

**SCENIC TOURS PTY LTD v MOORE**  
**(2017/292822)**

**Applicant's Outline of Submissions**  
**(Amended to comply with rule 51.36(1)(b))**

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## **A. Introduction**

1. This appeal raises, inter alia, the question as to the proper interpretation of the statutory consumer guarantees introduced by sections 60, 61(1) and 61(2) of the Australian Consumer Law (**ACL**).<sup>1</sup> It also raises the question as to application of those provisions to certain findings of fact which are, in part, the subject of challenge. In addition, this appeal is concerned with questions determined by the trial judge which

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<sup>1</sup> These provisions are set out at J306-307: White 91-2. The definition of “services” is set out at J310: White 92.

were not properly before him. For example, the trial judge denied Scenic procedural fairness and natural justice<sup>2</sup> by finding that the claimant (**Scenic**) was in breach of sections 61(1) and 61(2) of the ACL in relation to 10 of the 13 cruises in issue in circumstances where the question of compliance with section 61 was only before him in relation to the claim brought by the respondent (**Mr Moore**) and could not have been determined as a common question given Scenic relied upon s 61(3) ACL in its defence.<sup>3</sup> At J309 the trial judge erroneously stated that Scenic did not rely on s 61(3) ACL. However at J434 the trial judge correctly acknowledged that Scenic did rely on s 61(3) ACL and at J437-438 correctly found that it would be inappropriate to reach a view as to the application of s 61(3) other than in respect of and in rejecting Moore's claim.<sup>4</sup>

2. The trial was heard over 6 days in April/May 2016 and the primary decision was delivered on 31 August 2017. The evidence was largely documentary. Mr Moore only called witnesses from cruises 1, 4, 8, 9 and 11. Mr Moore called 7 witnesses in totality.
3. The matters the subject of the trial was Mr Moore's claim and, initially, the questions raised by an Amended Statement of Issues (**questions**) filed in Court on the last day of the trial. The previous iteration was settled by the Court. However, the trial judge amended Question 7A after publishing the primary decision. At the directions hearing on 15 November 2017, the trial judge ordered that Question 7A be amended so as to capture cruises 6 and 7 (topics which were not before the Court during the trial). The consequence of that denial of procedural fairness and natural justice is that findings were made that Scenic breached s 60 ACL in relation to cruises 6 and 7. In any event, the trial judge did not determine all of the questions. This is apparent from the decision in *Moore v Scenic Tours Pty Limited (No.3)* [2017] NSWSC 1555 which records the answers to the questions consequent upon the primary decision delivered on 31 August 2017.<sup>5</sup> Some (but not all) of those unanswered questions are the

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<sup>2</sup> See Grounds of Appeal 8A and 53: White 376, 382.

<sup>3</sup> Section 61(3) ACL is set out at J308: White 92. See Defence to Third Further Amended Statement of Claim, paragraph 13(c): White 323.

<sup>4</sup> See also J784 where the trial judge found non-compliance with ss 61(1) and (2): White 190-1.

<sup>5</sup> See for example the answers to questions 15 – 20 inclusive: White 362-4.

subject of an Amended Draft Notice of Contention.<sup>6</sup>

4. Mr Moore and the group members proceeded upon river cruises in Europe with Scenic trading as “*Scenic Tours*” and “*Evergreen Tours*” scheduled from between 10 May 2013 and 14 June 2013 (**the relevant period**).<sup>7</sup> There were 23 cruises within the relevant period however the trial, as ultimately conducted, was only concerned with 13 of them. The 13 cruises in issue are set out in the Table of Cruises at J13. Scenic was found “*liable*” in relation to 10 of the 13 cruises.<sup>8</sup>
5. The 13 cruises with which the trial was concerned can be divided into 4 categories:
  - (1) The South of France cruise (cruise 1).
  - (2) The May 2013 AMS/BUD and BUD/AMS cruises (cruises 2 – 7).
  - (3) The early June 2013 AMS/BUD and BUD/AMS cruises (cruises 8 – 9); and
  - (4) The later June 2013 AMS/BUD and BUD/AMS cruises (cruises 10 – 13).
6. This appeal is concerned with all of the cruises except for cruises 10, 12 and 13 for the reasons set out in footnote 8 below.

**B. The contract and the services: Grounds 1-7**

7. Central to this appeal is the proper characterisation of the services which Scenic agreed to provide, as recognised by the trial judge at J311 and J353. At J312-343 the trial judge made some observations about the Brochure promoted by Scenic and in so doing found that it “*precedes any agreement between Scenic and a prospective customer*” (J312).
8. At J343 the trial judge recorded Scenic’s submissions (which he should have accepted) that Scenic’s terms and conditions (set out at J348) contained within the Brochure properly characterise the services which Scenic agreed to provide and therefore inform the claim under the consumer guarantees. At J352, J364 and J368-369, the trial judge recorded further submissions made by Scenic to a similar effect

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<sup>6</sup> White Tab 16.

<sup>7</sup> Third Further Amended Statement of Claim (**TFASOC**) filed 12 May 2016 paragraph 2: White 292-3.

<sup>8</sup> In relation to cruise 12, none of the consumer guarantees were found to have been breached. In relation to cruises 10 and 13, the trial judge found that s 60 ACL was breached, but no compensable loss was suffered.

about the services which Scenic agreed to provide and at J370 rejected those submissions. In so doing the trial judge erred. The services which Scenic agreed to provide must, necessarily, be viewed by reference to its contractual obligations.

9. As the s 4 definition of “*services*” makes clear, “*services*” are ordinarily provided under a contract. Whilst the introductory words of the definition are sufficient to capture services provided otherwise than under a contract, here the services were provided pursuant to a contract. The contract thus defines the nature and scope of the services provided.
10. Scenic agreed to provide the “Tour” for the “Tour Price”. “Tour” is defined in clause 2.19 of the terms and conditions as “the tour you have booked with Us outlined in your itinerary, as amended in accordance with these Terms and Conditions....” Clause 2.7 of the terms and condition expressly provided that:

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 of 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.

11. Clause 2.10(e) required Scenic to use “*reasonable efforts*” to operate the tour as close as possible to the itinerary subject to changes or substitutions which may be necessary for reasons out of its control, such as high or low water levels, flooding and lock closures. Clause 2.10 entitled Scenic to vary a tour. More specifically, clause 2.10(g) entitled Scenic to substitute (at the nearest reasonable standard) another vessel or motor coach for all or part of the itinerary.
12. However, rather than focusing attention on the terms and conditions, the trial judge at J371 held that the Brochure (which he earlier held precedes any agreement) contains the “*offer*” of the services and in so doing erred. At J372, his Honour made a similar error. In essence his Honour found that the “*glossy*” and descriptive aspects of the Brochure (described at J312-343) contained the services which Scenic offered to

provide.<sup>9</sup> This error was at the core of the various findings of breach by Scenic of the ACL.

13. It should be pointed out that at J145 the trial judge arguably contradicted his finding at J371 and accepted Scenic's submissions as to the terms and conditions of the contract with Mr Moore, namely, that Scenic was obliged to provide the cruise for which Mr Moore had paid – subject to the terms and conditions.

**C. The South of France Cruise (FRCR 190513.1) (cruise 1): Grounds of Appeal 8D, 12 to 19 and 53**

14. Annexed as "A" is a form of a map as an aide memoire. It is only relevant to cruise 1.
15. The trial judge found that Scenic breached ss 60, 61(1) and (2) ACL (J472, 483, 764-5). As stated in paragraph 1 above, the questions concerning ss 61(1) and 61(2) were not before the trial judge (except in relation to Mr Moore's claim).
16. Shortly stated, Scenic challenge the factual finding to the effect that Scenic knew, by 16 May 2013, that there was a significant chance or likelihood that this cruise would experience a substantial disruption (J475-476, J482).
17. This tour commenced on 19 May 2013 with guests arriving in Paris where they stayed overnight.<sup>10</sup> The cruise embarked on 20 May 2013 in Chalon-sur-Saone (**Chalon**) with disembarkation scheduled for Arles.
18. The relevant factual findings are at J161 – 182 and, to a lesser extent at J183-203. The findings at J161 – 179 concern the period between 30 April to 8 May 2013, a point in time which is not, it is submitted, relevantly proximate to the date of embarkation (i.e. 20 May 2013) and provided Scenic (and therefore the trial judge) with no basis to consider that this cruise may, let alone was likely to be disrupted, particularly given:

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<sup>9</sup> At J44 - 53 the trial judge made some (obiter) observations about the nature of the competing arguments: White 26-8.

<sup>10</sup> Blue Vol.2 877 K-L; Blue Vol.1 223 L-M.

- (a) the evidence recorded at J176, namely that as at 7 May 2013 the water levels on the Rhone and Saone rivers were “*finally going down*”; and
- (b) the evidence recorded at J179 that “*the situation is definitely getting better*”.

19. There was a significant body of evidence as to the state of the Saone and the Rhone rivers shortly prior and as at 16 May 2013, specifically between 9 and 16 May 2013.

That evidence was not referred to by the trial judge:

- (1) On 13 May 2013 an Avalon ship left Lyon towards Chalon.<sup>11</sup>
- (2) On 13 May 2013 a Scenic ship cruised from Vienne to Lyon (i.e. towards Chalon) and the weather was sunny.<sup>12</sup>
- (3) On 13 May 2013 Scenic understood that “the water level has gone down and ships are able to sail under the Saone bridges in Lyon as from today”.<sup>13</sup>
- (4) On 14 May 2013 a Scenic ship cruised from Lyon (at 8pm) to Macon and the weather was sunny.<sup>14</sup>
- (5) On 14 May 2013 guests on an Avalon cruise were able to embark in Chalon.<sup>15</sup>
- (6) On 16 May 2013, a Scenic ship then on foot cruised from Macon to Tournus and then left Tournus at 6pm, arriving in Chalon at 9pm on 16 May 2013 without any difficulty.<sup>16</sup>

20. The evidence set out in paragraph **19** above (not referred to by the trial judge) was compelling evidence that there were no difficulties associated with the Saone river (where the subject cruise was scheduled to embark) as at 16 May 2013. It also demonstrates that there were no difficulties associated with the Rhone river, at least between Vienne and Lyon as at 16 May 2013. The evidence referred to in paragraph **19(6)** above is particularly important for the reasons developed in paragraphs **25 - 27**

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<sup>11</sup> Blue Vol.3 1099 N-P.

<sup>12</sup> Blue Vol.3 1113 V-Y.

<sup>13</sup> Blue Vol.3 1114 I-J.

<sup>14</sup> Blue Vol.3 1114 V-X.

<sup>15</sup> Blue Vol.3 1099 Q-R.

<sup>16</sup> Blue Vol.3 1117 H-I, V-W.

below.

21. The central findings summarised in paragraph **16** above appear to be based, in part, on the evidence recorded at J181 which concerns a cruise then underway. At J181, the trial judge set out a letter from Scenic to its guests dated 16 May 2013 in respect of that cruise as follows:

“As previously advised the high water levels on the Rhône and Saône have resulted in a revised itinerary for your cruise. ...  
... Unfortunately the situation is still fluid and the river levels are yet to determine our final disembarkation point in the river’s north.”

The words “the river’s north” must be taken as a reference to the Saone where the ship was at the time and where it was scheduled to disembark.

22. For completeness Scenic notes (although the trial judge did not refer to it) that on 18 May 2013 an Avalon ship cruised to Viviers (i.e. on the Rhone river) and got stuck there due to high water.<sup>17</sup> The same document also records that water levels (in the Rhone) are “*slightly sinking*”. The existence of high water levels (which are subsiding) at Viviers was of no relevance to Scenic as cruise 1 was scheduled to arrive in Viviers 8 days later on 26 May 2013.<sup>18</sup> Further there was no evidence that the high water levels at Viviers (as at 18 May 2013) may, let alone was likely, to remain an impediment to cruising, let alone a significant impediment, on 26 May 2013.
23. On 19 May 2013 Mr Britten and his wife arrived in Paris. That evening Mr Britten met the cruise director (Yvonne). According to Mr Britten, at that point there was no indication that the cruise would be affected by the rising river levels.<sup>19</sup> The trial judge did not refer to this evidence.
24. On 20 May 2013 Mr Britten and his wife travelled to Paris where they boarded a train for the day journey to Dijon. They were subsequently taken to Chalon where they

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<sup>17</sup> Blue Vol.3 1101 J-L, Q-R.

<sup>18</sup> Blue Vol.2 877 X – 878 N; Blue Vol.1 223 Y – 224 O – on day 8 the cruise was scheduled to sail from Tournon to Viviers.

<sup>19</sup> Blue Vol.1 208 Y, 209 E-J.

embarked upon a Scenic ship.<sup>20</sup>

25. On the evening of 20 May 2013 the passengers were informed about the “*water situation*” and that the ship would not be sailing to Tournus as the dock at Tournus was under water (J456). There is no evidence as to when the problem at Tournus manifested and no evidence of its expected duration.
26. There is no evidence which demonstrates that as at 20 May 2013 there may, or was likely to be, any other disruption to the itinerary, beyond the disruption caused by the dock at Tournus. There is no evidence that Scenic knew or ought to have known of the likely duration of any impediment to cruising as at 20 May 2013 occasioned by the situation at Tournus. There is no evidence that the dock at Tournus was under water (or anticipated to be under water) as at or about 16 May 2013. In fact, the evidence referred to at paragraph **19(6)** above (not referred to by the trial judge) strongly suggests that there were no difficulties associated with cruising to Tournus as at 16 May 2013.
27. On 22 May 2013 the ship cruised to Macon and remained there from 23 to 29 May 2013 (J458-459). There is no evidence as to why the ship could not sail south from Macon beyond “*high water*” (J479). More to the point, there is no evidence as to when the high water at Macon manifested, let alone evidence of its anticipated duration. There is no evidence that high water at Macon manifested (or was anticipated to manifest) on or about 16 May 2013. The evidence referred to at paragraph **19(6)** above strongly suggests that there were no difficulties associated with cruising to Macon or beyond as at 16 May 2013.
28. Mr Britten gave evidence that the cruise director provided explanations from time to time as to why the cruise had been and was going to be further disrupted. Those explanations included that events had occurred suddenly and unexpectedly.<sup>21</sup> There is no evidence that those explanations were inaccurate. They should have been accepted by the trial judge particularly given the trial judge, at J155, accepted as accurate comments made by the various cruise directors. The trial judge does not

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<sup>20</sup> Blue Vol.1 209 P – 210 D.

<sup>21</sup> Black 151 F-P.

refer to this evidence. In any event there is no evidence which contradicts the explanations provided to Mr Britten by the Scenic cruise director.

29. In summary, there is no evidence that this cruise which embarked in Chalon on 20 May 2013 was suspected to be burdened by a risk, let alone a likelihood of, a substantial disruption to the itinerary by 16 May 2013.
30. For completeness it is noted that at J184 the trial judge records that “*the following paragraphs do not relate to the situations on the French rivers...*”. That is erroneous as J185-191 and J194-202 concern the French rivers. It appears that the trial judge did not take the post-embarkation facts recorded in some of those paragraphs into account (which demonstrates that certain adverse conditions developed post-embarkation) in finding that Scenic was aware of the likelihood of substantial disruption.
31. The findings as to the application of s 60 ACL are found at J453 – J483 (save for J471 – 472). The evidence referred to by the trial judge and referred to above did not support the central conclusions at J476 – J483 (which concern s 60 ACL)<sup>22</sup> in respect of Scenic’s knowledge as at 16 May 2013. In light of the evidence recorded above, the findings referred to below were not available to the trial judge.
32. At J476 the trial judge held that the events in the “*earlier weeks [of May 2013]*” should have led to the realisation that there was a significant likelihood that the cruise would not be able to “*proceed smoothly and without interruption*”. Scenic respectfully submit that the history of what occurred in those weeks (as recorded by the trial judge) do not demonstrate that there was a likelihood, let alone a significant likelihood, that the cruise would not be able to proceed smoothly and without interruption and the trial judge provided no cogent reasons why the events of the earlier weeks of May 2013 should have led to the said realisation, particularly given the evidence referred to in paragraph **18** and **19** above.
33. Further, the finding at J476 that Scenic had no information “*at that time*” (presumably a reference to 16 May 2013) that enabled it to conclude that there was likely to be a

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<sup>22</sup> The findings as to s 61(1) and 61(2) ACL are at J471 - 472 and J764 - 765 respectively: White 129 and 186.

drop in the height of the rivers sufficient to permit navigation proceeds on the premise (not established), namely, that there were high water levels on both rivers as at 16 May 2013 which prohibited navigation and which was likely to cause a significant disruption to the subject cruise. There is no evidence to support such a finding. The evidence is to the contrary.

34. Still further, the finding at J476 had the effect of reversing the onus of proof. Mr Moore did not discharge his onus of proving that Scenic knew that the high water levels would remain, particularly in circumstances where “*the situation [was] fluid*” (J181).
35. At J479 the trial judge, after noting that there is no evidence as to why Scenic could not cruise south from Macon (on 22 May 2013)<sup>23</sup>, drew the conclusion that it was due to high water levels on the “*French rivers*” presumably a reference to the state of affairs as at 16 May 2013 as recorded at J181. However it does not follow that the “*interruptions*” experienced on 20 and 22 May 2013 (referred to at J479) resulted from the state of the rivers as at 16 May 2013 let alone were reasonably anticipated as at 16 May 2013. It does not follow that the nature, extent and duration of the high water levels on the “*French rivers*”, (assuming that was the situation) as it eventuated, was known to Scenic (as at 16 May 2013).
36. At J480 the trial judge referred to the “*immediately preceding cruise*” (a reference to the cruise discussed in J475) and held that because a ship sailing in the opposite direction to the subject cruise (i.e. north) could not establish a final disembarkation point (as at 16 May 2013) leads to the conclusion that “*this cruise was predictive of significant disruption*”. That finding is erroneous and devoid of reasoning. From the document upon which the finding at J475 is based<sup>24</sup> (set out at J181) it can be seen that as at 16 May 2013 Scenic were of the view that “*the situation is still fluid*”; in other words the cruise may disembark at its scheduled place i.e. Chalon, or it may not. The knowledge of Scenic as at 16 May 2013 (in relation to a cruise proceeding in the opposite direction) was therefore, not predictive of any disruption, let alone significant disruption. It is difficult to see how it was predictive of the cause of the actual disruption occasioned by the situation at Tournus and Macon.

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<sup>23</sup> See paragraph 27 above.

<sup>24</sup> Blue Vol.3 1100.

37. It follows that the finding at J481 that Scenic knew that there was a significant chance of a substantial disruption to the cruise is contrary to the evidence and erroneous.
38. At J477 the trial judge held that Scenic should have informed passengers of the “*state of affairs*”. The trial judge erred in that he did not identify precisely what the “*state of affairs*” was at any point in time in respect of which Scenic should have informed passengers.
39. The conclusion at J477 is amplified by the finding at J482 that Scenic should have informed passengers of the weather and river conditions by 16 May 2013 and its accurate view about the likelihood of a significant disruption, thereby facilitating cancellation for passengers and the failure to do so was a breach by Scenic of s 60 ACL (J482 – 483). Further at J477 his Honour held that there was no evidence that Scenic took any steps to inform the passengers of the “*state of affairs*”. As such, strictly speaking, beyond the evidence of Mr Britten, there was no evidence either way as to whether Scenic provided a warning to each and every passenger.
40. As to J482:
- (a) There is no evidence to support the finding that Scenic formed, or should have formed, a view as to the weather and river conditions to the effect that cruise 1 was likely to be significantly disrupted as at 16 May 2013;
  - (b) The trial judge made no specific finding as to the “*state of affairs*” about which Scenic should have advised passengers with any precision; and
  - (c) The common question before the Court was whether Scenic had an “*obligation to warn*” and not whether a warning was provided to every passenger on cruise 1.
41. Further, according to his Honour’s reasons, if a passenger was appropriately warned and proceeded with the cruise, Scenic would nonetheless have contravened ss 61(1) and (2) ACL.

**D. Amsterdam to Budapest and Budapest to Amsterdam – an introduction and Scenic’s s 267(1)(c)(ii) defence (Ground of Appeal 8B)**

42. Annexed as “**B**” is a form of a map as an aide memoire. It is relevant to the balance of

the cruises in issue.

43. Before addressing the factual matters relevant to the May 2013 cruises (i.e. cruises 2 – 7), it is important to have regard to the cruises which were excluded from the group by Mr Moore<sup>25</sup> and which embarked on or prior to 29 May 2013 (being the date the last of the May 2013 cruises commenced).
44. The following 5 cruises proceeded without any disruption to their respective itineraries<sup>26</sup>:
- (1) 11 May 2013 to 25 May 2013, Budapest to Amsterdam, Tour Code EGRC110513.1.
  - (2) 13 May 2013 to 27 May 2013, Amsterdam to Budapest, Tour Code STC130513.1.
  - (3) 13 May 2013 to 27 May 2013, Budapest to Amsterdam, Tour Code STC130513.2.
  - (4) 15 May 2013 to 29 May 2013, Amsterdam to Budapest, Tour Code STC150513.1; and
  - (5) 15 May 2013 to 29 May 2013, Budapest to Amsterdam, Tour Code STC150513.2.
45. A sixth cruise (tour code STC200513.1), Amsterdam to Budapest (20 May 2013 to 3 June 2013) proceeded with one alteration to its itinerary only, namely on 29 May 2013 the ship docked at Deggendorf rather than Regensburg.<sup>27</sup>
46. It must follow from the above (specifically paragraphs **44(4)** and **44(5)**) that as at 29 May 2013 there was no substantial impediment to cruising into Amsterdam and into Budapest.<sup>28</sup>
47. The trial judge did not refer to the evidence set out in paragraphs **44** to **45** above. This was significant evidence given 6 of the 10 cruises in issue embarked between 20 and

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<sup>25</sup> See Third Further Amended Statement of Claim, paragraph 2(f): White 293.

<sup>26</sup> Blue Vol.3 1461 D-N.

<sup>27</sup> Blue Vol.3 1461 N-S.

<sup>28</sup> See also the colour diagram referred to in paragraph **72** below: Blue Vol.3 1454.

29 May 2013.

48. Of the 6 cruises which proceeded between Amsterdam and Budapest in May 2013, Mr Moore accepted that in relation to cruises 2 and 3 that there were no specific matters known by Scenic prior to embarkation that were indicative of a prospect of disruption,<sup>29</sup> and the trial judge so found. The trial judge also found that in relation to cruises 4, 5, 6 and 7 (i.e. the rest of the May 2013 cruises) there were no specific matters known by Scenic prior to embarkation that were indicative of a prospect of disruption. Nonetheless Scenic was found “*liable*” in respect of cruises 2, 3, 4, 5, 6, and 7.
49. If Scenic was properly found liable in respect of those cruises, then Scenic’s defence under s 267(1)(c)(ii)<sup>30</sup> should have been upheld in relation to those cruises because the failure to comply with ss 61(1) and (2) was only due to a cause independent of human control that occurred after the services (or some of them) were supplied.<sup>31</sup> At J451, the trial judge dismissed this defence for the reasons he gave at J440-448 and J786. Indeed this defence should have been upheld in relation to all of the cruises, assuming the question of compliance with ss 61(1) and (2) was before the Court.
50. Finally, it is of some significance to note the length of the river system between Amsterdam and Budapest is about 1,790 km and over that length there may be different catchment areas feeding into rivers and the flows of waters from one part of those catchment areas will not always be identical with other parts (J157).

**E. Budapest to Amsterdam (STC 200513.2) (cruise 2): Grounds 20 and 53**

51. The claim in relation to this cruise which embarked on 20 May 2013 was only concerned with sections 61(1) and (2) of the ACL.<sup>32</sup> The trial judge found Scenic breached section 61(1) and (2) of the ACL. As stated in paragraph 1 above, it was not open to the trial judge to make those findings in relation to cruise 2. This much is

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<sup>29</sup> See Black 22 J-K and Black 377 P-S.

<sup>30</sup> Set out at J781: White 190.

<sup>31</sup> The defence under s 267(1)(c)(ii) is not available in respect of a claim under s 60 ACL.

<sup>32</sup> No claim under section 60 ACL was pressed.

sufficient to uphold the appeal in relation to cruise 2.

52. The relevant conclusions are found at J484 – 496. In summary at J490 the trial judge found that between 20 May 2013 and 3 June 2013 cruising occurred except for 3 days between 28 to 30 May 2013 and cruising was compromised on 31 May 2013 because the ship cruised during the night. There was no finding at J490 that the ship should have cruised during the day according to the itinerary. As to the 3 days during which the ship did not cruise, the evidence indicates that cruising was scheduled to take place during the night (at least in part).<sup>33</sup> Notwithstanding the matters recorded at paragraph 48 above, the trial judge held that Scenic breached s 61(1) ACL (J492 – 495) and s 61(2) ACL (J764 – 765). Scenic also challenge this finding on the merits. When the nature of the services which Scenic agreed to provide are properly identified (i.e. by reference to the terms and conditions), and absent a finding of breach of contract it is not possible for Scenic to have contravened s 61(1) and (2) ACL.
53. The challenge to the finding on the merits is supported by the findings summarised in paragraph 129 below, namely, that some latitude must be provided to Scenic in respect of things which happen and are beyond its control. Further, passengers, by the very terms and conditions, must be taken to have accepted the prospect of adverse weather conditions. Accordingly, an interruption of a little over 3 days should not have resulted in a finding that Scenic breached s 61(1) and (2) ACL.

**F. Amsterdam to Budapest (EGFC250513.1) (cruise 3): Grounds 21 and 53**

54. The claim in relation to this cruise which embarked on 25 May 2013 was only concerned with sections 61(1) and (2) of the ACL.<sup>34</sup> The trial judge found Scenic breached sections 61(1) and (2) of the ACL. As stated in paragraph 1 above, it was not open to the trial judge to make those findings in relation to cruise 3. This much is sufficient to uphold the appeal in relation to cruise 3.
55. The relevant conclusions are found at J497 – 523. In summary at J498 the trial judge

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<sup>33</sup> Blue Vol.2 792; see also Blue Vol. 3 1370, albeit in relation to cruise 5.

<sup>34</sup> No claim under section 60 ACL was pressed.

found that between 25 May 2013 to 28 May 2013 the cruise proceeded as scheduled and the balance of the tour consisted of coach travel over long distances (J517). Notwithstanding the matters recorded at paragraph 48 above, the trial judge held that Scenic breached s 61(1) ACL (J518 – 522) and s 61(2) ACL (J764 – 765). Scenic challenges this finding substantially for the reasons given in paragraphs 52 and 53 above.

**G. Amsterdam to Budapest (STC 270513.1) (cruise 4) and Budapest to Amsterdam (STC 270513.2) (cruise 5): Grounds 22-24 and 25-28 respectively and Grounds 8D and 8E**

*(1) Introduction*

56. It is convenient to deal with these two cruises together as they both embarked on 27 May 2013, albeit in the opposite direction.

57. The trial judge found that Scenic breached sections 60, 61(1) and 61(2) ACL in relation to both of these cruises. As stated in paragraph 1 above, it was not open to the trial judge to make findings concerning ss 61(1) and (2) ACL in respect of cruises 4 and 5.

*(2) Cruise 4: findings and challenge*

58. The trial judge found that cruise 4 proceeded as scheduled between 27 and 29 May 2013 (J525) and by 29 May 2013, Scenic knew that cruise 4 was likely to experience significant disruptions (J550).

59. The relevant conclusions are found at J524-535 and the following specific findings resulted (J554-555):

- (a) Scenic breached s 60 ACL as and from 29 May 2013 by not making “*any relevant disclosure to passengers*” (whatever that might mean);
- (b) As a consequence the passengers were denied the opportunity to cancel the further part of the tour – a finding which does not inevitably follow and which assumes that all of the passengers were unaware, by one means or the other of the circumstances; a finding not open as a common question as the question was not properly before the trial judge.

60. The cornerstone of the finding referred in paragraph **59(a)** above was the acceptance of the evidence of Mr Cairncross and Mr Holgye (J554). However, their evidence says nothing about whether information was given to other passengers. Further, the question before the Court was whether Scenic had an obligation to provide information post-embarkation and not the content of the information which Scenic in fact provided each and every passenger. As such Scenic were denied procedural fairness and natural justice. The trial judge also found that Scenic breached ss 61(1) and (2) ACL (J539 and J764 – 765). Further, according to the reasons of the trial judge, if a passenger had been given the opportunity to cancel and did not cancel, Scenic would nonetheless have breached ss 61(1) and (2) of the ACL.
61. Scenic challenges the primary factual finding that Scenic, by 29 May 2013 knew that the cruise was likely to experience significant disruptions. Scenic also challenges the “*consequential*” finding referred to in paragraph **59(b)** above.
62. The challenge to the primary finding is supported by the fact that the trial judge found that there were no specific matters known to Scenic in relation to cruise 6 and 7 (which embarked on 29 May 2013), that were indicative of a prospect of significant disruption (and in relation to those cruises Scenic was only aware of such a prospect as at 31 May 2013): see paragraphs **87** and **90** below.

*(3) Cruise 5: findings and challenge*

63. The trial judge found that cruise 5 proceeded as scheduled between 27 to 30 May 2013 (J557) and by 30 May 2013 Scenic knew that cruising was unlikely between Krems and Mainz (J580).
64. The relevant conclusions are found at J556-593 and the following findings resulted (J581-582, J593):
- (a) Section 60 of the ACL required Scenic to provide passengers with certain information; and
  - (b) the provision of this information would have entitled the passengers to make a decision as to whether they cancelled the cruise – a finding which does not inevitably follow and which assumes that all of the passengers

were unaware, by one means or the other of the circumstances; a finding not open for the reasons given in paragraph **59(b)** above.

65. The question before the Court was whether Scenic had an obligation to provide information and not whether Scenic provided information to each and every passenger. It should be noted that no passenger on cruise 5 gave evidence.
  66. The trial judge also found that Scenic breached ss 61(1) and (2) ACL (J575 and J764 – 765). Further, accordingly to the reasons of the trial judge, if a passenger had been given the opportunity to cancel and did not cancel, Scenic would nonetheless have breached ss 61(1) and (2) of the ACL.
  67. Scenic challenges the primary factual finding that Scenic knew, by 30 May 2013, that cruise 5 was likely to experience significant disruptions. Scenic also challenges the “*consequential*” finding referred to in paragraph **64(b)** above. The challenge to the primary finding is supported by the matters referred to in paragraph **62** above.
  68. The findings at J583 – J591 appear, with respect, to be confused; they concern, it would seem, cruise 8: see for example J591 where the trial judge refers to 3 June 2013 as the date of embarkation and the date by which cruise 5 should have been cancelled. Cruise 5 embarked on 27 May 2013. Cruise 8 embarked on 3 June 2013. Ground of Appeal 27 is concerned with these findings.<sup>35</sup>
  69. The trial judge dealt with factual matters relevant to these cruises at J185 – 186 and J192 to 271. It is not apparent if the findings at J185 – 186 which concern water levels as at 21 May 2013 in the Moselle River (upon which no relevant cruise proceeded) had any bearing on his Honour’s reasoning. In any event, there was no evidence which permitted the conclusion drawn in the final sentence at J186.
- (4) The evidence: cruises 4 and 5*
70. There does not appear to be any detailed treatment by the trial judge of the state of the river levels and Scenic’s knowledge as at 27 May 2013 (commencing at J155 where he set out Scenic’s knowledge of the river levels). Factual findings were made in

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<sup>35</sup> This error has been perpetuated in *Moore v Scenic (No.3)*: see Answer to Question 7A: White 358-9.

the section of the reasons concerning the application of the consumer guarantees (commencing at J524 and at J556 respectively).

71. It is important to bear in mind the matters recorded in paragraph **48** above and the finding that cruises 2 and 3 did not experience any interruption until 28 May 2013, i.e. after cruises 4 and 5 embarked (see paragraph **52** and **55** above).
72. Further, on 27 May 2013 the entire river path (including the River Main) was entirely open (between BUD – AMS and between AMS – BUD).<sup>36</sup> This is apparent from a Scenic business record which contains a diagrammatic representation (**the colour diagram**) as to the state of the rivers as at the relevant days including whether they were open, partially open, and if so in which direction.<sup>37</sup> This is the very document which counsel for Mr Moore at trial said is the “*primary source of information that we rely upon in the plaintiff’s case*”.<sup>38</sup> Scenic also placed (and places) significant reliance upon it. At J288 the trial judge completely disregarded it for reasons which are not adequate.
73. Still further, on 28 May 2013<sup>39</sup>:
- (1) The entire river path was open between Amsterdam to Budapest (including the River Main between Amsterdam and the Main-Danube Canal which is upstream); and
  - (2) The entire river path was open between Budapest to Amsterdam except for the River Main.
74. The observations of the trial judge at J201 (which concern the French rivers) and the consequent finding at J202 (in particular J202(b)) contradict the evidence recorded in paragraph **44** above. It is also inconsistent with the finding at J157, i.e. that the river levels in the Saone/Rhone rivers are “*not directly applicable*” to the Amsterdam/Budapest cruises. There was no basis for the inference drawn at J202

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<sup>36</sup> Blue Vol.3 1454.

<sup>37</sup> Black 14 G – 15 E.

<sup>38</sup> Black 35 R.

<sup>39</sup> Blue Vol.3 1454.

that the state of the French rivers was a reflection of the state of the river system along the entire AMD/BUD path or on a “*European river*”. To the contrary, the evidence recorded in paragraph 44 above alone demonstrates that as at 16 May 2013 there was no substantial impediment to cruising between Budapest and Amsterdam even though as at 16 May 2013, (according to the trial judge) Scenic knew that the South of France cruise was likely to be disrupted (see paragraph 16 above).<sup>40</sup>

75. Mr Cairncross who embarked on cruise 4 testified that on 31 May 2013 (day 5), due to high river levels his cruise was unable to cruise from Marksburg to Miltenberg.<sup>41</sup> (The trial judge at J526 seems to have erroneously found that cruise 4 was scheduled to cruise to Miltenberg on 30 May 2013). Mr Cairncross gave evidence that he was told that this was due to unexpected high river levels.<sup>42</sup>
76. As noted in paragraph 28 above, the trial judge at J155 accepted as truthful the information provided by Scenic cruise directors. Therefore, there is no evidence to support the finding at J550; there is no evidence to suggest that as at 29 May 2013 Scenic knew or ought to have known of the likelihood of an impediment to cruising from Marksburg to Miltenberg. The evidence is to the contrary.
77. Mr Cairncross gave evidence that when he arrived in Bamberg on 31 May 2013 the weather conditions “*closed in again*” and the river was swollen. He said that the captain told him that in no circumstances was it possible to cruise.<sup>43</sup> The tour director told him that due to unexpected weather conditions, or river conditions there was going to be a further disruption (or words to that effect).<sup>44</sup> There is no evidence that the unexpected conditions (as at 31 May 2013) were predictable and there is no evidence of its expected duration as at that date.
78. Mr Holgye (another passenger on cruise 4), subsequently received a letter from

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<sup>40</sup> There is further evidence which demonstrates that the two river systems operate independently of each other: On 2 June 2013, a South of France cruise (FRCR020613.1) embarked at Chalon. It proceeded without any interruption save for a disruption which occurred on 4 June 2013: Blue Vol.3 1462 E-H.

<sup>41</sup> Blue Vol.1 141 L-M.

<sup>42</sup> Black 125 W-Y.

<sup>43</sup> Black 126 L.

<sup>44</sup> Black 126 S-U.

Scenic dated 31 July 2013<sup>45</sup> which, inter alia, states:

At the time of embarkation, we had not been notified of any river closures that would impact this cruise. In the following days, various river sections exceeded navigation levels, including the Main after May 31<sup>st</sup>, and closures were notified to us.

The second and longer lasting impact was the closure of some Main Danube Canal and the Danube River sections, which commenced closures after June 2<sup>nd</sup>, and subsequently remained closed for longer than the Main River.

...

We are not aware of other cruise companies cancelling a cruise scheduled for departure at the same time as your cruise at a comparable location. From public information on various industry websites, it is evident that other cruises departing in late May did commence as scheduled and were subject to reconfigured itineraries.

79. The above letter is entirely consistent with the colour diagram and the objective evidence.
80. The trial judge accepted the evidence of Mr Cairncross and Mr Holgye as to the information they were provided (J554).
81. Scenic's tour director's contemporaneous tour notes (or diary) for cruise 4<sup>46</sup> records that on 30 May 2013 cruising occurred from Rhine Gorge (am) to Rudesheim (pm) and it was sunny in Rudesheim. The tour notes also record that passengers were updated regarding the "*high water situation*" on 30 and 31 May and 1 and 2 of June 2013, which is contrary to the finding noted in paragraphs **59(b)** above.
82. Scenic's tour notes for cruise 5<sup>47</sup> are consistent with J557, namely that the Danube

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<sup>45</sup> Blue Vol.1 198-202.

<sup>46</sup> Blue Vol.3 1261-7.

<sup>47</sup> Blue Vol.3 1268-74.

was rising (on 31 May 2013) and the lock in Melk was closed. They also record that the passengers were informed of the “*coming high water*” on 1 June 2013. The trial judge accepted these tour notes as accurate for the reasons he gave at J289.

83. It follows from the above that the factual findings recorded in paragraphs **58** and **63** above were contrary to the evidence.<sup>48</sup>

**H. Amsterdam to Budapest (STC 290513.1) (cruise 6) and Budapest to Amsterdam (STC290513.2) (cruise 7): Grounds of Appeal 29-31B and 32-34B respectively and Grounds 8D and 8E**

*(1) Introduction*

84. It is convenient to deal with these two cruises together as they both embarked on 29 May 2013, albeit in the opposite direction.

85. The trial judge found that Scenic breached sections 60, 61(1) and 61(2) ACL in relation to both of these cruises. As stated in paragraph **1** above, it was not open to the trial judge to make findings concerning ss 61(1) and (2) ACL in respect of cruises 6 and 7. As to the finding that Scenic breached s 60 ACL, the question before the Court (Question 7A) (being a question which was introduced in the Amended Statement of Issues filed on the final day of the hearing and then amended after the primary decision was published) was whether Scenic had an obligation to offer options post-embarkation and not whether Scenic was obliged to offer certain information, let alone whether Scenic as a matter of fact did provide such information to each and every passenger. In this sense Scenic was denied procedural fairness and natural justice. It should be added that no passenger from either of these cruises gave evidence.

*(2) Cruise 6: findings and challenge*

86. The trial judge found that cruise 6 commenced in Amsterdam and proceeded as scheduled between 29 May and 31 May 2013 (J596). The trial judge found that on 1

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<sup>48</sup> Finally, in relation to cruises 4 and 5, had the passengers been provided with adequate information and nonetheless proceeded with their respective cruises, according to the reasons of the trial judge Scenic would nonetheless have contravened ss 61(2) and (2) ACL.

June 2013 the Main River was closed due to “*high water*” (J596). The trial judge found that the ship did not cruise past Mainz, after reaching Mainz on 1 June 2013 (J604).

87. The trial judge held that as at 31 May 2013 there was a significant prospect that this cruise would not be able to proceed in accordance with its itinerary and would experience substantial disruption and as such the passengers should have been given that information to enable them to make a decision as to whether or not to cancel their tour (J611).<sup>49</sup> Scenic challenge this finding. The challenge is supported by the finding that Mr Moore’s cruise, which was subsequent in time and which also embarked in Amsterdam (cruise 8) should have been cancelled later in time, namely by 2 June 2013 (see paragraph **98** below).

88. The following finding resulted: Scenic breached s 60 ACL from 31 May 2013 (J612).

*(3) Cruise 7: findings and challenge*

89. The trial judge found that cruise 7 proceeded between 29 May to 1 June 2013 as scheduled between Budapest to Amsterdam (J613-614). The trial judge found that on 1 July 2013 the cruise director warned passengers about the “*coming high water*” (J614).

90. For the same reasons with respect to cruise 6, the trial judge held that Scenic, by 31 May 2013 breached section 60 ACL by failing to provide the “*appropriate information*” (J628) (whatever that might mean) notwithstanding the finding at J614. Scenic challenge this finding.

*(4) The evidence: cruises 6 and 7*

91. As at 31 May 2013, according to the coloured diagram, cruise 6 faced no impediment at all. As to cruise 7, as at the date of embarkation, i.e. 29 May 2013 the majority of the Main river was closed, however it would be some days before the cruise was to reach the Main river. Further, there is no evidence that Scenic ought to have been concerned that the Main river would be closed for a significant period of time as at 29 May 2013. As events unfolded, cruising the Main river from Budapest to Amsterdam

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<sup>49</sup> No passenger from cruise 6 was called to give evidence and as such the evidence was silent beyond documentary evidence. The same observation is made in relation to cruise 7.

remained closed for some days but that was due to later events (i.e. the subsequent 1:500 year flood event of 2 June 2013).<sup>50</sup>

92. Indeed the evidence recorded at J204 supports the proposition that as at 1 June 2013, cruise 6 was not likely to be significantly disrupted, let alone as at 31 May 2013. It is compelling contemporaneous evidence.
93. As to cruise 7, the evidence recorded at J204 similarly supports the proposition that as at 31 May 2013, contrary to the finding of the trial judge, there was not a significant prospect that this cruise would be significantly disrupted.
94. Further, the findings in relation to these cruises appears to assume (wrongly) that the events in early June 2013 (described by one of Scenic's competitors as "*unprecedented high water levels*" (J213)) were, or could have been, anticipated.
95. It is not controversial that on or about 2 June 2013 the area in question was the subject of a 1:500 year flood event. A flood affected Germany and parts of Europe resulting in a state of emergency being declared in Germany that day.<sup>51</sup> Several cities along the rivers Main and Danube had become flooded; flights had been cancelled (J226).
96. On 2 June 2013 some of Scenic's competitors started cancelling cruises (J211). On 4 June 2013 another of Scenic's competitors cancelled cruises departing between 6 and 8 June 2013 between Amsterdam and Budapest. There is no evidence that any Scenic competitor cancelled a cruise departing prior to 2 June 2013.

#### **I. Amsterdam to Budapest (STC 030613.1) (cruise 8): Grounds 35-37D**

97. Mr Moore proceeded upon cruise 8. It departed Amsterdam on 3 June 2013 (J629). The cruise proceeded as scheduled between 3 to 4 June 2013 (J633) and cruised for 3 days in totality (J644). The trial judge found that Scenic breached s 60 ACL (J654) and ss 61(1) and (2) ACL (J645 – 646 and J764 – 765).

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<sup>50</sup> See paragraph 95 above

<sup>51</sup> Black 139 U – 140 C; Blue Vol.1 42.

98. The trial judge held that Scenic should have cancelled this cruise by 2 June 2013 (J652, J654). On one view, inconsistent with the said finding, the trial judge found that Mr Moore should have, in the alternative, been given the opportunity to cancel the cruise (J810). The trial judge also found that Mr Moore should have been given to option to cancel (J812). Of course Mr Moore had that opportunity to cancel his cruise at any time but decided to proceed with the cruise to its conclusion. Scenic challenge these findings; the cancellation of the cruise could not have resulted in compliance with s 60 ACL and the provision of an option to cancel could not have resulted in compliance with s 60 ACL.
99. There are however other factual matters relevant to Mr Moore's claim. On 30 May 2013 Mr Moore flew out of Sydney (J85) and arrived in Paris on 1 June 2013 (J79). On 1 June 2013, Mr Moore, whilst in Paris received a letter from Scenic advising, inter alia, of high water levels on the River Main which have prevented navigation and of a ship swap (**the first Moore warning**). This letter is set out at J87. Mr Childs (who was on cruise 8 and who gave evidence) received the same letter.<sup>52</sup> The inference is that all guests scheduled to embark on this cruise received the same or substantially the same letter. This letter provided an appropriate warning of the prospect of disruption to Mr Moore's cruise. As a result of this letter Mr Moore became concerned that the tour may be disrupted as a result of high river levels.<sup>53</sup> However he did not cancel his cruise. The trial judge only referred to some aspects of the first Moore warning at J630 and found, at J810, that Mr Moore was not provided with accurate information about the likely interruption to his itinerary; a finding made without identifying, with any precision, the content of the warning which should have been provided or why the first Moore warning was insufficient.
100. On 1 June 2013, Mr Sandmeier of Scenic prepared an internal email which set out an estimation of further developments.<sup>54</sup> The trial judge set it out at J204. The effect of the email is as follows:
- (1) Rhine – navigation may be impacted in certain areas.

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<sup>52</sup> Blue Vol.1 102.

<sup>53</sup> Blue Vol.1 337 M-N.

<sup>54</sup> Blue Vol.3 1162.

- (2) Main – navigation stopped. Water should peak on Sunday [i.e. 2 June 2013] and then go down but may be as late as Tuesday [i.e. 4 June 2013] before the Main River opens.
- (3) Danube – water expected to recede after Sunday. A lock in Melk is closed and its likely reopening date is not known. Passau is open but water is rising quickly. Bridge in Bogen expected to be blocked Saturday and Sunday.
- (4) Main-Danube Canal – appears to be dependent upon situation on the Danube and the Main. The canal may be closed.

101. It can be seen that the forecast for the Rhine and the Main rivers were reasonably positive for the following days (as at 1 June 2013). In so far as the Main is concerned Mr Sandmeier expected it to likely open by 4 June 2013. As to the Danube, a lock in Melk was closed and the Bogen Bridge was likely to be blocked the following day (i.e. 2 June 2013). The 1:500 year flood event had not yet occurred.

102. On 3 June 2013 (Monday) Mr Moore left Paris and travelled to Amsterdam.<sup>55</sup> On that day at the first “*port talk*” (being the day of embarkation) the tour director told Mr Moore that the Jewel had been stuck in Bamberg for 8 days due to river levels and they are having some problems with rising river levels.<sup>56</sup> This served as a further warning to Mr Moore (**the second Moore warning**). The trial judge did not refer to this evidence in making the finding at J810 referred to in paragraph 99 above (although he did refer to it at J90 – 91, J133 and J193). Notwithstanding the second Moore warning, Mr Moore proceeded with his cruise.

103. Finally, Scenic challenges the finding that Mr Moore and cruise 8 only cruised for 3 days in totality. The evidence discloses that at least some cruising occurred on approximately 7 days on cruise 8.<sup>57</sup>

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<sup>55</sup> Blue Vol.1 337 O-P.

<sup>56</sup> Blue Vol.1 337 R-Y.

<sup>57</sup> See Blue Vol.3 1365 and Blue Vol.3 1318-23.

**J. Budapest to Amsterdam (EGRC 080613.1) (cruise 9): Grounds 38-43B**

104. This cruise was conducted under the “*Evergreen*” banner.<sup>58</sup> Shortly stated, the trial judge found that there was no evidence that passengers received any notification of any possible interruptions to their cruise before arriving in Budapest (J655). The trial judge held that this cruise which commenced on 8 June 2013 was interrupted save for the period between 16 June to 22 June 2013, when the cruise proceeded as scheduled (J664).
105. The trial judge held that Scenic should have cancelled the cruise by 7 June 2013 or offered the passengers the option to do so (J681-2). The trial judge also held that passengers should have been provided with information about the real prospect of the cruise being significantly disrupted (J682). The above findings do not sit together harmoniously. Scenic challenge the finding that the cruise should have been unilaterally cancelled by Scenic. It assumes that this would have been the preferred outcome for every passenger and that every passenger would have been able to make alternative arrangements at short notice. The finding also assumes that Scenic should have been expected to proceed with the cruise (making variations to the itinerary at its own cost) if some of the passengers wished to proceed with the cruise. The failure to provide information and/or cancel the cruise or provide the passengers the option to cancel was found to be a breach of s 60 ACL (J682). The trial judge also held Scenic to be in breach of s 61(1) and (2) (J671 and J764-5).
106. Scenic challenges the finding at J655 that there was no evidence of any notification before passengers arrived in Budapest (although there was no finding as to when each and every passenger arrived in Budapest) and the question as to whether notice was provided was not a question before the Court; the proper question was whether notice should have been provided. Scenic also challenge the proposition that s 60 ACL could have the effect of mandating the cancellation of the cruise by Scenic or the provision by Scenic of the option to cancel the cruise.
107. On 3 June 2013, Evergreen published an entry on its Facebook page stating that the

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<sup>58</sup> See J13: White 18.

high river levels are affecting navigation (**first cruise 9 warning**).<sup>59</sup>

108. On 5 June 2013 Evergreen sent an “*e-blast*” to agents/guests to advise that peak river levels are predicted in Budapest on Saturday (i.e. 8 June 2013), that they will be accommodated for the first 2 nights in Budapest hotel and that they envisage the guests will have land arrangements for the first 2 – 3 days of the cruise<sup>60</sup> (**second cruise 9 warning**).
109. On 6 June 2013 Mr Willems (who embarked on cruise 9) observed an Evergreen update on its Facebook page.<sup>61</sup> It relevantly said “The high water situation remains challenging but we are committed to operating in a safe and responsible manner and providing our guests with the best possible experiences” (**third cruise 9 warning**). Mr Willems said he interpreted this as a warning that his tour will proceed with some form of disruption.<sup>62</sup>
110. Also on 6 June 2013, Evergreen prepared a letter addressed to its guests (which was presumably sent although there was no evidence or finding to that effect) advising of high water levels, localised flooding in the Main and accommodation arrangements (**fourth cruise 9 warning**).<sup>63</sup> The better inference is that this warning was provided.
111. On 6 June 2013 Mr Willems received a phone call from Evergreen seeking confirmation that he had received an earlier email (**fifth cruise 9 warning**) advising of changes to his itinerary.<sup>64</sup>
112. On 7 June 2013 Mr Willems received a phone call from Evergreen. He was advised that he will be in the Budapest Novotel for at least the next 2 nights and may be up to 1 week<sup>65</sup> (**sixth cruise 9 warning**). The inference from Mr Willems’ evidence is that

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<sup>59</sup> Blue Vol.1 45.

<sup>60</sup> Blue Vol.1 1222 K-L.

<sup>61</sup> Blue Vol.1 7 O-S; Blue Vol.1 48.

<sup>62</sup> Black 96 F-G.

<sup>63</sup> Blue Vol.3 1228.

<sup>64</sup> Blue Vol.1 7 T-Y.

<sup>65</sup> Blue Vol.1 9 M – 10 J.

other passengers received the same warnings. This inference is strongly supported by Mr Willems' evidence (not referred to by the trial judge) that half the guests wanted to proceed with the cruise.<sup>66</sup>

113. Mr Willems said he would have been disappointed if Evergreen cancelled cruise 9 because he was going to spend 2 or 3 nights in a Budapest hotel.<sup>67</sup>
114. The 7 cruise 9 warnings are entirely inconsistent with the finding at J655, i.e. that there is no evidence that passengers received any notification of possible interruptions.

**K. Amsterdam to Budapest (STC 100613.2) (cruise 11): Grounds 45-49**

115. This cruise commenced on 10 June 2013 in Budapest. The trial judge records that a warning was provided to passengers by Scenic to the effect that they would not be able to embark in Budapest on 7 June 2013 (J699). The cruise proceeded as scheduled between 16 June and 24 June 2013 (J705). Overall four days of cruising were completely lost and one day of cruising was partially disrupted (J706). The trial judge held that that Scenic breached s 61(1) and (2) (J713 and J764). The trial judge held that by 8 June 2013 Scenic should have cancelled the cruise or passengers ought to have been able to cancel their cruise had proper information been provided and as such Scenic breached s 60 ACL (J714 and J717). Scenic challenge these findings. The trial judge did not refer to other warnings and "*information*" provided by Scenic.
116. On 4 June 2013 Mr Peattie (who embarked on cruise 11) received an update from Scenic warning him that "water levels will be a variable factor over the next 72 hours which should provide us with improved visibility for the outlook next week"<sup>68</sup> (**first cruise 11 warning**). Mr Peattie understood from this document that there was a reasonable possibility that his cruise would be disrupted depending upon how events

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<sup>66</sup> Blue Vol.1 12 H-I.

<sup>67</sup> Black 100 N-R.

<sup>68</sup> Blue Vol.1 305 L-M.

unfolded over the next 72 hours.<sup>69</sup> On 7 June 2013 Mr Peattie was given a letter which provided a further warning<sup>70</sup> (**second cruise 11 warning**). This warning was referred to by the trial judge at J699.

117. On 7 June 2013 Scenic sent a letter to agents in respect advising of the variation to the itinerary<sup>71</sup> (**third cruise 11 warning**).

118. On 9 June 2013 Scenic prepared an internal “*river update*”.<sup>72</sup> In summary it records:

- (1) Rhine – was open for navigation.
- (2) Main – was entirely open for navigation save for one stretch which was scheduled to open later that day or the following day.
- (3) Main-Danube Canal – was open except for one stretch which was likely to open on 12 June 2013 or shortly thereafter.
- (4) Danube – some stretches of the Danube were open. Some were closed. To the extent it was closed it was expected to open by about 15 June 2013.<sup>73</sup>

119. At J265 the trial judge also referred to an internal Scenic email which he states provided that the Rhine river was open for navigation with limitation. The internal email<sup>74</sup> in fact stated that the Rhine river was open for navigation without limitation.

120. On 12 June 2013 Mr Sandmeier prepared another “*river update*” as at 2pm the previous day.<sup>75</sup> In summary it records:<sup>76</sup>

- (1) Rhine – open.
- (2) Main – open except for a few stretches in particular section.

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<sup>69</sup> Black 166 S-U.

<sup>70</sup> Blue Vol.1 306.

<sup>71</sup> Blue Vol.3 1238.

<sup>72</sup> Blue Vol.3 1251-2.

<sup>73</sup> The colour diagram supports this summary: Blue Vol.3 1454-9.

<sup>74</sup> Blue Vol.3 1249 P.

<sup>75</sup> Blue Vol.3 1285.

<sup>76</sup> The colour diagram supports this summary: Blue Vol.3 1454-9.

- (3) Main-Danube Canal – open for navigation.
- (4) Danube – partly opened. Partly closed. Water levels rising on some sections again after storms the past 2 days with the potential of the levels going down.

121. As at 12 June 2013 there was no expectation of a substantial disruption. By the time cruises 10 and 12 had reached the Danube, the Danube was virtually entirely open except for the Altenworth lock (which Scenic learnt was closed on the afternoon of 13 June 2013) and the Budapest/Belgrade stretch of the Danube. Another tour operator learned of the closure of the Altenworth lock on the same day.<sup>77</sup> The email at paragraph **120** above suggests there was an expectation that the stretch between Vienna and Budapest will be open on 14 June 2013 or shortly thereafter. The email further records that as a result alterations will have to be made to the cruises identified in the email. The closure of the lock in Altenworth is something which arose after the cruises of 12 June 2013 had embarked and as such, at least to that extent, Scenic's defence based on s 267(1)(c)(ii) ACL should have prevailed.
122. Still further on any view, it was reasonable to proceed with cruise 11 as only minor disruptions were foreshadowed. (The closure of the Altenworth lock resulted in Mr Peattie embarking in Krems where his boat was docked for an extended period).<sup>78</sup> If it was not for the sudden closure of the Altenworth lock, cruise 11 would have been disrupted for a shorter period. The trial judge did not address the topic of the date the Altenworth lock closed. Further, given the disruption experienced was a little over 4 days (J706) it is difficult to see why the findings recorded in paragraph **129** below would not apply to exonerate Scenic, if the trial judge's interpretation of the statute is otherwise correct.

**L. Mr Moore – damages and compensation: (Grounds 54-60A)**

*(1) General observations*

123. Mr Moore's claim was an order for compensation under s 267(3) and (4) ACL (J766 and J787). Specifically Mr Moore sought compensation for the reduction in the value

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<sup>77</sup> Blue Vol.3 1308 I-J.

<sup>78</sup> Blue Vol.1 319 C-D. See also Blue Vol.3 1303 J-M, U-W.

of the services below the price he paid (s 267(3)(b)) and for damages for reasonably foreseeable loss (s 267(4)).<sup>79</sup>

124. In reaching the conclusion that Mr Moore would have cancelled his cruise, the trial judge found that flights back to Australia from Amsterdam could readily be arranged (J813). However there is no evidence of that at all. The (slight) evidence, such as there is, tends the other way (J226).<sup>80</sup>
125. The trial judge also found that Mr Moore's travel insurance was likely to have covered additional expenses incurred by him in cancelling (J813). No reasons were provided for that conclusion. The terms of his policy set out at J828 indicates that cover was available only if cancellation took place prior to "[Mr Moore] *leaving home*".
126. Importantly, Mr Moore, notwithstanding complaints raised during the course of his cruise did not abandon his cruise (J128). For the reasons set out above, the trial judge erred and provided inadequate reasons in finding that Mr Moore would have cancelled his cruise.
127. Mr Moore received \$1,293 from his travel insurer (J129). This should have been taken into account by the trial judge in determining compensation for breach of s 60 and damages, by analogy, for the reasons given by Meagher JA in *Ku-ring-gai Council v Chan* [2017] NSWCA 226 at [99] (even though, typically, insurance is treated as collateral and irrelevant). If the trial judge correctly treated insurance as irrelevant as he did (J818) then allowance should have been made for the undoubted fact that Mr Moore would have incurred other travel and accommodation costs had he been provided with the appropriate warning by 2 June 2013 as the trial judge found he should have been provided (J652, J654) and cancelled his cruise, as the trial judge found he would have done (J812 – 813). The trial judge should have found that the fact Mr Moore's additional expenses would have been covered by insurance (if correct) was also irrelevant in determining compensation.
128. In quantifying the various heads of loss (discussed below), the trial judge should have

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<sup>79</sup> Section 267 ACL is set out at J781: White 190.

<sup>80</sup> The document set out at J226 and dated 4 June 2013 states that some flights were cancelled: White 70-1.

made an allowance for the fact that Mr Moore was willing to accept the risk that his cruise will experience at least a degree of interruption. That Mr Moore was willing to accept at least a degree of interruption is to be inferred from the terms and conditions which he said he read and understood (J141 – 143), the inherent risks with cruising associated with weather conditions, the first and second Moore warnings (referred to in paragraphs 99 and 102<sup>81</sup> and the fact that Mr Moore was aware that there was a risk of high water levels and that disruption to his itinerary could occur suddenly and unexpectedly during the course of his cruise.<sup>82</sup> Further, Mr Moore should not be compensated for the materialisation of the risk that he was prepared to accept: *Wallace v Kam* [2013] HCA 19 at [32], (2013) 250 CLR 375. Still further, Mr Moore gave evidence that he was pleased that the cruise commenced notwithstanding his concerns about the river.<sup>83</sup> He said that if he was told that the days ahead are uncertain but ship was able to cruise for 2 days he would have proceeded with the cruise.<sup>84</sup>

129. Other factual findings relevant to the question of quantum include the finding that Scenic must be extended some latitude with respect to things which happen and are beyond its control – such changes are covered by the terms and conditions (J373 and J395). The trial judge did not account for such latitude in determining compensation.

(2) *Section 267(3)(b) – reduction in value of services*

130. The quantification of compensation by reference to the reduction in the value of the services is necessarily referable to the finding that Scenic contravened ss 61(1) and (2) ACL. At J790 the trial judge noted the approach propounded by Mr Moore, namely that his loss should be calculated by reference to the number of days of cruising which Mr Moore did not receive (i.e. 10 days out of 15). The trial judge expressed some views at J806 and at J807 accepted Mr Moore's approach to quantification and found that Mr Moore should receive \$7,362.60 on account of the 10 cruising days lost. The trial judge at J792 and 794 recorded and rejected the approach propounded by

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<sup>81</sup> The former was referred to by the trial judge at J793: White 192-3.

<sup>82</sup> Black 146 M-R.

<sup>83</sup> Black 74 O-Q.

<sup>84</sup> Black 74 W – 75 C.

Scenic, including the fact that value was provided by way of accommodation and food on the disrupted days and value should be attributed to the provision of those services. In so doing he fell into error. The trial judge also fell into error for the reasons noted in paragraphs **128** and **129** above in quantifying the reduction in the value of services provided.

(3) *Section 60 – compensation for failure to provide information prior to embarkation*

131. The trial judge considered this matter commencing at J810. At J811-812 the trial judge considered the possible outcomes as to cancellation by Mr Moore (J812-815) and held that Mr Moore should be entitled to \$10,990 (i.e. a complete refund). In so finding the trial judge erred by failing to take into account various of the matters referred to in paragraphs **125 – 129** above.

(4) *Section 267(4) – damages*

132. The trial judge commenced his consideration of this topic at J844. At J883 he found that the supply of the services were provided in NSW and in Europe. At J854 he found that a claim for distress and disappointment is caught by the *Civil Liability Act (CLA)* but that it was subject to whether the distress and disappointment was suffered in NSW (J784). At J908-911 the trial judge rejected Scenic's contention that an award for distress and disappointment was unavailable by reason of the operation of the CLA because the events giving rise to damages happened outside of NSW and at J920 awarded Mr Moore \$2,000 for distress and disappointment. In so doing the trial judge erred.

133. The trial judge erred in finding:

- (a) That Mr Moore's period of distress and disappointment ceased upon his return to NSW, i.e. the distress was experienced entirely overseas;
- (b) The events giving rise to damages happened entirely outside of NSW – Scenic should have provided warnings (which it did not provide) from NSW; and
- (c) The CLA does not have extraterritorial effect notwithstanding the contract was governed by the law of NSW.

134. Section 275 ACL provides a complete answer to the claim for distress and disappointment. It provides:

**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.

135. Clause 2.18(d) of the terms and conditions make NSW law the proper law of the contract. At J883 the trial judge accepted that Mr Moore's contract was governed by the laws of NSW.

136. The consequence is that the law of NSW applies to limit or preclude liability for the failure to comply with a guarantee – 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.

137. A similar conclusion was reached in *Flight Centre v Janice Louw* [2011] NSWSC 132. In that decision, Barr AJ dismissed a claim for distress and disappointment in relation to a holiday (booked in NSW but taken in Tahiti) on the basis that such a claim constituted non-economic loss for the purposes of s 3 of the CLA, (being pain and suffering) and amounted to personal injury: at [30]. His Honour held that there was no requirement for physical injury for the CLA to apply.

138. The consequence is that s275 picks up and applies ss5B, 5C, 5D, 16, 31 and 32 of the CLA in respect of Mr Moore's claim. Mr Moore's claim for distress and disappointment is:

(a) A claim for personal injury under the CLA.

- (b) A claim for damages for harm within the meaning of s5A CLA.
- (c) subject to the principles of Part 1A CLA.
- (d) A claim for non-economic loss which is governed by s16 CLA.
- (e) A claim for “pure mental harm” within the meaning of s27 CLA.
- (f) Subject to the Part 3 CLA.
- (g) Subject to the limitations imposed by s31 and s32 CLA.

139. Section 31 CLA excludes any liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness. It matters not as a question of construction whether the cause of action is framed in negligence or not. The liability must “*result from*” negligence.

140. Section 16(1) of the CLA provides:

**Determination of damages for non-economic loss**

(1) 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.

141. Mr Moore’s claim for distress and disappointment is significantly beneath 15% of a most extreme case and accordingly, no award of damages for distress and disappointment was available.

**M. Statement pursuant to r51.36(2)**

*(1) Cruise 1*

142. The trial judge found that Scenic knew, by 16 May 2013, that there was a significant chance or likelihood that cruise 1 would experience substantial disruption (J475-476, J482). The trial judge should have found that Scenic had no such knowledge as at 16 May 2013 (J176, J179; Blue Vol.3 1099 N-R; Blue Vol.3 1113 V-Y; Blue Vol. 3 1114 I-J, V-X; Blue Vol.3 1117 H-I, V-W; Blue Vol.1 208 Y; Blue Vol.1 209 E - 210 D; Black 151 F-P).

*(2) Cruise 4*

143. The trial judge found that Scenic knew, by 29 May 2013, that this cruise was likely to experience significant disruptions (J550). The trial judge also found that Scenic, by

reason of its conduct, denied passengers the opportunity to cancel the further part of the cruise (J554-555).

144. The trial judge should have found that as at 29 May 2013 Scenic did not know that cruise 4 was likely to experience significant disruptions; that as at 28 May 2013 virtually the entire path between Budapest and Amsterdam was entirely open (Blue Vol.3 1454; Black 126 L, S-U; Blue Vol.1 198-202). Further the trial judge should have found that passengers were provided with updates regarding the “*high water situation*” on 30 and 31 May and 1 and 2 June 2013 (Blue Vol.3 1261-7) and that Scenic did not deny the passengers the opportunity to cancel the further part of the cruise.

(3) *Cruise 5*

145. The trial judge found that Scenic knew that this cruise was likely to experience significant disruptions by 30 May 2013 (J580). The trial judge also found that Scenic, by reason of its conduct, denied passengers the opportunity to cancel the further part of the cruise (J593).

146. The trial judge should have found that as at 30 May 2013 Scenic did not know that Cruise 5 was likely to experience significant disruptions (Blue Vol.3 1454). Further, the trial judge should have found that passengers were informed of the “*coming high water*” on 1 June 2013 (Blue Vol.3 1268-74) and that Scenic did not deny the passengers the opportunity to cancel the further part of the cruise.

(4) *Cruise 6*

147. The trial judge found that as at 31 May 2013 Scenic were aware that there was a significant prospect that this cruise would experience a substantial disruption (J611).
148. The trial judge should have found that there was no reason for Scenic to consider that the cruise was likely to be substantially disrupted as at 31 May 2013 (Blue Vol.3 1454, J652, J654).

(5) *Cruise 7*

149. The trial judge found that as at 31 May 2013 Scenic were aware that there was a significant prospect that this cruise would experience a substantial disruption (J628). Scenic also challenge the finding that it did not provide appropriate information (J628).

150. The trial judge should have found that there was no reason for Scenic to consider that the cruise was likely to be substantially disrupted as at 31 May 2013 (Blue Vol.3 1454) and that the information provided on 1 June 2013 was adequate (J614).

*(6) Cruise 8*

151. The trial judge found that Scenic should have cancelled this cruise by 2 June 2013 (J652, J654). The trial judge also found that Scenic should have provided Mr Moore with the opportunity to cancel the cruise (J810) and the option to cancel the cruise (J810).

152. The trial judge should not have found that Scenic should have unilaterally cancelled the cruise. The trial judge should have found that Mr Moore had the opportunity to cancel the cruise at any time. Further, the trial judge should have found that the first Moore warning (J87) and the second Moore warning (Blue Vol.1 337 R-Y) provided Mr Moore with sufficient opportunity to decide whether or not to embark upon and continue the cruise.

153. The trial judge found that cruise 8 cruised for 3 days in totality (J644). The trial judge should have found that at least some cruising occurred on approximately 7 days.

*(7) Cruise 9*

154. The trial judge found that there was no evidence that passengers received any notification of any possible interruptions to their cruise before arriving in Budapest (J655).

155. The trial judge should have found that the passengers received as much as 7 warnings prior to embarking upon the cruise (Blue Vol.1 45; J223; Blue Vol.1 1222; Blue Vol.1 7 O-S, Blue Vol.1 9 M – 10 Q; Blue Vol.1 12 H-I; Blue Vol.3 1228).

*(8) Cruise 11*

156. The trial judge found that by 8 June 2013 passengers ought to have been able to cancel their cruise had proper information been provided to them by Scenic (J714 and J717).

157. The trial judge should have found that passengers received information at least on 3

occasions prior to embarking upon the cruise (Blue Vol.1 305 L-M; Blue Vol.1 306; Blue Vol.3 1238). Further, the trial judge should have found that Scenic learnt that the Altenworth lock was closed on the afternoon of 13 June 2013 (Blue Vol.1 319 C-D; also Blue Vol.3 1303 J-M, U-W).

(9) *Mr Moore*

158. The trial judge found that if Mr Moore was given the requisite information, he would have cancelled the cruise (J810, J812).
159. The trial judge should have found that Mr Moore would not have cancelled the cruise had he been given the requisite information, or the opportunity, or the option to cancel (J87; Blue Vol.1 337 M-N, R-Y).
160. The trial judge found that Mr Moore would readily have arranged a flight back to Australia from Amsterdam (J813). There was no evidence to enable such a finding to be made.
161. The trial judge found that Mr Moore's travel insurance was likely to have covered the additional expenses incurred by him in cancelling (J813). The trial judge should have found that Mr Moore's insurance policy would not have covered those expenses (J828).

13 April 2018

David L Williams  
Tel: 8815 9265  
Email: dlw@ninemwentworth.com.au

David S Weinberger  
Tel: 02 8815 9239  
Email: david.weinberger@ninemwentworth.com.au

“A”



The Seine river



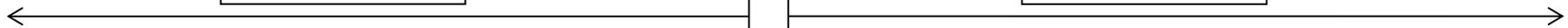
- Lock
- Bridge

“B”

Flow of river

Flow of river

Canal



- Lock
- Bridge