

REPLY

COURT DETAILS

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

FILED

2 FEB 2014



TITLE OF PROCEEDINGS

Plaintiff **David Moore**

Defendant **Scenic Tours Pty Limited**

FILING DETAILS

Filed for	David Moore Plaintiff
Filed in relation to	Defence
Legal representative	Benjamin James Hemsworth Somerville Legal Level 10, 32 Walker Street, North Sydney NSW 2060
Legal representative reference	AC:23951
Contact name and telephone	Adam Cutri - (02) 9923 2321
Contact email	acutri@somervillelegal.com.au

PLEADINGS AND PARTICULARS

In this Reply references to paragraph (or sub-paragraph) numbers are, unless the context requires otherwise, references to the Defendant's Defence dated 23 December 2014. Save insofar as the Defence consists of admissions and save as expressly admitted below, the Plaintiff joins issue with the allegations in the Defence.

1. In answer to sub-paragraph 4(b) and paragraphs 21-22 (incl), the Plaintiff
 - (a) admits that the plaintiff and group members contracted with the defendant whose services included arranging the tours;

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- (b) says that the defendant's services to the plaintiff and group member extended beyond merely arranging the respective tours, to taking all such reasonable steps as would enable the defendant to make decisions, prior to the departure of the plaintiff and group members for their tours, as to whether the tours (as set out in the respective tour itineraries) could proceed, as arranged, or required variation, delay or cancellation, having regard to the circumstances known by, or which should reasonably have been known by the defendant, including the prospects as to whether or not the purpose guarantee (referred to in paragraphs 7 and 9(a) of the Statement of Claim) and result guarantee (referred to in paragraphs 8 and 9(b) of the Statement of Claim) could be complied with. The services also included notifying the plaintiff and group members, prior to their departure, of necessary variations and, in the event of a decision to cancel, or delay, the tour, the communication of alternative tours or cruises.

Particulars

The plaintiff relies upon the Contract in its entirety, including (without limitation) the provisions in cl 2.7 and 2.9-2.11

2. In answer to sub-paragraph 12(b), the Plaintiff:

- (a) says that pursuant to cl 2.6(d) of the Contract, any cancellation fee to be incurred by the plaintiff and group members would only accrue where the decision to cancel the tours was made by the plaintiff and group members;
- (b) says that pursuant to cl 2.9(c) of the Contract, no cancellation fee would be incurred by the plaintiff and group members, where the defendant decided to cancel the tours and, in certain circumstances consequent to any decision by the defendant to cancel the tours (as set out in cl 2.9(c) and (f)), the plaintiff and group members would have been entitled to terminate the contracts and obtain a refund from the defendant;
- (c) in the events that occurred, the plaintiff and group members did not cancel the tours and would not have suffered any obligation to pay a cancellation fee

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(assuming also that the defendant would not have agreed to waive any right to insist upon their payment of a cancellation fee);

(d) otherwise deny the allegations contained therein.

3. In answer to sub-paragraph 16(a), the Plaintiff:

(a) says that pursuant to the respective contracts, the defendant agreed to supply the services to the plaintiff and group members beyond the point of arranging the tours (by booking the tours and compiling tour itineraries) up to the point of departure by the plaintiff and each group member,

Particulars

Such term arose by necessary implication from the Contract, including (without limitation) the provisions in cll 2.7, 2.9 - 2.11 (incl)

(b) otherwise does not admit the allegations contained therein.

4. In answer to sub-paragraph 17(a), the Plaintiff:

(a) says that the loss and damage he and other group members suffered arose because of the failure(s) by the defendant to comply with the consumer guarantees (by reason of the facts and circumstances referred to in paragraphs 12-14 (incl) in the Statement of Claim), and


(b) say that this conduct, occurring as it did before the plaintiff and group members departed for their cruises, did not occur only because of causes independent of human control after the services were supplied;

(c) otherwise denies the allegations contained therein.

5. In answer to paragraph 24, the Plaintiff:

(a) repeats what he says in paragraph 2, above; and

(b) denies the allegations contained therein.

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6. In answer to paragraph 25, the Plaintiff:

- (a) repeats what he says in paragraph 4(a)-(b), above; and
- (b) denies the allegations contained therein.

7. In answer to paragraph 26-27(incl), the Plaintiff:

- (a) says that the defendant failed to comply with the consumer guarantees (by cancelling or delaying the cruises) occurred prior to the departure of the plaintiff and group members for their cruises;
- (b) says that cl 2.10 of the Contract, which purports to operate upon or apply to Variations' that occur when a passenger was on a cruise, does not, properly construed, operate upon or apply to exclude or restrict or modify the defendant's conduct.
- (c) relies upon cl 2.10 for its full force and effect;
- (d) says, alternatively, that to the extent that the alleged variation was made by the defendant, purportedly in accordance with cl 2.10, and if that provision has the effect of excluding, restricting or modifying the application of the purpose guarantee (alleged in paragraphs 7 & 9(a) of the Statement of Claim) and result guarantee (alleged in paragraphs 8 & 9(b) of the Statement of Claim), then cl 2.10:
 - (i) is inconsistent with cl 2.15 of the Contract; and
 - (ii) is void, pursuant to s 64(1) of the Australian Consumer Law; and
- (e) otherwise does not admit the allegations.

8. In answer to paragraphs 28-30, the Plaintiff:

- (a) repeats what he says in paragraph 4, above;
- (b) says that defendant's failed to comply with the consumer guarantees (by cancelling or delaying the cruises) occurred prior to the departure of the plaintiff and group members for their cruises and was within the defendant's control;
- (c) says that cl 2.12 of the Contract does not, properly construed, operate upon or apply to exclude, restrict or modify the defendant's liability for its conduct;



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- (d) says, alternatively, that to the extent that the plaintiff and group members suffered loss or damage as a result of general risks associated with travelling, and if cl 2.12(a) has the effect of excluding, restricting or modifying the defendant's liability for its failure to comply with the purpose guarantee (alleged in paragraphs 7 & 9(a) of the Statement of Claim) and result guarantee (alleged in paragraphs 8 & 9(b) of the Statement of Claim) then cl 2.12(a):
- (i) is inconsistent with cl 2.15 of the Contract; and
 - (ii) is void, pursuant to s 64(1) of the Australian Consumer Law; and
- (e) otherwise denies the allegations therein.

9. In answer to paragraphs 31-32, the Plaintiff:

- (a) says that his claim, and the claims of other group members, is in respect to loss or damage suffered because of the defendant's failure to comply with each of the consumer guarantees (referred to in paragraph 9 of the Statement of Claim), and not from the conduct of any 'Service Provider';
- (b) says that, in the premises, cl 2.12 does not apply or operate to exclude, limit or modify the defendant's liability; and
- (c) otherwise denies the allegations therein.

10. In answer to paragraph 33, the Plaintiff:

- (a) says that to the extent that cl 2.13(a) may operate or apply so as to restrict or modify (or have the effect of restricting or modifying) the defendant's liability for loss or damage suffered by him, or the group members, because of the defendant's failure to comply with the consumer guarantees (referred to in paragraph 9 of the Statement of Claim), cl 2.13(a):
 - (i) is inconsistent with cl 2.15 of the Contract;



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(ii) is void pursuant to s 64 of the Australian Consumer Law

(b) denies the allegations therein.

11. In answer to paragraph 34, the Plaintiff:

(a) says that to the extent that cl 2.13(b) may operate or apply so as to restrict or modify (or have the effect of restricting or modifying) the defendant's liability for loss or damage suffered by him, or the group members, because of the defendant's failure to comply with the consumer guarantees (referred to in paragraph 9 of the Statement of Claim), cl 2.13(b):

(i) is inconsistent with, or subject to, cl 2.15 of the Contract;

(ii) is void pursuant to s 64 of the Australian Consumer Law

(b) denies the allegations therein.

12. In answer to paragraph 35, the Plaintiff:

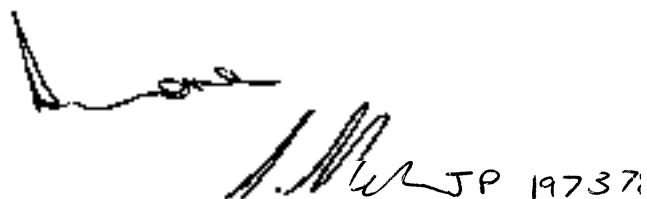
(a) says that to the extent that cl 2.13(c) may operate or apply so as to excluding, restrict or modify (or have the effect of excluding, restricting or modifying) the defendant's liability for loss or damage suffered by him, or the group members (including, without limitation, loss of enjoyment or consequential loss), because of the defendant's failure to comply with the consumer guarantees (referred to in paragraph 9 of the Statement of Claim), cl 2.13(c):

(i) is inconsistent with, or subject to, cl 2.15 of the Contract;

(ii) is void pursuant to s 64 of the Australian Consumer Law

(b) denies the allegations therein.

13. In answer to paragraph 36, the Plaintiff:



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- (a) denies that the defendant's liability to the plaintiff and group members, by its failure to perform its obligations, resulted from, or was a consequence of, a force majeure event;
- (b) otherwise does not admit the allegations.

14. In answer to paragraph 37, the Plaintiff:

- (a) says that to the extent that cl 2.14 may, by its operation, application or effect, restricts or modifies the defendant's liability for breach of the consumer guarantees, cl 2.14:
 - (i) is inconsistent with cl 2.15 of the Contract;
 - (ii) is void pursuant to s 64 of the Australian Consumer Law; and
- (b) denies the allegations therein.

SIGNATURE OF LEGAL REPRESENTATIVE

#This reply does not require a certificate under section 347 of the Legal Profession Act 2004.

#I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in this reply has reasonable prospects of success.

Signature



Capacity

Contact Solicitor

Date of signature

29 January 2015



L. Mel JP 1973

AFFIDAVIT VERIFYING

Name David Moore
 Address 109 Berkeley Street, Speers Point NSW 2284
 Occupation Teacher
 Date 29 January 2015

I say on Oath:

- 1 I am the plaintiff in these proceedings.
- 2 I believe that the allegations of fact contained in the reply are true.
- 3 I believe that the allegations of fact that are denied in the reply are untrue.
- 4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the reply are true.

SWORN at Speers Point NSW 2284
 Signature of deponent _____

Name of witness Fiona Milkins
 Address of witness 15 Springy place Mt Colah, NSW 2079
 Capacity of witness JP for NSW 197378

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

1 I saw the face of the deponent. ~~[OR, where applicable, I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*]~~

2

I have known the deponent for at least 12 months. ~~[OR, where applicable, I have confirmed the deponent's identity using the following identification document:~~

Drivers Licence (9030PO)
 Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note. The deponent and witness must sign each page of the affidavit See UCPR 35 7B

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