

## NOTICE OF MOTION

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Civil
Registry	Sydney
Case number	2014/223271

### TITLE OF PROCEEDINGS

Plaintiff	<b>David Moore</b>
Defendant	<b>Scenic Tours Pty Limited</b>

### FILING DETAILS

Person seeking orders	<b>David Moore, the plaintiff</b>
Filed in relation to	Plaintiff's claim
Legal representative	Benjamin James Hemsworth Somerville Legal Level 10, 32 Walker Street North Sydney NSW 2060
Legal representative reference	23951
Contact name and telephone	Cameron Graham, (02) 9923 2321
Contact email	cgraham@somervillelegal.com.au

### PERSON AFFECTED BY ORDERS SOUGHT

**Scenic Tours Pty Limited, the defendant**

### HEARING DETAILS

This motion is listed at

## ORDERS SOUGHT

1. Pursuant to ss 168, 177(1)(a)-(b), and/or 183 of the *Civil Procedure Act* (hereafter 'the Act'), and r 28.2 of the *Uniform Civil Procedure Rules*, the Court determines separately the question of whether a sub-group of passengers are eligible group members within the meaning of paragraph 2 of the Third Further Amended Statement of Claim on a date to be fixed.

For the purposes of order 1 (and orders 2 & 3 below), the 'sub-group' comprises all passengers who:

- i. travelled on any of cruises 1-9 (incl), 11 & 13 (as those cruises are identified in the table in paragraph 13 of the reasons for judgment dated 31 August 2017); and
  - ii. booked and paid for those cruises from within any of the countries Canada, the United States, Thailand, the United Kingdom or the New Zealand to a 'Scenic Tours' incorporated entity affiliated with, or related, but separate to, the defendant; and
  - iii entered into contracts with the defendant.
2. In the event the answer to the question in order 1 is answered in the affirmative, pursuant to ss 176(3)(a) and 183 of the *Civil Procedure Act*, the defendant is to provide to the plaintiff's solicitor the names and address details of all members of the sub-group (and all guests from Vanuatu who had entered into contracts with the defendant in the relevant period (hereafter the 'Vanuatu Guests')), in its possession, by a date to be fixed by the Court.

For the purposes of Order 2:

- (a) the defendant's 'possession' of the information includes the documents and information that the defendant has a right to obtain or would be likely to obtain, if it made requests of its internationally based affiliate entities;
  - (b) the defendant is relieved of the obligation of providing the information where that information has been previously provided to the plaintiff's solicitor.
3. Further, and also in the event that the question in order 1 is answered in the affirmative:
    - (a) pursuant to s 162(3) of the Act, \_\_\_\_\_ is fixed as the date by which a member of the said sub-group (and the Vanuatu Guests) may opt out of the proceeding (hereafter the 'opt out date').

(b) pursuant to ss 175(1)(a) and 176(1) of the Act, the Court approve the form and content of the proposed notice of opt out to the sub-group members (and the Vanuatu Guests) (hereafter 'the notice') attached to this motion.

(c) pursuant to s 176(2) of the Act, notice is to be given to the sub-group members (and the Vanuatu Guests) of the right to opt out in the following way:

i. On or before \_\_\_\_\_ the plaintiff (at his expense) is to send a copy of the notice by email to the persons in the sub-group (and the Vanuatu Guests) in respect to whom email addresses are known;

ii. On or before \_\_\_\_\_, the plaintiff (at his expense) is to send a copy of the notice by regular prepaid post to the persons in the sub-group (and the Vanuatu Guests) (or their agents) in respect to whom email addresses are not known, but postal addresses are known;

iii By no later than \_\_\_\_\_, the plaintiff's solicitor is to cause the notice to be displayed on the firm's website, as is to cause the notice to remain displayed until the opt out date.

(d) direct that if the legal representatives for either party receive a document purporting to be an opt-out notice on or before the opt out date, the legal representative is to file the notice within 7 days of receipt whereupon the document is to be treated as a regularly received opt out notice pursuant to the Court's orders.

4. Such further or other orders (including, without limitation, any other questions for separate determination) as the Court thinks fit.

5. Costs.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor

Date of signature

13/11/17

**NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT**

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

**REGISTRY ADDRESS**

Street address	Supreme Court of New South Wales Law Courts Building, Queens Square 184 Phillip Street SYDNEY NSW 2000
Postal address	GPO Box 3 SYDNEY NSW 2001
Telephone	1300 679 272

# SUPREME COURT OF NEW SOUTH WALES

**David Moore v Scenic Tours Pty Limited  
Proceedings 2014 / 223271**

## IMPORTANT NOTICE

### European River Cruise Class Action

#### 1. Why is this notice important?

A representative action has been commenced in the Supreme Court of New South Wales by David Moore (“plaintiff”) against Scenic Tours Pty Ltd (“defendant”).

The representative action claims damages for the plaintiff and group members for a breach of contract by the defendant arising out of the alteration of European River Cruises in May and June 2013 when flooding occurred in parts of Europe. On 31 August 2017, the Supreme Court of NSW published reasons for judgment in which it found that for eleven cruises during this period, Scenic had not complied with some or all of the consumer guarantees under ss 60, 61(1) or 61(2) of the *Australian Consumer Law*.

The Supreme Court of New South Wales has ordered that this notice be published for the information of persons who might be members of the group on whose behalf the action is brought and may be affected by the action. If you think that you may be a group member, then **you should read this notice carefully**. If there is anything in it that you do not understand, you should seek legal advice. You should not direct your questions to the Court.

#### 2. What is a representative action?

A representative action is an action, commonly known as a class action, brought by one person (the “plaintiff”) on his or her own behalf, and on behalf of a group of people (“group members”) against another person (the “defendant”) where the plaintiff and group members have similar claims against the defendant.

Group members are bound by any judgment or settlement entered into in the representative action unless they have opted out of the proceeding. This means that:

- (a) If the representative action is successful, group members may be eligible for a share of any settlement monies or Court-awarded damages;
- (b) If the representative action is unsuccessful, group members are bound by that result;

- (c) Regardless of the outcome of the representative action, group members will not be able to pursue their claims against the defendant in separate legal proceedings unless they have opted out.

### 3. What is “Opt out”?

The plaintiff in a representative action does not need to seek the consent of group members to commence a representative action on their behalf or to identify a specific group member. However, group members can cease to be group members by opting out of the representative action. An explanation for how group members are able to opt out is found below in the section headed ‘How can you opt out of the proceeding’.

### 4. What is this representative action?

This representative action, the European River Cruise representative action, is brought by the plaintiff on his own behalf and on behalf of all persons who are “group members” as defined in the proceeding.

The action arises out of a series of tours arranged by the defendant, “Scenic Tours” for its customers, with such tours scheduled to be conducted by cruise along European rivers in the period from 10 May 2013 to 14 June 2013.

Those cruises were:

- (1) along the Saone/Rhone rivers in France, scheduled to commence on 19 May 2013;
- (2) from Budapest to Amsterdam, scheduled to commence on 20 May 2013
- (3) from Amsterdam to Budapest, scheduled to commence on 25 May 2013
- (4) from Amsterdam to Budapest, scheduled to commence on 27 May 2013
- (5) from Budapest to Amsterdam, scheduled to commence on 27 May 2013
- (6) from Amsterdam to Budapest, scheduled to commence on 29 May 2013
- (7) from Budapest to Amsterdam, scheduled to commence on 29 May 2013
- (8) from Budapest to Amsterdam, scheduled to commence on 3 June 2013
- (9) from Budapest to Amsterdam, scheduled to commence on 8 June 2013
- (10) from Amsterdam to Budapest, scheduled to commence on 10 June 2013
- (11) from Budapest to Amsterdam, scheduled to commence on 10 June 2013
- (12) from Amsterdam to Budapest, scheduled to commence on 12 June 2013
- (13) from Budapest to Amsterdam, scheduled to commence on 12 June 2013

~~The plaintiff alleges, in the Amended Statement of Claim filed in the Supreme Court of NSW Proceeding 2014/223271, that the enjoyment of those tours, by that mode of touring, was substantially disrupted due to rising river levels caused by extensive flooding. It is also alleged that by its supply of services to group members in trade or commerce, certain ‘consumer guarantees’ came into existence and the defendant did not comply with those guarantees; and, further, that it was as a result of the non-compliance with those guarantees that group members suffered loss or damage.~~

~~The defendant does not admit the allegations and is defending the proceeding on~~

~~the basis, among other things, that the defendant did not fail to comply with consumer guarantees, that it was not responsible for any loss or damage suffered by group members and even if it was, its liability was excluded or limited by certain terms of the arrangements the defendant entered into with group members.~~

#### **5. Are you a group member?**

You are a group member if you:

- (a) Booked and paid for river cruises in Europe scheduled from 10 May 2013 to 14 June 2013 (hereafter the 'relevant period'); or
- (b) Acquired the services of the defendant, trading as 'Scenic Tours' and 'Evergreen Tours', concerning the operation of river cruises in Europe during the relevant period;
- (c) Have suffered loss or damage because of the conduct of the defendant in contravention of a consumer guarantee in Chapter 3 of the Australian Consumer Law; and
- (d) Are not a legal representative or funder assisting other group members to recover remedies in this proceeding.

If you are unsure whether or not you are a group member, you should contact Cameron Graham Adam Cutri, of Somerville Legal, on (02) 9923 2321 or [cgraham@somervillelegal.com.au](mailto:cgraham@somervillelegal.com.au) [acutri@somervillelegal.com.au](mailto:acutri@somervillelegal.com.au) or seek your own legal advice without delay.

#### **6. Will you be liable for legal costs?**

You will not become liable for any legal costs simply by remaining as a group member for the determination of the common questions. However:

- (a) If the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage Somerville Legal or other lawyers to do that work for you. A copy of the terms on which Somerville Legal are acting in the group action may be obtained from them on the number shown below.
- (b) If any compensation becomes payable to you as a result of any order, judgment or settlement in the representative action, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the plaintiff in running the representative action but which are not able to be recovered from the defendant; and
- (c) Representative actions are often settled out of court. If this occurs in the representative action, you may be able to claim from the settlement amount without retaining a lawyer.

#### **7. What will happen if you choose to remain a group member?**

Unless you opt out, you will be bound by the outcome of the representative action. If the representative action is successful, you will be entitled to a share in the benefit of any order, judgment or settlement in favour of the plaintiff and group

members (although in some cases, you may have to satisfy certain conditions before your entitlement arises). If the action is unsuccessful or is not as successful as you might have wished, you will not be able to sue on the same claim in any other proceedings.

**8. How can you remain a group member?**

If you wish to **remain** a group member there is **nothing you need to do** at the present time. You are invited to contact the plaintiff's Solicitors, Somerville Legal, on the number below and register as a group member so that further notices about the representative action can be sent to your preferred address.

**9. How can you opt out of the representative action?**

If you do **not wish to be** a group member you must opt out of the representative action.

If you opt out, you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the representative action, but you will be at liberty to bring your own claim against the defendant, provided that you issue Court proceedings within the time limit applicable to your claim.

If you wish to bring your own claim against the defendant, you should seek your own legal advice about your claim and the applicable time limit **before** opting out.

If you wish to opt out of the representative action you **must** do so by completing an "Opt Out Notice" in the form shown below, then return it to the Registrar of the Supreme Court of NSW at the address on the form. **IMPORTANT: the Opt Out Notice must reach the Registrar by no later than 4.00pm on 22 May 2015**, otherwise it will not be effective.

**10. Where can you obtain copies of relevant documents?**

Copies of relevant documents, including the Amended Statement of Claim and Defence may be obtained by:

- (a) Downloading them from [www.somervillelegal.com.au](http://www.somervillelegal.com.au); or
- (b) Inspecting them between 9am and 5pm at the office of Somerville Legal, contact details for which are available from [www.somervillelegal.com.au](http://www.somervillelegal.com.au) or by calling (02) 9923 2321.
- (c) Inspecting them on the Supreme Court's website [http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2\\_class\\_action/european\\_river\\_cruise.html](http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2_class_action/european_river_cruise.html).

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact ~~Cameron Graham Adam Cutri~~ of Somerville Legal on (02) 9923 2321 or [cgraham@somervillelegal.com.au](mailto:cgraham@somervillelegal.com.au) ~~acutri@somervillelegal.com.au~~ or seek your own legal advice.

This Notice is published pursuant to orders of the Supreme Court of New South



Wales made on ~~20 March~~ 2015.