.
5. The respondent's (Mr Moore) claim for damages for disappointment and distress pursuant to s 267(4) of the ACL be dismissed.
6. Direct that on the further hearing of the matter before the primary Judge, his Honour determine Mr Moore's claim for compensation for reduction in value of the services pursuant to s 267(3)(b) of the ACL in conformity with these reasons for judgment.
7. Set aside Order 2 made by the primary Judge on 15 November 2017.
8. The Group Members' claims for damages for disappointment and distress pursuant to s 267(4) of the ACL be dismissed.
9. Direct the parties to file within fourteen days agreed Common Questions and Answers thereto that give effect to these reasons for judgment, insofar as they address the claims of Group Members to compensation and damages by reason of Scenic's breaches and alleged breaches of the Consumer Guarantees.

10. In the absence of agreement, direct that
  - (a) Scenic file within 14 days its proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length; and
  - (b) Mr Moore file within a further 14 days his proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length.
11. Set aside Order 2 made by the primary Judge on 31 August 2017.
12. Order that the costs of the proceedings in the Common Law Division be determined by the primary Judge.
13. Order that Mr Moore pay 50 per cent of Scenic's costs of the application for leave to appeal and of the appeal.
14. If Scenic seeks costs orders other than Orders 11, 12 and 13, it should file and serve written submissions as to costs within 14 days, such submissions not to exceed five pages in length.
15. If Mr Moore seeks costs orders other than Orders 11, 12 and 13 or if he wishes to reply to any submissions on costs made by Scenic, he should file and serve written submissions within 28 days, such written submissions not to exceed five pages in length.
16. If Scenic does not file written submissions seeking a variation to Orders 11, 12 and 13, it should file and serve written submissions in reply to any submissions by Mr Moore within a further 14 days.

Catchwords:

REPRESENTATIVE PROCEEDINGS – representative proceedings brought by Plaintiff on behalf of passengers (Group Members) who paid for and travelled on European river cruises supplied by the defendant – a number of the cruises were seriously disrupted by high water levels on the rivers – Plaintiff seeks compensation for loss of value and damages for disappointment and distress for himself and Group Members – whether proceedings satisfactorily identified common questions of law or fact

CONSUMER PROTECTION – Plaintiff relies on the Defendant's failure to comply with the Consumer

Guarantees in ss 60 and 61 of the Australian Consumer Law (ACL) – whether the “services” to be provided by the Defendant for the purposes of the Consumer Guarantees were co-extensive with the defendant’s contractual obligations – whether services included provision of pre-embarkation information to passengers as to river conditions – whether the services provided by the defendant on the cruises were fit for the particular purpose for which Plaintiff and Group Members acquired them (ACL s 61(1)) – whether the services were not of a nature and quality as could reasonably be expected to achieve the result Plaintiff and Group Members wished the services to achieve (ACL s 61(2)) – whether primary Judge correctly applied the test for assessing compensation for lost value (ACL s 267(3)(b))

DAMAGES – whether Plaintiff and Group Members precluded from claiming damages for disappointment and distress by s 16 of the Civil Liability Act 2002 (NSW) (Civil Liability Act) – effect of s 275 of the ACL in picking up and applying the Civil Liability Act as a surrogate federal law – whether s 16 of the Civil Liability Act capable of applying to claims for non-economic loss where the claims arise from conduct outside Australia

Legislation Cited:

Acts Interpretation Act 1901 (Cth)  
Australian Consumer Law (Sch 2, Competition and Consumer Act 2010 (Cth)), ss 60, 61  
Australian Constitution  
Competition and Consumer Act 2010 (Cth)  
Judiciary Act 1903 (Cth)  
Trade Practices Act 1974 (Cth)  
Trade Practices Amendment Act 1977 (Cth)  
Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)  
Trade Practices Revision Act 1986 (Cth)  
Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth)

Civil Liability Act 2002 (NSW)  
Civil Procedure Act 2005 (NSW)  
Contracts Review Act 1980 (NSW)  
Interpretation Act 1987 (NSW)

Professional Standards Act 1994 (NSW)  
Sale of Goods Act 1923 (NSW)  
Supreme Court Act 1970 (NSW)

Supreme Court Act 1986 (Vic)

Consumer Guarantees Act 1993 (NZ)  
Sale of Goods Act 1893 (UK)

Trade Practices Amendment (Australian Consumer  
Law) Bill (No 2) 2010 (Cth)

Cases Cited:

Adamson v New South Wales Rugby League Ltd  
(1991) 31 FCR 242; [1991] FCA 425  
Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251;  
[2005] HCA 38  
Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018]  
FCAFC 93  
Austral Pacific Group Ltd (In Liquidation) v Airservices  
Australia (2000) 203 CLR 136; [2000] HCA 39  
Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387;  
[1933] HCA 35  
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd  
(2001) 117 FCR 424; [2001] FCA 1833  
Childs v Scenic Tours Pty Ltd [2014] NSWCATCD 128  
CSL Australia Pty Ltd v Formosa [2009] NSWCA 363;  
(2009) 261 ALR 441  
David Jones Ltd v Willis (1934) 52 CLR 110; [1934]  
HCA 47  
Dwyer v Calco Timbers Pty Ltd (2008) 234 CLR 124;  
[2008] HCA 13  
E v Australian Red Cross Society (1991) 31 FCR 299;  
[1991] FCA 603  
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007)  
230 CLR 89; [2007] HCA 22  
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22  
Graham Barclay Oysters Pty Ltd v Ryan (2000) 102  
FCR 307; [2000] FCA 1099  
Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49;  
[1935] UKPCHCA 1  
Henry Kendall & Sons v William Lillico & Sons Ltd  
(subnom Hardwick Game Farm v Suffolk Agricultural  
Poultry Producers Association) [1969] 2 AC 31  
House v King (1936) 55 CLR 499; [1936] HCA 40

Insight Vacations Pty Ltd v Young (2010) 78 NSWLR 641; [2010] NSWCA 137  
Insight Vacations Pty Ltd v Young (2011) 243 CLR 149; [2011] HCA 16  
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503; [2000] HCA 36  
Kay's Leasing Corporation Pty Ltd v Fletcher (1964) 116 CLR 124; [1964] HCA 79  
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12  
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 155; [2007] HCA 61  
Ku-ring-gai Council v Chan [2017] NSWCA 226; 224 LGERA 339  
Lloyd v Scenic Tours Pty Ltd [2010] NSWCTTT 591  
Macleod v Australian Securities and Investments Commission (2002) 211 CLR 287; [2002] HCA 37  
Merck Sharp & Dohme (Aust) Pty Ltd v Peterson [2009] FCAFC 26  
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30  
Moore v Scenic Tours Pty Ltd [2015] NSWSC 1777  
Moore v Scenic Tours Pty Ltd (No 2) [2017] NSWSC 733  
Moore v Scenic Tours Pty Ltd (No 3) [2017] NSWSC 1555  
Motorcycling Events Group Australia Pty Ltd v Kelly (2013) 86 NSWLR 55; [2013] NSWCA 361  
National Insurance Company of New Zealand v Espagne (1961) 105 CLR 569; [1961] HCA 15  
Northern Territory v GPAO (1999) 196 CLR 553; [1999] HCA 8  
Obeid v Australian Competition and Consumer Commission [2014] FCA 839  
Obeid v Australian Competition and Consumer Commission (2014) 226 FCR 471; [2014] FCAFC 155  
Old UGC, Inc v Industrial Relations Commission (NSW) (2006) 225 CLR 274; [2006] HCA 24  
Perisher Blue Pty Ltd v Nair-Smith (2015) 90 NSWLR 1; [2015] NSWCA 90  
Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [2010] FCA 180  
R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, (Australia) (1977) 137 CLR

545; [1977] HCA 34  
Redding v Lee (1983) 151 CLR 117; [1983] HCA 16  
Robinson Helicopter Company Inc v McDermott (2016)  
90 ALJR 679; [2016] HCA 22  
The National Insurance Company of New Zealand Ltd v  
Espagne (1961) 105 CLR 569; [1961] HCA 15  
Timbercorp Finance Pty Ltd v Collins (2016) 259 CLR  
212; [2016] HCA 44  
United Voice v Restaurant and Catering Association of  
Victoria (2014) 226 FCR 255; [2014] FCAFC 121  
Wallis v Downard-Pickford (North Queensland) Pty Ltd  
(1994) 179 CLR 388; [1994] HCA 17  
Wanganui-Rangitikei Electric Power Board v Australian  
Mutual President Society (1934) 50 CLR 581; [1934]  
HCA 3  
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9

Texts Cited:

Commonwealth Consumer Affairs Advisory Council,  
Consumer Rights: Reforming Statutory Implied  
Conditions and Warranties (Final Report 2009)

Commonwealth House of Representatives,  
Parliamentary Debates (Hansard), 17 March 2010

M Bridge, Benjamin's Sale of Goods (10th ed 2017,  
Sweet and Maxwell)

M Davies, A Bell and P Le G Brereton, Nygh's Conflict  
of Laws in Australia, (9th ed 2014, LexisNexis  
Butterworths)

M Harding and I Malkin, "The High Court of Australia's  
Obiter Dicta and Decision-Making in Lower Courts"  
(2012) 34 Syd L Rev 239)

Practice Note SC Gen 17

Category:

Principal judgment

Parties:

Scenic Tours Pty Ltd (Appellant)  
David Moore (Respondent)

Representation:

Counsel:  
Mr DL Williams SC / Mr DS Weinberger (Appellant)  
Mr A Abadee / Mr T Liu (Respondent)

Solicitors:

SWS Lawyers (Appellant)  
Somerville Legal (Respondent)

File Number(s): 2017/292822

Decision under appeal:

Court or Tribunal: Supreme Court of New South Wales

Jurisdiction: Common Law

Citation: [2017] NSWSC 733

Date of Decision: 31 August 2017

Before: Garling J

File Number(s): 2014/223271

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

## **HEADNOTE**

**[This headnote is not to be read as part of the decision]**

In early 2013 Mr Moore booked a European river cruise with Scenic Tours Pty Ltd (**Scenic**). The cruise was to depart from Amsterdam on 3 June 2013 and arrive in Budapest on 17 June 2013.

Mr Moore's cruise (Cruise 8) was seriously affected by high water levels on the Rhine and Main Rivers. As a consequence, passengers on Cruise 8 experienced substantial disruptions to their scheduled itinerary. Among other problems, passengers were required to spend many hours on buses travelling from place to place rather than cruising along the river system on a single "luxury" vessel.

Similar although not identical problems affected a number of other European river cruises conducted by Scenic or associated entities at about the same time.

Mr Moore commenced representative proceedings pursuant to ss 157 and 158 of the *Civil Procedure Act 2005* (NSW) on behalf of himself and persons who booked and paid for 23 river cruises with Scenic (**Group Members**). The trial, however, was concerned with only 13 river cruises scheduled to embark between 19 May 2013 and 12 June 2013.

The principal contentions advanced at the trial were that Scenic supplied services to Mr Moore and each Group Member:

- without due care and skill, in contravention of s 60 of the Australian Consumer Law (**ACL**) (**Care Guarantee**);
- such that the services were not fit for the purpose for which Mr Moore and each Group Member acquired them, in contravention of s 61(1) of the ACL (**Purpose Guarantee**); and
- such that the services were not of a nature and quality as could reasonably be expected to achieve the result that Mr Moore and each Group Member wished the services to achieve, in contravention of s 61(2) of the ACL (**Result Guarantee**).

(Collectively the **Consumer Guarantees**.)

In his own case, Mr Moore sought of damages or compensation by reason of Scenic's breaches of the Consumer Guarantees, as follows:

- compensation for "reduction in the value of services provided by [Scenic] below the price paid ... by [Mr Moore] for the services", pursuant to s 267(3) of the ACL; and
- damages for "loss or damage suffered by [Mr Moore] because of the failure to comply with the [statutory] guarantee", pursuant to s 267(4) of the ACL.

In Mr Moore's own case, the primary Judge found that Scenic:

- failed to comply with the Care Guarantee because Scenic, exercising due care and skill, should have recognised by 2 June 2013 (the day before Cruise 8

was scheduled to commence) that the river conditions did not enable the cruise to take place as promised and should have cancelled the cruise at that point;

- failed to comply with the Purpose Guarantee because the services it supplied to Mr Moore were not reasonably fit for the particular purpose he had made known, namely that he wished to take Cruise 8 and enjoy it together with all the services Scenic said that it would provide; and
- failed to comply with the Result Guarantee by not providing services to Mr Moore of a nature and quality that might reasonably have been expected to achieve the result that he desired to achieve, namely to cruise in the same cabin on the same ship for the entirety of the 15 day itinerary period in comfort while experiencing the waterways of Europe.

The primary Judge also gave answers to a series of questions that were said to include questions common to the claims of all Group Members. In substance his Honour found that Scenic had breached the Purpose and Result Guarantees in relation to 10 of the remaining 12 cruises and had breached the Care Guarantee in relation to nine of the 12 remaining cruises.

The primary Judge found that Mr Moore was entitled to compensation and damages by reason of Scenic's breaches of the Consumer Guarantees in relation to Cruise 8. His Honour awarded Mr Moore \$10,990 as compensation under s 267(3) of the ACL for Scenic's breach of the Care Guarantee and \$2,000 as damages under s 267(4) of the ACL for Scenic's breach of the Purpose and Result Guarantees. His Honour entered judgment in Mr Moore's favour for \$16,539.85 inclusive of interest.

Scenic sought leave to appeal against the primary Judge's decision. The Court granted leave to appeal and allowed the appeal in part.

**Sackville AJA (Payne JA and Barrett AJA agreeing) held:**

(i) The "services" to be provided by Scenic, for the purposes of the Consumer Guarantees, were not co-extensive with or limited by Scenic's obligations under the contractual Terms and Conditions which bound passengers. To determine the services Scenic was to provide it is necessary to assess objectively the dealings between the supplier of services (Scenic) and the

consumer (the passenger) to determine the benefits or facilities the consumer could reasonably expect the supplier to provide in return for the price paid for the cruise: [174], [176].

(ii) The services to be provided by Scenic to Mr Moore included the benefits and facilities of Cruise 8 as set out in Scenic's brochure made available to him prior to booking Cruise 8 (**Cruise Services**): [190].

(iii) However, the primary Judge erred in finding that the services to be provided by Scenic included informing Mr Moore and other passengers **before the commencement of a cruise** of events that might have an adverse impact on the scheduled itinerary: [202].

(iv) The primary Judge correctly found that Scenic failed to comply with the Purpose Guarantee in relation to Cruise 8 because the services it provided were not reasonably fit for the particular purpose for which Mr Moore acquired the services, namely experiencing Cruise 8 in accordance with the services and itinerary published in Scenic's brochure: [226], [237].

(v) In the way the trial was conducted it was open to the primary Judge to make findings that Scenic failed to comply with the Purpose Guarantee in relation to cruises other than Cruise 8: [256], [265], [266], [267], [268], [269], [271], [272], [277], [279].

(vi) The primary Judge did not err in finding that Scenic also failed to comply with the Result Guarantee: [283].

(vii) The primary Judge erred in finding that Scenic failed to comply with the Care Guarantee by its pre-embarkation acts or omissions: [293], [294], [296].

(viii) The primary Judge did not err in finding that Scenic failed to comply with the Care Guarantee because of post-embarkation conduct in relation to four of the cruises: [298], [302], [303], [304].

(ix) The primary Judge erred in assessing compensation for Mr Moore under s 267(3)(b) of the ACL for reduction in the value of the services provided to him by reason of Scenic's failure to comply with the Consumer Guarantees. The error consisted of assessing the reduction in value of the services by reference

to subjective rather than objective considerations. Thus the question of compensation should be remitted to the primary Judge: [331], [335].

(x) The primary Judge erred in awarding damages to Mr Moore under s 267(4) of the ACL for distress and disappointment caused by Scenic's failure to comply with the Purpose and Result Guarantees. This was because s 275 of the ACL picked up and applied s 16 of the *Civil Liability Act 2002* (NSW) (***Civil Liability Act***) as a surrogate federal law. Section 16 applied to Mr Moore's claim because he sought damages for non-economic loss (within the meaning of s 16) and could not satisfy the statutory threshold for a damages claim (15 per cent of a most serious case): [364], [372], [381].

*Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16; *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; [2010] NSWCA 137 applied.

(xi) Section 16 of the *Civil Liability Act* applied notwithstanding that Scenic's contraventions of the Purpose and Result Guarantees in Mr Moore's case occurred outside Australia. There was a sufficient geographic connection with New South Wales because s 16 is expressed to apply to a claim for damages in a New South Wales court: [388]

*Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 applied.

(xii) Group Members are precluded by s 275 of the ACL and s 16 of the *Civil Liability Act* from claiming damages for distress and disappointment. Their claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL remain to be determined where a breach of the Care Guarantee has been established: [397].

(xiii) Observations on the need to identify common questions of law or fact early in representative proceedings: [405]-[409]

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## LIST OF ABBREVIATIONS

<b>1893 Act</b>	<i>Sale of Goods Act 1893 (UK)</i>
<b>1923 Act</b>	<i>Sale of Goods Act 1923 (NSW)</i>
<b>3FASC</b>	Third Further Amended Statement of Claim
<b>ACL</b>	Australian Consumer Law
<b>Brochure</b>	The brochure promoting Scenic's cruises distributed to Mr Moore and Group Members
<b>Care Guarantee</b>	The guarantee imposed on a Supplier of Services by s 60 of the ACL
<b>Civil Liability Act</b>	<i>Civil Liability Act 2002 (NSW)</i>

<b>Civil Procedure Act</b>	<i>Civil Procedure Act 2005 (NSW)</i>
<b>Competition and Consumer Act</b>	<i>Competition and Consumer Act 2010 (Cth)</i>
<b>Consumer Council</b>	Commonwealth Consumer Affairs Advisory Council
<b>Consumer Guarantees</b>	The Care, Purpose and Result Guarantees collectively
<b>Consumer Rights Report</b>	Commonwealth Consumer Affairs Advisory Council, <i>Consumer Rights: Reforming statutory implied conditions and warranties</i> (Final Report, October 2009)
<b>Cruise 1</b>	14 day "South of France River Cruise" scheduled to depart from Chalon-sur-Saône on 20 May 2013 and to arrive at Arles (on the Rhône River) on 1 June 2013
<b>Cruise 8</b>	"Jewels of Europe River Cruise" departing from Amsterdam on the <i>Scenic Jewel</i> on 3 June 2013 and arriving in Budapest on 17 June 2013
<b>David Jones</b>	<i>David Jones v Willis</i> (1934) 52 CLR 110; [1934] HCA 47
<b>Evergreen</b>	Evergreen Pty Ltd
<b>Grant</b>	<i>Grant v Australian Knitting Mills Ltd</i> (1935) 54 CLR 49; [1935] UKPCHCA 1

<b>Group Members</b>	The persons on whose behalf the representative proceedings were commenced
<b>Insight Vacations (CA)</b>	<i>Insight Vacations Pty Ltd v Young</i> (2010) 78 NSWLR 641; [2010] NSWCA 137
<b>Insight Vacations (H Ct)</b>	<i>Insight Vacations Pty Ltd v Young</i> (2011) 243 CLR 149; [2011] HCA 16
<b>Interpretation Act</b>	<i>Interpretation Act 1987</i> (NSW)
<b>Judiciary Act</b>	<i>Judiciary Act 1903</i> (Cth)
<b>Mr Moore</b>	The respondent
<b>National Insurance v Espagne</b>	<i>National Insurance Company of New Zealand v Espagne</i> (1961) 105 CLR 569; [1961] HCA 15
<b>Notice of Appeal</b>	Scenic's Draft Amended Notice of Appeal
<b>Notice of Contention</b>	Mr Moore's Amended Draft Notice of Contention
<b>Obeid v ACCC</b>	<i>Obeid v Australian Competition and Consumer Commission</i> [2014] FCA 839
<b>Primary Judgment</b>	<i>Moore v Scenic Tours Pty Ltd (No 2)</i> [2017] NSWSC 733
<b>Purpose Guarantee</b>	The guarantee imposed on a Supplier of Services by s 61(1) of the ACL

<b>Result Guarantee</b>	The guarantee imposed on a Supplier of Services by s 61(2) of the ACL
<b>Revised EM</b>	<i>Revised Explanatory Memorandum</i> to the Treasury Legislation Amendment (Professional Standards) Bill 2004
<b>Scenic</b>	The appellant
<b>Scenic Europe</b>	Scenic Tours Europe AG
<b>Scenic Tours (No 1)</b>	<i>Moore v Scenic Tours Pty Ltd</i> [2015] NSWSC 1777
<b>Statement of Issues</b>	Issues identified in the document entitled “Amended Statement of Issues” filed in the Common Law Division proceedings on 13 May 2016.
<b>Supplementary Judgment</b>	<i>Moore v Scenic Tours Pty Ltd (No 3)</i> [2017] NSWSC 1555
<b>Supreme Court Act</b>	<i>Supreme Court Act 1970</i> (NSW)
<b>SZVFW</b>	<i>Minister for Immigration and Border Protection v SZVFW</i> [2018] HCA 30
<b>Terms and Conditions</b>	The contractual terms and conditions included in the Brochure
<b>Timbercorp</b>	<i>Timbercorp Finance Pty Ltd (in liq) v Collins</i> (2016) 259 CLR 212; [2016] HCA 44
<b>Trade Practices Act</b>	<i>Trade Practices Act 1974</i> (Cth)

## JUDGMENT

1 **PAYNE JA:** I have had the privilege of reading the decision of Sackville AJA in draft. I agree with his Honour's reasons and the orders he proposes.

2 **SACKVILLE AJA:**

### The proceedings

3 This is an application for leave to appeal from orders made by the primary Judge (Garling J) in representative proceedings brought in the Common Law Division pursuant to ss 157 and 158 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**). The proceedings were commenced by the respondent (**Mr Moore**) on behalf of himself and persons who booked and paid for 23 river cruises in Europe scheduled to take place between 10 May 2013 and 14 June 2013 (**Group Members**). The trial, however, was concerned only with 13 river cruises scheduled to embark between 19 May 2013 and 12 June 2013. The applicant (**Scenic**) operated the river cruises either by itself or through associated entities.<sup>1</sup>

4 Mr Moore, who travelled with his wife, booked a tour with Scenic that commenced in Paris on the morning of 31 May 2013. The tour included a "Jewels of Europe River Cruise" departing from Amsterdam on the *Scenic Jewel* on 3 June 2013 and arriving in Budapest on 17 June 2013 (**Cruise 8**). The scheduled route took the *Scenic Jewel* along the Rhine, Main and Danube Rivers. The route is shown on the plan reproduced at **Appendix A**.

5 Because of high water levels on the Rhine and Main Rivers, Scenic provided a different vessel for the start of Cruise 8, namely the *Scenic Ruby*. Passengers were later transferred to the *Scenic Jewel* but they experienced substantial disruptions to the scheduled itinerary. Passengers were required to spend many hours in buses on a number of days travelling from place to place, rather

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<sup>1</sup> Moore v Scenic Tours Pty Ltd (No 2) [2017] NSWSC 733 (Primary Judgment) at [3].

than cruising along the river system on board “Your luxury Scenic Tours ‘Space-Ship’”.<sup>2</sup>

- 6 Of the other 12 cruises, eleven were scheduled either to sail from Amsterdam to Budapest or on the return trip from Budapest to Amsterdam. The remaining cruise (**Cruise 1**) was a 14 day “South of France River Cruise” scheduled to depart from Chalon-sur-Saône on 20 May 2013 and to arrive at Arles (on the Rhône River) on 1 June 2013. The route for Cruise 1 is shown on the plan reproduced at **Appendix B**.
- 7 The Court was told that there were up to 1,500 passengers on the 13 cruises, all of whom are Group Members. Not all Group Members are residents of New South Wales. Some reside in other Australian States or Territories and some are resident in overseas countries. Seven passengers gave evidence in the proceedings (Mr Moore and six Group Members), of whom three were New South Wales residents and four were residents of Queensland or Victoria. As at November 2017, about 500 Group Members had retained the solicitors acting for Mr Moore.<sup>3</sup>
- 8 Mr Moore’s case, in its final form, was pleaded in the Third Further Amended Statement of Claim (**3FASC**).<sup>4</sup> He alleged that Scenic Tours contravened the statutory guarantees to consumers contained in ss 60 and 61 of the Australian Consumer Law (**ACL**)<sup>5</sup> both in relation to Cruise 8 and the other 12 cruises. In particular, Mr Moore alleged that Scenic Tours supplied services to Mr Moore and each Group Member:
- without due care and skill, in contravention of s 60 of the ACL (**Care Guarantee**);
  - such that the services were not fit for the purpose for which Mr Moore and each Group Member acquired them, in contravention of s 61(1) of the ACL (**Purpose Guarantee**); and
  - such that the services were not of a nature and quality as could reasonably be expected to achieve the result that Mr Moore and each Group Member wished

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<sup>2</sup> The description of the vessel in Scenic’s brochure entitled “Europe River Cruises & Tours: 2013-2014”.

<sup>3</sup> Moore v Scenic Tours Pty Ltd [2015] NSWSC 1777 (Scenic Tours (No 1)) at [52] (Beech-Jones J). No further information as to the retainer was provided to this Court.

<sup>4</sup> Mr Moore’s pleaded case is addressed in more detail at [53]-[62] below.

<sup>5</sup> The ACL is contained in Sch 2 to the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act). Sections 60 and 61 of the ACL are reproduced at [36] below.

the services to achieve, in contravention of s 61(2) of the ACL (**Result Guarantee**).

I refer to the three statutory guarantees collectively as the **Consumer Guarantees**.

- 9 Broadly speaking, Mr Moore claimed that Scenic breached the Care Guarantee in relation to a number of the cruises by failing to inform passengers in a timely manner of the disruptions it knew or should have known were likely to occur to each scheduled itinerary because of adverse weather and river conditions. Given the information available to Scenic, it should either have cancelled the cruise or given the passengers the opportunity to cancel.
- 10 Mr Moore's claim that Scenic breached the Purpose and Result Guarantees rested on the disparity between the services promoted and offered by Scenic to Group Members and the services actually supplied to them on the cruises. The disruptions to the cruises were so great in each case, so it was argued, that the services supplied were not reasonably fit for the purpose made known to Scenic by the Group Members (s 61(1)) and could not reasonably be expected to achieve the result the Group Members wished to achieve (s 61(2)).
- 11 In his own case, Mr Moore sought two heads of damages or compensation by reason of Scenic's breaches of the Consumer Guarantees, as follows:
  - compensation for "reduction in the value of services provided by [Scenic] below the price paid ... by [Mr Moore] for the services", pursuant to s 267(3) of the ACL;<sup>6</sup> and
  - damages for "loss or damage suffered by [Mr Moore] because of the failure to comply with the [statutory] guarantee", pursuant to s 267(4) of the ACL.
- 12 As is often the case with representative proceedings, there were disputes between the parties as to the manner in which the proceedings should be conducted. In the course of an interlocutory hearing prior to the trial, Scenic accepted that there were some questions common to all Group Members but contended that different questions arose for each of the 13 cruises and for different categories of Group Members. Scenic sought directions from the Court pursuant to s 168 of the *Civil Procedure Act*<sup>7</sup> establishing sub-groups to

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<sup>6</sup> Section 267 of the ACL is reproduced at [41] below.

<sup>7</sup> Reproduced at [32] below.

enable questions common to some but not all Group Members to be determined. This application was unsuccessful.<sup>8</sup>

- 13 The primary Judge recorded that the hearing was conducted on the basis that his Honour would determine the whole of Mr Moore’s claim and “the common issues insofar as they affected the group members’ claims, and insofar as they were common to the whole or an identifiable part of the group”.<sup>9</sup> What were said to be common issues were identified in a document filed in court on 13 May 2016, the last of the six hearing days (**Statement of Issues**). That document was subsequently amended.
- 14 The primary Judge delivered judgment on 31 August 2017. His Honour made findings as to whether Scenic had breached the statutory guarantees in relation to each of the 13 cruises. Mr Williams SC, who appeared with Mr Weinberger for Scenic, helpfully prepared a chart summarising the findings for each cruise. It is convenient to reproduce a portion of the chart here:<sup>10</sup>

N o	Cruis e Code	Star t date	Route	Consumer Guarantee breached?		
				Purp ose  s 61(1 )	Re sul t s  61( 2)	C ar e  s 6 0
1	<b>FRCR 19051 3.1</b>	19 May 201 3	Saone/R hône	<b>Y</b>	<b>Y</b>	<b>Y</b>

<sup>8</sup> Scenic Tours (No 1) at [44]. Scenic made a belated application to amend its Notice of Appeal to challenge the decision of Beech-Jones J. The application was refused: see at [80] below.

<sup>9</sup> Primary Judgment at [55].

<sup>10</sup> The names in the second column identify the passengers on various cruises who gave evidence in the Respondent’s case. As can be seen, Mr Moore adduced evidence at the trial from passengers who travelled on Cruises 1, 4, 8, 9 and 11.

	<i>Britten</i>	(em bark 20 May )				
2 .	<b>STC 20051 3.2</b>	20 May 201 3	BUD- AMS	Y	Y	N/ A
3 .	<b>EGFC 25051 3.1</b>	25 May 201 3	AMS- BUD	Y	Y	N/ A
4 .	<b>STC 27051 3.1</b> <i>Cairnc ross Holgy e</i>	27 May 201 3	AMS- BUD	Y	Y	Y
5 .	<b>STC 27051 3.2</b>	27 May 201 3	BUD- AMS	Y	Y	Y
6 .	<b>STC 29051 3.1</b>	29 May 201 3	AMS- BUD	Y	Y	Y

7 .	<b>STC 29051 3.2</b>	29 May 201 3	BUD- AMS	Y	Y	Y
8 .	<b>STC 03061 3.1</b> <i>Moore Childs</i>	3 Jun e 201 3	AMS- BUD	Y	Y	Y
9 .	<b>EGRC 08061 3.1</b> <i>Wille ms</i>	8 Jun e 201 3	BUD- AMS	Y	Y	Y
1 0 .	<b>STC 10061 3.1</b>	10 Jun e 201 3	AMS- BUD	N	N	Y
1 1 .	<b>STC 10061 3.2</b> <i>Peatti e</i>	10 Jun e 201 3	BUD- AMS	Y	Y	Y
1 2 .	<b>STC 12061 3.1</b>	12 Jun e 201	AMS- BUD	N	N	N

		3				
<b>1</b>	<b>STC</b>	12				
<b>3</b>	<b>12061</b>	Jun	BUD-	<b>N</b>	<b>N</b>	<b>Y</b>
<b>.</b>	<b>3.2</b>	e	AMS			
		201				
		3				

- 15 Care needs to be taken in interpreting this summary. For example, as will be seen, some breaches of the Care Guarantee (s 60) are said to have occurred prior to embarkation on the relevant cruise, while others are said to have occurred after embarkation. In two cases (Cruises 10 and 13) the primary Judge found that Scenic breached the Care Guarantee but also found that passengers on those cruises had not suffered any compensable loss or damage.
- 16 The chart correctly records that the primary Judge found that Scenic failed to comply with each of the three Consumer Guarantees in relation to Cruise 8, the cruise taken by Mr Moore. His Honour found that Scenic:
- failed to comply with the Care Guarantee because Scenic, exercising due care and skill, should have recognised by 2 June 2013 (the day before Cruise 8 was scheduled to commence) that the river conditions did not enable the cruise to take place as promised and should have cancelled the cruise at that point;<sup>11</sup>
  - failed to comply with the Purpose Guarantee because the services it supplied to Mr Moore were not reasonably fit for the particular purpose he had made known, namely that he wished to take Cruise 8 and enjoy it together with all the services Scenic said that it would provide;<sup>12</sup> and
  - failed to comply with the Result Guarantee by not providing services to Mr Moore of a nature and quality that might reasonably have been expected to achieve the result that he desired to achieve, namely to cruise in the same cabin on the same ship for the entirety of the 15 day itinerary period in comfort while experiencing the waterways of Europe.<sup>13</sup>
- 17 In reaching these conclusions the primary Judge rejected Scenic's contention that the "services" it supplied to Mr Moore and the Group Members were co-extensive with or delimited by the Terms and Conditions contained in the

<sup>11</sup> Primary Judgment at [652], [654], [810].

<sup>12</sup> Primary Judgment at [393], [645]-[646].

<sup>13</sup> Primary Judgment at [755], [765].

brochure issued by Scenic by which Mr Moore and the Group Members were bound. Mr Moore had pleaded that if Scenic's contention was accepted, the Terms and Conditions should be held to be unenforceable because they were "unjust" within the meaning of the *Contracts Review Act 1980* (NSW) or "unfair" within the meaning of s 24 of the ACL.<sup>14</sup> Since his Honour rejected Scenic's contention, he did not consider it necessary to deal with Mr Moore's case founded on unconscionability or unfairness.<sup>15</sup> That case is the subject of a Notice of Contention filed in this Court.<sup>16</sup>

18 His Honour found that Mr Moore was entitled to compensation and damages by reason of Scenic's non-compliance with the Consumer Guarantees.

19 In the Primary Judgment his Honour made an order in the following terms:<sup>17</sup>

"1. Judgment for [Mr Moore] against [Scenic] in the following amount:

(a) \$10,990 by way of compensation;

(b) \$2,000 by way of damages;

(c) Interest in accordance with s 100 of the *Civil Procedure Act 2005*, on the sum in (a) from 3 June 2013, and on the sum in (b) from 17 June 2013."

20 The award of \$10,990, which represented the full amount paid by Mr Moore for Cruise 8,<sup>18</sup> was made pursuant to s 267(3) of the ACL as compensation for reduction in the value of the services provided by Scenic to Mr Moore. His Honour awarded this sum as compensation for what he found was Scenic's breach of the Care Guarantee. That breach consisted of Scenic's:

"failure to provide, prior to embarkation, timely and accurate information about likely or anticipated interruption of the cruise itinerary, and either to cancel the cruise or else offer Mr Moore the opportunity to cancel the cruise".<sup>19</sup>

21 The award of \$2,000 was made pursuant to s 267(4) of the ACL as damages for Scenic's failure to comply with the Purpose and Result Guarantees. This was the full amount Mr Moore claimed as damages for "disappointment and

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<sup>14</sup> Primary Judgment at [43].

<sup>15</sup> See the answer to Question 18 in the Statement of Issues reproduced in Appendix C to this judgment.

<sup>16</sup> See at [52] below.

<sup>17</sup> Primary Judgment at [946]. On 15 November 2017 the primary Judge entered judgment for Mr Moore on his personal claim in the sum of \$16,539.85, inclusive of interest. See at [25] below.

<sup>18</sup> The total amount actually paid by Mr Moore to Scenic was greater than \$10,990 because the price included other services not in issue in the present case.

<sup>19</sup> Primary Judgment at [810].

distress". His Honour considered the amount to be "modest" and indicated that he would have assessed damages at a higher amount had Mr Moore not limited his claim to \$2,000.<sup>20</sup>

- 22 The primary Judge rejected Scenic's argument that the Court was precluded from awarding any damages to Mr Moore. Scenic submitted that s 275 of the ACL<sup>21</sup> required the Court to apply s 16 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) as a surrogate federal law. Section 16 of the *Civil Liability Act* precludes an award of damages for non-economic loss "unless the severity of non-economic loss is at least 15% of a most extreme case". The primary Judge accepted that s 16 was to be applied as a surrogate federal law but held that s 16 has no extra-territorial operation and therefore does not apply to non-economic loss sustained outside Australia.<sup>22</sup>
- 23 The primary Judge directed the parties to file short minutes of order proposing answers to "the questions agreed by the parties" in the light of the findings made in the Primary Judgment. A further hearing took place on 15 November 2017 at which the parties reached a "large measure" of agreement as to the answers.<sup>23</sup> The Statement of Issues was amended in some respects as the result of the parties' submissions at the hearing. The primary Judge then delivered an *ex tempore* judgment in which he "set out [the] questions and answers given by the Court with respect to the identified common issues".<sup>24</sup>
- 24 The Questions and Answers are contained in a lengthy document which is reproduced at **Appendix C**. The final question and answer are as follows:

**"Question 22:**

***With respect to issues 1 to 20 inclusive, are the answers common to all group members, some group members, and if so which ones, or else no group members?***

**Answer:**

Save to the extent indicated above, all of the answers to the questions are common to the claims of the group members, who resided in Australia and Vanuatu, and who contracted with the defendant. A determination has not yet

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<sup>20</sup> Primary Judgment at [918]-[920].

<sup>21</sup> Section 275 of the ACL is reproduced at [41] below.

<sup>22</sup> Primary Judgment at [942]-[943].

<sup>23</sup> *Moore v Scenic Tours Pty Ltd* (No 3) [2017] NSWSC 1555 (Supplementary Judgment) at [4].

<sup>24</sup> Supplementary Judgment at [5].

been made as to whether all of the answers to the questions are common to other passengers on the cruises who resided outside Australia and Vanuatu.”

25 The formal orders made by his Honour on 15 November 2017 included the following:

“1. On [Mr Moore’s] personal claim against [Scenic], I order there be judgment for [Mr Moore] in the sum of \$16,539.85.

2. Order that the common issues stated for determination be answered in the form of the Answers in the document described as ‘Answers to Common Issues Stated for Determination’ dated today and initialled by Garling J.”

The judgment sum included an allowance for interest.

26 The form of the answers (incorporated by reference into the orders) was evidently intended to comply with s 179 of the *Civil Procedure Act*, which provides as follows:

“A judgment given in representative proceedings:

(a) must describe or otherwise identify the group members who will be affected by it, and

(b) binds all such persons other than any person who has opted out of the proceedings under section 162.”

27 Assuming the orders made by the primary Judge stand, including the answers to the “common issues”, the outcome of the proceedings to date is as follows:

- Scenic has either not been found to have breached any of the Consumer Guarantees in relation to Cruises 10, 12 and 13 or, alternatively, the Group Members who were passengers on those cruises have been found not to have sustained any compensable loss or damage.
- Mr Moore’s claim has been resolved and final orders made in his favour.
- Insofar as the proceedings involve claims for compensation and damages arising out of Cruises 1-7, 8 (other than Mr Moore’s claim), 9 and 11, the claims remain to be determined consistently with the answers to the common questions.

28 The structure of this judgment can be discerned from the index of headings. The conclusions I have reached in relation to Mr Moore’s personal claim and the claims of the Group Members are summarised at [396]-[397] below. The orders I propose are set out at [398]-[404] below.

## **Jurisdiction**

29 The claims made by Mr Moore in the representative proceedings were founded on statutory guarantees created by a federal law (the ACL). If a party relies on

a right created or derived from a federal law there is a matter arising under a law made by the Parliament within s 76(ii) of the Constitution.<sup>25</sup> To the extent that the Court in this case might otherwise have had power to deal with the matter, that power was removed and then invested (subject to conditions) by s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). From the outset, therefore, the Court was exercising federal jurisdiction and not State jurisdiction.<sup>26</sup>

- 30 It follows that State law is displaced except to the extent that the law operates in federal jurisdiction by virtue of a law of the Commonwealth Parliament.<sup>27</sup> The laws that are relevant for this purpose are ss 79 and 80 of the *Judiciary Act*, which provide as follows:

**“79 State or Territory laws to govern where applicable**

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

...

**80 Common law to govern**

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.”

- 31 The reason that the provisions of the *Civil Procedure Act* relating to representative proceedings apply to this case is that they are picked up and applied to the Court exercising federal jurisdiction by s 79(1) of the *Judiciary Act*. However State laws may be picked up and applied as surrogate federal laws by more specific provisions such as s 275 of the ACL. It will be necessary

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<sup>25</sup> *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; [2005] HCA 38 at [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

<sup>26</sup> *Austral Pacific Group Ltd (In Liquidation) v Airservices Australia* (2000) 203 CLR 136; [2000] HCA 39 at [9] (Gleeson CJ, Gummow and Hayne JJ), at [50] (McHugh J); *CSL Australia Pty Ltd v Formosa* [2009] NSWCA 363; (2009) 261 ALR 441 at [23] per curiam.

<sup>27</sup> *CSL Australia Pty Ltd v Formosa* at [24]; *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 86 NSWLR 55; [2013] NSWCA 361 at [3] (Basten JA), at [36]-[37] (Meagher JA), at [76]-[79] (Gleeson JA).

to examine the operation of s 275 in some detail when considering the remedies available to Mr Moore for breach of the Consumer Guarantees.

## Legislation

### *Representative proceedings*

32 The statutory regime governing the institution and conduct of representative proceedings in New South Wales is in Pt 10 Div 2 of the *Civil Procedure Act*. For present purposes it is sufficient to extract the following provisions:

#### **“157 Commencement of representative proceedings**

(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person, and
  - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
  - (c) the claims of all those persons give rise to a substantial common question of law or fact,
- proceedings may be commenced by one or more of those persons as representing some or all of them.

(2) Representative proceedings may be commenced:

- (a) whether or not the relief sought:
  - (i) is, or includes, equitable relief, or
  - (ii) consists of, or includes, damages, or
  - (iii) includes claims for damages that would require individual assessment, or
  - (iv) is the same for each person represented, and
- (b) whether or not the proceedings:
  - (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or
  - (ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

#### **158 Standing**

(1) For the purposes of section 157(1)(a), a person has a sufficient interest to commence representative proceedings against another person on behalf of other persons if the person has standing to commence proceedings on the person's own behalf against that other person.

...

#### **168 Determination of questions where not all common**

(1) If it appears to the Court that determination of the question or questions common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining questions.

(2) In the case of questions common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.”

### *Competition and Consumer Act*

33 Section 131(1) of the *Competition and Consumer Act* provides that Schedule 2 applies as a law of the Commonwealth to the conduct of corporations.

Schedule 2 incorporates the ACL.

34 Section 5(1) provides that the ACL extends to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia.

35 Section 131C(1) states that Part XI (which includes s 131) is not intended to exclude or limit the concurrent operation of any law, written or unwritten, of any State or Territory.

### *Australian Consumer Law*

36 Sections 60, 61 and 64 of the ACL are in Part 3-2, Div 1. Sections 60 and 61 are in Subdiv B of Div 1. They provide as follows:

#### **“60 Guarantee as to due care and skill**

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

#### **61 Guarantees as to fitness for a particular purpose etc.**

(1) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

(4) This section does not apply to a supply of services of a professional nature by a qualified architect or engineer.”

37 The following terms relevant to ss 60 and 61 are defined in s 2 of the ACL:

“**services** includes:

(a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and

(b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or

(ii) contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

...

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

**supply**, when used as a verb, includes:

(a) in relation to goods—supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and

(b) in relation to services—provide, grant or confer;

and, when used as a noun, has a corresponding meaning, and **supplied** and **supplier** have corresponding meanings.”

38 Section 3 of the ACL defines “consumer”. It is not necessary to reproduce the definition as there is no dispute that Mr Moore and the Group Members satisfied it.

39 Section 64 of the ACL provides as follows:

**“Guarantees not to be excluded etc. by contract**

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

(a) the application of all or any of the provisions of this Division; or

(b) the exercise of a right conferred by such a provision; or

(c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.

(2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.”

40 Part 5-2 of the ACL deals with “Remedies”. Section 236(1) of the ACL provides as follows:

“(1) If:

(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.”

41 Part 5-4 of the ACL is headed “Remedies relating to guarantees”. It includes the following provisions:

**“267 Action against suppliers of services**

(1) A consumer may take action under this section if:

(a) a person (the supplier) supplies, in trade or commerce, services to the consumer; and

(b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and

(c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:

(i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or

(ii) a cause independent of human control that occurred after the services were supplied.

...

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

(a) terminate the contract for the supply of the services; or

(b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

(5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

#### **268 When a failure to comply with a guarantee is a major failure**

A failure to comply with a guarantee referred to in section 267(1)(b) that applies to a supply of services is a *major failure* if:

(a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose ...

...

#### **275 Limitation of liability etc.**

If:

(a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and

(b) the law of a State or a Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.”

42 Scenic says that the law referred to in s 275 of the ACL for the purposes of the present case is the Civil Liability Act.

## *Civil Liability Act*

43 Section 3A of the *Civil Liability Act* relevantly provides as follows:

### **“Provisions relating to operation of Act**

...

(2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.

(3) Subsection (2) extends to any provision of this Act even if the provision applies to liability in contract.”

Part 2 of the *Civil Liability Act* includes ss 11-26.

44 Section 11A of the *Civil Liability Act* provides as follows:

### **“Application of Part**

(1) This Part applies to and in respect of an award of personal injury damages ...

(2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.

(3) A court cannot award damages, or interest on damages, contrary to this Part.

...”

45 “Personal injury damages” mean “damages that relate to the death of or injury to a person”. “Injury” means “personal injury”, and includes “impairment of a person’s physical or mental condition”.<sup>28</sup>

46 Section 16(1) of the *Civil Liability Act* provides as follows:

“No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.”

47 The following definitions are relevant to s 16:<sup>29</sup>

“**court** includes tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

**damages** includes any form of monetary compensation ...

**non-economic loss** means any one or more of the following:

(a) pain and suffering,

(b) loss of amenities of life,

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<sup>28</sup> Both definitions are in *Civil Liability Act*, s 11.

<sup>29</sup> *Civil Liability Act*, s 3. These definitions apply to the whole of the *Civil Liability Act*.

...”

### **Necessity for leave**

- 48 The orders made in favour of Mr Moore are final because they determine his claim against Scenic. Nonetheless, Scenic requires leave to appeal against the judgment because the matter in issue does not amount to \$100,000 or more.<sup>30</sup>
- 49 The orders, insofar as they incorporate the answers to the questions in the Statement of Issues, are interlocutory. This is because the answers do not finally determine the claims of Group Members who booked and paid for Cruises 1-9 and 11. Accordingly, Scenic requires leave to appeal from the orders incorporating the answers.<sup>31</sup>
- 50 Mr Moore accepted that the answers relating to Cruises 10, 12 and 13 effectively dispose of the claims brought by Group Members who booked and paid for those Cruises even though no final orders to that effect have yet been made. Mr Moore has not sought leave to cross-appeal from the orders insofar as they incorporate the answers relating to Cruises 10, 12 and 13.
- 51 Scenic’s draft amended notice of appeal (**Notice of Appeal**) contains over 60 grounds of appeal. Only a few were not pressed. As Scenic’s notice of appeal raises some issues of principle and as the issues in dispute have been fully argued, it is appropriate that Scenic be granted leave to appeal.
- 52 Mr Moore filed an “Amended Draft Notice of Contention” (**Notice of Contention**). The grounds identified in the Notice of Contention arise only if this Court accepts Scenic’s contention that the services to be supplied to Mr Moore and Group Members were co-extensive with or delimited by Scenic’s contractual obligations under the Terms and Conditions.

### **Mr Moore’s pleaded case**

- 53 The final version of Mr Moore’s pleaded case was the Third Amended Statement of Claim (**3ASC**). The 3ASC describes the Group Members as each person who:
- booked and paid for river cruises in Europe scheduled from 10 May 2013 to 14 June 2013;

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<sup>30</sup> Supreme Court Act 1970 (NSW) (Supreme Court Act), s 101(2)(r)(i).

<sup>31</sup> Supreme Court Act, s 101(2)(e).

- acquired the services of Scenic concerning the operation of river cruises in Europe during the relevant period; and
- suffered loss or damage because of Scenic's conduct in contravention of a provision of chapter 3 of the ACL (para 2).

The definition is subject to exclusions that are not relevant for present purposes.

- 54 The 3ASC alleges that Mr Moore and the Group Members acquired Scenic's "services" as "consumers" for the purposes of the ACL (para 4). The particulars to this allegation describe the "services" as follows:

"As to 'services', rights, benefits, privileges or facilities were provided, or were to be provided, by [Scenic] to [Mr Moore] and all group members in trade or commerce, to arrange for and facilitate travel cruises along European rivers for the use, amusement, entertainment, recreation or instruction of the group members. Without limitation, the services included [Scenic] arranging for tours and monitoring and assessing (and thereafter communication with [Mr Moore] and group members), up to the dates for departure for the cruises, whether their tour itineraries could proceed in accordance with the existing arrangements, or should be varied, cancelled or delayed."

The services are said to have been supplied in trade or commerce (para 5).

- 55 Scenic is alleged to have contravened each of the Consumer Guarantees (paras 6, 7, 8). The allegation that Scenic contravened the Purpose Guarantee identifies the "particular purpose" made known by Mr Moore and the Group Members as:

"the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destinations." (para 7)

The particular purpose is said to have been impliedly made known to Scenic by:

"the nature of the relationship between [Mr Moore] and group members and [Scenic] (the supply of recreational services to each and every one of them), the purpose of the transactions that [Mr Moore] and group members entered into with [Scenic] and the booking of and payment for a cruise holiday along the rivers by all of them".

- 56 The "result" Mr Moore and Group Members wished to achieve by the services acquired from Scenic is defined in much the same terms as the "particular purpose" and is said to have been made known to Scenic in the same manner as the particular purpose (para 8).

57 It is alleged that from about April and early May 2013 there was extensive flooding in Europe causing river levels to rise along the paths of the cruises arranged by Scenic (para 10). Scenic should have known from about 3 May 2013 that the rising levels would or were likely to substantially disrupt for a period of about six weeks the enjoyment of passengers scheduled to embark on river cruises (para 11).

58 Scenic is alleged to have contravened the Care Guarantee by failing to exercise due care in supplying the services (para 12). The alleged contraventions of the Care Guarantee include:

“(a) failing to make any, or any adequate, enquiry, prior to the relevant period, into the nature and extent of flooding and rising river levels in Europe by the severe rainfall in late April and early May 2013;

(b) failing to determine, prior to the relevant period, that the nature and extent of flooding and rising river levels in Europe was such that by late April and early May 2013, it was inconceivable that the scheduled river cruises could proceed otherwise than without by substantial disruption or delay;

...

(d) failing, from about 3 May 2013, to cancel or delay the tours of the plaintiff and group members scheduled to occur in the relevant period, pending the receipt of information that would lead reasonable tour operators to conclude that the flooding and rising river levels had sufficiently abated so as to make it likely that the plaintiff and group members could substantially enjoy the benefit of travelling to the scheduled tour destinations by river cruise;

(e) failing, prior to the embarkation of the plaintiff and some group members on various the scheduled cruises, to unilaterally cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as to when the river levels would recede so as to enable the cruises to resume along the rivers);

...

(eb) falling, after the embarkation of the plaintiff and some group members on various scheduled cruises, to offer to passengers on those cruises, the opportunity to cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as to when the river levels would recede so as to enable the cruises to resume along the rivers);

...

(g) failing, from about 3 May 2013, to warn the plaintiff and group members, prior to their departure from their departing countries to commence their scheduled tours, that the weather and river conditions in Europe were such that it was unlikely that the plaintiff and group members would be able to enjoy, or substantially enjoy, the benefit of travelling to scheduled tour destinations by river cruise.”

59 The 3ASC pleads that Mr Moore and the Group Members suffered loss or damage because of Scenic's contraventions of the Consumer Guarantee in that:

“having embarked upon their respective tour itineraries during the relevant period they did not experience, or substantially experience, travel and accommodation on cruises along the European rivers and touring to scheduled destinations by river cruise at all”.

60 Mr Moore's claims to have suffered loss and damage comprising:

- “(a) the price of the tour;
- (b) a reduction [in] the value of services below the price paid by him or those services;
- (c) inconvenience, distress and disappointment; and
- (d) loss of the opportunity to consider and accept any proposed alternative tour or cruise offered by [Scenic] and (should such alternative have been rejected by [Mr Moore]) to terminate arrangements with [Scenic] and receive a full refund of all amounts paid to [Scenic].”

61 The balance of the 3ASC pleads a cause of action for money had and received (paras 17AA-17AF), unconscionable conduct by Scenic and unjust provisions in the Terms and Conditions (paras 17A-17I) and unfair provisions in the Terms and Conditions (para 17J).

62 The 3ASC identified a number of “common questions”, including the following:

- Scenic's knowledge of or inquiries about river conditions during the relevant period;
- whether the Consumer Guarantee required Scenic to cancel or delay cruises, offer refunds to Group Members or disclose information concerning known risks to the scheduled cruises and tours;
- whether the Care Guarantee required Scenic to disclose to Mr Moore and Group Members in advance of scheduled departures information known to Scenic about rising river levels and the risk of disruption to scheduled cruises and tours;
- whether the Purpose and Result Guarantees were satisfied in circumstances where Scenic failed to cancel or delay tours prior to departure and offer Group Members alternatives; and
- the heads of compensable damage.

The common questions identified in the 3ASC do not include the proper interpretation of “services” as that term is defined in the ACL.

## Common questions

### *Statement of Issues*

- 63 As the primary Judge explained, the hearing was conducted on the basis that all issues arising out of Mr Moore's individual claim concerning Cruise 8 would be determined, while common questions of law and fact affecting the claims of Group Members would also be identified and addressed. The Statement of Issues was intended to identify common questions of law and fact arising in the representative proceedings. However, his Honour expressly contemplated that the parties would have the opportunity to consider and make submissions on findings of fact relevant to the common issues.<sup>32</sup> His Honour considered that identification of the common issues and possible findings could await a further judgment.<sup>33</sup>
- 64 The Statement of Issues went through various iterations as the proceedings progressed. The parties filed competing versions of the Statement of Issues in December 2015. Mr Moore's version included a significantly greater number of questions than the version advanced by Scenic. At a pre-trial hearing held on 12 February 2016, Scenic submitted that some questions proposed by Mr Moore did not raise questions common to the claims of all Group Members. The primary Judge accepted this submission but proposed that a question should be added to the Statement of Issues asking which of the answers to the preceding questions were common to all, some or none of the Group Members. This suggestion was adopted by inserting Question 22 in the Statement of Issues.<sup>34</sup>
- 65 The position was complicated when Mr Moore applied during the course of the trial to amend his pleading. The amendments introduced allegations that Scenic breached the Care Guarantee by failing to cancel or to give Group Members the option to cancel cruises prior to embarkation. The amendments also alleged that Scenic breached the Care Guarantee by failing to give Group Members the opportunity to cancel four of the cruises **after** the date of

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<sup>32</sup> Primary Judgment at [55]-[56].

<sup>33</sup> Primary Judgment at [56]. His Honour said that this course was not atypical in representative actions, citing *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [2010] FCA 180 (Jessup J). This decision was a sequel to the Full Federal Court's decision in *Merck Sharp & Dohme (Aust) Pty Ltd v Peterson* [2009] FCAFC 26.

<sup>34</sup> Question 22 and the answer to it are reproduced at [24] above.

embarkation. The primary Judge granted Mr Moore leave to amend,<sup>35</sup> although the parties seem to have given little attention to whether a failure by Scenic to give Group Members an opportunity to cancel by reason of circumstances arising **after** embarkation could have entitled them to compensation or damages.

66 The amendments expanded the scope of the trial. They also necessitated amending the Statement of Issues to accommodate the new allegations. As already noted, this was done by the parties handing up an amended Statement of Issues on the last day of the trial.<sup>36</sup>

67 The directions made in the Primary Judgment afforded the parties the opportunity to make submissions on the answers to be given to the questions identified in the Statement of Issues. At the hearing held on 15 November 2017 Mr Abadee, who appeared with Mr Liu for Mr Moore, submitted that the findings made in the Primary Judgment required the Statement of Issues to be further amended. Mr Abadee pointed out that his Honour had rejected Mr Moore's claim that passengers booked on Cruises 6 and 7 should have been given an opportunity to cancel prior to embarkation. However, his Honour had also found that the passengers on Cruises 6 and 7 should have been given the option to cancel after the date of embarkation.

68 The primary Judge accommodated the findings concerning Cruises 6 and 7 by adding answers to Question 7A (which asked whether the Consumer Guarantees required Scenic to give passengers the option to cancel certain specific cruises after the date of embarkation). Thus the final form of the Statement of Issues was not settled until his Honour made orders on 15 November 2017.

#### *Difficulties with the Statement of Issues*

69 The High Court has emphasised that the subject matter of representative proceedings of the kind authorised by Part 10 of the *Civil Procedure Act* is a

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<sup>35</sup> The primary Judge explained his decision in the Primary Judgment at [58]-[73].

<sup>36</sup> See at [13] above.

claim which gives rise to common questions of law and fact.<sup>37</sup> It is, however, not necessary that the representative proceedings resolve or are likely to resolve the claims of all group members.<sup>38</sup> For example, group members may have individual claims that do not form part of the subject matter of the representative proceedings. For this reason the legislation empowers the Court, where the determination of questions common to all group members will not finally resolve all their claims, to give directions in relation to the determination of the remaining questions.<sup>39</sup>

70 The identification of substantial common questions of law and fact is a critical element in the conduct of representative proceedings.<sup>40</sup> In the present case, the Statement of Issues in both its preliminary and final versions, asked questions that were not common to all Group Members. For example, a number of the so-called “common questions” concerned Scenic’s knowledge of river conditions at different times and in different geographic locations. (The river journey from Amsterdam to Budapest is some 1,700 kilometres in length.) Similarly, the experiences of Group Members once on board the vessels obviously varied considerably, depending on which of the 13 cruises they embarked.

71 By way of illustration, Question 6 asks with respect to each cruise whether the content “of all or any of the [C]onsumer [G]uarantees” required Scenic:

“to warn [Mr Moore] and [G]roup [M]embers prior to them each embarking upon their (respective) scheduled cruises that there was a real or substantial prospect, or risk, that they would not, or were not, likely to experience or enjoy travel and accommodation by cruise along the rivers covered by their routes, without substantial disruption.”

The answers to this question, assuming it to be capable of answer, requires separate consideration of the circumstances relating to each of the cruises, if not to the individual circumstances of each Group Member booked on a particular cruise. The question also refers to all three Consumer Guarantees notwithstanding that each raises quite distinct issues.

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<sup>37</sup> *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; [2016] HCA 44 (*Timbercorp*) at [47]-[49] (French CJ, Kiefel, Keane and Nettle JJ), referring to ss 33C and 33H of the Supreme Court Act 1986 (Vic). The equivalent provisions in New South Wales are ss 157(1) and 161 of the Civil Procedure Act.

<sup>38</sup> *Timbercorp* at [50].

<sup>39</sup> Civil Procedure Act, ss 168, 169.

<sup>40</sup> See s 157(1)(c) of the Civil Procedure Act reproduced at [32] above.

72 The orders made by the primary Judge attempt to deal with this difficulty by giving separate answers to “common questions” for each of the 13 cruises. But this course was adopted at the conclusion of the trial, rather than at its outset. The trial itself was conducted without a clear differentiation between questions common to all Group Members and those common only to particular sub-categories (such as passengers booked on a specific cruise). It is therefore not entirely surprising that the parties disagreed in this Court as to precisely what matters were in issue at the trial.

73 The form of the questions included in the Statement of Issues has created further difficulties. Question 8 asks with respect to each cruise whether Scenic failed to comply with the Consumer Guarantees by reason of the circumstances pleaded by Mr Moore. Question 8 identifies the circumstances pleaded as “essentially”:

- Scenic’s failure to unilaterally cancel or offer passengers the opportunity to cancel the cruises before or after embarkation;
- Scenic’s breach of its obligation to warn; and
- Scenic’s breach of its obligation to offer options before and after embarkation.

74 The answers to Question 8 identify which of the three Consumer Guarantees (if any) Scenic failed to comply with in relation to each of the 13 cruises, but the answers do not specify the nature of Scenic’s contraventions. For example, Scenic is said to have contravened all three Consumer Guarantees applying to Cruise 5, but the answers to Question 8 do not specify the manner in which Scenic contravened each of the Consumer Guarantees.

75 If the answer to Question 8 is read with the answers to Questions 5, 7 and 7A, it can be inferred that his Honour found that Scenic failed to comply with the Care Guarantee by failing to cancel Cruise 5 no later than 3 June 2013 (after the date of embarkation). But, none of the answers to the other questions reveals the basis for a finding that Scenic’s conduct in relation to Cruise 5 failed to comply with the Purpose and Result Guarantees. The answer to Question 4 records that all three Guarantees applied to Cruise 5, but none of the other answers identifies the conduct of Scenic that is said to have contravened the Purpose and Result Guarantees.

76 The failure to explain the basis for the finding that Scenic contravened the Purpose and Result Guarantees may be due to the incompleteness of the summary of Mr Moore’s pleaded case contained in Question 8. The summary makes no reference to para 13 of the 3FASC (a paragraph was substantially amended during the trial). Paragraph 13 of the 3FASC alleges that:

“the services provided by [Scenic] were not reasonably fit for the particular purpose for which they were acquired, in that [Mr Moore and Group Members] did not enjoy, or substantially enjoy, the benefit of travel and accommodation by cruising European rivers to scheduled destinations”.

77 The incompleteness of the answers to the “common questions” reflects the dangers of leaving the finalisation of common questions of law and fact to the end of the hearing. It also reflects the length and complexity of the “common questions” identified in the present case, some of which conflate a number of distinct concepts. Moreover, the answers to the “common questions” do not accurately record all material findings of fact made by the primary Judge.

*Scenic’s application to amend its Notice of Appeal*

78 During the hearing of the appeal, Mr Williams sought leave to amend Scenic’s Notice of Appeal to challenge answers to a number of questions contained in the Statement of Issues. To a considerable extent the amendment application attempted to revisit issues dealt with in Beech-Jones J’s interlocutory decision<sup>41</sup>, against which Scenic did not seek leave to appeal. Mr Williams frankly acknowledged that he was motivated to seek leave to amend because:

“part of the problem here is that things have been perhaps considered to be common questions maybe shouldn’t have been, and there should have been some subgroups and the like that should have been identified”.

79 The additional grounds sought to be added to the Notice of Appeal were the following:

**“Ground 8AA**

1. It was not appropriate for the Court to answer the Questions contained in the Amended Statement of Issues number 5, 5A, 6, 7, 7A, 8, 15, 16, 17, 18, 19 and 20 (Answers) otherwise than by an answer to the effect:

‘Not appropriate to answer’

**Ground 8AB**

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<sup>41</sup> See at [12] above.

2. Answer 22 of the Answers should have identified that the Questions referred to in Ground 8AA were not questions common to all group members who resided in Australia and Vanuatu.”

- 80 The Court refused to grant Scenic leave to amend the Notice of Appeal. It did so primarily because Scenic had not sought leave to appeal from the decision of Beech-Jones J and the application to amend was made too late. The issue had not been identified in the original Notice of Appeal and had not been raised during the case management hearings in this Court. Had the amendment been allowed the scope of the appeal and the issues requiring determination would have been materially altered. Furthermore, the grounds belatedly propounded by Scenic departed markedly from the way in which the parties conducted the trial.
- 81 This is not to say that a timely challenge to the interlocutory decision would have lacked merit. The form of the “common questions” has presented significant difficulties, particularly having regard to the very limited evidence given in relation to some of the cruises the subject of the appeal. It would have been preferable for these issues to have been addressed and resolved at an early stage in the proceedings.<sup>42</sup>

*Question 8 and s 61(3) of the ACL*

- 82 As has been noted, the answers to Question 8 record that Scenic contravened the Purpose Guarantee in relation to Cruises 1-9 and 11. The answers make no reference to s 61(3) of the ACL, which provides that the purpose guarantee does not apply:

“if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill and judgment of the supplier”.

- 83 Scenic pleaded s 61(3) of the ACL as a defence to the claims by Mr Moore and Group Members founded on Scenic’s contravention of the Purpose Guarantee. Scenic submitted in this Court that although the primary Judge addressed the s 61(3) defence when determining Mr Moore’s individual claim, his Honour expressly reserved Scenic’s right to rely on s 61(3) as a defence to the claims made on behalf of Group Members.

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<sup>42</sup> See Practice Note SC Gen 17: Supreme Court – Representative Proceedings, cll 4.2(c), 7.1(c), 8.1(e).

84 Scenic's submission receives support from the Primary Judgment. After finding that Scenic had not made out the s 61(3) defence to Mr Moore's claim (a finding that is not challenged), the primary Judge continued as follows:<sup>43</sup>

"Scenic did however submit that the Court should not make a similar finding with respect to any other group members including those who had given evidence, because the Court was not determining their claims.

Notwithstanding the fact that evidence was given by some group members, **it would be inappropriate to reach a concluded view on this aspect with respect to these claims**". (Emphasis added.)

85 There may be an issue as to whether Scenic can realistically expect to make out the s 61(3) defence if Group Members otherwise establish the elements of a contravention of the Purpose Guarantee.<sup>44</sup> There may also be a question as to whether, as Scenic suggests, it is entitled to have the Court individually assess whether each Group Member relied on Scenic's judgment and skill. Nonetheless, the passage quoted above from the Primary Judgment indicates that his Honour recognised that a finding that Scenic contravened the Purpose Guarantee cannot be made in favour of Group Members until the s 61(3) defence is addressed. It therefore seems to follow that the answers to Question 8 must be amended to make it clear that no finding has yet been made that Scenic contravened the Purpose Guarantee in relation to Cruises 1-9 and 11.

86 Mr Moore responded to Scenic's submissions by noting that the primary Judge apparently contradicted himself by stating earlier in the Primary Judgment that Scenic had not relied on the exception in s 61(3) of the ACL.<sup>45</sup> Even if his Honour erred in making that statement, so it was argued, Scenic had the opportunity to propose different answers to Question 8 at the hearing on 15 November 2017 in the absence of any protest at that time, Scenic should be regarded as bound by the answers incorporated in his Honour's orders.

87 There is little doubt that his Honour was mistaken when he said that Scenic had not relied on s 61(3) of the ACL and that he correctly stated later in the Primary Judgment that Scenic had in fact relied on s 61(3). It is also clear enough that the s 61(3) issue was overlooked by the parties when the primary

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<sup>43</sup> Primary Judgment at [438].

<sup>44</sup> Cf *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307; [2000] FCA 1099 at [522]-[525] (Lindgren J, Lee J agreeing).

<sup>45</sup> Primary Judgment at [309].

Judge settled the answers to Questions 8 and 22 (which states that the answers are common to all Group Members). However, the parties' oversight does not mean that Scenic is precluded from contending in this Court that the answers to Question 8 were based on an erroneous view as to what was in issue at the trial. Nor is it precluded from submitting that the answers to Questions 8 and 22 should be amended to correct the error. Having expressly reserved the s 61(3) defence Scenic did not abandon it by failing to appreciate that the answers to Questions 8 and 22 should be qualified to reflect the reservation of the defence for future consideration.

88 The authority relied upon by Mr Moore to support his argument<sup>46</sup> involved different issues. In the case cited by him, a complaint of procedural unfairness was dismissed because the party complaining had been given an opportunity to present evidence to the decision-maker but failed to do so. The present case involves a challenge to answers that were given on the basis of a misapprehension as to the issues in dispute at the trial.

### **Background facts**

89 The following account is largely taken from the Primary Judgment or from documentary evidence. The account is directed primarily to Mr Moore's dealings with Scenic or his travel agent prior to embarking on Cruise 8 and the experiences of passengers on Cruise 8.

#### *Scenic*

90 Of the 13 cruises under consideration in the proceedings, eleven were operated by Scenic and two (Cruises 3 and 9) by Evergreen Pty Ltd (**Evergreen**).<sup>47</sup> Evergreen operated from the same offices in Newcastle and was part of the Scenic Group.

91 Scenic Tours Europe AG (**Scenic Europe**), a Swiss entity based in Zug, Switzerland, was responsible for managing all Scenic's cruises for Europe.<sup>48</sup> Scenic Europe was also part of the Scenic Group and other companies within the Scenic Group operated jointly and were closely associated.<sup>49</sup>

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<sup>46</sup> United Voice v Restaurant and Catering Association of Victoria (2014) 226 FCR 255; [2014] FCAFC 121.

<sup>47</sup> Primary Judgment at [14].

<sup>48</sup> Primary Judgment at [18].

<sup>49</sup> Primary Judgment at [19]-[23].

*The Brochure*

92 In October 2011 Mr Moore, who was then teaching science at a senior college on the Central Coast, obtained a brochure which provided information on a wide range of Scenic cruises, including those along the waterways between Amsterdam and Budapest. Mr Moore and his wife later went to Harvey World Travel, where they collected a large brochure promoting Scenic Tours (**Brochure**). The Brochure was printed by or at the behest of Scenic and was distributed to travel agents throughout Australia. The 225 page Brochure was described by the primary Judge as:

“large, printed on glossy paper with many photos. It is an enticing document, no doubt designedly so, which promises in many different ways a luxurious and all inclusive river cruise.”<sup>50</sup>

93 The first 39 pages of the Brochure were devoted to describing the benefits of all-inclusive luxury European river cruising. On pages 40 and following the Brochure provided detailed itineraries for a large number of individual cruises.

94 The primary Judge quoted extensively from the Brochure and a letter of welcome from the managing director of Scenic. A few extracts convey the general flavour:

“It’s my pleasure to invite you to join Scenic Tours for a once-in-a-lifetime cruise along the grand waterways of Europe. ... the minute you step on board a Scenic ‘Space-Ship’ you will be immersed in all-inclusive luxury.

Meticulous attention to detail, first-class service and intimate personal touches ensure your entire journey is truly unforgettable.

...

As you sail effortlessly along Europe’s majestic waterways your Scenic Space-Ship will be home for the duration of your voyage ...

...

From the moment you step on board to be personally welcomed by the Captain and crew, until you are finally farewelled, you will enjoy a level of inclusive luxury and service that is unsurpassed on the waterways of Europe.

...

One of the many pleasures of exploring the waterways of Europe is the sanctuary of your own private suite or stateroom on all Scenic ‘Space-Ships’.

...

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<sup>50</sup> Primary Judgment at [313].

The magical waterways linking Europe’s heart provide unrivalled access and the most refreshing views to some of the continent’s most extraordinary places. You will experience Europe in all its glory as you relax with refreshment in hand on your private door balcony that is exclusive to your suite.

...

... Your private butler is ready to assist at any time of day. It’s these delightful personal touches and added services that make a European River Cruise on board a Scenic ‘Space-Ship’ so special.”

95 The description of the “15 Day Jewels of Europe River Cruise” from Amsterdam to Budapest included the map reproduced in **Annexure A**. The map bore the notation:

“Map provided is a guide only. Please refer to terms and conditions”.

96 The itinerary for each day of the Jewels of Europe River Cruise identified the places that would be visited and described the “Scenic Free Choice” day tours that were included in the cruise. The itinerary, in brief, was as follows:

Day 1	- Amsterdam
Day 2	- Amsterdam
Day 3	- Cologne-Marksburg
Day 4	- Rhine Gorge – Rudesheim
Day 5	- Miltenberg
Day 6	- Würzburg
Day 7	- Bamberg

Day 8	- Nuremberg
Day 9	- Regensburg
Day 10	- Passau - Linz
Day 11	- Melk – Dürnstein – Vienna
Day 12	- Vienna
Day 13	- Vienna
Day 14	- Budapest
Day 15	- Disembarkation

97 The description of each day of the cruise was more detailed. For example, Day 10 was described as follows:

“Passau – Linz

Our included Scenic *FreeChoice* today gives you a choice of three countries: (1) a guided tour of Passau in Germany; or (2) a visit to Salzburg, setting for ‘The Sound of Music’ and birthplace of Mozart; or (3) visit Salzburg’s Salt Mines of Hallein acclaimed for their ‘white gold’; or (4) take an excursion to the medieval Czech town of Cesky Krumlov.

Meals: FB, L, D”

98 At the bottom of the pages describing each individual cruise itinerary the following words appear:

“Disruptions to cruising and itinerary arrangements may occur. For full terms and conditions please refer to pages 218 and 219.”

As the primary Judge found,<sup>51</sup> these words are in very small font and are hard to read. The terms and conditions are contained in a two page section at pages 218 and 219 of the Brochure (**Terms and Conditions**).

### *Terms and Conditions*

99 The primary Judge described the layout and placement of the Terms and Conditions as follows:

“It is not at all unfair to note that the Terms and Conditions either when referred to, or else when their actual content is printed, are not emphasised in any way throughout this Brochure. References to them are in small type and they are not prominently placed. The two pages describing the Terms and Conditions appear at the back of the Brochure. They are very hard to read, not only because of the size of the font and because of the page layout of three vertical columns, but also because of the complexity of the wording used, particularly in contrast with the plain, effusive language in which the luxury river cruising benefits are described in the Brochure.”<sup>52</sup>

100 The Terms and Conditions referred to in argument are set out below. The formatting is not as appears in the Brochure.

#### **“1 The Contract**

1.1 The contract between Scenic Tours Pty Limited (‘Scenic’, ‘We’, ‘Us’ or ‘Our’) and You includes:

- (a) these Terms and Conditions; and
- (b) Your Itinerary,  
(‘Contract’).

1.2 It is important that You carefully read the Contract as You will be bound by it once You have signed these Terms and Conditions or otherwise paid the earlier of Your Booking Deposit or the Tour Price.

#### **2. What You need to know**

2.1 Who is providing the Tour?

We will either:

- (a) provide the Tour directly through Our staff; or
- (b) arrange for the Tour to be provided by a Service Provider.

2.2 What’s included in the Tour Price?

Where indicated in Your Itinerary, Your Tour Price includes (a) all coach and cruise travel; (b) services of a Cruise Director (if applicable) and/or Tour

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<sup>51</sup> Primary Judgment at [346].

<sup>52</sup> Primary Judgment at [347].

Director; (c) airport transfers outside Australia (refer to clause 4.9); (d) specified meals; (e) internal flights (as specified in Your Itinerary); (f) accommodation; (g) sightseeing and admissions where stated; (h) GST (where applicable); (i) port charges; and (j) all gratuities and tipping on land tours and river cruises operated by Us.

...

## 2.6 Fees

...

### Variation Fee

(b) If You vary Your booking, other than by varying the Tour Departure Date, You must pay a variation fee of \$50.00. This fee is on account of administrative expenses incurred by Us in varying Your Tour and is a genuine and reasonable estimate of Our expenses.

(c) We may accept or reject Your request for variation at Our absolute discretion.

### Cancellation Fee

(d) Any cancellation of the Tour by You prior to Your Tour Departure Date (including any changes to Your Tour Departure Date or name changes) will result in the following cancellation fees:

Days of notice prior to Tour commencement	Cancellation charge (per person)
91 days and over	Loss of deposit
90 to 62 days	50% of Tour Price
61 days or less	100% of Tour Price

(e) We will not consider accepting a cancellation until We have received, during office hours, a written cancellation notice signed by You.

(f) You may also be liable to pay cancellation fees to airlines and other third parties.

(g) You must pay for any additional overnight accommodation required as a result of changes to Your flights.

(h) You must pay for all expenses which arise due to changes to Your Itinerary after Your Tour Departure Date. This includes changes due to illness or other personal reasons.

## 2.7 What are Our Tour obligations?

We will use reasonable endeavours to provide the Tour You have booked in accordance with Your Itinerary. However, due to the nature of travel, it may not always be possible for Us to adhere strictly to Your Itinerary. Where, due to circumstances outside Our control, We are unable to provide the Tour in accordance with Your Itinerary, We will use reasonable endeavours to provide or arrange appropriate alternatives.

...

## **2.9 What happens if We need to cancel or delay the Tour?**

### Tour Operation

(a) Your booking is conditional on Us receiving a minimum number of tour or cruise bookings to operate the Tour and ensure an enjoyable group atmosphere. Where sufficient numbers cannot be achieved, We may cancel or delay a scheduled Tour or Tour Departure Date.

(b) We will endeavour to make any decision to cancel or delay a Tour or cruise at least 60 days prior to the scheduled Tour Departure Date.

### Tour Cancellation

(c) Where We cancel a Tour, for whatever reason, before departure We will use reasonable endeavours to offer the closest available tour or cruise departure.

(d) Where the proposed alternative tour or cruise is:

(1) cheaper than Your original Tour Price, We will refund the difference to You; or

(2) more expensive than Your original Tour Price, You must pay the difference to Us.

(e) If You accept the proposed alternative tour or cruise, You will be bound by a new contract made up of these Terms and Conditions and Your amended Itinerary.

(f) If You do not accept the proposed alternative tour or cruise within 7 days of being notified by Us of the alternative, Our Contract with You will terminate, We will refund all monies paid directly to Us back to You and We will have no further liability to You.

(g) We are not liable for any third party costs You may incur, which We have not booked on Your behalf, for example airfares or other arrangements booked independently through or paid to a travel agent.

### Tour delay

(h) Where We delay the departure of a Tour or cruise, for whatever reason, for more than 7 days, You may terminate this Contract and We will either:

(1) provide You with a full refund of all amounts paid to Us; or

(2) provide You with a credit towards future tours with Us which will be valid for 24 months from the date You notify Us of the termination of this Contract.

## **2.10 How can We vary this Contract?**

(a) Subject to the remainder of this clause 2.9 [sic], We may amend these Terms and Conditions at any time.

...

#### Tour Variations

(d) We may change or vary Your Itinerary.

(e) Although We will use reasonable efforts to operate the Tour as close as possible to Your Itinerary, changes or substitutions may be necessary for reasons outside Our control. These circumstances may include, but are not limited to:

- (1) road, river or weather conditions;
- (2) national or local holidays affecting the closure of public buildings and attractions;
- (3) strikes; or
- (4) civil disturbances and advices by governments or other Force Majeure Events.

(f) Cruise itineraries may be varied due to high or low water levels, flooding, lock closures, unscheduled vessel maintenance or for any other circumstances beyond Our control.

(g) We may substitute (at the nearest reasonable standard) another vessel or motorcoach for all or part of this Itinerary and also provide alternative accommodation, where necessary.

(h) Where We make a variation to the Itinerary, We are not liable to You for such variations.

#### **2.11 How will We tell You about variations to the Contract?**

(a) Any changes to these Terms and Conditions will be posted on Our Website.

(b) Any changes to Your Itinerary will be notified to You;

- (1) if prior to Your Tour Departure Date, by phone, email or post; or
- (2) if during Your Tour, personally by Your Cruise Director or Tour Director.

#### **2.12 Notification of General Risks**

(a) You acknowledge and agree that there are general risks associated with travelling, which are beyond Our control and We are not liable to You for any loss, cost or damage You may incur as a result of these general risks. Such general risks include:

- (1) Tour variations or interruptions caused by road, river or weather conditions; ... high water levels; low water levels; flooding; lock closures; unscheduled vessel or vehicle maintenance;

...

- (3) any other circumstances beyond Our control.

...

### **2.13 Limitation of Liability**

(a) You acknowledge and agree that We accept no responsibility and will not be liable to You (or any third party) for any loss, cost or damage (including loss of enjoyment) suffered directly or indirectly in connection with:

...

(2) any change to Your Itinerary or delays in departure or arrival times of aircraft or otherwise during the conduct of the Tour;

...

(5) any loss of Your enjoyment due to circumstances outlined in the Contract or otherwise beyond Our control.

...

### **2.15 Competition and Consumer Act 2010 (Cth)**

Nothing in these Terms and Conditions operates to exclude, restrict or modify the application of any provision of the Competition and Consumer Act 2010 (Cth) or any equivalent State or Territory legislation, the exercise of a right conferred by such a provision, or any of Our liability for breach of a guarantee, condition or warranty implied by such a provision, where it is unlawful to do so.

...

### **2.18 General Provisions**

...

(h) The Tour Brochure and these Terms and Conditions are valid for Tour Departure Dates from 01 January 2013 to 31 December 2013 unless otherwise indicated in Your Itinerary, and supersedes all previous brochures.

...

Itinerary means Your personalised itinerary for Your Tour as amended from time to time by Us in accordance with the Contract.

...

Tour means the tour You have booked with Us outlined in Your Itinerary, as amended in accordance with these Terms and Conditions.”

#### *Mr Moore's booking*

101 On 15 December 2011, Mr Moore “pre-registered” for a place for himself and his wife on the Jewels of Europe River Cruise departing from Amsterdam on 3 June 2013. He paid a deposit of \$500 to Harvey World Travel.

102 Mr Moore paid a total of \$25,210 to Harvey World Travel during the period 21 May 2012 to 14 January 2013. This amount represented the cost to Mr Moore and his wife of:

- air fares to and from Europe via Singapore Airlines;
- a Scenic tour package providing accommodation and other services in Paris from 31 May 2013 to 3 June 2013;
- Scenic's Cruise 8 from Amsterdam to Budapest departing on 3 June 2013; and
- various transfers.

103 On 21 May 2012, Mr Moore arranged through Harvey World Travel to take out a travel insurance policy through Cover-More Insurance Services Pty Ltd. The premium, including cancellation cover of \$22,000, was \$636.

104 After making his final payment, Mr Moore received a personalised booklet from Scenic which set out the itinerary for the tour and a map showing the route of Cruise 8. The booklet included Scenic's Terms and Conditions. This was the first occasion on which Mr Moore received a copy of the Terms and Conditions other than as part of the Brochure he had obtained from Harvey World Travel.

105 Mr Moore subsequently signed a copy of a document including the Terms and Conditions. Mr Moore acknowledged in his evidence that the travel agent took him through the document before he signed it. He also acknowledged that he understood that the document was a legally binding contract with Scenic.

### *Cruise 8*

106 On 1 June 2013, when Mr Moore and his wife were in Paris, Ms Scoular from Scenic's Tour Operations Department wrote to passengers booked on Cruise 8. The letter, which was presumably sent by email, was received by Mr Moore in Paris. The letter addressed to "Scenic Guests" was as follows:

"We have recently experienced high water levels on several European waterways. In particular this week the high levels on the river Main have prevented navigation and this has had an impact on all river cruises in that region. High water levels prevent the ships sailing due to bridge clearance, lock operations and docking locations.

Due to these events, the Scenic Jewel is not able to be in Amsterdam for your embarkation, and we are forced to arrange a ship swap and your embarkation will be onto the Scenic Ruby. The Scenic Ruby is consistent with the Scenic Jewel delivering same inclusions, facilities and guest services. The Deluxe Balcony Suite you have booked on the Scenic Jewel is not identically

replicated on the *Scenic Ruby*, and although you will occupy the suite on the equivalent location, the suite will have some difference in layout and design features. Due to this change in your suite for this cruise, we will be arranging for the appropriate refund to be sent directly to you on your return home.

Although the river situation is a changing set of circumstances we are making arrangements to have you onboard the *Scenic Jewel* at a convenient location during your cruise. If this is possible you will complete your cruise onboard the *Scenic Jewel* as originally planned.”

- 107 Although the letter did not refer to the location of *Scenic Jewel*, according to an internal Scenic email it was in fact “stuck in Bamberg”. Cruise 8 was scheduled to reach Bamberg on Day 7.
- 108 Except for the change of vessel, Cruise 8 proceeded as scheduled on 3 and 4 June 2013. On 5 June 2013, the *Scenic Ruby* arrived in Cologne but could not continue cruising to Marksburg because of high water levels. The ship therefore docked at Linz. Passengers travelled by bus for approximately three hours to Marksburg, where they had the scheduled dinner at Marksburg Castle. They then travelled back to Cologne, boarding the *Scenic Ruby* at about 12.30 am on 6 June 2013.
- 109 On 6 June 2013, the *Scenic Ruby* cruised towards Rudesheim but was forced by water levels to turn back and dock in Koblenz. It was moored there between two other ships, preventing passengers enjoying any view.
- 110 Later that afternoon the passengers travelled by coach for about one hour to Cochem. This side trip was not on the itinerary, but was provided in place of an excursion to Rudesheim because the road to Rudesheim was closed. According to the itinerary, the ship should have docked at Rudesheim on Day 4.
- 111 On 7 June 2013, the passengers travelled by coach for approximately six hours from Koblenz to Marktheidenfeld and return. The *Scenic Ruby* left Koblenz at 7.00 pm for Wiesbaden. As his Honour found, the altered departure time meant that one advertised highlight of the cruise, namely viewing the Lorelei rock, was not possible because the vessel passed it during the night.
- 112 The passengers disembarked from the *Scenic Ruby* in Wiesbaden at about 8.00 am on 8 June 2013. They travelled by coach to Rothenburg, Würzburg and then to Bamberg, where they boarded the *Scenic Jewel*. The buses on

which passengers travelled to Bamberg did not have a functional bathroom or air conditioning. The coach trip took about three hours and, upon arrival at Bamberg, the passengers discovered that the ship was docked in an abandoned industrial area.

- 113 The *Scenic Jewel* remained docked in Bamberg from 9 to 11 June 2013. During this period, passengers travelled by coach to Nuremburg and Regensburg. The ship finally left Bamberg in the evening of 11 June 2013 bound for Regensburg.
- 114 The cruise along the Danube towards Regensburg on 12 June 2013 proceeded very slowly because of difficulties in traversing the locks. The ship docked in Berching in the early hours of 13 June 2013. The delay meant that the passengers did not get the opportunity to visit Salzburg or Český Krumlov in accordance with the itinerary.
- 115 On 13 June 2013, the passengers travelled by coach for approximately seven hours from the dock at Berching to Munich and back.
- 116 The passengers disembarked from the *Scenic Jewel* at around 8.00 am on 14 June 2013. Some passengers travelled by coach to Vienna. Mr Moore and other passengers took the train instead. Those who travelled by coach experienced delays because of flooding and did not arrive at the dock at Vienna until about 5.40 pm. They then checked into their cabins on a third vessel, the *Scenic Pearl*.
- 117 The cruise proceeded as scheduled from 15 to 17 June 2013, except that high water in Budapest prevented the usual evening cruise.
- 118 The primary Judge summarised the experience as follows:<sup>53</sup>

“Passengers on [Cruise 8] changed ships on two occasions and so travelled on three different ships. Instead of cruising on 10 days, they only cruised for three days”.

## Issues

### *Elements of the statutory causes of action*

- 119 Given that the Consumer Guarantees are intended to provide protection to consumers in their dealings with service providers, the statutory regime is

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<sup>53</sup> Primary Judgment at [644].

anything but straightforward. A consumer would need to be particularly well informed (or advised) to understand his or her rights under the regime.

120 A plaintiff seeking to rely on a failure to comply with the Care Guarantee must establish that the defendant:

- supplied services
- in trade or commerce
- to the plaintiff as a consumer
- without due care and skill.

121 A plaintiff relying on a failure to comply with the Purpose Guarantee must establish that the defendant:

- supplied services
  - in trade or commerce
  - to the plaintiff as a consumer;
- and in addition:
- the plaintiff made known to the supplier a particular purpose for which the services were being acquired by the plaintiff; and
  - the services were not reasonably fit for that purpose.

Even if the plaintiff establishes these matters, the defendant does not contravene the Purpose Guarantee if the circumstances show that the plaintiff did not rely on, or that it was unreasonable for the plaintiff to rely on, the skill or judgment of the defendant (s 61(3)).

122 A plaintiff relying on a failure to comply with the Result Guarantee must establish that the defendant:

- supplied services
  - in trade or commerce
  - to the plaintiff as a consumer;
- and in addition:
- the plaintiff made known expressly or by implication to the defendant or to a person conducting negotiations or making arrangements in relation to the acquisition of the services, the result the plaintiff wished to achieve; and

- the services were not of such a nature and quality, state or condition that they might reasonably have been expected to achieve that result.

Even if the plaintiff establishes these matters, the defendant does not contravene the Result Guarantee if the circumstances show that the plaintiff did not rely on, or that it was unreasonable for the plaintiff to rely on, the skill or judgment of the defendant (s 61(3)).

123 The statutory remedies available to a plaintiff for the defendant's failure to comply with one or more of the Consumer Guarantees are provided by s 267 of the ACL. For present purposes two remedies are relevant:

- an action under s 267(3)(b) to recover compensation for any reduction in the value of the services below the price paid by the plaintiff for the services; and
- an action under s 267(4) for any loss or damage suffered by the plaintiff because of the failure to comply with the Consumer Guarantee.

The remedies are cumulative (s 267(5)).

124 Subject to one qualification dealt with below, the same remedies are available for a failure to comply with each of the Consumer Guarantees. However, this does not necessarily mean that each contravention will produce an identical monetary award for a particular plaintiff.

125 To establish an entitlement to compensation under s 267(3)(b) of the ACL, a plaintiff must establish that the defendant:

- supplied services in trade or commerce to the plaintiff (also a prerequisite for establishing a contravention of one of the Consumer Guarantees); and
- failed to comply with one of the Consumer Guarantees  
and in addition:
  - the failure to comply either cannot be remedied or is a "major failure" (as defined in s 268); and
  - the value of the services received by the plaintiff was less than the price paid by the plaintiff for those services.

126 To establish an entitlement to damages under s 267(4) of the ACL, a plaintiff must establish the same matters as are required for a claim under s 267(3)(b) (other than the reduction in value of the services supplied) and must also establish that:

- he or she has suffered loss or damage because of the failure to comply with one or more of the Consumer Guarantees; and
- it was reasonably foreseeable that he or she would suffer such loss or damage as a result of the failure to comply.

127 The qualification referred to at [124] above is that a plaintiff cannot claim for a failure to comply with the Purpose Guarantee or the Result Guarantee if the failure to comply occurred only because of:

- an act or omission by a person other than the supplier or the supplier's agent; or
- a cause independent of human control that occurred after the services were supplied (s 267(1)(c)).

This qualification does not apply to a claim founded on the defendant's failure to comply with the Care Guarantee.

128 If the plaintiff establishes that the defendant has failed to comply with a Consumer Guarantee and that he or she satisfied the requirements to claim compensation or damages, the claim nonetheless may be defeated by s 275 of the ACL. Section 275 is a difficult provision to construe. It applies if:

- the defendant fails to comply with a Consumer Guarantee, and
- the law of a State or Territory is the proper law of the contract.

It is common ground that the proper law of the contract between Scenic and Mr Moore is the law of New South Wales.

129 If these conditions are satisfied, the proper law applies to limit or preclude liability for the failure and recovery of that liability:

“in the same way as it applies to limit or preclude liability and recovery of any liability for a breach of a term of the contract for the supply of the services”.

130 A passenger who suffers loss or damage by reason of a travel operator's failure to comply with one or more of the Consumer Guarantees may be entitled to claim the amount of loss or damage pursuant to s 236(1) of the ACL. However, Mr Moore has not relied on s 236(1) in these proceedings.

*A preliminary point*

131 It is a striking feature of these proceedings that Mr Moore placed considerable emphasis on Scenic's alleged non-compliance with the Care Guarantee. Mr Moore's pleaded case alleged that Scenic failed to exercise due care and

skill because it did not ascertain the extent of flooding and rising river levels prior to the commencement of the various cruises and failed to cancel or offer refunds to passengers when it knew or should have known of the disruptions to cruises that were likely to occur. Even the pleaded claims that Scenic breached the Purpose and Result Guarantees incorporated detailed allegations concerning Scenic's knowledge or means of knowledge about river conditions prior to the cruises commencing.

- 132 The questions in the Statement of Issues reflect the emphasis at the trial on Scenic's knowledge of river conditions and its failure to warn passengers or cancel cruises prior to embarkation. The parties' written submissions in this Court adopted a similar approach. Scenic raised a multitude of issues, but devoted much attention to challenging the primary Judge's findings as to Scenic's knowledge or means of knowledge of flooding and river conditions prior to embarkation. Mr Moore's submissions responded in detail to Scenic's challenges to these findings. The factual disputes involve consideration of a large amount of material relating to ten different cruises.
- 133 At the outset of the hearing in this Court, Mr Williams was asked whether the claims for breach of the Care Guarantee added anything of substance to the claims based on breaches of the Purpose and Result Guarantees. The same question was put to Mr Abadee, who appeared for Mr Moore on the appeal.
- 134 The questions were prompted, in part, because it was unclear from the parties' written submissions how Mr Moore and the Group Members could succeed on their claims based on the Care Guarantee if they failed on their claims based on the Purpose and Result Guarantees. Members of the Court observed that it is difficult to see how a case based on a failure to warn passengers or to cancel a cruise prior to embarkation could succeed if Mr Moore and the Group Members could not show that the services actually provided by Scenic were not fit for the purpose for which the passengers acquired them or could not reasonably be expected to achieve the result that the passengers wished to achieve. The questions were also prompted by a concern that success for Mr Moore and Group Members on their Care Guarantee case was unlikely to add anything to their claims based on Purpose and Result Guarantees if the latter

were successful. The parties gave two answers to the questions posed by the Court.

135 First, Mr Williams said that Scenic might succeed in establishing a defence under s 61(3) of the ACL to some of the Group Members' claims under the Purpose and Result Guarantees. Although Scenic did not challenge the primary Judge's rejection of the s 61(3) defence in Mr Moore's case, Mr Williams said that Scenic might be able to show that some Group Members had not relied on its skill and judgment or, alternatively, that it was unreasonable for them to do so, thereby making out the defence provided by s 61(3). The Group Members in this position might nevertheless demonstrate that Scenic had not supplied the services with due care and skill. According to Mr Williams, the result could be that some Group Members would fail in their claims based on Scenic's non-compliance with the Purpose and Result Guarantees yet succeed in their claims founded on the Care Guarantee.

136 Secondly, it was said that a breach of the Care Guarantee might support a claim for compensation or damages by Group Members precluded from claiming compensation or damages for a breach of either the Purpose Guarantee or the Result Guarantee. Mr Williams pointed out that s 267(1)(c)(ii) of the ACL permits a consumer to seek damages for non-compliance with the Purpose and Result Guarantees only if the non-compliance:

“did not occur because of a cause independent of human control that occurred after the services were provided”.

The same limitation does not apply to a claim for compensation or damages for non-compliance with the Care Guarantee.

137 It is true that Scenic relies on s 267(1)(c)(ii) as a defence to claims for compensation or damages for Scenic's breach of the Purpose and Result Guarantees. As will be seen, however, the primary Judge correctly rejected that defence to Mr Moore's claim for compensation or damages. It is difficult to see how that defence could succeed in relation to the claims of Group Members.

138 The parties also pointed out that the primary Judge awarded a higher amount as compensation for reduction in the value of services provided to Mr Moore on

his claim for Scenic's breach of the Care Guarantee than on his claim based on Scenic's breach of the Purpose Guarantee. But, this disparity came about because Mr Moore claimed a lower sum for the latter claim than for the former claim. Without that concession, the primary Judge would have awarded the same amount for Scenic's breach of the Purpose Guarantee as his Honour awarded for Scenic's breach of the Care Guarantee.

139 Although the parties' focussed on the Care Guarantee and Scenic's knowledge and conduct prior to the commencement of the cruises, those issues are of less significance to the outcome of the proceedings than the claims based on breaches of the Purpose and Result Guarantees. For that reason, the judgment directs most attention to the issues relating to those claims, although it is also necessary to address issues bearing primarily on the claims based on breaches of the Care Guarantee.

#### *Common ground*

140 Despite Scenic's enthusiasm for challenging the primary Judge's reasoning and findings, there was some common ground between the parties.

Specifically, it was common ground on the appeal that:

- Scenic supplied services to Mr Moore and Group Members in trade or commerce (although there is a dispute as to the nature of the services Scenic supplied);
- Mr Moore and Group Members were "consumers" as defined in s 3 of the ACL;
- the Terms and Conditions set out in the Brochure formed part of the contract between Mr Moore and Scenic and Mr Moore was aware of the Terms and Conditions;<sup>54</sup>
- Scenic failed to establish that Mr Moore did not rely on, or unreasonably relied on Scenic's skill or judgment (s 61(3));
- the primary Judge erred in awarding compensation for reduction in the value of the services below the price paid by Mr Moore (ACL s 267(3)), in that his Honour adopted a subjective rather than objective approach to the assessment of reduction in value;
- a claim under s 267(3)(b) of the ACL for reduction in the value of the services provided by the supplier is not a claim for non-economic loss and thus is not affected by s 16(1) of the *Civil Liability Act* (assuming s 16(1) to be otherwise applicable).

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<sup>54</sup> Primary Judgment at [148].

- the proper law of each of the contracts between Mr Moore and individual Group Members, on the one hand, and Scenic, on the other, is the law of New South Wales and the relevant law for the purposes of s 275 of the ACL was the *Civil Liability Act*; and
- this Court should follow its own decision<sup>55</sup> holding that damages for distress and disappointment are damages for “non-economic loss” within s 16(1) of the *Civil Liability Act* and thus cannot be claimed (assuming s 16(1) applies) unless the threshold of “15 per cent of a most extreme case” is satisfied.

141 The following are the principal issues raised by Scenic’s amended notice of appeal that are or may be common to the claims of Mr Moore and the Group Members:

- (i) Did the primary Judge err in rejecting<sup>56</sup> Scenic’s contention that the “services” it supplied to Mr Moore and the Group Members were co-extensive with or delimited by the Terms and Conditions by which Mr Moore and the Group Members were contractually bound?
- (ii) Did the primary Judge err in finding<sup>57</sup> that the services Scenic supplied to Mr Moore and Group Members included an obligation to provide, both in advance of the booked cruise and during it, information about the impact that events and circumstances would be likely to have on a passenger’s enjoyment of the cruise and the ability of Scenic to provide the services in a timely manner?
- (iii) Did the primary Judge err in finding<sup>58</sup> that Mr Moore made known the particular purpose for which he acquired the services supplied by Scenic?
- (iv) Did the primary Judge err in concluding<sup>59</sup> that s 16 of the *Civil Liability Act*, as a surrogate federal law picked up by s 275 of the ACL, did not preclude a claim by Mr Moore and Group Members for damages under s 267(4) of the ACL because s 16 did not have extra-territorial effect and therefore did not apply to events outside Australia that give rise to the entitlement to damages?

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<sup>55</sup> *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641; [2010] NSWCA 137 (*Insight Vacations (CA)*), *aff’d* *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149; [2011] HCA 16 (*Insight Vacations (H Ct)*).

<sup>56</sup> Primary Judgment at [370]-[374].

<sup>57</sup> Primary Judgment at [375].

<sup>58</sup> Primary Judgment at [397].

<sup>59</sup> Primary Judgment at [908]-[909].

142 It is necessary also to consider Scenic’s challenge to the findings made by the primary Judge relating to Mr Moore’s claim and to determine whether the outcome of those challenges applies to the claims made by Group Members.

143 Mr Abadee accepted that Mr Moore’s pleaded case alleging that the Terms and Conditions were unjust or unfair only arises if his argument on the definition of “services” for the purposes of ss 60 and 61 of the ACL is rejected.

### **Characterisation of “services”**

144 As has been seen, the 3ASC does not identify the proper construction of the definition of “services” in the Act as a common question. However, Question 1 in the final version of the Statement of Issues asks:

“What was the nature or character of the ‘services’ which [Scenic] was required to supply to [Mr Moore] and group members?”

The definition of “Services” in the ACL has been reproduced earlier.<sup>60</sup>

145 With Question 1 in mind, the primary Judge observed that:<sup>61</sup>

“It is of central relevance to these proceedings to first establish what services ... were provided by Scenic to [Mr Moore] and group members”.

His Honour also observed, consistently with the parties’ submissions, that there was:<sup>62</sup>

“little point in analysing the legal causes of action alleged by the plaintiff unless and until one resolves the issue of what services were supplied and, therefore, what were the services upon which the consumer guarantees fastened”.

### *Scenic’s submissions at trial*

146 Scenic contended before the primary Judge that the Terms and Conditions contained in the Brochure and to which Mr Moore and the Group Members agreed, determined the proper characterisation of the services which Scenic agreed to supply and thus limited the extent to which the Consumer Guarantees applied to the cruises.<sup>63</sup> Having regard to the Terms and Conditions, the services Scenic supplied:<sup>64</sup>

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<sup>60</sup> See at [37] above.

<sup>61</sup> Primary Judgment at [350].

<sup>62</sup> Primary Judgment at [353].

<sup>63</sup> Primary Judgment at [353].

<sup>64</sup> Primary Judgment at [352], [364].

“comprised a tour at a particular time, which included a river cruise to the extent that river conditions allowed it; to provide reasonable endeavours to provide the tour booked in accordance with the itinerary and to use reasonable efforts to substitute, where required, alternative transport (for example a motorcoach for a ship)”.

147 The Terms and Conditions were designed to take account of:<sup>65</sup>

“the well-known vagaries of cruising on a river, e.g. high or low water, good or bad weather, and the need for locks and other river infrastructure to be operational to permit passage along the river ...”

Scenic referred specifically to cl 2.10(g) of the Terms and Conditions which permitted it to substitute an alternative means of transport for all or any of the Itinerary.

### *Primary Judgment*

148 The primary Judge rejected Scenic’s approach to the characterisation of the services it supplied:<sup>66</sup>

“371 I accept that the starting point is the Brochure, because this is in effect the ‘offer’ of services both in a contractual context and in the statutory context. The Brochure is the only document which comprehensively describes the services which Scenic is promoting. It is that offer of those services which is accepted by the intending passenger when he (or she) pays a deposit and their booking is accepted by Scenic. In so acting, the customers of Scenic were not booking any tour by any means through Europe according to an itinerary which may or may not be delivered as promised – which is in effect what Scenic submitted. Scenic says that the contractual conditions ought to be read as allowing it to use an alternative means of transport and an alternative itinerary. Upon Scenic’s construction of the contract and the definition of the statutory term ‘services’, passengers could be taken from Amsterdam to Budapest by coach staying in hotels along the way and not be able to suggest that there was any breach of contract or failure to supply services to fulfil the guarantees which the ACL requires.

372 This would be a surprising result, particularly having regard to the essence or gist of what was prominently offered by Scenic in the Brochure. If [Mr Moore] was, having paid the deposit, to describe what he had booked for, no doubt he would have said that he and his wife had booked for a luxury river cruise from Amsterdam to Budapest; a cruise upon which he could occupy a single cabin for the entirety of the 15 day and 14 night period without the need to pack and unpack his bags on multiple occasions. He would have said that it was a cruise that provided him with a number of different restaurants in which he could eat, different places from which to observe the passing scenery, including from his cabin or the private balcony attached to his cabin. He would have said that he had access to food and drinks as he required them throughout the day, and that he could make choices about whether he wished to undertake any additional activities including shore excursions and the like. No doubt if [Mr Moore] had been asked at that time if what he had booked for

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<sup>65</sup> Primary Judgment at [368].

<sup>66</sup> Primary Judgment at [371]-[374].

included many days not spent on a ship cruising down the designated waterways of Europe, but rather spent in a seat on a motorcoach travelling along motorways or secondary country roads and staying in hotels for short periods for only 1 or 2 nights at a time involving regular packing and unpacking of his luggage, and without a choice as to where he might eat and without the capacity to eat and drink throughout the day as he saw fit, no doubt he would have said firmly and perhaps in a single word, that that was not what he had booked and paid for.

373 Of course, any travel provider must be extended some latitude with respect to things which happen and which are beyond their control. Adverse weather may be one such contingency beyond the provider's control. People who booked on a tour could not have cause for complaint if bad weather set in during the tour causing some relatively short term changes to a planned itinerary. Such changes would be well covered by the Terms and Conditions. But it seems to me that Scenic's approach allows the flexibility which is reasonably necessary in such a contract to become the subject matter, or essence, of the contract. Instead of providing the services of a luxury river cruise as the Brochure promotes and for which passengers booked, with all of the benefits such a cruise on board a Scenic ship offered, Scenic's submissions and its construction of services allows it to provide, without recourse, something entirely different.

374 Scenic's position simply does not reflect the reality of the essence of the contract and the services which the passengers booked and paid for, and the services which Scenic was obliged to provide."

149 For these reasons his Honour accepted Mr Moore's submission that Scenic should be regarded as:<sup>67</sup>

"providing services which were recreational and were constituted by a river cruise which included luxurious all inclusive accommodation, dining and entertainment, travelling along European rivers and stopping at certain destinations".

This category of services can be described as **Cruising Services**.

150 The primary Judge, however, went further:<sup>68</sup>

"375 ... In addition to the all-inclusive, five-star luxury river cruise with the features provided, Scenic was also obliged as a reasonable incident of that cruise, to provide information and management services. It was obliged to provide, both in advance of the intended cruise and during it, information about events and circumstances and the impacts (other than de minimis) which those events and circumstances would be likely to have on a passenger's enjoyment of the cruise, and the ability of Scenic to provide those services in a timely manner ('the Services'). This information was obliged to be provided as soon as it was reasonably available. Of course, the information provided had to be reasonably accurate.

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<sup>67</sup> Primary Judgment at [351].

<sup>68</sup> Primary Judgment at [375], [378].

378 In my view, the promise of information and management services was an integral part of the Services supplied to passengers and was included in that term as it is used in the consumer guarantee provisions.”

This category of services can be described as **Information Services**.

151 His Honour answered Question 1 in the Statement of Issues as follows:<sup>69</sup>

“Scenic ... provided recreational services constituted by a river cruise which included 5-star luxurious all-inclusive accommodation, dining, entertainment and travel by cruise along European rivers and stopping at certain destinations. In addition, Scenic provided information services, in advance and during each cruise, concerning events and circumstances and their impacts upon passengers’ enjoyment of their cruises and Scenic’s ability to provide its services in a timely manner. Further, Scenic provided management services to oversee, organise and manage the delivery of the cruise and the added services prior to embarkation and whilst the cruises were underway.

The finding that the services supplied by Scenic included Information Services was essential to the primary Judge’s finding that Scenic failed to comply with the Care Guarantee.

*Scenic’s submissions*

152 In this Court, Mr Williams repeated and elaborated upon the arguments that Scenic put at trial. He submitted that the services supplied by Scenic for the purposes of ss 60 and 61 of the ACL were those that Scenic agreed to provide and was capable of providing. Mr Williams accepted that the services included facilities over which Scenic had control, such as a functioning ship of appropriate quality and satisfactory standards of accommodation, food and entertainment. But it was necessary to distinguish between such facilities and matters over which Scenic had no control, such as weather conditions and river conditions.

153 Mr Williams submitted that it was precisely because Scenic could not control weather conditions and river levels that it reserved to itself the contractual right to change or vary a passenger’s itinerary and to substitute another vessel or motorcoach for all or part of the itinerary.<sup>70</sup> Thus a passenger booking a cruise with Scenic did not obtain an unqualified entitlement to enjoy a cruise along the entire scheduled route or to participate in a particular event if Scenic, by reason

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<sup>69</sup> See Supplementary Judgment at [5].

<sup>70</sup> See cl 2.10(d)-(h) of the Terms and Conditions, reproduced at [100] above.

of circumstances beyond its control, could not provide the scheduled itineraries or activities.

- 154 According to Mr Williams, the Consumer Guarantees have inbuilt “control mechanisms”. One control mechanism is provided, so he argued, by understanding a “supply of services” in a case such as the present to mean a supply of the scheduled tour on the Terms and Conditions to which the passenger has agreed. Mr Williams distinguished between contractual limitations which define the nature of the services to be supplied and terms of the contract which limit liability (such as cl 2.10(h) of the Terms and Conditions). Scenic relied only on the former.

#### *Legislative history*

- 155 The definition of “services” in s 2 of the ACL is in substance identical to the definition in s 4(1) of the *Competition and Consumer Act*. As the Full Federal Court explained in *Obeid v Australian Competition and Consumer Commission*,<sup>71</sup> the current definition derives from amendments made by the *Trade Practices Amendment Act 1977* (Cth) to the definition of “services” in s 4(1) of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**) as originally enacted.
- 156 The forerunner to the Consumer Guarantees contained in ss 60 and 61 of the ACL was s 74 of the *Trade Practices Act*. In its original form, s 74 used language similar to that now found in ss 60 and 61 of the ACL, but protected consumers by implying contractual warranties in contracts for the supply of services. Section 74 as first enacted provided as follows:

“(1) In every contract for the supply ... by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies ... services to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the

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<sup>71</sup> (2014) 226 FCR 471; [2014] FCAFC 155 (*Obeid v ACCC*) at [47] per curiam. The Full Court affirmed the decision of Farrell J in *Obeid v Australian Competition and Consumer Commission* [2014] FCA 839, in which her Honour traced the legislative history of the current definition. A marked up version of the amended definition of “services” in s 4(1) of the *Trade Practices Act* showing the changes from the original definition is reproduced in *Obeid v ACCC* at [47].

result that he desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment."

The implied warranty could not be excluded by a term of the contract between the corporation and the consumer.<sup>72</sup>

157 Section 74(3) of the *Trade Practices Act* contained a restricted definition of "services" specific to s 74 which limited the circumstances in which the statutory warranty could be implied into a contract between a corporation and a consumer. The restricted definition of "services" meant that the statutory warranties did not apply, for example, to a contract between a tour operator and a consumer for the supply of tourism services, whether the services were to be supplied in Australia or overseas.

158 Section 74(3) of the *Trade Practices Act* was repealed (and replaced by different provision) by the *Trade Practices Revision Act 1986* (Cth). Thereafter, subject to presently irrelevant exceptions, the broad definition of "services" in s 4(1) of the *Trade Practices Act* (as amended in 1977) applied to the statutory warranties implied by s 74(1) and (2)<sup>73</sup> of the *Trade Practices Act*. This expanded the circumstances in which s 74 could apply, although the mechanism for protecting consumers remained statutory warranties implied into contracts between corporations and consumers.

159 The High Court held in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*<sup>74</sup> that the statutory imposition of a contractual warranty in contracts for the supply of services was inherently accompanied by a full contractual remedy. The contractual warranty was, however, imposed by a federal statute. If a State law purported to modify or limit the operation of the statutory warranty, there was a direct inconsistency between s 74 of the *Trade Practices Act* and the

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<sup>72</sup> Trade Practices Act, s 68(1).

<sup>73</sup> The Trade Practices Revision Act 1986 (Cth) also amended s 74(2), but not in a manner material for present purposes.

<sup>74</sup> (1994) 179 CLR 388; [1994] HCA 17 (Wallis).

State law. The State law was therefore rendered invalid to the extent of the inconsistency by s 109 of the *Constitution*.<sup>75</sup>

160 The ACL came into force on 1 January 2011. On that date the name of the *Trade Practices Act* was changed to the *Competition and Consumer Act*.<sup>76</sup> Section 74 of the *Trade Practices Act* was repealed and replaced by Consumer Guarantees contained in ss 60 and 61 of the ACL.

161 The Consumer Guarantees differ from s 74(1) and (2) of the *Trade Practices Act* in that they provide protection to consumers by means of statutory guarantees, rather than by implying statutory warranties into contracts between corporations and consumers. The Minister's second reading speech accompanying the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*<sup>77</sup> indicated that the Consumer Guarantees had been "closely aligned to New Zealand law", a reference to ss 28 and 29 of the *Consumer Guarantees Act 1993 (NZ)*.<sup>78</sup> The Minister also stated that the reforms were based on a "comprehensive analysis" by the Commonwealth Consumer Affairs Advisory Council (**Consumer Council**).

162 The Consumer Council published its Final Report on *Consumer Rights* in October 2009.<sup>79</sup> It identified a number of problems with the existing law relating to implied terms. The difficulties included the complexity of the law, the lack of awareness by consumers of their statutory rights and the inappropriateness of

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<sup>75</sup> Wallis at 396-397 (Toohey and Gaudron JJ, Deane, Dawson and McHugh JJ agreeing). Wallis was applied in *Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [174]-[195] per curiam.

<sup>76</sup> Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth).

<sup>77</sup> Commonwealth House of Representatives, Parliamentary Debates (Hansard), 17 March 2010 at 2720.

<sup>78</sup> The New Zealand provisions are as follows: "28 Guarantee as to reasonable care and skill Subject to section 41, where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill. 29 Guarantee as to fitness for particular purpose Subject to section 41, where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be— (a) reasonably fit for any particular purpose; and (b) of such a nature and quality that it can reasonably be expected to achieve any particular result,— that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that— (c) the consumer does not rely on the supplier's skill or judgment; or (d) it is unreasonable for the consumer to rely on the supplier's skill or judgment."

<sup>79</sup> Commonwealth Consumer Affairs Advisory Council, *Consumer Rights: Reforming statutory implied conditions and warranties* (Final Report, October 2009) (Consumer Rights Report).

using a nineteenth century model of implied terms as a basis for a broader consumer protection regime. The Consumer Council noted that:<sup>80</sup>

“Since the legislation relies on the common law of contract, it assumes that all consumer sales are of a contractual nature, which [Consumer Affairs Victoria research paper] contrasts with an understanding of consumer purchases as simple ‘exchanges of money for a product that do not involve an offer, acceptance, consideration, express terms etc’. The existing consumer legislation is based on the law of contract. It does not explicitly set out all the rights and remedies that flow from a breach of an implied term.”

163 The Final Report of the Consumer Council analysed the New Zealand legislation in some detail and concluded that it had operated well with high levels of consumer awareness and satisfaction since its introduction in 1993. The chief advantages were said to be that it “achieves greater clarity in consumer rights and greater certainty in available remedies”.<sup>81</sup> The Consumer Council accordingly recommended the introduction of similar statutory guarantees in Australia. The ACL implemented the recommendation.<sup>82</sup>

#### *Approach to construction*

164 In *Obeid v ACCC* the Full Federal Court considered the definition of “services” in s 4(1) of the *Competition and Consumer Act*, although not for the purposes of construing the predecessors to ss 60 and 61 of the ACL. After referring to the familiar general principles of statutory construction,<sup>83</sup> the Court cited the comments of McHugh J in *Kelly v The Queen*.<sup>84</sup> In that case his Honour pointed out that:<sup>85</sup>

“the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition

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<sup>80</sup> Consumer Rights Report at 33.

<sup>81</sup> Consumer Rights Report at 35.

<sup>82</sup> Compare ss 74B and 74D of the Trade Practices Act which conferred on a consumer a direct right of action against the manufacturer of goods where the goods were not reasonably fit for the purpose for which they were acquired (s 74B(1)) or were not of merchantable quality (s 74D(1)).

<sup>83</sup> *Obeid v ACCC* at [44]-[45].

<sup>84</sup> (2004) 218 CLR 216; [2004] HCA 12.

<sup>85</sup> *Kelly v The Queen* at [103].

before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.”

165 The Court in *Obeid v ACCC* considered that the use of the word “includes” in the definition of “services” in s 4(1) of the *Competition and Consumer Act* indicated that the definition was not intended to be exhaustive.<sup>86</sup> This construction was supported by the distinction in s 4(1) itself between inclusive definitions and definitions using the word “means”. Furthermore, while the historical context could not displace the statutory text, the legislative history supported the Court’s non-exhaustive construction of the definition of “services”.

166 The Full Court accepted that unless a contrary intention appears in the substantive provisions being applied, the ordinary meaning of “services” should be adopted along with the various kinds of services specified in the definition itself.<sup>87</sup> Their Honours cited with approval a comment in a Federal Court decision that the word “services” has a wide application, although it usually connotes the provision of some form of assistance or accommodation by one person to another.<sup>88</sup>

#### *Construction of the ACL*

167 Although *Obeid v ACCC* was concerned with provisions of the *Competition and Consumer Act* the Court’s analysis applies with equal force to the definition of “services” in s 2 of the ACL. But it is necessary to remember that the definition has to be applied to the language used in the Consumer Guarantees. The parties in the present case tended to overlook the latter point. Their submissions concentrated on the definition of “services” in s 2 of the ACL in isolation from the language in the substantive provisions.

168 The definitions of “services” and “supply” in s 2 of the ACL are relevant not merely to the Consumer Guarantees but to a variety of substantive provisions. For example, s 29(1)(b) of the ACL prohibits a person in trade or commerce making a false or misleading representation that services are of a particular standard or quality; s 40(1) prohibits a person asserting without reasonable

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<sup>86</sup> *Obeid v ACCC* at [50]-[52].

<sup>87</sup> *Obeid v ACCC* at [53].

<sup>88</sup> *Obeid v ACCC* at [54] citing *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242; [1991] FCA 425 at 262 (Wilcox J).

cause a right to payment from another person for “unsolicited services”<sup>89</sup>; and s 278 provides a remedy in certain circumstances to a consumer who is party to a “linked credit contract”, a term defined by reference to the provision of credit in relation to the supply of services to a consumer.<sup>90</sup> The definition of “services” in s 2 of the ACL can therefore be said to have a protean quality in the sense that the language may be understood differently depending on the context in which it has to be applied.

- 169 It is nonetheless appropriate to start with the terms of the definition itself. Quite apart from the non-exclusive nature of the definition, nothing in the language requires or even suggests that “services” must be confined to services that are provided pursuant to a contract or that correspond precisely to the terms of a contract between the supplier and the consumer. Paragraph (b) states that the definition includes the rights, benefits, privileges or facilities that are or are to be provided, granted or conferred under a contract for or in relation to the provision of, or the enjoyment of facilities for amusement, entertainment or recreation. But para (b) is expressed not to limit para (a) of the definition.
- 170 Paragraph (a) contains no reference to a contract. It states that the word “services” includes any rights, benefits, privileges or facilities that are, or are to be, provided or conferred in trade or commerce. Clearly benefits, privileges and facilities and indeed other services can be provided by one person to another regardless of whether a contract is in place. Even if a contract is in place services can be provided by one party to another independently of the terms of the contract. The fact that services can be provided independently of contractual arrangements was a significant factor in the Consumer Council’s recommendation that consumers should be protected by freestanding statutory guarantees rather than implied contractual terms.
- 171 The reference in the definition of “services” to rights, benefits, privileges or facilities that “**are to be** provided, granted or conferred” indicates that the definition is not merely concerned with services that are in fact provided by a supplier to a consumer. The definition includes rights, benefits, privileges or

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<sup>89</sup> This term is also defined in s 2 of the ACL.

<sup>90</sup> ACL s 278(2)(b).

facilities that are **to be provided in the future**, whether pursuant to contract or otherwise.

172 The Care Guarantee in s 60 of the ACL uses the defined terms “supply” and “services”. It is not easy simply to read the definitions into s 60 in the manner suggested by McHugh J in *Kelly v The Queen*. Some adaptation is a grammatical necessity and, even then, the language does not achieve clarity or avoid awkwardness. Recognising the difficulty, s 60 can be read with the material parts of the definitions as follows:

“If a person provides, grants or confers, in trade or commerce, rights, benefits, privileges or facilities that are or are to be provided, granted or conferred in trade or commerce to a consumer there is a guarantee that the rights, benefits, privileges or facilities will be rendered with due care and skill”.

173 Despite the awkwardness of the statutory construct, the evident intention to be derived from the text of s 60 is that a person who, in trade or commerce, is to provide rights, benefits, privileges or facilities to a consumer is required to render them with due care and skill. The use of the future tense in the closing words of s 60 reinforces the conclusion that the Care Guarantee applies to services that are to be supplied to the consumer at some time in the future. The Care Guarantee may be enlivened by the supplier and consumer entering into a contract, as where the consumer pays a deposit and signs a standard form contract. But the Care Guarantee may also be enlivened without any enforceable contract coming into existence. For example a consumer may have a contract with one person but the services may be supplied by a third person with whom the consumer has no contractual relationship.<sup>91</sup>

174 The text of s 60 does not imply and certainly does not compel the conclusion that if there is a contract in place between the supplier and the consumer the obligations imposed on the supplier by the Care Guarantee are co-extensive with the supplier’s contractual obligations. Unless there is some contextual reason to construe the Care Guarantee in s 60 of the ACL as applying only to “services” that are co-extensive with the supplier’s contractual obligations,

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<sup>91</sup> Cf *E v Australian Red Cross Society* (1991) 31 FCR 299; [1991] FCA 603, where a patient was given a blood transfusion while in hospital but the blood was supplied by the Red Cross. There was a contract between the patient and the hospital but not between the patient and the Red Cross.

there is no basis for doing so. The same can be said for the Purpose and Result Guarantees.

- 175 In my view there is no contextual reason to construe any of the Consumer Guarantees in this way. To construe the Care Guarantee as applying only to services that are co-extensive with the supplier's contractual obligations would not achieve the object and purpose of the legislation ascertained from the text and structure of the statute.<sup>92</sup> The Care Guarantee is plainly designed to protect consumers by ensuring that the benefits, facilities or other services with which they are to be provided will be rendered with due care and skill. Parliament has expressly stated that a term of a contract which purports to exclude, restrict or modify the application of any of the Consumer Guarantees or any liability of a person for a failure to comply with any of the Consumer Guarantees, is void.<sup>93</sup> It can hardly be intended that a person who is to provide benefits or facilities to a consumer can avoid the statutory obligation to exercise due care and skill simply by entering into a skilfully worded standard form contract with the consumer which defines the services to be provided in a manner that effectively avoids any obligation to exercise due care and skill.
- 176 The threshold inquiry mandated by each of the Consumer Guarantees is to identify (relevantly for present purposes) the benefits and facilities the supplier is to provide to the consumer. This requires an objective assessment of the dealings between the supplier and the consumer to determine the benefits or facilities the consumer can reasonably expect the supplier to provide in return for the consumer's payment. The assessment is not confined to the terms of any contract between the supplier and the consumer. Nor is it foreclosed or limited by any contractual limitations on the supplier's ability for failing to provide the services for which the consumer has paid.
- 177 Depending on the circumstances, the terms of any contract may be a relevant consideration, particularly if the terms have been freely negotiated between the parties. But the benefits or facilities a consumer can reasonably expect the

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<sup>92</sup> Acts Interpretation Act 1901 (Cth) s 15AA.

<sup>93</sup> ACL s 64(1). Section 64(2) qualifies this provision by providing that a term of a contract is not taken to exclude, restrict or modify the application of a Consumer Guarantee unless the term does so expressly or is inconsistent with the provision.

supplier to provide are not to be delimited by exclusion terms in a contract drafted by a supplier primarily to protect its interests. To adopt this approach would be to render the Consumer Guarantees effectively nugatory. Such an intention cannot be imputed to Parliament.

- 178 It is no answer to suggest, as Mr Williams did, that the remedy for a consumer faced with such a contract is to invoke the provisions of the ACL rendering unfair terms of a consumer contract void.<sup>94</sup> This would place the onus on the consumer to establish the invalidity of a contract and undercut the utility of a guarantee intended to be directly enforceable by means of the statutory remedies.
- 179 Nor is it to the point that a supplier of services such as Scenic cannot control weather or river conditions. Scenic, like other suppliers of services in trade or commerce, is likely to be in a much better position than individual consumers to make a timely judgment as to whether external circumstances such as river conditions or civil unrest are likely to disrupt the services that are to be provided. A supplier may be able to rely on exclusion clauses in the contract with the consumer to shield itself from any liability under the general law for a failure to provide services that have been promised. But the consumer's rights under the Consumer Guarantees are separate and distinct from the consumer's contractual rights (and obligations). Indeed cl 2.15 of the Terms and Conditions expressly states that nothing therein operates to exclude or modify the application of any provision of the *Competition and Consumer Act* or Scenic's liability for breach of a guarantee where it would be unlawful to do so.<sup>95</sup>
- 180 As it happens, Scenic's own Terms and Conditions recognise that its primary obligation is to provide passengers with the benefits and facilities associated with the particular cruise they booked and paid for. The Terms and Conditions define the "Tour" to mean "the Tour You have booked with Us outlined in Your Itinerary as amended in accordance with these Terms and Conditions". The Itinerary means "Your personalised Itinerary for Your Tour as amended from time to time in accordance with the Contract". The passenger is entitled to

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<sup>94</sup> ACL s 23(1). See also ss 23(2), (3), 24, 25, 26, 27.

<sup>95</sup> See [100] above.

request a variation to “Your Booking” (an undefined term) and if Scenic accepts the request the passenger must pay a variation fee (cl 2.6(b)). Scenic undertakes to use reasonable endeavours to provide “the Tour You have booked in accordance with Your Itinerary” (cl 2.7). Scenic is permitted to change or vary “Your Itinerary” in certain circumstances and to substitute “another vessel or motor coach for all or part of the Itinerary and also provide alternative accommodation, if necessary” (cl 2.10(d), (g)). But Scenic is obliged to use reasonable efforts to “operate the Tour as close as possible to Your Itinerary” unless changes or substitutions are necessary for reasons outside Scenic’s control.

181 The Terms and Conditions reserve the right to Scenic to cancel a scheduled cruise. Clause 2.9(c) provides that if Scenic cancels a tour “for whatever reason before departure” it must use reasonable endeavours to offer passengers “the closest available tour or tour departure”. If the passenger declines the offer, the contract is terminated and Scenic must refund moneys paid “directly” to it, but is under no further liability to the passenger (cl 2(f)). The Terms and Conditions therefore contemplate that Scenic, for reasons beyond its control or otherwise, may decide to cancel a tour. However, the structure of the contract reflects the parties’ expectations at the time the passenger makes the booking and pays for the cruise that Scenic will supply the Services associated with the personalised Itinerary specified in the Brochure and the reservation form.

182 The Consumer Guarantees are integral components of the statutory scheme designed to afford protection to consumers who do not receive the services they reasonably expect to receive from a supplier. It is hardly surprising that the legislation is drafted on the basis that a supplier of services is ordinarily in a much better position than the consumer to assess in advance the risk that the services cannot be supplied as expected. If the risk materialises, the contract between the supplier and consumer may exempt the supplier from liability in tort or contract for the failure to supply the services. But as I have noted that is quite a separate issue from whether the failure causes the supplier to breach one or more of the Consumer Guarantees thereby entitling the consumer to enforce the statutory remedies for the breach. If the consumer can satisfy the

terms of the legislation, the effect of the Consumer Guarantees is to allocate the risk of loss from the failure to supply the expected services to the supplier rather than to the individual consumer.

183 It is true, as Mr Williams submitted, that a supplier of services such as Scenic cannot always accurately assess in advance the risk that the expected services cannot be provided, in whole or in part, by reason of external circumstances or events. The legislation does not require these difficulties to be completely ignored, nor does it seek to impose impossible burdens on service providers. In some cases where the supplier does not provide the services the consumer expects to receive the supplier will escape liability by reason of what Mr Williams described as the “control mechanisms” built into the Consumer Guarantees. The Care Guarantee requires only that the supplier will provide the services with due care and skill. The Purpose Guarantee requires the supplier to ensure that the services are **reasonably fit** for the purpose made known by the consumer. Similarly the Result Guarantee requires the services to be of such a nature and quality that they can **reasonably be expected** to achieve the result the consumer wishes to achieve and has made known to the supplier.

184 It may well be that the control mechanisms built into the Consumer Guarantee do not protect a supplier of services from all the consequences of circumstances beyond its control. But that is because Parliament has chosen to allocate to the supplier risks that neither the supplier nor the consumer could have anticipated. Whether or not that is an appropriate policy choice is not for a court to determine.

#### *Services supplied to Mr Moore*

185 The rejection of Scenic’s construction of the term “services” does not necessarily determine whether the primary Judge correctly characterised the services Scenic supplied to Mr Moore for the purposes of applying the Consumer Guarantees. It will be recalled that his Honour found that Scenic should be regarded as supplying two categories of services, namely Cruise Services and Information Services.<sup>96</sup>

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<sup>96</sup> See at [149], [150] above.

### **Cruise Services**

- 186 The inquiry required for the purpose of characterising the services Scenic supplied to Mr Moore, as has been explained, is not confined to construing the limits of Scenic's obligations under the Terms and Conditions or to ascertaining the services that were actually provided to Mr Moore after the tour commenced. The inquiry is (relevantly) as to the benefits and facilities Scenic was to provide to Mr Moore. This inquiry involves an examination of the dealings between Scenic and Mr Moore to determine what benefits and facilities Mr Moore, as a consumer, could reasonably expect Scenic to provide in return for payment of the charges for a reservation on Cruise 8.
- 187 Whatever difficulties may be encountered in other cases, the present case (as his Honour effectively found) is relatively straightforward. The Brochure, which Mr Moore read and understood before paying for Cruise 8, set out in great detail the benefits and facilities Scenic would provide to persons who booked and paid for the cruise. The Brochure, among other things, identified the vessel on which the passengers were to enjoy the luxury cruise and promised the "sanctuary of your own private suite or state room". The itinerary specified what passengers could expect on each day of the 15 days/14 nights cruise. Passengers were to "enjoy a level of inclusive luxury service that is unsurpassed on the water ways of Europe", extending to a "private butler ready to assist at any time of the day". The Brochure outlined the many "Scenic Highlights" passengers would experience while on board the vessel and the "FreeChoice" land tours included in the price.
- 188 Mr Moore, having read the Brochure and made his booking and reservation on the faith of it, as Scenic intended, could reasonably expect that Scenic would provide him with the benefits and facilities associated with Cruise 8 as described in the Brochure. Since Mr Moore also read the Terms and Conditions he presumably understood that if the expected benefits and facilities were not supplied Scenic's contractual liability to him was, or might be severely limited. But as has been noted that issue is distinct from determining the benefits and facilities Mr Moore could reasonably expect Scenic to supply by reason of his booking and payment for Cruise 8.

189 The primary Judge described the Cruise Services to be supplied to Mr Moore as:<sup>97</sup>

“providing services which were recreational and were constituted by a river cruise which included luxurious all inclusive accommodation, dining and entertainment, travelling along European rivers and stopping at certain destinations”.

This description omits any specific reference to Cruise 8, presumably because his Honour wished to frame the finding as applicable not only to Mr Moore but to all Group Members.

190 A more precise description of the services to be provided by Scenic to Mr Moore in my opinion is:

the benefits and facilities of Cruise 8 set out in Scenic’s Brochure, specifically at pages 40-41 of the Brochure.

For the purposes of Mr Moore’s case nothing turns on the differences between the primary Judge’s formulation and what I consider to be a more precise formulation of the services to be supplied by Scenic to Mr Moore. The more precise description is consistent with the definition of “services” in the ACL set out earlier in this judgment.

191 The conclusion that Scenic was to provide the Cruise Services (as I have explained the term) to Mr Moore does not mean that Scenic failed to comply with the Consumer Guarantees if it was unable to provide all the benefits and facilities described in the Brochure. Whether in that event Scenic failed to comply with one or more of the Consumer Guarantees is a separate question the answer to which depends on applying the language of each of the Consumer Guarantees to the particular circumstances.

#### **Information Services**

192 The primary Judge expressed his finding that Scenic was to supply Information Services to Mr Moore in different ways. His Honour referred to Scenic’s “concession” that monitoring and managing the services being provided were

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<sup>97</sup> Primary Judgment at [351].

“necessary incidents” of its contractual obligations. He then said that what Scenic actually did demonstrated that it accepted such obligations and that:<sup>98</sup>

“[t]hese additional services included the provision of timely and accurate information to passengers about the cruise **both in advance of the cruise, and during it. If, for any reason, the cruise could not go ahead, then Scenic was under an obligation to notify the passengers**” (Emphasis added.)

193 It is not entirely clear what his Honour meant by the expression “[i]f ... the cruise could not go ahead”. The expression seems to refer to a situation where the cruise cannot proceed at all and therefore must be cancelled. In this situation, the primary Judge considered that Scenic was obliged to notify passengers promptly that the cruise had to be cancelled.

194 It this is what his Honour meant, he immediately expanded the scope of the services Scenic was to supply to Mr Moore and Group Members. His Honour found that:<sup>99</sup>

“after the contract was entered into, Scenic had a continuing obligation to provide intending passengers (at least those who had made bookings which had been accepted) with information about events, or the consequences of events, which may have impacted in any real way (save for a de minimis impact) upon the provisions of Scenic of the booked cruise, or upon the passenger’s ability to travel in accordance with the itinerary and to enjoy the luxury cruise experience which Scenic had promised”.

His Honour repeated this formulation later in the judgment, adding that Scenic was obliged to provide the information as soon as it was reasonably available and to ensure that the information was reasonably accurate.<sup>100</sup>

195 The primary Judge did not distinguish between the Information Services Scenic supplied or was to supply before and after the commencement of a cruise. However, the position is not necessarily the same in each case.

196 His Honour applied the broader description of Information Services in finding that Scenic failed to comply with the Care Guarantee by its conduct in advance of the commencement of certain cruises. For example, his Honour found that it was clear to Ms Scoular of Scenic on 16 May 2013, four days before Cruise 1 was to commence from Chalon-sur-Saône, that water levels remained high and

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<sup>98</sup> Primary Judgment at [149].

<sup>99</sup> Primary Judgment at [151].

<sup>100</sup> Primary Judgment at [375], reproduced at [150] above.

that at that stage the cruise sailing north towards Chalon-sur-Saône could not establish a final disembarkation point. On the basis of these findings his Honour considered that:<sup>101</sup>

“having regard to the history of what had preceded during the earlier weeks in the month, any responsible provider of travel services would have realised that there was a **significant likelihood that the cruise due to commence when passengers embarked on 20 May 2013, would not be able to proceed smoothly and without interruption.** Particularly is this so because Scenic had no information at that time which enabled it to conclude that there was likely to be a drop in the height of either river sufficient to permit navigation.” (Emphasis added.)

It was therefore incumbent on Scenic, acting with due care and skill, to take reasonable steps to inform its passengers about the information available and given them the choice to cancel their reservation.<sup>102</sup>

197 It is not clear why the primary Judge defined the Information Services so broadly when considering the application of the Care Guarantee to circumstances arising before the commencement of a cruise. His Honour referred to a concession Scenic made at trial, but that concession appears to have been limited to an acknowledgement that the Terms and Conditions required Scenic to provide information to passengers in particular and limited circumstances. In his submissions on the appeal, Mr Williams accepted that it was an incident of the contractual arrangements that Scenic would notify passengers promptly if a cruise had to be cancelled. Mr Williams also accepted that Scenic would have to provide regular information to passengers while on board a vessel about their scheduled daily activities. But he disputed that Scenic had conceded at trial that its services were to include the provision of information to passengers about any risks that a cruise might not be able to “proceed smoothly and without interruption”.

198 Mr Abadee did not seriously contest Mr Williams’ explanation of the limited nature of Scenic’s concession. Nor did Mr Abadee identify any material in the Brochure that supported the primary Judge’s characterisation of the Information Services as applied to the Services Scenic was to supply before a cruise commenced. Somewhat ironically, given his insistence that the Terms

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<sup>101</sup> Primary Judgment at [476].

<sup>102</sup> Primary Judgment at [477], [482].

and Conditions did not limit the services Scenic was to supply, Mr Abadee relied principally on the contractual provisions to uphold the primary Judge's finding.

- 199 None of the Terms and Conditions to which Mr Abadee referred supports the primary Judge's characterisation of the Information Services. Mr Abadee relied, for example, on cl 2.6 of the Terms and Conditions. But that provision merely specifies the charges a passenger incurs in the event that he or she cancels the cruise before the departure date. It is impossible to infer from cl 2.6 that Scenic's services were to include notifying passengers in advance of embarkation of a risk that a cruise might not proceed smoothly and without interruption, or of a risk that events might occur in the future that could have more than a de minimis impact on the luxury experiences Scenic promised to provide.
- 200 On the primary Judge's formulation of the Information Services, Scenic's services were to extend to notifying passengers in advance of any event that might "impact in any real way upon the passenger's ability to travel in accordance with the itinerary". Scenic would then be obliged by s 60 of the ACL to exercise due care and skill to notify passengers in advance promptly of any event of which Scenic was aware that might have such an impact. As was pointed out in argument, on this approach the Care Guarantee might effectively require Scenic to notify passengers of a variety of events or even possible events that could have an impact on the cruises they had booked. For example, Scenic might be obliged to notify passengers of a strike of uncertain duration in one of the countries included in the cruise itinerary or even of tensions in other parts of the world that might result in intrusive security measures for passengers travelling along the European rivers or require eliminating one port from the itinerary.
- 201 It is one thing to infer from the Brochure and the Terms and Conditions that Scenic's services were to include prompt notification of a decision by it to cancel a cruise or substantially to change an itinerary. It is quite another to infer that Scenic was to supply services that included notification to passengers of

any risks to the smooth operation of the cruise. There is no basis for drawing such an inference from the material provided by Scenic to Mr Moore.

202 It follows that the primary Judge erred in finding that the services to be supplied by Scenic to Mr Moore and other Group Members **before the commencement of each cruise** included the Information Services as his Honour defined that expression. Mr Moore did not file a notice of contention seeking an alternative, more limited finding as to the additional services Scenic was to supply to Mr Moore and the Group Members.

203 The services Scenic was to supply **after** embarkation were not necessarily as limited as those it was to supply before the cruise commenced. Once on board the vessel passengers were entirely in the hands of Scenic and its representatives. They were responsible for providing the services and facilities booked and paid for by the passengers. They had access to information bearing on whether the scheduled itinerary was likely to be disrupted and, if so, to what extent. Scenic must have known that most if not all passengers would expect to be kept reasonably informed of matters known to Scenic, or of which it ought to have known, that were likely to interfere substantially with the services and activities they expected to enjoy.

204 The Brochure assured passengers that they would not only experience all-inclusive luxury throughout the cruise, but that they would receive “meticulous attention to detail, first class service and intimate personal touches”. Scenic had a contractual entitlement to provide a reasonable alternative to the scheduled itinerary if circumstances beyond its control rendered it impossible to adhere strictly to the schedule. But the assurances in the Brochure conveyed to passengers that Scenic’s services extended to providing reasonably timely information on such matters as unusual weather conditions, river levels or natural disasters likely to disrupt the scheduled itinerary. Passengers could reasonably expect to be informed of matters known to Scenic or which it should have known from sources of information available to it.

205 Mr Williams did not dispute that the services to be supplied by Scenic **after embarkation** included providing information to passengers about their daily

activities. It is but a small step to conclude, as did the primary Judge, that the services were to extend to the provision of timely information about substantial interruptions to the itinerary known to Scenic or of which it ought to have known. Scenic's failure to provide timely information of this kind, depending on the circumstances, therefore could constitute a failure to comply with the Care Guarantee. Scenic might have breached the Care Guarantee, for example, if it deliberately delayed informing passengers on board the vessel that it had already decided to make substantial changes to the current cruise because of known rises in river levels. It might also have breached the Care Guarantee if it failed to exercise reasonable care in ascertaining the true river levels and for that reason did not inform passengers that substantial interruptions to the scheduled itinerary would be experienced.

206 This construction of the Care Guarantee does not mean, however, that a contravention of the Care Guarantee by Scenic after a cruise commenced necessarily leads to the conclusion that it was bound to cancel the cruise or offer passengers a refund. A breach of the Care Guarantee is of a different character than a breach of the Purpose or Result Guarantee. If a failure to provide timely information to passengers constituted a breach of the Care Guarantee that is because the services to be supplied by Scenic included the provision of timely information to passengers once they were on board the vessel. But there was nothing in the material made available to prospective passengers in advance of the cruises which suggested that the "services" to be supplied by Scenic would include cancellation of the cruise or a refund of the full price paid by passengers.

207 The consequences of a failure to comply with the Care Guarantee are prescribed, for present purposes, by s 267 of the ACL. Thus a passenger's entitlement pursuant to s 267(3)(a) to terminate the contract for the supply of the services depends on whether the failure to comply cannot be remedied or is a "major failure" within the meaning of s 268 of the ACL. Termination of the contract after a Scenic cruise has commenced might give rise to questions as to the remedies available to a passenger who terminates the contract after receiving part but not all of the services to be provided by Scenic. A passenger's entitlement to damages under s 267(4) (assuming such an

entitlement is not precluded by s 275 of the ACL) depends on proof that the failure to comply with the Care Guarantee caused the passenger loss or damage. Where the failure to comply consists only of a delay in providing information as to likely disruptions to the scheduled itinerary, it may be difficult for the passenger to prove that he or she suffered loss or damage by reason of that delay. It is likely to be even more difficult for a passenger to demonstrate that a failure to provide timely information of itself warrants an award of damages equivalent to the full price paid for the cruise.

208 A failure by Scenic to comply with the Purpose or Result Guarantees also would not automatically trigger an obligation to cancel the cruise or refund the full purchase price paid by a passenger. The consequences of the breach would depend on the extent to which the services were not fit for the particular purpose made known by the passenger or fall short of achieving the result the passenger wished to achieve. Depending on the circumstances, Scenic (or another tour provider) might in practice be forced to cancel a cruise and make alternative arrangements for passengers to avoid having to compensate passengers to the extent of the full purchase price pursuant to s 267(3)(b) of the ACL. (Scenic might also be obliged in practice to take this course if, contrary to the view expressed later in this judgment, the passenger has an action in damages under s 267(4) of the ACL for distress and disappointment.) But Scenic would not be obliged by the provisions of Part 5-4 of the ACL to cancel the cruise or automatically refund the full purchase price.

### **Purpose Guarantee: Mr Moore's case**

#### *Particular purpose*

##### **Primary Judgment**

209 The elements of a claim founded on a failure to comply with the Purpose Guarantee have been explained earlier in this judgment.<sup>103</sup> The primary Judge found that Mr Moore had not established that he expressly made known to Scenic any particular purpose for which he acquired the services.<sup>104</sup> In his Honour's view, however, this did not matter. By publishing and distributing the Brochure and advertising in a variety of forums Scenic was "enticing

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<sup>103</sup> See [121] above.

<sup>104</sup> Primary Judgment at [385].

passengers to book for an all-inclusive five-star luxury cruise”.<sup>105</sup> Moreover Scenic understood that the services they were supplying were all those necessary to provide passengers with a luxury five-star all-inclusive experience of the river cruise it had promoted.<sup>106</sup>

210 In these circumstances and in the absence of direct evidence of the communication of any other “particular purpose”, his Honour concluded that:<sup>107</sup>

“when Mr Moore or any other intending passenger made a booking, paid the appropriate deposit, had their booking confirmed by Scenic for the identified cruise itinerary and with the selected cabin, and then in a timely way paid the balance of the itinerary price Mr Moore was impliedly making known to Scenic that he and his wife wanted to enjoy the cruise upon which they had booked with all of the benefits which Scenic said that it would provide and that was the particular purpose for which the services were being supplied by Scenic.”

211 In his Honour’s view the “particular purpose” within the meaning of s 61(1) of the ACL arises and is communicated at the time the services are acquired but before they are supplied. The purpose is “a unilateral one of the consumer” and need not necessarily be agreed with the supplier. Nor does the particular purpose have to be objectively reasonable.<sup>108</sup>

212 His Honour was satisfied that:<sup>109</sup>

“Scenic would have known, or understood, that Mr Moore’s particular purpose was to take the cruise which he booked and enjoy it together with all of the Services which Scenic said that it would provide”.

The primary Judge noted that Scenic’s final submissions did not dispute that this inference should be drawn. Indeed Scenic’s Defence admitted that Mr Moore and Group Members “wished to experience and enjoy travel and accommodation, by cruise, along European rivers to a range of tourist destinations”.<sup>110</sup>

213 The primary Judge observed that a supply of services would not breach the Purpose Guarantee unless the services were not reasonably fit for the identified purpose. A determination on that question was necessarily fact

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<sup>105</sup> Primary Judgment at [388].

<sup>106</sup> Primary Judgment at [389].

<sup>107</sup> Primary Judgment at [390].

<sup>108</sup> Primary Judgment at [391]-[392].

<sup>109</sup> Primary Judgment at [393].

<sup>110</sup> Primary Judgment at [394].

dependent and required a review of the facts relating to each cruise.<sup>111</sup> In undertaking that task it was appropriate:<sup>112</sup>

“to proceed on the basis that the particular purpose which was impliedly made known by Mr Moore **and each other booked passenger**, was as I have described earlier, namely to enjoy an all-inclusive five-star luxury river cruise experience with all of the additional services promised by Scenic.” (Emphasis added.)

### **Scenic’s submissions**

- 214 Ground 9 of the Notice of Appeal contends that the primary Judge erred in finding that the “particular purpose for which [Mr Moore] acquired Scenic’s services was not subject to the [T]erms and [C]onditions of the contract”. Scenic’s submissions in chief said virtually nothing to develop Ground 9 which, on one view, simply reiterates Scenic’s complaints about the characterisation of the “services” Scenic was to provide.
- 215 Scenic returned to Ground 9 in its reply written submissions, apparently in response to Mr Moore pointing out that nothing of substance had been said in Scenic’s submissions in chief. Scenic contended that the primary Judge erred in conflating the “particular purpose” made know by Mr Moore to Scenic with the services supplied or to be supplied by Scenic. It “defied reality”, so Scenic argued, to divorce Mr Moore’s particular purpose (and that of Group Members) from the inherent risks associated with cruising on the waterways of Europe.
- 216 Mr Williams put the argument somewhat differently in his oral submissions. He contended that the “particular purpose for which the services are being acquired by a consumer” must be something different from the services themselves. Beyond referring to the decision of the High Court in *David Jones Ltd v Willis*<sup>113</sup> (**David Jones**), Mr Williams did not develop the argument.

### **Consideration of Mr Moore’s particular purpose**

- 217 The *Sale of Goods Act 1893* (UK) (**1893 Act**) and its Australian counterparts provided that where a buyer expressly or impliedly made known to the seller the particular purpose for which the goods were required, so as to show that the buyer relied on the seller’s skill and judgment, there was an implied

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<sup>111</sup> Primary Judgment at [395]-[396].

<sup>112</sup> Primary Judgment at [397].

<sup>113</sup> (1934) 52 CLR 110; [1934] HCA 47.

condition that the goods were fit for that purpose.<sup>114</sup> The test of whether the buyer had relied on the seller's skill and judgment was whether in all the circumstances a person in the position of the seller would have realised that his or her skill and judgment was being relied on.<sup>115</sup> While the questions of particular purpose and reliance were distinct they were closely related and were often considered together.

218 Once a finding was made that the buyer had made known a particular purpose so as to rely on the seller's skill and judgment, it was usually a short step to conclude that goods which failed to satisfy a buyer's expectations were not reasonably fit for the particular purpose. Hence there were many and varied circumstances in which courts found that goods were not reasonably fit for the particular purpose made known to the seller.<sup>116</sup>

219 Section 61(1) of the ACL uses language similar to that found in the 1893 Act but the structure of the provision is different. Section 61(1) states that where the consumer, expressly or by implication makes known to the supplier **any** particular purpose for which the services are being acquired by the consumer, there is a guarantee that the services will be reasonably fit for that purpose. The particular purpose does not have to be made known to the supplier in a manner that shows that the consumer relies on the seller's skill and judgment. The issue of reliance is dealt with in s 61(3) which, as has been seen, provides that the section does not apply if the circumstances show that the consumer did not rely on the supplier's skill and judgment. In effect, the consumer's particular purpose has been uncoupled from the consumer's reliance on the skill and judgment of the supplier.

220 *David Jones*, the decision relied on by *Scenic*, arose under the *Sale of Goods Act 1923 (NSW) (1923 NSW Act)*. In that case, a purchaser of a pair of shoes sued the retailer which sold the shoes seeking damages by reason of injury suffered when the heel of one shoe became detached. The purchaser succeeded in her claim that the goods were bought by description within the

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<sup>114</sup> 1893 Act, s 14(1). In New South Wales the equivalent provision was the Sale of Goods Act 1923 (NSW), s 19(1).

<sup>115</sup> *Henry Kendall & Sons v William Lillico & Sons Ltd (subnom Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association)* [1969] 2 AC 31 at 81 (Lord Reid) (*Hardwick Farm*).

<sup>116</sup> M Bridge, *Benjamin's Sale of Goods* (10th ed 2017, Sweet and Maxwell) at [11-052].

meaning of s 19(2) of the 1923 NSW Act (the equivalent to s 14(2) of the 1893 Act) and that the retailer had breached the implied condition of merchantable quality. Three members of the High Court considered whether the purchaser could also succeed under s 19(1) of the 1923 NSW Act (the equivalent to s 14(1) of the 1893 Act).

221 Rich, Starke and McTiernan JJ considered that it was open to the jury to find that the buyer had expressly made known to the retailer that she required the shoes for the ordinary purpose of walking outdoors.<sup>117</sup> Starke J explained that:<sup>118</sup>

“a particular purpose is ‘a definite purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods’ ... it is not necessarily distinct from a general purpose. And it may appear from the contract or from evidence *dehors* the contract or from the description of the article itself”. (Citations omitted.)

McTiernan J observed that:<sup>119</sup>

“it is settled that the purpose for which goods are supplied may be ‘particular’ within the meaning of this provision, although it is the sole use for which goods of that kind are adapted. The purpose need not be some special use or requirement”. (Citations omitted).

222 It is difficult to see how *David Jones* assists Scenic’s argument. The now discarded linkage in s 19(1) of the *Sale of Goods Act 1923* (NSW) between particular purpose and reliance perhaps provided some support for the argument that a particular purpose had to be distinct from a general purpose. Yet a majority of the High Court rejected the argument.

223 None of the reasoning in *David Jones* is inconsistent with the reasoning of the primary Judge in the present case. Indeed, if anything, the observations of Starke and McTiernan JJ support the primary Judge’s finding (as I interpret it) that Mr Moore made known to Scenic that his particular purpose was to enjoy the services associated with Cruise 8 conducted in accordance with the itinerary set out in the Brochure.

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<sup>117</sup> *David Jones* at 119 (Rich J); at 122 (Starke J); at 128-129 (McTiernan J). Gavan Duffy CJ and Dixon J did not find it necessary to address s 19(1) of the *Sale of Goods Act*.

<sup>118</sup> *David Jones* at 121.

<sup>119</sup> *David Jones* at 128.

224 Mr Williams' submission also overlooked the decision of the Privy Council in the well known case of *Grant v Australian Knitting Mills Ltd*<sup>120</sup> (**Grant**), a case arising under the *Sale of Goods Act 1895* (SA) (relevantly identical to the 1893 Act). The appellant in that case purchased woollen underwear from a retailer. The manufacturer, unknown to the retailer, had introduced chemical substances into the manufacturing process. As a consequence, the purchaser developed a significant skin condition after wearing the garments. The Privy Council held that the purchaser made known to the retailer the particular purpose for which the underwear had been acquired so as to show that the purchaser relied on the retailer's skill or judgment.

225 Lord Wright made it clear that the "particular purpose" for which goods are acquired might be the only purpose for which someone might want to acquire them:<sup>121</sup>

"It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture : it is immaterial whether he be manufacturer or not: the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make : the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply : there is no need to specify in terms the particular purpose for which the buyer requires the goods : **which is none the less the particular purpose within the meaning of the section because it is the only purpose for which anyone would ordinarily want goods. In this case the garments were naturally intended and only intended to be worn next the skin.**" (Emphasis added.)

226 *Grant* demonstrates that a purchaser of goods may have the "particular purpose" of acquiring them for the only purpose for which the goods are suitable.<sup>122</sup> That reasoning applies *a fortiori* to the Purpose Guarantee. Thus a consumer may have the "particular purpose" of acquiring services for the only purpose for which the services are suitable. It was not necessary for Mr Moore to show that he had a more specific purpose than simply wishing to experience the services to be supplied by Scenic in connection with Cruise 8 conducted in

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<sup>120</sup> (1935) 54 CLR 49; [1935] UKPCHCA 1, reversing *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387; [1933] HCA 35.

<sup>121</sup> *Grant* at 60 (Lord Wright).

<sup>122</sup> *Hardwick* at 94 (Lord Morris of Borth-y-Gest).

accordance with the itinerary published in the Brochure. Accordingly, it was open to the primary Judge to infer from the dealings between Mr Moore and Scenic that he implicitly made known to Scenic that he was acquiring the services supplied by Scenic for the particular purpose of experiencing Cruise 8 in accordance with the services and itinerary published in the Brochure and booked by him. The fact that Mr Moore read and understood the Terms and Conditions did not require a contrary finding. His subjective purpose was not to enjoy services that Scenic might supply in substitution for Cruise 8. It was to enjoy Cruise 8.<sup>123</sup>

### *Fitness for purpose*

#### **Primary Judge's finding**

227 It will be recalled that the primary Judge found, in summary, that passengers on Cruise 8 were required to travel on three different vessels and instead of cruising on ten days as scheduled, they cruised on only three.<sup>124</sup> On the basis of the evidence that supported this finding his Honour found that the services supplied to Mr Moore were not reasonably fit for the particular purpose he had made known to Scenic.

228 The primary Judge explained this finding as follows:<sup>125</sup>

“... very little cruising in fact took place. The ships were docked in places which were unattractive. Lengthy coach tours were organised and passengers spent a very long time on coaches, some of which were inadequate.

It could not be said that the passengers on this trip received the benefit of the Services which Scenic ought to have provided. The services in fact provided were not reasonably fit for the Particular Purpose”.

#### **Scenic's submissions**

229 It is one of the peculiarities of this case that Scenic presented detailed arguments challenging the primary Judge's finding that it failed to exercise due care in supplying the Information Services, yet said virtually nothing in opposition to the finding that Scenic failed to comply with the Purpose Guarantee in supplying the Cruise Services. The absence of submissions on this point may simply have reflected an assessment that if this Court upheld the

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<sup>123</sup> As to subjective purpose see *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145; [2011] FCAFC 128 at [171] per curiam.

<sup>124</sup> Primary Judgment at [644]; see at [118] above.

<sup>125</sup> Primary Judgment at [645]-[646].

primary Judge's findings on the services to be supplied by Scenic and the particular purpose made known by Mr Moore to Scenic, it was very likely that the Court would also uphold the finding that Scenic breached the Purpose Guarantee.

230 In any event, the only challenge to the primary Judge's findings of fact in relation to Cruise 8 was that his Honour should have found that at least some cruising occurred on approximately seven days. The basis for this challenge was not explained, but apparently rested on a rather different concept of "cruising" than his Honour had in mind. But even if the complaint is justified, it does not detract from the primary Judge's assessment as to the gross disparity between the services Scenic was to provide on Cruise 8 and the services it actually supplied.

**Not fit for purpose**

231 As has been noted, the link in the Sale of Goods legislation between a purchaser's particular purpose and the purchaser's reliance on the skill and judgment of the seller of goods often assisted the purchaser in establishing that the goods were not reasonably fit for the particular purpose. The severing of the link in s 61(1) of the ACL perhaps may make it more difficult for a consumer who makes known a particular purpose for which services are being acquired to establish that the services supplied are not reasonably fit for that purpose. This question need not be explored in the present case since it is clear that the services provided by Scenic were not fit for the purpose Mr Moore made known to it, namely to experience Cruise 8 in accordance with the itinerary published in the Brochure and booked by Mr Moore.

232 As the account given earlier indicates, the services Scenic supplied to Mr Moore bore remarkably little resemblance to the itinerary set out in the Brochure and in his personalised booklet, for which he paid a considerable amount of money. In essence, as the primary Judge found, Scenic provided very little cruising but a great deal of lengthy and often uncomfortable coach travel, coupled with a seriously disrupted schedule and curtailed sightseeing. There was clearly a gross disparity between the services Scenic actually

supplied to Mr Moore on Cruise 8 and the services that could reasonably satisfy the particular purpose Mr Moore made known to Scenic.

- 233 Mr Williams submitted that when considering whether the services actually provided on Cruise 8 were reasonably fit for that particular purpose, it is necessary to consider the totality of the numerous services Scenic was to supply to Mr Moore. A contravention of the Purpose Guarantee is not established, so Mr Williams argued, merely by proving that the service provided failed to supply one component or even several components of a large suite of services the passenger expected to receive. So much may be accepted, at least if the failure relates to services that are not central to the fulfilment of the particular purpose made known to the service provider.
- 234 The primary Judge did not base his findings on relatively minor departures from the published itinerary and standards. Nor did he assume that any deviation from a published itinerary or an unavoidable failure to provide services of the expected standard would constitute a contravention of the Purpose Guarantee. It was the great disparity between the services needed to fulfil Mr Moore's particular purpose and the services actually supplied by Scenic that underpinned his Honour's finding that Scenic contravened the Purpose Guarantee.
- 235 Mr Williams also submitted, without elaboration, that whether services are reasonably fit for a particular purpose can be assessed only by taking into account matters outside the service provider's control. Thus in this case, so Mr Williams argues, it is necessary to take into account that Scenic cannot control weather, water levels and unexpected transport restrictions. I accept that the concept of reasonableness may allow matters of this kind to be taken into account. A holiday in the sun may be reasonably fit for purpose notwithstanding it rains incessantly (unless, perhaps the service provider knew that the holiday was scheduled for the monsoon season). A cruise is not necessarily rendered unfit for purpose simply because the local authorities require the vessel to dock at a secondary port on one or two days of a ten day cruise or because one or two of the land tours cannot take place as scheduled.

236 It is, however, one thing for the Court to take into account matters of this kind in determining whether services are reasonably fit for a particular purpose. It is another to conclude that a service provider cannot contravene the Purpose Guarantee if the failure to provide the expected services is due to circumstances beyond the provider's control. In each case an assessment has to be made of the services actually provided, making due allowance for the inevitable vicissitudes that can affect even the most meticulous travel and touring arrangements.

237 In the present case, the question is whether the services supplied by Scenic to Mr Moore were reasonably fit for the particular purpose he had made known: that is experiencing Cruise 8 in accordance with the itinerary and standards published in the Brochure. On the primary Judge's findings the great disparity between the services supplied and those needed to fulfil the particular purpose was such that the services supplied were not fit for that purpose. The primary Judge, made due allowance for the considerations I have referred to. His Honour therefore did not err in finding that the services Scenic supplied to Mr Moore were not reasonably fit for the particular purpose he made known to it.

### **Purpose Guarantee: Group Members**

#### *The finding as to "particular purpose"*

238 As has been noted,<sup>126</sup> the primary Judge considered it appropriate to proceed on the basis that the particular purpose impliedly made known to Scenic by Mr Moore and each other booked passenger was to enjoy an all-inclusive five-star luxury river cruise experience with the additional services promised by Scenic. On this basis his Honour found that Scenic contravened the Purpose Guarantee in relation to Cruises 1-9 and 11.

239 The answers to Question 8 in the Statement of Issues were apparently intended to record this finding but do not explicitly do so. The reason, as I have explained, is that Question 8 does not refer to the critical allegation in the 3FASC, namely that the services provided by Scenic were not reasonably fit for the purpose for which they were acquired by Mr Moore and the Group Members. Nonetheless it is clear that the primary Judge found that Scenic

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<sup>126</sup> Primary Judgment at [397], quoted at [213] above.

contravened the Purpose Guarantee by failing to provide services reasonably fit for the particular purpose made known by Group Members who booked Cruises 1-9 and 11. The primary Judge left it open to any Group Members who alleged that he or she made known any additional purpose to Scenic to do so. Any such allegation would have to await evidence from particular Group Members as to the additional purpose made known to Scenic.<sup>127</sup>

240 Mr Williams submitted that the issue of whether Scenic breached the Purpose Guarantee was not before the primary Judge, other than in relation to Mr Moore's claim. His principal complaint appeared to be directed to Scenic's reliance on s 61(3) of the ACL, a matter that has already been addressed.<sup>128</sup> But Mr Williams also contended that the primary Judge denied Scenic procedural fairness by applying the finding as to Mr Moore's particular purpose to all other Group Members. He contended that the "particular purpose", if any, made known to Scenic by each Group Member was not a common question and required evidence from each Group Member before a finding could be made in relation to that Group Member. It was therefore not open to the primary Judge, independently of the issue concerning s 61(3) of the ACL, to find that Scenic contravened the Purpose Guarantee (except in Mr Moore's case).

241 As has been pointed out, one of the difficulties with these proceedings is that some "common questions" identified in the Statement of Issues are not in truth common to Mr Moore and Group Members. Mr Williams was correct to submit that in principle a finding that Mr Moore impliedly made known a particular purpose for which Scenic's services were being acquired would not necessarily apply to each of the Group Members. Not all Group Members, for example, might have seen the Brochure or paid attention to any of Scenic's advertising, matters upon which the primary Judge relied in deciding that Mr Moore had made known his particular purpose to Scenic.<sup>129</sup>

242 The obstacle confronting Mr Williams is that the complaint about a denial of procedural fairness has been made very late in the piece and appears to be

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<sup>127</sup> Primary Judgment at [398].

<sup>128</sup> See at [82]-[87] above.

<sup>129</sup> Primary Judgment at [386]-[389].

inconsistent with the manner in which the proceedings were conducted. Mr Moore pleaded in the first version of the statement of claim filed in July 2014 that he and the Group Members:

“made known to [Scenic] that the particular purpose for the acquisition of services from [it as a supplier] was the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destinations”.

243 The particulars to this allegation stated that the purpose was made known by the nature of the relationship between Mr Moore and Group Members and Scenic, the transactions between Mr Moore and Group Members and Scenic and the conduct of Mr Moore and Group Members in booking and paying for cruise holidays. This allegation remained unaltered in the 3FASC. It is clear enough from the pleading that Mr Moore proposed to prove the allegation by relying on circumstances common to Mr Moore and all Group Members.

244 Scenic’s defence to all versions of the statement of claim admitted that Mr Moore and the Group Members:

“wished to experience and enjoy travel and accommodation, by cruise, along European rivers to a range of tourist destinations.”

The admission was limited in that Scenic did not admit that Mr Moore and each Group Member had made known their wishes to Scenic. Nonetheless the admission was made in relation to the claims of Mr Moore and all Group Members and went part of the way to making out Mr Moore’s pleaded case.

245 As has been noted,<sup>130</sup> Scenic unsuccessfully applied pursuant to s 168 of the *Civil Procedure Act* for directions establishing sub-groups and appointing persons to be the sub-group representatives on behalf of the Group Members. The judgment of Beech-Jones J rejecting the application did not identify “particular purpose” as an issue identified by Scenic as requiring the establishment of sub-groups. In any case, as has been pointed out, Scenic did not seek leave to appeal from the interlocutory decision and the attempt to raise the issue of the sub-groups in the appeal came far too late.

246 At a directions hearing held before the primary Judge on 12 February 2016, counsel appearing for Scenic raised concerns about questions identified in the

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<sup>130</sup> See at [12] above.

Statement of Issues that he said were not common to Mr Moore and all Group Members. The transcript indicates that the concerns expressed related to Questions 15-20, which addressed Mr Moore's contention that certain Terms and Conditions were unconscionable or unfair. No concerns appear to have been raised at the hearing about questions addressing Mr Moore's claim on behalf of himself and all Group Members that Scenic contravened the Purpose Guarantee.

247 The primary Judge recorded in the Primary Judgment that the hearing had been conducted on the basis that his Honour would determine not only Mr Moore's claim "but a number of questions which the parties agree are likely to arise with respect to the claims of [G]roup [M]embers".<sup>131</sup> Those questions were incorporated in the Statement of Issues in its final form.<sup>132</sup>

248 Whatever the deficiencies there may have been in the drafting of the Statement of Issues, it is apparent that the hearing was conducted on the basis that it was open to the primary Judge to find that the particular purpose for which the services were being acquired was impliedly made known to Scenic not only by Mr Moore but by all Group Members. In particular, Question 8 asked whether in respect of each of the cruises Scenic contravened the Purpose Guarantee. A substantive answer could not be given to Question 8 without the primary Judge making a finding as to the particular purpose made known to Scenic by each Group Member.

249 The answers to the questions in the Statement of Issues were settled by the primary Judge at the hearing on 15 November 2013 following delivery of the Primary Judgment. The answers to Question 8 recorded that Scenic did not comply with the Purpose Guarantee in respect to Group Members on each of Cruises 1-9 and 11. Question 22 recorded that the answers to Question 8 were common to all Group Members who resided in Australia and Vanuatu. Scenic made no submissions to the primary Judge at the hearing that the answers were inappropriate on the ground that non-compliance with the Purpose Guarantee was not an issue in contest before his Honour. If Scenic's

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<sup>131</sup> Primary Judgment at [10], [67].

<sup>132</sup> Primary Judgment at [55].

representatives considered that the proposed answers travelled beyond the issues litigated at the hearing, they might have been expected to say so.

250 For these reasons the primary Judge's finding that each Group Member made known the particular purpose for which he or she was acquiring services from Scenic did not involve any denial of procedural fairness to Scenic.

#### *Scope of appellate review*

251 Scenic challenges the findings made by the primary Judge that the services provided by Scenic on Cruises 1-9 and 11 were not reasonably fit for the particular purpose made known to Scenic by Group Members who were participants in those cruises. Mr Williams stated that Scenic accepted the findings of primary fact made by his Honour but disputed the conclusion.

252 This is not a case which rests on findings as to the credibility of witnesses. This Court is therefore not constrained by the principles articulated in cases such as *Fox v Percy*.<sup>133</sup> It is not necessary for Scenic, in order to challenge the primary Judge's conclusions on fitness for purpose, to demonstrate that they are "glaringly improbable" or "contrary to compelling inferences".<sup>134</sup>

253 The determination made by the primary Judge that the services provided by Scenic were not "reasonably fit" for the particular purpose made known by Group Members involved the exercise of an evaluative judgment. Not all judges applying the same criteria and weighing the relevant considerations would necessarily reach the same conclusion as to whether the services provided by Scenic in relation to each of the cruises were reasonably fit for the particular purpose made known by the passengers.

254 But this does not mean that the primary Judge's finding is to be characterised as an exercise of discretion reviewable only on the principles stated in *House v King*.<sup>135</sup> The question as to whether the services provided by Scenic were not "reasonably fit" for the particular purpose made known by Group Members must be answered by applying the express statutory criterion. While this is

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<sup>133</sup> (2003) 214 CLR 118; [2003] HCA 22.

<sup>134</sup> *Fox v Percy* at [28], [29]; *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679; [2016] HCA 22 at [43] per curiam.

<sup>135</sup> (1936) 55 CLR 499; [1936] HCA 40. As to the different senses in which the word discretion is used, see *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124; [2008] HCA 13 at [38]-[39] per curiam.

necessarily the product of an evaluative judgment it admits of only one legally correct answer.<sup>136</sup> The review of the primary Judge's finding is therefore to be conducted in accordance with the principles stated in *Warren v Coombes*.<sup>137</sup> Due respect is to be paid to the conclusions reached by the primary Judge, but the appellate court must make its own judgment as to the proper inferences to be drawn from the established facts and give effect to its own conclusions if they differ from those of the primary Judge.<sup>138</sup>

255 Before an appellate court undertaking an appeal by way of rehearing<sup>139</sup> can interfere with findings made by a trial judge error must be established.<sup>140</sup> In determining whether error has been shown in a case such as the present the approach to be taken is that described by Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*.<sup>141</sup>

“... First, the appeal court must make up its own mind on the facts. Secondly, that task can only be done in light of, and taking into account and weighing, the judgment appealed from. In this process, the advantages of the trial judge may reside in the credibility of witnesses ... The advantages of the trial judge may be more subtle and imprecise, yet real, not giving rise to a protection of the nature accorded credibility findings, but, nevertheless, being highly relevant to the assessment of the weight to be accorded the views of the trial judge. Thirdly, while the appeal court has a duty to make up its own mind, it does not deal with the case as if trying it at first instance . Rather, in its examination of the material, it accords proper weight to the trial judge's views. Fourthly, in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.

The degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge.”

(Citations omitted)

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<sup>136</sup> *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (SZVFW) at [49] (Gageler J); *Dwyer v Calco Timbers Pty Ltd* at [40].

<sup>137</sup> (1979) 142 CLR 531; [1979] HCA 9.

<sup>138</sup> SZVFW at [18] (Kiefel CJ), [27], [48]-[50] (Gageler J).

<sup>139</sup> Supreme Court Act, s 75A provides that the appeal is by way of rehearing and the Court has the powers of the Court from which the appeal is brought including the power to draw inferences and make findings of fact: s 75A(5), (6).

<sup>140</sup> SZVFW at [30] (Gageler J).

<sup>141</sup> (2001) 117 FCR 424; [2001] FCA 1833 at [28]-[29] (Drummond and Mansfield JJ agreeing). See *Aldi Foods Pty Ltd v Moroccan Oil Israel Ltd* [2018] FCAFC 93 at [4]-[7] (Allsop CJ, Markovic J agreeing), at [45]-[50] (Perram J).

256 In my view this is a case in which the primary Judge did have a marked advantage in making the evaluative judgment as to whether the services provided by Scenic were reasonably fit for the particular purpose. His Honour heard evidence from Mr Moore and a number of Group Members as to their understanding of the purpose made known to Scenic and their expectations founded on their reading of the Brochure and their dealings with Scenic. Evidence of this kind cannot be decisive on the question of whether Scenic's services were reasonably fit for the purpose. But the evidence could properly inform the primary Judge's evaluative judgment and justifies this Court in giving his Honour's assessment a significant degree of respect.<sup>142</sup>

#### *Scenic's submissions*

257 The review by the Court must be undertaken in the light of the submissions made by Scenic. It is striking that although Scenic placed great emphasis on challenging the primary Judge's findings and conclusions relating to the Care Guarantee, it said very little in support of its challenge to the specific findings that Scenic's services were not reasonably fit for the purpose. Scenic's written submissions in relation to Cruise 1, for example, devoted a total of ten pages to its challenge to the finding that Scenic failed to comply with the Care Guarantee because it failed to inform passengers before the cruise commenced that there was a significant chance that the itinerary would be disrupted. Yet Scenic's written submissions did not specifically address the finding that the services provided in connection with Cruise 1 were not reasonably fit for purpose. It would seem that this course was taken because Scenic chose to rely on its (unsuccessful) contention that contravention of the Purpose Guarantee was not in issue in the proceedings except in relation to Mr Moore's claim.

258 Indeed on my reading of Scenic's written submissions, subject to two exceptions, it advanced no arguments challenging the primary Judge's findings that the services it actually provided were not reasonably fit for the particular purpose made known by Group Members. Specifically, no such arguments were advanced in relation to Cruises 1, 4-9 and 11, except for the submissions made in Mr Moore's own case (which have already been considered). The

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<sup>142</sup> SZVFW at [33] (Gageler J).

written submissions concerning Cruises 1, 4-9 and 11 addressed only the state of Scenic's knowledge of adverse conditions threatening each cruise and whether Scenic should have informed passengers about any likely disruptions to scheduled itineraries and given them an opportunity to cancel or take other action. Scenic's oral submissions did not take the argument on reasonable fitness for purpose any further.

259 The two exceptions to which I have referred concern Scenic's challenge in its written submissions to the findings that the services supplied in connection with Cruises 2 and 3 failed to comply with the Purpose Guarantee. The submissions were, however, very brief. They appear to have been made because the primary Judge made no findings that Scenic contravened the Care Guarantee in relation to Cruises 2 and 3 (but did so in relation to Cruises 1, 4-9 and 11).

#### *Primary Judge's findings*

260 In the light of the limited scope of Scenic's submissions I propose to explain the primary Judge's reasoning in relation to Cruise 1 and to summarise briefly his Honour's approach to Cruises 4-9 and 11. I then deal separately with the findings concerning Cruises 2 and 3.

#### **Cruise 1**

261 The primary Judgment described the itinerary for 14 day South of France river cruise as follows:<sup>143</sup>

"Passengers were, on the morning of 20 May 2013, intended to travel by the fast train, the TGV [from Paris] to Dijon from where they would be transferred by coach to Chalon-sur-Saône to board the *Scenic Emerald*. The cruise was intended to finish on 1 June 2013, when passengers would disembark the ship in Arles and be transferred by coach to Nice airport. The planned itinerary included 12 days of cruising. The route proceeded south from Chalon-sur-Saône in central France to Arles in the south of France, passing through Tournus, Macon, Trevoux, Lyon, Vienne, Tournon, Viviers, Châteauneuf-du-Pape and Avignon."

262 His Honour made a series of detailed findings as to the events that occurred, including the following:<sup>144</sup>

- The passengers boarded the *Scenic Emerald* on 20 May and remained there until 22 May 2013. For the first night the vessel was moored in an "ugly"

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<sup>143</sup> Primary Judgment at [453].

<sup>144</sup> Primary Judgment at [456]-[469]

industrial harbour. On 21 May the passengers were taken sightseeing by coach around Chalon-sur-Saône and Beaune.

- On 22 May 2013 the passengers participated in various coach tours around Chalon-sur-Saône and were transported by coach to meet the *Scenic Emerald* in Macon as the vessel could not berth in Tournus.
- From 23 to 29 May the vessel remained docked in Macon. It therefore did not cruise as scheduled to Lyon, Vienne, Viviers, Chateauneuf-du-Pape or Tarascon. Passengers instead travelled by coach to these locations and participated in various land tours.
- The coach trips varied in distance and travelling time but on 26 May the coach tour to Tournon required 5 ½ hours of travel.
- On 27 May the passengers travelled 10 hours by coach from Macon to Avignon. They stayed in Avignon for two nights and took coach trips on 28 May 2013.
- On 29 May the passengers travelled to Nimes by coach and stayed overnight.
- On 30 May the passengers travelled by coach for 3 ½ hours to Arles, Les Baux and Vivers, where they boarded the *Scenic Emerald*. They then cruised for 80 kilometres to Avignon, arriving late in the evening. This was the “first and only day of cruising which the passengers were all to enjoy”.
- On 31 May the passengers were scheduled to travel by coach to La Camargue National Park, a round trip of 7 ½ hours. A number of passengers elected not to take the tour as they had already endured long coach trips.
- On 31 May the passengers disembarked.

263 The primary Judge summarised his findings as follows:<sup>145</sup>

“Overall, passengers cruised on only one of the 12 planned cruising days. The passengers were instead provided with coach trips, which took many, many hours, whilst they travelled to various locations and then returned to the *Scenic* ship when it was docked. They were also accommodated in hotels, two nights in Avignon and one night in Nimes, which required them to pack and unpack their suitcases for each hotel stay, and as the ships were changed.”

264 His Honour concluded that the services provided by *Scenic* were “wholly unfit” for the particular purpose made known to *Scenic*:<sup>146</sup>

“... Simply put, this was a bus tour around southern France with accommodation on two different ships and at two different hotels with only one afternoon of cruising during which the passengers had the opportunity of relaxing on board the *Scenic* provided ship, watching the countryside drift past.

The services provided were wholly unfit for the Particular Purpose. *Scenic* was in breach of this consumer guarantee with respect to this cruise.”

265 No basis has been shown for disturbing these findings.

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<sup>145</sup> Primary Judgment at [470].

<sup>146</sup> Primary Judgment at [471]-[472].

#### **Cruise 4**

266 Cruise 4 was scheduled to proceed from Amsterdam to Budapest on the *Scenic Ruby*, departing on 27 May 2013. The primary Judge found that passengers on this cruise had only three days of cruising, one of which was incomplete.<sup>147</sup> From the fourth day all touring was done by coach. The passengers were accommodated on three different vessels and at a hotel in Budapest. The primary Judge concluded as follows:<sup>148</sup>

“The passengers on this cruise were not provided with an all-inclusive five-star luxury cruise on their intended itinerary from Amsterdam to Budapest. They cruised only to Mainz and thereafter were provided with a bus tour to Budapest whilst accommodated on stationery ships. This was a far cry from receiving the Services which Scenic promised. I am satisfied that the services provided by Scenic were not reasonably fit for their Particular Purpose.”

No basis has been shown for disturbing his Honour’s finding.

#### **Cruise 5**

267 Cruise 5 was scheduled to proceed from Budapest to Amsterdam on the *Scenic Sapphire*, departing from Budapest on 27 May 2013. The primary Judge found that on eight out of ten cruising days there was no cruising at all with the touring being carried out by coach.<sup>149</sup> The passengers were obliged to change ships on two occasions with lengthy coach trips to effect the changes. His Honour concluded that the number of days on which the cruise was interrupted was “very, very substantial”.<sup>150</sup> In view of the description of Cruise 5 in the documentation his Honour was satisfied that the services provided by Scenic to the passengers on this cruise were not reasonably fit for the particular purpose made known by them.<sup>151</sup> No basis has been shown for disturbing this finding.

#### **Cruise 6**

268 Cruise 6 was scheduled to proceed from Amsterdam to Budapest on the *Scenic Diamond*, departing on 29 May 2013. The primary Judge found that cruising occurred on only three days, one of which involved “partial and

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<sup>147</sup> Primary Judgment at [536].

<sup>148</sup> Primary Judgment at [539].

<sup>149</sup> Primary Judgment at [569].

<sup>150</sup> Primary Judgment at [573].

<sup>151</sup> Primary Judgment at [574].

incomplete” cruising.<sup>152</sup> On ten days passengers stayed on board and took coach tours some of which involved very lengthy road trips. His Honour concluded as follows:<sup>153</sup>

“As the descriptions earlier indicate, the lengthy coach travel was not relaxing nor was it an enjoyable experience. A number of the coaches did not fit a description compatible with a luxury 5 star all-inclusive cruising experience.

I am satisfied that the services supplied to passengers on this cruise were not reasonably fit for Particular Purpose.”

No basis has been shown for disturbing this finding.

### **Cruise 7**

269 Cruise 7 was to proceed along the Budapest to Amsterdam route on the *Scenic Sapphire* departing on 29 May 2013. The primary Judge made the following findings:<sup>154</sup>

“Passengers experienced only three days of cruising out of the 10 days upon which cruising was to occur. Put differently, there were relatively short periods of cruising at the start and the end of the planned itinerary. The balance was a motor coach tour through flooded parts of Europe.

The coach trips were very long, the days were tiring. They could not be described as being relaxing. On one occasion, the passengers were fed lunch at 4pm. Such was the extent of the coach travel that a number of passengers declined one of the coach tour transfers, between Vienna and Bamberg, and made their own arrangements to travel by train. Because of the length of time travelling on coaches, meals were served late into the evening.

Having regard to what occurred, I am firmly persuaded that the services provided to the passengers on this cruise were not reasonably fit for the Particular Purpose.”

No basis has been shown for disturbing the finding that *Scenic* contravened the Purpose Guarantee.

### **Cruise 8**

270 The findings in relation to *Scenic*’s contravention of the Purpose Guarantee in relation to Cruise 8 have already been addressed.<sup>155</sup>

### **Cruise 9**

271 Cruise 9 was to travel from Budapest to Amsterdam on the *Amadeus Silver*, leaving on 8 June 2013. The primary Judge made the following findings:<sup>156</sup>

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<sup>152</sup> Primary Judgment at [603].

<sup>153</sup> Primary Judgment at [605]-[606].

<sup>154</sup> Primary Judgment at [625]-[627].

<sup>155</sup> See [231]-[237] above.

“The passengers on this cruise were significantly disrupted. In Budapest they were accommodated in a hotel and not on a ship. Between Budapest and Nuremberg, the passengers travelled by motor coach and did not have any cruising at all. They were accommodated on two ships and did not commence any cruising until the eighth day of this planned cruise. They only experienced four days of cruising.

...

In Vienna they boarded the ship which was docked in an industrial area, about which there was a pungent smell. They were accommodated for two nights on that ship and then they were transported by coach for about 14 hours to a dock near Nuremberg. They boarded a ship there, which remained docked for the next few days.

...

In cruising terms, the passengers on this trip did not get to cruise on the Danube River at all, which is a distance of about 800km. Nor did they cruise for about 100km on the Main/Danube Canal. Cruising occupied about half of the itinerary that it was intended to occupy. ... They experienced only four days of cruising. They were subject to long days of motor coach travel and did not have the time to enjoy the extent of the river cruise which they should have.

I am satisfied that the services provided to the passengers on this cruise were not reasonably fit for the Particular Purpose”

No basis has been shown for disturbing these findings.

### **Cruise 11**

272 Cruise 11 was to proceed from Budapest to Amsterdam on the *Scenic Sapphire*, leaving on 10 June 2013. The primary Judge made the following findings:<sup>157</sup>

“At the time the cruise was due to commence, the intended ship could not cruise to Budapest. Passengers who commenced the trip in Budapest were transported by coach to Krems where they boarded the *Scenic Sapphire*.

Krems is about 60km along the Danube River to the west of Vienna.

The ship remained docked in Krems for five days until 15 June 2013, where passengers disembarked from that ship and travelled by very long coach trip to Regensburg where they boarded the *Scenic Jewel*.

From Regensburg the cruise proceeded as scheduled to Amsterdam. The passengers on this cruise did not get the benefit of about 760km cruising along the Danube River, from Budapest to Regensburg. As well, their lengthy stay in Krems, which was described as an isolated industrial port, which was some distance from Vienna, did not accord with the itinerary.

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<sup>156</sup> Primary Judgment at [665], [667], [670]-[671].

<sup>157</sup> Primary Judgment at [707]-[711], [713].

... Long motor coach trips of the kind which occurred did not fulfil the purpose of a luxury cruise. Being docked at night for five nights, in an industrial harbour, did not provide the promised extensive views or any evening cruising.

...

I have concluded that the services provided with respect to this cruise were not reasonably fit for the Particular Purpose.”

No basis has been shown for disturbing these findings.

## **Cruise 2**

273 Cruise 2 was to proceed from Budapest to Amsterdam on the *Scenic Jewel* departing on 20 May 2013. The primary Judge found that from 20 to 28 May the cruise proceeded as scheduled. On 28 May the vessel began an “enforced stay” at Bamberg, remaining there until 31 May. The primary Judge inferred from the evidence given in relation to other cruises that the *Scenic Jewel* was docked in an unattractive industrial area which had a “foul smell”. Since the vessel was docked between other ships passengers had no outlook from their cabins and also had little privacy. On 29 May instead of cruising to Würzburg the passengers travelled there by coach and returned to the vessel. On 31 May, passengers disembarked the *Scenic Jewel* and travelled four hours by coach to Rudesheim, where they boarded the *Scenic Ruby*. They then cruised along the Main and Rhine Rivers to Cologne. Thereafter Cruise 2 proceeded as scheduled until it ended in Amsterdam.

274 The primary Judge found that Scenic contravened the Purpose Guarantee for the following reasons:<sup>158</sup>

“In this cruise, the disruption from cruising which, in all, included four days, occupied about one third of the days set aside for cruising on the itinerary and, I am satisfied that this constituted a significant disruption for the passengers on this tour of their cruise experience. This disruption was not a passing one. It did not last only a few hours, nor could it be described as a temporary interruption. On the contrary, for a cruise itinerary which was intended to provide a continuous cruising experience (except for spending two nights in Vienna) this was a most significant disruption to that cruising experience.

I am satisfied that a cruise, disrupted to this extent, and substituted by four days of motor coach tours including at least one which was described as ‘long’ did not provide services which were reasonably fit for the Particular Purpose.

It would not have been a pleasant experience, nor particularly relaxing, nor would it have been interesting to be presented with a choice of travelling on coaches for many hours to visit places described on an itinerary or else to

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<sup>158</sup> Primary Judgment at [492]-[494].

remain staring, essentially, at concrete walls or other ships whilst docked in an industrial area which was not close anywhere attractive.”

- 275 Scenic submitted that the evidence indicated that for the period the *Scenic Jewel* was docked in Bamberg some of its scheduled cruising was to take place at night. This is the only point made in Scenic’s written submissions, except for the argument that the passengers on Cruise 2 were bound by the Terms and Conditions and thus must be taken to have accepted the prospect of adverse weather conditions.
- 276 Contrary to Scenic’s submissions, the published itinerary for Cruise 2 did not indicate that part of the cruising between 28 and 31 May would take place at night. On the primary Judge’s findings, the passengers were deprived of cruising on four days out of a scheduled 12 day cruise. During that period the passengers were subjected to an unpleasant enforced stay in Bamberg and deprived of the opportunity for leisurely and comfortable sightseeing.
- 277 The services provided by Scenic in connection with Cruise 2 came closer to being reasonably fit for the particular purpose than the services provided in connection with Cruises 1, 4-9 and 11. Nonetheless, having regard to the significant disruptions to the scheduled itinerary and the unpleasantness of the enforced stay in Bamberg, I am not prepared to conclude that the primary Judge erred in finding that Scenic contravened the Purpose Guarantee.

### **Cruise 3**

- 278 Cruise 3 was to proceed from Amsterdam to Budapest on the *Amadeus Silver*, departing on 25 May 2013. The primary Judge made the following findings:<sup>159</sup>

“This cruise, not without difficulty, proceeded until it reached Wurzburg, i.e. it proceeded about 500km along the Rhine River, and about 240km along the Main River. That cruising took about four days. The passengers on this cruise did not travel again along the rivers of the Europe. They did not cruise on the balance of the Main River, the Main/Danube Canal or the Danube River i.e. they did not cruise for about 1,000km of the planned itinerary.

...

After Neustadt, where the ship remained, the balance of the trip was conducted on coaches. [T]he services provided to the passengers were badly organised, significantly disrupted and guests who did not have the capacity for walking and travelling on coaches, were obliged so to do. When the passengers were transferred to be accommodated on the *Scenic Rhapsody*,

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<sup>159</sup> Primary Judgment at [518], [520]-[522].

which was docked in Vienna, there were insufficient seats in the dining room to cater for the number of passengers. The hotel in which the passengers were accommodated in Budapest, was inadequate in all respects. The Cruise Director described it as the worst hotel he had ever been in. The passengers were accommodated there for two nights.

In all, the passengers were accommodated on two ships, in a number of different hotels and were transported on coaches for over half of the trip. Instead of having 10 days during which the passengers could experience the promised cruising, they only experienced two days.

The services provided to the passengers on this trip were not reasonably fit for the Particular Purpose.”

279 Scenic’s written submissions merely said that it relied on the same arguments as it advanced in relation to Cruise 2. In my view the primary Judge’s finding concerning Cruise was amply justified.

### **Result Guarantee**

280 The elements of a claim founded on a failure to comply with the Result Guarantee have been explained earlier in this judgment.<sup>160</sup> The primary Judge dealt briefly with Mr Moore’s case on the Result Guarantee on the basis that the same conclusion would be reached for each cruise as with Mr Moore’s case on the Purpose Guarantee.<sup>161</sup>

281 The primary Judge noted that Scenic made no specific submission that Mr Moore and Group Members did not wish to achieve the result promised by Scenic in its Brochure.<sup>162</sup> His Honour found that Mr Moore:<sup>163</sup>

“by receiving the assurances and enticements of Scenic in its Brochure, selecting a particular identified cruise, and then paying for the cruise, was impliedly making know to Scenic the result which he wished the Services to achieve.”

His Honour also found that the passengers who booked on the cruises which Scenic promoted were impliedly communicating that they expected the result from the services which Scenic assured them in the Brochure that they would receive.<sup>164</sup> This was, after all, what Scenic wanted the passengers on each

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<sup>160</sup> See at [122] above.

<sup>161</sup> Primary Judgment at [764].

<sup>162</sup> Primary Judgment at [404]-[406].

<sup>163</sup> Primary Judgment at [404].

<sup>164</sup> Primary Judgment at [405], [754].

cruise to receive; if it were otherwise a question would arise as to whether the contents of the Brochure were misleading or deceptive.<sup>165</sup>

282 His Honour concluded that for the same reasons he gave in relation to the Purpose Guarantee Scenic breached the Result Guarantee by failing to provide services of a nature and quality that might reasonably be expected to achieve the result Mr Moore and the Group Members wished to achieve.<sup>166</sup>

283 Scenic made no submission that the primary Judge's findings that Scenic failed to comply with the Result Guarantee should be set aside if its challenge to the findings in relation to the Purpose Guarantee failed. In taking this course Scenic may simply have recognised that its failure to comply with the Result Guarantee adds nothing material to a finding that it failed to comply with the Purpose Guarantee. In any event, no basis has been established for overturning his Honour's findings that Scenic contravened the Result Guarantee.

### **Care Guarantee**

284 The elements of a claim founded on a failure to comply with the Care Guarantee have been set out earlier.<sup>167</sup> The primary Judge summarised Mr Moore's argument that Scenic failed to comply with the Care Guarantee prior to commencement of the cruises as follows:<sup>168</sup>

“... had Scenic conducted its operations by which the Services were provided with due care and skill, and having regard to the facts of which it was aware, or ought reasonably been aware, it would have concluded that for all of the subject cruises, except Cruises 2 and 3, there was a real and substantial risk or prospect which existed prior to the commencement of the cruises, that the cruises would be substantially disrupted and that the cruise itinerary would not be supplied in accordance with the promised Services.

[Mr Moore] submitted that having regard to such a conclusion, to proceed with the supply of the Services as Scenic did, without either:

- (a) unilaterally cancelling Cruises 1 and 6 to 11 inclusive;
- (b) giving to the passengers the option prior to embarkation of voluntary cancellation for all cruises other than Cruises 2 and 3; and
- (c) for Cruises 2 to 5 inclusive, the option of cancellation and a partial refund or rescheduling,

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<sup>165</sup> Primary Judgment at [756].

<sup>166</sup> Primary Judgment at [764]-[765] (excluding cruises 10 and 12).

<sup>167</sup> See [120] above.

<sup>168</sup> Primary Judgment at [413]-[414].

meant that the Services were provided without due care and skill.”

*Pre-embarkation*

285 His Honour found that Scenic failed to comply with the Care Guarantee prior to embarkation on Cruises 1, 8 (Mr Moore’s cruise), 9 and 11. I shall briefly address each of these findings, starting with Cruise 8.

**Cruise 8**

286 The primary Judge recounted the contents of a number of internal emails sent by Mr Brown, Scenic’s General Manager, Operations and Administration, on Sunday 2 June 2013, the day before Cruise 8 was scheduled to depart. One of the emails was as follows:<sup>169</sup>

“The situation worsens on the Rhine/Main. I will be talking with Lucas [Sandmeier, Scenic’s Managing Director, Europe] today with our options.

I notice on Cruise Critic that Viking and Avalon have started cancelling cruises. I have advised Glen [Moroney, the Managing Director of Scenic] that it is not improving and we may not be able to make land alternatives part of our strategy.

CXL [cancellation] and return home options will be considered today.”

287 On the basis of the email exchanges the primary Judge found that:

“at least as at 2 June 2013, it was known by Scenic that many of the ships would be restricted to being docked in particular locations for significant periods of time. As well, it is apparent that there would be a significant number of excursions which would operate in a limited way or with deviations, or could not be operated at all. It also seems apparent that not all of the intended ports would be reached by those cruises. These restrictions also meant that if cruises were operated there would be extensive travel required by coach. The intended cruising itineraries, it was clear, would be substantially interrupted and would not attain what passengers were contemplating and the services which Scenic had promised it would provide.”

288 In addressing Mr Moore’s personal claim based on Scenic’s alleged contravention of the Care Guarantee, the primary Judge found that there was “simply no reason in the evidence advanced, which was an adequate justification of the decision of Scenic not to cancel [Cruise 8]”.<sup>170</sup> Its failure to do so was a clear demonstration of the provision of the services without due care and skill.<sup>171</sup>

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<sup>169</sup> Primary Judgment at [214].

<sup>170</sup> Primary Judgment at [651].

<sup>171</sup> Primary Judgment at [652].

“Intending passengers were booked on a luxury river cruise. The river conditions and weather did not enable that cruise to take place as promised. The only responsible action for Scenic, on all of the evidence, exercising due care and skill, was to cancel that tour. There is no explanation offered as to why it did not. To the extent that one can infer from the existing evidence why it did not, the most natural inference to be drawn is that Scenic preferred its own commercial interests.”

His Honour accepted Mr Moore’s submission that no later than 2 June 2013, Cruise 8 should have been cancelled. His Honour was therefore satisfied that the services for Cruise 8 were not provided with due care and skill.<sup>172</sup>

289 It is important to appreciate the issue his Honour was required to determine. It was not whether Scenic owed Mr Moore a duty to exercise reasonable care when making decisions to proceed with a cruise or cancel it. Nor was the issue whether Scenic’s decision to proceed with Cruise 8 in the face of information available to it on 2 June 2013 breached any such duty. This was not the case pleaded or conducted by Mr Moore. The issue was whether the services supplied or to be supplied by Scenic to Mr Moore in advance of the commencement of Cruise 8 were supplied with due care and skill. The threshold question is therefore what services were supplied or were to be supplied by Scenic to passengers in advance of embarkation.

290 The primary Judge’s finding appears to depend on his view that the services to be supplied by Scenic to passengers on Cruise 8 prior to embarkation included providing information on an ongoing basis as to circumstances that would reasonably be thought likely to cause disruptions to their scheduled itinerary. The services to be supplied by Scenic extended to prompt notification to passengers of a decision to cancel the cruise because of circumstances beyond Scenic’s control. For the reasons I have given the services Scenic was to supply to passengers booked on Cruise 8 did not include providing information prior to embarkation from time to time of likely disruptions to the scheduled itinerary.

291 If Scenic knew or should have known prior to embarkation of likely disruptions to the schedule itinerary but did not cancel Cruise 8, it ran a significant risk of failing to comply with the Purpose and Result Guarantees. That risk materialised. But the failure to keep passengers informed of likely disruptions

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<sup>172</sup> Primary Judgment at [654].

and the decision not to cancel the cruise did not constitute a failure to comply with the Care Guarantee.

### **Cruise 1**

292 The primary Judge found that shortly before Cruise 1 was scheduled to commence on 19 May 2013, Scenic knew or ought to have known that there was a “significant chance of a substantial disruption” to Cruise 1.<sup>173</sup> Thus Scenic, had it acted with due care and skill, should have contacted passengers no later than 16 May 2013. Scenic should have informed the passengers:<sup>174</sup>

“of the weather and river conditions, informed them accurately of the view which Scenic ought to have formed about the likelihood of significant disruption, and how Scenic would address that, if it were capable, and then given to the passengers a choice as to whether they embarked on the cruise or not, thereby facilitating cancellation for the passengers.”

His Honour made no finding that Scenic should have cancelled Cruise 1.

293 In my view, the services Scenic supplied or was to supply to the passengers on Cruise 1 for the purposes of the Care Guarantee did not include providing the information identified by the primary Judge. The finding that Scenic failed to comply with the Care Guarantee in relation to Cruise 1 therefore should be set aside.

### **Cruise 9**

294 Cruise 9 departed Amsterdam on 8 June 2013. The primary Judge found that no later than 7 June 2013, one day before the cruise commenced, the passengers should have been provided with information indicating that there was “a real prospect of the cruise being significantly interrupted”. That information should have been accompanied, so his Honour found, by an option to cancel.<sup>175</sup> In the absence of adequate information being provided, Scenic failed to comply with the Care Guarantee. For the reasons given in relation to Cruise 8, these findings do not justify concluding that Scenic breached the Care Guarantee.

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<sup>173</sup> Primary Judgment at [481]. See also at [196] above.

<sup>174</sup> Primary Judgment at [482].

<sup>175</sup> Primary Judgment at [682].

### **Cruise 11**

295 Cruise 11 departed from Budapest on 10 June 2013. On 7 June 2013, Scenic wrote to passengers informing them that the *Scenic Sapphire* would not be able to cruise into Budapest as scheduled and that they would travel by coach to Vienna to board the *Scenic Sapphire* there. The primary Judge found that by 8 June 2013, the passengers “ought to have been able to cancel their tour had proper information been provided”.<sup>176</sup> Scenic was:

“clearly on notice prior to the departure of this cruise that there was a real prospect that the cruise would not be able to be completed without interruptions.”<sup>177</sup>

In these circumstances, the provision of services with due care and skill required Scenic either to cancel the cruise or provide up to date and accurate information about likely interruptions to the cruising with an option of cancellation being offered to passengers.<sup>178</sup>

296 For the reasons given in relation to Cruise 8, the findings of fact made by the primary Judge do not justify concluding that Scenic breached the Care Guarantee by its pre-embarkation acts or omissions.

### *Post-embarkation*

#### **Cruise 4**

297 The primary Judge concluded that Scenic failed to comply with the Care Guarantee in relation to Cruise 4 because of its post-embarkation conduct. His Honour found that Cruise 4, which commenced on 27 May 2013 from Amsterdam, was unable to continue beyond Mainz on and after 30 May 2013, the third day of the scheduled cruise. Had Scenic’s operations staff taken steps to inform themselves at that time as to river conditions and weather forecasts, it would have been apparent that the passengers on Cruise 4 would experience significant interruptions to their schedule itinerary (as indeed turned out to be the case).<sup>179</sup> In his Honour’s view:<sup>180</sup>

“Had Scenic exercised due care and skill in the provision of the Services, it ought to have informed its passengers that was what was in prospect.

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<sup>176</sup> Primary Judgment at [714]

<sup>177</sup> Primary Judgment at [716].

<sup>178</sup> Primary Judgment at [717].

<sup>179</sup> Primary Judgment at [550].

<sup>180</sup> Primary Judgment at [552].

Individual passengers could then have made such decision as they thought best in the circumstances.”

298 Having regard to the primary Judge’s finding that Scenic did not advise passengers of likely serious disruptions to the scheduled itinerary of which it should have been aware, his Honour was justified in concluding that Scenic failed to comply with the Care Guarantee. As I have explained, this conclusion does not necessarily mean that the passengers on Cruise 4 were entitled to cancel the cruise or to claim damages by reason of Scenic’s failure to comply with the Care Guarantee. It is difficult to see how any relief available for a post-embarkation failure to comply with the Care Guarantee could be more valuable than the relief available for a failure to comply with the Purpose and Result Guarantees. As will be seen, in the present case that relief is confined to compensation pursuant to s 267(3)(b) of the ACL for reduction in the value of the services supplied below the price paid by the passengers.

#### **Cruise 5**

299 Cruise 5 was scheduled to depart from Budapest on 27 May 2013. The primary Judge found that by 2 June 2013, Scenic was aware that navigation on the Danube River and the Rhine River was likely to be significantly disrupted and that the *Scenic Sapphire* was unlikely to be able to move from its berth in Krems.<sup>181</sup> His Honour also found that the only information provided to passengers was in a letter of 1 June 2013 which “did not convey an accurate picture about Scenic’s ships or the state of the waterways.”<sup>182</sup>

300 On the basis of these findings his Honour concluded that there was no reasonable prospect by 2 June 2013 that the Cruise Services could be provided. Thus, so his Honour found, the cruise should have been cancelled and Scenic’s failure to do so constituted a contravention of the Care Guarantee.<sup>183</sup>

301 For the reasons given in relation to Cruise 4, I consider that there was no error in the primary Judge concluding that Scenic’s failure to provide timely information as to known likely substantial disruptions to the schedule itinerary

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<sup>181</sup> Primary Judgment at [584]-[585].

<sup>182</sup> Primary Judgment at [590], [591].

<sup>183</sup> Primary Judgment at [591], [593].

contravened the Care Guarantee. But I do not think it follows that the contravention consisted of Scenic's failure to cancel the cruise. Quite apart from the matters to which I have already referred, in the absence of danger to the passengers' safety or physical well-being, it is difficult to see why a failure to provide timely information as to likely disruptions to the services to be supplied by Scenic should require Scenic to cancel the cruise. Such a decision would involve a multitude of considerations, not least the welfare of passengers who, depending on what is meant by cancellation of the cruise, might find themselves deposited in a destination not of their choice without any arrangements in place for accommodation or onward travel.

302 Scenic's post-embarkation failure to comply with the Care Guarantee in the case of Cruise 5 consisted of its failure to provide passengers with timely information as to likely disruptions to the scheduled itinerary of which Scenic knew or ought to have known. As with Cruise 4, the entitlement of passengers to relief depends on factual matters in respect of which no findings have yet been made. In any event, it is highly unlikely that any available remedies could be more valuable or extensive than those flowing from Scenic's contraventions of the Purpose and Result Guarantees.

#### **Cruise 6**

303 Cruise 6 departed from Amsterdam on 29 May 2013. The primary Judge found that by 31 May 2013, the exercise of due care and skill required Scenic to inform its passengers that there was a "significant prospect" that Cruise 6 would be unable to proceed in accordance with the scheduled itinerary.<sup>184</sup> His Honour also found that Scenic did not provide information "in any way which approached a description of the reality of the circumstances".<sup>185</sup> On the basis of these findings, the position is the same as Scenic's contravention of the Care Guarantee in relation to Cruises 4 and 5.

#### **Cruise 7**

304 Cruise 7 departed from Budapest on 29 May 2013. The primary Judge found that by 31 May 2013, Scenic should have informed passengers of likely

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<sup>184</sup> Primary Judgment at [611].

<sup>185</sup> Primary Judgment at [612].

disruptions to the scheduled itinerary but did not do so. On the basis of these findings, the position is the same in relation to Cruises 4 and 5.

### *Notice of Contention*

305 The conclusions I have reached as to the services supplied or to be supplied to the passengers makes it unnecessary to consider Mr Moore's Notice of Contention.

### **Circumstances independent of human control**

306 As the primary Judge observed, the syntax of s 267(1)(c)(ii) of the ACL is not easy to understand. In substance, however, it relevantly provides that a consumer cannot rely on the Purpose or Result Guarantee if the failure to comply occurred only by reason of a cause independent of human control that occurred after the services were supplied. The primary Judge found that the services supplied to Mr Moore commenced when he made the booking in Cruise 8 and continued until his disembarkation from the cruise.<sup>186</sup> Mr Moore, so the primary Judge held, did not rely on Scenic's failure to comply with the Purpose and Result Guarantees **after** disembarkation. His case was based on Scenic's failure to supply the services of the requisite standard during the cruise. It followed that Scenic could not rely on a defence under s 267(1)(c)(ii) of the ACL.<sup>187</sup>

307 Although it was unnecessary to make a finding as to whether Scenic's failure to comply with the Purpose and Result Guarantees was due solely to a cause independent of human control, the primary Judge found that flooding and unseasonal rains were not the only causes of Scenic's failure to comply with the Purpose and Result Guarantees. Other causes were entirely within Scenic's control. These included its failure to cancel Cruise 8 prior to departure, the decision to use inadequate motor coaches to transfer passengers and the selection of unsuitable docking locations.<sup>188</sup>

308 Scenic's notice of appeal contains a ground (Ground 8B) alleging that the primary Judge erred in failing to uphold Scenic's defence under s 267(1)(c)(ii) of the ACL in relation to Mr Moore's claims based on contraventions of the

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<sup>186</sup> Primary Judgment at [444].

<sup>187</sup> Primary Judgment at [445].

<sup>188</sup> Primary Judgment at [448].

Purpose and Result Guarantees. Scenic's written submissions briefly addressed Ground 8B. The argument seems to be that if Scenic did not contravene the Purpose and Result Guarantees by acts or omissions prior to embarkation, the contraventions could only have been due to causes independent of human control (flooding and abnormal weather conditions) which occurred after the services were supplied. The contention was mentioned by Mr Williams in oral argument but was not developed.

309 The finding that Scenic failed to comply with the Purpose and Result Guarantees was based on the disparity between the nature and quality of the services Scenic was to provide to passengers booked on the various cruises and the nature and quality of the services supplied after the cruises commenced. The finding required a comparison to be made between the totality of post-embarkation services to be supplied by Scenic and the totality of post-embarkation services actually supplied. In each case services did not terminate (or were not to terminate) until the passengers disembarked. Even if, contrary to the primary Judge's findings, Scenic's failure to comply with the Purpose and Result Guarantees was due to causes independent of human control, the failure was not due solely to causes occurring after Scenic supplied the services. The challenge to the primary Judge's rejection of Scenic's defence under s 267(1)(c)(ii) of the ACL must be dismissed.

**Mr Moore's claim for compensation and damages: Primary Judgment**

310 The primary Judge addressed Mr Moore's own claim for compensation (pursuant to s 267(3) of the ACL) and damages (pursuant to s 267(4)) on the basis that Scenic failed to comply with each of the three Consumer Guarantees in relation to the services supplied in connection with Cruise 8. I have upheld the primary Judge's finding that Scenic failed to comply with the Purpose and Result Guarantees but I have concluded that his Honour's finding that Scenic did not comply with the Care Guarantee must be set aside.

311 Having regard to these conclusions and concessions made by one or both parties in the course of the appeal, it is not necessary to address all the issues on compensation and damages raised by the notice of appeal or the parties'

written submissions. Nonetheless, it is convenient to explain his Honour's reasoning on the issues debated before him.

### *Major failure*

312 A claim for compensation under s 267(3)(b) of the ACL based on a failure to comply with the Consumer Guarantees can only be made if the failure to comply cannot be remedied or is a "major failure" within the meaning of s 268 of the ACL. The primary Judge found that Mr Moore and his fellow passengers on Cruise 8 satisfied s 268(a) of the ACL in that "the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".<sup>189</sup> In his Honour's view, the contrast between the description of the services provided by Scenic and the services which were in fact supplied was such that no reasonable consumer would have gone ahead and acquired the services at the price charged by Scenic.<sup>190</sup> The primary Judge therefore concluded that Scenic's failure to comply with the Consumer Guarantees was a "major failure".<sup>191</sup>

### *Compensation*

#### **Breach of Purpose and Result Guarantees**

313 Mr Moore submitted to the primary Judge that compensation for reduction in the value of services pursuant to s 267(3) of the ACL should be assessed objectively. He contended that this could be done by calculating the number of days on which he lost the value of the services for which he had paid, and to attribute a portion of the cost of the cruise to each of those days. Mr Moore attributed a rate of \$732.66 for each day of the fifteen day cruise, being one fifteenth of the total cost for the cruise of \$10,990. Since he claimed to have effectively lost ten days of the cruising experience he claimed \$7,326.60 as compensation for reduction in value of the services supplied.<sup>192</sup>

314 Scenic argued that it was necessary to analyse the activities Mr Moore actually undertook on each day of the cruise and to determine which of those activities

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<sup>189</sup> Primary Judgment at [770].

<sup>190</sup> Primary Judgment at [774].

<sup>191</sup> Primary Judgment at [779]. Although the primary Judge did not expressly state that the conclusion applied to the failure to comply with each of the Consumer Guarantees that appears to have been his Honour's intention.

<sup>192</sup> Primary Judgment at [790]. The primary Judge said the claim was for \$7,362.60, but the correct figure for ten days at a daily rate of \$732.60 is \$7,326.00.

he enjoyed. Scenic pointed out that Mr Moore had been warned of possible disruptions prior to embarkation but had elected not to cancel the cruise. Scenic submitted that the best objective assessment of loss was \$1,293, the sum calculated by Mr Moore's insurer.<sup>193</sup>

- 315 The primary Judge considered that the price paid by Mr Moore was a "single one" that included all the services on Cruise 8. None of those services was charged for or valued separately. Furthermore, Cruise 8 was the one and only cruise experience that Mr Moore had ever had and he had taken long service leave to join the cruise.<sup>194</sup> In his Honour's view, Scenic's failure to provide the services could not "be measured in a piecemeal way". In order to assess compensation it was necessary to ask:<sup>195</sup>

"by reference to the entirety of the Services promised and those which were delivered ... to what extent there had been a loss of value to the plaintiff in the services actually provided as affected by the "major failure" compared with the services which were to be provided assuming the major failure had not occurred."

- 316 The primary Judge considered that it was open to conclude that Mr Moore had received no value at all from the recreational services supplied by Scenic:<sup>196</sup>

"the concept of 'value' in the circumstances here where what was to be provided was 'an experience' of and surrounding a recreational cruise which included specified visits highlighted on an itinerary, may not always be able to be measured only in monetary terms according to what was in fact received.

True it is that Mr Moore had an uninterrupted cruise for the first few days until the ship upon which he was embarked reached Wiesbaden, **but the value to him of those few days was**, according to his evidence, which I accept, **overwhelmed by the unfortunate experiences which followed**. These unfortunate experiences may themselves have not each been significant but, in Mr Moore's case, when he and his wife had booked this trip so far in advance and were expecting services of a particular nature and quality, and to enjoy themselves very much, matters which may seem trivial loom large in the context." (Emphasis added.)

- 317 For these reasons his Honour would have been minded to find that Mr Moore received no value at all within the meaning of s 267(3)(b) of the ACL and that he should be awarded compensation equivalent to the whole of the price he

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<sup>193</sup> Primary Judgment at [791].

<sup>194</sup> Primary Judgment at [797]-[800].

<sup>195</sup> Primary Judgment at [803].

<sup>196</sup> Primary Judgment at [804]-[805].

paid for Cruise 8.<sup>197</sup> However, it was appropriate that the award of compensation for Scenic's contravention of the Purpose and Result Guarantees should be limited to the amount claimed by Mr Moore (\$7,326.60).<sup>198</sup> The primary Judge expressed no view as to whether the methodology underlying Mr Moore's claim for \$7,326.60 was sound.

### **Breach of Care Guarantee**

318 The primary Judge dealt separately with Mr Moore's claim for compensation based on Scenic's failure to comply with the Care Guarantee. His Honour considered that if Scenic had provided timely information prior to embarkation about likely interruptions to Cruise 8, Mr Moore would have cancelled the bookings made for his wife and himself. On that basis, his Honour awarded compensation pursuant to s 267(3)(b) of the ACL equivalent to the full amount Mr Moore paid for Cruise 8 (\$10,990), plus interest.<sup>199</sup>

### *Insurance*

319 The primary Judge recorded that Scenic had submitted that any compensation awarded to Mr Moore should be reduced by the amount paid to him by his insurer (\$1,293) but noted that the parties' submissions paid little attention to the question. Nonetheless his Honour analysed<sup>200</sup> the principal authorities<sup>201</sup> and the terms of Mr Moore's insurance policy in some detail. His Honour found that the insurer had initially rejected Mr Moore's claim "for loss of enjoyment".<sup>202</sup> However, the insurer subsequently reversed its position and paid Mr Moore the sum of \$1,293 pursuant to the "Amendment and cancellation expenses" section of the policy, being the "difference between cruise and bus tour". The insurer's covering letter stated as follows:<sup>203</sup>

"Based on a letter provided by Scenic Tours, the breakdown for the missed attractions and daylight cruising experiences is \$1,293.00 per person. As such we have applied this amount to your settlement."

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<sup>197</sup> Primary Judgment at [806].

<sup>198</sup> Primary Judgment at [807].

<sup>199</sup> Primary Judgment at [812]-[815]. As to interest see Primary Judgment at [809], [842].

<sup>200</sup> Primary Judgment [819]-[824].

<sup>201</sup> *National Insurance Company of New Zealand v Espagne* (1961) 105 CLR 569; [1961] HCA 15 (*National Insurance v Espagne*); *Redding v Lee* (1983) 151 CLR 117; [1983] HCA 16.

<sup>202</sup> Primary Judgment at [829]-[830].

<sup>203</sup> Primary Judgment at [831].

320 The primary Judge concluded that there was no reason why Scenic should obtain the benefit of an entirely separate contract of insurance taken out by Mr Moore. In his Honour's view, there was no difference between the position of a plaintiff claiming personal injury damages, whose insurance entitlements are not deducted from any damages award, and Mr Moore's entitlement to compensation.<sup>204</sup>

### *Damages*

321 Mr Moore submitted to the primary Judge that he was entitled to claim damages for disappointment and distress caused by Scenic's failure to comply with the Purpose and Result Guarantees pursuant to s 267(4) of the ACL. Scenic's principal defence was that s 275 of the ACL picked up s 16 of the *Civil Liability Act* which precludes a claim for damages for non-economic loss unless the claimant's loss exceeds the threshold of 15 per cent of the most extreme case. Scenic submitted that since Mr Moore's claim was for "non-economic loss" as defined in the *Civil Liability Act* and since it was common ground that his loss did not exceed the threshold of 15 per cent of the most serious case, Mr Moore was precluded from claiming damages for disappointment and distress.

322 The primary Judge noted that Scenic did not dispute that the Consumer Guarantees applied to the supply of services outside Australia. Thus it was not in issue that the Consumer Guarantee applied to services supplied to a consumer outside Australia and that the consequences of a failure to supply services outside Australia were prescribed by the ACL.<sup>205</sup>

323 The primary Judge considered himself bound by authority to hold that a claim for damages for distress and disappointment not consequent upon physical injury or a psychiatric condition was a claim for "personal injury damages" for the purposes of the *Civil Liability Act*.<sup>206</sup> Such a claim was therefore within Part 2 of the *Civil Liability Act*. His Honour also considered himself bound by authority to hold that a claim for damages for disappointment and distress is a

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<sup>204</sup> Primary Judgment at [837].

<sup>205</sup> Primary Judgment at [885].

<sup>206</sup> Primary Judgment at [854]-[873], citing *Insight Vacations (CA)* at [78] (Spigelman CJ), [118], [125] (Basten JA), [166]-[167], [175] (Sackville AJA). *Insight Vacations (CA)* was affirmed by *Insight Vacations (H Ct)* but the construction of "personal injury damages" and "non-economic loss" was not addressed by the High Court.

claim for “non-economic loss” for the purposes of s 16 of the *Civil Liability Act*. The primary Judge therefore concluded that:<sup>207</sup>

“the claim made by Mr Moore for damages for distress and inconvenience under s 267(4) is, subject to the issue of extra-territoriality which is dealt with below, otherwise caught by the provisions of Pt 2 of the [*Civil Liability Act*]. The evidence does not establish that the extent of Mr Moore’s disappointment and distress could reach the minimum threshold fixed by s 16 of the [*Civil Liability Act*] and, accordingly, this claim must fail because the Court could not make any award of monetary damages.”

- 324 The primary Judge accepted that a State has power to enact legislation operating extra-territorially. But in his Honour’s view there was nothing in Part 2 of the *Civil Liability Act* to suggest that it was intended to have that effect.<sup>208</sup> His Honour noted that the context in which the Civil Liability Bill was introduced into Parliament was a perceived crisis in the cost of liability insurance in New South Wales.<sup>209</sup> His Honour considered that the context did not support the contention that s 16 is intended to have an extra-territorial operation.<sup>210</sup> His Honour considered that this conclusion was supported by the reasoning in *Insight Vacations (H Ct)*.<sup>211</sup>
- 325 Accordingly, where the events giving rise to an entitlement to damages occurred outside New South Wales, as with Mr Moore’s claim for damages for distress and disappointment, Part 2 of the *Civil Liability Act* (including s 16) did not apply to the claim. There was therefore no barrier to an award of damages to Mr Moore for disappointment and distress as a result of Scenic’s failure to comply with the Purpose and Result Guarantees.
- 326 The primary Judge noted that Mr Moore’s final submissions sought the sum of \$2,000 as damages for distress and disappointment. His Honour regarded this as a modest claim and indicated that he would have been disposed to award a larger sum as damages. He therefore assessed damages at the amount claimed by Mr Moore (\$2,000).<sup>212</sup>

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<sup>207</sup> Primary Judgment at [873].

<sup>208</sup> Primary Judgment at [892], [906]-[907].

<sup>209</sup> Primary Judgment at [899]-[902].

<sup>210</sup> Primary Judgment at [903].

<sup>211</sup> Primary Judgment at [893]-[895], citing *Insight Vacations (H Ct)* at [29], [33] per curiam.

<sup>212</sup> Primary Judgment at [918]-[920].

## **Compensation under s 267(3)(b) of the ACL**

### *Assessment of compensation*

- 327 The primary Judge's award of \$10,990 as compensation pursuant to s 267(3)(b) of the ACL to Mr Moore for reduction in the value of services supplied by Scenic was based on Scenic's failure to comply with the Care Guarantee in relation to Cruise 8 prior to embarkation. Since I have concluded that Scenic did not contravene the Care Guarantee that award cannot stand.
- 328 The primary Judge's award of \$7,326.60 as compensation for Scenic's failure to comply with the Purpose and Result Guarantees was subsumed by the larger award of compensation based on Scenic's failure to comply with the Care Guarantee. As I understood Mr Moore's position, if the award of compensation of \$10,990 for Scenic's contravention of the Care Guarantee cannot stand he seeks in the alternative compensation of \$7,326.60 for Scenic's contravention of the Purpose and Result Guarantees.
- 329 Scenic did not dispute that its contravention of the Purpose and Result Guarantees (assuming that finding was upheld) was a "major failure" for the purposes of s 267(3) of the ACL. However, Scenic submitted that the primary Judge erred in his assessment of compensation by failing to assess objectively the reduction in the value of the services supplied by Scenic. Mr Williams pointed out that at the trial Mr Moore accepted and indeed had submitted that compensation for any reduction in the value of services supplied should be assessed objectively. However, Mr Moore's written submissions at the trial calculated the loss of value simply by allocating a portion of the price to each day of the 15 day cruise and attributing a nil value to each day on which cruising did not take place.
- 330 The primary Judge assessed compensation for the contraventions of all three Consumer Guarantees on a similar basis. He took the view that any value to Mr Moore of the uninterrupted cruise for the first few days was "overwhelmed by the unfortunate experiences which followed".<sup>213</sup> On this basis he would have concluded that Mr Moore received no value at all for Cruise 8 and would have been disposed to award Mr Moore the full amount he paid for his booking on

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<sup>213</sup> Primary Judgment at [805].

Cruise 8 (\$10,990). The only reason the primary Judge gave for awarding a lower sum as compensation for Scenic's contravention of the Purpose and Result Guarantees was that Mr Moore's claim was limited to the lower amount.

331 Mr Abadee accepted during oral argument that the primary Judge assessed the reduction in value of the services supplied by Scenic on the basis of subjective considerations. Mr Abadee also accepted that this approach was erroneous. He acknowledged that the value of the services actually supplied by Scenic (as distinct from those that Scenic was to supply) should have been determined by reference to market considerations. He did not dispute the most obvious means of assessing market value of the services actually provided would be to estimate the amount a fully informed consumer would have been prepared to pay for those services.

332 Mr Williams submitted that the primary Judge took the approach he did because Mr Moore did not adduce at trial any objective evidence as to the reduction in the value of services supplied by Scenic. The methodology advanced on behalf of Mr Moore to assess compensation was purely arbitrary and did not reflect the market value of the services actually supplied by Scenic. In these circumstances, so Mr Williams argued, this Court should allow the appeal and dismiss Mr Moore's claim for compensation for loss of value.

333 Mr Abadee argued against this Court dismissing Mr Moore's claim for compensation. He submitted that the proceedings should be remitted to enable the primary Judge to reassess compensation for Scenic's failure to comply with the Purpose and Result Guarantees. Mr Abadee pointed out that the primary Judge had been invited by Mr Moore to apply objective criteria in assessing compensation. He also pointed out that there was some evidence, albeit slight, that would have enabled the primary Judge to assess compensation by reference to market criteria (such as the insurance payout to Mr Moore).

334 The primary Judge was placed in a difficult position when it came to assessing compensation for Scenic's contraventions of the Purpose and Result Guarantees. There was little evidence adduced that could have provided a foundation for a market based assessment of the value of services actually supplied by Scenic to Mr Moore. Even so, it is not clear that the primary Judge

would have dismissed Mr Moore's claim for compensation had his Honour applied objective criteria to determine the market value of the services actually supplied by Scenic.

335 The better course in the interests of justice is to remit to the primary Judge Mr Moore's claim for compensation under s 267(3)(b) of the ACL for reassessment of the quantum of compensation by reason of Scenic's contravention of the Purpose and Result Guarantees. It will be a matter for the primary Judge to determine whether Mr Moore should be permitted to adduce further evidence on this issue. As has been noted,<sup>214</sup> no issue arises as to the application of s 16 of the *Civil Liability Act* because Mr Williams accepted that Mr Moore's claim for compensation under s 267(3)(b) of the ACL is a claim for economic loss, not for non-economic loss within the meaning of s 16.

*Deduction for insurance payout?*

336 As has been seen,<sup>215</sup> the primary Judge rejected Scenic's argument that the compensation awarded to Mr Moore pursuant to s 267(3)(b) of the ACL should be reduced by the payment he received from his travel insurer. The primary Judge's final award of compensation was based on Scenic's breach of the Care Guarantee, although his Honour indicated that he would have awarded a lesser sum as compensation for Scenic's breach of the Purpose and Result Guarantees. It is not entirely clear whether his Honour's ruling was intended to apply only to compensation he awarded to Mr Moore for Scenic's breach of the Care Guarantee, or whether it was intended to apply also to compensation he notionally assessed for Scenic's breach of the Purpose and Result Guarantees. The better reading of the Primary Judgement is that the ruling was intended to apply to any compensation assessed to Mr Moore under s 267(3)(b) of the ACL, regardless of which breach of the Consumer Guarantees may have entitled him to an award of compensation.

337 The primary Judge's assessment of the compensation awarded to Mr Moore pursuant to s 267(3)(b) of the ACL was affected by an error of law. Accordingly the matter is to be remitted to the primary Judge to reassess the quantum of compensation for loss of value. As the primary Judge held that the insurance

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<sup>214</sup> See at [140] above.

<sup>215</sup> See at [320] above.

payment to Mr Moore should be ignored when assessing compensation for loss of value, it is appropriate to deal with Scenic's challenge to that holding.

- 338 Scenic's written submissions on the appeal only briefly adverted to the question of whether the insurance payout to Mr Moore should be deducted from the award of compensation. Scenic's submissions acknowledged that insurance payouts are "typically ... treated as collateral and irrelevant" but nonetheless contended that the insurance payout to Mr Moore should be offset against any compensation award. Mr Williams at one point in the oral argument in this Court indicated that he intended to address this issue but he did not return to it. The argument was therefore not developed beyond the brief mention in the written submission.
- 339 There are two reasons why the insurance payment to Mr Moore should not be deducted from the compensation awarded pursuant to s 267(3)(b) of the ACL. The first is the general principle referred to by the primary Judge that payments under an insurance policy taken out by a plaintiff for his or her own benefit is regarded as independent of and cumulative upon the plaintiff's right of redress against others.<sup>216</sup> Mr Moore took out and paid for the travel insurance policy prior to embarkation and independently of his arrangements with Scenic. The policy was clearly intended for his own benefit and was not intended to benefit Scenic.
- 340 Scenic's written submissions relied on a single paragraph in the judgment of Meagher JA in *Ku-ring-gai Council v Chan*<sup>217</sup> to support its argument that the general principle should not be applied in the present case. The principal issue in that case was whether the council, as principal certifying authority, owed the purchasers of residential property a duty of care when issuing an occupation certificate to avoid the purchasers suffering economic loss because of defective building work.
- 341 Having concluded that the Council did not owe the purchasers a duty of care, Meagher JA observed that if the Council had been liable for breach of duty:

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<sup>216</sup> *National Insurance v Espagne* at 573 (Dixon CJ, Fullagar J agreeing); at 599-600 (Windeyer J, Fullagar J agreeing); *Redding v Lee* at 138 (Mason and Dawson JJ, Wilson and Deane JJ agreeing).

<sup>217</sup> [2017] NSWCA 226; 224 LGERA 339 at [99] (McColl JA and Sackville AJA agreeing).

“it would have been necessary ... to take into account the value of the purchasers’ right of action for breach of the statutory warranties [under the *Home Building Act 1989* (NSW)] as well as their rights under the home warrant insurance”.

The brief observations were directed to a case where the purchasers, as successors in title to the original owner-builder, as they knew had the benefit of statutory warranties and of compulsory insurance cover. The observations reflected the particular statutory scheme and were not intended to cast any doubt on the general principle to which I have referred.

342 The second reason is that the payment by the insurer to Mr Moore appears to have been in respect of a different type of loss than the loss for which the primary Judge awarded compensation pursuant to s 267(3)(b) of the ACL. As the primary Judge’s reasons imply, it is not clear why the insurer reversed its original decision to decline Mr Moore’s claim for loss of enjoyment and agreed to pay \$1,293 under the policy. His Honour thought that the only section of the policy that was relevant to Mr Moore’s claim was that dealing with “Amendment or Cancellation Costs”.<sup>218</sup> Since this section of the policy entitled Mr Moore to the reasonable costs of having to rearrange a journey or to the unused position of prepaid travel costs in the event of cancellation it is by no means clear that it entitled him to compensation for his experiences on Cruise 8.

343 Whatever Mr Moore’s strict entitlements under the policy may have been, the insurer’s covering letter to him stated that it paid his claim for “the missed attractions and daylight cruising experiences”. Compensation awarded under s 267(3)(b) of the ACL is for “any reduction in the value of services below the price paid by [Mr Moore]”. The insurance payout was not expressed to be calculated by reference to any reduction in the value of services provided by Scenic. Nor was the Court taken to any evidence suggesting that the payment was intended to compensate for loss of value of the services provided as distinct from Mr Moore’s loss of enjoyment of Cruise 8 by reason of rearrangement or cancellation of the scheduled services and activities. In these circumstances it cannot be said that the insurance payout was for the same loss in respect of which Mr Moore has a right under statute to be compensated by Scenic.

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<sup>218</sup> Primary Judgment at [826].

### **Damages under s 267(4) of the ACL**

344 The primary Judge awarded Mr Moore the sum of \$2,000 as damages for distress and disappointment caused by Scenic's failure to comply with the Purpose and Result Guarantees.<sup>219</sup> Scenic did not dispute the quantum of damages but contended that s 275 of the ACL, read with s 16 of the *Civil Liability Act*, precluded an award of damages for distress and disappointment to Mr Moore.

#### *Scenic's submissions*

345 On the assumption that Scenic failed to comply with the Purpose and Result Guarantees, Scenic's argument on s 275 of the ACL proceeded by the following steps:

(i) As the primary Judge found,<sup>220</sup> New South Wales is the proper law of the contract between Scenic and Mr Moore.

(ii) Section 275 of the ACL requires the court to ask whether there is a law of New South Wales which would limit or preclude liability for a breach of a term of the contract for the supply of services. It is not clear whether s 275 is referring to the actual contract between Scenic and Mr Moore or to a hypothetical contract containing a term to the effect of the Purpose and Result Guarantees. In either case the relevant law of New South Wales for present purposes is the *Civil Liability Act*.

(iii) Section 275 of the ACL picks up and applies the *Civil Liability Act* as a surrogate federal law to the extent that it would apply to limit or preclude Scenic's liability in damages for breach of a term of the contract to the effect of the Purpose and Result Guarantees.

(iv) Section 16 of the *Civil Liability Act* is a law of New South Wales which would apply to limit or preclude Scenic's liability for a failure to comply with the Purpose and Result Guarantees if the failure constituted a breach of the contract to supply the services. This is because:

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<sup>219</sup> See at [326] above.

<sup>220</sup> Primary Judgment at [883]. This was the effect of cl 2.18(d) of the Terms and Conditions.

- Part 2 of the *Civil Liability Act* applies to and in respect of an award of personal injury damages, regardless of whether the claim for damages is brought in tort, in contract or under statute (s 11A(1), (2)).
- An award of damages for disappointment and distress is an award of “personal injuries damages” for the purposes of Part 2 of the *Civil Liability Act* because “injury” includes “impairment of a person’s mental condition” (s 11).
- A court cannot award damages for disappointment and distress contrary to Part 2 of the *Civil Liability Act*.
- Mr Moore’s claim for Damages for disappointment and distress is a claim for “monetary compensation” for pain and suffering or, alternatively, loss of amenities of life. It is therefore a claim for non-economic loss for the purposes of s 11 of the *Civil Liability Act* (s 3).

(v) Section 16 of the *Civil Liability Act* operates as a surrogate federal law to preclude Scenic being liable to Mr Moore for damages for disappointment and distress by reason of Scenic’s failure to comply with the Purpose and Result Guarantees.

(vi) No question arises as to the extra-territorial operation of s 16 of the *Civil Liability Act* notwithstanding that the failure to comply with the Purpose and Result Guarantees and the loss sustained by Mr Moore (or most of the loss) occurred outside Australia. This is because s 11(3) of the *Civil Liability Act* contains a direction to courts in New South Wales not to award damages contrary to Part 2 of the *Act*. The statutory direction provides the territorial connection with New South Wales.

346 In the alternative to (vi) Scenic submitted that since s 16 of the *Civil Liability Act* operates as a surrogate federal law, it is not subject to the same extra-territorial requirements or considerations as would apply if the section operated purely as a law of the State. Since the ACL operates extra-territorially,<sup>221</sup> so Mr Williams argued, s 16 of the *Civil Liability Act* also operates extra-territorially as a surrogate federal law.

#### *Mr Moore’s submissions*

347 Mr Abadee did not dispute that:

- the law of New South Wales was the proper law of the contract between Scenic and Mr Moore; and

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<sup>221</sup> Competition and Consumer Act, s 5(1)(c).

- s 275 of the ACL picked up the *Civil Liability Act* as a surrogate federal law insofar as it limited or precluded Scenic's liability for failing to comply with the Purpose and Result Guarantees, on the basis that the Guarantees were to be regarded as terms of the contract between Scenic and Mr Moore;
- on that assumption, Mr Moore's claim was for "personal injury damages" and thus a court could not award damages contrary to Part 2 of the *Civil Liability Act*;
- the decision of this Court in *Insight Vacations (CA)* established that Mr Moore's claim is for non-economic loss within the meaning of s 16 of the *Civil Liability Act*,<sup>222</sup> and
- Mr Moore cannot satisfy the threshold requirement stated in s 16 of the *Civil Liability Act* for an award of damages for non-economic loss.

348 Mr Abadee submitted, however, that the primary Judge correctly held that s 275 of the ACL, insofar as it picked up the *Civil Liability Act* as a surrogate federal law, does so subject to any limitation inherent in the State law. One such limitation, illustrated by *Insight Vacations (H Ct)*, is that s 16 of the *Civil Liability Act* does not operate extra-territorially. Since both Scenic's contravention of the Purpose and Result Guarantees and Mr Moore's loss in the form of disappointment and distress occurred outside Australia, so it was argued, s 16 has no application to his claims for damages for distress and disappointment.

349 Mr Abadee contended that by picking up s 16 of the *Civil Liability Act* as a surrogate federal law, s 275 of the ACL does not give s 16 any greater territorial operation than it would otherwise have as a State law. Mr Abadee invoked the general principle that State legislation is presumed not to have extra-territorial operation. There is no reason, so he argued, to read Part 2 of the *Civil Liability Act* as concerned with personal injuries sustained outside New South Wales. The context in which the legislation was introduced in New South Wales, as the primary Judge observed, was a perceived crisis in the affordability of insurance premiums. It is not necessary to construe s 16 as having extra-territorial operation in order to achieve the desired objective of reducing insurance premiums.

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<sup>222</sup> Mr Abadee did not challenge the correctness of *Insight Vacations (CA)* on this issue, but reserved Mr Moore's position should the matter proceed to the High Court. However, as Basten JA noted in *Motorcycling Events Group Australia Pty Ltd v Kelly* at [33], the High Court accepted the conclusions reached in *Insight Vacations (CA)* on this issue: see *Insight Vacations (H Ct)* at [8], [26].

350 Mr Abadee submitted that another reason for not applying s 16 of the *Civil Liability Act* to Mr Moore’s damages claim is that his entitlement to claim damages for distress and disappointment is not governed by New South Wales law, but by the *lex loci delicti*. He submitted that a statutory cause of action created by federal statute is analogous to an action in tort and the plaintiff’s entitlement to damages is therefore governed by the *lex loci delicti*.

*Legislative history: ACL s 275*

351 Section 275 of the ACL is curiously worded.<sup>223</sup> It appears to assume that there is or was a contract in existence between the supplier of services and the consumer seeking to enforce the Consumer Guarantees. Yet under the current statutory regime, unlike its predecessor, a consumer may be entitled to claim compensation and damages for a supplier’s failure to comply with one or more of the Consumer Guarantees regardless of whether there is or was a contractual relationship between the supplier and the consumer.<sup>224</sup> The legislative history does not explain this apparent anomaly, but it sheds light on the reasons for introducing the predecessor to what is now s 275 of the ACL.<sup>225</sup>

352 The predecessor to s 275 of the ACL was s 74(2A) of the *Trade Practices Act*, which was enacted in 2004.<sup>226</sup> Section 74(2A), which retained its original form until the repeal of the *Trade Practices Act*, provided as follows:

“If:

(a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and

(b) the law of a State or Territory is the proper law of the contract;

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.”

353 The *Revised Explanatory Memorandum* to the Bill introducing s 74(2A) into the *Trade Practices Act*<sup>227</sup> stated that:

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<sup>223</sup> Section 275 is reproduced at [41] above.

<sup>224</sup> The elements of the statutory causes of action are explained at [119]-[130] above.

<sup>225</sup> The legislative history of s 74(2A) of the *Trade Practices Act* is addressed in *Insight Vacations (CA)* at [39]-[45] (Spigelman CJ), at [142]-[143] (Sackville AJA).

<sup>226</sup> By the Treasury Legislation Amendment (Professional Standards) Act 2004 (Cth) (Professional Standards Act), Sch1, Item 8A.

“1.1 Professionals in every jurisdiction in Australia are currently facing difficulty in obtaining affordable professional indemnity insurance. It is essential that professionals be able to access this insurance to ensure that consumers can obtain damages in the event of negligently provided professional services.

1.2 The insurance industry and professionals alike have submitted to governments in all jurisdictions that Professional Standards Legislation (PSL) will ensure that professionals can obtain appropriate insurance and not be left to 'go bare'.

1.3 In essence, PSL seeks to minimise damages claims against professionals through improved professional standards - by requiring risk management strategies, compulsory insurance cover, professional education and appropriate complaints and disciplinary mechanisms - in return for caps on the liability of professionals who are covered by PSL”

354 The Revised EM pointed out that the prohibition on misleading or deceptive conduct in s 52 of the *Trade Practices Act* had the potential to be used as an alternative to an action in negligence. Other provisions which were “similarly capable of being used as an alternative to negligence in a wide range of circumstances” included those in the *Trade Practices Act* which implied into contracts an obligation to provide services with “due care and skill”.<sup>228</sup> The Revised EM explained that:

“1.14 While contract law is ordinarily dealt with by the States and Territories, the Commonwealth has been provided with legal advice that the effect of the High Court's decision in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*<sup>229</sup> is that actions in contract based on a breach of the condition that services be provided with 'due care and skill' would not be subject to any limitations which might be applied by a State and Territory to contractual remedies.

1.15 The amendments will seek to ensure that State and Territory reforms of the law of contract are not undermined.”<sup>230</sup> (Footnote added.)

355 The Second Reading Speech for the Bill included the following.<sup>231</sup>

“The purpose of the Treasury Legislation Amendment (Professional Standards) Bill 2003 is to amend the Trade Practices Act 1974 and other relevant Commonwealth legislation to support professional standards laws which have been passed by the parliaments of New South Wales, Victoria and Western Australia and where other jurisdictions have agreed to adopt the same approach. Professional standards laws seek to minimise damages

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<sup>227</sup> Revised Explanatory Memorandum to the Treasury Legislation Amendment (Professional Standards) Bill 2004 (Cth) (Revised EM).

<sup>228</sup> Revised EM at [1.13]-[1.14].

<sup>229</sup> See at [159] above.

<sup>230</sup> The Regulation Impact Statement forming part of the Revised EM stated the objective of the legislation in similar terms: Revised EM at [3.14].

<sup>231</sup> Commonwealth Senate, Parliamentary Debates (Hansard), 24 June 2004 at 25079 (Minister for Revenue and Assistant Treasurer).

claims against professionals through improved risk management strategies requiring professionals to hold compulsory insurance cover, engage in professional education and adopt appropriate complaints and disciplinary mechanisms. In return, professionals complying with schemes will be able to access capped liability.”

356 The professional standards law in force in New South Wales in 2004 was the *Professional Standards Act 1994* (NSW). A professional against whom a claim was made in contract or tort in relation to services provided to a client could rely on the limitation of liability afforded by the statutory scheme. Prior to the insertion of s 74(2A) into the *Trade Practices Act*, a professional sued for breach of the implied warranty contained in s 74 was unable to rely on the limitation of liability afforded by the State legislation. Section 74(2A) was clearly intended to enable professionals to invoke the State legislation as a surrogate federal law in order to limit their liability to clients.

357 The *Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) does not explain why s 275 of the ACL follows closely the language of s 74(2A) of the *Trade Practices Act* notwithstanding the substitution in the ACL of the Consumer Guarantees for the contractual warranties implied by s 74 of the *Trade Practices Act*. Nor does the *Explanatory Memorandum* refer to the professional standards legislation. Instead it refers to legislation limiting the liability of providers of recreational services, as follows:

“7.136 The States and Territories currently have laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts. It is expected that the States and Territories that currently have such laws in place will choose to have similar laws that exclude liability in respect of consumer guarantees.

7.137 The ACL provides for such laws to have effect to limit the guarantees provided for in Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL.”

### *Reasoning*

358 Section 275 of the ACL applies only if there is a failure to comply with one or more of the Consumer Guarantees. In the absence of s 275, the Consumer Guarantees apply to conduct engaged in outside Australia by bodies incorporated or carrying on business in Australia.<sup>232</sup> “Engaging in conduct” includes doing or refusing to do an act and also includes refraining (otherwise

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<sup>232</sup> Competition and Consumer Act, s 5(1).

than inadvertently) from doing an act.<sup>233</sup> I did not understand Mr Williams to dispute that **in the absence of s 275**, Scenic would have failed to comply with the Purpose and Result Guarantees if the failure related to services to be supplied outside Australia.

359 In the absence of s 275 of the ACL, s 16 of the *Civil Liability Act* would not apply to limit or preclude a supplier's liability under s 267(4) of the ACL to pay damages to a consumer sustaining loss by reason of the supplier's failure to comply with the Purpose and Result Guarantees. Since a court hearing such a claim for damages would be exercising federal jurisdiction, s 79 of the *Judiciary Act* would apply to the proceedings.<sup>234</sup> But s 79 of the *Judiciary Act* would not require the court to apply s 16 of the *Civil Liability Act* so as to preclude or limit the supplier's liability for its failure to comply with the Consumer Guarantees. That is because the consumer's entitlement to recover damages for any loss or damage caused by the supplier's failure to comply with a Consumer Guarantees is created by s 267(4) of the ACL. A State law purporting to limit or preclude the consumer's entitlement would be "irreconcilable" with the Commonwealth law.<sup>235</sup> Thus s 267(4) of the ACL would provide otherwise for the purposes of s 79 of the *Judiciary Act* and displace the State law.

360 Similarly, s 131C of the *Competition and Consumer Act* would not have the effect (in the absence of s 275) of applying s 16 of the *Civil Liability Act* to preclude a consumer from claiming damages under s 267(4) of the ACL for distress and disappointment. Section 131C evinces an intention that the *Competition and Consumer Act* (including the ACL) is not intended to cover the field of consumer protection. But s 131C does not avoid the consequences of a direct inconsistency between the *Competition and Consumer Act* (including the ACL) and a State law.<sup>236</sup> In the absence of s 275 of the ACL, s 16 of the *Civil Liability Act* (assuming it to be otherwise applicable) would be directly inconsistent with s 267(4) of the ACL.

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<sup>233</sup> Competition and Consumer Act, s 4(2).

<sup>234</sup> See at [30] above.

<sup>235</sup> Northern Territory v GPAO (1999) 196 CLR 553; [1999] HCA 8 at [80]-[81] (Gleeson CJ and Gummow J); Macleod v Australian Securities and Investments Commission (2002) 211 CLR 287; [2002] HCA 37 at [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>236</sup> R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, (Australia) (1977) 137 CLR 545; [1977] HCA 34 at 563-564 (Mason J, Barwick CJ, Gibbs, Murphy and Stephen JJ agreeing).

361 Section 275(b) appears to be drafted on the assumption that there is or was a contract in existence between the supplier of services and the consumer. As has been pointed out this will not always be the case. In the present case, however, the Terms and Conditions created a contractual relationship between Scenic and Mr Moore. Both parties were content to proceed on the basis that s 275(b) was satisfied because the relevant contract was that constituted by the Terms and Conditions. Both parties also accepted that the proper law of the contract was New South Wales law. Whatever difficulties s 275 might present in a case where there was no contractual relationship between the supplier of services and the consumer therefore do not arise here.

### **Insight Vacations (H Ct)**

362 The judgment of the High Court in *Insight Vacations (H Ct)* is of central importance to the issues arising in relation to Mr Moore's claim for damages for disappointment and distress. In that case, Mrs Young bought a European tour package from Insight Vacations. While travelling by coach from Prague to Budapest she was injured when the driver braked suddenly. Mrs Young sued Insight Vacations on the grounds that s 74(1) of the *Trade Practices Act* implied a term in the contract between them that the services supplied by Insight Vacations would be rendered with due care and skill and that implied term had been breached. Mrs Young succeeded in the District Court and Insight Vacation's appeal to the Court of Appeal was dismissed.<sup>237</sup> Insight Vacations was granted special leave to appeal to the High Court.

363 In the High Court Insight Vacations relied on an exemption clause in its contract with Mrs Young. It submitted that since the proper law of the contract was the law of New South Wales (as was common ground), s 74(2A) of the *Trade Practices Act* picked up and applied s 5N of the *Civil Liability Act* as a surrogate federal law. Section 5N provided as follows:

#### **"5N Waiver of contractual duty of care for recreational activities**

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

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<sup>237</sup> *Insight Vacations (CA)*, n 55 above.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.”

Insight Vacation’s contention was that the contract was for the supply of “recreation services” and thus s 5N permitted Insight Vacations to include an exemption clause in the contract.

364 The High Court explained that s 74(2A) of the *Trade Practices Act* picked up and applied, as a surrogate federal law, a relevant law of New South Wales. The law that was applied was a law of New South Wales that applied to limit or preclude liability for a breach of a term of the contract other than the term implied by s 74(1). The State law that applied to limit or preclude liability for that breach was then applied, by force of s 74(2A), to limit or preclude liability for breach of the term implied by s 74(1) in the same was as that State law applied to limit or preclude liability for breach of another term of the contract.<sup>238</sup>

365 The High Court held that s 5N of the *Civil Liability Act* was not a law that was picked up and applied by s 74(2A) of the *Trade Practices Act*. The reason was that s 5N did not itself provide exclusion, construction, restriction or modification of liability, but merely permitted the parties to a contract to exclude or restrict certain liabilities.<sup>239</sup> As the High Court noted, this conclusion was enough of itself to resolve the appeal.<sup>240</sup> Nonetheless, the Court went on to consider whether there were other reasons why Insight Vacation’s appeal had to fail.

366 The High Court held that even if s 74(2A) of the *Trade Practices Act* picked up and applied s 5N of the *Civil Liability Act* as a surrogate federal law, s 5N should be construed as applying only to contracts for the supply of recreation services in New South Wales.<sup>241</sup> Although this holding is arguably not part of the *ratio decidendi* of *Insight Vacations (H Ct)*, the High Court has said that lower courts should follow “seriously considered dicta” of a majority of the

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<sup>238</sup> *Insight Vacations (H Ct)* at [12].

<sup>239</sup> *Insight Vacations (H Ct)* at [26].

<sup>240</sup> *Insight Vacations (H Ct)* at [8].

<sup>241</sup> *Insight Vacations (H Ct)* at [35]-[36].

Court.<sup>242</sup> The observations in *Insight Vacations (H Ct)* were clearly seriously considered and were made by a unanimous Court.

367 *Insight Vacations (H Ct)* pointed out that, in contrast to the *Trade Practices Act*,<sup>243</sup> the *Civil Liability Act* made no express provision for any extra-territorial operation of its provisions. Their Honours considered that in determining any limitation on the operation of s 5N of the *Civil Liability Act* it was necessary to take into account s 12(1)(b) of the *Interpretation Act 1987 (NSW)* (**Interpretation Act**), which provides as follows:

“In any Act or instrument:

...

(b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.”

368 The Court considered that s 12(1)(b) “may be reason enough to read s 5N as subject to a geographic limitation”. However, the Court observed that s 12(1)(b) did not identify which of the several possible elements of s 5N was to be read as a “matter or thing in New South Wales”. The possibilities included the proper law of the contract, the place where the contract was made and the place where the services were to be supplied.<sup>244</sup> The Court stated that it was necessary to reconcile the generality of the language of s 5N with the geographical limitation to which the legislative power of a State Parliament is subject. That reconciliation required a consideration of the text and subject matter of the *Civil Liability Act*.<sup>245</sup>

369 The Court addressed the possibility that the reconciliation could be achieved by limiting the operation of the relevant provision to a contract the proper law of which is that of the enacting State. The Court said that this approach is appropriate in some cases, as where legislation modifies or invalidates

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<sup>242</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; [2007] HCA 61 at [51] (Gleeson CJ, Gummow, Heydon and Crennan JJ). See M Harding and I Malkin, “The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts” (2012) 34 Syd L Rev 239).

<sup>243</sup> *Insight Vacations (H Ct)* at [16], referring to the *Trade Practices Act*, s 5. See now s 5(1) of the *Competition and Consumer Act*, referred to at [34] above.

<sup>244</sup> *Insight Vacations (H Ct)* at [28].

<sup>245</sup> *Insight Vacations (H Ct)* at [29].

contractual rights “as an end in itself”,<sup>246</sup> but is not appropriate in others. It is not appropriate, for example, where legislation avoids agreements for non-compliance with statutory requirements. To limit legislation of this kind to contracts the proper law of which is that of the enacting State would permit “easy evasion of the reach of the avoiding provision”.<sup>247</sup>

370 The Court continued as follows:<sup>248</sup>

“What geographical limitation is there to the operation of the *Civil Liability Act*? The central focus of the whole of Pt 1A of that Act is liability for negligence (an act or omission involving a failure to exercise reasonable care and skill). As noted earlier, s 5A(1) provides that Pt 1A applies to any claim for damages for harm resulting from negligence, regardless of how the claim is framed. As also noted earlier, one natural geographical limitation that could be given to s 5A(1) is to read ‘any claim’ as ‘any claim in the courts of New South Wales’, leaving the applicability of the provisions of the Act in a claim brought in a court of another jurisdiction to the application of principles governing the choice of law. Or, ‘any claim’ could be read as ‘any claim where the law governing that claim is the law of New South Wales’. It is not necessary in this case to decide whether those are the only available constructions or to choose between them. The relevant geographic limitation is to be identified in the provisions of Div 5 of Pt 1A.”

371 In the Court’s view, Div 5 of Part 1A of the *Civil Liability Act* and s 5N in particular were directed to limiting liability for negligence in relation to recreational activities by permitting the parties to a contract stipulate for the exclusion or modification of any liability resulting from an express or implied warranty that services will be rendered with reasonable care. The definition of “recreational activity” referred to pursuits or activities engaged in at a place, such as a park or public open space. These references pointed decisively to reading s 5N:<sup>249</sup>

“as reaching all cases in which the contract in question (wherever it is made and by whatever law it is governed) is for the supply of recreation services in New South Wales ...

Reading s 5N(1) as hinging on the place of performance of the contract best gives effect to the purposes and text of the provision when it is read in its statutory context.”

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<sup>246</sup> As in *Wanganui-Rangitikei Electric Power Board v Australian Mutual President Society* (1934) 50 CLR 581; [1934] HCA 3; *Old UGC, Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274; [2006] HCA 24.

<sup>247</sup> *Insight Vacations (H Ct)* at [31]-[32], citing *Kay’s Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124; [1964] HCA 79; *Old UGC, Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274; [2006] HCA 24.

<sup>248</sup> *Insight Vacations (H Ct)* at [33].

<sup>249</sup> *Insight Vacations (H Ct)* at [35]-[36].

372 The following propositions can be drawn from *Insight Vacations (H Ct)* in relation to the operation of s 74(2A) of the *Trade Practices Act*:

(i) Section 74(2A) picked up certain State laws and applied them as surrogate federal laws.

(ii) The laws picked up by s 74(2A) were those that applied to limit or preclude liability for breach of another term of the contract. A law that answered that description was then applied as a surrogate federal law to limit or preclude liability for breach of the term implied into the contract by s 74(1) in the same way as it applied to limit or preclude liability for breach of the other terms of the contract.

(iii) A State law like s 5N of the *Civil Liability Act* which merely authorised the contracting parties to agree to a provision exempting the supplier of services from liability for breach of the implied warranty was not a law limiting or precluding liability.

(iv) If s 74(2A) picked up and applied a State law as a surrogate federal law, it was necessary having regard to s 12(1)(b) of the *Interpretation Act* to construe the State law to determine whether it was subject to a geographic limitation. The State law was to be construed as if it were stand alone State legislation. That is, provisions such as s 5(1) of the *Trade Practices Act* (applying s 74 to conduct outside Australia) did not determine or influence whether the State law was subject to a geographic limitation.

(v) Whether a provision of a State law was to be read as subject to a geographical limitation required the provision to be construed in its statutory context.

(vi) The geographical limitation to be imposed (if any) was not necessarily a limitation on the extra-territorial operation of the State law. It could be some other limitation, such as applying the provision when proceedings were brought in a New South Wales court or when the proper law of the relevant contract was New South Wales law.

### Construction of s 275 of the ACL

373 Once the conditions for the application of s 275 of the ACL are satisfied (as they are in this case) s 275 provides that the proper law applies to limit or preclude liability for the supplier's failure to comply with the Consumer Guarantees:

“in the same way as it applies to limit or preclude liability and recovery of any liability for a breach of a term of the contract for the supply of services.”

374 It may not be an entirely straightforward matter to apply the reasoning in *Insight Vacations (H Ct)* to s 275 of the ACL. Section 74(2A) of the *Trade Practices Act*, which was in issue in *Insight Vacations (H Ct)*, picked up and applied as a surrogate federal law a State law which applied to limit or preclude liability for a breach of another term of the contract for the supply of services. Since s 74(1) of the *Trade Practices Act* implied a warranty into the contract for the supply of services to the consumer, it was clear which contract s 74(2A) was referring to.<sup>250</sup>

375 Section 275 of the ACL may be difficult to apply in a case where a supplier of services contravenes the Consumer Guarantees without having previously had a contractual relationship with the consumer. In that case, one possibility is that s 275 does not pick up any State law as a surrogate federal law because there is no contract for the supply of services and therefore no means of applying the comparison required by the last part of s 275. Another possibility is that the matter is to be approached by assuming, contrary to the fact, that a contract was in existence between the parties and asking whether the relevant State law would apply to limit or preclude liability for a breach of that hypothetical contract. The problem does not arise in the present case because the parties accepted that the question posed by s 275 is whether s 16 of the *Civil Liability Act* would apply to limit or preclude Scenic's liability for a breach of a term of the contract between it and Mr Moore. That contract comprised the Terms and Conditions.

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<sup>250</sup> In *Austral Pacific Group Ltd (In Liquidation) v Airservices Australia*, the plurality observed that s 74 of the *Trade Practices Act* operated by a legal fiction, “namely that the parties made a contract including the relevant obligations”: at [9].

- 376 Section 275 of the ACL requires the Court to consider the way in which the relevant State law applies to preclude or limit the supplier's liability for "a breach of a term of the contract for the supply of services". The Court must perform this task even though there is no claim made by the consumer for breach of contract. In order to apply s 275, it is therefore necessary for the Court to address a hypothetical situation. The most natural reading of the statutory language is that the Court is required to consider how, if at all, the relevant State law would apply to limit or preclude the supplier's liability if it breached a term of the contract and the consumer sought the same relief in a contract claim as he or she seeks for breach of the Consumer Guarantees. To put the matter another way, s 275 of the ACL requires the Court to consider how (if at all) the relevant State law would limit or preclude the supplier's liability if the consumer had made a claim in contract for the same relief as he or she seeks in the claim for breach of the Consumer Guarantees.
- 377 The relevant State law in the present case is s 16(1) of the *Civil Liability Act*. In some circumstances s 16(1) would not apply to limit or preclude Scenic's liability to Mr Moore for breach of contract. For example, if Scenic's breach of contract caused Mr Moore to sustain loss of or damage to property his claim would be for economic loss. Since s 16(1) applies only to an award of damages for non-economic loss, it would not limit or preclude Scenic's contractual liability to Mr Moore in respect of property damage.
- 378 Mr Moore's claim pursuant to s 267(4) of the ACL seeks damages for disappointment and distress occasioned by Scenic's breach of the Purpose and Result Guarantees. That claim, as the parties accept, is a claim for "personal injury damages" as defined in s 11 of the *Civil Liability Act*. It is also common ground that Mr Moore's claim for damages for disappointment and distress is a claim for non-economic loss for the purposes of s 16(1) of the *Civil Liability Act*.
- 379 In the present case Scenic's breach of the Purpose Guarantee consisted of its failure to provide services that were reasonably fit for the purpose for which Mr Moore acquired the services. Scenic's breach of the Result Guarantee consisted of its failure to provide services that could reasonably be expected to

achieve the result Mr Moore wished to achieve. In each case the breach consisted of conduct that took place outside Australia.

380 On one view, it is not possible to determine whether s 16(1) of the *Civil Liability Act* would limit or preclude Scenic's contractual liability for conduct outside Australia until the geographical limitations (if any) on the operation of s 16(1) are ascertained. However, *Insight Vacations (H Ct)* suggests that the question of whether s 16(1) would limit or preclude Scenic's contractual liability for a breach occurring outside Australia is to be addressed in the first instance without reference to any geographical limitation on the operation of s 16(1). If the Court holds that as a matter of construction s 16(1) limits or precludes Scenic's liability for the contractual breach, it must then consider any geographical limitation on the operation of the provision.

381 Section 16(1) of the *Civil Liability Act* is a law which would limit or preclude Scenic's liability to Mr Moore for breach of the Terms and Conditions. Unlike s 5N of the *Civil Liability Act* considered in *Insight Vacations (H Ct)*, s 16(1) does not merely authorise the parties to a contract to include an exemption clause in the contract. Section 16 prohibits an award of damages for non-economic loss unless the threshold requirement of 15 per cent of a "most extreme case" is met. It follows, subject to any geographical limitation, that s 16(1) applies to limit or preclude Scenic's liability for its failure to comply with the Purpose and Result Guarantees in the same way as s 16(1) would apply to limit or preclude liability for a breach of the contract between Scenic and Mr Moore.

382 The next question is whether s 16(1) of the *Civil Liability Act* is subject to any geographical limitation and, if so, what. As has been noted, *Insight Vacations (H Ct)* requires this task be approached independently of the terms of the *Competition and Consumer Act* which give the ACL extra-territorial operation. That is, the *Civil Liability Act* is to be construed as a State statute uninfluenced by the extra-territorial operation of the ACL under Commonwealth law.

383 The general principle is that in an action for breach of contract brought in a New South Wales Court, the proper law of the contract determines the relief to

which the plaintiff is entitled.<sup>251</sup> Thus if the defendant's breach of contract occurs outside Australia, a New South Wales court determines whether the plaintiff is entitled to damages by reference to the proper law of the contract. While quantification of contractual damages was once considered to be procedural and therefore governed by the law of forum, the High Court has held that all questions relating to the kinds of damages or the quantum of damages that may be recovered should be regarded as substantive matters.<sup>252</sup>

384 Choice of law principles suggest that since New South Wales was the proper law of the contract between Scenic and Mr Moore, s 16(1) of the *Civil Liability Act* as the relevant law of New South Wales would limit or preclude a claim by Mr Moore for non-economic loss founded on Scenic's breach of the contract by reason of conduct occurring outside Australia. But this was not the approach taken by the High Court in *Insight Vacations (H Ct)*. In that case New South Wales law was the proper law of the contract but that finding did not determine whether s 5N of the *Civil Liability Act* applied to limit or preclude the supplier's liability for breach of the contract with the consumer. The answer to that question, so the High Court held, depended on the proper construction of s 5N. It follows that the question here is whether s 16(1) of the *Civil Liability Act*, on its proper construction, applies to limit or preclude Scenic's contractual liability for non-economic loss arising from a breach of contract which occurred outside Australia.

385 The High Court's construction of s 5N of the *Civil Liability Act* in *Insight Vacations (H Ct)* was very heavily influenced by the definition of "recreational activity". The definition was construed to refer to activities conducted in New South Wales. It followed that the statutory concept of "recreational services" directed attention to the place of performance of the contract, namely New South Wales. Since s 5N was concerned with contracts for the supply of recreational services, it was to be read as "hinging on the place of performance".<sup>253</sup>

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<sup>251</sup> M Davies, A Bell and P Le G Brereton, *Nygh's Conflict of Laws in Australia*, (9th ed 2014, LexisNexis Butterworths) at [19-106].

<sup>252</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36 at [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

<sup>253</sup> *Insight Vacations (H Ct)* at [36].

386 Section 12(1)(b) of the *Interpretation Act* states that in any Act a reference to any “other matter or thing is a reference to such ... other matter or thing in and of New South Wales”. As was pointed out in *Insight Vacations (H Ct)*, s 12(1)(b) does not identify a specific “matter or thing that is to provide the connection with New South Wales. As has been noted,<sup>254</sup> the High Court considered that s 5N of the *Civil Liability Act* incorporated a number of possible elements that could be understood as a “matter or thing in New South Wales”.

387 Section 16(1) of the *Civil Liability Act* states that no damages may be awarded for non-economic loss unless the claimant satisfies the statutory threshold. The reference to the “damages that may be awarded” implies that the command in s 16(1) is directed to a court. This is confirmed by s 11A which provides that:

- Part 2 applies to and in respect of personal injury damages, whether the claim is brought in tort, in contract, under statute or otherwise (s 11A(1), (2)); and
- **a court cannot award damages** contrary to Part 2 (s 11A(3)).

388 The judgment in *Insight Vacations (H Ct)* expressly recognises that the relevant “matter or thing in and of New South Wales” for the purposes of s 12(1)(b) of the *Interpretation Act* may be a claim in a New South Wales court.<sup>255</sup> When s 16(1) of the *Civil Liability Act* is read with s 11A and the definition of “court” in s 3,<sup>256</sup> the relevant matter or thing in and of New South Wales is seen to be the awarding of damages in New South Wales by a court or tribunal.<sup>257</sup> In my opinion, there is no contextual reason for reading s 16(1) as subject to any other geographical limitation.

389 It follows that s 16(1) of the *Civil Liability Act* would apply to limit or preclude Scenic’s liability to Mr Moore for a breach of the contract between them giving rise to a claim for non-economic loss notwithstanding that the breach occurred outside Australia. Accordingly, s 275 of the ACL applies s 16(1) as a surrogate federal law to limit or preclude Scenic’s liability to Mr Moore for damages for non-economic loss caused by Scenic’s breach of the Purpose and Result Guarantees notwithstanding that the breach occurred outside Australia.

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<sup>254</sup> See [368] above.

<sup>255</sup> *Insight Vacations (H Ct)* at [33].

<sup>256</sup> See at [47] above.

<sup>257</sup> It is not necessary in these proceedings to address the application of these provisions to an action brought in New South Wales in the Federal Court or in the Federal Circuit Court.

390 There is no dispute that Mr Moore cannot satisfy the threshold requirement specified in s 16(1). Accordingly s 16(1) precludes the Court hearing Mr Moore's claim from awarding damages for the distress and disappointment occasioned by Scenic's breach of the Purpose and Result Guarantees.

### **Conclusion**

391 Section 275 of the ACL picks up and applies s 16(1) of the *Civil Liability Act* as a surrogate federal law. Section 16(1), on its proper construction, precludes Mr Moore claiming damages for distress and disappointment by reason of Scenic's breaches of the Purpose and Result Guarantees. This is so notwithstanding that Scenic's breaches occurred outside Australia. It follows that the award of damages under s 267(4) in Mr Moore's favour must be set aside.

### **Group Members' claim for compensation and damages**

392 The primary Judge was not asked to assess and did not award compensation or damages to Group Members for Scenic's breach of the Consumer Guarantees. I have concluded that his Honour's findings that Scenic breached the Care Guarantee by reason of pre-embarkation conduct cannot stand. I have also concluded that his Honour's findings that:

- (i) Scenic breached the Care Guarantee in relation to Cruises 4, 5, 6 and 7 by its post-embarkation conduct; and
  - (ii) Scenic breached the Purpose and Result Guarantees in relation to Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11;
- should not be disturbed.

393 I can see no reason why the conclusion that Mr Moore is precluded by s 275 of the ACL and s 16(1) of the *Civil Liability Act* from claiming damages for distress and disappointment pursuant to s 267(4) of the ACL does not apply to the claims of the Group Members. Their claims for damages under s 267(4) of the ACL for Scenic's breach of the Consumer Guarantees must therefore be dismissed.

394 Group Members who booked to travel on Cruises 4, 5, 6 and 7 may have a claim pursuant to s 267(3)(b) of the ACL for reduction in the value of the

services provided by reason of Scenic's post-embarkation breach of the Care Guarantee. As I have noted, there is an unresolved question as to whether Scenic can make out its defence under s 61(3) of the ACL to Group Members' claims for compensation founded on Scenic's breach of the Purpose and Result Guarantees. Assuming (as I think likely) that Scenic cannot establish this defence, it is difficult to see how the Group Members' claim for reduced value compensation for Scenic's breach of the Care Guarantee can yield a larger award than their claims for reduced value compensation for Scenic's breach of the Purpose and Result Guarantees.

395 Group Members who booked on Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 have claims for reduced value compensation by reason of Scenic's breach of the Purpose and Result Guarantees. Subject to Scenic's defence under s 61(3) of the ACL, these claims will need to be determined by the primary Judge in accordance with the objective criteria the parties agree must be applied.

### **Resolution of the appeal**

#### *Summary of conclusions*

396 In Mr Moore's own case against Scenic I have concluded that:

- (i) the primary Judge's finding that Scenic breached the Care Guarantee in relation to Cruise 8 cannot be sustained;
- (ii) the primary Judge's finding that Scenic breached the Purpose and Result Guarantees in relation to Cruise 8 should not be disturbed;
- (iii) the primary Judge's award of \$10,990 in respect of Mr Moore's claim for compensation pursuant to s 267(3)(b) of the ACL for Scenic's breach of the Purpose and Result Guarantees was affected by an error of law and must be set aside;
- (iv) Mr Moore's claim for compensation pursuant to s 267(3)(b) of the ACL should be remitted to the primary Judge for determination in conformity with this judgment;
- (v) Mr Moore is precluded by s 275 of the ACL and s 16 of the *Civil Liability Act* from establishing that Scenic is liable pursuant to s 267(4) of the ACL to

pay damages for distress and disappointment by reason of Scenic's breach of the Purpose and Result Guarantees; and

(vi) accordingly, the award of damages in Mr Moore's favour of \$2,000 pursuant to s 267(4) of the ACL must be set aside and his claim for damages dismissed.

397 In the case brought on behalf of Group Members I have concluded that:

(i) the primary Judge's findings that Scenic breached the Care Guarantee by reason of its pre-embarkation conduct in relation to Cruises 1, 4, 5, 6, 7, 8, 9 and 11 cannot stand;

(ii) the primary Judge's findings that Scenic breached the Care Guarantee by reason of its post-embarkation conduct in relation to Cruises 4, 5, 6 and 7 should not be disturbed;

(iii) the findings that Scenic breached the Purpose and Result Guarantees in relation to Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 should not be disturbed;

(iv) the Group Members are precluded by s 275 of the ACL and s 16 of the *Civil Liability Act* from establishing that Scenic is liable pursuant to s 267(4) of the ACL to pay damages for distress and disappointment by reason of Scenic's breach of the Purpose and Result Guarantees;

(v) the Group Members' claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL by reason of Scenic's breach of the Care Guarantee in relation to Cruises 4, 5, 6 and 7 remain to be determined by the primary Judge;

(vi) the Group Members' claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL by reason of Scenic's breach of the Purpose and Result Guarantees in relation to Cruises 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 remain to be determined by the primary Judge; and

(vii) the Group Members' claims referred to in (vi) are subject to Scenic's pleaded defence under s 61(3) of the ACL which also remains to be determined by the primary Judge.

398 The following orders should be made in the proceedings:

1. Grant Scenic leave to appeal.
2. Direct Scenic to file a notice of appeal in the form of the draft amended notice of appeal within seven days.
3. Allow the appeal in part.

*Mr Moore's claim*

399 In relation to Mr Moore's claim for compensation and damages the following additional orders should be made:

4. Set aside Order 1 made by the primary Judge on 15 November 2017.
5. Mr Moore's claim for damages for disappointment and distress pursuant to s 267(4) of the ACL be dismissed.
6. Direct that on the further hearing of the matter before the primary Judge, his Honour determine Mr Moore's claim for compensation for reduction in value of the services pursuant to s 267(3)(b) of the ACL in conformity with these reasons for judgment.

*Group Members' claims*

400 Order 2 made by the primary Judge on 15 November 2017 provided that the common issues stated for determination be answered in the form of the Answers in the document described as "Answers to Common Issues Stated for Determination". Because of the conclusions I have reached many of the Answers cannot remain in place. More importantly, because of the difficulties with the form of this document, it would be neither appropriate nor helpful to attempt to reformulate the "Answers to the Common Issues" to give effect to these reasons for judgment. Instead the parties should be directed to agree on reformulated questions and answers that give effect to these reasons for judgment.

401 The following orders should therefore be made:

7. Set aside Order 2 made by the primary Judge on 15 November 2017.
8. The Group Members' claims for damages for disappointment and distress pursuant to s 267(4) of the ACL be dismissed.

9. Direct the parties to file within fourteen days agreed Common Questions and Answers thereto that give effect to these reasons for judgment, insofar as they address the claims of Group Members to compensation and damages by reason of Scenic's breaches and alleged breaches of the Consumer Guarantees.

10. In the absence of agreement, direct that

(a) Scenic file within 14 days its proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length; and

(b) Mr Moore file within a further 14 days his proposed Common Questions and Answers thereto, together with written submissions in support not exceeding five pages in length.

#### *Costs*

402 The primary Judge made an order in the Primary Judgment that Scenic pay Mr Moore's costs of "the claim" on a party and party basis. My present view as to costs is as follows:

(i) the costs of the proceedings in the Common Law Division should be determined by the primary Judge in the light of the outcome of the proceedings; and

(ii) having regard to the fact that Scenic's appeal has succeeded, but only in part, Mr Moore should be ordered to pay 50 per cent of Scenic's costs of the application for leave to appeal and of the appeal.

403 On this basis, the following orders as to costs should be made:

11. Set aside Order 2 made by the primary Judge on 31 August 2017.

12. Order that the costs of the proceedings in the Common Law Division be determined by the primary Judge.

13. Order that Mr Moore pay 50 per cent of Scenic's costs of the application for leave to appeal and of the appeal.

404 If the parties wish to argue for different costs orders they should have that opportunity. In this respect the following directions should be made:

14. If Scenic seeks costs orders other than Orders 11, 12 and 13, it should file and serve written submissions as to costs within 14 days, such submissions not to exceed five pages in length.

15. If Mr Moore seeks costs orders other than Orders 11, 12 and 13 or if he wishes to reply to any submissions on costs made by Scenic, he should file and serve written submissions within 28 days, such written submissions not to exceed five pages in length.

16. If Scenic does not file written submissions seeking a variation to Orders 11, 12 and 13, it should file and serve written submissions in reply to any submissions by Mr Moore within a further 14 days.

### Postscript

405 These are not the only legal proceedings relating to European river cruises conducted by Scenic in May and June 2013. In a decision handed down on 30 January 2014, the New South Wales Civil and Administrative Tribunal (**NCAT**) ordered Scenic to pay \$11,826 to two passengers on Cruise 8.<sup>258</sup> NCAT's judgment is five pages in length and was delivered just over seven months after Cruise 8 was completed.<sup>259</sup> By contrast, these proceedings have still not been finalised more than five years after the various cruises concluded their ill-starred journeys.

406 The first legislation in Australia providing expressly for representative proceedings was enacted by the Commonwealth Parliament in 1991.<sup>260</sup> The Second Reading Speech identified the basic objectives of the new statutory regime as follows:<sup>261</sup>

“The new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources ... Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost

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<sup>258</sup> Childs v Scenic Tours Pty Ltd [2014] NSWCATCD 128.

<sup>259</sup> See also Lloyd v Scenic Tours Pty Ltd [2010] NSWCTTT 591 for the similarly expeditious disposal of the like claims arising from a river cruise in 2009.

<sup>260</sup> Federal Court of Australia Amendment Act 1991 (Cth), inserting Part IVA into the Federal Court of Australia Act 1976 (Cth).

<sup>261</sup> Cth Parl Deb, 14 November 1991, at 3174-3175 (Attorney-General).

of taking action. The second purpose of the Bill is to deal with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.”

Part 10 of the *Civil Procedure Act* is modelled on the Commonwealth legislation and shares its objectives.

- 407 Representative proceedings present procedural complexities and potential pitfalls that unless appreciated and properly addressed create a serious risk that the objectives of the statutory regime will not be realised. The Supreme Court’s Practice Note relating to representative proceedings<sup>262</sup> expressly acknowledges the complexities and establishes procedures designed to facilitate the “prompt and efficient resolution” of such proceedings. These include procedures designed to ensure the early identification of the common questions of law or fact which are said to arise in the proceedings and the early resolution of any issues concerning the identification of the common questions.<sup>263</sup>
- 408 In the present case the parties never satisfactorily identified common questions of law or fact suitable for resolution in the representative proceedings. The Statement of Issues, which was said to identify the common questions, was not finalised until the last day of the hearing and even then was subsequently amended. In part the delay was a consequence of the late amendments to Mr Moore’s pleadings which, in the event, seem to have added little of value to the Group Members’ case. More significantly, as the parties accepted in this Court, most of the questions identified in the Statement of Issues are not in truth common questions of law or fact. It is therefore not surprising that there was disagreement between the parties and a good deal of confusion as to what matters had been in issue during the six day hearing before the primary Judge. Nor is it surprising that numerous issues remain to be determined.
- 409 If representative proceedings are to be an efficient and prompt means of resolving multiple claims, it is essential that common questions of law or fact be

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<sup>262</sup> Practice Note SC Gen 17: Supreme Court – Representative Proceedings (Practice Note 17).

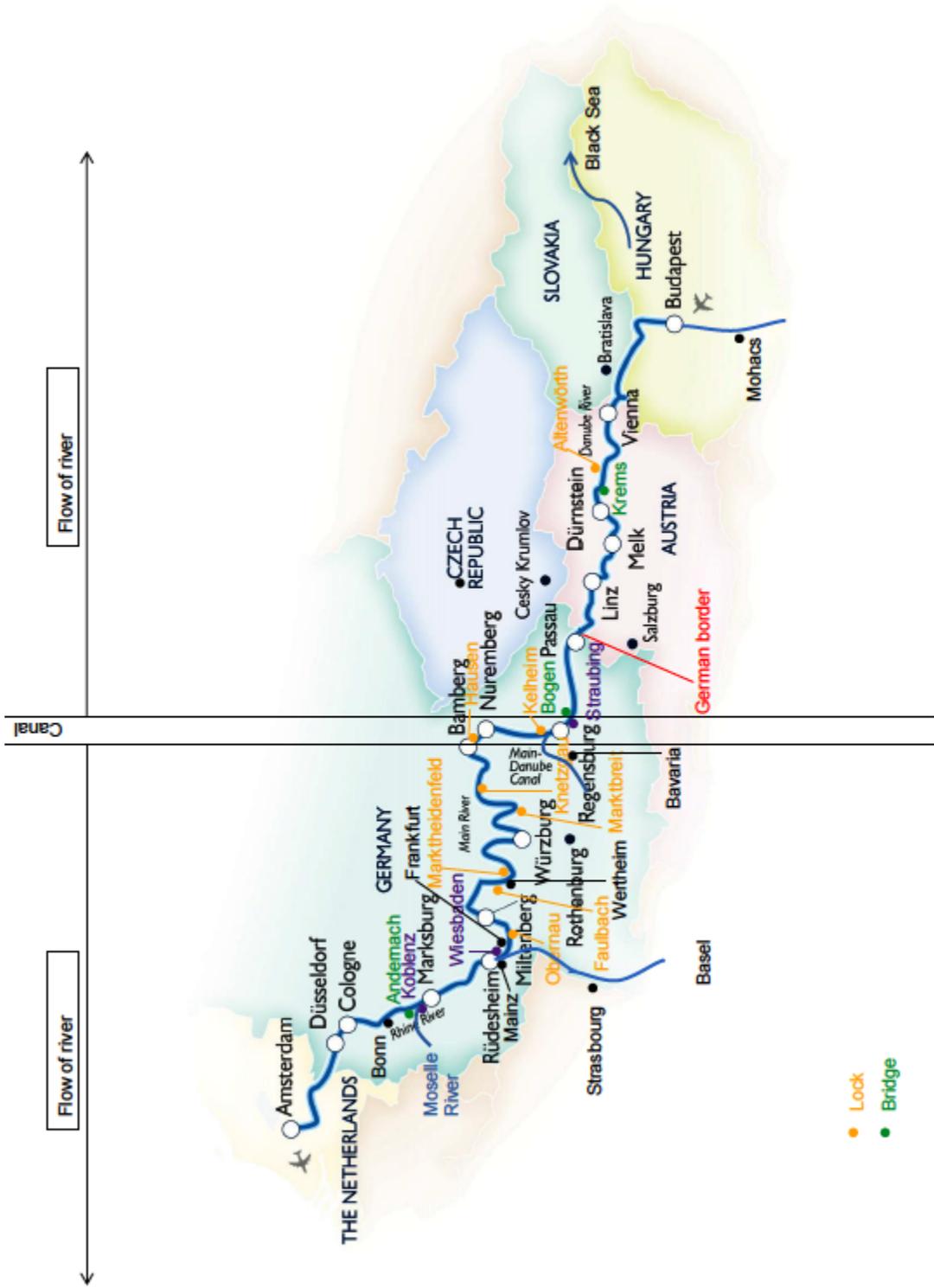
<sup>263</sup> Practice Note 17 at [4.2(c)], [7.1(c)].

identified early in the proceedings and that the substantive hearing be directed to resolving these questions. This is particularly important in proceedings where each group member has only a modest claim for damages or compensation, as is typically the case in representative proceedings brought on behalf of consumers. As the present case demonstrates, a failure to be rigorous in identifying common questions of law or fact often leads to inordinate delay, disproportionate expense and frustration for all parties to the litigation.

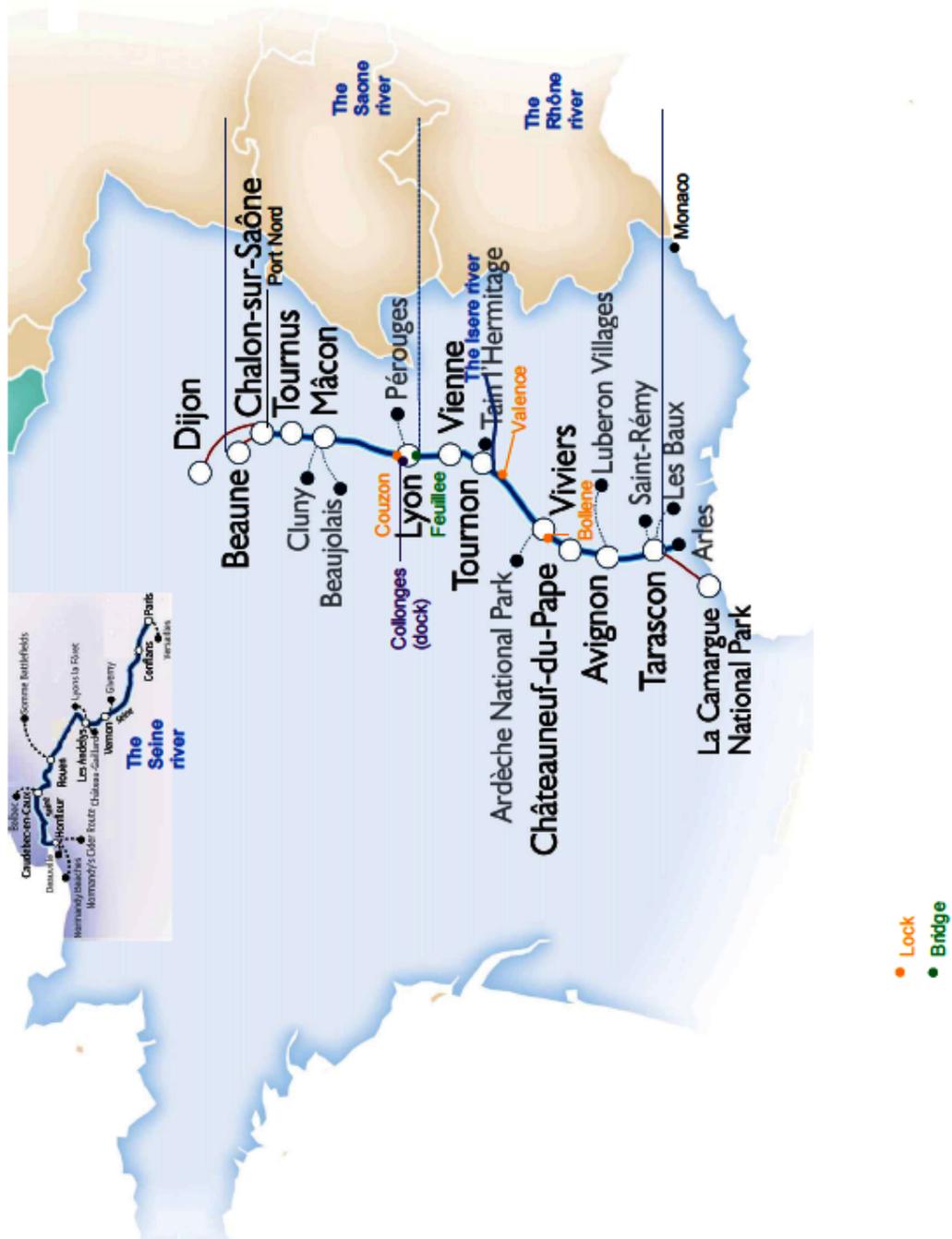
410 **BARRETT AJA:** I have had the advantage of reading in draft the comprehensive judgment prepared by Sackville AJA. Orders and directions should be made as his Honour proposes for the reasons he gives.

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## **APPENDIX A**



APPENDIX B



## APPENDIX C

### Question 1:

*What was the nature or character of the “services” which the defendant was required to supply to the plaintiff and group members?*

**Answer:**

Scenic Tours Pty Ltd (“Scenic”) provided recreational services constituted by a river cruise which included 5-star luxurious all-inclusive accommodation, dining, entertainment and travel by cruise along European rivers and stopping at certain destinations. In addition, Scenic provided information services, in advance and during each cruise, concerning events and circumstances and their impacts upon passengers’ enjoyment of their cruises and Scenic’s ability to provide its services in a timely manner. Further, Scenic provided management services to oversee, organise and manage the delivery of the cruise and the added services prior to embarkation and whilst the cruises were underway.

**Question 2:**

***Were the services which the defendant was required to supply to be performed wholly or partly outside Australia?***

**Answer:**

Partly outside Australia.

**Question 3:**

***Do the provisions of the Australian Consumer Law apply to services performed wholly or partly outside Australia?***

**Answer:**

Yes.

**Question 4:**

***In respect to each of the cruises scheduled to proceed during the period from 10 May 2013 to 14 June 2013 (“the relevant period”) along the:***

**(a) ‘Jewels of Europe’ (Amsterdam to Budapest and Budapest to Amsterdam) routes; and**

**(b) ‘South of France’ route (“the pleaded routes”)**

***was there a guarantee that the services which the defendant supplied to the plaintiff and group members:***

- (i) would be rendered with due care and skill;**
- (ii) would be reasonably fit for the purpose of experiencing and enjoying travel and accommodation, by cruise, along the rivers (covered by the said routes) to a range of tourist destinations;**
- (iii) might reasonably be expected to achieve the result of experiencing and enjoying travel and accommodation, by cruise, along the rivers (covered by the said routes) to a range of tourist destinations**

***pursuant to ss 60, 61(1) and 61(2) (respectively) of the Australian Consumer Law?***

**Answer:**

Yes

**Question 5:**

***Prior to the embarkation of each of the cruises scheduled to proceed during the relevant period along the pleaded routes, what was the defendant's knowledge (actual, imputed or constructive) of the river levels and other consequences of extensive flooding along the route in question and the extent to which the prospective experience and enjoyment of passengers on each of those scheduled cruises was likely to be disrupted?***

**Answer:**

**Cruise 1:** In respect to group members on Cruise FRCR 190513.1, by 16 May 2013, Scenic knew that the cruise which was then sailing north could not establish a final disembarkation point. Waters on the Saone and Rhone Rivers had been very high for most of May. Scenic would have realised that there was a significant likelihood that the cruise due to commence on 20 May 2013 would not be able to proceed smoothly and without interruption, particularly when Scenic had no information to suggest there was likely to be a drop in the height of the Saone and Rhone Rivers.

**Cruise 4:** In respect to group members on Cruise STC 270513.1, Scenic knew by 26 May 2013 that the River Main was closed and that high water was threatening the program for Cruise 2.

**Cruise 5:** In respect to group members on Cruise STC270513.2, Scenic knew by 26 May 2013 that the River Main was closed and that high water was threatening the program for Cruise 2.

**Cruise 6:** In respect to group members on Cruise STC290513.1, Scenic knew of the circumstances affecting Cruises 2–3, after those cruises had embarked (as found in paragraph [485] of Moore (No.2)), and knew of the circumstances affecting Cruises 4-5 before those cruises had embarked (as found in paragraphs [525] and [544] of Moore (No.2)), as at 28 May 2013.

**Cruise 7:** In respect to group members on Cruise STC 290513.2, Scenic knew of the circumstances affecting Cruises 2–3, after those cruises had embarked (as found in paragraph [485] of Moore (No.2)), and knew of the circumstances affecting Cruises 4-5 before those cruises had embarked (as found in paragraphs [525] and [544] of Moore (No.2)), as at 28 May 2013.

**Cruise 8:** In respect to group members on Cruise STC 030613.1, Scenic knew of the circumstances affecting Cruises 2–7 (inclusive), as described in these Answers, before and after those cruises had respectively embarked, as at 2 June 2013. Further, by 3 June 2013, Scenic knew that ships were stuck on the river and were unlikely to move for many days and that a significant component of the cruise would be undertaken as a motor coach tour by land and other cruise companies had formed a view that it was appropriate to cancel the cruise departing at that time

**Cruise 9:** In respect to group members on Cruise EGRC 080613.1, Scenic knew of the circumstances affecting Cruises 2-8 (inclusive), as described in these Answers, before and after those cruises had respectively embarked, as at 7 June 2013. Further by 7 June 2013, the defendant knew that there was no ship to embark upon and that situation was not likely to change in the near future, the high water levels and flooding was unlikely to allow for uninterrupted cruising on the rivers.

**Cruise 10:** In respect to group members on cruise STC 100613.1, Scenic knew of the circumstances affecting Cruises 2-9 (inclusive), as described in these Answers, before and after those cruises had respectively embarked, as at 9 June 2013. Further, by 8 June 2013, Scenic knew that there were significant interruptions to cruising along the rivers: the lock at Hausen on the Main/Danube Canal was closed and it was expected to reopen in a few days but it was not clear when; ships could not sail between Nuremburg and Bamberg in either direction; it would be a week before ships could cruise along the Main River. It was apparent to Scenic that the cruise could not be expected to proceed without significant disruption to the planned itinerary.

**Cruise 11:** In respect to group members on Cruise STC 100613.2, Scenic knew of the circumstances affecting Cruises 2-9 (inclusive), as described in these Answers, before and after those cruises had embarked, as at 9 June 2013,. Further, by 8 June 2013, Scenic knew that there would be no ship in Budapest for embarkation, and passengers would be moved to the nearest ship, docked in Krems, where it had been stuck since earlier in the month. The water level on the Danube continued to be high, the Hausen lock was still inoperative and not expected to be operating for a number of days and the re-opening dates for parts of the Danube and Main/Danube Canal were largely unknown. Scenic knew that there was a real prospect that the cruise would not be able to be completed without interruptions.

**Cruise 13:** In respect to group members on Cruise STC 120613.2, Scenic knew of the circumstances affecting Cruises 2-11 (inclusive), as described in these Answers, before and after those cruises had embarked, as at 11 June 2013. Further, by 11 June 2013, Scenic knew that there would be no cruising between Vienna and Budapest and that there was a real risk of significant interruption to the cruise and that cruising was unlikely to take place in its entirety for the whole of the itinerary.

***Question 5A:***

***Following the embarkation of each of the cruises scheduled to proceed during the relevant period along the pleaded routes, what was the defendant's knowledge (actual, imputed or constructive) of the river***

***levels and other consequences of extensive flooding along the route in question and the extent to which the actual experience and enjoyment of passengers on each of those scheduled cruises had been, was being and would likely continue to be disrupted?***

**Answer:**

**Cruise 2:** In respect to group members on Cruise STC 200513.2, Scenic knew by 26 May 2013 that the River Main was closed and that high water was threatening the program for Cruise 2 and that by 28 May 2013, the ship was to have an enforced stay in Bamberg.

**Cruise 3:** In respect to group members on Cruise EGFC 250513.1, Scenic knew by 28 May 2013, ships would soon be unable to pass under a bridge near Frankfurt, due to high water levels.

**Cruise 4:** In respect to group members on Cruise STC270513.1 by 30 May 2013, in addition to knowledge of Cruises 2 and 3, Scenic knew that three ships were docked in three locations along the river at Mainz, Bamberg and Krems. By 29 May 2013, it was clear that there was, or was likely to be, a significant interruption to this cruise. The ship upon which the passengers were embarked could not and would not be likely to be able to sail further east past Mainz. Scenic was confronted with the prospect of changing a river cruise effectively to a motor coach tour from a stationary ship with excursions along the way.

**Cruise 5:** In respect to group members on Cruise STC 270513.2, Scenic's knowledge, or knowledge which, acting reasonably, it would be expected to acquire, was the same as for Cruise 4. The one difference was that a successful passage at the western end of the Rhine River was always likely to be more feasible than passage in an easterly direction between Krems and Budapest. By the time the ship was docked in Melk and likely to move the following day only to Krems on 30 May 2013, it was apparent that the other ships on the river at that time were also docked in Bamberg and Mainz, and unlikely to move.

**Cruise 6:** In respect to group members on Cruise STC 290513.1, by 31 May 2013, Scenic knew of the circumstances affecting Cruises 2-5 (inclusive) and that there was a significant prospect that the cruise would not be able to proceed in accordance with the itinerary and that what was in prospect was a motor coach trip through the balance of the itinerary with accommodation provided on stationary, docked ships.

**Cruise 7:** In respect to group members on Cruise STC 290513.2, by 31 May 2013, Scenic knew of the circumstances affecting Cruises 2-5 (inclusive) and that there was a significant prospect that the cruise would not be able to proceed in accordance with the itinerary and that what was in prospect was a motor coach trip through the balance of the itinerary with accommodation provided on stationary, docked ships.

**Cruise 8:** in respect to group members on Cruise STC 030613.1, from 3 June 2013, Scenic knew of the circumstances actually affecting that cruise referred to at [633]-[643] in Moore (No.2) and in addition those circumstances affecting this cruise that it knew before the embarkation of this cruise, and as well the circumstances affecting Cruises 2-7 (inclusive).

**Cruise 9:** in respect to group members on Cruise EGRC 080613.1 from 8 June 2013, Scenic knew of the circumstances affecting that cruise referred to at [657]-[664] in Moore (No.2), in addition to circumstances affecting this cruise that it knew before the embarkation of this cruise and the circumstances affecting Cruises 2-8 (inclusive).

**Cruise 10:** in respect to group members on Cruise STC 100613.1 from 10 June 2013, Scenic knew of the circumstances affecting that cruise referred to at [685] and [692] in Moore (No.2) in addition to circumstances affecting this cruise that it knew before the embarkation of this cruise and the circumstances affecting Cruises 2-9 (inclusive) and Cruise 11.

**Cruise 11:** in respect to group members on Cruise STC 100613.2, from 10 June 2013, Scenic knew of the circumstances affecting that cruise referred to at [700]-[704] in Moore (No.2), in addition to circumstances affecting this cruise that it knew before the embarkation of this cruise and the circumstances affecting Cruises 2-10 (inclusive).

**Cruise 12:** in respect to group members on Cruise STC 120613.1, from 12 June 2013, Scenic knew of the circumstances affecting that cruise referred to at [719] in Moore (No.2), in addition to circumstances affecting this cruise that it knew before the embarkation of this cruise and the circumstances affecting Cruises 2-11 (inclusive)

**Question 6:**

***In respect to each of the cruises scheduled to proceed during the relevant period along the pleaded routes did the content of any or all of the consumer guarantees in ss 60, 61(1) or 61(2) of the Australian Consumer Law require the defendant to warn the plaintiff and group members, prior to them each embarking upon their (respective) scheduled cruises, that there was a real or substantial prospect, or risk, that they would not, or were not, likely to experience or enjoy travel and accommodation by cruise along the rivers covered by their routes, without substantial disruption (hereafter the 'obligation to warn').***

**Answer:**

**Cruise 1:** In respect to group members on Cruise FRCR190513.1, Scenic, acting with due care and skill ought to have informed passengers by 16 May 2013, that water levels on the rivers remained high, and that there was a significant likelihood that this cruise would not be able to proceed smoothly without interruption. By not providing that information, the defendant did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 4:** In respect to group members on Cruise STC270513.1, there was no obligation upon Scenic to warn, prior to embarkation.

**Cruise 5:** In respect to group members on Cruise STC270513.2, there was no obligation upon Scenic to warn, prior to embarkation.

**Cruise 6:** In respect to group members on Cruise STC290513.1 there was no obligation upon Scenic to warn, prior to embarkation.

**Cruise 7:** In respect to group members on Cruise STC290513.2, there was no obligation upon Scenic to warn, prior to embarkation.

**Cruise 9:** In respect to group members on Cruise EGRC080613.1, the provision of due care and skill by Scenic required the provision, by 7 June 2013, of information about the real prospect of the cruise being significantly interrupted. By not providing that information, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 11:** In respect to group members on Cruise STC100613.2 the provision of due care and skill by Scenic required that, by 8 June 2013 and as an alternative to Scenic cancelling the cruise itself, passengers be provided with up to date and accurate information about the likely interruption to the cruising. By not providing that information, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 13:** In respect to group members on Cruise STC 120613.2, the application of due care and skill required Scenic to notify passengers that there was a real risk of significant interruption to the cruise and that cruising was unlikely to take place in its entirety for the whole of the itinerary. By not providing that information, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Question 7:**

***In respect to each of the Cruises 1 and 4-13 (inclusive) scheduled to proceed during the relevant period along the pleaded routes, did the content of any or all of the consumer guarantees in ss 60, 61(1) or 61(2) of the Australian Consumer Law require the defendant to explain or present to the plaintiff and group members options, including opportunity for the plaintiff and group members to take alternative cruises or tours (on subsequent dates), or to offer refunds (wholly or partially) or credits on future cruises as alternative to their proceeding with embarkation upon the scheduled cruises on the scheduled embarkation dates (hereafter the 'obligation to offer options before embarkation')?***

**Answer:**

**Cruise 1:** In respect to group members on Cruise FRCR190513.1, the application of care and skill by Scenic required that by 16 May 2013, passengers to be given a choice as to whether they would embark on the cruise or not thereby facilitating cancellation for the passengers. By not providing that choice, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 4:** In respect to group members on Cruise STC270513.1, no.

**Cruise 5:** In respect to group members on Cruise STC270513.2, no.

**Cruise 6:** In respect to group members on Cruise STC290513.1, no.

**Cruise 7:** In respect to group members on Cruise STC290513.2, no.

**Cruise 8:** In respect to group members on Cruise STC030613.1, by 2 June 2013, the only responsible action for Scenic, exercising due care and skill, was to cancel the tour, or else offer an option to cancel the cruise. By not taking that action, Scenic did not comply with s 60(1) of the *Australian Consumer Law*.

**Cruise 9:** In respect to group members on Cruise EGRC080613.1, by no later than 7 June 2013, the only reasonable course which was open to Scenic, exercising due care and skill, was to cancel the cruise, or at least offer passengers the option to do so. By failing to cancel the cruise, or at least offer that option to passengers, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 10:** In respect to group members on Cruise STC100613.1, by 8 June 2013, passengers ought to have been given the option of cancelling their cruise.

**Cruise 11:** In respect to group members on Cruise STC100613.2, by at least 8 June 2013, the exercise of due care or skill required either the cancellation of the cruise or else passengers ought to have been able to cancel their tour. By not cancelling the cruise, or providing passengers with the option to cancel, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 12:** In respect to group members on Cruise STC120613.1, no.

**Cruise 13:** In respect to group members on Cruise STC120613.2, by 11 June 2013, the exercise of due care and skill required Scenic to offer passengers the option of cancelling a cruise. By failing to provide that option, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Question 7A:**

***In respect of the Cruises 2-7 inclusive, scheduled to proceed during the relevant period along the pleaded routes, did the content of any or all of the consumer guarantees in ss 60, 61(1) or 61(2) of the Australian Consumer Law require that after those cruises had embarked, the defendant to explain or present to the group members on those respective cruises the option to cancel their cruises, be offered alternative cruises or tours (on subsequent dates), or to provide refunds (wholly or partially) or credits on future cruises as alternatives to their continuing to proceed with their scheduled cruises (hereafter the 'obligation to offer options after embarkation')?***

**Answer:**

**Cruise 2:** In respect to group members on Cruise STC200513.2, no.

**Cruise 3:** In respect to group members on Cruise EGFC250513.1, no.

**Cruise 4:** In respect to group members on Cruise STC270513.1, by 29 May 2013, Scenic, exercising due care and skill, should have provided passengers with an opportunity to cancel the further part of the tour, and make further arrangements. By failing to provide passengers with that opportunity, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 5:** In respect to group members on Cruise STC270513.2, by 3 June 2013, Scenic, exercising due care and skill, should have cancelled the tour. By failing to cancel the tour, Scenic did not comply with s 60(1) [sic] of the *Australian Consumer Law*.

**Cruise 6:** In respect to group members on Cruise STC290513.1, by 31 May 2013, Scenic, exercising due care and skill, should have provided passengers with the opportunity to make a decision as to whether or not to cancel their

tour. By not providing that opportunity, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Cruise 7:** In respect to group members on Cruise STC290513.2, by 31 May 2013, Scenic, exercising due care and skill, should have provided passengers with the opportunity to make a decision as to whether or not to cancel their tour. By not providing that opportunity, Scenic did not comply with s 60 of the *Australian Consumer Law*.

**Question 8:**

***Whether in respect to each of the cruises scheduled to proceed during the relevant period along the pleaded routes the defendant did not comply with any or all of the consumer guarantees in ss 60, 61(1) or 61(2) of the Australian Consumer Law by reason of the circumstances pleaded (in paragraphs 12-14 of the amended pleading), being essentially:***

***(a) the defendant's failure to unilaterally cancel or delay the cruise and/or offer the option to passengers to cancel the cruises (before or after their scheduled embarkation);***

***(b) the defendant's breach of its obligation to warn; and***

***(c) the defendant's breach of its***

***(i) obligation to offer options before embarkation; or***

***(ii) obligation to offer options after embarkation.***

**Answer:**

**Cruise 1:** In respect to group members on Cruise FRCR 190513.1, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 2:** In respect to group members on Cruise STC 200513.2, Scenic did not comply with the consumer guarantees in ss 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 3:** In respect to group members on Cruise EGFC 250513.1, Scenic did not comply with the consumer guarantees in ss 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 4:** In respect to group members on Cruise STC 270513.1, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 5:** In respect to group members on Cruise STC 270513.2, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 6:** In respect to group members on Cruise STC 290513.1, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 7:** In respect to group members on Cruise STC 290513.2, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 8:** In respect to group members on Cruise STC 030613.1, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 9:** In respect to group members on Cruise EGRC 080613.1, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 10:** In respect to group members on Cruise STC 100613.1, Scenic did not comply with the consumer guarantee in s 60 of the *Australian Consumer Law*.

**Cruise 11:** In respect to group members on Cruise STC 100613.2, Scenic did not comply with the consumer guarantees in ss 60, 61(1) and 61(2) of the *Australian Consumer Law*.

**Cruise 12:** In respect to group members on Cruise STC 120613.1, there was no lack of compliance by Scenic with the consumer guarantees in the *Australian Consumer Law*.

**Cruise 13:** In respect to group members on Cruise STC 120613.2, Scenic did not comply with the consumer guarantee in s 60, although there was no lack of compliance with the guarantees in ss 61(1) and (2) of the *Australian Consumer Law*

**Question 9:**

***Whether, to the extent that the defendant did not comply with any or all of the said consumer guarantees, such non-compliance occurred only because of causes independent of human control occurring after the defendant had supplied its services.***

**Answer:**

No.

**Question 10:**

***Whether it is a defence to a claim for damages for non-compliance with any or all of the said consumer guarantees if the defendant relied upon the advice(s) of its service providers, or 'nautical partners' referred to in its Defence.***

**Answer:**

No.

**Question 11:**

***Whether the defendant's 'service providers' were the entity or entities responsible for damage suffered by the plaintiff and any group member.***

**Answer:**

No.

**Question 12:**

***What heads of damage are recoverable for a claim for compensation under s 267 of the Australian Consumer Law?***

**Answer:**

The plaintiff had an action to recover compensation under s 267(3)(b) for any reduction in the value of the services received below the price he paid. The plaintiff also had an action under s 267(4) to recover damages for loss which was reasonably foreseeable. In his case, the loss included distress, disappointment and inconvenience.

**Question 13:**

***Whether any or all of clauses 2.10(h), and 2.12 of the standard terms and conditions of the contract ('standard terms') applied to exclude the defendant's liability?***

**Answer:**

No.

**Question 14:**

***Whether cl 2.13 of the standard terms applied to limit the defendant's liability?***

**Answer:**

No.

**Question 15:**

***In respect to the standard terms of the contracts entered into by the plaintiff and each group member with the defendant:***

***15.1 was or were any of them the subject of any real or reasonable negotiation?***

***15.2 was it reasonably practicable for the plaintiff, or a group member, to negotiate for their alteration or rejection?***

***15.3 was any explanation as to their legal or practical effect given by or on behalf of the defendant?***

**Answer:**

Not necessary to answer.

**Question 16:**

***How are the circumstances, as alleged by the plaintiff in paragraph 17E of his pleading, in which 'contracts' were entered into by the plaintiff and group members to be characterised, by reference to the discretionary considerations in s 22 of the Australian Consumer Law and s 9 of the Contracts Review Act 1980?***

**Answer:**

Not necessary to answer.

**Question 17:**

***For the purposes of s 22 of the Australian Consumer Law and s 9 of the Contracts Review Act:***

***17.1 is it a relevant consideration that travel agents for the plaintiff or some group members (through whom bookings were made) were (allegedly) aware of the terms and conditions;***

***17.2 were the said travel agents of the plaintiff and group members 'agents' in law, or merely 'brokers' or independent contractors; and***

***17.2 is the said alleged awareness of the travel agents of the standard terms and conditions of the contracts to be imputed to the plaintiff and those other group members who made bookings through travel agents?***

**Answer:**

Not necessary to answer.

**Question 18:**

***Whether the defendant, if it is found to:***

***18.1 have engaged in unconscionable conduct; or***

***18.2 be applying to rely, or purporting to rely upon any or all of cll 2.6(d), 2.10 or 2.13 of the standard terms***

***should be prevented from being able to rely upon those provisions by orders made under ss 237 and/or 243 of the Australian Consumer Law.***

**Answer:**

Not necessary to answer.

**Question 19:**

***Did each of cll 2.6(d) and 2.10 of the standard terms have the effect pleaded in paragraph 17J?***

**Answer:**

Not necessary to answer.

**Question 20:**

***In respect to each of cll 2.6(d) and 2.10 of the standard terms:***

***20.1 did either or both cause a significant imbalance in the rights or obligations arising under each contract?***

***20.2 was either or both reasonably necessary to protect the defendant's legitimate interests?***

***20.3 would either of them cause detriment to the plaintiff or group members if applied or relied upon by the defendant?***

**Answer:**

Not necessary to answer

**Question 21:**

***All issues necessary for the determination of the entirety of the plaintiff's claim.***

**Answer:**

The plaintiff is entitled to judgment against the defendant in accordance with Moore (No.2).

**Question 22:**

***With respect to issues 1 to 20 inclusive, are the answers common to all group members, some group members, and if so which ones, or else no group members?***

**Answer:**

Save to the extent indicated above, all of the answers to the questions are common to the claims of the group members, who resided in Australia and Vanuatu, and who contracted with the defendant. A determination has not yet been made as to whether all of the answers to the questions are common to other passengers on the cruises who resided outside Australia and Vanuatu.

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## **Amendments**

25 October 2018 - [23] - 2013 amended to 2017

Typographical amendments to [372(ii)], [387], [406]

Fn 117 - Gavin Duffy CJ amended to Gavan Duffy CJ

Fn 141 - Marcovic J amended to Markovic J

14 November 2018 - [329] - delete "took", insert "did not take"

[392(ii)], [395] and [397(iv)] - insert Cruises 2 and 3

[396(iii) and (iv)] - insert section "s 267(3)(b)"

[122] - insert s 61(3)

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