PASSENGER'S REMEDIES FOR SUBSTANDARD EUROPEAN RIVER CRUISE UNDER AUSTRALIAN LAW: THE RIGHT TO A LUXURY RIVER CRUISE OR MERELY THE RIGHT TO GO ON A TOUR?

MOORE V SCENIC TOURS PTY LTD (NO 2) [2017] NSWSC 733

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1 Facts

The Defendant is an Australian company in the business of providing European river cruises, largely to Australian passengers. From April 2013, heavy rain and floods in Europe threw the luxury river cruise industry into chaos. Many of the cruise operators cancelled their cruises over that summer, but the Defendant pressed ahead. This course of action culminated in proceedings before the New South Wales Supreme Court, brought by Mr Moore (as a representative plaintiff) against the Defendant, concerning 13 different cruises over the relevant period.

The Defendant's promotional brochures invited guests to join the Defendant for a 'once in a lifetime' cruise along the grand waterways of Europe, during which they would be 'immersed in all-inclusive luxury'[1] using their ship as a base: an 'unpack once' experience. The various cruises would stop in certain towns and cities en route.

Moore and his wife had spent their life savings, and taken long service leave, to undertake the Defendant's cruise. They travelled from Australia to Europe on flights organised through the Defendant. About 48 hours prior to embarkation, passengers (including the Moores) were informed that floods had affected sailings, and that they would embark on a different ship before swapping to their designated ship at a later point.[2] Mr Moore claimed that what followed was an experience of being shuffled around Europe, largely by coach, and changing between three different ships[3] during limited time on the water.

The Plaintiffs claimed that the Defendant had failed to provide the promised 'once in a lifetime' luxury river cruises and sought compensation and damages. In essence, the Plaintiffs claimed that the Defendant ought to have known that the extent of the flooding would mean that it could not deliver the cruises, or alternatively, if it did proceed with the cruises, that they would be in 'circumstances of substantial disruption'.[4] The Defendant either knew and chose to proceed anyway without telling the Plaintiffs about the disruptions, or ought to have known of the disruptions if it was acting with due care and skill.

The Plaintiffs claimed the Defendant had breached the federal *Australian Consumer Law* ('*ACL*'), a schedule to the *Competition and Consumer Act 2010* ('*CCA*'). The *ACL* imposes statutory guarantees on those who supply goods or services to consumers.[5] Relevantly:

- services supplied must be reasonably fit for the purpose made known to the supplier (particular purpose guarantee – s 61(1));[6]
- services should be reasonably expected to achieve the result made known to the supplier (result guarantee – s 61(2));[7] and
- services are to be rendered with due care and skill (due care and skill guarantee – s 60).[8]

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[1] *Moore v Scenic Tours Pty Ltd (No 2)* [2017] NSWSC 733 [3] ('*Scenic Tours (No 2)*').

[2] *Scenic Tours (No 2)* [87]; tellingly, passengers from England, who had been informed before leaving home, had all chosen to cancel their holiday: *Scenic Tours (No 2)* [168]; *The Package Travel, Package Holidays and Package Tour Regulation 1992* (UK) provides strong consumer protection specifically for holidaymakers.

[3] *Scenic Tours (No 2)* [5].

[4] *Scenic Tours (No 2)* [44].

[5] As the contract was entered in New South Wales and all the parties were Australian, the case proceeded on the basis that New South Wales law applied as a proper law of the contract. As the judge noted, neither party addressed the question as to what extent a statutory cause of action might arise because of a breach overseas. *ACCC v Valve Corp* (No 3) (2016) 337 ALR 647 (Edelman J) was handed down after this case was argued.

[6] *Competition and Consumer Act 2010* (Cth), sch 2, s 61(1) ('*ACL*').

[7] *ACL*, s 61(2).

[8] *ACL*, s 60.

Notably, no claim was made for common law breach of contract: the Plaintiffs relied solely on their rights under the *ACL*.
The Defendant maintained that the circumstances were beyond its control; the floods were an ordinary incident of river cruising for which it ought not be held liable. Consistent with its terms and conditions, it was only obliged to use reasonable endeavours to provide the booked tour, and was entitled to substitute a motor coach for a vessel as required.[9] Nor was it obliged to give any warnings to the Plaintiff or other group members about the significant impact the flooding would have on their cruise.

The Defendant argued it was not in breach of any of the *ACL* guarantees because the contracted 'services' must relate to the particular circumstances at the time as to what was reasonably fit for purpose.[10] Further, determining the 'services' supplied has to be read with the key provisions and terms and conditions of the contract. In particular, the Defendant was entitled to vary the tour and substitute another vessel or motor coach for all or part of the itinerary, so long as the substitute was 'at the nearest reasonable standard'.[11] It maintained the services provided were reasonable. It contended the service it was obliged to provide was simply the right to go on 'a tour, at that particular time', rather than a luxury river cruise.[12]

2 Liability

Thirteen sailings were the subject of this litigation and much of the long judgment[13] of His Honour Justice Garling is concerned with specific breaches of the guarantees as regards each of those sailings.[14] The judge found the Defendant was motivated to operate the cruises to avoid the financial consequence of cancelling, which would have required it to pay out refunds.[15]

The judge rejected the Defendant's narrow characterisation of the 'service' as constrained in its terms and conditions, rendering the service only 'the right to go on a tour'.[16] The starting point for determining the 'services' supplied was the Defendant's brochure.[17] Essentially the service contracted was an all-inclusive, five star luxury river cruise experience from Amsterdam to Budapest.[18] That entailed occupying one cabin, with various dining options, vantage points and a choice of activities. It did not describe many days spent in a seat of a motorcoach, without a choice as to where or when to eat, and staying in various hotels and on board different ships[19] and with very little sailing. Further, the period of service commenced at the time of booking and continued until after the disembarkation.[20] The judge found that the Defendant was also obliged, as a reasonable incident of the cruise, to provide information and management services both before and during the cruise. Information about the likely disruption should have been provided as soon as it was reasonably available.[21]

As to the guarantees imposed by the *ACL*, the judge found that the passengers, in making a booking and paying for the cruise, were impliedly making it known that they wished to enjoy the cruise with all the benefits the Defendant had said it would provide. That was the 'particular purpose' with which the *ACL* guarantee was concerned, as regards the services that were being supplied.[22] Similarly, passengers had made clear the 'result' they wished to achieve, based on the experience the Defendant said they would get.[23] However, the word

[9] *Scenic Tours (No 2)* [47].
[10] *Scenic Tours (No 2)* [52].
[11] *Scenic Tours (No 2)* [49].
[12] *Scenic Tours (No 2)* [369].
[13] The judgment is 148 pages and 946 paragraphs in length.
[14] *Scenic Tours (No 2)* [453]–[747].
[15] *Scenic Tours (No 2)* [175].
[16] *Scenic Tours (No 2)* [370].
[17] *Scenic Tours (No 2)* [371].
[18] *Scenic Tours (No 2)* [372], [375], [397].
[19] *Scenic Tours (No 2)* [372]; as the judge rejected the Defendant's characterisation of the 'service' the subject of the guarantees, he did not have to deal with the Plaintiff's counterargument that the Defendant's terms and conditions were 'unfair' and therefore void, pursuant to the *ACL*, s 23: *Scenic Tours (No 2)* [380]; His Honour did note, however, that the terms and conditions did fall within the operation of that provision, being a standard form contract; and that if the Defendant was allowed to rely on the terms and conditions they would have 'had the consequence of negating, in its entirety, the true subject matter and essence of the contract, namely the provision of a luxury river cruise to passengers, without financial consequences to Scenic': *Scenic Tours (No 2)* [383]; His Honour also noted that 'Scenic did not effectively, or at all, draw the passenger's attention to the Terms and Conditions…'
[20] *Scenic Tours (No 2)* [444].
[21] *Scenic Tours (No 2)* [375].
[22] *Scenic Tours (No 2)* [390].
[23] *Scenic Tours (No 2)* [402], citing statements in the brochure.

'reasonably' in the statutory guarantees meant that not every small lapse or shortfall will constitute a breach. 'Reasonably' also imposes a qualitative assessment; an overall evaluation of the services provided and their fitness for purpose.[24]

The judge found that while the unseasonal rain and flooding was one cause of the breach of the guarantees they were not the only cause; and the other causes were 'entirely within the control and influence' of the Defendant.[25] The Defendant's view that if it supplied 50% of the cruise as promised then would comply with its contractual obligations was 'misguided', 'incorrect' and 'not at all satisfactory'.[26]

The judge also concluded there had been a failure to comply with the third statutory guarantee, requiring the Defendant to render the service with due care and skill.[27] Care and skill was required in the supply of the services in order to avoid the risk of the passengers suffering financial harm by way of economic loss and harm by way of disappointment and distress.[28] The Defendant claimed the duty to take care and skill would be modified by ss 5B and 5C of the *Civil Liability Act 2002* (NSW) ('*CLA*'), either because of s 275 *ACL*, or alternatively s 80 *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). Consistent with *Motorcycling Events Group Australia Pty Ltd v Kelly,*[29] the judge accepted that s 275 of the *ACL* did not uplift those provisions, which were instead uplifted by s 80 of the Judiciary Act. The assessment of breach of s 60 *ACL* was therefore subject to ss 5B and 5C the *CLA*. On application of those provisions, the judge found the risk of harm to be foreseeable, and not insignificant.[30]

The Defendant raised two defences under the *ACL*. First, it argued that the Plaintiff either did not rely on, or it was unreasonable for him to rely on, the skill or judgment of the supplier (s 61(3) *ACL*).[31] The judge held that defence was not made out, saying it would be 'surprising' if the Defendant could point to any unreasonableness in the conduct of a passenger in relying on the Defendant's skill and judgment.[32] Secondly, the Defendant argued that the failure was a result of a cause independent of human control after the services were supplied (s 267 (1)(c)(ii) *ACL*). The judge rejected this defence also, saying it seemed to apply only when the guarantee could not be fulfilled because of something happening after the service was supplied. That did not apply here because the service started at the time of booking and continued until disembarkation and transfer to the airport. Further, the failure to comply was not due 'only' to a cause independent of human control';[33] while the floods were independent of human control, they were not the only cause of the failure by the Defendant to comply with the guarantees:

> The other causes of the failure to comply with the purpose and result guarantees were entirely within the control and influence of Scenic. At the most basic level of Mr Moore's claim is the assertion that Scenic was in breach of the purpose and result guarantees by failing to cancel the cruise or defer its departure. Another reason why Mr Moore claims a failure of the guarantee is that Scenic decided to transfer the passengers by motor coach for very long trips, in circumstances when the motor coaches were not of an adequate quality, or else where drivers were not properly instructed. Mr Moore also drew attention to the inadequacies of the docking locations for some of the ships - they were not proximate to towns, were in smelly industrial areas, and ships were docked between or adjacent to their ships. There is simply no evidence led by Scenic, or otherwise, which explains why the ships were docked where they were…[34]

After reviewing each of the 13 cruises in issue, Justice Garling found the Defendant in breach of at least one *ACL* guarantee in relation to its conduct of 12 of them.[35] For most cruises, the Defendant was in breach of all three guarantees.

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[24] *Scenic Tours (No 2)* [395]; the judge rejected the Defendant's argument that the passengers did not rely on its skill and judgment based on *ACL*, s 61(3).
[25] *Scenic Tours (No 2)* [448].
[26] *Scenic Tours (No 2)* [653].
[27] This obligation is a reference to the common law standard of negligence. The common law of negligence has been modified by civil liability act legislation in each jurisdiction of Australia. It has been held by the New South Wales Court of Appeal that the Civil Liability Act modifications also apply to the due care and skill inquiry in the *ACL*: see *Scenic Tours (No 2)* [419]–[426].
[28] *Scenic Tours (No 2)* [428].
[29] (2013) 86 NSWLR 55.
[30] His Honour also noted that the application of the *Shirt* calculus would have led to the same result: [433].
[31] In reliance on *ACL*, s 61(3): [434].
[32] *Scenic Tours (No 2)* [439].
[33] *Scenic Tours (No 2)* [446]–[447].
[34] *Scenic Tours (No 2)* [448].
[35] *Scenic Tours (No 2)* [939]; only cruise 12 was held not to have been delivered without breach of the statutory guarantees.

3 Remedy

To recover compensation and damages for a breach of a consumer guarantee, the consumer must prove there has been a 'major failure' to comply with a statutory guarantee, as defined in s 268 *ACL*.[36] It is sufficient to establish that a reasonable consumer fully acquainted with the nature and extent of the supplier's failure to comply would not have acquired the services. Justice Garling found that a reasonable consumer fully acquainted with the nature and extent of the failure would not have acquired the services (in other words, a consumer would not have wanted to proceed with the cruise as delivered).

3.1 Compensation for Reduction in Value

Moore claimed compensation for the reduction in value of the services below that paid. The judge held that the Plaintiff was entitled to compensation for the both breach of both s 60 and s 61 but in order not to be overcompensated, he should be awarded the higher sum of the two. In relation to the breaches of s 61, His Honour found that the major failure so affected Mr Moore's cruise that the few days of cruising were overwhelmed by the unfortunate experiences that followed. Indeed, the judge would have awarded the full cost of the cruise as compensation, but as the Plaintiff had claimed a lesser amount representing the 10 days 'lost', that was the amount awarded for the breaches of s 61.[37] As to the breach of s 60, the judge considered it appropriate to award a full refund, as the Plaintiff would not have embarked on or continued the cruise had he been given accurate and timely information.[38] The full refund was the higher amount, so that was what was awarded for the reduction in value of the services.

The judge declined to discount the award for the small sum (about 10%) paid by the Plaintiff's insurance company, saying there was no reason why the Defendant should benefit from the Plaintiff's prudence in obtaining insurance.[39]

3.2 Damages for Disappointment and Distress

As well as a reduction in value, Mr Moore also claimed damages, as permitted under the *ACL*.[40] Essentially his claim was for damages for disappointment and distress, which the High Court of Australia has accepted may be a contractual head of damage where the object of the contract is to provide enjoyment, relaxation or pleasure.[41] However, Justice Garling was bound by precedent to hold that the Plaintiff's claim for disappointment and distress was a claim for 'mental harm' (and a personal injury claim) pursuant to the *CLA*: 'however surprising that result may appear in this case to be'.[42]

As the *CLA* restricts mental harm claims,[43] such a finding would have denied the Plaintiff any damages for disappointment and distress.[44] However, the Plaintiff argued the *CLA* did not have extraterritorial application to injuries sustained outside New South Wales in keeping with the High Court decision in *Insight Vacations*.[45] The judge agreed, finding that there was nothing in the relevant part of the *CLA* that exhibited an intent by Parliament

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[36] There are also preconditions to recovery stipulated in *ACL*, s 267: *Scenic Tours (No 2)* [781]–[787].
[37] *Scenic Tours (No 2)* [807].
[38] This was a failure of the guarantee to render the service with due care and skill: *ACL*, s 60.
[39] *Scenic Tours (No 2)* [838]; 'as a matter of principle, there seems to me to be no difference between the position of a claimant for damages for personal injury who has taken out an insurance policy of, for example, income protection which is then ignored in the assessment of tortious damages, and the position here': [837].
[40] *ACL*, s 267(4).
[41] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 ('*Baltic Shipping*'): this case concerned a passenger injured during the sinking of the *Mikhael Lermantov* off the coast of New Zealand in 1986. The High Court of Australia adopted the English position on damages for disappointment and distress.
[42] *Scenic Tours (No 2)* [854]; the judge referred to the NSW Court of Appeal decision of *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 as regards the effect of the *Civil Liability Act 2002* (NSW) ('*CLA*') on claims for damages of disappointment and distress. For more, see Kate Lewins, *International Carriage of Passengers by Sea* (Sweet & Maxwell, 2016) 4-129.
[43] Only mental harm accompanying physical injury, or pure mental harm that amounts to psychiatric illness, is recoverable: *CLA*, s 31; further, in New South Wales, the extent of harm must meet a minimum threshold fixed by *CLA*, s 16.
[44] *Scenic Tours (No 2)* [873].
[45] Which considered *CLA*, s 5N , holding it did not apply to events overseas: *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 243 CLR 149.

that it should have extra-territorial effect. Nor was the *CLA* a code for the award of damages.[46] Therefore, damages for disappointment and distress could be awarded to the Plaintiff.

In assessing an appropriate award, the judge considered awards for disappointment and distress in like cases to gauge a 'rule of thumb', noting the awards were generally double the cost of the holiday. The judge awarded the Plaintiff the amount he had claimed for this head of damage, namely $2,000; but the judge noted he would have been inclined to award a 'somewhat higher' amount.[47] Interest was also awarded, calculated from the end date of the cruise.[48]

In summary, the court found that the Defendant's delivery of twelve of the thirteen cruises in question to be in breach of at least one statutory guarantee. It is necessary to read the narrative of those cruises to appreciate the extent of the under-delivery of a 'luxury cruise' as found by the judge. The result was a comprehensive win for the Plaintiffs, with an expected payout to passengers of well over AUD$14 million.

The Defendant has filed a notice of intention to appeal.

4 Comment

The are several important takeaways from this decision.

First, in Australia, this decision makes it clear that cruise providers cannot expect to rely upon their terms and conditions (even those common in maritime contracts) to change the character of the nature of the 'service' they have agreed to supply to their passenger under the statutory guarantee.

Secondly, that in New South Wales at least,[49] traditional damages for disappointment and distress may still be awarded where the 'injury' is sustained outside Australia, in contrast to the outcome where the injury is sustained within that State. As regards the extraterritorial application of the *CLA*, this decision is consistent with, but an extension of, the reasoning of the High Court in *Insight Vacations*[50] and provides useful clarity. Many cruise lines are based in New South Wales and choose New South Wales as the applicable law of their contracts, so this is an important development. The position in other States, however, may well be different.

Thirdly, the fact that the Plaintiffs and Defendant were Australian meant that choice of law was a non-issue: but it is important to note that a foreign cruise operator cannot inoculate itself from an action based on the *ACL* guarantees if it is marketing its services in Australia.[51] Foreign cruise operators marketing their cruises in Australia should take note.

Fourthly, Australia's generic consumer law did provide the passengers with a remedy (albeit that applying the generic consumer laws to passenger contracts was not straightforward). Ironically, the consumer law is not always consumer friendly, particularly when paired with the Civil Liability Acts.[52] Nonetheless, this case provides a useful roadmap as to how such cases may play out, and there is the prospect of further guidance when the matter goes on appeal.

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[46] *Scenic Tours (No 2)* [906].
[47] *Scenic Tours (No 2)* [919].
[48] Given the Plaintiff's success on his main grounds, it was unnecessary for the judge to deal with the alternative claim for restitution of the fare. The Plaintiff sought to distinguish the High Court decision of *Baltic Shipping,* where the High Court found there could not be a total failure of consideration where the ship sank 10 days into the 15 day cruise. Justice Garling found *Baltic Shipping* to be indistinguishable from the present case, and rejected the claim for restitution based on the total failure of consideration.
[49] Each State and Territory has its own legislation roughly equivalent to the *CLA*, but they do vary. Therefore, this question may evoke a different answer in a different State.
[50] Which considered s 5N *CLA*, holding it did not apply to events overseas: *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 243 CLR 149. The question of damages for disappointment and distress was not the subject of appeal to the High Court. It is hoped that one day the High Court will review the New South Wales Court of Appeal's decision in *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641 as regards the effect of the *CLA* on claims for damages of disappointment and distress. For more, see Kate Lewins *International Carriage of Passengers by Sea* (Sweet & Maxwell, 2016) 4-129.
[51] *ACCC v Valve Corp* (No 3) (2016) 337 ALR 647 (per Edelman J) .
[52] A recent review of the *ACL* failed to consider this area for reform, despite it being in dire need of simplification: http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/

It is also noteworthy that, even if Australia had implemented the *Athens Convention 2002*,[53] it would have played no part in this litigation. River cruises do not fall within the terms of the *Athens Convention 2002*. The Convention deals with personal injury and property damage claims. It is the view of this author that damages for disappointment and distress ought not be characterised as a claim for personal injury in the form of 'mental harm'.[54] However, if this view is wrong and a claim for disappointment and distress *is* considered a 'personal injury', then the inevitable result would be that it would fall within the confines of the *Athens Convention 2002*. Whether such damages are recoverable would then depend on the interaction between the *Civil Liability Acts* and the *Athens Convention 2002*. If Australia does choose to adopt the *Athens Convention 2002*, it would be sensible for the enabling Act to explicitly deal with its interaction with the *Civil Liability Acts*.

[53] The Federal Government is carrying out public consultations on whether it should implement the *Athens Convention 2002*: https://infrastructure.gov.au/maritime/business/liability/damage_luggage.aspx

[54] See S. Walker & K. Lewins 'Dashed Expectations? The impact of civil liability legislation on contractual damages for disappointment and distress' (2014) 42 *Australian Business Law Review* 465.