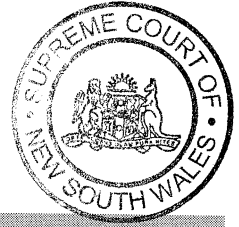


FILED

12 AUG 2022



STATEMENT OF CLAIM



COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Civil
Registry	Sydney
Case number	22 238642

TITLE OF PROCEEDINGS

Plaintiff	Darran Kelly
Defendant	Scenic Tours Pty Ltd

FILING DETAILS

Filed for	Darran Kelly, plaintiff
Legal representative	Benjamin Hemsworth Somerville Legal Pty Ltd
Legal representative reference	CG:34978
Contact name and telephone	Cameron Graham, (02) 9923 2321
Contact email	cgraham@somervillelegal.com.au

HEARING DETAILS

These proceedings are listed for an initial case conference at 9:00am on the Wednesday after the expiration of 42 days from the filing of this statement of claim.

TYPE OF CLAIM

Money claim – Common Law

RELIEF CLAIMED

The Plaintiff claims for himself and the Group Members:

- 1 An order for compensation pursuant to s 267(3) and/or (4) of the *Australian Consumer Law*.
- 2 Interest.
- 3 Costs.

PLEADINGS AND PARTICULARS

1. The Plaintiff (**Mr Kelly**) brings this proceeding as a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW).
2. This proceeding is commenced by Mr Kelly on his own behalf and on behalf of persons (**Group Members**) who:
 - (a) booked a place on or travelled on any of the river cruises operated by the Defendant (**Scenic**) set out in Annexure A to this Statement of Claim (collectively, **the Cruises**);
 - (b) suffered loss or damage because of the conduct of Scenic as described in the Statement of Claim;
 - (c) are not:
 - (i) legal practitioners or funders providing (respectively) services to Mr Kelly and other Group Members in order to assist them to recover the relief claimed in this proceeding; or
 - (ii) judicial officers of the Supreme Court of New South Wales or the High Court of Australia.
3. There are seven or more Group Members who have claims against Scenic.
4. At all material times, Scenic was an incorporated entity able to be sued in its own corporate name and style.

Acquisition of services

5. Mr Kelly and the Group Members entered into agreements with Scenic or other entities for the supply of recreational river cruise services by Scenic (the **Services**).

Particulars

- (a) Mr Kelly entered into an agreement in relation to Scenic's "Jewels of Europe" cruise from Budapest to Amsterdam, commencing on 30 July 2018 (**Mr Kelly's Cruise**) as follows:
 - (i) In February 2017, Mr Kelly booked a place on Mr Kelly's Cruise directly with a representative of Scenic at a travel expo in Adelaide, South Australia.
 - (ii) Within approximately one week, Mr Kelly paid a deposit to Scenic through a travel agent, Phil Hoffmann Travel, in Glenelg, South Australia.
 - (b) Each of the Group Members booked or travelled on one of the Cruises.
 - (c) Particulars for other Group Members will await the determination of common issues.
6. Mr Kelly and the Group Members acquired the Services within the meaning of s 2 of the *Australian Consumer Law*.

Particulars

- (a) Rights, benefits, privileges or facilities were provided, or were to be provided, by Scenic to Mr Kelly and the Group Members, to arrange for and facilitate the Cruise (including Mr Kelly's Cruise in the case of Mr Kelly and other passengers on board that cruise).
7. At all material times, Mr Kelly and the Group Members were consumers within the meaning of s 3(3) of the *Australian Consumer Law*.

Particulars

- (a) The Services were of a kind ordinarily acquired for personal use.
 - (b) Reliance is placed upon the presumption in s 3(10) of the *Australian Consumer Law*.
8. At all material times, Scenic supplied the said Services in trade or commerce.

Consumer Guarantees

9. Mr Kelly and the Group Members made known to Scenic that the particular purpose for the acquisition of the Services, was to experience a selected cruise in accordance with the itinerary and standards advertised by Scenic (**the Particular Purpose**).

Particulars

- (a) The Particular Purpose was impliedly made known to Scenic by:
 - (i) The nature of the relationship between Mr Kelly and the Group Members on the one hand (as consumers of the Services), and Scenic (as the supplier of the Services);
 - (ii) The purpose of the transactions that Mr Kelly and the Group Members entered into with Scenic;
 - (iii) The booking of and payment for the Services.
 - (b) The itinerary and standards for each of the Cruises were set out in the 2018 brochures published by Scenic.
 - (c) Group Members may also contend that the Particular Purpose (or another particular purpose) was also expressly made known by them to Scenic, however this may be the subject of further particulars after the determination of common issues.
10. Mr Kelly and the Group Members made known to Scenic that the result that they wished to achieve from the acquisition of the Services, was to experience the selected cruise in accordance with the itinerary and standards advertised by Scenic (**the Desired Result**).

Particulars

- (a) The Desired Result was impliedly made known to Scenic by:
 - (i) The nature of the relationship between Mr Kelly and the Group Members on the one hand (as consumers of the Services), and Scenic (as the supplier of the Services);
 - (ii) The purpose of the transactions that Mr Kelly and the Group Members entered into with Scenic;
 - (iii) The booking of and payment for the Services.
- (b) The itinerary and standards for each of the Cruises were set out in the 2018 brochures published by Scenic.
- (c) Group Members may also contend that the Desired Result (or another desired result) was also expressly made known by them to Scenic, however this may be the subject of further particulars after the determination of common issues.

11. In supplying the Services to Mr Kelly and the Group Members in trade or commerce, Scenic guaranteed Mr Kelly and the Group Members that:
- (a) The services supplied would be reasonably fit for the Particular Purpose (**Purpose Guarantee**).

Particulars

- (i) Section 61(1) of the *Australian Consumer Law*.
- (b) The services supplied might reasonably be expected to achieve the Desired Result (**Result Guarantee**).

Particulars

- (i) Section 61(2) of the *Australian Consumer Law*.

Contraventions of the *Australian Consumer Law*

12. In breach of the Purpose Guarantee, the Services were not reasonably fit for the Particular Purpose.

Particulars

- (a) Mr Kelly did not enjoy or substantially enjoy Mr Kelly's Cruise in accordance with the itinerary and standards advertised by Scenic, as Mr Kelly's Cruise suffered substantial disruption.
- (b) Further particulars in relation to each of the Cruises, including Mr Kelly's Cruise, will be supplied upon the service of evidence.
13. In breach of the Result Guarantee, the Services were not of such nature and quality as might reasonably be expected to achieve the Desired Result.

Particulars

- (a) The particulars referred to in paragraph 12 are repeated.

Loss and damage

14. Scenic's failures to comply with the Purpose Guarantee and the Result Guarantee could not be remedied, or cannot be remedied, or were each a 'major failure' within the meaning of ss 267(3) and 268 of the *Australian Consumer Law*.

15. Pursuant to s 267(3) of the *Australian Consumer Law*, Mr Kelly and the Group Members are each entitled to recover compensation for the reduction in the value of the Services below the price paid for the services.

Particulars

- (a) Mr Kelly paid \$11,465.00 for the services, and contends that he lost the entire value of the services and is entitled to \$11,465.00.
- (b) Further particulars in relation to the individual claims of Group Members will be supplied following the determination of common issues.
16. In reliance on the Purpose Guarantee and the Result Guarantee, Mr Kelly and the Group Members paid airfares for flights to and from a city in Europe for the purposes of taking part in the Cruises and receiving supply of the Services.

Particulars

- (a) Mr Kelly paid airfares for flights from Adelaide to Amsterdam (via Singapore and Zurich) and from Paris to Budapest prior to Mr Kelly's Cruise, and from Amsterdam to Adelaide (via Zurich and Hong Kong) after Mr Kelly's Cruise.
- (b) Further particulars of the airfares of each Group Member will be supplied following the determination of common issues.
17. Pursuant to s 267(4) of the *Australian Consumer Law*, Mr Kelly and the Group Members are each entitled to recover damages for loss suffered as a result of the failures to comply with the Purpose Guarantee and Result Guarantee.

Particulars

- (a) Such damages include, but are not limited to:
- (i) Inconvenience, distress, and disappointment; and
- (ii) Wasted expenditure on airfares independently acquired in order to travel to and from the cruise.
- (b) Mr Kelly claims \$22,930.00 pursuant to s 267(4) of the *Australian Consumer Law*, for inconvenience, distress, and disappointment (equal to twice the price he paid for Mr Kelly's Cruise).
- (c) Mr Kelly claims \$6,303.00 pursuant to s 267(4) of the *Australian Consumer Law*, for wasted expenditure on airfares.

- (d) Mr Kelly claims \$72.10 pursuant to s 267(4) of the *Australian Consumer Law*, for merchant fees and other credit cards fees wasted in acquiring Mr Kelly's Cruise and airfares.
 - (e) Further particulars of the consequential loss and damage suffered by each Group Member will be supplied after the determination of common issues.
18. Mr Kelly claims the following:
- (a) An order for compensation pursuant to s 267(3) of the *Australian Consumer Law*;
 - (b) An order for damages pursuant to s 267(4) of the *Australian Consumer Law*;
 - (c) Interest pursuant to ss 100 and 101 of the *Civil Procedure Act 2005 (NSW)*;
 - (d) Costs.

Specification of Common Questions

The questions of law or fact common to the claims of group members, or to potential sub-group members, in this proceeding are:

- 1 Whether the Group Members:
 - a. Entered into agreements with Scenic;
 - b. Acquired the services of Scenic within the meaning of s 2 of the *Australian Consumer Law*;
 - c. Were consumers within the meaning of s 3(3) of the *Australian Consumer Law*.
- 2 Whether Scenic supplied the Services to Group Members in trade or commerce.
- 3 Whether the Group Members impliedly made known to Scenic that
 - a. The particular purpose for the acquisition of the Services was to experience a selected cruise in accordance with the itinerary and standards advertised by Scenic;
 - b. The desired result which they wished to achieve from the acquisition of the Services was to experience the selected cruise in accordance with the itinerary and standards advertised by Scenic.
- 4 Whether Scenic guaranteed to Group Members that:

- a. The Services supplied would be reasonably fit for the Particular Purpose (within the meaning of s 61(1) of the *Australian Consumer Law*);
 - b. The Services supplied might reasonably be expected to achieve the Desired Result (within the meaning of s 61(2) of the *Australian Consumer Law*).
- 5 Whether, and the extent to which, each of the Cruises experienced disruption to the scheduled itinerary and standards.
 - 6 Whether, subject to any individual defences, Scenic breached the Purpose Guarantee and the Result Guarantee in relation to each of the Cruises.
 - 7 Whether, in relation to each of the Cruises, any breach of the Purpose Guarantee and the Result Guarantee constituted a 'major failure' within the meaning of ss 267(3) and 268 of the *Australian Consumer Law*.
 - 8 Whether, in relation to each of the Cruises, Group Members are entitled to recover compensation pursuant to s 267(3) of the *Australian Consumer Law*.
 - 9 The extent of the reduction in the value of the Services in relation to each of the Cruises provided to each of the Group Members.
 - 10 Whether Group Members are entitled to recover damages for inconvenience, distress, and disappointment, pursuant to s 267(4) of the *Australian Consumer Law*.
 - 11 Whether Group Members are entitled to recover damages for wasted expenditure on airfares, pursuant to s 267(4) of the *Australian Consumer Law*.

SIGNATURE OF LEGAL REPRESENTATIVE

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

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on record

Date of signature

8 August 2022

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.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Law Courts Building 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

AFFIDAVIT VERIFYING

Name Darran Kelly
 Address 9 Dunn Street, Bridgewater SA 5155
 Occupation Paramedic
 Date 8 AUGUST 2022.

I affirm:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

AFFIRMED at

BRIDGEWATER, SOUTH AUSTRALIA.

Signature of deponent



Name of witness

CAMERON GRAHAM

Address of witness

LEVEL 10, 32 WALKER ST, NORTH SYDNEY

Capacity of witness

Solicitor

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

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



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

This affidavit was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000* (NSW).

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name Darran Kelly
Address 9 Dunn Street
Bridgewater SA 5155

Legal representative for plaintiff

Name Benjamin Hemsworth
Practising certificate number 51908
Firm Somerville Legal Pty Ltd
Contact solicitor Cameron Graham
Address Level 10, 32 Walker Street
North Sydney NSW 2060

DX address DX 10502 North Sydney
Telephone (02) 9923 2321
Email cgraham@somervillelegal.com.au

DETAILS ABOUT DEFENDANT**Defendant**

Name Scenic Tours Pty Ltd
Address 25 Watt Street
Newcastle NSW 2300

Annexure A

1. NBU180618.1 – Scenic ‘Gems of the Danube’ cruise from Nuremberg to Budapest commencing on 18 June 2018.
2. STC250618.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest commencing on 25 June 2018.
3. NBU120718.1 – Scenic ‘Gems of the Danube’ cruise from Nuremberg to Budapest commencing on 12 July 2018.
4. NBU180718.1 – Scenic ‘Gems of the Danube’ cruise from Nuremberg to Budapest, commencing on 18 July 2018.
5. STC250718.2 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam, commencing on 25 July 2018
6. STC300718.2 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam, commencing on 30 July 2018 (**Mr Kelly’s Cruise**)
7. EWCR040818.2 – Evergreen ‘Splendours of Europe’ cruise from Budapest to Amsterdam, commencing on 4 August 2018
8. STC060818.2 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest, commencing on 6 August 2018
9. STC150818.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest commencing on 15 August 2018.
10. SCT200818.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest, commencing on 20 August 2018
11. STC030918.2 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam commencing on 3 September 2018.
12. EWCR080918.2 – Evergreen ‘Splendours of Europe’ cruise from Budapest to Amsterdam, commencing on 8 September 2018
13. STC170918.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest commencing on 17 September 2018.
14. NBU200918.1 – Scenic ‘Gems of the Danube’ cruise from Nuremberg to Budapest, commencing on 20 September 2018
15. STC011018.2 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam commencing on 1 October 2018.

16. STC101018.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest, commencing on 10 October 2018
17. STC151018.1 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam, commencing on 15 October 2018
18. AMBC221018.2 – Scenic ‘Rhine Highlights’ cruise from Amsterdam to Basel, commencing on 22 October 2018.
19. STC241018.2 – Scenic ‘Jewels of Europe’ cruise from Budapest to Amsterdam, commencing on 24 October 2018.
20. STC071118.1 – Scenic ‘Jewels of Europe’ cruise from Amsterdam to Budapest commencing on 7 November 2018.
21. CHMA211118 – Scenic ‘Christmas Markets’ cruise from Budapest to Amsterdam commencing on 21 November 2018.