

FILED

31 MAR 2015



AMENDED DEFENCE

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff **David Moore**

Defendant **Scenic Tours Pty Limited**

FILING DETAILS

Filed for Scenic Tours Pty Limited, the defendant
Legal representative Stuart James Clarke Windybank
McCabes Lawyers Pty Limited
ABN 15 122 850 033
Legal representative reference PCN 27941
Contact name and telephone Stuart Windybank+61 2 9261 1211
McCabes reference SJW:76465
Court user number 9439

HEARING DETAILS

The proceedings are listed on a date to be advised by the Court.

PLEADINGS AND PARTICULARS

1. The defendant does not plead to paragraph 1 of the statement of claim **(the claim)**.

Description of the group

2. In answer to paragraph 2 of the claim, the defendant:
- (a) admits sub-paragraph (a);
 - (b) admits that the plaintiff and the group members acquired services from it;
 - (c) admits that it trades as "Scenic Tours" and "Evergreen Tours";

- (d) denies sub-paragraph (c); ~~and~~
- (e) admits sub-paragraph (d); and
- (f) otherwise does not admit the allegations therein.

The defendants

- 3. The defendant admits paragraph 3 of the claim.
- 4. In answer to paragraph 4 of the claim, the defendant:
 - (a) denies that it is an operator of river cruises in Europe;
 - (b) says that the plaintiff and group members contracted with it for the provision of services which required the defendant to arrange tours;
 - (c) says that the paragraph does not properly plead the alleged "acquisition", *and* the alleged "services" and the contractual obligations particularised;
 - (d) says that the tours the plaintiff and the group members embarked upon were provided by service providers of the defendant, being independent contractors, namely Scenic Tours Europe AG and Dr. W. Lueftner Reisen GmbH trading as Luftner Cruises AG;
 - (e) will rely on the terms and conditions of its contract with each of the plaintiff and group members **(the terms and conditions)** at any hearing, including those referred to in paragraph 20 below; *and*
 - (f) says at least some of the services provided or which were to be provided concerns conduct outside Australia; and
 - (g) otherwise does not admit the allegations therein.
- 5. In answer to paragraph 5 of the claim, the defendant:
 - (a) repeats paragraph 4 above;
 - (b) admits that the services it supplied were supplied in trade and commerce; and
 - (c) otherwise does not admit the allegations therein.

The consumer guarantees

6. In answer to paragraph 6 of the claim, the defendant:
 - (a) repeats paragraph 4 above;
 - (b) says that the services which the defendant allegedly ought to have provided the plaintiff and the group members pursuant to the "care and skill guarantee" are not adequately pleaded; and
 - (c) otherwise does not admit the allegations therein.

7. In answer to paragraph 7 of the claim, the defendant:
 - (a) repeats paragraph 4 above;
 - (b) admits 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; and
 - (c) otherwise does not admit the allegations therein.

8. In answer to paragraph 8 of the claim, the defendant:
 - (a) admits 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; and
 - (b) otherwise does not admit the allegations therein.

9. In answer to paragraph 9 of the claim, the defendant:
 - (a) repeats paragraph 4 above;
 - (b) says that the services which the defendant allegedly ought to have provided the plaintiff and the group members pursuant to the "purpose guarantee" and the "result guarantee" are not adequately pleaded; and
 - (c) otherwise does not admit the allegations therein.

The flooding

10. In answer to paragraph 10 of the claim, the defendant:

- (a) says that there were high water levels in Europe from about May 2013;
 - (b) says that the river levels rose along the paths of the cruises provided by the defendant; and
 - (c) otherwise does not admit the allegations therein.
11. The defendant denies the allegations contained in paragraph 11 of the claim.

Contravention of consumer guarantees

12. In answer to paragraph 12 of the claim, the defendant:
- (a) repeats paragraph 4 above;
 - (b) says that the plaintiff and the group members would have suffered loss and damage under their respective contracts with the defendant (including cancellation fees) if the tours had been cancelled; and
 - (c) otherwise denies the allegations therein.
13. In answer to paragraph 13 of the claim, the defendant:
- (a) repeats paragraph 4 above; and
 - (b) otherwise denies the allegations therein.
14. In answer to paragraph 14 of the claim, the defendant:
- (a) repeats paragraph 4 above; and
 - (b) otherwise denies the allegations therein.

Loss and damage

15. The defendant denies the allegations contained in paragraph 15 of the claim.
16. In answer to paragraph 16 of the claim, the defendant:
- (a) says that the purported services supplied by the defendant to the plaintiff and group members were acquired prior to April/May 2013; and
 - (b) otherwise denies the allegations therein.

17. In answer to paragraph 17 of the claim, the defendant:
- (a) says to the extent that there was a failure by the defendant to comply with the "consumer guarantees", it occurred only because of a cause independent of human control that occurred after the services were supplied.

Particulars

- (i) river and weather conditions;
 - (ii) high water levels;
 - (iii) flooding (if found); and
 - (iv) navigational restrictions.
- (b) denies that the services provided by the defendant were a "major failure";
 - (c) repeats sub-paragraph 16(a) above; and
 - (d) otherwise denies the allegations therein.

Specification of common questions

18. The defendant says that the following common questions are likely to arise:
- (a) the nature and character of the services acquired by the group members;
 - (b) the nature and character of the services provided by the defendant's service providers;
 - (c) whether the group members made enquiries in accordance with clause 2.8 of the contract;
 - (d) whether the defendant varied the itinerary in accordance with clause 2.10(d) of the contract (noting that the various cruises had their respective itineraries varied in their own unique fashion);
 - (e) whether clauses 2.10(h), 2.12 and 2.13 of the contract limit the defendant's liability to the group members;

- (f) whether the group members would have suffered loss and damage in any event if the defendant had cancelled the tours; and
- (g) whether the conduct of the defendant the subject of complaint occurred outside of Australia and if so, whether the Australian Consumer Law extends to that conduct.

The terms and conditions

- 19. Each of the plaintiff and group members entered into a contract with the defendant **(the contracts)**.
- 20. The contracts contained the following terms and conditions (although some of the contracts contained slight variations in the numbering of the clauses):

"Your deposit will be complete once you have signed the form below indicating that you accept these Terms and Conditions.

1. The Contract

1.1 The contract between Scenic Tours Pty Limited ... and You includes:

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

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

2.6 Fees

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	Cancellation charge
Tour commencement	(per person)

91 days and over	Loss of deposit
90 to 62 days	50% of Tour Price
61 days or less	100% of Tour Price

2.8 What are Your Tour obligations

- (c) You must make Your own enquiries regarding Your Tour, including being aware of the relevant government travel safety warnings.

2.10 How can We vary this Contract?

- (a) Subject to the remainder of this clause 2.10, We may amend these Terms and Conditions at any time.

Tour Variations

...

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

- (1) road, river or weather conditions;

...

- (f) Cruise itineraries may be varied due to high or low water levels, flooding, ...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 levels; low water levels; flooding; lock closures; unscheduled vessel or vehicle maintenance;
 - (2) forces of nature;...
 - (3) any other circumstances beyond Our control.
- (b) You acknowledge and agree that where the Tour, part of the Tour, accommodation, flights or any other good or service is not directly provided by Us or Our staff, but is provided by a Service Provider, in the event of any dispute or claim including for loss, damage, breach of contract or negligence arising from the conduct of the Service Provider, You must pursue Your claim directly against the relevant Service Provider.

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 or arrival times of aircraft or otherwise during the conduct of the Tour;

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

Total Liability

- (b) Despite any other provision of the Contract, and to the extent permitted by law, Our maximum liability to You or any third party (including any claims of negligence by Us) is limited to the Tour Price You have paid to us.

Consequential Loss

- (c) You acknowledge and agree We are not liable to You, under any circumstances, 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.

Force Majeure

- (d) You acknowledge and agree that We are not liable for any delay or failure by Us or a Service Provider to perform Our obligations under the Contract, resulting from or as a consequence of a Force Majeure Event.
- (e) If a delay or failure occurs or is anticipated due to Force Majeure Event, Our obligations are suspended for the duration of the Force Majeure Event.

2.14 Warranties

- (a) To the extent permitted by law, all express or implied warranties, guarantees, representations, or terms or expressly excluded.

(b) Where the law implies any guarantee, condition or warranty which cannot be excluded, Our liability to You for breach of such an implied guarantee, condition or warranty is limited, to one or more of the following:

...

(2) in the case of services: supplying the services again or payment of the cost of supplying the services again.

...

21. Each of the plaintiff and the group members:

- (a) signed the form by which they indicated that they accept the terms and conditions; or
- (b) paid their Booking Deposit or the Tour Price.

22. By reason of the matters set out in paragraph 21 above, the plaintiff and the group members on the one hand, and the defendant on the other, entered into a contract containing the terms and conditions.

23. The plaintiff and the group members allege that the defendant, in breach of the 'care and skill guarantee', inter alia, failed to warn them, prior to their departure from their departing countries to commence their scheduled tours, that the weather and river conditions in Europe were such that it was unlikely that they would be able to enjoy, or substantially enjoy, the benefit of travel to scheduled tour destinations by river cruise.

24. If and to the extent that the plaintiff and group members have suffered any damage (which is denied), including by reason of the matters set out in paragraph 23 above, then some or all of that damage would have been sustained in any event because:

- (a) the plaintiff and the group members would have cancelled their respective tours; and
- (b) incurred a cancellation fee pursuant to clause 2.6 of the terms and conditions.

25. The loss and damage alleged by the plaintiff and the group members (which is denied) was a result of river or weather conditions, high water levels, flooding (if found) and circumstances beyond the control of the defendant and tour risks.
26. Pursuant to clause 2.10 of the terms and conditions, the defendant changed or varied the itinerary of the plaintiff and the group members and substituted (to the nearest reasonable standard) another vessel or motor coach for all or part of the itinerary.
27. Pursuant to clause 2.10(h) of the terms and conditions, the defendant is not liable to the plaintiff and the group members where it made a variation to the Itinerary.
28. The tours upon which the plaintiff and the group members embarked were provided by service providers of the defendant, being independent contractors.

Particulars

- (i) Scenic Tours Europe AG; and
 - (ii) Luftner Cruises AG.
29. The plaintiff and group members seek damages for loss, cost or damages incurred as a result of general risks such as forces of nature, river and weather conditions and circumstances beyond the control of the defendant.
30. By reason of clause 2.12 of the terms and conditions, the plaintiff and group members, the defendant is not liable for such loss and damage.
31. The allegations the subject of the proceedings include loss, damage, breach of contract or negligence arising from the conduct of the defendant's service providers.
32. By reason of clause 2.12 of the terms and conditions, the plaintiff and group members are prohibited from suing the defendant for the matters referred to in paragraph 31 above.
33. By clause 2.13(a) of the terms and conditions:
 - (a) the defendant is not liable to the plaintiff and group members for any loss, cost or damage suffered in connection with:

- (i) any tour risks or other aspects of the Tour notified in the contracts;
- (ii) any change to the itinerary of the plaintiff and the group members; and
- (iii) any loss of enjoyment due to circumstances outlined in the contracts or beyond the control of the defendant.

- 34. By reason of clause 2.13(b) of the terms and conditions, the defendant's maximum liability to the plaintiff and the group members is limited to the tour price the plaintiff and group members paid the defendant.
- 35. By reason of clause 2.13(c) of the terms and conditions, the defendant is not liable to the plaintiff and the group members for loss of enjoyment or any other consequential, special, or punitive loss, damage or expenses.
- 36. By reason of clause 2.13(d)-(e) of the terms and conditions, the defendant is not liable for the failure to perform its obligations under the contract as a consequence of a force majeure event (such as the high water levels and floods).
- 37. To the extent the guarantees relied upon by the plaintiff and group members sound in damages, the defendant's liability is, by reason of clause 2.14, limited to supplying the services again or payment of the cost of supplying the services again.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the *Legal Profession Act 2004* 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

Date of signature



Solicitor on record

30/3/15

AFFIDAVIT VERIFYING

Name Damien Thomas
Address C/-Scenic Tours Pty Limited
Level 2
11 Brown Street
Newcastle NSW 2300
Occupation Chief Operating Officer
Date 26 March 2015

I say on oath:

1. I am the Chief Operating Officer of the defendant.
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.

SWORN/AFFIRMED at Newcastle

Signature of deponent



Name of witness Clare Ann Campbell

Address of witness C/-McCabes Lawyers,
41-45 Newcomen Street
Newcastle NSW 2300

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 known the deponent for at least 12 months.

Signature of witness

