SCENIC TOURS PTY LTD v MOORE (2017/292822)

RESPONDENT'S AMENDED WRITTEN SUBMISSIONS

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A Introduction

1. The applicant ('Scenic') seeks leave to appeal from reasons for judgment[1] which, it says,[2] determined the respondent's ('Mr Moore') case, as well as the decision answering certain common questions.[3] If leave is granted, the appeal should be dismissed with costs. For reasons elaborated in these submissions:

    a. if the value of representative actions is to generate binding findings (of fact or law) to benefit group members, an endemic flaw in Scenic's draft Notice of Appeal and current submissions,[4] is its inability or unwillingness to identify what, if any, Answers to Common Questions[5] (in *Moore 3)* it asks the Court to disturb.[6] This has sometimes led to proposed Grounds of Appeal being articulated which, even if made out, are inconsequential;

    b. Scenic's submissions on legal issues relevant to liability appear tied to its erroneous belief that so long as it performed its obligations under contracts with its passengers carefully, it cannot be liable under the consumer guarantees of the *Australian Consumer Law* ('ACL');

    c. Scenic complains about a lack of procedural fairness, in that Answers were given about matters that it says were not properly within the purview of the Court's determination. In fact, Scenic was knowingly involved in identifying the issues for determination (including stated qualifications to those issues); it had fair opportunity to submit appropriate answers to those issues and made no complaint about the answers given at the relevant time;

    d. Scenic's submissions scarcely identify challenges to the primary facts (founded mainly in its own documents) as to what happened on each cruise and what knowledge of risk Scenic had (before and after embarkation), as distinct from its challenges to the primary judge's evaluative fact-finding. In many instances, it cites additional facts, which it complains were not taken into account, without providing cogent explanation as to why they render the evaluative fact-findings erroneous; apparently in the hope that by doing so, it may persuade the Court to substitute its own findings. In this, it misconceives the appellate function, in that by s 75A(5) of the *Supreme Court Act* 1970 (NSW), in an appeal

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[1] *Moore v Scenic Tours Pty Ltd (No.2)* [2017] NSWSC 733 ("*Moore 2*").

[2] Applicant's Summary of Argument, White 5.

[3] *Moore v Scenic Tours Pty Ltd (No.3)* [2017] NSWSC 1555 ("*Moore 3*"). Unless indicated otherwise, references to reasons for judgment are to *Moore 2*.

[4] Where specific reference is made to Scenic's written submissions, the prefix "AS" is used, followed by the relevant paragraph numbering.

[5] Where specific reference is made to Answers to Common Questions (White Tab 13), the prefix 'A' is used, followed by the question number and, where appropriate, the relevant cruise number. Similarly, the prefix 'Q' is used for the Common Question.

[6] On 9 April 2018, the Court granted Scenic further opportunity to indicate consequential orders flowing to the Answers to the Common Questions. As at the time of filing these submissions, Mr Moore had not seen this supplementary document from Scenic.

by rehearing only, the Court is not required to engage in a *de novo* evaluation of all the facts;[7]

e. In relation to Mr Moore's personal claim for compensation, Scenic fails to properly appreciate the statutory basis for compensation, which is not a claim at large for 'loss or damage' (ACL s 267(3)). Further, Scenic fails to demonstrate how the primary judge erred in finding that Mr Moore suffered disappointment and distress outside of NSW;

f. Some additional submissions are made to support Mr Moore's draft Notice of Contention.

B Scenic's uncommercial characterisation of the "services" (Grounds 1-7)

2. Scenic elides the distinction between the true character of the services supplied and the terms and conditions of the contract regulating the provision of the services. Simply because services are supplied pursuant to contract, that does not mean that when characterising the nature of those services for the purposes of a statute intended to provide consumer protection, the Court is limited to the four corners of the written contract.

3. The proper characterisation of 'services' proceeds from the statutory context. The consumer guarantees in ss 60, 61(1) and (2), which appear in Subdivision B of Part 3.2 Div 1 of the ACL, arise from the supply of services "in trade or commerce". Scenic impermissibly seeks to sever, from the process of characterisation, the commercial context in which the services were supplied, including the advertising and offer of the services, represented by the brochure (in which the terms and conditions are contained). The primary judge properly held (at J[365], [371], [385]-[389]) that characterisation of the services to be supplied by Scenic is to be seen in the context of the enticements that Scenic offered to prospective consumers in return for the advertised prices. The primary judge correctly characterised the services by reference to how the reasonable consumer, if asked, would have described them, which description would undoubtedly have been influenced by the content of the tour brochure (J[372]). Scenic's brochure did not hold out or entice consumers with the prospect of bus tours conveying them around the streets of European cities; plainly because reasonable and discerning prospective passengers would doubtless not wish to incur the expense of a river cruise if on-shore sight-seeing in European cities could be obtained by substantially less expensive means of transportation. As the trial judge correctly noted (at J[373]), Scenic's approach of reading down the nature of the services supplied to accommodate its construction argument about its contractual entitlements is to substitute the services to be supplied in a contingency for the general rule. Indeed, the effect of Scenic's characterisation is to render the statutory consumer guarantees as toothless: if Scenic's submissions are correct then consumers' statutory rights extend no further than an expectation about the careful performance of those terms by the supplier. Scenic boldly, and erroneously, argues (e.g. AS 52) that absent a

[7] *Williams v The Minister for Aboriginal Land Rights Act 1983 and the State of NSW* [2000] NSWCA 255, [60]-[61]; *Jones v Bradley* [2003] NSWCA 81, [113]-[116]; *Adler v ASIC* (2003) 179 FLR 1, [17]-[18].

finding of a breach of contract, there can be no determination of a lack of compliance with ss 61(1) and (2). If Scenic is right, the statutory obligations have no work to do.

4. The primary judge was also correct (J[375]-[378]) to ascribe 'information and management services' as part of the suite of services supplied. That is a form of "assistance and accommodation"[8] provided to passengers, and was incidental to its express obligations under the contract (and the ACL) (J[149]-[154]). Although Scenic disputes any obligations to inform and manage, the structure of the contract was such that several provisions envisaged that the exercise by passengers of rights depended upon the provision of information and management, either before or during the tour. This included cls 2.6(d), 2.9(e) and 2.11 of the contract.[9] Further, Scenic's own correspondence indubitably establishes that it did in fact purport to continually inform and manage passengers before and during the cruises; like its competitors. It sent correspondence to passengers (or their travel agents) before, or at the point of, embarkation of certain cruises. It had a designated tour director to liaise with passengers (i.e. inform and manage them) on cruises.

C The purpose and result passengers made known by Mr Moore was not that Scenic merely comply with the terms and conditions (Grounds 9 & 10; Proposed Notice of Contention, ground 1)

5. There is little, if any, attention paid to these grounds in Scenic's submissions, but they appear to flow from Scenic's flawed characterisation of the 'services'. Scenic does not contend that the primary judge was wrong in identifying the 'purpose' or 'result' to be obtained from the acquisition of the services from Scenic, nor that the primary judge erred in finding that the purpose and result was impliedly made known by Mr Moore (and indeed all passengers) to Scenic. That 'purpose' or 'result' was the same thing: that he (and his wife) wanted to enjoy an all-inclusive five-star luxury river cruise with the additional services promised by Scenic: J[390], [397], [404]-[405]. Scenic's point, under each of these grounds, is apparently that Mr Moore *impliedly* made it known that the purpose or result he desired would, or could in certain circumstances, yield to the application of terms and conditions of the contract, as interpreted by Scenic.

6. Scenic's position conflates Mr Moore's communication of his unilateral motivation for entry into a transaction with his consent to the terms or conditions for entering the transaction. This impermissibly ties the content of the statutory guarantees to the terms of the contract whereas the consumer guarantees are imposed, by statute, independently of the intentions of the supplier.[10] The issue here, as the primary judge correctly recognised, is the consumer's unilateral purpose of acquiring the services, which need not be expressed in the contract (J[391]). Mr Moore did not

[8] *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242, 262.
[9] Blue 967.
[10] *Alameddine v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 355; [2015] NSWCA 219, [77].

pay Scenic a substantial sum of money to travel on his cruise because he relished the possibility that, in certain circumstances, he might be forced to receive an extended bus tour. Further, it is not *necessary,* for the purpose of considering Scenic's suggested implication, for passengers booking and paying for these cruises to convey that the purpose or result that they seek may be affected by the operation or application of terms or conditions regulating the service. That was something already known by Scenic. Further, as the primary judge noted at J[395], the implication is not needed to protect the interests of the supplier, since the content of the purpose or result guarantees is that they be 'reasonably' fit (for purpose or result). In this case, Scenic staved off findings of non-compliance with the purpose and result guarantees for cruises 10, 12 & 13.[11] Further reasons for rejecting Scenic's construction arguments are that, were they to be accepted they would limit liability under the statutory guarantees in a way that (a) is inconsistent with cl 2.15 of the contract;[12] and (b) would infringe s 64 of the ACL; and would be susceptible to avoidance to that extent (as noted in ground 1 of Mr Moore's proposed Notice of Contention). If ground 1 of the proposed Notice of Contention is made out, it would follow that the contractual power of variation in cl 2.10 must be subordinated to the content of the purpose and result guarantees; which would effectively mean that Scenic was not at liberty to unilaterally decide whether to vary without reference to an objective assessment of whether such variation was compatible with the purpose and result guarantees.

D Scenic's unsubstantiated procedural fairness complaints (Grounds 8A, 8D, 8E, 12, 20, 21, 22, 25, 29, 32, 35, 38, 45, 53)

7. Scenic's complaints of an absence of procedural fairness do not grapple with the circumstance that the hearing of the representative action was run along conventional lines (as indicated in J[10], [55]-[57]) and gave fair notice to the parties of the issues to be determined and the opportunity to shape orders (and answers) in the light of findings in respect to those issues. In short, as in other representative actions, procedural fairness was discharged through: (a) identifying, from the pleadings and the evidence served by the parties, specific common questions to be tried at an initial hearing, and (b) answering those common questions. Scenic was an active and knowing participant in these processes.

8. Specifically, as noted at J[67], the hearing of the claims of the group members was to decide a number of identified common issues; acknowledging that the hearing would not resolve all of the claims of group members. The expedient of producing a pre-hearing statement of issues in representative actions was adopted because it is well recognised that the initial trial cannot resolve every issue raised in the pleadings and it defines the issues to be tried at the initial hearing. In other words, pleadings, although they facilitate identification of the common issues, are not

[11] White 360-1.
[12] Blue 967M.

enough to crystallize the issues that should be determined at the initial hearing. This was recognised by the Full Court of the Federal Court in *Merck Sharp v Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26 ([5], [9]), where the Full Court also observed (at [8]) that where it becomes apparent from the evidence and submissions in the initial hearing that issues hitherto identified as 'common' were not truly so, they would not be so determined. This, of course, presupposes and requires: (a) that if, *prior* to hearing, a party is dissatisfied with the breadth of common questions identified for determination, they take whatever steps to seek to narrow the breadth of those questions to alter them;[13] (b) the active consideration of the parties to the continuing appropriateness of determining common questions *during* the hearing and up to the point where orders are made which answer the common questions identified.

9. For all of the complaints of lack of procedural fairness, it is necessary to refer to the Statement of Issues for determination and how they were formulated. The Statement of Issues went through various iterations. First, the respondent filed a Statement of Issues on 21 December 2015.[14] This was the subject of argument at a mention in Court on 12 February 2016.[15] Secondly, the document was revised by the primary judge (in chambers) on or about 19 February 2016, following the recent mention.[16] Finally, during the hearing, and consequent to the respondent's successful application to amend[17], the Statement of Issues was amended (to reflect amendments to the statement of claim) – it is this version which was filed in Court on 13 May 2016 (the last day of the hearing) and which appears in the White Folder (Tab 11). This version was amended with Scenic's consent.

Non-compliance with ss 61(1) & (2) (Grounds 8A, 12, 20, 21, 22, 25, 29, 32, 35, 38, 45, 53)

10. This complaint is repeated, seriatim, in respect to each and every (relevant) cruise. For ease of reference, it will hereafter be called the 's 61 procedural fairness complaint'. In each of these iterations of the Statement of Issues, the question of whether ACL s 61(1) or (2) was complied with in respect to each and every cruise was a constant inclusion. Common Question 8[18] expressly identified the issue as to whether there was non-compliance with ss 61(1) and (2) on each of the cruises as an issue to be determined at the hearing. Up to and throughout the hearing, at no stage did Scenic ever seek any carve-out from the Statement of Issues in relation to the plain and express identification of the issue of its compliance with ss 61(1) and (2) on each and every cruise. It is not that Scenic lacked that opportunity: Common Question 22 asked whether, with respect to

[13] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 372, [81].
[14] Supplementary Blue 48-54.
[15] Supplementary Blue 55-67.
[16] Supplementary Blue 79-85.
[17] Black 267D-G, 278E, 306M-S.
[18] White 342.

all the preceding questions, the answers bound all group members, some group members (and if so, which ones) or no group members.[19]

11. Further, Scenic then had the additional opportunity, after reasons for judgment were delivered on 31 August 2017, to provide input in the drafting of the Answers to the Common Questions.[20] At the time of delivery of those reasons, the primary judge made directions intended to produce collaboration, if not co-operation, between the parties in framing the answers to the identified common issues in the light of findings made in the judgment.[21] To that end, the parties exchanged submissions and draft proposed answers to common issues prior to the hearing of what remained in contest on 15 November 2017.[22] Neither in its written submissions, or in its Counsel's argument on 15 November 2017 did Scenic suggest, let alone complain, that the Court should not make orders in terms of what ultimately appeared in A8.[23] Q22 was broad enough to encompass an answer, for each cruise in question, along the lines "there was a prima facie breach of s 61(1) and (2) for (X) cruise, but there can be no answer about non-compliance with s 61(1) or (2) binding any of the group members (on X cruise) until the s 61(3) defence is considered in the case of each and every passenger". But in neither its submissions, or in its counsel's argument on 15 November 2017, did Scenic suggest that A22 should be in any terms other than that which now appears. Scenic plainly had fair opportunity to protest the making of answers to the effect that ss 61(1) and (2) were not complied with in respect to passengers on each cruise, without consideration of s 61(3) in every case, but it did not do so. Its failure to do so is fatal to this ground.[24]

12. Since the focus of procedural fairness is the avoidance of practical injustice,[25] it may be wondered, in any event, how a s 61(3) defence might have operated in this case. This was alluded to at J[439]. It must be that a passenger did not rely, or unreasonably relied, upon Scenic's skill or judgement in the context where the purpose or result desired by the passenger from the acquisition of the service was to experience and enjoy travel and accommodation by cruise, along the rivers, to a range of tourist destinations.[26] Section 61(3), by its terms, speaks of the capacity of a consumer to exercise autonomous choice, such as where, for example, a consumer declines to follow the advice of the supplier. Q6 indicated that the question of what 'warnings' were provided (prior to embarkation) were in issue at the trial in respect to each cruise.[27] Warnings, essentially, amount to advice. Scenic plainly had the opportunity to adduce evidence as to its warnings on

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[19] White 345.
[20] White Tab 13.
[21] White 226-7, 349.
[22] Supplementary Blue 86-159.
[23] White 359.
[24] *United Voice v Restaurant & Catering Association of Victoria* (2014) 226 FCR 255 at 261-2, [24]-[32]
[25] *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 13-4 per Gleeson CJ.
[26] White 350 (A4).
[27] White 342.

each and every cruise. But in the context of the findings in this case of what the purpose or result was, and how the section was not complied with, the evidence in respect to each and every cruise was that Scenic provided no advice or recommendation (as distinct from the disclosure of *information*, the adequacy of which on cruises 8, 9 & 11 is contentious) to passengers whatsoever which could facilitate any choice in passengers to commence or continue with any of the cruises. In the absence of advice by Scenic, there is no measure against which it might be said that any passenger unreasonably relied upon Scenic's skill and judgment. Scenic's s 61 procedural fairness complaint is therefore theoretical.

Provision of information (Ground 8D)

13. Scenic's general attempt to distinguish the question of 'the ambit of Scenic's obligation under s 60' (which it says was before the Court) and the question of whether Scenic 'breached or complied' with s 60 (which it says was not before the Court) is tortuous. In the course of an interlocutory hearing, Scenic was informed that compliance with s 60 would be an issue to be addressed in relation to each and every cruise.[28] Thereafter Question 8 in the Statement of Issues plainly indicated that compliance with s 60 was in issue in respect to each of the cruises.[29] There was no qualification, or carve out to do with the content of that obligation elsewhere in the Statement of Issues.

14. Scenic's more specific distinction (AS 85, 90), as to whether there was an obligation to offer *options*, as distinct from an obligation to provide *information*, should also be rejected. As to the issue of options, that was identified in Q6-7A.[30] As to the issue of information, it is, at least implied in Q7 (containing a putative requirement to "explain") and Q8 (containing the putative requirement to "warn"),[31] that the issue of the information to be provided to passengers on each cruise would be determined in respect to each cruise. Indeed, the requirement to provide "options" implies the provision of information to facilitate the choice of such options. If Scenic wished to contend that it was deprived of the opportunity to contend (however improbably) that certain individual passengers received, in an ad hoc, accidental or idiosyncratic fashion, meaningful information, again, it had the opportunity to seek appropriate carve outs in the Statement of Issues and the Answers to Common Questions.

Denial of opportunity to cancel (post-embarkation) (Grounds 8E, 31B, 34B)

15. Scenic complains that the primary judge was precluded from finding that there was a non-compliance with s 60 as a result of passengers being denied the opportunity to cancel the tour after it had embarked (AS 59(b) (cruise 4) and AS 64(b) (cruise 5)). What Scenic should or should

[28] *Moore v Scenic Tours Pty Ltd* [2015] NSWSC 1777, [46] per Beech-Jones J; Supplementary Blue 14V-W.
[29] White 342.
[30] White 342.
[31] White 342 (Q7) and 342-3 (Q8).

have not done in terms of offering options was tied to its knowledge of river levels and risk of disruption to the cruises. Q5 & Q5A raised the matter of Scenic's knowledge of river levels and (consequential) risk of disruption to cruises. Q7 & Q7A respectively distinguished Scenic's obligations to offer options to passengers 'before embarkation' and 'after embarkation'.[32] Both issues were expressed with detailed particularity as to which category applied to which cruise. Q8 also raised, and indeed, rolled-up, the questions whether Scenic did not comply with its statutory guarantees (inter alia), by failing to offer options before and after embarkation without reference to specific cruises.

16. The net result of the way these Questions were framed, in terms of the evidence adduced at the hearing, was that for each and every cruise in the relevant period, it was inevitable that Scenic's knowledge of river levels would be under scrutiny throughout the entire period of the cruises. This meant that, in the way that Mr Moore's case developed before and during the hearing, there was always a possibility that whereas Mr Moore contended that there was an awareness in Scenic of a risk prior to cruise X embarking, the primary judge might find that the awareness of the risk was not at a sufficiently high level before cruise X embarked, but it did become apparent after cruise X had embarked.

17. This is what happened with cruises 6 & 7. Whereas Mr Moore had identified the question, in the case of cruises 6 & 7, whether Scenic, in non-compliance with s 60, did not offer passengers options *before* embarkation, the primary judge determined that, in respect to those cruises, non-compliance arose *after* the cruises had embarked. As a result of that determination, Mr Moore prepared draft Answers to the Common Questions.[33] Scenic prepared draft Answers in response,[34] which prompted some further revision by Mr Moore.[35] The parties' proposed Answers were thereafter the subject of argument before the Court on 15 November 2017.[36] It may be seen from the transcript that the extent of Scenic's objection on that day was limited to the inclusion (in A7A) of a particular date (Supplementary Blue 155B-W). No objection was taken by Scenic, on grounds of procedural fairness or anything else, to treating Scenic as not complying with s 60 in respect to cruises 6 & 7, by reason of not providing options to passengers after embarkation, rather than providing options to passengers before embarkation.

E The primary judge was entitled to give such weight to Ex P52 as he desired (Ground 8C)

18. The use which the primary judge made of this document,[37] appears at J[288]. But that usage should be read in the context of the primary judge's general description of how he weighed the

[32] White 342-3.
[33] Supplementary Blue 95W-96E, 109U-110P.
[34] Supplementary Blue 125L-128K.
[35] Supplementary Blue 139Y-142H.
[36] Black 336F-339H.
[37] Blue 1454.

evidence on the large issue of Scenic's knowledge of river levels, which description appears at J [155]-[160]. There, the primary judge emphasised the trail of email correspondence and reasonably contemporaneous reports from Cruise Directors, public information made available through the media, as well as what emerged of the activities of Scenic's competitors.

19. Set against all this, the subject document was discovered by Scenic. It was not the subject of any further explanation or interpretation by any witnesses called for Scenic. It plainly is indicative of the general impact of river levels at various places along the Amsterdam-Budapest route on different dates. But the document does not, of itself, identify *when* knowledge of the river levels was obtained by Scenic. Moreover, as the primary judge noted, there appeared some inconsistency between what was represented in the diagram and what was contained in the notes which followed it. In contrast, much of the email correspondence in evidence contained specific indications as to what parts of the river path were open and closed at particular times. Faced with this choice amongst sources of evidence, the primary judge was entitled to give a more subordinated status to the diagram then was submitted to him by the parties.

F Scenic's misconceived s 267(1)(c)(ii) defence (Ground 8B)

20. This defence is only applicable to the findings of non-compliance with ss 61(1) and (2). Scenic says (AS 48-49) that the defence applied to all of the cruises, although in its submissions, Scenic only makes reference to why the defence was specifically available to cruises 4-7 (incl).

21. Scenic refers (AS 49) to the primary judge's reasoning rejecting this defence, but does not explain why it is wrong. It appears to be its argument that its failure to comply with those guarantees was *only* due to a cause independent of human control occurring *after* the services (or some of them) were supplied (emphasis supplied). Once Grounds 1-7 are rejected, and, in particular, once it is accepted that Scenic's obligations to provide services extended beyond the point of embarkation of each cruise, then it cannot be said that its non-compliance with the purpose and result guarantees occurred *only* because of circumstances beyond its control. Where the services extended up to the point when passengers disembarked, and where Scenic was confronted by unexpected forces beyond its control, it had it within its control to respond in a way that would affect the purpose or result desired by a passenger. This included, for example, cancelling an existing cruise and offering a credit for a future cruise.

G The Court should decline Scenic's invitation to engage in a *de novo* evaluation of the facts (Grounds 12-43, 45-49 & 53)

Introduction

22. Certain general responses may be made to Scenic's Grounds in this section. First, Scenic invites the Court to survey afresh both the primary judge's (a) findings of fact and (b) evaluative conclusions of whether the services Scenic supplied in respect to each of the subject cruises were reasonably fit for purpose, or result, and/or provided with due care and skill.

23. *Secondly*, and following the first point, insofar as challenges are made to the primary judge's evaluative conclusions, it is Scenic's burden not only to demonstrate that there were alternative findings that the Court might prefer, but that in making the findings that he did, the trial judge actually erred.[38] Such burden is not discharged where all that is demonstrated is that the trial judge made a choice between competing inferences that the Court may not itself have been inclined to make. Be that as it may, the primary judge's evaluation of the facts was derived from primary facts which were substantially derived from documents discovered by Scenic. To the extent that uncertain or ambiguous inferences naturally emerged from that documentary evidence, such as what process of reasoning was undertaken by Scenic, including what level of risk it quantified as to the likely extent of disruption if a cruise had proceeded, it was Scenic that would naturally be expected to answer them. Scenic called no witnesses.

24. *Thirdly*, there is no clear statement in Scenic's submissions of what consequences would flow in the event that any of the Grounds are upheld. A number of the grounds assert errors which are inconsequential in terms of what effect they are said to have on the Answers to the Common Questions, such as for example, Grounds 18A & 28.

25. *Fourthly*, the suggestion is repeatedly made (e.g. AS 41, 60, 83 (fn 48), 105) that a determination of the question of compliance with s 60 in respect to each cruise should necessarily result in a determination of compliance with ss 61(1) and (2). That is not necessarily so. Specifically, Scenic asserts that, on the primary judge's reasoning, if warning was given, it was still possible that ss 61(1) and (2) may not be complied with. That may be so, but only to the extent that Scenic established that passengers did not rely, or unreasonably relied, upon Scenic's skill and judgement. That, however, presupposes that opportunity was given to passengers to demonstrate an absence of reliance or proof of unreasonable reliance; and not otherwise. There was no evidence that there was, despite Scenic having opportunity to prove so. Section 60 of the ACL is a fault-based guarantee. Sections 61(1) and (2) are not. Strict liability was, previously, a feature of jurisprudence concerning the implied terms of fitness for purpose and result under the former s 74(2) of the *Trade Practices Act* 1974 (Cth).[39] But his Honour understood that the guarantees under ss 61(1) and (2) were not a pure form of strict liability in the sense that *any* instance of disruption of purpose and result could result in non-compliance with the guarantees. The issue of Scenic's knowledge of river levels – before or after embarkation of the cruises – was not relevant per se, much less dispositive of, the claims for non-compliance with ss 61(1) and (2) of the ACL.

26. *Fifthly*, in the case of each and every cruise, Scenic challenges findings of what it knew, or should have known of the substantial risk, or prospect, of disruption to the cruising (hereafter, for

[38] *Gett v Tabet* (2009) 254 ALR 504, [22].
[39] *Gharibian v Propix Pty Ltd t/as Jamberoo Recreational Park* [2007] NSWCA 151, [62]; *Schepis & Ors v Elders IXL Ltd* (1987) ATPR 40-759, 48-219.

convenience, the 'Substantial Disruption Risk'). It is particularly the case with the cruises later in sequence, that as evidence of the disruption of earlier cruises mounted, it should have been apparent (if it was not actually known) that the prospect of Substantial Disruption Risk arose for forthcoming cruises. But in answer to this, Scenic provides explanations that are not properly the province of submissions but rather, should have been the subject of evidence. In the absence of contemporaneous explanations in its business documents, they should have come from witnesses. Scenic did not call any witnesses with the result that such hypotheses as may have been consistent with reasonable conduct on its part could not be entertained. With reference to the concept of 'risk' of disruption, it needs to be acknowledged that the concept is both contextual and relative. It is contextual because the risk is one of the extent of disruption to passengers' enjoyment of their cruise. Put another way, is there a substantial risk or prospect that the purpose and result guarantees will not be complied with? It is relative in the sense that risk is located on a continuum, between 'no' risk and 'certain' risk.

27. *Finally*, in repeated instances (e.g. AS 28, 77), Scenic challenges findings on the basis of opinions expressed in cruise director's reports. Whilst the content of the reports were admissible as business records, plainly the cruise director himself or herself did not have the expertise on risk assessments: s/he was communicating to passengers the company line and in the absence of explanation from the real decisions-makers that the disruption(s) were caused "unexpectedly" it was open to the judge to give little weight to such opinions.

Cruise 1

Scenic's knowledge of the Substantial Disruption Risk, pre-embarkation (Grounds 14, 16-18, 18A-19)

28. (AS 18-23) This cruise was scheduled to embark on 19 May. Scenic begins by discounting the weight ascribed by the primary judge to events in the period 30 April to 8 May; implying that they were of mere historical interest. They were not. The Avalon letter of 6 May 2013 (referred to at J[169]-[171])[40] identified high temperatures and the melting snows from the recent winter as an incipient cause of rising river levels. That cause was not likely to dissipate in the period leading up to the embarkation of this cruise on 19 May, even if river levels fluctuated in the intervening period. Scenic then extracts statements from 7 May,[41] and 8 May,[42] to suggest that concerns about river levels had gone away. But as the primary judge noted (at J[179]), the last of those statements was said in a context of another statement made at the same time indicating that it was impossible to sail to Tarascon and Avignon.

[40] Blue 1089I.
[41] Blue 1097I.
[42] Blue 1098.

29. Scenic then identifies evidence of sailing along the river between 9 and 16 May 2013 which it complains was not referred to by the primary judge. It did not include within its references evidence that showed that as at 12 May, an Avalon ship could not move beyond Lyon because of high water.[43] Contrary to its submission, the other evidence relied upon was not compelling, in the sense of dispelling any concern about future rising river levels. That much was evident from the content of Ms Scoular's letter of 16 May 2013 (referred to at J[181]),[44] noting the proposed revised itinerary for the cruise then underway (J[182]), due to high water levels of the Rhône and Saône Rivers. Cruise notes on that earlier cruise indicated that on 10 and 11 May, the ship could not sail from Avignon.[45] Then on 20 May, there were indications that docking in Tournus was under water (J[455]).

30. The primary judge's evaluation of the facts appears at J[473]-[481]. The primary judge was particularly influenced by the key circumstances that: on 16 May, Scenic knew that water levels on the rivers remained high (J[475]) and as soon as passengers arrived, passengers were informed that the ship could not cruise as planned (J[479]). The cruise could not proceed beyond Mâcon due to high water (J[479]). These findings, derived from Scenic's documents, and not contradicted by any Scenic witness, are not challenged and were open for the primary judge to make. It was therefore open for the primary judge to make the finding at J[476].

31. In all of this, Scenic's criticisms of the primary judge's findings, variously on the premise (AS 22) that although parts of the river path may be closed at some time there was a prospect that others might remain open, or that there was a basis for thinking that the cruise might be free from disruption; or that there was no explanation as to why problems emerged at Tournus on the first day of scheduled cruising, miss the point. The argument was not that Scenic had clear actual knowledge that the subject cruise would inevitably or certainly be disrupted, but that it was, or should have been, aware that there was a substantial risk that cruises would be disrupted. That risk is explicable by the rapid melting of the snow built-up in the past winter (J[473]) – a finding which Scenic does not challenge. All of the fluctuations to river levels along this river path that had occurred over the month of May 2013 plainly indicated that there was a substantial risk of disruption to a cruise along this particular river path. It so happened that that risk materialized during this cruise. Precisely where, when and how, in retrospect, that risk might materialize was not to the point. Such explanations (of the kind presented in Scenic's submissions) which Scenic might have provided for what level of risk of disruption was present at the point of embarkation and why Scenic was justified in proceeding (without warning or information) were not the subject of evidence.

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[43] Blue 1099N.
[44] Blue 1100L.
[45] Blue 1110-1.

32. Dealing with Scenic's specific criticisms, as to Ground 16, there was ample evidence positing that one of the reasons for the interruption to the cruises was high water level along the French rivers. Much of it was manifested after the cruise commenced and appears at Ex P13 (cruise director entries referring to the "high water situation" for 20 & 21 May),[46] Ex D15 (limits upon the approach to Lyon)[47] and Ex P16 (where in its letter of apology, Scenic attributed disruption to adverse weather conditions over the past few months and rising water levels).[48] Set against this, there was no evidence of any contrary hypothesis. As to Ground 17, Scenic criticises the primary judge's reliance (at J[475]) upon the circumstances affecting the previous cruise along this river-path, including its inability to establish a disembarkation point. This was, however, a relevant consideration: along the risk continuum, this circumstance was plainly more consistent with a risk (for the subject cruise) of some disruption rather than indicative of the likelihood of no disruption. The primary judge was entitled to use this evidence in conjunction with the content of Scenic's 16 May letter, to infer that there was no information, from that date up to the point of embarkation, as would lead a reasonable tour operator to confidently dispel the plain doubt that the height of either the Rhône or Saône Rivers would drop so as to permit navigation.

Provision of information (Ground 15)

33. (AS 38) Scenic isolates the statement at J[477] for criticism as to the primary judge's failure to specify the 'state of affairs' that passengers should have been informed about. Further along, at J[482], the primary judge indicated the topics in respect to which information should have been supplied. But having found that Scenic had not formed a view as to the likelihood and extent of disruption or how those matters could be addressed, no further specificity was required for the judge to identify the content of a past hypothetical. Scenic also protests (AS 39) that there was no evidence, either way, as to whether Scenic provided a warning to "each and every passenger". It was not necessary for Mr Moore to prove that, for this, or any other cruise, ad hoc warnings were provided to individual passengers or not. It was plainly obvious that the question of whether warnings, or as was also described in the Q7 & Q7A, 'information' or 'explanation's, should have been given was to be determined in each and every cruise. The primary judge determined that for this cruise, there was non-compliance with s 60 for failing to provide such warning.[49] There was no dispute that no warning was provided.

Non-compliance with purpose & result guarantees (Grounds 10, 53)

34. There is little challenge to the findings at J[471]-[472] and J[764]-[765], and, more pertinently, A8(1),[50] beyond Scenic's s 61 procedural fairness complaint. A qualification, however, (at AS 4) is

[46] Blue 1119K-1120Q.
[47] Blue 1124I.
[48] Blue 1160K.
[49] White 357-8.
[50] White 359.

Scenic's point that if it had not been negligent (by providing appropriate warning and passengers continuing to wish to cruise), on the primary judge's reasoning, Scenic may still be liable under ss 61(1) and (2). These points have been addressed above.

Non-compliance with due care & skill guarantee (Ground 11)

35. Once it is accepted that the primary judge was entitled to find that Scenic should have been aware of the likely risk of substantial disruption of this cruise when passengers embarked, and that an obligation to warn arose of the kind incorporating reference to the topics identified by the primary judge, Scenic's omissions in all of these respects amounted to non-compliance with s 60.

Cruises 2 & 3 (Grounds 20-21 & 53)

36. The first challenge (AS 51) is the s 61 procedural fairness complaint. Its second challenge tries to make something about the extent to which cruising was scheduled to take place at night; as if to dilute the nature of the purpose and result guarantees. The promotional brochure, which generated the passengers' expectations, included photographs depicting cruising through the day time.[51] Its third challenge (AS 52) is avowedly based upon its (erroneous) characterisation of the services. These challenges are answered above.

37. Its fourth challenge (AS 52) suggests that Scenic relies upon the undisputed fact that, for these particular cruises, Scenic did not know of any specific matters indicating a prospect of disruption. Be it so, but liability under ss 61(1) and (2) (and the remedy for non-compliance with them under s 267(1)(c)) is not based upon fault or even a supplier's mental state.

38. Scenic's next challenge (AS 53 & 129) posits that some latitude needed to be provided in respect to things which happened which were beyond its control. On the concept of 'latitude', see [81] below. Otherwise, these submissions conflate two subject matters. It is only once a finding is made of non-compliance with ss 61(1) and/or (2) (concerning the extent of latitude) that one then gets to the special defence in ACL s 267(1)(c)(ii) (concerning whether non-compliance with the guarantees was only caused by circumstances beyond the supplier's control after the services were supplied).

39. As to the merit-based factual challenge, there is no serious challenge to the findings at J[492]-[494] (cruise 2) and J[518]-[522] (cruise 3) which were available on the evidence.

Cruises 4 & 5 (Grounds 22-28 & 53)

Non-compliance with purpose and result guarantees

40. Scenic reprises its s 61 procedural fairness complaint. Scenic also reprises (AS 60 & 66) its earlier argument that, absent any negligent failure to warn and provide an option to cancel, there could be no liability under these guarantees.

[51] Blue 746, 748, 749-50, 751, 754, 756, 757, 762, 764, 766.

Scenic's knowledge of the Substantial Disruption Risk, post-embarkation

41. Mr Moore argued that Scenic acquired knowledge of the likely risk of substantial disruption both before *and* after the cruises had embarked on 27 May. The primary judge rejected the former argument but upheld the latter argument (in respect to both cruises). The relevant Answers to Common Questions, concerning knowledge acquired after embarkation at these cruises are A5A(4) & (5).[52] To be precise, in relation to both cruises, Scenic's knowledge as to likely disruption had accrued by 30 May. In this context, it is not clear to which Answers Scenic's submissions at AS 72-74 and 78-79 are directed.

42. That is not to say, however, that such knowledge as Scenic had acquired prior to 27 May became irrelevant when assessing what it should have known after these ships had embarked. In this regard, it appears that Scenic does not challenge A5(4) & (5),[53] through which it was determined that by 26 May 2013 (two days before the scheduled embarkation of these cruises), Scenic knew that the River Main was closed and that high water was threatening the program for cruise 2. Nor does it challenge A5A(4) & (5), through which it was determined that by 30 May 2013 (two days after embarkation), Scenic knew of the experience of cruises 2 & 3. The experiences of those cruises had been set out at J[484]-[491] (cruise 2) and J[497]-[517] (cruise 3).

43. Further, in the case of cruise 4, it was found that by 29 May 2013, Scenic knew that three of its ships were docked in three separate locations along the river at Mainz, Bamberg and Krems and were not able to sail on the river; and that for passengers on this ship, it was not likely that they could sail further east past Mainz (J[224], [550]). These findings are not challenged. Scenic (AS 76) says that, as at 29 May, there was no evidence of any impediment of travel from Marksburg to Miltenberg, but the primary judge did not say that there was. By 30 May, it was certain that, in respect to this cruise, Scenic could not comply with the purpose guarantee (J[553)]. There is no challenge to that finding.

44. In the case of cruise 5, Scenic had the same knowledge as it did in relation to cruise 4, save that it also knew, by 30 May, when the ship was docked in Melk, that other ships were docked along the river at Bamberg and Mainz and were unlikely to move (J[580]). Other matters (occurring since the ship had embarked) which made it abundantly clear that the passengers on this particular cruise were likely to have their purposes frustrated appear at J[201]-[203] and J[583]-[589]. By 2 June, even Mr Brown thought it was time to consider cancellation of the cruise. These findings are not challenged.

45. Scenic complains about 'confusion' (AS 68) about the relevance of findings at J[583]-[591]. The findings at J[583]-[589] set out matters indicating Scenic's knowledge of river levels, their impact upon existing and imminent cruises and risk from 31 May to 2 June, a few days after cruise 5 (and

[52] White 353-4.
[53] White 351.

cruise 4) had embarked. They were plainly matters that the primary judge was entitled to take into account in assessing: (a) Scenic's knowledge about actual and likely disruption to cruises 4 & 5; and (b) the adequacy (from the point of view of compliance with s 60) of its response to that knowledge. It may be that the findings at J[590]-[591] appear referable to cruise 8 (scheduled to embark on 3 June 2013), and what should have been done in connection with the disclosure of information prior to the embarkation of that particular cruise, but this does not derogate from the correctness, and salience, of the balance of the findings about which Scenic complains to cruises 4 & 5 and if there be error in this regard (as per Ground 28), it is inconsequential. At A7A(5),[54] the primary judge determined, without Scenic's complaint, that cruise 5 should have been cancelled by 3 June, after the cruise had embarked.

46. In relation to cruise 5, Scenic cites (AS 81-82) the circumstance (J[557]) that this cruise was proceeding as scheduled on that day and relies upon notes from the tour director. That sailing may have been available on one part of the river path says little, however, about what disruption may lie in store as the cruise proceeded.

Ground 18A

47. (AS 69) Scenic complains about the reference at J[185]-[186] to the Moselle River and speculates as to whether or not the reference played any part in the primary judge's reasoning (apparently) in connection with these cruises. This only demonstrates Scenic's inability to prove that the findings had any consequential effect even if they were erroneous.

Non-compliance with s 60

48. The reasoning to support the findings of non-compliance with s 60 in relation to cruise 4 appears at J[550]-[555]. The gist of the reasoning is that: (a) by 29 May (when it was highly likely) or 30 May (when it was certain) Scenic was aware that the nature of this tour would change from a river cruise to a motor coach tour from stationary ship to stationary ship with excursions along the way; (b) passengers should have been informed about this prospect and given the opportunity to cancel the further part of the tour and make other arrangements; (c) all passengers on the cruise (including, but not limited to Mr Holgye and Mr Cairncross, who gave evidence) did not receive that opportunity. The primary judge equated the concept in (a) with the high degree of unlikelihood that the purpose guarantee could be complied with.

49. Scenic's challenge to the characterisation in (a) fails for the reasons generally set out in the section of these submissions regarding Scenic's knowledge on this cruise above. However, somewhat desperately, Scenic relies upon the accuracy of opinions conveyed by the tour director on cruise 4, to the effect that such disruption as appeared in prospect was 'unexpected'. Mr Moore's general response to this point appears above (at [27]). But the broader question is, whatever the cause of

[54] White 358.

the disruption, from 29 or 30 May, what level of cruising would likely be achieved and what options were available to passengers.

50. As to non-disclosure of information, Scenic's challenge appears to be internally inconsistent and confusing. It takes an indirect swipe (AS 59(a)) at the primary judge's omission to specify the *content* of the information to be disclosed (which is also a reflection of Ground 8); and then (AS 60) argues that the issue to be determined was not actually the content of the information provided to each and every passenger, but whether there was any *obligation* to disclose information at all. If Scenic's complaint is about the content of the information that should have been disclosed to all passengers, then the gist of the required disclosure is referred to in J[551]-[553]. The content of disclosure, in short, required provision of information *and* opportunity. Scenic provides no answer why an obligation to disclose should *not* have arisen.

51. In relation to both cruises, Scenic appears to say (AS 60 & 65) that Scenic was denied the opportunity to put forward evidence to rebut the palpably obvious inference that passengers were not given the opportunity to cancel the balance of their tours on these cruises. In the context of cruise 4, Scenic appears to say that they might have wanted to advance the position that different information about options was provided to Messrs Cairncross and Holgye to that of all other passengers on board. This notion appears fanciful: it is highly improbable that any co-ordinated management system on a ship might provide different disclosures to different passengers. Scenic did not adduce evidence of its system in this respect. Be that as it may, if Scenic wanted to advance a position that sought to factually differentiate the warnings and/or options given to some, but not all, passengers (however improbable that scenario may appear), it could and should have sought some carve out or qualification to the Questions and Answers directed to that topic.

Cruises 6 & 7 (Grounds 29-34B)

Non-compliance with purpose and result guarantees (Grounds 29, 32 & 53)

52. These grounds appear limited only to Scenic's s 61 procedural fairness complaint.

Scenic's knowledge of the Substantial Disruption Risk, post-embarkation (Grounds 31A, 34A)

53. Although no ground of appeal is expressed in these terms, Scenic plainly (at AS 147-148) contests the findings, in respect to both cruises, that by 31 May 2013 (i.e. after both cruises had embarked) Scenic knew or should have known that there was a significant risk of disruption to the cruise. These findings are reflected in A5A(6) & (7).[55]

54. It is notable that the primary judge's findings about knowledge of risk of disruption concerned the position *after* the cruises had embarked – the primary judge having rejected Mr Moore's case that the knowledge was known, or reasonably apparent prior to the embarkation of each cruise (J[610]). That is not to say, however, that the knowledge that Scenic had acquired about the

[55] White 354.

experience of its other cruises before that date was irrelevant. This explains why the primary judge gave the answers at A5(6) & (7),[56] the effect of which is that it knew of the circumstances affecting the voyages of cruises 2-3: that by 28 May, Scenic was aware that the cruise director on cruise 4 had announced that changes to the tour itinerary were needed because of rising river levels (J[525]) and cruise 5 was stuck at Bamberg and could not proceed further to Amsterdam (J[[193], [544]). So even on the day before embarkation of cruises 6 & 7, Scenic knew of the problems encountered by its ships out along this riverpath.

55. As its submissions acknowledge (AS 91), Scenic was also aware that on the date of embarkation of these cruises, 29 May, the majority of the Main river was closed. On 30 May 2013, in the context of referring to cruise 1, Mr Sandmeier, the Managing Director of Scenic Tours Europe AG, sent a letter stating "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" (J[201]).[57] The primary judge's reference to this email appears to be the basis for Grounds 31A & 34A. The primary judge reasonably inferred that this statement about disruption to "many major European waterways" was applicable to cruises on the Amsterdam-Budapest river path. What was the Amsterdam-Budapest waterway (whose length of river system traversed 1,790km: J[157]) if not a major European waterway?

56. His Honour thereafter summarised Scenic's level of knowledge as at 30 May 2013 in the terms that appear at J[202]. By 31 May (2 days) after these cruises embarked, Scenic was also aware of the experience of cruises 4 & 5. The disruption affecting those particular cruises are summarized at J[545] and J[557]-[558]. Cruise 4 had been forced to dock at Mainz; there was bad weather in Bamberg and heavy rainfall in Budapest. As to cruise 5, its cruise director questioned whether, at the point when it had reached Melk, the cruise would even sail again. On the same day, a competitor, APT, had 5 ships stuck in various places along the river.[58]

57. These facts plainly supported the primary judge's finding of actual or constructive awareness of the Substantial Disruption Risk to the cruises from 31 May. It is notable, when considering Scenic's challenge, that much of its submissions amount to *ex post facto* rationalisations about how Scenic might have reasoned, such as for example (AS 91), a cruise might reach one of the scheduled points of river closure by a certain point, by which time, weather and river levels might have changed. If there was an explanation as to why the obvious prospect of disruption for these cruises should be discounted, and justification provided for continuing the cruises, it was for Scenic to provide it. Scenic's refusal to do so might be explicable by its attitudes towards its passengers

[56] White 351-2.
[57] Blue 1160K.
[58] Blue 1182W.

expressed at a very proximate point of time (28 May) to the embarkation of cruises 6 & 7,[59] which is reproduced at J[195], and which included the statements:

> "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 guests choose to leave the tour."

58. Scenic's 'coloured' program (Ex P52) that it relies upon (AS 91) does not provide any indication that the primary judge erred in making his finding. Mr Moore repeats his general response at [18]-[19] above to Scenic's complaint about the weight the primary judge ascribed to this document.

59. Scenic does not explain (AS 92-93) how Mr Sandmeier's report on 1 June 2013,[60] supports its position that there was no substantial risk of disruption to cruises 6 & 7 as at 1 June (let alone 29 May). The report referred to "high water levels" and forecasted heavy rain with possible impacts for navigations along the Rhine (until 2 June); maximum high water levels, the lock at Melk closed (with re-opening unsure), the possibility that the Main River may be closed until as late as 4 June; high water levels along the Danube; the possibility of the Main-Danube Canal being closed; and the same weather forecast for the Main-Danube Canal as that for the Main.

60. Even if a flooding 'event' occurred on 2 June (AS 94-95), that did not eradicate the Substantial Disruption Risk which was already apparent by 31 May. Indeed, the reasonable by-stander may think that the extent of flooding that occurred on, and from, that date was connected in some way to the rising river levels that had been experienced in the preceding weeks. Certainly Scenic adduced no evidence to suggest that what occurred before 2 June was unconnected with what happened after 2 June.

Non-compliance with s 60 (Grounds 30, 31, 31B, 33, 34, 34B)

61. These Grounds deal with what Scenic should reasonably have done in the light of knowledge of the Substantial Disruption Risk. This is the finding (in both cases) that passengers should have been given information to enable them to decide whether or not to cancel: J[611] (cruise 6) and J[628] (cruise 7). There is no relevant factual difference between each cruise in this regard.

62. Scenic's challenges seem to be: (a) the primary judge was not authorised to determine whether certain information needed to be disclosed, but only whether certain 'options' should have been given to passengers (AS 85); (b) the procedural fairness challenge that the primary judge was not authorised to determine that Scenic did not present every passenger on each cruise with the option

[59] Blue 1141H.
[60] Blue 1162.

to cancel (Grounds 31B, 34B); and (c) the merits of the finding that information should have been given to passengers as at 31 May (AS 87, 94-96).

63. In relation to cruise 6, the 'information' that needed to be disclosed is set out in J[611]. From there, the primary judge found that 'such' information was not provided in any way: J[612]. The terms of that finding theoretically left the factual question open whether any information was provided to any passenger, but the primary judge made it clear that, on the basis of the evidence before the Court, it was inadequate to conveying the content of the information referred to at J[611]. There is no error in this reasoning. The proposition that the primary judge was authorised to decide whether there was an obligation to provide *options* to passengers about what choices they might make (in the exercise of their autonomy) but not to decide whether Scenic was obliged to impart *information* is absurd. At any rate, Q7 and Q8, by their express references to obligations to "explain" and "warn",[61] plainly gave notice that for these (and all other cruises), the issue of the provision of information to passengers which was material to their decision to exercise options was to be tried at the hearing. Whether a tour director or someone associated with these cruises (whether authorised or not, whether informed or not) provided, in some non-systemic or idiosyncratic fashion, material information of the kind summarised in J[610] to one or more passengers was not, and could not, be a common question. As Scenic points out (AS 85) no passenger from either cruise gave evidence. Just because, theoretically, a factual contingency distinguishing one or more passengers from the balance of all passengers may have arisen does not mean that the primary judge was prohibited from expressing the general answers A7A(6) & (7).[62]

64. Scenic's challenge (AS 87) to the merits of this finding (beyond its challenge on the issue of its knowledge of the risk of substantial disruption) is limited. First, it seems (through the use of footnote 49) to make something of the circumstance that no passenger on this cruise (or cruise 7) gave evidence. That is irrelevant in circumstances where the gist of the information that the primary judge determined needed to be disclosed did not depend upon personal characteristics of passengers. Secondly, Scenic tries to make something of the finding (J[654], accepting Mr Moore's submission) that Scenic should have cancelled cruise 8 (which was scheduled to embark on 3 June) by 2 June. The supposed connection between cruises 6 & 8 is not explained. It is inferred that Scenic is pointing to some inconsistency in approach. It is difficult to identify any inconsistency, if that is what is suggested. Each of these particular cruises were scheduled to transfer from Amsterdam to Budapest. In the period 1 – 2 June 2013, cruise 6 was stuck in Mainz. Before cruise 8 was to embark on 3 June, reasonable conduct on its part would have seen that cruise (unilaterally) cancelled by 2 June. Scenic gains no support, from the point of view of timing, as to when information should have been disclosed to passengers on cruise 6, from the primary judge's consideration of what happened with cruise 8.

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[61] White 342 (Q7), 343 (Q8).

[62] White 359.

65. The related factual matter Scenic relies upon is the conduct of its competitors (AS 94-96) in cancelling cruises, but not before 2 June. This point is irrelevant, not for the least reason because Scenic is contrasting its failure to provide an option for passengers actually embarked on cruises, enduring a terrible experience, with decisions of other entities to unilaterally cancel prospective tours. At any rate, whether Scenic's competitors unreasonably delayed their decision-making was not a matter for the adjudication of the primary judge.

Cruise 8 (Grounds 35-37D, 53)

Non-compliance with s 61(1) (Grounds 35, 37D, 53)

66. Other than its s 61 procedural fairness complaint, the only other challenge on this count concerns the findings as to the extent of the disruption. Scenic complains against the finding at J[644]. This is, at one level, a matter of semantics. There is no dispute that the itinerary indicated cruising on 10 days. The primary judge found cruising "for" 3 days (in totality). Scenic's records indicate that the cruising component of the itinerary was punctuated by disruption.[63] On its face, the records indicate that cruising was not possible, *during the day* on scheduled days 4-13. Scenic specifically alleged in its Defence ([17AE] (particular VIII))[64] that 5 days' worth of cruising was interrupted, but did not prove that this was so. In the absence of more precise time intervals of cruising than the indications in the cruise director's notes or any other unidentified evidence before the Court, the Court is not in a position to determine the correctness of the primary judge's calculation. At any rate, no serious challenge is made to Mr Moore's damning account of his experience and how it measured up to his expectations (induced by Scenic), cited at J[90]-[134]. Even if there is some argument about the primary judge's arithmetic, any error is inconsequential.

Scenic's knowledge of the Substantial Disruption Risk, pre-embarkation

67. In its narrative statement of facts (AS 151-153) Scenic does not challenge the primary judge's findings (which appear at J[647]-[648]) about Scenic's awareness of the Substantial Disruption Risk as at 2 June and the disrupted experience of cruises 2-7 which is referred to in A5(8).[65] But Scenic reproduces (at AS 100) the content of Mr Sandmeier's internal email of 1 June 2013, considered above in connection with cruises 6 & 7.[66] Scenic does not derive any comfort from the content of that email as somehow portending a disruption-free experience for this cruise. Even if it did form such view (which was not the subject of any testimonial evidence) then the circumstance (referred to at J[647]) that the following day, on 2 June, Mr Brown sent multiple emails positing a gloomy scenario,[67] as well as alluding to the actions of Scenic's competitors in cancelling cruises,

[63] Blue 1364-5; see also Blue 1397.
[64] White 326.
[65] White 352.
[66] Blue 1162.
[67] Blue 1171-2.

would have dispelled any note of optimism that Scenic, in retrospect, seems to elicit from Mr Sandmeier's email of 1 June. The prospect of substantial disruption to cruise 8 along this river path, as at 2 June, could not be raised any more starkly than the conclusion of Mr Brown's email of 2 June (at 9:31am):

> "CXL [i.e. 'cancellation'] and return home options will be considered today"

68. At 4:58pm on 2 June, Mr Sandmeier said that "ships will certainly not move on Monday (3 June), and likely not for a few more days": J[219].[68]

Non-compliance with s 60 (Grounds 36, 37, 37A, 37C)

69. The real issues, then, associated with this particular cruise concern the primary judge's findings relating to the adequacy of Scenic's responses to this knowledge.

70. Scenic firstly contests the determination that cancellation should have occurred by 2 June 2013. This submission (AS 98) is not pursued with any real vigour, beyond a recitation (AS 100) of what Scenic says it understood (rather than what a tour operator in its position would reasonably have understood) as at 1 June. If, as is submitted, the primary judge's finding about Scenic's knowledge of the risk of disruption as at 2 June is unassailable, there is, subject to a qualification, little else submitted by Scenic to identify why the primary judge erred in his finding (at J[652]) that the only responsible action (in conformity with its s 60 guarantee) was to cancel the tour. Certainly no challenge is made to the reasoning that appears at J[648]-[653]. The qualification is Scenic's additional point (AS 98) that its exercise of power to provide for either (a) unilateral cancellation, or (b) the opportunity to cancel, would not result in compliance with s 60. This suggested qualification is absurd. On its point about unilateral cancellation, Scenic appears to suggest that it had its hands tied, that confronted with the circumstances it was faced with, it did not have it within its contractual power to cancel. That submission is surprising in view of the same power being exercised by its competitors; and such power does not appear precluded by the contract.[69] As to its point that providing opportunity to cancel could not amount to compliance with s 60, the submission belies the internal canvassing within Scenic that precisely this option should in fact have been provided (at least to those pro-active passengers who asked for it). The submission does not reckon with the content of A7(8),[70] that unilateral cancellation, or the provision of opportunity to cancel, entailed other options, or alternatives, for Mr Moore and his fellow passengers. Put another way, the services could be terminated with a refund or indeed postponed for the future.

71. Ground 37A (and AS 98) takes issue with the correctness of the finding that even if Scenic did not unilaterally cancel, Mr Moore could exercise that power. This submission first fails to pay heed to

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[68] Blue 1175M.
[69] Blue 967.
[70] White 357.

Scenic's own defence in this proceeding that, if passengers like Mr Moore had chosen to cancel then Scenic would have subjected them to cancellation fees.[71] More broadly, at AS 99, Scenic takes issue with the primary judge's treatment of the 'first Moore Warning' and the 'second Moore warning'. Grounds 37B and 37C will be considered at [92]-[95] below, on the issue of causation.

Cruise 9 (Grounds 38-43B, 53)

72. This cruise was scheduled to embark (at Budapest) on 8 June. It was an Evergreen cruise on the Amadeus Silver.[72] The relevant Answers to Common Questions affecting this sub-group were: (a) Evergreen (Scenic) knew of the circumstances affecting cruises 2-8 and, by 7 June, knew that there was no ship to embark upon and that this situation was not likely to change in the near future, that the high water levels and flooding were unlikely to allow for uninterrupted cruising on the rivers;[73] (b) from 8 June, it was not until 15 June (scheduled day 8 of the 15 day tour) that the first cruising commenced;[74] (c) by no later than 7 June, the only reasonable course for Evergreen to take was to cancel the cruise, or at least offer passengers the option to do so and by failing to do so, Evergreen did not comply with s 60;[75] (d) Evergreen did not comply with ss 60, 61(1) and 61(2).[76]

Non-compliance with ss 61(1) & (2) (Grounds 38, 53)

73. No additional submissions are made beyond the s 61 procedural fairness complaint.

Non-compliance with s 60 (Grounds 39-43B)

74. No challenge is made by Scenic to the primary judge's answers concerning its knowledge of the Substantial Disruption Risk. Instead the focus of challenge (on the s 60 claim) is Scenic's responsiveness to this risk, or prospect. It attacks the findings of inadequate warnings and information (Grounds 40-41); and attacks the findings as to the need for cancellation and provision of an option to cancel (Grounds 42-43B). These challenges have to be seen in the context of the primary judge's findings as to Scenic's knowledge of the Substantial Disruption Risk affecting this cruise. Scenic's knowledge is acutely apparent from the considerable volume of correspondence in the period from 4 June when its internal email correspondence not only showed its awareness of its competitors' plans in this period (to cancel) but its own active consideration of cancellation options (J[225]-[264]).[77] By 7 June, Scenic's focus appeared to be not so much upon the likely extent of disruption – it already knew that would be substantial – but rather, it was upon massaging and re-aligning passengers' expectations. At J[259]-[261], the primary judge referred to Mr

[71] Defence, [12(f)] & [24(b)] (White 322, 334).
[72] At J[17], the primary judge treated Evergreen as indistinguishable from Scenic.
[73] White 352 (A5(9)).
[74] White 355 (A5A(9)).
[75] White 357 (A7(9)).
[76] White 360 (A8(9)).
[77] Blue 1201-14.

Crichton's advice to Mr Sandmeier and Mr Brown, after predicting that 'the (Amadeus) Silver' would at worse case receive 6-7 days sailing ("almost 50%"):

> "We need to work on their European dreams and make sure they get to experience as much as possible *but just on a different form of transport* …"[78] (emphasis supplied)

75. Grounds 40-41 raise the matter of the existence of notice, or information or warning given to passengers prior to embarkation (on 8 June) and the adequacy (including accuracy) of that notice. The finding that is challenged is at J[655], which relevantly referred to an absence of "any notification of possible interruptions to their cruise" before passengers arrived in Budapest. These grounds relate only to the causation questions following a finding of non-compliance with s 60, by reason of the failure to provide an opportunity to cancel.

76. The notion of providing information was not an end in itself; it was important that information be provided to passengers so that they may assess their position. It would not be enough, for the purpose of complying with s 60, if the purported notification, objectively, underestimated the extent of that disruption. It is convenient to deal with each of the 6 "warnings" Scenic identifies.

    a. The 'first cruise 9 warning' (AS 107, Blue 45E-H): 5 days before the scheduled embarkation date, referred to heavy rains "currently" affecting navigation, indicating, at the date of the Facebook entry, that the affected ship was docked at Würzburg. No relevant disclosure of the (prospective) Substantial Disruption Risk to the scheduled cruise is apparent;

    b. The 'second cruise 9 warning' (AS 108, Blue 1222): this was referred to by the primary judge (at J[247]). As with the first cruise warning (albeit only, in this respect, 3 days before embarkation), it spoke of the 'current' position that the ship was docked in Würzburg. But unlike the first cruise warning, this one envisaged 'land arrangements only for the first two or three days' of (the cruise) …' This statement was a gross underestimate. On 4 June, Justin Brown, with an eye to what Scenic's competitors were doing, was internally canvassing the cancellation of cruises scheduled to embark (i.e. cruises 10 & 12) even after this particular cruise was to embark 4 days later: J[234]-[236];

    c. The 'third cruise 9 warning' (AS 109, Blue 50): this communication needs to be read alongside the other Facebook exchanges on the same page. On the face of this communication there was no "warning" at all. Evergreen was conveying that, two days before embarkation, no departures had been cancelled and "we expect to continue to operate our itineraries". What is also pertinent, in respect to the efficacy of this public warning is what followed: another passenger raised the point about Evergreen's competitors cancelling cruises. The Evergreen operator differentiated Evergreen from its competitors, because "fortunately (it) has lots of experience operating river cruises and

[78] Blue 1239.

tours in the region. We've been able to negotiate solutions allowing our programmes to continue …". Any 'warning' by the flood update on the Facebook page was thus negated by an entry later the same day at 11:50pm: the message was conveyed that Evergreen had confidence in its unique ability to manage whatever difficulty was in store;

d. The 'fourth cruise 9 warning' (AS 110, Blue 1228): here, there was a statement which indicated doubt that the Amadeus Silver would reach Budapest in time for the scheduled date for embarkation. The letter indicated Evergreen's intention to deliver as much of the (predominantly cruise) itinerary as possible and a guarantee that passengers would reach Amsterdam. Scenic knew that a competitor, APT, had cancelled cruises scheduled to depart on the day this 'fourth cruise warning' was disseminated: J[160], [237]-[240].[79] Far from stating the true position, this communication held out false hope to passengers on this cruise;

e. The 'fifth cruise 9 warning' (AS 111, Blue 7T-8X): this was a telephone conversation following up an email said to have been sent to passengers. The content of that email was not in evidence (other than what the Evergreen representative represented that it contained) and, at any rate, in Mr Willems' case, it was sent to the wrong email address. Nothing was said in the telephone conversation indicating the Substantial Disruption Risk to the cruise component of the tour. Worse still, in response to Mr Willems' expressed concern about he and his partner (Ms Buchanan, whose concerns were made known to Evergreen at Blue 50), the Evergreen representative positively rejected the notion of cancellation;

f. The 'sixth cruise 9 warning' (AS 112, Blue 9P-10Q). This was a telephone conversation with Mr Willems on 7 June, the day prior to scheduled embarkation. The context for this communication is the Facebook exchange that had occurred on 6 June (Blue 50). It followed from Evergreen's apparent discomfort in responding to Ms Buchanan's public airing over Facebook of her concerns. Ms Buchanan repeated the gist of her concerns (about undertaking a bus tour) in the conversation. When probed how long her bus tour would be, the Evergreen representative indicated that the bus tour would last until the flood receded and when pressed as to when (the representative) expected the cruise commence, the representative responded:

> "We are hopeful that we will be able to depart in two days however it will depend on the river levels and may be up to a week …"[80]

Taken in isolation, it might be said that this might reasonably convey (to Mr Willems and his partner) a *possibility* of disruption. Evergreen did not seek to demonstrate that

[79] Blue 1215.

[80] Blue 10H-J.

disclosure of this statement, or something like it, was publicly disseminated to all passengers (rather than pro-active passengers like Mr Willems and Ms Buchanan). (Contrary to AS 112, there is no evidence that passengers on this cruise received each and every one of the 'first' to 'fifth' cruise warnings). Be that as it may, however, such impression was, almost immediately, undercut, by the ensuing exchange:

> "[Judith said] Well, if you are sure that it will only be for a short period of time we will continue. I don't want to be on a bus for a week.
>
> [They said] I am 98% sure that you will be on the ship in the next few days"[81]

This statement reinforced Evergreen/Scenic's public position that the issue was getting its passengers on board and that it was uniquely equipped to respond to difficulties. Of course, its private position was different: relying upon its interpretation of its terms and conditions, the position, as at 7 June, the date of this 'sixth cruise warning', was apparent at J[252]-[256]. Nothing was said to passengers that the Danube River was closed, or that the Amadeus would only be able to sail as far as Vienna or Krems.

It was Ms Buchanan's communications to Evergreen which triggered Mr Crichton's "work on their European dreams" email, containing his prognosis on 7 June that, at worst case, passengers could get on for 50% of the cruise (J[259]). This prognosis did not feature in the 'sixth cruise 9 warning' (or any other warning) either.

77. The 'notifications' raised by Scenic/Evergreen did not amount to adequate warning. If the finding at J[655] is considered by the Court to require qualification, it does not lead to any alteration to A6(9).[82] That is because the finding of non-compliance with s 60, and in particular, the finding that the cruise should have been cancelled or (alternatively) that an option to cancel should have been provided, was not dependent upon a finding that Scenic (Evergreen) breached its obligation to warn.

78. The next question is whether A6(9) and A7(9) are erroneous (Grounds 42-43B). No specific submissions are made indicating error in A6(9). As to A7(9), and as indicated, there were two real alternatives: unilateral cancellation by Scenic; and an option to cancel provided to passengers. Scenic's contention that the primary judge was wrong to unilaterally cancel, or provide that option, is at odds with its own internal communications; and the conduct of its competitors. As to the latter, by 4 June, Uniworld and Avalon had cancelled cruises scheduled for 8 June (J[241]). They were joined by Viking Cruises on 6 June (J[244]). The content of the announcements by its competitors throws Evergreen's position into sharp isolation. APT's decision-making was founded upon concern of the "safety" of its passengers and crew "due to the high flood waters" (J[238]).[83]

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[81] Blue 10M-O.

[82] White 356.

[83] See Blue 1206 & 1215, respectively.

79. The general idea of cancellation was considered by Scenic on 2 June. At that stage, Justin Brown was concentrating upon cruises that had embarked – he indicated to Mr Sandmeier that he would consider cancellation of cruise 9 after 4 June.[84] On 4 June, Justin Brown indicated that Evergreen would accept *requests* for cancellation for this particular cruise together, it seems, with a re-scheduling of the cruise later this year.[85] He even set out something of a protocol for Scenic staff to follow should a passenger indicate a desire to cancel.[86] The Evergreen tour director for this cruise noted that many guests were upset, on the date of embarkation, about not having the option to fly home or go on tour (J[675], citing tour director notes).[87] Scenic/Evergreen did not explain why that which Mr Brown accepted as appropriate on 4 June, was not offered to *all* passengers for this particular cruise; but only to those passengers who went to the trouble of requesting the option. Certainly nothing happened from 4 June to the date of the scheduled embarkation that would suggest that the prospects for cruising had improved.

80. This leaves the notion of unilateral cancellation. Scenic did not call any witness to give evidence to distinguish it/Evergreen's capacity to provide a cruise-tour for this (or any other) cruise as being superior to that of its competitors, who had unilaterally cancelled tours scheduled for 8 June. It does not challenge the primary judge's reasoning at J[649]-[651]. Evergreen's arguments against unilateral cancellation are brief. Evergreen says that this would deprive those passengers who wanted to proceed with their tour. To this, Scenic cites Mr Willem's indication (AS 112-113) that many passengers wished to proceed and that he himself was content to spend 2 or 3 nights in a Budapest hotel. To the extent that Mr Willem's personal position was relevant to the Common Questions that the Court was required to answer, the hypothetical raised for his consideration was useless because it was premised upon Evergreen only cancelling because of a need to spend two or three nights in a hotel and that the cruise *was otherwise going to proceed* in accordance with the itinerary. The hypothetical situation was vastly different to the reality. More generally, this exchange demonstrates the point that whatever any particular passenger might have said about his or her desire to proceed with the cruise on 7 June would have been predicated upon his or her comparative ignorance of the current and forecasted conditions (including the weather, and river levels), at least set against the knowledge that a professional tour operator such as Evergreen would be expected to possess. Ultimately, however, it was for Evergreen to assess, as APT and other competitors assessed, whether because of safety concerns or other reasons, the purpose and result guarantees were likely to be complied with, even if there was a rump of (ill-informed) passengers willing to proceed. A further, related, point seems to be that passengers may have

[84] Blue 1175Y-Z.
[85] Blue 1208N.
[86] Blue 1201N-V.
[87] Blue 1324J.

been unable to make alternative arrangements at short notice. This is a poor explanation for Scenic's omissions, unsupported by evidence.

Cruise 11 (Grounds 45-49 & 53)

Non-compliance with ss 61(1) and (2) (Grounds 45 & 53)

81. The s 61 procedural fairness complaint is addressed above. Two other challenges are made. The *first challenge* concerns Scenic's specific invocation of a s 267(1)(c)(ii) defence affecting this cruise. Scenic contends (AS 121) that, from 12 June, any non-compliance with the purpose or result guarantees arose because of the closure of the lock at Altenwörth. The closure of this lock is referred to at J[277]-[278]. But even if this event did occur after the embarkation of this cruise, Scenic would not be exonerated in this regard. Scenic's contention is flawed because of its characterisation that the services concluded after the point of embarkation. Moreover, it is difficult to see how the closure of a lock could be seen as unconnected to the river conditions affecting that part of the riverpath which preceded the embarkation of this cruise. Scenic adduced no evidence, from its decision-makers or by independent expert opinion, that no association or connection existed between the closure of the lock and the rising river levels preceding the embarkation of this cruise. The *second challenge* concerns Scenic's argument (AS 122) that, allowing for latitude, disruption of the cruising experience of over 4 days did not amount to non-compliance with s 61. When the primary judge made his reference to the latitude to be extended to suppliers (J[373]), his Honour did so by reference to "relatively short term changes to a planned itinerary". Scenic has not demonstrated that the primary judge erred in deploying the practical measure of 'relatively short term changes' or by finding that 4 days' cruise disruption did not satisfy that measure.

Non-compliance with s 60

82. The first complaint concerning this cruise (scheduled to embark at Budapest on 10 June) concerns the findings that information was not, but should have been provided, about the likely interruption to cruising (A6(11)).[88] No challenge is made to the findings of Scenic's knowledge, prior to embarkation, that there was a real prospect that this intended cruise would not be completed without interruptions: more detailed particulars of the extent of that knowledge are referred to in A5(11);[89] see also J[225]-[264]. Included within this account was evidence that as at 4 June, Scenic was prepared to accept cancellation by its guests, with full refunds, if they requested this (J[234]-[235]).

83. To reiterate, the challenged finding is a failure to provide information, and/or a failure to offer the option to cancel, *prior to* 8 June. Information available to Scenic after that date (AS 118-122) does

[88] White 356.
[89] White 352-3.

not bear on the questions of what information should have been provided, or whether it was appropriate to offer the option to cancel, prior to 8 June, unless it was known by that date. On the subject of information, Scenic sets out what it calls 'warnings'. It is important, however, to be precise as to the findings that are challenged. The primary judge did not find that *no* information had been disclosed by Scenic. The findings (J[714] & [717]) relevantly were that no "proper" and/or "up-to-date and accurate" information was disclosed to passengers by 8 June 2013. Dealing with each of Scenic's 'warnings' in turn:

a. The 'first cruise 11 warning' (Blue 305), delivered on 4 June spoke, virtually in historical terms, about the recent high water levels. The tone of the message was re-assuring: Scenic was currently completing all its present cruises and were currently scheduled to operate this cruise (and cruise 12) "without impact". As noted at J[236], as at 4 June, there was an inconsistency between Scenic's external messages and its internal communications identifying that the option of voluntary cancellation was appropriate;

b. The 'second cruise 11 warning' (referred to at J[699]; Blue 306) referred to the circumstance that the ship would not commence to sail from Budapest, but from Vienna. The balance of the message was similarly optimistic in nature: although the river situation was changing, Scenic was "certain" its passengers would enjoy the "5 star all-inclusive experience"; they could expect to "relax and enjoy their ultimate European cruising experience". Missing from this letter of 7 June was disclosure of Scenic's own awareness that the Danube River was closed and its expectation at that date: that the flooding may not allow for uninterrupted cruising on this cruise (J[254]-[255]), and no mention was made as to Scenic's willingness to provide full refunds for those requesting cancellations (J[258]);

c. The 'third cruise 11 warning' (Blue 1238), also of 7 June. This was no different in substance to the second cruise warning.

84. Scenic's second complaint concerns the finding of Scenic's omission, prior to embarkation (by 8 June), to provide an option for passengers to cancel: A7(11).[90] In support of this complaint Scenic cites (AS 118-122) events occurring, or knowledge arising after 8 June. Those events are irrelevant to the question whether it was appropriate to offer passengers the option to cancel, prior to 8 June, other than to the extent they illuminate what was known prior to that date. At any rate, Scenic wrongly asserts that the 9 June update indicated that parts of the Danube closed at that point were expected to be open by 15 June: in fact, there was no indication as to the re-opening of stretches between Straubing to Ottensheim, or from Ennshafen to Novi Sad, where re-opening was expected *no earlier* than 15 June.[91] The 12 June update indicates a potential for the Danube River to be closed down again; with no indication of a date for re-opening of the stretch between

[90] White 358.
[91] Blue 1251Q-U.

Straubing to the German/Austrian border.[92] Scenic does not otherwise demonstrate that the primary judge's reasoning at J[715]-[716] is erroneous.

H Clause 2.10 is an unfair and unjust term and Scenic's purported exercise of the power is unconscionable (Proposed Notice of Contention 2-4)

85. This section need only be considered if (contrary to what is submitted) the Court accepts Scenic's characterisation of the 'services' it supplied to Mr Moore, its construction of the ambit of the consumer guarantees in ss 60 and 61 and finds that the application of the power to vary in the circumstances meant that it could not be said that the guarantees were not complied with.

'Unfair' and 'unjust' terms

86. The primary judge (at J[381]-[382]) considered the elements necessary to sustain Mr Moore's contention that cll 2.6(d) and 2.10 in the contract were "unfair". If it was necessary, clearly the primary judge would have made relevant determinations. Clause 2.10 generally provided the grounds upon which the defendant was entitled to vary the passenger's itinerary, in the event of certain circumstances.[93] The variation comprises the substitution of another vessel or motorcoach for all or part of the itinerary and also to provide alternative accommodation. The substantive effect of this provision was to confer a power upon the defendant to unilaterally alter the nature and extent of the touring experience enjoyed by passengers, even if that was to thwart the purpose or result for which they acquired Scenic's services. The primary judge referred, at certain points, to the internal convictions of the defendant's personnel, at certain times, that certain tours *should* be cancelled and that refunds may be given in certain circumstances. But where, as here, those convictions were not acted upon by Scenic, by its terms, cl 2.10 entitled it to do what it liked, without reference to the passengers, and if any passenger complained, the passenger would be shown cl 2.10. This is a paradigm example of an unfair term: s 25(1)(a) of the ACL. Clause 2.10 cannot properly be characterised as "defining" the subject matter of the contract, such as to fall within the exception in s 26(1)(a) of the ACL. The provision concerned changes to tour price and *variations* to a tour itinerary (as well as purporting to exclude liability for variations). Scenic did not adduce any evidence to rebut the presumption (in s 24(4)) that the term was not reasonably necessary to protect its legitimate interests. Finally, the provision would cause detriment if relied upon. In this case, the detriment is very real: Scenic maintains it could properly substitute a vastly different (and inferior) touring experience to that which it promoted, because of circumstances beyond its control and not be liable for making any (total or partial) refund for that experience. Mr Moore also relies upon his submissions at trial as to why the terms are unjust under the *Contracts Review Act*.[94]

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[92] Blue 1285T-U.
[93] Blue 967N-S.
[94] Black 417L-418P.

87. In the contingency described above, there is no impediment to the Court now avoiding cl 2.10 (under s 23 of the ACL); or ordering that the provision cannot be enforced (s 7 of the *Contracts Review Act*).

Unconscionable conduct

88. Further or alternatively, there was a combination of procedural and substantive matters which, if it becomes necessary, should lead to the alternative conclusion that Scenic's reliance upon standard contractual terms as against Mr Moore (including but not limited to cll 2.7, 2.10 & 2.13)[95] was unconscionable in the circumstances. As to its *procedural* aspects, it was not until after Mr Moore had booked and made final payment for his cruise that Scenic took any positive step to bring the terms and conditions of the contract to his attention: J[137]. He became bound to the terms once he had paid their non-refundable tour deposit (per cl 1.2 of the terms and conditions). As noted at J[382] the terms and conditions, written in (barely legible) small font, were tucked away towards the back of a voluminous document,[96] and it was only once he had booked and paid up his money that they were (more) prominently brought to his attention. This occurred by means of the provision of a booklet that contained a passenger's itinerary, a map of the cruise and the terms and conditions (J[137]). The terms and conditions, as a whole, were not the subject of any real, or reasonable negotiation, prior to Mr Moore being bound by them. They were not the subject of any explanation to him, in terms of their legal or practical effect.

89. At a *substantive* level, Scenic was: (a) aware that Mr Moore wished to enjoy travel and accommodation, by cruise, along the European rivers (J[394]); and (b) conscious about how exclusionary clauses in the contracts might be deployed against him. The unconscionable conduct arises from Scenic's continued retention of monies paid to it by Mr Moore where Scenic was aware of the Substantial Disruption Risk before his cruise embarked,[97] and refused to cancel prior to embarkation,[98] but instead relied upon the exclusion clauses (cl 2.13) and unilateral powers (cll 2.7 & 2.10) as providing justification for refusing to refund the purchase price when it took no steps to bring those exclusions to his attention before he made and paid for his booking, at which point he became bound by them. In the stated contingency, a declaration of unconscionable conduct and an order not permitting Scenic to enforce the variations (per ss 21 and 243(c) of the ACL) would be appropriate. Alternatively, although this was not specifically sought at trial, an order for refund would be appropriate under s 243(a) of the ACL.

I Mr Moore's claims for compensation and damages (Grounds 54-60A; Proposed Notice of Contention, pars 5-6)

[95] Blue 967.
[96] Blue 561 (this reference is to where the brochure is exhibited to Mr Moore's affidavit). The brochure also appears at Blue 746-974.
[97] White 352 (A5(8)).
[98] White 357 (A7(8)).

Introduction

90. The primary judge correctly adjudicated the claims under s 267(3)(b) and s 267(4) of the ACL separately: the legislation indicates that these remedies are separate (s 267(5)). Several of the Grounds that Scenic makes appear based upon the false premise that under both of these remedies, Mr Moore was seeking compensation or damages for 'loss or damage' he suffered at large and that his entitlement to recover (and requirement to give credit to a defendant in the applicant's position) under either or both of the statutory provisions is influenced by common law analogues.[99] What Mr Moore was to be awarded under s 267(3)(b) was "any reduction in value of the services below the price paid or payable by" the consumer. That is not compensation for 'loss or damage' writ large. The question, in effect, was whether Scenic is entitled to retain the benefit of the full price paid by Mr Moore if, because of the non-compliance with a consumer guarantee(s), the service proves to be unsatisfactory.[100] So understood, whether or not, for example, Mr Moore would (when considering compensation for non-compliance with s 60) still have incurred transportation or accommodation expenses if he had accepted Scenic's (hypothetical) opportunity to cancel would not limit his entitlement to a refund under the s 267(3)(b) remedy. Similarly, it is not established why an award for disappointment and distress under s 267(4) should be reduced on the grounds Scenic identifies.

91. Further, many of the Grounds (54-56 & 60) are directed to the consequences of the hypothetical cancellation of the cruise. Hypothetical questions associated with what would have happened if cancellation had been decided by Scenic, or offered to the respondent by Scenic, are only relevant to the claim for compensation arising from non-compliance with s 60 of the ACL – not ss 61(1) and (2) of the ACL.

The causation finding (relating to s 60) (Grounds 37A-37C, 54, 55, 57 & 60)

92. The only relevance of what Mr Moore would or would not have done is on the alternative aspect of non-compliance with s 60: that the non-compliance arose from Scenic's failure to offer him the opportunity to cancel. The question was whether Mr Moore would have chosen to proceed with the cruise had he received all the material information that a reasonable tour operator in Scenic's position (including its knowledge – actual or constructive) would have provided. The material information, which suffices for this purpose, is contained in A5(8).[101] This information does not appear in what Scenic calls the 'first Moore warning' (AS 99) or the 'second Moore warning' (AS 102). Read in context, those disclosures were not warnings at all of what was expected to come, but only an explanation for the alteration constituted by the ship swap. As to the former 'warning' (J[87]), the river levels were referred to as the explanation for why Scenic was forced to undertake

[99] In an analogous context, see *Marks v GIO Australia Holdings* (1998) 196 CLR 494, [38]; *Henville v Walker* (2001) 206 CLR 459, [18], [66], [130].
[100] Corones, *The Australian Consumer Law* (3rd ed, 2016) [15-185].
[101] White 352.

the ship swap. The reference to changing circumstances concerning the river situation was associated only with getting Mr Moore and passengers back on board the Scenic Jewel. As to the latter 'warning',[102] the disclosure in the conversation Scenic relies upon was merely an explanation for why passengers would embark on a different ship: because the expected ship was stuck in Bamberg. But passengers were told "Don't worry" because they would be placed on the scheduled ship for a couple of days. In short, such disclosures as were made by Scenic were inadequate.

93. The question of what Mr Moore would have done had he received proper disclosures is answered by reference to his (subjective) circumstances. The primary judge was justified in finding (J[813]) that he would have accepted, with alacrity, such opportunity if given the requisite information and an option to cancel. Mr Moore's personal circumstances are relevantly referred to in various passages of the judgment: at J[77]-[78], [121], [127] (Mr Moore's correspondence of complaint), [771]-[773] and [804]-[805] (the value Mr Moore attributed to what he acquired from Scenic). There was no challenge to the accuracy of Mr Moore's contemporaneous correspondence or the findings about his individual circumstances. Essentially, Mr Moore was a passenger who was relatively immobile (the judge referred to his spinal fusion at J[121]). For him, the prospect (which materialized) of his being forced to undergo extended bus tours and changes of accommodation would have been alarming. His desire to avoid that experience would only have been fortified if he was also informed that Scenic's competitors had decided to cancel tours at the same scheduled time as his. This correspondence and the circumstances amply justified the primary judge's finding that if presented with the option to cancel, with the warning and information that he should have been supplied, Mr Moore would have exercised that option.

94. That Mr Moore said he was concerned, as at 1 June 2013, that his forthcoming tour may be disrupted (AS 99) and that he accepted in cross-examination (AS 128) that he may have proceeded with a cruise had he known that there was a possibility of *some* disruption hardly took the matter far – the hypothetical upon which he was cross-examined did not raise for his consideration what he would have done if the substantial prospect of an extended bus tour was put forward for his consideration at a time when Scenic's competitors were cancelling their cruises. Scenic did not raise for his consideration the material information which the primary judge determined that Scenic knew, or ought to have known, prior to embarkation. Mr Moore said he would have asked what alternatives were available, one of which concerned the extent of his bus travel as opposed to cruising time.[103]

95. As to Ground 37C, Scenic challenges (AS 124) the finding at J[813] about the availability of flights from Amsterdam to Australia. Here the primary judge plainly reached his conclusion applying judicial notice. Scenic cites evidence of cancelled flights on 4 June, but the reasons for the

[102] Blue 337T-Y.

[103] Black 73-5.

cancellation did not obviously extent to precluding international flights from Amsterdam to Australia.[104] In any event, given a choice between a delayed flight (with options, such as a refund or a rescheduled cruise in the future) and the prospect of enduring disruption on a cruise, the primary judge was entitled to think that Mr Moore would choose the former.

Quantum

96. Scenic also complains (AS 131) that Mr Moore received a greater sum (the full amount, equivalent to the full purchase price) of his compensation claim under s 267(3) for non-compliance with s 60 than he did for his claim for non-compliance with ss 61(1) and (2). This was for procedural reasons referred to by the primary judge at J[814]. Although Mr Moore did not expressly submit such distinction himself, the primary judge was not bound by his submission and the primary judge did not err when finding (at J[815]) that he was not impeded in awarding the full sum. As his Honour noted, different results can arise from the non-compliance with the different guarantees. Where the gist of the non-compliance of s 60 relates to the failure to cancel, or failure to provide the opportunity to cancel, so that no tour would have occurred at all (but with the prospect of a substituted tour at a subsequent time), then the loss of value may be greater than the loss in value caused by the tour being endured by the suffering passenger.

97. Scenic complains (AS 129) about the receipt of a full refund in circumstances where the judge noted that "some latitude" needed to be allowed to Scenic. That observation was consistent with the terms of ss 61(1) and (2), as to whether a service was 'reasonably' fit for purpose or result, and also the additional defence to suppliers in Scenic's position under s 267(1)(c)(ii). But once liability for non-compliance under ss 61(1) & (2) was established and the defences in s 61(3) and s 267(1)(c)(ii) were not made out, then there is no warrant for importing further unexpressed limitations into recovery of compensation under s 267(3)(b) or s 267(4) for non-compliance with those guarantees. That includes the principle of '*volenti non fit injuria*' or the provisions of Part 1A, Division 4 of the *Civil Liability Act* (AS 128). As to the suggestion that compensation or damages might be limited to the extent to which a known risk materialized, whilst Mr Moore fairly acknowledged some risk of disruption, he would not be taken to have accepted the risk that conditions would be so bad as to require his and his partner's extended use of bus tours and the substantial negation of the purpose and result which he desired, and conveyed to Scenic when acquiring its services.

Travel insurance was correctly found to be irrelevant (Grounds 56 & 58)

98. If, contrary to what is submitted, the incidence of insurance is a relevant factor to be taken into account in quantifying a claim for compensation under s 267(3)(b) (AS 127), the primary judge surveyed the material terms of Mr Moore's insurance with Covermore at J[825]-[832]. The primary judge's reasoning for finding that the insurance payout received by Mr Moore should not be taken

[104] Blue 1199W.

into account, at J[837]-[841], was orthodox: it is reflective of previous authorities on the significance of injured plaintiffs receiving collateral benefits. The *obiter dicta* of Meagher JA in *Kuring-gai Council v Chan* [2017] NSWCA 226 at [99] was provided without elaboration, but may be explicable to the statutory scheme, including compulsory insurance, in issue in that case. It is not authoritative in this case.

Not taking into account benefits supplied during the interrupted cruising days (Ground 60A)

99. As the primary judge correctly noted (J[801]), and for reasons given at J[798], it is inapposite (AS 130) to deploy the 'piecemeal' or narrow approach of attempting to precisely extract or quantify the benefit of food, accommodation or other facilities provided during the non-cruising days.

Section 267(4) claim (Ground 59 and Mr Moore's draft Notice of Contention, pars 5-6)

100. The primary judge's reasoning, at J[887]-[911], and adopting the High Court's decision in *Insight Vacations*,[105] was plainly correct. Applying *Insight Vacations*, the question was whether the 'personal injury' (the disappointment or distress) as defined in the *Civil Liability Act* was experienced in New South Wales or in some other jurisdiction.

101. The provenance of the head of damage of disappointment and distress is the well-established line of authority which posits that this is available where the object of a contract is to provide relaxation and enjoyment and because of breach of a duty, the victim has not received that benefit.[106] This reasoning is readily transposed to where the object of a statutory guarantee is to ensure that services supplied are reasonably fit for purpose or the result desired. In that context, the disappointment and distress – the loss of expectation – is experienced where the unsatisfactory services are experienced. This occurred outside New South Wales. The primary judge did not say that disappointment and distress ceased when Mr Moore returned to New South Wales, but it is more accurate to say that, by then, anger and resentment (manifested in Mr Moore's subsequent correspondence to Scenic) had supplanted disappointment and distress. Contrary to Scenic's submissions, the primary judge did not say that all relevant events giving rise to the award of damages *entirely* occurred outside of New South Wales, but plainly it only became apparent that the services were not reasonably fit for purpose, or for the desired result or not rendered with skill or care when his cruise was substantially disrupted, outside the jurisdiction. Finally, the circumstance that the contract with Scenic that regulated the supply of services to Mr Moore was to be governed by the law of New South Wales was irrelevant to affixing a geographic limitation to recoverability under a federal statutory claim for damages, as it was in *Insight Vacations*.

[105] *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149.
[106] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 365, 369-70.

102. Against the possibility that Scenic demonstrates error in the primary judge's reasoning on the extra-territorial point, there may be a further (contingent) basis to support the award, which is set out in Mr Moore's draft amended notice of contention.[107] Ground 5 is not pressed. As to Ground 6, Mr Moore recognises that the relevant part of the Court's decision in *Insight Vacations Pty Ltd v Young* (2010) 268 ALR 570, classifying damage for disappointment and distress as a form of personal injury for the purposes of the *Civil Liability Act*, is not so plainly wrong so as to warrant reconsideration by a differently constituted Bench of the Court. That said, Mr Moore wishes to reserve the point as to the correctness of that classification should the general issue of whether Mr Moore was entitled to receive this head of damages under s 267(4) be considered by the High Court.

~~9~~ 20 April 2018

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[107] White Tab 16.