

NOTICE OF MOTION

COURT DETAILS

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

TITLE OF PROCEEDINGS

| | |
|-----------|-----------------------------|
| Plaintiff | David Moore |
| Defendant | Scenic Tours Pty Ltd |

FILING DETAILS

| | |
|--------------------------------|--|
| Person seeking orders | David Moore, plaintiff |
| Filed in relation to | Plaintiff's claim |
| Legal representative | Benjamin Hemsworth Somerville Legal |
| Legal representative reference | CG:23951 |
| Contact name and telephone | Cameron Graham, (02) 9923 2321 |
| Contact email | cgraham@somervillelegal.com.au |

PERSON AFFECTED BY ORDERS SOUGHT

Scenic Tours Pty Ltd, the defendant

HEARING DETAILS

This motion is listed at

ORDERS SOUGHT

- 1 An order pursuant to rr 20.14 and 20.15 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) that Michael Finnane KC, Kevin Andronos SC, Michael Cranitch SC, Simon Kalfas SC, Larry King SC, and Anthony Lo Surdo SC be appointed as referees (**the Referees**), with Michael Finnane KC to act as senior referee (**the Senior Referee**), to conduct an inquiry and prepare a report to the Court on the questions set out in **Annexure A** to these orders (**the Reference**).
- 2 An order pursuant to r 20.17 of the UCPR that the Referees provide the report to the Court by 25 August 2023.
- 3 An order pursuant to r 20.18 of the UCPR that the fees of the Referees are to be paid in the first instance by the defendant.
- 4 An order pursuant to r 20.20 of the UCPR that the Referees conduct the Reference in accordance with the terms of reference set out in **Annexure B** to these orders.
- 5 Such other orders as the Court thinks fit.

SIGNATURE

Signature of legal representative



Capacity

Solicitor

Date of signature

9 September 2022

NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

REGISTRY ADDRESS

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 Law Courts Building, Queens Square
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 SYDNEY NSW 2000

Postal address

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 SYDNEY NSW 2001

Telephone

1300 679 272

ANNEXURE A
QUESTIONS FOR REFERENCE

Proceedings means proceedings number 2014/223271.

First Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No. 2)* [2017] NSWSC 733.

Second Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No. 4)* [2022] NSWSC 270.

Group Member means a passenger on board Cruises 1 to 9 and 11 as set out in paragraph 13 of the First Primary Judgment excluding the plaintiff and any Group Member who has opted out of the Proceedings or whose claim for damages pursuant to s 267(4) of the *Australian Consumer Law* was determined in the Second Primary Judgment.

For each Group Member:

- (1) Has the Group Member, because of the failures of the defendant to comply with the purpose or result guarantees in respect of the relevant Cruise as found in the First Primary Judgment, suffered any of the following loss or damage:
 - a. Distress and/or disappointment;
 - b. Wasted airfare expenditure, where also:
 - i. the Group Member flew to Europe for the sole purpose of undertaking the Cruise; or
 - ii. the Group Member would not have travelled to Europe at all had they not booked for the Cruise;
 - c. Any other consequential loss claimed by the Group Member which was reasonably foreseeable.
- (2) If so, what is the amount of damages payable by the defendant to the Group Member for any such loss or damage?

¹ See Second Primary Judgement at [786]-[818].

ANNEXURE B
TERMS OF REFERENCE

Proceedings means proceedings number 2014/223271.

First Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No. 2)* [2017] NSWSC 733.

Second Primary Judgment means reasons and orders made in *Moore v Scenic Tours (No. 4)* [2022] NSWSC 270.

Group Member means a passenger on board Cruises 1 to 9 and 11 as set out in paragraph 13 of the First Primary Judgment excluding the plaintiff and any Group Member who has opted out of the Proceedings or whose claim for damages pursuant to s 267(4) of the *Australian Consumer Law* was determined in the Second Primary Judgment.

- (1) These terms of reference are subject to any more specific orders made by the Court in relation to the conduct of the Reference.
- (2) The parties are to provide such assistance to the Referees as is reasonably necessary to assist the Referees in the conduct of the Reference in accordance with these terms of reference.
- (3) The Referees are to consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, quick and cheap resolution of the Reference and completion of the Referees' report.
- (4) In order to facilitate the implementation of the just, quick and cheap resolution of the Reference and completion of the Referees' report, the Referees are to each make such directions as they consider appropriate as to the conduct of the Reference.
- (5) The Referees may, to the extent that each may consider appropriate:
 - a. make enquiries by telephone, audio-visual link, in-person, or in writing;
 - b. make any direction they consider appropriate in relation to the preparation and service of evidence and/or making of submissions by any party, including that any evidence and/or submissions be provided wholly in writing and be limited in length and topic;
 - c. make directions for the attendance of any person, and/or the production of documents, to be compelled by subpoena;
 - d. make directions for the conduct of any hearing which they consider appropriate and conduct any such hearing.

- (6) The Reference is to be conducted with as little formality and technicality as the proper consideration of the matter permits, in a manner which is proportionate to the amounts claimed.
- (7) If any party to the Reference is dissatisfied with any directions made by a Referee, that party may apply to the Senior Referee in writing for reconsideration of the directions in question, and the Senior Referee may set aside, vary, or confirm the directions in question.
- (8) The Senior Referee may make directions delegating the conduct of any part of the Reference to any one or more of the Referees, including the determination of the amount of damages payable to any sub-group of the Group Members on a cruise-by-cruise basis.
- (9) The rules of evidence do not apply to the Reference.
- (10) Any evidence before the Referees shall, unless the Referees otherwise direct, be taken by way of:
 - a. any statement of agreed facts; and/or
 - b. a written statement signed by the maker of the statement provided to the Referees by a party in accordance with any directions made by the Referees; and/or
 - c. upon an application by either party and if the Referees consider it helpful to permit it, oral evidence by way of cross-examination and re-examination of the maker of any written statement, subject to such limitations as to length and topic as the Referees consider appropriate; and/or
 - d. documents already discovered by the parties in the proceedings which are served in accordance with such directions as the Referees may make;
 - e. such other means as the Referees consider appropriate.
- (11) Notwithstanding clause 10, the Referees shall in the first instance determine the Questions for Reference in respect of each Group Member on the basis of:
 - a. any written statements or other documents that have been served in accordance with any directions made by the Referees;
 - b. any written submissions of the parties that have been served in accordance with any directions made by the Referees.
- (12) If any party to the Reference is dissatisfied with any determination made by any Referee in respect of a Group Member in accordance with clause 11 (**the Original Decision**), that party may apply to the Senior Referee in writing for reconsideration of

the Original Decision, stating the grounds for why the Original Decision should be varied or set aside.

- (13) Upon a party making an application for reconsideration of the Original Decision to the Senior Referee in accordance with clause 12, the Senior Referee shall convene a panel of two Referees (not including the Referee who made the original determination) (**the Panel**) to reconsider the Questions for Reference in respect of the Group Member the subject of the Original Decision.
- (14) The Panel convened in accordance with clause 13 shall conduct a rehearing and for that purpose may conduct any hearing they consider appropriate, and may allow:
- a. any written or oral submissions that the Panel considers appropriate; and/or
 - b. if the Panel so directs, any oral evidence by way of cross-examination and re-examination of the maker of any written statement, subject to such limitations as to length and topic as the Panel considers appropriate, provided always that the parties will not be permitted to cross-examine any witness unless they can demonstrate that there are cogent and compelling reasons for doing so.
- (15) The Panel upon any such rehearing may:
- a. vary the terms of the Original Decision; or
 - b. set aside the Original Decision; or
 - c. confirm the Original Decision; or
 - d. dismiss the application for reconsideration,
- and if it does any of (a) to (c) above the decision of the Panel shall take the place of the Original Decision.
- (16) The final report prepared by the Referees and delivered to the Court:
- a. may consist of reports prepared in respect of sub-groups of Group Members on a Cruise-by-Cruise basis and reports in respect of individual Group Members where it is not just, cheap and quick to deal with that individual together with the other Group Members on his or her Cruise (**Cruise Reports**);
 - b. must give reasons for the Referees' opinion on the Questions for Reference in respect of each Group Member, which reasons may be contained in each and any Cruise Reports.
- (17) To the extent that the Referees prepare any such Cruise Reports, these shall consist of, in relation to the Group Member(s) the subject of that report:
- a. a copy of any written statements and transcripts of evidence;
 - b. any written submissions or transcripts of oral submissions of the parties; and

- c. in respect of the reasons given for the opinion of the Referees on the Questions for Reference, either:
- i. a transcript of any reasons and determination delivered ex tempore whether orally or in writing from time to time during the course of the Reference; and/or
 - ii. other statement of the Referees in writing.
- (18) The parties are to provide the Referees with such administrative assistance as the Referees reasonably require, and the costs of providing that administrative assistance are to be costs in the proceedings.
- (19) The parties shall deliver to each of the Referees as soon as practicable an agreed brief of materials to include these orders, together with a copy of Part 20, Division 3 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) and a copy of the pleadings and any other material filed or tendered to date in these proceedings relevant to the questions the subject of the Reference.
- (20) Any amendments to the questions the subject of the Reference or these Terms of Reference, whether by agreement or otherwise, are to be the subject of an order made by the Court.
- (21) The Reference shall commence on such date as is directed by the Senior Referee, which date shall not be sooner than two months following the delivery of reasons for judgment by the New South Wales Court of Appeal in the appeal from the Second Primary Judgment.
- (22) Notwithstanding the above date for the commencement of the Reference, the Referees may immediately begin preparations for the carrying out of the Reference, including making such inquiries and directions as the Referees consider appropriate to facilitate the efficient conduct of the Reference upon its commencement.
- (23) The Senior Referee shall submit the report to the Court in accordance with r 20.23 of the UCPR by the date specified in the Court's orders, by email to the chambers of Justice Garling.
- (24) If for any reason the Referees are unable to comply with the order for delivery of their report to the Court by the date in the order, the Senior Referee is to provide to the Court an interim report setting out the reasons for such inability and an application to extend the time within which to deliver the report to the Court to a date when the Referees will be able to provide the report.
- (25) The Referees and each of the parties have liberty to seek directions with respect to any matter arising upon application made on 2 business days' notice in writing, save that if a matter requires the urgent assistance of the Court, the Referees or a party

may approach the chambers of Justice Garling by email, copied to the other party or parties.