

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Civil
Registry	Sydney
Case number	2022/00238642

TITLE OF PROCEEDINGS

Plaintiff	Darran Kelly
Defendant	Scenic Tours Pty Ltd (ACN 002 715 602)

FILING DETAILS

Filed for	Scenic Tours Pty Ltd (ACN 002 715 602), Defendant
Legal representative	Alex Tolliday, Allens
Legal representative reference	56218
Contact name and telephone	Alex Tolliday, +61 2 9230 4122
Contact email	alex.tolliday@allens.com.au

HEARING DETAILS

The proceedings are listed for a directions hearing before Garling J on 14 June 2024 at 9.30am.

PLEADINGS AND PARTICULARS

A PRELIMINARY MATTERS

- 1 Capitalised terms used in this Defence have the same meaning as in the Amended Statement of Claim filed on 10 March 2023 unless otherwise defined below. Those definitions are adopted for convenience only, and their adoption does not amount to an admission by the Defendant as to any allegation implied by the defined terms so used.
- 2 Headings in this Defence are used for convenience only. They do not form part of the response to the Amended Statement of Claim filed on 10 March 2023.

B COMMON QUESTIONS

1 Scenic does not admit:

- (a) that the questions as framed by the Plaintiff involve common issues of law or fact; or
- (b) insofar as they do, that those questions are common with respect to all alleged Group Members.

C PLEADINGS

In answer to the Plaintiff's Amended Statement of Claim filed on 10 March 2023, Scenic says as follows:

1 In answer to paragraph 1 of the Amended Statement of Claim, Scenic admits that Mr Kelly has purported to commence this proceeding as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) and otherwise does not admit the allegations in the paragraph.

2 In answer to paragraph 2 of the Amended Statement of Claim, Scenic:

- (a) admits that Mr Kelly booked a place and travelled on STC300718.2, the 'Jewels of Europe' cruise from Budapest to Amsterdam, commencing 30 July 2018 (identified as Cruise 6 in Annexure A of the Amended Statement of Claim);
- (b) denies that it operated the Cruises;

Particulars

Each of the Cruises was operated by Scenic Tours Europe AG (***STE***), a Swiss corporation, which itself entered into arrangements with other entities in relation to the use of their river cruise vessels and the provision of onboard and offshore services.

- (c) admits that it supplied river cruises to certain customers ordinarily resident in Australia (***Australian customers***);

Particulars

Scenic and Evergreen-branded cabin berths were purchased from STE and resold by Scenic to Australian customers.

- (d) denies that it supplied river cruises to customers ordinarily resident outside of Australia (***overseas customers***), or that those overseas customers acquired river cruises from it – which were supplied by, and acquired from, other entities;

Particulars

- (i) Scenic-branded cabin berths were supplied by Scenic Tours New Zealand Limited (**STNZ**) to overseas customers in New Zealand;
 - (ii) Scenic and Emerald-branded cabin berths were supplied by Scenic Tours (UK) Limited (**STUK**) to overseas customers in the United Kingdom;
 - (iii) Scenic and Emerald-branded cabin berths were supplied by Scenic Tours (USA) Inc (**STUS**) to overseas customers in the United States; and
 - (iv) Scenic and Emerald-branded cabin berths were supplied by ST Touring Canada Limited (**STCA**) to overseas customers in Canada.
- (e) denies that any person has suffered loss or damage as alleged in paragraph 2(b) of the Amended Statement of Claim;
- (f) refers to and repeats paragraphs 5 – 5B below in relation to the 'Services' allegedly provided to Mr Kelly and the alleged Group Members;
- (g) refers to and repeats paragraph 9 below in relation to the 'Particular Purpose' for which it is alleged Mr Kelly and the alleged Group Members acquired the Services;
- (h) refers to and repeats paragraph 10 below in relation to the 'Desired Result' that it is alleged Mr Kelly and the alleged Group Members made known that they wished the Services to achieve; and
- (i) otherwise denies the allegations in paragraph 2 of the Amended Statement of Claim.
- 3 In answer to paragraph 3 of the Amended Statement of Claim, Scenic:
- (a) refers to and repeats paragraph 2 above; and
 - (b) otherwise denies the allegations in paragraph 3 of the Amended Statement of Claim.
- 4 Scenic admits the allegations in paragraph 4 of the Amended Statement of Claim.
- 5 In answer to paragraph 5 of the Amended Statement of Claim, Scenic:
- (a) admits that it supplied cruises to Mr Kelly and certain other Australian customers;
 - (b) denies that it supplied cruises to overseas customers;

- (c) refers to and repeats paragraph 2(d) above and paragraph 5A below; and
- (d) otherwise denies the allegations in paragraph 5 of the Amended Statement of Claim.

5A In answer to paragraph 5A of the Amended Statement of Claim, Scenic:

- (a) admits that the 'Services' that it provided to Australian customers, and that each of:
 - (i) STNZ provided to overseas customers in New Zealand;
 - (ii) STUK provided to overseas customers in the United Kingdom;
 - (iii) STUS provided to overseas customers in the United States; and
 - (iv) STCA provided to overseas customers in Canada,
 included cruises and were as described in the Scenic Brochures and Emerald Brochures;
- (b) says that, in addition to cruises, the Services in some cases included:
 - (i) land components;
 - (ii) optional land-based 'extensions';
 - (iii) flights;
 - (iv) airport transfers; and/or
 - (v) pre- and post-tour accommodation;
- (c) says that the Services were offered subject to the Terms and Conditions set out in the relevant brochure;
- (d) says that each of the Scenic Brochures and Emerald Brochures stated, in addition to the relevant Terms and Conditions, that cruise itineraries may need to be varied, including as a result of adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of the entity from which customers acquired the Services; and

Particulars

Scenic refers to and relies on:

- (i) The Australian Scenic Brochure [DEF.009.001.0400] (p 242), Canadian Scenic Brochure [DEF.009.001.0940] (p 170), NZ Scenic Brochure (p 242) [DEF.009.002.0113], UK Scenic Brochure [DEF.009.001.1134] (p 168) and US Scenic Brochure [DEF.009.003.0001] (p 104), which stated:

Europe's beautiful rivers are occasionally at the mercy of the elements which can mean we encounter lock closures or difficulties passing under historic and often low-slung bridges when water levels are either too high or too low. Scenic has a range of carefully prepared plans ready to activate at the drop of a hat, should our ships encounter any water level issues.

Our state-of-the-art Space-Ships are designed to convert easily so they can slide under all kinds of bridges if the water is too high, allowing our expert crews to continue navigating even the trickiest waterways, but when the water on these rivers is simply impossible to work around, we are ready to put our contingencies into action.

- (ii) The Evergreen Brochure [**DEF.009.001.0250**], which stated (p 37):

Itinerary, hotels and inclusions are subject to change.

- (iii) The UK Emerald Brochure [**DEF.009.001.0205**], which stated (p 83):

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. If we're unable to continue sailing certain rivers due to water level problems, we'll do everything we can to minimise the impact it has on your holiday and make alternative arrangements for the rest of the itinerary. This could mean arranging coach transfers, organising ship swaps, providing hotel accommodation or finding alternative attractions to visit – all of which are weather dependent.

- (iv) The Canadian Emerald Brochure [**DEF.009.001.0093**] and US Emerald Brochure [**DEF.009.002.0001**], which both stated (p 109):

Water levels on Europe's rivers vary and that can occasionally mean disruption to our itineraries. If we are unable to continue sailing certain rivers due to water level problems, we will do everything we can to minimize the impact this has on your vacation and make alternative arrangements for the rest of the itinerary. This could mean arranging coach transfers, organizing ship swaps, providing hotel accommodation, or finding alternative attractions to visit – all of which are weather dependent.

Further particulars may be provided following the service of evidence.

- (e) otherwise denies the allegations in paragraph 5A of the Amended Statement of Claim.

5B In answer to paragraph 5B of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraph 5A above;
- (b) admits that the Services described in paragraph 5A above included the Onboard Services pleaded in sub-paragraph 5B(a);

- (c) in relation to sub-paragraph 5B(b):
 - (i) admits that the Services described in paragraph 5A above included onshore activities and tours; and
 - (ii) says that those onshore activities and tours were not offered daily in all cases;
- (d) admits that the Cruises involved itineraries of 7 or 14 nights; and
- (e) otherwise denies the allegations in paragraph 5B of the Amended Statement of Claim.

6 In answer to paragraph 6 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 2(d) and 5 – 5B above;
- (b) admits that Mr Kelly and the Australian customers acquired the Services supplied by Scenic within the meaning of section 2 of the *Australian Consumer Law*; and
- (c) otherwise denies the allegations in paragraph 6 of the Amended Statement of Claim.

7 In answer to paragraph 7 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 2(d), 5 and 6 above;
- (b) admits that Mr Kelly and the Australian customers were consumers within the meaning of section 3(3) of the *Australian Consumer Law*; and
- (c) otherwise denies the allegations in paragraph 7 of the Amended Statement of Claim.

8 In answer to paragraph 8 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 2(d), 5 – 5B and 6 above;
- (b) admits that it supplied the Services to Australian customers in trade or commerce; and
- (c) otherwise denies the allegations in paragraph 8 of the Amended Statement of Claim.

Consumer Guarantees

9 In answer to paragraph 9 of the Amended Statement of Claim, Scenic:

- (a) denies that the overseas customers made known to it any particular purpose for their acquisition of the Services;
- (b) says that Mr Kelly and the alleged Group Members knew, or ought to have known, that the Cruises and associated Services were subject to change and

may need to be varied as a result of adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of the entity from which they acquired the Services;

Particulars

Mr Kelly and the alleged Group Members knew, or ought to have known, the alleged matters by reason of the nature of the Services and the fact that they involved cruises that were in the ordinary course subject to climatic or other weather conditions and the effects arising from such conditions.

Further, Scenic repeats sub-paragraph (c) below.

Further particulars may be provided following discovery and/or the articulation of claims of the alleged Group Members.

- (c) says that the 'standards advertised' made clear that relevant Cruises and associated Services were subject to change and may need to be varied as a result of adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of Scenic or the entity from which customers acquired the Services;

Particulars

Scenic refers to and relies on:

- (i) the statements in the brochures set out in the particulars to paragraph 5A(d) above;
- (ii) clauses 1.5, 5, 7.1, 7.2, 8.5 – 8.7 and 8.10 of the Terms and Conditions set out in the Australian Scenic Brochure;
- (iii) clauses 1.5, 5, 7.1, 7.2, 8.5 – 8.7 and 8.10 of the Terms and Conditions set out in the Canadian Scenic Brochure;
- (iv) clauses 1.5, 5, 7.1, 7.2, 8.5 – 8.7 and 8.10 of the Terms and Conditions set out in the NZ Scenic Brochure;
- (v) clauses 16, 18 – 20, 30, 32, 34 and 35 – 37 of the Terms and Conditions set out in the UK Scenic Brochure;
- (vi) clauses 1.6, 5, 7.1, 7.2, 8.4 – 8.6 and 8.9 of the Terms and Conditions set out in the US Scenic Brochure;
- (vii) clauses 1.5, 5, 7.1, 7.2, 8.5 – 8.7 and 8.10 of the Terms and Conditions set out in the Evergreen Brochure;

- (viii) clauses 1.5, 5, 7.1, 7.2, 8.5 – 8.7 and 8.10 of the Terms and Conditions set out in the Canadian Emerald Brochure;
 - (ix) clauses 17, 19 – 21, 30, 34, 35 – 37 and 70 of the Terms and Conditions set out in the UK Emerald Brochure;
 - (x) clauses 2 – 3, 10, 12, 13 and 26 of the Terms and Conditions set out in the US Emerald Brochure;
 - (xi) clause 7 of the separate conditions of carriage of the operator of each river cruise vessel provided to customers prior to their tours [**DEF.008.002.0048**; **DEF.008.002.0007**]; and
 - (xii) the provision of coverage under the River Cruise Guarantee, which provided certain entitlements for unforeseen delays or cancellations (other than minor delays or deviations) occurring due to (among other things) weather.
- (d) says that, in some cases, notice was given to customers prior to embarkation that their Cruises and the associated Services may be interrupted or unable to be provided (either in whole or part) due to adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of Scenic or the entity from which they acquired the Services;

Particulars

Scenic refers to and relies on:

- (i) the email sent in relation to Cruise 3 on 11 July 2018 [**DEF.010.001.4162**];
- (ii) the email sent in relation to Cruise 4 on 17 July 2018 [**DEF.010.002.6657**];
- (iii) the emails sent in relation to Cruise 7 on 3 August 2018 [**DEF.010.001.2827**] and 4 August 2018 [**DEF.010.002.6492**];
- (iv) the email sent in relation to Cruise 8 on 3 August 2018 [**DEF.010.001.0129**];
- (v) the email sent in relation to Cruise 9 on 13 August 2018 [**DEF.010.001.3005**];
- (vi) the email sent in relation to Cruise 10 on 17 August 2018 [**DEF.010.001.0090**];
- (vii) the emails sent in relation to Cruise 11 on 24 August 2018 [**DEF.010.002.8360**] and 30 August 2018 [**DEF.010.001.5282**];

- (viii) the emails sent in relation to Cruise 12 on 30 August 2018 [DEF.010.001.5262] and 4 September 2018 [DEF.010.002.6139];
- (ix) the emails sent in relation to Cruise 13 on 30 August 2018 [DEF.010.001.5261] and 14 September 2018 [DEF.010.001.0022];
- (x) the emails sent in relation to Cruise 14 on 10 September 2018 [DEF.010.003.7288] and 18 September 2018 [DEF.010.001.0054];
- (xi) the email sent in relation to Cruise 15 on 28 September 2018 [DEF.010.001.0007];
- (xii) the emails sent in relation to Cruise 16 on 2 October 2018 [DEF.010.001.2782] and 8 October 2018 [DEF.010.001.4812];
- (xiii) the emails sent in relation to Cruise 17 on 8 October 2018 [DEF.010.002.6229] and 12 October 2018 [DEF.010.001.5717];
- (xiv) the emails sent in relation to Cruise 18 on 15 October 2018 [DEF.010.001.5631], 18 October 2018 [DEF.010.001.5456] and 19 October 2018 [DEF.010.001.5202];
- (xv) the emails sent in relation to Cruise 19 on 15 October 2018 [DEF.010.001.5631], 19 October 2018 [DEF.010.001.5203] and 22 October 2018 [DEF.010.002.3519];
- (xvi) the emails sent in relation to Cruise 20 on 24 October 2018 [DEF.010.001.2346] and 5 November 2018 [DEF.010.001.4440]; and
- (xvii) the letter sent in relation to Cruise 21 on 13 November 2018 [DEF.010.001.2290].

Further particulars may be provided following discovery or the service of evidence.

- (e) says that, where customers were given the opportunity to leave, or to not embark on, their tour after being given notice that the cruise and the associated Services may or would be interrupted or unable to be provided (either in whole or part) due to adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of Scenic or the entity from which they acquired the Services, those who elected to continue with the cruise cannot be

taken to have made known that the particular purpose for their acquisition of the Services was to experience the Services on a selected cruise in accordance with the originally planned itinerary; and

Particulars

When an unforeseen event covered by the River Cruise Guarantee was declared, customers were given the option either to (i) leave their cruise/tour (or not embark on it, if it had not already begun); or (ii) remain on the ship or continue with the alternate program.

Customers were notified of their ability to claim under the River Cruise Guarantee in relation to:

- (i) Cruise 2 on 4 July 2018 [DEF.011.001.6095];
- (ii) Cruise 4 on 21 July 2018 [DEF.010.002.0598];
- (iii) Cruise 5 on 7 August 2018 [DEF.011.001.1718];
- (iv) Cruise 6 on 5 August 2018 [DEF.010.001.0132];
- (v) Cruise 7 on 9 August 2018 [DEF.011.001.1610];
- (vi) Cruise 8 on 8 August 2018 [DEF.011.001.4989];
- (vii) Cruise 9 on 16 August 2018 [DEF.011.001.5581];
- (viii) Cruise 10 on 23 August 2018 [DEF.010.001.0107];
- (ix) Cruise 11 on 7 September 2018 [DEF.010.003.8023];
- (x) Cruise 12 on 11 September 2018 [DEF.010.001.5751];
- (xi) Cruise 13 on 25 September 2018 [DEF.010.001.0673];
- (xii) Cruise 14 on 25 September 2018 [DEF.010.003.3675];
- (xiii) Cruise 15 on 12 October 2018 [DEF.010.001.5293];
- (xiv) Cruise 16 on 18 October 2018 [DEF.010.001.5343];
- (xv) Cruise 17 on 16 October 2018 [DEF.010.001.5453];
- (xvi) Cruise 18 on 24 October 2018 [DEF.010.001.3107];
- (xvii) Cruise 19 on 25 October 2018 [DEF.010.001.9912];
- (xviii) Cruise 20 on 14 November 2018 [DEF.010.001.3193]; and
- (xix) Cruise 21 on 13 November 2018 [DEF.010.001.2290].

Further particulars may be provided following discovery or the service of evidence.

- (f) otherwise does not admit the allegations in paragraph 9 of the Amended Statement of Claim.

10 In answer to paragraph 10 of the Amended Statement of Claim, Scenic:

- (a) denies that the overseas customers made known to it any result that they wished to achieve from their acquisition of the Services;
- (b) refers to and repeats paragraph 9(b) – (d) above;
- (c) says that, where customers were given the opportunity to leave, or to not embark on, their tour after being given notice that their cruise and the associated Services may or would be interrupted or unable to be provided (either in whole or part) due to adverse climatic or other weather conditions and the effects arising from such conditions, water levels, lock closures, or other circumstances beyond the control of Scenic or the entity from which they acquired the Services, those who elected to continue with the cruise cannot be taken to have made known that the result that they wished to achieve from the acquisition of the Services was to experience the Services on a selected cruise in accordance with the originally planned itinerary; and

Particulars

Scenic repeats the particulars to paragraph 9(e) above.

- (d) otherwise does not admit the allegations in paragraph 10 of the Amended Statement of Claim.

11 In answer to paragraph 11 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 2(d), 5, 5A(c), 5A(d), 5A(e), 6, 9 and 10 above;
- (b) denies that the statutory guarantees in section 61(1) and (2) of the *Australian Consumer Law* included a guarantee to Mr Kelly and the Australian customers that they would experience the Services on a selected cruise strictly in accordance with the originally specified itinerary or in accordance with the standards advertised in the relevant brochure;
- (c) says, to the extent that the statutory guarantees in section 61(1) and (2) of the *Australian Consumer Law* included experiencing the Services on a selected cruise strictly in accordance with the originally specified itinerary or in accordance with the standards advertised in the relevant brochure (which is denied), that:
 - (i) customers did not rely on the skill or judgment of Scenic; and/or

(ii) it would be unreasonable for customers to rely on the skill or judgment of Scenic,

such that section 61 of the *Australian Consumer Law* would not apply (by reason of section 61(3)); and

(d) otherwise denies the allegations in paragraph 11 of the Amended Statement of Claim.

Alleged contraventions of the *Australian Consumer Law*

12 In answer to paragraph 12 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 5A(c), 5A(d), 5A(e), 6, 9, 10 and 11 above;
- (b) says that to the extent that the cruise itineraries varied from the 'standards advertised', these variations resulted from circumstances outside of Scenic's control, including climatic or other weather conditions and the effects arising from such conditions, water levels and lock closures; and
- (c) otherwise denies the allegations in paragraph 12 of the Amended Statement of Claim.

13 In answer to paragraph 13 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 5A(c), 5A(d), 5A(e), 6, 9, 10, 11 and 12 above; and
- (b) otherwise denies the allegations in paragraph 13 of the Amended Statement of Claim.

Alleged loss and damage

14 In answer to paragraph 14 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 5A(c), 5A(d), 5A(e), 6, 9, 10, 11, 12 and 13 above;
- (b) says that any assessment as to whether there has been a 'major failure' requires an assessment of what was delivered against the totality of the Services offered to each customer (including any included land components, optional land-based 'extensions', flights, airport transfers or pre- and post-tour accommodation); and
- (c) otherwise denies the allegations in paragraph 14 of the Amended Statement of Claim.

15 In answer to paragraph 15 of the Amended Statement of Claim, Scenic:

- (a) refers to and repeats paragraphs 2(d), 5, 6, 12 and 13 above;

- (b) says that there has been no failure to comply with the statutory guarantees in section 61(1) and (2) of the *Australian Consumer Law* that would entitle Mr Kelly or any other alleged Group Member to compensation;
- (c) says that even if there had been a failure to comply with the statutory guarantees in section 61(1) and (2) of the *Australian Consumer Law* (which is denied), that failure occurred only because of an act of a person other than it (or its agents or employees), or a cause independent of human control that occurred after the services were supplied, within the meaning of section 267(1)(c)(i) or (ii) of the *Australian Consumer Law*; and

Particulars

Interruptions to/deviations from the advertised itineraries were a result of circumstances outside of Scenic's control including:

- (i) unseasonably warm and dry weather;
- (ii) low water levels in the relevant river systems (the Rhine, Main and Danube Rivers and their tributaries); and
- (iii) lock closures.

Further particulars may be provided following discovery or the service of evidence.

- (d) says that if an order for compensation was otherwise appropriate (which is denied), any compensation provided:
 - (i) would need to take into account any moneys:
 - (A) paid to customers under the River Cruise Guarantee;
 - (B) claimable, but not claimed, by customers under the River Cruise Guarantee; and
 - (C) otherwise paid to customers as compensation for a reduction in the value of the Services supplied to them; and
 - (ii) would require an objective assessment of the difference between the price paid by each customer for the Services and the market value of the totality of the Services actually supplied to that customer (including any land components, optional land-based 'extensions', included flights, airport transfers, or pre and post tour accommodation); and
- (e) otherwise denies the allegations in paragraph 15 of the Amended Statement of Claim.

- 16 Scenic denies the allegations in paragraph 16 of the Amended Statement of Claim.
- 17 In answer to paragraph 17 of the Amended Statement of Claim, Scenic:
- (a) refers to and repeats paragraphs 2(d), 5, 6, 12, 13 and 15 above;
 - (b) says that any damages for inconvenience, distress or disappointment available under section 267(4) are limited to damages for inconvenience, distress or disappointment caused by a breach of the relevant guarantee under the *Australian Consumer Law*, and not inconvenience, distress or disappointment arising from factors beyond its control;
 - (c) says that, under the Terms and Conditions that it entered into with each of the Australian customers [DEF.008.003.0001; DEF.008.001.0001]:
 - (i) it is not liable, to the maximum extent permitted by law, for any loss of enjoyment, opportunity, profit, savings, revenue or interest or any other consequential or indirect, incidental, special or punitive loss, damage or expenses (clause 8.4); and
 - (ii) to the extent that the guarantees relied upon sound in damage, its maximum liability is limited to the amount paid by the customer for the tour/journey (clause 8.3; clause 8.8(b)); and
 - (d) otherwise denies that Mr Kelly and the alleged Group Members are entitled to recover the damages claimed in paragraph 17 of the Amended Statement of Claim.
- 18 Scenic denies that Mr Kelly (or other alleged Group Members) are entitled to the relief claimed in paragraph 18 of the Amended Statement of Claim.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity

Alex James Tolliday, solicitor on record for the
Defendant

Date of signature

17 April 2024

AFFIDAVIT VERIFYING

Name Damien Thomas
 Address c/- Scenic Tours Europe AG Dammstrasse 21 6300 Zug
 Switzerland
 Occupation Chief Operating Officer
 Date 17 April 2024

I affirm:

- 1 I am the Chief Operating Officer of the defendant and am authorised to verify this defence on its behalf.
- 2 I believe that the allegations of fact contained in the defence are true.
- 3 I believe that the allegations of fact that are denied in the defence are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Zug, Switzerland

Signature of deponent



Name of witness

George Francis Dawson

Address of witness

Deutsche Bank Place, Corner Hunter and Phillip Streets,
 Sydney NSW 2000

Capacity of witness

Solicitor

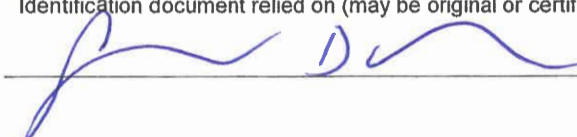
And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have confirmed the deponent's identity using the following identification document:

Passport

Identification document relied on (may be original or certified copy) †

Signature of witness



This document was signed and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000*.

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name	Scenic Tours Pty Ltd (ACN 002 715 602)
Address	25 Watt Street Newcastle NSW 2300

Legal representative for filing party

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