

<b>FILE NO</b> :	<b>2014/223271</b>	<b>001, 008</b>
<b>PARTIES</b> :	<b>David MOORE v Scenic Tours Pty Ltd</b>	
<b>DIVISION</b> :	COMMON LAW	
<b>DATES</b> :	14.7.23	
<b>CORAM</b> :	GARLING J	

**GARLING J MAKES THE FOLLOWING ORDERS:**

**Scope**

1. Pursuant to section 179 of the Civil Procedure Act 2005 (NSW) (the **Act**), the persons affected and bound by these orders are:
  - (a) the plaintiff;
  - (b) the **Sample Group Members** as defined in the orders dated 24 June 2022 excluding the plaintiff;
  - (c) any other group member in the proceeding who has not opted out of the proceeding (**Group Members**);
  - (d) Somerville Legal (solicitors for the plaintiff);
  - (e) Legal Justice Pty Ltd (the litigation **Funder**); and
  - (f) **Scenic Tours** Pty Ltd (ACN 002 715 602), the defendant.

**Approval of settlement**

2. Pursuant to sections 173 and 183 of the Act that the settlement of this proceeding as against the defendant be approved on in the terms set out in order 3 and 4.

**Settlement Sum**

3. Pursuant to section 173 and 183 of the Act, Scenic Tours shall pay to the Sample Group Members and all other Group Members who have registered with Somerville Legal on or before 31 July 2023 (together, the **Settlement Sum**):
  - (a) in respect of the damages and interest claimed by Sample Group Members, the total amounts set out in order 9a and 9c of the Orders dated 24 June 2022 plus interest at the rate prescribed under s 101 of the Act, to 17 May 2023 (**Sample Group Member Claims**) as set out in Annexure B to the Notice of Motion dated 2 June 2023;
  - (b) in respect of the damages and interest claimed by the balance of the Group Members other than the plaintiff (**Remaining Group Members**), pursuant to s 177(1)(e) of the Act:
    - (i) as to any claims for distress and disappointment pursuant to s 267(4) of the Australian Consumer Law, \$10,000.00 per passenger for the Remaining Group Members (**Distress & Disappointment Claims**), such amounts to be allocated to individual Remaining Group Members having regard to the mean level of such damages payable to Sample Group Members in respect of each Cruise, as set out in Annexure C to the Notice of Motion dated 2 June 2023;
    - (ii) in respect of any claims for damages under s 267(3)(b) of the Australian Consumer Law pursuant to orders 1 and 2 of the orders dated 26 August 2022, the total amount of \$10,250,000.00 inclusive of all interest, such amounts to be allocated to each Remaining Group Member as set out in Annexure D to the Notice of Moton dated 2 June 2023;

- (c) in respect of any and all legal costs owing to or claimed by the plaintiff in the proceedings (including the costs of all appeals other than the costs of proceedings S285/2019 in the High Court of Australia (**HCA Appeal**) which the Court notes have been agreed and paid by Scenic Tours), the fixed sum of \$3,000,000 (the **Costs Sum**).
4. The Sample Group Members and Remaining Group Members may elect to receive their individual award for damages as set out in order 3 (after deduction of any amount as provided for in orders 17, 18, 19 and 20) (the **Balance Entitlement**) above either in the form of money out of the Controlled Money Account or by receiving a voucher from the defendant to travel on one of the defendant's cruises to the value of the Balance Entitlement plus 25%, such voucher to be freely transferable to any Immediate Family Member and without expiration. For the purpose of this order, **Immediate Family Member** means a spouse, de facto partner, child, parent, grandparent, grandchild, or sibling.

#### **Constitution of Settlement Fund**

5. On or before 1 August 2023, Scenic Tours is to pay \$11,000,000.00 in partial payment of the Settlement Sum to a controlled money account established by Somerville Legal and notified to Scenic Tours (the **Controlled Money Account**).
6. On or before 7 August 2023, the plaintiff shall serve on the defendant evidence of the registration of each group member who has registered by either completing the registration form which was Annexure A to the Settlement Notice or going to the Somerville Legal website and registering at the link in accordance with the process set out in paragraphs 83 to 86 of the Affidavit of Ben Hemsworth dated 2 June 2023, such evidence to be in the form of a copy of the completed registration form or receipt confirming electronic registration.
7. On or before 21 August 2023, the defendant shall notify the plaintiff of the remaining balance of the Settlement Sum to be paid as calculated by reference to the evidence served by the plaintiff registrations in accordance with Order 6.
8. On or before each of 1 September, 1 October, 1 November, 1 December 2023 and 1 January 2024, Scenic Tours is to pay to the Controlled Money Account equal monthly instalments of the remaining balance of the total Settlement Sum as determined after completion of the registration process by 31 July 2023.
9. Pursuant to s 178(1)(a) of the Act, upon receipt of any part of the Settlement Amount into the Controlled Money Account, a fund be constituted consisting of the Settlement Amount (**the Settlement Fund**).
10. The solicitor on the record for the plaintiff, Benjamin Hemsworth, be appointed as administrator of the Settlement Fund (the **Fund Administrator**).
11. The Fund Administrator have liberty to apply to the Court for directions in relation to the administering of the Settlement Fund.
12. Pursuant to s 178(1)(c) of the Act, any interest earned on the money in the Settlement Fund is to be added to the Settlement Fund and shared amongst group members in proportion with their entitlement to share in the Settlement Fund.
13. Pursuant to s 178(2) of the Act, the reasonable costs of administering the Settlement Fund are to be paid out of the Settlement Fund.
14. Pursuant to ss 177(4)(a), and 178(3)(b) and (c) of the Act, a group member's entitlement to share in the Settlement Fund is to be determined in accordance with the distribution scheme set out in orders 18 to 25.

#### **Interim approval of costs**

15. Pursuant to sections 173 and 183 of the Act the Plaintiff's legal costs and disbursements for the conduct of these proceedings (not including the costs of this approval application but including all appeals from these proceedings), be approved in the amount of \$4,681,419.21 (which comprises \$4,009,387.30 on account of costs not including the HCA Appeal and \$672,031.91 on account of costs in the HCA Appeal).
16. Pursuant to sections 173 and 183 of the Act, the Plaintiff's legal costs and disbursements for this approval application up to 4 July 2023 be approved in the amount of \$182,692.40.

### **Reimbursement and recompense**

17. Pursuant to sections 173 and 183 of the Act, an amount of \$52,833 be paid to Mr Moore by the Fund Administrator from the Settlement Sum on account of Mr Moore's costs and expenses and as recompense for his time and effort as the lead plaintiff for the group members. This amount is to be paid in priority as the first distribution upon the constitution of the Settlement Sum.

### **Distribution scheme**

18. Pursuant to sections 173 and 183 of the Act, the Fund Administrator shall pay to Somerville Legal from out of the first instalment of the Settlement Sum to the extent such funds are available:
  - (a) \$4,009,387.30 on account of legal costs and disbursements not including this approval application or the HCA Appeal,
  - (b) \$185,535.16 on account of legal costs and disbursements incurred by the Plaintiff in the HCA Appeal that exceeded the amount of the estimated taxed costs on a party/party basis of \$485,496.75 already paid to the Plaintiff by Scenic Tours,
  - (c) \$182,692.40 on account of legal costs and disbursements for this approval application up to 4 July 2023.
19. Pursuant to sections 173 and 183 of the Act, the Fund Administrator be authorised to:
  - (a) make an estimate of the legal costs and disbursements for the balance of the approval application in consultation with Somerville Legal,
  - (b) withhold from any payment to any group member an amount equal to the proportion of fees that the group member would bear based on the Fund Administrator's estimate,
  - (c) seek approval from the Court for payment to Somerville Legal of the legal costs and disbursements for the balance of the approval application,
  - (d) in the event the amount approved by the Court is less than the amount withheld, make payment of the difference to the group members apportioned to the group members on a fair and reasonable basis.
20. Pursuant to sections 173 and 183 of the Act, the Fund Administrator be authorised on behalf of the Funder and any group member who has entered into a funding agreement with the Funder to:
  - (a) calculate the amount of the funding commission payable by the group member to the Funder,
  - (b) give notice to the group member of the amount of the funding commission payable by the group member to the Funder,
  - (c) withhold from any payment to the group member an amount equal to the funding commission payable by that group member to the Funder,
  - (d) pay to the Funder from the amount withheld the amount of the funding commission payable by that group member to the Funder.

21. Pursuant to sections 173 and 183 of the Act, the Fund Administrator be authorised to:
  - (a) make an estimate of his fees for the administration of the distribution scheme whether on a global basis or referable to the costs in relation to any individual group member or any combination of both,
  - (b) withhold from any payment to any group member an amount equal to the proportion of fees that the group member would bear based on the Fund Administrator's estimate,
  - (c) seek approval from the Court for payment to him of his fees in the administration,
  - (d) in the event the amount approved by the Court is less than the amount withheld, make payment of the difference to the group members apportioned to the group members on a fair and reasonable basis.
22. The Sample Group Members and Remaining Group Members who register their details with Somerville Legal by 31 July 2023 shall be entitled to be paid from out of the Settlement Sum the amount calculated in accordance with the methodology used to produce the figures in Annexures B, C and D to the Notice of Motion dated 2 June 2023 less the deductions and withholdings referred to in orders 18 to 21 unless the Group Member elects to receive a voucher in accordance with order 23(b).
23. Pursuant to sections 173 and 183 of the Act, the Fund Administrator is to write to all group members to advise them of the amount of their individual entitlement to share in the Settlement Fund and invite them to:
  - (a) provide a means of electronic payment, or an address for payment by cheque (less any reasonable bank charges and postal costs), for their entitlement; or
  - (b) elect whether he or she wishes to be paid the individual entitlement or receive a voucher in accordance with order 4 above,  
within 14 days.
24. In the event that a Group Member makes the election referred to in 23(b) above:
  - (a) the Fund Administrator shall so notify Scenic Tours in writing of the election and of the Group Member Balance Entitlement
  - (b) upon receipt of any such voucher from Scenic Tours, the Fund Administrator shall:
    - (i) forward such voucher to the Group Member; and
    - (ii) refund to Scenic Tours an amount equal to that Group Member's Balance Entitlement.

### **Mr Moore**

25. The plaintiff was paid the sum of \$16,539.85 by the defendant on 30 November 2017 pursuant to orders made on 15 November 2017. The plaintiff is to pay the defendant the sum of \$5,128.56 by 31 July 2023. If not paid by 31 July 2023, the defendant can deduct \$5,128.56 from the Settlement Sum.

### **Further listing**

26. The motion dated 2 June 2023 be returnable on 2pm on 8 September 2023 for the approval of the balance of the approval costs and costs of the Fund Administrator.

### **Consequential orders**

27. Pursuant to section 183 of the Act, the plaintiff be empowered to enforce these orders on behalf of Group Members.

28. Upon the making of the final instalment payment of the Settlement Sum:
- (a) all existing undertakings (save for confidentiality undertakings provided in respect of the production of documents under subpoena) be discharged; and
  - (b) the proceeding be otherwise dismissed, with no order as to costs.
  - (c) the parties and the Fund Administrator have liberty to apply on short notice.