

FILED IN COURT

27 FEB 2015



Form 3A (version 2)
UCPR 6.2

AMENDED STATEMENT OF CLAIM

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	David Moore
Defendant	Scenic Tours Pty Limited

FILING DETAILS

Filed for	David Moore , plaintiff
Legal representative	Benjamin Hemsworth Somerville Legal (ACN 117 159 172) Level 2, 65 Berry Street North Sydney DX 10573 North Sydney
Legal representative reference	AC:23951
Contact name and telephone	Adam Cutri (02)9923 2321

TYPE OF CLAIM

Common Law- Money claim

RELIEF CLAIMED

The plaintiff claims the following relief on behalf and on behalf of other group members:

- 1 An order for compensation pursuant to s 267 (3) and/or (4) of the *Australian Consumer Law* (in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
- 2 Further or alternatively, an order for personal injury damages pursuant Part VIB of the *Competition and Consumer Act 2010* (Cth).
- 3 Such further or other orders as the Court thinks fit.

PLEADINGS AND PARTICULARS

1. This proceeding is commenced as a representative proceeding pursuant to ss 157-158 of the *Civil Procedure Act 2005* (NSW).

Description of the group

2. The plaintiff and the persons he represents in these proceedings (the 'Group Members') are each persons who:
 - (a) had booked and paid for river cruises in Europe scheduled from 10 May 2013 to 14 June 2013 (hereafter the '**relevant period**'); or
 - (b) had acquired the services of the defendant trading as "Scenic Tours" and "Evergreen Tours" concerning the operation of river cruises in Europe during the relevant period; and
 - (c) suffered loss or damage because of the conduct of the defendant in contravention of a provision of chapter 3 of the Australian Consumer Law; and

- (d) is not a legal practitioner or funder providing (respectively) services to the plaintiff and other group members, in order to assist them to recover the relief claimed in this proceeding.

The defendant

3. At all material times, the defendant is an incorporated entity able to be sued in its own corporate name and style.

4. At all material times, the plaintiff and group members acquired the "services" of the defendant ~~in the nature of the operators of luxury river cruises in Europe~~ as "consumers" for the purposes of ss 2 & 3(3) (respectively) of the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (hereafter 'the **Australian Consumer Law**).

Particulars

As to 'services', rights, benefits, privileges or facilities were provided ~~under a contract for, or in relation to the provision of, use or enjoyment of facilities for recreation,~~ or were to be provided, by the defendant to the plaintiff and all group members in trade or commerce, to arrange for and facilitate travel cruises along European rivers for the use, amusement, entertainment, recreation or instruction of the group members. Without limitation, the services included the defendant arranging for the tours and monitoring and assessing (and thereafter communicating with the plaintiffs and group members), up to the dates for departure for the cruises, whether their tour itineraries could proceed in accordance with the existing arrangements, or should be varied, cancelled or delayed.

As to 'consumers', the plaintiff paid the defendant the sum of \$13,100 for the service, which service was of a kind ordinarily acquired for personal use. In the case of all the group members, reliance is placed upon the presumption in s 3(10) of the Australian Consumer Law.

Further particulars concerning the individual position of all group members, in terms of the date of the supply and price of service, will await the prior determination of common issues.

5. At all material times, the defendant supplied the said services in trade or commerce.

The consumer guarantees

6. In supplying the said services to the plaintiff and group members in trade or commerce, the defendant guaranteed the plaintiff and group members that services would be rendered with due care and skill (the '**care and skill guarantee**').

Particulars

The guarantee arose in law pursuant to s 60 of the Australian Consumer Law

7. Further and/or alternatively, the plaintiff and group members made known to the defendant that the particular purpose for the acquisition of services from them, as suppliers, was the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destinations.

Particulars

In the case of the plaintiff and all group members, the particular purpose was impliedly made known by them to the defendant by: the nature of the relationship between the plaintiff and group members and the defendant (the supply of recreational services to each and every one of them), the purpose of the transactions that the plaintiff and group members entered into with the defendant and the booking of and payment for a cruise holiday along the rivers by all of them.

Group members reserve the right to contend that the particular purpose was also made expressly known by the group members to the defendant; however this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

8. Further and/or alternatively, the plaintiff and group members made known to the defendant that the desired result that they wished to achieve from the acquisition of services from them was the experience of enjoying travel and accommodation, by cruise, along European rivers to a range of tourist destination.

Particulars

In the case of the plaintiff and all group members, the desired result was impliedly made known by the plaintiff and each of group members by: the nature of the relationship between the plaintiff and group members and the defendant, the purpose of the transactions that the plaintiff and group members entered into with the defendant and the booking of and payment for a cruise holiday along the rivers by the plaintiff and group members.

Group members reserve the right to contend that the desired result was also made expressly known by the group members to the defendant; however this would be the subject of individual enquiry and may be subject of further particulars after determination of the common issues.

9. In the premises, in supplying the said services to the plaintiff and group members in trade or commerce, the defendant further guaranteed them that:
 - (a) The services supplied would be reasonably fit for that purpose (the **'purpose guarantee'**).

Particulars

The guarantee arose in law pursuant to s 61(1) of the Australian consumer Law.

- (b) The services might reasonably be expected to achieve that result (the **'result guarantee'**).

Particulars

The guarantee arose in law pursuant to s 61(2) of the Australian Consumer law

The flooding

10. From about April and early May 2013, there was extensive flooding in Europe, causing rising river levels along the paths of the cruises provided-arranged for by the defendant.
11. The defendant, through their officers, employees or agents, knew or should have known by about 3 May 2013 that the rising river levels would, or were likely to, substantially disrupt, for a period of approximately 6 weeks thereafter, the enjoyment of passengers scheduled to embark upon river cruises.

Particulars

Currently, the plaintiff and group members contend that such knowledge ought to have been known to the defendant as reasonable tour operators conducting business Europe, being river cruises along European rivers in trade or commerce.

The actual knowledge of the defendant is a matter peculiarly within the knowledge of the defendant and further particulars will be supplied after discovery and, if necessary, the administration of interrogatories.

Contravention of consumer guarantees

12. In convention contravention of the care and skill guarantee, the defendant failed to exercise due care in supplying the services by:
 - (a) failing to make any, or any adequate, enquiry, prior to the relevant period, into the nature and extent of flooding and rising river levels in Europe by the severe rainfall in late April and early May 2013;
 - (b) failing to determine, prior to the relevant period, that the nature and extent of flooding and rising river levels in Europe was such that by late April and early

May 2013, it was inconceivable that the scheduled river cruises could proceed otherwise than without by substantial disruption or delay; or (alternatively);

- (c) unreasonably determining, prior to the relevant period, that the nature and extent of flooding and rising river levels in Europe were not so severe as to be likely to substantially impede the enjoyment of passengers scheduled to be embarked on river cruises a period of approximately 6 weeks from about 3 May 2013;
- (d) failing, from about 3 May 2013, to cancel or delay the tours of the plaintiff and group members scheduled to occur in the relevant period, pending the receipt of information that would lead reasonable tour operators to conclude that the flooding and rising river levels had sufficiently abated so as to make it likely that the plaintiff and group members could substantially enjoy the benefit of travelling to the scheduled tour destinations by river cruise;
- (e) failing, prior to the departure of the plaintiff and group members, to cancel their tours and offer them the closest available tour or cruise departure (after forming a reasonable view as to when the river levels would recede so as to enable the cruises to resume along the rivers): and
- (f) failing, prior to the departure of the plaintiff and group members, to delay the tours until after such time when, having taken into account and having formed a reasonable view as to the river levels would recede so as to enable the cruises to resume along the rivers).
- (g) failing, from about 3 May 2013, to warn the plaintiff and group members, prior to their departure from their departing countries to commence their scheduled tours, that the weather and river conditions in Europe were such that it was unlikely that the plaintiff and group members would be able to enjoy, or substantially enjoy, the benefit of travelling to scheduled tour destinations by river cruise.

13. By reason of the facts and circumstances alleged in paragraphs 7, 9(a) and 10-12 (incl). in contravention of the purpose guarantee, the services provided by the

defendant were not reasonably fit for the particular purpose for which they were acquired, in that, prior to their departures for their respective tours, it was reasonably apparent that the plaintiff and group members would ~~did~~ not enjoy, or substantially enjoy, the benefit of travel and accommodation by cruising European rivers to scheduled destinations, but despite that circumstance, the defendant failed to cancel or delay the tours and apprise and offer the plaintiff and group members proposed alternative tours or cruises.

14. By reason of the facts and circumstances alleged in paragraphs 8, 9(b) and 10-12 (incl), in contravention of the result guarantee, the services were not of such nature and quality as reasonably might be expected to achieve the result the subject of the result guarantee, in that, prior to their departures for their respective tours, it was reasonably apparent that the plaintiff and group members would ~~did~~ not enjoy, or substantially enjoy, the benefit of travel and accommodation by cruising across European rivers to scheduled destinations in accordance with their scheduled tours but despite that circumstance, the defendant failed to cancel or delay the tours and apprise and offer the plaintiff and group members proposed alternative tours or cruises.

Loss and damage

15. The plaintiff and group members suffered loss or damage because of the said contraventions of the care and skill guarantee, purpose guarantee and/or result guarantee, in that, having embarked upon their respective tour itineraries during the relevant period they did not experience, or substantially experience, travel and accommodation on cruises along the European rivers and touring to scheduled destinations by river cruise at all.
16. The services purportedly supplied to the plaintiff and group members:
- (a) would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure to comply with care and skill guarantee, the purpose guarantee and/or the result guarantee; and/or

- (b) were substantially unfit for the purpose for which service is of the same kind were commonly supplied would not, easily and within a reasonable time, be remedied so as to make fit the such purpose; and/or
- (c) were unfit for the particular purpose they were acquired by the plaintiff and group members that was made known to the defendant and could not easily and within a reasonable time, be remedied so as to make them fit for such purpose; and/or
- (d) were not of such a nature, quality, state or condition that might reasonably be expected to achieve the result desired by the plaintiff and group members, that was made known to the defendant and could not easily and within a reasonable time, be remedied to achieve such a result.

17. In the premises, the said failures to comply with the consumer guarantees could not, or cannot be remedied, or were a 'major failure' within the meaning of ss 267(3) and 268 of the Australian Consumer Law.

Particulars

The plaintiff contends, support of his personal claim, that he suffered the following loss and damage:

- (a) the price of the tour;
- (b) a reduction the value of services below the price paid by him or those services; and
- (c) inconvenience, distress and disappointment
- (d) loss of the opportunity to consider and accept any proposed alternative tour or cruise offered by the defendant, and (should such alternative have been rejected by the plaintiff) to terminate arrangements with the defendant and receive a full refund of all amounts paid to the defendant.

Particulars of the losses and damage suffered by individual group members will be supplied after the determination of common issues in the plaintiff's case.

Specification of common questions


18. The questions common to the claims of the group members (as at the commencement of this proceeding) are:

- (a) what knowledge did the defendant obtain concerning the incidence and extent of flooding and rising river levels in Europe in April and early May 2013 prior to the relevant period?
- (b) what enquiries did the defendant make prior to the relevant period concerning the incidence and extent of flooding and rising river levels in France and Germany in April and early May 2013, and whether those enquiries were reasonable having regard to the position and circumstances of the defendants?
- (c) what warnings and information to prospective passengers on cruises did other tour operators, in comparable position and circumstances to the defendant, provide to prospective passengers on cruises along European rivers in April and early May 2013, prior to the relevant period?
- (d) whether any guarantee that the services supplied with due care and skill required the defendant, in advance of the scheduled cruises in the relevant period, to cancel or delay cruises and to provide refunds and/or credits.
- (e) whether any guarantee to render services with due care and skill required the defendant to disclose to the plaintiff and group members, in advance of scheduled tour packages in the relevant period:
 - A information it and/or they had acquired, prior to the relevant period, about the incidence and extent of flooding and rising river levels in France and Germany affecting the river routes and destinations the subject of tour packages booked by the plaintiff and group members;

- B the risk that the flooding and river levels was or would be so high that the cruises would not be able to proceed, that tourist destinations could only be reached by bus transportation and that accommodation would be required onshore.
- (f) whether any guarantee that services would be reasonably fit for the purpose of enjoyment of travel to destinations and accommodation by cruises down the French and German rivers was satisfied in circumstances where the defendant failed to cancel or delay the tours prior to the departure of the group members and apprise and offer them proposed alternative tours or cruises:
- (g) whether any guarantee that services would achieve the desired result of travelling to destinations and accommodation by cruise down the French and German rivers was satisfied in circumstances where the defendant failed to cancel or delay the tours prior to the departure of the group members and apprise and offer them proposed alternative tours or cruises;
- (h) whether any failure to comply with a consumer guarantee applicable to the supply of services under Subdivision B, Div 1 of Part 3-2 of the Australian Consumer Law was a "major failure" of the purposes of s 268 of the Australian Consumer Law (as Sch 2 to the Competition and Consumer Act 2010 (Cth)) and/or could not be remedied; and
- (i) the heads of compensable damage.

SIGNATURE OF LEGAL REPRESENTATIVE

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

Signature 

Capacity Solicitor

Date of signature ~~28 July 2014~~ 26 February 2015

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

1. **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
2. **If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
3. **If money is claimed, and you believe you owe part of the money claimed**, by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales 184 Phillip Street SYDNEY NSW 2000
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Telephone	1300 679 272

FURTHER DETAILS ABOUT PLAINTIFF

Plaintiff

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Legal representative for plaintiff

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DETAILS ABOUT DEFENDANT

Defendant

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