



Common Law Division Supreme Court New South Wales

Case Name: Moore v Scenic Tours Pty Limited (No.2)

Medium Neutral Citation: [2017] NSWSC 733

Hearing Date(s): 26, 27, 28 April 2016,
11, 12, 13 May 2016

Date of Orders: 31 August 2017

Date of Decision: 31 August 2017

Jurisdiction: Civil

Before: Garling J

Decision: See [946]

Catchwords: CONSUMER LAW – all-inclusive five-star luxury cruise along European rivers – where cruise substantially disrupted by flooding – whether breach of consumer guarantees
CONSUMER LAW – meaning of “services” in particular factual context – whether breach a result of a cause independent of human control
STATUTORY CONSTRUCTION — whether Civil Liability Act (‘CLA’) picked up by s 80 Judiciary Act
DAMAGES – compensation for reduction in value – assessment – whether amount recovered through insurance policy to be subtracted from total of compensation awardable
STATUTORY CONSTRUCTION – damages for distress and disappointment – whether Pt 2 CLA applied by s 275 Australian Consumer Law – whether damages “personal injury” under Pt 2 CLA – whether damages meet Pt 2 CLA threshold – whether CLA operates extra-territorially
DAMAGES – assessment – damages for distress and disappointment
CONTRACTS – construction – whether terms and conditions permitted significant variation of itinerary

Legislation Cited: Australian Consumer Law
Civil Liability Act 2002
Civil Procedure Act 2009

Competition and Consumer Act 2010 (Cth)
Contracts Review Act 1980
Judiciary Act 1903 (Cth)
Social Security Act 1991 (Cth)
Supreme Court Act 1970
The Package Travel, Package Holidays and Package
Tours Regulations 1992 (UK)
Trade Practices Act 1971 (Cth)

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Adamson v NSW Rugby League Ltd (1991) 31 FCR
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Adeels Palace Pty Ltd v Moubarak [2009] HCA 48;
(2009) 239 CLR 420
Alameddine v Glenworth Valley Horse Riding Pty Ltd
[2015] NSWCA 219
Baltic Shipping Co v Dillon [1993] HCA 4; (1993) 176
CLR 344
Benic v State of NSW [2010] NSWSC 1039
Bradburn v Great Western Railway Co (1874) LR 10
Exch.1
Comalco Aluminium Ltd v Mogal Freight Services Pty
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QB 233
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Motorcycling Events Group Australia Pty Ltd v Kelly
[2013] NSWCA 361; (2013) 86 NSWLR 55
National Insurance Company of New Zealand Ltd v
Espagne [1961] HCA 15; (1961) 105 CLR 569

Obeid v Australian Competition and Consumer Commission [2014] FCAFC 155; (2014) 226 FCR 471
Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd [2010] FCA 180
Planet Fisheries Pty Ltd v La Rosa [1968] HCA 62; (1968) 119 CLR 118
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Rogers v Nationwide News Ltd [2003] HCA 52; (2003) 216 CLR 327
Shoalhaven City Council v Pender [2013] NSWCA 210
Trade Practices Commission v Legion Cabs (Trading) Co-Operative Society Ltd [1978] FCA 47; (1978) 35 FLR 372
Union Steamship Co of Australia Pty Ltd v King [1988] HCA 55; (1988) 166 CLR 1
Uniting Church in Australia Property Trust v Miller [2015] NSWCA 320; (2015) 91 NSWLR 752
Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40
Young v Insight Vacations Pty Ltd [2009] NSWDC 122

Texts Cited: Not Applicable

Category: Procedural and other rulings

Parties: David Moore (P)
Scenic Tours Pty Limited (D)

Representation: Counsel:
A Abadee (P)
G McNally SC (26, 27 April 2016) / D S Weinberger /
A Jordan (11, 12 May 2016) (D)

Solicitors:
Somerville Legal Pty Ltd (P)
McCabes Lawyers (D)

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JUDGMENT

- 1 The plaintiff, Mr David Moore, a school teacher, brings proceedings claiming compensation and damages, together with alternative relief arising out of a European river cruise that he and his wife (Janet Howell) took during June 2013.
- 2 Mr Moore's tour, which included an initial stay in Paris for a few nights, was booked 18 months prior to its departure date and paid for, in full, about 12 months before the cruise commenced. It was timed to take place during a period of long service leave taken by Mr Moore and was much anticipated. The long awaited cruise was intended to depart from Amsterdam, travel along the Rhine River, the Main River, the Main/Danube Canal and the Danube River to Budapest.
- 3 The defendant, Scenic Tours Pty Ltd ("Scenic") provided this tour, either by itself or its associated entities. In its brochure, which Mr Moore read, the founder and managing director of Scenic, Mr Glen Moroney, invited Mr Moore and other guests to join Scenic for "*... a once in a lifetime cruise along the grand waterways of Europe*" during which, whilst on board a Scenic ship, they would "*... be immersed in all inclusive luxury*". Mr Moroney assured readers of Scenic's brochure that their entire journey would be "*truly unforgettable*".
- 4 Mr Moore claims that his journey was, on the contrary, one which he would rather forget.
- 5 In the events which happened, Mr Moore claims that rather than experiencing a once-in-a-lifetime luxury river cruise along the promised waterways on a Scenic ship, his experience was one of being shuffled around Europe, largely by coach, for a great part of the trip and changing ships on two occasions so that by the time he disembarked in Budapest, he had experienced three different Scenic ships and that far from his cruise being one where he was immersed in all-inclusive luxury, he experienced something entirely different.

- 6 The disruptions to the planned itinerary of Mr Moore's cruise were caused by the decisions made by Scenic when confronted with high water levels on the rivers and extensive rainfall which occurred in Europe during May and June 2013. Many towns and cities in Europe, particularly those along the identified waterways, were flooded. Locks along the rivers were either damaged or inoperative. Ships were unable to pass under bridges crossing the rivers and some docking facilities could not be used and had been washed away.
- 7 Mr Moore brings a representative proceeding in this Court on behalf of a large number of his fellow travellers. He claims against Scenic that, with respect to 13 cruises, it knew that when he (and his fellow group members) booked their cruises, they did so because they wished to experience and enjoy a luxury five-star experience of a river cruise, in accordance with the selected itinerary which would include highlighted events and destinations. Scenic does not entirely admit that it knew that this was what the plaintiff and his group members wished to experience.
- 8 Mr Moore claims on his own behalf, and on behalf of the group members, that the services provided by the defendant did not fulfil this purpose, and did not provide the desired result. Accordingly, Mr Moore claims principal relief in this Court by way of damages and compensation.
- 9 Scenic contests the proposition that it did not provide the European river cruises in accordance with its statutory and contractual obligations, and contests Mr Moore's entitlement to any relief.
- 10 It will be appropriate to describe in more detail the cases for each of Mr Moore and Scenic. However, it is necessary to note that as this is a representative proceeding upon which the Court is embarked, the Court will in this judgment deal with the whole of the plaintiff's claim, and the determination of a number of questions which the parties agree are likely to arise with respect to the claims of the group members. Whether those questions do arise, and if so in respect of which group members, is part of the ultimate determination.

- 11 Included in the representative action are cruises which Mr Moore himself did not take, but which other group members did take. Twelve of the cruises were along the waterways which I have described above. Some of them went in an easterly direction from Amsterdam to Budapest, others travelled in a westerly direction from Budapest to Amsterdam.
- 12 One cruise was different. That was a cruise in the south of France which was intended to depart on 19 May 2013 and travel along the Saône River to Lyon and from there along the Rhône River to Arles.
- 13 The Court has been asked to, and will, make findings about what happened on each of these cruises.

Table of Cruises

| Cruise Number | Departure Date | Route | Scenic Code |
|----------------------|-----------------------|----------------------------|--------------------|
| 1. | 19 May 2013 | Saone/Rhone Rivers, France | FRCR 190513.1 |
| 2. | 20 May 2013 | Budapest to Amsterdam | STC 200513.2 |
| 3. | 25 May 2013 | Amsterdam to Budapest | EGFC 250513.1 |
| 4. | 27 May 2013 | Amsterdam to Budapest | STC 270513.1 |
| 5. | 27 May 2013 | Budapest to Amsterdam | STC 270513.2 |
| 6. | 29 May 2013 | Amsterdam to Budapest | STC 290513.1 |
| 7. | 29 May 2013 | Budapest to Amsterdam | STC 290513.2 |
| 8. | 3 June 2013 | Amsterdam to Budapest | STC 030613.1 |
| 9. | 8 June 2013 | Budapest to Amsterdam | EGRC 080613.2 |
| 10. | 10 June 2013 | Amsterdam to Budapest | STC 100613.1 |
| 11. | 10 June 2013 | Budapest to Amsterdam | STC 100613.2 |
| 12. | 12 June 2013 | Amsterdam to Budapest | STC 120613.1 |
| 13. | 12 June 2013 | Budapest to Amsterdam | STC 120613.2 |

- 14 As can be seen from the Table of Cruises, for the ships sailing from Amsterdam to Budapest the numerical extension “.1” was used. For ships

sailing in the opposite direction, the numerical extension “.2” was used. Cruises 3 and 9 were conducted by Evergreen Tours Pty Ltd (“Evergreen”) which is part of the Scenic Group.

- 15 In this judgment it will be convenient to refer to the cruises by their allocated cruise number, which is chronologically sequenced by departure date.

The Scenic Group

- 16 The evidence and documents which were tendered identified a number of individuals and corporate entities which were closely associated in the provision of services by Scenic to the plaintiff and group members. They can all be loosely and for convenience described as forming part of the “Scenic Group”.

- 17 As just mentioned, Evergreen was one such corporate entity. It published promotional material which was very similar in composition and style, and content, to that published by Scenic. It operated its tours on ships, the names of which all commenced with the title “Amadeus” rather than the title “Scenic”. Evergreen operated from the same offices in Newcastle as did Scenic. As the internal correspondence showed, Scenic and Evergreen shared an Operations Manager, Ms Scoular, and were in all respects regarded as the same organisation. On the back page of its brochure, Evergreen described itself as “...*a division of Scenic Tours*”. No submission was made to the Court that Scenic and Evergreen should be regarded as separate or distinct entities for any purpose.

- 18 Scenic Tours Europe AG (“Scenic Europe”) is another company identified in the documentary evidence. Mr Lucas Sandmeier was its Managing Director. It appears that Scenic Europe was based in Zug in Switzerland. It seems that it was responsible for managing all aspects of Scenic cruises in Europe. There were considerable internal emails and correspondence between Scenic Europe and Scenic. Employees of both Scenic and Scenic Europe used the same email addresses. After their individual names, their email addresses were all “...@scenictours.com”. Clearly, they were both closely associated

and worked jointly in the provision of services to booked passengers both before they embarked in their cruise and during their cruise.

- 19 Although there was tendered in evidence a formal Services Agreement between Scenic and Scenic Europe, and Scenic pleaded that Scenic Europe was an “*independent contractor*” Scenic did not ever suggest or submit that it could not be held liable for the conduct of Scenic Europe. There was no evidence as to whether these companies were in common ownership, or what their respective governance structures were. However, the plainest inference arises from all of the evidence in the case that these companies were operating jointly and were closely associated. Counsel for Scenic did not submit otherwise.
- 20 In light of that approach, it is appropriate to regard Scenic Europe as a part of Scenic’s operations, and as an integral part in the supply by Scenic of services to passengers. One example of the closeness with which these companies operated was that one of the agreements tendered in evidence refers to the operations of Scenic, Scenic Europe and Evergreen. In 2013, Scenic Europe was the entity which chartered the Amadeus Silver, the ship which operated some of the Evergreen tours between Amsterdam and Budapest. There was no separate agreement tendered in evidence between Scenic Europe and Evergreen and/or Scenic dealing with the basis of that charter and their respective rights and responsibilities.
- 21 The documentary evidence recorded the existence of a number of other companies associated with the ownership of the Scenic fleet of ships. Scenic River Cruise AG, Riverland Cruises AG, Scenic Crystal AG and Scenic Cruises Holdings AG were all Swiss-based companies, of which Lucas Sandmeier was the Managing Director which owned or was involved with the provision of the shipping fleet of Scenic ships which operated the relevant cruises under the Maltese flag. The particular role which any of these companies played in the provision of services by Scenic was not identified in the evidence. Interestingly, in respect of a particular services agreement with a third party, into which Scenic River Cruises AG and Riverland Cruises AG

entered, Mr Glen Moroney, who elsewhere identified himself as the Founder and Managing Director of Scenic, was nominated as the contact person for any contractual dispute.

- 22 Moreover, in its Defence, Scenic pleaded that the river cruises were provided by independent contractors, namely Scenic Tours Europe AG and Dr. W. Leuftner Reisen GmbH trading as Luftner Cruises AG. I have dealt with the former entity above. With regards to the latter, Luftner Cruises AG, no submission was made in argument or in writing by Scenic that Scenic should not be held liable for the actions of Luftner Cruises AG, or any other contractor which was associated with Scenic's service provision.
- 23 Accordingly, I have concluded that it is appropriate to also regard Luftner Cruises AG as a part of Scenic's operations and as integral to the delivery of the services to passengers on Scenic's river cruises.
- 24 It is unnecessary to refer to any of these companies any further. At some later point in time, probably by about June 2010, it seems that Scenic Europe had become the owners of the Scenic ship fleet.
- 25 There were many individuals whose names featured in the internal emails and correspondence, and in events which provided services to intending and booked passengers. They were writing on letterhead or over the signature block of various of the companies which I have earlier described. Principally, these companies were Scenic, Evergreen and Scenic Europe. It is convenient to set out below their names, job titles and company, so that when referred to later, it is unnecessary to repeat that material. In the absence of any direct evidence specifically outlining actual roles, descriptions and responsibilities, the material below is drawn from the tendered documents:

Senior Members of Scenic and Associated Companies

| Name | Role\Position |
|---------------------|---------------------------------------------------------------|
| Mr Glen Moroney | Founder and Managing Director of Scenic Tours |
| Mr Justin Brown | General Manager Operations and Administration of Scenic Tours |
| Ms Donna Willis | Customer Liaison Manager for Scenic Tours |
| Ms Kim Scoular | Operations Manager, Scenic and Evergreen Tours |
| Mr Angus Crichton | General Manager of Evergreen |
| Mr Lucas Sandmeier | Managing Director of Scenic Tours Europe AG |
| Ms Melanie Koch | Operations Supervisor Cruises and Extensions Scenic Europe |
| Ms Alexandra Graeff | Operations Manager of Scenic Europe |
| Ms Emma Lindsay | Operations Manager – UK Scenic Tours |
| Mr Leo Beilmann | Operations Manager of AGIS, a French-based Nautical Agency |

Plaintiff's Claim

- 26 The plaintiff's claim is contained in the Third Further Amended Statement of Claim ("3rd FASC"), ultimately filed in Court on 12 May 2016.
- 27 The first and principal claim is an order for compensation pursuant to s 267(3) and/or s 267(4) of the *Australian Consumer Law* ("ACL"). A second and alternative claim is for an order for personal injury damages pursuant to Part VI B of the *Competition and Consumer Act 2010* (Cth) ("Competition Act"). This second claim was ultimately not pursued. In the alternative to both of those claims, the plaintiff makes a claim for restitution.
- 28 There are six other prayers for relief in the 3rd FASC which deal with the capacity of the defendant to enforce various terms and conditions of the contract entered into between Scenic and the plaintiff. These claims in part depend upon the matters pleaded by Scenic in its defence. It will be convenient to discuss these claims in due course.

29 It is clear from the pleading and submissions that the plaintiff's case is a narrow one. He does not sue for damages for the tort of negligence, nor for damages for breach of contract. His claim does not rely upon a breach of the statutory prohibition on conduct which is misleading or deceptive, or likely to mislead or deceive: s 18 of the ACL. Rather, he sues only on the basis of a breach of one or more of the statutory guarantees provided in ss 60, 61(1) and 61(2) of the ACL.

30 The plaintiff's claim for damages seems, together with the other group members, to have these elements:

- (a) the plaintiff and group members were consumers within the meaning of the ACL and acquired "services" from Scenic in that capacity;
- (b) the services that were acquired, and which were provided in trade or commerce, were that Scenic would arrange for and provide luxury cruises along European rivers for the use, amusement, entertainment, recreation or instruction of the plaintiff and group members;
- (c) included in those services was an obligation on the defendant in arranging the cruises to monitor and assess, prior to and after the dates for departure of the cruises, whether the planned tour itineraries could proceed in accordance with existing arrangements, or whether the tours should be varied, cancelled or delayed. Necessarily part of these services was a requirement reasonably to communicate that information to the plaintiff and group members.

31 The plaintiff then pleads that because the services were supplied in trade or commerce (about which there is no dispute) to the plaintiff and group members in their capacity as consumers (again about which there is no dispute), the provisions of ss 60, 61(1) and 61(2) of the ACL were applicable. There is no dispute by Scenic that the three guarantees were applicable to the 13 nominated cruises.

32 Section 60 of the ACL provides for a guarantee that services will be rendered with due care and skill ("the due care and skill guarantee").

33 The plaintiff alleges that, in a number of ways, that due care and skill guarantee was breached. Those ways include:

- (a) failing to make any or any adequate enquiry about the nature and extent of flooding and rising river levels by reason of severe rainfall in late April and early May 2013 in Europe, and thus failing to determine that, having regard to the nature and extent of the flooding and rising river levels, it was "... *inconceivable that the scheduled river cruises could proceed otherwise than without substantial disruption or delay*";
- (b) failing to cancel or delay the tours of the plaintiff and group members without receiving information that would lead a reasonable tour operator to conclude that it was likely that the river cruises, the subject of the proceedings, could proceed in a way that the plaintiff and group members would substantially enjoy the benefit of travelling on the tour;
- (c) failing prior to the embarkation of the plaintiff and some of the group members on various of the scheduled cruises to unilaterally cancel their tours and offer them an alternative either by way of the closest available tour or departure; and
- (d) alternatively, failing to offer to passengers on those cruises the opportunity to cancel their tours, either prior to embarkation or after embarkation, when it became obvious that the tours would not be completed as programmed.

34 Finally, there is an allegation that Scenic ought to have warned, but did not, the plaintiff and group members prior to departing from their Australian points of departure that the weather and river conditions were such that it was unlikely they would enjoy their river cruises.

35 Section 61(1) of the ACL provides that where services are provided in circumstances, as here, the plaintiff and group members acquired them, and the purpose for which the services are required is made known, there is a guarantee that the services supplied would be reasonably fit for that purpose. This has been called the "purpose guarantee".

36 Section 61(2) of the ACL provides that where a desired result is made known (whether expressly or impliedly) to a provider of services prior to their acquisition, then the provider of the services guarantees that the services are such as might reasonably be expected to achieve the desired result. This is called the "result guarantee".

- 37 The plaintiff pleads that both the purpose guarantee and the result guarantee were breached because the services provided did not satisfy either or both of the guarantees.
- 38 The plaintiff pleads that, as a consequence of the breach of each of these guarantees, he and the group members individually have suffered loss or damage:
- “... in that, having embarked upon their respective tour itineraries during the relevant period, they did not experience, or substantially experience, travel and accommodation on cruises along the European rivers and touring to scheduled destinations by river cruise at all.”
- 39 The plaintiff’s claim for damages include the following components:
- (a) the price of the cruise;
 - (b) the reduction of the value of the services below the price paid by him for those services;
 - (c) inconvenience, distress and disappointment; and
 - (d) loss of the opportunity to consider and accept any proposed alternative tour or cruise offered by the defendant, or to terminate arrangements with Scenic and receive a full refund of all amounts paid.
- 40 Alternatively to those claims, the plaintiff mounts a claim in restitution as being an action for money had and received.
- 41 The plaintiff pleads that as part of the price paid for the cruise, it is possible to identify a distinct or severable component. In circumstances where individual days, capable of being identified by reference to each cruise, were lost and the benefits of the cruising were not received on those days, then there has been a failure of the consideration which has been paid for those days of cruising and, accordingly, it would be unjust or inequitable for the defendant to retain the payments made which constituted the cruise component of the relevant tour price.

- 42 The second part of the claim relates to the defence pleaded by Scenic. In its Defence, Scenic pleads and relies upon the terms and conditions of the contract into which the plaintiff (and each group member) entered.
- 43 In response to that pleading, the plaintiff pleads that the identified terms and conditions, if read as Scenic contends they should be, were, and are, unjust within the meaning of the *Contracts Review Act 1980* (“CRA”); that in enforcing the terms and conditions, Scenic is engaging in unconscionable conduct within the meaning of s 21 of the ACL; that the relevant terms and conditions are relied upon by Scenic in circumstances as would make them “*unfair*” within the meaning of s 24 of the ACL; and that as a consequence, in substance and effect, it is not open to the defendant to rely upon these particular terms and conditions of the contract in the way in which it does.
- 44 In what is perhaps an oversimplification of the plaintiff’s case, I would describe it in this way, namely, the plaintiff and group members booked a luxury river cruise with Scenic; in doing so, they expected to receive services of the kind they were promised in the brochure and other materials; Europe was the subject of very heavy rainfall and flooding in April and May 2013; the rainfall and flooding was unseasonal and very great. It must have been obvious to Scenic, either before the plaintiff and group members left Australia to travel to Europe to participate in the cruises or, alternatively, prior to the cruises commencing or, alternatively, at some point during at least some of the cruises, that the condition of the European rivers was such that the luxury river cruises were not going to take place at all or, if they did, it would be in circumstances of substantial disruption. Scenic either knew of those things and went ahead with the cruises in any event without telling the plaintiff and group members or, alternatively, ought to have known of them if they were acting with due care and skill.
- 45 The plaintiffs allege that the cruises with which they were provided did not match the promises that were made, and did not provide them with a luxurious holiday experience. In those circumstances, the plaintiffs claim an entitlement to compensation and damages.

The Case for the Defendant

46 Scenic contends that the poor weather, the very high river levels and flooding with the consequent adverse impact on navigation and on the timely operation of locks and the provision of docking facilities, amounted to circumstances entirely beyond its control and for any consequences of which it ought not be held liable. It contended that changing weather and variable river heights were an ordinary incident of river cruising which ought to be anticipated by its passengers. Speaking generally, it contended that these were risks for passengers to have regard to in considering whether to book a river cruise, when it should be booked for and what travel insurance should be arranged to enable the passengers to deal with those risks. As well, Scenic submits that such was the extent of the flooding and high water that it could not have been expected to predict or anticipate it.

47 The central contention in the defendant's case, but not the only contention, is that the services which it provided are not defined in the same way as that contended for by the plaintiff. Rather, the defendant defines the services which it provided in this way:

“... the services which Scenic was contracted to provide was a tour at a particular time, which included a river cruise to the extent that river conditions allowed it; to provide reasonable endeavours to provide the tour booked in accordance with the itinerary and to use reasonable efforts to substitute, where required, a motor coach for a vessel, for example.”

48 The defendant's case is that such a definition of services is the only one which sits consistently with the key provisions and fundamental terms and conditions of the contract entered into by the plaintiff and each group member.

49 Scenic points, in support of its definition, to terms which required it to use reasonable endeavours to provide the booked tour but, where Scenic was unable to provide the booked tour in accordance with the itinerary, its only obligation was to use reasonable endeavours to provide or arrange appropriate alternatives. In particular, Scenic points to the clause which entitles it to vary a tour and to substitute another vessel or motor coach for all

or part of the itinerary, subject only to the fact that such alternative vessel or motor coach was “*at the nearest reasonable standard*”.

- 50 Scenic accepts that it was providing each of the tours at a particular identified time. It also accepts that monitoring and managing the tour were necessary requirements of the terms and conditions of the contract. It follows that they are a part of the services which it provided. The defendant’s submissions highlight the difference in this way, namely that Scenic seeks to argue that the nature of the services which it provides cannot be defined by the provisions of the consumer guarantees, but rather only by the contract, and all of its terms and conditions.
- 51 Put another way, Scenic argues that the proper approach by the Court to considering the plaintiff’s claim and the common questions is by first having reference to the entirety of the contractual arrangements, including all of the terms and conditions which were a part of the contract, and then define what services were being provided as determined by the contract.
- 52 The defendant submits that it was not in breach of any of the guarantees. In particular with respect to the purpose and result guarantees, Scenic pointed to the fact that the services provided must relate to the particular circumstances in place at the time and that the services provided need only be either reasonably fit for the purpose or, alternatively, of a nature or quality that might reasonably be expected. It points to the fact that the circumstances were such that the services which in fact were provided were reasonable and therefore there was no breach of consumer guarantees.
- 53 Scenic rejects the proposition that it was obliged to provide any warning to the plaintiff or group members about the difficulties which may be encountered on their cruises.
- 54 Whilst it will be necessary to deal with each of the defences in due course, it is appropriate to identify at this stage that Scenic also submitted that s 275 of the ACL, in combination with the *Civil Liability Act 2002* (“the CLA”) has the

effect that any claim for distress and disappointment is barred by the provisions of the CLA.

Shape of the Hearing

55 The Court embarked upon a hearing of evidence. It indicated to the parties that the matters to be determined by the evidence led during the course of that hearing would be the whole of the plaintiff's claim and the common issues insofar as they affected the group members' claims, and insofar as they were common to the whole or an identifiable part of the group. Those common issues were identified, in their final form, in a document filed in Court on 13 May 2016.

56 In light of the any in which this judgment deals with the extensive matters of fact which were in issue, it will be appropriate for the parties to have the opportunity to consider, and make submissions on, the findings relevant to these common issues and the precise answers which ought be recorded after they have had the opportunity to consider these reasons.

57 In those circumstances, identification of those common issues and possible findings can appropriately await a further judgment. This is not atypical in representative actions: see *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* [2010] FCA 180.

A Late Amendment

58 When the hearing commenced, the plaintiff was proceeding on the basis of the Second Further Amended Statement of Claim, which had been filed on 26 April 2016.

59 When the plaintiff's final written submissions were provided to the defendant, the defendant submitted that some of those submissions travelled outside of the existing pleadings and ought not be permitted by the Court to be considered. In particular, the defendant was concerned with a number of allegations about how Scenic was in breach of the due care and skill

guarantee in failing to offer passengers on some cruises an opportunity to cancel those cruises either prior to embarkation, or at a time during the course of the cruise.

60 During final oral submissions, counsel for the plaintiff sought leave to amend the existing pleading. In so doing, he submitted that such an amendment was not strictly necessary in light of the way he had opened and conducted the plaintiff's case. The defendant consented to some of the amendments, namely those in paragraph 12(e) of the existing pleading, but opposed the addition of paragraphs 12(ea) and 12(eb) together with consequential amendments to paragraphs 13 and 14 of the proposed pleading.

61 When the application for amendment was made, and after the plaintiff completed his submissions, counsel for the defendant opposed the application on a number of grounds. One was the self-evident lateness of the application. The second was the absence of any affidavit of explanation as to the reason why the application was being so late. Another was that had the defendant been aware earlier of the amendment, then it may have conducted its case differently.

62 The defendant was given a short adjournment to enable it to consider this submission, to identify with some precision whether it would have taken a different approach and, if so, what that may be. The time was also given to enable it to further consider its position generally. That was obviously an important matter on the question of the possible prejudice which Scenic may suffer if the late amendment were allowed.

63 Upon resumption, counsel for the defendant, whilst maintaining its opposition to the amendment, informed the Court that the time allowed had been adequate and that Scenic did not wish to call any further evidence, nor did it wish an opportunity to further consider whether to adduce further evidence. Counsel confined his submissions on prejudice to the existence of corporate stress brought by reason of the litigation and Scenic's desire to have the litigation conclude as soon reasonably possible.

- 64 At the conclusion of those submissions, I indicated that I would grant leave to the plaintiff to further amend his Statement of Claim and that reasons for the decision would be given as part of these Reasons. Accordingly, on 12 May 2016, the plaintiff filed in court a Third Further Amended Statement of Claim which represents the current pleading. On 13 May 2016, Scenic filed a Defence to that pleading.
- 65 In my view it was appropriate to grant leave to the plaintiff to further amend the Statement of Claim because the effect of the amendment was, in substance, to ensure that the pleading aligned with the way in which the case had been opened and the evidence presented in support of it.
- 66 As well, I was satisfied that there was no prejudice to the defendant other than that which an order for costs would address. I was also satisfied that the necessity for the late amendment arose in circumstances where it had only become apparent to the plaintiff that the defendant objected to the way in which the case was being articulated in its final submissions. In other words, in circumstances where no objection had been taken to the plaintiff's opening.
- 67 The context of the amendment was also important. The hearing which was being conducted was to deal with the entirety of Mr Moore's claim on a final basis. With respect to the claims of each group member, the hearing was to decide a number of identified common issues, but it would not finally resolve all of the claims of the group members.
- 68 The proposed amendments insofar as they affected Mr Moore were, in my judgment, not significant. Mr Moore had pleaded that the cruise upon which he was booked ought to have been cancelled prior to embarkation by Scenic. The amendment added an allegation that Mr Moore, and his fellow passengers should, by 2 June 2013, have been given the option of cancelling the cruise himself (or themselves). Mr Moore was cross-examined on that issue by senior counsel for Scenic when he gave evidence, and a number of hypothetical factual circumstances were put to him about what decisions he may have made.

- 69 Similarly, with most of the other witnesses who had been passengers on various of the cruises, namely Mr Willems, Mr Cairncross, Mr Holgye and Mr Peattie, counsel for Scenic cross-examined them on various hypotheses (not necessarily the same) as to decisions which might have been made if circumstances had been different, and they had been offered the option of cancellation.
- 70 I concluded that counsel undertook that cross-examination as a result of a deliberate decision. No doubt it reflected his understanding of the case being made by the plaintiff at the time and the issues with which he needed to deal.
- 71 Ultimately, I was satisfied that the amendments were being made largely to bring the pleading into line with the way in which the case had been opened and conducted.
- 72 For all of those reasons I concluded that it was in the interests of justice to allow the proposed amendments and, accordingly, I granted leave to the plaintiff to file the Third Further Amended Statement of Claim. I made orders for costs of and occasioned by that amendment.
- 73 The parties made consequential amendments to the common issues.

Mr Moore's Experience

- 74 In October 2011, Mr Moore, who was then teaching science at a senior college on the Central Coast, decided with his wife, Janet Howell, to book a holiday with Scenic. Before doing so, he obtained a number of brochures including one about a wide range of Scenic cruises including those along the waterways between Amsterdam and Budapest. In addition, Mr and Mrs Moore were attracted to the tour being operated by Scenic because they had seen an ad on television.
- 75 Mr and Mrs Moore went to Harvey World Travel, a retail travel agent in Warners Bay. They did so to collect a large brochure of the kind which is in evidence, and which I have described elsewhere in the judgment. They had

not been to the travel agent before, and did not ask any questions at the time of collecting the large brochure.

- 76 Although there is no direct evidence on the topic, I would readily infer from the evidence of other passengers who obtained a similar brochure, and the terms of it, that the brochures were prepared and printed by, or at the behest of, Scenic and distributed to a large number of travel agents around Australia by Scenic, to promote its cruise program.
- 77 Mr Moore had not travelled overseas extensively prior to this occasion. He had undertaken one previous trip about 20 years before visiting Harvey World Travel, which was to China as part of a sporting team visit to that country. He did not attend to any of the booking arrangements, and travelled as one of the group on that trip. He relied upon the organisers of that sporting event to undertake all of the appropriate arrangements.
- 78 Mr Moore said, and I accept, that he and his wife were interested in the Scenic cruise because they liked the idea of having to unpack their belongings once only, and then still be able to see a number of locations in Europe by cruising along the waterways. This was of particular significance to Mr Moore who had had spinal surgery in 1993 and found it difficult to spend extended periods of time sitting down, particularly in confined spaces.
- 79 Having considered the matter with his wife, Mr Moore decided to book a cruise with Scenic, in particular the one which departed Amsterdam for Budapest on 3 June 2013, namely Cruise 8. Mr Moore in fact booked a package described in the Booking Advice issued on 6 September 2012, as "*Paris and Jewels of Europe (PACR 310513.1) from Paris to Bud*". In essence, Mr Moore and his wife flew to Paris, arriving on 1 June 2013, staying for two nights in a Paris hotel, before travelling by train to Amsterdam to embark on Cruise 8. There is no suggestion that the time spent in Paris was as a part of a designated group tour. The specific package (if it was one) was not mentioned in the brochure or separately identified.

- 80 On 15 December 2011, Mr Moore attended at the Harvey World Travel Agency and booked the cruise paying an initial deposit of \$500. A receipt was issued by Harvey World Travel, for that payment which was described as “*Pre-registration for Scenic European River Cruise for 2013*”.
- 81 On 6 September 2012, or shortly thereafter, Mr Moore received a four page document which originated from Scenic described as a “Booking Advice”. It was in fact addressed to Harvey World Travel. I infer that Harvey World Travel provided the Booking Advice to Mr Moore.
- 82 The last line of that document, on the fourth page, read:
- “This booking is covered by the Terms and Conditions of the relevant brochure”.
- 83 The document did not otherwise identify or further specify the brochure referred to. No copy of any Terms and Conditions was attached. No brochure was attached. The only brochure to which it could refer was the brochure current for cruises for 2013/2014, which was distributed by Scenic to travel agents.
- 84 Mr Moore was asked in cross-examination whether he had seen various references to the existence of terms and conditions in the brochure. He denied that he had. It was suggested to him that there would have been terms and conditions in relation to any contract which he entered into with Scenic, but he denied that - although he admitted that there were terms and conditions that he had read at a later point in time. He was unable to be specific about that time which was clearly before departure from Australia. I accept Mr Moore’s evidence on these matters. Mr Moore was not an experienced traveller.
- 85 On 16 May 2013, shortly prior to his departure, Mr Moore received an itinerary from Harvey World Travel. That itinerary provided the information that Mr Moore and Ms Howell would be leaving Sydney on a Singapore Airlines flight departing at 3.15pm on 30 May 2013.

86 That flight had been booked by Scenic on behalf of Mr Moore and his wife, and the charge for it was included in the monies paid to Scenic by Mr Moore. Accordingly, I infer that Scenic was, at all relevant times, aware of when Mr Moore and his wife would be leaving Australia for Europe to take up their river cruise booking. Scenic also had Mr Moore's contact details.

87 Shortly after leaving Australia, on 1 June 2013, Mr Moore received the following letter from Scenic. It said, referring to his booked cruise which was scheduled to commence less than 48 hours later:

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

Due to these events, the Scenic Jewel is not able to be in Amsterdam for your embarkation, and we are forced to arrange a ship swap and your embarkation will be on the Scenic Ruby. The Scenic Ruby is consistent with the Scenic Jewel, delivering the same inclusions, facilities and guest services. The deluxe balcony suite you have booked on the Scenic Jewel is not identically replicated on the Scenic Ruby, and although you will occupy the suite on the equivalent location, the suite will have some difference in layout and design features. Due to this change in your suite for this cruise, we will be arranging for the appropriate refund to be sent directly to you on your return home.

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

As this day approaches, you will be given all the necessary details from your cruise. Rest assured that our crew will undertake this ship change to your cabin on the MS Scenic Jewel during the day whilst you are enjoying your sightseeing activities.

I do apologise for the alteration, however I can assure you that our crew will do everything to make your cruise experience on board both these luxury ships truly memorable.

Your Cruise Director will advise all final arrangements and river conditions as you relax and enjoy your ultimate European cruising experience."

88 Mr Moore and his wife joined the cruise on 3 June 2013 (the first day of the cruise) while the ship was docked in Amsterdam. The ship remained in Amsterdam on the day and evening of 4 June 2013. It was always intended

that it would depart Amsterdam late in the evening of 4 June 2013 or else early on the following morning.

89 Upon boarding, each passenger, including Mr Moore, received a fold-out map entitled "Amsterdam to Budapest River Map". It was printed with Scenic's name on the cover. It traced the path along which the "Jewels of Europe" cruise would travel. It recorded river distances between identified landmarks. By reference to that map, which I infer is substantially accurate, it can be seen that the cruise involved travelling along the Rhine river from Amsterdam to Hochheim, a cruising distance of about 500km, then along the Main river from Hochheim to Bamberg, a cruising distance of 380km, then along the Main/Danube Canal from Bamberg to near Riedenburg, a cruising distance of 160km; and then finally along the Danube river from Kelheim to Budapest, a cruising distance of about 750km. In total the cruise from Amsterdam to Budapest involved cruising along the waterways just described for about 1,790km.

90 Upon arrival on the cruise ship on 3 June 2013, and after embarkation, Mr Moore gave evidence of a talk which was held by the Cruise Director, Mr Patrick Doyle, with the passengers then on the ship. He said:

"We will be embarking on the space ship Ruby instead of the Scenic Jewel as the Jewel is not available. The Jewel has been stuck in Bamberg for 8 days now due to the river levels. Don't worry as all of the Scenic ships are exactly the same in standards and inclusions. We are having some problems with the rising river levels. We will only be on the Ruby for a couple of days and then we will change to the Jewel."

91 Mr Moore was not challenged on his recollection of that conversation. I accept it. I also accept that Mr Doyle, the Cruise Director, was accurately describing the situation with respect to the waterways to Budapest. The effect of that conversation was that the river levels had, since about 27 May 2013 (which was about 8 days earlier), been such as to prevent complete navigation along the three river systems because of an issue with respect to the river heights and bridge clearances in the Bamberg area. Bamberg is located at the junction of the Main River and the Main/Danube canal.

92 The cruise which Mr Moore was booked on was, according to the itinerary, due to leave Amsterdam and commence cruising on the second day, that is, 4 June 2013. The third day of the cruise was described this way in the itinerary:

“Day 3 Cologne – Marksburg

Today cruise into Germany to historic Cologne. Choose from one of the following included Scenic free choice tours:

- (1) Discover Dusseldorf on a guided walking tour; or
- (2) Enjoy a walking tour of Cologne;
- (3) A guided hike in Cologne’s botanical gardens.

Tonight’s Scenic’s enrich highlights include a private medieval banquet in Marksburg Castle. Set high above the banks of the Rhine, this 12th century castle is the only one in this region never to have been destroyed. Enjoy a private tour of the castle before stepping back in time for a medieval feast.”

93 According to Mr Moore’s account, which was not challenged and which I accept, on this day, when the ship arrived in Cologne, it appeared to him that the river level was too high and that the ship would not be able to pass under one or more of the bridges in the area. Marksburg, according to the map given to travellers on the ship, was about 110 km by river from Cologne. The distance is a little further by road.

94 After arriving in Cologne, those passengers attending at the dinner at Marksburg Castle were directed onto a coach that had been organised for this outing and were then driven to the castle. The coach trip took a number of hours each way. The result was that the passengers arrived back on board the ship at about 12.30am.

95 The following day, 5 June 2013, the ship was able to cruise further up the Rhine River towards Koblenz. The ship was unable to sail under the three bridges that crossed the Rhine River at Koblenz and, accordingly, it turned around and sailed back a short distance to the junction of the Moselle and Rhine Rivers and docked in the Moselle River. At that point, the Cruise Director informed passengers that due to the rising river levels the ship was unable to proceed up the Rhine Gorge, but that the situation would be

reassessed in the event that the river levels decreased. The ship remained docked on the Moselle River in Koblenz. It was moored between two other boats. The effect of this was that Mr Moore and his wife had views of nothing other than cruise ships, and the use of their balcony was hindered.

96 At that time the passengers were informed by the Cruise Director that they would be unable to cruise any further along the Rhine River until the rivers subsided. A cruise through the Rhine Gorge was regarded by many passengers as the principal highlight of the cruise.

97 The passengers on the cruise were then offered coach trips to various locations which were not otherwise part of their itinerary. Whilst in Koblenz the passengers were offered a coach trip to a town Cochem which involved a round trip of approximately 120 km. That trip took about 1½ hours and the passengers toured a medieval village for about half an hour and were then returned to the ship.

98 The following day, 6 June 2013, passengers were offered a coach trip to Munich. The alternative was to remain on board the ship, moored where it was between two other cruise ships with no cruising occurring and no external views except into and over these boats. Mr Moore and his wife elected to go on the coach trip. Apparently full details were not provided to them and they did not realise that what was involved was a coach ride of approximately 2½ hours each way, and then once in Munich, a coach sight-seeing trip of about 1 hour's duration.

99 On the evening of 6 June 2013, after returning from that trip, Mr Moore and his wife and other passengers were told by the Cruise Director that the rivers were still too high and that they were not going to be able to cruise anywhere from that location. They were told:

“We have decided to abandon this ship. I will need you all to be packed by 8am tomorrow as we have booked buses and we will be travelling to Würzburg to board the Scenic Jewel.”

- 100 On 7 June 2013, the bus that was provided for the trip from Koblenz to Bamberg via Würzburg did not have an operational air conditioning system and did not have a functioning bathroom. The trip to Würzburg took many hours and the passengers arrived there at about 12 noon. A break was taken in Würzburg and the passengers were shown around the castle and given approximately 1 hour of free time to spend in the town. At the end of that time, they resumed their coach trip for a further 2½ hours to Bamberg to embark on the Scenic Jewel.
- 101 Unsurprisingly, by the end of that, and having regard to the lengthy coach travel which had occurred up to that point in time, Mr Moore noticed that his back was particularly sore.
- 102 The coach trip from Koblenz to Bamberg meant that Mr Moore and his wife missed out on about 475km of cruising along the Rhine River (about 80kms), the Main River (about 380kms) and about 15kms of the Main/Danube Canal.
- 103 When the passengers arrived in Bamberg, they found that the Scenic Jewel had been moored in an abandoned and somewhat desolate industrial area, which was about a 10 minute coach trip outside the town of Bamberg. There, the coaches did not have ready access to the ship's mooring. There was a steep hill between the ship and where the coach pulled up – the passengers were between 500m and 1km away from the ship which required considerable physical effort to transfer on and off the ship.
- 104 On 9 June 2013, the passengers were taken by coach into Bamberg and spent some time there. On their return, the passengers alighted from the coach and walked the distance of between 500m and 1km to the ship through quite heavy rain. No wet weather gear or umbrellas were provided.
- 105 During the evening of 9 June 2013, the Cruise Director informed the passengers that, given the river levels which existed, they would be unable to continue cruising and would be docked in Bamberg for a number of days whilst waiting for the rivers to subside.

106 On 10 June 2013, rather than cruising about 80kms along the river from Bamberg to Nuremberg, passengers were offered – and Mr Moore and his wife accepted – a coach trip into Nuremberg. The alternative was to remain on the ship, docked in the way I have previously described, which would not have been an attractive proposition. The return trip to Nuremberg occupied about 6 hours or so.

107 Upon returning to the ship, Mr and Mrs Moore received a letter dated 10 June 2013 from Scenic. It read:

“Scenic Tours is working around the clock to manage the current ever changing situation.

Our aim is to deliver the itinerary as much as possible, to ensure that the on-board inclusions remain unaffected.

As navigation is permissible on the river sections, we are making forward plans to sail as per the planned itinerary, and to utilise our fleet of space ships to deliver the cruise itinerary to you in a complete form as possible. Where suitable, we will perform a ship swap to pass any river sections that are a barrier to the continuity of the cruise.

With any extended docking, where there is an impact on the itinerary, we recognise your concerns about missed attractions or changes to the planned itinerary. At the conclusion of the cruise we will be making a refund to you, based on the impact to the overall cruise.

We appreciate your understanding as we strive to work within the limitations imposed by the water levels and the resulting navigation restrictions.”

108 On 11 June 2013, the ship remained moored in Bamberg and Mr and Mrs Moore stayed on board for that day. The passengers were scheduled to undertake a tour to Regensburg that day, but road flooding prevented that tour from proceeding.

109 On 12 June 2013, the ship cruised from Bamberg towards Berchtesgaden. Five stops had been scheduled on the itinerary between Bamberg and Vienna so that the passengers could visit Regensburg, Passau, Melk, Durnstein and the Wachau Valley. The ship arrived at Berchtesgaden quite early in the morning, and did not proceed any further. The cruise did not stop at any of the five identified places. Mr Moore and his wife did not cruise on the 50km (or so)

along the Main/Danube Canal or the 500km (or so) along the Danube River to Vienna.

- 110 On the day of their arrival in Berchsheim (which is east and south of Nuremberg), the passengers were advised that they would be travelling by coach to Vienna the following day with a stop for lunch on the way. The Cruise Director said:

“Unfortunately, given the delays which we have had today, we are running behind our schedule. You will not be able to do any of the Scenic free choices as we need to make up time.”

- 111 Mr Moore questioned the position, referring to news reports that the rivers had not yet reached their peak level. The Cruise Director responded:

“Don’t listen to the media. They always over-exaggerate things. I have been advised by head office that the river levels are subsiding. Unfortunately, a number of locks between here and Vienna are still closed. We have decided to enact a further ship swap in Vienna. You will all need to be ready to abandon this ship at 8am tomorrow and board the buses which will take us to the Scenic Pearl which is awaiting our arrival in Vienna.”

- 112 In a further conversation later that evening, Mr Moore asked the Cruise Director how long the bus trip to Vienna would be. He was informed that it would be about eight hours in total. Mr Moore informed the Cruise Director that with his back condition he would not be able to tolerate a bus trip of 8 hours.

- 113 The Cruise Director told Mr Moore that travel by train was possible between Regensburg and Vienna and would take about three hours. The Cruise Director made it plain that he (or Scenic) would not make any arrangements for train travel for Mr Moore and his wife. The Cruise Director said:

“You will need to organise that yourselves. We can’t help you with that. Are you going to go by train or get on the bus, so I know the numbers?”

- 114 Mr Moore declined to travel on an eight hour bus trip and said that he and his wife would organise a train trip.

- 115 This was the first occasion that Mr Moore and his wife had been Europe. They found organising the train trip extremely daunting and that it was particularly difficult to make arrangements, once they arrived in Vienna, to find and meet up with the rest of the travel group. Notwithstanding these difficulties, on the following day (14 June 2013) they travelled by coach from the ship in Berchsheim to Regensburg where, together with three other couples who were fellow cruise passengers, they went to the train station and caught the train to Vienna.
- 116 After arriving in Vienna, Mr Moore and his wife boarded the Scenic Pearl. There they received a letter dated 14 June 2013, which was in identical terms to the letter received by them on 10 June 2013 which is set out above at [107].
- 117 Their cruise itinerary had provided for two full days in Vienna, being days 12 and 13 of the tour. Included in those two days was a free choice tour by way of an excursion to the Slovakian capital of Bratislava. There were other inclusions as well such as a guided tour to the Schönbrunn Palace or a guided tour of the Spanish Riding School and observation of the morning exercise program of the Lipizzaner stallions.
- 118 Although Mr and Mrs Moore took that journey to Bratislava, it was particularly rushed because it was necessary for the ship to depart Vienna for Budapest at 4.30pm.
- 119 At the conclusion of their trip, Mr Moore and his wife prepared a joint letter to Scenic describing their experiences. There was no cross-examination of Mr Moore to suggest that this letter was in any way factually inaccurate.
- 120 Given that it was a contemporaneous letter, written whilst Mr Moore and his wife were still on board the ship at the end of their cruise, and given the absence of any challenge to what was written as a matter of fact, I accept that what was written was a reasonably accurate description of the cruise as

Mr Moore and his wife perceived it to be. It is appropriate to set out some parts of the letter.

121 It included the following expressions:

“(1) We joined the Scenic cruise because of a television ad that showed a couple cruising down the Rhine/Danube enjoying the scenery and relaxing. We were aware that there would be excursions off the boat, but not of any great length. ... we felt this particular type of cruise would benefit ourselves in overcoming our [personal situation]. I (David) have had spinal fusion, so coach touring was never an option. I have taken four weeks long service leave to come on this cruise.

Given the circumstances that Scenic Cruises would have known of the situation in Europe before we had left Australia / at worse when we were in Paris, options should have been given to us whether to continue or leave the cruise at that stage, not on 13 June. (Other cruises were cancelled or given refunds / other choices). If this was the case, I (David) could have redeemed my long service leave by returning to work.

We believed that once on board we would have to unpack once, after three different boats we have become experts in packing and unpacking.

We also believed that we would be relaxing in our own cabin balcony cruising down the Rhine / Danube enjoying the medieval castles, churches and European culture, as it happened we were stuck between other river boats with no views, in an industrial area or the cruising was done late at night whilst we were asleep. Transferring from ship to ship involved lengthy travel (sometimes in coaches without air-conditioning or working toilets).

In addition to the above, when we arrived on the Scenic Pearl we were informed by the crew that they had been stuck in Vienna for three weeks. That would mean that Scenic knew around 23 May that there were problems before we left Australia.

(2) Sunday 16th we were told by the tour guide that in Budapest the Danube had gone down two days ago but was flooded to the extent that docking was impossible and roads were underwater 10 days prior.

Further comments are about the itinerary, but I will add that Janet’s heritage is Austrian and the trip to Salzburg was cancelled because of the distance.

...

* Passau – still moored in Bamberg, because of length of trip to Salzburg, the tour director cancelled it.

...

* Vienna – when trip was booked it was two days in Vienna, but because we were to travel to Vienna, one day was lost travelling to Vienna. Janet and myself travelled by train. Because of my back, it was then the only possible

way of travelling. My back was still sore and in extreme pain that we could not go to organ recital that night.

* Vienna – (part 2) – coach tour of city, then given free time. Coach failed to arrive on time (¾ of an hour late) and a kilometre away from designated place of pick up.

...

This was not a relaxful cruise with early starts, earlier transfers from boat to boat, and events rushed. Rather the boat cabins have become an expensive (very) hotel room with long coach tours. Given that alcohol and excessive eating was not what attracted us to this cruise, we believe that Scenic have failed to provide the services advertised and are bitterly disappointed in not having been given alternatives.”

122 On 25 June 2013, Scenic wrote a letter to Mr Moore and Ms Howell. It included the following:

“The impact of the floods in central Europe created numerous logistical challenges to our cruise schedule, and prevented us from cruising on several days and necessitated itinerary alterations. Unfortunately, your cruise experience was altered due to this changing environment on the rivers as sections of the rivers and locks were closed. Our European operations team worked to rearrange itineraries, seek out new attractions, coordinate coach transfers and organise ship swaps, in response to the situation, however the extent of the river disruptions resulted in a number of itinerary alterations.

Please accept our sincere apologies for these alterations and the impact on your cruise experience. The onset of the floods and the impacts created some unprecedented issues that we worked to overcome on a day to day basis.

River cruising operates with many external factors that can introduce disruption to cruising and itinerary arrangements. We do take care to note this in our brochure and within the booking terms in relation to events outside our control, and we act accordingly upon each set of circumstances as they arise. These floods resulted in the degree of change to your cruise that was more variable and unpredictable than we would usually encounter.

River cruising is governed by the Waterways Authorities and dependent on the water levels, they determine the ability to navigate, dock and the operation of locks. At all times we were mindful of the changing river circumstances and our day to day program was adjusted to be as inclusive as possible based on the river situation. Any unexpected disruption to our cruise schedule can also require extended dockings in some locations as we are directed by the river authorities.

To deliver the best possible outcome and as much of the brochure itinerary as possible, whilst working within the river conditions, we introduced a coaching schedule, ship swaps and changes to the daily program. To experience the regional attractions there is always a component of coaching required, however due to the ship locations and river closures, we were required to

increase the time on coaches to reach some of these attractions and to transfer to other ships. We also always aimed to remain accommodated on the ship and continued to deliver the on-board service inclusions to avoid the disruption of moving to a hotel. ...

When presented with many factors outside our control that impact a cruise schedule, we introduce alternate touring schedules so as to continue to deliver as many of the regional attractions and highlights as possible. While we fully understand your disappointment, our contingency plan and response to the challenges was always focussed on delivering as full an itinerary within the conditions. We regret that we were unable to provide you with all the planned attractions as some did not operate at this time, while others were not feasible due to ship location.

We recognised that the challenges encountered on the cruise were disappointing and we did not have the ability to fully provide the Scenic experience.”

123 The letter went on to offer a refund of \$500 per person.

124 Further correspondence ensued between Mr Moore and Ms Howell and Scenic.

125 In a letter of 3 July 2013, Mr Moore and Ms Howell wrote:

“This was to be a holiday of relaxation and stress relief, it turned out to be one of constant extended coach trips (most were 2½ hours, one coach was without air conditioning or working toilet), early rises, packing and unpacking from ship to ship to ship with no cruising.”

126 On 19 July 2013, Scenic wrote, in the context of suggestions that other companies had cancelled cruises completely, this:

“Ship availability is a key factor in deciding to cancel a cruise. On all of our Amsterdam to Budapest cruises we have had our ships at embarkation ready to proceed as planned. Our process in these situations is to assess our ship availability and with the information at hand, make variations to our itinerary using coaches and ship swaps to manage the day to day disruptions. This strategy enabled us to provide as much of the planned itinerary as possible.

...

Attached to this letter is a tour variation summary for your cruise which outlines the variations. It represents a clear summary and includes information that guests have requested from us ...”

127 Mr Moore and Ms Howell responded by email on 24 July 2013. Besides addressing points and matters of detail, Mr Moore and Ms Howell wrote:

“We went on this cruise to enjoy river cruising and the sights of Europe in a relaxed environment. We selected your company as the travel agent said ‘Scenic was a family company and would therefore supply us with the best cruise and they are local’. We signed on the dotted line and handed over our life savings. How wrong that travel agent was. We have found and it is professionally acknowledged that good reputations are hard to earn but easily destroyed. Perhaps instead of investing hundreds (maybe millions) or thousands of dollars on advertising trips for the Today Show, you should have paid more attention to the people who will raise their voices and speak out about unjust treatment and the utter dismay you have offered, so little compensation. Those people whose money was their life savings, whose monies you invested for at least six months at high rates.”

128 Mr Moore then referred to a discussion which he had had with the Cruise Director on 12 June 2013, where he says that Mr Doyle said:

“We realise that some of you are bitterly disappointed with the way things have gone and although we wish you would complete the cruise, we understand that some of you want to leave unfortunately if you choose to leave we cannot help you with travel arrangements.”

129 Although Mr Moore and Ms Howell had taken out travel insurance as recommended, with Cover-More Insurance Services Pty Ltd, their claim was initially declined. Seemingly after the intervention of Scenic, Mr Moore and Ms Howell were paid the sum of \$1,293 each.

130 The last letter sent by Mr Moore and Ms Howell to Scenic Tours was dated 12 September 2013. It repeated many of the facts and circumstances which had earlier been referred to.

131 In particular, Mr Moore repeated the fact that so far as he was concerned, the issue was that Scenic knew prior to his leaving Australia that there would be disruptions to the river cruising part of the holiday and that in those circumstances Scenic should have cancelled the tours and refunded the money.

132 This assertion by Mr Moore of Scenic’s knowledge at a point in time prior to Mr Moore and Ms Howell leaving Australia, which was 31 May 2013, about

the disruption to cruises, was never specifically denied in any correspondence from Scenic to Mr Moore and Ms Howell. As no witness was called by Scenic, there was no direct or specific denial of that assertion by Scenic in the course of this case.

133 In the letter of 12 September 2013, Mr Moore and Ms Howell described their circumstances in this way:

“Prior to leaving Paris we were given a letter, attached, stating that the floods in Europe had caused amendments to the boat we were originally booked on, the Scenic Jewel, but the cruise would proceed as per schedule, this was a case of hope. When we arrived in the Scenic Ruby there was letter on our bed stating that there would be a refund because of the boat change and the change to the itinerary. The first ‘port talk’ from Cruise Director, P Doyle, was that the Scenic Jewel, our booking boat, was stuck in Bamberg and had been there for 8 days, this being 3 June (3 June minus eight days put us back to 25 May which we were still in Australia) and that is why we were on the Scenic Ruby. At this point the Danube/Rhine Rivers had not reached their peaks and were not likely to for a time. After travelling to Coblenz and being stuck there for four days between four boats, two portside, two riverside, we were bus/coached to Bamberg Germany (a three hour trip) where we boarded on the Scenic Jewel, our booked boat, which also we had a shower leak in our cabin, which we reported, each time we showered morning and night, so the bathroom area was continually wet so we were given extra towels to throw on the floor to stand on each morning and late afternoon because they said there was nothing they could do at that time until the boat went back to Amsterdam to have the problem repaired. In Bamberg Germany we were greeted with another letter, attached, of a refund. We were stuck on this boat moored in the industrial area of Bamberg for four days and on the fourth day we were coached to Vienna to board our third ship, the Scenic Pearl, where another letter, attached, of a refund was waiting. Notice, no word of compensation just a refund.

As one can see, we coached from boat to boat to boat, no river cruising here, but constant early starts and packing and unpacking to meet their deadlines to link up with other boats and transport, other passengers back to where we had come from. Because the boats were stuck in ports, not close to venues we booked to go on, there were lengthy bus/coach trips often two and a half hours each way. In some cases venues were cancelled and substitute hastily arranged and offered.

...

The issue is that Scenic River Cruises knew of the situation in Europe prior to us leaving Australia, at the very latest, whilst we were arriving in Paris. At this stage, like the other river cruise companies, they should have cancelled that component of the holiday and refunded our monies, instead of employing an attitude of wait and see, against all advice, and arranging alternative venues other than the ones we booked for and expecting us to participate, or just miss out regardless. ...

...

Scenic River Cruises have failed to deliver a holiday, one that was to be river cruising and seeing parts of Europe from a boat, not a bus/coach trip, using a boat as an expensive motel/hotel, not through the fact that there was flooding, through the fact that they failed to recognise facts that were evident to other cruise companies and through their own negligence failed to cancel/postpone a holiday they could not deliver on. Scenic River Cruises have in further correspondence stated that under certain clauses they can amend the river cruise to suit conditions, but to alter a river cruise to a coach tour, where there are people with varying degrees of medical conditions, is an extreme move. We would not have signed up for a river cruise holiday with the possibility of that being change to a bus/coach tour ...”

- 134 This further letter was responded to by the Customer Liaison Manager at Scenic, which, besides referring to the claim made by Mr Moore and Ms Howell on Cover-More Insurance, said this:

“In regards to our terms and conditions, we do outline in clause 2.10 tour variations that we may change the itinerary based on weather and river conditions.”

Mr Moore’s Agreement with Scenic

- 135 As noted earlier, the plaintiff had collected the large brochure which was 225 pages long, published and distributed by Scenic, from Harvey World Travel and, after a period of about four weeks, returned and paid a \$500 deposit for the cruise. Other passengers obtained an identical brochure. It was tendered in evidence. It is that brochure which will be referred to as “the Brochure”. There may have been other versions of a brochure printed and distributed, but none were relied upon in submissions.
- 136 In the course of cross-examination, the plaintiff was taken to various parts of the paperwork that he had entered into. When he was taken to the Brochure he was shown various references in it to the existence of terms and conditions. He gave evidence that he did not see, or notice, those terms and conditions. In particular, he said, and I accept, that he did not see the two pages of terms and conditions in a small font printed towards the back of the Brochure. He said, and I accept, that whilst he was taken to the page of the

Brochure showing the deck plan by the agent at Harvey World Travel, he was not taken to the two pages showing the terms and conditions.

- 137 According to his statement, Mr Moore and his wife paid the full amount for their cruise during the period 21 May 2012 and 14 January 2013. After making his final payment, he received a personalised booklet from Scenic which provided an itinerary and a map of the cruise. It also included Scenic's terms and conditions. That was the first occasion upon which he received a copy of the terms and conditions (other than as part of the Brochure).
- 138 At some stage, although he did not recall when, Mr Moore signed a copy of a document received from Scenic which included terms and conditions. This must have occurred after his final payment in January 2013. He glanced over the document before he signed it, and was taken through it by the travel agent who pointed out some parts of it to him.
- 139 Counsel for Scenic in cross-examination proceeded from a document consisting of eight pages and headed "Terms and Conditions for booking 294713". That booking number was the one provided by Scenic relating to Mr Moore and his wife in its booking advice of 6 September 2012.
- 140 The final page of the terms and conditions for the booking document had the typed names "Mr David Moore and Ms Janet Howell", but no signatures. It was apparent from the footer on the document that it had been printed out on 23 September 2014. There is no date in the body of the document itself.
- 141 In cross-examination, Mr Moore said that he did recall that the document which he had signed contained a heading which said "*This document is a legally binding contract between you and Scenic Tours*". Further, it had a note which said "*This contract contains all of the terms of our agreement and supersedes all other oral or written arguments and communications or representations*". He said he read and understood those two clauses.

142 Mr Moore was taken to clause 2.7 and agreed that he had read terms and conditions to this effect:

“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.”

143 It was also established in cross-examination that Mr Moore had read a number of other clauses including clause 2.10(f) which noted that cruise itineraries could be varied due to high or low water levels. He also thought that he had seen, but was less than clear, clause 2.10(g) which read:

“We may substitute at the nearest reasonable standard another vessel or motor coach for all or part of the itinerary and also provide alternative accommodation where necessary”.

144 Although there was no evidence provided by the defendant that dealt with the invariable business practice of sending out terms and conditions for intending passengers to sign, I am prepared to accept, in light of the answers given by Mr Moore in cross-examination, that he received a document in or to the effect of the terms and conditions document, and that he and his wife signed it and returned it before they left Australia.

145 The defendant submits, and I accept, that after reading the Brochure, booking the desired cruise and paying a \$500 deposit, Mr Moore, on behalf of himself and his wife, Ms Howell, entered into a contract with Scenic. That contract had a number of features:

- (a) on the part of Mr Moore (and Ms Howell) they were required to pay the balance of the price for the cruise by the date specified. They were required to complete and return any paperwork reasonably required of them including signing the document sent to them which acknowledged the terms and conditions of the contract after they had paid the balance of the monies due; and
- (b) on the part of Scenic, it was obliged, subject to the terms and conditions of the contract, to provide the cruise for which Mr Moore had paid. It was also obliged to arrange for Mr Moore’s travel to and from

Europe, and within Europe, as the itinerary provided for. It was obliged to arrange for the accommodation which he requested and which Scenic agreed to arrange.

146 These matters were either explicitly stated or else were implied in the contract. Scenic submitted that, in fact, it entered into a second contract with Mr Moore at the time he signed and returned the “Terms and Conditions” document, which he received after paying the entire amount of the monies due. Scenic submitted that this second contract was in identical terms to the first contract.

147 There are some conceptual difficulties with Scenic’s formulation of the existence of a second contract at a time that the Terms and Conditions document was signed and returned. The first difficulty is that the consideration paid by Mr Moore was, by that time, past. A second is that the acts said to constitute the second contract are consistent with giving effect to the obligations under the first contract. In short, there was no need to create a second contract of the kind Scenic proposes.

148 However, there is no need to make a final determination of this question because Scenic accepts that the operative terms of each contract were identical. There is no reason to think, and Mr Moore did not argue, that the Terms and Conditions did not form a part of the contract, although the way in which they were contained within the Brochure did not give them any prominence. Certainly, after Mr Moore was taken through the “important parts” and signed the Terms and Conditions document, it must be accepted that he was aware of the terms and conditions. He did not then seek to terminate the contract or cancel his trip.

149 But, it would be erroneous to conclude that Scenic did not have other obligations which were a necessary part of the contract. It accepts that monitoring and managing the services being provided were “necessary incidents” of the Terms and Conditions of the contract. That is, that in order for the contract to be successfully delivered, Scenic had to do more than just provide the cruise. Indeed, the evidence of what Scenic actually did in

respect of a number of the cruises demonstrated that Scenic itself accepted such obligations. These additional services included the provision of timely and accurate information to passengers about the cruise both in advance of the cruise, and during it. If, for any reason, the cruise could not go ahead, then Scenic was under an obligation to notify the passengers. That would be, in my view, reasonably incidental to the provision of the services to Mr Moore.

150 For example, Scenic could not cancel a cruise and then not notify the passengers as far in advance as was reasonable in the particular circumstances.

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

152 Because Scenic, as a corporation, operated in the field of the provision to consumers of recreational or travel services, its conduct in the supply of those services also meant that separately from the contract with Mr Moore, it was obliged to comply with the legislated consumer guarantees. Section 64 of the ACL prohibited Scenic from imposing any term or condition of any contract which did expressly, or else had the effect of, excluding, restricting or modifying the consumer guarantees.

153 Accordingly, Scenic had an obligation by reason of the provisions of the ACL to:

- (a) render the services with due care and skill;
- (b) provide those services in a way which was reasonably fit for the particular purpose made known by the consumer; and

- (c) provide services of such a nature and quality as might reasonably be expected to achieve the result desired by the consumer.

154 In the circumstances here, where the booking, reflected by the receipt and the “personalised booklet” received by Mr Moore, described a specific cruise by reference to the designation of that cruise and its itinerary as specified in the brochure, and the class of cabin which was booked and which was to be provided, Scenic was obliged to provide not just those travel services, but all such information as was reasonably necessary to enable Mr Moore to obtain the promised benefit of the contract, and to satisfy the consumer guarantees imposed by law.

Scenic’s Knowledge of River Levels

155 Scenic’s knowledge about the extent of the flooding and of the river levels in Europe is to be gleaned from the various documents including emails that are in evidence and the comments made by Cruise Directors to passengers. As well, Scenic tendered a series of contemporaneous, or else reasonably contemporaneous, reports compiled by the Cruise Directors as to what was happening on individual cruises as that cruise unfolded. No witness was called by Scenic to give evidence about the extent of Scenic’s knowledge of these matters.

156 As well, other documents were tendered from which knowledge by Scenic of the situation can be inferred. I accept the plaintiff’s submission that if there were reports in the newspapers or available from media sources such as television news, about the extent of flooding in the relevant areas, it could be reasonably expected that Scenic would have known about those reports and the material contained in them. Indeed, the Cruise Director on Mr Moore’s cruise knew of these reports because he discounted them saying that they were inaccurate. I do not think that he would have done so unless he had read, watched or heard them.

157 I have attempted, where possible, to trace Scenic’s knowledge of the situation in chronological form. In tracing this factual information it is important to

recognise first, the length of the river system being traversed between Amsterdam and Budapest (about 1,790km), and the fact that over that length there are many different catchment areas feeding into the rivers and that the flows of water from one part of those catchment areas would not always be identical with other parts. Secondly, it is important to recognise that reports of changes in river heights on the Saône/Rhône river cruises were not directly applicable to the cruises on the Rhine, Main and Danube Rivers.

- 158 Nevertheless, a report of severe weather conditions and rising river levels in one region in Europe is relevant in determining whether a company such as Scenic was or ought to have been alert to, taken notice of and, where appropriate, reacted to weather conditions in the areas along which their cruises were intended to travel.
- 159 As will be apparent from this chronological overview, Scenic's knowledge of weather and river conditions was first identified with respect to the cruises which were, or else were to be, taking place in France on the Rhône River and the Saône River. It seems from the evidence that these rivers experienced high water levels and flooding at an earlier point in time than the rivers further north in Europe.
- 160 Further, in the course of this chronology, it will be seen that other companies offering river cruises knew, said and did various things with regard to their cruises. These other companies were competitors of Scenic and, speaking generally, offered similar cruises in the same locations. The evidence did not identify any significant differences between their knowledge and skill when compared with Scenic's knowledge and skill. I infer that if any one of those companies knew, at a point in time, any particular information about the weather, river heights, and the possibility (or impossibility) of navigation on a river, then Scenic also knew of those facts or else ought to have known of them. The internal Scenic correspondence, and the statements which it distributed, do not make any claim that the competitors had any source of information which was confidential and not publicly available.

161 Scenic had early notice of high water levels on the French rivers. On 30 April 2013, Justin Brown sent an email to Lucas Sandmeier which confirmed that a barbeque had been cancelled. The email said:

“Rain and rain and more rain. Won’t be able to dock in Tarascon.”

162 Later that day Lucas Sandmeier responded to Justin Brown, passing on information which he had received from the “*nautical agent in Lyon*”. It read:

“Raising water levels on the Rhône, jeopardising cruising. Newline April 30: decision to leave Chateauneuf–de-Pape now (rather than 1400 as per schedule) to be sure ship can go to Avignon at least. Guests will return to ship by motorcoach.

May 1: Tarascon cannot be reached currently, as water level is too high for docking location. Improvement for tomorrow unlikely but monitored.”

163 The contents of this email message were passed on to a number of members of the Scenic staff, including the Cruise Director on the Scenic Emerald. It appears that the cruise director on each ship had an allocated Scenic email address.

164 On Wednesday 1 May 2013, a Scenic Cruise Director’s report noted that the water level on the Rhône River was still rising and the ship was unable to sail upstream from Avignon to Chalon. On 4 May 2013, the report noted that the Captain of the ship had been informed that the ship would not be sailing that day, but would remain in Avignon. On 6 May 2013, a number of guests arrived to board the Scenic Emerald to undertake a cruise on the French rivers. The Cruise Director’s report notes this:

“I started the welcome briefing with an explanation of the non-sailing situation and of the rearranging of the program. Some guests ... started to ask questions about the balcony situation as we are docked next to a ship and they paid a lot of money for their cabin and could not enjoy their balcony; about when we would be sailing – which I was unable to answer; and worried about too much coaching on the last day to get back to their airports. These few people were making their unhappy feelings known, but the rest of the group told them to sit down and be quiet.”

165 On Friday 3 May 2013, Mr Sandmeier was concerned to obtain confirmation of a statement he had heard, that the Saône River was closed until Wednesday. In response to that emailed query, he was told:

“Yes, I confirm. Saône is still very high at the moment, and the situation won't get better until Tuesday/Wednesday, maybe not before 1 week! We had storms and rain again yesterday evening and the weather forecast is not good at all: <http://france.meteofrance.com/> with storms this morning on the whole Saône area.”

166 On Saturday 4 May 2013, an email recorded that on the day before, Friday 3 May 2013, the water levels had risen again and had gotten worse than before. It was not anticipated that the ship could sail for the next two days.

167 On Monday 6 May 2013, Lucas Sandmeier sent to Mr Justin Brown and to Ms Donna Willis an email describing the river conditions on the Saône/Rhône Rivers. At that point in time the Saône/Rhône river system was not navigable due to high water levels. It was thought that the Rhône would become navigable sometime on the following day, but that the Saône would be closed for at least two to three more days. I observe that this estimate was based upon the fact that it was thought that the Saône River had peaked on 6 May 2013.

168 The email also noted that guests were not pleased about the situation, and that British guests who had been informed when they were still in England “... *have chosen not to fly to France at all, and have all cancelled*”. Mr Sandmeier sought instructions as to what response Scenic wished to provide to other guests. Whilst it may be accepted that different legal obligations may have applied to British guests: see *The Package Travel, Package Holidays and Package Tours Regulation 1992 (UK)*, the information that the guests had all cancelled, made plain to Scenic, if it was not otherwise apparent, that a significant proportion of passengers were not interested in availing themselves of a cruise compromised by difficulties in sailing and the provision of substituted itineraries.

169 An Avalon Waterways (“Avalon”) letter of the same date to two guests dealing with a cruise on the two French rivers, informed its guests as follows:

“Due to a sudden rise in temperatures causing the snows of this past long European winter to melt very rapidly, the river Rhône has been experiencing high water levels.”

170 Avalon Waterways was another organisation offering river cruises in Europe which were broadly similar to Scenic. No substantial difference was identified in the evidence between Avalon and Scenic.

171 This reference to high temperatures and the melting of snow is a piece of information which, I am satisfied, would have been public and which Scenic are likely to have known of. If they did not know of it, they ought to have. It would at the least have alerted them to the requirement to make enquiries about whether the phenomenon would have affected the rivers to the north along which their cruises would travel.

172 If it was not otherwise obvious from the nature of their business, it would also have been clear to Scenic on 6 May 2013, from a letter received from a passenger, Jacqueline Archer, who was intending to embark on the Saône/Rhône cruise, that the provision of accurate advice to guests at the earliest possible opportunity was a critical matter for the guests. It would also have been clear that guests, other than those from the UK, learning of the situation might wish to cancel their trips and not travel to Europe.

173 Also, on 6 May 2013, Ms Scoular sent an email to Justin Brown which informed him that due to high water levels currently on the Saône River, “... *the sailing of all passenger ships has been suspended*”.

174 An email dated 6 May 2013 from Mr Brown to Mr Sandmeier and others is informative of Scenic’s attitude to the way in which it would go about its business of providing cruises, notwithstanding the very high water levels and the closure of the Saône and Rhone Rivers. Mr Brown said this:

“We will not be offering a refund for this Emerald sailing. The cruise is operating and whilst there will be changes due to circumstances outside of our control, we are not offering refunds to the guests who cancelled.

In terms of guest management, Chris may offer an action to the UK guests, but that would be his local decision.

Obviously the situation is fluid and we don't yet have an itinerary, however we will be focussed on building the best possible experience and offering as much of the published itinerary as we can. We will evaluate the impact if any undelivered itinerary when we know the impact.” (sic)

175 In light of the fact that Scenic did not call Mr Brown to give evidence, I would readily infer that his view, speaking on behalf of Scenic, was that in order for Scenic to avoid the financial consequence to it arising from cancellation of a tour which may have necessitated the provision of a refund (clause 2.9 of the Terms and Conditions) or the provision of a tour at another time, it was determined to operate the cruise although the situation was unclear and although no itinerary could be determined for the cruise. Mr Brown's view, I would infer, was that if this lead to passenger-instructed cancellations, then no refund would be offered by Scenic. In other words, Mr Brown was seeking to ensure the best financial return for Scenic, by providing a substantially different holiday than the booked itinerary and relying on passengers to cancel which would not involve any expense to Scenic.

176 On Tuesday 7 May 2013, an email recorded that the water levels on the Rhône and Saône rivers were finally going down. However, the description of the water level in that email seems to have been rather short-lived, having regard to the report of the following day.

177 On that day, the unsatisfactory nature of the ship's docking in Avignon and not moving was recorded by the Cruise Director in this way:

“Tonight had the visit from the police once again, advising us that we were breaking the law by being docked here in Avignon with passengers on board. A decree was passed on May 3rd making it illegal for passenger ships to dock at Avignon during high water. The police advised us that we should consider disembarking guests and sail the ship to one of the three legal docking points i.e. Arles, Chateauneuf-de-Pape and St Pierre.”

178 Notwithstanding the visit of and advice from the police, that ship seems to have remained in Avignon.

179 On 8 May 2013, Mr Sandmeier was informed of the following:

“... the situation is not easy at all in Avignon.

1. Sailing to Tarascon is impossible at the moment because the water has overflowed the pontoon.
2. I would suggest to stay in Avignon until May 10 ...
- ...
4. for the water situation actually we can't sail upstream Avignon, but the water decreases and we can sail the passages through Bollene Lock up to Lyon, everything is free. The situation is definitely getting better. So the schedule with the longer stay in Avignon is good and right on time.”

180 The first day upon which this cruise ship was able to sail was 11 May 2013, when it sailed to Viviers. However, this could only occur if all passengers disembarked and were transported by coach north from Avignon to Viviers. Put differently, cruising not available for passengers, but the ship could be relocated.

181 On 16 May 2013, in a letter from Ms Scoular of the Scenic Tours Operations Department to guests, it was noted that:

“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.”

182 It was not clear from the evidence to whom this letter was sent. I infer from the terms of it, including the reference to previous advice, and the specific identity of the cruise director, that it was distributed to guests on the cruise which was then underway.

183 On 20 May 2013, the note recorded that the ship was unable to sail to Tournus because of the high water level. It read: “*According to the Captain, the docking in Tournus is under water*”.

184 Although the events recounted in this and the following paragraphs do not relate to the situations on the French rivers, they are included here, in their chronological order.

185 On 21 May 2013, in an email sent within Avalon, it was reported that one of its ships was docked in Cologne and was supposed to enter the Moselle River on 23 May 2013, but that river was "... *carrying high water*". It was clear that there was some real uncertainty as to whether the ship could proceed along the Moselle River from Koblenz.

186 Whilst none of Scenic's tours proceeded along the Moselle River, the height of the Moselle River remained a relevant contextual fact because it flowed into the Rhine River at Koblenz. The height of the Moselle River is a fact which would have been known to Scenic, or else ought to have been known to it, because it was readily capable of being ascertained from visual inspection or else from specialist weather and river condition websites which were freely available on the internet. As well, the height of the water in the Moselle River would be likely to have an impact on the height of the Rhine River.

187 On Friday 24 May 2013, Lucas Sandmeier informed Justin Brown, in answer to a query about the water level at Lyon, the following:

"Two official websites to check water levels:
<http://www.hydroreel.new.fr/>
<http://www.vigiscruces.gouv.fr/>

The critical water level for a safe passage at the Pont de Feuillée at the entry of the Rive Saône is 2.65 metres. Currently we stand at 3.15 metres. Water levels of Saône and tributaries to Saône start dropping 150km upstream. Operation of Lyon excursion today out of Macon. Ship will approach Lyon as much as possible today to be able to react quickly if passage possible. Excursion of Vienne tomorrow will be operated from location where ship will be tomorrow morning. Will have more details on this later today."

188 On Sunday 26 May 2013, Lucas Sandmeier was informed about the state of the French rivers that "*according to our Captain, there is no chance for the ship to move. Water level is rising*". It was suggested that it would be

sensible to book hotel rooms in Avignon until the following Saturday to avoid passengers being relocated after Wednesday.

- 189 On Monday 27 May 2013, Lucas Sandmeier responded to Mr Beilmann giving instructions about the movement of the ship. What is of particular importance is that it is clear that Mr Sandmeier had access to various websites setting out the water levels. He commented upon the information that he received. He said that the guests were being temporarily disembarked, and were to stay in Avignon. The email makes it clear that Scenic did not have a firm itinerary for the balance of the cruise.
- 190 On Tuesday 28 May 2013, Mr Sandmeier was given an update on the situation on the Saône River. He was told that the level of the water, whilst going down, was still too high to cruise south. He was further told that weather forecasts suggested rain again in the next two days.
- 191 On Wednesday 29 May 2013, Mr Sandmeier informed members of the Scenic staff that the Scenic Emerald was still in Macon. He noted that the water levels were dropping, but as at 8am that morning water levels at the Pont de Feuillée in Lyon did not permit safe passage.
- 192 The position of the more northerly waterways between Amsterdam and Budapest was the subject of considerable documentary evidence.
- 193 On 28 May 2013, one of the Scenic ships, which on 20 May 2013 had commenced a cruise from Budapest to Amsterdam, reached Bamberg. Instead of staying there for one evening as was planned, it remained docked in Bamberg. On the afternoon of 31 May 2013, the passengers from that ship were sent by coach to Rudesheim, where they embarked on the Scenic Ruby and proceeded with their cruise to Amsterdam. The coach trip was about four hours in length. This was the ship which Mr Moore joined in Amsterdam on 3 June 2013. These notes confirm his evidence that the Scenic Jewel was stuck in Bamberg as the Cruise Director informed him when he joined his cruise.

194 On 29 May, Mr Brown was informed by Mr Koch that a number of guests were considering leaving the cruise on the French rivers and were wanting to know the amount of compensation they were to receive.

195 Mr Brown's attitude about responding to those passengers (and any other similar) concerns, including his perception of Scenic's obligations, can be further seen in his reply email of 29 May 2013, to other staff members at Scenic. He said:

"For any cruise we have the possibility of alterations due to water levels, navigation issues and the operation of the waterways.

Within the terms and conditions we mention the possibility of alterations at 2.7 and 2.10 (d)-(h).

In the circumstances where we continue the cruise or tour and alterations are made due to circumstances out of our control we do not offer refunds or compensation should the guests choose to leave the tour.

In this cruise as per the previous cruise, we have continued to offer the cruise and its associated attractions as best we can in the circumstances. Guests can of course choose to partake in the altered delivery or they can stay on board if it is safe to do so.

If any guests want to leave the cruise, we try to encourage them to stay. However, if they do decide to leave the cruise we will offer to make the arrangements they require, but all additional costs are at the expense of the guest."

196 Mr Brown's statement in the fourth paragraph of that email is, to say the least, a curious one. It reflected a deep divide in the understanding of what Scenic thought, and a rational common sense approach. As at 29 May 2013, the passengers on the French rivers cruise, Cruise 1, had not experienced any cruising on a ship at all. Although they had slept overnight on a ship, they had for the previous eight days since first embarkation been transported by motorcoach to various destinations in France, often involving very long and tiring bus trips.

197 As a matter of common sense, such an extended coach tour could not be described as a cruise. Nor could the changes which had been made rationally fall within an "alteration". It was a completely different holiday.

Mr Brown and Scenic clearly did not accept that view, and persisted then and later with the proposition that a cruise had been undertaken in accordance with their contractual obligations. Mr Brown did not articulate any knowledge of, nor did he pay attention to, the applicable consumer guarantees imposed on Scenic by the terms of the ACL.

198 This failure by Mr Brown to attend to the ACL consumer guarantees is surprising having regard to the tone of an email responding to his email of 29 May 2013.

199 Ms Lindsay draw attention to the UK regulations, telling Mr Brown that Scenic's approach was to manage passenger-requested cancellations by relying on the Terms and Conditions of their booking agreements, but ultimately that resort was had by passengers in the UK to the applicable UK regulations on their return from cruises "*... which in the end we must abide by*".

200 Mr Brown acknowledged receipt of this information, but seemingly at no time considered this applicable to the Australian statutory requirements for Australian passengers.

201 Mr Sandmeier wrote an email to passengers on Thursday 30 May 2013, in reference to the cruise on the Saône and Rhône Rivers. That email reveals the knowledge of Mr Sandmeier who appears to be working in Europe and to be based there, more generally about weather conditions in Europe. He said:

"The adverse weather conditions over the past few months have caused various levels of disruption to all forms of navigation on many major European waterways. Rising water levels and the consequential increase of water current have a direct influence on the ability to safely manoeuvre the rivers through locks, bridges and docking births. At all times we follow the instructions of the Waterways Authorities and aim to minimise the disruption caused by these water level issues and to sail as and when it is permitted."

202 This email enables an inference to be drawn that the weather and river conditions which were being experienced at about that time were not new,

and had led to disruption on various European rivers. That is to say, Scenic knew as at 30 May 2013, if not significantly earlier, that:

- (a) there had been adverse weather conditions for the past two months;
- (b) there was a real risk of disruption of any cruise taking place on a European river;
- (c) there had been monitoring of the position with respect to disruption of navigation on the rivers; and
- (d) it was aware of the requirements of authorities responsible for navigation and it followed these requirements.

203 It follows from this that Scenic had sufficient time to consider how and when to inform passengers on cruises taking place around and after this time of any facts, matters and circumstances which they chose to tell them. For example, there was no reason why the position as described in Mr Sandmeier's email of 30 May 2013 would not have been communicated to passengers on cruises intended to depart over the next month.

204 On Saturday 1 June 2013, Mr Sandmeier reported as follows:

“Rhine – high water levels. Rain (mostly heavy) forecasted through Sunday. Navigations may be impacted in certain areas.

Main – Maximum water levels for navigation at any time of the day exceeded in many areas. Navigation stopped. Rain (mostly heavy) forecasted through Sunday. Water should peak on Sunday and then go down. Maybe as late as TUE, June 4 before the Main River reopens. Will reopen for operation in daylight first, then 24 hours navigation with further decreases. And then a few critical bridges to pass under.

Danube – High water levels. Rain forecasted through Saturday. Water expected to peak Saturday/Sunday and then start to recess. Critical areas currently. Lock in Melk closed – reopening unsure. Passau still open but water rising quickly. ...

Main – Danube – Canal - Depending on situation on the Danube and the Main the Canal between these two rivers may be closed.”

205 On 2 June 2013, there was an exchange of emails between Mr Sandmeier and Mr Brown. It is apparent from that exchange that Mr Brown was

attempting, from Australia, to monitor the river heights of the Rhine River. He was using the internet, and visiting sites on it to find out information. Mr Sandmeier provided three internet site URL addresses to Mr Brown. These sites each provided comprehensive, timely and accurate details of the water levels of the rivers in Germany and Austria. I am satisfied that the websites had not just come into existence at that time. The probabilities are that they had been in existence and operating for some years and could have been accessed throughout April, May and June when necessary.

206 At 5.06pm on 2 June 2013, which was the evening before Mr Moore embarked on Cruise 8 in Amsterdam, Mr Sandmeier reported to Mr Brown that, having regard to the water levels on the Rhine River at Basel, of which he provided a photograph:

“This water now will flow towards Amsterdam. Interruptions of Rhine to be expected. Will update when more information is available.”

207 Having regard to the geography, these interruptions would be on the Rhine River between Mainz (where it joins the Main River) and Amsterdam.

208 He also at about that time told Mr Brown this about Cruise 8:

“Currently it is forecasted that the water levels on Monday [3 June 2013] allow navigation to Bonn (although very close to maximum water level for navigation). Koblenz on Monday is forecast to be closed for navigation. We may get to Cologne or a little beyond on Wednesday June 5. ...”

209 It is apparent from the map provided that Cologne is about 300km upstream from Amsterdam, and that Koblenz is a further 110km upstream. This Scenic Cruise was due to reach Cologne on 5 June 2013 and Koblenz later on the same day.

210 According to an email from Ms Koch, as at the evening of 1 June 2013, the Scenic Jewel was stuck in Bamberg, and the Scenic Sapphire was stuck in Melk.

211 On 2 June 2013, which was the day before Mr Moore's cruise was due to embark, Mr Brown reported to Mr Glen Moroney, the Founder and Managing Director of Scenic, this:

"FYI.

Water levels on the Rhine and Main are very high, rain continuing. We have enacted 1 swap, and will have 5 ships possibly stuck today. Moving to land (coach and hotel) is challenging and capacity is limited. We are working on it with STE and I will advise on the escalations.

It may be that we have to just stay on board and then try to make it to disembarkation/embarkation points as best we can and make a refund.

On cruise critic I see that Avalon and Viking have started cancelling cruises."

212 I infer that the reference to "cruise critic" is a reference to a publicly accessible website, and from which information may be obtained about the cruising activities of a range of cruise providers on, at least, the rivers of Europe.

213 He then extracted into the email the publication by Avalon which was apparently accessible on the Cruise Critic website. It said:

"Due to the unprecedented high water levels in Europe, we have had to make the very difficult decision to cancel the June 2nd departure of our legendary Danube cruise aboard the Avalon Visionary.

We are currently contacting all guests scheduled to depart for this cruise (and the travel agents who booked them) to offer a refund which includes:

1. providing a full refund on the cruise;
2. providing all travellers who booked air with Avalon a full refund on air (including covering change fees);
3. covering change fees for air for any passengers who did not book air with us.

We are also offering travellers a \$500 credit on a future Avalon cruise."

214 Early on the morning of Sunday 2 June 2013, shortly after the email to which I have just referred, Mr Brown wrote to two members of Scenic's Operations Department of saying:

"The situation worsens on the Rhine/Main. I will be talking with Lucas today with our options.

I notice on Cruise Critic that Viking and Avalon have started cancelling cruises. I have advised Glen that it is not improving and we may not be able to make land alternatives part of our strategy.

CXL and return home options will be considered today.”

215 I take the abbreviation “CXL” to mean cancellation.

216 This email refers to the possible inability of Scenic to “... *make land alternatives part of our strategy*”. Again, this reflects Scenic’s approach to the services which it was supplying. It felt entitled to substitute a “*land alternative*” for the luxury all-inclusive cruising experience which it had promoted and on the basis of which intending passengers had booked.

217 In an email on Sunday 2 June 2013, sent by Mr Brown, he reveals planning for the then existing cruises from 2 June 2013 to 8 June 2013. It is clear from the spread sheet attached to that email that, at least as at 2 June 2013, it was known by Scenic that many of the ships would be restricted to being docked in particular locations for significant periods of time. As well, it is apparent that there would be a significant number of excursions which would operate in a limited way or with deviations, or could not be operated at all. It also seems apparent that not all of the intended ports would be reached by those cruises. These restrictions also meant that if cruises were operated there would be extensive travel required by coach. The intended cruising itineraries, it was clear, would be substantially interrupted and would not attain what passengers were contemplating and the services which Scenic had promised it would provide.

218 Against the background of that knowledge, Mr Brown wrote this in his email to Mr Sandmeier:

“I know that Avalon and Viking have already CXL some cruises. Our ‘advantage’ at the moment is that we have our cruises underway and will now just be dealing with what to do after MON.

Our options beyond Tuesday with current cruises will be:

- (i) stay on board and continue some form of cruise to get ships to the disembarkation point;

(ii) offer guests a partial refund and to return home.” (sic)

219 Mr Sandmeier responded to this email, saying:

“Ships will certainly not move on Monday and likely not for a few more days.”

220 This email exchange occurred before Mr Moore and his fellow passengers embarked on Cruise 8.

221 Early on the morning of 3 June 2013, Ms Scoular received an email from Ms Graeff. Ms Graeff reported that, due to the rain and high water, Salzburg could not be reached by coach travel from the river, some bridges in Salzburg were closed and that Český Krumlov was underwater. She said that it was not possible to go there and that there were difficulties in arranging other excursions. The excursions to Salzburg and Český Krumlov were included as Scenic Free Choice tours whilst the ship was docked in Passau.

222 According to an email, within the APT Group, the Main and Danube Rivers were recorded at that time as being closed altogether, and major flooding was happening. It was anticipated within the APT Group that the Rhine River would be closed from that day. It recorded the following:

“There are plans in place to swap guests off ships etc., but the greater problem is that ships will not be able to get to their embarkation point to pick up the new guests. We will be working today to determine whether we will need to cancel some cruises ...”

223 On 3 June 2013, Ms Scoular on behalf of Evergreen, sent a letter to their guests saying this:

“Northern Europe is experiencing unexpected high river levels causing impacts to the navigation on the major rivers as well as impacting residents and towns.

Navigation on the rivers is governed by the Waterways authorities who make the decisions on whether or not navigation and docking is permitted or not. The high water levels cause issues with clearance under bridges, the operation of locks and the use of berthing docks. The situation can alter quickly as various river sections return to normal levels and navigation can continue.

As you are aware, the high water levels on the River Main have resulted in a revised itinerary for your cruise. Accordingly, we have been looking at the best outcomes to be able to still deliver the majority of your touring itinerary. To do this it was necessary to accommodate you in Salzburg for two nights.”

224 On 3 June 2013, Ms Koch noted that four Scenic ships were currently stuck and unable to move. The Scenic Pearl was in Vienna, the Scenic Sapphire was in Krems, the Scenic Diamond was in Mainz and the Scenic Jewel was in Bamberg.

225 On 4 June 2013, it would appear that Scenic was acutely aware of the difficulties created for cruising on the northern European waterways. In an email headed “Re: STC Cruising/Emergency Plan/June 1–8 2013”, Mr Brown wrote:

“In reference to guests wanting to exit the cruise:

- Our position is that with half the cruise complete we would recommend that even with the ship swaps, we are still focussed on provided the itinerary highlights as best we can.
- Although not a commitment, we are hopeful that after the ship swaps we will continue cruising later this week for the sections leading to disembarkation in a normal manner.
- We do not see risk to their disembarkation, they will make the city and the day of disembarkation so any forward plans do not have to be altered.
- We are able to provide all meals and inclusions and remain on ship accommodation to the guests and at this stage we are not moving to hotels.
- If someone wants to voluntarily leave the cruise, we will offer them our best services to facilitate this at any time, at their expense.
- Any guest that wants to escalate a decision to exit the cruise will be managed case by case involving their respective market owner.
- Key for us is the ability to make an alteration, but still deliver the itinerary and remain on Scenic ships.
- What will it take for us to cancel the cruise and end it earlier than planned – this would only happen if we foresaw circumstances that indicate we could not offer any reasonable services and that there was risk to the planned disembarkation place and time. At this stage we are not in that position and do not foresee this happening.
- We are in the fortunate position of having our own ships of the same quality and inclusions that enables us to do the ship swaps and deliver the cruise with the least interruption. Other companies do not have this ability and have no options for their guests other than extended hotel stays.
- On the completion of the cruises we will review what we have been able to deliver to assess the actual impact of this situation.”

226 Within the Avalon cruise company, the situation was clear to them very early on the morning of Tuesday 4 June 2013. An email sent at a little after 5am said:

“A. GENERAL SITUATION.

(a) weather

Heavy Rainfalls combined with melting of recent snowfalls have caused extreme water levels on Rhine, Danube and its tributaries.

The centre of this low pressure area is going to move within the coming 24 h from Bavaria towards Eastern Germany (Elbe area) and Czech Republic.

(b) cities and traffic lines

Several cities along the rivers Main and especially Danube have been flooded and the water levels are higher than in 2002. These cities have unaccessible town centres and part of their Public infrastructure was shut down or has been destroyed.

Several railroads in Austria, Germany and Czech Republic have been shut down, due to the current flooding.

Some highways in the same areas have been closed and local detours have been set up, causing additional traffic jams and long delays.

Air traffic, some flights were cancelled mostly feeder flights to long haul flights and local flights, due to the current situation.

Local authorities have proclaimed ‘state of emergency’ for several cities and areas.

Prague: the city centre is closed due to the floods;

Regensburg: the city centre is closed due to flooding

Passau: the city is practically underwater and the centre is only accessible by boat.

Wachau Valley: flooded.

Vienna, still OK.

Bratislava OK - but restricted traffic.

(c) Ship traffic in rivers

Rhine: We have received confirmation that the river is closed between Strasbourg and Bonn.

Main; the Main river is closed between Mainz and Bamberg

Main-Danube canal: closed in its entire stretch between Bamberg and Nuremberg.

Danube: closed between Regensburg and Budapest.

...

C) FORECAST

In several areas we expect the peak of the wave to pass by during the coming night so that we might see the first falling water levels, by tomorrow. Still we do not expect a major change in the situation, till Wednesday. Passau reports for the time being a situation far worse than the 2002 flooding.

We do not expect the movement of the first ships before the end of this week.” (sic)

227 The email also recorded that seven of the nine vessels operated by Avalon were stuck in various locations and unable to move, the eighth was moving from Amsterdam to Cologne, but it was expected to stop at Bonn, and the final one was sailing from Cologne to Amsterdam. No interruption was anticipated for that ship.

228 Although this was an email within the Avalon Group, the information which is recorded about the general situation, the state of the various cities, the closure of rivers and the Main-Danube Canal, and the general situation including that they did not expect to be able to move their ship before the end of that week, were all facts readily available to Scenic. If they did not know them, they ought to have. In the absence of any evidence from Scenic to the contrary, I would readily infer that all of these facts were known to Scenic by the time of the email, if not earlier.

229 Early on the morning of 4 June 2013, Ms Willis sent an email about the two cruises which had departed from Amsterdam and Budapest on 27 May 2013. With respect to the cruise leaving Amsterdam, she reported that the water level situation remained a barrier to navigation and access to some towns and villages, in particular on the Main River. She said:

“Whilst the river situation is improving and improved weather is predicted, we remain focussed on delivering as much of the planned itinerary as best we can in these circumstances and that safe carriage of [the] guests to their planned disembarkation point and connection to their next tour or onward travel.”

230 It seems that this was an information sheet intended to be sent to travel agents and anyone who made enquiries about the situation.

231 This email was in response to an email from Mr Sandmeier sent some hours earlier in the early hours of 4 June 2013. It said:

"The re-opening for navigation of the various rivers is very uncertain. Indications are:

Rhine:

As the high waters move downstream, temporary interruption or closing of certain river stretches are expected at various times. No damage along rivers.

Main:

Water level peaks reached. Tributaries also peaked off. Will take some time for water levels to get back to navigation levels. Some damages along the rivers. Effect to navigation possible but unknown yet. Optimistic estimate for re-opening is Thursday. It may take as long as to the weekend though.

Main-Danube-Canal:

This stretch is likely to open before the Main River. i.e. navigation south towards the upper Danube may be possible earlier than cruising north towards the Rhine.

Upper Danube (Kelheim to Melk):

Severe flooding. Passau has reached highest water level in 600 years. Major damage along rivers, and likely to the river infrastructure (locks, docking places). Effect to navigation likely but unknown yet. Optimistic estimate for re-opening is the weekend. It may take considerably longer, however, to pass the worst hit areas such as Passau."

232 The plan which Scenic had in mind with respect to the passengers on its cruises is expressed also in this email. The context demonstrates that ensuring that passengers were at their final point of disembarkation on time was most important. It says:

"To achieve our plan to move guests close to the port of disembarkation, we plan to:

- Utilise the stationary ships as accommodation, and base for regional excursions. Threshold for duration of transfer for visit of attraction is 2 hours one way. If the scheduled excursions per two occasions can be executed within the threshold transfer time, we will operate the regular excursions. If not, we are offering alternative excursions.
- Swap ships to move closer towards the disembarkation port. ...

...

Instructions to CDs for guests approaching them to return home.

Guests requesting to return (only to be used when approached – do not promote!).

In reply to guests requesting to leave the tour, we would assist guests in making changes to their travel arrangements to travel home. As the current situation is the result of an act of God, any additional cost for such arrangement has to be covered by the guest, however. Also, the unused portion of the cruise is **not** subject to a refund. Guests choosing to abandon their tour should contact their booking agent upon return in their homes.”

233 On 4 June 2013, in an email from one of the other cruise companies describing a decision to cancel various cruises, the observation was made that there continued to be high flood waters, the Danube and the Main continued increase in water levels and Prague had severe flooding. These are facts which would have been known to the staff of Scenic.

234 On 4 June 2013, Mr Brown communicated to staff that it was intended to operate the cruises departing on 10 and 12 June 2013. He added this:

“If guests request to CXL their booking on either 10 or 12 June, we will agree to this.”

235 He added some terms and conditions with respect to cancellation. His position was made clear in an earlier email to Ms Willis in which he said:

“In response to any queries about voluntarily CXL – we will provide full refund as just advised. But our position today is that we will operate next week’s cruises.”

236 What is clear from this email is that Scenic recognised that it was reasonable and appropriate for passengers booked on the identified cruises to cancel their bookings and receive a full refund. The nominated cruises were those due to embark in six and eight days’ time respectively being Cruises 10 to 13 inclusive. However, the email demonstrates that Scenic was not willing to make its position clear to passengers on those cruises voluntarily, and would only do so if asked. At the same time as Scenic recognised that cancellation of these cruises was reasonable and appropriate, they were maintaining a public position that the cruises would operate, apparently without any stated or identified disruption. The inconsistency between Scenic’s external and internal position is readily apparent. No explanation or justification for this was offered in evidence.

237 On 4 June 2013, Mr Brown became aware that another cruise company, APT, had published an urgent release with respect to European flooding. In dealing with the statement, Mr Brown informed Mr Moroney that:

“We are on top of this and have issued guest and agent bulletins today for all current and upcoming cruises. Having our own consistent fleet and ships at both ends of the Main, has given us an option perhaps others do not have.

Our overall position is to manage the current cruises as best as possible while we plan for next week.

It is a changing environment and we will be advising any significant changes.”

238 The APT statement to which the email made reference included the following information about APT’s approach to the flooding situation:

“In response to the unprecedented flooding in central Europe that is causing major disruption to both towns and waterways and following liaison with local authorities, I can confirm that APT is adjusting its current cruising itineraries and that the decision has been made to cancel four forthcoming sailings.

Our priority is ensuring delivery of itineraries as advertising in our brochure and of course the safety of our passengers and crew. This has been the foundation of our decision to make changes to our itineraries and sailings.

...

The decision to cancel four of our forthcoming sailings has been guided following an in depth assessment of current and forecast weather levels for the coming days.”

239 It is interesting to note the different language used by APT.

240 The four cruises which were cancelled were between Amsterdam and Budapest, departing on 6, 7 and 8 June 2013.

241 Mr Brown was informed on the same day that in addition to APT, two other cruising companies, Uniworld and Avalon, had cancelled a number of cruises. Although the evidence does not provide the details of these cruises, Scenic could have established those facts easily.

242 Mr Brown prepared on 4 June 2013, what he described as “*forward looking statement*” which was obviously for distribution to passengers and travel

agents. I would also infer, that this was a statement which was intended to be published on Scenic's website, and available to the public generally.

- 243 Significantly, Mr Brown did not mention the prospect of any cancellation. He did not seek to differentiate Scenic's position from other suppliers. Rather, he remained positive and optimistic about the situation. His public statements played down the significance of what was occurring on the rivers in Europe. In so doing, the statement concealed Scenic's internal position that it would offer a full refund for guests on the identified cruises if requested. He described the operational position in this way:

"The current unexpected high water level situation has impacted navigation and access to some towns and villages in particular on the Main river in the past week.

...

... Dealing with high and low water levels is a seasonal event in Europe, and although we have had some ship swapping, we have been able to operate our current cruises with some amendments. ...

We are currently scheduled to operate our June 10 and June 12 departures without impact to embarkation or ship availability, we are very mindful in providing our guests with the inclusions Scenic is renowned for. These high water situations are challenging, however we remain committed to operating in a safe and responsible manner.

Our experience with these natural events on the river has us watching the situation closely and the next 72 hours will provide improved visibility to the outlook for the next week."

- 244 On 6 June 2013, Viking Cruises took the decision to cancel a number of cruises between Amsterdam and Budapest, or Nuremberg and Budapest because of the fact that:

"The Danube River will continue to be closed from Nuremberg to Budapest till June 16th."

- 245 This information that the Danube River was closed until 16 June was, or else should have been, known to Scenic. The information was highly significant because when cruising from Amsterdam in an easterly direction, each cruise was planned to arrive in Nuremberg on the morning of the eighth day of the

15 day cruise, namely at about the halfway mark. It also meant that there could not be any cruising for the balance of the scheduled trip for cruises travelling in an easterly direction. For cruises embarking in Budapest, and travelling westward, the itinerary provided for Nuremberg to be reached on the afternoon of the eighth day. The effect of the closure of the Danube River meant that those passengers, rather than cruising for the first half of their intended tour, would be covering the distance by motor coach, staying either in hotels or else on board stationary ships. On any view, the closure of the Danube River presented a very significant impact on the planned cruise itineraries.

246 There is no evidence that Scenic reacted in any way to this fact, other than maintaining the Panglossian view previously expressed by Mr Brown in his forward looking statement. There was no change to the position that cruises would be operating the scheduled itinerary "*with some amendments*".

247 On behalf of Evergreen, Ms Scoular sent out two "*e-blasts*" to travel agents and guests with respect to Evergreen Cruises which had departed Amsterdam on 25 May 2013 and also on 8 June 2013. The contents of these e-blasts make it plain that ships were not able to sail into Budapest because of the high water levels. Those passengers who were departing on 8 June 2013, were told that they would not be able to embark on the Amadeus Silver in Budapest and would, accordingly, be accommodated in a hotel in Budapest for two days. Those travelling to Budapest were given similar information. What is of significance from these "*e-blasts*" is that it was known to Scenic that Budapest was simply inaccessible at that time because of river heights, and that the Danube River was closed.

248 It also appears on 6 June 2013, that Uniworld Cruises made an announcement that they had cancelled several cruise departures along the same rivers on which Scenic was operating.

249 In that statement, which was a public statement, as well as the departures which were cancelled, it was said:

“... and in some cases, cancelling the remainder of the cruises. In the case of a cruise cancellation with guests already on board, we will be providing a full refund and a future cruise credit. Our guests will be given the option to stay on board the ship while we assist them in securing alternative arrangements or flight home.

We have now completed an updated review of all sailing scheduled to depart between June 10 and June 16 2013.

- Unfortunately, we are forced to cancel one additional sailing – the June 16 European Jewels departure on the River Empress. The ship is currently in Budapest and given the current conditions on the river she cannot reach Amsterdam by the June 16 embarkation date. ... With this knowledge we felt it was prudent to cancel with as much notice as possible to give our guests the time to try to plan alternative arrangements.”

250 The facts underlying the decision of Uniworld to cancel their cruise, namely the river and water conditions preventing a ship from reaching Amsterdam over the next 10 days would have been, or else ought to have been, known to Scenic.

251 On 7 June 2013, a Canadian passenger sent an email to Mr Moroney drawing his attention to the “*extreme flooding in central Europe*”. The passenger was due to embark on a trip commencing on 16 June 2013 from Budapest to Amsterdam, and noted that there was no travel update being provided by Scenic, but that their competitors, who had similar cruises, were providing travel updates.

252 Scenic’s position was also clear from an email sent by Mr Brown on Saturday 7 June 2013. He responded to Ms Graeff in the following way:

“In making an assessment to cancel a cruise, we consider:

the safety of our guests, the ability for us to continue all on board accommodation and related services, the fact that the cruise had commenced and consideration of how much of the itinerary attractions we could aim to deliver, our ability to perform ship swaps to our own other ships in the region. All of these being considered, we did not cancel any cruises.

Yes there have been deviations and missed itinerary items and at the end of the cruise we will be making an equitable refund of all guests for these omissions.”

253 No reference is made in this email to the issue of providing the passengers with a “*once in a lifetime cruising experience*”. No reference was made to Scenic’s obligations to its Australian passengers under the ACL. In an assessment about continuing or cancelling cruises, these matters were highly relevant. I would infer from the fact that Mr Brown did not include these matters, or even some oblique references to them as having played a part in his assessment process, that he disregarded this in his determination that Scenic would not cancel any cruises, or other passengers an option to cancel.

254 An email of 7 June 2013, from Scenic Europe to, amongst others, Mr Brown and Mr Sandmeier, suggested that a text of a publication to guests include the following:

“Due to the unprecedented and severe flooding throughout areas of central Europe, particularly affecting the Rhine, Main and Danube rivers, we understand that you may be concerned about your upcoming cruise with us.

...

Here is the current status and expectations regarding upcoming sailings:

- The June 10 and June 12 departures on Scenic ‘space ships’ from Amsterdam will embark as scheduled from Amsterdam.
- The embarkation process for the June 10 and June 12 departures on Scenic ‘space ships’ from Budapest will be affected. It is our expectation at this time the ships will be unable to dock in Budapest on those dates. Instead the ships will be docking in another location that is in the process of being determined. Scenic guests will be transferred directly to each ship or, alternatively, overnight in Budapest depending on flight arrival schedules and then be transferred to the ship the following day.

The situation on the Danube continues to be a concern, although it is our understanding that the water levels are dropping. The flooding may not allow for uninterrupted cruising on the June 10 and June 12 departures in both directions. ...”

255 What is of significance from this email on 7 June 2013, is that Scenic appreciated that Budapest was not accessible for ships, and that passengers on the cruise leaving Budapest would not be accommodated on the ship for two nights. Further, it was a masterful understatement for Scenic to say that there was a real prospect that uninterrupted cruising in both directions for these departures would not be possible due to the flooding. The fact was that

the Danube River was closed. As well, the suggested text continued Scenic's previous position of not notifying passengers that if they sought to cancel either of these cruises they would be provided with a full refund.

256 A few hours later, on the same day, Ms Scoular informed various members of the Scenic staff, including Scenic Europe, that the ship which was due to arrive in Budapest would only be able to sail as far as Vienna or Krems, which was close to Vienna. A three hour coach trip from there to Budapest was envisaged. She noted that there were still parts of the river that were not navigable.

257 On the same day, Ms Scoular wrote to travel agents, particularly those whose clients were due to depart on 10 June 2013 from Budapest. She advised them of the arrangements which had been put in place. Scenic's approach can be gleaned from what she told the agents. She said this:

"Although the river situation is still a changing set of circumstances, we are making arrangements to ensure the best possible European river cruising experience for your clients and we are certain they will enjoy the five star all inclusive experience our space ships (sic).

We do apologise for alteration, however I can assure you that our crew will do everything to ensure to make our guests' cruise experience on board and their touring arrangements through Europe truly memorable.

Our Cruise Director will advise all final arrangements and river conditions as guests relax and enjoy their ultimate European cruising experience."

258 Again, no mention was made of Scenic's willingness to provide a full refund to passengers on these cruises who asked to cancel their reservations, nor of the true impact which was properly to be anticipated for cruises.

259 Mr Angus Crichton sent an email on 7 June 2013 to Mr Sandmeier and Mr Brown. Amongst other things, it said:

"Late this afternoon we did get a client, Judith Buchanan ... on Facebook starting to ask about cancellations. ... We need to hold firm and talk about an altered itinerary but we are running the tour. Just about making sure guests are updated around the tour and that it's a very dynamic situation. We all know that they will get on the Silver at the worst case situation for at least six to seven days, almost 50%.

We need to work on their Europe dreams and make sure that they get to experience as much as possible but just on a different form of transport. I am sure there can be some very 'quirky and unique' experiences that they might be able to do and happy to 'value add' where we can."

260 Mr Crichton's statement contains a clear acknowledgement that the relevant operational executives knew that the Evergreen cruises would be significantly disrupted with the only confidence being that passengers would get "... *almost 50%*" of their time "... *on the Silver*", which was their intended and booked cruise ship.

261 The sentence used by Mr Crichton, namely, "*We need to work on their Europe dreams, and make sure that they get to experience as much as possible but just on a different form of transport*" again reveals much about Scenic's attitude to passengers and the expectations created by the Scenic brochure in which, as elsewhere recorded, passengers who booked on a Scenic cruise were invited by Mr Moroney to join Scenic "*for a once in a lifetime cruise, along the grand waterways of Europe ... immersed in all-inclusive luxury*". Putting it shortly, this attitude displays a complete indifference to such created expectations. It continued, or else reflected, the attitude underlying Mr Brown's earlier statement. The notion of "*a different form of transport*" also ignored the very significant difference for passengers relaxing on board a cruising ship with the choice as to where they would sit and relax, including in the privacy of their own cabin, when compared with travelling on a coach, restrained in their seat by a seatbelt, in fixed seating without any real variation in where to sit or different types of chairs, and without privacy. The statement does not have regard to the very different motions of a cruising ship, and a coach travelling on roads which or may or may not be occupied by other traffic, and which certainly are of variable quality. Shortly put, Mr Crichton was prepared to equate a coach tour around Europe with a luxury river cruise when these are simply not comparable or interchangeable experiences for passengers.

262 Mr Crichton seems to have been a reasonably senior and a responsible executive. No-one more senior to him in the Scenic hierarchy contradicted his

approach in any email or other communication. No evidence was led from any witness from Scenic that the expressed attitude was not a reflection of Scenic's approach to passengers who had booked cruises. In light of those matters, I would readily infer that Mr Crichton was describing the approach which Scenic adopted, namely that if passengers could get on a ship for almost 50% of the proposed cruise, providing the balance of the booked cruises by another form of transport, namely a coach, would satisfy the passengers' *"Europe dreams"*.

263 Lucas Sandmeier sent a river update in the early hours of the morning of 8 June 2013. He commented with respect to the Rhine River, that it was open for navigation except for a particular stretch which was blocked in both directions. With respect to the Main river, he said that:

"Full Main river cruising for 135 metre ships like the Scenic space ships expected to resume Tuesday or Wednesday next week."

264 He reported that the Danube was closed in a number of locations and that there had been heavy damage along the rivers and on river infrastructure. He reported that the stretch between Regensburg and Passau had an unknown reopening time. He also reported that Passau had announced that *"no ship can dock in Passau or Lindau through June 16"*. Apparently that was because a full assessment of damage would only be available after waters dropped following the flood. Other parts of the river were closed, and for some the reopening dates were unknown.

265 An email update was provided on Monday 9 June 2013 with respect to the position of the rivers as at 2300 hours on 8 June 2013. At that point the Rhine River was for open for navigation with limitation. The Main River was open for daylight cruising only. Water levels were dropping further, but the river was still too high at that stage to allow clearance under all bridges. On the Main Danube Canal, the lock at Hausen was closed but was expected to re-open "mid-week". The note said that ships could not sail between Nuremberg and Bamberg in either direction. The email noted that part of the Danube River, from Straubing down to Budapest, was closed. This was a distance of about

700km of river. There was heavy damage on the river and to the river infrastructure. The city of Passau had announced that no ship could dock in Passau or Lindau before 16 June 2013. It was expected that parts of the Danube would remain closed, although some parts of it might be expected to open the following week.

266 On 10 June 2013, Mr Brown reported to Mr Moroney the position as follows:

“Snapshot of where we are: generally the worst impacted navigation has been on the Main Danube Canal and on to the Danube.

...

STC 270513.1 – major loss of sailing days, final night in BUD hotel, will transfer out of BUD today as per itinerary.

STC 290513.1 – major loss of sailing days, final night in BUD hotel, will transfer out of BUD on Wed as per itinerary. This group has some guests causing noise and engaging other guests demand knowing the amount of refund before they disembark on Tuesday for night in hotel. ...

In terms of refunds: the ●1s [a reference to cruises from Amsterdam to Budapest] will be the most significant due to a lack of sailing (at least 50%), missed attractions and hotel in BUD. The ●2s [a reference to cruises departing from Budapest] managed to continue sailing to AMS, so less impact.”

267 At 9.30pm on the evening of 10 June 2013, Mr Brown reported to Mr Moroney that sections of the Rhine/Main Canal remained closed “*preventing continuity on the Danube*”. He noted unplanned stationary days, a term which he put in inverted commas, in the following way:

“Looking at ‘unplanned stationary days’, the most recent cruises score as below:

STC 270513.1 – 7 unplanned stationary days.

STC 270513.2 – 8 unplanned stationary days.

STC 290513.1 – 5 unplanned stationary days.

STC 290513.2 – 6 unplanned stationary days.

STC 030613.1 (now one week in) will have four days in Bamberg as a 30 km section Bamberg to Hausen Lock in front of them is closed, preventing further south cruising for the next 48 hours. Probability that they could have five days unplanned stationary.”

268 Mr Brown went on to make these remarks to Mr Moroney:

“Most noises both on board and on-line (Cruise Critic) is around the amount of non-sailing (stationary) days, regardless of what we do with coaches etc. Some land attractions have been missed. ‘The loss of cruising enjoyment’ theme is running hard.

Whilst we have held our position to date based on refunds being offered at the cruise end, when all relevant impacts can be assessed, guests are hearing about competitors being more definite during the cruise ... letting them know early what they can expect, takes away the conversation and places them in a frame for the cruise.

We won’t win this conversation with our harshest critics, regardless of our efforts. They will expect 50% as a minimum, as has been declared by competitors I am told.

But the sooner we close this off with our position on a refund, the better we will be with the majority of our guests. My aim is to close off these conversations this week.

I am not sure if we have any past precedents, but as a working amount how does a refund of \$150 per person per lost day equating to @ \$1,000 per person for the 270513.1?

This would be our consistent approach for this disrupted period only.

Thoughts?

For future, I will develop our response matrix for your approval which will enable us to declare our position earlier in these circumstances based on known or expected factors.”

269 This email explicitly acknowledges the stance which Scenic had taken with respect to the provision of their cruises and itineraries. That is that cruises would operate as booked, no cancellations or refunds would be offered, with any adverse impact being assessed at the end of the cruise.

270 It is also important to note the contents of this email because it enables certain conclusions to be drawn. The first is that Scenic did not have a response matrix, which they seemed to regard as a necessary business tool, to enable them to set out their position based on known or expected factors.

271 Secondly, Scenic seemed to regard unplanned stationary days as being part and parcel of what they were entitled to provide on a river cruise. Thirdly, they did not regard “*the loss of cruising enjoyment*” as being a matter which

should concern them. This continues and reinforces the attitude expressed by Mr Crichton to which I have earlier referred. Fourthly, they were aware that the competitors in their industry regarded 50% of the planned cruise as a minimum, acting reasonably for the provision of a refund.

272 On 11 June 2013, Mr Sandmeier reported the situation as being that the Hausen Lock between Bamberg and Nuremberg remained closed, parts of the Danube River, from Straubing to the Austrian border, remained closed and there was no indication of when it would open. Within Austria, over half of the Danube River remained closed and the Danube River in Hungary leading into Budapest was closed and likely to remain so for the rest of that week. Two locks, Jochenstein and Ottensheim, were reported as needing major repairs and dredging. I infer that this position with these locks also prevented navigation.

273 At that time, according to a further email, the Rhine River was open for navigation but a stretch of the Main River between Faulbach and Marktbreit, which was about 130km in length, was closed.

274 On 11 June 2013, the Operations Manager, Ms Scoular, advised various sales teams and other Scenic staff about the advice which was to be provided to callers to the Call Centre. In particular, when dealing with June departure cruises, the following information was to be provided to callers:

“Impacts on our calendar currently are only for the week ahead ... All remaining June departures will be operated. If guests are anxious around any June sailing, we can look at assisting by moving them to a later sailing in 2013 or 2014 – if required, we will offer guests on these sailings a refund only if unable to commit to offer of later sailing.”

275 The substance of the information which was to be proffered was, however, that all cruises would be currently operating in accordance with the cruise itinerary with minimal impacts to touring inclusions. Again, it appears that by this time, Scenic accepted that it was both reasonable and appropriate for any passengers who were booked to take a cruise on these rivers, and who were due to embark during the balance of the month of June, to cancel their cruises

and receive a full refund. However, the availability of this option to cancel and obtain a full refund was a last resort, and only to be offered where passengers declined an adjustment of departure dates.

276 On 11 June 2013, Lucas Sandmeier gave a further update. Relevantly for cruises travelling to Budapest, he noted that a significant section of the Main/Danube Canal remained closed and unlikely to open before sometime on the following day. A 180km section of the Danube River between Stremberg and Ottensheim was closed and there was no indication of when it might reopen. He also noted that the Hungarian government had proclaimed a state of emergency for three counties, including Budapest. He said that this would mean that traffic around those areas would be limited with expected delays.

277 A river update on 11 June 2013 at 1900 (European time) was sent through on 12 June 2013 by Mr Sandmeier. He recorded that the Rhine River, Main River and the Main-Danube Canal were open for navigation although there were some difficulties on the Canal. He recorded that parts of the Danube remained closed and that the Altenworth Lock, which is located between Vienna and Melk, would not be operating at least until 19 June 2013. He noted that Straubing was closed and would not open "*until the end of this week*".

278 On Thursday 13 June 2013, Mr Sandmeier advised fellow employees at Scenic and the Captains of each of the Scenic ships as follows:

"We have received the information this afternoon that the off-shore terminal of the lock in Altenworth (between Melk and Vienna) was washed out as a result of the floods and is threatening to collapse. For this reason the lock remains closed through June 18, opening possibly on the 19th. Also the ban of navigation between Vienna and Budapest will not be lifted prior to Friday June 14th at 1200 hours."

279 With respect to Cruise 8, upon which Mr Moore and his wife were embarked, Mr Sandmeier noted that the guests would be disembarked from the Scenic Jewel in Regensburg and bussed to join the MS Scenic Pearl in Vienna where it was moored. It was anticipated at that stage that the bus trip would take 8½

hours. The planned itinerary for this tour had that ship leaving Vienna for Budapest in the early morning of Friday 14 June 2013, even though that departure time was inconsistent with the ban on navigation noted in his earlier paragraphs.

- 280 An email in the early hours of the morning of 13 June 2013, from Mr Sandmeier, provided a degree of prediction about current and future cruises. In respect of the cruise leaving Budapest on 10 June 2013 (Cruise 11), it was clear that there would be no cruising from Budapest, but rather the passengers on that cruise who were commencing the cruise in Budapest would have a city tour on their first day. They would then be transferred by road to one of the Scenic ships that were docked in Krems, which was about 350km along the Danube river, past Vienna. By road it may well have been about 400km. It was also clear that the ship upon which they would embark in Krems would remain there until the evening of 13 June and, after a short cruise, a further ship swap would occur.
- 281 For the cruise leaving Budapest on 12 June 2013 (Cruise 13), the first night of accommodation in Budapest was in a hotel. There would be no ship for the cruise passengers to embark upon in Budapest, but the passengers would be moved by bus to Vienna for a city tour and accommodation on a boat located there, and then transferred by coach to Krems to join another boat.
- 282 The email also made clear with respect to further cruises that, particularly those starting on 17 June 2013, it was most unlikely that there would be a ship in Budapest which could accommodate the cruise. Hotel accommodation for passengers on that cruise had been booked for two nights in Budapest and Vienna.
- 283 A river update on 13 June 2013, noted that whilst the Rhine and Main Rivers were open, there were significant delays to navigation. It noted that the Danube River was closed between Kelheim and Regensburg, and between Regensburg and Vilshofen due to high water. It further noted:

“Passau not passable until earliest 17 June, lock Altenworth is the bottleneck now, this lock will be closed for one more week, you have to count with embarkation maybe in Krems ...”

- 284 A publication from Viking Cruises to its guests, and which was repeated on its website, noted that on 13 June 2013, the Austrian authorities reported that the Altenworth Lock was damaged and closed for repairs until 20 June 2013.
- 285 The status of Altenworth Lock was later changed to it being inoperable until 28 June 2013.
- 286 The source of this document was not identified in the evidence but, by reference to a ship named in it, I infer that it is a document circulated within one of the other cruise ship companies operating at that time. On that basis, the material contained in it is knowledge which I would be prepared to infer that Scenic had or else ought to have had. It is consistent with the contents of the river update of 13 June 2013.
- 287 Having regard to the fact that these proceedings are only concerned with cruises which embarked up to and including 12 June 2013, but not later, there is no need to continue to review the general state of knowledge of Scenic with respect to the waterways and their navigability. Specific knowledge with respect to cruises in operation after this time can be obtained from the Cruise Director’s diary entries which will be reviewed below.
- 288 An undated schedule, which became Exhibit P52, was tendered upon the basis that it diagrammatically represented the combined information known to Scenic. However, I prefer to rely upon the underlying facts to which reference has been made as more clearly demonstrating the position with respect to Scenic’s knowledge of the impediments to navigation on these rivers. For example, in Exhibit P52 the notes record that the Altenworth Lock was closed through to 26 June 2013, however the coloured diagram suggested that the Danube River from the German border to Vienna was completely open and navigable between 17 and 26 June 2013. If the lock at Altenworth was not open and operating, the river was not totally navigable.

- 289 Another source of primary information was the daily diary kept by the Cruise Directors. These appear to have been made either on the date of the note, or shortly thereafter, and are a reasonably contemporaneous account of events. These diaries appear to have been uploaded daily. Again, there is no reason to think that if facts recorded in those diaries were known to Cruise Directors and were uploaded into an electronic diary system, they would not also have been known to the executives of Scenic and those responsible for decision making. If not known, the facts could have been readily ascertained.
- 290 It will be necessary to turn to these diaries when considering what occurred on each cruise, but it is convenient to provide two summaries of the northern rivers cruise itineraries. The itinerary for each cruise was intended to be the same. Whether in fact the cruise accorded with the itinerary is a different question. The analysis of that question necessarily commences with the intended itineraries.

Amsterdam to Budapest Intended Itinerary

- 291 According to the brochure which was published by Scenic, the Amsterdam to Budapest cruise involved 15 days and 14 nights. In addition, five trips were identified and described as "*Scenic Free Choice*" or "*SFC*" which involved travel away from the river by road transport. The brochure noted a number of city tours of those cities along the rivers at which stops would be made. In some cases, the mode of transport for those city tours was identified e.g. "walking tour, guided bicycle tour or canal cruise". In other cases, the mode of touring of those cities was not identified. No doubt, in the larger cities such as Vienna and Budapest, it would not be unreasonable to have assumed that the city tour involved some travel by coach and some by walking. The brochure did not suggest that any road or coach transfer would be required between the place at which it was intended the ship would dock and the city or town adjacent to the dock. The brochure made it clear that independent sightseeing was available in almost all of the cities and towns which would be visited along the route.

- 292 The standard itinerary provided for two nights of accommodation on board whilst the ship remained berthed in Amsterdam although it does appear that the ship would sail from Amsterdam late on the second evening. At the end of the tour, on day 14, the ship would arrive, apparently quite early in Budapest, where the ship was to remain all day, including providing accommodation overnight and from which the passengers would depart on day 15. Thus the first two days and the last two days did not involve any cruising other than during the late evening or early morning.
- 293 It also appears that the ship would be docked in Vienna over two days, which included a night whilst docked in the city. By deduction, from the itinerary it would appear that the ship was due to arrive in Vienna sometime on the evening of day 11. Thereafter, although there would be four nights' accommodation on the ship in the cities of Vienna and Budapest, there would be limited cruising from Vienna to Budapest on the afternoon and evening of day 13 and perhaps the early morning of day 14.
- 294 The brochure noted the following Scenic Free Choice tours which must have involved transport by coach. The first was a visit from Cologne to Dusseldorf whilst the ship was stopped in Cologne. That is a distance of about 40km by road. An alternative guided walking tour of Cologne was offered. The second Free Choice tour was by road was from Würzburg to Rothenburg, a distance of about 65km. An alternative was offered to that journey of a walking tour of Würzburg including a private wine tasting.
- 295 The third and fourth free choice tours both originated in Passau. The first was a tour from Passau to Salzburg, a distance of about 120km, and the second a tour from Passau to Český Krumlov, a distance of about 125km. An alternative to those tours was offered, in the sense that passengers were informed that they could enjoy the sights of Passau, a location which had available the Scenic tailor-made tours which allowed for independent exploration of the town.

- 296 Finally, there was a tour offered from Vienna to Bratislava, a distance of about 80km. There were a number of other alternative excursions offered whilst the ship was berthed in Vienna, which were in and about Vienna.
- 297 So far as can be deduced from the published itinerary, it would have been anticipated that the ship would cruise during daylight or early evening hours on at least 10 days of the 15 day/14 night cruise. Although it appears that on the evening of the final day in Budapest, an evening cruise takes place, this seems to be a local cruise and I would not regard it as indicating that the day was set aside substantially as a cruising day.
- 298 It is equally clear that if one or more shore excursions or activities were undertaken, although not apparent from the published itinerary, on some occasions the planned excursions would then re-join the ship after it had cruised some distance.

Budapest to Amsterdam Cruise

- 299 The same conclusions can be readily reached with respect to this cruise because the itinerary is the reverse of the previous one. It is also described as a 15 day/14 night cruise from Budapest to Amsterdam.
- 300 The first two days of the cruise are spent in Budapest and the last two days of the cruise are spent in Amsterdam. The ship would seem to leave Budapest late on the evening of the second day of the cruise and arrive in Vienna on the morning of the third day. It was planned for the ship to spend most of two days and one night in Vienna, and then cruise to Durnstein and Melk on day 5, arriving in Durnstein in the morning. The final night of cruising between Dusseldorf and Amsterdam is on the evening of day 13. The ship arrives in Amsterdam, according to the itinerary, on the morning of day 14 and then remains there overnight until day 15.
- 301 The same free choice tours as for the itinerary from Amsterdam to Budapest are also offered and, essentially the same description of events is provided.

302 Again, I conclude that of the 15 day cruise, at least 10 days were intended to be spent with daylight or early evening cruising for substantial parts of those days.

303 As there is only one cruise to be dealt with in these proceedings involving rivers in France, the planned itinerary will be dealt with in detail when considering what happened on that cruise.

304 Against that background, it is necessary to examine what happened on each cruise, but it is convenient first to consider the obligations of Scenic under the ACL to the passengers on each of the cruises so that appropriate findings can be made at the end of the consideration of the facts of each cruise.

Consumer Guarantees

305 The plaintiff seeks to rely upon three statutory guarantees set out in the ACL.

306 The first is contained in s 60, which is in the following terms:

“60 Guarantee as to due care and skill

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

307 The next two statutory guarantees are those contained in s 61 of the ACL, which is in the following form:

“61 Guarantees as to fitness for a particular purpose etc.

(1) [Services reasonably fit for particular purpose] if:

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

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

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

(2) [Guarantee that services will achieve desired result] if:

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

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

(i) the supplier; or

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

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

308 Section 61(3) of the ACL provides an exception to the guarantee of fitness for a particular purpose. It provides:

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

309 Scenic did not rely on this exception.

310 “Services” as a term is described by an inclusive definition in s 2 of the ACL in the following way:

“Services includes:

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

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

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

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

...

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

311 It is necessary to attempt to identify, in the way in which this case has been pleaded, the services which it is said that the defendant promised to provide and which were provided.

Scenic’s Brochure

312 The commencement point of that identification is the Brochure which it seems was distributed broadly. This Brochure precedes any agreement between Scenic and a prospective customer. It is the source of the description of the

services which are to be provided, and forms the principal basis by which consumers are informed of the available services.

- 313 The Brochure is large, printed on glossy paper with many photos. It is an enticing document, no doubt designedly so, which promises in many different ways a luxurious and all-inclusive river cruise. The cover of the Brochure is entitled:

“EUROPE
RIVER CRUISES AND TOURS”

- 314 Underneath the title is a large photo which occupies most of the cover. It depicts a Scenic “Space-Ship” which has balcony suites cruising along an unidentified river with a panoramic view of the adjacent landscape dominated by a large castle located on a hill top.

- 315 On the first page of the Brochure, there is a letter of welcome written by Mr Glen Moroney who describes himself as the Founder and Managing Director of Scenic Tours. Amongst other things, Mr Moroney writes:

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

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

All Scenic ‘Space-Ships’ ... Providing the most comfortable river cruising experience on the market no matter the weather. ... Our relaxing River Café is open for all day grazing including barista coffee and gelato ...

...

Scenic Tours is the leading operator of All-Inclusive and fully escorted luxury river cruising tours in Europe.”

- 316 Passengers are promised impeccable hospitality and unforgettable experiences.

- 317 Immediately after the letter of welcome is a page which extends three pages in width. It features the phrase “All-Inclusive Luxury” in large font. In an

extended photo across all three pages, a ship called “Scenic Sapphire” is featured on a river in Europe. It describes what is offered in a variety of ways, including the following descriptions:

“INCLUDED Three viewing decks. Be spoilt for choice with three outdoor viewing areas. Observation deck, observation lounge and the sundeck.

INCLUDED Complimentary beverages, all day every day. Enjoy complimentary drinks at any time of the day from fine regional wines and boutique beers to barista coffee.”

- 318 There then follows two pages of a list of the contents of the Brochure and all of the specific cruises offered. There are many more cruises offered than those the subject of these proceedings. Immediately following that is a description of the all-inclusive luxury of Scenic Space-Ships. That description includes the following:

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

...

You will appreciate the spaciousness of our Panorama Lounge, which is larger than those on standard river cruisers. Here you can relax at the bar or River Café while taking in the breathtaking views from floor to ceiling windows. Additionally there are three outdoor viewing areas that provide excellent vantage points from which to admire the fairytale landscapes that pass you by. ...

...

To provide the flexibility that some guests desire, we also have a range of casual dining: the River Café provides full service casual dining from early morning until dinner and, on selected days, we offer High Tea and alfresco barbecues on the Sun Deck.”

- 319 On the following page the caption “Enjoy a Splendid view of the World” accompanies a photograph of a boat cruising on a river in Europe. A further photo on the same page is accompanied by the caption “Glide through the grand rivers of Europe”.

- 320 On the following page, a large headline appears with these further words

“Scenic Tours, in every respect, is the Ultimate River Cruising Experience

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

321 The page concludes with this expression:

“That’s why everything about your Scenic river cruise sets it apart.”

322 A few pages further there is a description of the “Spacious stateroom or suite” which is provided. It includes the following:

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

323 The following two pages outline 18 separate features of the ships and cruises which are included. The heading on these two pages is:

“Our Signature is All-Inclusive Luxury when you step aboard a Scenic ‘Space Ship’, experience the ultimate inclusions on Europe’s waterways.”

324 In describing the available private balcony suites, the following is said:

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

...

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

325 On the following page is photo of a couple apparently standing on the balcony of a ship’s cabin during the daytime and captioned with the words “Relax outdoors and watch the world go by”.

326 The Scenic sun lounge is a feature of the ships provided by Scenic Tours as described in this way:

“Scenic ‘Space-Ships’ with their exclusive full sized private balcony suites already offer the ultimate luxury in European river cruising, and from 2013 you are able to relax and watch the beautiful landscapes along the Rhine, Main, Mosel and Danube Rivers pass by at any time of day, no matter the weather.

...

The perfect balcony indoors or out

It’s a beautiful day on one of Europe’s grand waterways. The sun is shining and you’re relaxing, drink in hand, on your exclusive, outside private balcony. The mood is tranquil and you quietly reflect on the wonders of the world around. Now, regardless of the elements your balcony is perfect for all kinds of weather, any time of the day as it transforms into a Scenic ‘Sun Lounge’.”

327 The brochure deals with the provision of butler service. It says:

“At Scenic Tours we make every effort to ensure that your European river cruise is a unique and special experience that you will always remember. We want you to enjoy luxury river cruising at its best so we have extended our renowned butler service to all guests on a Scenic ‘Space-Ship’.”

328 The facilities in the Crystal Dining Room are described in this way:

“The Crystal Dining Room provides a wonderful ambience that is unsurpassed on the waterways of Europe. Spacious and light, with floor to ceiling glass to expose the passing panorama ...”

329 Another restaurant, Portobellos, is described in this way:

“Portobellos ... is strategically located at the front of the ship to take full advantage of the spectacular views.”

330 On the following page, a banner with photographs of Portobellos restaurant is described as “... an intimate affair with outstanding views”.

331 When describing the River Café, the Brochure includes the following:

“On board a Scenic river cruise you can enjoy a variety of casual dining throughout the day. It’s quite enticing and it allows you to indulge in that little casual snack just when you feel like it. ...”

On board our Scenic ‘Space-Ships’, casual dining is very much a part of life on board. Our guests can enjoy delicious light meals or casual snacks and refreshments, when and where it suits them. ...”

332 Further in the brochure, the general itinerary of the 15 day Jewels of Europe River Cruise is described. Prominent amongst the descriptions are these.

“Day 4 ... have your camera ready today as we cruise through the spectacular Rhine Gorge, with stunning vistas of castles perched above steep covered slopes.”

333 Further in the Brochure, the river cruise is contrasted with “*Fully Escorted, All-Inclusive European tours*”. These are described in the following way:

“The perfect complement to your luxury river cruise is, of course, a luxury Scenic tour. Explore the highlights of Europe that are not accessible by river in comfort and style. Planned to seamlessly link with your River cruise, Scenic Tours offers a relaxing pace with many 2 night stays.”

334 The description of these contrasting European tours includes this:

“You will be delighted at the standard and location of our amazing hotels and the extraordinary highlights that are included. Touring in our modern, executive motor coaches with an average of only 35 guests per tour provides plenty of room to stretch out in the comfortable ergonomic seats.”

335 The following page contains a small photograph of a motorcoach with the description “Luxury 40 seat coach designed for your comfort”. The only other similar small photograph appears earlier in the brochure where an inclusion with each river cruise is described as being “Airport transfers” with the description “Transfers both at the start and end of your journey are included, regardless of what time you arrive or depart you will be personally met”. In the background of the motorcoach in that photograph is a photo of a Scenic ship.

336 The Brochure carefully distinguishes the River Cruises from the Tours. On page 2, the contents provide the page numbers for each offered itinerary. Against each itinerary are either the word (in capitals) “CRUISE” or else the words “TOUR & CRUISE”. There is a ready identification of the difference in these itineraries. The three itineraries relevant in these proceedings are designated as “CRUISE”.

337 In contrast to those two photographs of coaches, there are over twenty photographs in the Brochure which depict both externally and internally, river cruising with scenery visible only from the rivers and canals.

338 Later in the Brochure, there is a description dealing with a cruise in the south of France. It includes these descriptions:

“There is no better way to explore the beautiful region of Southern France than on board our very own Scenic Emerald. ...

...

Our new 12 night cruise from Chalon-sur-Saône to Arles is the ultimate luxury river cruise available in France. The waterways along both the Saône and Rhône Rivers boast the most exceptional views and these stunning landscapes continually unfold on your unforgettable cruise south.

Our relaxed sailing pace also ensures you will enjoy maximum time on shore to discover and absorb the incredible cultures and colours of Southern France. Each night of your 12 night cruise enjoy the freedom that being docked in the local towns and villages provides.”

339 Readers of the Brochure are invited to “*take an evening stroll to experience the village atmosphere*”.

340 The specific itinerary included in the Brochure incorporates this description on Day 8 of the Southern France cruise:

“This afternoon relax on board as you sail through some of the vineyards that make this region’s longstanding tradition of winemaking famous. This evening arrive in Viviers. Perhaps take a stroll through buildings dating back to the Middle Ages and some fine examples of Renaissance architecture.”

341 The Brochure published by Evergreen is to a similar effect – it is perhaps less effusive, but nevertheless has as its central theme that guests are being invited to take “... *a luxury river cruise ... where you will experience the romance and adventure of Europe’s waterways like never before*”. Intending passengers are assured that their “*cruising and touring experience is managed in the same time zone and with expert local knowledge*”.

342 Intending passengers are told of their European cruise:

“Let us lure you away from your everyday life as Europe’s most beautiful cities and landscapes slide peacefully past you. Breathe in the history of the continent’s greatest rivers. This is the most relaxing and convenient way to experience Europe.

Terms and Conditions

343 The defendant contends that the terms and conditions contained in the Brochure are of significance in these proceedings. Scenic submitted that the terms and conditions play two separate roles. First, they fall to be considered in understanding what services are to be provided, and, secondly they are to be considered when evaluating any claim under the statutory guarantees against Scenic. It is convenient at this point to set out the relevant terms and conditions and describe the context in which they appear in the Brochure. I should note that the Terms and Conditions in the Evergreen brochure are in identical terms. There is no need to refer to these terms and conditions separately.

344 As I have earlier noted, the Brochure is a glossy colour brochure of 225 pages. The first 39 pages are devoted to describing the benefits of all-inclusive luxury European river cruising containing the material referred to above. On pages 40 and following, the Brochure describes individual itineraries for a large number of cruises. At page 122, the Brochure commences describing the experience of river cruising in Southern France. This description is followed by a further series of individual cruises, cruises and tour indexes.

345 The Terms and Conditions are contained on pages 218 and 219 (namely, almost at the very end of the document). Each of these pages is divided into three vertical columns full of very small print. It would not be an exaggeration to say that the ordinary reader who wished to read these terms and conditions carefully would need a magnifying glass to do so.

346 When readers of the Brochure are examining the itineraries for each cruise, there is a note in the top part of the page where the map is contained in these words “Please refer to terms and conditions”, and also a note that the map is

provided as a guide only. There is no other reference in the Brochure to the terms and conditions which is at all obvious. Other references do occur, but they are in very small type and hard to read. In particular, these occur at the bottom of the pages describing each individual cruise itinerary where the following words appear:

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

- 347 It is not at all unfair to note that the Terms and Conditions either when referred to, or else when their actual content is printed, are not emphasised in any way throughout this Brochure. References to them are in small type and they are not prominently placed. The two pages describing the Terms and Conditions appear at the back of the Brochure. They are very hard to read, not only because of the size of the font and because of the page layout of three vertical columns, but also because of the complexity of the wording used, particularly in contrast with the plain, effusive language in which the luxury river cruising benefits are described in the Brochure.
- 348 The wording, but not the layout of relevant Terms and Conditions is as follows. I add that these relevant Terms and Conditions as set out in this judgment are considerably easier to read and understand.

“2.6 Fees

...

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

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

Cancellation Fee

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

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

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

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

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

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

2.7 What are Our Tour obligations?

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

...

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

Tour Operation

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

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

Tour Cancellation

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

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

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

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

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

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

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

Tour delay

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

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

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

2.10 How can We vary this Contract?

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

...

Tour Variations

- (d) We may change or vary Your Itinerary.
- (e) Although we will use reasonable efforts to operate the Tours as close as possible to Your Itinerary, changes or substitutions may be necessary for reasons outside Our control. These circumstances may include, but are not limited to:
 - (1) road, river or weather conditions;
 - (2) national or local holidays affecting the closure of public buildings and attractions;
 - (3) strikes; or
 - (4) civil disturbances and advices by governments or other Force Majeure Events.
- (f) Cruise itineraries may be varied due to high or low water levels, flooding, lock closures, unscheduled vessel maintenance or for any other circumstances beyond Our control.
- (g) We may substitute (at the nearest reasonable standard) another vessel or motorcoach for all or part of the Itinerary and also provide alternative accommodation, where necessary.
- (h) Where We make a variation to the Itinerary, We are not liable to You for such variations.

...

2.12 Notification of General Risks

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

- (1) Tour variations or interruptions caused by road, river or weather conditions; national or local holidays affecting the closure of public buildings and attractions; strikes, civil disturbances and advices by governments; Force Majeure Events; hazards associated with travelling in undeveloped areas; travel by boat, train, automobile, aircraft and other means of transportation; high water level; low water levels; flooding; lock closures; unscheduled vessel or vehicle maintenance;

...

- (3) any other circumstances beyond Our control.

...

2.13 Limitation of Liability

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

- (1) any Tour risks or other aspects of the Tour notified to You in the Contract;
- (2) any change to Your Itinerary or delays in departure ...

...

2.15 Competition and Consumer Act 2010 (Cth)

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

..."

349 It is of interest to note that on page 219 of the Brochure, which is the second page of the Terms and Conditions, the final three paragraphs in the last column in what appears to be a more highlighted box and a slightly larger

font, one finds reference to the “Scenic Green Choice”. This appears to promote the fact that Scenic have climate friendly offices and that they provide for carbon friendly touring and cruising. The highlighted panel invites participants to pay \$5 a day for making their holiday climate friendly. A further paragraph in the highlighted box deals with “*off-setting your flights*”. Apparently Scenic regarded, at least at the time the Brochure was distributed, the provision of information about climate-related payment options as requiring greater prominence and emphasis than the terms and conditions upon which they offered the cruises to intending passengers. The Evergreen brochure did not include this choice.

Services

350 It is of central relevance to these proceedings to first establish what the services were that were provided by Scenic to the plaintiff and group members.

351 The plaintiff submitted that in the circumstances here, Scenic was providing services which were recreational and were constituted by a river cruise which included luxurious all inclusive accommodation, dining and entertainment, travelling along European rivers and stopping at certain destinations.

352 Scenic submitted that the services which it was contracted to provide comprised “*a tour at a particular time which included a river cruise to the extent that river conditions allowed it; to provide reasonable endeavours to provide the tour booked in accordance with the itinerary and to use reasonable efforts to substitute, where required, a motorcoach for a vessel, for example*”.

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

354 It is convenient, in considering the question of what the services were, to commence with some authorities about the term and its definition.

355 The term “services” and the meaning attributed to it in s 2 of the ACL, is not an exhaustive definition. Rather, the statutory definition includes services that would not fall within the ordinary meaning of that term e.g. rights relating to real property. In interpreting the term “services”, unless a contrary intention appears in the substantive provisions, ss 60, 61 and 62 of the ACL, the ordinary meaning of “services” is to be adopted along with the specified services in the definition itself: *Obeid v Australian Competition and Consumer Commission* [2014] FCAFC 155; (2014) 226 FCR 471 at [52]-[53].

356 In considering the word “services”, as Wilcox J observed in *Adamson v NSW Rugby League Ltd* (1991) 31 FCR 242 at 262:

“As a reference to any standard dictionary will show, although the word ‘services’ has a wide application, it imports always the notion of some assistance or accommodation being made available by one person to another.”

357 This passage was approved by the Full Court of the Federal Court in *Obeid* at [54].

358 In *CPA Australia Ltd v Storai* [2015] VSC 442; (2015) 299 FLR 288, Bell J said, having reviewed a series of decision of various courts dealing with the word “services” in various legislation this, at 295 [20]:

“True, *IW* was an anti-discrimination case in which (among other things) government-provided services were included in the definition of ‘services’. But the emphasis in all of the judgments upon the wide ordinary and natural meaning of the word ‘services’ and the emphasis in the majority judgments upon whether a benefit was supplied to the recipient (however else the relevant activity may also be characterised) is equally applicable to the meaning of the word in s 21(1) of the Australian Consumer Law. It is also true that in *Obeid*, the statutory mining approval found to constitute a commercial benefit was different to the operation of a complaints and discipline system. But the conclusion reached in *Obeid* was the product of the kind of benefit-focussed characterisation that must be undertaken in this case. *IW* and also *Obeid* show that it is not that the provider is government or private, or that the legal framework is public or civil, that is critical, but rather

whether some assistance or accommodation is provided to the recipient upon a proper characterising thereof.”

359 In this extract, the reference to *IW* is a reference to *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1.

360 His Honour noted at 295 [22] that that conclusion was consistent with a decision of the Full Court of the Federal Court of longstanding, *Trade Practices Commission v Legion Cabs (Trading) Co-Operative Society Ltd* [1978] FCA 47; (1978) 35 FLR 372, which:

“...demonstrates that, when considering whether facilities provided by a trade association to its members constitutes ‘services’, it is important to characterise the benefit provided without being unduly influenced by the co-operative setting.”

361 At the heart of the competing cases for the plaintiff and Scenic was the way in which each articulated the extent of the services which Scenic was obliged to provide. I have earlier referred to their respective positions. It is now necessary to resolve the competing contentions.

362 It is convenient to briefly repeat the descriptions of the services contended for.

363 The plaintiff contends that Scenic provided recreational services to the plaintiff (and group members) that comprised a cruise, including associated luxurious accommodation and dining, along identified European rivers and stopping at certain identified destinations. It seems that the plaintiff includes in this definition of recreational services that the cruise would start and finish in the locations identified and on the dates identified.

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

- 365 This determination about the services provided by Scenic takes place in the context of the agreement between Mr Moore (and group members) with Scenic. That agreement comprises the Brochure, the Terms and Conditions and the booking document or receipt for the initial payment, as the case may be.
- 366 The plaintiff submitted that his definition best fits the circumstances and the contractual documents. In particular, he pointed to the contents of the brochure which provided not a tour by any means through identified towns in Europe, but rather a luxury cruising experience along the nominated rivers providing the opportunity to visit the identified towns. He points to the way in which the booking is made with, and recognised by, Scenic – i.e. a specified cruise on a particular date in a specified class of cabin, on a named boat.
- 367 As well, Mr Moore notes that the concept of a tour by motorcoach is discussed in the brochure in terms which are quite separate and different from those relating to the cruise and no suggestion was made that these forms of touring, i.e. by coach or boat, were interchangeable and were to be equated with each other. He submitted that was in effect what Scenic’s submissions amounted to.
- 368 Scenic submitted that the construction of the term “services” it contended for is the one best supported by the Terms and Conditions of the contract, and which, having regard to the well-known vagaries of cruising on a river, e.g. high or low water, good or bad weather, and the need for locks and other river infrastructure to be operational to permit passage along the river, is the most appropriate one. In particular, Scenic noted that as clause 2.10(g) permits Scenic to substitute (to the nearest reasonable standard) an alternative means of transport, this means that one cannot construe the contracted service as a luxury river cruise but rather as a service of the kind for which it contended.
- 369 By reference to authority – *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* [1993] FCA 96; (1993) 113 ALR 677, Scenic submitted that the

expression “services” should be construed “... *broadly and in a common-sense and commercial way*”: see [49]-[50] per Shepherd J. It submitted, in effect, that it would be uncommercial for it to be tied to a narrow definition of the services as being a luxury river cruise rather than a tour at large. Scenic relied on other bases as well, to which I have had careful regard. In some, Scenic submitted that the only sensible construction of the services which it provided was that the consumers “... *acquire the right to go on a tour, and at a particular time*”.

370 I have reached the conclusion that the term services cannot be read in the way for which Scenic contends.

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

372 This would be a surprising result, particularly having regard to the essence or gist of what was prominently offered by Scenic in the Brochure. If the plaintiff was, having paid the deposit, to describe what he had booked for, no doubt he would have said that he and his wife had booked for a luxury river cruise from Amsterdam to Budapest; a cruise upon which he could occupy a single cabin for the entirety of the 15 day and 14 night period without the need to

pack and unpack his bags on multiple occasions. He would have said that it was a cruise that provided him with a number of different restaurants in which he could eat, different places from which to observe the passing scenery, including from his cabin or the private balcony attached to his cabin. He would have said that he had access to food and drinks as he required them throughout the day, and that he could make choices about whether he wished to undertake any additional activities including shore excursions and the like. No doubt if the plaintiff had been asked at that time if what he had booked for included many days not spent on a ship cruising down the designated waterways of Europe, but rather spent in a seat on a motorcoach travelling along motorways or secondary country roads and staying in hotels for short periods for only 1 or 2 nights at a time involving regular packing and unpacking of his luggage, and without a choice as to where he might eat and without the capacity to eat and drink throughout the day as he saw fit, no doubt he would have said firmly and perhaps in a single word, that that was not what he had booked and paid for.

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

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

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

376 The provision of management services (as Evergreen's brochure itself contemplated) was also an integral part of the Services provided. Each cruise had a Cruise Director appointed whose role, as is apparent from the diaries tendered in evidence, included doing all things necessary with the assistance of the staff at Scenic Europe, and staff on the ships, to oversee, organise and manage the delivery of the cruise and all of the added services. As the brochure said of those who filled this role:

"Our experienced and knowledgeable Cruise Directors are always on hand to assist throughout your cruise."

377 As is apparent from the internal emails, the staff at Scenic, as well as Scenic Europe, spent time managing the upcoming cruises and arrangements before embarkation and also whilst the cruises were underway. These services, which might be described as a "*back-office*" function, are a necessary part of, and integral to, the services provided to the passengers prior to and after embarkation and up until the booked cruise ended.

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

379 Because I have rejected the submissions of Scenic about the way in which the Terms and Conditions operated, it is unnecessary to consider a number of the claims made by Mr Moore in his final pleading which seek relief with respect to the operation of the Terms and Conditions.

380 Mr Moore claimed relief from the effect of those Terms and Conditions to the extent that they formed part of the contract with Scenic, on a number of bases including that:

- (a) Scenic, in all the circumstances, engaged in conduct which was unconscionable within the meaning of s 21 of the ACL;
- (b) the provisions of various of the clauses were unjust within the meaning of the CRA; and
- (c) clauses 2.6(d) and 2.10 of the Terms and Conditions were each unfair terms within the meaning of s 24 of the ACL and should be avoided by the Court pursuant to s 23 of the ACL.

381 However, had I reached a different conclusion with respect to the meaning of the term “services” and the effect of the Terms and Conditions relied upon by the defendant, these matters would have required careful consideration. It is not practicable to undertake that consideration because to do so would require the Court to create a hypothetical construct for the true meaning of the Terms and Conditions to be subjected to consideration with respect to the relief sought by Mr Moore.

382 However, some facts relating to these matters are clear. First, the form of contract used, to the extent that the Terms and Conditions were relied upon, was a standard form contract within the meaning of s 23(1)(b) of the ACL. Secondly, the intending passenger, such as Mr Moore, was simply not in a position to bargain with Scenic about any of the features of the contract and particularly the Terms and Conditions. Scenic was in a totally dominant bargaining position. There was no possibility of any reasonable negotiation about those terms. Thirdly, Scenic did not effectively, or at all, draw the passenger’s attention to the Terms and Conditions, nor did it by printing those Terms and Conditions in the form, font size and layout, do anything which

would have enabled the intending passengers to easily read and understand those Terms and Conditions. Fourthly, if Scenic's arguments about the true meaning of these terms was correct, reliance by Scenic on them would have had the consequence of negating, in its entirety, the true subject matter and essence of the contract, namely the provision of a luxury river cruise to passengers, without financial consequences to Scenic.

383 Finally, I should note that there was litigated during the hearing, the issue of whether the Terms and Conditions referred to above were, or were not, unfair within the meaning of that term in the ACL. On that issue, Scenic did not lead or tender any evidence which was capable of rebutting the presumption set out in s 24(4) of the ACL, and could not on the evidence be found to have rebutted that presumption.

384 However, I make no final determination on any of these matters.

The Guarantees

The Purpose Guarantee: s 61(1) of the ACL

385 There was no direct dealing between Mr Moore, and any employee of Scenic at the time the booking was made, or prior to the commencement of the cruise. The evidence did not support a finding that Mr Moore made known, expressly to Scenic, any particular purpose for which he acquired the Services. However, in the factual context of what occurred, that is hardly surprising. Scenic is in the business of providing river cruises and tours in Europe and elsewhere in the northern hemisphere. Some of the provided cruises travel on the Mediterranean Sea and also the Baltic Sea. Scenic holds itself out as a specialist in the field of the provisions of travel and recreational services, in particular, cruises. Each year, well in advance of when particular cruises are intended to embark, having made the arrangements for and designed or else fixed particular itineraries, Scenic publishes a large brochure advertising the cruises which it offers. As is apparent, the brochure also concentrates not just on the particular cruise

itinerary, but on the provision of a luxury all inclusive experience enhanced by features available for passengers on Scenic's "Space Ships".

386 The brochure is distributed to travel agents such as Harvey World Travel at Warners Bay, where Mr Moore obtained it, RACQ Travel in Bundaberg in the case of Mr Childs, Wherever Travel in Sydney in the case of Mr Cairncross, Flight Centre at Pinewood Shopping Centre in Victoria in the case of Mr Holgye and Jayes Travel in Newcastle in the case of Mr Peattie.

387 As well, it advertises its cruises on television and in other forms of the media. It also directly mails promotional material to individuals who have been passengers on cruises in the past, or else who are members of one or other of the Scenic reward programs. No doubt it undertakes other promotional activities.

388 By these activities Scenic was inviting intended travellers to make bookings on one or more cruises of their choice. That is, Scenic was enticing passengers to book for an all-inclusive five-star luxury cruise. As Scenic itself put it, in one of its many letters to guests explaining disruptions:

"... We are making arrangements to ensure the best possible European river cruising experience for you, and we are certain you will enjoy the 5-star all-inclusive experience our Spaceships (sic) ...

...

Our Cruise Director will advise all final arrangements and river conditions as you relax and enjoy their ultimate European cruising experience."

389 It cannot be doubted that Scenic understood that the Services they were providing were all those necessary to provide passengers with a luxury five-star all-inclusive experience of a river cruise which it had promoted.

390 In in those circumstances, and in the absence of any direct evidence of the communication of any other particular purpose, I would readily conclude that when Mr Moore or any other intending passenger made a booking, paid the appropriate deposit, had their booking confirmed by Scenic for the identified

cruise itinerary and with the selected cabin, and then in a timely way paid the balance of the itinerary price, Mr Moore was impliedly making known to Scenic that he and his wife wanted to enjoy the cruise upon which they had booked with all of the benefits which Scenic said that it would provide and that was the particular purpose for which the services were being supplied by Scenic.

391 It is to be noted that in the legislation the “particular purpose” stands independently of and precedes the “supply of services”. It arises and is communicated at the time of the acquisition of, but prior to, the supply of the services. As well, it is relevant to note that the purpose is a unilateral one of the consumer. It is not necessarily a purpose which must be explicitly agreed, nor does the purpose necessarily form part of a contract for the supply of services. Indeed, in many cases it will not.

392 It is also worth noting that the particular purpose does not have to be an objectively reasonable one. The ACL simply provides that if a particular purpose is made known, and the supplier of services goes on to supply those services knowing (either expressly or impliedly) of that purpose, then the purpose guarantee is brought into effect.

393 I am satisfied that Scenic would have known, or understood, that Mr Moore’s particular purpose was to take the cruise which he booked and enjoy it together with all of the Services which Scenic said that it would provide (“the Particular Purpose”). As earlier described, what Scenic said it would supply was an experience, namely a luxury five-star all inclusive river cruise. That is the only sensible implication to draw about Mr Moore’s purpose, and the purpose of other intending passengers, and is the obvious one. It derives from the undisputed facts of what Scenic said it would do for people who paid it to provide the recreational and travel Services which it said it would.

394 Scenic, in its final submissions, did not suggest that such an implication ought not be drawn, nor that the purpose was not correctly identified. Indeed, it admitted in its Defence to the Third Further Amended Statement of Claim that

“the plaintiff and the group members wished to experience and enjoy travel and accommodation, by cruise, along European rivers to a range of tourist destinations”. Instead, Scenic sought to concentrate upon the effect of the terms and conditions arguing, as I have earlier identified, that they were relevant to what the services were that Scenic was obliged to supply and necessarily what the implied particular purpose was.

395 The use in the ACL of the qualification “*reasonably*” when considering fitness for purpose, shows that not every small lapse or shortfall in the provision of services will result in a breach of the purpose guarantee. A supply of services will not be in breach of such a guarantee unless the services are not reasonably fit for the identified purpose. The use of the term “*reasonably*” also introduces an objectively referable measure. It is a qualitative rather than a quantitative one. It requires an overall evaluation of the services provided, and a determination of their fitness for purpose, qualified by the word reasonable.

396 Such a determination is also necessarily fact-dependant – which means that the issue of whether one or other cruise has not achieved the purpose guarantee may provide a different conclusion.

397 In undertaking the review of the facts of each cruise and to address the question of whether the Services provided were reasonably fit to achieve the particular purpose, for both Mr Moore and other group members, it is appropriate to proceed on the basis that the particular purpose which was impliedly made known by Mr Moore and each other booked passenger, was as I have described earlier, namely to enjoy an all-inclusive five-star luxury river cruise experience with all of the additional services promised by Scenic.

398 If a group member alleged any additional purpose which was expressly made known to Scenic, the results reached below might well be different. Such a decision will need to await evidence from group members of their particular expressed purpose, if any.

The Result Guarantee: s 61(2) of the ACL

399 In its application to these proceedings, the result guarantee contained within s 61(2) of the ACL requires the plaintiff to establish that Scenic supplied the Services to him as a consumer and that he had made known to Scenic, either expressly or impliedly, the result which he wished the Services to achieve.

400 If a supply then occurred, s 61(2) of the ACL imposes a guarantee that the Services supplied by Scenic will be of such a nature and quality that they might reasonably be expected to achieve that result.

401 The Services being supplied by Scenic were intended by it to provide the luxury all-inclusive experience which it promised to passengers who were the consumers of the Services. Amongst other things, as Mr Moroney's letter of welcome at the start of the Brochure made clear, Scenic was keen to welcome back people who had travelled previously with it, who had the benefit "... of the wonderful travel experience [Scenic] have shared with so many guests". He also encouraged first time travellers to consider booking again with Scenic.

402 The Brochure informed intending passengers of the experience which Scenic said that they would have and enjoy:

- "... you will experience a standard of luxury and service that you would expect in a five-star hotel";
- "... you will enjoy a level of inclusive luxury and service that is unsurpassed on the waterways of Europe";
- "... you will experience Europe in all its glory as you relax with refreshment in hand on your private outdoor balcony"; and
- "At Scenic tours we make every effort to ensure that your European river cruise is a unique and special experience that you will always remember."

403 Whilst Mr Moore certainly articulated, in correspondence written after he returned to Australia, the result which he had hoped for when he booked his cruise there is no evidence that he had expressly made known to Scenic the result which he wished the services to achieve.

- 404 However, I am well satisfied, as with the implication of the “Particular purpose” to which I have earlier referred, that Mr Moore, by receiving the assurances and enticements of Scenic in its Brochure, selecting a particular identified cruise, and then paying for the cruise, was impliedly making known to Scenic the result which he wished the Services to achieve.
- 405 It seems to me to be a matter, largely, of common sense that passengers who booked on the cruises which Scenic promoted and would provide, were impliedly communicating that they expected the result from the Services which Scenic assured them they would get.
- 406 Scenic did not make any specific submission that such a result was not expected by Mr Moore and other passengers, nor that the Court should not make the relevant implication. However, in its Defence, Scenic admitted that “the plaintiff and the group members wished to experience and enjoy travel and accommodation, by cruise, along European rivers to a range of tourist destinations”. This admission supports the conclusion that the result which the consumers sought to achieve was the provision of all of the Services.
- 407 As with the purpose guarantee, whether or not the nature and quality of the Services might reasonably be expected to achieve the result is fact-dependant and will undoubtedly vary from cruise to cruise.
- 408 There is a substantial overlap between many of the facts relevant to a claim for a breach of the result guarantee with those facts and circumstances relevant to the breach of the purpose guarantee.

Due Care and Skill Guarantee: s 60 of the ACL

- 409 This provision requires that the supplier of services to a consumer guarantees that the services will be rendered with due care and skill. The ultimate effect of this guarantee is that it precludes, in a consumer agreement, the capacity of the supplier of services to contract out of negligent conduct with respect to the supply of services.

410 The use of the phrase “due care and skill” is a direct reference to the common law standard of negligence.

411 The section assumes that the supplier owes to the consumer a duty to use due care and skill in the supply of services. Compliance with that duty is guaranteed and, accordingly, if the supplier acts without due care and skill, and a consumer suffers loss or damage, then compensation may be awarded.

412 This guarantee replaces the implied term under s 74(1) of the *Trade Practices Act* 1971.

413 The plaintiff’s case with respect to the due care and skill guarantee, is that had Scenic conducted its operations by which the Services were provided with due care and skill, and having regard to the facts of which it was aware, or ought reasonably been aware, it would have concluded that for all of the subject cruises, except Cruises 2 and 3, there was a real and substantial risk or prospect which existed prior to the commencement of the cruises, that the cruises would be substantially disrupted and that the cruise itinerary would not be supplied in accordance with the promised Services.

414 The plaintiff submitted that having regard to such a conclusion, to proceed with the supply of the Services as Scenic did, without either:

- (a) unilaterally cancelling Cruises 1 and 6 to 11 inclusive;
- (b) giving to the passengers the option prior to embarkation of voluntary cancellation for all cruises other than Cruises 2 and 3; and
- (c) for Cruises 2 to 5 inclusive, the option of cancellation and a partial refund or rescheduling,

meant that the Services were provided without due care and skill.

415 The plaintiff submitted that a review of Scenic’s attitude as can be ascertained from written emails and other internal communications, demonstrated that differently from other cruise companies providing similar cruises on the same

rivers, and contrary to prudent practice, Scenic determined to go ahead and provide the Services knowing that there would be significant disruptions, without providing any accurate information or indication to the passengers of any sense of the extent of that substantial disruption.

- 416 Put differently, the plaintiff claimed that Scenic seemed to take the view that it was entitled to determine, without consultation with or agreement with intending passengers, or passengers who had embarked on a cruise, that significant and substantial changes to the itinerary and the nature and the quality of the cruise, and accompanying Services was for it and it alone to decide. It fixed internally a rule of thumb that it thought that so long as it provided about 50% or more of the “*cruise experience*”, then that was a sufficient discharge of its obligation to provide Services with due care and skill.
- 417 The plaintiff submitted that this is a demonstration of the breach of the consumer guarantee in s 60, rather than evidence of compliance with it.
- 418 The defendant submitted that this approach is wholly misguided. Scenic submitted that the plaintiff was unable to discharge its onus of demonstrating any breach of the due care and skill guarantee in circumstances where it has not called any expert evidence. Scenic submitted that the test of whether or not it had failed to render its services to Mr Moore with due care and skill was one of reasonableness: *Indico Holdings Pty Ltd v TNT Australia Pty Ltd* (1990) 41 NSWLR 281 at 285(E).
- 419 In addition, Scenic submitted that in determining whether or not there had been a breach of this consumer guarantee, the Court must analyse the facts and circumstances according to the provisions of s 5B and s 5C of the CLA: *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361 at [145]-[150].
- 420 Scenic pointed to the terms and conditions, and in particular clauses 2.7 and 2.10(d)-(h) and submitted that in the circumstances there was no evidence

that the provision of the Services including an alternative itinerary were not carried out with due care and skill.

421 In considering the issue of whether the Services were provided with due care and skill, it will be necessary to determine at particular times whether Scenic's knowledge was sufficient to enable it to act as Mr Moore says it should have.

422 The provisions of ss 5B and 5C of the CLA are relevant to the question of whether a person is, or is not, negligent. Although the sections are to be found under the heading to Part 1A – Duty of Care, the sections in fact relate to breach of such duty: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [13]. Section 5D of the CLA deals with causation of loss.

423 The provisions of ss 5B and 5C are not picked up and applied by virtue of s 275 of the ACL because before that section operates, there first has to be a failure to comply with a guarantee. The provisions are sought to be applied here to the question of whether or not there has been a breach of the guarantee. Accordingly, they are not picked up by s 275. This conclusion is consistent with the reasoning of the Court of Appeal with respect to the predecessor to s 275 of the ACL, namely, s 74(2A) of the *Trade Practices Act 1974* (Cth): see *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361; (2013) 86 NSWLR 55 at [34] per Basten JA; at [46] per Meagher JA and at [144] per Gleeson JA.

424 However, the defendant submitted that these sections are picked up and have effect by reason of the application of s 80 of the *Judiciary Act 1903* (Cth). The commencement point of this analysis is that this Court in hearing and determining these proceedings is exercising Federal jurisdiction pursuant to s 39(2) of the *Judiciary Act* because the Court is determining a claim which arises under Federal law, namely, the ACL.

425 Thus, the law which governs the exercise of that Federal jurisdiction is to be identified in accordance with ss 79 and 80 of the *Judiciary Act*. Although the

claim of Mr Moore and the group members is brought for a breach of Federal law – ss 60 and 61 of the ACL – the failure to comply with s 60 is a failure to act with due care and skill, a notion commonly described as negligence. The ACL does not prescribe any standard for, or criterion to be considered by a court when determining whether a defendant acted without due care and skill. This has the consequence by application of s 80 of the *Judiciary Act* that the common law “... as modified ... by the statute law in force in the State ... in which the Court ... is held” governs this Court’s exercise of Federal jurisdiction.

426 Sections 5B and 5C of the CLA modify the common law of negligence – so much is explicit from the words used. Accordingly, I conclude that the defendant’s submissions ought to be accepted. This result is consistent with the Court of Appeal’s decision in *Motorcycle Events Group* at [34] per Basten JA; [46] per Meagher JA and [150]-[151] per Gleeson JA.

427 The provisions of s 5B of the CLA require the identification of a risk of harm. Neither party specifically addressed this in submissions. Identification of the risk of harm is an essential step in the proper application of this provision: *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151 at [22]; *Shoalhaven City Council v Pender* [2013] NSWCA 210 at [55]-[72]; *Uniting Church in Australia Property Trust v Miller* [2015] NSWCA 320; (2015) 91 NSWLR 752 at [100]-[128]; *Fairall v Hobbs* [2017] NSWCA 82 at [75]-[76].

428 It seems clear that the application of care and skill was required in the supply of the Services in order to avoid the risk of Mr Moore (and the group members) suffering financial harm by way of economic loss and harm by way of disappointment and distress if the Services were supplied without care and skill.

429 The first condition imposed by s 5B of the CLA is whether such risk was foreseeable – that is, whether it was known to Scenic or which Scenic ought to have known. I am satisfied that this risk of harm was known to Scenic at all material times. After all, Scenic encouraged all intending and booked

travellers to take out travel insurance to cover, inter alia, expenses related to the cancellation of cruises, and as well, disruption of the cruises.

430 As well, since the proceedings in *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344, which were widely publicised and which were of interest to all providers of cruises, I would be prepared to infer that Scenic had actual knowledge of the risk that Mr Moore and the group members would be likely to be distressed and disappointed if the Services were not supplied with due care and skill. Indeed, there are expressions by Scenic to its passengers, particularly after the cruises were complete, which would lead to the same conclusion. If Scenic did not actually know of the risk of harm (contrary to my finding) then it clearly ought to have.

431 The next matter is whether the risk of harm is not insignificant. I have previously described a principled approach to the determination of this element: see *Benic v State of NSW* [2010] NSWSC 1039 at [101]. I see no reason to depart from this approach. I am satisfied that the risk of harm here was not insignificant. It is not at all uncommon that disruptions in, or cancellations of, cruises will occur and be accompanied by additional cost and expense. The risk is not so low as to fall below the threshold as fixed by s 5B(1)(b) of the CLA.

432 The question of whether on any particular cruise, Scenic should have taken certain precautions so as to ensure that the Services were provided with due care and skill will depend upon the particular facts and circumstances of the cruise.

433 Against the possibility that the question of whether a breach of the due care and skill guarantee ought be judged by the common law, unmodified by the CLA, I should say that the application of the *Shirt* calculus: see *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40 at 147 per Mason J, would derive the same conclusions as I have just expressed.

Defences to the Guarantees

434 Scenic raised two matters by way of defence to the consumer guarantee claims. The first is the provisions of s 61(3) of the ACL which provides that s 61 does not apply:

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

435 The onus of demonstrating that any particular claim falls within s 61(3) falls onto the defendant. It must be established that a consumer did not rely on its skill or judgment. Mr Moore’s evidence was to the effect that he relied entirely on Scenic’s skill and judgment in the provision to him (and his wife) of the Services. Having regard to the background of Mr Moore and Ms Howell, the circumstances of their booking and the type and nature of the Services being provided, I am satisfied that he did rely (as did his wife) on the skill and judgment of Scenic.

436 Scenic did not make any submission which challenged this conclusion. It did not submit that it was unreasonable for Mr Moore (and his wife) to rely on its skill and judgment.

437 Accordingly, I am satisfied that this defence is not made out in respect of the claim by Mr Moore (and his wife).

438 Scenic did however submit that the Court should not make a similar finding with respect to any other group members including those who had given evidence, because the Court was not determining their claims. Notwithstanding the fact that evidence was given by some group members, it would be inappropriate to reach a concluded view on this aspect with respect to these claims.

439 However, it is appropriate to remark that given the nature of the Services being supplied by Scenic, its corporate structure and the extensive resources both human and ship-borne, it would be most surprising to find a group member who, like Mr Moore, was a person looking to enjoy the experience of a cruise, who would have such a level of skill and judgment that, assuming

the group member was not reckless, would enable him or her not to rely on the skill and judgment of Scenic. As it seems to me, at present, it would be surprising if Scenic was able to point to any unreasonableness in the conduct of a group member in relying on Scenic's skill and judgment. However, any decision on such matters (other than for Mr Moore and his wife) must await further evidence.

440 The second defence relied upon by Scenic is that referred to in s 267(1)(c)(ii) of the ACL. That section provides, with respect to the guarantees under s 61(1) and s 62(2) but not with respect to the due care and skill guarantees under s 60 of the ACL, that a consumer may take action under the section if the failure to comply with a guarantee did not occur only because of circumstances independent of human control that occurred after the services were supplied.

441 The syntax of this provision is not easy to understand. As I read it, it provides that, relevantly to these proceedings, a consumer is not be able to bring proceedings under s 267 against a supplier of services for a breach of either the purpose guarantee or the result guarantee, if the only failure relied upon is a cause independent of human control that occurred after the services were supplied.

442 Viewed in that way, it is necessary to ask, with respect to the failure relied upon, whether the cause of the failure was independent of human control and whether this failure occurred after the Services were supplied.

443 I turn to the last question, namely whether the failure occurred after the supply of the Services. It seems to me that what is to be understood by this timing provision is that the services have been supplied, the supply has concluded and the purpose and result guarantees have not been fulfilled because of something which happened afterwards.

444 My analysis of the Services provided by Scenic is that, although the intensity of the Services was somewhat intermittent, the Services nevertheless

commenced when the booking by Mr Moore on the identified cruise was made, and a cabin of particular quality was reserved for he and his wife. The Services then provided by Scenic were directed to ensuring that Mr Moore and his wife were able to arrive in Amsterdam to embark on the cruise, and also to ensuring that the all-inclusive luxury five-star cruise was able to be provided to Mr Moore and his wife. The Services then continued until his disembarkation from the cruise and transfer to the airport for his trip home. Throughout that period of time, and particularly in the lead up to and during the cruise, the Services were being supplied by Scenic.

445 Mr Moore does not rely upon any failure of the purpose or result guarantees which occurred after the Services were provided. Rather, he relies upon failures during the course of the provision of the Services both prior to and during the booked cruise. For that reason, the provision has no application to Mr Moore's claim, or any of the claims of the group members.

446 The second necessary element is that the failure to comply with either the purpose or result guarantees was due only to a cause independent of human control.

447 It cannot be doubted that flooding and/or the unseasonal rains which caused the high water levels and river infrastructure damage would be regarded as a cause that was independent of human control. But having regard to the way in which Mr Moore (and the group members) articulated their claim, this is one, but not the only, cause of the failure by Scenic to comply with the relevant consumer guarantees.

448 The other causes of the failure to comply with the purpose and result guarantees were entirely within the control and influence of Scenic. At the most basic level of Mr Moore's claim is the assertion that Scenic was in breach of the purpose and result guarantees by failing to cancel the cruise or defer its departure. Another reason why Mr Moore claims a failure of the guarantee is that Scenic decided to transfer the passengers by motor coach for very long trips, in circumstances when the motor coaches were not of an

adequate quality, or else where drivers were not properly instructed. Mr Moore also drew attention to the inadequacies of the docking locations for some of the ships - they were not proximate to towns, were in smelly industrial areas, and ships were docked between or adjacent to their ships. There is simply no evidence led by Scenic, or otherwise, which explains why the ships were docked where they were in Bamberg, Melk and Krems, whether the docks were chosen only because of the high water levels, damage to river infrastructure or for some other reason that was not explained by Scenic by evidence or in any document tendered in evidence.

449 It is inappropriate to go through and address the various individual failures which contributed, in different ways, to the experiences of passengers on each cruise as Scenic submits. This is because the question of whether the cruises achieved their objective and provided the Services so as to comply with the purpose and result guarantee is an evaluation made on the basis of examining all that was provided, and assessing it against what services ought to have been provided.

450 I am satisfied that the failures of Scenic relied upon by Mr Moore and the group members, were not caused only by circumstances outside human control.

451 Accordingly, this defence has not been made out by Scenic with respect to the purpose and result guarantees.

452 It is now necessary to examine the facts of each of the cruises and come to a decision as to whether any of the consumer guarantees were breached as the plaintiff claims.

Application of Purpose and Due Care and Skill Guarantees to the Cruises

Cruise 1: South of France River Cruise commencing 19 May 2013

The Cruise

- 453 The South of France River cruise was a 14 day cruise which commenced on Sunday 19 May 2013, with the first night in Paris at a hotel. Passengers were, on the morning of 20 May 2013, intended to travel by the fast train, the TGV, to Dijon from where they would be transferred by coach to Chalon-sur-Saône to board the Scenic Emerald. The cruise was intended to finish on 1 June 2013, when passengers would disembark the ship in Arles and be transferred by coach to Nice airport. The planned itinerary included 12 days of cruising. The route proceeded south from Chalon-sur-Saône in central France to Arles in the south of France, passing through Tournus, Macon, Trevoux, Lyon, Vienne, Tournon, Viviers, Châteauneuf-du-Pape and Avignon.
- 454 Some guests, prior to arriving in Paris, received advice from Scenic that there would be a change to the itinerary. That advice included the following:
- “We have now been advised that we are unable to dock in Arles at the end of your cruise. We will be sailing as far south as Tarascon on your itinerary ... which is only 17kms from Arles. Your final docking for disembarkation will be in Avignon.”
- 455 An itinerary was provided which included some amendments to reflect what is set out above, and also some changes to the order of the touring itinerary.
- 456 On 20 May 2013, passengers boarded the Scenic Emerald in Chalon-sur-Saône. Upon arrival on board the ship, the Cruise Director informed passengers that the ship would not cruise to Tournus the following day as the dock at Tournus was “*under water*”. Instead, they were told that the ship would cruise directly to Macon on 22 May 2013. Passengers embarked whilst the ship was “... *docked in ugly industrial harbour*” which apparently gave “... *not the best first impression*” according to the Cruise Director’s diary.
- 457 On 21 May 2013, the ship remained docked in Chalon-sur-Saône but at a different berth in the city centre. Passengers travelled by coach to Beaune and undertook sightseeing around Chalon-sur-Saône.
- 458 On the morning of 22 May 2013, the ship cruised about 50km from Chalon-sur-Saône to Macon while passengers participated in various coach tours

around Chalon-sur-Saône. Passengers were not permitted to remain on the ship during this cruising component. The ship arrived in Macon at about 1pm. In the afternoon, passengers travelled by coach for approximately two hours from Chateau de Cormatin to Macon, where they boarded the ship.

459 From 23 May 2013 to 29 May 2013, the ship remained docked in Macon. Consequently, the ship did not cruise to Lyon, Vienne, Tournon, Viviers, Châteauneuf-du-Pape and Tarascon as scheduled. Passengers instead travelled to these locations by coach and participated in various land tours.

460 On 23 May 2013, passengers travelled for approximately forty minutes by coach to Cluny, where they visited the Benedictine Abbey, before returning to Macon. Richard Britten, a group member and passenger on this cruise, recalled that he and his wife chose not to walk around Macon in the afternoon “[a]s a result of the long bus trips over the previous two days”.

461 On 24 May 2013, passengers travelled for approximately one hour by coach to Lyon in the morning, followed by a fifty minute coach trip to Perouges in the afternoon. Mr Britten recalled that he was becoming “...*extremely tired with the extended bus trips*”.

462 On 25 May 2013, passengers travelled for approximately 1½ hours by coach to Vienne, where they undertook sightseeing, before returning to Macon.

463 On 26 May 2013, passengers travelled by coach to Tournon, where they participated in a walking tour, before returning to Macon. Mr Britten recalls travelling on the coach for approximately 5½ hours that day. That evening, the Cruise Director informed passengers that they would be disembarking the Scenic Emerald the next morning and travelling to another ship further down the river. Mr Britten recalls that this announcement was met with “*general uproar and complaints*” by the passengers.

- 464 On 27 May 2013, passengers travelled for approximately 10 hours by coach from Macon to Ardeche and then Avignon, where they stayed overnight at a hotel.
- 465 On 28 May 2013, passengers travelled by coach for approximately 25 minutes from Avignon to Châteauneuf-du-Pape, where they participated in a wine tasting activity, before returning to Avignon, where they dined at the Palais-des-Papes. Mr Britten and his wife decided not to travel to Châteauneuf-du-Pape that day as they were “*extremely tired from the previous day’s coach trip*”. Passengers again stayed overnight at the hotel in Avignon.
- 466 On 29 May 2013, passengers checked out of the hotel in Avignon in the morning and travelled by coach to Gordes, Fontaine de Vaucluse, and Nimes. Mr Britten recalled travelling on the coach for approximately four hours that day. Passengers stayed overnight at a hotel in Nimes, a Roman town apparently renowned for Visigoths.
- 467 On 30 May 2013, passengers checked out of the hotel in Nimes and travelled for approximately 3½ hours to Arles, Les Baux and Viviers, where they boarded the Scenic Emerald. The ship cruised about 80km to Avignon and arrived late in the evening. This was the first and only day of cruising which the passengers were able to enjoy.
- 468 On 31 May 2013, passengers were scheduled to travel by coach to the La Camargue National Park. The round trip would take 7½ hours. Mr Britten recalled that he and his wife, along with several other passengers, elected not to go on this trip because they had already endured “...*a number of long coach trips...*” on the tour.
- 469 On 1 June 2013, passengers disembarked the Scenic Emerald in Avignon and the cruise concluded.

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

Purpose Guarantee

471 Passengers on this cruise only had one day cruising between Viviers and Avignon, a distance of about 80km. On no other occasion were the passengers on board the ship whilst it cruised anywhere. In addition to travelling by coach on each day of the tour (including the morning when the ship did finally cruise), the passengers changed ship and stayed for three nights in hotels. Instead of unpacking upon arrival on a ship and then not having to repack their bags until the end of the tour, the passengers actually had to attend to this tedious process on four occasions. Simply put, this was a bus tour around southern France with accommodation on two different ships and at two different hotels with only one afternoon of cruising during which the passengers had the opportunity of relaxing on board the Scenic provided ship, watching the countryside drift past.

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

Due Care and Skill Guarantee

473 It is clear that the waters on the Saône and Rhone Rivers had been very high for most of the month of May 2013. Cruises had been significantly disrupted. The rivers were closed to navigation with passengers from time to time. The cause of this was a rapid melting of snow build-up during the last European winter. A number of UK passengers had chosen not to fly to France to take up these cruises, and had cancelled. At least as late as 11 May 2013, cruising with passengers on board was simply not possible.

- 474 The French rivers cruise was due to start on 19 May 2013. The passengers were due to board the Scenic Emerald on 20 May 2013 and disembark on 1 June 2013.
- 475 On 16 May 2013, namely, three days before the start of the cruise and four days before guests were due to embark, it was clear to Ms Scoular that the water levels on the rivers remained high. At that stage, the cruise which was sailing north could not establish a final disembarkation point because it was not clear where it could navigate to, or where it could dock.
- 476 On any view, at this point in time, and having regard to the history of what had preceded during the earlier weeks in the month, any responsible provider of travel services would have realised that there was a significant likelihood that the cruise due to commence when passengers embarked on 20 May 2013, would not be able to proceed smoothly and without interruption. Particularly is this so because Scenic had no information at that time which enabled it to conclude that there was likely to be a drop in the height of either river sufficient to permit navigation.
- 477 It was incumbent in my view for a supplier of services, such as Scenic, acting reasonably and in the application of due care and skill, to have taken reasonable steps to inform its passengers of the state of affairs. There is no evidence that Scenic took any steps to inform the passengers who were booked on that cruise, that this was so. In fact, the letter provided by Scenic, concealed rather than revealed these facts.
- 478 My conclusion with respect to the reasonable expected knowledge of Scenic prior to the commencement of this cruise is strengthened by the fact that as soon as the passengers boarded the ship, they were informed that the ship could not cruise as planned because the dock was underwater.
- 479 The ship could not cruise further south than Macon. Indeed, the cruising which it did undertake between Chalon-sur-Saône and Macon was only permissible without passengers. There is no direct evidence as to why the

ship could not sail south from Macon. It is clear from the Cruise Director's report that arrangements to sail as far as Macon had to be changed due to the high water situation. As well, the Cruise Director's report includes the note that she had informed the passengers that the changes to the program for the cruise were due to high water. In those circumstances, and in the absence of any specific evidence brought on the matter by Scenic which would be in a position to adduce such if it wished, I infer that one reason for the subsequent interruptions to the cruise were the high water level on the French rivers.

480 Putting it in perspective, there had been a publicly known phenomenon of a high degree of melting of the snows due to warm weather. The river levels on these French rivers rose to heights which made navigation impossible, or else very restricted. That occurred from at least some time in April 2013 through to the first few weeks of May 2013. The immediately preceding cruise, whilst able to make its way along the rivers, was unable to inform its own passengers where they would be disembarking. In other words, the river situation most proximate in time and location to the embarkation of this cruise was predictive of significant interruption.

481 In those circumstances I am satisfied that Scenic knew, or ought to have known, that there was a significant chance of a substantial disruption to the cruise. In those circumstances, it was not in a position, even applying due care and skill, to deliver the Services.

482 No later than 16 May 2013, Scenic acting with due care and skill ought to have contacted passengers, informed them of the weather and river conditions, informed them accurately of the view which Scenic ought to have formed about the likelihood of significant disruption, and how Scenic would address that, if it were capable, and then given to the passengers a choice as to whether they embarked on the cruise or not, thereby facilitating cancellation for the passengers.

483 Scenic did not do any of these things, and I am satisfied that there has been a clear breach demonstrated of the due care and skill guarantee for Cruise 1.

Cruise 2: Budapest to Amsterdam departing 20 May 2013

The Cruise

- 484 This cruise was to proceed along the route from Budapest to Amsterdam, passing through Vienna, Durnstein, Melk, Linz, Passau, Regensburg, Nuremberg, Bamberg, Würzburg, Wertheim, Rudesheim, Marksburg, and Cologne (the Budapest to Amsterdam Route). The cruise was scheduled to commence on 20 May 2013 upon the Scenic Jewel.
- 485 From 20 May 2013 to 28 May 2013, the cruise proceeded as scheduled. However, on 26 May 2013, the Cruise Director recorded that “*high water is threatening program. River Main is now closed*”. On 27 May 2013, the Cruise Director recorded that the “*cruise is being weather affected*”.
- 486 On 28 May 2013, the Cruise Director recorded that the ship was to have an “*enforced stay*” in Bamberg. On 29 May 2013, instead of cruising to Würzburg, the ship remained docked in Bamberg and passengers travelled by coach to Würzburg and Rothenburg. On 30 May 2013, the Cruise Director recorded that the ship was “*immobilised by high water at Bamberg*”. Passengers either remained on the ship for the day or participated in a village event.
- 487 There was no specific evidence about the features of the dock in Bamberg during this cruise. But as is apparent from evidence about the later cruises, the Scenic Jewel was docked in an unattractive industrial harbour which had a foul smell. It was also docked between other ships, so that it had no outlook from cabin verandas. Equally, guests had little privacy in their cabins.
- 488 On 31 May 2013, passengers disembarked the Scenic Jewel in Bamberg and travelled for four hours by coach to Rudesheim, where they boarded another ship, the Scenic Ruby. Mr Doyle, the Cruise Director, recorded that the coach trip was “*long*” and “*not helped*” by the fact that the coaches stopped at the same resting points, causing delays for passengers needing to use toilet facilities. After boarding the Scenic Ruby, passengers cruised to Cologne.

The coach trip covered the length of the Main River, and a section of the Rhine River.

489 On 1 June 2013, the ship cruised to Dusseldorf and then to Amsterdam as scheduled, with the Cruise Director recording that the cruise was “*back to normal*”. On 2 June 2013, passengers undertook sightseeing around Amsterdam. On 3 June 2013, passengers disembarked the Scenic Ruby in Amsterdam and the tour concluded.

490 Overall, for three days from 28 to 30 May 2013, no cruising occurred as the ship was docked in Bamberg and unable to leave. On 31 May 2013, the passengers were transferred by coach for the day as they changed ships. Although some cruising occurred overnight, there was no daytime experience of cruising.

491 The Main River comprised about 380km of the overall cruise. The section of the Rhine River between the junction with the Main River to Rudesheim was about 50km. Passengers did not have the opportunity to experience European village life or see the attractions, towns and villages such as Wertheim and Miltenberg.

Purpose Guarantee

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

493 I am satisfied that a cruise, disrupted to this extent, and substituted by four days of motor coach tours including at least one which was described as

“long” did not provide services which were reasonably fit for the Particular Purpose.

494 It would not have been a pleasant experience, nor particularly relaxing, nor would it have been interesting to be presented with a choice of travelling on coaches for many hours to visit places described on an itinerary or else to remain staring, essentially, at concrete walls or other ships whilst docked in an industrial area which was not close anywhere attractive.

495 I am satisfied that the services provided to the passengers on this cruise were not reasonably fit for the Particular Purpose, and that a breach of the purpose guarantee has been proved.

Due Care and Skill Guarantee

496 Cruise 2 is not the subject of any claim for a breach of the due care and skill guarantee in s 60 of the ACL.

Cruise 3: Amsterdam to Budapest departing 25 May 2013

The Cruise

497 This cruise was to proceed along a route from Amsterdam to Budapest, passing through Cologne, Marksburg, Rudesheim, Miltenberg, Würzburg, Bamberg, Nuremberg, Regensburg, Passau, Linz, Melk, Durnstein and Vienna (the Amsterdam to Budapest Route). The Cruise was scheduled to commence on 25 May 2013 on the Amadeus Silver.

498 From 25 May 2013 to 28 May 2013, the cruise proceeded as scheduled.

499 However, on 28 May 2013, the Cruise Director recorded that ships would soon be unable to pass under a bridge near Frankfurt due to high water levels. On that day, in the afternoon, the ship cruised through the Rhine Gorge to Rudesheim. From there the passengers travelled by coach to Mainz, re-joined the ship and cruised to Miltenberg.

- 500 On 29 May 2013, the ship was due to cruise from Miltenberg to Wertheim, which is a distance of about 40km along the river. That passage took six hours to complete (according to the Cruise Director's diary) with the result that many guests, who had chosen to transfer from Miltenberg by coach to undertake a walking tour in Wertheim, were left waiting for the ship to arrive. The weather was rainy and cold. The temperature was about 14°.
- 501 When the ship docked, it was coupled with a cruise ship being operated by APT. This docking arrangement meant that disabled guests could not leave the Scenic ship because disabled access was not available through the APT ship.
- 502 On 29 May 2013, the Cruise Director recorded that by 8pm Würzburg had "*closed due to high water*". Instead of sailing to Würzburg, the ship docked at Neustadt, which was not far from Wertheim and which was about a five hour cruise from Würzburg.
- 503 On 30 May 2013, the ship remained docked in Neustadt. The ship attempted to cruise to Würzburg later in the evening. However, the ship could not pass under the last bridge before Würzburg. On 31 May 2013, the Cruise Director recorded that the ship was "*stuck just before Wurzenburg*" (sic) and that the "*forecast does not look good at all*". He recorded that the Main River was closed and one section of the Danube River was also closed. He correctly predicted that the river and weather conditions could influence the next trip as well.
- 504 There was to be no cruising for the rest of the tour.
- 505 On 1 June 2013, passengers travelled for approximately four hours by coach to Nuremberg from Neustadt and about the same time for the return trip. The Cruise Director recorded that it was "*raining all the time, very grim*". The coach tour to Nuremberg occupied the whole day.

- 506 On 2 June 2013, passengers travelled for approximately 2½ hours by coach in the morning to Weltenburg Abbey, and four hours by coach in the afternoon to Salzburg. The Cruise Director recorded: “*raining heavily whole day, cold, very unpleasant*”. Passengers stayed the night in Salzburg.
- 507 According to the Cruise Director’s notes, there was considerable difficulty and delay in the coaches reaching Salzburg. Most roads were blocked and there was only one road which allowed access into Salzburg. The buses carrying the passengers arrived between 7.15pm and 9.35pm. Passengers were accommodated in two separate hotels. The Cruise Director had also noted that passengers had waited up to three hours (12.15 to 3.15) to be driven by shuttle bus to visit the Weltenburg Abbey. The position was noted as “*ridiculous*”.
- 508 The view available during the coach trip and the experience of it was described in this way:
- “Raining heavily whole day, cold, very unpleasant, on the way seeing flooded fields, forests in a pool, houses in the middle of ‘lakes’.”
- 509 On 3 June 2013, no coaches were available, so passengers participated in a walking tour of Salzburg. Passengers stayed another night in Salzburg.
- 510 On 4 June 2013, passengers travelled by coach from Salzburg to Vienna via Melk. The lunch at Melk was described as “*very unorganised*”. The Cruise Director recorded that “*we have lots of guests who should not be on a bus tour*”. He also recorded that walking tours were inappropriate for some guests who had an “*absolute incapacity of walking*”. No doubt that incapacity was the reason those passengers chose to travel on a cruise.
- 511 The use by the Cruise Director of the “bus tours” when referring to the unsuitability of the guests is a telling one. First, it reveals a view of a Scenic employee (or agent) as to the substance of the services which were being provided. Secondly, it demonstrated that the Cruise Director was abandoning any pretence that the passengers were enjoying a luxury river cruise which

had been altered to any extent at all. Thirdly, the fact that lots of guests should not have been on a bus tour demonstrates that the services being provided were not reasonably fit for the purpose of those guests who had chosen a river cruise.

512 On 5 June 2013, passengers remained in Vienna but were accommodated on the Scenic Rhapsody. The Cruise Director recorded that “*many guests are getting really sick*” and that “*the guests are more and more gloomy*”. There were too many guests for the number of seats in the dining room on board that Scenic ship. Apparently guests were “*crying, upset, shouting*”.

513 On 6 June 2013, passengers travelled by coach from Vienna to Budapest via Bratislava. The Cruise Director recorded that the Danube was “*almost overflowing in Bratislava*” and that passengers were “*on the bus the whole day*”. The passengers arrived in Budapest at 6pm having been on buses “*the whole day*”. The Cruise Director also recorded that passengers were not satisfied with the quality of the rooms and food at the hotel in Budapest. No air-conditioning was available. The rooms were described as quite old and needing refurbishing. Passengers stayed the night in Budapest.

514 Clearly, the hotel in Budapest was in all respects inadequate. The Cruise Director wrote this:

“Meals in Mercure ... There was a huge line on the buffet. Guests did not like both – the place and food (confirmed by CD and assistants as well – more like a school buffet rather than delivering service to EG that claim to be 5* - as per brochure – this is barely 2* xxx it is the worst hotel I have ever been and had not changed for the 7 years I had not visited).”

515 The Cruise Director recorded that the quality of the tour was also adversely affected by staff inefficiencies in the principal European office. There was no evidence offered by Scenic to explain its choice of sub-standard hotel. In the absence of such explanation, I would readily infer that those selecting it made inadequate enquiries about its standard and the level of accommodation and service which it provided.

- 516 On 7 June 2013, passengers remained in Budapest and stayed another night at the “*barely 2**” hotel. On 8 June 2013, passengers checked out of the hotel and the tour concluded. No notes were made by the Cruise Director for these days.
- 517 The only cruising which took place in accordance with the itinerary and brochure was over the initial four day period which included two days of cruising. The balance of the tour consisted of coach travel over long distances and for many hours. Instead of having 10 days during which passengers could experience the promised cruising, the passengers on the trip experienced only two. The passengers were accommodated on two different ships and in two different hotels.

Purpose Guarantee

- 518 This cruise, not without difficulty, proceeded until it reached Wurzburg, i.e. it proceeded about 500km along the Rhine River, and about 240km along the Main River. That cruising took about four days. The passengers on this cruise did not travel again along the rivers of the Europe. They did not cruise on the balance of the Main River, the Main/Danube Canal or the Danube River i.e. they did not cruise for about 1,000km of the planned itinerary.
- 519 When docked in Wertheim, disabled or mobility restricted passengers could not leave the ship. That is because there was no disabled access through an adjoining ship to which the cruise ship was moored.
- 520 After Neustadt, where the ship remained, the balance of the trip was conducted on coaches. As the review of this cruise above demonstrates, the services provided to the passengers were badly organised, significantly disrupted and guests who did not have the capacity for walking and travelling on coaches, were obliged so to do. When the passengers were transferred to be accommodated on the Scenic Rhapsody, which was docked in Vienna, there were insufficient seats in the dining room to cater for the number of passengers. The hotel in which the passengers were accommodated in Budapest, was inadequate in all respects. The Cruise Director described it as

the worst hotel he had ever been in. The passengers were accommodated there for two nights.

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

522 The services provided to the passengers on this trip were not reasonably fit for the Particular Purpose. A clear breach of the purpose guarantee has been established for this cruise.

Due Care and Skill Guarantee

523 Cruise 3 is not the subject of any claim for a breach of the due care and skill guarantee in s 60 of the ACL.

Cruise 4: Amsterdam to Budapest departing 27 May 2013

The Cruise

524 This cruise was to proceed along the Amsterdam to Budapest route. The cruise was scheduled to commence on 27 May 2013 upon the Scenic Ruby.

525 From 27 May 2013 to 29 May 2013, the cruise proceeded as scheduled. However, Frank Holgye, a passenger who gave evidence about this cruise, recalled that as the ship was cruising on its first planned day of cruising from Amsterdam to Dusseldorf on 28 May 2013, he observed a number of large, mature trees submerged in the water. According to Mr Holgye, the Cruise Director announced that evening that there were "*problems with the rising river levels*" and consequently some revisions needed to be made to the itinerary.

526 On 29 May 2013, the ship cruised from Dusseldorf to Cologne as scheduled. However, on 30 May 2013, instead of cruising to Rudesheim and then Miltenberg, the ship was forced to dock in Mainz. That evening, the Cruise

Director announced that some of the rivers had been closed due to rising water levels and that passengers would have to disembark the Scenic Ruby and travel to Bamberg by coach to board another ship, the Scenic Jewel.

- 527 On the morning 31 May 2013, passengers disembarked the Scenic Ruby and boarded coaches to take them to Bamberg. Mr Holgye recalled that passengers had to walk approximately 1km up a hill to board the coaches. The Cruise Director's notes recorded that the passengers "... *had to walk through pouring rain and heavy wind upon the departure 500m to the coaches*". Passengers then travelled by coach from Mainz to Miltenberg and Marktheidenfeld village, where they undertook sightseeing, before arriving in Bamberg at approximately 6pm. Mr Holgye, who was on crutches, recalled that he was "*extremely tired*" from the lengthy coach trip. He recalled that passengers spent many hours on coaches that day. Andrew Cairncross, another group member, recalled that conditions in Bamberg were "*extremely unpleasant*" and that there was a "*foul smell*" at the industrial port where the Scenic Jewel was docked. The Scenic Jewel remained docked in that port with the passengers on board for a total of four nights.
- 528 On 1 June 2013, the ship remained docked in Bamberg. Passengers travelled by coach to Würzburg and Rothenburg.
- 529 On 2 June 2013, the ship remained docked in Bamberg. Passengers undertook a city tour of Bamberg. Mr Cairncross recorded in his travel diary that "*we are stranded, have been for two days*".
- 530 On 3 June 2013, the ship remained docked in Bamberg and had not cruised to Nuremberg as scheduled. Passengers instead travelled to Nuremberg by coach. The coach trip was significantly delayed due in part to the construction of a temporary dam which caused a traffic jam. Mr Holgye recalled that passengers only had a couple of hours in Nuremberg due to the lengthy coach rides there and back. He recalled that the Cruise Director informed passengers in the evening that they would have to disembark the Scenic

Jewel and travel to Krems the next morning to transfer to another ship, the Scenic Sapphire.

- 531 On the morning of 4 June 2013, passengers disembarked the Scenic Jewel and travelled for approximately seven hours by coach to Krems, where they arrived at about 7pm and boarded the Scenic Sapphire. Lunch was taken in Regensburg. The ship was located in an abandoned industrial area. Mr Cairncross recalled a “*foul smell*” in the area.
- 532 For the five nights from 5 June 2013 to 9 June 2013, the Scenic Sapphire remained docked in Krems whilst the passengers were accommodated on board. Mr Holgye recalled extensive bus travel and walking during this period. It appears from a document sent by Donna Willis that on 5 June 2013, passengers were taken on a coach tour of Krems. On 6 June 2013, they went on a coach tour to Melk. On 7 June 2013, passengers were taken on a coach tour to Vienna. On 8 June 2013, a number of coach tours were offered. Two of those trips returned to Vienna. A third travelled to Bratislava. It is fair to describe these days as amounting to a coach tour of parts of Austria and Slovakia whilst accommodation was provided on a ship moored in an industrial estate on a flooded river in Krems. On 5 June 2013, Mr Cairncross and his wife decided to leave the cruise as there was no prospect of any further cruising. They stayed at a hotel in Vienna. Apparently, a Ms Kristian Kozma (whose position is not recorded in Cruise Director’s report) was brought to the ship “... *to speak to the guests and listen their [grievances]*”.
- 533 On 7 June 2013, two guests who had earlier complained about the tour consulted the Cruise Director about leaving the cruise. They were told that Scenic would not give any refund, and that any arrangements which they made were at their own expense. These terms were unsatisfactory – the guests elected to remain.
- 534 On 8 June 2013, passengers who went on trips to Vienna or Bratislava were provided with luncheon on the Scenic Pearl, another of Scenic’s ships which was docked in Vienna.

- 535 On 9 June 2013, passengers disembarked the Scenic Sapphire in Krems and travelled for approximately four hours by coach to Budapest. They were accommodated overnight in a hotel in Budapest. On 10 June 2013, the tour concluded in Budapest.
- 536 The passengers on this cruise had only three days of cruising, one of which was incomplete. From the fourth day onwards, all touring was done by coach. An email on 10 June 2013, from Justin Brown to Glen Moroney recorded that there were “7 *unplanned stationery days*” on this cruise. The passengers stayed on three separate ships and at a hotel in Budapest.

Purpose Guarantee

- 537 This cruise struck trouble early on. On 30 May 2013, which was the third possible day of cruising, the ship was unable to continue past Mainz, a town essentially near the junction of the Rhine River and the Main River. From that day onwards, the passengers travelled by coach for the whole of the distance between Mainz and Budapest. They were accommodated on the Scenic Jewel in Bamberg in a dock described by the passengers as extremely unpleasant, having the foul smell of an industrial port. They were then accommodated on another ship in Krems in an abandoned industrial area for five nights, and then they were transferred by coach to a hotel in Budapest.
- 538 The passengers on this cruise had only three days of cruising, one of which was incomplete, and from the fourth day onwards all touring was done by coach. They stayed on three separate ships and at a hotel. They missed out on about 1,200km of the 1790km waterway route.
- 539 The passengers on this cruise were not provided with an all-inclusive five-star luxury cruise on their intended itinerary from Amsterdam to Budapest. They cruised only to Mainz and thereafter were provided with a bus tour to Budapest whilst accommodated on stationery ships. This was a far cry from receiving the Services which Scenic promised. I am satisfied that the services provided by Scenic were not reasonably fit for their Particular Purpose. A breach of the purpose guarantee has been established.

Due Care and Skill Guarantee

- 540 As just noted above, Cruise 4 was the one upon which Mr Holgye and Mr Cairncross travelled, and about which they gave evidence.
- 541 The plaintiff submitted that if Scenic had been acting with due care and skill, it would have provided to passengers on Cruise 4, by 25 May 2013, an option to cancel the cruise and not proceed with it. That is, cancellation should have been offered two days before the passengers were due to embark on this cruise.
- 542 Cruises 2 and 3 which were at that time on the rivers between Budapest and Amsterdam proceeded as scheduled on 25 May 2013. Neither had encountered any difficulties on that day although, no doubt, some could have been anticipated.
- 543 Mr Holgye observed signs of what he thought was a high water level and had a conversation with a crewmember on board the ship which referred to rising water levels. However, without more, this material was not sufficient to suggest that a decision to proceed with the commencement of Cruise 4 and the provision of services supporting that decision occurred without due care and skill.
- 544 On 28 May 2013, the Scenic Jewel reached Bamberg and could not proceed further towards Amsterdam i.e. towards where Cruise 4 was about to commence sailing.
- 545 Unsurprisingly, Cruise 4 was significantly interrupted on 30 May 2013, when the ship was forced to dock in Mainz due to rising water levels. At that time, the rain was particularly heavy and there was significant bad weather in Mainz. Bad weather in Bamberg was also recorded on 27, 29 and 31 May 2013. On 30 May 2013, there was heavy rain all day in Budapest, which continued on 1 June 2013 to some extent and substantially on 2 June 2013 in the areas between Budapest and up to and including Vienna.

- 546 No doubt weather forecasts, which were easily accessible to Scenic, would have provided an indication of the weather over the next seven or 14 days. There is no evidence as to what those forecasts were, and there is no evidence as to what enquiries, if any, Scenic made about the likely weather along the rivers over the period from 28 May 2013, when the Scenic Jewell became stuck in Bamberg.
- 547 Providing the Services with due care and skill would, in my view, as a minimum have obliged the relevant operations staff at Scenic to have informed themselves as to what the weather forecast was and as to the predicted weather. As well, providing these Services with due care and skill would have required the operations staff of Scenic to inform themselves of the existing river heights, and the predicted heights of the rivers throughout the time of the cruise. In particular, the context in which that information should have been obtained, in the exercise of due care and skill, would include the maximum river heights at which the cruises could safely operate. These river heights would need to be ascertained at the relevant locations where the height clearance for ships passing under bridges was a critical, safe navigation issue.
- 548 All of this information was, so far as can be seen from the internal correspondence of Scenic and also other announcements made by other river cruising companies, publicly and readily available. There does not seem to have been any suggestion of the need to expend any significant monetary resources to obtain this material.
- 549 There was certainly no evidence provided by Scenic that would suggest that material of this kind was unavailable to it, or that it had any difficulty in obtaining such information.
- 550 In those circumstances, given what was known by 30 May 2013, in particular that ships were docked in three locations along the river at Mainz, Bamberg and Krems, and were not able to sail on the river, the provision of the Services with due care and skill warranted information being provided to

passengers about the likely future course of the cruise. In the case of those passengers on Cruise 4, by 29 May 2013, it was clear that there was or else was likely to be, a significant interruption to their cruise. The ship upon which they were embarked could not and would not be likely to be able to, sail further east past Mainz. The ship that was further along this river could not sail west from Bamberg. The ship at Krems could not sail in either direction.

551 What Scenic was confronted with was changing a river cruise to, what was in effect, a motor coach tour from stationary ship to stationary ship with excursions along the way.

552 Had Scenic exercised due care and skill in the provision of the Services, it ought to have informed its passengers that was what was in prospect. Individual passengers could then have made such decision as they thought best in the circumstances.

553 In other words, by 29 May 2013, Scenic was in the position where it was highly likely that it could not comply with the purpose guarantee. That likelihood became a certainty on 30 May 2013, when the ship became stuck in Mainz. After that point in time, Scenic could not continue to pretend that it was providing a river cruise of the kind which has earlier been described, or able to provide the Services.

554 However, it did not make any relevant disclosure to passengers. I accept Mr Holgye's evidence, and that of Mr Cairncross, as to the information they were provided. That information, which was part of the Services being provided, was wholly inadequate. It denied to Mr Holgye and Mr Cairncross, and all other passengers on that cruise, the opportunity of determining for themselves what they wished to do. Part of that was an opportunity to cancel the further part of the tour, and make other arrangements.

555 I am satisfied that as and from 29 May 2013, the Services provided to the passengers on Cruise 4, were provided without due care and skill, and that the plaintiff has established a breach of the due care and skill guarantee.

Cruise 5: Budapest to Amsterdam departing 27 May 2013

The Cruise

- 556 This cruise was to proceed along the Budapest to Amsterdam route. The cruise was scheduled to commence on 27 May 2013 upon the Scenic Sapphire.
- 557 From 27 May 2013 to 30 May 2013, the cruise proceeded as scheduled. However, on 31 May 2013, when the ship was in Melk, the Cruise Director recorded that the “*ship cannot sail onwards*” because of high water levels on the Danube River and the closure of the lock in Melk. The Cruise Director noted that it was “... *questionable on when the ship will sail again!*”.
- 558 The opinion of the Cruise Director was prescient. Although he may not have known it, Scenic certainly knew that by 31 May 2013, the waterways to the west of Melk towards Amsterdam were not then navigable. Ships were stuck in Mainz and Bamberg. The Main River was closed. The Rhine River had high water levels with more rain both occurring and predicted. The situation was such that it was highly likely that the Services were going to be significantly disrupted.
- 559 On 1 June 2013, the ship remained docked in Melk and was unable to cruise to Passau as scheduled. Passengers participated in tours to Salzburg and Český Krumlov by coach. At 7:10 pm, the ship commenced cruising to Krems, a distance of about 40kms where it docked for the evening. Both coach tours involved a drive of about three hours in each direction.
- 560 On 2 June 2013, the ship remained docked in Krems and the Cruise Director recorded that the “*ship cannot sail due to high waters*”. Passengers in cabins on one side of the ship only had a view of the “*wall in the industrial harbour*”. Passengers travelled to Regensburg, Passau and Linz by coach. The Cruise Director recorded that these locations were far away and that the drive to Regensburg was “*very long*”. There was heavy rain and traffic which contributed to the circumstances.

- 561 On 3 June 2013, the ship remained docked in Krems. Passengers travelled by coach either to Vienna or into Krems. That day, the Cruise Director informed passengers that they would disembark the Scenic Sapphire the next morning and travel to Bamberg to board another ship, the Scenic Jewel.
- 562 On the morning of 4 June 2013, passengers disembarked the Scenic Sapphire and travelled by coach to Nuremberg and then to Bamberg, where they boarded the Scenic Jewel. Passengers were required to board the coaches by 7.30am. The coaches did not arrive in Nuremberg until 2pm - a total of about 6½ hours of travelling. After lunch and a short time to explore Nuremberg, passengers returned to the coach for a tour of Nuremberg, after which they travelled for another hour on coaches to reach the Scenic Jewel at Bamberg. The Cruise Director recorded that passengers had commented that it had been “... *a very long day*”.
- 563 One couple concerned about the trip expressed the view to the Cruise Director that there had been long days on coaches, and that they should have been given the opportunity to choose between continuing the trip or going home. It appears that, in substance, the passenger was pointing out the invidiousness of the position in which they were placed because there was no real choice – either they stayed on a stationary ship all day or else spent the day going on quite lengthy coach tours. Neither of these options reflected the cruising experience which Scenic described in its Brochure.
- 564 On 5 June 2013, the Scenic Jewel remained docked in Bamberg. Passengers travelled by coach to Rothenberg and Würzburg where they participated in tours. That evening, the Cruise Director informed passengers about another ship swap to take place the following day.
- 565 On 6 June 2013, passengers disembarked the Scenic Jewel in Bamberg and travelled by coach to Mainz, where they boarded the Scenic Diamond. The Cruise Director recorded that “*everyone was really tired from the ship swap & [being] on the coaches again*”. Guests were obliged to walk about 500m from the Bamberg dock location to the nearest coach parking area to board the

buses for Mainz. They arrived in Mainz at about 5pm which meant that the passengers had spent the bulk of the day on coaches.

- 566 On 7 June 2013, the Scenic Diamond remained docked in Mainz. Passengers travelled to Rudesheim by coach. In the evening, the Cruise Director informed passengers that the ship would commence cruising up the Rhine Gorge at 6am the next morning. The highlighted event on the intended itinerary of a visit to Marksburg Castle with a dinner there was cancelled, although the reason for that cancellation is not apparent in the evidence.
- 567 On 8 June 2013, the ship cruised up the Rhine Gorge and arrived in Cologne at approximately 4pm. Passengers then undertook a tour of Cologne. The ship left Cologne at about 7pm and commenced cruising to Amsterdam.
- 568 On 9 June 2013, the ship continued cruising from Cologne to Amsterdam and, on 10 June 2013, the tour concluded.
- 569 Overall, on eight out of the ten days, which were described in the intended itinerary as cruising days, there was no cruising at all, with all touring being carried out by coach. Justin Brown's email of 10 June 2013, recorded "*eight unplanned stationary days*". The passengers were obliged to change ships on two occasions during the cruise, with lengthy coach trips to effect the ship swaps.

Purpose Guarantee

- 570 This cruise proceeded as far as Melk, which it reached on the fourth day of the cruising component. There it remained, except for a short trip, without passengers, to Krems. The passengers disembarked the Scenic Sapphire in Krems and travelled by coach to Bamberg to the Scenic Jewel which was moored there.
- 571 After a number of nights moored in Bamberg, the passengers disembarked the Scenic Jewel and were transported by coach to Mainz where they boarded the Scenic Diamond.

- 572 On eight days of this itinerary that were described as cruising days, there was no cruising at all. All touring on those days was carried out by coach. The passengers were obliged to change ships on two occasions during the cruise, with lengthy coach trips undertaken to effect the changes of ship.
- 573 The number of days during which this cruise was interrupted was in, in my view, very substantial.
- 574 Having regard to the description of this cruise earlier set out, and the matters to which I have just referred, I am satisfied that the services provided by Scenic to the passengers on this cruise were not reasonably fit for the Particular Purpose.
- 575 I am satisfied that the plaintiff has established a breach of the purpose guarantee.

Due Care and Skill Guarantee

- 576 The plaintiff submitted that if Scenic had been acting with due care and skill, it would have provided to passengers on Cruise 5, by 26 May 2013, an option to cancel the cruise and not proceed with it. That is, the day before the cruise was due to depart.
- 577 The ship arrived in Melk on 31 May 2013 and could not sail onwards because of high water levels on the Danube River and the closure of the lock in Melk. It did not move again except for a short distance cruise without passengers to Krems where it docked and where it remained.
- 578 The effects of weather and high water levels with respect to this cruise were the same as those with respect to Cruise 4. After all, the cruises were being conducted at the same time, simply in opposite directions. Scenic's knowledge, or knowledge which, acting reasonably, it would be expected to acquire, was the same as for Cruise 4.

- 579 The one difference was that a successful passage at the western end of the Rhine River was always likely to be a more feasible option than the passage in an easterly direction between Krems and Budapest.
- 580 By the time the ship was docked in Melk and likely to move the following day only to Krems on 30 May 2013, it was apparent that the other ships on the river at that time were also docked and unlikely to move in Bamberg and Mainz. If the Services had been provided to passengers on this cruise with due care and skill, by 30 May 2013 the passengers would have been informed of the fact that cruising on the river was unlikely between Krems and Mainz, that what was intended to be undertaken was a motor coach tour with intermediate accommodation being provided on the stationary ships, docked as they were, and subject to improvement in the weather, with the prospect that another ship would be able to sail west from Mainz to complete the cruise to Amsterdam.
- 581 The provision of the Services with due care and skill required that information to be provided to the passengers with a reasonable indication of what was entailed in the motor coach trips, by way of length, and any reasonably available alternative options for the passengers such as a shorter tour or remaining on board the ship.
- 582 Upon the basis of that information, passengers could then make a decision as to whether they wished to remain on the tour or cancel it.
- 583 By 1 June 2013, it was clear to Mr Sandmeier, and he so informed the relevant executives of Scenic, that cruising was significantly interrupted. It was unclear to him when navigation could resume on the Main River, on the Danube River and, to some extent, on the Main/Danube Canal. Even the position on the Rhine River was unclear and he was concerned that navigation could be impacted on that river.
- 584 By that time, or at least the next day, Scenic knew that navigation on the Rhine River was likely to be significantly disrupted because Koblenz was

forecast to be closed for navigation within 24 hours and that the water was significantly above the level necessary for safe navigation around Basel. As Mr Sandmeier himself said, on 2 June 2013, “*interruptions of Rhine to be expected*”.

585 By that time, the Scenic Diamond was docked in Mainz and was unlikely to be able to move. The Scenic Jewel was docked in Bamberg and unable to move. The Scenic Sapphire was docked in Krems and unable to move. The Scenic Pearl was docked in Vienna and unable to move. The Scenic Ruby was in Amsterdam and the Scenic Crystal was in Budapest. It was also apparent to Mr Sandmeier, at least by 2 June 2013, that it was unlikely that the ships would be able to move for a number of days. Scenic regarded the ships as being “stuck”.

586 By 31 May 2013, the Avalon Cruising Company, which had four ships sailing along these rivers, being the Luminarie, the Vista, the Expression and the Visionary, had concluded that these ships were also stuck on the rivers and that they would be unable to sail for some days. With respect to a cruise heading east, at least from Frankfurt, to the Danube area, Avalon had concluded that it was very likely that the cruise “*will turn into a coach tour*”. With respect to a tour on the ship Tranquility, it was clear to Avalon as at 1 June 2013, that it would become a coach tour.

587 Early on the morning of 2 June 2013, Mr Brown recognised the position. As earlier set out, he reported this to Mr Moroney:

“Water levels on the Rhine and Main and very high, rain continuing. We ... will have 5 ships possibly stuck today.
Moving to land (coach and hotel) is challenging and capacity is limited.

...

It may be that we have to just stay on board and then try to make it to disembarkation/embarkation points as best we can and make a refund.”

588 Mr Brown also knew that both the Avalon Cruising Company and Viking Cruising Company had started cancelling cruises which were due to depart on 2 June 2013. Mr Brown thought that it was time, by 2 June 2013, to consider cancellation and return home options for Scenic cruises.

- 589 Whatever were the views of Mr Brown, which were kept within Scenic, it was clear that the provision of the identified Services with due care and skill objectively and reasonably required either cancellation of cruises, or else the provision of clear information to intending passengers so as to enable them to consider whether they wished to cancel the tour or what their other options were.
- 590 In light of this dire picture for cruising on these waterways, and the internal knowledge of Scenic, the only communication with the passengers on this cruise was the letter of 1 June 2013, provided by Scenic to the guests. It is set out at [69] above. That letter did not convey an accurate picture about Scenic's ships or the state of the waterways. The lack of accurate information denied to passengers the chance to make an informed decision about whether to embark on the cruise or cancel it. The picture painted by the letter was simply that a different ship would commence the cruise, and that passengers would at some point transfer onto the intended ship for the completion of the cruise.
- 591 What was missing from this letter was any information about how the "cruise" was going to be conducted by Scenic – namely, an initial cruise until the high water levels on the Rhine which were anticipated prevented further cruising, and then a motor coach tour to Budapest with accommodation being provided on stationery ships which could not move from where they were docked. Even allowing for the fact that conditions might change over a two week period, there was no reasonable basis on 1 and 2 June 2013, and certainly not by 3 June 2013 when the passengers on the cruise embarked, to conclude that there was any reasonable prospect that the Services could be provided. The execution of due care and skill in the provision of the Services would have led to the cancellation of the cruise.
- 592 As is apparent from Mr Brown's email of 4 June 2013 (at [193] above), Scenic's decision-making was guided by these propositions:

- (a) that the provision of motor coaches to transport passengers over the distances between docked ships along the waterways was a proper alternative to cruising on the waterways;
- (b) accommodation, whether with restricted outlooks or no views at all, on docked ships, was a proper alternative to cruising along the waterways with “*brehtaking views*” and the “*most refreshing views to some of the continent’s most extraordinary places*”;
- (c) cruises would start and/or continue unless there was a risk to planned disembarkation places and times;
- (d) the provision of the “*Ultimate River Cruising Experience*” was to be provided by motorcoach tour with accommodation on multiple docked ships (or hotels as necessary) and by providing some reasonable services;
- (e) passengers would not be informed of an option to cancel, or invited to cancel, and if they wished to voluntarily leave the ship they would do so as their own expense. Any passenger’s complaint which seemed challenging would be dealt with by escalation and according to the “market owner”;
- (f) all could be made well at the end of each cruise by an offer of compensation.

593 The services provided for the passengers on this cruise were not provided with due care and skill. I am satisfied that Scenic was in breach of its due care and skill guarantee.

Cruise 6: Amsterdam to Budapest departing 29 May 2013

The Cruise

594 This cruise was to proceed along the Amsterdam to Budapest route. The cruise was scheduled to commence on 29 May 2013 upon the Scenic Diamond.

595 On the evening of 30 May 2013, before the ship sailed from Amsterdam, the passengers were given an update by the Cruise Director “...*regarding [the] high water situation*”.

- 596 From 29 May 2013 to 31 May 2013, the cruise proceeded as scheduled. However, on 1 June 2013, the Cruise Director recorded that the Main River was closed due to “*high water*” and consequently the ship was forced to dock in Mainz. At Mainz, he recorded that there was “*extreme high water*”. This accorded with the knowledge of Mr Sandmeier at that time.
- 597 From 2 June 2013 to 5 June 2013, the ship remained docked in Mainz. During this time, passengers travelled by coach to Miltenberg, Rothenburg, Würzburg, Frankfurt and Heidelberg. Passengers were obliged on 6 June 2013 to disembark from the Scenic Diamond and to travel by coach to Vienna and there board the Scenic Pearl.
- 598 At approximately 8am on 6 June 2013, passengers travelled from Mainz to Regensburg by coach, where they had lunch and participated in a walking tour, before travelling by coach to Vienna, where they arrived in the early hours of the morning on 7 June 2013. In order to facilitate this particular ship swap, the passengers’ luggage, according to the Cruise Director’s report, was loaded onto a truck at 7am. Necessarily, passengers would have had to have packed up their luggage and given it to the crew sometime before then so that it could be transferred onto the luggage truck. The first part of the trip from Mainz to Regensburg, a distance of 360km, took 4½ hours. The buses left Regensburg after lunch at 3pm. The trip from Regensburg to Vienna was a distance of about 450km. The trip was long and somewhat unorganised. The four buses arrived in Vienna at the Scenic Pearl between 12.15am and 1.30am. There, passengers boarded their second ship, the Scenic Pearl. The Cruise Director recorded that the passengers were “*tired, stressed, exhausted and finally ‘happy’ to arrive on the ship*”. The Cruise Director also recorded that the coach drivers were “*stressed, tired and not prepared*”, drove carelessly at times, and had poor communication skills.
- 599 The passengers would need to have woken up at about 6am to ensure that their luggage was available to be loaded at 7am. Then, with the exception of lunch and rest breaks, they were on buses for about 16 hours, and had been

awake for up to 20 hours before accessing their new cabins. This sort of day falls well short of the Services which Scenic offered to provide.

600 On 7 June 2013, the Cruise Director recorded that he received many complaints from passengers; they "... *complained massively* ..." about two of the buses, general handling of some transfers and especially the bus drivers. The Cruise Director's notes for the previous day, which refer in detail to the events of the very lengthy coach transfer, provide more than ample corroboration for these complaints. On the following day the Cruise Director again fielded a number of complaints from passengers who were expressing, at least, their disappointment about "... *the entire situation*".

601 From 7 June 2013 to 10 June 2013, the ship remained docked in Vienna. During this time, passengers participated in tours in and around Vienna. On 9 June 2013, the Cruise Director recorded that a number of passengers were complaining about the lack of cruising and inquiring about obtaining a refund.

602 On the morning of 11 June 2013, passengers disembarked the Scenic Pearl and travelled to Budapest by coach. The trip took a little over four hours including a 1½ hour stop at a petrol station. Passengers stayed at a hotel in Budapest overnight. On 12 June 2013, the tour concluded.

603 Overall, only two days of cruising occurred on the trip. Cruising on a third day was partial and incomplete. Justin Brown's email of 10 June 2013 records only five unplanned stationary days which, in my view, is not correct. There were in fact 10 days when the passengers stayed on a ship and took bus tours. This does not include their time in Amsterdam or Budapest. The passengers stayed on two separate ships and in a hotel. They had very lengthy motor coach trips.

Purpose Guarantee

604 This cruise commenced in Amsterdam on the requisite date and travelled as far as Mainz. After reaching Mainz, on 1 June 2013, no further cruising was undertaken. The passengers completed the itinerary between Mainz and

Budapest by coach travel. The coach travel involved many hours and involved passengers staying on two separate ships and in a hotel.

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

606 I am satisfied that the services supplied to passengers on this cruise were not reasonably fit for Particular Purpose. Scenic was in breach of the purpose guarantee.

Due Care and Skill Guarantee

607 Cruises 6 and 7 were due to depart Amsterdam and Budapest respectively on 29 May 2013.

608 By that stage the weather was looking poor, and although the ships had not yet become stuck, it seems to me realistically, that enquiries of the kind which I have earlier explained were necessary would have been likely to demonstrate that there was a prospect that the cruises would not be able to be completed without significant interruption.

609 The plaintiff submits with respect to these two cruises, that by 28 May 2013, Scenic should either have cancelled the cruises or, alternatively, prior to their embarkation, have informed their intending guests of the prospect of significant interruptions.

610 On the evidence, there is insufficient material to enable a conclusion to be drawn that a failure to cancel these tours was a decision made without the application of due care and skill.

611 However, the position is different on 31 May 2013. As is apparent from an earlier accounting of what was known to Scenic by this time, the provision of the Services with due care and skill required Scenic to inform its passengers on these cruises that there was a significant prospect that the cruises would

not be able to proceed in accordance with the itinerary, and, in effect, what was in prospect was a motor coach trip through the balance of the planned itinerary, with accommodation being provided on stationary, docked ships. Passengers should have been given that information to enable them to make a decision as to whether or not to cancel their tour.

- 612 Such information was not provided in any way which approached a description of the reality of the circumstances. In my view, the services provided from that date onwards for either of these two cruises were not provided with due care and skill.

Cruise 7: Budapest to Amsterdam departing 29 May 2013

The Cruise

- 613 This cruise was to proceed along the Budapest to Amsterdam route. The cruise was scheduled to commence on 29 May 2013 upon the Scenic Sapphire.
- 614 From 29 May 2013 to 1 June 2013, the cruise proceeded as scheduled. That is, the ship remained in Budapest until later on the evening of 30 May 2013, when it commenced to sail towards Vienna. Sailing continued on 31 May 2013 until it arrived in Vienna in the afternoon. On 1 July 2013, the passengers engaged in a series of tours around Vienna. In the evening they were warned by the Cruise Director “... *about the coming high water*”. However, from 2 June 2013 to 5 June 2013, the ship remained docked in Vienna. During this time, passengers travelled by coach to Melk and Krems. Those trips were not without difficulty. It was not possible to go to Durnstein because the road was closed due to flooding. The lower town in Melk was flooded, causing some change in arrangements. There was heavy rain all day. The ship remained docked in Vienna instead of sailing from Durnstein to Aschach.
- 615 On 3 June 2013, the ship was intended to sail to Passau where there would be excursions to Salzburg or Český Krumlov. On the evening of 3 June 2013,

the ship ought to have sailed overnight to Regensburg. Instead, the ship remained docked in Vienna, and passengers were taken on coach excursions in Vienna and to Baden. These excursions were not on the original itinerary.

616 On 4 June 2013, the ship was intended to sail overnight to Nuremberg, after passengers had spent the day in Regensburg. Instead, the passengers remained on the ship which was still docked in Vienna. A number of excursions were arranged for, in and around Vienna and a coach was provided to shuttle the passengers into Vienna from the ship and back again.

617 On 5 June 2013, which was the eighth day of the cruise, that is just over halfway through the cruise, the ship and the passengers had not proceeded past Vienna and its environs. Their itinerary would have had them spending the day in Nuremberg on the various intended excursions, and then to cruise overnight to Bamberg. The passengers spent the day in and around Vienna. No excursions were provided although a shuttle bus was provided to take the passengers in and out of Vienna.

618 On the morning of 6 June 2013, passengers disembarked the Scenic Sapphire in Vienna and travelled by coach to Regensburg and then to Bamberg, where they boarded the Scenic Jewel. The Cruise Director recorded that because the motorways were closed, it took almost 9 hours to reach Regensburg. The passengers had "lunch" at about 4pm. The coaches left Regensburg at 6.15pm. It then took a further three hours to reach the Scenic Jewel which was docked in Bamberg. The Cruise Director recorded, in somewhat of an understatement, that it had been a "*tiring day*" for the passengers. Ten passengers declined to transfer from Vienna to Bamberg by coach. They made arrangements at their own expense to travel by train instead. I infer that they did so because they regarded that mode of transport as being preferable to spending a long day on a coach. Dinner was provided to passengers on the Scenic Jewel commencing at 9.15pm.

619 On 7 June 2013, the ship remained docked in Bamberg. Passengers travelled by coach to Würzburg, Rothenberg and Nuremberg. The Cruise

Director's notes for this cruise can only be described as spare, particularly when compared with other Cruise Director's reports. Nevertheless, it is possible to track the intended itinerary and the actual trip carried out from other exhibits. The day of 7 June 2013 should have started in Würzburg after an overnight cruise from Bamberg. The passengers ought to have been able to experience Würzburg and Rothenburg and then sailed overnight to Wertheim. Instead, the ship remained docked in Bamberg and passengers travelled by coach back to Nuremberg and Würzburg (where the ship was planned to stop) and also to Rothenburg.

620 On 8 June 2013, passengers disembarked the Scenic Jewel in Bamberg and travelled by coach for approximately four hours to Wiesbaden, where they boarded the Scenic Ruby. In the middle of the trip there was a "village event" at Freudenberg. The Cruise Director recorded that the passengers were tired of bus rides. Had the cruise proceeded as intended, the ship would have sailed from Wertheim to Rudesheim and passengers would have experienced the village event in Freudenberg without the need for any lengthy coach tour.

621 From 9 June 2013 to 12 June 2013, the cruise proceeded as scheduled, which included two days of cruising and then two days in Amsterdam including the final departure day. Passengers were noted to be "... *happy that we are sailing*".

622 On this cruise it was intended that cruising take place on 10 days but the passengers experienced only three days of cruising. They did experience the two day port stop at each end of the trip in Budapest and Amsterdam, which included the starting day and the finishing day.

Purpose Guarantee

623 The ship was able to cruise to Vienna from Budapest. By halfway through the cruise, namely 5 June 2013, the ship had still not proceeded past Vienna where it remained docked – having arrived there on the afternoon of 31 May 2013. The passengers had been engaged in travelling from the ship in

Vienna to a variety of locations by coach. They had not had the pleasure of any real or sustained cruising experience at that point.

624 On the morning of the ninth day of the cruise, the passengers were transported by bus for a very long day to the Scenic Jewel, which was docked in Bamberg. The passengers remained on that ship, as it remained docked in Bamberg, for a number of nights and were transported to various places by coach. The passengers were then transported by coach for many hours to Wiesbaden where they boarded the final ship. The passengers had two days' cruising after that.

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

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

627 Having regard to what occurred, I am firmly persuaded that the services provided to the passengers on this cruise were not reasonably fit for the Particular Purpose. The purpose guarantee was breached.

Due Care and Skill Guarantee

628 For the reasons expressed with respect to Cruise 6, I am satisfied that the due care and skill guarantee was breached by Scenic, by it failing to provide the appropriate information by 31 May 2013. .

Cruise 8: Amsterdam to Budapest departing 3 June 2013

The Cruise

- 629 This cruise was to proceed along the Amsterdam to Budapest route. The cruise was scheduled to commence on 3 June 2013 upon the Scenic Jewel. The cruise was to last 15 days. This was the cruise that the plaintiff, Mr Moore, and his wife were booked on. I earlier recounted his evidence about his experience. What follows supplements his account and is derived largely from the Cruise Director's report and other documents.
- 630 On 1 June 2013, two days before the cruise was to commence, Scenic Tours wrote to passengers informing them that due to "*high water levels*" they would no longer be embarking upon the Scenic Jewel but upon another ship, the Scenic Ruby. Mr Moore, the plaintiff and passenger on this cruise, recalled that on 3 June 2013, whilst in Amsterdam, the Cruise Director told passengers that "*[w]e will only be on the Ruby for a couple of days [then we'll] change to the Jewel*".
- 631 On 1 June 2013, two of the other passengers on this cruise, Mr and Mrs Brayford, received a letter from Scenic pointing out that the current high water levels on the Main river had prevented navigation with the consequence that they were to be embarked on the Scenic Ruby rather than the Scenic Jewel. It seems that Mr and Mrs Brayford had paid for a cabin upgrade for their cruise on the Scenic Jewel. However, they were being accommodated on a lower deck and in a smaller room. Ms Scoular wrote to them:

"We do recognise and understand that this change at this stage is disappointing, and in conjunction with our apologies we will of course refund you the entire cabin upgrade fee of \$1695 per person that you have paid for the original cabin; and also the full cost of your airfares and taxes of \$2527 per person. Whilst in the State Room we will offer you the enhanced services of complimentary laundry and pressing. If for any reason another suite is available we will ensure to accommodate you into that suite.

The above refund reflects the costs for the entire cruise, although as we sail towards Budapest we are making arrangements to transfer all guests back onto the Jewel at a convenient location ..."

- 632 No upgrades could be offered to any passengers because of the change of ship. The Cruise Director recorded that on the first evening in Amsterdam, the guests "... saw the flooding on BBC World. Thank God for 24 hour news". The Cruise Director's attitude to the downgrading of the cabins was "*In any case, the Ruby is a fine ship. The infrastructure of the product is far superior to any other company on the river, and the crew is great. What more can you ask for?*" That rhetorical question may well have been answered by Mr and Mrs Brayford by saying they wanted that which they were promised.
- 633 From 3 June 2013 to 4 June 2013, the cruise proceeded as scheduled. On 5 June 2013, the ship arrived in Cologne. However, the ship was unable to continue cruising to Marksburg due to high water levels, so it docked in Linz. Passengers instead travelled for approximately 3 hours by bus to Marksburg, where they had dinner at Marksburg Castle, before travelling back to Cologne, arriving at the ship at about 12:30 am on 6 June 2013.
- 634 The Cruise Director's report noted with respect to the Marksburg Castle dinner that "... *THE Marksburg Castle event is a great evening but coming on top of the Sfc [Scenic Free Choice] earlier, it is a bit of a killer*". One guest was heard to be denouncing Scenic and the holiday saying that it was not a holiday. I infer that this was a reference to the fact that the cruise was not a relaxing, enjoyable experience, and that there were overly lengthy motor coach trips involved.
- 635 On 6 June 2013, passengers cruised towards Rudesheim. However, the ship was forced to dock in Koblenz due to the "*water situation*". According to Mr Moore and another passenger, Mr Harold Childs, the ship was docked in between two other ships, preventing passengers from enjoying views from their balconies. Later that afternoon, passengers travelled by coach for approximately 1 hour to Cochem. The Cochem excursion was not on the itinerary. The original plan of which the guests were informed at the "port talk" was that there would be an extended excursion to Rudesheim. However, when the coaches arrived, and about 10 minutes prior to the proposed departure, the coach drivers informed the Cruise Director that the main road

to Rudesheim was closed and that it would be necessary to travel by back roads over the mountains which would take three hours. The excursion to Cochem was introduced as an alternative to Rudesheim trip. Mr Moore recalled that the Cruise Director said: "*We will not be sailing any further until the rivers subside*".

636 On 7 June 2013, passengers travelled by coach for approximately six hours from Koblenz to Marktheidenfeld and return. At Marktheidenfeld they participated in a village event. At 7pm, passengers commenced cruising from Koblenz to Wiesbaden. This timing meant that one highlight of the cruise, namely seeing the Lorelei rock, was not possible as it was passed in the dark. The Cruise Director recorded the following note at the end of 7 June 2013:

"These guests hate travelling on a bus and we have to take one tomorrow and we took one yesterday. So far we are spending more travelling time on the bus than the ship."

637 At around 8am on 8 June 2013, passengers disembarked the Scenic Ruby in Wiesbaden, and then travelled by coach to Rothenburg, Würzburg and then to Bamberg, where they boarded the Scenic Jewel. Mr Moore and Mr Childs recalled that the buses they travelled on did not have a functional bathroom or air conditioning, making the bus trip "*very hot*" and requiring passengers to wait for roadside stops to go to the bathroom. Mr Childs recorded that the trip was "*very uncomfortable*" and took about three hours. Mr Moore recalled that upon his arrival in Bamberg, the ship was docked in an "*abandoned industrial area*".

638 The Cruise Director's notes corroborated this state of affairs. He wrote:

"Those who went on Bus 1 to Wurzburg suffered from no toilet and no air-conditioning on what was a hot day – 27 degrees. ...

Disembarkation and loading 170 suitcases delayed Wurzburg and Rothenburg which were done on route to Jewel, not as it said in the letter of apology which stated that the move would be made while you enjoy your scenic excursions ... The sub-contracted bus from Linz was a disgrace, old toilet not working, half safety belts missing ... a busy day for all involved."

- 639 From 9 June 2013 to 11 June 2013, the ship remained docked in Bamberg. On 9 June 2013, the Cruise Director recorded that guests complained that where the ship was docked in Bamberg was smelly. Guests asked whether the ship could be docked "*somewhere else*". During this time, passengers travelled by coach to Nuremberg and Regensburg. On 11 June 2013, the Cruise Director recorded that guests were "[o]bviously fed up with staying in Bamberg in an industrial port with no views from their cabins". In the evening of 11 June 2013, the ship began sailing to Regensburg. A small cheer was heard from the passengers.
- 640 On 12 June 2013, the ship cruised along the Danube towards Regensburg. The Cruise Director recorded that the ship was cruising "*at an incredibly slow pace through the locks*" and would not reach Regensburg. He noted that passengers were "*annoyed*" by this and also because they would not get the opportunity to visit Salzburg or Český Krumlov. The ship docked in Berching in the early hours of the morning on 13 June 2013.
- 641 On 13 June 2013, passengers travelled by coach for approximately seven hours from Berching to Munich and back. The Cruise Director recorded that it had been a "*long day*" for passengers and that they faced another long bus journey to Vienna the next day, where they would board another ship. He wrote:
- "Excursion to Munich was a good idea in theory. But it made for a long day with about 7 hours spent on the bus ... We all got back to the ship about 1830 with the prospect of packing for the third time for the third ship and a 9 hour bus journey. ... High water prevent us getting to Kelheim so destinations keep changing"
- 642 At around 8am on 14 June 2013, passengers disembarked the Scenic Jewel and travelled by coach to Vienna. Mr Moore and other passengers took a train to Vienna instead. The Cruise Director noted that it was "*not a relaxing day*" for the passengers. Because of the length of the bus trip, including the closure of the motorway because of flooding near Passau and a huge traffic jam near Vienna, passengers arrived on the Scenic Pearl at about 5.40pm or shortly afterwards. There was very little time to check in to their cabins, have

dinner and change before leaving for an evening concert at 7.10pm. No doubt these events contributed to the Cruise Director's evaluation of the day.

643 From 15 June 2013 to 17 June 2013, the cruise proceeded as scheduled. On the evening of 15 June 2013, passengers cruised from Vienna to Budapest. The high water in Budapest prevented the usual evening cruise. On 16 June 2013, the Cruise Director recorded that Mr Moore had inquired about suing Scenic Tours due to the lack of cruising. The Cruise Director recorded that the main problem with the tour was the "*extended stay ... in Bamberg in an unattractive docking position*". The Cruise Director also recorded that the main claim of the dissatisfied guests is that they did not get what they paid for "*... a cruise. Many hated going by bus so that the long excursion in Munich on a hot day defeated its purpose ...*". The Cruise Director concluded that the "*... truth is that the river situation kept changing ...*".

644 In summary, passengers on this cruise changed ships on two occasions and so travelled on three different ships. Instead of cruising on 10 days, they only cruised for three days.

Purpose Guarantee Analysis

645 It is clear based upon all of the experiences recounted with respect to this Cruise, that the services provided were not fit for the Particular Purpose. Very little cruising in fact took place. The ships were docked in places which were unattractive. Lengthy coach tours were organised and passengers spent a very long time on coaches, some of which were inadequate.

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

Due Care and Skill Guarantee

- 647 By 2 June 2013, Mr Brown communicated internally that the situation was not improving and that Scenic may not be able to make land alternatives part of their strategy and that cancellations would be considered.
- 648 By 3 June 2013, when the cruise was due to leave, it was apparent that ships were stuck on the river and unlikely to move for many days. It was also apparent to Scenic that a significant component of the cruise would be undertaken as a motor coach tour by land. Other cruise ship companies formed the view that it was appropriate to cancel the cruise departing at that time.
- 649 The submission advanced by counsel for Scenic was that Scenic was in a better position than other companies, because of its ability to undertake ship swaps, to enable the cruise to go ahead.
- 650 That submission is unpersuasive. First, there is no evidence that that was the fact, although assertions to that effect were made by Scenic in correspondence. Secondly, it is apparent from the Exhibits that Avalon itself was capable of undertaking ship swaps between ships operated by its company which were stuck on the river.
- 651 There is simply no reason in the evidence advanced, which was an adequate justification of the decision of Scenic not to cancel this cruise.
- 652 Its failure to do so, in my opinion, is a clear demonstration of the provision of the Services without due care and skill. Intending passengers were booked on a luxury river cruise. The river conditions and weather did not enable that cruise to take place as promised. The only responsible action for Scenic, on all of the evidence, exercising due care and skill, was to cancel that tour. There is no explanation offered as to why it did not. To the extent that one can infer from the existing evidence why it did not, the most natural inference to be drawn is that Scenic preferred its own commercial interests.

653 Scenic's view that it could by providing 50% of the cruise, comply with its contractual obligations was misguided for a number of reasons. First, as I have previously explained, what is in issue here is not compliance with a contractual obligation but delivery of services in accordance with the consumer guarantee provisions of the ACL. Secondly, as I have explained when considering the terms and conditions, the terms and conditions of the contract did not enable Scenic to substitute substantively a coach tour for a river cruise. Thirdly, the concept of 50% being an acceptable standard is not grounded in any evidence as being related to an industry practice or a norm of any kind. Looked at objectively, the provision of 50% of a booked cruise is not at all satisfactory and is rather an acceptance that the Services were not supplied with due care and skill, or such as were necessary to achieve the Particular Purpose or the appropriate result.

654 The plaintiff submitted that no later than 2 June 2013, the cruise ought to have been cancelled. This submission has been made good. I am satisfied that the services for this cruise were not provided with due care and skill.

Cruise 9: Budapest to Amsterdam departing 8 June 2013

The Cruise

655 There was no evidence that passengers received any notification of any possible interruptions to their cruise before arriving in Budapest. This cruise was to proceed along the Budapest to Amsterdam route. The cruise was scheduled to commence on 8 June 2013 upon the Amadeus Silver. The cruise was to last for 15 days. At that time, the Amadeus Silver was in fact docked in Nuremberg.

656 On 8 June 2013, the Cruise Director recorded that many passengers were unhappy upon arrival because they were not given the choice whether to fly home or to continue with the tour. Passengers did not board the Amadeus Silver as scheduled but instead stayed at a hotel in Budapest. Arrangements for this hotel reservation must have been made some days earlier.

- 657 On 9 June 2013, passengers undertook sightseeing of Budapest and stayed another night at the hotel. Martinus John Willems, a passenger on the cruise, recalled that the “*flooding around Budapest was significant*” and that the docks were “*completely destroyed and/or were ... underwater*”.
- 658 At around 8am on 10 June 2013, passengers travelled by coach for approximately nine hours from Budapest to Vienna and then to Bratislava. In Vienna, passengers boarded the Amadeus Brilliant. Mr Willems recalled that the ship was docked in an “*industrial area*” and that there was a “*pungent smell*”.
- 659 On 11 June 2013, the ship remained docked in Vienna instead of cruising to Durnstein. Passengers participated in a walking tour around Vienna or an optional tour to Schönbrunn Palace. Mr Willems noticed “*tree logs and flotsam*” floating in the canal near the ship.
- 660 At around 8 am on 12 June 2013, passengers disembarked the Amadeus Brilliant in Vienna and travelled for 14 hours by coach to Nuremberg via Salzburg, where they boarded the Amadeus Silver at around 10pm. The passengers missed out on their planned visits to Durnstein and Melk. Mr Willems recalled having a sore back after this bus trip. He also recalled that the Cruise Director advised that sailing would commence “*by 3pm tomorrow*”.
- 661 On 13 June 2013, despite the remarks of the Cruise Director the previous evening, the ship remained docked in the Nuremberg area. It did not cruise to Regensburg. Mr Willems recalled that the ship was docked approximately 40km from the city of Nuremberg and that there were no shops or attractions nearby. A shuttle bus operated to the city centre but the planned excursions to Passau and Český Krumlov could not take place.
- 662 On 14 June 2013, the ship remained docked in Nuremberg. Passengers travelled by coach to Regensburg and Weltenburg before returning to

Nuremberg. Mr Willems chose to remain on the ship on this day because he feared that another long bus trip would aggravate his wife's DVT condition.

663 On 15 June 2013, which was the eighth day of the 15 day tour, passengers participated in a bus tour around Nuremberg. At about 7pm that evening, the ship commenced cruising to Bamberg. This was the first cruising that had taken place on the tour.

664 From 16 June 2013 to 22 June 2013, the cruise proceeded as scheduled.

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

Purpose Guarantee

666 The passengers on this ship suffered significant disruption of the planned cruise itinerary. Upon arrival in Budapest, there was no ship for the passengers to embark upon. They stayed at a hotel. They were then transported by coach on the morning of 10 June 2013, when they would otherwise have been cruising, to Vienna.

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

668 The first time upon which any cruising occurred was in the evening of 15 June 2013, which was the eighth day of the 15 day tour.

669 Thereafter the cruise proceeded as scheduled.

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

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

Due Care and Skill Guarantee

672 When the passengers arrived in Budapest on 8 June 2013 there was no ship for them to embark upon. That would have been clear to Scenic for many days prior to 8 June 2013, as would have been the fact that the situation would not be changing for the better in the near future. The passengers were given little, if any, information about the likely disruption to their cruise.

673 Upon arrival the passengers were accommodated at a hotel which was 5km out of Budapest. No doubt, this was appropriate having regard to the flooding in and around Budapest. Perhaps it was the only available hotel. The evidence does not permit of any conclusion about this.

674 The Cruise Director's report which was tendered is an incomplete one. It contains only notes for 8 June 2013 and then from 20 June 2013 onwards. The document refers to other trip reports which have been uploaded, but they were not tendered in evidence.

675 According to the Cruise Director's report, APT at this time were giving their guests a choice of whether to cancel the tour and return home, or else proceed on the tour. This was apparently known to a number of the guests and reported to the Cruise Director. The Cruise Director also recorded that the unprofessional handling of the issue (late explanation, letter delivery etc.,

“and the hotel letter was sent without info to deliver”) had caused a great deal of upset amongst guests. It was clear also to the Cruise Director that there were likely to be difficulties with sailing along the entire cruise route. She noted that she had asked about a boat trip in the Wachau Valley on a future date *“... when Danube is maybe open so that we are on a waiting list ...”*.

676 On 8 June 2013, the Scenic ships were still stuck at various locations along the waterways. It was clear that Scenic knew that APT had cancelled its sailings which were due to depart on 8 June 2013. It knew that Uniworld and Avalon had cancelled a number of their cruises. It also knew that Viking cruises had cancelled a number of their cruises because of the fact that the Danube River would be closed between Budapest and Nuremburg until at least 16 June 2013. On 6 June 2013, Uniworld had cancelled the remainder of a number of cruises, providing a full refund to guests on board and a future cruise credit. It also cancelled a cruise due to leave Amsterdam on 16 June 2013.

677 By 7 June 2013, the day before this cruise was due to depart, Scenic knew that the high water levels and flooding was unlikely to allow for uninterrupted cruising on the rivers for the departures due on 10 June and 12 June in both directions. A fortiori, the position for the departure on 8 June 2013.

678 Critically, Mr Crichton from Evergreen said on 7 June 2013, the day before this cruise was due to depart when dealing with the subject of cancellations:

“We need to hold firm and talk about an altered itinerary but we are running the tour. ... We all know that they will get on the Silver at the worst case situation for at least 6-7 days, almost 50%.

We need to work on their Europe dreams and makes sure they get to experience as much as possible, but just on a different form of transport.”

679 What is clear is that information faithful to this view was not communicated to passengers on this ship.

680 In my view, due care and skill required not the concealing of information within Scenic’s internal communications network, nor the provision of partial

information which pretended that things were better than they actually were, but the provision of accurate, reliable and truthful information to passengers to enable them to decide whether they would cancel the tour. Clearly, this did not take place.

681 In my view, having regard to all of the circumstances, and those which could reasonably be predicted, the services provided to passengers on this cruise were provided without due care and skill, because the only reasonable course which was open to Scenic was to cancel the cruise, on or before 7 June 2013, or at the least offer the passengers the option so to do.

682 The plaintiff submitted that the passengers ought to have been given an option with respect to this cruise of cancelling or not on 6 June 2013. I agree that no later than 7 June 2013, the passengers ought to have been provided with the information about the real prospect of the cruise being significantly interrupted. That information should also have been accompanied by an option to cancel. Scenic was in breach of its due care and skill obligation at that time.

Cruise 10: Amsterdam to Budapest departing 10 June 2013

The Cruise

683 This cruise was to proceed along the Amsterdam to Budapest route. The cruise was scheduled to commence on 10 June 2013 upon the Scenic Pearl.

684 On 10 June 2013, the cruise commenced upon the Scenic Diamond. The captain spoke to the passengers on the first evening about the “*high water situation*”. The entire cruise proceeded as scheduled except for one day, 21 June 2013, when passengers had to disembark the Scenic Diamond and travel by coach from Durnstein to Vienna to board another ship, the Scenic Pearl. The coach trip took around one hour to complete. The Cruise Director recorded that he emphasised to passengers “*how lucky we were to be able to sail as we did*”.

685 Whilst the cruise largely proceeded according to the planned itinerary, there were some difficulties associated with the river conditions which necessitated some alterations. On 14 June 2013, because of strong currents on the river, the cruising speed of the ship was reduced and its arrival to collect passengers in Marktheidenfeld was delayed. On 18 June 2013, shipping traffic overnight caused delays, which meant that coach tours started from a different location and involved slightly longer coach trips. Docking was not possible in Passau because of damaged power and water connections, but the ship docked 5km away. A stop in Linz was not possible. None of these difficulties seemed to cause a major disruption. The cruise was completed with passengers travelling on two ships instead of one. But the change of ship only involved a relatively short coach trip. Overall, the cruise took place without any substantial deviation from or interruption to, the planned itinerary.

Purpose Guarantee Analysis

686 As the facts recounted above demonstrate, the entire cruise proceeded as scheduled except for one day when passengers had to disembark from one ship and travel by coach for around an hour to board another ship to enable the cruise to be completed.

687 Although there were other minor interruptions, I am satisfied that this cruise took place without any substantial deviation or interruption, and without any substantial reduction in the Services which were provided by Scenic.

688 Accordingly, I could not be satisfied on the evidence that the services provided by Scenic on this cruise were not reasonably fit for the relevant purpose. On the contrary, I am satisfied that the services provided were reasonably fit for that purpose.

Due Care and Skill Guarantee

689 Cruises 10 and 11 were due to depart from Amsterdam and Budapest respectively on 10 June 2013.

690 The plaintiff submitted that in the exercise of due care and skill in the provision of its services, Scenic ought to have either cancelled, or else given passengers the option of cancelling this cruise, Cruise 10, by 8 June 2013.

691 By that time, Scenic was aware that there were significant interruptions to cruising along the rivers. The lock at Hausen on the Main/Danube Canal was closed. It was expected to reopen in a few days, but it was not clear when. Ships could not sail between Nuremburg and Bamberg in either direction. About 700km of the Danube River from Straubing to Budapest was closed. There was heavy damage on the river and to the river infrastructure. No ship could dock in Passau or Lindau, at least for a week. Even the rivers which were open for navigation had limitations. Mr Sandmeier knew on 8 June 2013 that it would be at least a week before Scenic ships could cruise along the Main River.

692 On 11 June 2013, Ms Scoular was informing Scenic staff and various sales teams that if guests were anxious about any June sailing:

“... we can look at assisting them by moving them to a later sailing ... If required we will offer guests on these sailings a refund only if unable to commit to offer of later sailing.”

693 No doubt this was seen to be a prudent course to take. Unfortunately for passengers on Cruises 10 and 11, that option was not made known to them as it should have been.

694 In my view, it was apparent to Scenic that the cruises departing on 10 June 2013 could not be expected to proceed without significant interruption to the planned itinerary. And passengers should have been given the option of cancelling the cruise and returning home.

695 As it happens, and in the words of the Cruise Director for Cruise 10 which departed Amsterdam on 10 June 2013, and which was concluded without a substantial interruption, it was a matter of luck that this was how the cruise turned out.

696 Although in my view, passengers embarking on Cruise 10 ought to have been offered the option of cancellation, having regard to what occurred on this cruise, and my conclusions with respect to it, I am not presently satisfied that any passenger on this cruise suffered any loss of a kind which is compensable with respect to a breach of s 60 and the due care and skill guarantee.

697 That position however is different for Cruise 11. The difference arises because the conditions of the rivers changed at different rates and at different times so that the conditions appeared to linger for a far longer period at the eastern end of the waterways.

Cruise 11: Budapest to Amsterdam departing 10 June 2013

The Cruise

698 This cruise was to proceed along the Budapest to Amsterdam route. The cruise was scheduled to commence on 10 June 2013 upon the Scenic Sapphire.

699 On 7 June 2013, three days before the cruise was to commence, Scenic Tours wrote to passengers informing them that the ship would not be able to cruise into Budapest as scheduled due to “*peak river water levels*”. Passengers would instead travel by coach from Budapest to Vienna, where they would board the Scenic Sapphire. They would be spending none of the planned time in Budapest.

700 On 10 June 2013, Robert Peattie, a group member and passenger on this cruise, boarded a bus to Vienna which had been organised by Scenic Tours. He recalled that the bus had little leg room, no bathroom, and was “*very jolty*” when moving at high speed. He recalled that items were falling from the overhead storage. He recorded a short video which captured these events. This bus trip could not be said to have been relaxing or enjoyable.

- 701 At around 4pm to 5pm on 10 June 2013, after approximately eight hours of travel, the bus arrived not in Vienna but in Krems, where Mr Peattie and other passengers boarded the Scenic Sapphire. Mr Peattie recalled that Krems was an *“isolated industrial port”*.
- 702 From 10 June 2013 to 13 June 2013, the ship remained docked in Krems. Mr Peattie undertook excursions to Budapest on 11 June 2013 and 12 June 2013, and to Vienna on 13 June 2013.
- 703 On 14 June 2013, the ship remained docked in Krems. Mr Peattie recalled that, in the evening, the Cruise Director said that passengers would have to swap to another ship approximately 300 km away and that they would have to take a bus to *“go around a damaged lock”*.
- 704 At about 9:30am on 15 June 2013, passengers disembarked the Scenic Sapphire and travelled by coach for approximately 13½ hours to Regensburg, where they boarded the Scenic Jewel. Mr Peattie recalled that upon boarding the Scenic Jewel, he was *“physically and mentally tired from exhausting coach trips”*.
- 705 From 16 June 2013 to 24 June 2013, the cruise proceeded as scheduled.
- 706 Overall, four days of cruising were completely lost and one day of cruising was partially disrupted. Budapest was not able to be enjoyed, nor was the vast majority of the Danube River.

Purpose Guarantee

- 707 At the time the cruise was due to commence, the intended ship could not cruise to Budapest. Passengers who commenced the trip in Budapest were transported by coach to Krems where they boarded the Scenic Sapphire.
- 708 Krems is about 60km along the Danube River to the west of Vienna.

- 709 The ship remained docked in Krems for five days until 15 June 2013, where passengers disembarked from that ship and travelled by very long coach trip to Regensburg where they boarded the Scenic Jewel.
- 710 From Regensburg the cruise proceeded as scheduled to Amsterdam. The passengers on this cruise did not get the benefit of about 760km cruising along the Danube River, from Budapest to Regensburg. As well, their lengthy stay in Krems, which was described as an isolated industrial port, which was some distance from Vienna, did not accord with the itinerary.
- 711 As indicated above, five days of this cruise were either lost or partially disrupted. As well, the services that were provided at that time were not ones which would discharge the Particular Purpose. Long motor coach trips of the kind which occurred did not fulfil the purpose of a luxury cruise. Being docked at night for five nights, in an industrial harbour, did not provide the promised extensive views or any evening cruising.
- 712 As well, the fact that the passengers commenced the cruise in the middle of the intended itinerary in an exhausted physical and mental state brought about the long coach trips, would have continued their negative experiences.
- 713 I have concluded that the services provided with respect to this cruise were not reasonably fit for the Particular Purpose. A breach of the purpose guarantee has been established.

Due Care and Skill Guarantee

- 714 In my view, in the application of due care and skill and the provision of services, I am satisfied that by at least 8 June 2013, passengers on Cruise 11 ought to have been able to cancel their tour had proper information been provided.
- 715 This conclusion differs from that with respect to Cruise 10, which was embarking in Amsterdam on the same day. What was known to Scenic with respect to this cruise and before passengers arrived in Budapest, was that

there would be no ship in Budapest for embarkation and that passengers would spend little, if any, time in Budapest. Rather, they would be moved to the nearest ship which was docked in Krems, where it had been stuck since earlier in the month.

716 As earlier explained in [220] and [221] above, Scenic was clearly on notice prior to the departure date of this cruise that there was a real prospect that the cruise would not be able to be completed without interruptions. The water level on the Danube was continuing to be high with no information suggesting that these levels would be diminishing. The Hausen Lock was still inoperative and not expected to be operating for a number of days. This made highly likely the need for a further ship swap between Krems and Regensburg, which is what actually happened. The re-opening dates for parts of the Danube and the Main/Danube Canal were largely unknown.

717 In those circumstances, the provision of the Services with due care and skill, required either the cancellation of the cruise or else the provision of up-to-date and accurate information about the likely interruption to the cruising with an option being offered to the passengers to cancel their cruise.

Cruise 12: Amsterdam to Budapest departing 12 June 2013

The Cruise

718 This cruise was to proceed along the Amsterdam to Budapest route. The cruise was scheduled to commence on 12 June 2013 upon the Scenic Ruby. There is actually very little evidence about what happened on this cruise.

719 From 12 June 2013 to 22 June 2013, it appears that the cruise proceeded as scheduled. On 22 June 2013, passengers disembarked the Scenic Ruby and travelled by coach to Vienna, where they stayed in the Hilton Hotel overnight. On 23 June 2013, passengers boarded the Scenic Crystal in Vienna and the cruise proceeded as scheduled.

720 Overall, this cruise proceeded largely as intended but for the single night's accommodation in a hotel in Vienna.

Purpose Guarantee

721 This cruise proceeded largely as intended. The only variation was a single night's accommodation in a hotel in Vienna rather than on a ship in Vienna. As well, the passengers were required to change ships and were transported by coach to Vienna.

722 I do not regard this interruption, or any evidence about what occurred on this cruise, of which there was very little, as indicating that the services supplied were not reasonably fit for the Particular Purpose. I am satisfied that the services for this cruise accorded with, and achieved, the Particular Purpose. There has been no breach established which is sufficient to enliven the consumer guarantee.

Due Care and Skill Guarantee

723 The plaintiff submitted that if Scenic had been acting with due care and skill, it would have provided to passengers on Cruise 12, by 11 June 2013, an option to cancel the cruise and not proceed with it. That is, one day before the cruise was due to depart from Amsterdam.

724 I am not satisfied that for passengers departing from Amsterdam on Cruise 12, having regard to the conditions as they existed, there was any reason for Scenic to provide to those passengers any information at all about the possibility of significant disruption. Whilst it may have been not unreasonable for Scenic to have done so, I cannot conclude that their failure to do so constituted a breach of due care and skill guarantee.

Cruise 13: Budapest to Amsterdam departing 12 June 2013

The Cruise

725 This cruise was to proceed along the Budapest to Amsterdam route. The cruise was scheduled to commence on 12 June 2013 upon the Scenic Pearl.

- 726 On 12 June 2013, passengers did not embark upon the ship as planned but instead stayed overnight at a hotel in Budapest. A group of 42 of the passengers was sent straight to the Scenic Pearl which was docked in Vienna when they arrived at the hotel in Budapest.
- 727 On 13 June 2013, the remaining passengers undertook a city tour of Budapest before travelling by coach to Vienna, where they also boarded the Scenic Pearl at about 5.30pm.
- 728 On 14 June 2013, passengers disembarked the Scenic Pearl in Vienna and after a city tour of Vienna, travelled by coach to Krems, which is a relatively short distance, where they boarded the Scenic Sapphire. The reason for their transfer was that the Altenworth Lock was closed.
- 729 On 15 June 2013, the ship remained docked in Krems adjacent to a dark wall and passengers undertook activities in and around Vienna including a tour to Bratislava.
- 730 From 16 June 2013 to 26 June 2013, the cruise proceeded broadly as scheduled.
- 731 Overall, 3 days of the intended cruising did not take place which meant that about 350km of cruising along the Danube River did not occur.

Purpose Guarantee

- 732 The first night's accommodation was in a hotel in Budapest rather than on a boat. Some of the passengers were transported straight to one of Scenic's ships, which was docked in Vienna.
- 733 After remaining in Vienna in accordance with the itinerary, the passengers were taken by coach to Krems. This is not a lengthy distance and the trip was not a particularly long one. They embarked on a different ship in Krems and from 16 June 2013, the cruise proceeded broadly as scheduled.

- 734 The passengers on this cruise did not receive the benefit of cruising from Budapest to Vienna or the 50km or so from Vienna to Krems. There is no evidence that the hotel in Budapest was anything other than suitable, nor that the arrangements made to change ships were not carried out at an appropriate level and in an appropriate manner.
- 735 There is no evidence that the services which were provided, other than the diminution in cruise length and the need to change ships, were not reasonably fit for the Particular Purpose.
- 736 The fact that three days of cruising did not take place at all, and that some but not all passengers were accommodated for one night in a hotel (which meant an increase in the frequency of packing and unpacking), may point towards the provision of services which were not reasonably fit for purpose. As well, the fact that all passengers were also required to change ships from the Scenic Pearl to the Scenic Sapphire would add weight to a consideration of the provision of services which were not reasonably fit for purpose.
- 737 However, there was no evidence from any passenger about this cruise. It is simply unknown whether these interruptions were well or poorly managed by Scenic. There is no evidence of any inconvenience being caused to the passengers, the length of the coach travel between Budapest and Vienna, nor the nature or quality of the services provided. The onus of proof with respect to the purpose guarantee has simply not been discharged.
- 738 I am not persuaded that there has been any breach of any consumer guarantee with respect to this cruise.

Due Care and Skill Guarantee

- 739 With respect to Cruise 13 departure from Budapest, much as with Cruise 11, the position was different compared with the Amsterdam departure of the same date. The passengers were told, for example, that a cruise ship would not arrive in Budapest because of the high water and river infrastructure damage.

- 740 The plaintiff submitted that if Scenic had been acting with due care and skill, it would have provided to passengers on Cruise 13, by 11 June 2013, an option to cancel the cruise and not proceed with it. That is, one day before the cruise was due to depart.
- 741 In my view, the application of due care and skill and the provision of the Services required Scenic by 11 June 2013 to notify the passengers that there was a real risk of significant interruption to the cruise and that cruising was unlikely to take place in its entirety for the whole of the itinerary. It was well-known that there would be no cruising between Vienna and Budapest. Passengers should have been offered an option of cancellation, but were not. On the contrary, information provided to the passengers did not adequately reflect the likely course of events.
- 742 In my view, Scenic was in breach of the due care and skill guarantee with respect to Cruise 13 by failing to provide the requisite information by 11 June 2013, accompanied by an option to cancel the cruise.
- 743 It may seem to be a curious result that, with respect to the same cruise, Scenic could be found not to have been in breach of the purpose guarantee, but to have been in breach of the due care and skill guarantee. But consideration of each of these guarantees takes place, in the circumstances here, at different times and in the case of the care and skill guarantee, involves a prospective consideration of what is likely to occur. In the case of the purpose guarantee, the enquiry focuses upon what in fact occurred, and whether that was what was foreseen as being reasonably likely.
- 744 So, in this case, a likely disruption was foreseen. That situation required notification to occur as discussed. Passengers ought to have had the choice of whether to go ahead with the cruise or not, having regard to what was in prospect. In that way, the due care and skill guarantee was breached.
- 745 However, after the passengers commenced the cruise, the question is to whether the services actually provided were reasonably fit for purpose. On

the limited evidence tendered, I have not been persuaded that the purpose guarantee was breached.

746 Another reason for this dichotomy of result is that it reflects the way in which the plaintiff's case was argued with respect to the due care and skill guarantee – namely, that due care and skill required cancellation of cruises or else giving the passengers the opportunity to cancel the cruise before it commenced, or else at a particular point during the cruise.

747 It is also relevant to note here that with respect to a breach of a purpose guarantee and also the due care and skill guarantee, the occurrence of loss or damage is not an essential element of the cause of action as it is with claims based upon the tort of negligence.

Application of the Result Guarantee to the Cruises

748 It is convenient to consider the issue of whether the result guarantee has been breached with respect to all cruises together.

749 There is no evidence that Mr Moore or his wife made known expressly to Scenic or its employees or agents, any result which he or she wished the services to achieve. Any consideration of this consumer guarantee requires the Court to imply the expected result, rather than to proceed on the basis of an express result.

750 On page 14 of the Brochure the intending passenger is informed:

“Scenic Spaceships with their exclusive full size private balcony suites, already offer the ultimate luxury in European river cruising, and from 2013 you are able to relax and watch the beautiful landscapes along the Rhine, Main, Moselle and Danube Rivers pass by at any time of the day, no matter the weather. ... **Now when you travel with Scenic Tours, you can rest assured that** regardless of itinerary or time of year you choose to travel on these waterways, **you will enjoy the ultimate river cruise experience.**”
(emphasis added)

751 The introductory letter from Mr Moroney, the founder and Managing Director of Scenic, to intending passengers included these statements:

“It is my pleasure to invite you to join Scenic Tours for a **once in a lifetime cruise** along the grand waterways of Europe. **With Scenic Tours you will enjoy unrivalled access** to some of the Continent’s most extraordinary places and the minute you step on board a Scenic Spaceship **you will be immersed in all-inclusive luxury**.

Meticulous attention to detail, first class service and intimate personal touches **ensure your entire journey is truly unforgettable.**” (emphasis added)

752 On page 4 of the Brochure, the following statement was made:

“**As you sail effortlessly** along Europe’s majestic waterways, **your Scenic Spaceship will be home for the duration of your voyage**. Here **you will experience a standard of luxury and service** that you would expect in a five star hotel.” (emphasis added)

753 At page 6, the following statement was included:

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

754 Having regard to the statements which are contained in the promotional brochure by which intending passengers select their itinerary and upon the basis of which they make their bookings, it is reasonable to conclude that the intending passenger is impliedly making known to the supplier the result which the intending passenger wishes to achieve.

755 That result is to cruise on the same ship, and in the same cabin, in all-inclusive luxury for the entirety of the 15 day itinerary period in comfort, receiving an unsurpassed level of services by way of accommodation, food and beverages, whilst experiencing the waterways of Europe (“the Result”). The intending passenger is assured that the entire journey will be truly unforgettable.

756 Such a result is, after all, what Scenic intends the passengers to achieve. If it were not, a question would arise as to whether the contents of the brochure were accurate or misleading and deceptive. The proceedings before this Court do not call for it to make any such determination. Rather, the parties have proceeded on the basis that the Court should accept that the statements

made by Scenic were accurate, and intended to be accurate, at the time they were made.

- 757 As with the purpose guarantee, the result which the consumer wishes the services to achieve is one with which the supplier does not have to expressly agree. The structure of s 61(2) of the ACL is that the consumer makes known, either expressly or by implication, the expected result, and if the supplier then supplies the services, the guarantee takes effect.
- 758 Of course, as the defendant submitted, the standard of the services which is needed to be achieved is not an absolute one nor does it demand perfection. On the contrary, the nature and quality of the services must be such that they might “... *reasonably be expected to achieve the result*”.
- 759 In circumstances such as those to be considered here and where the services are being provided over a lengthy period, 15 days, s 61(2) of the ACL does not specify the point of time at which the Court is to judge whether the nature and quality of the services are such that they might reasonably be expected to achieve the result.
- 760 An analysis of the section in the circumstances being considered here needs to follow a similar evaluation of the kind undertaken with respect to s 61(1) of the ACL. The supplier of services guaranteed that the service would be of a nature and quality that might reasonably be expected to achieve the result. The time for the determination of that question is at the end of the provision of the services.
- 761 What Scenic here did was to make decisions about the provision of the Services which involved, speaking generally, significant time periods and distances of substitution of motor coaches travelling on roads for river cruises on rivers, requiring passengers to unpack and pack on a number of occasions to take accommodation either on static ships which were in some locations docked in unpleasant locations, or else in hotels, some of which did not meet an appropriate standard or quality, and to supply a range of services which

did not match the promised services, even allowing for an adequate meaning to be given to the terms and conditions of the contract.

762 Supplying a 13½ hour motor coach trip on roads instead of a river cruise is not the supply of a nature or quality of services that might reasonably be expected to achieve the Result. Requiring passengers to pack and unpack luggage and provide it for an early morning departure, could not reasonably be expected to achieve the desired result.

763 But to approach each of these cruises by taking one such example, would be to adopt less than an overall approach which, in my view, is what is required, having regard to the nature of what was promised and the terms in which the services were promised.

764 There is no need to examine each cruise, and the facts of each cruise, again because as is apparent from the analysis with respect to the purpose guarantee, the same conclusion will be reached with respect to the result guarantee, as was reached with respect to the purpose guarantee for each cruise.

765 In those circumstances, Scenic, with the exception of Cruises 10 and 12, were in breach of the result guarantee by not providing services of a nature and quality that might reasonably be expected to achieve the Result.

Damages

766 The plaintiff's claim for damages is formulated by reference to s 267 of the ACL.

767 To enable the proper identification of damages pursuant to that section, it is necessary to first consider whether any of the failures to comply with the consumer guarantees is a "major failure" within the meaning of s 268 of the ACL.

768 Section 268 of the ACL is in the following form:

“268 When a failure to comply with a guarantee is a major failure

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

- (a) the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or
- (b) the services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (c) both of the following apply:
 - (i) the services, and any product resulting from the services, are unfit for a particular purpose for which the services were acquired by the consumer that was made known to the supplier of the services;
 - (ii) the services, and any of those products, cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- (d) both of the following apply:
 - (i) the services, and any product resulting from the services, are not of such a nature, or quality, state or condition, that they might reasonably be expected to achieve a result desired by the consumer that was made known to the supplier;
 - (ii) the services, and any of those products, cannot, easily and within a reasonable time, be remedied to achieve such a result; or
- (e) the supply of the services creates an unsafe situation.”

769 Given the nature of the services which were supplied and in the circumstances identified in these proceedings, namely that they were provided to Mr Moore, and his fellow passengers on the booked cruise, with respect to a single event i.e. prior to, and over the course of, an intended river cruise for which they had booked and paid, the Services did not involve any ongoing supply of services (or goods) past the end of that event. It follows that no question of remediation of the services could, or was argued to, apply.

770 In considering the question posed by s 268(a) of the ACL, I am satisfied that Mr Moore himself, and his fellow passengers, would not have acquired the services had they been “fully acquainted” with the nature and extent of the failure to comply with the guarantees contained in s 61 of the ACL. Putting it differently, had Mr Moore and his fellow passengers been told, or come to realise, that they would have little, if any, cruising on European rivers, and would have had a substantial part of their intended cruise provided by motorcoach transport with a variety of different accommodations requiring

them to pack and unpack on a number of occasions, they would not have acquired them.

771 In Mr Moore's case he gave evidence to that effect which encompassed the attitude of both he and his wife, which I accept. His contemporaneous correspondence is entirely consistent with his evidence.

772 Although evidence of that kind can be, and often is, given little weight by courts, because of its hindsight nature, in this particular case there are other facts and circumstances which strongly point, in Mr Moore's case, to that conclusion.

773 These surrounding facts and circumstances include, but are not limited to, his particular health issues, namely having had an operation to his back, he did not wish to be confined in a seat for an unduly long period because it caused him pain; the fact that he was taking a once off holiday during a period of long service leave, which could be cancelled by him if circumstances changed; given the lengthy lead time between when he made the booking, and when the holiday was to be taken, his freedom to research, plan for, and undertake an alternative holiday suitable for his needs and interests; and the ready availability of other holidays which he could have chosen to suit those particular needs. In other words, this was not the provision of services which he could get in any other way or from any other provider.

774 However, s 268(a) focuses not on a particular individual, but on whether a "reasonable consumer fully acquainted with the nature and extent of the failure" would not have acquired the services. This is an objective test. It incorporates questions of reasonableness. Such was the contrast between the description of the Services to be provided by Scenic, and the services which were in fact supplied, including the failure of those supplied services to fulfil either the purpose or result guarantees, I am satisfied that no reasonable consumer would have gone ahead and acquired the Services at the price which was being charged.

- 775 In considering that question, I keep in mind, and give weight to, the fact that Scenic was not the only supplier of these services in the market, so that if a reasonable consumer wished to undertake such a river cruising holiday, they could have booked the holiday with a different provider, or at a different time, at a level consistent with the Services being offered by Scenic.
- 776 As well, the Services being required were not an essential service. That is to say, the Services which were offered by Scenic could be taken up or not, by a consumer as they wished. These were not services essential to the ordinary everyday functioning of a consumer.
- 777 Finally, the particular failures in the guarantees occurred during a specific period. That is to say a period during which extensive flooding occurred in Europe. The Services could have been acquired for essentially the same price at a different time.
- 778 Putting it differently, the reasonable consumer did not have to acquire the Services because they were not essential; could have acquired the Services from another supplier; could have acquired the Services at another time; or finally, could have acquired alternative recreational services, such as a holiday in a different location. Each of these available alternatives means that the reasonable consumer would not have gone ahead and acquired the Services promised by Scenic had the reasonable consumer been acquainted with the failures of the consumer guarantees, in the circumstances which occurred.
- 779 Given, as I have earlier found, that the Services could not be remedied within a reasonable time so as to make them comply with the consumer guarantees, there has been a major failure as that term is defined within s 268 of the ACL, by reference to sub-sections (a) and (b) of s 268.
- 780 Next, one needs to pay attention to the provisions of s 267 of the ACL, insofar as those provisions deal with a major failure, so as to identify the availability of damages in the plaintiff's case.

781 Section 267 of the ACL is in the following form:

“267 Action against suppliers of services

- (1) A consumer may take action under this section if:
 - (a) a person (the supplier) supplies, in trade or commerce, services to the consumer; and
 - (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and
 - (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
 - (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
 - (ii) a cause independent of human control that occurred after the services were supplied.
- (2) ...
- (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
 - (a) terminate the contract for the supply of the services; or
 - (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
- (5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).”

782 Section 267(1) provides a number of preconditions which must be met before compensation or damages, or both, can be recovered by action.

783 The first precondition (s 267(1)(a)) is that the services are supplied in trade and commerce to a consumer. That is not in issue in these proceedings. It is admitted by the defendant that services were provided in trade or commerce to a consumer.

784 The second precondition is that any of the consumer guarantees relating to the supply of services, including those set out in ss 60 and 61, are not

complied with. For the reasons earlier discussed, I have concluded that the guarantees were not complied with in the cruises identified.

785 The final precondition, although it is not applicable to the guarantee of due care and skill contained within s 60 of the ACL, is that the failure to comply with the guarantees did not occur only because of any act, default or omission by a person unrelated to the supplier either itself or an agent or employee, or else the cause of the failure occurred after the services were supplied and was independent of human control.

786 As I have earlier discussed, the failures arose within the Scenic group whether by reason of the employees or agents of that group, and occurred at the time the services were being provided. Accordingly, as explained at [440] to [450] above, this third precondition is fulfilled.

787 In the result, in dealing with the availability of an action for compensation and damages, Mr Moore has an action to recover compensation for any reduction in the value of the Services below the price he paid (s 267(3)(b)) and also for damages for any loss which was reasonably foreseeable (s 267(4)). No other cause of action is relied upon by Mr Moore.

788 It is necessary to consider these two differing heads of damages separately.

Compensation for Reduction in Value

789 A claim for compensation under this provision necessarily depends upon when the failure occurred, and the particular guarantee. Differing amounts of compensation may be available for breaches of different guarantees. This is so because the section calls attention to the value of the services provided as against the price paid for the services. It is convenient to consider compensation first with respect to the failures by Scenic with respect to the purpose and the result guarantees.

790 The plaintiff submitted that compensation in this respect is an objective matter. He submitted that the appropriate way to calculate the compensation

is to determine the sum paid by Mr Moore for the Services. That, he submitted, was \$10,990. Ms Howell also paid a similar sum. The sum paid comprised the costs of the cruise, including an upgrade to a higher grade of cabin on a higher deck, together with port costs and taxes. The plaintiff submitted that from that total sum, a daily cost can be derived, namely \$732.66. The plaintiff submitted that a calculation of the number of days for which Mr Moore lost the value of the services, and in particular his loss of a luxury river cruising experience, on ten out of 15 days, meant that he should receive \$7,362.60. In addition, the plaintiff submitted that he would be entitled to interest on this sum.

791 The defendant argued that in assessing the reduction in value, one should examine carefully not only whether the plaintiff enjoyed cruising on each of the days set aside for that in the itinerary, but what activities he actually undertook, whether he enjoyed any and if so which of those activities, and to only assess a lost value with respect to a particular activity and only to the extent which it was not provided. The end point of this submission by the defendant is that the best objective evidence of loss of value is \$1,293 - which is the sum calculated by Mr Moore's travel insurer.

792 The defendant pointed to the fact that Mr Moore did not abandon the cruise at any time during it. No doubt, the defendant submits that was "... *because he subjectively perceived there to be a substantial value in the ongoing service which Scenic was providing*". It also submitted that in assessing the diminution in value of the Services, the Court must take into account the fact that Mr Moore was willing, by booking the cruise, to accept a degree of risk about high (or low) water levels, and the disruption which could unexpectedly occur to his cruise.

793 The defendant pointed to the fact that the letter sent by it to Mr Moore on 1 June 2013, did not deter him from commencing the cruise and that the letter of 10 June 2013, did not deter him from continuing with the cruise, and accordingly the Court should infer that Mr Moore in so commencing and continuing the cruise accepted all of the risks which came with it. The

defendant argued that if Mr Moore accepted a risk which ultimately materialised then he ought not be compensated for it.

794 The defendant also criticised the plaintiff's approach to the calculation, drawing attention to the fact that the plaintiff's calculation attributed a nil value to any activity which took place on any of the 10 days which he claimed were the subject of substantial disruption.

795 Both parties contended that each other's calculations of loss in value impermissibly varied from submissions which were earlier put to the Court during interlocutory proceedings.

796 There is little to be gained by an analysis of Mr Moore's claim by reference to what may have been said during the course of earlier interlocutory submissions. No doubt what was said to the Court was informed by the knowledge of the parties at the time and their then formulation of or resistance to the claim. There was nothing about those submissions or the circumstances in which they were made, which would mean that either party is bound by them. It is preferable for the Court to develop, in considering Mr Moore's claim, an assessment of his lost value by reference to principle.

797 In assessing the lost value compensation being claimed, the commencement point is to consider the services for which the original price was paid. The price paid was a single one, only differentiated by the level of the cabin which was booked. That single price included all accommodation, food, some drinks, provision of butler services, live entertainment during the course of the evening spent on the cruise ship and a number of other inclusions described as "Scenic Free Choice" events. The provision of WI-FI and access to the internet was also included in the price.

798 None of these individual services were charged for, or valued separately. The evidence did not reveal the cost of any of these services to Scenic, nor did it reveal how Scenic calculated the price paid for the trip or the way in which that was calculated.

- 799 The Services being provided by Scenic were described as “*all inclusive 5 star luxury*”. What was provided by these Services was an overall experience of taking one of Scenic’s cruises in what was emphasised throughout the Brochure as a once-in-a-lifetime experience. The Terms and Conditions did not derogate from that proposition.
- 800 It is appropriate also to have regard to the overall context of the provision of the Services. Whilst, undoubtedly, some passengers take more than one cruise in the course of their travelling activities, many do not. For them, the cruise on which they are booked and upon which they embark will be the one and only cruise experience which they have. In Mr Moore’s case, he took a period of long service leave to enable him to take this cruise.
- 801 The reason why this context is of importance, and the nature of the Services which were to be provided are also important, is because it demonstrates that the Services provided and the failure to provide the Services cannot be measured in a piecemeal way. It is entirely feasible that a single failure over a short period might ruin an entire cruise experience. By way of example, if a Scenic ship was involved in a collision on the tenth day of a 15 day cruise, as a result of which the ship sank and although passengers were saved they underwent a terrifying ordeal and all of their baggage was lost, it would be hard to argue that their entire cruise experience had not been destroyed by such an event and that they did not get any benefit at all from their experience of the first ten days of the tour. This is so notwithstanding they may have been accommodated, fed and taken to various promised places on the itinerary, and in that way obtained some value.
- 802 Whilst, in similar circumstances when analysed from the contractual perspective, there was not a total failure of consideration: see *Baltic Shipping Co v Dillon* [1993] HCA 4; (1993) 176 CLR 344, that does not directly equate to the statutory concept in s 267 of the ACL of lost value.
- 803 Accordingly, the issue of compensation, which in the circumstances here which must be explored, is to ask by reference to the entirety of the Services

promised and those which were delivered, and without approaching the matter narrowly or in a piecemeal fashion, to what extent there had been a loss of value to the plaintiff in the services actually provided as affected by the “*major failure*” compared with the services which were to be provided assuming the major failure had not occurred.

804 In my view, where the major failure has affected, as it did on Mr Moore’s cruise, about two thirds of the time set aside for the cruise according to its intended itinerary, and in light of Mr Moore’s evidence about his particular circumstances, the particular importance of the cruise to he and his wife, and the particular purpose for which he acquired the Services, it would be open to conclude that he had received no value at all from the recreational services supplied. That is because the concept of “*value*” in the circumstances here where what was to be provided was “*an experience*” of and surrounding a recreational cruise which included specified visits highlighted on an itinerary, may not always be able to be measured only in monetary terms according to what was in fact received.

805 True it is that Mr Moore had an uninterrupted cruise for the first few days until the ship upon which he was embarked reached Wiesbaden, but the value to him of those few days was, according to his evidence, which I accept, overwhelmed by the unfortunate experiences which followed. These unfortunate experiences may themselves have not each been significant but, in Mr Moore’s case, when he and his wife had booked this trip so far in advance and were expecting services of a particular nature and quality, and to enjoy themselves very much, matters which may seem trivial loom large in the context. For some travellers, the experience of organising train travel from Regensburg to Vienna may have been an enjoyable one, typical of a European holiday, but for Mr Moore and Ms Howell doing so in the middle of an organised cruise, by themselves and without any assistance from Scenic staff, caused them to again feel that the experience they were looking forward to was not of the nature and quality which was appropriate. As Lord Denning MR said in *Jarvis v Swan Tours Ltd* [1972] EWCA Civ 8; [1973] QB 233:

“... There were many other matters too. They appear trivial when they are set down in writing, but I have no doubt that they loomed large in Mr Jarvis’s mind when coupled with the other disappointments.”

806 In those circumstances, I would but for what follows, have been minded to find that Mr Moore had received no value at all within the meaning of s 267(3)(b) of the ACL, and made an award of compensation equal to the whole of the price paid by Mr Moore.

807 However, Mr Moore did not claim that he was entitled to compensation calculated in that way. His was a claim for a lesser sum as I have articulated above. The defendant has not had an opportunity to deal with a claim for lost value which is potentially any greater than that articulated by the plaintiff in his final submissions. It would not be procedurally fair to make a finding of compensation which exceeded that sought by the plaintiff.

808 I have concluded that as the sum claimed by the plaintiff is reasonable and represents no more than an appropriate sum of compensation, I should allow the whole of the amount claimed as representing the compensation component of an award available under s 267(3)(b) of the ACL, for a breach of the purpose and result guarantees.

809 Mr Moore claims that he is entitled to interest on that sum. I agree. Interest in accordance with s 100 of the *Civil Procedure Act 2005* should be calculated not from the time when the money was originally paid, but rather from when the major failure occurred and the loss of value was capable of being ascertained. It is at that point in time when compensation would fall due to be paid. The relevant date here is the date the cruise finished, namely 17 June 2013. Interest should be calculated from that date.

810 It is necessary now to consider the claim for compensation based upon Scenic’s failure to comply with the due care and skill guarantee imposed by s 60 of the ACL. This major failure consisted of the failure to provide, prior to embarkation, timely and accurate information about likely or anticipated

interruption of the cruise itinerary and experience, and either to cancel the cruise or else offer Mr Moore the opportunity to cancel the cruise.

- 811 In considering the first two options, namely if Scenic had cancelled the cruise, then the calculation of compensation would be relatively straight forward. No services by way of the cruise would have been provided and Mr Moore would have been entitled to a refund of the whole of the monies which he had paid with respect to the period from 2 June 2013 onwards. Interest would be calculated from that date – which is the date of the major failure.
- 812 With respect to the second option, namely cancellation by Mr Moore, provided the Court was satisfied that Mr Moore would have cancelled the trip at that time, then the compensation would also be for the whole of the monies paid. But, would Mr Moore if given the requisite information and the option of cancellation, have done so before the trip commenced? I am satisfied that he would have cancelled the cruise for both he and his wife.
- 813 I reach that conclusion for a number of reasons. First, it was very important to Mr Moore that he could travel in a way which allowed him to not be confined, and to move about so as to prevent or ease any back pain. Secondly, this holiday represented a major expenditure for he and his wife, an expenditure which he described as his “*his life savings*”, and he would not have wished to have an experience which wasted such a sum without receiving the full benefit of the cruise. Thirdly, I think that the issue of additional expense caused by his cancellation would not have deterred him because he had in place satisfactory travel insurance which was likely to have covered such costs. Fourthly, Mr Moore and Ms Howell were looking forward to a relaxing cruise in which they could regather their equilibrium and recover from their recent personal stresses. Information which accurately conveyed the prospect of what was in fact in store would, I am satisfied, have brought them to the conclusion that what they were facing was neither relaxing nor restorative. Fifthly, flights back to Australia from Amsterdam could be readily arranged without difficulty.

- 814 However, the plaintiff did not plead or particularise specifically any actual sum relating to a breach of the due care and skill guarantee, but the compensation claimed involved, as the central notion, that Mr Moore would not have embarked upon or continued with the cruise, had he been given accurate and timely information.
- 815 Accordingly, there is no procedural reason why the full amount paid by Mr Moore ought not to be awarded by way of compensation, namely \$10,990 together with interest from 2 June 2013.
- 816 The defendant submitted that the monies received by Mr Moore from his travel insurance company, namely \$1,293, should be taken into account as a credit against an award of compensation from the date it was paid because otherwise there would be double compensation.
- 817 Although little attention was paid to this issue in the course of submissions, it is not without legal difficulties.
- 818 As a general proposition, where a plaintiff has taken precautions against loss and damage from an event, by way of insurance, or by obtaining a pension or the like, then if the event occurs, the damages (or compensation) recoverable will not be diminished by the amount of insurance, pension or other such monies. However, this general proposition needs to have regard to the nature of the loss and damage, the nature of the payment received from the third party and an evaluation of whether in truth those monies ought be set off against the damages or compensation payable.
- 819 In considering this question, there is some analogy, although not a complete one, to be found in the law of tortious damages. In *National Insurance Company of New Zealand Ltd v Espagne* [1961] HCA 15; (1961) 105 CLR 569, Windeyer J (with whom Dixon CJ and Fullagar J agreed), said when discussing whether a governing principle emerges, this at 599-600:

“So far as any rules can be extracted, I think they may be stated, generally speaking, as follows:

In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not be regarded as mitigating his loss, if:

- (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he may have; or
- (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages.

The first description covers accident insurances and also many forms of pensions and similar benefits provided by employees: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of monies paid or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the state as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit received in consequence of, or as a result of the injury, but what was its character: and that is determined in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than cause.”

820 In *Espagne*, the High Court held that an invalid pension granted by the Commonwealth was not to be taken into account in assessing a party’s economic loss as a consequence of a motor accident.

821 A similar issue fell for consideration in *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117. There the High Court held that in the assessment of damages to be awarded in an action for personal injuries caused by negligence, unemployment benefits received by an injured plaintiff pursuant to the *Social Security Act* 1991 (Cth) should be deducted from his loss of wages up to the trial.

822 At 122-123, Gibbs CJ said:

“The common law has clearly recognised two types of receipts that are not to be brought into account in the assessment of damages for financial loss, notwithstanding that the sums have been received in consequence of the injuries for which the plaintiff sues, namely, monies payable to the plaintiff under a contract of insurance which he has taken out, and gifts made by a benevolent third party seeking to ameliorate the situation in which the plaintiff has been placed by his injuries. It has been said that ‘the common law has

treated this matter as one depending on justice, reasonableness and public policy': *Parry v Cleaver* [1970] AC1 at p13."

823 At 134, Mason and Dawson JJ said by reference to an early decision in England, *Bradburn v Great Western Railway Co* (1874) LR 10 Ex.1, this:

"In *Bradburn* itself the Court refused to discount the plaintiff's damages by reference to the proceeds of an accident insurance policy which became payable following his injury, declaring that the plaintiff's damages should not be reduced by his receipt of a financial benefit which was, not the consequence of his injury, but the consequence of a contract which he had made with a third party."

824 Their Honours went on to say at 138-139 this:

"It would be unjust and unreasonable to reduce the damages of the prudent plaintiff who insures himself against accident by allowing the premiums which he paid and the proceeds of the policy to enure for the benefit of the tortfeasor and make the existence of the insurance the occasion for giving the plaintiff a lesser award of damages than he would have obtained had he not been insured. If he had not taken up the policy his assets would not have been depleted by the payment of premiums and his damages could not then have been reduced by reference to the greater worth of his assets ...

...

In addition to pension and superannuation benefits, and benefits arising from benevolence, all of which may be disregarded provided their purpose is to confer a benefit on the plaintiff irrespective of the plaintiff's right of action against the tortfeasor, it is necessary to identify two other broad categories of benefits, the first of which will in general be disregarded and the second of which will in general have to be brought into account in the assessment of damages. The first category concerns proceeds from insurance policies such as those received by the plaintiff in *Bradburn* ... The second category comprises benefits provided to the plaintiff which are a substitute, or partial substitute, for wages."

825 Mr Moore took out insurance with Cover-More Travel Insurance.

826 The policy effective from 31 July 2012 was in evidence. So far as can be ascertained, the policy benefit upon which Mr Moore's claim was based is that to be found in s 3 of the policy headed "Amendment or Cancellation Costs". No other section of the policy appears to have any relevance to the claim made by Mr Moore, and there was no evidence which identified any other part of the policy which responded. On their face, the other sections had no

application to the circumstances here. The coverage under s 3 was summarised in this way in the policy:

“Cover, if due to unforeseen circumstances outside your control, your journey has to be rearranged or cancelled e.g. illnesses, accidents, extreme weather conditions, examine re-sit or retrenchment.”

827 Under the policy conditions the following is specified:

“5. If you are able to claim from a statutory fund, compensation scheme (for example a private health fund or workers compensation scheme) or transport provider for monies otherwise payable under this policy, you must do so and the policy will only cover the remaining amount.”

828 Curiously, within s 3, the only applicable area of coverage, that coverage is expressed in these terms with the following exceptions:

“If due to circumstances outside your control and unforeseen at the relevant time:

1. You have to rearrange your journey prior to leaving home, we will pay the reasonable cost of doing ...
2. You have to cancel the journey (where you cannot rearrange it prior to leaving home) we will pay you:
 - (a) the non-refundable unused portion of all travel costs prepaid in advance including the travel agents commission ...
 - (b) for frequent or other similar flight reward points lost following cancellation of your airline ticket ...

...

We will not pay for claims caused by:

1. Transport provider caused cancellations, delays or rescheduling other than when caused by strikes.
2. The disinclination of you or any other person to proceed with the journey or deciding to change plans.”

829 Cover-More’s initial response to Mr Moore with respect to his claim by letter dated 16 August 2013, said this:

“Thank you for submitting your recent travel insurance claim with us.

Based on the information you have provided and the details of your policy coverage, we regret to advise that we are unable to approve your claim for loss of enjoyment on your recent overseas holiday.”

830 The letter went on to provide the basis for that refusal. It said:

“Please note the relevant sections of your policy:

Under the heading ‘General Exclusions’ of the ‘Options PDS (Product Disclosure Statement)’ it states:

We will not pay for:

16. Claims involving consequential loss of any kind including loss of enjoyment or any financial loss not specifically covered in the policy.”

831 That position was reversed by letter dated 23 August 2013, when by reference to the “Amendment and cancellation expenses” Cover-More provided a refund of \$1,293 to Mr Moore, and the same amount for Ms Howell, which it stated as being “*difference between cruise and bus tour*”. The letter also said:

“Based on a letter provided by Scenic Tours, the breakdown for the missed attractions and daylight cruising experiences is \$1,293.00 per person. As such we have applied this amount to your settlement.”

832 Whatever be the correct view of the extent of coverage under the policy, it appears to be the fact that the sum of \$1,293 was paid under the Cover-More insurance policy pursuant to the cancellation and amendment section of the policy.

833 For this insurance cover, which resulted in the payment, Mr Moore had paid a premium which was separate and apart from the monies paid to Scenic for the cruise. Travel insurance was not compulsory but was rather a separate contract entered into by Mr Moore prior to his leaving. It was no doubt prudent of him so to do. After all, he may have needed to cancel his tour for one reason or another and he no doubt wished to be insured against that possibility. As well, he may have suffered a medical condition during the course of his tour which required him to return to Australia for treatment, or

else to seek treatment at a medical facility in the region where he was travelling.

834 Many travellers do not take out travel insurance and take the risk that any events covered by such policies will be managed by them without the benefit of insurance.

835 I also note the condition of the policy of insurance which is that the policy responds only to any component of the costs and expenses of the tour which is uncompensated for by a travel provider.

836 The question is then whether Scenic is entitled to the benefit of the insurance monies by way of a credit against Mr Moore's claim for compensation under s 267 of the ACL.

837 I am unable to see why Scenic ought obtain that benefit. As a matter of principle, there seems to me to be no difference between the position of a claimant for damages for personal injury who has taken out an insurance policy of, for example, income protection which is then ignored in the assessment of tortious damages, and the position here.

838 There is no reason to suppose, and it does not seem intrinsically fair, that Scenic ought get the benefit of Mr Moore's prudence and expenditure of premiums, when they would pay out more to a less prudent person who did not take out travel insurance.

839 The fact that the payment received by Mr Moore covers the same items or events or disadvantages which he encountered on his trip as forms part of his claim for compensation, does not seem to me to be the end of the matter. After all, Scenic did not pay for the insurance. The premium was paid by Mr Moore and the benefits of the policy are to enure to him. The notion of compensation under s 267 of the ACL, as has earlier been explained, covered the difference between the price paid for services and the value received for

those services. That is a cost to be paid by the provider of the services, here Scenic.

840 But Mr Moore separately and independently bargained for, and obtained a contract, under which he might obtain certain monetary benefits in the event of identified occurrences. The common law has never regarded such insurance receipts as being relevant to an assessment of damages. I see no reason why a claim for compensation under s 267 of the ACL ought engender any different response.

841 I decline to allow Scenic credit for the sum of \$1,293 paid to Mr Moore by his insurer.

842 Mr Moore has established an entitlement to compensation for breaches by Scenic of each of the consumer guarantees. However, he is not to be doubly compensated, and is not entitled to retain both sums of compensation. In these circumstances, I conclude that the appropriate award is the higher of the two sums. Accordingly, Mr Moore is entitled to an award for compensation pursuant to s 267(3) of the ACL in the sum of \$10,990 plus interest.

843 It is now necessary to consider a further head of damage claimed by Mr Moore, namely a sum for foreseeable damages pursuant to s 267(4) of the ACL.

Claim for Damages Pursuant to s 267(4) of the ACL

844 Section 267(4) of the ACL speaks of the entitlement of a consumer who has suffered foreseeable loss or damage to recover “*damages*” against the supplier of the services. This action is separate from and additional to the right under s 267(3) of the ACL to recover compensation from a supplier of services for any reduction in the value of the services: see s 267(5) of the ACL.

- 845 With respect to this claim, the plaintiff submitted that it is apt to include damages for disappointment and distress.
- 846 As the High Court's decision in *Baltic Shipping Co* recognised, where (at least) a contract, one object of which is to provide enjoyment, relaxation, pleasure or entertainment is breached, then damages for distress or disappointment are recoverable in an action for breach of contract: see Mason CJ (with whom Toohey and Gaudron JJ agreed) at 365; Deane and Dawson JJ at 381-382, McHugh J at 405.
- 847 The plaintiff submitted that damages for disappointment and distress fall within the term "reasonably foreseeable" when considered in the context of a consumer of recreational services of the kind the subject of this judgment. The defendant did not submit that damages for distress and disappointment were not reasonable foreseeable in the context of the supply of the Services by Scenic to Mr Moore and the group members. Rather, the defendant submitted that on a number of bases damages of this kind are not available in these proceedings.
- 848 Principally, the defendant relied upon the limitation of liability provided for in s 275 of the ACL, and various other provisions in the CLA which, Scenic submits are picked up by the ACL, and which apply to this head of claim.
- 849 Section 275 of the ACL is in the following form:

"275 Limitation of liability etc.

If:

- (a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3 2; and
- (b) the law of a State or a Territory is the proper law of the contract;

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

- 850 The defendant submitted that the effect of s 275 is to apply the law of NSW, including any statute law, where there has been a failure to comply with a consumer guarantee providing that such law limits, or precludes, liability and recovery of that liability for a breach of a term of a contract for the supply of services. The defendant submitted that the provisions of the CLA fall within that description.
- 851 Relevantly, for these proceedings, the defendant submitted that Pt 2 of the CLA which deals with personal injury damages is the applicable damages regime for the assessment of claims pursuant to s 267(4) of the ACL, where personal injury damages would be awarded.
- 852 In response, the plaintiff submitted that s 275 of the ACL does not pick up the provisions of Pt 2 of the CLA because in these proceedings the plaintiff and group members do not sue in contract or seek recovery for damages for breach of a term of contract. The plaintiff submitted that the cause of action is solely one created by a Commonwealth statute and that the action is not based upon, nor referable to, any breach of contract.
- 853 As well, the plaintiff submitted that even if the provisions of Pt 2 of the CLA were picked up and applied by s 275 of the ACL, those provisions were not engaged. The plaintiff submitted that the damages regime under the CLA has a geographical limitation where the damages occurred beyond the territorial jurisdiction of NSW, here, in Europe. The plaintiff submitted that this approach is consistent with the approach of the High Court of Australia in *Insight Vacations Pty Ltd v Young* [2011] HCA 16; (2010) 243 CLR 149.
- 854 Although some doubt earlier existed as to whether damages for distress and inconvenience not consequent upon any physical injury, or discrete psychiatric condition, constituted personal injury damages as that phrase is used in the CLA, it is now clear that I am bound by authority, however surprising that result may appear in this case to be, to conclude that a claim for damages for distress and disappointment as articulated by the plaintiff here, is caught by Pt 2 of the CLA.

855 Section 11 of the CLA provides that injury means personal injury and includes the impairment of a person's mental condition. It also provides that the term "personal injury damages" means damages that relate to injury to a person.

856 Part 2 of the CLA is expressed, in s 11A, to apply in respect of an award of personal injury damages. Section 11A(2) specifically provides:

"This part applies regardless of whether the claim for the damages is brought in contract, under statute or otherwise."

857 Moreover, s 3, which is the definitional section for the CLA, provides that the term "damages" includes any form of monetary compensation. It also defines non-economic loss in the following way, namely:

"Non-economic loss means any one or more of the following:

- (a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of expectation of life;
- (d) disfigurement."

858 In the NSW Court of Appeal judgment in *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137, Spigelman CJ concluded at [78] in expressing his agreement with the reasoning of Basten JA and Sackville AJA, to which I will shortly come, this:

"I prefer the characterisation that grief, anxiety, distress and disappointment are elements of pain and suffering rather than of 'loss of amenities of life' within the definition of 'non-economic loss' in s 3 of the *Civil Liability Act*."

859 Basten JA said at [118]ff:

"118. The analysis so far does not however answer the question whether damages for injury to feelings, disappointment and inconvenience fall within the concept of 'non-economic loss' and are thus regulated by s 16. This question might be addressed by one of two approaches: on the one hand, it may be possible to distinguish different elements of harm, 'distress' being an element of pain and suffering recoverable as non-economic loss, but 'disappointment' being something different; that being the approach adopted by the trial Judge in the present case ... On the other hand the question may be approached at a higher level of generality, by saying that the kinds of damages which may be

awarded for a breach of contract fall outside the scope of tortious damages, to which the act was directed. ...

...

125. It is undoubtedly true ... that injury to reputation, deprivation of liberty and outrage, humiliation, indignity and insult are not commonly referred to as forms of personal injury; rather they usually derive from torts other than negligence, often intentional torts. Matters such as grief, anxiety, distress and disappointment, may fall into a different category. They can be elements of pain and suffering which are the subject of awards for non-economic loss. Similarly, as reflected in the definition of non-economic loss in the *Civil Liability Act*, an award may be made for 'loss of amenities', to cover the non-economic loss resulting from the deprivation of the ability to participate in normal activities and thus to enjoy life to the full and to take full advantage of the opportunities that otherwise it might offer: *Teubner v Humble* [1963] HCA 11; (1963) 108 CLR 491 at 506 (Windeyer J). This is not a different concept from that accepted in *Baltic Shipping*; where such damages are said to flow from a breach of contract they are limited to the loss of the benefit to be provided under the terms of the contract. These, however, are heads of damage which fall within the general law understanding of non-economic loss and the statutory definition of that term. Accordingly, they are subject to the constraints imposed by s 16."

860 Sackville AJA considered the question at [166]. His Honour said:

- "166. It has been accepted for a considerable time that damages for personal injuries occasioned by the negligence or breach of duty can include compensation for the ruination or loss of a holiday attributable to the injuries. Such damages are ordinarily assessed as part of the damages for non-pecuniary or non-economic loss sustained by the plaintiff in consequence of his or her injuries: ...

167. Damages so assessed answer the description of damages for loss of amenities of life in the sense used by Windeyer J in *Teubner v Humble*. ...

...

175. The damages awarded by the primary judge for 'disappointment' fall within the description of damages for loss of amenities given by Windeyer J in *Teubner v Humble*. The award in the present case therefore was compensation for loss of amenities of life. The fact that the loss was less serious and related to a shorter period than, say, the loss of amenities associated with a permanent physical disability does not detract from that conclusion."

861 The decision of the Court of Appeal in *Insight Vacations* was the subject of an unsuccessful appeal to the High Court of Australia: *Insight Vacations Pty Ltd v*

Young [2011] HCA 16; (2010) 243 CLR 149. That appeal did not deal directly with any question of damages. It dealt with other provisions of the CLA and their applicability so as to deny the plaintiff, Ms Young, the right to recover completely.

862 Barr AJ in *Flight Centre Ltd t/as Infinity Holidays v Janice Louw* [2011] NSWSC 132, was called upon to consider whether the Local Court had made an error of law in awarding damages to the plaintiffs in that court whose holiday was affected by construction noise and inaccessibility of parts of a resort by reason of construction activity. The Local Court had found that the plaintiff suffered loss, inconvenience, distress and disappointment as a result of that construction activity. An order in the Local Court was made for a sum of damages to reflect that loss.

863 The defendant in the Local Court, Infinity Holidays, sought relief in the Supreme Court pursuant to s 69 of the *Supreme Court Act* 1970 to quash the orders of the Local Court for error of law. The primary argument put to Barr AJ was that no award under that sum ought to have been given because s 16 of the CLA applied to it, and the relevant threshold was not reached. The central submission made by Infinity Holidays in the Supreme Court was that an award for inconvenience, distress and disappointment constituted “*impairment of a person’s ... mental condition*” and was therefore an award for personal injury as defined in s 11 of the CLA. Once so defined, the provisions of s 16 would apply.

864 Having referred to the relevant authorities, Barr AJ said at [31]:

“It seems to me that much assistance is to be gained from the several remarks of the members of the Court of Appeal in the cases cited. In my opinion, the inconvenience, distress and disappointment experienced by the first and second defendants constituted non-economic loss for the purposes of s 3 [of the *Civil Liability Act*], being pain and suffering. In my opinion, they constituted impairment of the mental condition of each of the first and second defendants and so amounted to personal injury. It follows that the assessor was obliged to ask himself, in accordance with s 16, whether the severity of the non-economic loss was at least 15% of a most extreme case. He did not do so. The plaintiff has established that there was an error of law ...”

- 865 Although I am not strictly bound by the decision of Barr AJ, it is appropriate that I follow it, unless I am persuaded that it is obviously wrong. I am not so persuaded.
- 866 A more recent decision of the Court of Appeal in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219 touches upon this question. In that case, an individual sustained physical injury whilst engaged in riding a quad bike at a recreational facility operated in Glenworth Valley by the respondent to the appeal. The original claim was based both on an allegation that the respondents were liable to the appellant in tort for their negligence, and further that they were liable for breach of the consumer guarantees set out in ss 60 and 61 of the ACL.
- 867 Macfarlan JA (with whom Simpson JA and J C Campbell AJA agreed), held that the respondents had been negligent in their operation of the quad bike recreational activity and that other provisions of the CLA, in particular s 5N, did not preclude recovery. Equally, his Honour was not persuaded that there were any exclusion clauses in the contract which had any effect so as to avoid the claim.
- 868 His Honour considered the consumer guarantees and found that such negligence as had been indicated with respect to the common law claim meant in the circumstances of this claim, that the respondent had been in breach of the due care and skill guarantee of s 60 of the ACL. His Honour did not find it necessary to deal with the consumer guarantee of s 61.
- 869 He was persuaded that the claim under that consumer guarantee succeeded.
- 870 On the question of damages, his Honour identified that the only issue between the parties was whether the appellant should be awarded damages for non-economic loss calculated in accordance with s 16 of the CLA , or of a lesser sum calculated in accordance with s 87M of the Competition Act.

871 His Honour was persuaded that the two damages regimes were not inconsistent with each other and accordingly concluded that the successful plaintiff was entitled to choose the more favourable of the two calculations of damages. Because there was an action both in negligence and for breach of the statutory guarantees, it was unnecessary for his Honour to consider to any extent the provisions of s 275 of the ACL. But his Honour was satisfied that the damages under the consumer guarantee were to be calculated as personal injury damages.

872 No party in these proceedings suggests that the provisions of Pt VI B of the Competition Act, in which s 87M is to be found, apply to these proceedings. That is because the provisions of s 87E of the Competition Act, which purports to apply Pt VI B of that Act to a range of proceedings, does not include claims arising from a failure to comply with the consumer guarantees set out in Pt 3.2 of the ACL, or claims that are made pursuant to Div 1 of Pt 5.4 of the ACL.

873 I conclude that the claim made by Mr Moore for damages for distress and inconvenience under s 267(4) is, subject to the issue of extra-territoriality which is dealt with below, otherwise caught by the provisions of Pt 2 of the CLA. The evidence does not establish that the extent of Mr Moore's disappointment and distress could reach the minimum threshold fixed by s 16 of the CLA and, accordingly, this claim must fail because the Court could not make any award of monetary damages.

874 However, as indicated earlier, the plaintiff submitted that as the distress and disappointment were conditions which were suffered whilst Mr Moore was in Europe, the provisions of the CLA were not engaged because that Act extended only to personal injury suffered within the geographic limitation of the borders of NSW.

Extra-territoriality

875 In *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503, the High Court was called upon to consider the principles that govern by which

legal regime a claim in tort that occurred in one Australian jurisdiction, and which was the subject of proceedings brought in another Australian jurisdiction, was to be determined.

876 In particular, the Court was called upon to consider what regime of damages would be applicable. At 840 [86]-[87], the judgment of the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said:

“86. In Australia, in all its law areas, the same common law rules apply and any relevant difference in substantive law will stem from statute. Applying the *lex loci delicti* will apply a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts and will recognise and give effect to the predominant territorial concern of the states and territory legislatures. These factors favour giving controlling effect to *lex loci delicti* rather than the *lex fori*.”

87. Application of the *lex loci delicti* as the governing law in Australian torts involving an interstate element is similar to the approach adopted in Canada ... Accordingly, the common law should now be developed so that the *lex loci delicti* is the governing law with respect to torts committed in Australia but which have an interstate element.”

877 The Court went on to consider the issue of which damages law applied. There had previously been debate about whether laws relating to damages were in whole or in part substantive, or procedural. On that issue the, the plurality said at 544 [100]:

“... All questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.”

878 The High Court specifically noted in *John Pfeiffer* that it was not dealing with international torts, and that they were putting entirely to one side issues which might arise in an international context.

879 In *Regie National des Usines Renault SA v Zhang* [2002] HCA 10; (2002) 210 CLR 491, the High Court considered the international context for application of laws relating to tortious injury. In *Renault*, a resident in New South Wales was seriously injured in a motor vehicle accident in New Caledonia where the laws of France applied. He commenced proceedings in the Supreme Court of NSW, alleging that his injuries were caused by the negligent design and

manufacture of the vehicle in which he was travelling by the defendants which were foreign companies whose principal place of business was in France.

880 The principal issue before the High Court of Australia was whether the Supreme Court of NSW was an inappropriate forum for the trial. One issue before the High Court was whether having regard to the designation of the rule in *John Pfeiffer*, the law of the *lex loci delicti* would apply to intra-national torts, the same should apply to international torts. At 520 [75] the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said:

“75. The submission by the Renault companies is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti* should be extended to foreign torts, despite the absence of the significant factor of Federal considerations, and that this should be without the addition of any ‘flexible exception’. That submission should be accepted.

76. To that outcome several caveats should be entered. In *Pfeiffer* reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti* and, secondly, that:

‘all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.’

... We would reserve the further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort.”

881 Some features of these decisions should be drawn to attention. The first is that both decisions concerned a cause of action arising in tort. The injury and damage, the subject of the tort, happened in either the interstate or foreign jurisdiction. Damage is of the essence of a tort. In both cases, there were powerful arguments for placing the tort as arising where the accident happened. There was no necessary connection between the tort and the state in which the proceedings had been brought. That is not to say that the Supreme Court of NSW did not have jurisdiction, because in each case the

plaintiff lived in NSW and, at least arguably, suffered damage whilst in NSW. The question of jurisdiction can be put to one side. It is not challenged in these proceedings.

882 The second feature is that in *Renault*, whilst the motor accident happened in New Caledonia, which is, broadly speaking, subject to the law of France, the negligent design and manufacture occurred in France. The claim was not made by reference to any NSW or French statute, but rather by reference to common-law causes of action. Thirdly there was no suggestion of any voluntary choice of law provision in any of the transactions which underlay the torts which were committed.

883 Here, Mr Moore entered into a contract for the supply of services with an Australian company, which contract was governed by the laws of NSW. The supply of services occurred partly in NSW, at the time of booking and by the provision of pre- travel information, but substantially in Europe. The cause of action upon which Mr Moore claims, is that created by an Australian statute referable to the supply of services caught by that statute, but he argues that the failure to comply with the Australian statute occurred in one at least, if not more, foreign countries.

884 In other words, the essence of Mr Moore's contract is that the supply of services, although partly in Australia and partly overseas, is nevertheless caught by an Australian statute.

885 Scenic did not argue that the statutory consumer guarantee provisions did not apply to the supply of services which occurred outside of Australia. Nor did Scenic argue that if a failure to supply services occurred outside Australia, such failure and its consequences were not caught by the statutory consumer guarantees in the ACL. It was not in issue therefore that the statutory guarantees applied to services which were supplied to a consumer outside Australia.

- 886 Although attention was drawn to the decision of the High Court of Australia and the NSW Court of Appeal in *Insight Vacations Pty Ltd v Young*, I note that that was a case which depended entirely on a contract which was accepted on the facts to have been entered into in NSW, and to which the law of NSW applied as the proper law of the contract.
- 887 Neither party referred the Court to any authority dealing with the question of how one might decide which law applies to a statutory cause of action (s 267(4)) arising because of a breach in an overseas country of a consumer guarantee imposed on a supplier of services based in Australia. The question is, from the perspective of legal authority, at large.
- 888 A factor which is to be regarded as being of significance for the purpose of this analysis, is that legislation is presumed, as a matter of statutory interpretation, not to have an extraterritorial effect.
- 889 An early, but nonetheless clear statement of this presumption is to be found in *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J:
- “In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most statutes if their general words were taken literally in their widest sense would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits.”
- 890 Of course, a State Parliament can lawfully pass legislation which has an extraterritorial effect. To be valid, there needs to be the existence of a connection between the State enacting the legislation and the extraterritorial person, things or events upon which the State law operates: see *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55; (1988) 166 CLR 1; *Lipohar v The Queen* [1999] HCA 65; (1999) 200 CLR 485.
- 891 Ordinarily, the displacement of the presumption requires clear words or else a demonstration that the application of the presumption would defeat the

purpose of the legislation: see *Kumagai Gumi Co Ltd v Commissioner of Taxation* (Cth) [1999] FCA 235; (1999) 90 FCR 274 at 283.

892 There is nothing about the provisions of Pt 2 of the CLA which could give rise to a conclusion that the presumption against extraterritoriality is overridden by the terms of the legislation, or else is inconsistent with those terms.

893 Mr Moore's argument calls in aid, by analogy, the decision of the High Court of Australia in *Insight Vacations*. There, at [29] the Court said:

“As Kitto J pointed out in *Kayes Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142, is necessary to reconcile the generality of the language used in a provision like s 5N [of the *Civil Liability Act*] with the geographical limitation to which the legislative power of the State Parliament is subject. And that reconciliation must be undertaken upon a consideration of the context and the subject matter of the Act in question stop.”

894 The Court further addressed that question at [33] where it said:

“What geographical limitation is there the operation of the *Civil Liability Act*? Central focus of the whole of Pt 1A of that Act is liability for negligence ... As noted earlier, s 5A(1) provides that Pt 1A applies to any claim to damages for harm resulting from negligence, regardless of how the claim is framed. As also noted earlier, one natural geographical limitation that could be given to s 5A(1) is to read ‘any claim’ as any ‘claim in the Courts of New South Wales’, leaving the applicability of the provisions of the Act in a claim brought in a court of another jurisdiction of the application of the principles governing the choice of law ... Or, ‘any claim’ could be read as ‘any claim where the law governing back claim is the law of NSW’. It is not necessary in this case to decide whether those are the only available constructions to choose between them. The relevant geographic limitations to be identified in the provisions of Div 5 of Pt 1A.”

895 The Court went on to consider the specific terms of s 5N of the CLA. At [36] it held that that construction of the provision reads “contract for the supply of recreation services” as a compound expression. It concluded that the relevant geographical limitation of the compound expression directs attention to the place of performance of the contract, namely where the relevant recreation services are to be supplied. Once that reading was adopted, the Court held that it follows that it is neither necessary nor appropriate to construe the subsection as importing any other geographical limitation (or extension) of its operation. More particularly, the Court reasoned if s 5N(1) is

read as a provision which is hinged upon the place of performance of the relevant contract, there is no satisfactory basis upon which the provision could be construed as including in the class of contracts to which s 5N(1) applies, contracts that are to be performed outside NSW but whose governing law is the law of that State. Reading s 5N(1) as hinging on the place of performance of the contract best gives effect to the purposes and text of the provision when it is read in its statutory context.

896 Determination of the extraterritoriality question in this judgment calls attention to statutory construction of Pt 2 of the CLA.

Statutory Context

897 The CLA was introduced in 2002. It was introduced initially by two separate Bills. The first called the “Civil Liability Bill” was introduced into Parliament in May 2002. The second part of that Bill was introduced in October 2002 and entitled “Civil Liability Amendment (Personal Responsibility) Bill”. The Civil Liability Bill, the first piece of legislation, essentially introduced the damages regime which is now to be found in Pt 2 of the Act.

898 In introducing it, the Premier in his Second Reading Speech said:

“The bill will implement Stage 1 of the government’s tort law reforms. Three weeks ago I was in no doubt that these reforms were vital to the survival of our community. I have heard and seen the damage that the public liability crisis is doing to our sporting and cultural activities, small businesses and tourism operators, and our local communities.

... Since I released the consultation draft of the bill, I have met with many local government and community representatives. They have told me that the approach of the courts to public liability is unsustainable and the government agrees with them. ...

This bill implements Stage 1 of the government’s Tort Law Reform Program. I will introduce Stage 2 of the government’s Tort Law Reform Program next session. ... Stage 2 will introduce broad-ranging reforms to the law of negligence. ...

These reforms are urgent and I understand and share the sense of urgency. ... The reforms that I am introducing today in Stage 1 are tried and tested: they have worked in health care liability, in motor accidents and in workers compensation. In contrast Stage 2 is uncharted waters.”

- 899 The Premier went on to deal with the question of insurance premiums and predicted that as a consequence of the Government's Stage 1 reform, namely the introduction of a damages regime for public liability claims, there would be a 17.5% reduction in the cost of personal injury claims and a reduction of some 12% in public liability premiums.
- 900 At the time of the introduction of this Bill, there was a general perception and a view across Commonwealth and State governments that the award of damages for personal injury caused negligently had become unaffordable and unsustainable.
- 901 The Commonwealth government appointed an expert panel to review and report on a reform of the law of negligence. The first Bill dealt only with the awarding of personal injury damages, i.e. damages that relate to the death of or injury to a person which was caused by the fault of another person. When the second Bill was introduced, that section was amended so as to remove the requirement for fault.
- 902 The context in which the Bill was introduced and in respect of which it was drafted, dealt with a perceived crisis in the affordability of insurance premiums and awards made by courts in NSW with respect to public liability claims which had led to the closure of a number of public facilities and the ceasing of a number of public recreational activities.
- 903 There is nothing in the context of the Bill which suggests that it was necessary for it to have any extra territorial application, let alone an effect extending internationally.
- 904 It is necessary to consider the text of the relevant provisions. Section 11A of the CLA deals with the application of Pt 2. It is in the following form:

"11A Application of Part

- (1) This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part by section 3B.

- (2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.
- (3) A court cannot award damages, or interest on damages, contrary to this Part.
- (4) In the case of an award of damages to which Part 2A (Special provisions for offenders in custody) applies, this Part applies subject to Part 2A.”

905 Subsection 3, which provides that a court cannot award damages contrary to the part, is not a code for the award of damages for personal injury. The text does not make it explicit that a court can only award damages which are to be assessed only in accordance with Pt 2. In other words, the text does not on its face provide for a code of damages. It simply prohibits a court from awarding damages contrary to the Part.

906 There is nothing in that text which suggests that the Act has extra-territorial jurisdiction. On the contrary, the fact that it is not a code for the award of damages by a court in NSW suggests that if there is another claim for damages, or regime of damages, which stands outside the provisions of Pt 2, then the award of such damages could be made because such an award would not be contrary to Pt 2.

907 Nor is there anything about the text of any of the other provisions in Pt 2 which points to any intention on the part of the legislature that the provisions would apply to damages which may be awarded in respect of a cause of action which depends upon facts which have occurred wholly outside of NSW.

908 Accordingly, I conclude that the CLA was not intended to, and does not have, any extraterritorial effect. This conclusion is not inconsistent with that reached by the High Court in *Insight Vacations*.

909 Accordingly, I am satisfied that where the events giving rise to an entitlement to damages happened outside of NSW, as did Mr Moore’s damages for distress and inconvenience, Pt 2 of the CLA does not apply to such a claim.

910 Mr Moore’s distress and inconvenience upon which his damages claim is based, arose outside of NSW because the failure to comply with the

consumer guarantees occurred when Mr Moore's cruise experience suffered the major failure which I have earlier described. That failure occurred overseas. Mr Moore, in the course of that failure, suffered disappointment and distress. Those feelings were suffered overseas and as a consequence of the overseas events.

911 As Pt 2 of the CLA does not, in my view, apply to the claim by Mr Moore for damages, any award which I make on this claim will not contravene the provisions of s 11A which restrict the jurisdiction of this Court in the awarding personal injury damages contrary to Pt 2. That is because Pt 2 does not apply to Mr Moore's claim. Any award of damages on that basis is not contrary to the Part, because the Part has no application.

Assessment of Damages

912 Damages for distress and disappointment are able to be assessed at large. In Mr Moore's case, the features of importance, as have been previously articulated, included the fact that this was his first trip to Europe and his first experience of a river cruise, the fact that he had booked it significantly far in advance with the expectation, according to the material given to him by Scenic, that he would be immersed in an all-inclusive luxury cruise along the rivers of Europe, that he had taken long service leave for this purpose and that his particular physical disability meant that the particular form of cruise which he chose was important.

913 Each case must be assessed according to the distress and disappointment which a person has suffered, and having regard to all of the facts and circumstances which are proved for that individual.

914 It does not seem to be correct to award only a token or nominal sum for such damages. I reach that conclusion by a consideration of other cases which have been given awards for damages for distress and disappointment. Those cases are:

- (a) *Jarvis v Swan Tours Ltd* where, Lord Denning MR, with whom Edmund Davies and Stephenson LJJ agreed, assessed damages for distress and disappointment in the sum of £125, which was very close to double the cost that the plaintiff had paid for his holiday, which was £63.90;
- (b) In *Baltic Shipping Co*, the trial Judge awarded damages for disappointment and distress in the sum of \$5,000 which was a little under double the fare which totalled a little over \$2,200.
- (c) In *Insight Vacations*, the trial Judge made an award of \$8,000 for damages for disappointment which was a little under double the cost of the basic trip which was about \$4,700: see *Young v Insight Vacations Pty Ltd* [2009] NSWDC 122 at [6]. Ultimately, as indicated above, that award was disallowed, but not on any basis related to the sum of money which was awarded.

915 Identifying these awards and having regard to them, I so as to be satisfied merely that awards of damages for distress and disappointment are not nominal or token awards does not contravene the principle in *Planet Fisheries Pty Ltd v La Rosa* [1968] HCA 62; (1968) 119 CLR 118 at 124. In *Planet Fisheries*, the High Court rejected a submission, in a case concerned with excessiveness of an award of general damages, that the Court should seek out a norm or standard from other decisions by which the award under challenge could be identified as disproportionate: see also *Rogers v Nationwide News Ltd* [2003] HCA 52; (2003) 216 CLR 327 at [69] per Hayne J.

916 Rather, the reference to these decisions is a transparent way of determining an issue of principle, namely whether awards of damage for distress and inconvenience are merely nominal or not. An assessment of the sum of damages is still one undertaken as in the individual case of Mr Moore, by an evaluative process applying a sense of fairness and justice: see *Moran v McMahon* (1985) 3 NSWLR 700 per Kirby P at 707Cff.

917 The reference by me to these cases does not constitute any inhibition at all of the evaluative function upon which I am engaged. Nor am I attempting to derive a norm or standard of damages. The use of them rather falls into identifying nothing more than a rule of thumb acquired by a form of convention: see Kirby P in *Moran v McMahon* at 706D.

918 Here, the plaintiff claims the sum of \$2,000 in his final submission.

919 I regard this as, in the circumstances applicable here, a modest sum. Having regard to all of the circumstances, I would have assessed the plaintiff's damages as being somewhat higher than that. However, since that is all the plaintiff claims, it would be wrong in the circumstances, and procedurally unfair to the defendant, to determine a sum which exceeds that claimed.

920 For damages for disappointment and distress, I award the plaintiff \$2,000.

921 Interest ought accrue on that award from 17 June 2013 which is the date upon which the cruise ended.

Restitutionary Judgment for Money Had and Received

922 The plaintiff claims as an alternative, against the possible failure of his claim for damages for contravention of the statutory guarantees, an entitlement to a significant refund of the monies which he paid, on the basis of a claim for money had and received.

923 The plaintiff submitted that such an action arises where there is a failure of consideration in circumstances where payments are made for a particular purpose, and the purpose fails or the contemplated state of affairs disappears. The plaintiff submitted that here, by the mechanism of a daily allocation of the cruise cost, the consideration is partly severable so that monies paid for a purpose which has failed can be recovered.

924 The plaintiff went on to submit that the decision, to contrary effect in *Baltic Shipping*, is distinguishable.

925 The defendant submitted that there was nothing about the circumstances of the agreement between Mr Moore and Scenic which involved any apportionment of any of the payments at all, let alone to distinct performance obligations. The defendant submitted that the decisions relied upon by the plaintiff were not in point.

926 As I am dealing with a claim which arises only in the alternative, the claim can be dealt with quite readily, and without lengthy discussion.

927 I have earlier found that a single price was paid for the tour upon which Mr Moore embarked and further that, as the facts demonstrate, it was paid well in advance. There was no apportionment between the parties with respect to any part of that payment.

928 For my part, I find the circumstances here indistinguishable from those which applied in *Baltic Shipping*. There, the cruise passenger had paid monies in advance for the cruise. The ship sank 10 days into a 15 day cruise. The first part of the cruise had been undertaken without incident. The action for money had and received in that case depended upon an allegation of total failure of consideration.

929 The High Court held that a claim in restitution was not available to the plaintiff. At [12], Mason CJ said:

"When, however, an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract breaker of its obligations under the contract, and the contract-breaker renders an incomplete performance, in general, the innocent party cannot recover unless there has been a total failure of consideration. ... If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected of the contract, it will not be a total failure of consideration."

930 The Chief Justice went on to find that the consequence of the passenger's enjoyment of the benefits provided under the contract during the first eight full days of the cruise, was that the failure of consideration was partial not total. Brennan J agreed with the Chief Justice on this question. Deane and Dawson JJ also concluded that there had not been any failure of consideration of a kind sufficient to give rise to restitution.

931 McHugh J analysed the position in this way:

"Contrary the conclusion reached in the Supreme Court of New South Wales: Mrs Dillon was not entitled to have her fare refunded. The advance payment

of the fare was not a security for the price of the cruise. Nor was it a payment which was to be earned by Baltic only upon performance which promise to provide a fourteen day cruise. The fare, with other fares, was payable in advance in order to provide a fund from which Baltic could meet the expense of providing the various benefits associated with the cruise, benefits which were to be enjoyed throughout and from the commencement of the cruise. Consequently, the right of Baltic to retain the amount of the fare became unconditional once Baltic began to provide those benefits to Mrs Dillon. Furthermore, the subsequent sinking of the 'Mikhail Lermontov' did not alter Baltic's unconditional right to retain the amount of the fare. Because the common law has no doctrine of apportionment in respect of a partial failure of consideration, Mrs Dillon's remedy in respect of Baltic's failure to complete the cruise was an action for damages for breach of contract and not an action for partial restitution of the sum paid as the price of the fare."

932 I can find no difference in substance between what occurred in that case to the unfortunate Mrs Dillon, and the circumstances in which the cruise was booked by and paid for, by Mr Moore in these proceedings.

933 In my view, there has not been a total failure of consideration, and it is not open to the plaintiff to obtain restitutionary relief on the basis that one can apportion the cruise cost on a daily basis and deal with the claim on the basis that there has been a total failure on those days.

934 I would reject this claim.

Summary

935 I have concluded that Mr Moore is entitled to compensation under the ACL for a breach of the due care and skill guarantee by Scenic amounting to a total of \$02,990 plus interest. He has also established breaches of the purpose and result guarantees.

936 In terms of the issues raised at hearing, I have resolved them in the following manner:

937 On the issue of the proper characterisation of the services provided by Scenic to Mr Moore, I have held that the services were appropriately characterised as generally put forward by the plaintiff. That is, services which were recreational and were constituted by an all-inclusive, luxury five-star river cruise.

Moreover, Scenic was obliged to provide, both in advance of the intended cruise and during it, information about events and circumstances and the impacts (other than de minimis) which those events and circumstances would be likely to have on a passenger's enjoyment of the cruise, and the ability of Scenic to provide those services in a timely manner.

938 I have found that the consumer guarantees applied to Mr Moore and the other passengers.

939 I have also found that the purpose guarantee and the result guarantees have been breached by Scenic in relation to all cruises except cruises 10 and 12. The due care and skill guarantee was not pleaded in relation to cruises 2 and 3, and I have found that it was breached in all cruises except for cruise 12.

940 Furthermore, I have concluded that the breach of the consumer guarantees constituted a "major failure" within the meaning of s 268 of the ACL.

941 As to Mr Moore's right to compensation, I have found that Mr Moore had an action to recover compensation for any reduction in the value of the services below the price he paid (s 267(3)(b) ACL) and also that he may recover damages for any loss which was reasonably foreseeable (s 267(4) ACL).

942 In construing the operation of s 275 of the ACL, I have determined that that section applies the provisions of the CLA. Accordingly, subject to the issue of extra-territoriality, I have found that Mr Moore's claim must fail because the evidence did not establish that the extent of Mr Moore's disappointment and distress could reach the minimum threshold fixed by s 16 of the CLA.

943 With regards to extra-territoriality, I have concluded that, absent any specific words displacing the presumption that legislatures do not presume to exceed their jurisdiction, the CLA cannot apply to Mr Moore's claim, where Mr Moore's distress and disappointment had occurred outside of Australia. As a result, s 275 of the ACL does not prevent Mr Moore's claim in damages.

944 Upon this basis, I have awarded Mr Moore the sum of \$12,990 in compensation, being the sum of \$10,990 (awarded for compensation for loss of value) and \$2,000 (awarded as damages under s 267(4) of the ACL), plus interest. In doing so, the Court rejected Mr Moore's alternative argument that he was entitled to a significant refund of the monies which he paid, as money had and received.

Common Questions

945 It will be appropriate for the parties to have an opportunity make submissions on the way in which the identified common questions should be answered, and the form which those answers should take, including whether the questions are no longer to be regarded as being common.

Orders

946 I make the following orders:

- (1) Judgment for the plaintiff against the defendant in the following amount:
 - (a) \$10,990 by way of compensation;
 - (b) \$2,000 by way of damages;
 - (c) Interest in accordance with s 100 of the *Civil Procedure Act* 2005, on the sum in (a) from 3 June 2013, and on the sum in (b) from 17 June 2013.
- (2) Defendant to pay the plaintiff's costs of his claim on a party and party basis forthwith.
- (3) Declare that for the purpose of order 2, and in accordance with UCPR r 42.34, I am satisfied that the commencement and continuation of the proceedings in the Supreme Court and not in any other Court was warranted.
- (4) Order the plaintiff to file and serve Short Minutes of orders which he proposes should be formally made by the Court on or before 29 September 2017 including the proper sum for judgment and interest.

- (5) Order the defendant is to file and serve Short Minutes of the orders which it proposes should be formally made by the Court on or before 20 October 2017.
- (6) Each party is to file with the Short Minutes of Order, the answers which it contends ought to be given to the questions agreed by the parties, together with an outline of submissions in support of the Short Minutes of Order and answers to common questions.
- (7) If any party seeks any costs order different from that which the Court proposes, then the party should file a notice of motion specifying such orders, together with all affidavits in support and outline of written submissions (not exceeding 5 pages) in support of such orders on or before 27 October 2017.
- (8) If a party opposes such costs order, then that party is to file all affidavits upon which it intends to rely and an outline of written submissions (not exceeding 5 pages) on or before 10 November 2017
- (9) Stand the proceedings over to 15 November 2017 at 9.30am for the determination of the appropriate orders to be made including the determination of any Notices of Motion for costs.
- (10) The parties have liberty to apply on 2 days' notice.
