

AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Civil
Registry	Sydney
Case number	2022/0023864

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 Benjamin Hemsworth , (02) 9923 2321
Contact email	egraham bhemsworth @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 or otherwise supplied by or acquired from the Defendant (**Scenic**) as set out in Annexure A to this Statement of Claim (collectively, **the Cruises**);
 - (b) suffered loss or damage because **the Services (as defined below)**:
 - (i) were not reasonably fit for the Particular Purpose (as defined below);
 - (ii) were not of such nature and quality as might reasonably be expected to achieve the Desired Result (as defined below); and
 - (b) ~~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.

Particulars

- (a) Supplied (supply) has the same meaning as in s 2 of the Australian Consumer Law (ACL), and includes in relation to the Services – provide, grant or confer.

- (b) Acquired (acquire) has the same meaning as in s 2 of the ACL, and includes in relation to the Services – accept.
- (c) The persons to whom Scenic supplied the Cruises and who acquired the Cruises were those who:
- (i) booked a Cruise in response to reading a brochure published by Scenic;
 - (ii) booked a Cruise with Scenic, whether through a travel agent or by direct communication with Scenic or any other agent of Scenic;
 - (iii) booked a Cruise and paid any deposit to Scenic; or
 - (iv) were a passenger who booked on, or booked and paid a deposit for, a Cruise operated by Scenic whether through Scenic or any other entity.
- (d) The defendant operated each of the Cruises by:
- (i) working jointly with other entities associated with the defendant which owned and operated the cruise vessels including Scenic Tours Europe AG to provide the Cruises to passengers;
 - (ii) further as to the Evergreen / Emerald Waterways branded cruises, Evergreen being a brand or division of Scenic, partnering with 'Emerald Waterways', a trading name used by ST Touring Canada Ltd and Scenic Tours (UK) Ltd, to provide the Evergreen / Emerald Cruises to passengers.
- (e) Any person who did not travel on a Cruise is not a Group Member.

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 accepted the supply by entered into agreements with Scenic or other entities for the supply of recreational river cruise services by Scenic (of the Services, as further described in paragraph 5A).

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:
- (i) booked a Cruise in response to reading a brochure published by Scenic;
 - ~~(ii)~~ booked a Cruise with Scenic, whether through a travel agent or by direct communication with Scenic or any other agent of Scenic;
 - (iii) booked a Cruise and paid any deposit to Scenic; or
 - ~~(iv)~~ was a passenger on a Cruise operated by Scenic—booked or travelled on one of the Cruises.
- (c) Particulars for other Group Members will be provided after discovery and/or through evidence await the determination of common issues.

5A. The Services were a luxury European cruise holiday described in:

- (a) brochures published under the Scenic brand (the **Scenic Brochures**); and
- (b) brochures published under the Evergreen or Emerald Waterways brand (the **Emerald Brochures**).

Particulars

Scenic Brochures

- (a) The Hidden Wonders of Europe River Cruising 2018 (Ex SM-1 p.34) published by Scenic Tours Pty Ltd (the **Australian Scenic Brochure**);
- (b) The Hidden Wonders of Europe River Cruising 2018 (Ex SM-1 p.648) published by Scenic Tours Pty Ltd (see Ex SM-1 p.835), referencing UK

telephone numbers and www.scenic.co.uk website and Scenic Tours (UK) Ltd (the **UK Scenic Brochure**);

(c) The Hidden Wonders of Europe River Cruising 2018 (Ex SM-1 p.454) published by ST Touring Canada (the **Canadian Scenic Brochure**);

(d) Further particulars will be provided after discovery.

Emerald Brochures

(e) "Evergreen Cruises & Tours: Europe: Deluxe River Cruising & Tours 2018" (Ex SM-1 p.304) published by Scenic (the **Australian Emerald Brochure**);

(f) "Emerald Waterways 2018 European River Cruises" (Ex SM-1 p.948) identifying UK contact details (Ex SM-1 p.992) (the **UK Emerald Brochure**);

(g) "Emerald Waterways 2018 European River Cruises" (Ex SM-1 p.836) published by ST Touring Canada Ltd (Ex SM-1 p.947) (the **Canadian Emerald Brochure**);

(h) Further particulars will be provided after discovery.

5B. The Services as identified in the Scenic Brochures and the Emerald Brochures was the provision of a luxury European river cruise experience on the Rhine/Main/Danube river system including on-board and on-shore services, comprising:

(a) on board services available for all guests during a Cruise (the **Onboard Services**);

(i) luxury accommodation on a 5-star Scenic Space-Ship (Scenic) or deluxe Star Ship (Evergreen/Emerald);

(ii) guests' choice of luxury / deluxe suites;

(iii) butler service (Scenic) / concierge service (Evergreen/Emerald);

(iv) laundry concierge;

(v) complimentary beverages all day, every day (Scenic) or with meals (Evergreen/Emerald);

(vi) dining including three main meals per day (one on embarkation and disembarkation days) with a range of quality (five star) dining options, from casual to fine dining;

(vii) authentic local entertainment;

(viii) wellness and fitness area;

- (ix) bicycles for self-guided and guided tours;
- (x) Cruise Directors to guide and assist;
- (xi) expert local guides;
- (xii) complimentary Wi-Fi internet; and
- (b) daily onshore activities and tours, during a Cruise (the **Onshore Services**);
and
- (c) an itinerary of 7 or 14 nights (the **Itinerary**).

Particulars

Under the Scenic Brand and in relation to all Scenic branded Cruises:

- (a) As to cruising generally, see 'Life on the River' on page 242 of the Australian Scenic Brochure, page 168 of the UK Scenic Brochure and page 170 of the Canadian Scenic Brochure.
- (b) As to on board and onshore options generally, see descriptions on page 2 of each of the Australian, UK and Canadian Scenic Brochures.
- (c) As to luxury accommodation, see descriptions of facilities available on board "All-inclusive Space Ships" at pages 22-24 of the Australian Scenic Brochure and pages 20-22 of the UK Scenic Brochure and Canadian Scenic Brochure.
- (d) As to the choice of luxury / deluxe suites, see the descriptions of "Scenic Space-Ship Suite inclusions" at pages 252-253 of the Australian Scenic Brochure, pages 178-179 of the UK Scenic Brochure and 180-181 of the Canadian Scenic Brochure.
- (e) As to butler services, see descriptions of the "All-inclusive butler" on page 31 of the Australian Scenic Brochure and page 29 of each of the UK Scenic Brochure and the Canadian Scenic Brochure.
- (f) As to the laundry concierge, see descriptions on page 31 of the Australian Scenic Brochure and page 29 of each of the UK Scenic Brochure and the Canadian Scenic Brochure.
- (g) As to complimentary beverages all day every day, see pages 2 and 21 of the Australian Scenic Brochure and pages 2 and 19 of each of the UK Scenic Brochure and the Canadian Scenic Brochure.
- (h) As to dining options, see description of "All-inclusive Dining and Beverages" including:

- (i) 'River Café', a casual and flexible dining option;
- (ii) 'Crystal Dining' with a la carte menus and a range of cuisines;
- (iii) 'Portobellos/L'Amour' with a locally inspired five course menu;
- (iv) 'Table LaRive/Table d'Or' with a six-course degustation menu with paired wines;

each further described at pages 28-29 of the Australian Scenic Brochure, and pages 26-27 of each of the UK Scenic Brochure and the Canadian Scenic Brochure.

- (i) As to authentic local entertainment, see page 2 of each of the Australian Scenic Brochure, the UK Scenic Brochure and the Canadian Scenic Brochures.
- (j) As to the wellness and fitness area, see page 251 of the Australian Scenic Brochure, page 177 of the UK Scenic Brochure and page 179 of the Canadian Scenic Brochure.
- (k) As to bicycles, see page 2 of the Australian Scenic Brochure, page 19 of the UK Scenic Brochure and page 2 of Canadian Scenic Brochure.
- (l) As to Cruise Directors to guide and assist, see pages 2 and 42 of the Australian Scenic Brochure, pages 2 and 40 of the UK Scenic Brochure and pages 2 and 40 of the Canadian Scenic Brochure.
- (m) As to expert local guides, see pages 2, 21 and 42 of the Australian Scenic Brochure, pages 2 and 40 of the UK Scenic Brochure and pages 2, 19 and 40 of the Canadian Scenic Brochure.
- (n) As to complimentary Wi-Fi internet, see page 2 of each of the Australian Scenic Brochure, the UK Scenic Brochure and the Canadian Scenic Brochure.
- (o) As to on-shore activities, see descriptions of the following:
 - (i) "Exclusive Scenic Tailormade GPS for self-guided touring and on-board commentary" at pages 2 and 21 of the Australian Scenic Brochure, pages 2 and 39 of the UK Scenic Brochure and pages 2 and 19 of the Canadian Scenic Brochure.
 - (ii) "Scenic Freechoice" comprising a "choice of wonderful activities throughout your journey"; as "[a]ll our guests are unique so we appreciate that you may want to move at your own pace" – Freechoice options extend to a "wealth of extra choice in all locations to satisfy the

most curious of guests, whatever cruise you decide on", see descriptions of "All-inclusive Scenic Freechoice" at pages 2, 40-41 of the Australian Scenic Brochure, pages 2 and 34-35 of the UK Scenic Brochure and pages 2 and 38-39 of the Canadian Scenic Brochure.

(iii) Scenic Enrich comprising one or more "unforgettable and exclusive once in-a-lifetime experiences" such as visits "into the private rooms of castles and châteaux, ...exclusive concerts and mouth-watering feasts, ... we'll open the door on village life and take you back generations"- see pages 2 and 37 of the Australian Scenic Brochure, pages 2 and 33 of the UK Scenic Brochure and pages 2 and 35 of the Canadian Scenic Brochure.

(p) The itinerary for each Cruise listed in Annexure A items 1-6, 8-11, 13-21 is set out in the corresponding section of the Australian, UK and Canadian Scenic Brochures for the cruise of that departure date and start and end point.

Under the Evergreen/Emerald Brand:

(q) As to cruising generally, see pages 2-3 of the Australian Emerald Brochure and pages 26-27 of each of the UK Emerald Brochure and the Canadian Emerald Brochure.

(r) As to luxury accommodation, see descriptions of Emerald's "award-winning 'Star-Ships'" at pages 6-7 of the Australian Emerald Brochure, pages 8-9 of the UK Emerald Brochure and page 7 of the Canadian Emerald Brochure.

(s) As to the choice of luxury / deluxe suites, see descriptions of "suites and staterooms" at pages 8-9, 128-135 of the Australian Emerald Brochure, pages 13-15 and 76-79 of the UK Emerald Brochure and pages 16-19 and 105-107 of the Canadian Emerald Brochure.

(t) As to concierge services (available as an inclusion only for some room types), see pages 10-11 of Australian, 76-77 of UK and 16-19 of Canadian Emerald Brochures.

(u) As to the laundry services (available as an inclusion only for some room types, otherwise available for a fee), see pages 10-11 of the Australian Emerald Brochure, pages 76-77 of the UK Emerald Brochure and pages 16-19 of the Canadian Emerald Brochure.

(v) As to complimentary alcoholic beverages included with meals (and available for purchase outside of meal times), see page 13 of the Australian Emerald

Brochure, page 16 of the UK Emerald Brochure and page 15 of the Canadian Emerald Brochure.

- (w) As to dining options, see descriptions of the:
- (i) Reflections Restaurant, including a four-course a la carte menu;
 - (ii) Al fresco terrace, for fair-weather outdoor-dining during non-cruising evenings; and
 - (iii) "Horizon" lounge,
- each further described at pages 12-13 of the Australian Emerald Brochure, pages 16- 21 of the UK Emerald Brochure and pages 11 and 15 of the Canadian Emerald Brochure.
- (x) As to authentic local entertainment, see pages 14-15 of Australian, 21 of UK and 71 of Canadian Emerald Brochures.
- (y) As to the wellness and fitness area, see page 7 of the Australian Emerald Brochure, pages 10 of the UK Emerald Brochure and page 13 of the Canadian Emerald Brochure.
- (z) As to bicycles, see pages 18-19 of the Australian Emerald Brochure, 25 of the UK Emerald Brochure and page 9 of the Canadian Emerald Brochure.
- (aa) As to Cruise Directors to guide and assist, see page 4 of the Australian Emerald Brochure, page 99 of the UK Emerald Brochure and page 29 of the Canadian Emerald Brochure.
- (bb) As to expert local guides, see page 5 of the Australian Emerald Brochure, page 7 of the UK Emerald Brochure and page 21 of the Canadian Emerald Brochure.
- (cc) As to complimentary Wi-Fi internet, see page 7 of the Australian Emerald Brochure, page 7 of the UK Emerald Brochure and page 111 of the Canadian Emerald Brochure.
- (dd) As to on-shore activities, see descriptions of the following:
- (i) You're Invited (under Evergreen brand) or EmeraldPLUS (under Emerald brand) including unique and exclusive local experiences where our guests are welcomed into the lives of real people: see pages 16-17 of Australian, 25 of UK and 21 of Canadian Emerald Brochures. These were included in the price of the Cruise.

- (ii) EmeraldACTIVE (under both Evergreen and Emerald brands) – being options for more “active” guests to explore Europe, including the ability to book complimentary bicycles at any time, as well as guided bicycle tours and hikes: see pages 18-19 of the Australian Emerald Brochure, page 25 of the UK Emerald Brochure and page 21 of the Canadian Emerald Brochures. These were included in the price of the Cruise.
- (iii) “Discover More” excursions and experiences that guests could participate in for an additional cost: see pages 136 – 139 of the Australian Emerald Brochure, page 25 of the UK Emerald Brochure and page 22 of the Canadian Emerald Brochures.
- (ee) The itinerary for each Cruise listed in Annexure A items 7 and 12 is set out in the corresponding section of the Australian, UK and Canadian Emerald Brochures for the cruise of that departure date and start and end point.

6. Mr Kelly and the Group Members acquired the Services supplied by Scenic within the meaning of s 2 of the *Australian Consumer Law*.

Particulars

- (a) Mr. Kelly and the Group Members accepted the supply of the Services, per s 2 of the ACL: “acquire” per subparagraph (b) and “supply” per subparagraph (b).
 - (b) 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 the Services on 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 promotion through the Scenic Brochures and the Emerald Brochures of the Services with their itinerary and standards to be supplied by Scenic as contracting party and/or operator of the Cruises; and.~~
 - ~~(ii) The purpose of the transactions that Mr Kelly and the Group Members entered into with Scenic;~~
 - ~~(iii) The booking by Mr Kelly and by Group Members of the Services to be supplied by Scenic or any other entity including ST Touring Canada Ltd and Scenic Tours (UK) Ltd.~~
 - ~~(iv) Alternatively, and payment of a deposit by Mr Kelly and by Group Members to Scenic or any other entity including ST Touring Canada Ltd and Scenic Tours (UK) Ltd secure supply of for the Services by Scenic.~~
- ~~(b) The itinerary and standards for each of the Cruises were set out in the 2018 brochures published by Scenic.~~
- ~~(e)(b)~~ 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 Services on a 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 promotion through the Scenic Brochures and the Emerald Brochures of the Services with their itinerary and standards to be supplied by Scenic as contracting party and/or operator of the Cruises.~~
 - ~~(ii) The purpose of the transactions that Mr Kelly and the Group Members entered into with Scenic;~~
 - ~~(iii) The booking by Mr Kelly and by Group Members of the Services to be supplied by Scenic;~~
 - ~~(iii)(iv) Alternatively, and Payment of a deposit by Mr Kelly and by Group Members to secure supply of for the Services.~~
- ~~(b) The itinerary and standards for each of the Cruises were set out in the 2018 brochures published by Scenic.~~
- ~~(e)(b)~~ 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 as supplied were not reasonably fit for the Particular Purpose.

Particulars

- (a) Mr Kelly and Group Members did not enjoy or substantially enjoy ~~Mr Kelly's~~their Cruise in accordance with the itinerary and standards advertised by Scenic, ~~as Mr Kelly's~~when each Cruise suffered substantial disruption arising from drought conditions in Europe. Scenic failed to provide the Services in accordance with the itinerary and standards advertised by Scenic, or provided alternatives which were not reasonably fit for the purpose of enjoying the Services.
- (b) Letter dated 28 October 2022 from the solicitors for the Plaintiff to the Defendant.
- (c) 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 as supplied were not of such nature and quality as might reasonably be expected to achieve the Desired Result.

Particulars

- (a) Mr Kelly and Group Members did not enjoy or substantially enjoy their Cruise in accordance with the itinerary and standards advertised by Scenic, when each Cruise suffered substantial disruption arising from drought conditions in Europe. Scenic failed to provide the Services in accordance with the itinerary and standards advertised by Scenic, or provided alternatives which were not services that might reasonably be expected to achieve the Desired Result.
- (b) The particulars referred to in paragraph 12(b) and (c) 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:

1A Whether Scenic operated the Cruises.

1B Whether Scenic by operating the Cruise supplied Services to Group Members.

1C Whether Scenic supplied the Services to the Group Members.

1D Whether the services supplied to or acquired by the Group Members included the Onboard Services as advertised in the Scenic Brochures and the Emerald Brochures.

1E Alternatively:

(a) whether the services supplied to or acquired by the Group Members on Cruises 1-6, 8-11, and 13-21 included the Onboard Services as advertised in the Scenic Brochures;

(b) whether the services supplied to or acquired by the Group Members on Cruises 7 and 12 included the Onboard Services as advertised in the Emerald Brochures.

1F Whether the services supplied to or acquired by the Group Members included the Onshore Services as advertised in the Scenic Brochures and the Emerald Brochures.

1G Alternatively:

(a) whether the services supplied to or acquired by the Group Members on Cruises 1-6, 8-11, and 13-21 included the Onshore Services as advertised in the Scenic Brochures;

(b) whether the services supplied to or acquired by the Group Members on Cruises 7 and 12 included the Onshore Services as advertised in the Emerald Brochures as inclusions within the Cruise.

1 Whether the Group Members:

~~a. Entered into agreements with Scenic;~~

~~a.b. Acquired the services of Scenic within the meaning of s 2 of the *Australian Consumer Law*;~~

~~b.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 the Services 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 Services 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

10 March 2023

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 10 MARCH 2023.

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, 5155

Signature of deponent



Name of witness

Ellen Gwynn Lyett

Address of witness

c/- 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, confirmed the deponent's identity using the following identification document: SA Drivers Licence

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~~Benjamin Hemsworth
Address Level 10, 32 Walker Street
North Sydney NSW 2060
DX address DX 10502 North Sydney
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Email egraham@hemsworth@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. STC060818.12 – 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. ~~STC~~200818.1 – 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 Amsterdam to Budapest ~~to Amsterdam~~, commencing on 15 October 2018
18. AMBC221018.12 – 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. CHMA211118.2 – Scenic 'Christmas Markets' cruise from Budapest to Amsterdam commencing on 21 November 2018.